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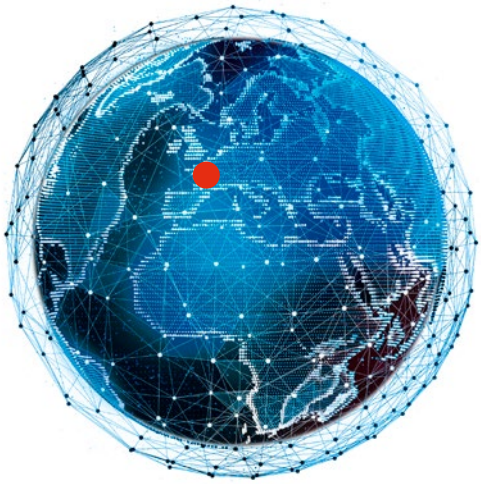


NEW FRONTIERS OF ANTITRUST

DEMAIN LA CONCURRENCE

14th ANNUAL INTERNATIONAL CONFERENCE OF CONCURRENCES REVIEW

KEY TAKEAWAYS | PARIS, 22 JUNE 2023

ATTENDEES

INSTITUTIONS / AGENCIES

- Assemblée nationale
- Autorité de la concurrence
- Belgian Competition Authority
- Commission de la concurrence Suisse
- Cour de cassation
- DG COMP
- DG TRADE
- DG Trésor
- DGCCRF
- European Parliament
- General Court of the European Union
- Hellenic Competition Commission
- Hungarian Competition Authority
- Inspection générale des finances
- OECD
- OFGEM

ECONOMISTS / CONSULTANTS

- Acquis EU Law & Policy
- Analysis Group
- Avisa Partners
- Biontino Europe
- Charles River Associates
- Compass Lexecon
- E.CA Economics
- Hill+Knowlton Strategies
- Oxera
- Positive Competition
- RBB Economics
- Teneo
- The Brattle Group

LAW FIRMS

- ACTECON
- ADVANT Altana
- BDGS Associés
- Bird&Bird
- Bredin Prat
- Carbonnier Lamaze Rasle
- Cleary Gottlieb
- Clifford Chance
- Darrois Willey
- Dechert
- ELIG Gürkaynak Attorneys-at-Law
- Fiducial Legal By Lamy
- Fieldfisher
- Franzosi Dal Negro Setti with Muscolo
- Fréget Glaser & Associés
- Freshfields Bruckhaus Deringer
- Gide Loyrette Nouel
- Hogan Lovells
- Jones Day
- Latham & Watkins
- Linklaters
- Milbank
- MLAB Abogados
- Orrick
- Paul Hastings
- Racine
- Rizom Legal
- Sheppard Mullin
- Sullivan & Cromwell
- Van Bael & Bellis
- Viguié Schmidt et Associés
- Weil, Gotshal & Manges
- Willkie Farr & Gallagher

CORPORATIONS

- Airbus
- Alstom
- Amazon
- Bayer HealthCare
- Cisco
- CSL Vifor
- Dassault Systèmes
- EssilorLuxottica
- HP
- La Banque Postale
- Michelin
- Philip Morris International
- SNCF
- Suez
- TDF
- Tereos
- Veolia

PROGRAM

8:30 WELCOME & REGISTRATION

8:45 INTRODUCTORY REMARKS

Frédéric JENNY | Professor, ESSEC, Paris | Chairman, OECD Competition Committee, Paris

9:00 OPENING KEYNOTE

Benoît COEURÉ | President, Autorité de la concurrence, Paris

9:30 #1 THE REVIVAL OF INDUSTRIAL POLICY AT A TIME OF POLYCRISIS: IS COMPETITION POLICY LOSING GROUNDS?

Marion BAILLY | Deputy Head of Unit - Merger Case Support and Policy, DG COMP, European Commission, Brussels

Pascal BELMIN | VP, Head of EU Regulatory Affairs, Airbus, Paris

Stéphanie YON-COURTIN | Member, European Parliament, Brussels

Moderator: **Frédéric JENNY** | Professor, ESSEC, Paris | Chairman, OECD Competition Committee, Paris

11:00 COFFEE BREAK

11:30 #2 THE INTERPLAY BETWEEN PUBLIC AND PRIVATE ENFORCEMENT: HAVE WE GOT THE BALANCE RIGHT?

Laila MEDINA | Advocate General, Court of Justice of the European Union, Luxembourg

Séverine SCHRAMECK | Partner, Cleary Gottlieb, Paris

Wouter WILS | Legal Advisor, Legal Service, European Commission, Brussels / Visiting professor, King's College London

Moderator: **Rafael AMARO** | Professor, University of Caen

13:00 LUNCH

14:00 #3 ESTABLISHING ABUSES OF DOMINANCE: IS THE EFFECTS-BASED APPROACH ADMINISTRABLE?

Inge BERNAERTS | Director for Policy and Strategy, DG COMP, Brussels

Antoine CHAPSAL | Managing Principal, Analysis Group, Paris/Brussels/London

Ioannis LIANOS | Chair, Hellenic Competition Authority, Athens

Moderator: **Damien GERARD** | Prosecutor General, Belgian Competition Authority, Brussels

15:30 COFFEE BREAK

16:30 #4 GETTING THE DEAL THROUGH: HOW TO NAVIGATE THE INCREASED COMPLEXITY OF REGULATORY CONDITIONS?

Marie-Anne LAVERGNE | Head of Unit, Foreign Investments Control at French Treasury, Ministère de l'Économie, Paris

Ief DAEMS | Legal Director, Antitrust, Cisco, Brussels

Damien LEVIE | Head of Unit, Technology and Security, FDI Screening, DG Trade, European Commission, Brussels

Etienne PFISTER | Partner, RBB Economics, Paris

Moderator: **Faustine VIALA** | Partner, Willkie Farr & Gallagher, Paris

17:30 CLOSING KEYNOTE

Anna MARCOULI | Judge, General Court of the European Union, Luxembourg

18:00 PH.D 2023 AWARDS

18:30 RECEPTION

OPENING REMARKS

Frédéric Jenny

Chairman, OECD Competition Committee / Professor Emeritus, ESSEC Business School

Les 30 glorieuses du droit de la concurrence

- Le droit de la concurrence a connu un essor considérable entre les années 70 et la fin des années 90.
- Le nombre de pays dotés d'une politique de concurrence est passé d'une quarantaine à environ 140 pays.
- Les déterminants de l'essor du droit de la concurrence sont le consensus international post-Seconde Guerre mondiale qui a rejeté le protectionnisme, le corporatisme et le dirigisme afin d'ouvrir les opportunités économiques et donc de développer le commerce international.
- L'ouverture commerciale a contribué à une régression significative de la pauvreté.
- L'évolution du commerce international a été accompagnée par l'évolution du droit de la concurrence, qui garantit l'efficacité des échanges internationaux négociés entre les pays.
- Le droit de la concurrence a été soutenu par l'analyse économique et le consensus politique, mais a parfois montré de l'arrogance envers d'autres politiques réglementaires, de régulation sectorielle ou industrielle. Il était considéré comme supérieur et les autres droits devaient se soumettre à la logique de la concurrence.
- Les autorités de concurrence ont acquis une expertise et se sont développées pendant cette période.

Le tournant du siècle s'est avéré être, intellectuellement et dans les faits, crucial

- En 1977, Giuliano Amato a publié «Antitrust and the bounds of power», soulignant que le droit de la concurrence est le résultat d'un compromis politique définissant la frontière entre l'abus de pouvoir privé et public, pouvant varier d'un pays à l'autre et à travers l'histoire.
- En 2001, Mario Monti mentionne pour la première fois que la protection du consommateur est l'objectif ultime du droit de la concurrence.
- «Globalization and its discontent», de Joseph Stiglitz, évoque les coûts potentiels associés à une politique libérale, commerciale ou de concurrence.

