



## Market definition between law and economics: Spectrum or prism

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### Abstract

In competition law, the relevant market acts as a filter which delineates that part of commerce within which competition law assesses companies' market behaviour. This paper considers how competition law can reconcile the legal concept of the relevant market with its economic roots. It first explores a pragmatic approach to this issue, which understands our conceptualisation of market definition to move along a spectrum between law and economics. On this spectrum, economics can take on a more or less normative role. The paper then revisits this question from a theoretical perspective, which looks at market definition through the lens of the law and sees it as a legal concept building upon an economic one. While the first approach gives ampler room for law and economics to interact and sometimes concedes a more normative role to economics, the second merely assigns an interpretive role to economics. Although the relevant market today is understood to be a concept shared between law and economics, it maintains a distinct legal conception. If it is acknowledged that the relevant market acquires a distinct legal conception through its incorporation into the competition laws, then this has far-reaching repercussions on our entire conception of competition law, calling into question the prevailing understanding of shared legal and economic concepts such as market power or abuse of dominance.

*Keywords:* antitrust, competition, relevant market, legal concepts, legal theory, pragmatism

*JEL:* B10, K21, K4, L10, L40, L5

### Contents

1	Introduction.....	2
2	Market definition between law and economics .....	2
2.1	A pragmatic perspective on market definition: The spectrum.....	3
2.2	A theoretical perspective on market definition: The prism .....	11
2.3	Economics' normative and interpretive roles in market definition .....	16
3	Reflections on the relevant market as a shared legal and economic concept .....	18

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## 1 Introduction

Competition laws are based on a certain understanding of how markets work and what market outcomes should be achieved. This understanding was, in turn, greatly shaped by economics. This also applies to the relevant market as one of the basic analytical tools that competition law employs. The role of economics in understanding the concept of the relevant market as it is relied upon in competition law is a central one. At the same time, however, it is a role that is often not clearly defined: Is market definition primarily a legal concept with roots in economics, or is it principally an economic concept which is plugged into the legal analysis in an antitrust case, based on economic expertise? What consequences – if any – does either understanding entail for competition law?

This paper looks at two different perspectives on the interplay of law and economics that can be adopted when it comes to the concept of the relevant market: a pragmatic one and a theoretical one. The pragmatic approach relies on considerations that arise from practical experience and aims at what is possible rather than what might be ideal.<sup>1</sup> This view is more flexible, allowing us to regard market definition as moving along a *spectrum* between law and economics. It can sometimes result in market definition being seen as an economics exercise with a more subdued role for the courts, and – in turn – heightened pressure on the integrity of economics. The theoretical approach as discussed in this paper<sup>2</sup> derives its understanding of market definition from the theory of legal concepts and sees market definition as a rigorously legal concept with a more subordinate role for economics (the *prism*). Understanding the relevant market as a thoroughly legal concept has far-reaching repercussions on the entire subsequent antitrust analysis. In order to maintain the integrity of competition law analysis, other concepts such as market power or abuse of dominance would equally need to be regarded as legal concepts that are not necessarily equivalent to the economic concepts competition lawyers have become so accustomed to. This would come nothing short of questioning our current conception of competition law.

## 2 Market definition between law and economics

The relevant market delineates that part of commercial life within which competition law assesses companies' market behaviour, fulfilling the function of a filter.<sup>3</sup> Contrary to the substantive competitive assessment, which asks whether a certain type of behaviour or a certain merger raises competition concerns, market definition delineates the area to which the substantive provisions apply. Nevertheless, it has a decisive function as it allows antitrust enforcers to focus their attention on a particular relevant market, which is said to include all relevant competitive constraints.<sup>4</sup> Some have described the relevant market as a 'legal

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<sup>1</sup> Oxford English Dictionary, 'pragmatic, adj.' <<http://www.oed.com/view/Entry/149289?redirectedFrom=pragmatic#eid>> accessed 30 November 2017.

<sup>2</sup> The theoretical approach in this paper is understood to be one inspired by the history of ideas and the theory of legal concepts, but a multitude of approaches based on other theoretical conceptions are possible, such as a law & economics approach based on efficiency considerations.

<sup>3</sup> Although the following remarks focus on the product dimension of the relevant market, most will equally apply to the geographic dimension.

<sup>4</sup> This essential analytical function is well understood in competition law; for instance, see Robert Pitofsky, 'New Definitions of Relevant Market and the Assault on Antitrust' (1990) 90(7) Columbia Law Review 1805, 1807; Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015) 27.

construct,<sup>5</sup> others as ‘a shorthand for a legal requirement.’<sup>6</sup> It represents an important legal concept in a wide range of antitrust jurisdictions, but at the same time one must caution that its precise meaning may differ greatly amongst these antitrust jurisdictions. For this paper, it is not the exact content that is ascribed to the legal concept of market definition in a particular jurisdiction that is of interest,<sup>7</sup> but rather how jurisdictions arrive at this content. Or, to put it differently, we are not looking at how the filter of market definition works, but which raw materials are used in which proportions to build it. Law and economics, then, are understood as the raw materials making up the filter of market definition.

## 2.1 A pragmatic perspective on market definition: The spectrum

Competition lawyers – practitioners but also scholars – frequently take a more pragmatic approach to the issue of market definition, and the relevant market which results from this exercise. This pragmatic approach is grounded in reality and reasonableness,<sup>8</sup> and answers to the requirements of legal practice. While such a perspective acknowledges certain tensions between the relevant market as a legal and as an economic concept, it accepts these as given rather than questioning their legitimacy. Thereby, a pragmatic approach can overcome formalistic hurdles by focusing on the practical questions at hand. Two dimensions of such a pragmatic perspective shall be discussed, the first relating to the prevailing competition law culture (section 2.1.1) and the second consisting of ‘pragmatic theorizing’ (section 2.1.2).

### 2.1.1 Competition law culture as a frame for conceptualizing market definition

The practical interplay between law and economics in the area of antitrust market definition is an intricate one. On its face, the question seems to be whether market definition is primarily a legal concept that is informed by economics, or whether it is mainly an economic concept that is relied upon in competition law.<sup>9</sup> However, neither narrative reveals the complexities of this concept and of the positions that are possible on this question, which resemble a spectrum between law and economics, with lots of possible positions along the line. Contrasting the US and EU experience, it can be seen how competition law culture has

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<sup>5</sup> This exact description has been used by Michal S Gal and Daniel L Rubinfeld, ‘The Hidden Costs of Free Goods: Implications for Antitrust Enforcement’ (2016) 80 *Antitrust Law Journal* 521, 26; van den Bergh, Roger J. ‘The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?’ in Mitja Kovač and Ann-Sophie Vandenberghe (eds), *Economic Evidence in EU Competition Law* (Intersentia 2016) 35 (who added that this legal construct ‘has no direct relation to the economic concept of market power.’).

<sup>6</sup> James R Eiszner, ‘Innovation markets and automatic transmissions: a shift in the wrong direction?’ (1998) 43 *Antitrust Bulletin* 297, 338.

<sup>7</sup> In fact, it has been criticized that the question of what a market actually is for antitrust purposes is frequently simply ignored or avoided; see Rupprecht Podszun and Benjamin Franz, ‘Was ist ein Markt? – Unentgeltliche Leistungsbeziehungen im Kartellrecht’ [2015] *NZKart* 121, 125. The present analysis will only partially shed light on this important issue, confining itself to the more dogmatic issue of understanding the formation of the legal concept of the relevant market.

<sup>8</sup> Noting that legal pragmatism was guided by reasonableness, see Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 59, 64.

