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**“Lost in Translation”? Towards a Theory of Economic Transplants**

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## “Lost in Translation”? Towards a Theory of Economic Transplants

*By Ioannis Lianos* \*

### **Abstract**

The rise of economics as one of the main (some will advance the most important) “source” of competition law discourse is well documented. This study focuses on a facet of the integration of economic analysis in competition law: "economic transplants". The term “economic transplants” refers to specific economic concepts that were incorporated into the legal discourse by an act of “translation”. They represent the ultimate degree of interaction between the legal and the economic systems. Using a paradigmatic approach the study examines their specific characteristics and what distinguishes them from other forms of integration of economic analysis in competition law. It critically assesses their role and their impact on the legal and the economic discourses. The study concludes that the “paradigm” of translation constitutes the most appropriate explanatory framework for taking into account the dual nature of economic transplants and, more broadly, for conceptualizing the interaction of law with other social sciences. It should be distinguished from the existing methodologies of interaction between the disciplines of law and economics, such as the concept of “economic law” and the law and economics approach.

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Sofia Coppola, *Lost in translation*, (2003)

*“Film Director [in Japanese, to the interpreter]: The translation is very important, O.K.?*

*The translation.*

*Interpreter [in Japanese, to the director]: Yes, of course. I understand.*

*Film Director [in Japanese, to Bob]: Mr. Bob. You are sitting quietly in your study. And then there is a bottle of Suntory whiskey on top of the table. You understand, right? With wholehearted feeling, slowly, look at the camera, tenderly, and as if you are meeting old friends, say the words. As if you are Bogie in Casablanca, saying, "Here's looking at you, kid," –Suntory time!*

*Interpreter [In English, to Bob]: He wants you to turn, look in camera. O.K.?*

*Bob: Is that all he said?”*

## I. Introduction

The interaction of law with economic theory has been an old story<sup>1</sup>. With some notable exceptions<sup>2</sup>, the first generation of scholarship interested in the interaction of law with economics focused on the understanding of the origin and transformation of legal rules and institutions through an analysis of the economic conditions and theories of the time<sup>3</sup>. The case law occasionally referred to economic theory<sup>4</sup> in its effort to uncover underlying principles of legal change<sup>5</sup>. Legal literature was predominately doctrinal but, following the inception of the realist movement, was influenced by some form of “external” approach that emphasized the role of the social, economic, and political landscape in framing legal change<sup>6</sup>. The interaction of law with economics was a two-way traffic: legal concepts were also influential in framing economic discourse and lending content to economic concepts<sup>7</sup>. Law and institutions were a focal topic for

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<sup>1</sup> See, J. Walter Jones, *Historical Introduction to the Theory of Law* (Oxford, Clarendon Press, 1956), at 235-269; D. Hughes Parry, ‘Economic Theories in English Case Law’ (1931) 47 LQR 183-202.

<sup>2</sup> H.W. Robinson, ‘Law and Economics’ (1939) 2(4) MLR 257-265.

<sup>3</sup> E.g. G. Ripert, *Aspects Juridiques du Capitalisme Moderne* (Librairie générale de droit et de jurisprudence, 1946).

<sup>4</sup> See, for instance, C.A. Cooke ‘Adam Smith and Jurisprudence’ (1935) 61 LQR

<sup>5</sup> The laissez-faire theory in contract law for example: R. A. Epstein, *Contracts Small and Contracts Large: Contract Law through the Lens of Laissez-Faire*, in F.H. Buckley (ed.) *The Fall and Rise of Freedom of Contract* (Duke University Press, 1999), 25-60

<sup>6</sup> C. McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 LQR 632-650, at 634.

<sup>7</sup> J. Walter Jones, *Historical Introduction to the Theory of Law* above n 1, at 238-245; C. A. Cooke, ‘The Legal Content of the Profit Concept’ (1936) 46 Yale l.J. 436-446; A. Leroux & A. Marciano, *La Philosophie Economique*

economic analysis, which was largely following an inductive and empirical approach, based on a thorough analysis of the institutions that influenced the behavior of market actors in different industries<sup>8</sup>. The emergence of the discipline of “economic law” epitomizes the need to take into account the dominant economic principles of the day, without however that leading to an abandonment of an internal (to law) doctrinal analysis. The integration of economic theories in legal analysis was followed by a normative and cognitive closure of the (legal) system once economic concepts were juridified<sup>9</sup>.

The second generation of scholarship on the interaction between law and economics did not limit itself to a simple doctrinal analysis. Explicitly adopting an “external approach” the literature considered “whether specific legal interventions are acceptable when assessed against external moral, ethical, or political principles”<sup>10</sup>. The law and economics scholarship advanced as a criterion the concept of economic efficiency, itself framed according to neoclassical economic theory and the idea of equilibrium, thus a principle entirely external and disconnected to the legal system. The interplay of law and economics acquired a normative interest as a research question, in the sense that economic concepts and methods were directly influential in re-framing and enriching legal discourse. At the same time, the Coase theorem led to a certain degree of indifference to legal institutions in economic analysis, one of the basic tenets of the theorem suggesting that when transaction costs are low efficiency can be achieved through bargaining, without any contribution from law<sup>11</sup>. The degree and the form of openness of the legal system to external sources determine the influence of the “external approach” to legal change.

The increasing influence of economic discourse was particularly felt in the area of competition law. Its main tenets and principles witnessed a profound transformation with the systematic recourse to neoclassical price theory as an external source of authority<sup>12</sup>. More than in

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(Paris 1998), pp. 15-18 on the notion of interest in economics.

<sup>8</sup> On the specificities of the old institutionalist school, see G.M. Hodgson, *The Evolution of Institutional Economics: Agency, Structure and Darwinism in American Institutionalism* (Routledge, London & New York, 2004).

<sup>9</sup> , D.J. Gerber, ‘Constitutionalizing the Economy: German neoliberalism, Competition Law, and the New Europe’ (1994) 42 Am. J. Comp. L. 25-84.

<sup>10</sup> C. McCrudden, above n 6, at 632.

<sup>11</sup> R.H. Coase, ‘The Problem of Social Cost’ (1960) 3 Journal of Law and Economics 1–44. This was not necessarily what R. Coase himself had in mind, as he had recognized elsewhere the importance of institutions in economic theorizing. R. H. Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386–405. One should wait the new institutional school of economics for institutions to be again the subject of mainstream economic theory:

<sup>12</sup> I. Lianos, *La Transformation du droit de la concurrence par le recours à l’analyse économique*

any other field of law, except perhaps the related area of public utilities law, competition law is intrinsically linked with the discipline of economics, as this is shown by the frequent references to economic concepts and methodology of competition authorities, the case law of the courts and the expanding soft law related to the interpretation of the competition law statutes<sup>13</sup>. A common feature of this transformation of competition law is the emphasis put on a, mostly synchronic, analysis of the welfare effects of the specific commercial practice on consumers or more broadly economic efficiency. This is the main thrust of the “more economic” “effects-based approach”<sup>14</sup>, that gained momentum in European competition law with the reform of merger control regulation, Article 81 EC and most recently Article 82 and State aids control. An important part of the evidence presented in competition law disputes is of economic nature, such as consumer surveys, simulation techniques and economic models.

But economic theory is not only relevant for the adjudication of evidence in specific competition law disputes. It has also been increasingly relevant at the “doctrinal stage” if one follows Ronald Dworkin’s conceptualization of four stages in legal reasoning, to which it could be helpful to refer in order to define the scope of this study<sup>15</sup>. Dworkin distinguishes the semantic stage<sup>16</sup>, the jurisprudential stage<sup>17</sup>, the doctrinal stage<sup>18</sup> and the adjudicative stage<sup>19</sup>. For example, the economic efficiency versus justice debate that permeates the question of the objectives of competition law belongs to the jurisprudential stage as it refers to the values (external in this case) that should provide content to the principle of coherence in legal interpretation. This important topic will be outside the scope of this study, which will instead attempt to focus on the implications of an external approach on the doctrinal stage. I will claim that an important implication of the second generation of interaction between law and economics

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(Bruylant/Sakkoulas, 2007).

<sup>13</sup> On the influence of economics on law see, W. M. Landes & R. A. Posner, ‘The Influence of Economics on Law: A Quantitative Study’ (1993) 36 *Journal of Law & Economics* 385-424.

<sup>14</sup> On this terminology and the opposition of “effects-based” to “form-based” approach see, EAGCP Report on An Economic approach to Article 82 EC (July 2005), <[http://europa.eu.int/comm/competition/publications/studies/eagcp\\_july\\_21\\_05.pdf](http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf)> p 2 & 7.

<sup>15</sup> R. Dworkin, *Justice in Robes* (Harvard Univ. Press, 2006), pp. 9-21.

<sup>16</sup> Which relates to the general assumptions and practices people share over the concept of law- e.g. criterial, interpretive, natural kind.

<sup>17</sup> The development of a theory of law that is appropriate given the theorist’s answer at the semantic stage, in other words develop the values justifying a specific legal practice.

<sup>18</sup> Where we construct an account of the truth conditions of propositions of law in the light of the values identified in the jurisprudential stage.

<sup>19</sup> Where judges or decision-makers adopt propositions of law based on the conclusions reached at the doctrinal stage.

is the emergence of economic transplants, that is, economic concepts that are “translated” into the legal system at the doctrinal stage. These concepts also contribute to the influence of economics at the adjudicative stage.

My claim is that the paradigm of translation is the most adequate explanatory framework for taking into account the dual nature of economic transplants and in envisioning the interpretative strategy that should be employed. It can also serve, more broadly, to conceptualize the interaction of law with other social sciences, such as economics, in a way which is different from the first (“economic law”) or the second (economic analysis of law) generation of scholarship on the interaction of law and economics.

The first section will introduce the paradigm of translation, which will set the broad theoretical framework of this study, a relation between law and economics marked by a two-way linguistic and conceptual hospitality. This is an important difference in comparison with the two previous approaches in the interaction between law and economics, where one-way communication prevailed. This relation between the two disciplines was exclusively dominated either by law (in the case of “economic law”) or by economics (in the case of economic analysis of law). The second section will apply this framework to competition law and will give examples of economic transplants that have emerged in this area. It will identify the main characteristics of economic transplants and will distinguish them from other forms of integration of economic concepts in law. The third section will discuss the interpretative techniques that preserve the specific characteristics of economic transplants and more broadly avoid any risk of hegemonic or deferent translation of economic concepts in law, in conformity with the paradigm of translation. The last section will conclude.

## **II. The “paradigm” of translation**

The study advances that the activity of “translation” best describes the process of integration of economic concepts in law in the form of economic transplants. A prerequisite for translation is the existence of different languages<sup>20</sup>. It is only if one conceives law and economics as two different languages/discourses that the concept of translation is an appropriate term to use for my purposes.

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<sup>20</sup> P. Ricoeur, *On Translation* (trans. E. Brennan, Routledge, 2006), at 2. One could follow Saussure and distinguish the terms language (*langue*) and discourse or use of the language (*parole*): F. de Saussure, *Course in General Linguistics* (1915). However, this study will assume that language and discourse are intrinsically linked to each other for reasons that will be exposed in the following section.



### *A. Law and Economics use distinct languages/discourses*

The term “translation” should be understood as a mode of external inter-linguistic communication.<sup>21</sup> I employ the term “inter-lingual” because what matters is the fact that the target language is a different language and/or discourse than the source language. This will bring me to the difficult question of determining if law and economics constitute two different languages/discourses and the relation of strangeness (*alterité*) that exists between them.

One could determine the existence of two different languages/discourses by identifying two separate communities employing a distinct style of talk. One could identify a language community by the distinct techniques its members use from other communities. Economics was recognized as an independent scientific discipline relatively recently (since the end of the 18<sup>th</sup> century), a period that saw its transformation from moral philosophy to political economy<sup>22</sup>. In his monumental *History of Economic Analysis* Joseph Schumpeter famously asked “is economics a science?”, before answering that “since economics uses techniques that are not in use among the general public, and since there are economists to cultivate them, economics is obviously a science within our meaning of the term”<sup>23</sup>. He identified these techniques as being essentially three: economic history, statistics and theory (explanatory hypothesis) to which he added in a later edition of his volume economic sociology, which form, what he calls, “economic analysis”. These tools frame the style of talk that distinguishes the scientific economist from all other people who think, talk and write about the same (economic) topics.

This group has not always employed that specific style of talk. Schumpeter remarked that jurisprudence is relevant to a history of economic analysis, first of all because, to a considerable extent, economists have been jurists “who brought to bear the habits of the legal mind upon the analysis of economic phenomena”. He gave the example of the sociological and economic systems of the scholastic doctors of the 16<sup>th</sup> century which were “primarily treatises on the

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<sup>21</sup> In his remarkable treatise *After Babel*, George Steiner adopts a wide definition of the term: G. Steiner, *After Babel* (Oxford University Press, 1975), at 46, “any model of communication is at the same time a model of trans-lation, of a vertical or horizontal transfer of significance. No two historical epochs, no two social classes, no two localities use words and syntax to signify exactly the same things, to send identical signals of valuation and inference. Neither do two human beings”. If a human being performs an act of “translation”, in the full sense of the word, when receiving a speech-message from any other human being, the concept has little interest for our purposes. This study will therefore adopt a narrower definition of the term which will cover only *inter-lingual translation or translation proper*, following the typology of R. Jakobson, ‘On Linguistic Aspects of Translation’ in R. Brower (ed.) *On Translation* (Harvard University Press, 2000), pp. 232–9, at 233 (first published in 1959).

<sup>22</sup> R. A. Backhouse, *The Ordinary Business of Life: A History of Economics from the Ancient World to the Twenty-First Century* (Princeton Univ. Press, 2004 ), at 132.

<sup>23</sup> J. Schumpeter, *History of Economic Analysis* (Routledge, 1994, first published in 1954) at 10.

political and economic law of the Catholic Church” and whose technique “was derived primarily from the old Roman law as adapted to the conditions of the time”<sup>24</sup>. However, in many respects, the style of talk of this community of scholars evolved differently from that of those self-defined as jurists.

During the period Schumpeter wrote his treatise the tool of statistics was not a language employed by the community of lawyers. But is this still the case today? A more diachronic approach will indicate that statistics have now become a tool of legal scholarship (empirical legal studies). Can we therefore still claim that law and economics employ two different languages? Or, has the style of talk of economists, evolved so that the language of law and the language of economics remain still distinct from each other?

Schumpeter was telling only one part of the story. Starting with the programme of “social mathematics” of Condorcet<sup>25</sup>, (political) economists such as Canard, Cournot, Bertrand, Walras, Jevons, Edgeworth, Marshall and their followers, progressively recognized mathematics as the predominant style of talk of the community self-defined as economists<sup>26</sup>. Of course, the tool of mathematics has greatly evolved since the calculus used by Cournot to game theory and topography but the hypothetico-deductive system of mathematics forms the backbone of “scientific” discourse in economics. Since the 1930s, economists have become enchanted by this “scientific” way of thinking<sup>27</sup>. The alliance of mathematical economics and neoclassical price theory in the 1950s with the development of a mathematical proof of the general equilibrium theory still dominates the field of welfare economics<sup>28</sup>. The same trend towards mathematization can be observed in other social sciences during the same period, a by-product of the diffusion of game theory<sup>29</sup>.

Not everyone in economics has welcomed this particular trend. Tony Lawson has in fact defined the “*nature of heterodox economics*” in opposition to economic orthodoxy or

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<sup>24</sup> Ibid., at 24 fn 2.

<sup>25</sup> Keith M. Baker, *Condorcet: From Natural Philosophy to Social Mathematics* (University of Chicago Press, 1975).

<sup>26</sup> See, Andres Vazques, ‘Marshall and the Mathematization of Economics’, (1995) 17 *Journal of the History of Economic Thought* 247-265.

<sup>27</sup> D. McCloskey, *The Rhetoric of Economics* (University of Wisconsin Press, 2<sup>nd</sup> ed. 1998), at 139, observes that “the economic conversation has heard much eloquent talk, but its most eloquent passages have been mathematical”.

<sup>28</sup> Y. P. Yonay, *The Struggle over the Soul of Economics* (Princeton Univ. Press, 1998), at 187-190; G. Debreu, ‘Theoretic Models: Mathematical Form and Economic Content’, (1986) 54(6) *Econometrica* 1259-1270

<sup>29</sup> A.M. O Rand, ‘Mathematizing Social Science in the 1950s: The Early Development and Diffusion of Game Theory’ (1992) 24(Supplement) *History of Political Economy* 177-204.

mainstream economics that he closely identified to the “mathematising inclination” or the formalistic-deductive framework of mathematics<sup>30</sup>. One could distinguish, for reasons of conceptual clarity, the claim of mathematization and that of formalism of economic analysis.

Economic theory followed closely mathematical developments, starting “with the elements of differential calculus and linear algebra and that gradually called on an ever broader array of powerful techniques and fundamental results offered by mathematics”<sup>31</sup>. In his analysis of the evolution of Walrasian general equilibrium theory, Ali Khan observes the influence of the mathematical tools that were progressively integrated and have framed economic theory<sup>32</sup>. Khan notes that the evolution of economic theory was function of the new tools that mathematics developed from differential calculus to convex analysis and non smooth analysis<sup>33</sup>. The integration of convex analysis led to game theory and further developments in the field<sup>34</sup>. Debreu gives the example of nonstandard analysis to claim that “the lag between the date of a mathematical discovery and the date of its application to economic theory decreased over time”<sup>35</sup>. One could thus expect the evolution of economic theories, once new developments in mathematics are translated in economics. Mathematics becomes the *Reine sprache* of economics and a means of dialectic interaction between the community of mathematicians and that of mathematical economists<sup>36</sup>, the new guardians of the economics Temple. Mathematical language ensures precision and openness to scrutiny for logical errors. It is *par essence* a universalistic language, closely related to the imaginary of “economic physics” and its ideal of a “unified science”<sup>37</sup>. It is allegedly ideology free<sup>38</sup>.

