Economic Consequences for Lawyers: Beyond the Jurisprudential Preface

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Abstract: This article moves from the premise that a bilateral relationship between law and economics requires the contribution of the theory of legal reasoning and argumentation. The article shows that, to be legally relevant, economic consequences have to be incorporated into interpretive arguments. In this regard, the jurisprudential preface strategy proposed by Craswell goes in the right direction, but begs the question of why the legally relevant consequences have to be assessed in terms of total welfare maximization instead, for example, of consumer welfare maximization. After having identified five points of divergence between total and consumer welfare approaches, the article draws from legal inferentialism to propose an analytical tool for assessing the explanatory power of these two approaches – the explanatory scorekeeping model. The model is then applied to the reasoning in United Brands Company v. Commission.

Keywords: Consumer Welfare, Economic Consequences, Explanatory Scorekeeping, Jurisprudential Preface, Total Welfare.

1. Introduction

In The Future of Law and Economics, Calabresi points out that the mainstream economic approach to law is a unilateral, imperialistic application of normative economics to law. In his view, the first step of a bilateral law and economics has to be the identification of an economic theory such “that it can explain why the real world of law is as it is”.³ Being Calabresi one of the founding fathers of the “law and economics” movement, this call for a bilateral relationship between law and economics deserves to be considered seriously. Others have advanced similar critiques.⁴ Curiously, the first one – to our knowledge – was an economist, James Buchanan, in his review of Posner’s textbook.⁵ There was a time in which explaining the content of the law was, in some sense, a priority for the economic approach to law. We refer to the 70’s and 80’s of the last century, and more precisely, to Posner’s efficiency hypothesis of the common law. Posner attracted much attention to the economic approach to law by exploring “the hypothesis that common-law rules and institutions tend to promote economic efficiency”, with “economic efficiency” to be understood as “wealth maximization”.⁶ Ironically, at the time it was fashionable to distinguish between the positive approach of Posner and the Chicago School in opposition to the normative approach of Calabresi and the New Haven School.⁷ This is ironical because the – now – mainstream approach of the Chicago School over the years abandoned its positive aspirations and became normative all the way down. The abandonment of the positive approach is typically explained by pointing out its significant methodological shortcomings.⁸ In particular, it can be objected that many purported positive explanations are advanced by cherry-picking the explananda and are fundamentally disinterested to actual legal reasoning and argumentation.

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³ Calabresi (2016), 4.
⁵ Buchanan (1974).
⁶ Posner (1979), 285.
⁷ Ivi. On the distinction between the Chicago and New Haven Schools, see Esposito (2017b).
This article specifies Calabresi’s claim by exploring the relationship between his fitness test and legal argumentation. More precisely, this article aims to show that the theory of legal argumentation is foundational to a bilateral law and economics research program. To do so, we will build on some previous research on the relationship between total and consumer welfare. One of us has been working for some time on the claim that consumer welfare maximization can be an alternative axiological foundation for an economic approach to law; this appears to be particularly relevant for the legal community because it explains better than total welfare maximization the content of economic law, especially in the EU.\(^9\) For current purposes (and in the lack of a better name), we shall call this claim "the consumer welfare economic approach to law". A bit more precisely, the consumer welfare economic approach to law holds that by assuming that the microeconomic rationale of the market mechanism is the maximization of consumer instead of total welfare, we can account for the legal arguments involved in the practice of economic law.

The other of us has been working in the field of legal argumentation and interpretation, contributing in particular to the discussion on legal inferentialism. The general idea of this approach is to understand and determine legal content in terms of inferential relations between terms, expressions and sentences used in legal practice. More in particular, it is the practice of legal interpretation and argumentation that shows the correctness conditions of the use of legal terms, expressions and sentences. So, in previous works, Canale and Tuzet have used Robert Brandom’s model of scorekeeping to show how the meaning of a legal provision is fixed in a pragmatic interaction between different speakers.\(^10\) Also these ideas are discussed in more details below.

In this context, it is illuminating to discuss the idea of adding a jurisprudential preface – as proposed by Craswell\(^11\) and endorsed by Cserne\(^12\) – to the consequentialist interpretive arguments of mainstream economists of law. The jurisprudential preface would inform that the arguments of mainstream economics of law can be taken into account with the proviso that it remains to be settled what their argumentative power in a court of law is.\(^13\) This preface is indeed necessary because, as we will see in Section 3, consequentialist arguments are first-order interpretive directives, but second-order directives are needed to solve conflicts between the various first-order interpretive directives. Unfortunately, the jurisprudential preface strategy begs the question “what economic consequences are legally-relevant?”.

Once we focus on this question, we see that the consumer welfare economic approach to law exposes a gap in the conceptual foundations of mainstream economics of law: mainstream economics of law simply assumes that the variations of total welfare ought to be the legally-relevant economic consequences. Therefore, adding Craswell’s jurisprudential preface to the normative arguments of mainstream economists of law does not suffice to make a total welfare approach legally-relevant: the jurisprudential preface does not tell us why total welfare instead of consumer welfare. After all, they are both economic accounts of what economic consequences matter.

Reflecting on the limitations of the jurisprudential preface strategy exposed by the consumer welfare economic approach to law, this article integrates insights from economic and legal theory to develop an inferentialist methodology capable of testing the fitness with legal reasoning and argumentation of economic analyses. Therefore, this article moves beyond the jurisprudential preface strategy and towards a truly bilateral law and economics approach.

The article is structured as follows. Sections 2 and 3 set the stage by detailing the basic analytical models used in economic analysis of norms and in the theory of legal argumentation. Section 4 takes stock and shows that if economic consequences have to have any bearing on legal

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\(^12\) Cserne (2012), 50.

\(^13\) Craswell (1993), 293.
argumentation, they must be used in the argumentation developed about norms. The main problem then becomes understanding what economic consequences are legally relevant. To answer this question, the consumer welfare economic approach to law borrows from legal inferentialism. Section 5 describes the consumer welfare economic approach to law and its relationship with mainstream literature and, in particular, with the efficiency hypothesis of the common law. Section 6 introduces legal inferentialism and explains how it can be integrated with the consumer welfare economic approach to law. Section 7 applies the conceptual apparatus built in the previous sections to a landmark case of EU Competition Law, *United Brands Company v. Commission*, and it shows how to infer the type of economic consequences that were found to be relevant in that case. Section 8 concludes by pointing out venues for future research.

