9. Global competition law convergence: Potential roles for economics

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Discussions of the future of competition law on the transnational level often reflect assumptions about the role of economics. Perhaps the most pivotal of these assumptions is that economics can provide a basis for global competition law convergence. It is pivotal, because choices and strategies relating to competition law often depend on it. Moreover, many see convergence among competition law systems as the only viable response to the problems and weaknesses of the current legal framework for transnational competition, and this view reduces incentives to evaluate or pursue other strategies such as coordination among states.[1] Yet the prospects for convergence rest on assumptions about the role of economics in the convergence process, and these assumptions therefore deserve careful attention.

This chapter explores these assumptions. It clarifies some of the concepts involved and identifies some of the roles that economics can play in the context of competition law convergence. In particular, it explores the issue of how and to what extent economics can provide a basis for competition law convergence. Curiously, this 'how' issue is seldom explored carefully. Discussions of competition law convergence often proceed as if the science of economics will be central to global convergence, but they seldom explain *how* it can be expected to play this role.

Our analysis here reveals that undifferentiated assumptions about the role of economics in the convergence process are likely not only to create uncertainty and impose costs, but also to cloud discussions of the issues and distort decisions regarding them. If, however, we distinguish among the various *functions that economics performs* in competition law regimes and analyze the potential for convergence around each, a different picture emerges. It becomes clear that economics *can support certain forms of convergence* and that it has much potential value in this context.

The focus here is narrow. The chapter looks specifically at the issue of

[1] For further discussion of strategies for global competition law development, see David J. Gerber, *Global Competition: Law, Markets and Globalization* 271–325 (Oxford U. Press, 2010; pbk. 2012).

whether economics can provide a basis for global competition law convergence, and, if it can, how and to what extent. It does not delve into related issues such as what kind of economics might be used as a basis for competition law convergence[2] and it does not purport to engage in a full analysis of the factors that might influence the effectiveness of particular uses of economics in competition law convergence. My central objective is to identify the problem, which is seldom discussed, to suggest a form of analyzing it, and to indicate its potential value.

I. CONVERGENCE AS CONCEPT AND POLICY

Confusion about convergence as concept and policy impedes effective analysis of the role of economics in competition law convergence. It is necessary, therefore, to clarify the way it is used here and place it in its policy context.[3]

A. Convergence as Concept

The term 'convergence' necessarily refers to a *process of movement* towards a center. That is its core or lexical meaning. In a convergence process the distances between individual points and a central point are reduced. They move or 'converge' toward this *convergence point*.[4] Unfortunately, however, the term is often used vaguely to refer to increasing similarities without specifying what is increasing in similarity to what.[5] Moreover, the process itself is seldom identified – what is changing and how and why. Without specifying these elements, references to convergence carry little or no meaning and have limited value.

These problems are evident in many discussions of global competition law convergence, and this makes it important to examine more carefully

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[2] I discuss these issues briefly in a forthcoming article. See David J. Gerber, 'Adapting the role of economics for competition law: A developing country dilemma', in Michal Gal et al, eds, *The Economic Characterisitcs of Developing Countries* (Edward Elgar, Cheltenham, UK and Northampton, MA, 2015) 248–264 [herinafter, Gerber, Developing country dilemma].

[3] For extended and insightful analysis of the literature on convergence, see Thomas K. Zheng, 'Convergence and its discontents: A reconsideration of the merits of convergence of global competition law,' 12 *Chi. J. Intl. L.* 433 (2012).

[4] For further discussion of convergence issues, see Gerber, *Global Competition*, supra note 1, 272–92.

[5] Increasing similarity may, e.g., refer to a process in which A is becoming more similar to B and C is becoming more similar to D. This is clearly not 'convergence' toward a particular point.

the convergence process. In this content, it is particularly critical to specify the convergence point of the process, because unless this point is specified, discussions of convergence as policy tend to be characterized by confusion and uncertainty, and they are unlikely to provide the basis for sound policy decisions.

In the context of competition law, 'convergence' refers to a process in which the characteristics of individual competition law systems increasingly resemble some set of characteristics which represents the convergence point. We refer to this set of characteristics functions as a 'model.' It represents an identifiable and relatively stable 'package' of characteristics, and convergence can be said to occur when decision makers alter their competition law systems to resemble this model more closely.

Note that the process itself consists of *decisions* – specifically, decisions by competition law decision makers to move their competition law systems toward a convergence point. Our analysis thus focuses on decisions and the factors that influence them. We are here concerned only with decisions that are made *independently and voluntarily* – i.e., those that are neither the subject of an obligation (created by agreement or otherwise) nor subject to coercive pressures from external sources. This limitation is important, because the thrust of convergence as policy is that the model itself attracts emulation. A process that involves coercion or obligation necessarily has very different characteristics and consequences.

B. Content and Dimensions: What's Converging and How?

In order to analyze a convergence process, it is necessary to specify the 'what' of the process – What is converging? In the competition law context, however, this is often left surprisingly vague. For example, a typical reference might claim or imply that competition law 'systems' are converging. This type of reference has little analytical value, because it might have many referents. It might, for example, refer to entire systems converging. As we shall see, however, this type of reference is so general as to be virtually meaningless for most purposes. It could also refer to statutory language and claim that there is convergence because there are increasing similarities in the language of statutes. Yet similarity in statutory language often has limited functional importance in the content of competition law, where the gap between statutory language and actual practice is often a chasm. We need to know what the referent is in order to assess any claims about convergence.

Each convergence process also has a specific shape – a set of dimensions such as breadth, depth, and speed. These may vary greatly, and it is necessary to specify them as much as possible in order to make references to the process useful. One dimension is 'breadth' – i.e., the number of participants

in the process. Convergence between two systems (e.g., US and EU) is obviously very different to convergence involving hundred of systems. Another dimension is 'depth,' which refers to the significance and extent of convergence-related decisions within the legal system. For example, a convergence decision may refer to an issue that is of little general importance in the legal system and about which only a few officials are aware. It may also, however, refer to a decision that is a major political, legal or even constitutional concern and one that therefore would be associated with many other decisional elements in the system. 'Duration' is a third dimension. A convergence process that lasts hundreds of years obviously has characteristics and issues very different from one that is understood to be a basis for current economic policy and expected to yield results in a far shorter time.

C. Convergence Dynamics

Convergence is a *process* – not a static phenomenon. It consists of decisions and shaped by the factors that influence those decisions I refer to the interplay of these factors as the 'dynamics' of convergence. For purposes of this chapter, I focus on two main components of convergence dynamics. Both relate to patterns of alignment that can generate convergence.

Cognitive alignment

One set of factors involves cognitive alignment. What the relevant decision makers KNOW is a critical component of any convergence process. All else being equal, the greater the similarities in the knowledge base of the decision makers the greater the likelihood that their decisions will converge toward a particular point. If, for example, decision makers in various systems have the same basic knowledge of a particular model of competition law, this knowledge can provide the basis for convergence toward that model. If decision makers were unaware of the model, it would be less likely that they would move toward it. In effect, the model represents a kind of target that can relate decisions of diverse decision makers. Decision makers may or may not choose to move toward the target, but knowledge of the model shapes both positive and negative responses.

