Louis Kaplow’s *Why (Ever) Define Markets*? in the Harvard Law Review was one of the most provocative papers in the antitrust literature over the past few years. We’ve discussed it here. I wrote:

Kaplow provocatively argues that the entire “market definition/ market share” paradigm of antitrust is misguided and beyond repair. Kaplow describes the exclusive role of market definition in that paradigm as generating inferences about market power, argues that market definition is incapable of generating reasonable inferences for that purpose as a matter of basic economic principles primarily because one must have a “best estimate” of market power previous to market definition, and concludes that antitrust ought to do away with market definition entirely. As my description of the paper suggests, and Kaplow recognizes, it is certainly an “immodest” claim. But it is a paper that has evoked much discussion in antitrust circles, especially in light of the recent shift in the 2010 HMGs toward analysis of competitive effects and away from market definition.

Many economists were inclined to agree with the basic conceptual shift toward direct analysis of competitive effects. Much of that agreement was had on the basis that the market definition exercise aimed to do a number of things directed toward identifying the potential competitive effects of a merger (identifying market power is certainly one of those things), and that if we had tools allowing for direct inferences we ought to use those instead. Kaplow’s attack on market definition, however, was by far the most aggressive critique.

Kaplow’s analysis prompted responses from antitrust scholars, including most notably Greg Werden (DOJ). I discuss Werden’s critique here.

In my view, the debating over the proper scope and function of market definition in antitrust - and in particular the proper relationship between the market definition inquiry and competitive effects analysis - is ongoing. Thus, it was interesting for me to see Richard Markovits’ (Texas) latest entry on SSRN (HT: Danny Sokol), which appears to attempt to shift the debate from whether market definition should be killed, to whom the credit should be attributed for its execution. Markovits’ piece, *Why One Should Never Define Markets or Use Market-Oriented Approaches to Analyze the Legality of Business Conduct Under U.S.*
Antitrust Law, argues – well – what the title says. And in particular, he defends his earlier work against Kaplow’s dismissal of it in footnote – claiming his is own analysis, not Kaplow’s, that should be credited with the rejection of market definition based approaches (in fact, Markovits’ claim is much broader). From the abstract:

In 2010, Professor Louis Kaplow published an article Why Ever Define Markets? that argues for the proposition that one should never define markets for the purpose of measuring a firm’s economic power, which is a corollary of the conclusion that I established in 1978. Kaplow’s article includes a lengthy footnote that — after stating that my 1978 article constitutes a “particularly harsh attack on market definition” — denigrates it on a number of accounts. The article I am posting (1) delineates slightly-improved versions of my 1978 arguments against the use of market-oriented approaches to analyzing the legality of business practices under U.S. antitrust law, (2) explains why those arguments and the “idiosyncratic” (Kaplow’s accurate if pejorative characterization) conceptual systems and competition theories they employ imply that Kaplow’s more limited conclusion is correct, (3) delineates and criticizes Kaplow’s “arguments” for his conclusion (the most relevant of which is a correct assertion of a proposition that is an analog to the conclusion of my second argument for the claim my 1978 article establishes — an assertion he does not and cannot justify because he does not develop and use any counterpart to my idiosyncratic conceptual systems and theories, which play a critical role in the justificatory argument), (4) demonstrates that all of Kaplow’s criticisms of my 1978 article are either incorrect or unjustified, and (5) asserts that at least some of the errors Kaplow makes when criticizing my article are important because they are made by others as well and militate against the correct analysis of the legality of various types of business conduct under U.S. antitrust law.

It is an interesting debate. And I certainly do not fault Professor Markovits for defending his claims against Kaplow’s dismissal. The piece is very long and dense, and frankly, was a difficult read (at least for me). But it is a provocative read. However, my reaction to reading it was that I couldn’t escape thinking about one problem with arguments largely about the intellectual credit for eliminating market definition: market definition isn’t even close to dead. Perhaps it will be in 20 years. But it isn’t now and its entirely unclear that antitrust jurisprudence in the courts is even moving that way – the agencies may be a different story. Further, there isn’t much evidence that the move within the 2010 Guidelines to reduce the importance of – but not eliminate the need for – market definition was part of a broader movement toward rejection what Markovits describes as “market-oriented approaches” to antitrust analysis. In any event, perhaps we will eventually be citing the Markovits-Kaplow, or will be be Kaplow-Markovits, for the death of market definition. But for now, market definition appears to be alive and kicking.

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