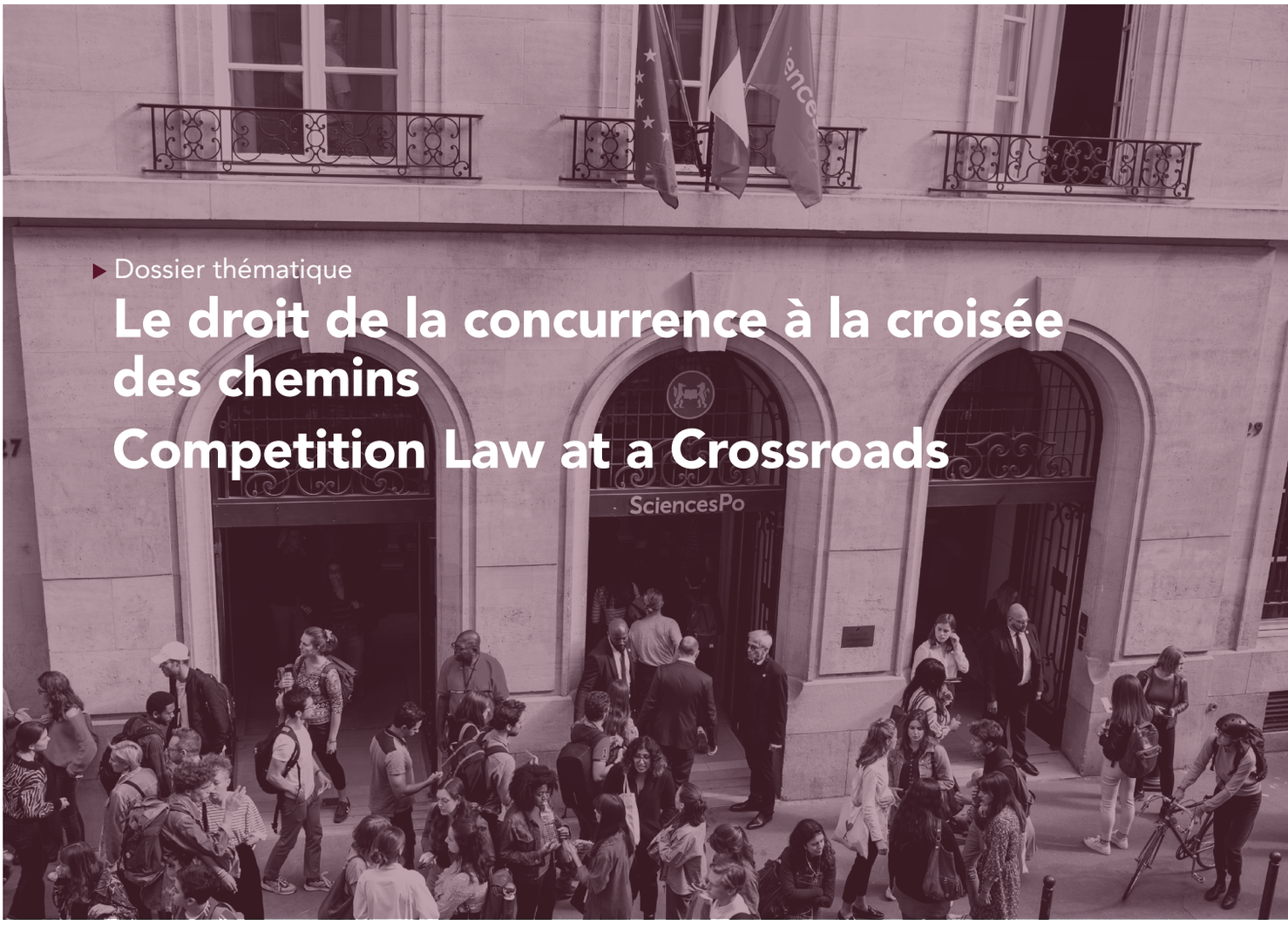
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1 Édito



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Dear Readers,

The thesis of this issue is a seemingly simple one : competition law is at a crossroads. Simple, that is, until one realises that the crossroads is not a moment of crisis but rather one of revelation, namely that competition law has always been more than a technical instrument for market efficiency, and that the debates now converging upon it are finally making that visible.

The consumer welfare standard, having long served as the central criterion for antitrust enforcement on both sides of the Atlantic, is under pressure from multiple directions at once. Neo-Brandesians argue that reducing competition regulation to consumer welfare has left the law blind to broader policy goals, such as the protection of the environment and of workers, of innovation and of democracy. The second Trump administration, meanwhile, is departing from Chicago school orthodoxy in a different direction, subordinating enforcement to an 'America first' geopolitical logic. In Brussels, the ongoing review of the EU merger guidelines is exploring whether transactions should be assessed against goals beyond consumer welfare, from sustainability, to innovation, defence, or democratic resilience.

This issue sets out to substantiate what unites these developments : that competition law does not merely regulate markets, but rather, it also structures them. Competition law shapes the very conditions under which economic activity takes place, and in doing so, it inevitably reflects political choices going far beyond markets in many other areas of society.

Moving past the question of whether competition law pursues goals beyond efficiency, this issue also asks which goals should be pursued and how.

It is that question that lies at the heart of the contributions gathered here : from environmental protection and labour rights, to the governance of artificial intelligence and the future of Big Tech, to the view from the Global South, and finally to the enforcement institutions that aim to translate these goals into reality.

The issue opens with two fascinating interviews highlighting the perspectives of and debates around the French competition authority. Conversations with two prominent figures in French competition law, Isabelle de Silva and Benoît Cœuré, reflect on the state and future of enforcement in France and Europe. Another contribution closely analyses the *Autorité de la concurrence*'s leniency programme, which confirms its continued centrality to cartel detection, while identifying concrete measures to strengthen its attractiveness to firms.

The second chapter offers theoretical contributions and begins with a conversation that sets the scene : In a discussion hosted by the Law, Economics and Policy Initiative at Sciences Po in 2021, Lina Khan, Thomas Philippon and Luigi Zingales, moderated by Dina Waked and Emeric Henry, reflect on the optimal level of competition, on what antitrust can and cannot achieve, and on the role that competition law plays, or should play, in accommodating a plurality of policy goals. Another contribution examines the divergence between Neo-Brandeisianism and Trumpian antitrust, two movements that share a rejection of consumer welfare as the sole criterion of competition law enforcement, yet arrive at different conclusions about what should replace it. We then turn to merger control beyond a technical exercise in market definition, which has become, as one contribution argues, a tool for structuring markets and a democratic counterweight to concentrated economic power.

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The subsequent chapter then addresses the topics of AI, innovation and intellectual property. The first contribution sits at the frontier of artificial intelligence, where leading firms have constructed dense networks of partnerships and investments that blur the lines of existing antitrust categories. Do these arrangements constitute a new form of permissible economic coordination, or do they foreclose the market structures within which competition might otherwise develop? The question may be the defining antitrust problem of the coming decade. Another contribution argues that in pharmaceutical markets, competition policy faces a dilemma : promoting access and affordability in the present risks undermining the incentives for research that will produce tomorrow's treatments. The chapter closes with a contribution that identifies a structural problem at the interface of competition law and intellectual property, pointing towards the need for institutional reform, due to limited subject-matter jurisdiction of competition authorities and the insufficient expertise of courts called upon to adjudicate at the boundary of two fields that were never designed to fit together.

This fourth chapter also focuses on the rapidly evolving landscape of digital markets, by taking the stock of two years of enforcement of the EU's Digital Markets Act (DMA). The DMA, which imposed its obligations on designated gatekeepers in March 2024 and saw its first fines issued a year later, is examined from two complementary angles : an institutional account of the Commission's early enforcement activity and regulatory dialogue ; and a practitioner's assessment of whether the framework has begun to deliver on its promise of fair and contestable digital markets. A third contribution situates the DMA within the framework of EU industrial policy, arguing that far from being an obstacle to competitiveness, it harmonises fragmented national rules and creates the conditions for innovation to emerge with European values. The fifth chapter asks how far competition law can and should reach beyond the market to address broader social objectives. The first contribution challenges the prevailing treatment of EU labour antitrust as a corrective to the blind spots of national labour law, showing through a study of non-compete clauses how Articles 101 and 102 TFEU already intervene, cautioning that the bluntness of competition law's tools risks fracturing the very protections it seeks to strengthen. A second contribution makes the case for deploying Article 102 against unsustainable conduct by dominant firms, arguing that there is a compelling legal, economic and moral case for exploring how abuse-of-dominance rules can contribute to the fight against climate change. The third contribution includes a comparative study of how European and American competition law navigate the growing presence of Corporate Social Responsibility, a domain where firms' invocations of social and environmental commitments increasingly collide with antitrust prohibitions.

The final chapter ends steps outside the transatlantic frame by writing from the perspective of the Global South. A contribution reflects on competition law as a tool for industrial policy and proposes redistributive competition law and South-South cooperation as alternatives to a liberal order. The issue then closes with a reflection on the International Competition Network as it approaches its twenty-fifth anniversary, bringing a Global South voice of Chair Marván to the helm of the network itself : both a celebration of what voluntary, trust-based international cooperation can achieve, and a call to adapt in the face of a global environment shaped by geopolitical fragmentation and technological upheaval.

We are most honoured to publish this edition under the scientific direction of Professor Dina Waked, whose own teaching has inspired the angle of this edition and whose support and contributions have been most appreciated. We would also like to thank M. Bernard Stirn, President of the scientific committee, and all members of the scientific committee, for their continued support and guidance that have allowed us to get in touch with some of our distinguished contributors.

Finally, we would like to extend our gratitude to all contributors for their thoughtful contributions and fruitful dialogues in the editorial process, as well as to all members of the RJSP Editorial Board, who have carried this edition from start to finish.

We wish you an excellent read and look forward to your feedback!■

Chers lecteurs,

Le thème porté par ce numéro est d'une apparente simplicité : le droit de la concurrence se trouve à la croisée des chemins. Simple, du moins, jusqu'à ce que l'on réalise que ce carrefour n'est pas tant un moment de crise qu'un moment de révélation : le droit de la concurrence a toujours été bien plus qu'un instrument technique au service de l'efficience des marchés, et les débats qui l'entourent aujourd'hui rendent cette réalité visible.

Le standard du bien-être du consommateur, longtemps resté le critère central à la mise en œuvre de l'*antitrust* des deux côtés de l'Atlantique, est désormais sous pression de toutes parts. Certains mouvements soutiennent que réduire la régulation de la concurrence au seul bien-être du consommateur a rendu le droit de la concurrence aveugle à des objectifs de politique publique plus larges, tels que la protection de l'environnement, des travailleurs, de l'innovation ou de la démocratie. À Bruxelles, la révision en cours des lignes directrices sur les concentrations explore la possibilité d'évaluer les transactions à l'aune d'objectifs allant au-delà du bien-être du consommateur : innovation, durabilité, défense, ou encore résilience démocratique. Parallèlement, la seconde administration Trump s'écarte de l'orthodoxie de l'École de Chicago dans une autre direction, subordonnant l'application du droit de la concurrence à une logique géopolitique de « l'Amérique d'abord » (*America first*).

Le droit de la concurrence ne se contente pas de réguler les marchés, il les structure. Il façonne les conditions mêmes de l'activité économique et, ce faisant, reflète inévitablement des choix politiques qui irriguent de nombreux autres domaines, dépassant largement les marchés.

Ce numéro vise à mettre en lumière la nature de ces objectifs, les moyens de les poursuivre et les mécanismes de contrôle qui en découlent : protection de l'environnement, droits des travailleurs, gouvernance de l'intelligence artificielle, en passant par une perspective du Sud global, et enfin par celle des institutions chargées de transformer ces ambitions en réalité.

Le dossier thématique s'ouvre avec des perspectives de la pratique institutionnelle de la concurrence. Benoît Cœuré et Isabelle de Silva reviennent, dans leurs entretiens, sur l'état et l'avenir de l'application du droit de la concurrence en France et en Europe. Une analyse approfondie du programme de clémence de l'Autorité de la concurrence vient ensuite réaffirmer son rôle crucial dans la détection des ententes, tout en suggérant des leviers concrets pour accroître son attractivité auprès des acteurs économiques. → Suite page 3

Le deuxième chapitre offre quelques réflexions théoriques : lors d'un échange organisé par la *Law, Economics and Policy Initiative* (LEPI) de Sciences Po en 2021, Lina Khan, Thomas Philippon et Luigi Zingales, animée par Dina Waked et Emeric Henry, livrent leurs réflexions sur le rôle que le droit de la concurrence joue, ou devrait jouer, dans la conciliation d'une pluralité d'objectifs politiques. Ce chapitre se poursuit sur le mouvement néo-brandeis et le conservatisme *antitrust*, deux mouvements qui partagent un rejet du bien-être du consommateur comme critère unique mais parviennent à des conclusions divergentes sur ce qui devrait le remplacer. Est ensuite abordé le contrôle des concentrations qui, au-delà d'un simple exercice technique de définition de marché, est devenu un outil de structuration des marchés et un contre-poids démocratique face à la concentration du pouvoir économique.

Le troisième chapitre intitulé « Intelligence artificielle, innovation et propriété intellectuelle » explore le défi consistant à favoriser simultanément la concurrence et l'innovation. Il analyse d'abord les nouveaux enjeux de l'IA, où les réseaux de partenariats et d'investissements brouillent les catégories traditionnelles de l'*antitrust*. La question de savoir si ces alliances constituent un verrouillage du marché pourrait bien s'imposer comme le défi majeur de la décennie à venir. Ce chapitre aborde ensuite le dilemme propre aux marchés pharmaceutiques, où la politique de concurrence doit arbitrer entre soins abordables et soutien à la recherche, avant d'aborder les tensions structurelles à l'interface du droit de la concurrence et de la propriété intellectuelle.

Le quatrième chapitre, « DMA et concurrence », se consacre ensuite aux mutations profondes des marchés numériques et examine la mise en œuvre du règlement européen sur les marchés numériques (DMA) sous un double prisme : celui du dialogue institutionnel et réglementaire, et celui de son efficacité réelle à garantir des marchés équitables et contestables. Une troisième contribution replace le DMA au cœur de la politique industrielle de l'UE, arguant que loin de freiner la compétitivité, il harmonise des cadres nationaux fragmentés pour favoriser une innovation ancrée dans les valeurs européennes.

Dans quelle mesure le droit de la concurrence peut-il, et doit-il, servir des revendications sociétales plus larges ? Le cinquième chapitre, « Le droit de la concurrence au service d'objectifs sociaux », analyse l'interaction entre droit de la concurrence et droit du travail au sein de l'Union européenne, explore la manière dont les règles relatives aux abus de position dominante peuvent contribuer à la lutte contre le changement climatique, et revient sur les tensions croissantes entre régulation et responsabilité sociétale des entreprises (RSE).

Le sixième et dernier chapitre propose de dépasser le cadre transatlantique avec une perspective du Sud global, envisageant le potentiel du droit de la concurrence comme outil de politique industrielle, redistributif, et la coopération Sud-Sud comme alternatives à un ordre libéral. Ce numéro se clôt sur le vingt-cinquième anniversaire de l'*International Competition Network*, un hommage à la force de la coopération volontaire et un appel à l'agilité du droit de la concurrence face aux fractures géopolitiques et aux bouleversements technologiques actuels.

Nous sommes heureuses et honorées de publier ce numéro sous la direction scientifique de la Professeure Dina Waked, dont les enseignements ont inspiré la ligne éditoriale de ce numéro et dont le soutien constant a été des plus précieux. Nous tenons à remercier particulièrement Monsieur Bernard Stirn, Président de notre comité scientifique, ainsi que l'ensemble de ses membres pour leurs conseils et leur accompagnement dans la réalisation des projets portés par la RJSP.

Nous exprimons aussi notre reconnaissance à tous les auteurs ayant contribué à ce numéro pour la richesse de leurs réflexions et la qualité des échanges tout au long du processus éditorial, ainsi qu'à tous les membres du comité de rédaction de la RJSP, qui ont porté ce projet avec rigueur et sans qui ce numéro n'aurait pas pu voir le jour.

En vous souhaitant une excellente lecture !■

2 Édito



Dina Waked,
Professeure à l'École de droit
et doyenne de l'École de la recherche de Sciences Po

The world is marred by war, rising conflict, global insecurity, environmental destruction, rising inequality, persistent poverty, the concentration of wealth and power, the precaritization of work, exploitative extractivism, rising nationalism, and more. Many of these harms have emerged from the pursuit of endless growth, profit, and capital accumulation that have characterized both colonial and contemporary capitalist systems and economic models. This pursuit has driven firms, from arms manufacturers and pharmaceutical companies to technology and AI firms, banks, brokers, and many others, to exploit the most vulnerable in their insatiable accumulation of surplus.

