Journal of Competition Law & Economics, 17(3), 586–619
https://doi.org/10.1093/joclec/nhab001
Advance Access publication 17 March 2021

THE ANTITRUST MARKET DOES NOT EXIST: PURSUIT OF OBJECTIVITY IN A PURPOSIVE PROCESS

*Magali Eben**

ABSTRACT

There is no such thing as an 'antitrust market'. Markets are merely analytical tools, which serve to structure available evidence and enable a comprehensive answer to a particular question. They do not exist as such in the real world but are figments of our intellectual imagination. In that capacity, they can be immensely useful. A pursuit of objectivity in the process of product market definition remains in vain as long as we fail to acknowledge that the utility of antitrust markets lies precisely in their reductive and purposive nature. This article makes two main arguments. The first argument is simple, yet far-reaching: antitrust market definition is useful because it is a method to enable the answer to a question. The implication is that the market is defined by reference to that particular question, rather than as an independent and neutral object. Market definition is 'purposive'. In the context of competition investigations, this question can concern, but does not have to be limited to, determinations of market power. The second argument is that market definition, even though purposive, does not need to be subjective. Objectivity in market definition can be achieved by aspiring to process objectivity, rather than to objective outcomes.

JEL codes: K21; L40; A00

I. INTRODUCTION

Product market definition is both the most controversial and most ubiquitous concept in competition law. Though prominent scholars have railed against it,[1]

* Lecturer in competition law, University of Glasgow, Glasgow, Scotland, United Kingdom. E-mail: Magali.Eben@glasgow.ac.uk. In accordance with the ASCOLA declaration of ethics, no conflict of interest is declared. I am very grateful to Konstantinos Stylianou, Florence Thépot and Maximiliaan Gobert-Tanghe for their comments on the first draft of this paper, and to the anonymous reviewers for their encouraging comments.

[1] See extensive debate on the sense and nonsense of market definition: Kaplow, L. 2010. Why (Ever) Define Markets, Harvard Law Review, 124(2): 437; Markovits, R.S., The Inevitable Arbitrariness of Market Definition's, in ECONOMICS AND THE INTERPRETATION AND APPLICATION

it remains a salient step in antitrust investigations. Antitrust market definition persists, despite many perceived flaws, because it provides enforcers with an easy to comprehend method to structure the evidence before them, so that they can answer the factual and legal questions they were called upon to resolve. When market definition is criticized, it often reveals an underlying flaw in the reasoning of sceptics: they take market definition too seriously. There is, after all, no such thing as an 'antitrust market' (or any other market, for that matter). Markets are merely analytical tools, which serve to structure available evidence and enable a comprehensive answer to a particular question. They do not 'exist' as such in the 'real world', but are figments of our intellectual imagination. In that capacity, they can be immensely useful. They lend themselves to the nuances and aims of the particular study for which they are constructed. From 'economic' markets to 'antitrust' markets, the 'market' notion enables the study of occurrences which are otherwise too challenging to capture. A pursuit of 'objectivity' in the process of product market definition remains in vain as long as we fail to acknowledge that the utility of antitrust markets lies precisely in their reductive and purposive nature.

This article intends to make two main arguments. The first argument is simple, yet far-reaching: the antitrust market does not exist, and that is a good thing. The utility of antitrust markets lies exactly in the fact that antitrust markets are not 'natural' phenomena, but intellectual fictions. Antitrust market definition is useful because it is a method to enable the answer to a question. The important implication of this argument is that the market is therefore defined by reference to that particular question, rather than as an independent and neutral object. In the context of competition investigations, this question can concern, but does not have to be limited to, determinations of market power.

The second argument this article makes is that, even though the market is fictional and purposive, market definition can still be objective. Both enforcers and scholars seem increasingly concerned with coherence and certainty in the process and rationale of market definition.[2] This article therefore explains, in Part IV, why calling antitrust markets 'subjective', merely because they are purposive, is erroneous. Markets may be defined to answer a particular question, which makes them flexible; yet, they should only be condemned as

OF U.S. AND E.U. ANTITRUST LAW: VOLUME I. 165 (R.S. Markovits eds., Austin, Springer 2012); Werden, G.J., Antitrust Needs the Relevant Market, in INTERNATIONAL ANTITRUST LAW AND POLICY (B.E. Hawk, Fordham Competition Law 2013); Cameron, D., Glick, M., Mangum, D. 2012. Good Riddance to Market Definition, Antitrust Bulletin, 57(4): 719.

[2] See Podszun, R. 2016. The Arbitrariness of Market Definition and an Evolutionary Concept of Markets, The Antitrust Bulletin, 61(1): 123; Sousa Ferro, M. MARKET DEFINITION IN EU COMPETITION LAW (Cheltenham, UK, Edward Elgar 2019) 21; Markovits (*supra* note 1) 166. Also raised by the European Commission in *Market Definition Notice Evaluation Roadmap* (2020) Ref. Ares(2020)1911361, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law [hereafter 'Evaluation Roadmap'] 1.

'subjective', where they are defined by reference to the personal views of those engaged in defining them, rendering them, ultimately, arbitrary. Where they are defined by reference to a particular question, even where multiple such questions are possible, markets are not inherently subjective, and objectivity can be attained. The article argues that objectivity in market definition, under a purposive approach, can be achieved by aspiring to process objectivity, rather than to objective outcomes. For the most part, discussions about market definition remain too narrow-minded, seeking objectivity by pursuing 'realistic' *outcomes* rather than a coherent process, fuelled by a lack of recognition that market definition's utility lies in its analytical and imaginary nature. This article, therefore, also seeks to provide a reassurance that a 'purposive' antitrust market does not automatically mean a 'subjective' antitrust market, and proffers preliminary suggestions on steps to ensure process objectivity in antitrust market definition. Achieving objectivity in market definition is crucial because, since the concept of the market is foundational in EU competition law, and markets are routinely defined as the aperture of administrative decisions, subjectivity in market definitions would ultimately undermine the legitimacy of the enforcement of the law.[3]

The article is divided into three parts. Part II ('The nature of markets') provides a general portrayal of markets as intellectual constructs describing different economic phenomena, corresponding not to natural objects in the real world, but to analytical tools which help structure the study of a particular question. This description sets the scene for Part III ('The nature of antitrust markets') which sets out the nature and utility of market definition, in the context of competition law. This part introduces the purposive approach to antitrust market definition, according to which the boundaries of the market will be drawn in function of a specific question. It emphasizes that market power is but one question which can be asked as part of this broader framing function of the antitrust market. Part IV ('Objectivity in a purposive process') argues that purposive market definition does not need to be synonymous with subjective market definition. Objectivity in antitrust market definition cannot flow from consistency in outcomes, that is, from the establishment of a single antitrust market, which is consistent across different investigations. Rather, objectivity will have to be achieved by explicitly acknowledging the static and functional nature of the antitrust market, and taking steps to achieve process objectivity.

This article marries the poetic with the practical, by describing the rationale behind market definition, the artificiality of any market (and the utility of that artifice), and the purpose for which antitrust product markets can be defined. In doing so, this article hopes to prompt scholars engaged in the improvement, or even replacement, of antitrust market definition to take a step back and see the bigger picture. Objectivity in antitrust market definition

[3] See Sousa Ferro (*supra* note 2) 30.

will not be achieved by ignoring the functional nature of the concept, but rather by embracing and explicitly acknowledging its nature and scope. This is a much-needed call, currently underemphasized in academic discussion, which can help competition authorities (including, but not limited to, the European Commission) explain the rationale behind maintaining antitrust market definition. It is also quite timely, since the European Commission has recently embarked upon a reevaluation of its Market Definition Notice, citing efficiency and relevance (including 'transparency' and 'guidance') as evaluation criteria.[4]

II. THE NATURE OF MARKETS

'In the process of reflecting the world, we organize it into entities. We conceive of the world by grouping and segmenting it as best we can, in a continuous process that is more or less uniform and stable, the better to interact with it. We group together into a single entity the rocks that we call Mont Blanc, and we think of it as a unified thing. We draw lines over the world, dividing it into sections. We establish boundaries. We approximate the world by breaking it down into pieces.'[5]

Rovelli's description of human understanding of the world is an apt starting point to explain what 'markets' are. Although markets do not exist as such in the natural world—as opposed to the rocks which make up Mont Blanc—they perform similar intellectual functions as the concept of a mountain. They structure the world in a manner which enables human understanding. They draw a limit which, if not entirely arbitrary, at least corresponds to a particular choice (where other choices might have been possible), and then attribute a specific label to that chosen delimitation. Mountains are to rocks, what markets are to economic life: merely, a word we attach to a group of interrelated objects or occurrences. Human beings select which rock formations belong together, and call the whole 'Mont Blanc'. Similarly, they select particular economic interactions they consider to be related, and call it a market. As discussed below, what is included in that group is wholly dependent on the humans who describe it and the relationship they want to study.

This article is by no means new in describing markets in this manner. It has long been established that the 'market' is a social construct, valuable only insofar as it allows us to describe economic, and thus human, phenomena.[6] Where this article differs is that it emphasizes this constructive nature of the market to clarify both the scope and utility of the concept. This is important, because the concept of the 'market' is used in a myriad of economic and competition law

[4] Evaluation Roadmap 1.

[5] Rovelli, C. The Order of Time, 85 (London, United Kindom, Penguin Books 2017).

[6] For example, Von Mises, L. Human Action: A Treatise on Economics, 359 and 312 (Scholars' edition, Alabama, USA, Ludwig von Mises Institute 1998) (originally published 1949); Storr, V.H. 2010. The Social Construction of the Market. Society, 47(3): 200–206.

scholarship, yet the meaning and purpose of the concept seems little clarified.[7] As such, this part of the article sets out three key characteristics of markets in general (they demarcate economic interactions; they are useful fictions; and they are particular to the enquiry), before expanding on this in the context of competition law enquiries in the next part of this article. These are three characteristics which, although they may seem evident, are underemphasized in antitrust discussions, despite being crucial to the nature and utility of the concept for the purpose of competition law.

A. Markets demarcate economic interactions

The use of the word 'market' to describe a nucleus of economic interaction, rather than a mere physical location for sellers and buyers to meet, dates back a long time. It finds its roots in economic theory[8] which studies the scarcity of resources and the human response to that scarcity. There are 'two fundamental conditions of human existence': humans tend to have unlimited wants, and there are only limited resources to satisfy those wants.[9] Economic theory studies the ways in which resources are, or could be, allocated among all individuals who need them to satisfy their wants. It describes how individuals select among competing wants, to determine which satisfaction they will prioritize, and what influences these choices. Economics is, as famously proposed by Robbins, the 'science of scarcity and choice'.[10]

The forces of supply and demand—the rivalry to acquire and provide the scarce means to satisfy wants—are not physical objects. You cannot measure them as you would measure the width of a tree or the weight of a sack of flour. To enable a meaningful discussion about the interaction of these forces with each other, a framework is needed, which is delimited in time and space. This framework is the 'market'. It is an artificial construct, which draws

[7] Cf., similar surprise noted by economic historian North: 'It is a peculiar fact that the literature of economics and economic history contains so little discussion of the central institution that underlies neo-classical economics—the market.' (North, D.C. 1977. Markets and Other Allocation Systems in History: The Challenge of Karl Polanyi, Journal of Economic History, 6(3): 710).

