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Competition Policy and Industrial Policy: For a reform of European law

Bruno DEFFAINS
Olivier d'ORMESSON
Thomas PERROUD

In Europe the recent period has been marked by the emergence of a debate on the modalities and objectives of the competition policy. The failures of certain merger projects such as Alstom/Siemens raise questions about the inadequacy, or even obsolescence, of existing mechanisms and, above all, the place of competition law in relation to other public policy objectives. Other challenges are also being set for competition law that must be tackled head-on: firstly, the current law faces challenges raised by the digital economy (in particular the power of the GAFA); then, European competition law does not take sufficient account of the competition that European companies face from third countries that do not respect the same principles. In other words, when Europe decides to open up its market, it quickly realises that other countries are not subject to the same constraints and often have more room to manoeuvre to support the implementation of industrial projects likely to contravene competition rules. This is because, in Europe, competition law takes precedence over all other national or Community approaches to industrial policy. On the one hand, this is certainly due to the structure of European texts, in that the Treaty provisions on competition enjoy almost "constitutional status". On the other, competition law instruments are used by the European Commission to pursue objectives that are far removed from the classic notion of competition. Should a rebalancing not be carried out between competition policy and industrial policy so that the objectives of the latter can be deployed?

THE PRIMACY OF COMPETITION LAW OVER EUROPEAN AND NATIONAL INDUSTRIAL POLICIES

The primacy of competition law over European and national industrial policies results from the drafting of the Treaty, the Regulation implementing the competition rules and the Merger Regulation. The European Economic Community (EEC), which came into being in 1957, has long been known as the "Common Market". However, the EEC is not just a trade organisation. It aims to merge the economies of the Member States through a process of economic integration. To understand the nature of the EEC, it is therefore fundamental to look at its mode of economic regulation, i.e. the relationship between national and Community public authorities, enterprises and non-state actors in the management of economic activity.

Since its inception, the Community has tackled State intervention in the economy on three fronts. Firstly, internally, by monitoring very closely the way in which European States might hinder the free movement of goods, services, capital and persons. In this sense, it has succeeded in creating a real market. Since the *Cassis de Dijon* judgment, the case law of the Court of Justice on free movement has succeeded in identifying all State techniques constituting barriers that aim to favour national production. European companies now have a "level playing field" for selling their products throughout the common market.

Then, externally, although the debates on the liberal or protectionist nature of the EEC took centre stage in the years 1956-1959, they became secondary because the European Community very quickly proved its external openness.

The fundamental controversies in fact relate much more to macroeconomic regulation within the EEC and to the regulation of industrial structures. The latter subject has long been ignored by historiography even though it comprises a fundamental controversy in the history of the EEC, and beyond, in economic history, that of the

opposition between competition policy and industrial policy, the former having become hegemonic since the "public turn" of competition law in the 1980s.

European competition law, which was an "emerging law" in the 1970s and 1980s, became a "dominant law" at the beginning of the 21st century. It is also relatively recent, with the first regulation implementing Articles 101 and 102 dating from 1962 and the Merger Control Regulation of 1989. The first procedural regulation on State aid dates from 1999.

However, this law has gradually become dominant due to the principle of the primacy of European law over national laws and the broad powers of the European Commission in competition matters, which have been continuously extended with the active support of the case law of the European Court of Justice. While Articles 101 to 109 of the Treaty on competition law confer important powers on the Commission, Article 173 of the Treaty, which deals with the Union's industrial policies, does not grant it direct powers. As in other areas, it is the Council and the European Parliament that decide. Moreover, Article 173 specifies in fine that any industrial policy measure may not "*lead to a distortion of competition*".

It is therefore clear, in the light of these articles of the Treaty, that any European industrial policy is subordinate to competition policy.

Similarly, all national laws and measures are subject to the Commission's decisions in competition matters. The fact that in 2007, following the Lisbon Treaty (and at the request of France), "free and undistorted competition" should no longer be an EU objective has not changed a great deal. The Court of Justice, invoking Protocol No. 27 annexed to the Lisbon Treaty, clarified in its rulings that this "downgrading" did not affect the continued application of competition rules as they existed prior to the Lisbon Treaty.

EUROPE, THE ONLY ENTITY IN THE WORLD WHERE COMPETITION RULES HAVE QUASI-CONSTITUTIONAL STATUS

China and the United States do not face constraints like those arising from European competition law. As David Bosco and Catherine Prieto[1] note, attempts to harmonise competition law at international level have failed, partly due to the United States. However, the very extensive scope of European competition law, in its various aspects, limits the action of European companies as they face foreign groups which are not subject to such limitations.

While everything is guaranteed in Europe to ensure that the State cannot distort competition, this is not the case in the United States, and even less so in countries such as China.

In the United States, competition law provides another illustration of how public intervention in the economy is dealt with. This treatment is profoundly different. U.S. competition law is not intended to apply to public activities, nor is it intended to control State action that would have an anti-competitive effect. This is not the case in Europe.