'Knowledge' here is *subjective*. Decisions are not based on some objectively verifiable reality, but on what the decision makers *believe they know*, and thus decision makers may have very different images or beliefs about a model and its characteristics. What one decision maker *believes she knows* about a convergence point may differ from what other decision makers believe they know. Subjective knowledge of a model may vary widely among those who believe they know what the model represents.

As a result, different decision makers may believe they are moving toward the same convergence point, but if they have different images of that convergence point, they may not be moving toward the same point. For example, if various decision makers have different images ('subjective knowledge') of a potential convergence point such as the 'economics-based model,' each may move toward a version of that model, believing that the moves are shared by others and thus that they are all converging. In fact, however, they will not be moving toward the same point! Moreover, they may in some cases actually be diverging from each other.

Incentive alignment

Cognitive alignment does not in and of itself, of course, generate convergence. There must also be incentives for the decision makers to move toward a convergence point. Incentives are, therefore, a second important form of alignment that shapes convergence. To the extent that decision makers perceive the same or similar incentives to move toward a convergence point, the probability of convergence tends to increase. Incentives that may generate alignment include factors such as the perceived quality of the model, its status among important reference groups, it prevalence among other relevant groups and so on. The factors that lead individual decision makers to move toward a convergence point may differ, of course, but where the same incentives influence many decision makers, this tends to support.

Convergence drivers

Specific institutions or even specific people may 'drive' convergence. These 'convergence drivers' can influence cognitive alignment, incentive alignment or both. For example, an international organization such as the International Competition Network (ICN) may support cognitive alignment by focusing attention on particular models, approaches or 'best practices,' thereby disseminating them among members and increasing their prominence.[6] The ICN may also influence incentives by fostering support for a particular model or position and providing status enhancement or other rewards for decision makers who move toward that model. Individual states or competition authorities may also drive convergence by providing such rewards. For example, both the US and the EU have actively promoted convergence toward their own models of competition law.

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[6] See Paul Lugard, ed., *The International Competition Network at Ten* (Cambridge, 2011).

II. CONVERGENCE, COMPETITION LAW AND ECONOMICS

We can use these concepts in assessing the potential role of economics in competition law convergence. First, however, we need to place the issues in their policy context, not least because that context shapes the potential role of economics in the convergence process in important ways.[7]

A. Contexts of Convergence

Convergence as a transnational strategy is usually seen as a response to the inadequacies and limitations of the current legal framework of transnational markets. That framework is based on public international law principles of jurisdiction that entitle a state to apply its laws to private conduct outside its own territory – i.e. extraterritorially – under certain circumstances. These principles basically entitle a state to apply its laws to *conduct outside its own territory* under either of two conditions.[8] First, it may apply its laws to its own nationals regardless of where they engage in conduct (nationality principle). Second, it may apply its laws to conduct outside its territory if the conduct has significant effects within its territory (effects principle). For our purposes, the effects principle is central, because it creates virtually unlimited potential for conflicts among competition laws. One consequence of its widespread use is that conduct on a transnational market may be subject to the laws of any state where the requisite effects of the conduct occurs, and thus many states may apply their competition laws to the same conduct.

In this system, *national laws govern transnational markets*. As a result, there are often significant differences among the rules and principles that differing jurisdictions within the same economic market apply to conduct on that market. These differences impose significant costs on transnational economic activity generally. They distort market incentives and thus reduce the efficiency of markets. They also create uncertainty for business decision makers, imposing potentially onerous planning and compliance costs on firms that must take these uncertainties into account in planning

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[7] For fuller examination of these contexts, see Gerber, *Global Competition*, supra note 1, 79–117.

[8] For discussion of the evolution of these principles, see, e.g., David J. Gerber, 'Beyond balancing: International law restraints on the reach of national laws', 10 *Yale J. Intl L.* 192 (1985).

their transnational operations. Finally, they create the potential for conflicts among states.[9]

Prior to the 1990s these problems and costs were limited by a variety of factors. Among the most important were the facts that few states enforced competition law intensively and that many states did not even have competition laws. In the 1990s, however, the collapse of the Soviet Union combined with rapidly increasing economic globalization to set in motion an extraordinary increase in support for competition law in many parts of the world. Many more states soon had competition laws, and there was a dramatic increase in enforcement activity for both new and older competition law systems. Moreover, economic globalization increased the geographical expanse of markets and thus significantly increased the likelihood that these systems would collide – i.e., that differing rules would become relevant for business firms and their governments. These factors increased the costs and risks of the traditional jurisdictional system, and they also increased awareness of those costs and risks.

One response to these threats was to seek to coordinate competition law regimes – i.e., to create relationships among them that entail shared objectives and obligations intended to serve those objectives. EU leaders initially pursued this path, seeking in the mid-1990s to include competition law within the newly formed World Trade Organization.[10] For reasons that often had little to do with assessment of the costs and benefits of coordination for global political and economic development, both the US and an important group of developing countries either actively opposed the idea or failed to support it. As a result, efforts to include competition law in the WTO were abandoned in the early 2000s. Bilateral coordination has emerged as a form of coordination, but so far its scope and impact has been limited primarily to improved communication flows among a small group of developed country competition authorities.

B. Convergence as Strategy

Even as coordination was being discussed at the WTO, the idea of convergence acquired increasing attention as an alternative. A group of

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[9] For discussion and examples of such conflicts, see David J. Gerber, 'The European Commission's GE/Honeywell decision: US responses and their implications', *J. of Competition L.* 87 (2003).

[10] For further discussion, see Kevin C. Kennedy, *Competition Law and the World Trade Organization: The Limits of Multilateralism* (London, 2001). See also David J. Gerber, 'Competition law and The WTO: Rethinking the relationship', 10 *J. Intl. Econ. L.* (2007).

competition law officials and scholars, primarily from North America and Europe, began to promote convergence as an alternative to including competition law in the WTO. They created the ICN as a forum for discussion and, according to some, as a vehicle for convergence.

The primary policy justification for this strategy has been that reducing differences in the norms governing competition on global markets will reduce the costs and risks associated with the jurisdictional system. Reducing the differences will reduce distortions and inefficiencies resulting from the differences. This can be expected to increase business certainty and also diminish the probability of inter-jurisdictional conflicts. Moreover, achieving these benefits would not entail the need to negotiate agreements, and thus it would address the harms of the system without imposing the costs of coordinating.[11]

For many supporters of this strategy an additional benefit of convergence is that it can be expected to lead states toward a 'better' model of competition law. Discussions of convergence and its mechanisms are strongly influenced by assumptions about the content of the convergence point itself. Assessments of the value of convergence as a strategy are inseparable from assumptions and evaluations of the point to which convergence can be expected to move – what its endpoint or target is.[12]

The 'better' model that is widely assumed to be the point of convergence is the so-called "economics-based model" (EBM) as it has developed in the US.[13] In this model, the central proposition is that economics should be the basis for competition law norms.[14] Economic analysis should basically determine whether competition law has been violated. It is the normative base for the system. More specifically, competition law should intervene in economic decision making only where a specific form of economic analysis

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[11] A second justification is that convergence will improve communication and cooperation among competition agencies, because competition law will have a more uniform 'language' or frame of reference. This plays at best a marginal role in most discussions.