[8] At least, in so far as we are talking about the *'modern' Western* economic tradition. For further reading: de Jong, H.W. & Shepherd W.G. Pioneers of Industrial Organization: How the Economics of Competition and Monopoly Took Shape (Cheltenham, United Kingdom, Edward Elgar 2007); Buchholz, T.G. New Ideas from Dead Economists: An Introduction to Modern Economic Thought (New York, USA, Penguin 1999); Backhouse, R.E. The Penguin History of Economics (London, United Kingdom, Penguin 2002); Heilbroner, R.L. The Worldly Philosophers: The Lives, Times, and Ideas of the Great Economic Thinkers (7th Ed., London, United Kingdom, Penguin 2000).

[9] Shapiro, M. Foundations of the Market-Price System 9 (Maryland, USA, University Press of America
1974) 9.

[10] Robbins, L. An Essay on the Nature and Significance of Economic Science 15 (London, United Kingdom, Macmillan 1932).

boundaries around different economic decisions of production, acquisition, and consumption. It is used to add structure to thinking about economic interactions, indicate *which* economic interactions are relevant to the analysis at hand, and enable a meaningful analysis of these interactions.

B. Markets are very useful fictions

Markets do not exist. You cannot leave your house and 'enter' a market. You might walk into a market*place*, where different vendors exhibit their wares in an assembly of stalls. Yet you would not be entering 'the market' in an economic sense. Markets are fictions, much more even than mountains are. While mountains are the result of a human process of ordering and cognition, they do refer to a collection of natural objects (a landform consisting of rocks and earth). Markets, however, do not reflect any 'natural' objects as such. Economic interactions—exchange, supply, and demand—exist only as representations of (aggregated) human activity. Indeed, 'demand' in itself does not correspond to a natural object. You may instinctively understand demand—as you as an individual desire and purchase products for the satisfaction of your wants—but your 'demand' is not a physical object that can be grasped, and furthermore does not refer merely to your individual activity but to the aggregation of the desires and purchases of a very big group of people.[11] These phenomena exist only as imagined products of human activity.[12] Since markets are merely our name for a grouping of these phenomena, their existence is entirely fictive: they are cognitive abstractions of different human decisions and interactions.

The market is a very useful fiction. It is exactly its lack of 'natural' reality that makes it such a useful tool for analyses of various types. Markets are the 'intellectual machinery', which allow researchers and authorities 'to work things out analytically'.[13] As such, their fictive nature makes them particularly well-suited to this task. Because markets represent a chosen way of looking at relationships between (groups of) people and their decisions, they are very flexible: markets can be defined according to what it is one wants to find out about these relationships. A market is an 'abstract mechanism',[14] drawn according to the nature of the enquiry, used to describe the meeting of a particular section of supply and demand for the satisfaction of a particular

[11] Morgan, M.S. 2014. What if? Models, fact and fiction in economics, Journal of the British Academy, 2: 246.

[12] Berger and Luckmann described social order as existing 'only as a product of human activity' in their reputed book of 1966 'The Social Construction of Reality'. Storr extended this by application the market in 2010 (*supra* note 6). We break his accurate description of the market as a social construct down into its constituent elements, to clarify both the scope of any market and its utility.

[13] Morgan, M.S., 'What if? Models, fact and fiction in economics' (2014) 2 Journal of the British Academy 249, citing Arthur Pigou (1922).

[14] Callon, M., *The Laws of the Markets* (1998 Blackwell) 1.

want.[15] They are structures within which actors compete with each other to obtain and provide the means they desire to satisfy that want.[16] The concept may be filled in differently, depending on the activities that are being studied. Markets are drawn according to the nature of the enquiry and will therefore align with the economic phenomenon one wishes to observe.[17]

C. Markets are particular to the enquiry

Since there is no true market, the meaning and scope of the concept will vary depending on the context in which it is used.[18] Although the 'market' concept generally refers to the arena where demand and supply meet, the focus of the market depends on the subject of the study. The 'market' includes all decisions and relationships of production, acquisition, and consumption, which are relevant to the question one wishes to answer. The market concept is functional.

Although the basic understanding of a 'market' is largely similar across different fields of study—as the identification of 'arenas' of production, sale, purchase, and/or consumption of goods or services facilitated through a form of exchange[19]—the exact delineation of these activities will depend on the particular field and even the particular question asked. If one wishes to study the pricing process, the market may be defined around only those products achieving similar price levels. If one defines a market as the resources which are optimally allocated, 'optimal' allocation needs to be predefined. If one wishes to understand the social dimensions of exchange, the market may be defined around those persons whose economic behaviour and decision-making are directly related to each other.[20] The economic objects (products, natural, and legal persons), relationships, and decisions included in those varying understandings of the market concept may partially overlap, yet will not be

[15] Behrens, Markets, in Encyclopaedia of Law and Society (D.S. Clark ed., Vol. II, 2007, California, USA) 985.

[16] Cf., Aspers, P. Markets 4 (Cambridge, United Kingdom, Polity Press 2011); Shapiro (*supra* note 9) xiv; Parkin, M. Economics 94 (12th ed., Harlow, United Kingdom, Pearson Education 2016).

[17] Geroski, P.A. 1998, Thinking Creatively about Markets, International Journal of Industrial Organization, 16(6): 678; Robertson, V. 2019. The Relevant Market in Competition Law: A Legal Concept, Journal of Antitrust Enforcement, 7(2): 161; Melischek, C.A. The Relevant Market in International Economic Law: A Comparative Antitrust and GATT Analysis 169 (Cambridge, United Kingdom, Cambridge University Press 2012).

[18] Fernández-Huerga, E. 2013. The Market Concept: A Characterization from Institutional and Post-Keynesian Economics, American Journal of Economics and Sociology, 72(2): 362.

[19] For example, Fligstein, N. The Architecture of Markets 30 (New Jersey, USA, Princeton University Press 2001).

[20] For a highly insightful overview of different notions of the market in scholarship, see Swedberg, R., The Markets as Social Structures, in The Handbook of Economic Sociology (N.J. Smelser & R. Swedberg eds., New Jersey, USA, Princeton University Press 1994).

wholly the same. The more practical the context in which the concept is used, the more refined and narrow the concept will be.

When studying the interaction of prices with demand and supply in theory, there is no need to have a very specific definition which can be used for practical applications. Thus, Cournot defined 'market' as 'the whole of any region in which buyers and sellers are in such free intercourse with one another that the prices of the same goods tend to equality easily and quickly', a notion upon which Marshall built in his *Principles of Economics*,[21] and has been used in a variety of scholarship since.[22] Yet, in 1952, Machlup recognized the need to have an analytical tool to frame questions of research in a manageable, focused manner. Thus, he contended that the concept of an 'industry' (called 'market' by Mason, Bain, and Stigler) served merely to 'limit the scope of problems of interdependence' of sellers. It was a tool—and nothing but a tool—to focus the analysis and rule out 'negligible' interdependence.[23]

An important consequence of the functional nature of the market concept is that there cannot be one 'true' market. First, any market will vary depending on the field of study and the particular objective of a specific enquiry. Second, since any market is drawn, at a particular time to answer a particular question, including economic relationships and decisions relevant to that question, the answer is likely to differ every time the question is asked. A market *place* may include some sellers who satisfy a specific want, but will not include *all* sellers and product to whom an individual could turn to satisfy their particular want. The reality is not just that there is no physical place which corresponds to a 'market' in any economic sense; it is that there will *never* be any collection of sellers and products which could be identified as being the 'one true' economic market. Wants, tastes, desires, and needs are as fickle as the weather.

This has particular implications for calls for 'objectivity'. Since the result of market delineation will differ each time it is perform, the objectivity stems not from similar outcomes, but from a structured and transparent process. What ought to be made explicit, in the pursuit of objectivity, is the purpose of the market delineation, and perspective and selection criteria adopted.

III. THE NATURE OF ANTITRUST MARKETS

A. Economic markets and antitrust markets

The precise boundaries of markets, which are after all merely the result of an intellectual exercise, will change depending on the context in which they are

[21] Marshall, A. The Principles of Economics 189 (8th ed., London, United Kingdom, MacMillan 1920).

[22] For example, Polanyi: 'The supply–demand-price mechanism,... (which we popularly call the market), is a...modern institution of specific structure, which is easy neither to establish nor to keep going.' (*The Livelihood of Man* (1977 London, United Kingdom, Academic Press) 6).

[23] Machlup, F. The Economics of Sellers' Competition: Model Analysis of Sellers' Conduct 213 (Baltimore, USA, Johns Hopkins Press 1952).

'drawn'. The principal distinction for our purposes is the difference between 'economic markets' (the market concept as used in economic scholarship) and 'antitrust markets' (the market concept used in competition policy). Economic markets (also called 'trading markets') are usually interpreted as groupings of relatively homogenous demand, where the products are subject to arbitrage which is sufficient to maintain similar prices.[24] Antitrust markets are defined around the competitive constraints on particular economic entities, which are relevant to determining the factual possibility of particular conduct, and the legal desirability of that conduct, in the context of a specific legal enquiry.[25]

The notion of economic markets was initially largely theoretical. When studying the interaction of prices with demand and supply in theory, there was no need to have a definition which could be used for practical applications. Cournot defined 'market' as 'the whole of any region in which buyers and sellers are in such free intercourse with one another that the prices of the same goods tend to equality easily and quickly', a notion upon which Marshall built in his *Principles of Economics*.[26] No real attempts were made to transform this rhetorical mechanism into a practical tool, for competition policy or otherwise.[27] Some economists accepted that goods ought to be included in the same market if they were substitutes, but this was mainly for statistical purposes.[28]

A more practical understanding of markets was provided in the late 30s by industrial organization (IO) economists.[29] IO markets are defined by starting from the position of a single seller and identifying all the considerations, which influence his decision-making, including the desires and actions of buyers and other sellers. Mason, often said to have founded the modern field of IO,[30] stated that market of this seller 'includes all buyers and sellers, of whatever

[24] Cournot, A. Researches into the Mathematical Principles of the Theory of Wealth 51–52 (Macmillan 1838); Stigler, G.J. The Theory of Competitive Price 92 (New York, USA, Macmillan 1942); Geroski (*supra* note 17) 680; Massey, P. 2000. Market Definition and Market Power in Competition Analysis: Some Practical Issues, The Economic and Social Review, 31(4): 318; Lipczynski, J., Wilson, J., & Goddard, J. Industrial Organization: Competition, Strategy, Policy 207 (Harlow, United Kingdom, Prentice Hall 2005).