2. The foundations of the economic approach to norms

A basic idea of the economic approach to legal norms is to look at these as incentives to perform certain forms of conduct. If these incentives have a minimum of effectiveness, they have an impact on the conduct of their addressees and produce some economic consequences. Now, for a better understanding of this mechanism, it is necessary to consider also the logical structure of legal norms. Legal norms generally have a conditional logical structure: they are constituted by an antecedent part representing a form of conduct and a consequent ascribing a legal consequence to that conduct. If a certain conduct is performed, a certain legal consequence ought to follow. Logically speaking, the antecedent is descriptive of a form of behaviour, while the consequent is normative in that it prescribes what ought to follow from that form of behaviour. Typically, the legal consequence is a sanction on those who perform the regulated conduct. When the sanction is negative (e.g. a fine), it has the apparent role of an incentive not to perform the regulated conduct. When it is positive (e.g. a fiscal deduction) it is an incentive to perform the conduct. If such norms are effective, they play a role in the decision-making of the law's addressees. The addressees take the norm into account when they determine their actions. In this way, legal norms produce (or contribute to the production of) economic consequences. For instance, law's addressees perform certain transactions that are legally encouraged because of their beneficial effects. In other terms, the ascription of legal consequences to certain forms of conduct contributes to the factual and causal determination of certain economic consequences.

Bearing all this in mind, we introduce the foundational scheme of an economic approach to law, with C for conduct, S for sanction, EC for economic consequences, \(\Rightarrow_1\) meaning that between C and S there is a (normative) legal implication, and \(\Rightarrow_f\) meaning that \((C \Rightarrow_1 S)\) factually causes EC:

\[
(1) \quad (C \Rightarrow_1 S) \Rightarrow_f EC
\]

Proposition (1) requires some comment. First, \(\Rightarrow_1\) means, more precisely that, according to the law, S ought to follow when C is the case. Second, the concept of economic consequence is ambiguous in an important sense. On the one hand, economic consequences can be consequences in the economy. For example, variations in the GDP, employment rate, import-export ratio, etc. On the other hand, “economic consequences” can stand for “consequences calculated with an economic method”. This meaning often overlaps with the previous one, but sometimes it does not. For example, an economic consequence could be calculated with a non-economic method (e.g., a philosophical claim about welfare) or a non-economic consequence could be calculated with an economic method (e.g., an

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economic analysis of the judicial system).\textsuperscript{15} In this essay, we try to set this problem aside by focusing on the central case of economic consequence, namely the understanding of economists about consequences on the economy. We leave for another occasion any reflection on the other, less central, meaning of "economic consequence". Third, the scheme can be used both in an ex ante perspective to express the expected economic consequences of a norm, and in an ex post perspective to express the consequences that are actually produced. Fourth, to supplement the previous point, the economic consequences EC produced according to the scheme are not necessarily those envisaged by the lawmakers or by the analyst. A classic example of economic consequences that legal scholars would risk not to consider are the enforcement costs\textsuperscript{16} of the norms – this neglect was termed "nirvana fallacy" by the libertarian economist Harold Demsetz.\textsuperscript{17} As we discuss in more detail in Section 5, the total vs. consumer welfare disagreement is exactly a disagreement about which economic consequences have to be included in the foundational scheme. In other terms, it is a disagreement about what "economic consequences" and "EC" mean in the context of economic analysis.

We give to proposition (1) the somewhat pretentious name "foundational scheme" because it establishes the factual implication between the norm and some notion of economic consequence and this implication is at the core of all the questions economic analysts of law typically ask. Both the ideas of predicting the economic consequences of a norm and of measuring these consequences presuppose the existence of the factual implication schematically represented by proposition (1). Also, the normative analyses of economists presuppose this factual connection. Norms are evaluated for their capacity to cause certain economic consequences.

Such consequentialist normative analyses presuppose a further premise, namely a relation of preference between different norms in the light of their economic consequences, which can be formalized as follows. Let N1 be the norm C \(\Rightarrow_1 S\), EC\textsubscript{N1} the expected economic consequences if norm N1 is in force, EC\textsubscript{N2} the expected economic consequences if a different norm N2 is in force, p an operator expressing a preference relation between different states of affairs, and \(\Rightarrow_1\) the interpretive implication between preferred consequences and the interpretive outcome consisting in a preference relation p between the two norms (N1 and N2); then an argument from economic consequences can be written as follows:

\[
(\text{EC}_{N_1} p \text{EC}_{N_2}) \Rightarrow_1 (N_1 p N_2)
\]

Proposition (2) establishes an interpretive legal implication between the finding that the economic consequences are preferable if N1 instead of N2 is in force. In other terms, it is desirable to have N1 because the economic consequences are more valuable when N1 is in force in comparison to when N2 is in force. For current purposes, proposition (2) is particularly important because, as we shall see below, it expresses a type of consequentialist argument\textsuperscript{18}. To see this, we now turn the analytical model of legal reasoning and argumentation.

3. The analytical model of legal reasoning and argumentation

\textsuperscript{15} Notably, the "law and economics" Marciano refers to is largely coincident with the legal field called "economic law" (Marciano and Harnay 2009; similarly Medema 2011), but it is largely different from Calabresi’s law and economics.

\textsuperscript{16} Enforcement costs can be distinguished in direct and indirect costs. Direct costs are the costs related to the functioning of the legal system, such as the salaries of police officers, judges, court clerks, litigators, etc. Indirect costs are other costs caused by the legal system, such as the costs deriving from over- and under-enforcement of a norm. A locus classicus of this analysis is Calabresi (1970).

\textsuperscript{17} Demsetz (1969).

\textsuperscript{18} From a logical point of view, scheme (2) can be taken as an interpretive directive, therefore as a norm itself, but also as a proposition about a normative implication; we use it in the latter sense.
Analytical philosophers typically divide legal arguments into two broad categories: arguments about *norms* and arguments about *facts*. Arguments about norms aim at justifying (or contesting) the identification, construction, validation of norms as legal norms. In a legal dispute, the participants typically start from a legal provision, such as a code article, that is considered to be relevant and applicable to the case in hand. The provision at stake is usually in need of *interpretation*, or of being contextualised to the legal system it belongs to. The latter operation requires a reconstruction of the system, of its principles, of its statutory norms, of the relevant judicial precedents, etc.

Arguments about facts aim at justifying (or contesting) the reconstructions or representations of the relevant facts. They concern the warrant, proof, truth of propositions that are legally relevant to the problem or case in hand. In a legal dispute, parties typically produce evidence to support their factual claims, or to contest the rival claims. And given that evidence *per se* doesn’t yield verdicts, the evidence presented is in need of being “inferentialised”, that is translated in evidentiary inferences and arguments aimed at persuading the fact-finders.

Once the facts are found and the relevant norms are pointed out, the decision-makers need only apply the latter to the former. Now, some analytical approaches to this subject claim that this kind of application consists, logically speaking, in a deductive inference. According to the traditional model of the “judicial syllogism”, decision-makers are to deduce the legal consequences of the case from the facts and the applicable norms. Following the syllogism model, the relevant norm constitutes the major premise of the syllogism, the relevant fact constitutes the minor premise, and the legal consequences of them constitute the conclusion of the inference. Some literature calls “internal” the justification of the conclusion provided by the deductive structure of the inference, and “external” the justification of the premises of it. Interpretive arguments provide the external justification of the major premise, and evidentiary arguments provide the external justification of the minor premise of the syllogism.