[12] For our purposes here, it is important to distinguish between substantive and institutional/ procedural components of a competition law system. The institutional/procedural features of most competition law systems tend to resemble continental European patterns, and there is some indication that some of these features are converging toward the US model. Here, however, we are interested only in substantive law convergence.

[13] U.S. Antitrust Law and the Convergence of Competition Laws, 50 *Am. J. Comp. L*. 236 (2002).

[14] The classic presentation of this model is Robert Bork, *The Antitrust Paradox* (New York, 1978). For discussion, see Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge, MA., 2006).

of the conduct identifies a particular economic harm – usually a reduction in economic 'efficiency' or in 'consumer welfare' (as defined in economics).

The assumption that the EBM must be the point of convergence rests in large part on the recognition that US officials, lawyers and scholars would not accept a process of convergence that did not rest on this foundation. In US antitrust law, economic analysis provides the basic criterion for determining whether the law has been violated. The central substantive question in antitrust litigation is generally whether conduct is found to cause a particular form of economic harm that is defined by economists and that can in most cases be assessed only on the basis of economic analysis. If, e.g., economic analysis demonstrates that the conduct raises price above a competitive level, this may constitute a violation of the competition laws. The EBM thus represents orthodoxy in the US context, and it has very strong support among scholar, officials and lawyers. Given the central importance of the US in the competition law world, this basically means that there can be no substantive convergence other than toward an economics-based model. EU competition law officials have increasingly supported this basic model, as have officials in some other countries, so there is also significant support for the EBM as a convergence point.

The central point here is that perceptions of convergence and thus support for the role of economics are intertwined with domestic competition law experience and agendas. There are thus strong interests involved in convergence analysis, and they can be expected to influence discussions of the role of economics in global competition law convergence.

III. FOCUSING THE ISSUE: ECONOMICS AND ITS ROLES

Against this background, we can look more closely at the role of economics in global competition law convergence. Our focus will be on the role economics in generating convergence in competition law norms. It is important to emphasize that we are here concerned with the laws that influence global markets – i.e., the conduct standards that are actually applied or can be expected to be applied by competition law systems. I refer to them here as 'operational' norms or rules. As noted, the main policy justification for convergence is that it will reduce differences among the rules that businesses must take into consideration in making decisions, and norms are unlikely to influence business conduct if they are not made 'operational' – i.e., that they are actually applied. Only then can they reduce uncertainty, costs and potential conflicts. Formal rules may be consistent with operational rules, but in many competition law systems

there are wide discrepancies between the formal rules and the rules that are actually applied.

The following analysis reveals that vague references to a general role for economics in the convergence of these operational rules are of limited value and are likely to obscure effective evaluation of convergence as a strategy. It also reveals, however, the potential value of identifying *specific functions* that economics performs in competition law systems and assessing convergence potential in relation to these functions.

A. General References to Economic Science as a Convergence Point

General references to the capacity of economics to serve as a convergence point for global competition law are common, but they are often of limited analytical value. They suggest that the science of economics can in an unspecified way attract decision makers to move their competition law systems toward an economics-based system. As such, however, this suggestion is of dubious value not only because of its vagueness, but also because it rests on a basic misconception. Economics is a social science. It has its own goals, methods, actors and incentives.[15] It seeks to develop knowledge about relationships among the components of economic systems. Its basic functions are to create knowledge and to develop tools for applying such knowledge. The contrast with legal systems is sharp. Legal systems have different objectives and incentives. Their basic function is to influence conduct and to develop and maintain the tools for influencing conduct. There is little value, therefore, in suggesting that economic science *itself* can be the point toward which *legal regimes* converge.

A related suggestion is that economic perspectives may just 'seep in' to competition law systems around the world and that this will lead to convergence of competition law norms. Some suggest that this may occur because the use of economics is intrinsically attractive and somehow competition law decision makers will learn about its uses, recognize its attractions, and begin to use economics in competition law. Others suggest that economics will seep into common use in competition law as a result of international conferences and meetings in which the value of an EBM is discussed and in which competition law economists demonstrate their potential value for competition law decision makers.

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[15] For discussion, see, e.g., Melvin W. Reder, Economics: The Culture of a Controversial Science (University of Chicago Press, 1999) and Diane Coyle, The Soulful Science: What Economists Do and Why it Matters (Princeton University Press, 2007).

Again, however, the claims are too vague to have much utility. There is limited evidence that competition law officials are generally attracted to accepting a competition law model in which the norms they apply are provided by economics or that economics will somehow naturally infuse competition law in ways that generate convergence. Many competition law institutions appear quite content with applying competition law in the same basic ways that other laws are applied in their legal system rather than relying on economics to provide the norms of the system. Moreover, in this claim, economics is not even presented as a convergence point. As we shall see, economics can be used in many ways and for many purposes, and merely using 'more economics' can lead in many directions. At this level of generality, therefore, economics seems to hold little promise for generating widespread convergence of competition law norms.

B. Identifying Specific Roles for Economics

If we identify *specific functions that economics performs* in competition law regimes, however, we can analyze more meaningfully the potential roles of economics in promoting convergence in competition law norms. This function-centered analysis makes the issue tractable. If competition law decision makers in disparate competition law regimes increasingly use economics to perform a particular function in their own regimes, each such *function* becomes a convergence point, and we can then ask whether these elements of convergence can be expected to support convergence in competition law norms.[16]

I here identify three main functions that economics performs in competition law systems and examine some of the factors that are likely to influence their potential as convergence points. One is the role of economics in describing – i.e., assembling and interpreting data and identifying and quantifying relationships among economic variables. A second is the normative role of economics. Here economics provides the basic norms of competition law. A third role is what I call the methodological role – i.e., the uses of economic methods in the operation of the competition law system. The first two of these roles may have relatively limited capacity to induce normative convergence on the global level, but the convergence-inducing potential of the third may be significant.

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[16] For analysis of the embeddedness of economics in procedural and institutional frameworks, see David J. Gerber, 'Competition law and the institutional embeddedness of economics', in *Economic Theory and Competition Law* (Josef Drexl, Laurence Idot & Joel Moneger, eds, Edward Elgar, Cheltenham, UK and Northampton, MA, 2009).