To address these harms, few have looked to competition law and policy as part of the arsenal of tools available to address possible solutions. Indeed, competition law often appears, to many, as a sideshow. This is misplaced. Competition law not only plays a fundamental role as an integral tool in our toolbox to address these political, social and economic harms ; it is also the law that structures markets giving rise to many of these harms in the first place. It does so through its impact on how markets are organized ; markets that lie at the heart of our economies and of the harmful consequences that are produced therein. In this respect, it is impossible to ignore the impact of competition laws and policies in enabling these harms, and therefore, in the solutions needed to address them.

Competition laws are, after all, laws that shape our markets. They provide tools to encourage competition, to prevent harmful concentrations, abuses of dominance, illegal cartels, and vertical integrations. They have also been used to encourage innovation, the breakup of concentrated wealth and power, and thereby enhance democratic accountability. Yet it is important to caution that the pursuit of competition, as a goal in itself detached from broader social objectives such as distributive justice and environmental protection can, and has, led to harmful consequences not dissimilar to those produced by the pursuit of endless growth. Competition laws and policies, therefore, need to be understood, and as the articles in this issue illustrate have indeed been understood, within a wider framework of public interest considerations that are not oblivious to the harms that unrestrained rivalry can create.

Competition laws, thus, play a structuring role in balancing cooperation and competition, and regulating market abuses that affect prices, consumer choices, firm expansion, trade, and production ; issues that are central to addressing the harmful effects that afflict our current world order. In this sense, competition law can be understood as an integral part of what John R. Commons described, in his influential 1924 work *The Legal Foundations of Capitalism*, as the legal architecture that structures economic life.

Moreover, competition law and policy are not only impactful in these areas, they are also sufficiently malleable to address broader policy issues of public interest. As competition law's narrow objective of efficiency and consumer welfare has gradually been relaxed, thanks to decades of policy advocacy and academic research, the reach of these laws has expanded to address many of the harms mentioned above. Competition law has increasingly been mobilized to confront concerns ranging from poverty eradication and climate change to innovation, the regulation of digital markets, improving working conditions, democratic accountability, corporate social responsibility, industrial policy, and development in the Global South.

These are the themes and subjects addressed in the articles part of this issue. Their diversity speaks to competition law's centrality and breadth. They address the role of competition law in both theory and practice. Contributions examine competition authorities' enforcement and regulatory approaches, international competition networks, and law firms' practices as well as theoretical perspectives on competition law and policy's central questions. The different contributions illustrate the diversity of what competition law and policy are and what they can achieve. In many ways, the articles in this issue demonstrate that competition law has come to be about more than competition alone. The diversity of the papers, as well as the voices they bring together, from academics to practitioners, policymakers, enforcers, regulators, and students, adds further perspectives, illustrating the many ways in which competition law can be understood and practiced.

At the center of many of the contributions to this volume is a shared idea : these laws are capable of changing how markets operate, and thereby how surplus is distributed, how economies grow and develop, how firms behave, how technologies and innovations advance, and how workers and consumers are protected. Ultimately, these laws can reshape capitalism itself. They can, thus, bring us closer to a world where we center distribution, climate and racial justice, degrowth and fairness. They are important tools for bringing such alternative visions into being. Achieving this, however, may require thinking beyond the strict limits and narrow definitions imposed on the notion of competition itself. We need to collapse the boundaries and open the confines of these terms and categories if we are to contribute to building a more socially just and equitable world. As the articles in this issue demonstrate, this task has never been more urgent, and perhaps never more possible, than at the crossroads moment we now face. It is in that spirit that this issue is put together, and it would not have been possible without the exceptional contributions of the authors, the support of the members of the journal's board, and especially the student editors and reviewers whose colossal work brought this issue together.■

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Ses travaux portent essentiellement sur l'économie et le droit de la concurrence, notamment sur les pratiques anticoncurrentielles basées sur les algorithmes, et l'histoire des politiques de concurrence. Il a été, de 2019 à 2023, membre du Collège de l'Autorité de la concurrence en qualité de personnalité qualifiée pour les professions réglementées.

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Andrea Marván Saltiel is a renowned lawyer specialized in economic competition. She joined the Federal Economic Competition Commission of Mexico (Cofece) in 2012, where she held the positions of Deputy Director General of Absolute Monopolistic Practices and Chief of Staff of the Investigative Authority. She was later appointed Director General of Competition Promotion and was also Chair of Cofece. In October 2025, President Claudia Sheinbaum appointed her Chair of the National Antitrust Commission. At the international level, in May 2025, she was elected Chair of the Steering Group of the International Competition Network (ICN).

Isabelle de Silva est présidente de la sixième chambre du Conseil d'Etat depuis 2022. Spécialisée en matière de droit de l'environnement, droit des libertés publiques, droit de la régulation économique et numérique et droit de la concurrence, elle est diplômée de HEC, de l'ENA et titulaire d'une licence de philosophie (Paris I Sorbonne). Professeur associé à Sciences Po et conseiller scientifique de l'Ecole d'Affaires publiques de Sciences Po, elle y enseigne le droit constitutionnel et la régulation des plateformes numériques.
Entrée au Conseil d'État en 1994, elle occupe au cours de sa carrière des postes clés : conseillère technique au ministère de la Culture (1999-2000), directrice des affaires juridiques du ministère de l'Écologie (2009-2011), membre de l'Autorité de régulation de la distribution de la presse (2012-2016) et membre de l'Autorité de la concurrence (2014).
Nommée présidente de l'Autorité de la concurrence en 2016, son mandat (qui s'achève en 2021) est marqué par la priorité donnée aux enjeux numériques, l'adoption de plusieurs décisions significatives sanctionnant des infractions aux règles de concurrence commise par les grandes plateformes numériques, et une modernisation du cadre législatif applicable à l'Autorité de la concurrence.

Dina Waked is a professor at Sciences Po Law School and the dean of Sciences Po's School of Research. She works at the intersection of several disciplines, particularly law and economics, and has been involved in interdisciplinary projects such as the co-foundation of Sciences Po's Law and Economics Policy Initiative (LEPI). Her teaches and publishes in antitrust and competition law; law and economics, and law and development, with a particular focus on the Global South. Her work focuses on redistribution, inequality, and social justice.

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Dossier Thématique



Thematic Feature



Chapitre I
Perspectives institutionnelles



Chapter I
Institutional perspectives



3 Entretien avec Benoît Cœuré, président de l'Autorité de la concurrence, président du Comité concurrence de l'OCDE



La *Revue des Juristes de Sciences Po* (RJSP) a l'honneur de présenter une série de réflexions de Benoît Cœuré, partagées le 26 janvier 2026, sur son expérience à la présidence de l'Autorité de la concurrence et les défis actuels de la régulation.

1. Articulation entre politique de concurrence et compétitivité européenne

La Revue des Juristes de Sciences Po (RJSP) : Dans son rapport sur l'avenir de la compétitivité européenne, Mario Draghi souligne la nécessité de renforcer la compétitivité de l'UE, tout en mettant en garde contre le risque de politiques visant à défendre les « champions nationaux » au détriment de la concurrence et de l'innovation.

Comment répondez-vous aux critiques qui considèrent que la politique de concurrence est trop restrictive et constitue un frein à l'innovation, l'investissement et la productivité européenne ? Quelle balance d'intérêts exercer entre atteintes à la concurrence et progrès économique ?

Benoît Cœuré (BC) : Les critiques adressées à la politique de concurrence tombent trop souvent dans une facilité intellectuelle qui consiste à lui imputer des problèmes dont elle n'est pas responsable. Lorsque ses détracteurs accusent la politique de concurrence, et en particulier le contrôle des concentrations, d'être un frein à l'innovation, à l'investissement et à la productivité européenne, ils critiquent en réalité moins la concurrence que la fragmentation du marché intérieur, la surabondance normative ou les difficultés d'accès au financement, voire l'ouverture commerciale. Ce sont autant de sujets identifiés par Mario Draghi dans son rapport, mais qui n'ont rien à voir avec la politique de concurrence au sens des articles 101 et 102 du Traité sur le fonctionnement de l'Union européenne (TFUE).

La concurrence n'est pas un obstacle mais un moteur pour l'innovation et la croissance qui permettra à nos entreprises de devenir les champions européens et mondiaux de demain. C'est un principe bien compris par les Américains, qui ont veillé à ce que le financement public du vaccin contre le Covid donne leur chance à plusieurs laboratoires concurrents, comme par la Chine dont les entreprises doivent survivre à une concurrence féroce sur le marché domestique avant de partir à l'assaut des marchés mondiaux. Un athlète ne peut pas se présenter aux Jeux Olympiques sans entraînement.

Pour autant, les autorités de concurrence ne doivent pas rester sourdes aux évolutions du monde qui les entoure. Mario Draghi a raison sur ce point essentiel : la politique de concurrence ne peut plus être pensée en silo, sur la base des décisions passées. Comme l'a affirmé le premier ministre canadien Mark Carney à Davos, « la nostalgie n'est pas une stratégie [1] ». La politique de concurrence doit s'articuler avec les autres composantes de la politique économique européenne, politique industrielle, politique commerciale, politique d'innovation, et prendre en compte les objectifs de l'Union en matière de développement durable, de transformation numérique ou encore de résilience des chaînes de valeur. En tant qu'autorités de concurrence, nous avons le devoir de contribuer à ces objectifs chaque fois que nous le pouvons, dans le respect du mandat que nous confèrent les Traités et le droit national.

C'est dans ce contexte qu'il faut penser l'équilibre entre atteintes à la concurrence et progrès économique, comme nous y invite l'article L. 430-6 du code de commerce. En matière de contrôle des concentrations, une opération peut être autorisée si les gains d'efficacité qu'elle rend possibles compensent les effets anticoncurrentiels identifiés. Jusqu'à présent, ces arguments, qu'il revient aux entreprises concernées de présenter, sont cependant rarement retenus. Aujourd'hui, nous sommes prêts, en tant qu'autorité de concurrence, à examiner sérieusement ces arguments s'ils sont solides et étayés économiquement et juridiquement. Nous travaillons dans ce sens avec la Commission européenne dans le cadre de la révision des lignes directrices relatives aux opérations de concentrations.

2. Potentielles réformes en matière de compétitivité et de droit de la concurrence

RJSP : **La Commission européenne a inscrit à son programme de travail pour 2026 plusieurs initiatives législatives importantes en matière de compétitivité et de droit de la concurrence, notamment la mise à jour des règles de procédure en matière de pratiques anticoncurrentielles [2].**

Au-delà de ces annonces, d'autres réformes vous semblent-elles indispensables pour relever les défis de compétitivité auxquels l'UE est confrontée ? Comment procéder, selon vous, pour mobiliser le droit de la concurrence comme levier pour répondre aux enjeux de compétitivité auxquels l'Europe est confrontée ? De quelle manière estimez-vous que cette poli-

1. « *Mark Carney's full speech at the World Economic Forum in Davos* » sur National Post [en ligne], publié le 20 janvier 2026 [consulté le 5 février 2026]. <http://youtu.be/btqHDhO4h10>
2. Commission européenne, « Programme de travail de la Commission pour 2026. L'Europe prend son indépendance », Communication COM(2025) 870 final, 21 octobre 2025.

tique peut servir le développement du marché unique, qui constitue l'un des atouts majeurs de l'UE ?

BC : Permettez-moi tout d'abord de rappeler que la modernisation des règles de concurrence constitue un enjeu majeur pour la compétitivité européenne : des procédures plus efficaces et plus rapides renforcent la sécurité juridique des entreprises et ainsi l'attractivité du marché intérieur. Il est donc fondamental de réfléchir à la manière dont le droit de la concurrence peut se moderniser. Par exemple, l'Autorité de la concurrence milite de longue date auprès de la Commission européenne pour qu'elle recoure plus souvent à ce « référé concurrence » que sont les mesures conservatoires en droit français de la concurrence [3] et les mesures provisoires en droit de l'Union. En France, cet instrument permet d'agir rapidement pour faire cesser un comportement qui porte une atteinte grave et immédiate à l'économie générale, au secteur intéressé, à l'intérêt des consommateurs ou aux entreprises plaignantes. Alors que le temps de l'économie s'accélère, cet outil est particulièrement utile, et l'autorité française est de loin celle qui y recourt le plus fréquemment. La révision du règlement n°1/2003 relatif à la mise en œuvre des règles de concurrence constituera l'occasion d'assouplir les conditions d'octroi de ces mesures pour permettre à la Commission de s'en emparer plus souvent et de mieux répondre aux évolutions rapides des pratiques, par exemple dans l'intelligence artificielle [4].

La politique de concurrence peut être mobilisée de plusieurs façons pour répondre aux enjeux de compétitivité auxquels l'Europe est confrontée. D'abord, une application vigoureuse des règles de concurrence permet de promouvoir l'innovation dans les secteurs qui sont essentiels pour atteindre les objectifs stratégiques de l'UE, comme les services d'informatique en nuage (*cloud*) ou l'intelligence artificielle. Ensuite, elle permet de s'assurer que la politique industrielle est une politique pro-compétitive. Sans concurrence, la politique industrielle se bornerait à subventionner des entreprises déjà en place.

Au-delà de la politique de concurrence, plusieurs réformes me semblent indispensables pour que l'Europe tire parti de son principal atout, le marché unique. D'abord, la fragmentation persistante du marché intérieur empêche les entreprises de croître et d'opérer efficacement à l'échelle européenne. L'intégration complète des marchés européens devrait être une priorité dans des secteurs stratégiques tels que les télécommunications, les marchés financiers et l'énergie, secteurs concernant lesquels Mario Draghi affirme que les barrières réglementaires nationales continuent de limiter l'émergence de champions paneuropéens. J'entends dire qu'il y a plus d'une centaine d'opérateurs de télécommunication en Europe, et trois aux États-Unis [5]. Or, plus de cent opérateurs sur 27 marchés, cela fait presque quatre par marché !

Ensuite, l'insuffisance d'accès au capital privé est un frein au financement des entreprises, en l'absence d'une véritable circulation des capitaux et d'un fléchage de l'épargne vers le financement de l'innovation. L'union des marchés de capitaux a fait peau neuve sous le nouvel intitulé d'union de l'épargne et des investissements : on aimerait que le progrès ne soit pas que sémantique. Le financement public doit lui aussi être repensé en canalisant les aides d'État vers des projets, tels que les projets importants d'intérêt européen commun (PIIEC), pensés d'emblée à l'échelle de l'Union européenne.

3. La révision des lignes directrices relatives au contrôle des concentrations (EU Merger Guidelines)

RJSP : **La Commission est en train de réviser ses lignes directrices sur les concentrations (*EU Merger Guidelines*), notamment avec le lancement de deux premières consultations publiques en 2025 [6]. Ces dernières reflètent une vision du droit de la concurrence qui se transforme pour poursuivre d'autres objectifs de politique publique, au-delà du bien-être des consommateurs, et qui voit le droit de la concurrence comme un outil pouvant contribuer à la compétitivité, l'innovation, la durabilité et technologies propres, ou encore la digitalisation. Que pensez-vous de cette évolution, et quelles sont selon vous les limites du droit de la concurrence vis-à-vis d'objectifs comme la démocratie ou le climat ?**/

BC : L'Autorité de la concurrence a accueilli positivement l'initiative de la Commission européenne de réviser ses lignes directrices sur le contrôle des concentrations horizontales et non horizontales, qui datent respectivement de 2004 et 2008. Nous participons activement à ces réflexions, notamment au sein du réseau européen de la concurrence qui regroupe les 27 autorités nationales et la Commission.

Cette révision se justifie tout d'abord par le fait qu'il est nécessaire de refléter dans les lignes directrices la pratique décisionnelle et la jurisprudence des vingt dernières années, ce qui représente déjà un travail conséquent. Ensuite, le contexte économique dans lequel les autorités de concurrence interviennent a fortement évolué depuis leur adoption, notamment relativement à la transition environnementale et numérique et aux objectifs que l'Union européenne s'est fixés dans ces domaines. Il faut naturellement prendre ces évolutions en compte.

L'adaptation des lignes directrices est donc indispensable, mais deux remarques liminaires s'imposent.

D'abord, s'il faut mieux articuler les différents outils de politique économique de l'Union, notamment la politique de concurrence, la politique industrielle et la politique commerciale, afin de répondre efficacement aux défis économiques et géopolitiques actuels, il faut assumer la complémentarité de ces politiques et ne pas leur attribuer des objectifs qui ne sont pas les leurs. Par exemple, la politique de concurrence ne saurait se substituer à la politique commerciale en ciblant agressivement les entreprises étrangères. Des défenses commerciales sont indispensables pour protéger nos entreprises mais elles appellent des instruments spécifiques, qu'ils soient traditionnels (*antidumping*, mesures de sauvegarde) ou innovants (règlement sur les subventions étrangères, instrument anti-coercition).

Ensuite, affaiblir le droit de la concurrence n'est pas la voie à suivre. Cela ne produirait qu'une économie moins innovante et moins compétitive, sans parler de la ponction qui s'en suivrait sur le pouvoir d'achat des ménages français et européens.