[25] Eben, M. 2019. *Addressing the Main Hurdles of Product Market Definition for Online Services: Products, Price, and Dynamic Competition* (PhD thesis) p. 27 http://etheses.whiterose.ac.uk/26343/1/EBEN_MAK_Law_PhD_2018.pdf.

[26] Marshall (*supra* note 21) 189.

[27] Werden, G. 1992. The History of Antitrust Market Delineation, Marquette Law Review, 76(1): 126. (This is of some interest, as the Sherman Act in the USA was published in the same year as Marshall's Principles).

[28] Werden, G. 1992. The History of Antitrust Market Delineation, Marquette Law Review, 76(1): 127 footnote 21.

[29] The field started its 'modern' phase at that time, implementing more technical ideas. (de Jong, H.W. & Shepherd W.G. Pioneers of Industrial Organization: How the Economics of Competition and Monopoly Took Shape xix (Cheltenham, United Kingdom, Edward Elgar 2007)).

[30] Werden, G. 1992. The History of Antitrust Market Delineation, Marquette Law Review, 76(1): 128.

product, whose action he considers to influence his volume of sales.'[31] Thus, the market is defined by reference to all customers for the product of the single seller identified, and all the sellers he considers when making his decisions on price and output. One way to choose the other sellers to include is to identify products with high cross-elasticity with the single seller's product.[32] High cross-elasticity means that changing the price of the first product will have a significant impact on the quantity demanded of the second product.[33] The reasons for this are that the decisions on output and price made by the sellers of these products will have a significant impact on each other.[34]

The IO concept of markets focuses not only on the way supply responds to demand in general but also on how the decisions of other suppliers in response to that demand limit the commercial choices available to the seller who is the focus of the analysis. The market is a device through which to concentrate on specific constraints on the behaviour of sellers. Since not all behaviour of, and not all considerations by, sellers can be studied all at once, every study has a narrow scope. Every study will, therefore, have a market defined around a narrow set of constraints. Machlup recognized the need to have an analytical tool to frame questions of research in a manageable, focused manner. Thus, he contended that the concept of an 'industry' (called 'market' by Mason, Bain, and Stigler) served merely to 'limit the scope of problems of interdependence' of sellers. It was a tool—and nothing but a tool—to focus the analysis and rule out 'negligible' interdependence.[35] Accordingly, IO markets formed the ideal foundation for antitrust markets to guide competition enforcement. Indeed, some IO economists saw their research as the basis on which policy and enforcement could rely, and explicitly considered it their aim to devise criteria to guide lawyers and judges.[36]

The market concept will need to be refined to fit a certain purpose. An 'antitrust' market, that is, a market defined for competition policy purposes, will have a different focal point than, say, a market for corporate strategy.[37] The 'antitrust' market will ground the general concept within an enquiry into competition. Accordingly, it is necessary not only to determine what the core

[31] Mason, E.S. 1939. Price and Production Policies of Large-Scale Enterprises, American Economic Review Papers and Proceedings, 29(1): 69.

[32] Machlup (*supra* note 23) 214.

[33] Rutherford, D. Economics: The Key Concepts (2007 Abingdon, United Kingdom, Routledge) 71.

[34] Bain, J.S. Pricing, Distribution and Employment: Economics of an Enterprise System 16–18 (New York, USA, Holt 1948); Stigler, G.J. The Theory of Price 282–283 (2nd ed., New York, USA, Macmillan 1946); Nevo, H. Definition of the Relevant Market: (Lack of) Harmony between Industrial Economics and Competition Law 58 (Cambridge, United Kingdom, Intersentia 2014).

[35] Machlup (*supra* note 23) 213.

[36] Wilcox, C., Chamberlin, E.H., & Clark, J.M. 1950. Discussion, American Economic Review Papers and Proceedings, 40(2): 101.

[37] Geroski (*supra* note 17) 680.

features of a general 'economic' market concept are, but which economic principles are relevant to antitrust markets in a legal context in particular. Turner has acknowledged that there can be a gap between the economic market, as understood primarily by IO economists, and the antitrust market. Even where economists and competition law authorities start from a similar question—what are the substitutes for this product?—the subsequent choice of which products to include may differ, since gaps in substitution chains or time frames adopted may be more or less relevant depending on the legal issues under investigation.[38] An important reason why the antitrust market may differ from an IO market is that the purpose of defining the antitrust market is very particular: it is first and foremost a legal concept, used within an enquiry into the possibility of conduct which creates harm within the scope of the legal provisions.

Because antitrust markets are legal concepts rooted in economics, their delineation requires an understanding of the economic theory underpinning them. As Robertson puts it, 'law and economics are ... the raw materials to build the filter of market definition'.[39] These economic foundations serve to add rationality and coherence to the process.[40] However, they are used to inform the definition of markets for competition law purposes, not replace them. Since the market is a functional concept, and competition law inquiries are of a legal nature, there can be a discrepancy between economic markets and antitrust markets in light of the differing objectives of the inquiries.

B. The purposes of product market definition

Market definition is a universal tool, adopted in many jurisdictions as a first step in assessments of the effects on competition of concerted practice, unilateral conduct, and mergers.[41] It is of significance in competition law decision-making since, beyond the mere reference to 'markets' to underpin the legitimacy of competition law,[42] it is used by competition authorities as a framework within which to solve the hurdles necessary to reach a decision. Not only are markets drawn to enable indirect measurements of market power, they more broadly provide the boundaries of the evidence needed to resolve questions of fact, conduct, and anti-competitive effects. The former is the most often cited justification for market definition: findings of market power are

[38] Turner, D.F. 1980. The Role of the "Market" Concept in Antitrust Law, Antitrust Law Journal, 49(3): 1145–1147.

[39] Robertson (*supra* note 17) 161.

[40] Bork, R.H. The Antitrust Paradox: A Policy at War with Itself 117 (New York, USA, The Free Press 1993).

[41] OECD. 2012. Market Definition, *Policy Roundtables* DAF/COMP(2012)19, 21.

[42] The market is a foundational concept in competition law, since competition law strives to safeguard the free *market* economy from deleterious distortions. Thus, establishing the scope of a 'market' is, at its most elemental, a matter of legitimacy of the competition law system. (See Podszun (*supra* note 2) 219; Sousa Ferro (*supra* note 2) 30).

required by law, and, since these often require the identification of markets, market definition is too. Yet this article contends that, despite the frequency with which market power is cited as *the* rationale for market definition, it does not need to be the *principal* justification for market definition. Rather, the most convincing rationale for market definition is that it provides a tool to draw the boundaries within which to asses a particular question, most prominently concerning the conduct, theory of harm, and anti-competitive effects alleged. Thus, the boundaries of the market will be drawn in function of the question which is asked. This can be called a 'purposive' approach to market definition.

Even more strongly, it can be argued that market power is not even a separate purpose of market definition, but merely, one iteration of market definition's broader framing function. Although the market power-rationale and the purposive approach may appear, from their treatment in the scholarship, as two distinct views on the utility of market definition, the market power-rationale could actually be conceptualized as just 'one' iteration of the purposive approach. Market definition is useful, because it enables the identification of the forces at play which are relevant to a question, structuring them in such a way as to elucidate that particular question. This approach can include market power assessments, since a market can be defined for the purpose of identifying those forces which, at the time of the conduct, limited the undertaking's ability to profitably increase price or adopt other strategies indicative of market power. Yet the purposive approach stretches beyond the focus on market power, because it allows for the direction of the market definition towards *any* question the analysis aims to answer, so that it might include factors which may affect the conduct of an undertaking on a market, even if it does not obviously affect its market power at that time. In the following sections, the market power rationale and purposive approach are described separately, before turning to an analysis of the common baseline in all iterations of a purposive approach.

1. The market power rationale

The most commonly cited rationale for the definition of relevant markets is the finding of market power.[43] Market definition is useful to assess the competitive structure in which undertakings operate and thus establish the boundaries within which to calculate market shares. Market shares serve as indirect measures of market power.[44] They are widely used in the decisional

[43] Massimo Motta even stated that 'market definition is instrumental *only* to the assessment of market power' (own emphasis) (Motta, M., Competition Policy: Theory and Practice 102 (New York, USA, Cambridge University Press 2004))—a statement which we contest in the second part of this section.

[44] Furse, M., Competition Law of the EC and UK 253 (5th ed., Oxford, United Kingdom, Oxford University Press 2006); Jones, A., Sufrin, B., & Dunne, N., EU Competition Law: Text, Cases, and Materials 306 (7th ed., Oxford, United Kingdom, Oxford University Press 2019).

practice and jurisprudence as filters to separate cases which involve significant market power from cases in which there is no notable market power.[45]

Finding that undertaking(s) have market power is crucial, because such findings are *legal* requirements in EU competition law. EU competition law requires market power, to a different extent, under Article 101 TFEU (the Treaty on the Functioning of the European Union), Article 102 TFEU, and the EUMR (EU Merger Regulation). Under the EUMR, a merger will be blocked if it will significantly impede effective competition, particularly by creating or strengthening a dominant position.[46] Article 102 findings are predicated on the existence of a dominant position, which is a position of significant market power. Even under Article 101, which does not explicitly require dominance, findings of market power can be significant, since the appreciable effect on competition of an agreement can be determined quantitatively, by looking at the turnover and *the market shares* of the participants.[47] The General Court (GC) has held that, although market definition may be relevant under both Article 101 and 102, it is only *necessary* for rulings under Article 102, since under Article 102, power on a given market is the essence of the prohibition.[48] Article 101 is theoretically possible without market definition, except where its application depends on the establishment of market shares. The use of market share thresholds turns market definition into a requisite, since market shares cannot be calculated without reference to a market, as confirmed by the Court in *Ziegler*.[49] In summary, market power plays a role in the three types of cases, and consequently market definition does too, although to differing extent and for different purposes.

Despite the widespread adoption in decisional practice and jurisprudence of market definition to indirectly enable findings of market power, doing so is not an imperative established by the text of the law. In most cases, with exception of certain written presumptions based on market shares,[50] the

[45] Monti, G., EC Competition Law 124 (Cambridge, United Kingdom, Cambridge University Press 2007); Podszun (*supra* note 2) 122.

[46] Article 2(2) of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1 [hereafter 'EUMR'].

[47] For example, European Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (2001) OJ C368, §7 [hereafter 'Commission Notice (2001)'].

[48] Case T-62/98, *Volkswagen* v *Commission* (2000) ECLI:EU:T:2000:180 §230; Case T-61/99, *Adriatica di Navigazione* v *Commission* (2003) ECLI:EU:T:2003:335 §27; Case T-57/01, *Solvay v Commission* (2009) ECLI:EU:T:2009:519 §248.