IV. ECONOMICS AS A DESCRIPTIVE TOOL

One role of economics in competition law is to describe – i.e., to gather and interpret data for use by competition law decision makers. Economists structure data, identify the actual and potential effects of conduct on other economic variables and so on. Their training prepares them to perform these tasks effectively and thoroughly. Most competition law officials, judges and other decision makers value more accurate information regarding the effects of potentially anti-competitive conduct, and thus they have incentives to employ economists and use their tools to provide this kind of information.

This appeal might suggest that this function of economics could be a basis for convergence, but further analysis suggests that there is little to support this expectation. Increased use of economics to describe has no necessary relationship to normative convergence, because it has no necessary relationship to the norms applied. Economics can provide *information about anything* in the economic world (and even beyond). The use of economics to describe facts can serve any competition law or regulatory goals and can be used for countless normative purposes. It merely increases the amount and quality of information used in the system.

In some cases, the increased use of economics as a descriptive tool might even impede convergence. Increasing the information available for applying different kinds of norms in different systems with very different goals may actually maintain diversity among competition law systems. As individual systems invest in using better and more reliable data in pursuit of their specific normative goals, the costs of moving to different goals will increase, and decision makers are more likely to resist moving away from those goals and toward a system that has a very different set of goals.

V. EXPLORING THE NORMATIVE ROLE OF ECONOMICS

Most claims about the role of economics in competition law convergence refer (often implicitly) to the normative role of economics. For our purposes here, identifying this function is critically important, because failure to distinguish it from other functions of economics often renders analysis confusing, at best, and highly misleading, at worst. I use the term 'normative role' to refer to the role of economics as a source of competition law norms. In this role, economics has the central role of determining whether competition law has been violated. In US antitrust law, economics plays this role. The central test of whether the law has been violated is performed

by economics. If economics determines, for example, that conduct has increased price above a competitive price, the conduct will generally be assumed to have violated the law. If it does not, this generally precludes a finding of antitrust violation. This description is necessarily oversimplified, but it captures the essential role of economics. Economics is, of course, filtered through and applied by legal institutions, but the basic proposition of the EBM is that conduct violates competition law if and only if it causes or can be expected to have specified economic effects.

This normative role is central to convergence discussions, because, as noted above, the main justification for relying on convergence as a strategy is that it will, over time, generate increasingly uniform standards of conduct for global markets. If competition law regimes increasingly use economics to set the norms of competition law, this creates convergence of norms and thereby reduces the burdens and costs for global markets that result from normative diversity. A central issue is thus whether this specific use of economics can serve as the convergence point for competition law systems – i.e., whether decision makers from many systems can be expected to *use economics to perform this normative function*. There are incentives for convergence toward this normative role for economics, but cognitive and incentive alignments may be weaker than some suppose.

A. Cognitive Alignment

One positive convergence factor is the universality of economics as a discipline. The economics profession in much of the world operates with the same basic tools of analysis, and this can facilitate cognitive alignment *among economists* regarding competition law norms, and this, in turn, increases the potential for similar alignments regarding competition law norms. If there were no such general acceptance of the basic tools of economic science, economics could not support convergence.[17]

The posture of economics *as a science* provides additional support for this role. As a science, economics operates within the framework of a community-based discipline. There are often major disagreements among economists regarding the *application* of economic principles to specific cases and categories of usage, but most of the core propositions of the science are widely shared. Moreover, they are debated and evaluated by the economics community in a relatively transparent process of analysis and comment. To the extent, therefore, that economics is used by competition

[17] For the internationalization of the economics profession, see *The Post-1945 Internationalization of Economics* (A. W. Coats, ed., 1996).

law decision makers one can expect a significant degree of cohesion in that use – i.e., in what economists and others 'see' when they view competition law issues.

Several factors may limit, however, the extent to which this cognitive alignment within the economics profession can be expected to generate similar alignment regarding a normative role for economics in competition law systems.[18] In the context of competition law, the issue is not whether *economists* know and see the same convergence point, but whether *decision makers* in those systems see the same convergence point. Decision makers evaluating an EBM may have very different expectations as to what the normative use of economics would mean in the context of their systems. A competition law decision maker in Malaysia may not 'see' an EBM in the same way that a decision maker in the US sees that model.

One reason is that the institutional embeddedness of economics varies dramatically among competition law systems.[19] Economics will always be only one factor among many that might influence competition law decisions. It cannot be applied as 'purely' as economists might wish. In a competition law system various institutions and factors may influence decisions. Goals, rules and procedures will be established, imposed and maintained by different institutions in different ways, and these will influence and constrain the use of economics. Economics must, therefore, compete for influence on decisions, and its 'competitive position' will vary significantly among systems.

Second, although many basic principles of analysis are widely accepted within the economics profession, there are often significant variations and conflicts within the profession regarding some key principles. For example, even the most basic assumption of economics – that economic actors are 'rational actors' in the sense that they respond to presentations of costs and benefits according to objectively identifiable principles – has been the subject of major debates within the profession over the last two decades.[20]

A third impediment to cognitive convergence toward an EBM is the extent of knowledge of economics within competition law systems.

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[18] The economist Dani Rodrik develops in many works the proposition that the uses of economics are shaped by the institutional context in which they operate. See, e.g., Dani Rodrik, *One Economics; Many Recipes* (Princeton, 2007).

[19] For a comparison between the US and Europe on this point, see David J. Gerber, 'Convergence in the treatment of dominant firm conduct: The United States, The European Union, and the institutional embeddedness of economics', 76 *Antitrust L.J*. 951 (2010)

[20] See, e.g., Daniel Kahneman, 'Maps of bounded rationality: Psychology for behavioral economics', *American Econ. Rev*. 1429–71 (2003).

Knowledge of economics among competition law officials is often limited. More importantly, even among those operating as 'economists' there are often significant variations in skill and knowledge. While doctoral level economists trained in the US and in some other locations generally share the same basic framework of knowledge and expertise, many who are called 'economists' in other parts of the world are much less likely to have full mastery of these tools and perspectives. Even where they do possess high levels of economic sophistication, they may not have the same access to current developments in the 'Western' economics profession.

This points to another set of issues: 'Who knows what?' issues. In any competition law system, decisions about competition law are located in different institutions and subject to the influence of differing communities of individuals (e.g., political, social, ideological and business communities). Key decisions may be made by administrative officials who have significant competition-law relevant economic knowledge, but they may also be made by officials with scant knowledge of economics or by judges in the regular courts who may have virtually no knowledge of economic analysis. There might be extensive economic knowledge among a small group of economists in the competition authority, for example, but the economists might be routinely ignored by others in the system. The impact of economic knowledge on competition law decisions depends in part, therefore, on where the knowledge is located and the extent to which those with such expertise can influence competition law decisions. This then conditions the potential for normative convergence and impedes convergence in the norms of competition law.