Pour en venir au fond, le point d'ancrage des autorités de concurrence restera le bien-être du consommateur, conformément à ce qui est prévu dans le règlement européen sur les concentrations [7]. Cela ne signifie pas pour autant que la politique de concurrence doit rester enfermée dans un silo. Le bien-être du consommateur est de plus en plus multiforme. Si la question du prix a été longtemps au centre de l'attentions des autorités de concurrence, le consommateur européen est aujourd'hui attentif à d'autres paramètres : la qualité et la durabilité des produits ou des services qu'il consomme, l'innovation, la protection de ses données personnelles, le pluralisme de l'information, etc. Les autorités de concurrence sont donc appelées, à juste titre, à adopter une approche moins centrée sur le prix et plus dynamique dans l'analyse des opérations de concentration qui leur sont soumises.

3. C. com., art. L. 464-1.
4. Règlement (CE) n° 1/2003 du Conseil du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du traité, JO L 1.
5. GROS Daniel et MAGLIANO Davide, « *Mobile Telecom in Europe : Urban Legend or Case Study in Market Fragmentation?* », IEP@BU Policy Brief, juillet 2024, n° 22, p. 2.
6. « Review of the Merger Guidelines » sur *European Commission* [en ligne], publié le 8 mai 2025 [consulté le 5 janvier 2026]. <http://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_en?prefLang=fr>
7. Règlement (CE) n° 139/2004 du Conseil du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises, JO L 24.

Ceci vaut également pour l'analyse des gains d'efficacité, outil aujourd'hui largement sous-exploité par les autorités de concurrence qui participerait pourtant pleinement à la complémentarité des politiques économiques européennes mentionnée plus haut. Très concrètement, il s'agirait de mieux prendre en compte les apports d'une opération de concentration en termes de progrès technique et économique au niveau européen, pouvant également inclure des considérations de compétitivité européenne, d'innovation, voire de résilience ou de durabilité. Nous avons appelé de nos vœux une évolution sur ce sujet, aussi bien de la part de la Commission européenne que des entreprises, qui devront être en mesure de soumettre des analyses solides nous permettant de tenir compte de ces gains.

4. Réformes et initiatives de la Commission européenne

RJSP : **La Commission a également inscrit à son programme de travail pour 2026 une initiative législative sur les marchés publics, qui permettra notamment de privilégier les produits européens dans les marchés publics pour certains secteurs stratégiques [8].**
Quels sont, selon vous, les enjeux de ce texte dans la pratique de la commande publique, et que pensez-vous de la perspective de « préférence européenne » dans ce domaine ? Comment l'Autorité de la concurrence française a-t-elle fait valoir une approche singulière de la commande publique et, de manière plus générale, comment se déroule la construction de tels textes dans la réflexion interministérielle en cas de spécificités nationales sur les sujets ?

BC : Les travaux de la Commission concernant les marchés publics montrent que ceux-ci représentaient en 2023 une valeur de près de 2,6 trillions d'euros, soit près de 15 % du PIB de l'Union européenne [9]. Ils constituent donc un levier puissant pour soutenir l'activité économique ainsi que l'innovation, la résilience et la durabilité.
À titre personnel, je suis favorable à une « préférence européenne ».Il faut cependant être vigilant à ce que les règles de concurrence soient préservées. L'enjeu principal de la révision de ces textes sera de trouver un juste équilibre entre, d'une part, la volonté légitime de renforcer l'autonomie stratégique européenne et, d'autre part, la préservation des principes fondamentaux de la commande publique : égalité de traitement, liberté d'accès et transparence mais surtout, de mon point de vue, le respect de la concurrence. Une telle préférence ne doit pas être exclusivement pensée comme un mécanisme de protection commerciale : le risque est d'aboutir à devoir choisir entre des entreprises européennes moins performantes. Au contraire, le resserrement des entreprises potentiellement éligibles doit être compensé par une concurrence vigoureuse garantissant des produits et services performants aux acheteurs publics.
Au sein de l'Autorité de la concurrence, la lutte contre les pratiques faussant les règles de la commande publique et lésant le contribuable constitue une priorité de longue date, et notre pratique décisionnelle en la matière en témoigne. La révision des directives relatives à la commande publique offre une opportunité de moderniser nos outils de détection. Grâce aux innovations apportées par le développement de l'intelligence artificielle, les autorités de concurrence ont aujourd'hui la possibilité technique de développer de nouveaux outils permettant de détecter des indices de pratiques anticoncurrentielles à grande échelle. Il s'agit d'un virage à ne pas manquer. Il nous faut pour cela accéder aux bonnes données, de préférence de manière centralisée, ce qui n'est malheureusement pas le cas en France. Nous travaillons en coordination étroite avec le ministère de l'Économie pour faire avancer les choses sur ce point.

5. Le DMA : Équilibre entre concurrence et coopération transatlantique

RJSP : **Certains pays n'hésitent pas à utiliser la concurrence comme un instrument de politique économique et commerciale. Vous avez souligné l'impératif de ne pas faire du règlement sur les marchés numériques (DMA) un instrument de guerre commerciale contre les États-Unis, tout en insistant sur la nécessité qu'il cible davantage de contrôleurs d'accès européens pour garantir sa crédibilité.**
Dans quelle mesure considérez-vous que l'usage d'instruments de concurrence comme mesures de protection commerciale est un enjeu important au vu de l'actualité internationale ? Selon vous, quelles seraient les conséquences à long terme d'un tel risque ?

BC : La fragmentation du commerce mondial, le déclin du multilatéralisme et la montée des rivalités stratégiques conduisent certains États à mobiliser ouvertement tous les instruments économiques à leur disposition à des fins de puissance commerciale. On observe ainsi, de plus en plus fréquemment, des tentatives visant à présenter les décisions européennes en matière de régulation numérique ou d'*antitrust* comme faisant partie d'une négociation plus large, notamment dans la relation transatlantique. Je me suis toujours opposé à cette approche transactionnelle. Traiter le droit de la concurrence comme une variable d'ajustement dans des négociations commerciales ou diplomatiques conduit mécaniquement à affaiblir son efficacité et à créer une incertitude juridique majeure pour les entreprises, quelle que soit leur localisation. L'ancrage dans l'État de droit fait du cadre européen de la concurrence un facteur de stabilité, de prévisibilité et, en définitive, de compétitivité. Le fait que les décisions de concurrence soient prises sur la base des faits et du droit et susceptibles d'appel est, en soi, un avantage concurrentiel pour attirer les entreprises en Europe. L'indépendance des autorités de concurrence est un actif stratégique qu'il est important de préserver.■

8. Commission européenne, « Programme de travail de la Commission pour 2026 », *op. cit.*
9. Commission européenne, « Document de travail des services, Évaluation de la Directive 2014/23/UE sur l'attribution de contrats de concession, Directive 2014/24/UE sur la passation des marchés publics et abrogeant la directive 2004/18/CE et Directive 2014/25/UE relative à la passation de marchés par des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des services postaux et abrogeant la directive 2004/17/CE », 14 octobre 2025, Tableau 83, p. 193.

4 Entretien avec Isabelle de Silva, présidente de la sixième chambre de la section du contentieux du Conseil d'État et présidente de l'Autorité de la concurrence de 2016 à 2021



La *Revue des Juristes de Sciences Po* (RJSP) a eu l'honneur de s'entretenir le 20 janvier 2026 avec Isabelle de Silva pour l'interroger sur son expérience en matière de droit de la concurrence.

1. Droit de la concurrence et environnement

La Revue des Juristes de Sciences Po (RJSP) : Vous avez exercé la fonction de présidente de l'Autorité de la concurrence entre 2016 et 2021. Depuis 2022, vous êtes présidente de la sixième chambre de la section du contentieux du Conseil d'État, dans le cadre duquel vous traitez des contentieux environnementaux devant la haute juridiction administrative. Votre carrière, qui comprend également la direction des affaires juridiques du ministère de l'écologie, du développement durable, des transports et du logement, se situe à l'intersection des problématiques concurrentielles et environnementales.
Selon vous, comment le droit de la concurrence peut-il être un levier et quelles sont ses limites vis-à-vis de l'objectif de protection de l'environnement et de transition écologique ? Pourquoi, comment et jusqu'où les autorités de régulation peuvent-elles prendre en compte les enjeux environnementaux dans leur contrôle ?

Isabelle de Silva (IDS) : Les enjeux environnementaux ont pris de l'ampleur pendant mon mandat, et cette évolution s'est poursuivie avec mon successeur, Benoît Cœuré. Cet intérêt institutionnel croissant nous renvoie à une interrogation plus générale : comment une autorité de régulation peut-elle contribuer à des objectifs d'intérêt général qui ne sont pas au cœur de sa mission première ?

La mission centrale de l'Autorité de la concurrence est de protéger le jeu concurrentiel : réprimer les infractions au droit de la concurrence, mais aussi, de manière plus proactive, favoriser le bon fonctionnement des mécanismes concurrentiels. C'est ce qui fonde sa légitimité. Pour autant, cela n'empêche pas l'Autorité de contribuer à d'autres politiques publiques, selon le contexte, les priorités du moment, et l'impulsion donnée par son président.

Concernant l'aspect environnemental, il est important de rappeler une évidence : l'Autorité de la concurrence n'est pas l'Agence de l'environnement et de la maîtrise de l'énergie (ADEME), elle n'a pas vocation à conduire une politique environnementale. Il y a cependant plusieurs façons pour l'Autorité d'intégrer un tel prisme dans ses activités en faveur de la concurrence.

Une première série de débats a porté sur la question suivante : des actions coordonnées entre entreprises visant à améliorer la protection de l'environnement peuvent-elles entrer en contradiction avec le droit de la concurrence ? Le sujet s'est surtout cristallisé autour du droit des ententes, puisque l'un des principes essentiels du droit de la concurrence est d'empêcher que des entreprises s'accordent pour fausser le jeu concurrentiel. Des entreprises ont exprimé une inquiétude très concrète : la poursuite, dans un cadre collectif (syndicats professionnels, mutualisation, etc.) d'un objectif environnemental légitime les expose-t-elles à un risque juridique au titre du droit de la concurrence ? Loin d'être purement théorique, ce risque se matérialise lorsque certaines actions « vertes » méconnaissent le droit de la concurrence, notamment lorsqu'elles entravent le jeu concurrentiel.

Mais le droit de la concurrence peut aussi jouer un rôle convergent avec la préservation de l'environnement. Un exemple très parlant est celui du cartel des revêtements de sol, sanctionné en 2017 [1]. Dans cette affaire, des entreprises s'étaient accordées pour empêcher la mise en avant des produits les plus performants sur le plan environnemental. Ici, les objectifs de préservation de la concurrence et de protection environnementale sont allés de pair : sanctionner l'entente permettait au libre jeu du marché de mettre en avant les produits moins nocifs pour l'environnement, à un moment où la demande des consommateurs allait précisément dans ce sens.

À l'inverse, la difficulté qui préoccupait certaines entreprises était plutôt la suivante : si des entreprises s'accordent, par exemple, pour éliminer des produits nuisibles à l'environnement, est-ce que cela pourrait être qualifié d'entente ? Cette incertitude a conduit à une réflexion approfondie, tant au niveau national qu'européen, afin que le droit de la concurrence ne devienne pas un frein indu à des pratiques environnementales vertueuses.

D'abord, les lignes directrices européennes ont cherché à clarifier la compatibilité de certaines coopérations interentreprises avec le droit de la concurrence, *via* la prévision d'exemptions individuelles ou par catégorie dans des règlements européens [2]. Ensuite, à l'échelle nationale, nous avons contribué à

1. Autorité de la concurrence, Décision du 18 octobre 2017, n° 17-D-20, relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilients.
2. Commission européenne, « Lignes directrices sur l'applicabilité de l'article 101 du TFUE aux accords de coopération horizontale », JOUE C 259, 21 juillet 2023 ; Règlement (UE) 2022/720 de la Commission du 10 mai 2022 relatif à

mettre en place un « guichet environnement » animé par un spécialiste thématique au sein de l'Autorité. Ce guichet offre notamment un cadre de droit souple aux entreprises, qui peuvent y exposer leurs projets et leurs interrogations. Ceci peut déboucher sur des lettres d'orientation informelles de l'Autorité indiquant les potentiels risques concurrentiels de pratiques. Cette démarche s'inscrit dans une approche fondée sur la conformité, le guichet adoptant une logique de « portes ouvertes » pour un dialogue ouvert et transparent avec divers acteurs économiques. Un document publié en 2024 a précisé le mode d'emploi de ce dispositif [3]. Enfin, l'Autorité peut agir en ciblant les infractions qui nuisent à la concurrence et indirectement, à la transition environnementale. Sous mon mandat, dans le cadre des priorités annuelles fixées par l'Autorité, nous avons œuvré pour l'incorporation d'un réseau « environnement » au sein de services d'instruction, afin de mieux identifier ces infractions dans les secteurs phares de notre intervention, comme celui des transports ou de l'industrie.

À mon sens, un autre axe est très prometteur : l'interrégulation, c'est-à-dire le travail commun entre autorités de régulation. Dans un groupe informel réunissant notamment l'Autorité des marchés financiers, l'Autorité de régulation des communications électroniques (ARCEP), l'Autorité de régulation de la communication audiovisuelle et numérique (ARCOM), nous avons exploré des thématiques transversales, partagé des bonnes pratiques et identifié des actions concrètes dans chaque champ, y compris celui de l'environnement. À titre d'exemple, un enjeu émergent du numérique est la prise de conscience par le consommateur de l'impact environnemental de ses usages : l'intelligence artificielle (« l'IA »), les services informatiques en nuage (*cloud*) et les services numériques de manière générale ont un impact environnemental très fort mais qui n'est pas toujours connu du marché. Agir pour développer des logos ou indicateurs peut favoriser le développement d'une dynamique concurrentielle intégrant le paramètre environnemental. Les consommateurs comme les entreprises ont besoin d'indicateurs environnementaux fiables. Les labels, informations sur les ressources consommées, et autres indicateurs relèvent certes du droit de la consommation, mais sont également un facteur de concurrence. Différentes réflexions, même si elles ne débouchent pas systématiquement sur des sanctions, contribuent à structurer une politique de concurrence reflétant l'évolution de nos problématiques sociétales.

RJSP : **Vous avez évoqué un cas de figure dans lequel protection de la concurrence et protection de l'environnement convergent. À l'inverse, avez-vous rencontré, ou imaginez-vous, des situations dans lesquelles la protection de la concurrence pourrait entrer en tension avec un objectif environnemental ?**

IDS : À ce stade, je n'ai pas d'exemple concret à vous citer de tension entre politique de concurrence et protection de l'environnement. Une telle hypothèse reste pour le moment théorique, même si des situations pourraient émerger ou être en cours d'instruction.

Imaginons le cas de figure suivant : dans le contexte de la réduction des émissions de gaz à effet de serre, des entreprises doivent parfois engager des transformations conséquentes. On pourrait concevoir qu'elles soient tentées de se coordonner sur le calendrier ou les modalités de mise en conformité pour éviter qu'un acteur devienne « mieux-disant » sur le plan environnemental. Ce type de coordination pourrait soulever des questions concurrentielles.

Au fond, l'inquiétude récurrente des entreprises est surtout liée à leur perception du frein que peut représenter le droit de la concurrence aux pratiques environnementales vertueuses, bien que ce cas de figure trouve peu d'applications concrètes. L'enjeu principal n'est pas tant d'utiliser le droit de la concurrence comme levier direct de transition écologique, mais plutôt d'organiser une conciliation et de développer une vigilance sur les contradictions possibles. Une concurrence efficace peut souvent favoriser des politiques plus vertueuses pour l'environnement.

La transition écologique est néanmoins un processus long, exigeant et parfois contraignant pour les entreprises, comme l'illustre la conversion automobile vers l'électrique. Les acteurs économiques doivent avoir une perspective et une feuille de route claire, y compris en matière de concurrence.

C'est avec cet objectif que l'Autorité a développé des outils pédagogiques et de facilitation, afin d'expliquer concrètement ce que le droit de la concurrence autorise ou interdit, notamment pour les PME. Il est crucial de mettre en place des guides pratiques et des ressources accessibles, de nombreuses infractions étant commises sans que les entreprises en aient conscience. Les entreprises ne peuvent pas, par exemple, contrôler les prix de revente ou interdire la vente en ligne de certains produits. Ces méconnaissances s'expliquent en partie par le fait que la culture concurrentielle française est encore récente, et bien plus jeune que celle d'autres pays comme les Etats-Unis.

2. Évolutions de la politique européenne relativement à la protection de l'environnement

RJSP : **La période récente est qualifiée par certains auteurs de « *backlash* écologique » ou « dérégulation », notamment en référence au paquet Omnibus qui révise en particulier les Corporate Sustainability Reporting Directive (« CSRD ») et Corporate Sustainability Due Diligence Directive (CS3D), au motif que les obligations imposées seraient trop lourdes, notamment pour les PME. Que pensez-vous de cette évolution ? Pensez-vous que le paquet Omnibus soit un signal de recul, ou de pragmatisme pour la transition écologique ?**

IDS : Le terme de « *backlash* » me semble un peu excessif. Il est vrai qu'au cours des dix dernières années, la protection de l'environnement s'est considérablement renforcée, notamment dans le sillage de l'Accord de Paris. Cela s'est traduit par le déploiement de nombreux instruments européens, dont des directives et règlements sur la protection environnementale dans de multiples domaines. Cet ensemble a créé un acquis juridique très substantiel.