Les difficultés rencontrées par le droit de la concurrence lors les deux dernières décennies

- La globalisation a été perçue de manière plus nuancée, avec une prise de conscience des inégalités engendrées par la concurrence déloyale.
- La crise économique et financière de 2008 a remis en question les bienfaits de la globalisation et du libéralisme en révélant l'irrationalité des marchés concurrentiels et la fragilité des pays interdépendants.
- La crise du Covid-19 a renforcé cette perspective en mettant en évidence la dépendance vis-à-vis de sources d'approvisionnement lointaines, la lenteur de l'ajustement entre l'offre et la demande en période de chocs externes, et la nécessité d'une intervention publique pour faire face à de telles externalités.
- Le droit de la concurrence a été replacé dans un ensemble de politiques économiques plus larges afin de prévenir les effets négatifs de la globalisation.
- La crise climatique a ajouté une dimension socio-politique, nécessitant une intervention étatique pour assurer l'inclusivité et la durabilité.
- La révolution technologique du numérique a modifié la perspective sur le droit de la concurrence, avec des concepts différents tels que la concurrence sur l'innovation et l'importance des plateformes. Les autorités de concurrence ont été confrontées à des difficultés d'adaptation, ce qui a suscité du scepticisme quant à leur efficacité et a remis en question le droit de la concurrence par rapport à d'autres moyens d'action.

Marie de Monjour drafted the following synthesis for Concurrences. 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.

OPENING DISCUSSION

Aleksandra Boutin (Founding Partner, Positive Competition, Brussels) a modéré la discussion. Lors de cet échange plusieurs points essentiels ont été abordés concernant le rôle des économistes et leur influence sur les priorités de l'Autorité française de concurrence. Il a été question de la façon dont l'Autorité fait face aux crises récentes, aux questions stratégiques émergentes et aux changements dans le paysage politique en constante évolution. Un défi majeur soulevé était de gérer la multiplication des instruments législatifs qui peuvent impacter les décisions en matière de concurrence. Enfin, un enjeu majeur évoqué est celui du numérique, avec l'émergence d'entreprises technologiques et les nouveaux défis liés à la concurrence en ligne.

Benoit Cœuré

Président, Autorité de la concurrence, Paris

L'influence des économistes sur la vie de l'Autorité

- Être doté d'un service économique dédié n'est plus aujourd'hui une option mais une nécessité. Le service économique de l'Autorité a été créé dès 2007..
- Cependant, les juristes restent majoritaires parmi les agents de l'Autorité. L'ADN de l'Autorité est ainsi hybride, ce qui le rend plus robuste.
- La collaboration entre les juristes et les économistes est une grande force de l'Autorité.

La réorientation des politiques de l'Autorité afin de cibler les problématiques actuelles

- La réorientation des politiques est possible car les autorités publiques doivent se concentrer sur les préoccupations des citoyens et la complémentarité entre les instruments macroéconomiques et microéconomiques dans la lutte contre l'inflation.
- Le temps de la concurrence diffère de celui de l'action macro-économique. L'Autorité a des priorités d'action, mais son intervention ne suit pas le rythme de l'action macro-économique ou de la politique.
- L'efficacité de l'Autorité réside dans l'application stricte de la loi pour que les entreprises comprennent que les comportements contraires au droit de la concurrence seront sanctionnés, notamment en matière de marge et de prix excessif.
- L'Autorité a également une fonction consultative qui peut être mobilisée pour identifier des gisements de croissance et libérer du pouvoir d'achat.

La multiplication des instruments au niveau européen et leur interaction avec ceux de l'Autorité

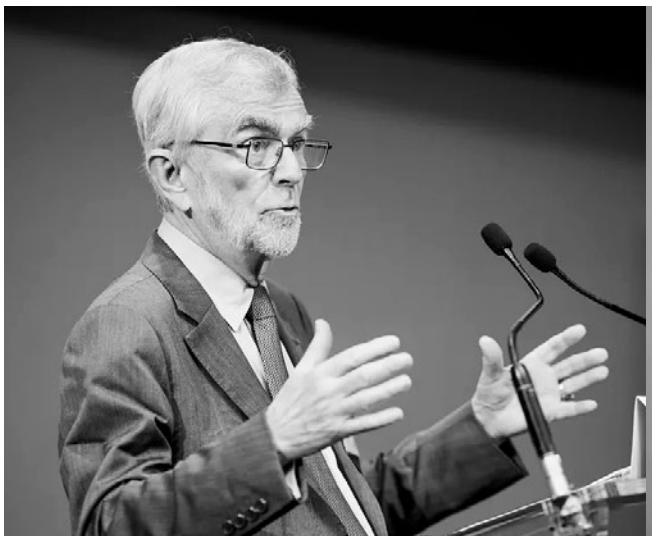
- La multiplication des instruments législatifs rend nécessaire de définir et mettre en œuvre leur doctrine d'emploi.
- La frontière entre l'application de l'article 102 et du DMA sera définie par la Commission européenne à travers sa doctrine d'emploi du DMA, dès lors que les obligations deviendront contraignantes en 2024.
- L'Autorité aborde ces questions avec un état d'esprit pragmatique et se coordonne au sein du Réseau européen de la concurrence (REC) avec la Commission européenne et les autres autorités de concurrence.
- Il est important de s'en tenir au principe de Tinbergen qui préconise de choisir un instrument adapté à chaque objectif que l'on poursuit.
- La multiplication des instruments est donc bénéfique, à condition qu'ils soient complémentaires et n'entrent pas en conflit les uns avec les autres.
- La politique de la concurrence et la politique industrielle doivent être considérées comme complémentaires pour un cadre cohérent. Une politique industrielle sans politique de concurrence favorise indûment les entreprises en place et décourage l'innovation. Inversement, la politique de concurrence ne peut ignorer le fait qu'un certain niveau de pouvoir de marché est favorable à l'innovation et à la résilience.

Le réseau européen de concurrence (REC)

- Le REC est un réservoir de ressources où la confiance et la bonne coopération permettent de réfléchir ensemble à des sujets communs.
- Le dialogue entre les autorités de concurrence est bénéfique, comme dans le cas de TF1/M6 où l'Autorité a bénéficié de l'expertise de l'Autorité néerlandaise qui traitait en parallèle un cas similaire.
- Des questions importantes en concentration se posent après l'arrêt Towercast. Il est nécessaire d'établir une doctrine d'emploi pour appréhender les opérations de concentration sous l'angle de l'abus de position dominante. Il est important d'apporter de la clarté sur la manière dont ces instruments vont être utilisés, quand quel ordre et dans quels cas.
- Le dialogue avec la Commission a déjà commencé sur ces sujets, et une position commune doit être établie pour en discuter ensuite avec les entreprises.

Le numérique

- Le temps consacré au « numérique » se justifie en raison de son impact sociétal. Cela implique que le pouvoir de marché des grandes entreprises du numérique n'est pas seulement économique mais devient aussi un pouvoir politique. Il est donc légitime que les politiques s'y intéressent.
- Les grandes entreprises du numérique disposent d'une influence politique qui découle de leur pouvoir économique, ce qui justifie l'intérêt des politiques pour les réguler.
- Une bonne combinaison entre l'application du droit de la concurrence et la régulation est nécessaire, car la régulation seule peut présenter des inconvénients.
- L'Autorité utilise activement ses instruments, notamment les mesures conservatoires, pour montrer l'efficacité d'une bonne politique de concurrence.
- La révolution technologique du numérique a modifié la perspective sur le droit de la concurrence, avec des concepts différents tels que la concurrence sur l'innovation et l'importance des plateformes. Les autorités de concurrence ont été confrontées à des difficultés d'adaptation, ce qui a suscité du scepticisme quant à leur efficacité et a remis en question le droit de la concurrence par rapport à d'autres moyens d'action.




