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)

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
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 an antitrust case, so be it.’ (Desautels-Stein 2007)
     – Posner (2004): American legal theory is pragmatic, European is formalistic
     – Pragmatic perspective: the spectrum

ii. Theoretical perspective
   • Law consists of norms and rules, but also of concepts
   • What is a legal concept?
     - Highly abstract level in law
     - Rather highly abstract level
     - Medium level of abstraction
     - Low level of abstraction
     - 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!
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
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

Thank you for your attention!
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