Dans cette perspective, ajuster certains dispositifs me semble relever d'une modification ciblée qui ne remet pas en cause l'essentiel des politiques environnementales. Les avancées majeures, par exemple sur la réduction des émissions, restent en place : on peut citer le très ambitieux paquet « *Fit for 55* [4] », qui a placé l'Europe en première ligne de la réduction des gaz à effets de serre au niveau mondial.

On discute parfois de réglages à la marge, par exemple portant sur le rythme de transition vers les véhicules électriques, mais il s'agit davantage d'ajustements de calendrier et d'acceptabilité économique que d'une remise en cause globale des avancées environnementales européennes.

La CSRD s'inscrit dans une logique de « compliance », adaptant le modèle précédemment utilisé en matière d'anti-blanchiment, de lutte contre la corruption, et l'étendant au développement durable. Il s'agit d'un outil, dont les États membres peuvent décider de réajuster certains paramètres s'ils apparaissent, en pratique comme trop contraignants ou trop larges. L'objectif environnemental ne disparaît pas ; il s'adapte aux réalités économiques.

D'autres champs visés par l'Union européenne revêtent aujourd'hui une importance majeure dans la lutte contre le réchauffement climatique, comme la prise en compte de l'impact environnemental des produits importés. L'Europe demeure une zone où le niveau de protection environnementale est élevé, au point d'être une source d'inspiration pour d'autres régions du monde. Les tensions économiques et internationales

l'application de l'article 101, paragraphe 3, du traité sur le fonctionnement de l'Union européenne à des catégories d'accords de recherche et de développement et à des catégories d'accords de spécialisation, JOUE L 134, p. 4.

3. Autorité de la concurrence, « Communiqué relatif aux orientations informelles de l'Autorité en matière de développement durable », 27 mai 2024.

4. « *Fit for 55 : Delivering on the proposals* » sur *European Commission* [en ligne], publié le 31 octobre 2025 [consulté le 4 février 2025]. : Delivering on the proposals – European Commission>

peuvent relancer des débats, comme l'a illustré le débat public autour de l'accord du Mercosur. Les évolutions que vous avez citées, encore en discussion, ne doivent pas être, à ce stade, surestimées ou considérées comme un revirement total de l'approche européenne en la matière.

3. Réformes et initiatives de la Commission européenne

RJSP : **La Commission a inscrit à son programme de travail pour 2026 une initiative législative sur les marchés publics, qui permettra notamment de privilégier les produits européens dans les marchés publics pour certains secteurs stratégiques. Quels sont, selon vous, les enjeux de ce texte dans la pratique de la commande publique, et que pensez-vous de la perspective de « préférence européenne » dans ce domaine ? Le contenu « *Made in Europe* » est-il un bon moyen de relocaliser les industries stratégiques pour l'atteinte de la neutralité carbone ?**

IDS : Distinguons les deux sphères que sont le droit de la concurrence et le droit des marchés publics. Les deux régimes interagissent, mais répondent à des logiques et cadres juridiques différents.

L'approche européenne en matière de marchés publics a longtemps visé à maximiser l'efficacité économique : obtenir le meilleur rapport qualité-prix pour le consommateur européen (qu'il soit public ou privé) *via* une concurrence large, ouverte, y compris à des entreprises extra-européennes.

L'idée d'une préférence européenne correspond à un véritable changement de priorité. L'objectif n'est plus seulement le meilleur résultat économique pour l'acheteur public, mais aussi la protection et le soutien du fournisseur européen. Cette orientation réduit mécaniquement la concurrence, dans la mesure où les offres sont évaluées au sein d'un périmètre plus restreint. Les régimes spécifiques ne sont pas entièrement nouveaux, ils existent par exemple de longue date en matière de défense ou dans certains marchés stratégiques.

Il faut cependant penser aux effets systémiques d'une telle préférence : une concurrence réduite peut entraîner des prix plus élevés. Par exemple, une augmentation du coût d'achat de rames ferroviaires peut se répercuter sur le consommateur européen, voire sur l'inflation. Il est aussi important de vérifier les effets réels sur l'emploi d'une telle politique, une entreprise européenne n'employant pas nécessairement exclusivement une main d'œuvre localisée en Europe et recourant souvent à des « intrants » extra-européens. Pour résumer : le « *Made in Europe* » correspond à des choix politiques possibles, mais ceux-ci peuvent créer des gagnants et des perdants, il faut en avoir conscience.

RJSP : **Dans cette perspective, comment articuler la politique de concurrence avec des enjeux comme la souveraineté ou l'environnement ? Cette articulation correspond-elle plutôt à une conciliation, ou à une opposition qui relève d'un choix politique ?**

IDS : L'articulation entre politique de concurrence et enjeux comme la souveraineté ou l'environnement ne constitue pas nécessairement une contradiction. La souveraineté a pris une place importante, notamment dans le sillage de l'affaire Siemens-Alstom [5], et faisait partie des priorités affichées de la première Commission von der Leyen.

Il est important de se méfier des oppositions simplistes. Certains soutiennent qu' assouplir les règles de concurrence permettrait quasiment mécaniquement l'émergence de champions européens en mesure de rivaliser avec les géants américains ou asiatiques. Il faut cependant souligner que la concurrence renforce également les entreprises européennes, poussées à se surpasser, tandis qu'une protection excessive peut, à l'inverse, les fragiliser.

En revanche, il peut être légitime de remettre en question les règles du jeu concurrentiel si elles ne sont pas équitables. À titre d'exemple, faut-il laisser entrer sur le marché européen des produits fabriqués dans des conditions environnementales ou sociales très éloignées des standards européens ? C'est un débat brûlant, illustré par les négociations de l'accord UE-Mercosur ou par les problématiques liées à des plateformes comme Shein. Le consommateur, qui bénéficie dans ces contextes concurrentiels de prix particulièrement bas, est-il prêt à supporter un coût plus élevé afin d'exiger des standards de production et de protection des fournisseurs européens plus stricts ? C'est en cela que réside l'enjeu.

Plus largement, construire une souveraineté européenne suppose d'adopter une approche holistique englobant une pluralité de secteurs, tels que l'éducation, le financement, l'accès aux capitaux, et la réduction de la fragmentation des marchés. Malgré le marché unique, une start-up en IA reste confrontée à des spécificités nationales. C'est aussi pour cela que des instruments comme le Digital Markets Act (DMA) et le Digital Services Act (DSA) sont importants : ils harmonisent les règles du jeu en termes de régulation et évitent la fragmentation que causerait l'adoption d'une myriade de lois sur l'IA dans chaque État membre. À cet égard, ils sont un élément essentiel pour favoriser l'émergence d'acteurs européens.

Enfin, sous l'étiquette de la souveraineté, on trouve déjà de nombreux leviers européens d'action : projets industriels stratégiques, régime des aides d'État, politique de financement européenne, etc. Il ne faut pas faire de la concurrence un bouc émissaire : elle a aussi permis l'émergence d'acteurs européens de premier plan dans plusieurs secteurs, même si le retard est particulièrement visible dans le numérique. Mais ce n'est sans doute pas la politique européenne de concurrence qui en est responsable, plutôt le retard dans la construction d'un marché structuré pour les investissements innovants.

RJSP : **Certains observateurs soutiennent que la politique de concurrence constitue un obstacle à l'émergence de champions nationaux ou européens. Vous défendez cependant la thèse inverse, selon laquelle la fermeture du marché serait non seulement insuffisante, mais pourrait également fragiliser les acteurs économiques concernés. Pourriez-vous développer cette position ?**

IDS : Partons de l'observation d'un fait structurel : l'Europe compte beaucoup de petites entreprises, et l'innovation vient souvent de ces acteurs. La richesse du marché européen tient à sa diversité.

Ensuite, une concurrence vive stimule les entreprises : elle les pousse à améliorer sans cesse leurs produits, à innover, à se confronter à leurs concurrentes. L'inverse est observable dans les marchés protégés, où les entreprises s'enlisent dans l'inefficacité. L'expérience de l'Union soviétique, pour ne citer qu'elle, en est un bon exemple.

Le débat autour du projet de fusion Siemens-Alstom illustre ce point [6]. L'objectif poursuivi était de créer un champion mondial en fusionnant deux leaders sur le marché des trains à très grande vitesse. Mais la Commission craignait une dégradation de la concurrence sur des marchés stratégiques, notamment celui des rames et de certains systèmes technologiques pointus pour le guidage des trains. Une telle dégradation aurait principalement affecté les opérateurs ferroviaires, et ultimement le consommateur européen, dans la mesure où une position dominante d'une entreprise réduit le choix sur un marché donné, permettant ainsi à cette entreprise d'augmenter les prix et d'altérer la qualité.

Cette décision a suscité des critiques. Néanmoins, une opération ultérieure de rachat par Alstom du canadien Bombardier a permis la constitution d'un acteur mondial, sans compromettre l'état de la concurrence en Europe [7]. De manière générale, les refus de concentrations sont, d'ailleurs, très rares : la grande majorité des opérations est autorisée sans difficulté.

5. Commission européenne, Décision du 6 février 2019, aff. M.8677 – C(2019) 921, *Siemens/Alstom*, déclarant une concentration incompatible avec le marché intérieur et avec le fonctionnement de l'accord EEE.

6. *Ibid.*

7. Commission européenne, Décision du 31 juillet 2020, aff. M.9779 – C(2020) 5450 final, *Alstom/Bombardier Transportation*, déclarant une concentration compatible avec le marché intérieur et avec le fonctionnement de l'accord EEE, sous réserve du respect de certains engagements.

4. Concurrence et numérique

RJSP : **Durant votre mandat de présidente de l'Autorité de la concurrence entre 2016 et 2021, vous avez notamment imposé de lourdes amendes à Google et Apple.**
Au regard des transformations rapides des marchés numériques et de l'avance prise par certains acteurs extra-européens dans les technologies d'IA et de données, estimez-vous que le cadre français et européen de régulation du numérique (concurrence, contrôle *ex ante* type DMA, contrôle des concentrations, etc.) est aujourd'hui adapté pour favoriser l'émergence d'acteurs innovants ? Comment répondez-vous aux critiques du droit de la concurrence comme frein à la compétitivité européenne ?

IDS : L'Europe a un atout majeur : son droit de la concurrence. C'est sans doute l'un des domaines où l'action de l'Union a obtenu les résultats les plus éclatants. Ces décisions structurantes que vous citez, sanctionnant des acteurs mondiaux du numérique, ont été prises sur le fondement de ce droit européen, aussi bien par la Commission, sous l'égide de Margrethe Vestager, qu'au niveau national.
Ces décisions sont intervenues à un moment stratégique : les grandes plateformes sont devenues centrales dans nos économies et dans la vie quotidienne. Le droit de la concurrence est favorable à l'innovation, mais interdit les comportements abusifs liés à une position dominante. Il était nécessaire d'intervenir dès lors que de tels comportements d'abus étaient constatés (intervenir sur un marché innovant ne signifie pas que toutest permis). Ces acteurs entraient dans une phase de maturité qui ne leur permettait plus d'échapper aux règles du jeu.
Ces enquêtes furent extrêmement complexes, avec des questions juridiques et techniques inédites. Chaque affaire posait des questions inédites, avec peu de précédents : un moteur de recherche constitue-t-il un marché pertinent ? Peut-on parler de domination sur un système d'exploitation, un réseau social ou un moteur de recherche ? Ces questions étaient au cœur d'affaires comme celle de Google Android [8].
La plupart de ces décisions ont été confirmées après un contrôle approfondi par le Tribunal de l'Union européenne ou la Cour de justice, dans des arrêts dont la longueur reflète la complexité des débats. Certaines affaires ont également connu des revers, par exemple l'affaire Apple sur les aides d'État, d'abord censurée puis confirmée [9].
Nous avons vécu une période particulière : les plateformes numériques se sont longtemps développées sans véritable régulation. Ensuite est intervenue une confrontation directe avec le droit, et les régulateurs ont dû s'adapter très rapidement aux logiques d'algorithmes, de données et d'économie des plateformes.
Certaines affaires, comme la décision européenne Google Shopping [10] ou les décisions françaises Google Gibmedia [11] et Google Droits voisins [12] ont posé des principes essentiels : transparence, non-discrimination, impossibilité de modifier un algorithme pour favoriser ses propres services et évincer les concurrents. À partir de ces décisions, le DMA a en partie systématisé les règles dégagées par cette jurisprudence, et les a transformés en règles plus générales. Ce règlement innove également en introduisant la catégorie des « contrôleurs d'accès », définie par l'influence d'une plateforme dans son écosystème.
Ces règlements restent jeunes, et le DMA commence seulement à être pleinement appliqué, mais la Commission a d'ores et déjà affiché sa volonté d'ouverture de dossiers et d'application énergique de ce cadre normatif récent. Très concrètement, le DMA protège les acteurs européens qui dépendent des grandes plateformes pour leur activité. Par exemple, une petite entreprise qui vend un produit *via* Amazon doit disposer de des garanties contre des pratiques abusives, telles que l'appropriation de données de vente pour concurrencer ladite entreprise avec un produit similaire. Le texte a été nourri de problèmes réels, pointés par les opérateurs économiques ou identifiés par les autorités de concurrence ou autres régulateurs.
Le règlement contribue également à éviter un réel danger, que j'ai déjà mentionné, celui de la fragmentation de la régulation en Europe. En effet, sans ce cadre commun, chaque pays aurait pu fixer ses propres règles, ce qui aurait compliqué la croissance des entreprises européennes à l'échelle du marché intérieur.
Cependant, l'émergence de champions ne peut reposer uniquement sur des textes tels que le DMA ou le DSA. Il dépend aussi d'un environnement plus large : la qualité du système éducatif, l'accès facile à des capacités de financement pour l'investissement initial mais aussi pour accompagner la croissance des start-ups.
Il en est de même pour l'IA. Certains estiment que la régulation européenne est venue trop tôt, ou encore est excessivement contraignante au regard de la compétition mondiale. Compte tenu de la rapidité de la diffusion de l'IA, il était important d'agir vite, quitte à adapter par la suite le règlement si nécessaire.
Toutefois, si l'on regarde la situation réglementaire en 2026, l'Europe est la première zone disposant d'un cadre opérationnel de régulation des plateformes, tandis que beaucoup d'autres États ne sont qu'au stade des discussions ou réflexions, bien loin de la mise en place d'une réglementation comparable. Le règlement général sur la protection des données (RGPD) a déjà prouvé que l'Europe pouvait créer des normes qui font école. On peut espérer un effet similaire pour le DMA.

RJSP : **Pensez-vous que, face au pouvoir des géants numériques, les actions de groupe en matière de concurrence pourraient devenir un outil efficace ?**

IDS : Les actions de groupe existent depuis longtemps, mais selon un modèle différent des *class actions* états-uniennes. S'agissant de la répression des infractions de concurrence, ce que nous voyons à présent se développer fortement sont les actions indemnitaires formées, par exemple, par les victimes d'un cartel : l'exemple le plus parlant concerne le cartel des camions [13], qui a donné lieu à des actions indemnitaires concernant des centaines, voire des milliers d'entreprises. Le cadre européen facilité beaucoup les actions, et c'est un facteur de dissuasion supplémentaire. L'infraction « coûte » deux fois, par la sanction, puis le cas échéant par les condamnations indemnitaires.
Dans le numérique, la difficulté réside parfois dans la faiblesse ou la difficulté à caractériser le préjudice du consommateur. Dans le cadre du RGPD par exemple, une violation n'entraîne pas toujours un dommage individuel suffisamment incitatif pour déclencher une action de groupe. En revanche, certaines actions individuelles ont produit des avancées majeures : le droit au déréférencement est né d'un contentieux individuel contre Google Espagne [14], avant d'être intégré dans les textes.
Un facteur culturel est également à prendre en compte : il est désormais plus envisageable d'agir contre les *Big Tech* qu'auparavant, dans le sens où l'illusion de surpuissance dont elles étaient auréolées auparavant, menant à considérer l'action perdue d'avance, s'est considérablement fragilisée aujourd'hui grâce aux sanctions à leur encontre.
Il existe également des formes d'actions collectives de fait, même sans action de groupe au sens strict. Dans l'affaire Google portant sur les droits voisins, la quasi-totalité des acteurs de la presse en France étaient requérants devant l'Autorité de la concurrence [15]. Cette mobilisation des acteurs de la presse a permis à l'Autorité de disposer d'éléments probatoires précieux

8. Commission européenne, Décision du 18 juillet 2018, *Google Android*, relative à une procédure d'application de l'article 102 du TFUE et de l'article 54 de l'accord EEE, Affaire AT.40099 – C(2018) 4761 final.
9. CJUE, Arrêt du 10 septembre 2024, *Commission c/ Irlande (Apple)*, C-465/20 P.
10. Commission européenne, Décision du 27 juin 2017, Google Search (Shopping), aff. AT.39740.
11. Autorité de la concurrence, Décision du 19 décembre 2019, n° 19-D-26, relative à des pratiques mises en œuvre par Google dans le secteur de la publicité en ligne liée aux recherches.
12. Autorité de la concurrence, Décision du 21 juin 2022, n° 22-D-13, relative à des pratiques mises en œuvre par Google dans le secteur de la presse.
13. Commission européenne, Décision du 19 juillet 2016, Aff. AT. 39824, *Camions*.
14. CJUE, Arrêt du 13 mai 2014, *Google Spain*, C-131/12.
15. Autorité de la concurrence, Décision du 21 juin 2022, n° 22-D-13, relative à des pratiques mises en œuvre par Google dans le secteur de la presse.

pour ses investigations. La décision rendue dans cette affaire a permis de conférer une portée concrète à la directive sur les droits voisins de la presse et des agences de presse [16] ainsi qu'à sa transposition, tandis que l'attitude initiale de Google était de considérer que ces évolutions normatives ne devaient rien changer.