Moreover, even where economists and others using economic analysis are all highly knowledgeable, their own experience and their own perceptions of the consequences of specific decisions will influence the way they apply economics.[21] This will inevitably lead to the use of differing assumptions in economic thinking. The experience of an economist in the US Federal Trade Commission or the competition directorate of the European Commission will differ significantly from the experience of an economist in Beijing. This, in turn, colors the perceived consequences of particular competition law principles and decisions. Furthermore, even among economists in the US and Europe ideologies and perceptions differ significantly. This can influence the assumptions they make and thus the competition law decisions that flow from them. One need only think of Chicago-school assumptions about the ease of entry into markets and the

[21] This issue is approached from several useful angles in Robert F. Garnett, ed., *What Do Economists Know?* (London, 1999).

often strong criticism of these assumptions not only outside the US, but also among US competition law specialists.[22]

Finally, economics as a science may be neutral, but when it is put in the service of contesting parties, it cannot operate as it does in the context of academic discussions. In the context of competition law, it becomes a tool of advocacy promoted by competing interests and arguments, and it is not subject to the constraining forces of the economics community and its disciplines.

B. Incentive Alignment

Even if we assume a higher degree of cognitive alignment than may be warranted – i.e., even if competition law decision makers were all to 'see' more or less the same thing when they envisioned the normative role of economics, they may encounter significant and varying impediments toward that goal. Some are related to the expected substantive outcomes of following the EBM model, while others are related to institutional and procedural factors.

The potential policy benefits of an EBM have been widely discussed and debated, and there is no need to elaborate them here.[23] They generally revolve around one basic idea. If economics is the primary source of competition law norms, this will align competition law with the needs of the market – i.e., it will maximize market efficiency. An EBM requires decision makers to abstain from interfering with business conduct unless it is clear that such interference is economically justified. It calls for them to avoid over-enforcement (type I errors). If this basic precept of an EBM is followed, competition law enforcement can be expected to target what can clearly be shown to impede the functioning of the market (e.g., price cartels). Enforcement will be less likely to target conduct that cannot clearly be shown to have short-term effects on price or output (e.g., unilateral conduct by dominant enterprises). This central policy benefit to the economy is associated with other more specific benefits. For example, an EBM can be expected to benefit consumers by focusing competition law's attention on cartels that tend to increase prices.

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[22] For discussion, see, e.g., Spencer Weber Waller, 'The law and economics virus', 31 *Cardozo L. Rev.* 367 (2009) and Eleanor Fox, 'The efficiency paradox', in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, at 77 (Robert Pitofsky, ed., OUP, 2008). See also Joshua White, 'Abandoning antitrust's Chicago obsession: The case for evidence-based antitrust', 78 *Antitrust L.J.* 241–71 (2012).

[23] See supra, text accompanying note 14.

Another set of potential benefits is institutional, and it is less often discussed. Four interrelated benefits appear significant. One involves the 'neutrality' of economics. Legislators and competition officials may see benefit in moving toward an EBM because economics is 'neutral.'[24] It has a scientific apparatus that can be applied without regard to political or other issues. Competition law often involves major economic and sometimes political interests, and relying on a neutral source for norms may appeal to some competition law decision makers.

A second institutional benefit relates to status. In general, science enjoys respect in most societies. It is associated with expertise and knowledge and this tends to generate status. Economics as a science can thus provide status benefits for competition law, because using economics as the primary source of competition law norms associates competition law decisions with this expertise. Such decisions are then no longer just decisions of bureaucrats and judges who may or may not have high levels of status in the society and may or may not enjoy high levels of trust. Instead competition law is the product of 'science' and deserving of respect.

Related to these two factors is a third potential attraction. Competition law decision makers may see value in transferring responsibility to a group of presumably non-political experts applying this 'science.' This may be expected to provide something of a shield against outside influences on competition law decisions. Economists on this view are applying a reason-based analysis that is supported by a science and that seeks to improve the economy. They are not just applying 'law,' which may be subject to numerous influences and may change at the whim of politicians, and they are not just carrying out 'policy.' which may be made at the behest of particular societal groups and reflect tensions within the society. Economists are engaged in a different kind of enterprise. Needless to note, some decision makers may have personal or institutional reasons for rejecting such reliance on economic 'experts.' They may prefer to keep competition law under their own control.

Finally, an EBM system may provide network benefits. To use economics as the primary source of competition law norms is to become associated with other potentially important competition law regimes, institutions and individuals who use economics in this way. This association provides

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[24] This incentive appears frequently in discussions with developing country competition leaders. See, e.g., the articles included in Josef Drexl, *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar, Cheltenham, UK and Northampton, MA, 2012). In that volume, see David J. Gerber, 'Regionalization, development and competition law: Exploring the political dimension', 253–72.

a basis for comparison and communication with other such systems, and it may provide opportunities to make potentially valuable contacts with officials, institutions and scholars from those competition law systems. For many, these kinds of contacts and associations can provide significant benefits.

There also, however, significant disincentives to convergence toward an EBM model. In reviewing these disincentives, it is important to recall that the convergence-enhancing role of incentives is necessarily tied to issues of cognitive alignment. If decision makers actually envision the EBM model in differing ways, then incentives for a particular regime to move toward what its decision makers 'sees' may actually not move it in the direction others are moving. For example, US officials may 'see' an EBM very differently from officials in a developing country. They may seem to be talking about the same thing, but they may actually envision outcomes that differ widely. Incentives to move toward an EBM model may thus lead in directions that are difficult to assess and may diverge significantly. We will assume in the paragraphs that follow an EBM as discussed above, but with the understanding that there may be many interpretations of that model.

Incentives to move toward an EBM model are necessarily influenced by the contexts within which competition law operates. Decisions relating to competition law respond to the experience of a country and to the specific decision making context of those responsible for competition law decisions. Differing perceptions of economic need, differing ideologies, and differing political structures shape incentives to move toward an EBM. A country in which competition is associated with negative values will have very different incentives to accept an economics-based model of competition law than one in which there is significant trust in the capacity of government to regulate economic activity.

A related factor involves the expected consequences of competition law decisions. Such decisions have consequences that are measured not by brilliance or mathematical sophistication, as is often the case within the economics community.[25] The concerns and incentives of decision makers are typically far more immediate. 'Will an EBM benefit us and, if so, how?' is likely to be the foremost question. For example, from a theoretical perspective the economic concept of 'consumer welfare' may present the most cogent and convincing basis for competition law norms, but a competition

[25] Possible 'oversophistication' of economics is increasingly seen as a potential hindrance to effective competition law enforcement. See, e.g., Simon Bishop, 'Snake-oil with mathematics is still snake-oil: Why recent trends in the application of so-called "sophisticated" economics is hindering good competition law enforcement', 9 *Eur. Competition L. Rev.* 67–77 (2013).

law official in sub-Saharan Africa may be subject to severe pressures not to apply such a standard, given that doing so may harm producers in that country and thus also the country's economic development. In addition, those producers might also be very important for the decision maker financially and/or politically.