Yet, the translation of mathematics into economics is not without important implications on the content of economics. The translator moves from one linguistic medium to another. It serves two masters: the source language and the target language. There is a risk that the form of

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<sup>30</sup> T. Lawson, ‘The Nature of Heterodox Economics’ (2006) 30 Cambridge Journal of Economics 483-505, at 488.

<sup>31</sup> G. Debreu, ‘The Mathematization of Economic Theory’ (1991) 81 American Economic Review 1-7, at 3.

<sup>32</sup> M. Ali Khan, ‘The Irony in/of Economic Theory’, (1993) 108(4) MLN 659-803.

<sup>33</sup> *Ibid.*, at 778-781.

<sup>34</sup> G. Debreu, ‘Theoretic Models: Mathematical Form and Economic Content’, above n 28, at 1261.

<sup>35</sup> G. Debreu, ‘The Mathematization of Economic Theory’, above n 31, at 3.

<sup>36</sup> G. Debreu, ‘Theoretic Models: Mathematical Form and Economic Content’, above n 28, at 1263 explains: “(a)s new fields of mathematics were introduced into economic theory and solved some of its fundamental problems, a growth-generating cycle operated. The mathematical interest of the questions raised by economic theory attracted mathematicians who in turn made the subject mathematically more interesting”.

<sup>37</sup> B.P. Stigum, *Towards a Formal Science of Economics: the Axiomatic Method in Economics and Econometrics* (CUP, 1990).

<sup>38</sup> G. Debreu, ‘Theoretic Models: Mathematical Form and Economic Content’, above n 28, at 1266.

one language influences/deforms the content of the message transmitted by the other. It is indeed impossible to avoid a tension between economic content, which is continuously evolving and reacting to external stimuli (social phenomena) and the closed system of mathematical form. The only partial cure is the “axiomatization” of the economic theory: Debreu explains that

“(a)n axiomatized theory first selects its primitive concepts and represents each one of them by a mathematical object. [...] Next assumptions on the objects representing the primitive concepts are specified, and consequences are mathematically derived from them. The economic interpretation of the theorems so obtained is the last step of the analysis. According to this schema, an axiomatized theory has a mathematical form that is completely separated from its economic content. If one removes the economic interpretation of the primitive concepts, of the assumptions, and of the conclusions of the model, its bare mathematical structure must still stand”<sup>39</sup>.

Indeed, the mathematical inclination of economics transposes itself to the use of models and formalization<sup>40</sup>. “Theory means models and models mean ideas expressed in mathematical form (language)”<sup>41</sup>. Although one cannot deny that there are different discourses in economics (some of them declining the use of mathematics, such as the Austrian school) and that even in mainstream economic theory there is diversity of styles of talk, the mathematizing inclination is certainly a common feature of modern economics. Heterodox economics’ slow integration to the mainstream paradigm follows the pace of their conversion to the mathematizing inclination.

This axiomatization may be understood as a response to the absence of “a secure empirical base”, which may have led economic theory to emphasize “internal logical consistency”, through “methodological formalization”<sup>42</sup>. Formalism could in this case take the form of “self-contained rule following”, which would employ formal language and “deductive systems that are independent of content”<sup>43</sup>. The recourse to the concept of equilibrium<sup>44</sup>, the

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<sup>39</sup> Ibid., at 1265.

<sup>40</sup> H.K.H. Woo, *What’s wrong with formalization in economics: an epistemological critique* (Newark, CA, Victoria Press, 1986).

<sup>41</sup> D. Strassmann, ‘Feminist thought and economics; or, what do the Visigoths know?’ (1994) *American Economic Review*, Papers and Proceedings, 153-158, at 154 cited by T. Lawson, ‘The Nature of Heterodox Economics’, above n 30, at 490.

<sup>42</sup> R. E. Backhouse, ‘If mathematics is informal, then perhaps we should accept that economics must be informal too’ (1998) 108 *The Economic Journal* 1848-1858, at 1857 building on G. Debreu. ‘The Mathematization of Economic Theory’, above n 31, at 2.

<sup>43</sup> V. Chick, ‘On Knowing one’s place: the role of formalism in economics’ (1998) 108 *The Economic Journal* 1859-1869, at 1859.

divorce until recently of the study of economic behavior from behavioral sciences' input<sup>45</sup>, or the "narrowness of *homo economicus*'s concerns (the assumed separability of economics from politics and social philosophy, the absence of altruism, the lack of context)" constitute the side effects of this axiomatization and formal logic<sup>46</sup>. Contrary to "axiomatic reasoning", "ordinary reasoning" authorizes "several different starting points, each impinging on the subject from a different angle and bringing different knowledge to bear"<sup>47</sup>.

The fact that mathematics constitutes the language of economics has profound implications on the stories told by economists, that is, economic discourse. What is formalizable can be subject to economic inquiry; what is not, is excluded from the focus of the discipline. Debreu observed that, as "the very choice of the questions to which he (the theorist) tried to find answers is influenced by his mathematical background", "the danger is ever present that, economics will become secondary, if not marginal, in that judgment"<sup>48</sup>. In other words, the natural constraints of the language restrict the topics of conversation, its narrative. This is a profound consequence of modernist thought of which economics is a step child. Modernism views science as axiomatic and mathematical. In the modernist view considerations of efficiency and justice should be separated: "they form churches with separate devotees: each can specialize in one kind of argument"; "(b)ut arguments do not cross: this year's GNP is one thing; an axiom of social choice is another; sympathy for the poor still another"<sup>49</sup>.

Modernist tradition is also present in legal discourse. How could one otherwise understand the fury with which arguments of economic efficiency were welcomed by some quarters in legal academia<sup>50</sup>? The value of economic efficiency was dismissed and ridiculed. Efficiency talk is wrong, a utilitarian blasphemy in the Temple of Justice<sup>51</sup>. The fact that this efficiency talk was coming from apostates, lawyers converted to economic discourse, suspect of

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<sup>44</sup> V. Mosini (ed.), *Equilibrium in Economics – Scope and Limits* (Routledge, 2006).

<sup>45</sup> For an interesting analysis see, D. Wade Hands, 'Introspection, Revealed Preference and Neoclassical Economics: A Critical Response to Don Ross on the Robbins-Samuelson Argument Pattern', (2008) 30(4) *Journal of the History of Economic Thought* 453-478.

<sup>46</sup> V. Chick, 'On Knowing one's place: the role of formalism in economics', above n 43, at 1862.

<sup>47</sup> Ibid.

<sup>48</sup> G. Debreu, 'The Mathematization of Economic Theory', above n 31, at 5. This problem is not confined to economic theory but also extends to applied economics, econometrics etc. See the discussion of statistical versus economic significance in Deirde Mc Closkey & Stephen Ziliak, *The Cult of Statistical Significance* (Univ. of Michigan Press, 2007).

<sup>49</sup> D. McCloskey, *The Rhetoric of Economics* (University of Wisconsin Press, 1985), at 6.

<sup>50</sup> Efficiency was also criticized from the point of view of economics, notably from law and economics scholars members of the Austrian school: see, M. Rizzo, 'The Mirage of Efficiency', (1980) 8 *Hofstra L Rev* 641-651.

<sup>51</sup> See the discussion in 'Symposium on Efficiency as a Legal Concern', (1980) 8 *Hofstra Law Rev* 485-770.

ideological bias, their efficiency talk being a scientific masquerade of a profoundly libertarian political agenda, finished by concealing the essence of the argument. To the rhetoric of numbers and optimization, lawyers responded by the rhetoric of values and morality, using their favorite weapons, those of hermeneutics<sup>52</sup>. But in essence, their argument had also a profound modernist taste: law is about justice, not about efficiency; these concepts should be separated. If efficiency was not to be a valuable consideration, it was probably because law did not have the adequate language to apprehend it without risking a profound reconsideration of its internal values and premises. These values are allegedly wider than those traditionally pursued by neoclassical economic theory. The increasing anxiety with which evidence law scholars reacted to the introduction of probability theory and methods of mathematical proof in evidence theory may also illustrate how issues of discourse and language are interrelated with each other<sup>53</sup>.

Deductive reasoning and abstraction is certainly not absent from legal discourse. The positivistic model of law aimed to transform the discipline to a proper scientific field. The search for coherence in law participated to this “quest for natural science status”<sup>54</sup>. Geoffrey Samuel convincingly argues that “the association of law with scientific rationality”, a legacy of civilian legal history, “marks an epistemological shift” and could be understood as a quest for a new source of authority, other than the authoritative texts of Roman law: “[...] for the jurists who succeeded the medieval doctors one part of the authority was to be found in the ‘scientific’ or systematic coherence of law because this rationality provided not just the deductively valid solutions but, in doing this and thus freeing judging from subjective bias, the very authority that gave law its validity”<sup>55</sup>. “Law was a system, analogous to mathematics, consisting of axioms from which all other norms, together with the solutions to case law problems, could be logically deduced”<sup>56</sup>. Christopher McCrudden also notes how “legal academics are constantly constructing explanatory ‘models’ from the legal material at their disposal, models that they then test against that legal material”<sup>57</sup>. Nevertheless, the movement of axiomatization and formalism in law has never attained the perfection and success it has achieved in economics. What some authors

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<sup>52</sup> E.g. R. Dworkin, ‘Why efficiency?’, (1980) 8 Hofstra Law Rev 563-69; R. Dworkin, ‘Is wealth a Value?’ (1980) 9 Journal of Legal Studies 191-226.

<sup>53</sup> Laurence Tribe, ‘Trial by Mathematics: Precision and Ritual in the Legal Process’ (1971) 84 Harv L Rev 1329.

<sup>54</sup> G. Samuel, ‘Is law really a social science? A view from comparative law’ (2008) 67(2) CLJ 288-321, at 294.

<sup>55</sup> *Ibid.*, at 295.

<sup>56</sup> *Ibid.*, at 312.

<sup>57</sup> C. McCrudden, ‘Legal Research and the Social Sciences’, above n 6, at 634.

mocked as the “Heaven of legal concepts<sup>58</sup>”, where prediction, the cornerstone of scientific pretense, of how courts decide cases was finally possible through abstract analysis and deductive thinking, was quickly shattered by the challenge of *Interessenjurisprudenz*<sup>59</sup> and the functionalism of the realist movement<sup>60</sup>. Mathematics could not become the language of law.

The different techniques/styles of talk employed by the communities of lawyers and economists inevitably led to their perception as forming separate social sub-systems<sup>61</sup>. Scientific knowledge, as any other knowledge is being shaped in a complex social process. It is therefore equally important to examine how scientific knowledge is actually constructed<sup>62</sup> and follow rigorously the historical development of theories<sup>63</sup>, in order to convey the deep sense of the translated discourse than to adopt a purely internal (to law or to economics) perspective. The development of a discourse supposes the existence of a shared meaning and common beliefs in different communities forming different social sub-systems. One could indeed conceptualize the domains of law and economics as two distinct self-contained and self-referential autopoietic social systems or, better, sub-systems (if one does not overlook their common origins in moral philosophy<sup>64</sup>), employing a distinct style of talk/rhetoric. For example, the concept of rationality could take a different form in the context of economic discourse than in legal discourse<sup>65</sup>.

A characteristic of autopoietic systems is that communications occur mainly within the system itself, not with the outside world.<sup>66</sup> “Society is seen as fragmented into a multiplicity of

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<sup>58</sup> R. von Jhering, ‘In the Heaven for Legal Concepts: A Fantasy’, in C. L. Levy (trans.) 58 *Temple LQ* 799-842 (first published as ‘In Juristischen Begriffshimmel: ein Phantasienbild’ in *Scherz und Ernst in der Jurisprudenz*, Leipzig, 1885).

<sup>59</sup> See, O. Jounjan, *Une histoire de la pensée juridique en Allemagne* (PUF, 2005).

<sup>60</sup> W. Twining, *Karl Llewellyn and the Realist Movement* (Hackensack, New Jersey. Fred B. Rothman & Co., 1973); G. Samuel, ‘Can legal reasoning be demystified?’ (2009) 29(2) *Legal Studies* 181-210, at 205-206.

<sup>61</sup> See, N. Luhmann, *Law as a Social System* (OUP, 2004), chap. 2.referring to the “operative closure of the legal system”. This emphasis on communities, the social construction of reality, could be considered as a constructivist viewpoint.

<sup>62</sup> J. Law, ‘Theories and Methods in the Sociology of Science: An Interpretative Approach’ (1976) 13 *Social Science Information*, 163.

<sup>63</sup> See, A. Pickering (ed.), *Science as Practice and Culture* (Univ. of Chicago Press, 1992).

<sup>64</sup> Adam Smith’s economic thought was only a part of a broader moral philosophy project: see, J. Evensky, *Adam Smith’s Moral Philosophy: A Historical and Contemporary Perspective on Markets, Law, Ethics, and Culture* (CUP, 2005).

<sup>65</sup> Rationality is a product of ‘situational analysis’. It is content-empty as it “is merely the assumption that a person will act adequately or sensibly, given his or her goals and the situation”: W. A. Gorton, *Karl Popper and the Social Sciences*, (State University of New York Press, 2006), at 8.

<sup>66</sup> See, the studies included in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (de Gruyter, 1988).

closed communicative networks”, each network constructing “a reality of its own”<sup>67</sup>. One way to conceive it is to think of the existence of different conversations going on at the same time within different groups of interlocutors. Once the conversations get started, they have their own script, which participants of other groups that may occasionally participate to these conversations cannot alter<sup>68</sup>. Nevertheless, each sub-system does not ignore all others. Although a situation of incommensurability between the two discourses should not be excluded, autopoietic social systems are cognitively open to their environment, despite being normatively closed.

More concretely, the self-containedness of auto-poietic social systems means that foreign discourse cannot enter directly into the script/programme of another conversation<sup>69</sup>. This preserves the complexity of each environment but may also lead to incommensurability, because of different sets of normative values that operate within each system (“environment”) that blur understanding and communication without the necessary coding. A normative closure and areas of untranslatability emerge<sup>70</sup>. However, interpenetration ensures that each system will be cognitively open: legal and economic discourses may communicate with each other and may mutually influence each other, without necessarily sharing the same values.<sup>71</sup>

It follows, that the interaction between each system does not take only one direction, for example, economics influence law, but that legal discourse should also influence the production and directions of economic discourse, as it is always the case for interpenetrating systems<sup>72</sup>. Interpenetration is of course a matter of degree and may follow specific cycles. For example, although early jurists played an important role in formulating the methods of different social sciences<sup>73</sup>, including political economy, this was followed by a period where each community of scholars evolved differently.

A possible explanation of this different direction could be the different “paradigms”, that

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<sup>67</sup> G. Teubner, ‘How the Law Thinks: Towards a Constructivist Epistemology of Law’, (1989) 23 *Law and Society Review* 727, at 738.

<sup>68</sup> *Ibid.*, at 740, assuming that law as an autopoietic social system is made of legal communications (not just rules or legal decisionmakers).

<sup>69</sup> D. Dwyer, *The Judicial Assessment of Expert Evidence*, (CUP, 2008), at 126, “(e)ach system reconstructs its own image of the external system within itself”.

<sup>70</sup> *Ibid.*, at 125.

<sup>71</sup> *Ibid.*, at 115. As Déirdre Dwyer explains “this would mean that one believes that it is possible to agree on statements about the external world with people from another social group, but that statements about values cannot be directly translated”.

<sup>72</sup> N. Luhmann, *Social Systems* (Stanford University Press, 1995), at 213 explains that “interpenetrating systems exist when this occurs reciprocally, that is when both systems enable each other by introducing their own already constituted complexity into each other”.

<sup>73</sup> See, D. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard Univ. Press, 1990).



is the “epistemological orientation”, “kinds of reasoning”<sup>74</sup> or “a body of attitudes or behaviour”<sup>75</sup> of the main actors of each discipline: social sciences allegedly follow a paradigm of inquiry that “subjects research to means of validation” (or falsification if one follows Popper), while law embraces an “authority paradigm”, “in which epistemological validity arises not from scientific inquiry but uniquely from authority”<sup>76</sup>. The sources of this authority have obviously changed and could be summarized as the ideal of legal coherence based on some form of textual reference, *Grundnorm* or some principle of moral philosophy, even to the price of some distance from social reality.

However, even if one adheres to this broad description, it is clear that the principle of coherence is also of central importance to axiomatized modern economics. Empiricism and falsification are largely absent from economic theory. Much of economic theory is not based on empirical research but on “a fairly abstract, sometimes unverifiable, and largely mathematically derived conclusions about human behavior”.<sup>77</sup> The dominant paradigm in economic theory remains Friedman’s instrumentalism, where the only validity test is the comparison of predictions with experience<sup>78</sup>. What counts is the theory’s predictive adequacy and simplicity, not necessarily the correspondence of its assumptions with reality. The “paradigm of authority” plays therefore a central role in economics as well. Furthermore, such a sharp dichotomy between the authority paradigm and the inquiry one ignores that judges will also “be sensitive to the consequences of any decision”<sup>79</sup>. The court’s decisions should be perceived not only as epistemologically true [some sort of justified (true) belief] but also as persuasive to all actors of the legal sub-system.

What matters for a legal system’s legitimacy is that those subject to the judicial decisions

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<sup>74</sup> G. Samuel, ‘Can legal reasoning be demystified?’ above n 60, at 182.

<sup>75</sup> Ibid, at 204.

<sup>76</sup> Ibid.

<sup>77</sup> H. Hovenkamp, ‘Economic Expertise in Antitrust Cases’, Chapter 44, in D. L. Faigman, D. H. Kaye, Michael J. Saks, and J. Sanders (ed.), *Modern Scientific Evidence: The Law and Science of Expert Testimony* (2nd ed., West Group, 2002), at 723.