<sup>9</sup> An article in the 1980s accused economics of imperialism towards the law, while detecting a refutation of economics amongst lawyers without trying to understand what economics may contribute; see Robert D Cooter, ‘Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books’ (1982) 29 *UCLA Law Review* 1260, 1260–1261.

shaped today's multi-faceted understanding of the concept of the relevant market in practice.<sup>10</sup>

### 2.1.1.1 *The legal provisions and market definition in the courts*

The economic concept of a relevant market was not written into the antitrust statutes at their inception. Rather to the contrary, the relevant market terminology is not explicitly used in the US antitrust statutes – which date from the late 19<sup>th</sup> and early 20<sup>th</sup> century –, but this concept is today generally read into these provisions.<sup>11</sup> As such, § 1 Sherman Act prohibits anti-competitive agreements in restraint of trade or commerce, § 2 Sherman Act is concerned with monopolization of any part of the trade or commerce, and § 7 Clayton Act deals with a merger's anti-competitive effects in any line of commerce. Similarly, the concept of the relevant market is today understood to form an integral part of the EU competition law provisions,<sup>12</sup> which were adopted in 1957. Article 101 TFEU prohibits anti-competitive agreements in the internal market, while Article 102 TFEU forbids the abuse of a dominant position, with the latter referring to a position of market power on a given relevant market. And the EU Merger Regulation prohibits mergers that would have anti-competitive effects, particularly through the creation or strengthening of a dominant position on the relevant market.<sup>13</sup>

When applying the antitrust provisions, US courts have relied on economic thinking for many decades if not a century, and did so long before this reliance became openly visible over the last decades.<sup>14</sup> When delineating the relevant antitrust market, the US Supreme Court has referred to concepts such as 'cross-elasticities of demand,'<sup>15</sup> a notion which the Court borrowed from economics. In *Brown Shoe* (1962), the US Supreme Court made an apt remark on how it conceives market definition, holding that 'Congress prescribed a pragmatic,

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<sup>10</sup> Legal culture is here understood as social behaviour directed at the law; see David Nelken, 'Using The Concept of Legal Culture' (2004) 29(1) Australian Journal of Legal Philosophy 1, 1. On the importance of the legal context for competition law, see also Ariel Ezrachi, 'Sponge' (2017) 5(1) J Antitrust Enforcement 49.

<sup>11</sup> In this vein, see for instance *United States v Bethlehem Steel Corporation* (1958) 168 F. Supp. 576 (1958) 587 f (on § 7 Clayton Act) (Southern District of New York (District Court)); *United States v Grinnell Corp* [1966] 384 US 563, [1966] (US Supreme Court) 573 (on the concept in the Clayton Act and in § 2 Sherman Act); *Golden Bridge v Motorola* (2008) 547 F.3d 266 (5th Cir. 2008) 271 (on § 1 Sherman Act) (US Court of Appeals for the Fifth Circuit).

<sup>12</sup> In this vein, see for instance *Stergios Delimitis v Henninger Bräu* [1991] C-234/89, [1991] ECR I (CJEU) para 16 (on Article 101 TFEU); *VSPÖB and others v Commission* (1995) T-29/92 para 74 (on Article 102 TFEU) (General Court); *France v Commission, Société commerciale des potasses et de l'azote (SCPA) & Entreprise minière et chimique (EMC) v Commission* (1998) Joined Cases C-68/94 & C-30/95 para 143 (CJEU). In the EUMR, of course, reference is made to a 'dominant position,' which necessarily refers to a dominant position on the relevant market. See also the EUMR's reference to the relevant product market and the relevant geographic market in its provisions on the referral of a case to national competition authorities; Council Regulation (EC) 139/2004 on the control of concentrations between undertakings 2004, EU Merger Regulation (Council of the European Union) recital 15, arts 9(3), 9(7) (the latter provision is on the 'geographic reference market') and 9(8) (which allows Member States to take measures to ensure competition 'on the market concerned').

<sup>13</sup> *ibid* art 2 para 3.

<sup>14</sup> On this, see Herbert J Hovenkamp, 'The reckoning of post-Chicago antitrust' in Antonio Cucinotta, Roberto Pardolesi and Roger van den Bergh (eds), *Post-Chicago Developments in Antitrust Law* (Edward Elgar 2002) 1–2.

<sup>15</sup> *Times-Picayune Publishing Co v United States* [1953] 345 US 594 (1953), [1953] (US Supreme Court) 612 n 13.

factual approach to the definition of the relevant market, and not a formal, legalistic one.<sup>16</sup> And in *Grinnell*, the Supreme Court cautioned that ‘the search for “the relevant market” ... is, in essence, an economic task put to the uses of the law.’<sup>17</sup> In 2000, the DC Circuit held that market power can be shown in two ways: through direct economic evidence thereof, or through the more conventional route of defining the relevant market and assessing the market share thereon.<sup>18</sup> And in 2015, the Supreme Court underlined that ‘the Sherman Act ... gives courts exceptional authority to shape the law and reconsider precedent based on better economic analysis.’<sup>19</sup>

In EU courts, economics has traditionally not been equally influential in competition law as in the US.<sup>20</sup> The European Court of Justice has deferred a lot of interpretive power over economics-based questions pertaining to competition law to the European Commission. In one case, the General Court highlighted that it was ‘not for the Court to carry out its own analysis of the market.’ Instead, the Court could only verify whether the European Commission’s decision was correct.<sup>21</sup> A recent example from a different area of antitrust provides valuable insight into the CJEU’s struggle to find its position along the spectrum of law and economics: In the *Intel* saga, the Commission based its substantive analysis of rebates on a dual approach. The first was the CJEU’s formalistic precedent which presumes that fidelity rebates are anti-competitive, and the second was the economics-based as-efficient-competitor test as elaborated in its 2009 Guidance Paper on exclusionary abuses.<sup>22</sup> Thereby, it tried to cover the entire spectrum between law and economics. As Advocate General Wahl remarked, the fundamental question in the case was which constituted the *legal* test for rebates.<sup>23</sup> The CJEU was not prepared to decide where on the spectrum between law and economics it positioned itself, instead finding that as the Commission heavily relied on its economic analysis to conclude that Intel’s rebates were anti-competitive, the General Court should review Intel’s counter-arguments in that respect.<sup>24</sup> It appears that the Court is still torn between law and economics, and prefers to decide its particular position along the spectrum on a case-by-case basis. This is also true for market definition.

While in the US, courts appear to have pursued a pragmatic approach when considering the question of law vs economics on the issue of market definition, the EU courts initially ceded a lot of interpretive power to the Commission when it came to market definition, but

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<sup>16</sup> *Brown Shoe v United States* [1962] 370 US 294 (1962), [1962] (US Supreme Court) 336.

<sup>17</sup> *United States v Grinnell Corp* (n 11) 587.

<sup>18</sup> *Toys "R" Us v FTC* (2000) 221 F.3d 928 (7th Cir 2000) 937 (US Court of Appeals for the Seventh Circuit)

<sup>19</sup> *Kimble v Marvel Entertainment* (2015) 576 US \_\_\_ (2015) Syllabus p [3] (direct quote) and Opinion p [14] (US Supreme Court).

<sup>20</sup> Roger J van den Bergh, ‘The difficult reception of economic analysis in European competition law’ in Antonio Cucinotta, Roberto Pardolesi and Roger van den Bergh (eds), *Post-Chicago Developments in Antitrust Law* (Edward Elgar 2002) 34.

<sup>21</sup> *Società Italiana Vetro v Commission* (1992) Joined Cases T-68/, T-77/ and T-78/89 para 160 (General Court)

<sup>22</sup> See Guidance on the Commission’s enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings 2009, Guidance Paper (European Commission) paras 3, 25.

<sup>23</sup> *Intel v Commission* (2016) para 52 (Advocate General Wahl).