In the United States, states may choose to protect certain activities from competition law enforcement. The U.S. doctrine that allows states to be exempted from competition law enforcement, called the state action doctrine, is directly inspired by federalism and the idea that the will of each state must be respected. In this respect, we shall see to what extent the American Supreme Court is more respectful of state sovereignty than its European counterpart. In the words of Eleanor Fox, "the United States (...) has given preference to state sovereignty over national governance, when the opposite choice would have increased national welfare"[2]. To this choice must be added another element, relating to the purpose of competition law in the United States, which is to punish private anti-competitive practices, not the activities of government-affiliated entities. Thus, there is no state aid control in the United States.

For its part, China unrestrainedly supports its national champions who - thanks to State aid - compete unfairly on world markets and, in particular, against European groups. The financial aid provided by the Chinese State to large national groups is undeniable. It can take the form of subsidies, capital increases, loans from State banks, etc. It can also take on more disguised aspects, which are difficult to identify by European players, particularly the European Commission, which often lacks evidence. This is why some authors have

[1] D. Bosco, C. Prieto, Droit européen de la concurrence, Bruylant, 2013.

[2] E. Fox, "What if Parker v. Brown were Italian?", Chap. 19 in 2003 Fordham Corp. L. Inst.,International Antitrust Law & Policy (B. Hawk ed. 2004) at p. 463

suggested that the Commission should be equipped with a real economic intelligence service.

Moreover, the application of merger control in China is subject is very "varying". It applies (almost) normally, sometimes quite strictly, to foreign groups and Chinese private groups. But it applies little (or not at all) to Chinese State-owned enterprises. According to a study covering the years 2008 to 2013, only 15% of the merger notifications in China concerned concentrations between purely Chinese companies, while 45% concerned mergers between non-Chinese companies. By comparison, over the same period, 47% of the mergers notified to the European Commission concerned purely European companies while 16% concerned mergers between non-European groups.

Public industrial groups, which are under central government control, are - in theory - subject to merger control. But in practice, when two public groups merge, they sometimes opt not to notify the Chinese competition authority.

When the government-initiated concentration between public groups is notified, it is generally authorised on the basis of "national interest" and "industrial policy" criteria that complement the pure competition criteria. The Chinese Competition Authority cannot - de facto - oppose the will of the central government.

THE COMMISSION'S EFFORTS TO IMPLEMENT AN INDUSTRIAL POLICY AT EUROPEAN LEVEL

It should be recalled that in competition matters, the Commission can take direct decisions sanctioning companies, imposing the termination of infringements or ordering the repayment of State aid. It also has exclusive competence in this field. All these powers have meant that competition law instruments, and in particular State aid rules, have been used to pursue pan-European industrial policies: formerly in the steel, coal and shipbuilding sectors, and more recently in the banking or energy sectors, and to achieve a degree of tax harmonisation by eliminating the most aggressive "tax rulings". They have also been used to implement an embryonic European industrial policy on the basis of the Communication on Important Projects of Common European Interest ("IPCEI").

1. During the "banking crisis" that erupted in 2007-2008, the need was felt for a regulator at European level, which did not exist at the time. DG Competition "COMP" played this role by using its State aid powers. All support measures and aid granted by States to restore confidence in the banking system and to avoid a systemic crisis had to be approved by the European Commission on the basis of Article 108 of the Treaty (on State aid procedure). Within this framework, 112 banks in the EU received State aid, i.e. 30% of the European banking system (in terms of assets). Aid in cash represented 5.4% of EU GDP (€671 billion) and aid in guarantees 10.3% of GDP (€1288 billion).

2. Almost 60% of all aid granted in Europe to industry and services is earmarked for environmental protection, energy efficiency and the production of renewable energy (mainly "green electricity"). They are examined and approved in accordance with the criteria laid down by the Commission, in particular in its Guidelines. This has led to the adoption of a pan-European "industrial policy" aimed at encouraging support for "good" ("green") energy sources and discouraging support for polluting energies. The directive nature of the pan-European guidelines in the energy sector are reflected in the Commission's decisions on "capacity mechanisms", measures introduced by the public authorities to guarantee the security of electricity supply and to ensure that the supply of electricity meets demand at all times in the medium and short term. The Commission has imposed its own vision in this area on Member States which have not always shared the Brussels view.

3. To circumvent (partly) the fact that any reform for the harmonization of direct taxation rules must be adopted unanimously and that there is always one or more Member States to block any developments, the Commission has considered using the State aid rules to attack the most aggressive "tax rulings" in certain Member States. It has already adopted eight decisions condemning tax rulings and requiring large groups to repay the aid received by means of these discriminatory and competition-distorting tax advantages in the European market. The most emblematic decision is the one requiring the Apple group to repay €14.3 billion (with interest) to Ireland. The Commission's action has led to major tax reforms

in the Netherlands, Luxembourg and Ireland, which remove the provisions that allowed the adoption of the criticised 'tax rulings'.

The Commission therefore has few pan-European powers and is led to use or consider using those resulting from competition law, in particular the rules on State aid, to pursue objectives unrelated to this area: industrial policy, tax harmonisation, banking regulations, development of green energy, use of data by GAFA, combating unfair competition from non-European groups subsidised by their State.

