

Judicial Review: Do European Courts Care about Market Definition?

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I. Introduction

European courts generally do not feel comfortable interfering in market definitions carried out by administrative authorities. This *malaise* is rooted in the notion that defining a market involves complex economic assessments that a court should not overrule except in case of a manifest error of assessment, allowing the European Commission and NCAs a significant discretionary margin.

This article argues that, in the majority of cases, this idea is predicated upon a fundamental misinterpretation of what is involved in market definition and in its judicial review. Furthermore, it is argued that this has frequently resulted in denial of justice in specific cases and has frustrated the development of an objective method of market definition in EU competition law. Ultimately, it is the very rule of law that is in jeopardy.

II. Principles of judicial review

The case law on the principles of judicial review for market definitions carried out by the Commission includes drastic variations. At times, the predominant tendency of limiting control to manifest errors of assessment has been expressed, in clear and absolute terms, as the only type of possible control.¹ And yet, the case law of the Court does not allow for such a conclusion.

Key Points

- Applicants have a very small chance of seeing the European Courts overturn a market definition in a Commission decision.
- There is a tendency to limit judicial review of market definitions to manifest errors of assessment, when, actually, most issues that are raised before the Court are points of facts, of law, or of logic, which are subject to full judicial review.
- The ECJ has shown itself particularly unwilling to discuss this issue, jeopardising the rights of the defence, the objectivity of market definition, and, ultimately, the rule of law.

A. Moot arguments

Judicial review must be refused (and indeed is refused, in a very large number of cases) when the issue cannot affect the outcome of the specific case, rendering the discussion moot.²

Thus, challenges to market definition are not entertained when the issue being discussed does not require a market definition, or a precise definition would not change the conclusion in question.³ On appeal, the ECJ will also not discuss each of the EGC's individual findings,

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¹ See, eg Case T-405/08, *Spar Österreichische Warenhandels v Commission* [2013] (not yet reported), para 118 ('selon une jurisprudence constante, le contrôle juridictionnel des appréciations de la Commission en matière de définition des marchés de référence est celui de l'erreur manifeste'); Case T-11/08 *MasterCard et al v Commission* [2012] (not yet reported), para 169; Case T-427/08 *CEAHR v Commission* [2010] ECR II-5865, para 66; Case T-151/05, *NVV et al v Commission* [2009] ECR II-1219, para 80; Case T-346/02 etc., *Cableuropa v Commission* [2003] ECR II-4251, para 119; Case T-221/95 *Endemol Entertainment v Commission* [1999] ECR II-1299, para 106.

² See, eg Case T-57/01 *Solvay v Commission* [2009] II-4621, para 259.

³ Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875, paras 79, 94, and 232; Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, para 231; Case T-25/95 etc., *Cimenteries CBR et al v Commission* [2000],

ECR II-491, paras 833–835 and 1094; Case T-86/95 *Compagnie générale maritime et al v Commission* [2002] ECR II-1011, para 134; Case T-185/00 etc., *M6 et al v Commission* [2002] ECR II-3805, paras 51–54; Case T-213/00, *CMA CGM et al v Commission* [2003] ECR II-913, para 215; Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349, paras 27–29; Case T-5/00 etc., *NFVGETU v Commission* [2003] ECR II-5761, para 122; Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paras 132–133; Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, para 99; Case T-49/02 etc., *Brasserie nationale et al v Commission* [2005] ECR II-3033, para 144; Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, para 99; Case T-48/02 *Brouwerij Haacht v Commission* [2005] ECR II-5259, paras 57–59; Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-3255, paras 230–239; Case T-259/02 etc., *Raiffeisen Zentralbank et al v Commission* [2006] ECR II-5169, paras 172–175; Case T-30/05 *Prym v Commission* [2007] ECR II-107, para 87; Case C-510/06 P, *Archer Daniels Midland v Commission* [2009], ECR I-1843, para 98; Case T-59/07, *Polimeri Europa v Commission* [2011] ECR II-4687, para 101; Case T-82/08 *Guardian Industries et al v Commission* [2012] (not yet reported), paras 89–90; Case T-91/11 *InnoLux v Commission* [2014] (not yet reported), para 129.

when such an analysis would not affect a number of other grounds identified in the judgment in question.⁴

The Court has stated that it is the applicant who must show that a market delineation discussion is relevant in the specific case, and that this does not constitute an undue reversal of the burden of proof.⁵

Together, these case law principles have drastically reduced the number of cases in which the European Courts actually tackle the market definitions challenged by applicants.

But there have also been many occasions when issues of fact and/or of law regarding a market definition by the European Commission, crucial to the outcome of an annulment proceeding, have been addressed by the Court. It is these occasions that shall be the focus of the following analysis.

B. Compliance with the Market Definition Notice

On rare occasions, the EGC has tackled a challenge to a market definition by checking, exclusively, whether the options taken complied with the method set out in the Commission's Market Definition Notice,⁶ with no reference whatsoever to case law principles.⁷ While this may be the result of replying to applicants' arguments that are limited to the Notice, it ignores the fact that the Court should raise points of law on its own initiative, and may lead to a refusal of justice.

The law is not to be found in the Notice, but in EU law as clarified by the Court. And while the two are mostly in tune, there are some aspects in which the first is not entirely compatible with the latter.⁸

Thus, even if a market definition did not breach the rules to which the Commission voluntarily bound itself, it might still have infringed the law, as clarified by the Court, and should not be automatically confirmed.

Furthermore, any control of market definitions that is limited to verifying compliance with the Notice doubles

the Commission's discretionary margin, to such an extent that judicial review becomes pointless.⁹

C. The facts

It is well known that the degree of judicial review varies according to the subject of the review. An issue of fact, a point of law, and a legal conclusion are subject to different types of scrutiny.

However, errors in qualification of arguments and failures to distinguish between these different scenarios have occasionally led the Court to grant an undue discretionary margin to the European Commission when defining markets.

To begin with, it is often overlooked that the judicial review of market definitions may, and often does, relate to findings of fact and that, in that framework (in the first instance), it is unlimited.

The following are examples of issues of fact: (i) the number of suppliers of a certain service in a certain area; (ii) the technical feasibility and time required to switch production to a new product; (iii) a company's subjective perception of the competition one of its products is exposed to; (iv) consumers' past reaction to a small increase in prices; etc. It is also an issue of fact to conclude, for example, whether there is interchangeability between two products, when evidence produced before the court shows that such substitution has occurred in significant amounts in the past.¹⁰

It is settled case law (restated specifically in the context of market definition) that '*the Commission has no margin of assessment in relation to questions of fact*'.¹¹ Thus, whenever an applicant invokes a factual error, the Court is entirely free to, and should, replace its opinion for that of the Commission, the latter having no discretionary margin.¹²

In this context, '*the Community judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine*

⁴ See, eg Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, paras 24 and 28; Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, paras 17–19; Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297, paras 41 and 94.