Now, interpretive arguments usually make appeal to the “canons of interpretation”, or “interpretive directives”, which can be used in a given legal system. The theory of legal interpretation and argumentation provides a list of such devices. A standard taxonomy of the interpretive directives divides them in textual, systemic, and consequentialist arguments. Consequentialist arguments, in particular, are those arguments according to which a norm or major premise is justified in the light of the consequences that it brings about. At this point, it is interesting to recall proposition (2): (EC\(_{N1}\) p EC\(_{N2}\)) \(\rightarrow\) (N1 p N2). In essence, proposition (2) expresses more formally the same idea of the consequentialist argument given in natural language in the previous sentence. The main difference is that proposition (2) is strictly focused on economic consequences, while consequentialist arguments allow for considerations about consequences in general. It then follows that proposition (2) expresses a particular type of consequentialist argument, the argument about economic consequences.

In some legal systems (or subsystems), some arguments prevail, are preferred over the others. For instance, the textual arguments, such as the argument from literal meaning, in criminal law usually prevail over other arguments because they put more constraints on judicial interpretation and decision-making and therefore better protect the rights of criminal defendants. Every time a system has an interpretive directive that dictates the preference for one argument over another, such a directive can be called a second-order directive, whereas the arguments in the ranking are first-order interpretive directives. Second-order directives establish, more in detail, the systemic preference criteria about first-order directives. More precisely, they concern the precedence of some argument when they require it to be used before others are; and they concern the prevalence of it when they

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19 Beccaria (1764).
require that, in case of conflict between interpretive outcomes generated by different arguments, one argument be given more weight or strength.\textsuperscript{22}

In the next section, we discuss more in detail the importance, for the interaction between lawyers and economists, of the fact that lawyers need legally-relevant arguments.

4. Lawyers need legally-relevant economic consequences

This section connects to legal argumentation the total vs. consumer welfare disagreement in economics. As seen in the previous section, to argue in favour or against the legality of a norm, \textit{lawyers need legal arguments}. As also seen, to be legally relevant, an interpretive argument has to belong to the list of interpretive arguments that are legally applicable in the legal system. In other terms, the argument has to be recognized by legal practitioners as belonging to one of the acceptable types of first- or second-order interpretive arguments.

The fundamental scheme of economic analysis outlined in Section 2 shows that mainstream economists of law focus their attention on the relationship between economic consequences and legal norms. When their analysis is normative, they take economic consequences as the criterion for evaluating the law and suggesting reforms. In so doing, their argumentation is \textit{not that far from legal practice} as one might think. Indeed, the role of economic consequences is discussed in the study of legal reasoning and argumentation, in particular in connection to consequentialist arguments.\textsuperscript{23}

In discussing consequentialist arguments, in fact, it is common to adopt the analytical distinction between \textit{legal and extra-legal consequences}.\textsuperscript{24} Examples of legal consequences in this sense include the invalidity of a contract, the transfer of property, the limitation of personal freedom. At the same time, the reduction of accidents, the increase in alcohol consumption, the variation of the GDP, are extra-legal consequences. According to this distinction, economic consequences are extra-legal consequences.

Being extra-legal, are economic consequences necessarily irrelevant from a legal point of view? Obviously not. Some extra-legal consequences are legally relevant while others are not. In her review of the topic, Carbonell gives legal certainty as an example of a naturally legally-relevant consequence and economic stability as an example of an extra-legal consequence that is not clearly legally relevant.\textsuperscript{25} We agree that variations in legal certainty are obviously legally relevant.\textsuperscript{26} However, we disagree that the legal relevance of economic stability is uncertain, at least in the European Union. In fact, price stability is at the core of the internal market project.\textsuperscript{27} While economic stability cannot be self-evidently reduced to price stability, the latter is at least part of the former. And this suffices to conclude that according to EU law, economic stability is indeed legally-relevant. Thus, we find more precise to distinguish three things here: legal consequences \textit{strictu sensu}, \textit{prima facie} extra-legal consequences (which are later found to be legal consequences) and extra-legal consequences \textit{strictu sensu} (consequences that are later not found to be legally-relevant).

The point can be further illustrated \textit{ad absurdum}. Imagine a criminal law provision that says that "Murder is punished with 30 years to life imprisonment unless the harm was inflicted to avoid a greater harm". George murders JJ. During the investigations, George states "I do not understand why

\textsuperscript{22} Cf. MacCormick and Summers (1991), 530. The precedence relation is usually accompanied by the idea the subsequent arguments need not come into play if the precedent ones are sufficient to settle the issue.

\textsuperscript{23} We do not want to deny that also other arguments can be relevant. We simply find it appropriate for the purposes of this paper to limit the analysis to these forms of legal argument. On the role of textual arguments, see Papayannis (2013), 73-74 and Esposito (2017), 103-105.

\textsuperscript{24} See Cserne (2012) and Carbonell (2013) for a discussion and further references.

\textsuperscript{25} Carbonell (2013), 4.

\textsuperscript{26} See Esposito (2017), 106.

\textsuperscript{27} Article 3(3) Treaty of the European Union.
you are doing this. JJ had been seduced by the dark side of the Force. He was a serious threat to countless lives. Regardless of whether we are in Brazil, Canada, China, Finland, Hungary, India, Italy, Russia, the US, etc., the beliefs of a delusional fan of Star Wars will never work as a legal argument (while it could still be the case that George can successfully invoke some mental-illness defence). None of the legal systems referred to above recognise the existence of the fictional universe invented by George Lucas. Thus, a consequentialist argument presupposing the existence of the Force, Jedi, Sith, etc. is legally irrelevant.

The example also illustrates the distinction between *prima facie* extra-legal consequences and extra-legal consequences *strictu sensu*. Decisions about contractual validity presuppose the identification of the law applicable to the contract – this identification is done by international private law, such as Regulation (EC) No 593/2008. For example, whether the fact that the representative of bank A has not signed bank A’s standard form contractual document has as a consequence the invalidity (or even the inexistence) of the contract is a question about a legal consequence *strictu sensu*. Saving a human life is instead an extra-legal consequence. This is the case because the action of saving a human life is conceivable independently from a legal system. The next question is whether saving a human life is an extra-legal consequence *prima facie* or *strictu sensu*. At least the overwhelming majority28 of legal systems recognize human lives as legally protected. In these systems, saving countless lives is a *prima facie* extra-legal consequence. Upon reflection, it becomes clear that saving countless lives is also a legally-relevant consequence. These systems recognize human life as a legal value.

Let us reconsider the idea of adding a jurisprudential preface29 to the normative arguments of mainstream economists of law. As seen in the Introduction, the jurisprudential preface informs the addressees of the consequentialist arguments of mainstream economics of law that such arguments can be taken into account with the proviso that it remains to be settled what their argumentative force in a court of law is.30 This preface is indeed necessary because, as seen in Section 3, consequentialist arguments are first-order interpretive directive, but then we need second-order directives to solve conflicts between first-order ones.