<sup>24</sup> *Intel v Commission* (2017) C-413/14 P paras 142-144 (CJEU). For a critical discussion of the fate of the more economic approach in the light of the General Court’s judgment, see Paul Nihoul, ‘The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?’ (2014) 5(8) *Journal of European Competition Law & Practice* 521.

have now adopted a more pragmatic approach which tries to reconcile law and economics without relying on a coherent theoretical framework for this interaction.<sup>25</sup>

### 2.1.1.2 *Economics at the competition authorities*

The legal culture and tradition as regards the institutional embeddedness of economics has left a particularly strong mark on how the EU and US rely on economics in competition law generally, and in market definition particularly.<sup>26</sup> Economists and lawyers have joined forces in public US antitrust enforcement since its very inception. When the Federal Trade Commission (FTC) first took up its work over a century ago, in 1915, it was already equipped with an Economic Division (today: Bureau of Economics) with roles in both industry investigation and law enforcement.<sup>27</sup> It had a considerable number of economists or accountants working for it from the start,<sup>28</sup> and today the Bureau of Economics employs a total of 52 economists in its two antitrust divisions.<sup>29</sup> Similarly, the Antitrust Division of the Department of Justice (DoJ) is supported by an Economic Analysis Group which currently employs about 50 economists in addition to research analysts and financial analysts.<sup>30</sup> Over 100 economists therefore work at the two US antitrust authorities. In addition, one should not forget that only about 5% of antitrust enforcement is public enforcement in the US; economists also take on a very active role in private antitrust cases before US courts.<sup>31</sup>

The Merger Guidelines, which the US antitrust agencies have regularly updated since the 1960s,<sup>32</sup> can be seen as the agencies' constant push towards a more economics-based delineation of relevant markets. In 1982, the DoJ first introduced the hypothetical monopolist

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<sup>25</sup> In this vein see *Intel v Commission* [2014] T-286/09, (General Court) and Marc Jaeger, 'Perspective of the Judiciary' (Dynamic markets and dynamic enforcement: Which competition policy for a world in flux?, Brussels, 27 January 2017).

<sup>26</sup> These differences can also be explained by the very different institutional embeddedness that economics have been subjected to in these two jurisdictions; on this see David J Gerber, 'Competition law and the institutional embeddedness of economics' in Josef Drexl, Laurence Idot and Joël Monéger (eds), *Economic Theory and Competition Law* (Elgar 2009).

<sup>27</sup> Paul A Pautler, 'A Brief History of the FTC's Bureau of Economics: Reports, Mergers, and Information Regulation' (2015) 46(1) *Review of Industrial Organization* 59 60.

<sup>28</sup> For instance, in 1917 it employed 33 economists or field agents, a number which increased to 71 in the subsequent year due to the war; this amounted to 51% of the FTC's staff in 1917, and approximately 70% of its staff in 1918. See Federal Trade Commission, 'Annual Report' (1918) 28 f.

<sup>29</sup> In total, the Bureau of Economics lists 4 (Deputy/Associate) Directors, 27 economists/analysts in its Division of Antitrust I, 25 economists/analysts in its Division of Antitrust II, and 21 economists in its Division of Consumer Protection, in addition to eight further posts in the Office of Applied Research and Outreach and the Office of Accounting and Financial Analysis. See Federal Trade Commission, 'Bureau of Economics Biographies' <<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/biographies>> accessed 2 January 2018.

<sup>30</sup> See US Department of Justice, 'Economic Analysis Group' <<https://www.justice.gov/atr/about-division/economic-analysis-group>> accessed 2 January 2018.

<sup>31</sup> Noting the importance of the federal courts for US antitrust enforcement, and the role economists play in court cases, see for instance Gerber (n 26) 29.

<sup>32</sup> See US Department of Justice, 'Merger Guidelines' (1968); US Department of Justice, 'Merger Guidelines' (1982); US Department of Justice, 'Merger Guidelines' (1984); US Department of Justice, 'Horizontal Merger Guidelines' (2 April 1992); US Department of Justice and Federal Trade Commission, 'Horizontal Merger Guidelines' (8 April 1997); US Department of Justice and Federal Trade Commission, 'Horizontal Merger Guidelines' (19 August 2010).

test in a footnote to its Merger Guidelines,<sup>33</sup> a test which has since been continuously refined by the agencies, most recently in 2010.<sup>34</sup> The hypothetical monopolist test frames the question of the relevant market in economic terms, asking whether a 5-10% price increase for a certain product would be profitable or whether customers would turn to substitutable products and thus make it unprofitable. In the 1980s, the hypothetical monopolist test was perceived as ‘a major advance in the economic theory of markets,’<sup>35</sup> and dominates the discussion about the economic conceptualization of the relevant market to this day. In fact, some economists have argued that there can be no alternative for delineating a relevant antitrust market.<sup>36</sup> At the same time, the US antitrust agencies try to de-emphasize the importance of market definition in the realm of merger cases.<sup>37</sup>

The EU’s attitude towards incorporating economics was decidedly more reserved and continues to culminate in clashes between economics-based and legalistic approaches, as was seen when discussing economics at the courts. At the European Commission’s Directorate-General of Competition (DG COMP), the post of Chief Competition Economist was only established in 2003.<sup>38</sup> While rather small initially, the Chief Economist Team has grown from a mere five members in 2003<sup>39</sup> to currently 28 economists.<sup>40</sup> In addition, it is worth pointing out that a substantial number of officials at DG COMP have an economics background – in 2005, roughly 200 out of over 700 officials.<sup>41</sup> These developments went hand in hand with the more economic approach that the Commission has pursued since the 1990s – and which highlights that competition law in general, and market definition in particular, were (even) less economics-based prior to this.

The European Commission only published its Market Definition Notice – which introduced the hypothetical monopolist test into EU competition law – in 1997.<sup>42</sup> This policy

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<sup>33</sup> US Department of Justice, ‘Merger Guidelines’ (n 32) § II n 6. On market definition in these guidelines, see Robert G Harris and Thomas M Jorde, ‘Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement’ (1983) 71 California Law Review 464.

<sup>34</sup> US Department of Justice and Federal Trade Commission, ‘Horizontal Merger Guidelines’ (n 32).

<sup>35</sup> Ian Ayres, ‘A Private Revolution: Markovits and Markets’ (1988) 64 Chicago-Kent Law Review 861, 865.

<sup>36</sup> See Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010) § 4-016.

<sup>37</sup> See US Department of Justice and Federal Trade Commission, ‘Horizontal Merger Guidelines’ (n 32) § 4. US scholars have also called into question the continued reliance of competition law on relevant markets; see Richard S Markovits, ‘Predicting the Competitive Impact of Horizontal Mergers in a Monopolistically Competitive World: A Non-Market-Oriented Proposal and Critique of the Market Definition-Market Share-Market Concentration Approach’ (1978) 56(4) Texas Law Review 587; Louis Kaplow, ‘Why (Ever) Define Markets?’ (2010) 124(2) Harvard Law Review 438. While this is not the place to respond to these critics in any detail, suffice it to say that as of now competition laws still rely on the concept of the relevant market in many respects. On the development of market definition in the US, see Gregory J Werden, ‘The History of Antitrust Market Delineation’ (1992) 76(1) Marquette Law Review 123.

<sup>38</sup> Lars-Hendrik Röller and Pierre A Buigues, ‘The Office of the Chief Competition Economist at the European Commission’ (May 2005) 2.

<sup>39</sup> For this number, see A. J Padilla, ‘Fundamentos económicos del derecho de la competencia en la UA: De la reforma <Monti> al paquete de modernización de las ayudas de estado’ [2015] Papeles de Economía Española 57, 58.

<sup>40</sup> For this number, see The Chief Competition Economist, ‘Chief Competition Economist’s team’ <<http://ec.europa.eu/dgs/competition/economist/contacts.html>> accessed 26 May 2017.

<sup>41</sup> Röller and Buigues (n 38) 28 n 16 However, not even 20 out of these held economics PhDs.