⁵ Case T-329/01, cit., para 237; Case C-510/06 P, cit., paras 97–98 and 101–104; Case C-511/06 P *Archer Daniels Midland v Commission* [2009] ECR I-5843, paras 127–128. Although a surprising statement, given that the relevance of market definition is a legal issue, it must be read in light of its specific context (wherein the demonstration of certain factual circumstances was apparently relevant to assess the need to define the market).

⁶ OJ C 372/5, 09/12/1997.

⁷ See, eg Case T-210/01 *General Electric v Commission* [2005] ECR II-5575.

⁸ Thus, for example, the Market Definition Notice presents supply-side interchangeability as something which 'may' be taken into account, whereas the principles affirmed in the case law always require the pondering of both supply side and demand side perspectives, even if the

latter is (unfortunately) described as '*the most immediate and effective disciplinary force*' (contrast Market Definition Notice, cit., paras 13–14 and 20, with, eg Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, para 99). The Notice does not prevent the definition of 'future markets', whereas the Court has never identified a market where no product/service has been or is presently traded, etc.

⁹ To the usual discretionary margin granted by the Court when reviewing the conclusions, one adds the broad discretionary margin inherent in the criteria to be applied, that derives from the '*great freedom of choice*' the Commission gave itself when writing the Notice—see Case T-210/01, cit., paras 519–520.

¹⁰ See, eg Case T-210/01, cit., para 497.

¹¹ Case T-210/01, cit., para 490 (see also para 491).

¹² As an example of this type of judicial review, see Case T-336/07 *Telefónica v Commission* [2012] (not yet reported), paras 115 *et ss*. See also, generally, B Vesterdorf, 'Standard of Proof in Merger Cases: Reflections on the Light of Recent Case-Law of the Community Courts' (2005) 1:1 ECJ 3, at 15.

whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.¹³

Thus, complex technical or economic assessments can only be subject to limited judicial review to the extent that they relate to legal qualifications or conclusions that are based on the facts as established by the Court, rather than to facts in themselves.

If the Court is unsure, it cannot invoke complexity to exclude judicial review and give the benefit of the doubt to the Commission. This would disregard the allocation of the burden of proof. In such a situation, the principle of *in dubio pro reo* requires it to find in favour of the applicant.¹⁴

D. The law

Issues of law refer to determining the rules in force and the applicable normative criteria (such as the market definition method), but also to logical conclusions resulting from applying normative criteria to the facts of the case (definition of legal nature and determination of legal consequences).¹⁵

In the framework of issues of law, judicial review may deal with errors of law (when it is the law itself that must be clarified) or with manifest errors of assessment (in certain cases when the dispute concerns a conclusion to be drawn from the application of the law to the proven facts).¹⁶

If it is argued that the rule or normative criterion applied was wrong—eg whether a ‘future market’ or a

‘gratuitous market’ can be defined, whether lack of substitution following a 20 per cent price variation means the absence of ‘sufficient’ interchangeability, requisites for identifying a ‘system market’, admissibility of certain elements to determine the boundaries of a market, etc.—, this is an alleged error of law, which courts can and must control without limitation (full jurisdictional control).¹⁷ The number of disputes that turn on errors of law is much larger than is often believed.¹⁸

If what is challenged is a debatable interpretation of the facts, in light of the legal criteria for market definition, when such debate requires complex economic assessments—eg determining degree of cross-elasticity on the basis of incomplete historic data¹⁹—, the Court’s control will be limited to manifest errors of assessment.²⁰

But there are many debatable interpretations of the facts which do not require complex economic assessments. Very often, arguments raised in the context of complex economic assessments require only the use of philosophical logic. To that extent, there can be no limitation of judicial review. An illogical syllogism, for example, cannot be upheld because it is included within the framework of an economic complex assessment. Testing the validity of a syllogism does not require technical economic knowledge.

A market definition may require the analysis of economic reports, tests, and models. But the Courts cannot (and, indeed, do not) accept the conclusions of such expert evidence without a degree of control.²¹ Their affirmations are not facts in themselves, rather they are

13 Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para 33 (see also para 78). See further Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 89.

14 See Art 6(2) of the ECHR, Art 48(1) of the EU’s Charter of Fundamental Rights, and Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paras 149–150.

15 For an example of these conceptual distinctions, see Case C-136/92 P *Commission v Brazzelli Lualdi et al* [1994] ECR I-1981, paras 48–49.

16 It is revealing of the lack of clarity in the case law regarding this distinction that the most repeated principle concerning judicial review of complex economic assessments, in the context of market definition, refers to the control of factual errors, procedural and reasoning errors, and misuse of powers, with no mention of errors on law (see, eg Case T-321/05, cit., para 32), when it is beyond question that such errors are also subject to review (see Case T-427/08, cit., para 65).

17 Thus, when the EGC indicates that it considers that ‘*the fact that the products may differ from the point of view of product technology is not sufficient in itself to distinguish two separate markets where that difference is not taken into account by the consumer as a decisive factor*’ (Case T-7/93 *Langnese Iglo v Commission* [1995] ECR II-1533, para 69), it is deciding on a legal issue, after having established a factual basis. It is a clarification of normative criteria to be followed when applying the legal method of market definition. For further examples, see Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, para 48; Case T-336/07, cit., para 123; Case T-427/08, cit., paras 105, 114, and 118; Case T-346/02, cit., para 133. See also B Vesterdorf, cit., at 12. Determining whether a certain degree of interchangeability between two products is ‘sufficient’ to include them in the same market is a legal issue: it depends, not on economic theory or

analysis, but on the criterion adopted in the case law to decide how much is enough. Otherwise, there would be no legal certainty or predictability in the application of competition law, as the degree of ‘sufficiency’ would always be subject to scholarly debate between economists. It would also render judicial review impossible.