While insightful and largely agreeable upon, the jurisprudential preface strategy ultimately rests on a faulty premise. The faulty premise is that a consequentialist argument is necessarily about total welfare.31 However, we have seen in Section 3 that this is not the case. Following this faulty premise, economic arguments would be *implicitly translated* into legal arguments about certain consequences.32 In other terms, the relationship between economic arguments about total welfare and consequentialist arguments would be so close that it would hardly require any justification. Just like it is evident that considerations about legal certainty or saving human lives are legally-relevant, it would be evident that considerations about total welfare are legally-relevant. The problem of this analysis is that to build a consequentialist argument one has to establish what consequences matter from a legal point of view. And, as seen, consumer welfare is a possible challenger to total welfare.

Disagreement on which consequences matter has to be solved - just like any interpretive disagreement - by way of legal argumentation. This general observation also applies to economic consequences. In the following sections, we thus reflect on how to answer the question “*what economic consequences are legally-relevant*, those about total welfare or those about consumer

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28 We do not write “all” simply because our limited knowledge of the law of all the other jurisdictions in the world does not allow us to be sure about the universal value of human life.
30 Craswell (1993), 293.
31 Patterson does not refer to consequentialist argument and does not define what it is about. He simply observes that “Drawing attention to the ill effects of the wooden application of precedent is the essence of the prudential form of argument” (1993, 278). However, in a more recent paper, he states that a prudential argument is about “weighting or assessing the consequences (in terms of ‘costs’) of a particular rule” (Patterson 2004, 248).
32 On the concept of implicit translation from economics to law, see Esposito (2017), 104-106.
welfare?”. From a legal point of view, this question is about the legality of two different arguments from economic consequences.

5. Which argument from economic consequences? Conceptual divergences between total and consumer welfare approaches

The previous section explained why the members of the legal community need legally-relevant arguments to exercise their professions – to participate in legal practice. The importance of understanding what consequences are legally relevant is thus apparent: if an economic theory does not fit with legal practice, how can it provide ammunitions expendable in legal argumentation?

In this context, we propose an approach based on two claims, one conceptual and the other methodological. The conceptual claim – anticipated in the Introduction – is that “allocative efficiency” is ambiguous in economic discourse and can mean both total welfare maximization and consumer welfare maximization.33 In other terms, the economic consequences that are relevant when deciding what market-related state of affairs is more desirable can be measured either in terms of total welfare or in terms of consumer welfare. The methodological claim is that an explanation of the law has to provide an account of the reasons given and accepted by legal practitioners. The significance of the methodological claim should be already apparent on the grounds of the discussion in the previous section. Two further observations are worthy of notice.34 First, the consumer welfare approach overcomes a critique commonly made by legal theorists to economists of law, namely that economic analysts ignore legal reasoning and offer mere external accounts of legal practice. In so doing, it reduces and perhaps even bridges the gap between the two disciplines. Second, the consumer welfare approach calls for a comparative evaluation of the explanatory power of competing accounts. A comparative evaluation is advisable because it reduces the possibility of self-indulgent claims, it is more open to subjacent approaches, and it finally helps to clarify the competing approaches. Methodological considerations are specified in the next section. The remainder of this section focuses on the conceptual claim.

Two considerations show the importance of the conceptual claim. First, while it can be accepted – at least for the sake of the argument – that mainstream economics associates allocative efficiency to total welfare, once the legal point of view is adopted, this finding is not particularly moving. In fact, it might well be that the consumer welfare approach, which is subjacent in economic literature, dominates the legal discourse in some contexts at least.35 Second, the claim that allocative efficiency means total welfare maximization is at the core of the economic approach to law. More precisely, that claim holds that what makes the market a desirable social institution is that it allocates resources efficiently because it maximizes total welfare. The fact that in economic literature allocative efficiency can also be about consumer welfare thus hits the economic approach to law at its core.

To test the explanatory power of the concepts of total and consumer welfare, we need to identify cases of divergence between a reasoning based on the former and one based on the latter. Especially in competition law, the conflict between total and consumer welfare as the goal of competition law is extensively debated. However, also in that context, consumer welfare is considered a non-economic goal.36 In other terms, the debate on the goals of competition law – just like the jurisprudential preface strategy – mistakenly grants to total welfare maximization exclusivity over the status of economic goal for competition law. The consequences of this finding are explored in some detail elsewhere.37 This

33 See, Esposito and De Almeida (2017) and Esposito and Grundmann (2017).
34 For a more detailed discussion of these points, see Esposito and De Almeida (2017).
35 See, Esposito (2017).
37 Esposito (Forthcoming, 2018).
debate in competition law scholarship is nevertheless useful to highlight divergences between a total and a consumer welfare approach to competition.

We can identify at least five\textsuperscript{38} interrelated divergences between arguments concerned with total welfare and arguments concerned with consumer welfare: i. Who is harmed by anti-competitive behaviour? ii. Do wealth transfers count? And if so, why? iii. Is the deadweight-loss calculated? And if so, why? iv. Is the elasticity of demand calculated? And if so, why? v. What are the enforcement priorities of a competition authority? We consider them briefly in the following.

\textit{i. Who is harmed by anti-competitive behaviour?}

Understanding whose interest an anti-competitive behaviour is detrimental to is a straightforward way to decide between total and consumer welfare. If one blames certain behaviour because it harmed consumers, it is consumer welfare; if society or the economy as a whole was harmed, then it is total welfare. Unfortunately, not even this criterion is as straightforward as it seems. It is always possible to argue that when someone says s/he cares about the interest of someone, this claim has to be understood as instrumental to another goal. In the economic approach to law, this strategy is rather popular, also outside competition law.\textsuperscript{39} However, to be inferentially plausible, the instrumentalist account needs to have some grounds in legal discourse – otherwise, it is a manifestation of the sufficiency bias.\textsuperscript{40}

\textit{ii. Do wealth transfers count? And if so, why?}

Wealth transfers are the amount of wealth that undertakings extract from their consumers due to their anti-competitive behaviour. From a consumer welfare perspective, wealth transfers obviously count because they make consumers poorer. Total welfarists, instead, are typically uninterested in transfers because their effect is merely distributive – allegedly falling outside the scope of economic analysis. Some scholars deny that wealth transfers have only distributive effects. In their view, they can indirectly reduce productive efficiency because to get the transfers, undertakings would engage in all sorts of wasteful activities. The problem with this argument is that – to avoid boiling down to another manifestation of the sufficiency bias – one has to inquire in detail whether it is plausible that these wastes would take place.\textsuperscript{41} In any case, if considerations about the waste of societal resources are found in the discussion of transfers, then these considerations will count in favour of a total welfare approach.

\textit{iii. Is the deadweight-loss calculated? And if so, why?}

The deadweight-loss represents the welfare loss caused by the restriction of output caused by an anti-competitive behaviour. The deadweight-loss is, at least in part,\textsuperscript{42} a representation of the harm inflicted

\textsuperscript{38} In EU law, two additional differences relate to the inter- vs. intra-state character of competition law and on the axiological hierarchy – if there is any – between the four freedoms and competition law. See, Tuori (2015). A third one relates to the cases in which an anti-competitive behaviour is nevertheless lawful. In EU competition law, there are three types of defences once the anti-competitive character of a conduct is established: \textit{de minimis} defences; efficiency defences; balancing defences. As these three differences are not relevant for the discussion in Section 7, we do expel them from the analysis.