<sup>78</sup> M. Friedman, *Essays in Positive Economics* (Univ. Chicago Press, 1953), 3-43, at 40, “[A] theory cannot be tested by comparing its “assumptions” directly with “reality.” Indeed, there is no meaningful way in which this can be done. Complete “realism” is clearly unattainable, and the question whether a theory is realistic “enough” can be settled only by seeing whether it yields predictions that are good enough for the purpose in hand or that are better than predictions from alternative theories. Yet the belief that a theory can be tested by the realism of its assumptions independently of the accuracy of its predictions is widespread and the source of much of the perennial criticism of economic theory as unrealistic. Such criticism is largely irrelevant, and, in consequence, most attempts to reform economic theory that it has stimulated have been unsuccessful.”

<sup>79</sup> G. Samuel, ‘Can legal reasoning be demystified?’ above n 60, at 207.

believe that the court adequately explained its decision so that the losing party recognizes it as “a valid”, yet unfavorable, “exercise of judicial authority”<sup>80</sup>. The accent is put more on the process of decision-making, rather than on the outcome, seen from the point of view of some external reality or principle. Outcomes certainly matter and the perception that a legal rule leads to unacceptable consequences, in terms of public policy, could eventually lead to its revision. However, the authority of legal reasoning is only remotely linked to the acceptability of such outcomes, from an external, to the discipline, perspective.

This is not to advance that legal reality can entirely “immunize itself against conflicting realities produced by other discourses in society”<sup>81</sup>. As Teubner explains, “[...] juridical constructs are exposed to the constructs of other discourses in society [...] (t)hey are exposed to a test of ‘social coherence’ that replaces the old fiction of a test of correspondence with outside reality”<sup>82</sup>. This “interference”, the “mutual diffusion of law and other social sciences”, has important implications for legal discourse: the latter “is supposed to incorporate social knowledge into its world constructions and permanently revise legal models of social reality according to the accumulation of knowledge in the social sciences”<sup>83</sup>.

One could advance a similar point with regard to evolution of economic theory and its positivistic turn, where outcomes outside the strict confines of the discipline did not matter. For example, one of the aims of the ordinalist revolution in economics was to clear economics from any reference to psychological assumptions: the concept of cardinal utility was abandoned and replaced by the concept of a scale of preferences.<sup>84</sup> This was linked to a shift in the acceptable methods of observation. In the words of Lionel Robbins, “valuation is a subjective process. We cannot *observe* valuation. It is therefore out of place in a scientific explanation. Our theoretical constructions must assume observable data”.<sup>85</sup> The rejection of cardinal utility led also to the extrusion from economic analysis of behaviourist psychology, a “queer cult”.<sup>86</sup> The question that economics should attempt to answer was, according to Robbins, “choice under scarcity”, scarcity

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<sup>80</sup> R. B. Katskee, ‘Science, Intersubjective Validity, and Judicial Legitimacy’ (2008) *Brooklyn L Rev* 857-877, at 861.

<sup>81</sup> Gunther Teubner, above n 67, 745.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, at 747.

<sup>84</sup> P. Baert, *Philosophy of the Social Sciences* (Polity, 2005), at 150.

<sup>85</sup> L. Robbins, *An Essay on the Nature and Significance of Economic Science* (2<sup>nd</sup> ed., London, 1945, first published 1932), at 87

<sup>86</sup> *Ibid.*

being “the scarcity of given means for the attainment of given ends”.<sup>87</sup> The agent’s preferences were a “given” which economists had to identify in order to analyze consumer choice. The concept of revealed preferences further attempted to ground the theory of consumer behaviour on observable concepts and to suppress any reference to psychology and introspection.<sup>88</sup>

The models established lacked, however, any correspondence to reality, as constructed by other fields of science (e.g. psychology) and were proved ultimately inapt (and illegitimate) for public policy prescription, an area where the role of economists was increasingly expanding<sup>89</sup>. This led contemporary economic theory to attach greater attention to inputs from psychology.<sup>90</sup> The psychological trend, that is witnessed in many recent economic movements, such as behavioural law and economics, experimental economics, neuro-economics, transforms economics into a sort of cognitive science, where economic behaviour is reconceived on the basis of “psychological facts” discovered with the method of experimental introspection. Economics and economists are in search for new sources of translation than mathematics and the more “reality-proof” cognitive sciences constitute a popular candidate. The advanced hypothesis is that economics becomes more reactive to the pressure of reality the more it attempts to occupy the terrain of policy prescription and analysis and produce consequences to actors outside the specific economic sub-system. This pressure is not yet as strong as in the legal system, but it may explain the importance attached by recent economic theory to more realistic assumptions<sup>91</sup>. In conclusion, the authority versus inquiry dichotomy does not take into account the broad social context of the evolution of social sciences.

One should also account for this different evolution of these two disciplines the fact that the “quest for truth” has a different purpose in science (social science included) than it has in the law and the courtroom<sup>92</sup>, which might explain the different evolution of each separate sub-

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<sup>87</sup> Ibid, at 46. Emphasis added.

<sup>88</sup> For a criticism, see S. Wong, *The Foundations of Paul Samuelson’s Revealed Preference Theory: a study by the method of rational reconstruction* (Routledge, 1978).

<sup>89</sup> The expansion of economics as the main source of wisdom for competition law and consequently the role of economic consultants in competition policy analysis and prescription can be well illustrated with the rise of economic consultancies in competition law practice: see, D. Neven, ‘Competition economics an antitrust in Europe’ (2006) *Economic Policy* 741-756.

<sup>90</sup> For an overview see, D. Kahneman, ‘A Psychological Perspective on Economics’ (2003) 93 *American Economic Review*, 162.

<sup>91</sup> See, G. A. Akerlof, ‘The Missing Motivation in Macroeconomics’ (2007) 97(1) *American Economic Review*, 5-36.

<sup>92</sup> As the US Supreme Court noted in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993), “there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory”.

system. It is thought that the objective of the scientific method is not to legitimate the power of scientists but to increase the stock of “objective knowledge”, in other words to discover more about the world. In contrast, the quest for “truth” in the courtroom is to arrive to an ultimate, in the sense of persuasive, explanation, in terms of legitimate exercise of authority.<sup>93</sup> Ultimate explanations exist in the sense that they are defined by the courts.<sup>94</sup> This is not the case in the process of scientific discovery, as “every explanation may be further explained”, in the sense that a known state of affairs may always be explained by an unknown state of affairs.<sup>95</sup> In other words, “objectivity” and “truth” may be the aim of both the scientific and the legal process but the nature of “objectivity” or “truth” that they aim to uncover is of a different kind.

Once we accept that law and economic form two distinct sub-systems in interaction with each other, it is important to discover how interconnection and cognitive openness operate between them.

First, one could argue that when an autopoietic system of discourse is brought into being, it brings with it some of the elements of broader social discourse that it made use of before it became normatively and operationally closed. It is possible to argue that all of us participate at the same time to different conversations or games if we prefer this metaphor<sup>96</sup>. The participants to these different conversations (an individual can belong to more than one disciplines) may bring to the conversation information acquired from other social sub-systems to which conversations they also participate.<sup>97</sup> This is how facts, concepts, methodologies and theories may spread over time from one specialist system into another or the society in general.<sup>98</sup> This establishes the ground rules of social communication between the different systems, a kind of meta-language. The existence of a *tertium comparationis* or metalanguage is also a common feature of some theories of translation. Walter Benjamin defended the view that translation

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<sup>93</sup> As it is also recognized by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, at 597, “(s)cientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly... We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes”.

<sup>94</sup> R. B. Katskee, ‘Science, Intersubjective Validity, and Judicial Legitimacy’ (2008) *Brooklyn L Rev* 857, at 861.

<sup>95</sup> N. Rescher, *The Limits of Science* (Univ of Pittsburgh Press, 1999), at 136.

<sup>96</sup> F. Ost & M. Van de Kerchove, *Le droit ou les paradoxes du jeu* (PUF, 1992).

<sup>97</sup> F. Ost & M. Van de Kerchove, *Le droit ou les paradoxes du jeu* (PUF, 1992).

<sup>98</sup> For a number of empirical studies documenting, among others, how facts and evidence claims travel between social sciences as well as over time, see the inter-disciplinary project ‘The Nature of Evidence: How Well Do ‘Facts’ Travel’ at LSE : <[www.lse.ac.uk/collections/economicHistory/Research/facts/Default.htm](http://www.lse.ac.uk/collections/economicHistory/Research/facts/Default.htm)> (last visited, July 18, 2009).

implies a pure language (*reine Sprache* or *Mentalese*), which will allow the passage from language A to language B by ensuring that both are equivalent to an expression in metalanguage C<sup>99</sup>. One could subject this view to criticism, as it is possible to argue that in order to decide if A and B are similar in meaning to a text in language C, one needs a new metalanguage D etc...(the “Third Man Argument”)<sup>100</sup>.

Second, some could argue that language and discourse are marked by relations of power, hegemony and authority represented in the different sub-groups employing it: Translation is thus more than a simple technical exercise of transfer of meaning<sup>101</sup>. Some actors in several sub-systems may acquire a specific status or power in the host system that they are able to be perceived as the “official” translators of cognitive signals coming from the exterior and thus influence the choice of the source language to translate. Would antitrust have evolved differently, if a sociologist or a cognitive scientist was appointed Assistant attorney general of antitrust instead of economist Donald Turner in 1965, Turner being instrumental for the inception and publication of the 1968 merger guidelines, the first systematic application of economic concepts in antitrust law enforcement? Laurence Sullivan has once wondered about the existence of different sources of wisdom in antitrust than economics and offered a possible alternative<sup>102</sup>, thus demonstrating that economics should not be the only source of (external) wisdom for competition law. Gunther Teubner summarizes the point by noting that “economic rationality does not have the privilege of society-wide institutionalization all to itself”<sup>103</sup>. The issue is not to eliminate “moral-political monotheism, in favour of economic monotheism which law needs only to reflect” but “to change from monotheism to polytheism, from the monotheism of modern rationality to a polytheism of the many discourses”<sup>104</sup>.

In conclusion, autopoietic theory brings attention to the separate beliefs that may animate

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<sup>99</sup> W. Benjamin, ‘The Task of the Translator’ (1969), H. Zohn (trans. from German), in L. Venuti (ed.) *The Translation Studies Reader* (Routledge, 2000), pp. 15-25. at 21, “a real translation is transparent; it does not cover the original, does not block its light, but allows the pure language as though reinforced by its own medium to shine upon the original all the more fully”. Chomsky’s “generative grammar” derives from a similar intellectual tradition: N. Chomsky, *Aspects of the Theory of Syntax* (MIT Press, 1965), at 3. See also, F. Ost, *Traduire – Défense et illustration du multilinguisme* (Fayard, 2009), pp. 67-105.

<sup>100</sup> U. Eco, *Experiences in Translation* (University of Toronto Press, 2001), at 12.

<sup>101</sup> See, in particular, A. Gramsci and M.M. Bakhtin. For an analysis, P. Ives, *Gramsci's politics of language: engaging the Bakhtin Circle and the Frankfurt School* (University of Toronto Press, 2004), chapter 2.

<sup>102</sup> L. Sullivan, ‘Economics and more Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?’ (1977) 125(6) *University of Pennsylvania L Rev* 1214-1243.

<sup>103</sup> G. Teubner, ‘*Altera Pars Audiatur*: Law in the Collision of Discourses’, in R. Rawlings (ed.), *Law, Society and Economy* (OUP, 1997), 149, at 150.

<sup>104</sup> *Ibid.*

the actors of the different sub-systems. These may be the consequence of the specific limitations of their language techniques and consequently the story and script of their conversation. One could therefore distinguish between legal and economic discourses: in the sense that the topics examined and the style of the conversation differs in each discipline. It follows that the meaning of a term/statement may be different if one takes it in isolation from the conversation to which it is integrated. One could give the example of polysemic concepts, such as “property rights”, which are present in the vocabulary of both disciplines but have a different meaning. This is more the object of the study of pragmatics (which examines the influence of context on the interpretation of an utterance) than of translation, which emphasizes the transfer of meaning from one language/discourse to the other with the aim of equivalence in meaning (deep sense).

### ***B. The aim of translation***

If translation refers to a transfer of meaning/significance from a source language to a target language, its aim is to convey meaning, to express the deep sense of a *parole* (discourse). In that sense, the act of translation is a concept different from the act of communication or distorted communication, which does not necessarily involve the objective of the transfer of meaning or deep sense. No one shows this better than Lewis Carroll in *Alice Adventure's in Wonderland*. The beings inhabiting that country understand Alice's language, more or less, but the inhabitants of this place do not engage in meaningful (in terms of structured) exchanges with each other. Opposing this world to the paradigm of argumentation that he advances, Chaim Perelmann observes that “between Alice and the inhabitants of Wonderland, no hierarchy, precedence, or functions requires one to answer rather than another. Even those conversations that begin are apt to break off suddenly”<sup>105</sup>.

One could also distinguish translation from interpretation. Translation can be considered as a limited type, “a species of interpretation governed by certain principles proper to translation”<sup>106</sup>. Interpretation involves a certain degree of correspondence to the original text, a constraint that is not faced by translation. In translation, there can be no correspondence between the two texts<sup>107</sup>.

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<sup>105</sup> C. Perelmann, *New Rhetoric* (University of Notre Dame Press, 1969, first published in 1958), at 15.

<sup>106</sup> U. Eco, *Experiences in Translation*, above n 100, at 80, in the sense that translation is “the outcome of an interpretative inference (a bet on the sense of a text) that can or cannot be shared by other readers (ibid., at 16).

<sup>107</sup> G. Steiner, *After Babel*, above n 21, at 309, “the complete translation, the definitive insight and generalization of the way in which the translated language relates word to object would require a complete access to it from the

It follows, that there is no identity between the language source and the language target, rather some loose sort of equivalence of meaning. The translator is therefore free to change the story (content). She must decide what is the fundamental content conveyed. As Eco explains, “in order to preserve a deep story, the translator will be entitled to change the surface one”<sup>108</sup>. More precisely, translation is a form of “inter-systemic interpretation with marked variations in the substance of the expression”<sup>109</sup>. Translation involves a constant negotiation between different meanings without aiming to correspondence of meaning. Once one renounces to the “very ideal of the perfect translation” begins the “work of mourning”, that is, exposing oneself to the “test of the foreign”<sup>110</sup>.

But if translation does not aim to formal correspondence (in both form and content), what constitutes its aim?

A possible option could be “dynamic equivalence”, that is, “equivalence of response” or “conformance” of the translation to the receptor language and culture as a whole”<sup>111</sup>. It is thus possible that the aim (“*skopos*”) of the translator is to reach “a set of addresses” in the target culture: “the target text [...] is oriented towards the target culture, and it is this which ultimately defines its adequacy”. It follows that “source and target texts may diverge from each other quite considerably, not only in the formulation and distribution of the content but also as regards the goals which are set for each, and in terms of which the arrangement of the content is in fact determined”<sup>112</sup>. Reflecting on our discussion of the interaction between law and economics, this indicates that the quest for correspondence/equivalence of the economic concept integrated in legal discourse with some ideal form of “sound economics” is a futile exercise.

The domestication of the foreign text is not however without limits. The translator mediates between the author and the reader: In the words of Ricoeur, “to translate is to serve two

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translator. The latter would have to experience a total mental change”.

<sup>108</sup> U. Eco, *Experiences in Translation*, above n 106, at 31.

<sup>109</sup> Ibid., at 106. Nothing better illustrates that than the translation of the title of Umberto Eco’s book *Experiences in Translation* from Italian to French and to English. The title of the book in Italian is “*Dire quasi la stessa cosa, esperienze di traduzione*”, which was translated in French “*Dire presque la même chose : Expériences de traduction*”. The first part of the title has disappeared in the English edition. Indeed, translation is “*dire PRESQUE la même chose*” (Emphasis added).

<sup>110</sup> P. Ricoeur, *On Translation*, above n 20, at 23.

<sup>111</sup> E. Nida, ‘Principles of Correspondence’ in L. Venuti (ed.), *The Translation Studies Reader* (Routledge, 2004) pp. 153-167, at 163 (first published in 1964).

<sup>112</sup> H.J. Vermeer, ‘Skopos and Commission in Translational Action’, in L. Venuti (ed.), *The Translation Studies Reader* (Routledge, 2004), pp. 227-238, at 229. Translation is not “trans-coding”, a procedure which is “retrospectively oriented towards the source text, not prospectively towards the target culture” and thus “diametrically opposed to the theory of translational action”.

masters: the foreigner with his work, the reader with his desire for appropriation”<sup>113</sup>. In some instances, the translation will maintain the foreign character of the translated message by indicating its linguistic and cultural differences from the culture of the target language (foreignizing translation).

In essence, the aim of the translation is to link two heterogeneous communities around the translated text. Its aim is to foster “a community of readers who would otherwise be separated by cultural differences” but also to establish “a community that includes foreign intelligibilities and interests, an understanding in common with another culture, another tradition”<sup>114</sup>. The objective of economic transplants could therefore be conceived as the creation of this “linguistic zone of contact between the foreign and translating cultures”<sup>115</sup>, in our case between the rhetoric of law and the rhetoric of economics. This has important implications as it engages within a hybrid discourse community, lawyers and economists. A consensus has thus to be built between all discourse participants in order to determine true from false statements.

### **III. Economic transplants as an illustration of the paradigm of translation**

This section will analyze the interaction between legal and economic discourse in the area of competition law, from the perspective of the paradigm of translation. It will first examine the different forms that may take the incorporation of economic discourse into legal discourse, before focusing on a specific form, economic transplants, which fits perfectly with the paradigm of translation that was exposed in the first part.

#### ***A. The many faces of economic analysis in competition law***

The judge or legal decision-maker has different options in the incorporation of economic analysis into legal discourse.

