COMPETITION FORUM
LAW & ECONOMICS

April 29th, 2021

Interview of Viktoria H. S. E. Robertson on her book: 'Competition Law's Innovation Factor: The Relevant Market in Dynamic Contexts in the EU and the US' (Hart Publishing 2020)

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To quote this paper: M. Cartapanis, V. H. S. E. Robertson, "Interview of Viktoria H. S. E. Robertson on her book: 'Competition Law's Innovation Factor: The Relevant Market in Dynamic Contexts in the EU and the US'", *Competition Forum*, 2021, n° 0017, https://www.competition-forum.com/.

Summary:

Viktoria H. S. E. Robertson is Professor at the Vienna University of Economics and Business, where she heads the Research Group on Competition Law and Digitalization. She is also Professor of International Antitrust Law at the University of Graz, and Course Director for High Tech Markets and Antitrust at the College of Europe. She holds a law diploma and a doctorate from Graz University and an MJur from Oxford University. Amongst others, she has been a visiting academic with Oxford University's Centre for Competition Law and Policy (CCLP), the Max Planck Institute for Comparative and International Private Law in Hamburg, Stanford University and the FGV-Rio Law School. She has taught competition law at Oxford University, the European University Institute, the College of Europe, Graz University and the Vienna University of Economics and Business. She is a member of the European Law Institute and the Academic Society for Competition Law. Most recently, she published her book Competition Law's Innovation Factor: The Relevant Market in Dynamic Contexts in the EU and the US with Hart Publishing (2020).

In recent years, market definition has come under attack as an analytical tool of competition law. Scholars have increasingly questioned its usefulness and feasibility. That criticism comes into sharper relief in dynamic, innovation-driven markets, which do not correspond to the static markets on which the concept of the relevant market was modelled. This book explores that controversy from a comparative legal perspective, taking into account both EU competition and US antitrust law. It examines the manifold ways in which courts and competition authorities in the EU and US have factored innovation-related considerations into market delineation, covering: innovative product markets, product differentiation, future markets, issues going beyond market definition proper – such as innovation competition, innovation markets and potential competition –, intellectual property rights, innovative aftermarkets and multi-sided platforms. This book finds that going forward, the role of market definition in dynamic contexts needs to focus on its function of market characterisation rather than on the assessment of market power.

1) Vicky, your book focuses on the consideration of innovation in the delineation of the relevant market. Why was this question of particular interest to you? Could you, in a few words, present your work, the challenges and obstacles you have had to face, for example, in defining innovation?

Several years ago, I did some extensive research on the question of standard-essential patents and how they're treated under competition law. I found the innovation dimension to be particularly interesting and important. I also came to realize that, in the end, every case was fundamentally based on one analytical pillar: that of market definition. That led me to look into the issue of innovation considerations in market definition more closely. I was intrigued to find out how competition law could frame this important analytical tool in a less price-based way, so as to leave room for innovation. That of course required that I define innovation and innovative markets for the purposes of my book. As a lawyer by training, this called for reading-up on numerous economics papers, something that I thoroughly enjoyed. This then served as the basis for exploring how two jurisdictions – the US and the EU – account for various dimensions of innovation when delineating the relevant market. As dynamic markets usually don't just stop at the border, this comparative component of my research was particularly important to me.

2) The relevant market is a determining tool, but it is also highly contested. What do you think of the proposal, formulated by certain economists, to abandon the relevant market in favour of a more inclusive analysis, based on "market power"? In this respect, do you think that a difference should be made depending on whether the case concerns a cartel or an abuse of a dominant position, or even a concentration?

In antitrust, the relevant market is a key analytical tool because the law requires us to stake out the area to which the antitrust rules apply. Under the current status quo, we therefore simply need a relevant market in order to apply the competition law provisions.

Of course, that does not preclude discussions *de lege ferenda*. And that is precisely what my book looks at: What is the role of the relevant market in competition law? How can this role be fulfilled in dynamic market environments that don't adhere to the market logic we've become so accustomed to? While the relevant market is often regarded as the automatic gateway to my market power appraisal, particularly in Europe, market definition has another important function: that of closely characterizing the market at issue so as to understand competitive constraints in a broader sense, and in order to situate the theory of harm. This aspect of market definition is frequently overlooked or brushed aside. I conclude that it constitutes a central element in any competition law case, particularly in dynamic market environments.

As for different market definition frameworks for different areas of competition law, based on considerations such as legal certainty, the approach to market definition should be the same no matter whether we're dealing with a cartel, unilateral conduct or a merger. This is also the premise that the Market Definition Notice is based on. However, the point of view will often diverge depending on the particular case, once being retrospective, once prospective, but also having a different focal

point depending on the nature of the case. But in terms of methodology, there is a good argument to be made for a uniform approach.

3) In the treatment of innovation, US antitrust is more advanced than European law, particularly with the "Antitrust Guidelines for the Licensing of Intellectual Property". How do you explain this difference in the treatment of innovation between the two continents?

From my perspective, US antitrust and EU competition law have focused on different aspects of innovation in the past. In the US, you have the IP Licensing Guidelines and the innovation market concept, while in the EU, you have the R&D Block Exemption Regulation and the innovation spaces concept, for instance. These and other tools are all geared towards innovation-specific antitrust assessments. The different soft law instruments, block exemption regulations or concepts that were specifically developed are an expression of the types of cases that regularly came before the respective antitrust authorities. But they also show how these two jurisdictions are constantly inspiring each other with new ideas and developments.