\textsuperscript{39} In competition law this can be seen very clearly in the debate over "private enforcement"; see below. For examples outside competition law, see in consumer law: Epstein (2013), 219; in company law: Armour et al. (2017), 23.

\textsuperscript{40} Jolls et al. (1998), 1595.

\textsuperscript{41} On this point, see Ayal (2014), 44-45.

\textsuperscript{42} At least in part for two reasons. The first is that there is a difference if the market is considered in a short-run or long-run equilibrium. In the short-run, the supply curve is increasing ($y'>0$), so that part of the deadweight-loss is born by producers. In the long-run, instead, the supply curve is flat ($y'=0$) and all the deadweight-loss is born by consumers. Additionally, the standard representation of the deadweight-loss overstates its size because
to those consumers who are excluded from the market. Thus, the deadweight-loss matters from a consumer welfare perspective. However, it is crucial from a total welfare perspective. In fact, from this perspective, the deadweight-loss is the central component of the anti-competitive harm.

**iv. Is the elasticity of demand calculated? And if so, why?**

The elasticity of demand describes the relation between the variation of prices and the variation of quantities exchanges in a market. If a price variation of x% causes a reduction of quantities exchanges of x+k%, demand is elastic. Conversely, if a price variation of x% causes a reduction of quantities exchanges of x-h%, demand is inelastic.\(^{43}\) Elasticity does not provide any direct information about the total-consumer welfare controversy, but it can be used to connect different relevant concepts in a number of ways. In fact, elasticity connects wealth transfers to the deadweight-loss. Accordingly, an estimation of the elasticity allows inferring the deadweight-loss from wealth transfers, and vice versa. On these grounds, it has been observed that a competition authority aiming at the maximization of total welfare would focus on markets with high elasticity, and one aiming at the maximization of consumer welfare would focus on markets with low elasticity.\(^{44}\)

**v. What sanctions? How are they calculated?**

We use the term “sanction” in the sense of any material consequence the law attaches to the fulfilment of the conditions established by the logical antecedent of a norm (see Section 2 above). EU competition law comprises at least two main types of sanctions: fines and damages. From a consumer welfare perspective, fines aim at avoiding the unlawful behaviour. Damages aim at eliminating (or at least reduce) the harmful consequences of the unlawful behaviour.\(^{45}\) From a total welfare perspective, instead, there is no significant difference in terms of aim between fines and damages. Fines and damages are both means to the maximization of total welfare. Ultimately, they function like prices or taxes that the legal system imposes on undertakings.\(^{46}\) They should be equal to the harm to others (wealth transfers, deadweight-loss and enforcement costs) of the anti-competitive behaviour. Neither higher, nor lower than that. The reason is that if undertakings are willing to pay this sanction, it means that the conduct increases total welfare. If they are not willing to pay this sanction, the conduct would have reduced total welfare and, therefore, the undertakings abstain from the conduct.

6. **Which argument from economic consequences? Methodological considerations**

In the previous section, we have seen five points of divergence between total and consumer welfare approaches to the evaluation of the economic consequences of competition law. If variations in consumer welfare are more legally-relevant economic consequences than variations in total welfare, **lawyers need arguments about consumer welfare more than they need arguments about total welfare.** The reason is simply that legal discourse is more porous to considerations about consumer welfare than to considerations about total welfare. Consequences about consumer welfare are thus more easily inferentialised in legal arguments about norms. In other terms, economic considerations about consumer welfare are more easily translated from economic discourse to legal discourse. The five cases of divergence identified above constitute the grounds on which we can compare the explanatory power of total and consumer welfare approaches. What we are still missing is a procedure that does not consider the welfare gains of the excluded consumers and producers in the second-best allocation; on this point, see Esposito (Forthcoming, 2018), ch. 2.

\(^{43}\) With x, k and h > 0.

\(^{44}\) Kaplow (2012).

\(^{45}\) See, for all, Wils (2009).

\(^{46}\) Landes (1983).
for making the comparison. We find it useful to adopt a modified version of the model of interpretive or judicial scorekeeping and we shall call it *explanatory scorekeeping*.

In a linguistic exchange, according to Brandom's model, competent participants keep track of their own, and of each other's speech acts: they "keep score" of commitments and entitlements by attributing these deontic statuses to others and undertaking them themselves. By virtue of this model, the content of a *concept* -- that is, the set of the correct inferences it can be involved in -- is instituted by the practice of keeping score of each participant's discursive commitments and entitlements when that concept is used.

This conceptual framework is the foundation of an approach in legal theory called *legal inferentialism*. The general idea of this approach is to determine legal content in terms of inferential relations between terms, expressions and sentences used in legal practice. More in particular, the ascription of meaning to a legal provision can be seen as the act of assessing the *correctness conditions* of the use of legal terms or expressions that figure in that provision. Determining what a legal expression means is to fix under what conditions the expression is correctly used in the linguistic practice which is called legal argumentation and adjudication. As far as an inferential approach to content is concerned, these conditions have an inferential nature and can be made explicit in legal argument: the meaning of a legal expression can be seen as the set of correct inferential relations in which it participates in a discursive practice.

Let us now conceive of legal argumentation and interpretation in inferentialist terms. In inferentialist terms, legal argumentation and interpretation have to deal with the inferential relations of legal terms, expressions and sentences, and, more in particular, with the *deontic statuses* expressing such content in the scorekeeping practice. These deontic statuses determine the inferences that can be treated as correct in the context of legal argumentation and interpretation. But notice that, in a legal case, the linguistic exchange is basically between the parties and the judge (or court), and that the latter has an authoritative role which has no parallel in everyday linguistic exchanges. Indeed, it is the judge who finally decides how the law has to be interpreted and applied; in this sense, it is the judge who keeps score of the inferences which s/he takes to be correct starting from the speech acts of the parties. The result of the judge's interpretive scorekeeping will determine the content of the term, expression, or sentence at stake relatively to the case in hand.

Recall proposition (2): \((EC_{\text{I}1} \land p \land EC_{\text{N}2}) \Rightarrow (N_1 \land p \land N_2)\) and consider the following imaginary (but plausible) example regarding the application of EU competition law by the European Commission in its capacity of European Competition Authority (ECA) to an undertaking (U). ECA performs the following speech act:

\[
(ECA1): \ U \ \text{has violated Article 102 TFEU by applying unfair prices to its customers.}
\]

In uttering ECA1, ECA undertakes the following commitments (C):

\[
(C1): \ U \ \text{is an undertaking in a dominant position;}
\]
\[
(C2): \ U \ \text{has applied unfair prices to its customers.}
\]

To this allegation, U replies that:

---

47 See in particular Canale and Tuzet (2005).
48 "The significance of a performance is the difference it makes in deontic score -- that is, the way in which it changes what commitments and entitlements the practitioners, including the performer, attribute to each other and acquire, acknowledge, or undertake themselves" (Brandom 1994, 166). Cf. Brandom (2000), 173 ff.
(U1) While our company enjoys a dominant position, our prices are not unfair because if we were to charge lower prices, we would be better-off ceasing to operate in this market at all. And we are sure the ECA does not want that.

