



HOW FAR SHOULD THE SCOPE OF ANTITRUST BE EXTENDED: INNOVATION, ENVIRONMENT, PRIVACY ?

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KEY TAKEAWAYS

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PANEL

Séverine Schrameck (Partner, Cleary Gottlieb Steen & Hamilton, Paris), moderated the discussion with Antoine Chapsal. She discussed the growing importance of data protection regulations, in particular the RGPD, and their consideration by national competition authorities (e.g. the Meta case). She highlighted the growing importance of environmental concerns, reflected in particular in the Green Deal, and questioned the limits and potential risks of extending the boundaries of competition law.

Antoine Chapsal (Managing Principal, Analysis Group, Paris), moderated the discussion with Séverine Schrameck. He questioned whether competition policy should extend to innovation, environmental concerns and privacy protection solely from the perspective of consumer welfare, or as independent objectives with social or political significance.

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Relationship between competition and innovation

- Competition stimulates innovation, increasing consumer welfare by improving products and lowering prices.
- The intensification of competition encourages leading companies to innovate in order to maintain their position. This is the concept of «Escape Competition». However, the opposite effect can be observed if the companies present on the market are not sufficiently efficient to counter the growing competition.

- The impact of competition on innovation follows a U-shaped curve; a positive relationship up to a certain point, after which excessive competition can reduce innovation.

Challenges of competition in the United States

- Competition policy in the US has not adequately addressed the emergence of large companies. This trend is attributed to the emergence of companies such as Google, Amazon and Walmart, which first boosted productivity, then hampered innovation and discouraged potential new entrants.
- Since the early 2000s, economic growth has been declining, while corporate profits have been rising.

Need to reform competition policy

- A dynamic view of competition that goes beyond static considerations of consumer surplus and market share must be adopted. Competition should be assessed for its long-term effects on technological progress and innovation.

Marie de Monjour drafted the following synthesis for Concurrency. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.



- Sometimes too focused on the domestic market, competition must be reformed to take account of global competition.
- The authorities should examine how mergers and acquisitions could have an impact on future innovation and market contestability (e.g. Alstom-Siemens merger).
- Competition policy needs to evolve towards an ex-post approach allowing for the ex-post review of state aid and mergers to determine their impact on competition. At the very least, ex-ante control must be made more flexible.

Relationship between competition and the environment

- Competition has a virtuous effect on the environment, in that it can encourage green innovation when consumers demand environmentally-friendly products. Companies must therefore protect the environment in order to retain their customers.
- Competition also has a negative effect on the environment, in that the lower prices it brings about can lead to an increase in the volume of production, which can have harmful consequences for the environment.

Desirable developments in industrial policy and competition policy

- If competition policy and industrial policy are to be reconciled, both must evolve. In the context of competition policy, we need to move more towards an ex-post approach.
- For example, this would mean saying that state aid is not prohibited in principle, but if ex-post it has led to a reduction in competition, then we need to intervene.

Example of a successful industrial policy: the Defence Advanced Research Project Agency (DARPA)

- DARPA combines a «top down» approach, i.e. public funding, with a «bottom up» approach, i.e. competing projects triggered by this funding. It allows ambitious objectives to be set and mobilises the necessary resources, thereby encouraging innovation and technological development. An example of this is the

application of RNA Messenger Technology to the COVID-19 vaccine.

- Consideration should be given to the idea of increasing European borrowing capacity to finance a European DARPA, with a commitment by Member States to budgetary responsibility, particularly in the fields of energy, health, defence and space. Similar to the ERC (European Research Council), this model would involve no right of veto and no requirement for repayment, favouring a «Coalition of the willing» approach.

Concept of quantification in competition law

- Significant progress has been made in the collection and analysis of economic data, particularly in the measurement of productivity growth. This has led to a better assessment of inflation, a more accurate picture of economic growth and more reliable indicators than ever before.



Benoît Cœuré

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Application of consumer welfare criteria

- The day-to-day application of these criteria is already flexible and open to many considerations, going beyond pure theory. For example, merger decisions take into account considerations of diversity of supply and plurality.
- There is room for a pragmatic approach. However, it is worth questioning whether it is necessary and whether competition authorities are best placed to adopt it when their mandate and democratic responsibility are limited to competition.