<sup>42</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law 1997. On this Notice and its weaknesses, see Peter D Camesasca and Roger J van den Bergh, ‘Achilles

instrument has remained unchanged ever since. In a nod to the legal concept that market definition continues to be, the Market Definition Notice underlines that the Court's interpretation of the relevant market concept takes precedence over its own guidelines.<sup>43</sup> At the same time, the Notice also pursues a dual approach by resting its analytical guidance both on established case law and on a European version of the hypothetical monopolist test.<sup>44</sup> This was criticized by some who argued that the Notice 'leaves the impression of new theories and techniques being injected into an orthodox legal straitjacket.'<sup>45</sup>

### 2.1.1.3 *Some thoughts on competition law culture and the relevant market*

As was seen, significant differences remain between the EU and the US competition law culture and their reliance on economics. The US embraced economics very early on, even if different antitrust schools of thought brought different insights to the table.<sup>46</sup> Today, the US can look back on a tradition of competition lawyers working alongside competition economists going back to the early 20<sup>th</sup> century. The institutionalization of economics in the EU, on the other hand, occurred much later and remains quite different both from the institutional point of view (time of establishment, size) and from the point of view of how economists participate in ongoing cases.<sup>47</sup> Together with the EU courts' preference for clear-cut legalistic rules, this continues to have implications for the way economics is relied upon in European cases today. It is fair to say that 'the role of economic analysis in the definition of the substantive principles of the [antitrust] discipline'<sup>48</sup> is still subject to intense debate in Europe, but is much less controversial in the US. Already twenty years ago it was held that in US antitrust law, economists rather than lawyers have the main say in market definition.<sup>49</sup> Practically speaking, it appears that market definition in the US is seen not so much as a legal concept informed by economics, but more as an economic concept relied upon in antitrust legal analysis. This view concedes normative force to the economic concept, thus clearly siding more on the economics side of the spectrum. At the same time, however, forces within the judiciary appear to place themselves more on the law side along the spectrum.

In the EU, one can identify a number of forces within competition law that oppose the adoption of a far-reaching more economic approach, amongst them a prevailing hesitancy towards the *laissez faire* minded Chicago School of antitrust, doubts as regards the assumptions that many economic models are based on, and a rejection of economic

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uncovered: revisiting the European Commission's 1997 market definition notice' (2002) 47 Antitrust Bulletin 143.

<sup>43</sup> Commission Notice on the definition of relevant market (n 42) para 6.

<sup>44</sup> This can particularly be noticed in *ibid* para 15 (calling the hypothetical monopolist test 'one way' of determining demand substitutability); para 36 (referring to product characteristics as a good starting point, but not sufficient for market definition).

<sup>45</sup> Camesasca and van den Bergh (n 42) 156–157.

<sup>46</sup> See, for instance, Herbert J Hovenkamp, 'Post-Chicago Antitrust: A Review and Critique' (2001) 2001(2) Columbia Business Law Review 257; William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' (2007) 1(1) Columbia Business Law Review 1; Bruce H Kobayashi and Timothy J Muris, 'Chicago, Post-Chicago, and beyond: Time to Let Go of the 20th Century' (2012) 78(1) Antitrust Law Journal 147.

<sup>47</sup> For a comparison, see Röller and Buigues (n 38) 9–10

<sup>48</sup> Pablo Ibáñez Colomo, 'Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law' (2016) 53(3) Common Market Law Review 709, 711.

<sup>49</sup> Thomas E Kauper, 'The Problem of Market Definition under EC Competition Law' (1997) 20 Fordham International Law Journal 1682, 1682.

arguments that cannot fit within the legal framework.<sup>50</sup> In short, in the EU the applicability of economics in competition law needs to be better substantiated than elsewhere, and even then it will often lack acceptance within parts of the competition law community. This might also explain the dual approach – one law-based, one economics-based – that the Commission often relies on in market definition as well as in other areas of competition law.

Despite these differences in legal culture and tradition, there has been a continuous push towards the economics side of the spectrum in both the EU and the US. A jurisdiction's position along this spectrum is not static but can be subject to change as competition law culture evolves. Courts and antitrust authorities, it would seem, do not always cohabitate the same position.

### 2.1.2 The interaction of law and economics in market definition: pragmatic theorizing

We now turn to the broader discussion on how law and economics (should) interact when it comes to the relevant market. This can be referred to as *theorizing on a practical level* because it mirrors a debate which regularly takes place outside the framework of a specific legal theory and is instead very much grounded in legal practice. It is pragmatic in the sense that it 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.'<sup>51</sup> This is not to suggest that all scholars cited in the following are legal pragmatists, but simply that their arguments on law and economics in market definition are here used in such a pragmatic way.

It has been long recognized that economic facts have always had a considerable influence on the law.<sup>52</sup> Applied to market definition, the question emerges to what degree the relevant market as conceived in economics has, for all practical purposes, actually become the law. The interaction between law and economics in competition law has been characterised in many different ways, with accounts reflecting different views as to the role that economics should be assigned within competition law. Some speak of a 'long and fruitful interdisciplinary collaboration'<sup>53</sup> between the two disciplines, others emphasize how much competition law was influenced by industrial organisation,<sup>54</sup> some suggest that economics are 'the intellectual foundation of antitrust in modern times,'<sup>55</sup> others view competition law today as 'a field of applied economics,'<sup>56</sup> and yet others contradict the latter statement.<sup>57</sup> It has also

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<sup>50</sup> On these, see van den Bergh (n 5) 30.

<sup>51</sup> Justin Desautels-Stein, 'At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis' [2007] Michigan State Law Review 565-630, 569 (attributing this pragmatic attitude to 'contemporary legal consciousness'). Desautels-Stein goes on to analyse various kinds of legal pragmatism – eclectic, economic and experimental pragmatism – of which particularly economic pragmatism is relevant for our present enterprise, which hails its insights from economic theory and is indeed quite closely connected to law and economics; on this see *ibid* 595, particularly n 124.

<sup>52</sup> Josef Dobretsberger, 'Beziehungen zwischen Rechts- und Wirtschaftstheorie' (1927) 20(4) Archiv für Rechts- und Wirtschaftsphilosophie 571, 571.

<sup>53</sup> Jonathan B Baker and Timothy F Bresnahan, 'Economic Evidence in Antitrust: Defining Markets and Measuring Market Power' in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press 2008) 1.

<sup>54</sup> In fact, it has been argued that economics today provide the very basis for competition law, and that no legal rules on antitrust can dispense with economic considerations; see Hila Nevo, *Definition of the Relevant Market: (Lack of) Harmony between Industrial Economics and Competition Law* (Intersentia 2015) 1–2.

<sup>55</sup> *Ibid*.

<sup>56</sup> Alan Devlin, *Fundamental Principles of Law and Economics* (Routledge 2015) 304. This phrase seems to be borrowed from Judge Posner, who stated in 1999 that 'antitrust law has become a branch of applied economics.' Richard A Posner, *The Problematics of Moral and Legal Theory* (Belknap Press 1999) 229.

been held that in competition law, '[t]he legal question ... is essentially an economic question.'<sup>58</sup> But what does this mean for our case of market definition? If the law needs to rely on a relevant product market in a given case, is it economics' prerogative to provide the answer to this – or is it for the law to determine, perhaps based on learnings from economics, which analytical steps to take in order to arrive at the legally relevant answer? From the perspective of competition law scholarship, the question quickly becomes a very fundamental one: How are originally economic concepts incorporated into competition law? What does it mean when an economic concept turns into a legal concept? While the present section ventures into this rather doctrinal territory from a more practical perspective, section 2.2 looks at it from a theoretical perspective.