18 See, eg F Castillo de la Torre, ‘Evidence, Proof and Judicial Review in Cartel Cases’ (2009) 32:4 WC 505, at 577–578.

19 The identification of a relevant market in an annulment proceeding (the end result of applying the market definition method adopted in EU Competition Law) is a legal conclusion (see, eg DS Tucker, SL Reiter, and KL Yingling, ‘The Customer Is Sometimes Right: The Role of Customer Views in Merger Investigations’ (2007) 3:4 Journal of Clinical Legal Education 551), and it will frequently be based on complex economic assessments, but it is only the final step in a logical process, including the clarification of the facts and the law, as well as several intermediate legal conclusions, of which some may not be complex economic assessments.

20 For examples of this type of situation, see Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, para 25 *et ss*; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paras 70–71. For a restatement of the principle of limitation of judicial review in such cases, see Case T-201/04 cit., para 482. This does not mean that the Court can refuse judicial review simply because the Commission has based a conclusion on economic data, as the Court clarified in this same paragraph.

21 References in the case law to economic evidence are not abundant. Sometimes, it is mentioned in support of facts. But even when complex economic assessments are referred to, the Court has not shied away from controlling their logical soundness (see, eg Case T-191/98 etc., *Atlantic Container Line et al v Commission* [2003] ECR II-3275, paras 877–878),

aimed at persuading the judges of certain facts and conclusions.²² To that extent, their persuasiveness largely depends on how they fit with other evidence.²³ And the Court must also control whether the required tests were carried out, whether economic assessments rest on sound logical premises and true assumptions, etc.²⁴

One can argue that such control, through the use of logic, does not require complex technical (economic) knowledge, and therefore is not limited to the identification of manifest errors of appreciation. Or one can state, as Werden, that while it is an assessment of complex economic issues, logical errors must be considered manifest errors.²⁵

E. Appeals

In the appeal stage, judicial review of market definitions by the Commission (or, rather, of their control by the EGC) is more limited.

On the one hand, the ECJ does not get many chances to address the issue. Only a fraction of the cases where market definition was raised actually get to the appeal stage, and in only a few of these do appellants raise this issue (again).

On the other hand, as a general rule, the ECJ is barred from reexamining the facts of the case,²⁶ ‘*save where the clear sense of that evidence has been distorted*’²⁷ (ie the equivalent of a manifest error of assessment of the evidence by the EGC). As a result, the outcome of any challenge to a market definition that turns on a non-evident finding of fact will be irrevocably determined in the first instance.

That being said, there are still many occasions in which the ECJ can play a decisive role.

First, it is often the case that findings of fact are predicated upon a simple application of logic. Any such conclusion that rests on faulty logic (eg it is proven that company X took a long time to enter the market, therefore potential competitors take a long time to enter the market) must be considered a distortion of the evidence, subject to revision by the ECJ.

Second, the appeal focuses on identifying procedural infringements and infringements of EU law by the EGC.

sometimes even disagreeing with economists’ conclusions (see Case T-30/89, cit., para 76).

22 See Conclusions of Judge Vesterdorf in Case T-1/89 etc., *Rhône-Poulenc et al v Commission* [1991] ECR II-867, s E(5); and F Castillo de la Torre, cit., at 557–558.

23 See, eg JB Baker and DL Rubinfeld, ‘Empirical Methods in Antitrust Litigation: Review and Critique’, (1999) 1 American Law and Economics Review 386, at 430.

24 GJ Werden, ‘Economic Reasoning in Merger Cases and How Courts Should Evaluate It’ (2009) 5:3 European Competition Journal 701, at 708.

25 GJ Werden, cit., at 703, 715, and 719.

26 See Art 256(1)(2) TFEU and Art 58 of the Statute of the ECJ.

27 Case C-53/92 P, cit., para 42. See also Case C-295/12 P *Telefónica v Commission* [2014] (not yet reported), para 84; Case C-439/11 P Ziegler v

The latter include, as described above, not only erroneous statements of the law (eg the market definition method adopted in EU law and its various normative criteria), but also mistaken legal findings (qualifications or consequences).²⁸

Thus, while this is unheard of at the EU level, the last instance court can and should strike down the lower court’s conclusion concerning the relevant market, on the basis of the established facts, whenever that conclusion rested on an error of law or on a logically untenable application of the law to the facts.

As for procedural infringements, the ECJ must assess whether the EGC failed to adjudicate on a specific head of claim²⁹ (eg failed to address the issue of market definition, when this was raised and was relevant for the outcome of the case) and whether it has failed to duly reason its judgment (including considering all potentially relevant evidence produced before it).³⁰

III. The gap between theory and practice

We have noted that (even though a few judgments state divergent principles) the principles of judicial review of market definition seem to be fairly settled in the case law of the ECJ and EGC. It is in the way these principles are interpreted and applied in practice that lies the crux of the matter. The practical result is not what one would expect from the theory.

A. Challenging market definitions: dare not hope

The reality of the judicial review of market definitions carried out by the European Commission shows that applicants have a very low probability of success in overturning the Commission’s position.

In a universe of 608 annulment proceedings before the ECJ and EGC (including appeals) that addressed substantive competition issues, ever since *Continental Can*,³¹ the issue of market definition was raised in 134 (22 per cent³²). In only five of these cases (3.75 per cent)

Commission [2013] (not yet reported), paras 74–75; Case C-552/08 P *Agrar-Invest-Taschl v Commission* [2009] ECR I-9265, para 46; Case C-440/07 P *Commission v Schneider Electric* [2009] ECR I-6413, para 104; Case C-136/92 P cit., para 48.

28 See, eg Case C-154/99 P *Politi* [2000] ECR I-5019, para 11; Case C-136/92 P, cit., paras 48–49.

29 See Art 155 of the ECJ Rules of Procedure and Case C-200/10 P *Europaiki Dynamiki v Commission* [2011] ECR I-67, paras 32–33 and 42–43.

30 As derives implicitly from Case C-53/92 P, cit., paras 19 and 44–47.

31 Case 6/72 *Continental Can v Commission* [1973] ECR 215.

32 Broken down as follows: 52.6% in Art 102 proceedings; 15.8% in Art 101 proceedings; and 42.5% in merger control. State aid cases were not included in this statistical analysis.

was a Commission decision annulled (at least partly) on the basis of an incorrect or insufficiently justified market definition.³³ In four others, the Court expressed some displeasure with the market definition, but this did not lead to an annulment.³⁴

In other words, applicants have only succeeded in persuading the Court that the Commission erred in its delineation of the market in 6.7 per cent of the cases where the issue was raised. Some evidence suggests a similar or smaller chance of success before the national courts of EU Member States.³⁵

B. The EGC

The EGC has shown a tendency to stress different principles of judicial review, without this necessarily translating into how demanding it is, in the specific case.