He may choose to delegate the translation task to an “expert”, someone who is well versed into the economic discourse, who will attempt to provide an explanation of its deep meaning to the judge. The task of translation will be performed by an expert witness, a court-appointed expert, an assessor, a single joint expert. The “epistemic asymmetry”<sup>116</sup> that exists between the

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<sup>113</sup> P. Ricoeur, *On Translation*, above n 20, at 4.

<sup>114</sup> L. Venuti, ‘Translation, Community, Utopia’ in L. Venuti (ed.), *The Translation Studies Reader* (Routledge, 2004), pp. 482-502, at 491.

<sup>115</sup> *Ibid.*

<sup>116</sup> S. Brewer, ‘Scientific Expert testimony and Intellectual Due Process’ (1998) 107 Yale L J 1535-1681, at 1586 (referring to the concept of “epistemic deference”).



judge and the community of economists renders necessary the delegation of the translation task to someone from the “foreign” sub-system. The judge recognizes that the concept belongs to a different discourse, that of economics, and does no effort to domesticate it within his own discourse. There are many reasons why a judge will decide to appeal to an “expert” of economic discourse.

Economic discourse constitutes an importance source of inspiration and authority for the judge in enforcing competition law (economic authority). For example, one of the major implications of the evolution of competition law towards an economic approach has been the importance of normative economic arguments and theories for the interpretation of what constitutes a restriction of competition. The terms “restriction of competition”, “abuse of dominant position” or “significant impediment of effective competition” have no content on their own unless the interpreter has recourse to certain economic considerations, such as consumer welfare, economic efficiency, unilateral effects, coordinated effects, collusion etc...The judge needs therefore to have access to economic expertise, which will give to this body of law its muscle.

It is clear that the judge will be influenced by economic authority as well as by legal precedent in enforcing the competition law provisions. This is particularly the case in situations where there is no consensus in the legal or in the economics community over the adequate competition law standard that will apply to a business practice. Chicago theories about economic efficiency gains, the post-Chicago theories of anticompetitive harm for vertical mergers and foreclosure, such as raising rivals costs theory, theories about incentives to innovate are increasingly framing the debate over the adequate competition law standards for certain commercial practices. The Courts look implicitly or explicitly “to economic authority in order to establish antitrust authority as a matter of law”<sup>117</sup>.

However, one should not conceive economic discourse as being marked by uniformity but as a discourse characterized by numerous sub-discourses, schools, theories etc. Often, these theories rest on first assumptions for which there is no consensus in the self-defined community of ‘economists’. The choice of the expert will therefore have important implications on the act of translation. Each translation will be different as it is the outcome of an interpretative inference

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<sup>117</sup> A. Gavil, “Competition Policy, Economics and Economists: Are We Expecting Too Much?”, Chapter 24 in B. Hawk (ed.), *1998 Fordham Corporate Law Institute – International Antitrust Law and Policy*, (1999), 575, at 579.

that can or cannot be shared by everyone. Each translator will inevitably emphasize different parts of the original discourse.

The recent US Supreme Court case in *Leegin* on the continuous validity of the *per se* interdiction rule for resale price maintenance may illustrate the variety of translations and therefore the difficulty of the task of the judge<sup>118</sup>. During the oral hearing, an interesting dialogue occurred between Theodore Olson appearing for *Leegin* and Justice Breyer. Olson claimed that it will only be in an economic context where retailers dispose of a strong market power that resale price maintenance will most likely lead to anticompetitive effects. He based his argument on the Chicago school's assumption that the interest of supplier and consumers are always aligned and on the need to preserve a dealer's promotion efforts from free riding. This assumption has been questioned by a number of other economists who claim that vertical restraints and, in particular, resale price maintenance, may lead to consumer harm<sup>119</sup>. Justice Breyer, a fine connoisseur of antitrust and regulatory economics, was quick to observe:

“Breyer: “Which economists? I know the Chicago school tends to want rule of reason and so forth. Professor Sherer is an economist, isn't he? Worked at the FTC for a long time? A good expert in the field...And his conclusion is, as in the uniform enforcement of resale price maintenance, the restraints can impose massive anti-consumer benefits. Massive...”

Olson: “In the vast majority of the economist who have looked at this have come out to the opposite conclusion, Justice Breyer”

Breyer: “We 're supposed to count economists? Is that how we decide it? (Laughter)”<sup>120</sup>.

One could understand the challenges of decision making on the basis of conflicting economic expertise that follows different assumptions and different inferences. Because of the epistemic asymmetry problem, the judge is not able to assess, by her own, the “loyalty” of the translation to the original. It is not also clear how the “loyalty” of the translation will be examined, if it is not by another expert, which inevitably raises the “Third Man Argument” (e.g. a third expert to verify the loyalty of the second expert's decision over the loyalty of the first one and so on). Loyalty may also matter a little, at the end, if one perceives the two discourses as

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<sup>118</sup> *Creative Leathers Products, Inc. v. PSKS, Inc.*, 127 S Ct 2705 (2007).

<sup>119</sup> See, W. S. Comanor, ‘Vertical Price Fixing – Vertical Market Restrictions and the New Antitrust Policy’ (1985) 98 Harvard L Rev 983-1002.

<sup>120</sup> US Supreme Court, No 06/480, Oral argument (March 26, 2007), transcript available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-480.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-480.pdf) (last visited, July 18, 2009), at 7.

separate, closed sub-systems. But we know that, in reality, this is not the case. The choice of a specific economic discourse by the legal system will have profound implications on the conversation that takes place between economists by conferring on some schools the authority and support of the legal apparatus and weakening others by rendering more difficult the recruitment of devotees to their “church”.

In other circumstances, the judge will not have to choose between different translations, as there is a broad consensus in economic discourse. This is particularly the case for economic facts: statistical data (firms’ sales, turnover, sales in the industry, economies of scale...) or economic concepts widely used by the profession, such as opportunity costs, variable costs, fixed costs, average avoidable costs, incremental costs. These data are based on observations, which are ultimately theory laden<sup>121</sup>. There is however generally a broad consensus between economic experts on their meaning. This consensus does not include the inferences that are drawn from the data by the use of statistical methodology. The concept of economic facts includes descriptive statistics but excludes inferential statistics<sup>122</sup>. The involvement of the judge is limited in these cases to the decision to take into account this economic context in the qualification of the facts of the case. If the judge decides to take into account the economic context of the dispute, these economic facts will be established empirically by experts. The degree of epistemic asymmetry will reach its peak: the expert does not only have superior knowledge, in comparison with the judge, of the statistical methods that will be used to collect and to present the data but has also spent time in collecting and associating these specific data to the economic context of the particular dispute.

One could also identify circumstances where economic theories are universally accepted not only by the overwhelming community of economists but have been incorporated into the general social system: economic laws<sup>123</sup>. The layman or non expert judge comprehends their meaning without any need for translation. These concepts form part of the common code of the

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<sup>121</sup> Observation is always informed by theory: E. Beecher-Monas, *Evaluating Scientific Evidence* (CUP, 2007), 37-39 (noting the social construction of scientific “facts”).

<sup>122</sup> Descriptive statistics describe the data (including concepts such as standard deviation, etc). Inferential statistics are used in drawing conclusions/inferences about the general population from a single study: E. Beecher-Monas, *Evaluating Scientific Evidence*, above n 121 at 60.

<sup>123</sup> The distinction between economic “facts” and “laws” follows the pattern of the traditional “fact”/”law” classification in legal thought: Cl. Morris, “Law and Fact”, (1942) *Harvard Law Rev* 1303, 1315, “facts are transitory and particular”, law is the opposite. This classification may be criticized, as facts relate to values and laws are not independent of facts (e.g. statistical laws). One should not thus consider that economic facts and laws are ultimately of a different kind..

legal and economic sub-systems. In the most extreme scenario, economic laws are well enshrined in all different forms of discourse and take the form of “common sense”. For example the idea that market power may produce allocative inefficiency is based on the perfect competition model, which could be conceived as a specific expression of the economic law of supply and demand. As Mark Blaug remarks in his *Methodology of Economics* this is not a natural law, like the Universal Law of Gravitation, which can be tested (Blaug adopts a Popperian perspective), but relies instead on hypothesis and assumptions such as the Invisible Hand, the rationality postulate and constitutes a partial model of equilibrium. Economic laws may be subject to questioning by contrary empirical evidence. For example, recent advances in experimental economics demonstrate that real consumers are sometimes guided by their perceptions of fairness rather than by economic factors such as marginal utility, even when they make clear economic choices<sup>124</sup>.

However, despite these challenges, economic laws form part of general experience and there is no need for them to be established and explained by experts. Epistemic asymmetry between the judge and the expert is in this case minimal, almost inexistent. One could advance that these economic laws are integrated at the jurisprudential stage or as Learned Hand called them, “general truths derived from specialised experience”<sup>125</sup>. One could certainly question the universal validity of these general “truths”. These economic laws form, however, an indistinguishable part of the legal and economic nexus. For example theories that question the “economic law” of supply and demand will have little chance of being accepted as valid economic authority in competition law. The judge will automatically exclude this type of economic expertise, based on her experience of the tensions that would exist between this economic testimony and the basic assumptions that lay the economic foundations of her legal system.

### ***B. Economic transplants in competition law***

The task of translation may also not be entirely delegated to an expert economist but part of it could be performed by the legal decision-maker/judge. This constitutes an important characteristic of economic transplants. Economic transplants also convey the decision to

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<sup>124</sup> M. Rabin, ‘Incorporating fairness into game theory and economics’, (1993) 83(5) *American Economic Review* 1281-1302.

<sup>125</sup> L. Hand, ‘Historical and Practical Considerations Regarding Expert Testimony’ (1901) 15 *Harvard L Rev* 40-58, at 54.

integrate explicitly economic analysis, not only at the adjudicative stage (as was the case with economic facts and economic authority) but also at the doctrinal phase, where they operate as guiding principles for all decisions adopted at the adjudicative stage. This section will examine the emergence of economic transplants before analyzing the reasons that explain why the effort of translation has not been entirely delegated to experts.

### **1. The emergence of economic transplants**

The term “economic transplants” refers to any concept of economic discourse that has been incorporated into the legal discourse by an act of translation performed by an organ vested with the authority to adjudicate and capable therefore of producing an impact on the interpretation of legal norms. Economic transplants constitute in most cases analytical concepts, such as market power, barriers to entry, consumer welfare, efficiency gains, that are essential intermediary steps in the process of qualification of the facts of the case as constituting, for example, a restriction of competition, under Article 81 EC, or an abuse of a dominant position, under Article 82 EC. Economic transplants are most frequently incorporated in legal discourse by soft law instruments, such as guidelines. Eleanor Fox’s aphorism “the guidelines are when economists are kings” provides an adequate explanation for the role of soft law<sup>126</sup>. Economic transplants are not usually incorporated for the first time in hard law instruments, such as regulations, which employ instead descriptive, not analytic, concepts (such as market shares, the latter being proxies for the concept of market power)<sup>127</sup>.

This situation should be distinguished from all those where expert economic evidence “crystallizes into legal standards that are applied in subsequent cases”<sup>128</sup>. Barbier de la Serre and Sibony give the example of the concept of collective dominant position, framed progressively by the case law on the basis of economic evidence presented to the European Courts on the theory of tacit collusion. It is important to observe that the Courts did not adopt the economic concept of tacit collusion but preferred instead to develop a new legal concept, collective dominant position, thus breaking any link between this new concept and its economic underpinnings. This is not the

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<sup>126</sup> E. Fox, ‘The 1982 Merger Guidelines: When Economists are Kings?’, (1983) 71 California L Rev 281-302, at 281.

<sup>127</sup> E.g. Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336/21; Commission notice - Guidelines on Vertical Restraints [2000] OJ C 291/1 (hereinafter Guidelines on vertical restraints).

<sup>128</sup> E. Barbier de la Serre & A.-L. Sibony, ‘Expert Evidence Before the EC Courts’ (2008) Common Market L Rev 941-985, at 969.

case for economic transplants, where the choice of an equivalent denomination to that employed in economic discourse emphasizes the economic origins and nature of the transplant. One could consider that this choice indicates a canon of interpretation addressed to the legal community – Do not ignore that this concept also belongs to a separate discourse! The recent effort by the European Commission to integrate as a substitute or complement to collective dominance the economic concept of coordinated effects indicates the importance of economic transplants in competition law. This led to a dialogue between the European Commission and the European courts, which are less prompt to integrate economic discourse, most probably because of their composition. The Courts attempted to integrate the economic transplant of coordinated effects into their own legal construct of collective dominant position, but without abandoning the later<sup>129</sup>.

An interesting feature of economic transplants is that their interpretation is not always consistent with the exact meaning of the concept in economics. In that sense, they share a common characteristic with the concept of “legal transplants”.

For Alan Watson, as legal systems develop, they are constantly borrowing concepts or approaches from other legal systems<sup>130</sup>. This possibility is denied by Pierre Legrand for whom legal rules may travel but legal meanings and cultures do not<sup>131</sup>. At best, these concepts take on a form and life of their own, as they are immersed into their receiving environments<sup>132</sup>. The concept of economic transplants refers to a borrowing of economic concepts through an act of translation. However, for any good translation, even if there is some degree of equivalence between the target and the source language, there may be important differences: as Umberto Eco illustrated with regard to the translation of his novel, *The name of the Rose*, the same Italian text may be translated differently in Russian, German or French<sup>133</sup>. The economic transplant takes a different form as soon as it is translated: its content evolves separately than in its original setting, it evolves in congruence with the context of its host language.

In competition law, economic transplants were predominantly integrated by the instrument of

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<sup>129</sup> Case T-464/04, *Independent Music Publishers & Labels Association (IMPALA) v. Commission*, [2006] ECR II-2289, para. 247-248 & 525-528.

<sup>130</sup> A. Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed., University of Georgia Press, 1993)

<sup>131</sup> P. Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 *Maastricht Journal of European Comparative Law* 111-124.

<sup>132</sup> A. Watson, *Law Out of Context* (University of Georgia Press, 2000); P. Legrand & R. J. C. Munday (ed.), *Comparative legal studies: traditions and transitions* (CUP, 2003).

<sup>133</sup> U. Eco, *Experiences in Translation*, above n 106, at 28-29.

soft law (Guidelines)<sup>134</sup>. This followed the path of US antitrust law. Starting with the 1968 Guidelines on Merger Enforcement, US antitrust law integrated different economic concepts that became influential in framing antitrust law discourse in courts<sup>135</sup>.

Hillary Greene's important study on the institutionalization of US merger guidelines in antitrust discourse provides an excellent example of the integration of economic transplants through the instrument of guidelines<sup>136</sup>. Greene cites the example of concentration measures in merger control in order to illustrate the impact of the guidelines. Prior and shortly after the 1968 US Guidelines on merger control, the Courts employed the four-firm (CR4) concentration measure in merger analysis, representing the sum of the market shares for the four largest firms in the market<sup>137</sup>. In 1982, the DOJ revised its 1968 guidelines and introduced a new measure of concentration, the Herfindahl-Hirshman Index (called HHI), which is the sum of the squares of the market shares of the firms present in that market<sup>138</sup>. Hillary Greene observes that the HHI index was discussed in economic circles, since at least the early 1960s<sup>139</sup>, when George Stigler published his seminal work on oligopoly theory<sup>140</sup>, and that it "became part of the mainstream legal literature" following the suggestions of the law professor, then judge, Richard Posner<sup>141</sup>. She notes, however, that the case law on Section 7 of Clayton Act (the US merger statute) has ignored the HHI index until the 1982 Guidelines were adopted<sup>142</sup>. Prior to that date, case law was written almost entirely in terms of CR4 or other concentration ratios. Immediately after the adoption of the 1982 Guidelines, a transition period started during which both CR4 and HHI concentration measures were relied by the courts, although the later gained progressively a more important role<sup>143</sup>. She also records the important increase of the rate of references to the guidelines since the early 1970s. She concludes that the adoption of new version of Guidelines

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<sup>134</sup> Ph. Areeda, 'Justice's Merger Guidelines: The General Theory' (1983) *California Law Rev* 303-310.

<sup>135</sup> The 1968 Guidelines were the intellectual child of Donald Turner, the first PhD economist to be appointed Assistant Attorney General for Antitrust and a key figure in the re-orientation of antitrust law in the US towards an economic approach in the 1960s. See, O. Williamson, 'The Merger Guidelines of the US Department of Justice – In Perspective' available at [http://www.usdoj.gov/atr/hmerger/11257.htm#N\\_1](http://www.usdoj.gov/atr/hmerger/11257.htm#N_1) (last accessed July 18, 2009).

<sup>136</sup> H. Greene, 'Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse' (2006) 48(3) *William & Mary L Rev* 771-857.

<sup>137</sup> U.S. Dep't of Justice, *Merger Guidelines-1968*, reprinted in 4 *Trade Reg. Rep. (CCH)* ¶ 13,101 (May 20, 1968).

<sup>138</sup> U.S. Dep't of Justice, *Merger Guidelines-1982*, reprinted in 4 *Trade Reg. Rep. (CCH)* ¶ 13,102 (June 14, 1982).

<sup>139</sup> H. Greene, above n 136, at 788.

<sup>140</sup> G. Stigler, 'A Theory of Oligopoly' (1964) 72(1) *Journal of Political Economy* 44-61, at 59.

<sup>141</sup> R.A. Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach', (1969) 21(6) *Stanford L Rev* 1562-1606, at 1602-1603.

<sup>142</sup> H. Greene, above n 136, at 789.

<sup>143</sup> *Ibid.*, at 790-791.

profoundly influenced the direction of the case law (hard law).<sup>144</sup>.