With U1, U does not only challenge commitment $C_2$ of EC but also performs another deontic activity. It confers to ECA an entitlement ($E$) to commitment $C_1$:

$$(E1): \text{U is an undertaking in a dominant position.}$$

The challenge to $C_2$ can be broken down in several ways, and divided in multiple commitments. For current purposes, it is useful to note that U1 formulates an argument about economic consequences and to breakdown U's commitments accordingly. In essence, U holds that:

$$(C3): \text{one economic consequence of ECA1 would be that U stops operating in the relevant market;}$$

$$(C4): \text{such economic consequence of ECA1 is worse than the opposite;}$$

$$(C5): \text{in the light of (C3) and (C4), the negation of (ECA1) shall prevail over (ECA1).}$$

In line with our proposition (2) about norms, (ECA1) is the better adjudicative outcome granted (C2), while (C5) expresses the commitment of U to the interpretive directive according to which the economic consequence described in speech act U1 has as normative implication that the negation of (ECA1) ought to prevail on (ECA1). It is therefore clear that U advances an argument from economic consequences to defend itself against the charge of ECA.

Let us move now from interpretive to explanatory scorekeeping. As seen, in the interpretive scorekeeping model, the speakers are the parties and the judge (or judicial authority, more generally). In the case of the explanatory scorekeeping, the speakers are partially different: in addition to the judge, we have one or more theorists trying to explain judicial interpretation and decision-making. Therefore, while we still have the judge, her role is reversed. She does not confer entitlements anymore to the commitments of the other speakers. Rather, her speech acts are considered by the theorists as commitments that their theories have to explain. In other terms, the explanatory scorekeeping is a meta-interpretive scorekeeping because it takes place at a higher (meta) linguistic level.

In the explanatory scorekeeping, “to explain” means to find in the theory a justification for conferring a (theoretical) entitlement to the speech acts of the judge. From this perspective, the analysis in Section 5 will prove to be crucial. Consider point i. of Section 5 – who is harmed by an anti-competitive behaviour. In the light of the discussion there, the consumer welfare theorist (CW) has the following theoretical commitment (TC):

$$(TC1) \text{Anti-competitive practices ultimately harm consumers.}$$

On the contrary, the total welfare theorist (TW) is committed to:

$$(TC2) \text{Anti-competitive practices ultimately harm society as a whole;}$$

$$(TC3) \text{The harm to consumers is a proxy for the harm to society as a whole.}$$

These theoretical commitments will be the grounds for conferring entitlements to the decision of the judge. Imagine that judge J writes the following in her opinion:
(J1) Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it.

For CW it is easy to attribute a point to J in the light of (TC1). On the contrary, TW cannot attribute any point to J – this is especially because (J1) flatly contradicts (TC3). From the perspective of TW, J is wrong. For the purposes of this article, an important aspect of a legal inferentialist analysis is that it makes explicit the concepts used by legal practitioners. In so doing, it guarantees that the application of the explanatory scorekeeping model will provide materials useful for developing an internal explanation of legal practice. This is important because, as seen in the previous Section, legal theorists criticize the usual disinterest of economists for legal reasoning insofar as it implies that they can hardly provide internal explanations of their practice.

(Fun fact: J1 is a citation from The Wealth of Nations. Hence, all the TWs who consider Adam Smith the founding father of economics as an academic discipline might want to reflect on the foundational character of total welfare for professional economics.)

Be that as it may, in the following Section we apply the explanatory scorekeeping model to a landmark case of EU Competition Law, United Brands Company v. Commission.50

7. Which argument from economic consequences? The example of United Brands

Equipped with the conceptual apparatus developed in the previous sections, we now look at a landmark decision in EU Competition Law, United Brands Company v. Commission. Decided in 1978, United Brands Company v. Commission is about the application of Article 102 TFEU, which sanctions the abuse of dominant position.51 Having been in force for almost 40 years, the United Brands decision is thus a stable component of EU Competition Law. Additionally, when looking at EU law, it is important to consider the peculiar judicial style of the Court of Justice of the European Union (CJEU or, the Court). The CJEU in fact relies heavily on its precedents in building its reasoning. It then becomes particularly significant to focus on the reasoning in landmark cases in EU law.

In the 70’s, the United Brands Company (UBC) was a US multinational operating in the commerce of bananas, in particular of the Chiquita brand. The European Commission found UBC to have abused of its dominant position in four, interconnected ways.52 First, UBC forbade its ripeners/distributors to resale bananas, basically imposing a limitation of parallel trade. Second, it refused to deal with a distributor, excluding it from the market. Third, UBC had discriminated its distributors, putting them at competitive disadvantage. Fourth, UBC had charged unfair prices.

The purpose of this section is to use the explanatory scorekeeping model described in Section 6 to assess to what extent the reasoning of the CJEU in United Brands fits in a total and in a consumer welfare approach to competition law. As in the previous section, the scorekeepers are a total welfarist (TW) and a consumer welfarist (CW). They attribute points to the decision of the CJEU in the light of the contents of Section 5. In other terms, when the reasoning of the Court fits in one of their frameworks, this framework is attributed one point.

51 Among other things, Art 102 TFEU sanctions excessive and unfair pricing. This provision has been applied following the so-called “United Brands test”, which holds that Article 102(2)(a) is violated when (i) the prices charged are excessive in comparison to the cost of the product/service and (ii) unfair in themselves or in comparison to the prices charged to or by others. See, for example, Decision of the European Commission of 14 July 2004, Scandlines Sverige AB v Port of Helsingborg, Case COMP/A.36.568/D3. United Brands is cited in multiple decisions and discussed in many doctrinal texts.
52 We simplify a bit the fact to focus the reader’s attention on what matters for current purposes.
The CJEU justified the unlawfulness of the restriction on resales by reference to Article 102(2)(b) TFEU, which forbids the following conduct: "limiting production, markets or technical development to the prejudice of consumers". The Court stated:

(CJEU1): Restricting competition to pursue a policy of quality is a lawful goal. However, UBC's restriction goes beyond the objective to be attained thereby *limiting the markets to the prejudice of consumers and affecting trade* between member states, in particular by partitioning national markets.

TW and CW observe the following:

(TW1): Limiting the markets "affects trade between member states" in the sense that it causes misallocations of resources, thereby reducing total welfare. "Consumers" means "potential consumers who would have purchased the bananas but for the restriction". From this perspective, the prejudice to consumers is a salient effect of the true problem, the deadweight loss.

