



Eben, M. (2020) Market Definition in EU Competition Law, by Miguel Sousa Ferro. *CoRe: European Competition and Regulatory Law Review*, 4(4), pp. 333-335. (doi: 10.21552/core/2020/4/15) [Book Review]

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Market Definition in EU Competition Law, by Miguel Sousa Ferro, Edward Elgar Publishing 2019; 356 pp.; DOI 10.4337/9781788118392; Hardback

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Market definition remains a ubiquitous step in competition law investigations, and a common source of discontent in scholarship and decisional commentary. Yet, despite the controversies surrounding both its existence and method, there is a distinct lack of monographs on the topic. Sousa Ferro superbly remedies this gap with this book, entitled *Market Definition in EU Competition Law*. As the title suggests, the book does not address a specific problem for market definition, occurring in a particular industry or for a particular group of people, but rather provides a general view of the legal status, value, and method of market definition in EU competition law. This is exactly what makes this book such a valuable addition to the literature. Sousa Ferro has written a comprehensive account of market definition, supported by a systematic review of the jurisprudence.

The book consists of 12 chapters, the content of which becomes more focused as the book progresses. It starts with an overview of the history and conceptual framework of market definition in Chapters 2 and 3. These chapters lay the groundwork for the rest of the book, and are not to be overlooked by any reader, even those ‘merely’ interested in applying market definition in practice. To understand the relevance of the market in decisional practice, it is crucial to understand the origins and definitional challenges of the concept. These chapters raise two key concerns of market definition: that the ‘market’ is a concept with many meanings, for which a consensus is lacking both in economics and law; and that the way a market should be defined may at times be

interpreted by secondary law, jurisprudence, and decisional practice, in a manner at odds with primary law.

Chapter 3 also explores the purpose of market definition in theory, evoking general ideas and controversies about the instrumental nature of market definition, its relationship with market power assessments, the objectivity of market definition, and the legitimacy of the market as a legal construct. It notes that market definition provides a source of legitimacy for the application of EU competition law, even if it would be possible in a particular case to arrive at a decision without defining a market. When robustly and consistently delineated, a market provides boundaries within which to assess the significance of the adopted business practices, weigh the rights of the parties concerned, apply the proportionality test, and ensure legal certainty. Moreover, the chapter rightly notes that market definition is instrumental, having goals beyond the identification of market power. It nonetheless cautions that such plurality does not justify the adoption of multiple market definition methods. Even though the book does not develop this point at great length, it does evoke a tantalising debate about the relationship between the goals and method of market definition, which the scholarship will hopefully take up in the near future.

Chapter 3’s general discussion of the purpose of market definition sets the scene for Chapter 4, which provides an overview of the relevance of market definition in practice. The chapter highlights that, even though it is not true that market definition is a necessary precondition for any judgment, there are many more situations in which a market is required than are commonly acknowledged. Market definition plays a role in collective practices, unilateral practices, merger control, and state aid, and the chapter provides a long list of the practical uses of market definition for each of

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accepted in October 2020 for publication by CoRe. For the final published version, see the European Competition and Regulatory Law Review.

these categories.

Whereas Chapters 2 to 4 scrutinise the concept and purpose of market definition, Chapters 5 to 8 move on to the more practical side of market definition. Chapter 5 explores the market definition method in general. In this chapter, Sousa Ferro argues for a single market definition method, regardless of the dispute at hand, and cautions that market definition inevitably involves fictions and abstractions. The chapter also explores basic concepts and tools of market definition, such as interchangeability, the SSNIP test, and potential competition. In doing so, it provides a useful introduction to the practice of market definition. The chapter does not endeavour to clarify certain tricky concepts of market definition, such as the scope of 'products', which have so far not received proper attention in the scholarship. Of course, a book like this cannot cover everything, and this merely leaves room for further scholarship.

Chapters 6 to 8 then provide a description of the principles and challenges in each of the three dimensions of market definition: the product, geographic, and temporal market. The most interesting analysis can be found in the chapter on the temporal dimension of the market. Sousa Ferro astutely distinguishes the 'timeframe' for market definition (chapter 8.1.) from the 'time dimension' of the market (chapter 8.2.). The timeframe is the period of reference within which the market definition exercise is carried out, whereas the time dimension (or 'temporal market') is a crucial element of the market itself, affecting the competitive factors of demand and supply. As is rightly noted, every market involves a timeframe, since data about demand and supply is collected for a specific period. Few markets, however, are temporal in the latter sense.

