

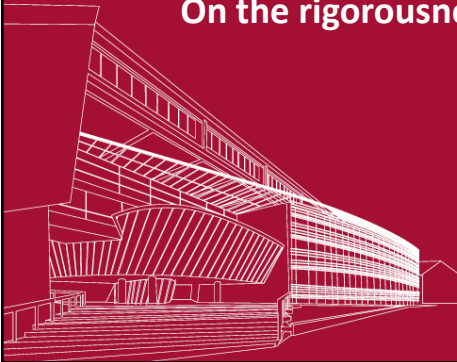


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Market definition between law and economics

On the rigorousness of a legal concept



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The Antitrust Enforcement
Symposium 2017

Oxford, 24 June 2017

1. Introduction

- Multi-sided markets, free services, 'digital products' => need to adapt our market definition tools
- **But... WAIT!**
- Relevant market = filter
 - 'Legal construct' (Gal & Rubinstein 2016; van den Bergh 2016), 'shorthand for a legal requirement' (Eiszner 1998)
- Law and economics in antitrust market definition
 - *Pragmatic perspective*: the spectrum



- *Theoretical perspective*: the prism



2. Market definition between law & economics

i. Pragmatic perspective

- Pragmatic = reality, reasonableness
- Competition law culture: US experience
 - *Brown Shoe* (1962): ‘Congress prescribed a pragmatic, factual approach to the definition of the relevant market, and not a formal, legalistic one.’ (p 336)
 - Agencies
 - 100+ economists at FTC and DoJ
 - SSNIP test in Horizontal Merger Guidelines
 - Market definition as ‘process dominated by economists who shape lawyers’ arguments’ (Kauper 1997)

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2. Between law and economics

i. Pragmatic perspective

- Competition law culture: EU experience
 - General Court, *Italian Glass* (1992): it is ‘not for the Court to carry out its own analysis of the market.’
 - European Commission
 - Market Definition Notice 1997
 - 28 economists in Chief Economist’s Team (since 2003)
 - Dual approach
- EU & US on the spectrum between law and economics
 - **Authorities** more economics-minded in both jurisdictions
 - **US courts**: pragmatic, dual approach
 - **EU courts**: more legalistic

Law

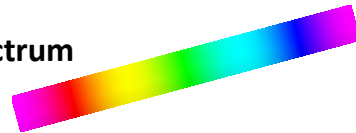


Economics

2. Between law and economics

i. Pragmatic perspective

- Pragmatic theorizing
 - Legal pragmatism will ‘intelligently and persuasively wield any argument that suits the context. If that means an economic argument makes best sense in a[n] antitrust case, so be it.’ (Desautels-Stein 2007)
 - Posner (2004): American legal theory is pragmatic, European is formalistic
 - Pragmatic perspective: **the spectrum**



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2. Between law and economics

ii. Theoretical perspective

- Law consists of norms and rules, but also of concepts
- What is a legal concept?

Conceptual scheme of the law

(1) Highly abstract level in law

(2) Rather highly abstract level

(3) Medium level of abstraction

(4) Low level of abstraction

von der Pfordten 2009

- Heavily modified non-legal concepts
- Inner-systematic determination
- ‘any concept taken up by the law [] turns into a legal concept’ with a meaning ‘specific to the law’ (Poscher 2009)
- Very concrete legal concept → technical norms
- Open to autonomous legal determination – by experts or lawyers

Discrepancies between these options, as regards role of economics!

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2. Between law and economics

ii. Theoretical perspective

- Evolving nature of the relevant market concept
 - Conceptual history: Concepts contain ‘condensed experience’ (Wimmer 2015)
 - Geographic and time-sensitive differences
- Incorporating the economic market concept into the legal
 - Concept of the market in economics ≠ legal concept of the relevant market in competition law (Geroski 1998; Turner 1980)
 - Shared concept – but ‘distinct conceptions’ (Poscher 2009)
 - Similar discussion in sociology (Weber 1907)

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2. Between law and economics

ii. Theoretical perspective

- Two principal roles of economics in competition law (Gerber 2009)
 - *Normative*: ‘Concepts and categories drawn from economic science ... become operative standards of the legal system.’
 - Questions of law
 - *Interpretive*
 - Schuhmacher (2011): law must ask questions from normative perspective, economics may help in answering them
 - Questions of fact
- Theoretical perspective: **the prism**



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3. A shared legal *and* economic concept

-  vs  → different implications
 - If we agree on the basic insights provided by the theoretical approach → re-think any legal concept in competition law shared amongst law and economics
- Benefits of re-thinking our conceptualization of the relevant market
 - Analytical clarity? Market definition is not an aim in itself..
 - Legal interpretation → uncertainty, flexibility

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**Thank you for your
attention!**

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Images

- Prism: <http://www.azooptics.com/Article.aspx?ArticleID=723>
- Spectrum: <https://commons.wikimedia.org/wiki/File:Spectrum.2400.1800.S.G.png>