PANEL 1

THE REVIVAL OF INDUSTRIAL POLICY AT A TIME OF POLYCRISIS: IS COMPETITION POLICY LOSING GROUNDS?

Frédéric Jenny (Chairman, OECD Competition Committee / Professor Emeritus, ESSEC Business School) a modéré le panel. Les débats ont été centrés sur le renouveau de la politique industrielle et son interaction avec la politique de concurrence. Dans ce contexte, les difficultés de communication entre la politique industrielle et la politique de concurrence traditionnelle ont été soulignées. Il est notamment important d'analyser les déterminants du renouveau de la politique industrielle dans le contexte de multiples crises. La question se pose donc de la conciliation possible entre les objectifs de la politique industrielle et de la politique de concurrence afin de rendre plus cohérente et acceptable l'interface entre les deux.

Tension entre politique industrielle et politique de concurrence

- Dimension incitation/capacité : Les économistes de concurrence se concentrent sur les incitations et les évolutions structurelles, tandis que la politique industrielle souligne l'importance des capacités.
- Temporalité de l'examen : Les autorités de concurrence ont traditionnellement une perspective temporelle étroite (environ 3 ans), tandis que la politique industrielle examine les innovations à plus long terme.
- Modèle d'équilibre statique : Le droit de la concurrence est basé sur un modèle statique, mais les questions à l'interface avec la politique industrielle impliquent des considérations dynamiques et à plus long terme.

Marion Bailly

Deputy Head of Unit - Merger Case Support and Policy, DG COMP, European Commission, Brussels

Competition policy and industrial policy

- The European Commission sees competition as an enabler of industrial policy, not an obstacle, aiming to incentivize innovation and competitive prices for consumers and companies.
- Healthy competition is essential to create champions in the market.
- In the Siemens/Alstom merger, the two companies were already and still are successful global companies.s
- Merger control does not prevent companies from gaining capacity and scale; it focuses only on problematic overlaps. Large deals are regularly approved, with and without remedies.
- Recent crisis show that the trend towards globalisation can somehow be reversed or questioned, and Europe is now very much concerned about ensuring strategic autonomy and reducing dependency.
- European industries have also observed increased concentration levels, especially in digitally sensitive sectors.
- In this context, the debate evolved from whether competition-based decisions should be overruled by industrial policy to what more can be done or created to complement competition policy.

Merger control and its industrial objectives

- Competition policy and merger control can do its part and contribute to industrial objectives, when focusing on innovation, green aspects, and access to raw materials.
- In the last mandate, there has been an unprecedented revision of texts in various areas, including merger control, antitrust, including on sustainability agreements, and state aid.

- Also, the recalibrated approach to the referral mechanism in merger control (article 22) allows reviewing transactions that may not meet turnover thresholds but are still significant, especially in innovative sectors like biotech and the digital markets.
- Beyond the revision of texts and tools, the European Commission is enforcing, and concretely contributing to the twin transition by taking into account market dynamics which are important for consumers and competitive processes of the industries. The European Commission is doing so when defining markets, assessing closeness of competition and viability of remedies during case reviews.
- The competence of the Directorate General for Competition of the European Commission on merger control is limited to tackling competition dynamic impacts, but Member States have the authority to act on mergers based on other legitimate interests.

Kai-Uwe Kühn

Academic Advisor, The Brattle Group, Brussels

General perspective on industrial policy

- There is scepticism towards industrial policy in both merger and state aid cases due to past instances of bad industrial policy.
- National champion arguments in mergers have not been reasonable, and mergers are driven by individual firm decisions rather than industrial policy concerns.
- State aid projects intended for industrial policy purposes have encountered problems.
- Bad experiences with industrial policy indicate a need for better justifications, and state aid control is in place to address competition policy concerns.

Industrial policy from the perspective of competition economists

- Identifying clear problems is essential.
- Supply chain security is crucial but often undervalued by economists.
- Certain risks, although infrequent, can have a massive impact on a country's overall production, but individual firms may not account for them in their investments.
- There is an externality where cost-minimising firms may neglect to buffer against risks, necessitating intervention.
- Stress tests and policies for extreme events should be considered.
- The growth emphasis on sectors is path-dependent and influenced by specialisation.
- Long-term comparative advantage depends on current investments.
- Specialising in the wrong way can lead to a comparative disadvantage and diminish the growth path. The choice of growth path is crucial and may require subsidies to switch.
- Complementarity between different actions is essential for successful state aid policies. Creating an ecosystem where initiatives work together and are coordinated is important. The coordinated environment encourages actors to develop and invest.
- A mixture of different types of investments is needed to support growth.

Asymmetry in terms of efficiencies

- Competition policy focuses on addressing market power concerns and is not intended to be a tool for promoting industrial policy objectives.
- Efficiencies arising from mergers are generally limited and should not be overestimated as a means of justifying anticompetitive behaviour.
- Industrial policy transitions are more effective when there is competition, and state aid principles play a crucial role in ensuring diversification and openness to different technologies while setting limits.
- State aid and good industrial policy can work together in a complementary manner to foster economic development and competitiveness.

Elie Cohen

Directeur de recherche émérite, Centre de recherches politiques de Sciences Po, Paris

Affaire Alstom/Siemens

- La Chine a lancé un programme massif de TGV (7500km) et a subventionné des commandes importantes, permettant à son champion national de contester les positions d'Alstom et Siemens dans le monde entier.
- Cela illustre une politique suicidaire menée au niveau européen, ignorant le besoin d'autonomie stratégique.

- Après l'échec de la fusion Alstom-Siemens, les deux entreprises ont dû restructurer leurs activités pour atteindre un seuil de rentabilité sur des micro-activités. C'est le cas d'école parfait qu'il faudrait étudier pour dire ce qu'il ne convient pas de faire.
- Présenter cette décision comme ayant évité le pire montre une méconnaissance des dynamiques des échanges internationaux et de la montée en puissance industrielle et technologique de la Chine.

Perspective de politique industrielle au niveau européen

- L'Europe a pratiqué des politiques de «benign neglect» à l'égard des questions de production, spécialisation industrielle et autonomie stratégique. Il a longtemps été considéré que la spécialisation économique et industrielle se déterminait par les avantages comparatifs, mais cela a conduit à la désindustrialisation et à des économies de basse spécialisation.
- L'intervention de l'État est nécessaire pour favoriser l'innovation dans le secteur vert et faciliter la conversion de l'économie brune à l'économie verte.
- Les expériences avec le Covid ont mis en évidence la nécessité de prendre en compte la sécurité d'approvisionnement et de diversification des sources d'offres pour protéger les populations.
- Le monde n'est pas régi uniquement par le commerce, mais par des stratégies nationales et des réalités tangibles.
- L'UE a donc mis en place un agenda pour renforcer la production, la spécialisation industrielle et mettre en place des politiques sectorielles pour améliorer l'autonomie stratégique.

Politique de concurrence et politique industrielle

- Les politiques industrielles sont des politiques de développement et les politiques de concurrence sont des politiques de moyen.
- Historiquement, les politiques industrielles ont été efficaces pour la reconstruction et l'émergence économique, mais ont été abandonnées en France depuis 1983.
- Le choix de l'intégration européenne et du marché unique a conduit à renoncer à la politique des champions nationaux.
- La France connaît des gaps technologiques par rapport aux autres grands nationaux. Afin de faire face à ces fragilités et enjeux politiques, la politique industrielle peut-elle à nouveau faire sens ?
- La Commission européenne examine les maillons critiques des écosystèmes et cherche à augmenter la production de composants électroniques sur le sol européen. Par exemple, alors que la Chine avait un programme 6G très développé, il n'y avait que des actions dans le domaine de la 5G au niveau européen.
- Afin de concurrencer d'autres pays pour attirer les usines de grandes entreprises technologiques sur son sol, l'Europe a décidé de doubler la part de production de composants électroniques dont elle a l'usage unique sur son territoire.
- L'Europe fait face à des défis en termes de ressources, de mobilité, d'institutions et de déploiement.