Thus, in some cases, it states (*tout court*) that the judicial review of market definitions by the European Commission is limited to the identification of manifest errors of assessment.³⁶ But while some of these situations lead to an effective absence of control of the market definition, others generate substantial judicial review (eg NVV) and at least one of them (CEAHR) led to an annulment of the Commission's delineation.

In other cases, while mentioning the limit of manifest error of assessment, the EGC stresses that this only applies to complex economic issues within the market definition process, and that '*this does not prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.*'³⁷ In these cases, the Court tends to carry out an in-depth review of the facts and logic used in the market definition. While it still mentions the absence of manifest errors of assessment, and may even present the argument, overall, as being an allegation of a manifest error of assessment, it actually carries out a thorough reassessment of the delineation.

³³ See Case 6/72, cit.; Case T-49/93 *SIDE v Commission* [1995] ECR II-2501; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381; Case T-155/98 *SIDE v Commission* [2002] ECR II-1179; Case T-427/08, cit.

³⁴ See Case T-68/89 etc., *Società Italiana Vetro et al v Commission* [1992] ECR II-1403; Case T-7/93, cit.; Case T-9/93 *Schöller Lebensmittel v Commission* [1995] II-1611; Case T-61/99 cit.

³⁵ In Portugal, for example, courts have never disagreed with a market definition carried out by the Portuguese Competition Authority. In only one case did a court find that the decision was insufficiently reasoned, in that it failed to clearly define the relevant market—see Order of the Lisbon Commercial Court of 31 March 2004, *Arriva* (case no 154/04).

³⁶ See cases quoted above, at n 2.

In *AstraZeneca*, for example, faced with the argument that two pharmaceutical products should be included in the same market, where one was more advanced and was gradually replacing the other, the Court clarified points of law (eg regarding asymmetric interchangeability in market definition,³⁸ the application of the SSNIP test to gradual substitution,³⁹ the definition of the market within the relevant timeframe,⁴⁰ etc.) and carried out a complete reassessment of the market delineation, discussing arguments and evidence (including expert witnesses) in extensive detail, in almost 200 paragraphs.

On the flip side, in *Spar Österreichische Warenhandels*, the EGC imaginatively avoided controlling an obviously erroneous market definition. The Commission had defined a retail consumer goods market (supermarkets) with a national scope. This went against fairly consolidated market definition practice of the NCAs, and the decision itself was fraught with contradictions, recognising that such markets, from the users' perspective, should be delineated on the basis of a 20–30 minutes radius of travel by car (ie local markets). However, the impact of the merger in the various local markets was not taken into account. The Court refused to discuss the market definition by arguing that the applicant had not actually challenged it. And yet, it went on to show that the applicant had questioned the geographic level at which the effects of the merger should be assessed—what is this, if not the relevant geographic market?⁴¹

An example of a different type of refusal to address issues raised by the applicant can be found in *MasterCard*. The Court succinctly dealt with the argument that a single market should be defined, encompassing the different sides of the multilateral platform in question, by stating that there were different services provided to different demand agents who exert separate competitive pressure on issuing and acquiring banks.⁴² But this is a selective, non-justified, view of the reality of the competitive interplay and fails to address the underlying legal issue. In the '*presence of indirect network effects*', where one side of the platform subsidises the other, while it is true that there is no interchangeability between the two products, the freedom to increase prices for one is

³⁷ Case T-201/04, cit., para 482. See also, eg: Case C-12/03 P, cit., para 39; Case T-151/05, cit., paras 53–54; Case T-301/04 *Clearstream v Commission* [2009] ECR II-3155, paras 47, 67–68, and 73; Case T-446/05 *Amann & Söhne v Commission* [2010] ECR II-1255, para 54; Case T-321/05, cit., paras 32–33.

³⁸ Case T-321/05, cit., paras 90–96. Confirmed in Case C-457/10 P *AstraZeneca v Commission* [2012] (not yet reported), para 48.

³⁹ Case T-321/05, cit., para 89.

⁴⁰ Case T-321/05, cit., para 97. Confirmed in Case C-457/10 P, cit., para 37.

⁴¹ Case T-405/08, cit., paras 121 *et seq.*

⁴² Case T-111/08, cit., paras 173–178.

severely restricted by demand for the other. The point of law was to clarify why the relevant market should not be delineated taking these indirect effects into account. A more reasoned response was called for.

And, in a surprising number of cases, the EGC has upheld market definitions with the argument that the boundaries of the market may be defined by the scope of the anticompetitive practice in question.⁴³ This, in our view, is an error in law, which equals a refusal to apply the market definition method as set out in the case law.⁴⁴

In *Airtours*, the applicant challenged a shaky market definition, distinguishing a market for short-haul and a market for long-haul foreign package holidays. The EGC was faced with a large number of factual, logical, and economic arguments, concerning both demand-side and supply-side substitutability, and the decision itself provided evidence of some interchangeability,⁴⁵ but the Court dismissed them all, focusing predominantly on average price differences and treating other arguments rather superficially and even surprisingly.⁴⁶

Around the same time, what was arguably a much more complex delineation was overturned by the Court in *Tetra Laval* on the basis of a succinct (ten paragraphs) but persuasive analysis, which concluded that the evidence provided in the decision showed an error in the Commission's assessment and was insufficient to justify subdividing SBM machines into different markets according to use.⁴⁷ Not only was the Court critical of the reasoning of the decision, it mentioned several factors which suggested

that a single market for all SBM machines should be defined, reviewing the characteristics of the products, the economic implications of their lifespan, cost of consumables, cost of adapting machines to different uses, first mover advantage, etc.

Market definition was introduced in European Competition Law by a case in which the absence to define a relevant market was found to be a breach of the duty to adopt sufficiently reasoned decisions.⁴⁸ But, ever since then, the annulment of market definitions, with this basis, has become extremely rare.⁴⁹ In fact, we know of no case where such an annulment occurred for this reason alone, when the Commission had actually defined the market, but was found to have insufficiently justified its option.⁵⁰

It is well established that '*the lack of, or an inadequate, statement of reasons constitutes a plea of infringement of an essential procedural requirement*'.⁵¹ Without adequate justification of the Commission's choices, there can be no effective judicial control of market definition.⁵² Therefore, one cannot but be concerned with the number of cases in which the Court has tolerated and validated extremely scarce or even nonexistent justifications of market definitions. This has the effect of enlarging the discretionary margin granted to the Commission, or even of excluding, in practice, the duty to state reasons.

