1. Introduction

It is difficult to find an issue in EU competition law which is both as potentially important and as arguably neglected by legal scholarship as the rules applicable to market definition. This incredibly broad topic is relevant for all areas of competition law and for a number of different enforcement steps, leading it to be described as the most frequently debated issue in competition cases.[1]

At the most basic level, to define a relevant market means to delineate an area of confrontation between competing undertakings, in a material, geographic and temporal sense. This area reflects, up to a point, the competitive pressures to which those undertakings are subject and which are capable of limiting their behaviour in the supply or demand of the products or services in question.

One may need to determine the borders of the relevant market in order to assess (i) if an undertaking holds a dominant position awarding it a special responsibility and limiting its freedom of behaviour; (ii) if an agreement between undertakings is capable of having a significant impact on the market and is thus subject to legal restrictions; (iii) if a merger between undertakings is likely to substantially lessen competition and should be prohibited; etc.

The borders of the relevant market often have a decisive impact on what an undertaking may and may not do. So it is surprising that there is actually very little clarity about the basic concepts and the method one should follow to delineate the market. More often than not, the perceptions of managers regarding the markets in which their companies are active, the opinions of economists concerning the breadth of those markets, and their delineation according to the law, are all quite different.

The study of market definition has so far been characterized by a clear dominance of economic doctrine and by a surprising tendency for silence in legal scholarship. What is more, the latter has tended to be limited to reproducing soft-law documents, and to rely excessively on administrative practice and on the teachings of economic science. The latter

[1] See Kaplow, L., 'Why (ever) define markets?', (2010) 124 *Harvard Law Review* 437, at 439.

characteristic is particularly problematic because the two perspectives rest upon fundamentally different bases.

Economists tend to see market definition as a necessary evil, an imperfect instrument to arrive at an end which would, ideally, be reached through methods of direct assessment of market power. Economic science was not concerned at all with the identification of the precise borders of a specific market before competition law created a demand for such clarity.[2] To this day, economists' interest in this subject remains, fundamentally, a by-product of antitrust law (and certain branches of regulatory law). Many of them abhor what they perceive as lawyers' tendency for purely structural market analysis, which often leads to erroneous conclusions. Several leading thinkers have suggested doing away with market definition altogether. This initially American debate has reached a peak in recent years and even crossed the Atlantic.

While economists may hope that the end result of their proposed market definition methods will be as close to reality as possible, it is clear that this reality is not perceivable in an objective manner. It must be measured through economic models and assumptions, built on the basis of invariably imperfect information. Furthermore, as economists sometimes confess to, no one truly knows what a market is. Inevitably, a number of options must be taken which are arbitrary – or, at best, largely discretionary – and which render the delineation of a market a necessary fallible and simplified exercise.

Jurists also do not know what a market is.[3] They turn to market definition as a (sometimes) indispensable tool for the interpretation and

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[2] See Fisher, F. M., 'Economic analysis and "bright-line" tests', (2008) 4 *Journal of Competition Law and Economics* 129, at 132: 'What, then, does economic analysis have to say about market definition? In one sense, the answer is "Nothing at all". The question of what is "the" relevant market never arises in economics outside of antitrust. Moreover, … it is not a question that has a precise, well-defined answer.' Kate, A., Niels, G., 'The relevant market: a concept still in search of a definition', (2009) 5(2) *Journal of Competition Law and Economics* 297, at 298, noted: 'it is hard to find a satisfactory description or definition [of relevant market] in textbooks on microeconomics or industrial organization, if the concept is mentioned at all in such readings'. And Kaplow concludes: 'In the field of industrial organization economics, which devotes substantial attention to matters of market power and competition policy more generally, the concept of market redefinition [beyond a homogeneous product market] does not really exist' (Kaplow, *supra* n.1, at 458).

[3] See Ordover, J. A., Wall, D. M., 'Understanding econometric methods of market definition', (1989) *Antitrust* 20, at 20: 'Can market definition be more than educated guesswork? There are times when that seems doubtful. There is a

enforcement of competition law. Confronted with rules whose meaning and consequences depend on a concept which is, at the outset, foreign to legal science, jurists tackle two predominant concerns: certainty and justice. On the one hand, they need an objective, certain and predetermined method to identify a market in a specific case, so as to guarantee an indispensable level of legal certainty. On the other hand, that method must lead to realistic and just results, or behaviours will be prohibited and penalized on the basis of false assumptions, and unjustified, disproportional and discriminatory burdens may be imposed on undertakings. An equilibrium must be sought between the two.