Pascal Belmin

Vice President, Head of EU Aviation and Regulatory Affairs, Airbus, Bruxelles

Le droit de la concurrence face aux autres politiques

- Le droit de la concurrence doit désormais s'articuler avec d'autres politiques.
- Les priorités européennes sont centrées sur l'environnement, le digital et la résilience, qui chacunes intègrent de plus en plus une dimension de politique industrielle.
- Depuis 4-5 ans, des réglementations et initiatives concrètes ont adoptées et mises en place afin de soutenir ces politiques.

Exemples concrets : les priorités environnementales et de résilience comportent des éléments de politique industrielle

- À la suite du lancement de l'Inflation Reduction Act aux Etats-Unis, l'Europe a adopté le Net Zero Industry Act. L'objectif est d'atteindre 30 à 40% de capacité de production dans certaines technologies identifiées d'ici 2030.
- Un «Critical Raw Material Act» est en discussion pour réduire la dépendance vis-à-vis de matières premières critiques comme le titane et les alliages.
- La question se pose alors de savoir comment articuler le droit de la concurrence avec ces priorités industrielles. Dans ce contexte, il est donc clair que les priorités industrielles définies dans les initiatives réglementaires et politiques ne peuvent pas être ignorées dans les décisions de concurrence ou d'aides d'État.

- Les instruments législatifs tels que la réciprocité sur les marchés publics, les règlements sur les subventions internationales, les foreign subsidies et la coercition économique sont des outils permettant de rétablir une égalité de concurrence (level playing field).
- Le travail en transversalité entre la Commission et les États est essentiel pour réussir à intégrer les politiques industrielles et remplir les objectifs fixés.

Articulation entre le droit de la concurrence et les politiques industrielles

- Le droit de la concurrence peut être complémentaire avec d'autres politiques, mais cela nécessite de la flexibilité pour intégrer les priorités industrielles.
- Une question se pose sur la nécessité d'adapter la lettre du droit de la concurrence pour prendre en compte ces priorités. Par exemple, un tel changement peut se faire au niveau des gains d'efficience car il sera plus facile d'introduire des considérations tirées d'autres politiques européennes en restant cohérent avec les fondamentaux de l'analyse de concurrence.

Stéphanie Yon-Courtin

Member, European Parliament, Brussels

Articulation entre la politique de concurrence et la politique industrielle

- La nouvelle ère européenne depuis 2019 a vu une articulation claire entre la politique industrielle et la politique de concurrence.
- Dans une certaine mesure, les crises ont permis à l'UE de s'attarder sur cette articulation.
- Par exemple, le Covid a accéléré cette complémentarité avec des coopérations temporaires dans le domaine pharmaceutique pour éviter les ruptures d'approvisionnement. De plus, les aides d'État ont été au cœur de la réponse à la crise, avec des cadres temporaires et des PIEC pour concilier politique industrielle et politique de concurrence.
- L'adaptation du droit de la concurrence aux nouvelles technologies, comme l'IA, a révélé des lacunes et la nécessité d'outils de régulation tels que le DMA et le règlement sur les subventions étrangères.
- L'objectif est désormais de trouver comment articuler ces différentes politiques pour concourir aux transitions et à l'idée de souveraineté.

L'aiguillon de l'innovation

- Le Parlement joue un rôle de colégislateur et de contrôle de l'action de la Commission. Le ton est donné à travers l'aiguillon de l'innovation qui est considéré comme principe directeur.
- Il est important de trouver comment articuler les multiples textes en intégrant plus de transversalité, ce qui nécessite une réorganisation institutionnelle de la Commission qui travaille en silo. Il est également important d'assurer une coopération entre la Commission et les autorités de régulation nationale.
- Le retour à la normale pour les aides d'État est essentiel, tout en favorisant l'accès au financement au niveau européen et en promouvant la production européenne dans la commande publique.
- Des exemples de marchés articulant politique industrielle et politique de concurrence, tels que le Telecoms Act, présentent des défis.
- Il est maintenant temps de mettre en œuvre et de s'approprier les textes de réglementation, car de nombreux acteurs (citoyens, entreprises) ne sont pas encore familiarisés avec cette vague de réglementation.

PANEL 2

THE INTERPLAY BETWEEN PUBLIC AND PRIVATE ENFORCEMENT: HAVE WE GOT THE BALANCE RIGHT?

Rafael Amaro (Professor, University of Caen) a modéré le panel. La discussion a pour objectif de faire un état des lieux du droit positif, l'état des équilibres entre le public et le *private enforcement* tel qu'ils se dégagent de la directive dommage ainsi que de l'actualité jurisprudentielle. Un certain nombre d'arrêts récents redessinent les modalités de ces interactions entre le public et le privé. De plus, une présentation des aspects positifs et négatifs de la proposition de la Monopolkommission qui vise à créer une clémence civile sera discutée.

Laila Medina

Advocate General, Court of Justice of the European Union, Luxembourg

Tools in competition law where the Commission is trying to strike a balance

- There are competing interests between economic and legal perspectives in this particular field. It emphasises the challenge of balancing economic and legal perspectives in this area.
- Access to information and evidence is crucial, and the ECJ plays a role in ensuring a fair balance between public and private enforcement, as well as the rights of parties with information (public authorities and undertakings) and the rights of victims in competition cases.

The place and importance of private enforcement

- The Court recognizes the importance of private enforcement in enforcing articles 101 and 102 TFEU.
- Private enforcement is crucial in three areas: when public authorities fail to act, ensuring compensation for victims, and allowing courts to develop competition law.
- The right to compensation is a fundamental right protected by national courts and written into the Treaty. However, this right doesn't mean everything should lean towards the victim's right of compensation. It is the interplay between public enforcement authorities, companies accused of infringement, and the victims must be considered.
- Victims need access to information under the right of disclosure, but this should not negate the obligation of public enforcement to prove the alleged infringement.
- The Court has struck a balance by providing more protection to information gathered for public enforcement needs compared to information in the hands of private companies, while still making relevant information available to victims claiming damages.

Follow-on actions

- Stand-alone actions or parallel actions for enforcing antitrust law have limited possibilities for compensation.
- However, follow-on actions offer the most realistic chance for an average company to seek compensation for anticompetitive practices.
- National courts' competence is relevant, but the emphasis will still be on follow-on actions.
- Follow-on actions have been criticised for potentially prolonging the case.

Access to evidence

- The Private Enforcement Directive aims to address the information imbalance between parties.

- Victims/companies have the right to request disclosure of information from both public and private actors.
- The Court emphasises reasonably broad access to evidence to strike a balance between competing interests. It is a reasonable tool to compensate for information asymmetry.
- Three main rules for achieving this broad access: strict adherence to articles 5 and 6 of the directive, not exceeding what is necessary, and ensuring a connection between claims before the court and evidence.
- Requests for new or additional information are permissible if reasonable and necessary to balance information asymmetry.
- Different types of evidence are treated differently:
  - Blacklist evidence is never disclosed and receives full protection.
  - Grey list evidence can be disclosed after administrative proceedings are closed, with temporal protection.
  - White list evidence can be disclosed but is not required at any time.

General conditions for disclosure of evidence

- The Court provides procedural guidance for national courts regarding requests for disclosure of evidence.
- National courts must rigorously assess the request for information and disclose only what is strictly needed, proportional, and connected to the claim before the court.
- In cases with parallel ongoing investigations, national courts can grant access to information but must not jeopardise the interests of the public authority conducting the investigation.
- Information on the grey list is subject to serious protection of the public authority's interests, and damages directives exhaustively harmonise access to information on the grey list. Therefore, Member States may not add extra burden on access to information which are on the grey list.
- Ex novo rules allow requesting the defendant to create a document if reasonably needed by the possible victim company.
- Requests for information considered fishing expeditions are not protected by national courts.

