

## **Competition Law's Innovation Factor – The Relevant Market in Dynamic Contexts in the EU and the US**

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### **1. Introduction**

In competition law, it is crucial to determine whether a behaviour took place in a certain “relevant market”, one of the most relevant and complex concepts in this field.

In dynamic markets, crossing the lines of such concept may be an arduous task, since the concept was thought for static markets. Therefore, in recent years, some lecturers have been questioning the need of a market definition in competition law.

In the book, which corresponds to Volume 23 of the “Hart Studies in Competition Law” series, the author provides a deep analysis of case-law, law and soft law in order to clarify how the definition of relevant market as we know it may be aligned with the specific characteristics of dynamic markets, specifically innovative markets. Therefore, this book relies on a comparative study between EU competition law and US antitrust law, carrying out an analysis of the issues arising from relevant market delineation in innovative markets.

The methodology adopted by the author contributes to the debate on the need of an overhaul of the legal analytical framework for determining the concept of relevant market in an innovative context.

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## **2. Book Chapters**

The book is divided into three parts (“Market definition and innovation”, “The innovation factor in market delineation under EU competition and US antitrust law”, and “Reconceptualising the legal framework for delineating antitrust markets in dynamic contexts”) and eleven chapters.

In Part I, the author starts by explaining the importance of the key issue discussed in the book and deconstructs the concepts of relevant market and innovation. Part II analyses the impact of innovation (which includes digital markets) on market definition under both EU competition law and US antitrust law. Finally, Part III is dedicated to the conclusions arising from Parts I and II and focuses on the need to reconceptualise the market definition framework.

Chapters 1 and 2 introduce the theme and explain how innovation may raise problems in the delineation of relevant market. The author starts by characterising relevant market and each of its functions, both in EU competition law and US antitrust law, questioning whether it is possible to abolish market definition from antitrust law. The third chapter points out the impact of innovation (which encompasses new and improved processes, technologies and products) on competition law by showing that the unique features of innovative markets represent several challenges for market definition, since this concept was constructed based on static markets.

Part II shows how the difficulties arising from market definition in dynamic markets have been addressed by courts and competition authorities in both the EU and the US. Chapter 4 tackles the product (one of the essential dimensions while crossing the borders of a relevant market) from an innovative perspective. In this context, the author points out the need to bear in mind demand and supply substitutability to characterise dynamic markets in order to apply competition law in such markets.

In the fifth chapter, the author highlights that, in dynamic markets, it is important to understand the existing context before the emergence of a relevant product. Notwithstanding, it is not clear in which framework such assessment may be made – how can one characterise a market before it even exists? Therefore, the author presents a number of concepts that have been applied in order to best describe antitrust markets even before they exist: (i) the concept of future markets (discussed previously in chapter 4); (ii) the concept of potential competition; (iii) the concept of innovation market; and (iv) the concept of innovation competition.

As noticed by the author, current product markets, future markets, potential competition and innovation competition are the concepts that best allow competition authorities and courts to comprehend innovation in dynamic markets, both in defining relevant market and at proceeding with the relevant substantive analysis.

Chapter 6 sets out the role of intellectual property rights in defining the relevant market and the several problems connected to such right in dynamic contexts. This chapter also examines specific case law on technology markets and the role that innovation may play in those markets – what are the effects of intellectual property rights on technology markets?

The author starts by explaining that, in both EU competition law and US antitrust law, the possession of intellectual property is not sufficient to presume market power. In those cases, competition authorities still need to rely on the relevant market in order to prove market power. Further in the analysis, it is explained how one can define relevant market when an intellectual property right is present. Product markets may be defined according to intellectual property rights and, when that is not the case, intellectual property rights still have a central role in the analysis of the relevant market.

It is important to consider two relevant aspects in order to rely on intellectual property rights for defining product market. First, it is essential to analyse to what degree the intellectual property right leads to differentiation. Subsequently, it is relevant to understand if and how the product protected by an intellectual property right is able to capture costumers.

Chapter 7 addresses innovative aftermarkets – also known as secondary markets<sup>1</sup> – focusing on the issues that relevant market delineation may raise in innovative aftermarkets. The author explains how aftermarkets are delineated in antitrust law and analyses the connection between primary and secondary aftermarkets, discussing proprietary and non-proprietary aftermarkets and aftermarkets in franchises.

Chapter 8 mentions the major difficulties arising from market definition in platform markets<sup>2</sup>. In this chapter, the focus is on the role played by multi-sided markets in the definition of antitrust markets.

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<sup>1</sup> The author defines aftermarket as a market that “consists of goods or services that are complements to a long-lasting primary product and that are typically bought after acquisition of the primary product” – Viktoria H. S. E. Robertson, *Competition Law's Innovation Factor – The Relevant Market in Dynamic Contexts in the EU and the US* (Oxford: Hart Publishing, 2020), 195.

<sup>2</sup> Platform markets are two or multi-sided markets.

By analysing the case law on multi-sided markets, the author concludes that at first, competition authorities and courts ignored the multi-sidedness of markets but, since the beginning of the twenty-first century, cases show that multi-sidedness has finally been acknowledged within the context of competition law.

In this framework, it is pointed out that market delineation in multi-sided markets is still evolving. Therefore, although it is still not clear how competition authorities and courts incorporate multi-sided markets into market delineation, the prevailing opinion among scholars is that multi-sidedness should be considered in market definition.

The author concludes that it may be reasonable to make a two-step market analysis to “characterise the relevant market(s) both at the level of the platform and on all market sides”<sup>3</sup>.

Concluding Part II, chapter 9 analyses additional issues that may arise from innovation and market delineation and explains the difficulty of applying standard economic tests to innovative markets. Such tests have price as the nuclear parameter and, in the context of innovative markets, price is not as relevant as in other type of markets. Therefore, the solution could be the substitution of the variable that forms the basis of the SSNIP test (*i.e.*, the price) for a more suitable variable, such as quality or performance. Thus, throughout part of this chapter, the author considers the applicability of three economic tests in innovative markets: (i) the SSNIP test, (ii) market shares, and (iii) concentration levels. In his view, particular care must be taken when determining market shares in innovative markets, bearing in mind the distinctive characteristics of dynamic markets. The chapter refers delineation of geographical market definition as a problem in dynamic markets, since there are some factors that must be considered to determine the geographical scope of an innovative market.

Part III concludes the book. In the tenth chapter, the author explores two different possibilities to reconceptualise the market definition framework. The first focuses on market definition as a concept whose main function is to assess market power, whereas the second has its basis on market definition as a tool that allows market characterisation.

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<sup>3</sup> Viktoria, *Competition Law's Innovation Factor*, 247.

### **3. Conclusion**

In chapter eleven, the author concludes that, considering the two main functions of market delineation (highlighted above) and the several roles that the concept plays within this context, it is not possible to conceive competition law without an analysis of the relevant market, which is pointed out as being an extremely important legal concept for competition law in both the EU and the US.

Therefore, one cannot assume that market delineation is no longer relevant. It is indispensable to reconceptualise the concept of relevant market. Yet, the two options presented by the author in chapter 10 are only possibilities and should not be seen as recommendations to be strictly followed.

In the author's point of view, market definition is "too big to fail"<sup>4</sup> and, as such, in order to adequate relevant market to innovation contexts, the concept should emphasise its function of market characterisation.

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<sup>4</sup> Viktoria, *Competition Law's Innovation Factor*, 317.