[49] Case C-439/11 P, *Ziegler v Commission* (2013) ECLI:EU:C:2013:513 §63.

[50] For example, market share thresholds to determine appreciable effect (in Commission Notice (2001)) or to apply block exemptions (for example, Article 3 of Commission Regulation (EU) No.330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VBER), Article 4 of Commission Regulation (EU) No.1217/2010 on the application of Article 101(3) on the Treaty on the Functioning of the European Union to certain categories of research and development agreements).

statutes themselves do not explicitly require 'market definition', instead referring more broadly to 'market power'. Where the law does not use market shares, it could be argued that it is not market definition, but market power which is legally unavoidable. It is conceivable, then, that where market power could be established without defining a market, this process could be avoided.[51] Since there does not yet seem to be a satisfactory method to establish market power directly,[52] rather than via market shares, authorities cannot avoid the process of market definition. Calculating market shares is only possible if one knows the boundaries of the product and geographic market in which the undertaking operates. Therefore, market definition remains, for the time being, an important step in the process of assessing market power. Authorities and courts in both the EU and the US have consistently acknowledged market definition as a critical tool in antitrust assessments.[53] Market definition is recognized in the European Commission's Notice on Market Definition and the United States Department of Justice and Federal Trade Commission's (FTC) Horizontal Merger Guidelines as an important step in the assessment of market power.[54] The GC of the European Union similarly emphasizes the crucial nature of market definition: 'an undertaking's possibly dominant position on a given market may be examined only once it has been established that the market in the relevant products is distinct from other sectors of the general market'.[55]

[51] Kaplow, L., Market Definition, in THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS: VOLUME I 346 (R.D. Blair & D. Sokol eds., New York, USA, Oxford University Press 2014); Geradin, D., Layne-Farrar, A., & Petit, N., EU COMPETITION LAW AND ECONOMICS 78 (Oxford, United Kingdom, Oxford University Press 2012); Niels, G., Jenkins, H., & Kavanagh, J., ECONOMICS FOR COMPETITION LAWYERS 107 (2nd ed., Oxford, United Kingdom, Oxford University Press 2016).

[52] See limitations identified in: Hovenkamp, H., PRINCIPLES OF ANTITRUST 63 (West Academic Publishing 2017); Monti (*supra* note 45) 131; Geradin, Layne-Farrar, & Petit (*supra* note 51) 82–86.

[53] See: US: *United States v. E.I. du Pont de Nemours*, 351 U.S. 377 (1956) §593; *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) §271. EU: Case 27/76 *United Brands v Commission* (1978) ECLI:EU:C:1978:22 §10; Case 31/80, *L'Oreal v De Nieuwe AMCK* (1980) ECLI:EU:C:1980:289 §25; Case C-62/86, *AKZO Chemie v Commission* (1991) ECLI:EU:C:1991:286 §51; Case T-62/98, *Volkswagen v Commission* (2000) ECLI:EU:T:2000:180 §230; Case T-68/96, *Kish Glass v Commission* (2001) ECLI:EU:T:1998:20 §62.

[54] US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (2010) [hereafter 'US Merger Guidelines (2010)']; European Commission Notice on the definition of the relevant market (1997) OJ C 372 [hereafter 'Commission Notice (1997)'].

[55] Case T-83/91, *Tetra Pak International v Commission* (1994) ECLI:EU:T:1994:246 §2. Other judgments repeat the same point: e.g. Case T-342/99, *Airtours v Commission* (2002) ECLI:EU:T:2002:146 §3; Case 6/72, *Europemballage & Continental Can v Commission* (1973) ECLI:EU:C:1973:22 §247.

2. The purpose of the enquiry

Despite the emphasis on market power in the scholarship, the assessment of market power is not the only, or even primary, purpose of market definition. In fact, it may only be one iteration of market definition's broader framing function, under a purposive approach. As is explained at length above, markets are analytical tools to find the answer to the question around which an enquiry is framed.[56] In the context of antitrust markets, this question is not merely limited to market power. Market definition is, more broadly, undertaken to obtain a frame of reference[57] within which to evaluate the facts and theories put forward in a particular case. An antitrust market provides useful boundaries for the investigation, within which to identify the key players and factors relevant to the analysis.[58] It will put at the centre of the analysis the factors which influence supply and consumption decisions, principally the relevant competitive forces at play, structuring them in such a way as to elucidate the question an investigation tries to answer.[59] Through the definition of an antitrust market, you organize the available evidence and paint a picture of the different actors in and features of an industry, making it easier to analyze the impact certain decisions and events can have on competition.[60] This picture can then be used to make an informed decision on the alleged breach of competition law, and its consequences on that particular section of the economy, with an eye to the actual forces at play.[61] In that sense, the antitrust market stretches beyond the narrow aim of establishing market power, to provide decision-makers with the environment in which the practices are alleged to have taken place, and with the boundaries within which they can limit their analysis.

This view of market definition is a flexible one: since the antitrust market is an analytical tool, it will necessarily be deployed in the manner best suited to the analysis which it is meant to assist. Critically, this means that the relevant antitrust market will depend on the particulars of the case at hand, varying

[56] Glasner, D., & Sullivan, S. P., The Logic of Market Definition. University of Iowa Legal Studies Research Paper 20.

[57] We gladly borrow the wording for market definition used by the CMA in its decisional practice.

[58] For example, in *Brasserie de Haecht* (1967) p.415, the European Court of Justice evoked the idea that effects of anticompetitive practices could only be assessed by reference to a defined market (Case 23/67, *Brasserie de Haecht v. Wilkin-Janssen* (1967) ECLI:EU:C:1967:54 408).

[59] Fisher, F.M., Diagnosing Monopoly, (1978) Massachusetts Institute of Technology Working Paper 15. Antitrust Law Journal 83 (2): 293.

[60] Indeed, in its recent *American Express* judgment, the Supreme Court reiterated the need to define the market in order to assess the effects of allegedly anticompetitive conduct (*AmEx* (2018) §2885), as it had done 5 decades earlier (*Walker Process Equipment v. Food Machinery and Chemical Corporation* (1965) §177).

[61] Cameron, Glick, & Mangum (*supra* note 1) 721; Nevo (*supra* note 34) 10, 260–262; Glasner & Sullivan (*supra* note 56) 20; Fisher, F.M. 2008. Economic Analysis and "Bright-Line" Tests, Journal of Competition Law and Economics, 4(1): 130; Podszun, R., The Pitfalls of Market Definition: Towards an Open and Evolutionary Concept, in ABUSIVE PRACTICES IN COMPETITION LAW (ASCOLA) 81 (F. Di Porto & R. Podszun eds., Edward Elgar 2018)

with the analytical purpose for which the market is being defined. Such a view of the antitrust market can be called a 'purposive' approach,[62] since it sees the market not as a static reality but as a process which alters depending on the purpose for which it is used. This 'purpose' is that of the specific enquiry, rather than some broad 'goal' of the laws themselves.[63] The antitrust market is an analytical tool, and thus, its use will be determined by the question the enquiry seeks to answer.

Although the articulation of a purposive approach to market definition is most evident in Australian scholarship and jurisprudence,[64] such an approach is not alien to scholarship and enforcement practice in Europe and the USA.[65] In 1977, Breyer, when reflecting on the notion of the word 'market' in competition law for an Australian audience, portrayed the 'market' as a tool to give effect to the particular purpose of the competition law provision. Thus, he argued, 'markets' are not objective realities, but flexible means to assess the conduct at hand by reference to a specific aim.[66] In 1980, Turner explained that the antitrust market fulfils a 'dual role': first, it provides a 'rational economic basis for assessing the consequences of a particular kind of conduct', and only secondly can it be used as an indirect means of assessing market power—a role for which Turner felt market definition may not always be well-suited.[67] To this day, American scholars have asserted a role for market definition beyond market power assessments. Werden responds to the depictions of market definition as 'useless' and 'arbitrary', by reflecting on the utility of the antitrust market for the identification and delineation of the competitive process allegedly harmed.[68] Salop argues that antitrust markets

[62] For use of the term 'purposive' in this context, see Beaton-Wells, C., Proof of Antitrust Markets in Australia 39 (Annandale N.S.W., Australia, The Federation Press 2003). We also like the wording 'instrumental approach', cf., Podszun, (*supra* note 61) 74.

[63] Traditionally, 'purposive' refers to a type of interpretative approach for legislation, under which the legislature's purpose is used to give meaning to statutes. See, for example, Barak, A., Purposive Interpretation in Law xii (New Jersey, USA, Princeton University Press 2005); Gifford, D.G., Reynolds, W.L., & Murad, A.M. 2012. A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation: *Bruesewitz v. Wyeth*, South Carolina Law Review, 64: 231. The use of 'purposive' here has a more narrow meaning, referring to the purpose of the enquiry, rather than the purpose behind the adoption of the statute. Of course, it is possible that the purpose of the enquiry might be determined by virtue of the goals of the law, but this is not a given.

[64] See Beaton-Wells (*supra* note 62) 42.

[65] Podszun, (*supra* note 61) 81; Glasner & Sullivan (*supra* note 56) 23; Salop, S.C. 2000. The First Principles Approach to Antitrust, *Kodak*, and Antitrust at the Millennium, Antitrust Law Journal, 68(1): 188; Katz, A. 2007. Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power, Arizona Law Review, 49: 880.

[66] Breyer, S. 1977. Five Questions About Australian Anti-Trust Law, The Australian Law Journal, 51: 34.

[67] Turner (*supra* note 38) 1145–1147. The critique of market definition, where market power can be assessed directly, has indeed persisted to this day.