The next chapter, Chapter 9, succinctly outlines particular challenges which may arise when defining markets, covering seven issues in around 30 pages. The book offers a brief account of the problems with unidirectional interchangeability, two-sided markets, free

products, chains of interchangeability, exclusive rights, tenders, and discrimination. This account will no doubt be appreciated by any scholar in search of a starting point for their own in-depth analysis.

In Chapters 10-11, the book moves on to the analysis which, in this reader's opinion, was the most impressive and convincing of the book: issues of evidence and judicial review in market definition. Chapter 10 introduces the burden of proof in the process of market definition, and the types of evidence and relative importance assigned to them in the jurisprudence. It also explores the value of market definition precedents, and discusses the European Commission's obligation to state reasons for the delineation chosen.

Chapter 11 engages with the extent to which market definitions adopted by the European Commission can, and are, reviewed by the European General Court (EGC) and, on appeal, by the European Court of Justice (ECJ). The chapter first takes aim at the idea, commonly evoked, that the EGC does not and should not interfere in market definitions adopted by the Commission, save in cases of manifest error. Sousa Ferro argues that this idea stems from a misinterpretation of what market definition entails: disputes about market definition do not solely involve economic assessments, but often include issues of law. The applicable rules, normative criteria, and the logical conclusions derived from their application, are all issues of law, and thus subject to review. The chapter also reminds readers that the Market Definition Notice is not law as such, so that reviews cannot be limited to checking for compliance with the Notice. The chapter, subsequently, provides an assessment of judicial review in practice, reviewing the jurisprudence of the EGC and ECJ, respectively, to highlight the deficiencies in the reviews adopted by both Courts. This is worrisome because, as Sousa Ferro emphasises at the start of this chapter, a lack of judicial review 'has frequently resulted in denial of justice in specific cases and has frustrated the development of an objective method of market

definition', jeopardising the rule of law.² This chapter represents a very impressive account of the scope and deficiencies of judicial review of market definition, and will no doubt be cited for a long time to come.

The book's last chapter, Chapter 12, provides a brief conclusion on the recent economic proposals to replace market definition. Sousa Ferro explains why he has not been convinced by arguments to replace market definition, asserting that these are often fueled by misunderstandings by economists and lawyers rather than by the inherent arbitrariness or disutility of market definition itself. The chapter does not engage at length with the critiques of market definition as a means to establish market power, or with the proposals for alternatives. This is fine, since such an in-depth analysis would likely have detracted from the scope of the book. It sets the scene for more constructive reviews of such critiques and proposals in the future.

Sousa Ferro's book has two key strengths. The first is its unabashed return to the law. As Whish notes in the foreword to the book, scholarship on the topic of market definition has tended to show undue deference to economic literature, overlooking the legal status of market definition. Sousa Ferro's book acknowledges that the legal and economic perspectives of the market rely upon different bases, and that, for the 'market' to be used to apply the law, it has to have precise boundaries where it may not have them in economics.

Not only does the book acknowledge the need to separate economics and law, it also does not shy away from calling out a truth not sufficiently appreciated: that it is not the European Commission which ultimately decides the law. Indeed, a key strength of his book is that it reminds us where the authority resides in matters of competition law: it is the legislature and the Courts who get to determine, *erga omnes*, the scope and method of market definition, not the European Commission.

The second strength of the book is the

impressive empirical research which underpins it. Even though one may not always agree with the conclusions drawn from it, the extensive review of the case-law – in an area where the scholarship only selectively refers to judgments – can only be praised. This book will undeniably become a key reference for any future scholarship on market definition, precisely because of its meticulous incorporation of the jurisprudence.

The book seems to be intended as a unified overview of market definition in EU competition law rather than an in-depth analysis of particular issues. As such, the topics covered remain perfunctory. This does not render the book less commendable. Sousa Ferro's statements are always well considered, and his observations astute. Thus, he leaves room for further scholarship to untangle the issues this book raises, using it as a stepping stone to do so.

This book will likely become the go-to source for anyone interested in the principles of market definition, as developed by the jurisprudence rather than economic theory alone. It will make a valuable addition to the bookshelf of any competition law scholar or practitioner, interested in both the theory and practice of market definition.

² Chapter 11, p.312.