Enfin, il faut mentionner le rôle d'autres autorités comme la Commission nationale de l'informatique et des libertés (CNIL) qui a renforcé le niveau de ses sanctions, y compris sur des sujets techniques comme le consentement aux *cookies* ou la protection des données. Cette dynamique ouvre un champ contentieux plus large et renforce l'effectivité des règles dans le domaine du numérique.■

16. Directive (UE) 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique, JO L 130.

5 Le récent rapport de l'Autorité de la concurrence sur son programme de clémence : un bilan globalement positif et quelques propositions d'amélioration



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1 - Introduit en droit français en 2001 [1], le programme de clémence permet à une entreprise ayant participé à une entente, plus souvent qualifiée en pratique de « cartel », d'obtenir une immunité ou une réduction d'amendes en contrepartie d'une coopération active avec l'Autorité de la concurrence, destinée à révéler et documenter l'existence de ce cartel [2].

Le 9 janvier 2026 [3], l'Autorité de la concurrence a publié sa troisième étude (ci-après l'« étude ») relative à son programme de clémence, dans la continuité de ses rapports de 2014 [4] et de 2018 [5]. Elle fait ainsi un état de la mise en œuvre de son programme de clémence, en se reposant sur les observations recueillies auprès des praticiens.

L'étude nous conduit à considérer que, si un bilan globalement positif peut être tiré de la mise en œuvre du programme de clémence en particulier depuis ces cinq dernières années (I), plusieurs mesures peuvent toutefois être utilement proposées afin d'en renforcer l'attractivité et l'efficacité (II).

1. Le bilan globalement positif du programme de clémence

2 - Dans l'étude, l'Autorité de la concurrence dresse un bilan globalement positif de la mise en œuvre du programme de clémence, présenté comme un outil efficace de répression des cartels (A). Plusieurs questions qui ne sont pas ou peu abordées par l'étude laissent toutefois entrevoir certaines zones d'ombre sur son efficacité et son attractivité pour les entreprises (B).

A. - Le programme de clémence, un instrument de répression efficace

3 - Inspiré d'une pratique initialement développée aux États-Unis [6], le programme de clémence, qui repose sur la théorie du dilemme du prisonnier, instaure un climat de défiance au sein des cartels. À la menace extérieure d'être découvert par les autorités de concurrence s'ajoute une menace interne de dénonciation du cartel par l'un de ses participants.

Tout d'abord, l'Autorité de la concurrence révèle dans l'étude que, depuis l'introduction du programme de clémence en droit français, plus de 200 demandes ont été déposées. Elle fait observer qu'au cours des cinq dernières années, 30% de ces demandes ont émané d'entreprises françaises, ce qui représenterait une très forte hausse du nombre des demandes formulées par les entreprises françaises [7]. Ces 200 demandes de clémence auraient conduit à l'adoption d'une vingtaine de décisions de sanction entre 2014 et 2023, représentant près de 2,55 milliards d'euros d'amendes prononcées, soit environ 36 % du montant total des amendes infligées sur cette période [8].

En outre, l'Autorité de la concurrence relève que près de la moitié des décisions adoptées durant cette même période l'ont été en coopération avec d'autres autorités de concurrence dans le cadre du Réseau européen de la concurrence (REC), confirmant ainsi que la décision des entreprises de recourir au programme de clémence est souvent prise par les entreprises dans un contexte de cartels européens [9].

Ensuite, selon l'Autorité, une forte augmentation du recours au programme de clémence a pu être observée depuis 2020, avec une augmentation annuelle de près de 50 % du nombre de demandes [10]. Cette augmentation du nombre de demandes s'accompagnerait d'un élargissement tant des secteurs qu'elles concernent que des pratiques dénoncées. En effet, les demandes de clémence ne se limiteraient plus aux cartels mis en place dans des secteurs traditionnels, mais elles porteraient également sur des cartels dans des secteurs plus innovants, tels que ceux des produits liés à l'intelligence économique [11].

À cet égard, d'une part, l'Autorité de la concurrence considère que l'augmentation du recours au programme de clémence s'explique en partie par la simplification de la procédure opérée lors de la transposition de la directive ECN+ [12]. La suppression de l'avis de clémence, qui impliquait l'intervention du collège de

1. Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques.
2. C. com., art. L. 464-2, VI.
3. Autorité de la concurrence, « 3e étude relative au programme de clémence », 9 janvier 2026. <http://www.autoritedelaconcurrence.fr/sites/default/files/2026-01/Etude-de-cle%CC%81mence_public_adlc.pdf>
4. Autorité de la concurrence, « Étude relative au programme de clémence français », 15 avril 2014 <http://www.autoritedelaconcurrence.fr/sites/default/files/etude_clemence_avril2014.pdf>.
5. Autorité de la concurrence, « 2e étude relative au programme de clémence », 2018.
6. LEVÊQUE François, « L'efficacité des programmes de clémence », *Concurrences*, 2006, n° 4-2006, p. 31-36.
7. Autorité de la concurrence, « 3e étude relative au programme de clémence », 2026, p. 4.
8. *Ibid.*, p. 5.
9. *Ibid.*, p. 5
10. *Ibid.*, p. 6.
11. *Ibid.*, p. 6.
12. Directive (UE) 2019/1 du Parlement européen et du Conseil du 11 décembre 2018 visant à doter les autorités de concurrence des États membres de moyens

l'Autorité de la concurrence sur proposition du rapporteur général pour déterminer les conditions d'octroi et le taux d'exonération, a été remplacé par une lettre du rapporteur général, informant l'entreprise de son éligibilité, de son rang d'arrivée et des conditions d'octroi de l'exonération. Cette réforme aurait permis de réduire sensiblement le formalisme et les délais attachés au traitement des demandes de clémence [13].

D'autre part, l'Autorité de la concurrence souligne la remarquable stabilité des facteurs d'incitation des entreprises à recourir au programme de clémence. Selon elle, le premier facteur poussant les entreprises à demander la clémence demeure, sans véritable surprise, la perspective d'une exonération ou d'une réduction substantielle de l'amende [14]. Le second facteur décisif résiderait dans la probabilité de détection et de sanction du cartel à la suite d'une opération de visite et saisie [15]. Viendraient ensuite, à un niveau équivalent, les facteurs liés à l'ouverture d'une enquête et à la crainte qu'un autre participant ne dépose une demande de clémence avant soi [16]. Ces éléments confirmeraient l'élément psychologique attaché au programme de clémence selon lequel les entreprises n'y recourent que lorsqu'elles perçoivent un risque réel et imminent de découverte du cartel par l'Autorité de concurrence.

Si les autres facteurs tels que l'amélioration de l'image de l'entreprise [17] ou la perspective d'évolution de l'entreprise sur le marché [18] demeurent secondaires dans la décision des entreprises de recourir au programme de clémence, l'Autorité de la concurrence met toutefois en lumière dans l'étude l'importance grandissante des programmes de conformité sur la décision de recourir au programme de clémence. Elle relève à cet égard que la détection des cartels au moyen d'un programme de conformité est à l'origine d'une part significative du nombre de demandes de clémence enregistrées au cours des dix dernières années [19].

Tout en soulignant donc le bilan globalement positif du programme de clémence mis en œuvre au cours des cinq dernières années en particulier, l'Autorité de la concurrence laisse néanmoins apparaître dans l'étude certaines zones d'ombre qui invitent à nuancer ce bilan.

B. - Les zones d'ombre du programme de clémence

4 - Dans l'étude, l'Autorité de la concurrence relève, comme cela est évoqué ci-dessus, une hausse significative du recours au programme de clémence au cours de ces cinq dernières années, tout en laissant toutefois planer des doutes sur la question de son attractivité réelle aux yeux des entreprises.

En effet, tout d'abord, si l'Autorité de la concurrence relève que 93 % des répondants à l'étude ont estimé que le risque d'actions indemnitaires pouvait être un facteur dissuasif pour recourir au programme de clémence [20], elle ne fournit toutefois pas d'analyse circonstanciée de l'influence du développement du contentieux indemnitaire sur la décision des entreprises de recourir au programme de clémence alors même que la directive Dommages a profondément modifié le calcul coûts-avantages de la clémence pour les entreprises [21].

De plus, au-delà du risque indemnitaire, l'étude reste relativement silencieuse sur la portée des coûts stratégiques et réputationnels perçus par les entreprises en cas de recours au programme de clémence. Les éventuels risques de représailles commerciales, de perte de parts de marché ou de fragilisation durable des relations contractuelles, s'ils existent, ne sont abordés dans l'étude que de manière superficielle, alors que ces facteurs sont susceptibles de constituer des éléments déterminants dans la décision des entreprises de solliciter la clémence.

Ensuite, l'Autorité de la concurrence ne fait pas état dans l'étude de l'évolution du nombre de cartels détectés par elle sans l'assistance du programme de clémence. Or, si l'augmentation du nombre de demandes de clémence constitue sans nul doute un indicateur utile de l'attractivité du programme de clémence, il demeure toutefois insuffisant pour apprécier son efficacité structurelle.

Enfin, si la simplification de la procédure de clémence consistant notamment dans la mise en place d'un formulaire électronique sécurisé de demande de clémence constitue une avancée réelle, certaines inquiétudes subsistent parmi les entreprises sur son utilisation [22]. En effet, une part significative des répondants à l'étude continuerait d'estimer que les garanties de confidentialité offertes par cette procédure demeurent insuffisantes [23].

Afin de garantir et de consolider l'efficacité et l'attractivité du programme de clémence, plusieurs propositions d'amélioration nous semblent envisageables.

2. Quelques propositions d'amélioration du programme de clémence

5 - Afin d'améliorer, d'une part, l'effectivité du programme de clémence (A) et, d'autre part, son attractivité pour les entreprises (B), plusieurs pistes de réflexion mériteraient, selon nous, d'être approfondies.

A. - Le renforcement de l'efficacité du programme de clémence

6 - Le renforcement de l'efficacité du programme de clémence réside dans le renforcement du risque de détection des cartels, dans l'intérêt du bon fonctionnement des marchés.

À cet égard, il est utile de rappeler que, d'une part, dans son rapport annuel de 2024, l'Autorité de la concurrence a relevé que le démantèlement des cartels en France pourrait accroître la productivité nationale de 2 % et le bien-être économique de 3,5 % [24]. D'autre part, l'amélioration de l'efficacité du programme de clémence ne constitue pas seulement un enjeu purement national, mais elle contribue également à la préservation d'une concurrence effective sur le marché européen dans son ensemble.

Dans ce cadre, si le programme de clémence demeure l'outil privilégié des autorités de concurrence pour détecter et sanctionner les cartels, il ne fonctionne de manière optimale que si l'entreprise participant à un cartel est convaincue qu'elle a plus à gagner à demander la clémence qu'à s'abstenir d'y recourir [25]. Deux principales pistes nous semblent devoir être creusées à cet égard.

Tout d'abord, il nous semble que le premier levier d'amélioration de l'efficacité du programme de clémence repose sur le renforcement de la capacité de détection des cartels par l'Autorité de la concurrence. À cet égard, une augmentation du nombre d'enquêtes lancées *ex officio* par l'Autorité de la concurrence, rendue possible notamment par le recours systématique à des tech-

de mettre en œuvre plus efficacement les règles de concurrence et à garantir le bon fonctionnement du marché intérieur, JO L 11.

13. Autorité de la concurrence, *op. cit.*, p. 7.
14. Autorité de la concurrence, « Communiqué de procédure du 15 décembre 2023 relatif au programme de clémence français », 15 décembre 2023, pt. 40.
15. Autorité de la concurrence, « 3e étude relative au programme de clémence », 9 janvier 2026, p. 17.
16. *Ibid*., p. 13-14.
17. *Ibid*., p. 17.
18. *Ibid*., p. 18.
19. *Ibid*., p. 15-16.
20. *Ibid*., p. 19.
21. Directive 2014/104/UE du Parlement européen et du Conseil du 26 novembre 2014 relative à certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence des États membres et de l'Union européenne, JO L 349.
22. Autorité de la concurrence, *op. cit.*, p. 10.
23. *Ibid.*, p.10.
24. Autorité de la concurrence, « Avec audace construisons demain : Rapport annuel 2024 » Rapport annuel, 2024, p. 22 <http://www.autoritedelaconcurrence.fr/sites/default/files/2025-07/Rapport-annuel-2024-final_0.pdf>.
25. *Ibid*., p. 5.

niques de *screening*, à l'analyse algorithmique des comportements de prix ou d'offres sur certains marchés particulièrement exposés, ou encore aux outils reposant sur l'intelligence artificielle, constituerait un facteur déterminant dans la décision des entreprises de demander la clémence. En effet, comme l'étude le relève à juste titre, plus le risque de détection d'un cartel est perçu comme important par les entreprises, plus leur intérêt à recourir au programme de clémence est pressant.

Ensuite, le renforcement des motivations et des droits des lanceurs d'alerte introduits par la loi Sapin 2 de 2016 [26] constituerait un second levier qui devrait s'avérer particulièrement efficace pour augmenter le nombre de demandes de clémence. En effet, si le risque de détection augmente également en raison du risque que le cartel soit découvert grâce à un lanceur d'alertes, l'entreprise membre d'un cartel a alors un intérêt accru à demander la clémence avant que l'alerte ne soit lancée. Plusieurs juridictions ont déjà tiré les conséquences de ce constat. Aux États-Unis [27] comme au Royaume-Uni [28], des mécanismes de récompense financière ont été mis en place afin d'augmenter la capacité des autorités de concurrence à détecter des cartels. Ainsi, la *Competition and Market Authority* a récemment augmenté la récompense octroyée aux lanceurs d'alerte de 100.000 £ à 250.000 £ [29]. A cet égard, il ne nous paraît pas injustifié que le lanceur d'alerte, qui prend des risques importants, notamment réputationnels et professionnels, se voie dédommager pour les conséquences négatives qu'il aurait à supporter après avoir rapporté l'existence d'une infraction grave aux autorités de concurrence.

Le renforcement par l'Autorité de la concurrence de ses outils de détection et de leur utilisation conduirait donc sans aucun doute à un renforcement de l'effectivité du programme de clémence.

B. - Le renforcement de l'attractivité du programme de clémence

7 - Le renforcement de l'efficacité du programme de clémence nous semble également devoir passer par un renforcement de son attractivité pour les entreprises, en particulier au regard du risque indemnitaire accru auquel elles s'exposent depuis près de dix années. Il serait ainsi, à notre avis, bénéfique pour l'efficacité du programme de clémence, d'accroître l'intérêt du bénéficiaire à l'immunité en diminuant son risque indemnitaire, de sorte à faire pencher la balance coûts-avantages dans le sens du recours au programme de clémence.

En effet, comme il l'a été relevé ci-dessus, le développement du contentieux indemnitaire, favorisé par la directive Dommages [30] a profondément modifié l'analyse coûts-avantages de recourir au programme de clémence auquel les entreprises procédaient dès lors que l'entreprise qui coopère avec l'Autorité de la concurrence peut s'exposer à des demandes en indemnisation d'un montant très nettement supérieur à celui de l'amende administrative à laquelle elle s'expose. Ce constat est illustré, comme le relève l'étude, notamment par l'affaire du « cartel des camions [31] », dans laquelle le montant cumulé des actions indemnitaires dépasse très largement le montant total de près de 4 milliards d'euros d'amende imposée aux participants de ce cartel [32].

Or, le programme de clémence ne deviendrait particulièrement attractif pour les entreprises que si l'intérêt du demandeur à l'immunité – par opposition à celui des demandeurs à la réduction d'amendes – de transiger avec ses victimes directes à un stade précoce de la procédure devant l'Autorité de la concurrence était renforcé.

En effet, il convient de rappeler que, conformément à l'article 11 de la directive Dommages, l'article L. 481-11 du Code de commerce limite la responsabilité civile du bénéficiaire de l'immunité d'amendes à ses seules victimes directes, prévoyant ainsi que seules les autres entreprises impliquées dans le cartel peuvent être tenues solidairement de l'indemnisation [33].