It is one thing to say that a Decision need not deal with market definition in a specific section.⁵³ And one may even concede that, theoretically, an implicit definition of the market may suffice,⁵⁴ as long as its reasoning is perceptible and sufficient. But it is not enough to be

⁴³ See, eg Case T-9/89 *Hüls v Commission* [1992] ECR II-499, paras 379–380 (and other judgments in the polypropylene cartel); Case T-34/92 *New Holland Ford v Commission* [1994] ECR II-909, paras 51 and 56; Case T-29/92 *VSPOB et al v Commission* [1995] ECR II-289, paras 77 and 81; Case T-91/11, cit., para 131.

⁴⁴ As a rule, an unlawful practice does not make a market smaller. If a relevant market is delineated on the basis of sufficient (demand and supply side) interchangeability between products and areas, an artificial partition resulting from an unlawful agreement does not, in itself, change the borders of the market (notice the analogy with the reverse 'cellophane fallacy', for predatory pricing). One cannot define a market corresponding to the scope of the agreement and then identify an anticompetitive practice corresponding to an artificial partitioning of a broader market. And an unlawful practice does not make a market larger. Just because undertakings may decide to adopt a single agreement or decision that affects a number of relevant markets, it does not mean that such markets can then be defined as a single one.

⁴⁵ Case T-342/99, cit., paras 21 *et seq.*

⁴⁶ Thus, for example, the Court relied on average flight times, dismissing the idea that consumers care, instead, about total travel time and that, depending on connections and transfers, it may take longer to fly to Turkey (short-haul) than to Florida (long-haul). This point, as well as the discussion of average price difference, also overlooked the fact that any aggregation of so many different destinations necessarily involves a large level of arbitrariness. And it completely failed to address the issue of supply-side substitutability, which would arguably have been decisive in this case (were supply structure and competition conditions for short-haul packages different from those for long-haul? Even if there were

operators focusing only on one type of package, did anything prevent them from supplying the other type in the very short term?). The EGC seemingly suggested—in what we would see as an error in law—that demand-side perspective must be given preference.

⁴⁷ Case T-5/02, cit., paras 259–269.

⁴⁸ Case 6/72, cit., para 37.

⁴⁹ See Case T-34/02 *EURL et al v Commission* [2006] ECR II-267, paras 123, 125, and 131.

⁵⁰ In Case T-5/02, cit., and in Case T-427/08, cit., the Court concluded that there was insufficient reasoning, but also disagreed with the definition itself.

⁵¹ Case T-155/04 *SELEX v Commission* [2006] ECR II-4797, para 120.

⁵² It is settled case law that '*the statement of reasons required by [current Article 296(2) TFEU] must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review*' (see, eg Case C-413/06 P *Bertesmann* [2008] ECR I-4951, para 166; Case T-491/07 CB v *Commission* [2012] (not yet reported), para 116).

⁵³ Case T-86/95, cit., para 114.

⁵⁴ Case T-29/05 *Deltafina v Commission* [2010] ECR II-4077, paras 84 and 153; Case T-168/01 *GlaxoSmithKline v Commission* [2006] ECR II-2969, para 156; Case T-199/08 *Ziegler v Commission* [2011] ECR II-3507, paras 69–70; Case T-208/08 etc., *Gosselin Group et al v Commission* [2011] ECR II-3639, paras 112–113.

able to guess the market definition, one must also know why the market was so defined. In this regard, the Court has, on occasion, been excessively lenient with the Commission, to the detriment of the rights of the applicants.

In *Deltafina*, the Court concluded that the Decision had (implicitly) identified the relevant product and geographic market (Spanish market for the first purchase and first processing of raw tobacco).⁵⁵ But the Decision presented no justification whatsoever for this delineation, it simply described the operating conditions on the market on the assumption of that definition.⁵⁶ Why, for example, should such a market have a national scope? For the Court, the only point of contention was whether the relevant market had been perceptibly identified, not if it had been sufficiently reasoned.

In *GlaxoSmithKline*, the EGC found that the market definition was implicit but sufficiently clear, which was surprising, considering that the Court itself could not quite explain what that definition was, nor was it clear that it agreed with the Commission in that regard.⁵⁷ Furthermore, the Court seemed to partly base its findings on explanations provided by the Commission during the judicial proceedings, rather than on the content of the decision alone.⁵⁸

In the *Belgian international removal services cartel*,⁵⁹ the EGC confirmed that, even though this was an object restriction, the Commission had to define the relevant market in order to demonstrate (in the way it did) that it affected trade between Member States. It also noted that the Commission had failed to do so.⁶⁰ The definition itself was, in our view, highly questionable.⁶¹ The EGC, however, concluded that the restriction was above the 5 per cent market share threshold established in the Commission's 2004 Guidelines.⁶² Aside from the problem that the Guidelines are not law and that the cross-border effect cannot be demonstrated strictly by reference to it,

this was shocking, because it rested on the idea that the Commission had sufficiently reasoned its decision and that the market was correctly defined.

The EGC realised that its conclusion was surprising. It noted: 'the Commission's finding that the 5% threshold was reached should, theoretically, be rejected'.⁶³ But the '*circumstances of the case*' led the Court to find that, '*exceptionally*', the Commission was entitled to apply the 5 per cent threshold without defining the market.⁶⁴ And this was allegedly possible because the Commission described the '*sector*', the services in question, and the companies active on it.⁶⁵

Once again, the EGC reduced its control of the decision's reasoning to the identification of the market, doing away with the need for any justification or effective judicial control of that delineation. The issue was not whether one could understand what had been the market identified by the Commission. The issue was whether the agreement exceeded 5 per cent of the relevant market, and this required verifying whether the market had been correctly defined. A task made impossible by the absence of justification, which is in itself grounds for annulment.⁶⁶

Another way in which the theoretically expected result of judicial review has sometimes differed from practice has to do with questionable distributions of the burden of proof. The *in dubio pro reo* principle has never been (explicitly) applied by the Court in the context of controlling market definitions. If anything, it is the Commission that is occasionally given the benefit of the doubt. It is an undue burden upon the applicants, namely, to require them to provide evidence in favour of a challenge to unsubstantiated statements in the decision.⁶⁷

The variations in the level of proof required further differ between cases, in practice, by the fact that, in some, the EGC takes it upon itself to require the production of

⁵⁵ Case T-29/05, cit., paras 74–84 and 149–153.

⁵⁶ Commission Decision 38.238, *Raw tobacco* (ES).

⁵⁷ Case T-168/01, cit., paras 155–156.