(CW1): Limiting the market harms consumers by reducing choice and increasing prices. The reference to the trade between member states is not important for current purposes because it is simply a procedural constraint to divide between the application of EU and national competition laws, as established by the case law of the Court (see C-22/78, [17]). Moreover, there is no reason in CJEU1 to reduce the scope of "consumers" to the "excluded-but-for consumers". Both the provision and CJEU1 show that limiting the markets is forbidden because it is prejudicial to consumers. Thus, TW1 is not convincing.

Thus, these are the theoretical entitlements (TE) attributed by TW and CW:

(TE_{TW1}) CJEU1 has a total welfare explanation;
(TE_{CW1}) CJEU1 has a consumer welfare explanation;
(TE_{CW2}) CJEU1 has no total welfare explanation.

Both TW and CW attribute one point to the CJEU, but CW contests TW's attribution. We do not settle these conflicts here, but let the readers form their own judgment. (This situation can be understood as TW ignoring the speech acts of CW. As a consequence, it is almost as if TW and CW were not really

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53 See paras 157-159:
157. To impose on the ripener the obligation not to resell bananas so long as he has not had them ripened and to cut down the operations of such a ripener to contacts only with retailers is a restriction of competition.
158. Although it is commendable and lawful to pursue a policy of quality, especially by choosing sellers according to objective criteria relating to the qualifications of the seller, his staff and his facilities, such a practice can only be justified if it does not raise obstacles, the effect of which goes beyond the objective to be attained.
159. In this case, although these conditions for selection have been laid down in a way which is objective and non-discriminatory, the prohibition on resale imposed upon duly appointed Chiquita ripeners and the prohibition of the resale of unbranded bananas — even if the perishable nature of the banana in practice restricted the opportunities of reselling to the duration of a specific period of time — when without any doubt an abuse of the dominant position since they limit the markets to the prejudice of consumers and affects trade between member states, in particular by partitioning national markets.
discussing with one another.) The CJEU considered UBC’s refusal to deal with a distributor, contrary to both the above-mentioned Article 102(2)(b) and (c), which forbids “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”:

(CJEU2): An undertaking in a dominant position such as UBC cannot terminate a long-term business relationship when the partner abides by regular commercial practice and the orders it places are in no way out of the ordinary. This refusal would limit markets to the prejudice of consumers and would amount to discrimination which might, in the end, eliminate a trading party from the relevant market.

About CJEU2, TW and CW perform the following speech acts:

(TW2): CJEU2 can be explained just like CJEU1.
(CW2): In CJEU2, the Court confirms the importance of the prejudice to consumers. Additionally, the Court shows that the harm to trading parties is instrumental to consumer welfare. If they are discriminated, they might be eliminated from the market, which would make consumers worse-off. Hence, TW2 is even less convincing of TW1.

With (TW2) and (CW2), TW and CW attribute the following theoretical entitlements:

(TE_{TW}2) CJEU2 has a total welfare explanation;
(TE_{CW}3) CJEU2 has a consumer welfare explanation;
(TE_{CW}4) CJEU2 has no total welfare explanation.

At this stage, both TW and CW attribute two points to the CJEU, but CW contests TW’s attributions. The third point is the discrimination of distributors, and the relevant provision is again Article 102(2)(c) TFEU. The CJEU establishes this:

See paras 182-183:
182. It is advisable to assert positively from the outset that an undertaking in a dominant position for the purpose of marketing a product — which cashes in on the reputation of a brand name known to and valued by the consumers — cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.
183. Such conduct is inconsistent with the objectives laid down in Article 3(1)(g) of the treaty, which are set out in detail in Article 82, especially in paragraphs (b) and (c), since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market.

See paras 232-234:
232. These discriminatory prices, which varied according to the circumstances of the member states, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of bananas while still green and by reducing the deliveries of the quantities ordered.
233. A rigid partitioning of national markets was thus created at price levels, which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been competition had thereby been distorted.
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(CJEU3): Having partitioned the market, UBC was able to charge to its distributors prices that were artificially different. In so doing, UBC _hindered the free circulation of goods, thereby putting its distributors at competitive disadvantage._

With regard to (CJEU3), TW and CW observe the following:

(TW3): The concern for the circulation of goods is explained like that for limiting the market in CJEU1: it reduces the number of exchanges, thereby causing deadweight losses.

(CW3): For the CJEU, hindering the free circulation of goods harms the distributors. As "limiting markets" and "hindering the free circulation of goods" have essentially the same meaning, CJEU3 is explained by pointing out that distributors are also consumers. (TW3) ignores the factual implication between hindering the circulation of goods and the disadvantage for distributors made explicit by the adverb "thereby". Hence, (TW3) is even less convincing of (TW2).

About CJEU3, the theoretical entitlements given by TW and CW replicate the pattern of the previous speech acts of the CJEU so that both TW and CW attribute three points to the CJEU, and CW contests all the attributions of TW.

Finally, on the unfairness of the prices charged by UBC, the CJEU applies Article 102(2)(a), which states "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions": 57

(CJEU4): charging a price excessive because it has no reasonable relation to the economic value of the product supplied is a _way to reap trading benefits_ which the undertaking would not have reaped if there had been normal and sufficiently effective competition. The difference between prices and costs of production is an objective indicator of the degree of excessiveness of the price.

TW and CW advance these explanations of (CJEU4):

(TW4): Equating the economic value of a product neither to its exchange nor its use value, but to its cost of production, is bizarre. Nevertheless, that is not important. Calculating the difference between prices and costs allows inferring the deadweight loss once the elasticity of demand is considered.

(CW4): The CJEU considers the prices unfair because UBC has enriched itself at the expenses of its consumers. There is no need to invoke inferences based on what the Court could have said in

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234. Consequently the policy of differing prices enabling UBC to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, was an abuse of a dominant position.

57 See paras 249-251:

249. It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

250. In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.

251. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC’s costs structure.
the light of the relationship between prices, elasticity and the deadweight loss. The silence of the Court on the elasticity cannot be ignored, as TW does. This silence is theoretically relevant.\(^{58}\)

The analysis of (CJEU4) reiterates what we already saw. Both TW and CW attribute a point to the Court, but CW contests the explanation given by TW. In the light of (CJEU1-4), the Court concluded that the Commission had proven that UBC had committed the first three violations of Article 102 TFEU, but not the fourth because the Commission had failed to prove that the prices were excessive. On these grounds, the Court reduced the fine imposed to UBC.\(^{59}\)

(CJEU5): The Commission fined UBC for the sum of 1 mln units of account in the light of UBC’s total annual turnover and also of the high profits made as a result of its pricing policy. The amount of the fine imposed does not seem to be out of proportion to the gravity and duration of the infringements (and also to the size of the undertaking), but it shall be reduced by 15% due to the partial annulment of the decision of the Commission.