[68] Werden, G. 2013. Why (Ever) Define Markets? An Answer to Professor Kaplow, Antitrust Law Journal, 78(3): 732.

can only properly be defined 'in the context of the alleged anticompetitive conduct and effect'.[69] Glasner and Sullivan refer to several objectives of market definition other than the calculation of market shares, including imposing analytical discipline, organizing the available evidence, screening out implausible theories, and providing a focused framework to guide the analysis.[70] In Europe too, scholars have noted a broader rationale for the antitrust market. Podszun writes that 'market definition is all about ... identifying the economic circumstances relevant for the behaviour in question'.[71] Robertson advances 'market characterization' as a function of market definition, which may be complementary to the market power rationale. This function, she writes, 'provides the necessary market context in order to understand and apply the competition theory of harm and an analysis of anti-competitive effects.'[72]

Scholars can find support for these views in authority guidance, enforcement practice, and jurisprudence. In its Notice on Market Definition, the European Commission describes market definition as a tool which 'serves to establish the framework within which competition policy is applied.'[73] Even when it refers to market power, it only does so as a secondary objective: '[i]t is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power'.[74] In 1967, in *Brasserie de Haecht*,[75] the European Court of Justice evoked the idea that effects of anticompetitive practices could only be assessed by reference to a defined market. More recently, both Advocate-General Bot and Advocate-General Kokott expressed, in *Erste Bank* and *Ziegler*, respectively, that the definition of the market had to be performed by reference to the problem to be resolved, the nature of the issue examined, and the likelihood that harmful effects would occur.[76] When the US FTC argued in *Whole Foods Market* that it did not need to define a market, since antitrust markets are defined only to assess market power, the Court of Appeals referred to *Brown Shoe* to clarify that market power assessment is *not* the only purpose of market definition, since the antitrust market provides 'the appropriate setting for judging the probable anticompetitive effect' in a case.[77] Lastly, in its recent *American Express* judgment, the US Supreme Court reiterated the need to

[69] Salop (*supra* note 65) 191.
[70] Glasner & Sullivan (*supra* note 56) 4–5.
[71] Podszun (*supra* note 61) 74.
[72] Robertson, V., Competition Law's Innovation Factor: The Relevant Market in Dynamic Contexts in the EU and US 15 (Oxford, United Kingdom, Hart Publishing 2019).
[73] Commission Notice (1997) §2.
[74] *Id*.
[75] Case 23/67, *Brasserie de Haecht v. Wilkin-Janssen* (1967) ECLI:EU:C:1967:54 415.
[76] Opinion in C-125/07 P, *Erste Bank et al v Commission* (2009) ECLI:EU:C:2009:192 §§172 and 177; Opinion in Case C-439/11 P, *Ziegler v Commission* (2013) ECLI:EU:C:2012:800 §§53 and 58.
[77] *FTC v. Whole Foods Mkt., Inc*., 548 F.3d 1028, 1036 (D.C. Cir. 2008), referring to *Brown Shoe* (*Brown Shoe*, 370 U.S. 322).

define the market to assess the effects of allegedly anticompetitive conduct,[78] as it had done five decades earlier in *Walker Process Equipment*.[79]

What all these statements have in common is that they consider market definition to have utility beyond the mere assessment of market power. They see market definition as dependent on the purpose pursued in the enquiry, rather than being an independent and self-reliant concept. An antitrust market, in each particular case, is to be defined by reference to the question the case seeks to answer. This means that the legal or factual question needs to be articulated before the market can be defined.[80]

C. Articulating the purposive approach

1. Potential variations

Since a purposive approach merely means that the antitrust market is defined by reference to the purpose of the enquiry, there can be a variety of purposive approaches. This article provides a brief overview of potential variations. These variations can include, but are not limited to, market definition for the purpose of assessing the feasibility of the alleged conduct, evaluating the theory of harm, or establishing market power. The first variations rely on the notion of an antitrust market as the 'forum for economic decisions'.[81] The market is the analytical vessel containing the facts, actors, and forces which have shaped the (anti)competitive situation which has given rise to the case at hand. Selecting which facts, actors, and forces this vessel contains will depend on the perspective adopted. This perspective could be the alleged conduct, the theory of harm, or even the interests one intends to protect.[82] The further, more traditional, market power-rationale can itself be considered a purposive approach. The market power assessment is not truly distinct from the purposive approach but is merely one variation on it: one specific question which market definition can assist in answering.

The first variation focuses on the alleged conduct. If antitrust markets are defined with a view of assessing the feasibility of the alleged conduct, the conduct one believes to be problematic needs to be articulated before the market can be defined.[83] The market would be defined, under this approach, to reveal the (existence or lack of) constraints which would impede the adoption of such conduct by the undertaking(s) under investigation.[84]

[78] *Ohio v. American Express Co.* (2018) 585 U.S. 2885.

[79] *Walker Process Equipment v. Food Machinery and Chemical Co.* (1965) 382 U.S. 177.

[80] Salop (*supra* note 65) 188.

[81] Podszun (*supra* note 61) 81.

[82] Glasner & Sullivan (*supra* note 56) 5; Katz (*supra* note 65) 880; Salop (*supra* note 65) 191; Baker, J. B. 2007. Market Definition: An Analytical Overview, Antitrust Law Journal, 74(1): 129.

[83] See, in this regard, Salop (*supra* note 65) 188.

[84] Similarly, Baker and Bresnahan argue that '[t]he market definition requirement also permits the defendant to rebut the idea that competition is fragile enough to be harmed, by attempting

A second approach is the definition of the market to assess the plausibility of the alleged harm. For example, in a case concerning exclusionary unilateral conduct, where the defendant adopted a strategy which interfered with rivals' access to an essential input, the allegation may be that consumers suffered higher prices as a result of the rivals' inability to constrain the defendant with its own offer. In that case, the market could be defined with reference to the preferences of consumers in the absence of the specific conduct, to enable an analysis of the price fluctuations under that counterfactual. All things being equal, would, in the absence of the strategy to impede access, and some consumers have considered the rival product a substitute to the defendant's offer.

Defining markets around the feasibility of the alleged conduct will likely seem more acceptable than a purposive approach centred on the theory of harm. If antitrust markets are defined with a view of assessing the alleged theory of harm, the starting point of the market delineation may vary. An example of this is when an authority takes the group it wishes to protect as the starting point of the exercise. This could be called the 'protected interest' approach. This might occur when the objective of competition enforcement and policy is construed as being concerned *exclusively and directly* with the harm to the interests of a particular group. In that case, the starting point of the exercise may be the group whose interests are allegedly harmed.[85] Posner stated, for example, that '[f]irst, a group of purchasers entitled to the protection of law must be identified (for example, customers of corned beef in New York City)'.[86] This 'protected interest' approach would, we would argue, only make sense in the context of a competition policy which clearly and unequivocally concentrates on the harm caused to one particular group. In reality, it is more likely that a system will seek to protect the interests of multiple groups.[87] In practice, it is not that easy to separate the 'protected interests' from the 'undertaking and its product' as a starting point, as one will influence the other. It is by reference to the customers (often one of the protected groups) of a product, after all, that a product will be defined. Indeed, Posner's protected

to establish a wider market.' (Baker, J.B. & Bresnahan, T.F., Economic Evidence in Antitrust: Defining Markets and Measuring Market Power, in HANDBOOK OF ANTITRUST ECONOMICS 7 (P. Buccirossi ed., MIT Press 2008)).

[85] Harris, R.G., & Jorde, T.M. 1984. Antitrust Market Definition: An Integrated Approach, California Law Review, 72(1): 6.

[86] Posner, R.A. ANTITRUST LAW 149 (2nd ed., University of Chicago Press 2001).

[87] Ezrachi, A. 2017. Sponge, Journal of Antitrust Enforcement, 5(1): 51; Moisejevas, R., & Novosad, A. 2013. Jurisprudencija Jurisprudence 20 . Some Thoughts Concerning the Main Goals of Competition Law, 628. Podszun does note that the European Commission 'usually tries to side with the consumer—and accordingly construes a perception of economic facts that looks at the forum for economic decisions called the market from a consumer perspective.' However, if this is not done consciously, with a view to safeguarding consumer interests in particular, this falls short of a proper 'protected interest' approach to market definition. (See Podszun, (*supra* note 61) 81).

group—NYC corned beef customers—are defined by reference to a product—corned beef. It is necessary, therefore, to identify the interested group—the customers—accurately, to identify the product accurately, even if one cares about the interests of other groups as well.

Defining the market with a view to testing the alleged conduct or theory of harm may seem controversial, but it can be argued that this merely recognizes that the concern of competition law is with the deviation from the standard of perfect competition, principally through the use of market power. Collusive conduct, exclusionary conduct, and also exploitative conduct in the EU are prohibited because of the impairment to the functioning, or outcomes, of the competitive market. The logic of market definition is already infused with the concepts of collusion, exclusion, and retrospective and prospective harm.[88] Indeed, the tests currently deployed for market definition are intrinsically linked with the theories of harm we adopt in competition law scholarship and practice. The use of the hypothetical monopolist test, or alternatively the hypothetical cartel test,[89] is rooted in the concern with increased prices as a result of the exercise of existing market power,[90] the same concern which forms the central point in traditional portrayals of antitrust injury flowing from collusion or exploitation. It is not a given that these are the tests which ought to be deployed in each case,[91] but their enthusiastic acceptance when first introduced is due in most part to the link of these tests with 'the real economic question' at the heart of merger cases.[92]

Finally, the market power rationale itself can be considered a purposive approach: after all, the factors included in the market are only those relevant for answering a particular question—can the undertaking act to some extent independently, unrestrained by competition? Under a traditional price-centric approach, the market is defined to gauge the ability of the undertaking to increase prices significantly, in the absence of the disciplining force of substitution. Such an assessment is not truly distinct from the purposive approach but is merely one variation on it: one specific question which market definition can assist in answering.

A significant part of modern scholarship focuses on the market power-rationale of market definition, disregarding or overlooking the broader utility of market definition. Where scholars do evoke rationales for market definition akin to the purposive approach described in this article, they often appear to

[88] See, for example, Baker's overview of market definition in retrospective and prospective harm cases (Baker (*supra* note 82) 159–173).

[89] See US Merger Guidelines (2010) footnote 4.

[90] Werden (*supra* note 27) 198.

[91] Sean Sullivan will in fact argue that a more modular approach could be taken to market definition: paper in progress.

[92] Schmalensee, R. 1987. Horizontal Merger Policy: Problems and Changes, Economic Perspectives, 1(2): 47.

imply that such a rationale is an *alternative* or *complement* to market power-justifications. This is the case for most of the scholars cited in the section above. Robertson cites 'market characterization' as 'another function of the relevant market'.[93] Turner speaks of a 'dual role' for market definition, with the provision of a 'rational economic basis' for the decision as the primary role, and market power assessment as a secondary role. Turner does note that these two roles are, in fact, closely related and that, furthermore, market definition may not be well-suited for the establishment of market power.[94] Similarly, Podszun describes the European Commission's approach to market definition in the Notice as follows: 'the Commission quickly turns market definition from "establishing the framework" to "calculate market shares," not noting that the former could be enabled by the latter'.[95] It is correct, of course, that the Commission and Courts have not made an explicit declaration that market definition is a purposive tool, with market power assessments merely one example of such a purpose. Yet, even in the Notice, the Commission leaves room for such an interpretation, by providing that one of the possibilities of market definition is '*inter alia*' to calculate market shares.[96]

2. *Competitive constraints*

A purposive approach means that the relevant antitrust market will be defined to answer a particular question—for example, the existence of market power, the feasibility of the alleged conduct or theory of harm—and thus be defined *in function* of that question. A market power-assessment may, at first glance, appear far removed from the view of market definition as a framework to assess the alleged conduct or theory of harm. However, this is not necessarily the case. One the contrary, all these purposes share a common baseline—which is essential to ensuring coherence in market definition.