⁵⁸ *Idem*, paras 154–156.

⁵⁹ Case T-199/08, cit., paras 41–74; Case T-208/08, cit., paras 81–119.

⁶⁰ Case T-199/08, cit., para 68; Case T-208/08, cit., para 110.

⁶¹ It was particularly surprising since most transport markets are defined as routes (point-to-point) and, from the supply-side, there seems to be a great deal of geographic interchangeability that suggests a widening of the market. Thus, even the idea that the 'services in question' were correctly identified as 'international removal services in Belgium' is debatable.

⁶² The Commission had also based its conclusion on the turnover threshold, but the EGC found that it had failed to meet its burden of proof, its arguments failing to meet a test of logic, showing a level of control of this issue of fact far different from the one it applied to the market definition itself—see Case T-199/08, cit., paras 56–63; Case T-208/08, cit., paras 101–106.

⁶³ Case T-199/08, cit., para 68; Case T-208/08, cit., para 110.

⁶⁴ Case T-199/08, cit., paras 69 and 72; Case T-208/08, cit., paras 111 and 116.

⁶⁵ Case T-199/08, cit., paras 70 and 65; Case T-208/08, cit., paras 112 and 113.

⁶⁶ The '*exceptionality*' of this case (which would subsequently be denied by the ECJ) may lie in the fact that the EGC seemed to find the idea of an absence of effect on trade between Member States absurd (see, eg Case T-208/08, cit., para 115). If the Commission had properly defined the market, in a reasoned decision, the conclusion would probably have been the same. But this means that the Court is willing to set aside reasoning obligations when it believes (without actually being able to control) that the conclusion in question was right.

⁶⁷ See, eg Case T-7/93, cit., para 65, regarding the exclusion of multipacks sold by food retailers from the market for industrial impulse ice-cream. The Court excluded the applicant's challenge to that conclusion by saying that it had not provided supporting figures and, therefore, '*had not produced sufficient evidence to counter the Commission's statement*'. But the statement in the decision had not been substantiated by evidence. It was a mere supposition. The EGC required the applicant to disprove something which had not been proven.

additional evidence by the Commission and the undertakings concerned, occasionally with decisive consequences for its conviction of certain facts,⁶⁸ whereas in others it chooses not to do so. According to the ECJ, this is a prerogative of the EGC which it is entirely free to use, or not to use, as it sees fit.⁶⁹

This brief overview aimed at showing that, in the end, the principles of judicial review affirmed by the Court are far less important than the ‘mood’ of the Court. A series of eminently psychological factors, tied to the specifics of each proceedings and difficult to identify from the outside, lead the Court to be permissive in some cases and demanding in others.

C. The ECJ

In appeals, the ECJ has had very little to say about market definition. One is hard pressed to find a case, since the EGC was created, with any level of substantial analysis of this issue by the ECJ.⁷⁰ It has shown a tendency to merely repeat case law principles prior to 1989. This has effectively frozen the market definition method in EU Competition Law, preventing the EGC from introducing improvements that many erroneously take for granted (such as the full affirmation of the SSNIP test as the objective guiding criterion for market delineation, instead of an undefined ‘sufficient’, ‘reasonable’, or ‘significant’ degree of interchangeability).

The ECJ has not been particularly demanding and has never accepted that the EGC’s findings concerning market definition were insufficiently reasoned. This naturally trickles down to the level of reasoning required from Commission decisions. It has also never disagreed with the conclusions of the EGC concerning market definitions. While in most cases, this may not raise practical concerns, this is not always so.

In *New Holland Ford*, the ECJ concluded that the EGC’s ‘reasoning [was] clear and sufficient’, and that no reasoning fault could be found, ‘*a fortiori when the appellant has not adduced any specific arguments in support of its contention*.’⁷¹ In other words, the ECJ seemed to create a ‘burden of arguing’, failing which any potential lack of reasoning becomes irrelevant. This was especially

surprising in a case where the applicant had argued a number of specific arguments before the EGC, and where the latter’s reply (which even admitted the applicant’s point on the geographic market, in theory) was based exclusively on the erroneous point of law that the boundaries of the market were defined by the scope of the anticompetitive practice in question.⁷²

In the *Austrian banking cartel*, the Commission defined a national market for banking products and services (implicitly, with no discussion). It was, clearly, a simplification. As the EGC itself noted, ‘*the various banking services covered by the agreements cannot be substituted for each other*.’⁷³ And yet, it upheld the definition, because ‘*most customers of universal banks call for a set of banking services (...) and competition between those banks is liable to relate to all those services. A narrow definition of the relevant market would therefore be artificial in that business sector*.’⁷⁴ The argument had been raised when challenging the effect on trade between Member States, and the Court essentially found that the agreement was subject to competition law if that effect was proven on some of the affected markets. The ECJ agreed.

However, it also found that the EGC had ‘*duly stated the reasons for which a narrow definition of the market would be artificial, taking the view that [i] most customers of universal banks call for a set of banking services and, moreover, [ii] the effect on trade may be indirect and [iii] the relevant market may differ from the market for the products and services covered by the cartel*.’⁷⁵ Points [ii] and [iii] do not clarify the justification of the chosen market delineation. As for point [i], the arguments presented by the EGC were clearly insufficient and explicitly relied on setting aside the market definition method in the name of avoiding some supposed ‘artificiality’, which was not even explained. The services encompassed were not listed, nor was there any evidence mentioned to show that the structure of supply and competitive conditions were identical for all. The mere fact that some products are usually offered in a bundle is not sufficient to justify a market delineation in the absence of additional analysis. The ECJ upheld an unsubstantiated, overly-simplistic, definition, which actually contradicted consolidated market definition practice by the Commission, later confirmed by the Court.⁷⁶

⁶⁸ See, eg Case T-199/08, cit., para 57; Case T-336/07, cit., para 127; Case T-7/93, cit., para 70; Case T-9/93, cit., para 44.

⁶⁹ Case C-283/99 P etc., *Limburgse Vinyl Maatschappij et al v Commission* [2002] ECR I-8375, para 404.

⁷⁰ As high watermarks, see Case C-82/01 P, cit., and Case C-457/10 P, cit.

⁷¹ Case C-8/95 P *New Holland Ford v Commission* [1998] ECR I-3111, paras 55–56.

⁷² Case T-34/92, cit., paras 41–44, 51, and 56.

⁷³ Case T-259/02, cit., para 174.

