November, 5th 2020

Defining markets in a new age:
Save the relevant market now!

Rafik RABIA

To quote this paper: **Rafik RABIA, "Defining Market in a New Age: Save the relevant market now!", *Competition Forum,* 2020, art. n° 0006, https://www.competition-forum.com/.**

Resume. *In a speech entitled "Defining markets in a new age", delivered at the conference organized by Chillin' Competition in Brussels on December, 9, 2019, the European Commission's Vice-President, Margrethe Vestager, announced the forthcoming revision of the Commission's communication on the definition of the relevant market. An optimistic speech that hides a malaise: how to save the relevant market ?*

De Grament predicted it! The relevant market will be the victim of the impertinence of its definition. The competition authorities "run through capricious curves that respond more to chaos theory than to classical mathematics"[i], which calls into question any substantive analysis.

In a speech entitled "Defining markets in a new age", delivered at the conference organized by Chillin' Competition in Brussels on December, 9, 2019, the European Commission's Vice-President, Margrethe Vestager, announced the forthcoming revision of the Commission's communication on the definition of the relevant market. An optimistic speech that hides a malaise: how to save the relevant market.

The tendency to segment the market reflects a human tendency to fragment reality in order to better apprehend it. Its expression in the form of language depends on a cognitive simplification, even if it betrays this reality, as soon as the definition meets a specific need at a given moment in time.

The language used to communicate this ideal materialization is generally combined with a common definition of the concepts. When the members of a community share the same definitions, the exchange will be intelligible. But when each one has his own specific definition, or at least one definition adapts to his perspective, it will be more difficult to communicate.

The criticism of the relevant market is of the same order as that made by Henri Bergson on the concept of time. When humans break time down into small units of measurement and segment it into several moments to better understand it, they deny its continuous and uninterrupted nature. An event that takes place in a space also takes place over a continuity of time and not on two well-defined intervals in minutes or hours such as it is easily integrated by a human brain. In the same way, the splitting of the relevant market into small segments, and sometimes niches, in a global market denies its interconnected and continuous nature, which is an impertinent way of distorting reality through cognitive simplification.

In addition to these conceptual issues, there is a methodological difficulty. If the structural approach of the beginnings of the European construction consecrated by the emblematic *Continental Can* decision[ii] allows a certain predictable segmentation of reality, or at least in its method, the new approach based on the effects seemed to dethrone the market structure. In theory, it was supposed to lead to the disappearance of the notion of the relevant market.

The switch from a structural approach to an effects-based approach raised the question of the relevance of the market definition, at least in its version related to the 1997 notice.

The effect of an anti-competitive act in a structural conception of the market may be ineffective, particularly in differentiated products markets. The effects can now be assessed on several market structures by including any product on which a hypothetical monopolist can “crack down”. Thereby, the tendency to shrink the field on a part of the market comes up against this permeability of market structures. It is thereby legitimate to wonder about the interest of proceeding to several market definitions, or even of "niche", when the primary goal is to narrow the definition towards a given category. This process also finds unfavorable focus with the legal profession, who finds it beyond the reach of any conceptualization of this concept, which is essential to the application of a legal sanction.

The relevant market provides a tool for a comprehensive competitive analysis. Its delimitation is intended to put the assessment of market power in an appropriate context by allowing the decision-maker to identify all competitive constraints.

Its implementation is, however, difficult in practice. This is due, in part, to the exercise of defining the relevant market, which involves several factors without any logic or hierarchy. Such a definition rarely, if ever, allows conclusions to be reached in black or white. Real-world markets “are composed of different shades of grey, where there may be gaps in the lines of substitutes and where products do not always fall clearly into or out of the market”[iii]. This is, in part, the result of the methodologies, which are characterized by a choice of models, uncertainties or margins of error. This is why its relevance is the first thing contested by the parties in a dispute.

Can we get away from the market definition?

Defining the relevant market in the new age is not only about the purpose of the definition. Economics, or more exactly econometrics, is taking on more importance in the method of substantial analysis to the degree that the survival of the relevant market is questioned[iv].

The economic literature has proposed substituting economic analysis to the defining of relevant market. In the merger cases, for example, M. IVALDI and F. VERBOVEN, propose prediction effects methods of a merger that allow to override the relevant market definition[v]. They put forward a method that involves three tests: a hypothetical market power test, a real market power test and a comparative market test. This new method aimed at distinguishing the different approaches to market power from the traditional approach generally used by the Commission. The aim of this new line of thought, which was mainly based on the economic literature, was to move from an indirect prediction mechanism, based on market definition and concentration measurement, to a direct prediction mechanism by using economic analysis.

J. FARREL and C. SHAPIRO[vi] proposed the integration of an alternative economic method to market definition, called UPP[vii]. It allows, in a horizontal market, to assess the effect of a merger on differentiated markets. Based on the theory of unilateral effects, this method aims to determine, "initially", the impact of the transaction on the new entity's pricing incentives on the market of differentiated products. The analysisis also based on the impact made by removing the competitive pressure between the parties and the reduction in the new entity's production costs on its pricing incentives. The outcome depends on the assessment of a balance sheet that counterbalances these two effects. These methods, both equally interesting, cannot therefore replace the definition of relevant market.