From a pragmatic perspective, many legal concepts in antitrust, and particularly that of market definition, have their roots in economics. Therefore, for all practical purposes it makes sense to rely on economic arguments when discussing the concept of the relevant market. This is also what many of the characterisations in the previous paragraph try to convey. One renowned economic pragmatist and antitrust scholar, Richard Posner, has remarked that American legal theory is pragmatic, while continental European legal theory is rather formalistic.<sup>59</sup> This, one could say, is also reflected in the different experience that US antitrust and EU competition law have had with economics, particularly in the area of market definition. The US judiciary's stances on market definition quoted above are exemplary for a thoroughly pragmatic approach. At the same time, Posner believes that economic thought may be gaining importance in European legal doctrine.<sup>60</sup> This can be seen in the European Commission's more economic approach that it has adopted since this statement was made by Posner, and which the European Court of Justice is still trying to come to terms with.

Today, EU and US courts regularly regard market definition as a necessary basis for competition cases, and frequently believe that they or the parties are required to appoint an economic expert for this analysis.<sup>61</sup> The question, then, is whether the economic expert simply brings his or her economic insights on the market to the table, or goes further and also provides the court with the legal answer to the question of market definition. An active court (or jury) might decide to intervene and question the resulting market definition, but this is not inevitably so. Where courts view market definition as the economist's job, rather than falling within their own legal competence, they will readily delegate this task to the economic expert(s). However, as Donald Turner has remarked, 'there is bound to be ... a difference between the economic and legal concepts of the market.'<sup>62</sup> He suggested that 'the process of defining [a] market ... should, as closely as is feasible, mirror what an economist, a good economist, would do. ... [B]ut then, in the end, ... the courts have to decide just how you are

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<sup>57</sup> Olav Kolstad, 'Competition law and intellectual property rights - outline of an economics-based approach' in Josef Drexl (ed), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar 2008) 11 ('Competition law is not applied economics.')

<sup>58</sup> Nevo (n 54) 1.

<sup>59</sup> Richard A Posner, 'Legal Pragmatism' (2004) 35(1-2) *Metaphilosophy* 147 157.

<sup>60</sup> *ibid* 159.

<sup>61</sup> This insight is derived from anecdotal evidence by German and Austrian competition law justices that spoke under the Chatham House rule; Seminar for competition law judges on 'Aktuelle Fragen bei der privaten Durchsetzung des Kartellrechts' (Vienna, 22 June 2015)..

<sup>62</sup> Donald F Turner, 'The Role of the "Market Concept" in Antitrust Law' (1980) 49(3) *Antitrust Law Journal* 1145 1147.

going to break the market, whether you are going to break it here, here or here.’<sup>63</sup> Turner seems to appreciate that there is both a legal and an economic dimension of the relevant market, and that the latter can inform the former to a certain degree, but then needs to leave legal decisions to be made by the judiciary. Ultimately, judges need a relevant market in order to answer legal questions, and an economist’s view of what market is relevant may not do justice to the legal framework. It is clear that the concept of relevant market that is used in antitrust law is not identical to what is sometimes referred to as ‘the market’ in business.<sup>64</sup> Similarly, however, the concept of the market in economics and the legal concept of the relevant market as relied upon in competition law are related, but not congruent.<sup>65</sup>

The hypothetical monopolist or SSNIP test has long conquered the antitrust world, emanating from the DoJ Merger Guidelines of 1982. Nevertheless, economic experts that agree on using this methodology regularly disagree on the relevant markets it leads to, effectively leading to ‘economic mayhem in antitrust cases.’<sup>66</sup> This inconsistency among results appears to be accepted from a pragmatic perspective.

## 2.2 A theoretical perspective on market definition: The prism

Returning to some basic insights from legal theory and the history of ideas allows us to take a fresh look at the relevant market as a legal concept within competition law. Law consists of norms and rules,<sup>67</sup> but also of concepts. As a legal concept within the sphere of competition law, the relevant market has its place amongst the competition law rules on anti-competitive agreements, unilateral conduct and merger control. The formation of that legal concept is of particular interest for our present inquiry.<sup>68</sup> There are many ways of approaching legal concepts in legal philosophy,<sup>69</sup> but for the present purposes a legal concept is understood to be a mental representation of certain properties or entities, which is

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<sup>63</sup> *ibid* 1148.

<sup>64</sup> See Commission Notice on the definition of relevant market (n 42) para 3. This is also the reason why managers’ insights into demand substitution might be of great value for antitrust market definition, but their views as to what constitutes ‘the market’ might not; on this see also Jonathan B Baker, ‘Market Definition: An Analytical Overview’ (2007) 74 *Antitrust Law Journal* 129, 139. On the difference between the intuitive apprehension of ‘the market’ and the antitrust law concept of ‘the relevant market’, see also Cristina Caffarra and Mike Walker, ‘An Exploration into the use of Economics before Courts in Europe’ (2010) 1(2) *Journal of European Competition Law & Practice* 158, 159.

<sup>65</sup> Nevo (n 54) 58. On different market concepts, see also Paul A Geroski, ‘Thinking Creatively About Markets’ (1998) 16 *International Journal of Industrial Organization* 677. Similarly, it has been cautioned that the antitrust law concept of the relevant market ‘has no direct relation to the economic concept of market power.’ van den Bergh (n 5) 35. It is for competition law to find a meaningful way of dealing with this issue.

<sup>66</sup> David A Huettner, ‘Product market definition in antitrust cases when products are close substitutes or close complements’ (2002) 47 *Antitrust Bulletin* 133, 133, 134, 138 (direct quote).

<sup>67</sup> On the form of legal rules and their ‘constituent features,’ see Robert S Summers, *Form and Function in a Legal System: A General Study* (Cambridge University Press 2006) 136 ff (direct quote on p 136).

<sup>68</sup> On the functions of legal concepts, not further explored in this paper, see Åke Frändberg, ‘An Essay on Legal Concept Formation’ in Jaap C Hage and Dietmar v d Pfordten (eds), *Concepts in Law* (Springer 2009) 2.

<sup>69</sup> On the lack of agreement concerning the nature of concepts generally, see Torben Spaak, ‘Explicating the Concept of Legal Competence’ in Jaap C Hage and Dietmar v d Pfordten (eds), *Concepts in Law* (Springer 2009) 68. See, for instance, von der Pfordten who distinguishes four classical alternatives in the history of ideas: idealism, realism, conceptualism and nominalism; Dietmar v d Pfordten, ‘About Concepts in Law’ in Jaap C Hage and Dietmar v d Pfordten (eds), *Concepts in Law* (Springer 2009) 19–20 See also Margolis and Laurence, who distinguish between mental representations, abilities and Fregean senses; Eric Margolis and Stephen Laurence, ‘Concepts’ in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy*.

employed as a tool to grasp the meaning of the law.<sup>70</sup> As such, a legal concept can convey a sophisticated meaning to the informed lawyer based on its context and its use in the relevant legal rules, in judgments or in scholarship. It can help in solving a legal problem, and allows us to frame our legal arguments based on a shared understanding of the content of the legal concept.<sup>71</sup>

### 2.2.1 The relevant market concept's abstractness and its roots in economics

If we start from the premise that the relevant market constitutes a legal concept, then the challenge is to understand how to consolidate this view with its economic roots. We will tackle this challenge by relying on two different options as regards a legal concept's abstractness.

The abstractness or concreteness of a legal concept can provide us with helpful insights into the law's ability to infuse a concept with independent meaning. Concepts can vary in their abstractness, which bears on their specificity and also on their function and relation to each other.<sup>72</sup> In law, we encounter concepts pertaining to four different levels of abstraction.<sup>73</sup> Two of these levels of abstraction may be particularly informative for better understanding the relevant market as a legal concept:<sup>74</sup> The first is the second highest level of abstraction (level 2), at which one may encounter concepts that are quite abstract and that are 'either heavily modified non-legal concepts or are even produced entirely by the legal system.'<sup>75</sup> The meaning of these concepts is relatively malleable in the hands of the law because they do not refer to an empirically verifiable concept which would inform and shape our understanding.<sup>76</sup> The law frequently makes use of everyday concepts – eg, a market – and then modifies its meaning so as to satisfy 'special doctrinal exigencies.'<sup>77</sup> This, it has been argued, is precisely the point at which non-lawyers become mystified by the law's meaning.<sup>78</sup> No matter how far the legal concept departs from the original concept it is built upon, 'any concept taken up by the law [necessarily] turns into a legal concept' in that it takes on a particular meaning or

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<sup>70</sup> Similarly, see Pfordten (n 69) 20, 21.