4) You make a metaphor between competition law and tennis. You explain that different types of courts (be they clay, carpet, grass or hard courts) require different skills for line calls, just like different market environments in competition law do. Would you go so far as to say that a special competition law should emerge on innovative grounds? Moreover, the innovation process can vary considerably between sectors: for example, the impact of intellectual property rights is fundamental in the pharmaceutical sector, more incidental in some digital markets. Would taking innovation into account also imply differentiating market delineation methods according to the sectors involved?

Every market has its specific characteristics. The direct and indirect network effects that we encounter in digital markets, for instance, require my attention when I attempt to delineate a relevant market. But the law tries to provide tools that are of general application, so this does not necessarily mean that a *lex specialis* needs to be drafted for digital markets alone. Nevertheless, it could be a good idea to incorporate specific aspects of such issues into new guidance. This is what I propose in my reconceptualization of the legal framework for delineating antitrust markets in dynamic contexts.

5) Competition law is permeated by economic considerations. What do you think of the place given to economic analysis in competition law? More specifically, with regard to innovation, economic doctrines are sometimes contradictory. This is the case of the very different approaches developed by Arrow, Schumpeter and the new industrial economy. In your opinion, can competition law overcome this obstacle? Is the divorce "just around the corner"?

For antitrust purposes, the relevant market is a legal concept that is based on an economic one. Glassman called market definition a troubled marriage of economics and the law. Now what matters is how we reconcile the two. In market definition, but also in antitrust more generally, the law clearly has to be in the driver's seat – not only because we're talking about an area of the law, but also because economics is not the precise science competition lawyers would often like it to be.

On the other hand, competition law relies on many insights provided by economics – particularly when applying antitrust doctrine to new types of markets and business situations, for instance in the case of multi-sided platforms. So it's vital that this union of law and economics continue, but perhaps communication needs to be more straightforward.

6) You say that in economics, it is believed that, in the long run, dynamic competition - or innovation - can generate greater consumer welfare than static competition. This long-term observation is shared by the majority of the doctrine. But in the concrete implementation of competition law, is this long-term perspective, in your opinion, "operative"? Firstly, is there not, in practice, a necessary trade-off between static competition based on price and dynamic competition based on innovation? Secondly, before the Commission or the Union judge, the parties must provide evidence of the arguments put forward. But innovation necessarily induces a movement, a prospective approach. In your opinion, from a legal point of view, can we provide proof, for example of potential competition? Can we, in short, "prove the future"?

Price is something we can easily observe. It's also the metric that economists are most comfortable working with. So it is not surprising that a lot of competition law and economics is based on and revolves around price. What we've seen over the past few years is that other parameters of competition are increasingly being focused on – innovation, quality, perhaps even privacy. Quite frequently, however, we do not have the tools to readily measure them or to easily incorporate them into our frames of reference as we would with price – they are, as you say, not yet operative enough. So the preference for or bias towards price-based tools is understandable. But it is something that competition law and economics are working on. A central question in this endeavour, of course, is the required standard of proof. When can we speak of a future market that we're sure (enough) will emerge, at what point can we speak of a potential competitor? Any prospective analysis has an inherent element of uncertainty, so it's up to the law to establish certain thresholds that count.

7) Isn't the issue of innovation in competition law basically a question of political will? In France, the Minister of the Economy has the power to review a merger authorised by the Competition Authority for reasons of general interest other than the maintenance of competition, such as the maintenance of employment or industrial development. This power is not used for innovation, but more for employment policy. Could we imagine a similar mechanism at European or American level in favour of innovation? More generally, you have worked on US law. Do you think that the new Biden administration is fundamentally different from the Trump administration for antitrust law? At the European level, Vestager announced on 9 December 2019 a revision of the relevant market notice. What do you expect from this?

It certainly is the case that competition policy can be more or less favourable to innovation considerations, so political will can contribute to a stronger focus on innovation. But the

type of innovation that is good for consumers is part and parcel of what competition law is trying to achieve and promote, so it necessarily needs to form part of the competition assessment under current laws. We don't need another mechanism to enforce this, so I do not see the necessity for a ministerial permission based on the German or French model for promoting innovation. In fact, this might be counterproductive, as innovation will usually not be the only consideration at stake. Some balancing will often be required.

The Biden administration is only starting out, so we'll need to wait and see what its impact will be on antitrust. With the nominations of Lina Khan and Tim Wu, we're expecting to see some movement in digital antitrust. Interestingly, one of President Biden's first executive orders back in January insisted that all federal agencies – and I understand this to include the antitrust agencies – must take the climate crisis into account in their work. That could also refer to green innovation. So this is something we should be looking out for.

In Europe, the review of the Market Definition Notice – which dates from 1997 – is an opportunity to update this soft law instrument against the background of current market realities. This will particularly require a strategy on how to delineate relevant markets in the presence of multi-sided platforms and digital ecosystems. At the same time, it will be crucial for the European and US competition authorities to cooperate more closely on these issues – beginning with market definition. Particularly in dynamic markets, they frequently deal with the same companies and the same behaviour, so lots of synergies could be created here.

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