The Small but Significant Non Transitory Increase in Price test (SSNIP) illustrates also the role of guidelines in transplanting an economic concept in legal discourse<sup>145</sup>. The test measures cross-price elasticity between two products through a speculative experiment postulating a hypothetical small but lasting change in relative prices [5-10%] and evaluating the likely reactions of customers to that increase. The test was first developed by American economist Morris Adelman in an article published in a legal journal in 1959<sup>146</sup> and then reformulated by American economist F.M. Scherer in an expert testimony he presented at the Federal District Court for the Eastern District of Michigan during April 1972 before including this test in the 1980s edition of his industrial organization textbook<sup>147</sup>. The test found its way in official antitrust legal discourse when economist Lawrence White used it in the 1982 DOJ Merger Guidelines, in his capacity of chief economist of the DOJ Antitrust Division<sup>148</sup>. This proved extremely influential in US courts, which, prior to the 1982 Guidelines, were employing in merger control the definition provided by the *Brown Shoe* case law of the Supreme Court, which emphasized functional characteristics for market definition<sup>149</sup>. Since 1982, cross-price elasticity and the SSNIP test have gradually acquired prominence in US merger control discourse before migrating to Europe.

The European Commission referred to cross-price elasticity in its *Eurofix-Bauco v. Hilti* decision in 1987<sup>150</sup>. The decision was later reviewed by the ECJ<sup>151</sup>. The Commission argued that its emphasis of cross-price elasticity was a “synthesis of all the factors that determine whether or not two different products can properly to be said to be in the same relevant market, according to

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<sup>144</sup> Ibid., at 802-803, According to Greene, “from around 10-15% in the 1970s the reference rate increased to 15-20% in the late 1970s and early 1980s. In 1983 shortly after the adoption of the 1982 Guidelines were issued, the reference rate increased to above 50% and by the late 1980s the rate averaged 60% or higher. After the 1982 Guidelines were issued, merger guidelines quickly became the “basic reference point” in section 7 Clayton Act rulings”.

<sup>145</sup> Ibid., at 796-798.

<sup>146</sup> M. A. Adelman, ‘Economic Aspects of the Bethlehem Opinion’, 45 Virginia L Rev 684-696, at 688 (1959).

<sup>147</sup> F.M. Scherer, ‘On the Paternity of a Market Delineation Approach’ (January 12, 2009). Available at SSRN: <http://ssrn.com/abstract=1337079> (last visited, July 18, 2009)

<sup>148</sup> L. White, ‘Present at the Beginning of a new Era for Antitrust: Reflections on 1982-1983’ (March 1999). New York University, Center for Law and Business, Working Paper No. 99-005. Available at SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=167208](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=167208) (last visited, July 18, 2009)

<sup>149</sup> *Brown Shoe Company v. United States*, 370 U.S. 294 (1962).

<sup>150</sup> Decision 88/138/EEC, *Eurofix Bauco v. Hilti* [1988] OJ L 65/19, para 73.

<sup>151</sup> Case T-30/89, *Hilti AG v. Commission* [1991] ECR II-1439.



the previous case law of the Court”<sup>152</sup>. The ECJ repeated its previous case law emphasizing product characteristics and interchangeability (a functional approach based on its *Continental Can* case law<sup>153</sup>) but found the Commission’s decision “sufficiently clear and convincing” to carry its belief<sup>154</sup>. The SSNIP test had been employed in other occasions by the Court<sup>155</sup>, before it was formally incorporated by soft law at a doctrinal stage in 1997<sup>156</sup>. This was the first step of the “modernization” effort of EC competition law, in other words, the attempt to put EC competition law in conformity with neoclassical price theory and economics, in the late 1990s<sup>157</sup>. The Courts’ reaction was not initially very positive. In *Colin Arthurs Roberts*, the applicants argued that consumers distinguish between pubs and clubs based on the difference of the price of beer (the price of beer in bars is 82-83% of the price of beer in clubs), which demonstrated, according to them, that consumers of beer in pubs will not switch to consume beer in clubs if there was an hypothetical increase of the price by 5-10%<sup>158</sup>. The applicants relied on the Commission’s Market Definition Notice. The Court rejected this argument and although it cited the Notice, it also considered the previous case law on market definition in the beer sector (the *Delimitis* case) which emphasized structural factors<sup>159</sup>. For the Court, the applicants relied on the single criterion of price difference and disregarded a specific feature of the sale of beer, which is that “consumption of beer in establishments selling it for consumption on the premises does not depend essentially on economic considerations” but influenced “primarily by their environment and atmosphere”<sup>160</sup>.

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<sup>152</sup> *Ibid.*, at para. 55.

<sup>153</sup> Case 6/72 *Continental Can v. Commission* [1973] ECR 215, para. 32.

<sup>154</sup> Case T-30/89, above n 151, para. 70.

<sup>155</sup> E.g. Case T-83/91 *Tetra Pak International SA v. Commission* [1994] ECR II-755, paras 67-68 ; Case C-333/94 *Tetra Pak International SA v. Commission* [1996] ECR I-5951, para. 16.

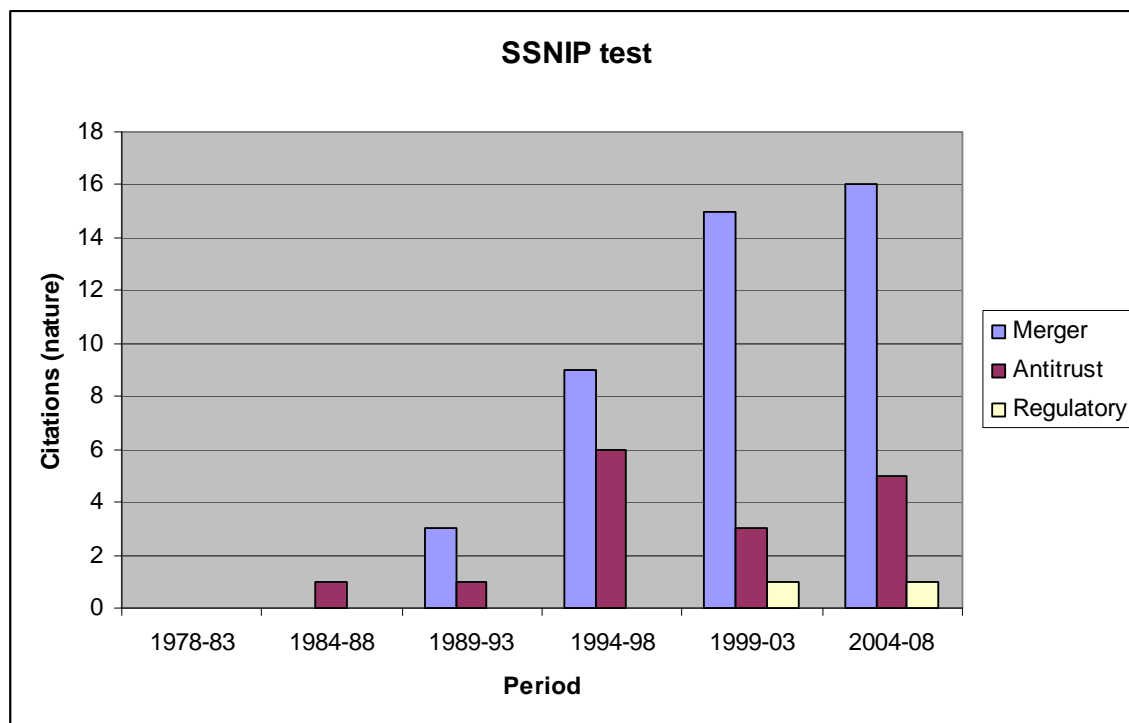
<sup>156</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C 372/5, para. 17.

<sup>157</sup> For a critical assessment see, I. Lianos, *La Transformation du droit de la concurrence par le recours à l’analyse économique*, above n 12, pp. 163-290..

<sup>158</sup> Case T-25/99, *Arthur Roberts and Valérie Ann Roberts v. Commission* [2001] ECR II-1881, para. 20.

<sup>159</sup> Case C 234/89, *Stergios Delimitis v. Henninger Bräu AG* [1991] ECR I-935.

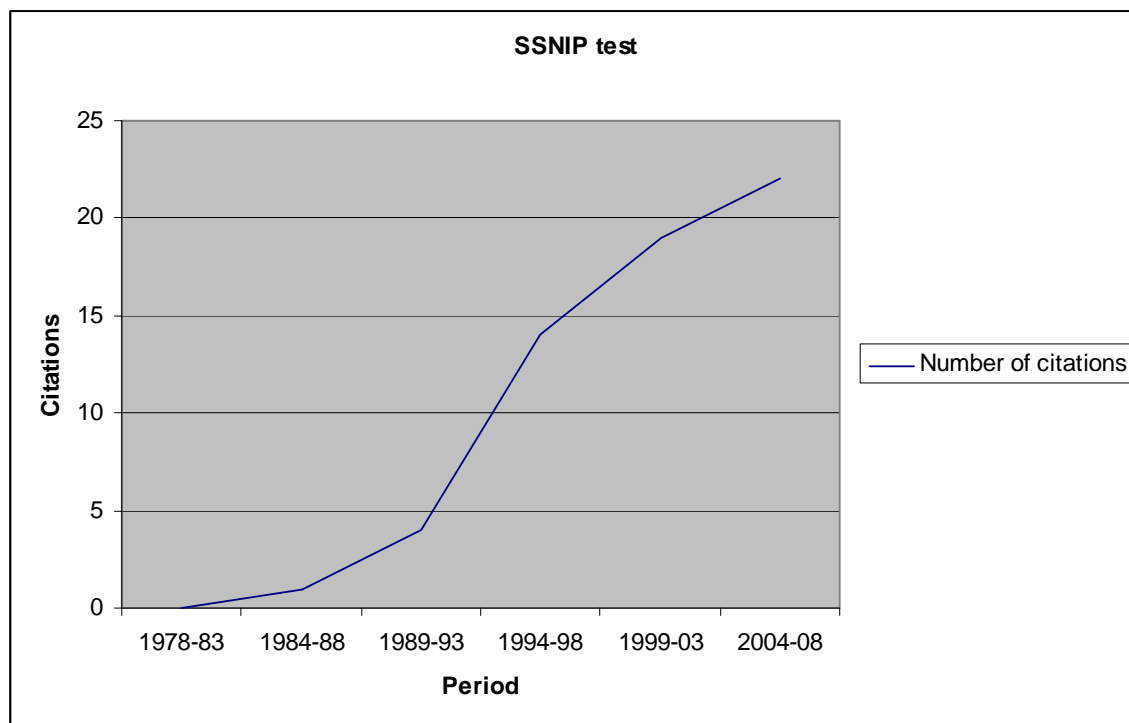
<sup>160</sup> Case T-25/99, above n 158, at para. 40.



However, the Court has, in subsequent cases, explicitly and systematically cited the Commission’s Notice, in particular in the merger area, but also beyond<sup>161</sup>. There are now an increasing number of cases where the Courts adopted the SSNIP definition culminating in 2006-2008 towards an institutionalization of the SSNIP test as the main test for market definition in the case law of the Court. The Commission has also incorporated in its Notice the so called “cellophane fallacy”, which advises against employing an SSNIP test based on prevailing market prices for abuse of dominance cases, as “the prevailing price has been determined in the absence of sufficient competition”<sup>162</sup>.

<sup>161</sup> E.g. Case T-342/99, *Airtours plc v. Commission* [2002] ECR II-2585, para. 45 (merger) ; Case T-210/01, *General Electric Co. V. Commission* [2005] ECR II-5575, para. 477 (merger); Case T-177/04 *Easyjet Airline Co. Ltd v. Commission* [2006] ECR II-1931 (merger); Case T-340/03, *France Télécom SA. V. Commission* [2007] ECR II-107, para. 86 (article 82); Case T-201/04, *Microsoft Corp. v. Commission* [2007] ECR II-3601, para. 484 (article 82).

<sup>162</sup> Commission Notice on the definition of relevant market, above n 156, at para. 19.



In conclusion, economic transplants should be distinguished from economic authority. One of their important features is that the legislator (an actor of the legal sub-system) defines their content and use, while at the same time she notes the foreign character of the concept, by employing a identical term than in economics. She thus emphasizes their dual nature, in other words, their mutual appurtenance to the separate sub-systems of law and economics. This provides an important guidance for the interpretation of these concepts. But, it may also explain how the same economic concept may take various forms when immersed in different legal systems. With regard to the SSNIP test, the European legislator defined the percentage of price increase that has been since employed for the hypothetical experiment (5-10%)<sup>163</sup> at a different level than that chosen by the US legislator (5%)<sup>164</sup>, although it is not clear if the SSNIP test requires a relative increase in the price of one, some or all of the products in the candidate market (aggregate diversion ratio) in the case of multi-product firms<sup>165</sup> and there is considerable

<sup>163</sup> Ibid., at para. 17.

<sup>164</sup> U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines-1992, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, although it is also mentioned that "what constitutes a "small but significant and nontransitory" increase in price will depend on the nature of the industry, and the Agency at times may use a price increase that is larger or smaller than five percent".

<sup>165</sup> For a discussion, Ø. Daljord, L. Sørsgard and Ø. Thomassen, 'The SSNIP test and market definition with the aggregate diversion ratio: A reply to Katz and Shapiro', (2008) 4(2) Journal of Competition law and Economics 263-

variation of the emphasis given to supply or demand-side factors in practice<sup>166</sup>. These differences are often motivated by policy preferences which are external to economic discourse. The policy maker may aim to favor in certain cases infra-marginal instead of marginal consumers, thus adopting a lower threshold for market definition<sup>167</sup>.

But why the policy –maker or legal adjudicator does not delegate the task of translation to an external (to the legal system) expert, as it is the case for economic authority?

## 2. Economic transplants and the translator’s aim

Economic transplants have a dual nature. They belong to both legal and economic discourses. This constitutes the principal motivation for their adoption: the aim is to build a bridge with a “foreign” culture, a shared space between the distinct communities of lawyers and economists; inscribe the concept with the intelligibilities of both discourses. Establishing this shared understanding supposes a link between the legal process and the scientific process.

Sheila Jasanoff observes how the interaction between legal and scientific discourse does not take only one direction (e.g. economics influence law), but legal discourse or legal institutions also influence economic discourse<sup>168</sup>. She eloquently highlights how “the law today not only interprets the social impacts of science” but also “constructs” the very environment in which scientific discourse comes to have “meaning, utility, and force”<sup>169</sup>. Research is conducted and interpreted to answer legal questions and the content of scientific knowledge is shaped in a complex social process, which includes the legal sub-system as well as the specific scientific discourse. Judicial decision-making exercises an important influence on the definitions of “good science”, therefore affecting at the same time the content and direction of economic discourse.

An illustration of the profound interaction between legal and economic discourses is the emergence of economic “schools of thought”, a way to conceptualize and rationalize *ex post* legal doctrine and authority in the area of competition law. If explanatory features of economic

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270; A. ten Kate & G. Niels, ‘The Relevant Market: A Concept Still in Search of a Definition’ (2008) 5(2) Journal of Competition Law and Economics 297-333.

<sup>166</sup> M.B. Coate & J.H. Fischer, ‘A practical Guide to the Hypothetical Monopolist test for Market Definition’ (October 2007). Potomac Papers in Law and Economics 06-01. Available at SSRN: <http://ssrn.com/abstract=940667> (last visited July 18, 2009).

<sup>167</sup> See, Competition Commission, The Supply of Groceries in the UK Market Investigation, available at [http://www.competition-commission.org.uk/rep\\_pub/reports/2008/fulltext/538.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf) (April 30, 2008), at 4.11, “(g)iven the importance of groceries expenditure in the household budget, we think that the appropriate price increase for assessing the relevant market for the supply of groceries is likely to be less than 5 per cent”.

<sup>168</sup> Sheila Jasanoff, *Science at the Bar* (Harvard Univ. Press, 1997)

<sup>169</sup> *Ibid.*, at 16.

discourse, such as schools of economic thought, become also explanatory features of legal discourse, this strongly illustrates the profound interaction and mutuality between law and economics in competition law. This approach of conceptualizing the evolution of competition law doctrine indicates that institutionalised “schools” or “networks” play an important role in antitrust law, if not always, during the process of formation of competition law doctrine, at least at the stage of the *ex post* conceptual rationalization of the case law and therefore its subsequent interpretation.

It follows that the decision by the legal decision-maker to maintain authority by incorporating the economic transplant into the legal discourse (and therefore not by delegating the authority to “external” experts) may be explained by a broader regulatory aim: impact as much as possible on the evolution of both legal and economic discourses. But what, more precisely, would be the regulatory aims followed by the legal translator?

First, with regard to the impact on legal discourse, the translator may attempt to distinguish the specific transplant from an existing economic transplant incorporated into the legal system of another jurisdiction. In other words, the aim of the translator is to render explicit the specific objectives followed by her legal system. This implies that, as for legal transplants, economic transplants do not have a similar content when incorporated in different legal systems, even if the economic concept from which they both originated is the same.

Second, with regard to the impact of the translation on economics, the translator may also wish to preserve the variety of economic discourse: in other words to preserve her legal system from the influence of a dominant trend in economics, which, for different reasons, does not address or does not correspond to the objectives (preferences) of her legal system or more broadly is so dominant as to suppress any other competing form of discourse within economics (in case the regulator values diversity and competition in the marketplace of economic theory)<sup>170</sup>. In this case, the regulatory intervention will aim to preserve variety in the marketplace of ideas.