This equilibrium requires a legal solution, determined in statute and clarified in case-law. Thus, while the study of this topic and its implementation requires an interdisciplinary approach, lawyers should not lose sight of the fact that, at the end of the day, the way to define markets cannot be left up to a debate of economics.[4]

The concepts and method of market definition, for the purposes of enforcing competition law, are a matter of law. The use of indeterminate concepts gives the law some welcome flexibility but, at any given time, it must be possible to know the method we should use to legally define a market. The law does not refer this issue to economic science, allowing the latter to freely determine what a relevant market is. Instead, it bases itself on economic science to define normative criteria for market definition.[5] Economic doctrine may disagree with the options underlying

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widespread perception that the "fact" of a market with certain specific contours is not like other facts capable of definitive proof. For example, though it may be just as difficult to prove the existence of a conspiracy as it is to prove the market, at least lawyers embark upon the former task confident that there is a "real" answer – there either was a conspiracy or there wasn't. Market definition is different. The "inherent fuzziness" that the Supreme Court spoke about twenty-five years ago is real, and it can make lawyering very difficult.'

[4] As stated in Glassman, M. L., 'Market definition as a practical matter', (1980) 49 *Antitrust Law Journal* 1155, while it is true that '[t]he definition of the relevant product and geographic market in antitrust litigation requires the marriage of the economic and legal disciplines', this 'marriage is, at best, a troubled one, and divorce seems always imminent'. See also Baker, J. B., Bresnahan, T. F., 'Economic evidence in antitrust: defining markets and measuring market power', (2006) 328 *Stanford Law and Economics Olin Working Paper*, at 2: 'Antitrust analysis … reflects the concerns of the legal systems, leading judges at times to approach issues in ways that differ from how we economists might act on our own.'

[5] In the words of Judge Cruz Vilaça: 'the great challenge for the jurist, and in particular, for the judge, is to turn economic theories into solid legal criteria,

these normative criteria defined by the legislator and the courts but its criticism, no matter how accurate, does not, by itself, change them.

Therefore, despite the frequency with which this occurs, it is incorrect to try to identify in economic doctrine the 'correct' method of market definition in competition law.[6] Economic doctrine can only supply arguments to be pondered by the interpreters of the law, to the extent they are adequate, and their proposed solutions are compatible with legal principles and rules in force, or in a *de jure condendo* approach. In other words, economists tend to discuss competition policy, not competition law.

It should also be kept in mind that an ideal market definition method for economic science is not necessarily ideal for the law. If for no other reason, this is so because rigorously determining price elasticity and interchangeability is impossible in practice. Even approximate attempts

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capable of securing the clarity of the concepts and their adaptability to a complex reality, as well as to enhance legal certainty and predictability in the application of the law': Cruz Vilaça, J. L., 'The intensity of judicial review in complex economic matters – recent competition law judgments of the court of justice of the EU', (2018) 6(2) *Journal of Antitrust Enforcement* 173, at 187. As stated by Brunt: 'One might refer to competition law as a "blend" of law and economics or as having "mixed economic-legal content". But while suggestive, such a characterization is, to a degree, misleading. It is more apt to say that economic concepts are "absorbed" or "assimilated" by the law. For it is plain that the law must be the dominant partner' (OECD, *Judicial enforcement of competition law*, GD(97)200, 1996, at 47–48); and by Potocki: 'competition law is different, not only because it applies law to economics but because it grafts economic concepts onto law. … It issues prohibitions with reference to economic concepts; for example, it prohibits abuse of dominant position. This prohibition cannot be understood and applied only in its economic sense. Economic concepts thus become legal rules. The transmutation is essentially a political choice, a political act. … [A]s economic concepts have become an integral part of the rule of law, a purely economic logic no longer applies' (*ibid*, at 54). Recall also Bork: 'Because the issues of goals and of economic means must both be faced, antitrust is necessarily a hybrid policy science, a cross between law and economics that produces a mode of reasoning somewhat different from that of either discipline alone. … Though its theory is not, and cannot be, nearly so highly developed as that of economics, law does have requirements that are distinctively its own' (Bork, R. H., *The antitrust paradox – a policy at war with itself*, The Free Press, 1993, at 8).

[6] See, e.g., Case T-1/89 *Rhône-Poulenc et al v Commission* EU:T:1991:38, Section E(5) (Opinion of Judge Vesterdorf, acting as AG); and Case T-491/07 RENV *CB v Commission* EU:T:2016:379, para. 98.

will not be feasible in the majority of cases.[7] A legal framework resting on such a theoretical requirement would be bound to create injustice. The law finds compromise solutions, based on concerns of fairness and pragmatism, which play no role in economic science. It is more important for legal certainty and social peace that there be an easily determinable normative concept of market that can be applied homogeneously, than that there be a theoretically perfect concept which will always be out of reach.

In legal practice, the significance of market definition has been simultaneously overestimated and underestimated.