AMENDMENTS TO THE COMPETITION RULES ALREADY PUT FORWARD WHICH DO NOT REQUIRE AMENDMENTS TO THE TREATY OR THE MERGER REGULATION

Following the Alstom-Siemens case, many proposals have been made to reform competition law and better respond to the challenges posed by globalisation; almost all of these proposals seek to avoid an amendment to the Treaty (TFEU) and the Merger Regulation. The main proposals put forward are listed and summarised in the report. But such changes are unlikely to be sufficient to enable the implementation of an "industrial policy" in Europe.

Our main proposals

- **Amendment to the Merger Regulation to better reflect efficiency gains**. Efficiency defence may lead competition authorities to accept the lawfulness of restrictions on competition by using a dynamic efficiency test aimed at relaxing a prohibition in principle in the name of the public interest.

- **A rebalancing between competition policy and industrial policy** and, to this end, an amendment to Article 173 of the Treaty to confer more extensive powers on the Commission in order to implement a Europe-wide industrial policy. According to the current wording, this is essentially a question of coordination between Member States and not of defining industrial policy objectives. A subparagraph should therefore be added to paragraph 173 as follows:

"*4. The Competitiveness Council shall each year set industrial policy objectives which the Commission shall take into account in its decisions.*"

The direct powers of the Commission may be defined by a regulation modelled after the provisions of Article 103 of the Treaty on competition.

- **DG COMP must continue to investigate cases on the basis of pure competition criteria**, but when it opens phase 2 (in-depth merger investigation), it should make a proposal to the College of Commissioners, which would carry out a "cost-benefit" analysis in consultation with the other DGs and experts and could exceptionally take a decision involving industrial policy, environmental protection, employment or competitiveness objectives. In this way the College of Commissioners will regain its original role in competition matters: a forum for debate and decision-making.

- **The creation of a European DARPA** dedicated to undertaking industrial policy actions, particularly those likely to bring innovative and competitive projects at European level. In practice, this would involve the creation of a European breakthrough innovation fund along the lines of the American Defense Advanced Research Projects Agency (DARPA). Such a measure, provided that adequate resources are available, would aim to protect and stimulate European industry: to have a selection of industrial projects financed from public funds within the framework of an "agile" and "light" structure, capable of working with start-ups, universities or private companies. In practice, we might imagine the European DARPA operating in the ilk of the ERC, which would call on scientific and industrial experts working with a concern for impartiality and efficiency. It might also advise the Competitiveness Council and implement its guidelines; this DARPA could advise the College of Commissioners.

It is the combination of these reforms that should make it possible to reconcile competition and industrial policy issues.

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The purpose of this report is not to confine itself to observations. It is intended to be constructive and geared towards the search for operational solutions in order to make the European competitive framework compatible with industrial policy objectives. We thought it would be useful to recall the principles on which Europe was built and not to lose sight of this heritage when considering the conditions for modernising the system in place. For the time being, almost all the reports focus on essentially technical issues which largely overlap: the idea of a European "prosecutor", modification of the notice on the definition of relevant markets, the idea of developing behavioural remedies, taking better account of efficiency gains, developing a European innovation policy, seeking solutions in the field of international trade law to promote industrial strategies, etc.

These measures are, if not ancillary, at least inadequate, if not simply utopian (for example by appealing to WTO law). They are also of a rather "conservative" nature, since they adopt as their first principle that competition policy is self-sufficient and that no in-depth reform - particularly with regard to the Treaty - is either necessary or desirable. However, this is an issue that deserves discussion. Of course, we can consider that competition policy is satisfactory overall and that the important thing is to supplement it on other fronts, such as data law, which some people are calling for in order to meet the challenges made by digital companies, or renewed international trade law to strengthen the necessary tools for dealing with State aid. However, such a position seems difficult to sustain, given the interlocking and fragile nature of the systems.

Moreover, competition law is used for all purposes and outside its traditional field. Thanks to the important powers conferred on the Commission by the rules on State aid, it has become the instrument for implementing a pan-European industrial policy. It is also used to regulate the use of data by the GAFA, to combat unfair competition from groups supported by third countries and, in particular, China, etc. It is also used to regulate the use of data by the GAFA to combat unfair competition from groups supported by third countries and, in particular, China.

Why deprive ourselves of further, in-depth thought? Could we not imagine reforming the system beyond mere cosmetic makeover? Why not imagine "relieving" the work of DG COMP by asking it to investigate cases, leaving the decision-making power to another independent authority (this would avoid confirmation bias and would be in line with the lessons learned from economic research)? Why not grant, in exceptional cases, a right of evocation to the policy on certain subjects such as mergers or State aid?

The full report is available in electronic format.

Bruno Deffains

Professor of Economics at Panthéon-Assas

Director Paris Center for Law and Economics, CRED

Olivier d'Ormesson

Lawyer specialised in competition law

Lecturer in competition law at Sciences Po, HEC and Paris 2 Panthéon Assas

Thomas Perroud

Professor of Public Law at Panthéon-Assas

Director Institut de préparation à l'administration générale de Paris (Paris Institute of Preparation for General Administration)

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