Séverine Schrameck

Partner, Cleary Gottlieb, Paris

L'effet dissuasif des actions en réparation de dommages (« damage claims »)

- Les actions en réparation de dommages ont un rôle dual de compensation et de dissuasion, comme l'indiquent la jurisprudence et la Directive. La dimension dissuasive n'allait pas de soi, les actions en « réparation » ayant traditionnellement pour fonction, justement, de réparer.
- Ce double rôle est source d'incertitudes et de craintes liées aux incertitudes des conséquences allant désormais bien au-delà des amendes potentielles pour violation des règles antitrust du point de vue des entreprises.
- La clarification des règles d'attribution de dommages et intérêts est une bonne chose pour les entreprises, notamment en considérant les lignes directrices existantes.
- Les décisions d'entrer dans des cartels ne sont généralement pas des décisions d'entreprise, mais plutôt des initiatives individuelles mal maîtrisées.
- La décision d'entrer dans une procédure de clémence est une décision économique complexe, car le coût de la clémence est difficile à évaluer a priori.

Déséquilibre d'information entre la victime et le cartelliste

- La Directive dommages et la jurisprudence visent à rétablir l'équilibre dans l'accès à l'information (arrêt Pacar, RegioJet, Manuel Feller).
- Il peut exister d'autres formes d'asymétries que celles attendues, par exemple, un déséquilibre économique qui joue en sens inverse du déséquilibre d'accès à l'information, le plaignant étant le client du défendeur et parfois un client qui a un fort pouvoir de négociation.

- Dans certains cas, les actions en dommages et intérêts peuvent devenir des outils commerciaux ou de négociation plutôt que juridiques.
- Les instruments juridiques favorables aux victimes peuvent rendre les actions en dommages et intérêts peu coûteuses, mais il y a de l'incertitude concernant qui peut facilement engager ces actions en dehors des clients directs.
- La jurisprudence Sumal indique que les victimes de dommages peuvent attaquer une filiale de l'entité qui a mis en œuvre le cartel, ce qui peut entraîner un forum shopping et une concurrence entre les cours pour allouer des dommages, où le Royaume-Uni joue un rôle prédominant.

David Sevy

Executive Vice President, Compass Lexecon, Paris / Brussels

L'existence du préjudice

- La question centrale pour déterminer l'existence du préjudice est la causalité entre les faits générateurs et les changements sur le marché.
- Les documents publiquement disponibles fournissent des informations sur les faits générateurs, mais il peut y avoir un déficit concernant les effets sur le marché.
- Cela conduit à un univers de présomptions plutôt qu'à la certitude de l'existence d'un préjudice.
- La présomption réfragable est difficile à établir.
- Les documents de clémence ne changeraient pas grand-chose à cette situation car ils apportent des informations sur les faits mais peu sur les effets sur le marché et l'existence du préjudice.

La quantification du préjudice

- Les actions follow-on posent un problème fondamental.
- Le guide pratique de la Commission européenne et les fiches pratiques de la Cour d'appel ont permis de structurer le débat avec un vocabulaire commun et une grammaire commune. Cela permet d'établir un vrai dialogue.
- Les données sont essentielles dans la quantification du préjudice, mais il peut y avoir des oppositions radicales sur le point d'atterrissage des compensations. Le manque d'entre deux dans les évaluations est donc problématique pour la compensation des préjudices.
- L'un des enjeux majeurs des dommages concerne l'établissement du contradictoire afin que les juges puissent apprendre à travailler avec des appréciations divergentes et à amener ces appréciations à un certain degré de convergence.
- Dans ce contexte, la production de documents peut aider à atteindre un niveau raisonnable de compensation en permettant une confrontation éclairée entre experts et juges.

Wouter Wils

Legal Advisor, Legal Service, European Commission, Brussels / Visiting professor, King's College London

Follow-on actions for damages

- Actions for damages have significantly increased, starting before the Damages Directive in various Member States like Germany, Netherlands, UK, etc.
- The Damages Directive in 2014 encourages follow-on actions for damages and also aims to prevent potential negative effects on leniency programs from such actions.
- The Directive includes two provisions: the prohibition of disclosure and use in evidence of leniency statements, and the limitation of immunity recipients' damages liability primarily to their own direct and indirect purchasers and providers.
- Importantly, the Directive is not retroactive and applies to cases where the cartel is still ongoing until after its transposition into national law.

OECD competition trends

- From 2016 to 2020, there was a 70.5% decline in leniency applications in Europe, with a similar decline of 68.5% in the US.

- Germany intends to strengthen cartel prosecution through initiatives to better protect immunity recipients and reform the EU Competition Damages Directive.
- In 2022, the Monopolkommission proposed that immunity recipients should be fully exempted from damages liability under certain conditions, including making leniency statements available to injured parties.
- The optimal number of leniency applications lies between complete immunity for all and full deterrence, which is neither possible nor desirable due to economic and psychological reasons.
- Leniency is a complement to other methods of collecting intelligence and evidence on cartel infringements, not a substitute.

The evolution of the number of leniency application

- The trend in the decline of the number of leniency applications has been reversed. The European Commission has received in 2022 twice as many leniency applications as in 2021, and three times as many as in 2020. OECD Competition Trends 2023 show that there are 32% more leniency applications in 2021 than in 2020 in Europe.
- Three main factors contribute to the decline in leniency applications:
  - Fewer cartels due to increased enforcement, follow-on actions for damages, compliance efforts, and use of mergers and acquisitions as alternatives.
  - Evolution of the number of ex officio cartel investigations.
  - Uncertainty surrounding follow-on actions for damages, with the decisive element being the threat of ex officio enforcement.

Immunity recipients should not receive immunity from damages

- The first reason is that it creates a problem of injustice. This is corrective injustice that requires not only that the injured party receives full compensation, but also that the party that caused the injury pays
- The second reason is harm to public anti-cartel enforcement, as leniency statements are crucial evidence.The proposal of the Monopolkommission raises two issues:
  - First the evidential value of the leniency statement of the immunity recipient will go down.
  - Because the value goes down you need more corroborative evidence, but the willingness of second-in or third-in potential leniency applicants to provide such evidence will decline.
- The third raison is that it will lead to increase in market concentration, as many immunity recipients have high market shares. Excluding dominant companies from benefits may not be an effective solution, as cartels typically do not involve dominant firms.

PANEL 3

ESTABLISHING ABUSES OF DOMINANCE: IS THE EFFECTS-BASED APPROACH ADMINISTRABLE?

Damien Gerard (Prosecutor General, Belgian Competition Authority, Brussels) moderated this panel. The discussion focused on the significance of enforcing Article 102 in EU competition law, with many impactful decisions based on it in recent years. There has been a notable increase in EU Court cases related to Article 102, prompting a transformation in enforcement practices since the 2008 Guidance Paper. It aims at enabling the emergence of an effect based approach. The Intel case exemplifies this approach, raising concerns about its administrability and evidentiary standards. In response, the EU Commission adopted amendments and plans to replace the Guidance Paper with Guidelines on exclusionary abuses, sparking debates on the scope and requirements of Article 102. A reassessment of enforcement is now needed, considering the rationale for adjustments by the Commission and NCAs.