On the one hand, the Court has occasionally stated that 'the appropriate definition of the market in question is a necessary precondition of any judgment concerning allegedly anticompetitive behaviour',[8] which is clearly at odds with its own case-law. The necessity of market definition has become so axiomatic that we have forgotten that, for a long time, antitrust law was applied without any such operation – as we now know it – being undertaken.

On the other hand, there are some areas where the borders of the market in question may have a decisive impact, which have not yet been fully recognized. And there is a fundamental value of the market definition method, as a theoretical basis for the very legitimacy of antitrust rules, that is rarely addressed, and which raises intriguing concerns.

It must be stressed, at the outset, that a monumental gap has developed between the theory of market definition and its practice. The importance of market definition has grown in time. It was introduced gradually in the different areas of competition law and in the different jurisdictions. In

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[7] See Shenefield, J. H., 'Market definition and horizontal restraints: a response to Professor Areeda', (1983) 52 *Antitrust Law Journal* 587: 'The fact that a series of economic concepts may be difficult to implement should cast no doubt on the value of mastering and refining those concepts. It is essential that we have our economic ideals in mind, if only so that we can be conscious of how far we must depart from them. … From the practitioner's point of view, however, the abstract desirability of analyzing each of these factors will frequently be modified by pragmatic considerations. These considerations include whether the required data are likely to be available at a reasonable cost in the kinds of circumstances in which attorneys and their clients most frequently find themselves, and whether judges and juries will be willing or able to attach much significance to them.'

[8] Case T-68/89 *Società Italiana Vetro et al v Commission* EU:T:1992:38, para. 159.

parallel, the theory of market definition has become increasingly complex. The quest for an ever-better method of identifying relevant markets is far from over. But practice has not kept up, nor can it. The concerns and pragmatic possibilities of practitioners, in the vast majority of cases, especially outside of specialized agencies and beyond very large cases, are now miles away from the theoretical framework.

Today, market definition knows different shapes depending on whether we look at it in economic theory, in administrative theory and in legal (judicial) theory. And, in most cases, neither of those quite matches legal practice.

To make matters worse, this has become an area where, clearly, the law for the 'poor' is not the same as the law for the 'rich'. The fact that strict adherence to theory requires ample data processing and expensive economic studies means that the options realistically available to a large multinational group are not the same as those available to most undertakings or consumers when enforcing, or defending themselves against an enforcement of, competition law that may turn on an issue of market definition.[9] The market definition method cannot change depending on whether those applying it are rich. And it cannot be so demanding that those who are poor cannot apply it. This is a fundamental aspect to keep in mind as one considers the possible degrees of complexity in market definition exercises.

This book focuses on market definition in EU competition law. While it may be of some use in non-European jurisdictions, it does not aim to state the law in force elsewhere. Contrary to what might be expected, especially by those who perceive this topic strictly as a product of economic science, the rules on market definition vary between legal orders.[10] Indeed, even within the EU, and despite the harmonization of competition law among the Member States, there is at least one important variation between national laws. Options and precedents in the Member States will be mentioned only to the extent that they are particularly relevant to a point being made.

The analysis that follows rests on what little guidance can be found in the letter of the law itself and, most of all, on an exhaustive overview of the case-law of the European Court of Justice (ECJ) and European

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[9] See Idot, L., 'Modern industrial economics revisited – comments on Daniel Rubinfeld, Michele Polo and Oliver Budzinski', in Drexl, J., Kerber, W., Podszun, R. (eds.), *Competition policy and the economic approach*, Edward Elgar Publishing, 2011, 139, at 142.

[10] See, e.g., the different legal solutions for definition of multisided markets in the EU and in the USA (section 9.2).

General Court (EGC), and on a sample of case-law from Member States. Soft-law documents adopted by the European Commission and the National Competition Authorities (NCAs), as well as a sample of their decision-making practice, will also be taken into account.[11]

The main purpose of this book is to provide a comprehensive, general theory of market definition in EU competition law. It hopes to fill a gap in scholarship on this topic, too often piecemeal, and unconcerned with identifying legal solutions as determined in the case-law.

Ultimately, by providing an ensemble, bird's-eye view of the case-law relating to market definition, I hope to contribute to greater clarity in debate and to the elimination of internal contradictions in the courts' individual rulings, as well as in sectoral debates that lose sight of the big picture.

The time has come to perfect the initial market delineation concepts, included in the first judgments and in the Commission's Notice, which are no longer in accordance with the clarifications of the Court's[12] thinking. This can only be achieved with a fundamental shift in the limited judicial review to which market definitions by the Commission have been subject, and with a reclaiming, by the Court, of the decision-making and legal interpretation space which is its own.

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[11] The case-law was systematically collected up to 31 May 2018. To the extent possible, particularly relevant judgments after that date were still considered.

[12] Throughout the book, and unless otherwise indicated, the term 'Court' refers to the Court of Justice of the European Union, including the ECJ and EGC.