⁷⁴ Idem. The EGC also added: ‘*Moreover, a separate examination would not make it possible fully to appreciate the effects of agreements.*’ This part is clearly not true, or the EGC misspoke. Defining autonomous relevant markets in no way prevents considering the ensemble of the relevant markets (and even other, indirectly affected markets) when pondering the effects of an agreement at a subsequent stage of analysis.

⁷⁵ Case C-125/07 P etc., *Erste Groupe Bank v Commission* [2009] ECR I-8681, para 62.

⁷⁶ Some of the services provided by ‘universal banks’, and which were covered by the agreement in question (see Commission Decision 36.571,

In another case, the ECJ saw no fault in a reasoning that stated that (1) a market definition was indispensable, (2) the Commission had failed to carry it out, and yet (3) the decision was still sufficiently reasoned and the (implicit and unjustified) market definition was correct.⁷⁷ At the end of the day, in this case, the Courts upheld a cartel decision where market delineation was essential, but had not been justified at all, effectively doing away with the need for a reasoned decision. Without a duty to state reasons, there can be no effective judicial review.

In the rare occasions, since 1989, when the ECJ has been called to assess market definitions by the Commission as a first instance court, it showed itself unwilling to entertain this debate. In a manifestation of the above-mentioned ‘moot arguments’ issue, it went so far as to exclude an argument of insufficient reasoning of a Decision that merely affirmed the relevant market, with no justification whatsoever, exclusively on the grounds that the applicant had not proposed an alternative definition nor did it adduce evidence in favour of a different delineation (raising interesting issues of distribution of the burden of proof).⁷⁸

D. Case study: ECJ hangs up on Telefónica

In 2007, the European Commission found that the Spanish telecom incumbent abused its dominant position on the Spanish ‘market for wholesale broadband access for which traffic is delivered at the regional level’ and on the Spanish ‘market for wholesale broadband access for which traffic is delivered at one national hand-over point’, in both cases encompassing only ADSL-based services.⁷⁹ These definitions excluded interchangeability with local loop unbundling.

Before the EGC, Telefónica argued, *inter alia*, that ‘local loop unbundling, the regional wholesale product and the national wholesale product belong to the same relevant product market’ (being interchangeable from the demand perspective), and that the regional and national wholesale products belonged to the same market.⁸⁰

Austrian Banks, para 10 and n 32), fell within the markets for the issuance of cards and acquiring of merchants, which have been repeatedly defined as autonomous relevant markets (see, eg Commission Decision 38.606 *Groupeement des Cartes Bancaires ‘CB’*; and Case T-111/08, cit.).

⁷⁷ See Case T-199/08, cit.; Case T-208/08, cit.; Case C-439/11 P, cit.; Case C-429/11 P *Gosselin Group et al v Commission* [2013] (not yet reported). The Commission itself described this reasoning as ‘somewhat contradictory’ (Case C-429/11 P, cit., para 56). Adding to the confusion, while the EGC indicated that its conclusions were based on exceptional circumstances, the ECJ refused that any exception to the general principles had been made.

⁷⁸ Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paras 74–76. See Commission Decision 96/563/EC, JAKO Jadekost.

In so doing, it raised several issues which might be described as having a highly complex nature (both economic and technical). And yet, the EGC carried out a careful and thorough analysis of the arguments, not once mentioning any limitation to its judicial review or the presence of complex economic assessments that required the granting of a certain discretionary margin.⁸¹ And rightfully so, because all the issues discussed by the Court were either: (i) issues of fact; (ii) clarification of applicable normative criteria; or (iii) logical conclusions. Some examples follow:

- (i) *Fact*: amount of investment and time required to switch between products; competitors’ annual revenues; number, type, and timing of previous offers on the basis of local loop; functional differences between the local loop and wholesale offers; actual use by operators, in the relevant period, of an optimal combination of wholesale products including unbundling; content of quoted documents; etc.;⁸²
- (ii) *Normative criteria*:
 - (a) substitutability ‘on the margin’ is not ‘sufficient substitutability’, in the sense of the case law, for products to be included in the same market;⁸³
 - (b) substitution between products can only lead to their inclusion on the same relevant market if it can occur in the short term;⁸⁴
 - (c) market definition must take into account asymmetric substitution and the case law indicates that large discrepancies in switching rates suggest the absence of interchangeability;⁸⁵
- (iii) *Logical conclusions*:
 - (a) the fact that a company invested X in 2005/2006 with the objective of creating a complete local loop network, does not mean that this is the total cost of creating such a network, namely because it does not take into account

⁷⁹ EC Decision of 2007/01/30, *Telefónica* (38784), paras 208–209.

⁸⁰ Case T-336/07, cit., paras 114 and 135.

⁸¹ Idem, paras 114–144.

⁸² Idem, eg paras 116–117, 127, 130, 132. These issues were dealt with on the basis of confession (non-challenge) by the applicant, contradictory prior statements, evidence included in the Decision, analysis of documents and statements of third parties, etc.

⁸³ Idem, paras 128–129.

⁸⁴ Idem, paras 122–123.

⁸⁵ Idem, para 140.

- prior and future investments needed to achieve complete coverage;⁸⁶
- (b) ‘even on the assumption that [A] . . . it does not necessarily mean that [B] . . . The applicants’ argument . . . does not call in question the fact. . .’;⁸⁷
 - (c) ‘the fact that . . . does not confirm the existence of effective substitutability’;⁸⁸
 - (d) Extrapolation of level of investments required in one country from facts about investments required in another country, adjusted to preserve analogy;⁸⁹
 - (e) ‘Given the costs associated with switching from [A] to [B], even in the case of a [SSNIP] of [B], it would be unlikely and irrational from an economic point of view that operators which have already invested in the roll-out of a network will bear the cost of not using that network and decide to use the national wholesale product, which would not give them the same possibilities in terms of control over the quality of service of the retail product as the regional wholesale product’.⁹⁰

In other words, in this case, the EGC carried out a full review of the arguments raised concerning market definition, and dismissed all of them, demonstrating an approach in stark contrast with that of other cases where the limitation of judicial review was invoked.

But then it was the ECJ’s turn.