<sup>71</sup> On the cognitive role of conceptual structures in the law, see Giovanni Sartor and Enrico Francesconi, 'Legal informatics and legal concepts' (Luxembourg, 18 & 19 November 2010).

<sup>72</sup> See Pfordten (n 69) 24, 27.

<sup>73</sup> See *ibid* 30. Interestingly, the breadth of a legal concept may also bear some relation to its (perhaps necessary) abstraction, for instance if one thinks about the concept of life (as pertaining to the highly abstract level in law), the concept of law (again as part of the highly abstract level in law), or the concept of breach of contract (as part of the rather highly abstract level in law). On the concept of law, see, famously, HLA Hart, *The Concept of Law* (3rd edn, OUP 2012).

<sup>74</sup> Von der Pfordten's four levels of abstractness in the conceptual scheme of the law are the following: '(1) highly abstract level in law, (2) rather highly abstract level, (3) medium level of abstraction, (4) low level of abstraction.' The highest level of abstraction (level 1) refers to systematizing concepts, and is not of relevance for our particular concept of market definition. The medium level of abstractness (level 3), on the other hand, relates to concepts that are close to empirical sensations (eg, pear, bicycle or wet) and that the law can only determine to a very limited degree, and this again is not of direct relevance to market definition. On these levels, see Pfordten (n 69) 29 f (direct quote at p 30).

<sup>75</sup> *ibid* 30.

<sup>76</sup> *Ibid*.

<sup>77</sup> Ralf Poscher, 'The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate' in Jaap C Hage and Dietmar v d Pfordten (eds), *Concepts in Law* (Springer 2009) 99. For a discussion of another meaning of 'the market' understood as a legal concept, namely in the more capitalistic terms of a market economy, see Justin Desautels-Stein, 'The Market as a Legal Concept' (2012) 60(2) *Buffalo Law Review* 387. Compared to this type of market conceptualization, the relevant market in antitrust is a very narrow concept.

<sup>78</sup> Poscher (n 77) 99.

conception ‘specific to the law.’<sup>79</sup> It is a ‘linguistic fact’ that the law, when incorporating concepts from other areas, necessarily reinterprets them to make them its own, and this mechanic ‘has a deep and profound cause in the structure of the institutional and doctrinal practice of law.’<sup>80</sup> Applying this reasoning to the concept of the relevant product market in competition law, one quickly understands that this concept originates from the economic concept of the market but was subsequently heavily modified in order to fulfil certain analytical functions within the antitrust provisions. It has taken on its own, specifically legal conception. In particular, the clear market boundaries with which competition law operates do not resonate with economists, which regard the relevant market as more of a continuum.

Another option for conceptualizing market definition is as pertaining to the lowest level of abstraction within the conceptual scheme of the law (level 4), ie as being a very concrete legal concept. At this level one finds, amongst others, technical norms in medical, environmental or economic law, and again these are relatively open to legal determination – be it by specialists in the field (eg, economists) or by the law itself.<sup>81</sup> In this sense, the relevant product market in competition law can be understood as a concrete concept which operates like a technical norm and which economic experts or competition lawyers can determine rather autonomously.<sup>82</sup>

It is interesting to observe the tension between these two possible understandings of the relevant product market, once as a rather highly abstract legal concept which leaves ample room for inner-systematic determination (level 2), and once as a very concrete legal concept again with plenty of room for legal determination – but with a palpably stronger influence from economic experts (level 4). This very well represents the two main approaches to market definition that one encounters in the scholarly debate and also in practice, as could be seen in the discussion on the pragmatic approach to market definition (section 2.1). If the relevant market in competition law is understood to embody a level 2 abstraction, then we acknowledge that the concept of a relevant market is originally non-legal but also emphasize that, when used in the competition law context, it is heavily modified so as to fit within the legal framework of competition law. This modification can lead ‘to the extreme of total invention’<sup>83</sup> because our inner-systemic determination of the concept may depart entirely from its origins in the non-legal world; here: economics. On the other hand, if the relevant market is understood to be a concrete legal concept at level 4 of the abstraction scheme, we still expect a large degree of inner-systemic determination to be possible when framing the concept, but give significantly more leeway to a determination that may come from outside the law, for instance from economic experts. Even when observing the concept of the relevant market through the prism of the law, one therefore again sees a spectrum between law and economics opening – albeit one that is different from the pragmatic perspective in that the nature of the relevant market as a legal concept provides for stronger boundaries on the economics side. These boundaries stem from the fact that the economic expert, in order to

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<sup>79</sup> *ibid* 103.

<sup>80</sup> *ibid* 108.

<sup>81</sup> Pfordten (n 69) 30.

<sup>82</sup> Whether it is economists or lawyers to determine the concept’s content will depend on what is foreseen in the competition laws or in procedural laws.

<sup>83</sup> *Ibid*.

help elucidate a level 4 concept, needs to be guided by clear principles that will provide the competition lawyer – be it a judge, a competition authority or a practitioner – with the answer(s) he or she requires for the subsequent legal analysis. A level 2 concept, on the other hand, already places strong limits on the usefulness of economists by making the relevant market a concept within the law, and there is thus much less scope for economists’ insights being relied upon from the outset.

### 2.2.2 The evolving nature of the relevant market concept

Starting from the premise that the relevant market in competition law is a legal concept, the next question is what we understand by this *at a given point in time*. Concepts evolve, and capturing the evolution of a legal concept can be a delicate enterprise. Conceptual history, ie the discipline of historical study concerned with the evolving nature of concepts over time,<sup>84</sup> can provide us with some important insights that we can apply by analogy when it comes to understanding the evolving nature of legal concepts such as the relevant market. In fact, one can observe similar issues pertaining to our understanding of legal concepts in two dimensions: first of all, legal concepts evolve over time and may not be understood to mean exactly the same today as they did several decades ago. This is certainly true for the relevant market as it was understood when the European and US legal antitrust provisions were first promulgated – and the understanding of this legal concept as it is prevalent today. At the same time, there is a geographic component, for legal concepts may differ substantially in different jurisdictions. While this is quite intuitively understandable for some concepts (eg, the concept of individual freedom today and in 1850; the concept of political freedom today in the United Kingdom and today in Turkey), it is less palpable for others – while equally applicable. Concepts contain ‘condensed experience,’<sup>85</sup> they often convey much more than initially meets the eye, and may also be subject to changes that are not easily monitored. These considerations apply to legal concepts such as the relevant market with full force. In another area of commercial law, Stephen Weatherill has referred to the European Union’s internal market as an ambiguous, contested and dynamic legal concept.<sup>86</sup> A similar characterisation fits the relevant market concept, which equally evolves over time and with the challenges that it is faced with – for instance as concerns product markets in the digital economy.<sup>87</sup>

Although some scholars have forcefully questioned competition law’s continued reliance on market definition,<sup>88</sup> from a more pragmatic perspective the relevant market is unlikely to lose its importance in the foreseeable future. In fact, the practical significance of this legal concept becomes clear when it is asserted that ‘the quality of competition law is directly determined by the reliability of the market definition used.’<sup>89</sup> At the same time, what

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<sup>84</sup> Mario Wimmer, ‘Conceptual History: Begriffsgeschichte’ in James D Wright (ed), *International encyclopedia of the social & behavioural sciences* (2nd edn. Elsevier 2015) 548 (also highlighting that conceptual history is primarily concerned with ‘the changing semantics of concepts or notions over time’).