*(a) The impact of economic transplants on legal discourse*

Economic transplants are often preferred to economic authority, as they enable the integration in economic discourse of the objectives of the specific legal system, as opposed to the values of another legal system. In this case, the definition of the content of the transplant, or even

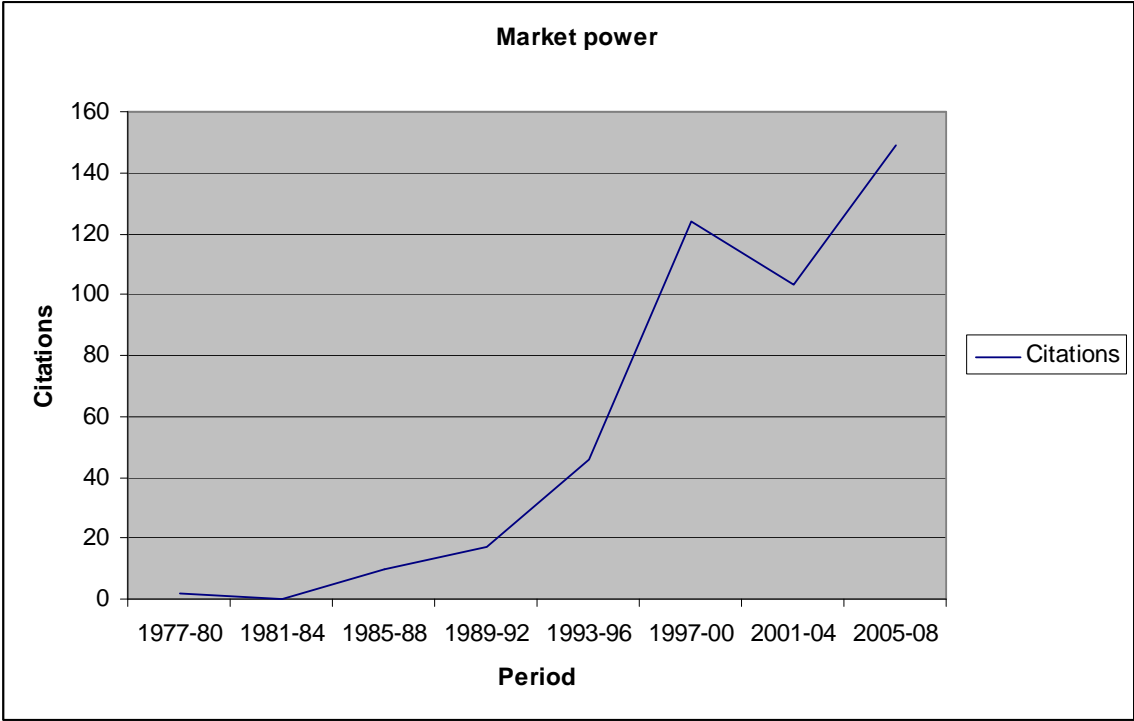
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<sup>170</sup> On the risks of “monoculture” in competition economics, see O. Budzinski, ‘Monoculture versus diversity in competition economics’ (2008) 32 *Cambridge Journal of Economics*, 295-324.

the form of integration, may indicate the specific nature of the economic transplant, in comparison to similar economic transplants integrated in other legal systems. The economic transplants of “market power” and “consumer welfare” exemplify this impact.

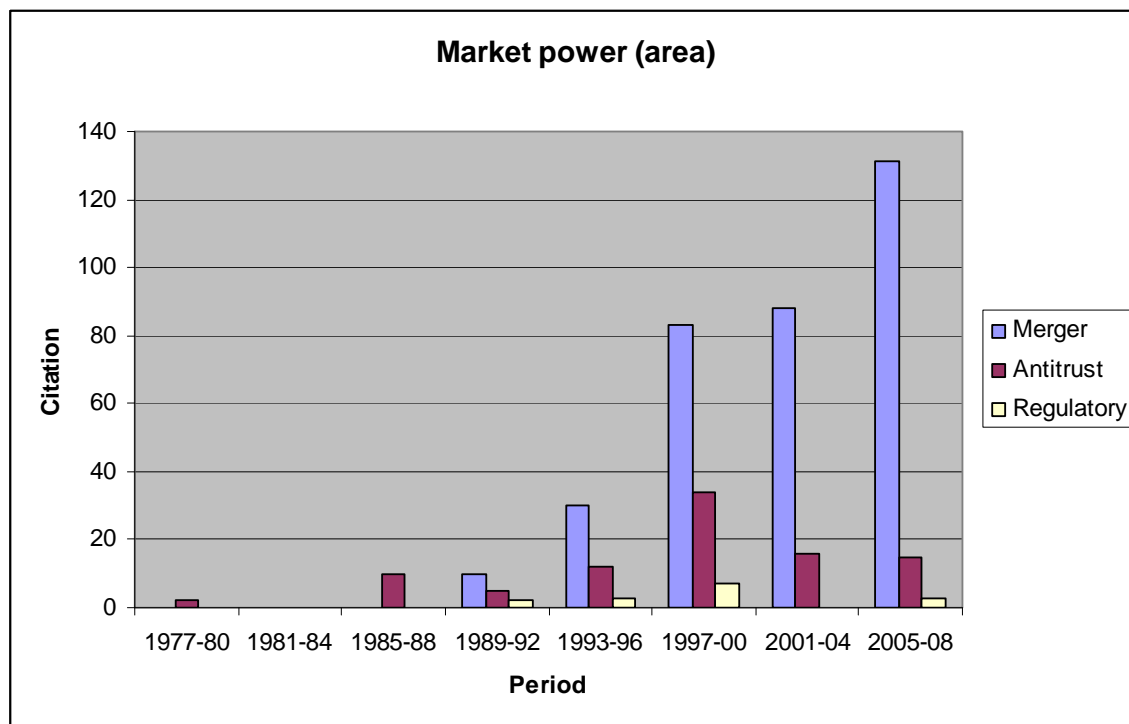
(i) Market power

The integration of the concept of market power in competition law is an illustration of the growing importance of economic transplants in competition law discourse. The following tables make more explicit the expansion of the concept of market power, measured by the total number of citations to “market power” in court cases, Commission’s decisions, guidelines and regulatory texts relevant to competition law (based on research conducted with Westlaw and LexisNexis).



The next table details these citations according to the area of competition law. The concept of market power plays a dominant role in the area of merger control. The reduction of the number of citations of the concept of market power in cases or documents related to antitrust (articles 81 and 82) does not mean that the relative importance of the concept has decreased in this area. What has decreased is the number of total competition law cases based on Articles 81 and 82 brought by the European Commission during that period (in particular during the period

2002-04, probably as a result of the economic crisis following the dot-com bubble burst in 2001) and the decentralization of competition law enforcement during the same time.



An interesting feature of economic transplants is that their interpretation is not always function of the exact meaning of the concept in economics. A typical example of this asymmetry is the different conceptions of market power in competition law and in economics<sup>171</sup>. The neoclassical definition of market power has always focused on the ability of a firm to raise prices profitably and reduce output, which essentially fits to the competition as an efficient outcome approach<sup>172</sup>, whereas the legal definition of market/monopoly power has always emphasized the ability of the firm to exclude competitors and to affect the competitive process, a definition that fits well with the competition as a process of rivalry paradigm<sup>173</sup>.

<sup>171</sup> For a further analysis, see I. Lianos, *La Transformation du droit de la concurrence par le recours à l'analyse économique*, above n 12, pp. 328-384

<sup>172</sup> For an interesting comparison of the different original definitions of market/monopoly power in law and in economics, see E. Mason, 'Monopoly in Law and Economics' (1937) 47 Yale L J 34-49.

<sup>173</sup> See, M. Blaug, 'Competition as an End-State and Competition as a Process', in M. Blaug (ed.), *Not Only an Economist: Recent Essays by Mark Blaug* (Edward Elgar, 1997). One could also note that this definition of market power is also compatible with the emphasis given by the Structure-Conduct-Performance school, the dominant school of neoclassical economic analysis in competition policy during this period, to barriers to entry: see, J. Bain,

The concept of dominant position in EC competition law has been predominately inspired by the second approach, as it insists on the ability of the firm to maintain independent behaviour from the other actors of the market system rather than on market outcomes. The classic definition of the concept of dominant position within the meaning of Article 82 is found in the ECJ's judgment in the *United Brands* case, and refers to

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers”<sup>174</sup>.

The broad definition of dominant position as essentially an ability of independent behaviour made possible the consideration by the Court of a variety of sources of economic power, including the power to exclude competitors (exclusionary economic power) or purely relational economic power because of the existence of a situation of obligatory partner and economic dependence<sup>175</sup>.

The position of EC competition law has nevertheless evolved towards more convergence with an outcome based approach. Article 2 of the former EC Merger Regulation 4064/89 employed the concept of dominant position but linked it more directly than the previous case law on Article 82 to the concept of effective competition.<sup>176</sup> In order to define the existence of effective competition, one should look to indications of performance as well as of market structure. In other words, effects on the market count. Relying on this effects-based approach, subsequent case law broadened the concept of dominant position in order to cover situations of coordinated effects. It was not clear if the concept could, however, be extended to cover unilateral effects. This led to the implementation of a new substantive test in EC merger control, the significant impediment of effective competition test. According to Regulation 139/2004, the criterion of dominant position serves now as a simple indication of a significant impediment of

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*Barriers to New Competition* (Harvard University Press, 1956). The Chicago school's emphasis on allocative efficiency and the more restrictive definition of the concept of barriers to entry they adopted widened the distance between the legal and the economic conception of market power, see R.H. Coase, 'Industrial Organization: A Proposal for Research,' in V. Fuchs (ed.), *Policy issues and Research Issues in Industrial Organization: Retrospect and Prospect* (National Bureau of Economic Research, 1972), pp. 59-73.

<sup>174</sup> Case 27/76, *United Brands v Commission* [1978] ECR 207. See also, Cases 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461.

<sup>175</sup> I. Lianos, *La Transformation du droit de la concurrence par le recours à l'analyse économique*, above n 12, at pp. 348-384.

<sup>176</sup> Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, [1989] L 395/1.



effective competition and therefore of the existence of a potential harm to consumers.<sup>177</sup>

The alleged unilateral effects “gap” was not, however, the principal reason for the institution of the new substantive test in EU merger control<sup>178</sup>. The main motivation can be found in the need to provide tools to both the legal and economic communities to work together in framing the content of the new substantive test, without being subject to the constraints of the previous case law on the concept of dominant position. Quantitative evidence also requires observable and measurable factors, such as predictable market outcomes, rather than ambiguous relational criteria, such as the existence of a position of economic strength.

In its most recent documents, the Commission embraced this more economics-oriented definition of the concept of dominant position in other areas than EU merger control. The staff discussion paper on Article 82 illustrates this subtle evolution:

“[T]he definition of dominance consists of three elements, two of which are closely linked: (a) there must be a position of economic strength on a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained on that market by (c) affording it the power to behave independently to an appreciable extent”.<sup>179</sup>

Of particular importance here are the last two elements, which, according to the staff discussion paper, are intrinsically linked. The discussion paper reveals the nature of the relationship between these two elements of the dominant position, that is, the idea of independent behaviour and the concept of effective competition and brings closer than ever this concept to the economic conception of monopoly, by introducing the concept of “substantial market power”.<sup>180</sup>

Market power, or substantial market power, is the missing thread that operates as the unifying concept for the application of Articles 81 and 82 EC and the introduction of a more economics-oriented approach in justifying antitrust intervention on the marketplace. A capacity of independent behaviour with regard to the competitors and consumers is not a sufficient

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<sup>177</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] OJ L24/1, Article 2(2).

<sup>178</sup> See, for a critical assessment of the test G. Monti, “The New Substantive Test in the EC Merger Regulation – Bridging the gap between Economics and the Law”, LSE Legal Studies Working Paper, July 30, 2008, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1153661](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153661); M.B. Coate, ‘Did the European Union’s market dominance policy have a gap? Evidence from enforcement in the United States’, (May 26, 2009). Available at SSRN: <http://ssrn.com/abstract=1410246>

<sup>179</sup> DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005), available at [ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf](http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf) (5 April 2009), para. 11.

<sup>180</sup> Ibid., para 23, “(t)he notion of independence, which is the special feature of dominance, is related to the level of competitive constraint facing the undertaking(s) in question. For dominance to exist the undertaking(s) concerned must not be subject to effective competitive constraints. In other words, it thus must have substantial market power”.

criterion for the finding of a dominant position. The discussion paper adopts, instead, an approach that is closer to the definition of market power by neoclassical price theory (the ability to raise prices profitably and reduce output). The recent Commission Guidance on its Enforcement Priorities in Article 82 (hereinafter Commission Guidance) adopts an equivalent formulation but also further emphasizes the link with neoclassical price theory:

“[t]he Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant”<sup>181</sup>.

The convergence of the economic and the legal definition of monopoly power or dominant position is not, however, complete. While the definition of the concept of market power adopted by the Commission Guidance as well as the recent non-horizontal merger guidelines presents similarities to the economic concept of market power, its scope is broader. In a similar formulation for Articles 81, 82 EC and EC merger control purposes, the Commission defines market power as “the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition”<sup>182</sup>. This broad definition accommodates the emphasis of EC competition law on the protection of the competitive process and consumer sovereignty. Although the ability to increase price stays the primary concern of competition law, in conformity with the neoclassical price theory approach, the emphasis on other parameters of competition than price, in particular consumer choice, epitomizes the broad definition of what constitutes a restriction of competition under EC competition law and the recognition of the importance of quality and variety investment competition instead of just price competition<sup>183</sup>.

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<sup>181</sup> Communication from the Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, C(2009) 864 final, para 11 (hereinafter Commission Guidance on Article 82).

<sup>182</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/6, para. 10; Guidelines on the application of Article 81(3) [2004] OJ C 101/97, para. 25; DG Competition Discussion paper on the application of Article 82, above, para 24; Commission Guidance, above, para 11.

<sup>183</sup> Competition based on quality (Q) or variety (V) increasing investment is equally important than price competition. Richard Markovits defines QV investment competition as “the process through which rival sellers compete away their potential supernormal profits by introducing additional QV investments until even the most profitable project in the relevant area of product space generates just a normal rate of return”: R. Markovits, *Truth or Economics. Is economic efficiency a sound basis upon which to make public policy or legal decisions?* (Yale Univ. Press, 2008), at 90. The importance of this type of competition has been recognized by the European Court of

In contrast, US courts have not generally included as an equal consideration other parameters than price in the definition of market power and in their assessment of anticompetitive effects: non price competition has been a concern in some US cases but still remains a secondary concern or simply never mentioned<sup>184</sup>.

There has been a considerable debate in the US case law also on the different sources of market power that are taken into account. For historical reasons, European competition law has given equal consideration to exclusionary and relational sources of market power rather than to the ability to control price by restricting its own output. This is not the case in the US, where Stiglerian market power (insisting on the ability of a monopolist to restrict its own output) has been a more important concern than Bainian power<sup>185</sup>, or relational market power<sup>186</sup>.

This example illustrates that, economic transplants are influenced by the legal environment to which they are integrated and by the specific objectives pursued by the legal system. The same economic concept, market power, may have a different content when it is transplanted in EC competition law than in US antitrust law. As Robert Bork has perceptively remarked, “antitrust is necessarily a hybrid policy science, a cross between law and economics

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Justice in Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para 21.

<sup>184</sup> See, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 495, 503 (1986) [“ market power is usually stated to be the ability of a single seller to raise price and restrict output ”]; *Jefferson Parish Hosp. Dist No 2 v. Hyde*, 466 U.S. 2, 27 n. 46 (1984) [“ as an economic matter, market power exists whenever prices can be raised above levels that would be charged in a competitive market ”]; *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 n. 38 (1984) [“ market power is the ability to raise prices above those that would be charged in a competitive market ”]; *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7<sup>th</sup> Cir. 1986), 1335 [“ market power comes from the ability to cut back the market’s total output and so raise price ”]; *Wilk v. American Med. Ass’n*, 895 F.2d 352, 359 (7<sup>th</sup> Cir. 1990) [“ market power is the ability to raise prices above the competitive level by restricting output ”]; *PSI repair Services, Inc v. Honeywell, Inc.*, 104 F.3d 811, 817 (6<sup>th</sup> Cir. 1997) [“ the ability of a single seller to raise price and restrict output ”]; *Ryko Mfg. Co. v. Eden Services.*, 823 F.2d 1215, 1232 (8<sup>th</sup> Cir. 1987) [“ market power generally is defined as the power of a firm to restrict output and thereby increase the selling price of its goods in the market ”]; *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1441 (9<sup>th</sup> Cir. 1995) [“ the ability to control output and prices (is) the essence of market power ”]; *U.S. v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) [“ a firm is a monopolist if it can profitably raise prices substantially above the competitive level. ”]. See, however, U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual property, (April 6, 1995) Section 2.2, available at <http://www.usdoj.gov/atr/public/guidelines/0558.htm> (last visited, July 18, 2009). [“ Market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time. Market power can be exercised in other economic dimensions, such as quality, service, and the development of new or improved goods and processes. A buyer could also exercise market power (e.g., by maintaining the price below the competitive level, thereby depressing output. ”].

<sup>185</sup> Where the source of market power is the ability of a firm to raise the costs and therefore reduce output of its competitors. On the distinction see, Th. G. Krattenmaker & S. C. Salop, ‘Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price’, (1986) 96 Yale L J 209-293; Th. G. Krattenmaker, R. H. Lande & S. C. Salop, ‘Monopoly Power and Market Power in Antitrust Law’ (1987) 76 Georgetown L Rev 241, 249-250.

<sup>186</sup> W. Grimes, ‘Market Definition in Franchise Antitrust Claims: Relational Market Power and the Franchisor’s Conflict of Interest’ (1999) 67 Antitrust L J 243-281.

that produces a mode of reasoning somewhat different from that of either discipline alone”<sup>187</sup>. This is due to the effort made by the policy makers and adjudicators to interpret economic transplants in conformity with the preferences of their legal system. The discourse is still presented as economic in nature, as this is shown by the choice of the expression “market power”, instead of the legal concept of “dominant position”, for example. But the economic transplant is domesticated<sup>188</sup>.

It follows that even if two sub-systems use the same terms, they may understand them in different ways. For example, one could identify two different normative values that shape economic and legal discourse with regard to the definition of market power. If the purpose of the economic analysis of market power is to highlight a change in the current equilibrium of supply and demand, the ultimate purpose of legal discourse is to assign to this economic “factual” nexus of market power the coding of either lawful or unlawful or put differently, of interest for competition law intervention versus of no interest for competition law intervention. It follows, that if the economists do not hesitate to declare that every firm benefits from a degree of market power, in the sense that they have the ability to increase the price profitably to at least a category of consumers, this cannot be relevant for legal discourse, as only a certain kind or degree of market power will be qualified as “unlawful” or “of interest”. This may also explain the different content given to the economic transplant of market power by each legal system, as internal considerations to the system, such as, is the regulator more risk averse to false positives or false negatives or, what is the acceptable level of substantive (error) costs?<sup>189</sup>, play an important role.