Concerning CJEU5, TW and CW observe the following:

(TW5): The sanction is calculated oddly, at least in part. It is reasonable to assume that enforcement costs are liquated separately from the fine. To calculate the fine, the Court considers the duration, the profits and the turnover of UBC. The duration is obviously relevant, and the profits are a convincing proxy for the wealth transfers. Additionally, as explained in (TW4), from the profits we can infer the deadweight loss. If the sanction is set at the level of wealth transfers, deadweight loss and enforcement costs, we can expect that only the violations of Article 102 TFEU that increase total welfare will take place. However, the turnover of UBC is irrelevant.

(CW5): The fine has a dissuasive function. By violating Article 102 TFEU, UBC has hurt its consumers which, as explained in (CW3), also include UBC’s distributors. From this perspective, it becomes important to consider the turnover of UBC, the duration of the violation and the profits it generates to ensure that the fine is high enough to deter UBC and others from violating Article 102 TFEU. Note that in CJEU5 “the high profits made as a result of its pricing policy” is synonym to “the gravity ... of the infringement”. Also in (TW5), the silence of the Court is filled with inferences deriving from the total welfare approach with no justification, but the need to make (CJEU5) fit with the theory. TW constantly assumes what s/he has to prove and, in so doing, commits the petitio principii fallacy. Apparently, this is not epistemologically sound. The

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\(^{58}\) On the silence of the legislature, see Canale and Tuzet (2010). With regard to the case law of the CJEU, see Sarmiento (2012) and Sankari (2013), especially 177 ff.

\(^{59}\) See paras 296 and 302-304:

- 296 Finally according to the Commission the amount of the fine was fixed at one million units of account in the light of UBC’s total annual turnover of about two thousand million dollars and its annual turnover in bananas of fifty million dollars on the relevant market and also of the high profits made as a result of its pricing policy. ...
- 302 The amount of the fine imposed does not seem to be out of proportion to the gravity and duration of the infringements (and also to the size of the undertaking).
- 303 Account must however be taken of the partial annulment of the decision and the amount fixed by the Commission reduced accordingly.
- 304 A reduction of the fine to 850 000 (eight hundred and fifty thousand) units of account, to be paid in the national currency of the applicant undertaking whose registered office is situate in the Community, that is to say 3 077 000 Netherlands guilders (three million seventy seven thousand Netherlands guilders), appears to be justified.
consumer welfare approach performs much better in explaining what the Court says and what it does not say.

In the light of the above, TW attributes four points to the CJEU while CW attributes five points to it. In addition, CW criticizes all the attributions made by TW and ultimately charges her/him of committing an informal fallacy, the petitio principii or begging the question fallacy. This outcome is not conclusive, but we submit that it is a good starting point for a broader reflection on the explanatory power of total and consumer welfare approaches to law.

8. Conclusions

This last section recapitulates the flow of the essay, what it did and did not claim and concludes with some remarks on future research. The starting point of the analysis has been the way in which economists analyse norms. In this regard, it was pointed out that economists conceive of norms as a means to bring about economic consequences. Hence, norms are evaluated in their capacity to cause these economic consequences into existence. However, the total vs. consumer welfare disagreement shows that the concept of economic consequence is not self-evident. We then moved to legal theory, to see what insights can be collected there about the relationship between norms and economic consequences. The standard model of legal reasoning conceives of norms as the major premise of a syllogism, with the fact being the minor premise, and the conclusion being the application of the norm to the facts. These premises are justified by way of specific arguments. The arguments justifying norms are interpretive arguments, and they are built in the light of first- and second-order interpretive directives. In this context, it was shown that economists formulate interpretive arguments based on the economic consequences of norms. These arguments are a type of argument from consequences, the argument from economic consequences. The legal literature on the point shows the importance of distinguishing between two categories of economic consequences – prima facie economic consequences and economic consequences. Prima facie economic consequences can be shown to be legally-relevant, thereby becoming legal consequences, while mere economic consequences cannot. The difference is crucial because mere economic consequences are irrelevant for legal practice, which means that they cannot be used to justify the legality of a norm. At this point, it becomes clear that the total vs. consumer welfare disagreement is consequential for an economic approach to law. After having pointed out five divergences between total and consumer welfare approaches, following Brandom’s inferentialism, we built an analytical device that we call explanatory scorekeeping. Finally, with the aid of this tool we compared possible explanations of the judicial reasoning in the 1978 EU Competition Law case United Brands. We find that a total welfare explanation can be given of four out of five parts of the decision, while a consumer welfare one can be given of all of them. Additionally, the consumer welfare approach contests all the explanations on the grounds of the total welfare approach. In the light of the above, we observe the following. First, the issue of what economic consequences are legally-relevant has important social and legal implications, so that it deserves more attention by legal scholars. Second, and conversely, “economic consequences” does not necessarily mean what mainstream economists think it does. This fact requires more attention by lawyers but also by economists in the choice and justification of the premises of their analysis, arguments, etc. This recommendation is particularly important because a mainstream approach can both shift the burden of persuasion to a subjacent one and also claim to have explained a phenomenon by advancing poor explanations.

After having summarized what we claim and why we think it is important, let us emphasize what we do not claim. We do not claim that we have established once and for all that it is true that EU Competition Law is about consumer welfare maximization. The analysis does not warrant this claim for two main reasons. First, United Brands is just one decision. Albeit an important one, the analysis
has to have a much broader scope. It is expectable that, with a broader scope, the room for silence-filling explanations will shrink. Second, and perhaps more importantly, the claim is comparative between total and consumer welfare approaches. It might well be that a third approach would have superior explanatory power. Additionally, we do not claim that any argument about economic consequences is about consumer welfare. We have simply explored the possibility that in a specific context – EU Competition Law – it does.

Let us now conclude by pointing out directions for further research. In this regard, we find one consideration particularly significant. We have seen that the explanatory project started by Posner in the 70’s of the last century has progressively become unfashionable. However, it is an important research program for legal scholarship. Bearing in mind that moral explanations of legal discourse are customarily offered and debated by legal scholars, we do not see why it should be any different for economic explanations – especially if one considers normative economics as falling within moral philosophy. Additionally, we have shown that if the explanatory hypotheses are spelt out in enough detail, legal argumentation becomes a source of evidence that also economists might want to consider in their analysis of the law. This will ultimately increase the realism of the analyses and reduce the irritation of doctrinal legal scholars for economic approaches to law. Finally, there are points touched upon in this essay that will benefit from additional elaboration. First, the concept of economic consequences, which can refer to the consequences for the economy, or to consequences calculated with economic methods, or to both. Second, we have limited the account to the argument that more clearly has a connection with economic consequences – the consequentialist argument from economic consequences. However, we find no reason to doubt that economic consequences have a bearing also in the formulation of other interpretive arguments. Third, we have seen that, in Section 7, an analytical problem derived from the lack of any rule of inference on how to consider the silence of the Court. A refinement of the explanatory scorekeeping model in this regard is thus advisable, if not necessary. Fourth and finally, we have some hope that, once properly refined, the explanatory scorekeeping model could be coded, thereby opening the way to a quantitative internal analysis of large sets of legal materials.
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