Toutefois, cette protection légale contre le risque découlant du jeu de la responsabilité solidaire n'empêche pas que le demandeur à l'immunité soit perçu comme une cible prioritaire dans le cadre d'actions en indemnisation, en particulier en raison de la reconnaissance de culpabilité que la demande en immunité implique.

Dans ce contexte, comme le relève d'ailleurs l'Autorité de la concurrence dans l'étude [34], certains praticiens ont évoqué l'opportunité d'instaurer une immunité civile au profit du bénéficiaire de l'immunité d'amendes, à l'instar de ce qui a été proposé par la *Monopolkommission* allemande. Cette proposition soulève toutefois des difficultés juridiques qui nous semblent insurmontables, dans la mesure où une telle disposition serait contraire au droit à une indemnisation intégrale et effective du préjudice subi par les victimes de pratiques anticoncurrentielles [35].

Une voie médiane reposant sur une meilleure articulation entre le programme de clémence et la logique transactionnelle en matière d'indemnisation des préjudices pourrait donc être envisagée.

Il est ainsi proposé que l'Autorité de concurrence prévoie après le dépôt d'une demande de clémence une période temporaire de transaction, d'une durée relativement courte qui pourrait être de quelques mois à compter de l'obtention d'un marqueur [36], permettant au demandeur à l'immunité de proposer à ses victimes directes de les indemniser pour le préjudice qu'ils ont subi.

Dans la mesure où une transaction interviendrait avant même la condamnation du demandeur à l'immunité et où elle inclurait la fourniture d'informations et preuves du cartel aux victimes directes du demandeur à l'immunité qu'elles pourraient utiliser dans le cadre de leur demande en réparation adressées aux autres participants du cartel, cette transaction réduirait de manière très significative l'aléa financier des entreprises souhaitant mettre fin à un cartel.

De cette manière, non seulement le demandeur à l'immunité se verrait exonéré du paiement de l'amende que l'Autorité de la concurrence aurait pu lui imposer, mais encore cette transaction limiterait significativement le montant d'indemnisation qu'il aurait autrement eu à verser. Dans le même temps, les victimes directes du demandeur à l'immunité bénéficieraient, d'une part, d'une

26. Loi n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d'alerte.
27. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 21 juillet 2010. Aux États-Unis, la récompense peut aller jusqu'à un montant équivalent à 30 % des 100 premiers millions de dollars de l'amende imposée, puis représenter jusqu'à 5 % de l'amende lorsqu'elle est comprise entre 100 et 500 millions de dollars.
28. *Public Interest Disclosure Act,* 1998 <http://www.legislation.gov.uk/ukpga/1998/23/contents>.
29. Competition & Markets Authority, « Blowing the whistle on cartels » [en ligne], communiqué de presse, 6 juin 2023, [consulté le 5 févr. 2026] <http://www-.gov.uk/government/news/blowing-the-whistle-on-cartels?>.
30. Directive 2014/104/UE du Parlement européen et du Conseil du 26 novembre 2014.
31. Commission européenne, Décision du 19 juillet 2016, aff. AT. 39824, *Camions*.
32. Autorité de la concurrence, « 3e étude relative au programme de clémence », 9 janvier 2026, p. 20. Dans l'étude, l'Autorité de la concurrence relève que, selon deux avocats, le montant total des demandes d'indemnisation dirigées contre leurs clients s'était élevé à plus de huit fois le montant de l'amende administrative prononcée à la suite de leur participation à une entente anticoncurrentielle.
33. C. com., art. L. 481-11.
34. Autorité de la concurrence, *op. cit.*, p. 25.
35. Directive 2014/104/UE, art. 3 et 4.
36. Autorité de la concurrence, « Communiqué de procédure du 15 décembre 2023 relatif au programme de clémence français », p.6 : « L'entreprise peut demander que lui soit octroyé un délai, pendant lequel la place de sa demande dans l'ordre d'arrivée est maintenue, afin de lui permettre de réunir les éléments d'informations au soutien de sa demande. [...] Le délai octroyé est fixé en principe à une durée d'un mois. Toute demande de prolongation est soumise au rapporteur général, qui peut l'accorder au cas par cas. » <http://www.autorite-delaconcurrence.fr/sites/default/files/2023-12/communique-clemence-15-dec-2023.pdf>

première indemnisation rapide et, d'autre part, d'informations et preuves renforçant leur capacité à obtenir réparation des autres participants du cartel. L'efficacité du programme de clémence que recherche pour sa part l'Autorité de la concurrence se trouverait alors renforcée par l'attractivité accrue pour les entreprises de demander l'immunité.

Naturellement, rien n'obligerait légalement les victimes directes du demandeur à l'immunité de transiger avec lui. Toutefois, elles disposeraient alors d'un intérêt financier important à le faire dès lors que, d'abord, cela leur permettrait d'obtenir une première indemnisation rapide, ensuite, cela renforcerait leur possibilité effective d'obtenir une indemnisation des autres participants au cartel et, enfin, cela leur offrirait un moyen de conserver de bonnes relations commerciales avec leurs clients directs.

À titre de conclusion, l'on retiendra que l'étude confirme que le programme de clémence demeure un instrument central de détection et de sanction des cartels, dont l'efficacité dépend toutefois de son attractivité réelle perçue par les entreprises. Renforcer la détection des cartels tout en augmentant les avantages objectifs des entreprises, tant sur le plan des amendes qu'indemnitaire, à participer au programme de clémence, apparaît donc comme essentiel pour augmenter l'efficacité de ce programme et, ce faisant, le bon fonctionnement des marchés dans l'intérêt général.■

Chapitre II
Réflexions théoriques



Chapter II
Theoretical reflections



6 Antitrust, the Rise of Market Power, and the Future of Capitalism

Webinar – Law, Economics and Policy Initiative at Sciences Po – January 29th, 2021

The Law, Economics and Policy Initiative (LEPI) is a joint initiative of the Sciences Po Law School and the Department of Economics, created to foster interdisciplinary dialogue between legal scholars, economists and policymakers on issues of public policy, regulation, and institutional design.
Within this framework, LEPI regularly convenes public lectures and academic panels bringing together leading thinkers and international scholars to address pressing policy questions at the intersections of law and economics.
The present interview stems from one such event held on January 29th, 2021, at a moment of global debate over the resurgence of market concentration, the power of digital platforms, and the adequacy of existing antitrust frameworks on both sides of the Atlantic. Today, these issues remain most relevant, and spotlighting the interview offers valuable reflections of this issue on competition law at crossroads.
Given the Covid-19 pandemic, the event took place online. A video of the full debate can be found using the QR code at the end of this abridged transcription of the debate.

Lina Khan, Associate Professor of Law at Columbia University. Lina is one of the most prominent young scholars in antitrust law, infrastructure industries, and the law and political economy.Widely recognized as a leading U.S. expert in these areas, she has published extensively in books and top law journals. Several of her works examine the limits of competition law in the face of the rise of major technology platforms, and *Politico* has described her as « *a leader of a new school of antitrust thought*. » This interview was conducted two months before she was nominated – and subsequently confirmed with bipartisan support – as Chair of the U.S. Federal Trade Commission (FTC), a position she held from 2021 to 2025. She is currently serving as co-chair of Zohran Mamdani's mayoral transitional team following the 2025 New York City mayoral election.
Thomas Philippon, Professor of Finance at New York University's Stern School of Business. Thomas is an economist whose research spans a broad range of topics in economics and finance, from microeconomic mechanisms to macroeconomic dynamics. He is also the author of the highly influential and provocative book *The Great Reversal : How America Gave Up on Free Markets*, in which he powerfully analyzes the growing concentration of corporate power and its consequences for American capitalism and competition.
Luigi Zingales, Professor of Finance at the University of Chicago Booth School of Business. Luigi is a world-renowned scholar in finance, law and economics, and political economy. He has published widely in leading journals and has been at the forefront of research on the interactions between political and market power. He coined one of my favorite expressions in recent political economy debates the *Medici vicious circle* to describe the self-reinforcing dynamics between economic power and political influence.
The session is moderated by Professor **Emeric Henry**, from Sciences Po's Department of Economics, and Professor **Dina Waked**, from the Sciences Po Law School.

1. Markets and competition

DINA WAKED : There's been a growing body of literature examining not only the benefits but also the potential harms of competition. I would like to explore how you think about perfect competition both in its traditional, neoclassical microeconomic sense, and as a regulatory ideal : the idea that a perfectly competitive market is not only the best structure to aim for, but also a mechanism to discipline monopolistic behavior and to mitigate its harmful consequences.
Do you truly believe in the ability of competitive markets to deliver those outcomes? Is competition always desirable? Can it really curb monopoly power and its negative effects? Or, conversely, might competition itself be partly responsible for some of the problems we're now observing, such as rising concentration, inequality, or the « race to the bottom, » especially when we consider impacts on the Global South, on labor standards, the environment, and broader sustainability goals?
LUIGI ZINGALES : It's very important to understand what competition can do, what it *cannot* do, and what the *costs* are of having intense competition without the proper rules in place.
I remember many years ago, on my first visit to India, a friend told me : *« Go to the state-owned stores, not the private market they won't cheat you there.* » And as a Chicago economist, I was honestly puzzled that someone would recommend *state-owned stores* as being *better* than the free market.
But the explanation was actually quite simple. In a state-owned store, there's little incentive to treat customers well, but also very little incentive to cheat. In the private market, incentives are strong both to improve and to cheat. And if you have a system that does *not* punish cheating, then competition can simply lead to *maximizing* cheating rather than efficiency.
So, if you have competition without the right rules, the potential damage can be huge. And when we look at what's happening in the Global South, I think we see this very clearly. Western companies are often able to corrupt local governments and get away with it and that's devastating, not only for local economies but also for political systems and for long-term development. Everyone tries to shift the blame : Western companies say it's not their fault, because the Chinese are coming in and playing by a different set of rules ; others say they're just trying to keep up. The reality is that competition, without a proper institutional framework, is not going to fix these problems. Rather,it can actually make them worse.
Of course, *perfect competition* doesn't exist in the real world, so we shouldn't push that concept too far. However, I do think that antitrust plays an essential role : it's about improving competition within markets. Other types of regulation, meanwhile, are designed to address different issues.
To give a simple example : any first-year economics student knows that a monopoly produces less output than a competitive market. If production causes pollution, then less output means less pollution. But that doesn't mean we should *favor monopolies* because they pollute less. The right approach is to *keep competition* and *regulate pollution*.

So, going in the opposite direction weakening competition in the name of solving other problems would be a serious mistake.
We need to be very clear about what competition law can and cannot achieve. If we expect competition law to fix *everything*, we're deluding ourselves. We need to improve competition policy, but we also need to fix many *other* aspects of our systems to make markets work for society.

THOMAS PHILIPPON : First of all, I agree with what was just said : competition in markets is very good at maximizing efficiency, cutting waste, and helping firms perform better. This works well as long as the rules ensure that doing so does not harm other stakeholders. When we take into account externalities, such as pollution, competition is clearly beneficial. If we ignore those externalities, however, competition can sometimes be harmful, leading to what is often called a « race to the bottom. »
I want to take a step back. If you ask me, in general, « is competition good? », the short answer is yes – and that answer is not just about microeconomic theory. While it is possible to construct theoretical examples or point to historical cases where too much competition might be harmful, the overwhelming majority of cases show that competition is beneficial.
There is a deeper reason for this. When you consider all the incentives faced by the various actors in the system, such as firms, regulators, politicians, and legal authorities, there is almost always a stronger incentive to restrict competition than to promote it. Competition is rarely perfect, and it can involve trade-offs, but in practice, the problem is usually not too much competition, it is too little.
We also need to be careful about how we measure competition. For example, competition and concentration are not the same. In fact, making a market more competitive can sometimes increase concentration : when markets are more competitive, profit margins shrink, and firms often need to grow larger to cover their fixed costs. Therefore, concentration alone does not indicate whether a market is competitive. In well-defined markets, increasing competition can actually lead to higher concentration.
The way competition manifests in practice is complex and depends heavily on the specifics of each market. The key point to remember is that, once we account for lobbying and political influence, there is generally more power working to reduce competition than to increase it. Competition has the character of a public good : consumers benefit from more competitive markets, but that benefit is diffuse and weakly represented. In contrast, individual firms or industries have strong incentives to limit competition in their own markets.
This is the core of the argument : competition is unquestionably beneficial, but the challenge lies in ensuring that the incentives within the system allow it to thrive.

LINA KHAN : My starting point in thinking about these questions is not competition *per se*, but rather the recognition that market structure is a policy vehicle. The laws and rules we use to shape and structure markets are a way to achieve policy goals. So the first step is to be clear about what those goals are. The next step is to identify the market arrangements and structures that will further those goals. In some cases, that will involve competition ; in other cases, it will involve infrastructure, rules, or regulations. Sometimes, it may even require allowing coordination rather than competition, as in the labor context where we permit collective bargaining. For me, competition comes after clarity about policy goals and the recognition that it is appropriate in some contexts but not in others.
It is true that in the U.S., the foundational antitrust laws explicitly identify the dispersion of economic power as a key policy goal. However, translating those foundational principles into a workable regime of law enforcement has not always been successful. What competition actually means under U.S. antitrust law is often underdeveloped and, at times, incoherent.
This incoherence is evident, for example, when companies attempt to merge and the government tries to block the merger. Both sides may argue that their preferred outcome will increase competition, leaving judges in a difficult position. How can merging increase competition while blocking the merger also increases competition? For instance, in the [2020] Qualcomm decision, the Ninth Circuit Court of Appeals even suggested that the purpose of competition is not necessarily to serve customers. There is clearly a lot of ambiguity in how competition is defined within the legal system. Whether this stems from the underdeveloped state of economic theory or from a failure to translate economic concepts into law is an open question. What is clear, however, is that when competition law is operationalized in the U.S., there are many flaws, and a significant number of these stem from the fact that the notion of competition in the legal context is easily manipulated.

EMERIC HENRY : None of you mentioned innovation is that by choice? Some observers might point out the example of COVID vaccines, where Big Pharma played a major role. Doesn't that suggest that there is value in having large firms? Even though the debate on competition and innovation is not fully settled, it seems that for major breakthroughs, size still matters. Do you have a perspective on this?

THOMAS PHILIPPON : I think in that case, all the good ideas came from small firms. The big firm only played a role on the production side. This illustrates why innovation often happens in small firms. Over the past 20 years, the business model in pharma has evolved deliberately around this insight. Large firms recognized that they were not particularly good at radical innovation, so they adapted their approach : they maintained production facilities while relying on an ecosystem of small firms to explore more experimental ideas. Once one of those small firms succeeded, the big firm would either acquire it or partner with it.
This is an interesting example of a partial separation of innovation and production. Innovation is carried out by relatively decentralized teams in smaller firms, while production is centralized. Production is where returns to scale are most predictable. While returns to scale exist in other areas as well, they are most reliable in production. This arrangement of decentralized innovation combined with centralized production actually makes a lot of sense.

LUIGI ZINGALES : I agree with Thomas. In addition, one could also argue the opposite : the vaccine sector had actually fallen behind in innovation. It took this pandemic, along with substantial funding from the U.S. government, to push things forward. Operation Warp Speed, for all its flaws, was actually a smart move. The way it structured compensation created a strong incentive, and we achieved vast progress in vaccine development in just one year thanks to that system.
This raises the question of why such progress didn't happen in the previous 20 years. I think part of the reason is the concentration in the industry, both on the production side and the demand side, which did not create the right incentives to produce vaccines. Concentration does not necessarily lead to higher innovation. In fact, it is often the opposite, particularly when it comes to radical innovation. Maintaining competition in the market is crucial to foster this kind of breakthrough innovation.

LINA KHAN : I would echo those points on innovation. I think we also saw an interesting example in the U.S. pharmacy context. The government partnered with large chains like CVS and Walgreens to distribute the vaccine, while some states have laws that limit the role of big chain pharmacies. From what I understand, it has actually been independent pharmacies that have been far more effective at getting the vaccine to citizens. Many of the delays and disruptions were associated with the larger chains.
The U.S. health system is highly concentrated across the entire supply chain. Even in areas like medical supplies, we see monopolies : for instance, one company controls a large portion of the syringe supply market, which is crucial for vaccines. This shows that concentration can be harmful not just for innovation, but also for distribution and access. In real time, we are seeing how excessive concentration can create bottlenecks and inefficiencies rather than delivering benefits.