The definition of the market in light of the alleged conduct or theory of harm should be founded on a 'competitive constraints'-baseline. Adopting such a baseline pulls together the idea of market power, as the broader concern of competition law, and more granular purposive approaches centred on the conduct or theory of harm. This is the baseline which most closely aligns with European (and American) jurisprudence. Indeed, authorities and courts in both the EU and the USA have consistently acknowledged that market definition concerns the identification of primary competitive constraints.[97] After all, we know broadly what competition policy cares about: namely, the existence and impairment of competition. Thus, markets *ought to be defined*

[93] Robertson (*supra* note 72) 55.
[94] Turner (*supra* note 38) 1145–1147.
[95] Podszun (*supra* note 61) 75.
[96] Commission Notice (1997) 2.
[97] See judgments *supra* note 53; European Commission Decision AT.39740, *Google Search (Shopping)* (2017) §146.

around the existing competitive constraints, but the competitive forces that are to be considered relevant may vary depending on the conduct alleged or the theory of harm.

To illustrate this point, think of the difference between merger review and an assessment of unilateral conduct by companies with market power. For mergers, authorities will care about impediments to competition in the future, particularly if the merger were to lead to the creation of a dominant position,[98] and thus define markets by virtue of the constraints on such creation now, and the possible removal or addition of such constraints after the merger. In unilateral conduct cases, the market will be defined by reference to the (lack of) forces which would have obstructed the alleged harm. More specifically, the concern with mergers may be that prices will rise significantly as a result of this new dominant position. The question is whether there are *and will remain* sufficient competitive constraints, after the merger has been consumed, to keep the undertaking from being able to raise prices significantly. Another concern could be whether innovation will significantly be reduced. In that case, the authorities will have to define the market in line with the competitive constraints which impact the undertaking's decisions with regard to innovation. Price constraints may be—but are not necessarily—the same as innovation constraints. Likewise, a specific concern under Article 102 TFEU may be that the undertaking has been able to foreclose competitors in an adjacent market, not by offering a superior product, but by tying that product to its 'flagship' product. In that case, two markets ought to be defined—and the question will not only be whether there are any constraints on the undertaking's ability to sell its flagship product at any price it wants, but more specifically whether it is constrained from selling it with another product. The market for the flagship product would include all those constraining factors. Similarly, to define the market for the tied product, the question would not just be which forces constrained the sale of that product with regard to price and output, but also with regard to making such a sale conditional on the purchase of another product.[99]

The competitive constraints' approach to market definition is not only in line with the purpose of inquiries but also bears the best resemblance to the concept of markets as used in IO scholarship. Fisher stated as early as 1987 that 'the "market" must include those firms and services that act to constrain the activities of the firm or firms that are the object of attention.'[100] The purpose of the exercise influences what the starting point and focus of the exercise ought to be. As explained above, IO markets were drawn by reference to a single seller, and its product(s), to identify which forces would constrain the

[98] EUMR, Art.2.

[99] Salop (*supra* note 65) 191; Unknown Author—Note. 1954. Definition of the Market in Tying Arrangements: Another Aspect of Times-Picayune, Yale Law Journal, 63(3): 391.

[100] Fisher, F.M. 1987. Horizontal Mergers: Triage and Treatment, Journal of Economic Perspectives, 1(2): 28.

seller from adopting certain conduct (for example, raising prices). A similar approach is taken for antitrust markets, where markets are drawn by reference to a particular entity and its product(s), which are relevant to the behaviour of concern. Under Article 102 TFEU, the investigation may be concerned with allegedly anticompetitive conduct which has affected price, and thus the market will be defined by reference to a particular undertaking and the product it sells, identifying the constraints on the ability to substantially adjust the price of that product. Under Article 101, the focus would be on the ability of multiple entities together to adopt certain conduct regarding a particular product. In a merger review, if the investigation centres on the forces which would restrain a merged entity from, say, raising the prices of joint supply, the starting point is likely to be two undertakings, in consortium, selling a particular product (range). The question could be whether the merger is likely to lead to higher prices in the future, so that the market will be defined by reference to future constraints on a merger product offer. The concern may be different, however, if the prices already appear high. In that case, the concern could be whether the currently separate undertakings face competitive constraints premerger, and how the merger would impact those constraints: would the merger render permanent a (high price) situation which may otherwise be transient?[101]

The competitive constraints' approach is not incompatible with a market power approach. After all, market power is said to exist when an undertaking can profitably raise price—something it will not be able to do if it is *competitively constrained* at that time. The value of the competitive constraints approach lies in its ability to paint a fuller picture of the setting in which the conduct occurs, through the lens of the effects the authority cares about. It is *purposive*, rather than singularly focused on an imagined 'objective' measure (that is, market power). It sheds light, not only on the market power (pricing ability) of the undertaking at that point in time but also on whether it is constrained from adopting certain (harmful) practices by present and potential forces. When the focus of market definition is not just on market power, market definition becomes a more useful tool to identify the key factors relevant to an understanding of the conduct at hand, in a manner which can be used by authorities and courts. As stated by the Commission, 'the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained This enables the establishment of market power, where required, but strives to go further by providing a lens through which to assess the facts'.

[101] Fisher (*supra* note 100) p.29.

IV. OBJECTIVITY IN A PURPOSIVE PROCESS

A purposive approach to antitrust market definition implies the adoption of a particular perspective when delineating the market, distilling complex, and dynamic relationships into a static picture useful to the enquiry. As will be seen in this part of the article, such a market may be particular (defined by reference to a previously established perspective), but it does not need to be subjective (that is, defined in the function of the personal opinions of the decision-makers). To reduce the risk of subjectivity and arbitrariness, authorities and regulators ought to strive for process objectivity in the definition of antitrust markets.

Achieving objectivity in the definition of antitrust markets matters greatly, since a lack of trust in the conclusions drawn in particular cases, which start with and often rest on the relevant market, would lead to a lack of trust in the law as a whole. The replicability and coherence of the process, and assurance of equality in enforcement, are necessary preconditions for the rule of law.[102] Calls for objective market definition abound, by scholars as well as the European Commission.[103] What is often missing in discussions on how to achieve such objectivity is a recognition of the true nature and utility of the market as a purposive and particular frame of reference.

A. The particular market

The world is always changing, and our description of it in terms of quantities (length, height, weight, . . .) is merely the description of relative change. We describe the world by describing how one variable changes in relation to another. Any measurement distils the relationship between variables into a particular point.[104] The dynamic is rendered (artificially) static, to provide human beings with a frame of reference. That frame of reference is not only static, when the world is actually in constant movement, it is also particular. Human beings do not perceive everything about the world. Our vision of reality is blurred: we remain blind to many variables and register only those parts with which we interact and which our brain considers useful for our understanding in that particular moment and place.[105] This is a general truth, which becomes even more pertinent in the context of an investigative analysis with a particular

[102] See Hoffmann, H.C.H., General principles of EU Law and EU Administrative Law, in European Union Law 208 (C. Barnard & S. Peers eds., Oxford, United Kingdom, Oxford University Press 2017); Popelier, P. 2000. Legal Certainty and Principles of Law-Making, European Journal of Law Reform, 2(3): 321; Bingham, T. 2007. The Rule of Law, Cambridge Law Journal, 66(1): 69.

[103] See Sousa Ferro (*supra* note 2) 30; Podszun (*supra* note 2) 123; Evaluation Roadmap 2; submission to Evaluation Roadmap.

[104] Rovelli (*supra* note 5) 103.

[105] Cf., Rovelli (*supra* note 5) 126; Nagel, T., The View from Nowhere 86 (New York, USA, Oxford University Press 1986).

end-goal. If a researcher means to find out the impact of a particular change on a particular system, they keep 'all other things equal', merely investigating the relationship between the change in one variable on the variable of reference. The researcher does not construct a 'study of everything'. The answer to the question depends on the question itself. We assess things by adopting a particular perspective.[106] In that sense, no answer is ever wholly complete and objective: we select what is included in the assessment based on prior choice. Thus, when making sense of the world for a particular purpose, two things are evident: we make the dynamic static and we cannot reach perfect objectivity.

These two conclusions hold true especially for the definition of antitrust markets. An antitrust market is by its nature a blurred picture. It consists of a selection of variables, which have been chosen because they are considered most relevant to answer the specific question at hand. We cannot 'take a view from nowhere',[107] as the 'market' exists not only by virtue of human interaction but more pertinently by virtue of the investigator's perspective. Markets are defined by reference to a starting point: a focal undertaking or a focal want (focal product). A different starting point will likely lead to a different relevant market. Moreover, because of the purposes of product market definition set out above, choosing which economic entities (and even which parts of such entities) to include, which wants to consider, and which customers to take into account will depend on the conduct or theory of harm considered. Antitrust markets cannot be delineated in total isolation from the alleged conduct and theory of harm.

The static nature of antitrust markets may appear confounding to many: the concept is, after all, used to assess decisions and conduct of (natural or legal) persons, phenomena which are by their nature dynamic. This is even more challenging in the context of industries where wants, products, business models, and market participants seem in continuous flux—an issue to be explored in future research. Yet, this staticism is inherent in, and even necessary for, a meaningful analysis with 'objective' parameters. Antitrust product markets do not delimit objects or entities but rather put *relationships* under a magnifying glass. Antitrust markets bring order where none exists in reality. Product markets are only seen as 'static', because we fail to comprehend that *everything* is dynamic, that any description of the world by its nature is an attempt to preserve that what cannot be preserved, to make static that what

[106] Rovelli describes this quite eloquently: 'Science aspires to objectivity, to a shared point of view about which it is possible to be in agreement. This is admirable, but we need to be wary about what we lose by ignoring the point of view from which we do the observing. In its anxious pursuit of objectivity, science must not forget that our experience of the world comes from within. Every glance that we cast towards the world is made from a particular perspective.' (Rovelli (*supra* note 5) 132)

[107] Reiss, J., & Sprenger, J., Scientific Objectivity, in Stanford Encyclopedia of Philosophy (E.N. Zalta ed., Metaphysics Research Lab Stanford University 2014); in reference to Nagel (*supra* note 105).

is dynamic. You cannot hold a wave in the palm of your hand, but you can capture it on film, in a static and imperfect manner. Distilling order from chaos will always be reductive and flawed. It is nonetheless an important task, which should not be discarded merely because it is imperfect.