#### (ii) Consumer welfare

The integration of economic transplants in legal discourse may also pursue a transformative aim. This may succeed or not, depending on the ability of the translator to attract the support of the most powerful actors in the authoritative interpretation of legal rules, the courts. The integration of the concept of “consumer welfare” in EC competition law may provide some useful insights.

Consumer welfare denotes the idea that following the change from an equilibrium situation to another, the consumers of the specific product will benefit from a surplus and/or

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<sup>187</sup> R. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Simon & Schuster, 1993), at 8.

<sup>188</sup> As D. Dwyer, *The Judicial Assessment of Expert Evidence*, above n 57, at 126 perceptively remarks, the legal system “reconstructs its own (legal) image of the external system within itself”.

<sup>189</sup> A. Stein, *Foundations of Evidence Law* (OUP, 2005), at 1.

wealth transfer, in the sense that their ability to satisfy their preferences will increase. The choice of consumer welfare as an objective of competition law has distributive consequences. This concept is generally distinguished from the concept of total welfare that takes equally into account the benefits collected by other societal groups, such as the shareholders of the firm that adopts the specific commercial practice under investigation (consumer and producer surplus). Consumer welfare is an excellent illustration of the role of the translator and how social science constructs may “not only be transformed or distorted, but constituted anew, if they are incorporated into legal discourse”<sup>190</sup>. Robert Bork’s ‘translation’ of consumer welfare in antitrust law discourse is a classic example of an attempt to reconstruct the meaning of a term in the host language in order to advance a position in the closed operational network of legal communications<sup>191</sup>.

In competition law, the incorporation of consumer welfare as a valid objective of competition law implies that the outcome/consequences of a specific practice on consumers matters, before any decision on the lawfulness or unlawfulness of this practice has been reached. A reduction of competitive rivalry, following the exclusion of a competitor or an agreement between two competitors to cooperate with each other, will not be found unlawful, if they do not also lead to a likely consumer harm/detriment. A different approach would be a deontological emphasis on competitive rivalry, irrespective of any actual or potential consequences of a specific practice/conduct on consumers. Effects may indicate empirical observable findings on the worsening, in terms of price or quality, of the situation of specific groups of consumers, following the adoption of the anticompetitive practice (actual effects). It may also refer to situations where there are no observable findings of effects on these groups of consumers but there is “a consistent theory of consumer harm” which is empirically validated; That is, “the theory of harm should be consistent with factual observations” (ex ante validation) and “that the market outcomes should be consistent with the predictions of the theory” (ex post validation).<sup>192</sup> The theory of harm has the objective to establish a relation of causality between the specific practice and the consumer detriment. One could think in terms of a probability-statement, that is,

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<sup>190</sup> Gunther Teubner, above n 67, at 749.

<sup>191</sup> Bork famously conflated consumer welfare and total welfare or efficiency by including monopolists in the consideration of the effects of a specific commercial practice on consumer welfare, arguing that monopolists are also consumers. See, Robert Bork, above n 187, at 108-110.

<sup>192</sup> P. Papandropoulos, ‘Implementing an effects-based approach under Article 82’, (2008) *Concurrences* 1-5, at 3.

an evaluation of the “inferential soundness” of this relationship<sup>193</sup>, or in terms of relative plausibility of the specific consumer harm story<sup>194</sup>.

I will not discuss here the relative merits of the possible integration of the concept of consumer welfare in EC competition law, which could be the subject of a specific study. The philosophical foundations of the concept<sup>195</sup>, as well as the methodology of revealed preferences that has permitted its measurement<sup>196</sup>, are put into question by scholars that criticize “equilibrium economics<sup>197</sup>” and by recent economic thinking emphasizing “social preferences”<sup>198</sup>, endogenous preference formation<sup>199</sup>, more realist assessment of consumer behavior<sup>200</sup>, thus leading to an integration of social, behavioral and institutional constraints in conceptualizing consumer choice<sup>201</sup>. My objective will be descriptive: provide an account of the increasing importance of this concept in competition law discourse.

The concept has been introduced rather recently in competition law, again with the means of guidelines and other soft law texts. The term first appeared in EC competition law in the *Green paper* on vertical restraints, which marked the debut of the “modernization” of EC competition law<sup>202</sup>. It also figures in the agreement between the European Commission and the

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<sup>193</sup> J. Cohen, *The Probable and the Provable* (Clarendon Press, 1977), at 27

<sup>194</sup> R. J. Allen, ‘The Nature of Juridical proof’ (1991) 13 *Cardozo L Rev*, 373.; M. S. Pardo & R. J. Allen, ‘Juridical Proof and the Best Explanation’ (2008) 27 *Law and Philosophy*, 223.

<sup>195</sup> The two “fundamental theorems” of welfare economics: see M. Blaug, ‘The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated’, (2007) 39(2) *History of Political Economy* 185-207.

<sup>196</sup> Paul Samuelson, ‘A Note on the Pure Theory of Consumer Behavior’ (1938) 5 *Economica* 61-71; Paul Samuelson, ‘Consumption Theory in Terms of Revealed Preference’ (1948) 15 *Economica* 243; Paul Samuelson, ‘The Problem of Integrability in Utility Theory’ (1950) 17 *Economica* 355.

<sup>197</sup> E.g. N. Kaldor, ‘The Irrelevance of Equilibrium Economics’, (1972) 82(3) *The Economic Journal* 1237-1255; S.A.T. Rizvi, ‘The Microfoundations project in General Equilibrium Theory’, (1994) 18(4) *Cambridge Journal of Economics* 357-377; F. Ackerman, ‘Still dead after all these years: interpreting the failure of general equilibrium theory’ (2002) 9 *Journal of Economic Methodology* 119-139.

<sup>198</sup> E.g. E. Fehr & U. Fischbacher, ‘Why Do Social Preferences Matter – The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives’, (2002) 112 *Economic Journal* C1-33

<sup>199</sup> E.g. S. Bowles, ‘Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions’, (1998) 36(1) *Journal of Economic Literature* 75-111.

<sup>200</sup> E.g. R. Thaler, ‘Towards a Positive Theory of Consumer Choice’, (1980) 1 *Journal of Economic Behavior & Organization* 39-60; G.A. Akerlof & W.T. Dickens, ‘The Economic Consequences of Cognitive Dissonance’, (1982) 73(3) *American Economic Review* 307-319.

<sup>201</sup> For an analysis of the possible implications of these new constraints in competition law assessment, in particular under Article 82 EC, see I. Lianos, ‘Classification of Abuses: a Straight Story?’, CLGE Working Paper Series 1/09, University College London (UCL), forthcoming 2009.

<sup>202</sup> European Commission, *Green paper on vertical restraints in EC Competition Policy* 91997), available at [http://europa.eu/documents/comm/green\\_papers/pdf/com96\\_721\\_en.pdf](http://europa.eu/documents/comm/green_papers/pdf/com96_721_en.pdf) (last visited, July 18, 2009), para. 25; See also, *Communication from the Commission on the application of the Community competition rules to vertical restraints – Follow up to the Green paper on vertical restraints*, COM/98/544 final; *Communication pursuant to Article 5 of Council Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to categories of agreements and concerted practices* [1999] OJ C 270/7, para 3 (“EC competition policy in the field of vertical

US on the application of positive comity principles in the enforcement of competition law, adopted in 1998<sup>203</sup>. After the publication of the guidelines on vertical restraints the concept spread to other areas of EC competition law, such as the transfer of technology agreements<sup>204</sup>, some Article 81 EC cases<sup>205</sup>, some merger cases<sup>206</sup>, the horizontal merger guidelines in 2004<sup>207</sup>, the guidelines on the application of Article 81(3)<sup>208</sup>, the white paper on damages actions in 2008<sup>209</sup> and most recently the Commission Guidance on Article 82 EC<sup>210</sup>.

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restraints has the following objectives – the protection of competition is the primary objective as this enhances consumer welfare and creates an efficient allocation of resources”).

<sup>203</sup> Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws [1998] OJ L 173/28, point 3 (“(t)he purposes of this Agreement are to: (a) help ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the parties are not impeded by anti-competitive activities for which the competition laws of one or both Parties can provide a remedy”). The concept of “consumer welfare” becomes therefore a relevant concept for the interpretation of the scope of an international agreement between the European Communities and a third country. The US government followed with great interest and encouraged the progressive transformation of EC competition law towards an economic approach.

<sup>204</sup> Commission evaluation report on the transfer of technology block exemption regulation 240/96, COM(2001)786 final, paras 29 & 31; Commission Notice – Guidelines on the application of Article 81 of the EC treaty to technology transfer agreements [2004] OJ C 101/2, paras 5 & 7.

<sup>205</sup> Commission Decision, *Glaxo Wellcome* [2001] OJ L 302/1, para 153.

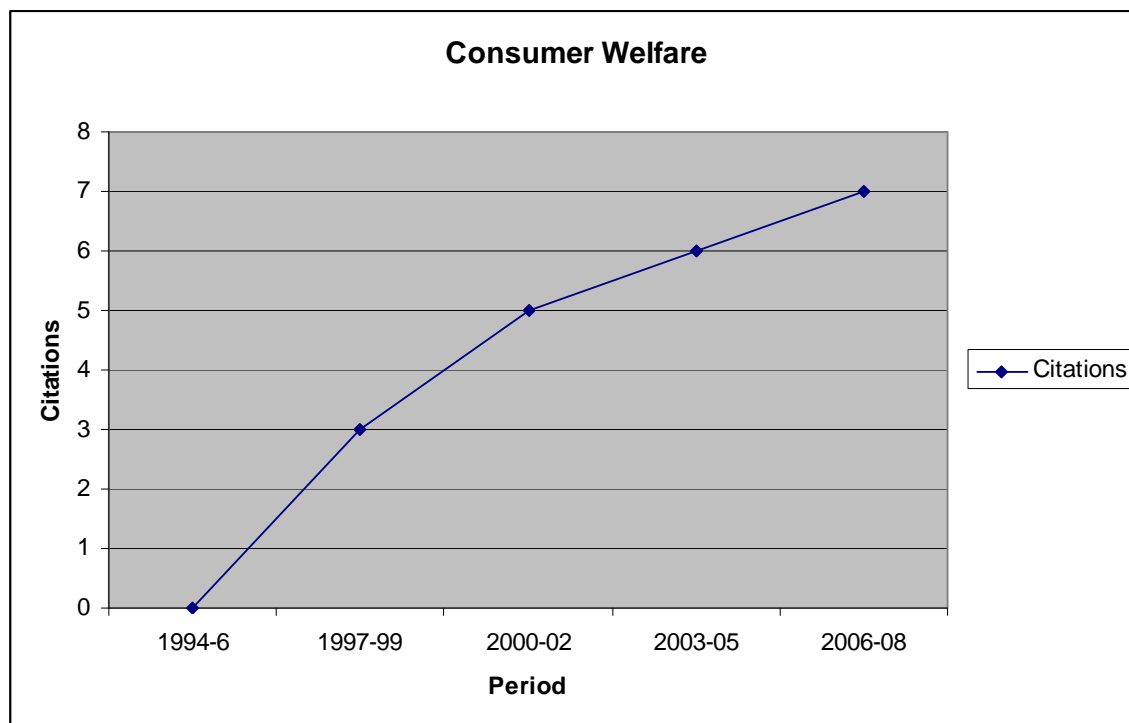
<sup>206</sup> eg, see *Newscorp/Telepiù* (Case COMP/M.2876) Commission Decision [2004] OJ L 110/73, para 269; , *Ryanair/Aer Lingus* (Case COMP/M.4439) Commission Decision [2008] OJ C 47/9, para 26.

<sup>207</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para. 61.

<sup>208</sup> Communication from the Commission – Notice – Guidelines on the application of article 81(3) of the Treaty [2004] C 101/97, paras. 13, 21, 33 & 104

<sup>209</sup> Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final, para 179.

<sup>210</sup> Commission Guidance on Article 82, above n 181, para 19, 29 & 85, although the Commission also employs the terminology of “consumer harm” without explaining if consumer welfare is a genus of consumer harm or if consumer harm and consumer welfare should be understood the same.



Its integration in EC competition law has been carefully designed and progressively, found its way in the case law of the European Courts. The term was first used in the context of the case law of the European Courts, by Advocate general Jacobs in his Opinion in SYFAIT in 2004 when he examined the economics of innovation in the pharmaceutical sector<sup>211</sup>. The ECJ did not address that issue in its decision as it declined to respond to the preliminary question sent by the Greek competition authority, the later not being formally a court under Article 234 of the EC Treaty. The concept then appeared in the *Microsoft* decision of the CFI in 2007 but only in a reference to the decision of the European Commission that was reviewed by the Court<sup>212</sup>. The concept took a more prominent role in the recent Opinion of AG Trstenjak in *Beef Industry Development* in September 2008<sup>213</sup>. The Advocate general adopted a theory according to which Article 81, paragraph 1 and Article 81, paragraph 3 take into account different aspects of “consumer welfare”:

“...the general conception of Article 81 EC is to ensure the optimal supply of consumers.

<sup>211</sup> Case C-53/03, Opinion of AG Jacobs, *Syfait & Others v. GlaxoSmithKline plc & GlaxoSmithKline A EVE* [2005] ECR I-4609, para 91 & 92.

<sup>212</sup> Case T-201/04, *Microsoft Corp. v. Commission* [2007] ECR II-3601, para 41.

<sup>213</sup> Case C-209/07, Opinion of AG Trstenjak, *Competition Authority v. Beef Industry Development Society Ltd* [September 4, 2008] nyr.



However, different aspects of consumer welfare are taken into account under Article 81(1) EC and under Article 81(3) EC. Under Article 81(1) EC, agreements which restrict competition between market participants and thus its function of supplying consumers optimally with a product at a lowest possible price or with innovative products are prohibited in principle. Such agreements directly affect consumer welfare and as such are prohibited in principle<sup>214</sup>.

However, the Court did not accept this position and did not refer to the concept of “consumer welfare”<sup>215</sup>.

The reaction of other members of the Court has not taken long to manifest. In her recent Opinion in *T-Mobile*, Advocate General Kokott defended a different perspective:

“Article 81 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared”<sup>216</sup>.

The Advocate general considers that the concept of anticompetitive object covers two forms of practices: first, practices that have a direct impact on consumers and the prices paid by them, referred to by the parties as practices affecting “consumer welfare”, and secondly, practices that have an indirect negative impact on consumers by restricting or distorting competition<sup>217</sup>. Advocate general Kokott takes care to not employ the term, preferring instead a descriptive account of the form of the impact on consumers. At the doctrinal stage, she is careful to move away from economic terminology and economic transplants. First, she refers to the public interest of undistorted competition, indicating that maintenance of rivalry remains an important concern. Secondly, she suggests a limiting (outcome-based) principle to the scope of Article 81(1) and the process-based definition of competition she advocates, which is, however, extremely ambiguous: “the objective of European competition law must be *to protect competition and not competitors*, because indirectly that is of benefit also to consumers and the

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<sup>214</sup> Ibid., para 56.

<sup>215</sup> Case C-209/07, *Beef Industry Development & Barry Brothers* [ 2008] nyr.

<sup>216</sup> Case C-8/08, *T-Mobile Netherlands BV and Others*, Opinion of AG Kokott [February 19, 2009], para. 58.

<sup>217</sup> Ibid, para 59.

public at large<sup>218</sup>. The reference to the “public at large” seems to expand the beneficiaries of the principle of competition enshrined in Article 81(1) beyond the category of final, or even, intermediary consumers, thus implicitly questioning the utility of the concept of “consumer welfare”. The Court of Justice accepted the formulation of AG Kokott, although it carefully omitted any reference to “the public at large”, thus opening the possibility that this judgment could be interpreted as adopting a long term vision of “consumer welfare” or being inspired by the principle of “consumer sovereignty”<sup>219</sup>.

What these examples show is that the integration of the economic transplant of “consumer welfare” along traditional objectives of EC competition law, such as market integration or the protection of the structure of competition, unveil the effort made by the policy makers to render the interpretation of the competition law provisions of the Treaty more compatible with recent economic discourse. For some, the new economic discourse should set aside old principles. For others, the newly imported economic discourse should complement the existing values and principles. The instrument of economic transplant is flexible enough to accommodate both possibilities.

*(b) Economic transplants as a means to preserve the variety of economic discourse*

The concept of “barrier to entry” is of particular importance in EC competition law for the definition of a relevant market (barriers to existing competition) as well as for defining the existence of a restriction of competition in Article 81 or of a dominant position in Article 82 EC (barriers to potential competition). There has been a considerable literature on the economic concept of barriers to entry. In the neoclassical tradition of competition as an end-state, a barrier to entry is a market factor that prevents entry from occurring in the long run. The economists are generally interested in determining whether there is an equilibrium in which entry will or will not occur. Deterrence of entry, not simple delay of entry is of concern. By contrast, lawyers think of barriers to entry as factors that permit either substantial periods of monopolistic pricing (competition as an end-state) or factors that permit exclusion of competitors (competition as a process of rivalry), thus including factors slowing entry. Therefore, the competition lawyer’s interest is not restricted to those situations where the social loss caused by the monopolistic pricing is infinite, but where it is too large by some measure which is entirely a function of

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<sup>218</sup> Ibid., para 71. Emphasis added.

<sup>219</sup> Case C-8/08, *T-Mobile Netherlands BV and Others* [June 4, 2009], para. 38.

public policy (e.g. the regulator's preference on the degree of openness of the markets). The incorporation of the concept of barrier to entry into different legal systems will not produce identical effects. The concept may have a different meaning in US antitrust law from what it has in EC competition law and it may be different in competition law than in trade law<sup>220</sup>.