Relationships between competition law and other economic, political and social policies provide a third element of variation. Decisions relating to competition law are inevitably shaped by the overall objectives of government policy makers and by related policies. For example, in many countries trade (e.g., many Latin American countries) and investment (e.g., China) policy may have far more influence on government decision making than does competition policy. As a consequence, even if the leadership of a competition authority wishes to move toward increased use of economics as a source of norms, they may not be allowed to do so, because other policies and players may have more political weight. The degree of independence of competition-related decisions from these influences varies widely. In some countries such as the US competition law is relatively independent of other policies, whereas in many other countries it is largely subject to other policies and concerns.[26]

In addition to these factors that are external to the competition law regime, internal factors may also influence incentives to move toward an EBM. One is the relationship of the EBM to the stated and official objectives of competition law. The objectives that legislators and courts have established necessarily influence how economics is used in competition law and the avenues and incentives to use it, as do significant stakeholders in the country, including general public opinion. If the law talks about 'fairness' and protection of small producers, for example, enforcement officials must take these factors into account at least to some degree, and this may represent an impediment to moving toward an EBM. Decision makers also have incentives related to factors such as the influence of their institutions, its financial support, and their own careers. Relying on economics to provide competition law norms when the law dictates that a competition authority pursue other goals and follow other directives is not likely to be an attractive proposition for many decision makers.

Finally, the institutional and procedural embeddedness of competition law in the legal system also influences incentives, and these differ widely.

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[26] For discussion, see, e.g., Josef Drexl, 'On the (a)political character of the economic approach to competition law', in Josef Drexl et al, eds, *Competition Policy and the Economic Approach*, 312 (Edward Elgar, Cheltenham, UK and Northampton, MA,2011).

In some competition law regimes (e.g., the US) the most important and influential competition law decisions are made by courts, whereas in (most) others such decisions are primarily the province of administrative decision makers, with courts playing a more marginal role, if any. Procedures in competition law also vary enormously, and they influence not only the incentives to use economics as a source of norms, but also the opportunities to do so and the influence economics can have on decisions. In the US, for example, court procedures rely heavily on private initiative and vest high levels of responsibility on private lawyers. Costs are generally borne by the litigants. In many other competition law procedures, lawyers have far more limited roles, and the state pays a much larger portion of the costs of the proceedings.

C. Convergence Drivers

To what extent then can we expect institutions to 'drive' convergence toward an EBM? The role of convergence drivers may be particularly salient in this context, in part because of the central role of the US in relation to both cognitive and incentive alignment.

The US antitrust model supports cognitive alignment, because virtually anyone dealing with competition law anywhere is likely to have some acquaintance with the basics of US antitrust law and to be aware that in that economics somehow guides, dictates or shapes antitrust law norms. For many foreign observers, however, this 'knowledge' of the US antitrust system tends to be very thin. There are many misunderstandings and misrepresentations of the US model and the role of economics in it. Nevertheless, it is a frequent reference point in both domestic and transnational discussions of competition law, and it plays a central role in discussions of the role of economics in competition law.

Driver issues are particularly important in relation to incentive alignment. Experience in legal systems always creates interests – in particular, the interests of those who make decisions within institutions and those who seek to influence the decisions. These interests, in turn, always create incentives. These interests and incentives are central to analysis of the prospects for convergence toward an EBM. US experience in developing this use of economics over the last four decades has generated incentives among officials, practitioners and scholars to promote the use of this model elsewhere, and more limited experience using economics in Europe and elsewhere creates similar interests.

Three groups have notably powerful incentives to promote convergence toward the normative use of economics as well as significant means to pursue their objectives. One includes US lawyers and scholars who have

acquired expertise in this use of economics and the issues it represents and who stand to gain professionally to the extent others systems have increased need for this knowledge and expertise. This group can provide status and other rewards to officials and supporters in other competition law systems, particularly those in emerging market economies. A second consists of economists. The more economics is used in competition law systems, the greater the demand for their services and their compensation for providing those services. Economists as a profession also have significant influence in many institutions (e.g., the World Bank and the IMF) whose support is particularly important to many countries. A third group includes US government institutions and representatives. Convergence toward an EBM is seen as serving US interests, not only because it is thought to represent a more effective and efficient form of competition law that reduces discretion and increases predictability, but also because it tends to limit administrative interference with business conduct, particularly that of larger and potentially dominant firms. US government support can also offer more tangible and less tangible rewards to individuals and institutions that accept US policy suggestions and preferences. Together, these groups represent potentially powerful incentives for competition law decision makers in most countries.

D. Prospects for Convergence Towards an EBM

This analysis of the potential for convergence towards a normative role of economics in competition law systems reveals support for both cognitive and incentive alignment, but it also reveals significant constraints on the operation of those factors. Cognitive alignment is hampered by uncertainties and divergent understandings of what an EBM represents and how it would work in varying legal, political and economic contexts. Incentives to move toward such a model are limited not only by these uncertainties, but also by concerns about the capacity of competition law systems to adopt a central normative role for economics and by the potential consequences of doing so. Convergence drivers can provide intellectual, political and economic inducements to move in that direction, but there is much uncertainty about how effective these incentives can be expected to be.

VI. CONVERGENCE AND ECONOMIC METHODS

Our analysis so far casts doubt on claims that economics can in some general and unspecified way generate convergence of global competition law norms. It also provides little basis for confidence that increased use of

economics for descriptive purposes will lead to convergence in competition law norms, and it reveals significant obstacles to convergence toward an EBM in which economics is the principal source of competition law norms. There is, however, a third potential role for economics. It has been little, if at all, discussed in relation to convergence, but it may provide significant support for convergence while maintaining avenues for disciplined differences among competition law regimes. *Economic methodology* may itself provide a set of convergence points each of which can *reduce the range of variation in the norms of competition law systems* while at the same time *identifying and enabling variations* within that range.

A. Economics and Decisional Discipline

The central insight in this analysis is that the use of economic *methods* for *specific competition law functions* can discipline decision making related to those functions – i.e., it can impose constraints on the decision-making process. Focusing analysis and policy choices on these individual functions disaggregates the role of economics. This allows increased use of economic methods if and to the extent that competition law decision makers see value in its use, and it may avoid obstacles raised to using economics for all such functions. In each competition law regime, support for using economic methods for specific functions will depend on the perceived salience of the function and on political, economic and legal support factors.

Economic methods can narrow the range of decisions related to a specific legal function precisely because the use of such methods requires that certain kinds of questions be asked and particular kinds of analyses be used. Methods impose requirements on decision making, and they impose obligations on decision makers.[27] These requirements and obligations constrain the discretion of decision makers either directly or indirectly (by exposing deviations from the methods). We look briefly at two sets of factors in economics methodology that discipline competition law decisions. One consists of basic social science methods – methods that economics shares with other social sciences. The other is more closely linked to economics itself.