<sup>85</sup> *ibid* 548.

<sup>86</sup> Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 2.

<sup>87</sup> On this, see already Viktoria HSE Robertson, ‘Delineating Digital Markets under EU Competition Law: Challenging or Futile?’ (2017) 12(2) *Competition Law Review* 131.

<sup>88</sup> See references at n **Fehler! Textmarke nicht definiert.** above.

<sup>89</sup> van den Bergh (n 5) 35.

jurisdictions understand the relevant market to be may not always be the same,<sup>90</sup> ie the legal concept may take on different meanings depending on the jurisdiction, but market definition as a legal concept exists. What we need to find out, therefore, is what we understand by this legal concept.

### 2.2.3 The economic concept of a ‘market’ as incorporated into the legal concept

It is today well accepted that economics can help set out the goals of competition law,<sup>91</sup> although historically this has not always been the case.<sup>92</sup> Amongst antitrust economists, the delineation of the relevant antitrust market is often seen as a common denominator.<sup>93</sup> Nevertheless, based on the theoretical insights gained above it comes as no surprise that the concept of the relevant market that is used in antitrust law is not identical to what is sometimes referred to as ‘the market’ in business.<sup>94</sup> Similarly, the concept of the market in economics is not identical to the legal concept of the relevant market as relied upon in competition law,<sup>95</sup> with the legal concept containing an essentially normative quality.<sup>96</sup> In economics, different conceptions of the (boundaries of) markets exist, depending on the nature of the enquiry.<sup>97</sup> Competition law is only interested in one of these notions, where market definition serves to delineate the boundaries of a meaningful antitrust market which includes the competitive constraints.<sup>98</sup>

Just like there is no *one* legal concept of market definition, there is not *the* economic concept of market definition. There are different jurisdictions ascribing a (perhaps only slightly) different meaning to the legal concept of the relevant market, and there are different strands of economics with different ideas about what a market entails. What is important to bear in mind is that the legal concept of a relevant market shares ‘the core of its extensions’<sup>99</sup> with economics, but has very different intensions. In that sense, the relevant market is a shared concept. Both its legal and its economic dimension relate to the same core, but at the same time the legal and the economic concepts necessarily have – as Poscher called it – ‘distinct conceptions’ in that they are not aligned in what they are meant to achieve. In fact, in relation to the relevant market one might even state that use of the term relevant market might be slightly misleading in economics, as economics does not actually rely on any such

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<sup>90</sup> We know that legal concepts are highly context-dependent, ie they are very much determined by the legal system within which they find each other. On this, see already Gianmaria Ajani and Martin Ebers, ‘Uniform Terminology for European Contract Law: Introduction’ in Gianmaria Ajani and Martin Ebers (eds), *Uniform Terminology for European Contract Law* (Nomos 2005) 14–15.

<sup>91</sup> Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers* (2nd edn, OUP 2016) § 1.07.

<sup>92</sup> One merely need to think of the *Ordnungspolitik* pursued by the Ordoliberal School.

<sup>93</sup> Hans W Friederiszick, ‘Economic analysis in EU competition cases’ in Josef Drexler, Laurence Idot and Joël Monéger (eds), *Economic Theory and Competition Law* (Elgar 2009) 3.

<sup>94</sup> See Commission Notice on the definition of relevant market (n 42) para 3.

<sup>95</sup> Geroski (n 65), 678; Nevo (n 54) 58. One merely needs to consult the glossary of a generalist economics textbook in order to see the breadth of the concept of a market; see for instance Paul T Heyne, Peter J Boettke and David L Prychitko, *The Economic Way of Thinking* (13th edn, Pearson 2014) 416.

<sup>96</sup> Podszun and Franz (n 7), 125.

<sup>97</sup> Pointing to trading markets, antitrust markets and strategic markets, see Geroski (n 65) Geroski adds that economists ‘devote surprisingly few resources to defining what might naturally be regarded as our basic unit of analysis.’ (p 678).

<sup>98</sup> Commission Notice on the definition of relevant market (n 42) para 2 (footnote omitted).

<sup>99</sup> Poscher (n 77) 101.

concept but understands the term market in a wholly different way from antitrust. It is only through antitrust that the ‘relevant market’ has entered competition economics as that branch of industrial organisation which relates to competition law.<sup>100</sup> In fact, it might be distorted to ask an economic expert to delineate the relevant product market in a given antitrust case without giving her further normative guidance on how this should be done – her answers will necessarily rely on the economic conception of the concept of a relevant market, and will only be informative in the legal context to the extent that these two concepts are shared. The legal concept of the relevant market is interested in the ‘area’ to which the competition laws apply, in which commercial behaviour is assessed against the legal standards of antitrust, while the economic concept is possibly more interested in ways in which to conceptualize market behaviour.<sup>101</sup> Of course, economic experts have nowadays become well accustomed to dealing with competition law and with competition lawyers, and have often adapted to the legal way of thinking about relevant markets. But one cannot help but wonder whether the ‘shared concept/distinct conception’ dichotomy does not continue to influence the lawyer/economist interaction.

For functional reasons, in developing its concept of the relevant market competition law will not unreasonably stray away from economic concepts of the market drastically, but noticeable differences can continue to exist even where established economic insights are markedly different from the legal conceptualization.<sup>102</sup> This can again be explained by the ‘specific legal and doctrinal exigencies’<sup>103</sup> that the legal concept of the relevant market is subjected to, which may not be able to accommodate particular economic conceptions of a (relevant) market. In a similar vein, Max Weber observed that the social sciences – including economics – frequently rely on legal terminology and on legal concepts (substantively conceived), but that by doing so these legal concepts relied upon are necessarily reinterpreted.<sup>104</sup> The same is true when the law uses an economic concept as a starting point, takes it up and subsequently necessarily forces its own conceptualisation on it. While this argument has been well accepted for concepts that are shared between the law and morality,<sup>105</sup> it is just as applicable to concepts shared between law and economics.

### 2.3 Economics’ normative and interpretive roles in market definition

Gerber has convincingly argued that economics serves two principal roles in competition law: a normative one and an interpretive one. Under the normative role, ‘economics supplies the content of legal norms. ... Concepts and categories drawn from economic science ...

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<sup>100</sup> On competition economics as a stand-alone discipline (or not), see Niels, Jenkins and Kavanagh (n 91) § 1.14

<sup>101</sup> The latter assertion is necessarily a competition lawyer’s best guess.

<sup>102</sup> For a general discussion of this insight, see Poscher (n 77) 102.

<sup>103</sup> Ibid.

<sup>104</sup> Max Weber, ‘R. Stammlers “Überwindung“ der materialistischen Geschichtsauffassung’ (1907) 24(1) *Archiv für Sozialwissenschaft und Sozialpolitik* 94, 145.

<sup>105</sup> On this, see Poscher (n 77) 106; Danny Priel, ‘Farewell to the Exclusive-Inclusive Debate’ (2005) 25(4) *Oxford Journal of Legal Studies* 675, 682 (speaking of connected but ‘logically independent’ concepts). Poscher also argues that this dissolves the Hart-Dworkin debate on the role of morality in hard cases because both Hart and Dworkin overlooked the fact that the law, when incorporating concepts like morality, forms its own legal conception of those concepts; see Poscher (n 77) 111 with reference to Hart (n 73); Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013).

become operative standards of the legal system.’<sup>106</sup> This normative role of economics can be easily accommodated within a pragmatic approach to market definition, and finds itself on the economics side of the spectrum. Drawing attention to the conceptual limits of this approach, however, a European scholar has argued that economics may well function as the foundation of the normative rules on market definition, but may not supplant these.<sup>107</sup> Applying these insights to the realm of market definition, one can argue – as results from the theoretical approach discussed in this paper – that the concept of the relevant market originates from economics, and has been turned into an operative standard of competition law with a specific legal meaning. As a legal concept, the relevant market must be precise and predictable. As such, there appears to be an inherent friction between the multiple approaches to the relevant market that economic models make available – especially in dynamic markets! – and the requirements of a legal concept.<sup>108</sup> This first, normative role of economics can be characterized as pertaining to questions of law, and can only be accommodated within a more pragmatic view which positions itself strongly on the economics side of the spectrum.