Although the EGC had described the applicant’s plea as an allegation of ‘errors of fact and of law in the definition of the relevant wholesale markets’, and although the appeal (in this regard) was summarised as an argument ‘that the General Court erred in law in the definition of the relevant wholesale markets’,⁹¹ the ECJ saw nothing before it but issues of fact. It dismissed the market definition plea as inadmissible, in its entirety, in nine brief, impassive paragraphs, on the grounds that all ‘those arguments seek to challenge factual assessments made by the General Court’.⁹²

To be sure, many of the appellant’s arguments did relate to issues of fact.⁹³

But, first, a great deal of the EGC’s reasoning had been based on applying logic to established facts. The ECJ

describes paras 115–134 of the EGC judgment as a ‘series of factual assessments’,⁹⁴ and that was not entirely the case, as described above. For the ECJ to refuse to control the many logical processes included therein seems to go far beyond what is required to prevent a reassessment of facts, and it gets in the way of guaranteeing that the sense of the evidence has not been distorted.

And, second, at least one issue was clearly a point of law, a clarification of the applicable normative criteria: ‘the appellants contend that the General Court made an error of assessment by endorsing, at paragraph 123 of the judgment under appeal, the Commission’s reasoning that the necessary substitutability for the purposes of the definition of the relevant market must materialise in the short term. According to the appellants, the General Court overlooked the fact that the SSNIP (...) test must be applied in a specific temporal context’.⁹⁵

For the ECJ to qualify this as an issue of fact is a denial of judicial review. Not that it would necessarily have any relevance in the specific case. But it sets a dangerous precedent. True, the judgment must be read in the context of a case where there was not much room to challenge the work of the EGC and the appeal was drafted unclearly.⁹⁶ But it can be perceived as a sign that the ECJ is inclined to refuse to discuss market definition at all, in appeals, regardless of the nature of the issue raised before it, especially when added to the long line of judgments that show a similar inclination.

IV. Conclusion

The theoretical method of market definition, as set out in EU case law, is incredibly complex and generally involves a high degree of uncertainty. It calls into play technical knowledge and economic tests and instruments which few jurists feel prepared to fully grasp. It comes as no surprise, therefore, that courts’ prevailing tendency is to find ways of avoiding this discussion, staying clear of what they seem to perceive as an alien bog of endless debates.

We have seen that this tendency manifests itself in many different ways, and in varying degrees. One of the distinctive features of the case law is, indeed, its inconsistency in the level of judicial control, ranging from

⁸⁶ Idem, para 119.

⁸⁷ Idem, para 120.

⁸⁸ Idem, para 128.

⁸⁹ Idem, paras 135–137.

⁹⁰ Idem, para 139.

⁹¹ Case C-295/12 P, cit., para 81.

⁹² Idem, para 89 (see also paras 83–85). The AG did the same in just one paragraph—Opinion of AG Wathelet, Case C-295/12 P, cit., para 12.

⁹³ For example, para 117 of the EGC judgment deals with issues of fact (see ECJ judgment, para 83).

⁹⁴ Case C-295/12 P, cit., para 86.

⁹⁵ Idem, para 87.

⁹⁶ According to the AG, ‘the complaints put forward in support of this ground of appeal are obscure and formulated in a virtually unintelligible manner’—Opinion of AG Wathelet, Case C-295/12 P, cit., para 12.

extremely demanding to bizarrely lenient.⁹⁷ This should be addressed, and harmonisation should not occur on the tempting side of permissiveness.

When this tendency surfaces, the result is always the same: the European Commission is granted an excessive margin of discretion and the rights of the defence are reduced, or even denied, excluding access to effective judicial review. This, in turn, places the very rule of law into question. It allows for the adoption of a case-by-case approach, preventing the practical implementation of a homogenous, objective market definition method. Without such objectiveness, undertakings cannot safely predict the application of EU Competition Law to their practices.

It is surprising that this is still the state of affairs, over 40 years since the ECJ first closed an open window into arbitrariness in the enforcement of competition law, by demanding that the Commission identify the relevant market in a reasoned decision, when this is significant for the outcome of the case.

The way to revert this tendency may be to clarify that, while market definition theory may be highly complex, its practical application and the specific issues raised before Courts usually do not require complex assessments of an economic nature. The majority of market definitions are not based on complex economic data, but are instead built on facts, opinions, and logic. A great number of challenges to market definitions turn on the clarification of the law itself or on factual issues, and such matters are subject to full judicial review. And, generally, even complex assessments rest on logical premises, which Courts are perfectly suited to (and must) control.

As was stressed by Werden,⁹⁸ the legal method of defining a market is, more than an exercise of economic science, a logical exercise, carried out in the framework of the rules on the burden of proof. Starting from the established facts, the Court applies the normative criteria

for market definition to define the market through abductive, deductive, and/or inductive reasoning.

Even for specific issues where judicial review is limited to manifest errors of assessment, the traditional justification for such limitation (that administrative authorities have a greater grasp of the technical knowledge required⁹⁹) is becoming less and less persuasive. The ECJ/EGC and some national courts (such as the CAT) now include professionals who are highly specialised in competition law, and even some trained in Economy.¹⁰⁰

One should also remember (especially in light of the never forgotten criticism of excessive concentration of decision-making power with the Commission) that the legal orders of some Member States apply different judicial review principles. In some countries, NCA decisions are entirely subject to full review by the first instance court.¹⁰¹ In theory, the decision functions as an indictment and the case is ‘retried’ by the court. In these countries, the limitation of judicial review of market definitions to manifest errors of assessment, which does seem to happen (in practice, if not in law), is especially misplaced.

The recent *Telefónica* case demonstrated what may be the most important obstacle to be overcome: the ECJ needs to start caring about market definition, just a little bit. Some EGC judgments have shown that it may be willing to thoroughly revise the Commission’s market definitions, so as to guarantee that applicants truly have their day in court. But if the ECJ continues to wave its hand at this issue, and inclusively to refuse to recognise that these discussions include legal issues that only it can truly clarify as settled case law, there is little hope for a reality of judicial review that is closer to the theory.

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⁹⁷ This brings to mind one author’s conclusion: ‘Ultimately, «manifest [error]» is whatever the judges consider to be «manifest»’ (F Castillo de la Torre, cit., at 566).

⁹⁸ GJ Werden, cit., at 703 *et ss.*

⁹⁹ N Petit, ‘How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of their Enforcement Activities? A Multi-Jurisdictional Assessment’ (2010) 1 *Concurrences* 44, at 45.

¹⁰⁰ See, eg N Petit and L Rabeux, ‘Judicial review in French competition law and economic regulation—a post-Commission vs Tetra Laval assessment’, available at <http://ssrn.com/abstract=1290143>, at 22.

¹⁰¹ Such is the case of the ‘hybrid’, German-inspired, system in Portugal—see J Lobo Moutinho, *Direito das contraordenações—ensinar e investigar* (2008), at 392 *et ss.*