Even within the paradigm of neoclassical economics, there are many traditions of the concept of barrier to entry. The study will focus on only the two main ones to make the point, although one could list more: for example, according to new industrial economics, barriers to entry may be defined as absolute/natural or strategic and then divided between those that relate to endogenous sunk costs and those to exogenous sunk costs<sup>221</sup>

The Bainian (according to economist J. Bain) approach to barriers to entry regards qualifying barriers to entry as market factors that deterred entry even if the firms already in the market were charging prices above the competitive level<sup>222</sup>. For example, a Bainian definition would define economies of scale as an entry barrier. Scale economies entail that a firm contemplating entry must always consider, not merely the cost of producing, but also the cost of acquiring enough sales to make its own entry into the market profitable. If economies of scale are substantial, a dominant firm may be able to set a price above its costs and earn profits without causing new entry, for the residual market will not be large enough for a new firm to bring its costs down to the same level.

This position is not shared by the Stiglerian approach (according to economist G. Stigler) to the definition of barriers to entry. For Stigler and the libertarian Chicago school, the notion that economies of scale can be entry barriers seems irrational, because scale economies are themselves a form of efficiency<sup>223</sup>. The consideration of scale economies as barriers to entry will make efficiency an antitrust offense. Largely for these reasons, Stigler defines barriers to entry as “a cost of producing (at some or every rate of output) which must be borne by a firm which seeks

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<sup>220</sup> The public policy objective pursued in this case is to prevent protectionist measures, not to protect consumer sovereignty or welfare.

<sup>221</sup> See, for instance, S. C. Salop, ‘Strategic Entry Deterrence’ (1979) 69 *American Economic Rev.* 335-338; On the various definitions of barriers to entry, see R.P. McAfee, H.M. Mialon & M. Williams, ‘What is a Barrier to Entry?’ (2004) 94 *American Economic Rev.* 461-465.

<sup>222</sup> J. Bain, *Barriers to New Competition* (Harvard University Press, 1956), at 3.

<sup>223</sup> G. Stigler, *The Organization of Industry* (1968), at 113-122; See also, H. Demsetz, ‘Economics as a Guide to Antitrust Regulation’, (1976) 19 *Journal of Law & Economics* 371-384, at 382, “alleged barriers to entry as advertising, vertical integration, and capital requirements all fall into the class of competitive tactics more likely to be associated with productive rivalry than unproductive monopolisation [...]”; H. Demsetz, *Barriers to Entry*, (1982) 72 *American Econ. Rev.* 47-57.

to enter an industry but is not borne by firms already in the industry”<sup>224</sup>. Concerning scale economies, it is clear that the costs for these are borne by firms already in the industry, therefore they should not be considered as barriers to entry. A Stiglerian perspective suggests more permissive antitrust standards than Bain’s definition<sup>225</sup>, as potential competition is socially desirable only if the new entrant has at least identical cost functions to the incumbent. Critical to Stigler’s argument is the assumption of credit easiness. He questioned Bain’s appeal to imperfections in the capital market that would have eliminated the possibility of new as efficient as potential entrants to finance their investments up to the point where they would benefit from equivalent scale economies to these of a dominant firm. Stigler thought that large investment requirements could not impede the plans of a new firm to enter the market, given the wide range funding options in financial and credit markets. Is this assumption still valid in an era of the credit crunch?

It is thus clear that the choice of one or another definition of barrier to entry by a legal system is function of the values/preferences of this specific system regarding “efficiency” or openness and market access as well as basic assumptions on the ability of firms to get the necessary credit to fund their entry into the market.

The case law of the courts in the US has been ambiguous regarding the definition of barriers to entry<sup>226</sup>. Some US circuit courts of appeal have followed a Stiglerian approach<sup>227</sup>, while others, have followed a definition close to Bain<sup>228</sup>. Some are inspired by both definitions<sup>229</sup>. In Europe, the courts have employed the expression in various settings. There does not exist an authoritative definition of the concept in EC competition law, although in *United Brands* the Court followed a Bainian definition by including economies of scale as an example

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<sup>224</sup> G.J. Stigler, *The Organization of Industry* (Homewood, Ill., R. D. Irwin, 1968), at 67.

<sup>225</sup> R. Schmalensee, ‘Sunk Costs and Antitrust Barriers to Entry’ (2004) 94(2) *American Economic Review* 471-475, at 472.

<sup>226</sup> G.J. Werden, ‘Network Effects and Conditions of Entry: Lessons from the Microsoft Case’ (2001) 69 *Antitrust L J* 87-111, at 103-109.

<sup>227</sup> E.g. *Advo Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1200-1202 (3d Cir. 1995).

<sup>228</sup> E.g. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 509 (1969); *Jefferson Parish Hospital District N° 2 v. Hyde*, 466 U.S. 2, 13 n° 19, 14 (1984); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 485 (1992); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8<sup>th</sup> Cir. 2000)

<sup>229</sup> *Rebel Oil. Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9<sup>th</sup> Cir 1995), “entry barriers are additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns”; *Accord W. Parcel Express v. UPS*, 190 F.3d 974, 975 (9<sup>th</sup> Cir. 1999).

of barriers to entry.<sup>230</sup> The variety of the possible approaches to the definition of barriers to entry led the European Commission to adopt in its vertical restraints guidelines a position which seems closer to that defended by J. Bain:

“Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level, usually above minimum average total cost, and make supra-normal profits without attracting entry”<sup>231</sup>.

At the same time, however, the Commission accommodated new industrial economic literature by introducing an additional requirement for the qualification of entry barrier:

“The question whether certain of these factors should be described as entry barriers depends on whether they are related to sunk costs. Sunk costs are those costs that have to be incurred to enter or be active on a market but that are lost when the market is exited. Advertising costs to build consumer loyalty are normally sunk costs, unless an exiting firm could either sell its brand name or use it somewhere else without a loss”<sup>232</sup>.

The most recent Commission’s Guidance on its Enforcement priorities in Article 82 explicitly cites economies of scale and scope as examples of barrier to entry. Interestingly, the Commission’s Guidance does not employ the factor of sunk costs as an indicator of barriers to entry, thus retreating from the view it had adopted in the vertical restraints guidelines<sup>233</sup>. This may be justified by recent economic thinking that had cast doubt on the factor of sunk costs<sup>234</sup> and a more empirical turn in competition law discourse. The most recent OECD “Best Practices” report on barriers to entry completely sidelines the issue of the definition of barriers to entry and concludes that “what matters in actual cases is not whether an impediment satisfies this or that definition of an entry barrier, but rather the more practical questions of whether, when, and to what extent entry is likely to occur given the facts in each case”<sup>235</sup>.

In conclusion, the economic transplant of barrier to entry aims to maintain diversity in economic discourse.

This does not however mean that economic transplants should lead to a static view of the

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<sup>230</sup> Case 27/76, *United Brands v. Commission* [1978] ECR 207, para 122.

<sup>231</sup> Guidelines on vertical restraints, above n 127, para. 126.

<sup>232</sup> *Ibid.*, para. 128.

<sup>233</sup> Commission Guidance on Article 82, above n 181, para. 17.

<sup>234</sup> L.M. B. Cabral & T. W. Ross, ‘Are Sunk Costs a Barrier to Entry?’ (2008) 17 *Journal of Economics and Management Strategy*, 97–112.

<sup>235</sup> OECD, Competition Committee, DAF/COMP(2005)42, available at <http://www.oecd.org/dataoecd/43/49/36344429.pdf> at 17.

translated scientific discourse. The dual nature, legal and economic, of economic transplants guarantees that this will not be the case. The last part will conclude by developing some ideas on an interpretative theory that will preserve the specificities of economic transplants and will correspond to the requirements of the paradigm of translation.

#### **IV. “Beyond Babel”: legal and economic discourses in the age of “economic transplants”**

As Paul Ricoeur reminds us, the paradigm of translation is based on the principle of “linguistic hospitality”: “(w)e are called to make our language put on the stranger’s clothes at the same time as we invite the stranger to step into the fabric of our own speech”<sup>236</sup>. Yet translation should remain a mediation between two distinct communities that stay loyal to their own discourse while being open to the “betrayal” of translation. The risk for this delicate equilibrium is the slippery towards “hegemonic” or “deferent” translations. Establishing a diachronic dialectical interaction between the two discourses will preserve that from happening.

##### ***A. The risk of “hegemonic” and “deferential” translations***<sup>237</sup>

Hegemonic translations occur when the host legal system crystallizes existing economic discourse and adopts it, regardless of the evolutionary potential of this discourse or the variety of this discourse in the foreign (economic) sub-system. In other words, the legal system builds its own image of economic discourse, appropriates it and cuts any link that may tie the transplant with the evolution of the original concept in the source language/discourse.

One could consider that “economic law” in the European continental tradition is an illustration of hegemonic translations<sup>238</sup>. Economic law is the law of the market organization: a branch of law more than a medium of communication between legal and economic discourse, as the law and economics movement conceived itself. If one looks to the concept more closely, however, it will be clear that the concept of economic law involves some form of communication between law and economics. The main difference with economic analysis of law is that this communication takes place only at the moment of the translation of the economic concept into

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<sup>236</sup> P. Ricoeur, *On Translation*, above n 20, at 23.

<sup>237</sup> Both terms are inspired by the discussion that followed the presentation of A. Bayeux and F Ost at the Séminaire interdisciplinaire d’études juridiques, *Traduction et Droits Européens-Enjeux d’une rencontre* (February 19-20, 2009), Facultés Universitaires de Saint Louis – Bruxelles. See also, A. Bayeux, ‘Traduction et droits européens – premiers jalons’, (in file with the author).

<sup>238</sup> See, I. Lianos, *La Transformation du droit de la concurrence par le recours à l’analyse économique*, above n 12, at 69-81.

legal norm. The translation is domesticating the economic concept, which loses its distinctive character or its original nature and is crystallized into a term of the legal sub-system and subject to the auto-referential interpretative process of the latter. This constitutive moment ends the effort of communication: once the economic discourse becomes legal discourse/norm, its origins are forgotten and it is interpreted as if it were any other form of legal discourse, without any particular attention to the concurrent evolution of the original concept in economic discourse. Most often, the translation effort involves the re-naming of the concept, so as to make even clearer the dissociation between the concept and its origins (a situation of domesticated translation).

The concept of “free competition” in ordo-liberal thought is an illustration of this approach<sup>239</sup>. If one reads Walter Eucken’s formulation of the principle in *Foundations of Economics* it is very clear that the concept is intrinsically linked to an atomistic conception of competition, based on the perfect competition model<sup>240</sup>. Renaming the concept to “free competition” ensures that the economic origins of the concept and its possible conceptual defects will not haunt the legal interpretative effort, sapping the epistemic legitimacy and therefore the authority of legal discourse. One could indeed perceive economic law as being essentially historically trapped to the economic imaginary of its period of creation: a Pigouvian pre-1940 version of welfare economics before new challenges such as the “new welfare economics” of Hicks and Kaldor, which gained prominence in the 1940s, or the Coasian new institutional economics in the 1960s challenged the Pigouvian church<sup>241</sup>. A parallel criticism of hegemonic translation can be made to the law and economics movement pioneered, among others, by Judge Richard Posner, essentially an importation in legal discourse of a different economic paradigm, new welfare economics with some Coasean framework, without paying any attention to the criticisms and oppositions to that model in economic discourse.

Deferential translations exist when the economic discourse is translated without any regard to the specific objectives of the legal system. For example a normative emphasis on economic efficiency only will render an unsatisfactory outcome, from a legitimacy point of view. The

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<sup>239</sup> W. Möschel, ‘The proper scope of government viewed from an ordoliberal perspective: the example of competition policy’ (2001) 157 *Journal of Institutional and Theoretical Economics* 3-13.

<sup>240</sup> W. Eucken, *Foundations of Economics* (trans. By T.W. Hutchison, University of Chicago Press, 1951), at 269-270.

<sup>241</sup> For an interesting discussion see, M. Blaug, ‘The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated’ (2007) 39 *History of Political Economy* 185-207.

emphasis of economic analysis to economic efficiency may be understood from a methodological point of view. For example, the quest for respectability and conceptual coherence was particularly influential in the decision by welfare economists to ignore any ethical, social, distributive or psychological dimensions in the progressive construction of their ideal model of *homo economicus*. Economists were aware that their approach was by definition incomplete and essentially a purely methodological decision, motivated by the logical positivism shift that attempted to re-conceive economics as a more respectable hard (natural) science<sup>242</sup>: “(s)tyle is often an appeal to authority”<sup>243</sup>.

In contrast, legal discourse is by definition holist: it should incorporate all the dimensions of human existence if it is to be persuasive to the much broader group of constituents that it is addressed to. The translator should therefore be aware of the existence of areas of intranslability, precisely because of the different methodologies and, more specifically, audiences to which the rhetoric of law and the rhetoric of economics aim to. The translator should also be attentive to the conditions that make scientific discourse blossom: that is, its openness, dialogue and continuous critical self-assessment, which will be examined in the last section.

### ***B. The need for a diachronic dialectic interaction between legal and economic discourses***

The dual nature of economic transplants and their potential impact on both legal and economic discourses inevitably influences the choice of the method of interpretation that should be used in order to make them operational at the adjudicative stage, in different fact patterns and contexts. This method will be based on the default interpretation rule that the act of translation from economic to legal discourse maintains the economic nature of the concept and provides guidance to the interpreter to remain cognitively open to developments affecting the meaning and operation of this concept in economic discourse. In other words, the paradigm of translation, epitomized by the emergence of economic transplants, requires the establishment of a diachronic dialectic interaction between the legal and the economic discourses. A number of practical implications follow.

First, specialized tribunals or generalist tribunals with “opinion specialization”<sup>244</sup> and a strong interdisciplinary capacity (clerks, research and documentation units) should be preferred

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<sup>242</sup> For an interesting analysis of this link, see J.R. Hackney, *Under cover of science: American legal-economic theory and the quest for objectivity* (Duke University Press, 2007), ch. 3.

<sup>243</sup> D. Mc Closkey, *The Rhetoric of Economics*, (University of Wisconsin Press, 1985) at 11.

<sup>244</sup> See, E. K. Cheng, ‘The Myth of the Generalist Judge’, (2008) 61 *Stanford L Rev* 519-572.



in areas with economic transplants, in order to ensure that economic analysis will still permeate the application of economic transplants following their translation to legal discourse. In other words, specialized adjudication will avoid the “regression” to economic law and the epistemic asymmetry problem (between judges and “experts”) that could increase the risk of deferent translation. This does not mean that economists, or other social scientists without legal training and experience, should be members of the judiciary. This could increase the risk of deferent translation (the judge may have an intellectual bias towards the dominant school of his discipline), unless they form part of a judicial panel along with legally trained or experienced judges.

Secondly, particular attention should be brought to the conformity of interpretation with the preferences of the legal sub-system, in particular the consideration, in the effort of translation, of minority views in economic discourse, which may have been included by the policy maker in the design of the economic transplant.

Thirdly, authoritative and close-system definitions of economic transplants in hard legal texts should be avoided in order to limit the risk of crystallization of economic discourse and the consequent risk of regression towards “economic law”. This does not mean that hard texts, such as case law, cannot include references to economic transplants, but a particular effort should be made to establish a link with the guidelines that had first introduced these economic transplants, so as to emphasize the contingent and open to evolution character of their importation in legal discourse. This is of particular interest and importance, as economic orthodoxy can be questioned and economic discourse is currently undergoing an important shift<sup>245</sup>.

## V. Conclusion

Umberto Eco’s novel *The Name of the Rose* (1983) provides an interesting metaphor for the description of economic transplants. The main topic of the book is that the context of interpretation matters as much as empirical and deductive reasoning: William of Baskerville makes a wide use of modern hermeneutics in attempting to solve the different murders occurring at the Benedictin monastery. But of particular interest, for our purposes, is the character of Salvatore. When Adso, who is the narrator in the book, first meets him he compares him to his image of a monster. He describes his face as a face put together with pieces from other people’s

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<sup>245</sup> See, G. A. Akerlof, ‘The Missing Motivation in Macroeconomics’, (2007) 97(1) American Economic Review 5-36.

faces. What Salvatore speaks is not Latin or any language at all, “Salvatore spoke all languages, and no language”. He takes words sometimes from one language and sometimes from another. Salvatore was actually not inventing his own sentences but using words he had heard in the past in different situations. The babel-esque mutterings of Salvatore could appear as an adequate metaphor for the monstrous appearance of economic transplants to the devotees of the pure economic and legal discourse. Teubner was indeed right when he described how this “social science enlightenment” of law may lead to the production of “an hybrid artifact. with ambiguous epistemic status and unknown social consequences”<sup>246</sup>. Economic transplants are of this sort.

Yet, the emergence of economic transplants, as challenging as it may appear for the “familiar landmarks of our thought”, offers the chance of a deeper interaction between economics and the law. Economic transplants are concepts developed in economics that are translated in law at the doctrinal stage. Their role can be better understood if one thinks of them as illustrations of the shift of competition law towards the paradigm of translation. In contrast to the closed-system hermeneutics of the pure legal or economic discourse, the paradigm of translation aims to put these two communities in a diachronic and dialectic interaction with each other. In contrast to the concept of economic law and to the law and economics movement, economic transplants are a hybrid style of talk, at the intersection of these two disciplines, evolving separately but also in congruence with each of them. Their interpretation should integrate the fact that they are the product of an act of translation: One could not expect that they are similar to the concept in their source language. Their subsequent interpretation and application should not also be cut off from the discourse of their community of origin. Lawyers and economists are therefore bound to work together in order to make sense of economic transplants. This is, after all, the main implication of the shift towards the paradigm of translation.

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<sup>246</sup> G. Teubner, above n 67, at 752.