Pragmatic approach to innovation

- Innovation, data protection and the environment are policy objectives at both French and EU level.
- As a policy of the Union in general, competition policy must take account of the priorities of the Union's policies, in particular as regards environmental protection, as set out in Article 11 TFEU.
- In this context, there is a certain institutional and political organisation. Where there is a sectoral regulator, that regulator must assume its responsibilities.
- At the same time, the competition authorities must be encouraged to be modest, and not to get involved in areas where other regulators are better equipped or more legitimate.
- The relationship between competition policy and industrial policy
- It is essential to recognise the complementary nature of competition policy and industrial policy.

- It is sometimes necessary to invent new instruments to protect both industrial policy and competition. This is one of the reasons why the Foreign Subsidies Regulation was adopted. It introduces a new instrument for protecting the Union's borders and should make it possible to stop blaming competition policy for the lack of a level playing field with non-European companies, which has often been criticised.
- To be effective, a European industrial policy must go beyond simply aggregating the national policies of the 27 Member States. Remaining at national level would not allow the economies of scale of the single market to be exploited and, by focusing the discussion on State aid granted to national companies, would turn it into a toxic budgetary debate between the Member States. Ultimately, it would be the most solvent Member States, of which France is not one, that would come out on top. In this respect, the current momentum of discussions between Member States, particularly on defence and energy, is worrying and not heading in the right direction.

Concept of quantification in competition law

- Significant progress has been made in the collection and analysis of economic data. However, certain dimensions, such as diversity of supply, cannot be quantified in the same way as effects on prices, thus creating an unquantifiable part of the economic analysis of competition.

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Difficulty of ex-post control by competition policy

- Ex-ante control of mergers and state aid is justified by the complexity and potential costs of ex-post control. Although ex-ante control may involve errors, its advantages in terms of preventing problems are considered valid.
- Ex-ante control is in fact already flexible. For example, two key principles guide the allocation of public funds: there must be a market failure, and therefore a need for intervention, and subsidies must not exceed what is necessary to remedy that failure. Although modelling these principles is complex, aid allocations are generous in order to prevent projects from failing for lack of funding, while respecting the limits imposed by the Treaty.

Role of competition policy

- Competition policy in Europe has its origins in the project for political integration. Today, it is there to protect markets in their function of efficient allocation.
- Although consumer surplus can be used as a means of achieving an efficient allocation of resources, competition policy must not be overloaded with multiple objectives.
- Competition policy must be consistent with other EU policies, such as industrial policy, environmental protection and the protection of personal data. However, it does not necessarily have to adopt the objectives of these policies.
- There is no doubt that competition policy has traditionally focused on the internal market, and thought needs to be given to adapting it to an international context.

Relationship between innovation and competition

- Innovation is a natural element of competition that competition policy already takes into account in its assessments. It is often the result of synergies between the civil and defence sectors, but the lack of coordination within the European Union has prevented these synergies from being fully exploited.

Relationship between environmental considerations and competition

- Environmental protection policies - as well as personal data protection policies - must be examined to determine whether they correspond to consumer preferences, and therefore may affect competition.
- Environmental considerations have already influenced market definitions in merger cases. This was the case in particular in the SMPR Ardian case, in the context of the question of oil transport by pipeline versus transport by lorry, where the carbon footprint was taken into account.



- Progress has been made in incorporating these considerations into Article 101-3. A text clarifying the way in which the Competition Authority will be able to issue informal guidance to companies on Article 101-3 will be published by the end of the year.
- The integration of environmental objectives into Article 102 is still an unexplored area.

Relationship between competition policy and industrial policy

- There has been an evolution and increasing convergence of these policies, both seeking to ensure long-term competitiveness. For example, in competition law there has been a gradual alignment of the criteria for validating cartels (Article 101(3)) with those used in mergers. This development has led to more microeconomic and efficiency-focused standards.
- It is important to push for better understanding and coordination between competition policy and industrial policy.
- Fostering competitiveness requires improved European cooperation to define and promote the Union's collective interest. As this has not yet been defined, Europe is made up of as many Member States as there are interests, unlike the United States, which has a clearer vision of its national interest. This explains why there is no equivalent to DARPA within the EU.

Concept of quantification in competition law

- Perfect quantification in competition has never been realistic. Comparisons between different aspects, such as quantifiable effects on the market and qualitative impacts such as innovation, have always involved a certain degree of judgment and assumptions on the part of the competition authorities, under the control of the judge.