Antoine Chapsal

Managing Principal, Analysis Group, Paris/Brussels/London

The emergence of an effect based approach

- Article 102 decisions by EU Commission and NCAs are now grounded in economics due to a better understanding of potential anticompetitive effects.
- The first guidance by the EU Commission and economists' papers contributed to developing an economic-based approach.
- Decisions now rely on convincing theories of harm that rigorously align with economic reasoning.
- Case law has clarified key aspects of the effect-based approach, making it more predictable, such as the use of price-cost tests.
- It is not necessary to identify actual anticompetitive effects; long-term consumer welfare impact is crucial.
- Detecting anticompetitive effects may be complex, especially when rivals continue to operate but their surplus is captured by the dominant firm.
- Administering Article 102 is challenging, requiring precise conduct identification, demonstrating dominance, and assessing competition distortion and impact on consumer welfare.
- This analysis demands significant resources from Competition Authorities.

Type I and type II errors

- Type I error (over-enforcement) cost may be lower than Type II error (under-enforcement) cost.
- Decision-making cannot solely rely on the relative cost of Type I and Type II errors.
- The expected cost, which considers the probability of anticompetitive or pro-competitive effects, is essential in the decision-making process.
- Authorities should consider multiple parameters, not just the relative cost of errors, when making decisions.

Building presumptions

- Economic theory can help design different kinds of presumptions and legal standards.
- The interpretation of the DMA creates a shortcut to implement Article 102 with restrictions on gatekeeper firms.
- There are two extremes for easier administration: per se legality or per se illegality, and in the middle, the 2005 paper's pure rule of reason approach.
- Rebuttable presumptions of legality or illegality are other options that can be analysed economically based on various conducts.

- Analysing potential effects of practices is feasible with economic theories and theories of harm to understand causality between conduct and potential anticompetitive effects.
- Likelihood of anticompetitive effects varies based on the category of conduct. For example, bundling is more likely to have procompetitive effects compared to below-cost predation.
- Different conducts require specific legal standards and tests to determine if the presumption of legality or illegality can be rebutted.

As efficient competition principle/test

- The principle of pushing out less efficient rivals is easy for a dominant company.
- The price cost test allows us to see whether there is potentially an anticompetitive problem.
- A shift from the «as efficient competitor» principle to the «not yet as efficient competitor» principle is proposed to protect less efficient firms and foster competition.
- Implementation of the «not yet as efficient competitor» test may be complex and challenging.
- There is a need to design the test carefully to avoid giving advantages to lazy or inefficient competitors.
- This test is similar to identifying a natural monopoly where size leads to cost efficiency and new competitors struggle to compete.

Gönenç Gürkaynak

Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

Effect based approach and legal certainty

- Advising clients on the effects of unilateral conduct is challenging due to the absence of clear rules, requiring a case-by-case analysis.
- Uncertainty is not necessarily negative, as easy labels can lead to the lack of effective enforcement, which means that there could be false positives.
- In the past, bright line rules offered more legal certainty, but they may not capture the complexities of unilateral conduct cases, especially exclusionary conduct cases.
- Presumptions in exclusionary conduct cases can lead to overuse and hasty judgments without considering actual market effects.
- The shift towards an effect-based approach places the burden of proof on the enforcer to show the conduct's detrimental effects on competition, making the task more difficult.
- Efficiency in enforcement should prioritise reducing false positives without increasing false negatives, particularly concerning in Article 102 cases with exclusionary conduct.
- Effective competition can resemble exclusionary conduct, leading to the demise of some competitors, making precision in analysis essential to avoid false positives.

Amendments to the Guidance Paper

- The Commission's amendments have achieved a balance between effective enforcement and legal certainty.
- Assessing potential effects along with actual effects is a positive approach, supported by the Court.
- Agencies should handle complaints carefully, especially when complainants claim exclusionary conduct by incumbents causing their market exit.
- Potential effect analysis allows for more objective examination based on data, reducing controversies.
- The amendment emphasises the importance of factual and economic data in the analysis, moving away from assumptions and narrow understandings of effects.
- Recognizing that genuine competition can come from less efficient entities is a positive change in perception.

Ioannis Lianos

Chair, Hellenic Competition Authority, Athens

EU effect based approach

- As opposed to the US approach, the European effect-based approach focuses on potential effects rather than actual effects.
- Effects-based cases are quite demanding in resources and any reform at the EU level (e.g Guidelines) should take into account not only the institutional capabilities of the European Commission and some large NCAs but also those of smaller NCAs and national courts. This means that an expansion of the effects-based approach to Article 102 and its national equivalents will lead less enforcement and therefore to a higher risk of false negatives overall.

- NCAs have seen an increase in cases, often involving less comprehensive effect analysis, with a resurgence of cases on naked restrictions or more by object cases due to the complexities involved in effect-based analysis.
- Some national courts have not fully embraced the effect-based approach, taking a more aggressive perspective on Article 102 based on the precautionary principle and emphasising justice and fairness over economic effects.
- Policy standards in effect analysis are based on a broad conception of consumer welfare (including harm to the competitive process) but also behavioural norms based on principles of justice and fairness (impediment competition as opposed to merits-based performance competition), which explains why for naked restrictions positive effects may not rebut the presumption of anticompetitiveness.

Potential effects

- There is a trend towards analysing potential effects, requiring more reliance on economic evidence of a predictive nature (e.g. economic models, simulation) but also data analytics that emphasise tendencies rather than causal interactions narrowly constructed.
- The Commission is re-adopting the «not as yet as efficient competitor» test that was introduced in a discussion paper in 2005, considering the importance of protecting possible future competitors in complex economic settings, a principle abandoned in the Priority Guidance in favour of the As Efficient Competitor Test, which was promoted by economic consultancies and the defence bar
- Emphasising potential effects may lead to the need for more presumptions, similar to those in the economic approach in the context of Article 101 TFEU (by object restrictions of competition).
- Presumptions in the effects approach can be rebutted with economic evidence. However, this possibility does not exist for naked restrictions where the only possibility of rebuttal is evidence showing the anticompetitive conduct didn't occur.
- The design of these presumptions will be an evolutionary process, relying on case law and categorical thinking on the basis of economic but also other social science empirical research, which remains crucial in Article 102 enforcement.

Building presumptions

- Different theories of causality in which a simple contribution to an effect are considered is considered as demonstrating a causal relation. There is a quite open perspective on causation if the Commission may only need to prove potential effects. The but for approach is not the only way to prove causality in this context and we may use generalised probabilistic theories of causality.
- Various parameters of competition are taken into account (e.g. price, innovation, quality, variety, resilience), and presumptions are needed to reduce administrative costs.
- Presumptions should be designed with the help of economists/social scientists but also legal precedent and consider behaviours that are not considered as competition on the merits not only for economic but also for ethical reasons (establishing a moral market economy).
- Rebuttable analysis is ideal, but limited empirical research and costs lead to relative probability analysis by judges and enforcers due to the lack of full knowledge.

As efficient competitor test

- The European approach differs from the US.
- Principle in the EU: Consumer betterment standard.
- The test is a price cost test, limited to efficiency and price considerations, not useful for innovation, quality or variety parameters. Therefore, the ambit of the AEC test is very limited. Only for price predation theories of harm but does not concern leveraging/anti-competitive foreclosure theories of harm.
- A less efficient competitor in terms of price may still have positive aspects for consumers as it may constrain the ability of the dominant undertaking to increase prices further (due to the price constraint by the less efficient competitor).

Inge Bernaerts

Director for Policy and Strategy, DG COMP, European Commission, Brussels

Dynamic and workable effect based approach

- The Commission stands behind the effect-based approach and continues to integrate economics into exclusionary abuse cases.
- Since the adoption of the Guidance Paper in 2008, the Commission has dealt with 26 unilateral conduct cases, leading to 32 judgments, and has followed the Court's interpretation of the effect-based approach, influencing changes to the Guidance Paper.

- The question is not whether to use an effect-based approach but how to do so. The Court's case law on evidentiary standards for the approach is still somewhat in flux.
- With Google Shopping and Google Android, the Court seems to recognise that a qualitative assessment is conducted in an effect based approach. The Court also looks at the full context and the full body of evidence that is available.
- The Intel renvoi case raised concerns about the evidentiary standards, and the Commission appealed the decision to seek clarification.
- The Commission wants Article 102 to be applied not only by the Commission but also by NCAs and national courts, requiring an enforceable standard and a realistic threshold of evidence.