Social science elements include, for example, conceptual rigor, transparency, and data testing. Conceptual rigor requires that the concepts that are used in the analysis be scrutinized as to their precise content. Debates about the exact meaning of terms that are used and their operational

[27] For discussion, see Mark Blaug, *The Methodology of Economics Or How Economists Explain* (2d. ed, Cambridge University Press, 1992).

usage often continue for years or even decades in social science, generally leading to increased agreement as to core meanings and awareness among participants of the peripheral and less clear meanings. This can support more consistent and transparent performance of legal functions, and it can facilitate the discussion of legal issues across the boundaries of legal systems. Where the meanings of terms are made clearer, decision makers and practitioners in diverse systems have clearer reference points and thus the basis for more effective communication. The requirement of transparency is related. It calls for the elements of analysis to be exposed rather than hidden. This allows observers to have access to the basis for claims and decisions. Also important in this context is the requirement that conclusions be tested against available data. It imposes an obligation to use available data in assessing claims about material being discussed.

These and other requirements both presuppose the existence of a 'community' of users of the methods and facilitate communication and mutual support among community members. In science, this is called a 'scientific community,' but it can include any set of relationships that looks at the same tasks with the same sets of questions and issues. These relationships provide a reference point for discussions, and they create expectations and obligations among members of the community and can encourage interchanges within it. Ideally, members of the community interact to promote and refine methods and principles that are part of the community. In the context here this might include the requirements of data testing, transparency and conceptual rigor noted above.

Economics also provides methodological principles that are more specific to its terrain within the social sciences. I note only two examples that are potentially relevant to the competition law context. One is the need for rigor in analyzing claims of causality. In some ways this issue is present in all social sciences, but it is particularly prominent in economics, where controlled experiments are often difficult or impossible to perform. Economists dealing with competition law must look at highly complex fact patterns and seek to identify causal relationships within them. Economics provides widely accepted methods for performing that function.[28] The appropriate level of care and procedure in evaluating claims of causality have been central issues in competition law, especially in recent years.

A second methodological principle derives much of its centrality from the difficulty of assessing causality. Given the often-complicated fact patterns in economic life, economists have long relied on so-called 'rational

[28] For discussion, see Roger D. Blair and D. Daniel Sokol, 'The rule of reason and the goals of antitrust: An economic approach, 78 *Antitrust L. J.* 471 (2012).

actor' assumptions to provide insights that penetrate these complex fact patterns. The basic idea is that economic actors can be assumed to respond to identifiable and objective sets of incentives – that, in essence, they will weigh the economic gains of proposed conduct against its anticipated costs and make decisions on the basis of that 'cost-benefit' analysis. This assumption allows sophisticated modeling of data and can improve the capacity of analysts to identify causal relationships. It can thus play valuable roles in disciplining the analysis of economic conduct. Since the 1990s challenges to this rational actor assumption have increased. Nevertheless, within the economics profession deviations from the rational actor assumption must be justified either empirically or theoretically, and thus it continues to provide a potentially valuable disciplining role.

B. Shaping Stated Conduct Standards

Economic methods can be used to shape both stated norms of conduct and the application and enforcement of these standards. Their potential importance in shaping stated norms – basically, statutes, regulations and case decisions – is particularly important, because convergence claims typically refer primarily to stated norms. Central questions are 'what does the statute say?' or 'How should the cases be interpreted?' In this context, economic methods can be used to structure and constrain the language of statutes, cases, regulations and other authoritative pronouncements. For example, economic methods can be used to discipline statements of competition law's goals. In many, if not most, contexts outside the US there are pressures to include a wide variety of goals in competition law systems, including goals of fairness, protection of small- and medium-sized businesses, social justice and others, and decision makers often find it difficult to justify particular goals. Economic methods can be used to structure these statements of goals. If decision makers decide that only those goals should be included that relate directly to the effective functioning of economic markets, for example, other goals must be eliminated. In the US, this process was carried out in the federal courts over several decades, but it can also be carried out by eliminating goals from the statement of goals in statutes or regulations as has been done in some European contexts.

Economic methods can also be used to shape the conduct norms themselves. For example, the general statute for competition law can provide that competition law will only be violated where harm (or a specified level or form of harm) to competition can be demonstrated. This requirement can shape all of the system's norms. More specific roles for economics in this context include the requirement that a specified form of market power

be proven in order to established a violation of specified norms (e.g., those relating to unilateral conduct or vertical restraints). In each context, the use of economic methods shapes substantive competition law.

C. Shaping Enforcement Decisions

Economic methods can also discipline the application and enforcement of competition law. In many competition law systems, stated norms are of limited value in predicting when and how competition law will be applied, but the use of economic methods can give shape and content to the actual operation of competition law in these contexts. For example, enforcement officials can be required to meet standards of proof that meet specified economic criteria. This can refer, for example, to a general requirement that any claim that conduct has economic consequences must be supported by economic analysis of the cause-effect relationship. This basic requirement can itself dramatically change the way competition law is enforced. This disciplining role of economics may be established within a competition agency by officials who wish to give direction to enforcement, but it can also be imposed by courts or through administrative procedures.

More specific examples of this type of function might include a requirement that any definition of markets must be based on economic analysis. Most competition law systems require that markets be defined when applying competition law to specified types of conduct (e.g., abuse of dominance and mergers), and imposing a requirement that economic methods be used for this purpose gives structure and form to that type of analysis. Related to this is the concept of market power (or, more generally, economic power). Again, most competition law systems contain provisions that relate to economic power, but often statutes and cases are unclear as to how market power is to be used in the context of enforcement decisions. The monopolization provisions (art. 2) of the US Sherman Act are among the provisions that suffer from this lack of clarity, but it is also true of large numbers of systems that contain provisions relating to abuse of a dominant position. If competition officials are required to define economic power on the basis of economic analysis, this shapes and disciplines the application of these norms.

D. Economic Methods and Cognitive Alignment

Each of these uses of economic methods can support both cognitive and incentive alignment. The potential for cognitive alignment is significant for four main reasons. One is that the basic methods of neo-classical

economics are standard for professional economists throughout the world. They are known and used by professional economists virtually everywhere. There is, therefore, a clear conceptual framework to which economists and others can refer in using those methods in the context of competition law. A second is that basic concepts such as supply and demand relationships are cognitively accessible to non-economist decision makers. The use of some basic economic methods is possible for competition law decision makers virtually everywhere. A third factor is the accumulated experience with using these methods. They have now been used in a variety of contexts and over time not only in the US and Europe, but increasingly in other countries as well. Finally, use of basic methods is simpler and more accessible, and thus it can generate cognitive convergence far more readily than can highly sophisticated elaborate forms of economic analysis that may be called for where economics must provide the basic norms of competition law.