THOMAS PHILIPPON : The effectiveness of independent pharmacies in the state of West Virginia seems to be similar to the distribution of government funds to SMEs : SMEs that banked with relatively large banks were slower to receive support in summer 2020, compared to SMEs that banked with smaller,

local banks. The smaller banks were simply more agile in helping their clients navigate the application process.
The key factor appears to be the interaction between the government and the local level. Whether it's distributing vaccines or federal aid to SMEs, the final stage of distribution appears to work better when smaller, more localized entities are involved. This may be a general pattern or just an isolated exception, but it's certainly an interesting observation.
LINA KHAN : One additional factor in the independent pharmacy context is that many of these pharmacies have much closer relationships with their patients. This made them far better equipped to reach out directly to the people who needed the vaccine most. They had more detailed patient data and were able to distribute according to the priority hierarchy more effectively. Studies suggest that independent pharmacies simply have stronger relationships with residents and customers, which enhances their ability to deliver services efficiently.
LUIGI ZINGALES : What's interesting, though, is that there's a huge literature suggesting that, especially when it comes to digital data, larger organizations are better. You might therefore expect that for systematic deployment for instance, using large databases to identify people with pre-existing conditions a well-organized, large pharmacy chain would outperform smaller, independent pharmacies.
The fact that we don't see this is fascinating. It may reflect the role of profit motives. An independent pharmacy has a direct incentive to deploy the vaccine quickly, because it benefits their business. In contrast, employees in a large chain follow orders and may lack the incentive or flexibility to be creative, which can slow down distribution.

2. Articulation between cooperation and competition

DINA WAKED : Some of you mentioned that in certain instances, it's better not to decide *a priori* whether we want competition *per se*.
How do we strike that balance? How do we decide in which markets, and under what circumstances, competition is appropriate? You mentioned that we need to start by clarifying our policy goals and then tailor the laws accordingly. What would that look like in practice? How would you recommend balancing a certain level of cooperation with competition to achieve the most desirable outcomes?
LINA KHAN : There are a couple of important points here. First, we need to apply the traditional economic analysis of underlying cost structures and the economic features of technologies. Are there reasons to expect economies of scale or network effects that justify preserving some level of concentration? If so, we also need mechanisms to ensure that individuals, executives, or firms controlling these naturally concentrated markets do not abuse that power.
This requires examining power asymmetries within a market. For example, in the U.S. employment context, it is recognized that workers generally have less bargaining power than employers. This is why workers are allowed to organize and engage in collective bargaining. Similar considerations exist in agriculture, where exemptions to antitrust laws are granted to farmer cooperatives, acknowledging the intrinsic power imbalance between farmers and the meat packers or processors they rely on to reach the market.
This type of analysis helps determine when competition is appropriate, even within a single industry or market, or across different parts of a supply chain. Ultimately, though, these decisions must be highly fact-specific, taking into account the particular economic, structural, and power dynamics at play in each case.
THOMAS PHILIPPON : The notion of natural monopolies and essential market facilities has been around for more than a century, and that fundamental idea hasn't really changed. What is new, however, is how we apply it to emerging industries. The key challenge is figuring out the right framework to analyze their production functions.
Take essential market facilities, for example. Traditionally, we distinguish between the « pipes » and what flows through the pipes. In industries like electricity or gas, this distinction is straightforward because the physical infrastructure the pipes hasn't changed much over the past fifty years. Obviously, you wouldn't have five separate pipelines bringing electricity or gas to the same house, but multiple firms can compete in providing the electricity or gas itself. That model works well and doesn't require much adjustment.
The challenge arises when we try to apply this framework to digital markets. Unlike physical utilities, the « pipes » in digital infrastructure change rapidly and endogenously. This raises difficult questions : should these digital pipes be regulated as national facilities? And if so, would that regulation stifle innovation in the very infrastructure itself? These are the tricky questions that are increasingly relevant and that we will likely explore further.
LUIGI ZINGALES : There is some value in going back to the etymology of the word *competition*. The word comes from Latin and essentially means « to seek something together », conveying the idea that when people strive together, the best succeed. That's the kind of competition we typically value in economics. However, today, « competition » is often interpreted as rivalry, a fight, or doing anything to win something quite different. This distinction is often overlooked, and the consequences can be costly. For example, a 2020 book on digital platforms by Nicolas Petit looks at the annual reports of these companies and concludes that they live in fear of being displaced by potential entrants [1], which he argues that this indicates a lot of competition.
Nevertheless, the analogy that comes to my mind is the mafia. In the mafia, every family fears being displaced by another family. Technically, there is « competition, » but it's not the kind we like : the mafia family blocks new entrants through violence and sabotage. Similarly, some digital platforms try to prevent competition by erecting barriers that harm society rather than benefiting consumers.
In economics, the competition we value occurs when firms compete by lowering prices or improving quality. The problem arises when competition is engineered through roadblocks or other anti-competitive practices. One could call this *contra-competition*, though that might be too technical. The key point is that this kind of negative competition is increasingly common in digital markets.
Authorities should focus on leveling the playing field, ensuring that barriers to entry unrelated to efficiency are removed, and firms that erect such barriers should be penalized. This should be a central goal of competition policy today.

3. The objectives of antitrust – *market power and democracy*

EMERIC HENRY : We often tend to think of antitrust regulation as something that should focus narrowly on promoting competition, while other areas of regulation, such as those dealing with inequality, environmental impact, or social goals, are treated as entirely separate.
Should that really be the case? For instance, when we're reviewing a merger, should we also consider its potential impact on the environment or on inequality? Should these broader dimensions be integrated into the merger review criteria, or should they remain outside the scope of antitrust, to be addressed later through other types of regulation that apply to the merged firm's activities?
LUIGI ZINGALES : In my opinion, it's quite dangerous to give multiple objectives to the authority or institution in charge of making antitrust decisions. This is particularly true in a common law system like that of the United States, where much is left to the discretion of judges. You simply cannot expect judges to make

1. Petit, Nicolas, *Big Tech and the Digital Economy : The Moligopoly Scenario* (Oxford, 2020 ; online edn, Oxford Academic, 19 Nov. 2020) <http://doi.org/10.1093/oso/9780198837701.001.0001> accessed 9 January 2026.

complex trade-offs that are both highly technical and deeply political at the same time.

Take an example : today, General Motors is moving into electric vehicles. That's a great thing from an environmental point of view, but it also comes with major employment costs, because electric vehicles require far fewer parts, and therefore fewer workers, to produce. Now imagine this was not just a business transition, but part of a merger review. Do we really want a judge to decide whether the loss of jobs is worth the environmental benefit? I don't think so. These kinds of trade-offs are political decisions, and they should be made at the political level, not by judges.

Judges need a clear and well-defined objective function they can apply consistently. They should not apply their own personal view of what the right balance should be, as that would undermine one of the fundamental elements of the rule of law : legal certainty.

LINA KHAN : I completely agree – judges should not be turned into policymakers. Decisions regarding value trade-offs and policy judgments that antitrust inevitably involves properly belong to political institutions, namely Congress, and also to administrative and executive agencies, which should have a much larger role in developing substantive antitrust rules. Historically, this was the rationale for creating the Federal Trade Commission (FTC) : to take power back from the courts. Unfortunately, in practice, the FTC has largely failed to fulfill this original administrative role, focusing mainly on litigation, which leaves substantive rule-making in the hands of judges.

Thus, the institutional balance needs to be rethought. Broader policy considerations should be decided by lawmakers, not judges, and we also need to rebalance power between the agencies and the courts to ensure that democratic accountability is restored to the antitrust system.

THOMAS PHILIPPON : There are multiple objectives that people advocate should be taken into account in antitrust policy. First, the environment : I think including this is neither practical nor actually useful. The environment should be protected completely and strongly, but independently of antitrust. Second, inequality : This is different, because we now have evidence that in some local labor markets, mergers can depress wages, which should be part of the antitrust standard. Taking inequality into account isn't about creating a new standard for equity as a separate goal, but it's actually part of competition policy. Beyond these, there is a danger in asking judges to consider the impact on employment or other independent standards in antitrust cases. I am strongly against that.

DINA WAKED : Do you see all forms of concentrated power as inherently threatening to democracy, or is this concern mostly specific to the tech giants and digital monopolies?

Secondly, how do you respond to arguments that say « big government » and concentrated enforcement power can be just as problematic for democracy as market concentration itself?

LUIGI ZINGALES : I am probably one of the most outspoken on this issue.

I believe that all forms of concentrated power are dangerous.

Some argue concentrated private power is preferable to government power, but this is flawed, as the government will access concentrated private data anyway, so the question is whether we want democratic accountability. The problem of concentrated power is not unique to the digital world. Historical examples like United Fruit in Honduras show how economic concentration destroys sovereignty.

This problem is severe for the United States, but even more severe for other countries. Take India, for example : it is now trying to reassert its sovereignty, to resist a new form of digital colonization. Because if Google and Facebook hold all your citizens' data, and can effectively influence who gets elected, can we really say that your country remains independent?

LINA KHAN : I agree with much of what Luigi just said. Concentration of economic power inevitably leads to concentration of political power, and that dynamic is by no means unique to the digital context.

In the United States, as Thomas's work has shown, we're facing a situation where concentration has become a systemic feature of our economy. It's not just about Big Tech, but it is happening across major sectors like telecommunications, airlines, and even in industries most people rarely think about : eyeglasses, hospital beds, funeral caskets. In all these cases, markets are increasingly dominated by a handful of firms.

That economic concentration translates into political concentration. These firms wield disproportionate influence, not only through lobbying or campaign finance, which are the most visible channels, but through a far broader and more subtle network of mechanisms. They shape what information gets produced, which experts are heard, what data regulators see, and even how policy debates are framed. Thus, the power isn't just financial or political, but it extends to controlling the very production of information that informs democratic decision-making.

That said, I do think the digital sector makes these dangers uniquely visible. The [2020] U.S. presidential election was a stark reminder of what happens when one private platform Facebook effectively controls the information environment of hundreds of millions of citizens. Elected officials were literally begging Mark Zuckerberg to take action against election misinformation, to prevent the distortion of public understanding about who had actually won.

That moment captured something profoundly troubling : that such an immense democratic responsibility as the integrity of elections themselves could rest in the hands of a single company, and ultimately one individual. The fact that Mark Zuckerberg could unilaterally decide how information about an election would circulate underscores both the grotesque imbalance of power and the deep threat that such concentration poses to democracy.

THOMAS PHILIPPON : I want to emphasize that it is still very unclear whether digital platforms have truly changed the game when it comes to information and public opinion.

Disinformation through the media is not new – 19th century newspapers were often full of corruption and foreign manipulation. That is why I think we shouldn't be overly pessimistic about the present. There is one important new element that social media does bring : coordination. The ability to coordinate large groups of people in a completely decentralized way is genuinely new. We've seen that again with the GameStop episode on Reddit : coordinating a million small investors to act collectively on one stock, in real time, would have been impossible twenty years ago.

To sum up, the coordination capacity is new, but the disinformation, the craziness of ideas, and the willingness to believe in conspiracy theories is not new. Social media didn't create those tendencies ; it just reflects the society we already have.■

The discussion continued with audience questions and further debate. The full webinar is available at :

7 Antitrust américain : L'approche par les effets sous des feux croisés ?



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Les responsables des autorités de concurrence nommés au début du second mandat du Président Trump ont placé leur politique dans la filiation du Conservatisme antitrust. Si celui-ci s'inscrit en radicale opposition avec les objectifs progressistes portés par les tenants du New Brandeis Movement (mouvement néo-brandeisien), il présente néanmoins quelques points communs avec ce dernier, par exemple dans son rejet de l'approche dominante en matière d'application des règles de concurrence depuis la fin des années 1970 qui repose sur la prise en compte du bien-être du consommateur comme critère d'appréciation de la licéité des pratiques. Cette contribution analyse cet assaut contre le consensus antitrust sur deux fronts successifs et s'interroge sur ses impacts potentiels.

1 - La promulgation du *Sherman Act* en 1890 répondait aux enjeux tant économiques que politiques liés à l'extrême concentration du pouvoir économique observée lors de la période de la Reconstruction au lendemain de la Guerre de Sécession et dans le cadre de la crise économique de la fin des années 1870 et des années 1880. Ces enjeux tenaient non seulement à la capacité des grands groupes, notamment structurés sous forme de *trusts*, à fixer unilatéralement les prix mais également au risque que leur puissance économique faisait courir à la démocratie américaine. L'argument de l'efficacité économique n'était pas présent dans les débats. Pis, les économistes américains considéraient alors majoritairement la concentration comme nécessaire à la réalisation de gains de productivité et voyaient la concurrence comme destructrice de richesse. Ce n'est qu'à la fin des années 1930 qu'un consensus s'établit, considérant la concentration comme non-désirable en termes politiques et inefficace en termes économiques. Ce consensus se maintint jusqu'aux années 1970, soutenu sur le versant économique par l'École de Harvard qui défendait alors un paradigme structuraliste, considérant que la performance des firmes dépend de la structure du marché, et sur le versant juridique par l'influence du Juge Douglas à la Cour Suprême qui défendait, à la suite du Juge Brandeis, une interprétation du *Sherman Act* en termes de dispersion du pouvoir économique.

Cette interprétation fut contestée par l'École de Chicago, laquelle voyait dans ce dernier une *consumer welfare prescription*. En d'autres termes, sa seule finalité légitime tenait à la promotion de l'efficacité. Dans le même temps, la concentration n'apparaissait plus comme un problème en soi. Elle était perçue comme la conséquence d'une efficacité économique supérieure et intrinsèquement précaire dès lors que le marché n'était pas protégé par des barrières à l'entrée. De la même façon, l'application des règles de concurrence sur la base d'une approche *per se* (des pratiques de marché étant considérées comme anticoncurrentielles en elles-mêmes) était vue comme préjudiciable en termes d'efficience, en ce qu'elle pouvait conduire à sanctionner des pratiques dont l'effet net sur le bien-être (c'est-à-dire dont l'effet restrictif en termes concurrentiels est plus que compensé par les gains d'efficacité générés). Cette balance des effets, sur la seule base de l'efficacité, devint la caractéristique de l'*antitrust* américain, même si l'approche post-Chicago nuança dès les années 1980 les prescriptions de l'Ecole de Chicago.

Ainsi, l'approche par les effets en matière d'application des règles *antitrust* constitue le principal trait constitutif du consensus qui s'est imposé aux États-Unis dès la fin des années 1970. La maximisation du bien-être du consommateur est tenue comme l'unique objectif légitime des règles de concurrence à l'exclusion de toute considération de nature redistributive. En effet, malgré l'utilisation du terme de bien-être du consommateur, l'approche par les effets repose sur une évaluation des pratiques sur le bien-être total. Tant qu'en valeur absolue le gain associé à une pratique de marché est positif, une compensation est possible. De la même façon, le caractère concentré du marché ne pose pas de problème tant que la position de la firme est due à ses mérites et qu'elle demeure contestable par ses concurrents. Cette logique a longtemps été vue comme un outil de dépolitisation et de garantie de la redevabilité de la décision concurrentielle, le recours à un critère économique unique apparaissant comme une garantie de neutralité [1].

Ce consensus suscite cependant de vives contestations depuis une quinzaine d'années aux États-Unis en ce que l'approche par les effets conduirait à une sous-application préjudiciable des règles de concurrence [2]. Si les premières critiques, au début de la seconde décennie de notre siècle, sont venues de progressistes soucieux des effets en termes de concentration du pouvoir économique et de ses conséquences sur le processus démocratiques et en matière d'inégalités [3], les secondes, moins attendues, viennent du camp conservateur.

Au printemps 2025, les principaux dirigeants des entités chargées de l'application des règles de concurrence aux États-Unis, la *Federal Trade Commission* (FTC) et la division *antitrust* du Département de la Justice (DoJ), ont placé leur action sous l'égide d'un conser-

1. CRANE Daniel, « *Technocracy and Antitrust* », *Texas Law Review*, 2008, vol. 86, n° 6, p. 1159-1222.
2. NADLER Jerrold et CICILLINE David, « *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations* », *U.S. Subcommittee on Antitrust, commercial, and administrative law of the committee on the Judiciary of the House of Representatives*, États-Unis, CP 11768 Part I, 117 Congress, 2nd session, 2020.
3. Nous faisons ici référence au mouvement néo-brandeisien, porté notamment par Lina Khan.
   KHAN Lina, « *The New-Brandeis Movement : America's Antimonopoly Debate* » *Journal of European Competition law & Practice*, 2018, vol. 9, n° 3, p. 131-132.

vatisme *antitrust*. Celui-ci repose sur un objectif de contrôle des pouvoirs économiques privés et de lutte anti-monopoles, et sur un ambigu rejet de l'approche par les effets pour jauger de la licéité des pratiques concurrentielles en ce qu'il met en avant un critère du bien-être du consommateur distinct de l'acceptation chicagoéenne qui en fait un critère de bien-être total et qu'il s'inscrit dans une logique de respect du précédent et de conformité aux intentions du législateur selon une lecture originaliste [4]. Ainsi, tant en matière de définition des finalités de la règle concurrentielle que de choix des procédures de décisions, cette approche s'inscrit en rupture avec le consensus *antitrust* [5].

L'approche conservatrice, parfois qualifiée de post néolibérale, suscite plusieurs questions [6]. Quelles sont les similarités et les différences entre l'approche promue par les nationaux conservateurs et les néo-brandeisiens en matière d'application des règles *antitrust* ? Quels sont les fondements théoriques de l'approche conservatrice ? Quelles pourraient être les conséquences d'une politique *antitrust* s'écartant d'une évaluation des effets économiques, non seulement en termes de redevabilité des décisions ?