Amendments to the Guidance Paper

- The standard for anticompetitive foreclosure lies between purely hypothetical effects and actual effects and requires clarification. The Commission prioritises looking at potential effects in setting its enforcement priorities.
- The concept of harm to the competitive process is broader than a full foreclosure test.
- The Commission relies on its own enforcement practices, especially in the digital sector, and draws lessons from those cases. Exclusionary conduct by dominant players can prevent competitors from growing and exercising competitive constraints, even if it doesn't entirely keep them out of the market.
- Protection of competition from less efficient competitors may be necessary in some circumstances.
- The standard for exclusionary conduct is not solely based on the dominant player being able to profitably increase prices afterwards, as competition dynamics involve factors beyond just prices.

The process of establishing guidelines

- Different categories of conduct fall under naked restrictions (e.g., Intel case).
- Need to preserve naked restrictions from a public enforcement perspective.
- Extent of quantified economic assessment varies for different exclusionary conduct categories.
- Pricing conduct, being part of fierce competition, requires deeper quantified economic assessment.
- Differentiation between categories required to meet evidentiary standards in public enforcement.

As efficient competitor principle

- The 2008 Guidance Paper on exclusionary conducts faced allegations from the US that the Commission was preventing inefficient competitors from being pushed out of the market through competition on the merits.
- The as efficient competitor test played a role in this context.
- Distortion of the competitive process is necessary to meet the legal standard.
- This highlights the need to focus on potential effects on the competitive process.
- Pricing conduct: The Court regarded it as an optional test, sparking the need for further debate.
- Utilising the contestable share calculation in the test can lead to a false sense of legal certainty.

PANEL 4

GETTING THE DEAL THROUGH: HOW TO NAVIGATE THE INCREASED COMPLEXITY OF REGULATORY CONDITIONS?

Faustine Viala (Partner, Willkie Farr & Gallagher, Paris) moderated the panel. The discussion will highlight several hot topics in the EU right now: FDI, article 22 regime, FSR, merger control difficulties, risks of diverging outcome from different jurisdictions (e.g., market share thresholds, filing requirement, notification obligation for the digital gatekeepers, the referral mechanism, remedies, etc.).

Marie-Anne Lavergne

Head of Unit, Foreign Investments Control, DG Trésor, Paris

Pratique du contrôle des investissements étrangers en France

- La Direction du Trésor (DGT) vise à accroître la transparence et la prévisibilité pour les investisseurs en France.
- La transparence garantit une meilleure compréhension et application du mécanisme de contrôle par les investisseurs étrangers notifiant leurs investissements auprès de la DGT.
- La clarté juridique est essentielle pour l'attractivité de l'économie française, le contrôle des investissements étrangers n'ayant pas pour but de limiter ces investissements, mais de préserver les intérêts nationaux tout en maintenant l'ouverture aux investisseurs étrangers.
- La DGT a entrepris plusieurs démarches dans cette optique, dont la publication en septembre 2022 de lignes directrices ayant deux volets : clarifier les dispositions juridiques du cadre réglementaire de contrôle des investissements étrangers en France et préciser la procédure de contrôle qui n'est pas codifiée. Ces lignes directrices pourront évoluer en fonction de l'évolution du cadre juridique et de la pratique.
- Les décisions prises dans le cadre du contrôle ne sont pas rendues publiques, car elles concernent des informations sensibles, confidentielles voire classifiées. De plus, le contrôle des investissements étrangers en France est une analyse au cas par cas, dépendant de l'activité de l'entreprise française, de l'investisseur concerné et du contexte économique, avec un accent sur l'impact sur la sécurité publique française.

Sur la transparence et la publication des décisions

- L'autorisation du ministre est nécessaire avant de réaliser une opération soumise à contrôle des investissements étrangers. Si l'investisseur ne sollicite pas cette autorisation alors qu'elle était requise, il s'expose à des sanctions de la part du ministre.
- L'analyse de risques consiste à déterminer si l'opération est hors du champ du contrôle et peut être réalisée sans autorisation préalable, ou s'il existe un doute nécessitant de passer par la procédure pour avoir une certitude juridique.
- En cas de non-conformité, l'investisseur peut faire face à des sanctions et est réputé juridiquement nul.

Paramètres d'analyse d'une notification

- Trois paramètres sont pris en compte lors de l'analyse des investissements étrangers en France : l'activité de la cible française et son impact sur la sécurité publique, l'identité de l'investisseur, et la stratégie derrière l'investissement.
- Ces trois paramètres ne peuvent pas être retrouvés dans d'autres opérations, car chaque opération implique des acteurs, des activités et des stratégies différentes.
- Par exemple, un investisseur industriel peut rechercher des synergies et potentiellement délocaliser certaines activités, tandis qu'un

investisseur financier peut viser principalement la rentabilité de l'investissement.

- L'analyse de ces paramètres est complexe et nécessite une approche holistique.

Articulation between the French FDI Regime and the implementation of the EU Regulation

- Les objectifs des deux instruments et les autorités qui les supervisent sont très différents : FSR est sous l'autorité européenne, tandis que FDI relève des États membres.
- Les procédures et décisions des deux instruments seront distinctes en raison de leurs objectifs différents.
- En France, les autorités chargées du contrôle des investissements étrangers n'échangent pas d'informations avec d'autres autorités concernant les procédures parallèles de contrôle des concentrations ou de FSR.
- La DGT mène ses procédures dans le but de protéger les intérêts nationaux et la sécurité publique française, sans anticiper de difficultés particulières dans l'articulation avec les procédures de FSR.

Damien Levie

Head of Unit, Technology and Security, FDI Screening, DG Trade
European, Commission, Brussels

The establishment of an EU framework

- In 2017, the European Commission proposed a legislative framework in response to requests from several Member States for an EU framework to facilitate cooperation among authorities.
- In 2019, the regulation was adopted.
- Initially, 12 Member States had legislation in place to control foreign investments; now, there are 21, and it will be 23 by the end of the year.
- In about three years, the European Commission and other national authorities have reviewed over 1000 cases notified by Member States' authorities to the network of 27 authorities plus the Commission.
- The system strikes a balance between keeping economies open to foreign investments and having a framework and tools to identify potential risks to security or public order and issue binding or non-binding opinions to Member States for necessary actions.
- The European Commission closes over 85% of the cases within 2 weeks, indicating that the system does not delay transaction and approval processes.
- The European Commission has announced plans to improve the system due to the complexity of mechanisms working together, particularly in multi-country cases, without fundamentally changing the architecture of competences between NCAs responsible for national security and the European Commission.

On the issue of the scope of the Regulation

- The European Regulation does not provide guidance to Member States to define the scope of their investment screening legislation .
- It offers indications of factors to be considered by both Member States and the Commission for the substantive assessment of FDI transactions, based on international commitments of the EU and its Member States.
- The effectiveness of the framework is being assessed by the European Commission in the ongoing evaluation. One issue that we are looking at is to what extent Member States are covering similar sectors or not.

The new FSR regime

- There will be a learning process on FSR.
- The EU wants a level playing field to address concerns about companies from third countries benefiting from subsidies and operating in the internal market, especially in services and acquisitions.
- The Commission plans to publish guidelines on implementing the balancing test within a year.
- Identifying subsidies, especially in non-market economies, is challenging.

Ief Daems

Legal Director, Antitrust, Cisco, Brussels

Uncertainties raised by merger control and FDI

- In merger control, certain jurisdictions are moving away from traditional revenue thresholds, making it complex for companies to identify where to notify.
- FDI regimes often apply open definitions, adding complexity to merger notification assessments.
- Early engagement with authorities can be helpful to avoid last-minute questions and uncertainties.
- Companies need guidance and clarity on notification requirements to make informed decisions. The authorities have to be appreciative that companies may want informal guidance if the rules are not clear.
- Transparency in the FDI process allows parties to provide targeted remedies and resolve potential concerns more effectively.