E. Economic Methods and Incentive Alignment

The use of economic methods to perform specific tasks in competition law systems tends to support incentive alignment for many of the same reasons discussed above in relation to the use of economics as a source of competition law norms, and there is no need to repeat those factors. The use of economic methods to perform specific functions may in some cases, however, engender even greater incentive alignment. Competition authorities generally have incentives to perform their tasks more effectively, and if economic methods promise to assist them to perform specific functions more effectively or efficiently, they have incentives to increase the use of economic methods to perform those functions. In any event, these incentives are likely to be greater than incentives to change their operations in fundamental and inevitably more costly ways and to rely on economists to provide the norms of competition law. Most, if not all, competition law decision makers are likely to see some benefit in using at least some basic economic methods in their competition law systems. As a result, an effort to increase the capacity of administrators and judges to evaluate the consequences of their decisions seems unlikely to encounter principled opposition.

Nevertheless, several factors can impede convergence toward increased use of economic methods in competition law. First, competition law institutions and courts may resist change as a result of bureaucratic inertia. Second, using economics in legal decision making is in many legal systems virtually unknown, and thus officials and judges may resist taking economic methods into account or relying on them, simply because they

are little known and understood and because they diverge from, and may undermine, familiar and accepted methods. Third, the language of competition law statutes may leave little apparent room for the use of economic methodology. And fourth, using economic methods requires resources. These may be minimal, amounting to buying a few books or making a few phone calls to foreign experts, but the more extensively economics is used, the higher the costs. The gradual and flexible nature of methods-based convergence should reduce these concerns, but it will not eliminate them.[29]

F. Driver Effects

The 'drivers' that support convergence toSward an EBM also support convergence towards the use of economic methods to perform specific functions, but the incentives they use can be expected to have a longer trajectory. In the context of methods-based convergence, for example, the incentives for US lawyers and officials to promote convergence will be somewhat weaker for two basic reasons. First, methods-based convergence has a narrower focus. It does not require that economics be used as the source of competition law norms and thereby require major changes in competition law systems. It involves movement toward the increased use of economics in the performance of specific functions. Some systems may move toward the use of economic methods in some functions, but not in others, while other systems may increase use of economic methods in other functions. Second, methods-based convergence is slower. It does not imply immediate and dramatic increase in the use of economists or lawyers with experience in the use of economics. As a consequence, its policy pay-offs for officials and its professional pay-offs for lawyers will be less immediate and less predictable. The incentive structure for economists is less clear. Increased use of economic methods will tend to increase the use of economists even in the short run, and even piecemeal movement toward the use of economic methods may have significant benefits for economists who provide expertise in employing these methods. Similarly, international institutions that favor increased use of economics in competition law systems still have incentives to support methods-based convergence, because even this form of convergence represents movement toward a more stable and predictable normative regime for global markets.

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[29] For discussion of strategies for modifying the use of economics in competition law systems to meet these kinds of restrictions, see Gerber, 'Developing country dilemma', supra note 2.

G. Potential Benefits of Methods-based Convergence

This analysis suggests that economic methods may have significant potential to generate convergence, and this form of convergence may have many benefits for competition law development. Most fundamental perhaps is the potential value of the discussion to restructure legal and policy discussions. It moves the focus of such discussions away from the politically and economically 'loaded' and often highly sensitive issue of whether a country should adopt an economics-based model of competition law and thereby accept the forms and models of competition law developed in the US. Instead the focus is on how competition law systems apply their laws and what factors might most profitably be used to improve their efforts to achieve their goals. A methods-centered discussion can open and broaden competition law discourse. It centers attention on the *effects of conduct* rather than on legal rules, and it calls attention as well to the *effects of government intervention* in markets. This calls for competition law decision makers to look beyond the meaning of statutes and regulations and to think about competition law in less formal ways.

Another benefit of this form of convergence is that the focus on economic methods is flexible and adaptable. It can be used with any legal methods (e.g., those that are 'civil law' or 'common law' in style). It is independent of statutory language and institutional structures and rules. It can also be used in relation to a wide range of competition law goals, including those that are themselves not strictly 'economic.' For example, a methods-based analysis can be used in contexts in which decision makers are required by law to take 'fairness' issues into account.[30] Whereas the normative use of economics may be conceptually antithetical to this competition law goal, economic methods may be used to identify the effects of many forms of conduct and may even be used in creative ways to give conceptual content to fairness considerations.

Methods-based convergence also has the benefit of emphasizing and enhancing convergence dynamics. It is based on a process of change in which decision makers have incentives to move cautiously and carefully, learning from their own experience as well as from other users of the methods. It encourages the development of feedback loops involving the use of the methods. This provides significant incentives for decision makers to look to the experience of other similarly situated competition law regimes who are seeking the same objectives. For example, a

[30] For discussion, see, e.g., William J. Baumol, *Superfairness* (Cambridge, Mass., 1986).

competition law authority in Nicaragua would have incentives to look to experience from other small and emerging economies.[31] This would not replace existing incentives to learn from experts from developed countries, but it would provide an additional source of information and guidance.

Convergence based on economic methods avoids or reduces some of the major obstacles to convergence based on acceptance of an EBM. It would not require decision makers to 'abdicate' their responsibility for developing competition law norms in favor of economists. It would not require any particular set of norms, and thus it would not conflict with statutory requirements. It would not necessarily call for large expenditures to finance economists. Perhaps most basic it would be a gradual process that would not call for immediate change and the attendant bureaucratic, political and personnel costs and issues that such change entails. There may opposition on other grounds to using more economic methods in competition law, but such opposition would appear to have weaker intellectual and political support than opposition to adopting an EBM.

Convergence around the use of economic methods for specific competition functions is not 'heroic.' It cannot be expected to achieve dramatic or short-term results. Moreover, its impact is often difficult to identify and to measure. Shared experience is likely to be the main vehicle for generating convergence around these uses. As the methods are used for these purposes, the potential advantages of these uses can be transmitted through competition law networks, and where the experience is positive it is likely to encourage similar use by competition authorities elsewhere. To the extent this occurs, the range of variation among competition law outcomes can also be expected to diminish, thereby promoting the cost saving and other benefits that normative convergence promises without imposing specific norms or models.

VII. CONCLUDING COMMENTS

The importance of economic science in some competition law systems, and its potential value in others should make it an important element of any discussion of competition law convergence. Yet references to the role of economics in this process are often veiled, aspirational, uncertain or all three. In this chapter we have seen that loose references and simple

[31] See, e.g., Voluntary Peer Review on Competition Policy: Kenya, at p. vii, available at http://unctad.org/en/Docs/ditcclp20056_en.pdf (in English, last visited on July 2, 2013).

assumptions about its roles can significantly cloud and distort discussions of the issue and may impede the development of competition policy on both the national and transnational levels. They can create both false expectations and unnecessary fears.

When we identify the *specific functions* that economics can play in competition law systems, however, we can discern some potentially valuable roles for economics in supporting convergence. The use of economic methods for specific purposes may generate convergence around these uses, and to the extent that such convergence occurs it reduces the uncertainties and costs that the jurisdictional system imposes on economic actors. This type of convergence is likely to be a gradual process of changing perspectives and introducing particular forms of discipline into competition law decisions. It is a form of change that tends to have lasting effects.