KEYNOTE SPEECH

Antoine Chapsal (Managing Principal, Analysis Group, Paris), introduced Philippe Aghion's speech, expressing his gratitude to the latter. Mr. Chapsal highlighted his major academic achievements and significant contributions to economic research. Specifically, he emphasized the challenge to a Chicago school thesis, the integration of the concept of creative destruction into growth theory, and the analysis of the relationship between competition and innovation. Subsequently, Mr. Chapsal underscored Mr. Aghion's professional journey as a professor and his contribution to expanding access to higher education for French students. Finally, Mr. Chapsal emphasized Mr. Aghion's commitment to the public debate in support of education and innovation as drivers of economic growth and inequality reduction

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Introduction of an innovation-driven growth model in the climate debate

- A model of growth was built based on innovation following Schumpeter's concept of creative destruction, which describes how new innovations replace old technologies.
- Promoting creative destruction is essential for addressing climate issues effectively, because of its positive impact: new firms are not burdened by path dependence and can replace older firms while accelerating the green transition.
- An inherent contradiction within Schumpeter's paradigm must be pointed out; innovation requires the prospect of "innovation rents" to motivate innovators, however those who enjoyed past success may resist subsequent innovation to avoid creative disruption. Regulating capitalism involves addressing this contradiction.
- Then, a new growth paradigm was built on three elements. Firstly, long-term growth is driven by the cumulative process of innovation, where each innovator builds upon previous innovations. Secondly, innovations result from entrepreneurial activities, R&D, and investments driven by the prospect of innovation rents. Thirdly, creative destruction plays a crucial role as new innovations displace and render old technologies obsolete.

Competition and innovation

- Competition's impact on innovation varies based on a firm's proximity to the technological frontier, as firms close to the technological frontier benefit from competition, while those far behind react negatively to it. This analysis can be found in its entirety in "Bitcoin and Mobile Payments, Constructing a European Union Framework", published by Palgrave Mcmillan in 2016.

Innovation in the climate debate

- The notion of "degrowth", suggesting negative growth as a solution to climate problems, should not be embraced as it previously had negative consequences as it was observed during the COVID-19 crisis. The emphasis should be on innovation, which is historically absent from the innovation climate models, notably in the work of William Nordhaus, a Nobel laureate.
- Three types of innovations can be pointed out; "mitigation", which slows down the rise in temperature, "adaptation", which helps societies cope with warming and "amelioration", which actively work to improve to mitigate climate issues.

Introduction of innovation

- The state needs to face "Path Dependency", a phenomenon by which firms that previously invested in dirty technologies tend to continue down the same path. The State needs to redirect innovation toward cleaner technologies.
- One solution in this context is that if you boost creative destruction it helps in solving the climate problem because old firms are replaced with new firms that do not have the path dependence problem.
- Another solution is to act right away. Waiting to initiate the transition to a clean economy increases the overall cost of the transition in the future, and accumulates a debt that future generations will have to bear. There is a need for adjustments in both monetary and budgetary policies to address these interconnected challenges effectively.

- Civil society has a role in pushing for green innovations. Indeed, informed consumers can encourage firms to innovate sustainably, as consumer preferences have an influence on businesses.

Role of industrial policy and finance

- Green industrial policy is essential to overcome coordination challenges within value chains, in particular in complex industries. It must be a complementary approach to a Pigovian taxes (carbon tax), which is inefficient to address the transition to cleaner technologies.
- Finance can also have an impact on green innovations. When firms rely on banks, and when monetary policy against inflation uses interest rates, a raise in interest rate increases the cost of borrowing and delays the green transition. Restrictive monetary policy when facing inflation should take into account the context of energy transition.

Challenges encountered by the EU in the energy transition

- Changes are needed in European institutions, such as modernizing Maastricht, aligning competition policy with industrial goals, and enabling European borrowing.
- Europe excels in regulatory matters, effectively implementing policies and regulations. However the European budget is inadequate, as it currently stands at a mere 1% of GDP. Allowing for European borrowing, balanced out with fiscal discipline among member states, could supplement the limited budget resources.
- Competition policy should not be at odds with industrial policy and should support and align with industrial objectives.
- There is a need to differentiate between recurrent spending and investment in green technology.