B. Objectivity in the process of market definition

1. Particular but not subjective

Even without considering antitrust markets under a purposive approach, certain scholars have voiced concerns over the alleged 'subjectivity' or 'arbitrariness' of (certain forms, tests, or evidence of) market definition[108] and have suggested means to ensure its compliance with the principle of legal certainty.[109] Both enforcers and scholars seem increasingly concerned with coherence and certainty in the process and rationale of market definition,[110] rightly worried about the adherence of competition law decision-making with the rule of law. It would be understandable, then, if upon considering the purposive approach to market definition, one would fret that market definition risks becoming subjective, or mere 'guesswork',[111] since the antitrust market varies with the purpose of the enquiry.[112] Indeed, decisions have at times (rightly or wrongly) been criticized for defining different markets even when the same undertaking was being investigated (especially when these decisions followed each other in a short space of time).[113] Yet subjectivity of the antitrust market cannot be claimed merely on the basis that a different market was defined in another case. The functional nature of the antitrust market means that, when an investigation concerns different conduct or a different theory of harm, the market may differ. This can be called 'subjective', only if one were to define 'subjective' as 'influenced by the purpose of the enquiry', or as referring

[108] For example, Sousa Ferro (*supra* note 2) 21.; Markovits (*supra* note 1) 166; Ortiz Blanco, L., Market Power in EU Antitrust Law 4 (Hart Publishing 2011).

[109] Boshoff, W. H. 2014. Market Definition as a Problem of Statistical Inference, Journal of Competition Law and Economics, 10(4): 861.

[110] Such as raised by the European Commission in its Evaluation Roadmap; Podszun (*supra* note 2) 123.

[111] Ordover and Wall asked whether market definition can ever 'be more than educated guesswork', for example (Ordover, J.A., & Wall, D.M. 1989. Understanding Econometric Methods of Market Definition, Antitrust, 3: 20).

[112] See Robertson (*supra* note 72) 57: 'From a legal perspective, such an approach is problematic insofar as the legal provisions do not in themselves provide a credible reason for differing market definitions—where they do differ, a policy motive may be suspected. It defies the purpose of market definition if it is carried out with a particular theory of harm or a particular outcome in mind. Yet, the type of anti-competitive behaviour at issue in a case may very well be related to the characteristics of the relevant market.'

[113] For example, Ebraheim, M. 2017. Antitrust and Hospital Mergers: Uniqueness and Consistency in Market Definition Analysis, University of Toledo Law Review, 48: 351; Morse, M.H. 2003. Product Market Definition in the Pharmaceutical Industry, Antitrust Law Journal, 71(2): 634; Akman, P. 'A Preliminary Assessment of the European Commission's *Google Android* decision' (December 2018) CPI Antitrust Chronicle 3; Sousa Ferro (*supra* note 2) 296.

to an 'imagined' phenomenon.[114] Any such reference to 'subjectivity' really is a reference to the 'particularity' of an antitrust market, previously explained. If, on the other hand, 'subjective' is used in the prevalent sense, to refer to a result which is dependent upon and variable with the feelings or opinions of the persons engaged in the analysis,[115] then an antitrust market is *not* subjective. It does not depend on personal opinions, but on the conduct or theory at play. Antitrust markets are particular, not subjective.

No process, which results in the drawing of boundaries where none naturally exist, is ever devoid of particularity. Evidently, such particularity increases the flexibility of antitrust market definition, potentially increasing the discretion authorities may feel they possess. This discretion, and the risk of arbitrary decisions it entails, would be antithetical both to a rational application of the law and to the ideal of legal certainty and foreseeability, which are essential to the rule of law. It is imperative, therefore, to ensure that the perspective adopted in the definition of the market depends on the previously established purpose of the enquiry, rather than on the personal aspirations of the decision-maker. It is important to pursue objectivity in antitrust market definition, not through similar outcomes for similar undertakings, but through a structured and transparent process.

Objectivity can be achieved in two distinct manners: either through product objectivity or through the reliance on process objectivity. Product objectivity is attained when the outcomes of an analysis or theory correspond to accurate representations of the natural world—a reflection of phenomena which, even absent the human perceiver, would fit the description given.[116] Colour, though possibly perceived differently by different individuals, corresponds to a particular wavelength which does not alter under the individual gaze. The wavelength is therefore an objective product.[117] Process objectivity, on the other hand, may not lead to products which unalterably correspond to external reality. Indeed, the outcomes of an analysis may be inherently variable with the perspective adopted. Rather than through the realism of the outcomes, objectivity is achieved during the analysis itself, by removing the individual biases of the investigator from the analysis. Process objectivity does not mean

[114] The latter corresponding to definition 4b given by the Oxford English Dictionary: 'existing in the mind only, without anything real to correspond to' ("subjective, adj. and n." OED Online, Oxford University Press, June 2020, www.oed.com/view/Entry/192702. Accessed 7 July 2020).

[115] Oxford English Dictionary definitions 1, 3. 4a.

[116] Reiss and Sprenger (*supra* note 107); Ilmari Niemi, M., Objective Legal Reasoning—Objectivity without Objects, in Objectivity in Law and Legal Reasoning 70 (J. Husa & M. Van Hoecke eds., Oxford, United Kingdom, Hart Publishing 2013).

[117] As Reiss explains, the notion of product objectivity can be traced back to Galileo's conception of two different forms of qualities of objects: qualities of objects which depend on human perspective (such as colour) and qualities which would endure even if 'all conscious beings were wiped out of existence'. (Reiss, J. Struggling over the Soul of Economics: Objectivity versus Expertise, in Experts and Consensus in Social Science 135 (C. Martini & M. Boumans eds., Cham, Switzerland, Springer).

lifting the analysis out of a particular perspective, but freeing it from an individual's interests.[118] Though perspective is intrinsic in the process, this 'perspective' is not understood as the individual perspective of the person performing the analysis or formulating the theory, but as the aggregate human perspective which shapes the phenomenon being studied, or the values or presuppositions commonly known and accepted in a field. Removing the individual's feelings and opinions from the analysis is how objectivity can be achieved in an analysis which is perspective-particular.[119] Process objectivity retains a role for values—those of a society or a school of thought—but removes the individual's desire for a particular outcome. Thus, process objectivity would be achieved when outcomes change with a change in overall perspective, not a change of individual investigator.[120]

In the context of antitrust market definition, *product* objectivity cannot be attained. First, because, since there is no 'market' absent human behaviour and human perspective, there is no 'market' in the natural world. Second, and more pertinently for our aims, because, as 'antitrust markets' are defined in order to answer a specific question on the feasibility of alleged conduct and/or theory of harm, they are dependent on a competition law-'purposive' perspective. Thus, removing 'human' and 'purposive' perspectives means erasing the antitrust market altogether. This does not mean, however, that we cannot strive for *process* objectivity. Though a purposive perspective is fundamental to the delineation of the antitrust market in a case, the individual perspective of the investigator is not. The antitrust market for the same undertakings and even same products may differ from case to case, as the alleged conduct and/or theory of harm varies,[121] but should not depend on the individuals working on the case.

A further compelling argument in favour of process objectivity, as an assurance against subjectivity, is the nature of an antitrust market as a *legal*

[118] Reiss & Sprenger (*supra* note 107); Douglas, H. 2004. The Irreducible Complexity of Objectivity, Synthese, 138(3): 454. See also Niemi (*supra* note 116, 70) who, despite not using the terminology 'process' and 'product' objectivity, describes a similar 'cognitive' dimension to the objective-subjective dichotomy.

[119] Reiss & Sprenger (*supra* note 107); Douglas (*supra* note 118) 454.

[120] Douglas (*supra* note 118) 459.

[121] For example, compare two decisions by the European Commission involving General Electric: European Commission decision IV/36.213/F2, *Engine Alliance* and *European Commission decision* COMP/M.2220 *General Electric/Honeywell*. Both decisions focused on competition in the offer of jet engines intended to equip particular airframe platforms, offered by the same undertaking, yet there was divergence in the market definition in each decision. The former was a decision under Article 101 TFEU, in which only first-line competition between engine manufacturers (to obtain certification of engines on a platform) was deemed relevant to assess the effects of a joint venture between General Electric and Pratt & Whitney. The former was a merger decision in which both first-line competition and second-line competition (competition between certified engines) were deemed relevant in the assessment of the acquisition of Honeywell by General Electric.

analytical tool. Antitrust markets are more than mere factual descriptions relevant to the analysis: they are normative benchmarks. As a legal concept,[122] the antitrust market translates multifaceted economic ideas into predominantly binary choices, to enable legal decision-making.[123] Such choices are normative choices.[124] Under the rule of law, legal decision-making is expected to adhere to principles of certainty and impartiality,[125] notions which align closely with the understanding of 'process' objectivity. Objectivity in legal decision-making cannot be achieved by demanding that case outcomes correspond to a 'natural' truth—such truth being at the very least unattainable, if not inexistent—free from societal values. Thus, legal scholarship and doctrine has developed principles of objective decision-making, based on transparency and predictability of the applicable rules and normative criteria, and assurances concerning the neutrality of decision-makers.[126] A decision is objective, where it is free from personal interests, it is based on general and publicly available principles, the values that underlie it are commonly known, and it is supported by well-justified and publicized reasoning.[127] In sum, the rule of law considers the process of decision-making, not its outcomes *per se*: if the process of decision-making corresponds to the principles of certainty and impartiality, it is deemed to be objective.[128]

2. *Achieving process objectivity*

Process objectivity implies the absence of individual predisposition, rather than the absence of a specific overall perspective. Thus, a purposive approach of any kind is not inherently at odds with process objectivity. Nonetheless, there is a risk, common to any decision-making process involving a degree of discretion, that a multitude of variations will be adopted without any coherence, so as to suit the desires of individual investigators in specific cases, turning a 'purposive approach' into a 'subjective approach'. It is possible to minimize the risk that

[122] See, for an excellent analysis of the relevant market as a legal concept, Robertson (*supra* note 17) 158.

[123] Van den Bergh, R., The More Economic Approach in European Competition Law: Is More Too Much or Not Enough? in Economic Evidence in EU Competition Law 35 (K. Mitja & A. Vandenberge eds., Cambridge, United Kingdom, Intersentia 2016); Eiszner, J. A. 1998. Innovation Markets and Automatic Transmissions: A Shift in the Wrong Direction? Antitrust Bulletin, 43(2): 338.

[124] See Robertson (*supra* note 72) 253; Sousa Ferro (*supra* note 2) 316.

[125] See, for example, Wardhaugh, B., Competition, Effects and Predictability: Rule of Law and Economic Approach to Competition Law 18 (Oxford, United Kingdom, Hart Publishing 2020).

[126] Husa & Van Hoecke (*supra* note 116) 4; Wardhaugh (*supra* note 125) 18–24.

[127] Niemi (*supra* note 116) 79; Hackney, J., Under Cover of Science: American Legal-Economic Theory xiv (North Carolina, USA, Duke University Press 2006).

[128] Wardhaugh (*supra* note 125) 216; Van Hoecke, M., Objectivity in Law and Jurisprudence, in Objectivity in Law and Legal Reasoning 4–6 (J. Husa & M. Van Hoecke eds., Oxford, United Kingdom, Hart Publishing 2013).

a purposive approach be co-opted to serve individual preferences, by putting a few measures in place.