Under the second role that Gerber has made out, economics fulfils an interpretive role in that it helps answering factual questions.<sup>109</sup> Similarly, Schuhmacher suggests that the law must ask the questions from a normative perspective, whereas economics may help in answering them.<sup>110</sup> In the same vein, market definition frequently relies on economics in order to conduct the hypothetical monopolist test, calculate critical loss or compute concentration ratios. But economics also allows lawyers a more fundamental insight into how a particular market works, which can considerably shape a lawyer’s understanding of how the legal rules need to be applied in a given case. This interpretive function will continue to play an important role, but it is a continuing challenge to differentiate between the interpretive aspect of economics and its influence on the normative aspects of the relevant market. The interpretive role of economics can also be characterized as pertaining to questions of fact, in which economics can come to play a very decisive role – while keeping to the ‘rules of the game’ which are staked out by the law. This second, interpretive role of economics fits well within a view of market definition as a legal concept, as well as within a pragmatic view which is leaning more towards the law side of the spectrum.

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<sup>106</sup> Gerber (n 26) 25.

<sup>107</sup> Florian Schuhmacher, *Effizienz und Wettbewerb: Ein Modell zur Einbeziehung ökonomischer Ansätze in das Kartellrecht* (Nomos 2011) 421.

<sup>108</sup> It should be noted here that economic models also require a substantial amount of simplification or abstraction; see Malcolm B Coate and J H Fischer, ‘Is market definition still needed after all these years’ (2014) 2(2) *Journal of Antitrust Enforcement* 422, 424. However, due to the sheer unlimited possibilities in economic modelling, they do not easily lend themselves to an overall applicable theory that can be repeatedly relied on, as required for legal rules. While this might lead to a debate about the issue of legal (un-)certainty, I have deliberately shied away from any such discussion in the present paper, as this question does not as such pertain to an inquiry into the nature of the legal concept of the relevant market. In any case refuting the argument that a more economics-based understanding of competition law may undermine legal certainty, see Yannis Katsoulacos, Svetlana Avdasheva and Svetlana Golovanova, ‘Legal standards and the role of economics in Competition Law enforcement’ (2017) 12(2-3) *European Competition Journal* 277 285 f (containing further references to earlier articles).

<sup>109</sup> This includes the existence of market power; see Gerber (n 26) 25.

<sup>110</sup> Schuhmacher (n 107) 298.

### 3 Reflections on the relevant market as a shared legal and economic concept

We have seen that as a legal concept, the relevant market provides competition law with a commercial space that includes all relevant competitive constraints, and within which companies' market behaviour is legally assessed. It is the first analytical step upon which the substantive competitive assessment builds, and as such is of great practical importance. This paper set out to explore both a more pragmatic and a more theoretical approach to the question whether the relevant market is essentially economics plugged into the law, or a proper legal concept with roots in economics. The latter allows us to develop a rigorous legal conception of the relevant market, with a well-defined role for economics. If this view is accepted, then we need to acknowledge that the same reasoning necessarily applies to many other economic concepts as they are relied upon in our competition law frameworks, such as market power or tacit collusion – and we cannot help but ask ourselves whether this calls into question our entire conception of competition law.

A pragmatic perspective of the relevant market concept understands the dynamic interaction between law and economics on a practical level and a case-by-case basis. It sees an indefinite number of possible positions on the spectrum between law and economics, and is not as such interested in which discipline generally takes precedence over the other, and why. Depending on the particular competition law culture, economics may be understood as an important, sometimes perhaps even as a naturally dominating part of competition law which needs to define or at least inform competition law concepts. It was seen that US competition law culture has a long and well-established tradition of embedding economics in antitrust and can be said to be more pragmatic, while European competition law culture only started to introduce a more economics-based approach at the end of the 20<sup>th</sup> century, and continues to be more formalistic in some respects. Being practically-oriented, this perspective's particular strength lies in its ability to adapt to new scenarios without much of a headache. It cannot, however, propose a solution that would settle the question of how law and economics relate to the legal concept of the relevant market in a competition law context.

A theoretical perspective of the relevant market concept needs to be understood as a prism, seeing market definition through the lens of the law. It regards the concept of the relevant market as a legal concept which builds upon an initially economic one, but which is subsequently re-interpreted within the legal context. No matter whether we regard it as belonging to a higher or the lowest level of abstractness, there remains considerable scope for inner-systematic determination of the concept within the legal sphere. This means that any meaning that economists ascribe to the concept of a relevant market needs to be questioned in the legal context. Economic expertise on what constitutes the relevant market in a given case needs to be scrutinized against this background. If we adhere to the 'very concrete legal concept' view, then economic expertise will regularly determine what constitutes the relevant market in a given case, but the law needs to guide economists so that their expertise provides competition lawyers with the information they require for further analysis. If the relevant market is seen as a highly abstract concept, however, the role of economists is much more limited as the specific legal meaning of the concept needs to be determined by lawyers.

Although many competition law jurisdictions have embraced a more economics-based approach in the second half of the 20<sup>th</sup> century, the legal nature of this and other concepts relied upon in competition law must not be overlooked.<sup>111</sup> This oversight frequently seems to occur in practice, with soft law instruments either ignoring market definition's legal nature (US) or trying to consolidate them in rather unorthodox – or pragmatic – ways (EU). It might be *because* of the long and rich relationship between law and economics in competition law that it is so very difficult to identify antitrust legal concepts as just that: legal concepts.<sup>112</sup> As Geroski has pointed out, the concept of an antitrust market is 'geared towards the needs of antitrust policy users.'<sup>113</sup> There is a considerable difference between the term market as understood in economics and the market as a legal concept in competition law with a normative quality,<sup>114</sup> and yet it seems impossible to understand market definition within the competition law context in a purely legal or an exclusively economic way. This is a paradox which competition law must deal with regarding any economic concept that it incorporates.

The analysis has shown that there is an inherent friction in legal certainty and the precision that economic models can provide lawyers with. Can a more rigorous, legal understanding of the concept of the relevant market, as proposed in this paper, provide us with the analytical clarity that lawyers strive for? After all, market definition is not an aim in itself,<sup>115</sup> but only serves certain analytical purposes in competition law. Unfortunately, while competition economics is not the mathematically precise discipline we would often like it to be, neither is the law. Legal interpretation opens up avenues of uncertainty that give the law considerable flexibility. Appreciating how our legal concepts are construed through context, economic roots and re-interpretation can increase our understanding of competition law, but will not necessarily improve analytical stringency in a given case.

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<sup>111</sup> Similarly, in the recent *Sainsbury's v MasterCard* case before the UK's Competition Appeal Tribunal, it was held with relation to the concept of passing-on that 'the legal definition of a passed-on cost differs from that of the economist in two respects,' and then went on to explain the difference between the legal and the economic concept of passing-on; see *Sainsbury's v MasterCard* (2016) 1241/5/7/15 (T) [2016] CAT 11 para 484 s 4.

<sup>112</sup> In medical law, the question has been posed whether a physician's error should be understood as a medical or as a legal concept; see Hajrija M Mujovic-Zornic, 'Physician's Error: Medical or Legal Concept' (2010) 29(2) *Medicine and Law* 159.

<sup>113</sup> Geroski (n 65) 678.

<sup>114</sup> Podszun and Franz (n 7) 125.

<sup>115</sup> For instance, see Michael R Baye, 'Market Definition and Unilateral Competitive Effects in Online Retail Markets' (2008) 4 *Journal of Competition Law and Economics* 639, 652.