The purpose and the goals of the FDI regime

- The focus is now on the implementation and how to efficiently manage and prepare for it as a company.
- FDI notification forms require collecting new information, and companies need to set up systems to gather data continuously from the past three years.
- The Regulation has a broad definition of foreign financial contribution, and even companies without foreign subsidies can trigger notification thresholds if engaged in sales to public entities.
- In particular companies that engage in public procurement will need to prepare for the new FDI regulation.

From a content perspective

- Proposed simplifications are hoped to be approved.
- Companies need to look at all entities in their business for merger notification perspective.
- Important to determine how to identify the entities concerned.
- Identifying entities and defining «tax measures of a general nature» are key questions.
- Minimal thresholds are helpful for the notification form but require a complete overview of relevant contributions.
- Implementing regulation is awaited, and businesses need to prepare in advance.
- Companies hope for a pragmatic approach from the Commission perspective.

Etienne Pfister

Partner, RBB Economics, Paris

FDI SCREENING
Goals of the FDI screening control

- FDI screening and merger control have different objectives.
- FDI control focuses on national security, public safety, public health, and public order.
- FDI control aims to prevent risks such as foreign acquisition of key technologies from French industries.

Similarities between the FDI screening control and merger control

- Merger control and FDI control share common points: both are ex ante procedures with two stages and strict delays, and both relate to acquisitions.
- They may have substantial common concerns. Indeed, national security and public health are not independent from pricing and product/service quality.
- Economists also analyse issues like supply shortages and market competition during both procedures. Both FDI screening and merger control are concerned about the behavior of the new entity after merger. And both regimes are interested to know whether the target owns some strategic technologies/know-how/products that other companies do not have.

- Hence, despite differences, there are common tools and analyses used in both procedures.

Predictability of the FDI procedure

- Governments face criticism for lack of transparency in decision-making, especially when dealing with confidential trade secrets and strategic technologies.
- FDI control has expanded beyond defence industries, necessitating efforts to maintain transparency and predictability in the decision-making process.
- Transparency is crucial to anticipate decisions, reduce uncertainty, and encourage foreign companies to invest in French companies.
- France has made many efforts to improve transparency, including publishing guidelines and allowing for preliminary assessments by the ministry.
- Open communication between parties and the ministry is essential to address concerns and find solutions.

FOREIGN SUBSIDY REGULATION (FSR)
The substance of the FSR procedure

- After addressing the informational burden, three main issues will be considered in FSR:
  - What constitutes a foreign subsidy?
  - Whether the subsidy creates a competition distortion. This will depend on subsidy type, amount, and market structure. In particular, this risk of crowding out unsubsidized competitors will depend on two things: the type and amount of the subsidy, and the second one will be the market structure.
  - These issues are newer in acquisitions or public procurement, with key aspects being the strategic nature and subsidy amount compared to the tender or target cost.
- Subsidies can reinforce competition if they bring in new competitors without crowding out others, especially if the money comes from foreign countries.
- The balancing test will consider both the distortion and positive effects of the subsidy, with the purpose of the subsidy being crucial.
- Companies should prepare systems for collecting information on foreign subsidies and conduct preliminary assessments if planning to acquire an EU-based company or bid in an EU call for tender.

CLOSING SPEECH

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Introduction

- Competition law and, more generally, EU Economic Regulation are at a time of multiple transformation.
- Two distinct but complementary patterns of evolution can be recognized. A first pattern of evolution corresponds to an adaptation which seems to be driven from within the EU, and concerns EU Competition Policy in a strict sense. A second pattern of evolution corresponds to its adaptation to external constraints and developments, and concerns more generally EU Economic Regulation.

The internally driven evolutions of EU competition law

- The EU is actively adapting its competition policy to address new challenges using hard or soft law instruments.

Abuse of dominance cases

- Recent judgements by the General Court and the Court of Justice have clarified novel questions, particularly in cases related to abuse of dominant position and digital products/services (Google Shopping case, the referral in the Intel case, the Qualcomm exclusivity payment case, Google Android case, etc.). All these judgements provide recent examples of how the General Court reviews article 102 cases following the 2017 judgement in the Intel appeal case.
- Two main points from these judgements:
  - Demonstration of effect is crucial. Following the Intel appeal case, the General Court examines arguments and evidence put forward to call into question the Commission assessment of exclusionary effects. This analysis could lead the GC to review complex assessments both of economic and technical nature.
  - The as efficient competitor test has been reviewed by the General Court in various cases, providing clarifications on its application and evidentiary standard. The GC dealt both with cases where this test was used by the Commission to prove an anticompetitive practice and with cases where it was put forward during the administrative procedure by the undertaking as exculpatory evidence.
- Consequences of these judgements include the modification of the 2008 guidance paper in order to update it to most recent case law and to maintain efficiency in enforcement.
- The EU's approach aims to incorporate recent case law while considering resource constraints, leading to an ongoing process of adaptation and improvement.

Private and public enforcement issues

- Decrease in public enforcement of cartel cases leads to fewer cartel cases brought before EU Courts.
- EU Courts public database and annual report show that in 2022, only 4 new cases concerning 101 decisions were brought before the Court, compared to 68 new cases concerning state aid.
- This difference reflects perhaps the focus placed by the Commission on MS public intervention on the economy in the particular context of the last years.
- The EU Court's role in interpreting the private enforcement directive is through preliminary reference questions, providing clarifications for national judges enforcing the directive.

Merger control

- Recent case law in merger control (Towercast, Illumina) appears to be a vector for evolution through the EU Court's interpretation.
- Illumina appeal case judgement could provide information on Member States' referrals to the Commission for concentrations falling below thresholds.

The externally driven evolutions of EU Economic Regulation

- The EU has adapted its regulatory toolkit in response to geopolitical, economic challenges, and crises.
- Recent published data show that in 2008 the EU economy was larger than America's, 16.2 trillion versus 14.7 trillion. By 2022 the US economy has grown to 25 trillion whereas the EU and the UK together have only reached 19.8 trillion. It seems that the pressure from such economic data as well as the need for autonomy and resilience, are one of the drives behind the Commission's decision to use different legislative tools to deal with the new challenges and priorities in a more effective way.
- Shift from ex post review to ex ante control in the Commission's approach could be due to difficulties in effective ex post enforcement in complex competition cases, especially concerning Big Tech.
- New legislative instruments aimed at maintaining competitiveness, ensuring a level playing field, enhancing trade and industrial policies must also promote fundamental values.
- The EU responded to subsidisation by third countries of their economies with the open strategic autonomy policy and climate change with the green industrial policy.
- The adoption of the foreign direct investment regulation shows that screening mechanisms were considered necessary already few years ago, but the recent swift adoption of the foreign subsidies regulation also demonstrates the urgency of going further by granting the Commission specific powers in this field. In a certain sense, the foreign subsidies regulation can be seen as representing an extension of competition law with mechanisms and rules inspired by EU competition law applied to new domains.
- The FDI screening mechanism will be reviewed by national courts, but the Court will have an essential role through preliminary references.
- Green industrial policy might imply a loosening in state aid control, but Commission decisions will be subject to GC review. The same happened with the relaxation of state aid control during COVID period, with related Commission decisions subject to court challenges.
- DMA and foreign subsidies regulation empower the Commission to adopt individual decisions, which will be also subject to General Court control.

Conclusion

- Competition law is not losing its role. Competition law remains relevant but it is finding its place amongst other EU policies. It cannot be seen in isolation, or as the solution to all market problems. It must be conceived and applied within the more global context of the other EU internal and external policies.