First, adopting a common baseline, such as the competitive constraints approach described above, is a first step to ensure 'process objectivity'. Any purposive approach adopted ought to tie into the broader concern of competition law with impairments of competition. This would not only enhance the legitimacy of the process but also provide a touchstone for the predictability of the process. This means, in practice, that we should strive towards a full identification of the different forces which can act as sources of competitive constraint, based on economic theory and experience. Any market definition, performed on a case-by-case basis, would refer to these competitive constraints and select those most appropriate to the alleged conduct and theory of harm. Such a list could perhaps, at European level, be incorporated in a more comprehensive Market Definition Notice, to be expanded beyond the currently rather limited description of demand substitution, supply substitution, and potential competition. Whether in the Notice or in another form, it is crucial that as our understanding of competitive constraints progresses, in light for example of new business models and commercial strategies, any such list should be updated.

Second, process objectivity requires that the approaches (which could be) adopted be made explicit, in order to ensure a degree of foreseeability for subjects of the law. This means that authorities or courts tasked with antitrust market definition need to be explicit about the manner in which the process is conducted. Transparency in the delineation of antitrust markets is extremely important. The antitrust market can be determinative for the final decision in case.[129] A balance should therefore be struck between the utility of a 'particular' analytical tool and legal certainty for the persons involved. Transparency is achieved in two stages: both by making the approach and process explicit ex ante, for example, through guidance papers, as well as in each specific case. What ought to be made explicit is: first, the particular purposive perspective authorities can and do adopt and, second, the common steps of antitrust market definition and how the purposive approach affects them.

Authorities should frankly admit that antitrust market definition depends on the purpose of the enquiry. They need to set out, in clear terms, that the conduct alleged and/or theory of harm is explicitly considered when defining an antitrust market. This ought to be done before cases are brought, through guidance papers, and should furthermore be a standard part of the market definition in each decision. When defining a relevant market in a particular case, the authority should highlight the purpose for which the market is defined, by reference to the competitive constraints of relevance to the investigation. This means that a clear distinction ought to be made

[129] Wardhaugh (*supra* note 125) 75.

between the facts available to the authority[130] and the purposive perspective adopted in the assessment of those facts. The authority should determine the purpose of market definition (identifying the competitive constraints relevant the alleged conduct and theory of harm) and then give due consideration to *all* the evidence before it which may be relevant (and reliable)[131] to that perspective. The authority cannot omit facts which would indicate the existence of competitive constraints on the basis that they would undermine the theory of harm the authority wishes to put forward. It needs to provide reasoning as to why certain facts are (not) relevant to the identification of the competitive constraints on the alleged conduct and harm.[132]

In addition, the specific steps authorities undertake and variables they consider in antitrust market definition should be clearly publicized. Despite the variation in antitrust markets depending on the context of the enquiry, there are indeed specific steps which are uniform across market definition: the identification of the focal product as a starting point, the identification of a candidate market, the identification of competitive constraints, and the ultimate conclusion on a relevant market. Where these steps may vary depending on the scope of the purposive approach, this ought to be made explicit as well. These should be publicly set out, not just in guidance available before any cases are brought, but also in every specific decision: the process of the definition of the market in every case should be made public, not merely the resulting market.[133]

Lastly, there is a need for thorough judicial review of relevant antitrust markets adopted by authorities in specific cases. Although administrative authorities, within their own respective legal systems, may enjoy a certain degree of discretion in complex economic and technical matters,[134] accurate portrayal of facts as well as the legality of decisions are, or ought to be, subject to judicial review.[135] First, market definitions ought to be reviewed

[130] For example, technical or production information of a good, number of suppliers of a specified good, data on consumer usage or price reasons, cost and revenue data, and so on.

[131] For an analysis of the 'relevance test' and the 'reliability' test in EU competition law, see Kalintiri, A., Evidence Standards in EU Competition Enforcement: The EU Approach 103–106 (Oxford, United Kingdom, Hart Publishing 2019).

[132] *Id*

[133] The European Commission especially ought to provide more public information on the steps it undertook to define markets in particular cases.

[134] Case 42/84, *Remia v Commission* (1985) ECLI:EU:C:1985:327 §34; Case C-204/00 P, *Aalborg Portland* ECLI:EU:C:2004:6; Case T-201/04, *Microsoft* (2007) ECLI:EU:T:2007:289 §§87–88.

[135] **European Union:** Decisions of the European Commission *are* subject to judicial review under EU law. Not only are Commission decisions subject to a legality review under Article 263 TFEU, but the CJEU has also held that they ought to rely on accurate portrayal of facts, which can be subject to review. Even though market definition 'involves complex economic assessments', the Commission's relevant market needs to be based on 'accurate and reliable' data, said the GC in Case T-301/04, *Clearstream v Commission* (2009) ECLI:EU:T:2009:317 §47. See also Case C-7/95 P, *John Deere v Commission* (1998) ECLI:EU:C:1998:256 §34.

for the selection and appraisal of facts by the authority within the purposive perspective adopted. In the EU, the extent of judicial review is currently ambiguous in situations of complex economic evaluations, including market definitions.[136] It could be argued therefore that the definition of a market, based on the selection of facts within a purposive perspective, is such a complex economic assessment subject to limited review. Nonetheless, EU jurisprudence has emphasized the need for the GC to ensure that the decision contains all information 'that must be taken into consideration in appraising a complex situation'.[137] Where the Commission has not considered all relevant and reliable evidence, there would be a 'manifest error of assessment'.[138] Thus, even if an argument could be made in favour of limited judicial review of the purposive perspective adopted, the GC ought to be able to hold the Commission to take account where it has failed to consider factors which indicate the existence of competitive constraints on the alleged conduct within that perspective. Second, a legality review ought to be undertaken. Sousa Ferro has argued that market definition, particularly the method applied and key principles (such as whether 'gratuitous' markets can be defined) adopted, entails the application of 'normative criteria' and should therefore be subject to review.[139] That market definition, which entails normative principles, is a proposition with which this article would agree, for a much more compelling reason: if market definition is purposive, it is intrinsically linked with decisions about the aim of individual investigations and thus, ultimately, the goals pursued by the law. Though policy decisions may to some extent be left to the discretion of an administrative authority, matters of law ultimately belong to the Courts.[140]

These different suggestions all need to be considered, as they are undeniably linked to one another. A thorough judicial review, for example, can only be

United States of America: the facts as portrayed by the FTC decisions are subject to review under the 'substantial evidence' standard, and the Commission's application of legal standards is subject to 'de novo' review. See, for example, *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005); *McWane, Inc. v. FTC*, 783 F.3d 814, 824–825 (11th Cir. 2015).

[136] Case T-301/04, *Clearstream v Commission* (2009) ECLI:EU:T:2009:317, §47; Case T-556/08, *Slovenská Pošta* (2015) EU:T:2015:189, §113.

[137] Case T-342/99, *Airtours v. Commission* (20020) EU:T:2002:146, §§109–119; Case T-310/01, *Schneider Electric v. Commission* (2002) EU:T:2002:254, §§153–191; Case T-5/02, *Tetra Laval v. Commission* (2002) EU:T:2002:264, §161; See also, for the argument that the Commission ought to consider evidence presented by the undertaking, C-413/14 P, (2017) *Intel v Commission* ECLI:EU:C:2017:632, §138.

[138] Kalintiri, A. 2016. What's in a Name? The Marginal Standard of Review of "Complex Economic Assessments" in EU Competition Enforcement, Common Market Law Review, 53(5): 1298.

[139] Sousa Ferro (*supra* note 2) 316.

[140] It is unfortunate that this ideal is not always that simple to achieve in practice. For an impressive account of the rule of law in EU competition law, see Stones, R., EU Competition Law and the Rule of Law: Justification and Realisation (London School of Economics PhD theses 2018) available at http://etheses.lse.ac.uk/3938/1/Stones__EU-competition-law-rule-of-law.pdf.

effectively undertaken if there is a degree of transparency in the purposive approach adopted in a particular case, as well as in the different purposive approaches the authority has at its disposal. As Breyer noted, the drawing of a specific market cannot be criticized, even if other markets were possible, so long as it meets the criteria previously set out for legitimate market definition, and so long as the Court, but more generally the 'public', can access information which would enable broad inferences about the other markets which could have been drawn.[141]

These are all broad theoretical suggestions to achieve process subjectivity in antitrust market definition. They would require further development in research, as well as implementation in practice. The key take-away at this stage should be that, in acknowledging the true fictitious, analytical, and flexible nature of the antitrust market and adopting a purposive approach, there is no need to forsake a relatively objective and predictable process. There are measures which can be taken to ensure that 'purposive' does not become synonymous with 'subjective'. In doing so, we embrace the antitrust market's utility while ensuring the legality and legitimacy of the exercise.

V. CONCLUSION

Markets do not 'exist'; they are figments of our imagination. They do not capture a 'natural' reality, but human interaction. Markets distil dynamic decisions and relationships into a fictional static snapshot. To make this argument, the article starts by highlighting three lessons about the antitrust market which are often underemphasized in debates about its future: antitrust markets are analytical tools, there is no 'true' market, and the boundaries of a market will depend on the purpose for which it is drawn (a 'purposive approach'). Only when these truths are acknowledged can we see market definition for what it really is: merely a fictional framework to organize the chaos of economic interactions into an intellectually useful framework. This utility is derived precisely from the fictional and reductive nature of the antitrust market. It is why market definition lends itself so beautifully to the purpose for which it was designed: to select and organize those economic relationships which are relevant to answering a particular question about the alleged anticompetitive conduct. To fulfil this purpose, market definition needs to be static. You cannot study ever-changing relationships, unless you can bring temporary stillness to the chaos.

Crucially, markets are defined with a purpose. Since markets are analytical tools, their boundaries change in light of the specific question asked. Though the antitrust market is often portrayed as a tool with a narrow aim—to enable indirect measurements of market power—it actually lends itself to more than this one purpose. The antitrust market could, for example, be defined to shed

[141] Breyer (*supra* note 66) 34.

light on the feasibility of the alleged conduct or theory of harm. It is a flexible tool. Markets, then, are imaginary and purposive. They are not real and they are not fixed. Those are exactly the reasons that antitrust markets are so very useful.

This article aimed to convince the reader of the utility of antitrust markets by setting out the nature and purpose of the antitrust market (Part III), building on an exploration of the 'market' concept in general (Part II). This nature and purpose of the antitrust market implied that there could be no single antitrust market: that every case may imply a different market, even if it involves the same undertaking. However, as this article argued, this does not mean it is pointless to aspire to objectivity in antitrust market definition (Part IV). This objectivity would not lie in the specific outcome of the definition but in the process of product market definition. Antitrust markets may be particular, but they do not have to be 'arbitrary'.[142]

[142] Cf., wording by Markovits (*supra* note 1).