The relevant market is actually the sphere in which one or more companies can use their market power. This power no longer comes to fruition on the usual trend of price increases independent of any competitive pressure. The assessment of price incentives is itself obsolete in the face of the emergence of so-called "free" markets. The hypothetical monopolist test, used by the Commission since 1991 in the Nestlé/Perrier case[viii], is no longer the essential tool[ix].

Moreover, the identification of markets for differentiated products is itself a definition of a market, which is not based, of course, on traditional criteria, but allows the identification of competitive pressure between operators.

These models could thereby make it possible to identify markets on which practices can be assessed by reversing the process. In other words, economic analysis of the effects/identification of the effect's target markets. The deal can also be taken concurrently without attempting to eliminate the relevant market notion, as time cannot be separated from space, the anti-competitive act cannot be separated from the market "virtual place".

To save the relevant market, the definition under the New Age must therefore integrate further economic analysis. However, it must be allowed to survive by strengthening its objectivity. Economic analysis must be able to assess market power outside of all price incentives and thereby identify the playing field. The economic approach based on effect must therefore be definitively adopted to identify the market(s) on the basis of an operator's harmful capacity.

Big Data or Big Monster?

The right question to ask when defining the relevant market in this hypothesis is : "are there really free products"? The ultimate aim of a merger combining free products, which the parties consider economically rational, should therefore be questioned. If any anti-competitive act is the direct or indirect expression of market power, it would thus be quite reasonable to reflect further on the power conferred by the marketing of a "free" product on the market as a whole, and the correlation likely to manifest on all its interconnections.

The Big Data is actually a Swiss Army Knife. Its use knows no limits. All "sub-markets" that are likely to receive the exercise of market power from a free product must therefore constitute "The" relevant markets in consideration of the new economic approach based on effect. They may also be sub-markets in which the operator is likely to capture and/or store data[x].

Thereby, digitization allows market power to be exercised by the mere possession of DATA. If human behaviour has not changed, as the Vice-president rightly points out, the factors that determine human behaviour have undergone a real metamorphosis.

Most of the people are not aware of the real causes of their decisions, as they believe that their choices were taken knowingly, which is the root of the problem. Without dissenting from Spinoza's determinism, it must be admitted that the use made by the Big Data through the algorithm distorts any prognosis on the natural behaviour. The Big Data confers the power to orient the choice, and this power must be put in the front line in the assessment of market power and consequently of the relevant market.

Consequently, the definition of market power must thereby remain the cornerstone of market definition without any attempt at simplified segmentation. But competition must do away with pricing incentives in the assessment of market power.

Ownership and use of Data is likely to transform consumer habits in markets that seem, *a priori*, unrelated to a relevant market defined on the basis of a traditional method or on the basis of price based simulations.

The notion of the relevant market, such as time, remains as elusive as ever. It reminds us of the quotation from Saint Augustine who said: "If no one asks me what time is, I know what it is; and if I am asked and want to explain it, I no longer know".

But unlike time, which leaves an impact through the ageing process, the market leaves none, or if it does, it will be too late to remedy it. In particularly in view of the New Competition Tool, which seems to foreshadow a generalization of ex ante control of the EU market at the risk of sacrificing liberties and legal security[xi], the authorities want to act without any perceptible effect.

The relevant market is in the same vein. We have to accept its elusive nature, try to bring definitions closer together, and adapt the methods to save it by increasing his credibility, because as time is linked to space, the anti-competitive act is linked to the relevant market.

Rafik RABIA

[i] D. DE GRAMONT, "Propos impertinents sur le marché pertinent dans le droit de l'Union ", *Dalloz*, aff., 1996.
[ii]ECJ, February, 21, 1973, *Europemballage Corporation & Continental Can Company Inc. vs/ Commission*, aff. 6/72, Rec., p. 215.
[iii]M. OINONEN, "Modern Economic advances in contemporary merger: an imminent farewell to the market definition?", *E.C.L.R.* 2011, 32(12), pp. 629-637.
[iv]D. Gore, "Market definition in merger control : An overview of EU and national case law", 6 February 2020, e-*Competitions Market definition in mergers*, Art. N° 92115.
[v]M. IVALDI and F. VERBOVEN, "Quantifying the effects from horizontal mergers in European competition policy", *International Journal of Industrial Organization,* 2005, 23, p. 669.
[vivi] J. FARELL & C. SHAPIRO, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, UC Berkeley: Competition Policy Centre, 2008 available on : *http://escholarship.org/uc/item/8z51b1q8*.
[vii] Upward-pricing-pressure test.
[viii] Comm. EC, July, 22, 1992, Nestlé/Perrier COMP/M.190, JO L356/1.
[ix] See A. CHARPIN, "L'indispensable test du monopoleur hypothétique", *Revue Lamy de la concurrence*, N° 47, 1 February 2016.
[x] B. VICENTE, "The Big Data Relevant Market As a Tool for a Case by Case Analysis at the Digital Economy: Could the EU Decision at Facebook/WhatsApp Merger Have Been Different?", June 12, 2017, Ascola Conference 2017, Available at SSRN: https://ssrn.com/abstract=3064795 or http://dx.doi.org/10.2139/ssrn.3064795.
[xi] M. S. GARNIER, "The New Competition Tool, A Trojan Horse to win the war against liberty », *Competition Forum, 2020, art. n° 0005. http:/www.competition forum.com.*