À cette fin, notre contribution décrit dans une première section la convergence de l'*antitrust* américain vers une interprétation des règles de concurrence faisant du bien-être du consommateur leur finalité exclusive. Elle s'attache dans une deuxième section à la critique qui fut portée par le courant de la *Law and Political Economy* et, dans une troisième, à celle actuellement formulée par les figures de proue de l'administration Trump en matière d'*antitrust*. Elle traite, dans une quatrième section, des critiques qui sont adressées à cette éventuelle inflexion de la politique concurrentielle américaine. Une cinquième section conclut sur les impacts potentiels de l'approche conservatrice sur les garanties fondamentales en matière de droit de la concurrence.

1. La lente construction d'un consensus *antitrust* : d'une visée politique à une finalité exclusivement économique

2 - La vision traditionnelle d'une politique *antitrust* attachée au contrôle des structures de marché est née de la pratique des juridictions américaines dans les premières décennies de l'après-guerre. Même si l'approche économique alors développée par l'École de Harvard (avec le paradigme SCP : structure, conduite, performance) joua un rôle important dans la formation de ce consensus en établissant un lien entre la concentration du marché et le niveau des prix [7], la racine essentielle de l'inclinaison structuraliste tenait à une interprétation du *Sherman Act* de 1890 par les juridictions chargées de son application comme relevant, en premier lieu, d'une logique anti-monopole et favorable au maintien d'une rivalité effective sur le marché.

L'opposition aux monopoles occupe en effet une place centrale dans la philosophie politique américaine. Au-delà même de la guerre d'indépendance, cette opposition est un héritage direct de la lutte du Parlement contre les privilèges accordés par le monarque à telle ou telle entreprise [8]. Pour autant si la *monopolisation* au sens anglais procédait d'un abus de pouvoir politique (le pouvoir discrétionnaire du Prince), la *monopolization* au sens américain désigne un abus de pouvoir économique privé (le fait d'obtenir, de prolonger ou d'étendre un pouvoir de monopole sur une autre base que celle des mérites).

Le *Sherman Act* de 1890 ne répondait guère à des préoccupations économiques quant aux effets économiques des *trusts* [9] mais s'ancrait dans une tradition attentive à la sauvegarde de la liberté des opérateurs sur le marché et soucieuse du maintien d'une structure de marché déconcentrée. La concentration du pouvoir économique était vue dans les années 1880 comme porteuse d'un nouveau féodalisme [10] et comme un risque direct pour les libertés politiques. Le discours du Sénateur John Sherman en 1890 mettant en parallèle le refus d'un monarque dans la sphère politique et celui d'un autocrate dans la sphère économique prend son sens ici [11]. Dans l'interprétation du *Sherman Act* qui a prévalu jusqu'aux années 1970, l'action à l'encontre de la concentration du pouvoir économique répondait en premier lieu à une logique de protection de la déconcentration du pouvoir politique par le maintien de la dispersion du pouvoir économique.

Les grands arrêts de l'immédiat après-guerre en matière d'*antitrust* ne reposaient pas sur une considération des effets économiques de la concentration mais sur une telle interprétation du *Sherman Act* [12]. L'acmé de cette interprétation fût atteinte à la fin des années 1960 avec la publication du *Neal Report* proposant de modifier le *Sherman Act* pour introduire une Section 2A [13]. Celle-ci aurait consisté en une *no-faulty monopolization* : des remèdes structurels (démantèlements) auraient pu être prononcés même si l'entreprise avait acquis sa position de monopole par ses seuls mérites. L'*antitrust* était conçu dans ce cadre comme un outil de déconcentration du pouvoir économique, abstraction faite de ses éventuelles conséquences en termes d'efficience.

Le reflux était cependant déjà annoncé avec la montée en puissance des arguments développés par l'École de Chicago, porteuse d'une nouvelle interprétation du *Sherman Act* en termes d'efficacité économique. Pour Robert Bork, ce dernier doit être interprété comme une *consumer welfare prescription* [14] : chaque pratique concurrentielle doit être évaluée sur la base de ses effets nets sur

4. KIRAT Thierry et MARTY Frédéric, « Les effets économiques de l'originalisme constitutionnel aux États-Unis », *Revue Interdisciplinaire d'Etudes Juridiques*, 2022, vol. 89, n° 2, p. 3-38.
5. Pour une présentation de ce consensus que nous pourrions qualifier de post-chicagoéen, voir : HOVENKAMP Herbert, *The Antitrust Enterprise : Principle and Execution*, 2006, Harvard University Press.
6. Elle se distingue en effet de l'approche chicagoéenne (ici qualifiée de néo-libérale) en deux points. Premièrement, elle s'écarte d'une approche strictement économique dans le traitement des pratiques des firmes pour jauger de leur conformité aux règles de concurrence. Deuxièmement, elle considère que la concentration du pouvoir économique peut être un problème en soi au regard de ses conséquences tant économiques que politiques. V. BAKER Jonathan, « *Trumpian Populism and the Changing Intellectual Landscape in Antitrust : Century-Old Resonances, The New Right, and the Possible End of an Era* », *Antitrust Law Journal*, 2025, vol. 87, n° 1, p. 283-326.
7. KAYSEN Carl et TURNER Donald, *Antitrust Policy : An Economic and Legal Analysis*, Cambridge, Harvard University Press, 1959.
8. À l'instar des Bourbons, les Stuart (principalement Elizabeth I et Jacques I) furent prompts à accorder, sur la base de contreparties financières, des monopoles. À l'inverse de la situation française, les contre-pouvoirs permirent de faire pièce à ces pratiques de captures croisées entre pouvoirs économiques et politiques. La tradition anti-monopole américaine procède de l'héritage de l'arrêt *Darcy v Allen* (1603 77 Eng. Rep. (Q.B.), *The Case of monopolies*) et du *Statute of Monopolies* promulgué par le Parlement (1623, 21. Jac.1, c3 (Eng)).
V. CALABRESI Steven G. et LEIBOWITZ Larissa C., « *Monopolies and the Constitution : A History of Crowny Capitalism* », *Harvard Journal of Law and Public Policy*, 2013, vol. 36, n° 3, p. 983-1097.
9. BOUGETTE Patrice, DESCHAMPS Marc et MARTY Frédéric, « *When Economics met Antitrust : The Second Chicago School and the Economization of Antitrust Law* », *Enterprise and Society*, 2015, vol. 16, n° 2, p. 313-353.
10. HUDSON James, « *Modern Feudalism* », *The North American Review*, 1887, vol. 144, n° 364, p. 277-290.
11. Congressional Record, 1890, 21, p. 2455 et 2457.
12. Deux exemples peuvent être cités. Le premier est celui de l'arrêt *Alcoa* de 1945 et de la position du juge Hand : « [...] *industrial concentrations are inherently undesirable, regardless of their economic results* » (*U.S. v. Aluminium Co. of America*, 148 F.2d 416, U.S. Court of Appeals for the Second Circuit, 1945). Le second est celle du Juge Oliver Douglas dans l'arrêt *U.S. v. Columbia Steel Co.*, 334 U.S. 495, p. 535, Supreme Court of the United States, 1948 : « *Power that controls the economy [...] should be scattered into many hands so that the fortunes of people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.* [...] *That is the philosophy and the command of the Sherman Act* ».
13. NEAL Phil, BAXTER William, BORK Robert et FULDA Carl, « *Report of the White House Task Force on Antitrust Policy* », *Antitrust Law and Economics Review*, 1968, vol. 11, n° 2.
14. BORK Robert, *The Antitrust Paradox – a Policy at war with itself*, 2nd éd., New York City, Free Press, 1993.

le bien-être du consommateur au cas par cas [15]. Au regard des risques de faux positifs, c'est-à-dire de décisions venant sanctionner à tort des pratiques efficaces économiquement, l'approche chicagoéenne insiste sur la nécessité de prendre en compte le coût collectif d'éventuelles erreurs et prône une élévation du standard de la preuve ainsi qu'une forte prudence lorsqu'il s'agit de sanctionner une pratique unilatérale [16].

Le primat de l'École de Chicago porté par le revirement de la pratique décisionnelle de la Cour Suprême dans la seconde moitié des années 1970 et par l'administration Reagan au début des années 1980 se traduisit donc par une très nette décrue du *public enforcement*, notamment pour ce qui était des pratiques de monopolisation [17]. Pour autant, cette nouvelle ère ne revenait pas à une non-application des règles de concurrence. Les ententes horizontales, notamment sur les prix, furent toujours sanctionnées. Cependant, une très grande retenue était de mise (pour utiliser un euphémisme) dès lors qu'une pratique de marché était susceptible de générer des gains d'efficience. Le traitement des opérations de concentrations verticales témoigne de l'importance des présomptions de gains d'efficacité. De la même façon, des textes *antitrust* dont l'objet tenait à des considérations d'équité et non d'efficacité n'étaient dès lors plus appliqués, comme le montre l'exemple de la non-activation du *Robinson-Patman Act* (1936) depuis les années 1970 [18].

Le primat de l'efficacité constitua ainsi la base d'un consensus *antitrust* qui s'établit aux États-Unis durant près de quatre décennies. Ce consensus dépassa l'influence réelle de l'École de Chicago pour plusieurs raisons. Premièrement, l'École de Harvard elle-même avait convergé vers la préconisation d'évaluation des pratiques au cas par cas. L'ADN de l'*antitrust* américain combine ces deux influences [19]. Deuxièmement, les développements en économie industrielle (*Industrial Organization*) ont certes fortement relativisé les résultats classiques de l'approche chicagoéenne mais la méthode de raisonnement de cette dernière a conservé son influence et ses objectifs n'ont pas été remis en cause. L'efficacité économique évaluée sur la base de la maximisation du bien-être du consommateur prévaut toujours [20]. Troisièmement, cette approche technique de l'*antitrust* (*technical antitrust*) avait pour avantage de dépolitiser la question [21] et indirectement de réduire la place potentielle d'une intervention régulatrice de l'État [22].

2. La critique de type *Law and Political Economy* à l'encontre de l'approche par les effets

3 - Cette approche technique de l'*antitrust* se caractérisa donc par deux lignes de force : d'abord une sous-application principalement en matière de contrôle des comportements des entreprises dominantes et des opérations de concentrations verticales, ensuite une dépolitisation [23]. Dans les années 2010 se développa une contestation théorique de cette conception de l'*antitrust* basée sur la déconnexion des dimensions économiques et politiques. En ceci, cette approche souvent labellisée de néo-brandeisienne se proposait de renouer avec l'avant-Chicago en considérant que la question de l'efficience peut être seconde par rapport aux enjeux posés par la concentration du pouvoir économique [24]. Dès lors, l'accent est mis sur la question du pouvoir de régulation privée attaché à la puissance économique, appréciée non seulement en fonction de la taille de l'entreprise mais également de sa part de marché. La capacité des firmes dominantes à exercer ce que nous appellerions dans un contexte européen un pouvoir de contrôleur d'accès peut leur permettre de maîtriser à leur profit les règles du jeu concurrentiel, de prélever des rentes au détriment des consommateurs et des partenaires commerciaux et d'orienter la dynamique concurrentielle à leur avantage.

Cette approche participait de la même logique que celle promue, de façon plus générale par le courant *Law and Political Economy*. Ce dernier revendique sa différence par rapport à *Law and Economics*, qu'il qualifie de synthèse de la fin du 20ème siècle, par son rejet du critère de l'efficacité économique comme seul critère admissible pour la mise en œuvre des règles de concurrence. Cependant, l'approche néo-brandeisienne se distingue de la *Law and Political Economy* en ce qu'elle n'attribue pas à l'application des règles de concurrence un rôle de réduction des inégalités, se refusant à lui faire porter des objectifs plus larges de politique publique que celui du contrôle des pouvoirs économiques [25]. Elle vise à contrôler l'exercice des pouvoirs de marché conformément à l'interprétation qu'elle fait du *Sherman Act*, comme une loi anti-monopoles [26].

Ainsi, en reprenant l'héritage des juges Louis Brandeis et Oliver Douglas, l'approche néo-brandeisienne considère que l'*antitrust* doit porter des finalités plus larges que l'efficacité. Celles-ci peuvent tenir à la déconcentration (ou la régulation) du pouvoir économique à des fins de protection d'un équilibre social et démocratique mais également à la protection des petites et moyennes entreprises, des partenaires commerciaux dépendants, des travailleurs, etc. Le cas des grands écosystèmes numériques est topique de situations dans lesquelles le problème concurrentiel n'est plus réductible à la seule dimension de l'efficacité économique et s'étend aux questions de régulation privée et d'influence possible sur la sphère politique [27]. Des figures de proue du mouvement néo-brandeisien tels Tim Wu [28] et Lina Khan [29] occupèrent des positions cruciales dans l'administration démocrate et incar-

15. MARTY Frédéric, « Le critère du bien-être du consommateur comme objectif exclusif de la politique de concurrence : une mise en perspective sur la base de l'histoire de l'Antitrust américain », *Revue Internationale de Droit Économique*, 2014, n° 4, p. 471-497.
16. HOVENKAMP Herbert, « *Antitrust Error Costs* », *University of Pennsylvania Journal of Business Law*, 2022, vol. 24, n° 2, p. 293-349.
17. U.S. Department of Justice, « *Competition and Monopoly : Single-Firm Conduct under Section 2 of the Sherman Act* », États-Unis, 2008.
18. BLAIR Roger et DEPASQUALE Christina, « *Antitrust's Least Glorious Hour : The Robinson-Patman Act* », *Journal of Law and Economics*, 2014, vol. 57, p. 201-215.
19. KOVACIC William, « *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct : The Chicago/Harvard Double Helix* », *Columbia Business Law Review*, 2007, n° 2007/1.
20. GIOCOLI Nicola, « *Old lady charm : explaining the persistent appeal of Chicago antitrust* », *Journal of Economic Methodology,* 2015, vol. 22, n° 1, p. 96-122.
21. HOVENKAMP Herbert, « *Whatever Did Happen to the Antitrust Movement?* », *Notre Dame Law Review,* 2018, vol. 94, n° 2, p. 583-638.
22. LANCIERI Filippo, POSNER Eric et ZINGALES Luigi, « *The Political Economy of the Decline in Antitrust Enforcement in the United States* », *Antitrust Law Journal,* 2023, vol. 85, n° 2, p. 441-519.
23. FIRST Harry et WALLER Spencer, « *Antitrust's Democratic Deficit* », *Fordham Law Review*, vol. 81, n° 5, p. 2543-2574.
24. TEACHOUT Zephyr et KHAN Lina, « *Market Structure and Political Law : A Taxonomy of Power* », *Duke Journal of Constitutional Law & Public Policy*, 2014, vol. 9, n° 1, p. 37-73.
25. BRITTON-PURDY Jedediah, SING GREWAL David, KAPCZYNSKI Amy et al., « *Building a Law-and-Political-Economy Framework ; Beyond the Twentieth-Century Synthesis* », *Yale Law Journal*, 2020, vol. 129, p. 1784-1835.
26. KHAN Lina, *op. cit.*
27. MAKRIS Stavros et LUBINSKI Filip, « *Antitrust and complex democracy : Reclaiming markets from technofeudalism* », *Concurrences*, 2025, n° 7-2025.
28. WU Tim, *The Curse of Bigness : Antitrust in the New Gilded Age*, New York City, Columbia Global Reports, 2018.
29. KHAN Lina, « *Amazon's Antitrust Paradox* », *Yale Law Journal*, 2017, vol. 126, p. 710-804.

nèrent le virage amorcé par celle-ci en matière de revivification du *public enforcement* des règles de concurrence entre 2020 et 2024.

Il ne s'agit pas ici de dresser le bilan de la politique de concurrence américaine durant l'ère Biden mais de mettre en exergue les dimensions par lesquelles les tenants du mouvement néo-brandeisien s'opposaient à l'approche par les effets.

Cette nouvelle approche réfute que l'efficacité économique soit le seul objectif de l'*antitrust*. Cela conduit par exemple à adopter une position critique vis-à-vis de l'action qui fût celle de Thurman Arnold à la tête de la division *antitrust* du DoJ à partir de 1938. La raison en est que pour ce dernier, les problèmes tenaient aux dommages économiques liés aux comportements des firmes et non aux conséquences politiques de leur taille [30]. Le refus de considérer l'efficacité comme l'objectif unique de l'*antitrust* s'inscrit dans une dynamique plus large de rejet de la *Law and Economics* (assimilée ici à l'approche chicagoéenne) exprimé par le courant *Law and Political Economy*. En matière d'*antitrust*, cette approche préconise une vision plus holistique englobant, par exemple, des dimensions relatives aux inégalités [31].

Plusieurs axes de contestation du consensus *antitrust* se développèrent dans ce cadre. Un des premiers consista en la mise en cause de l'interprétation du *Sherman Act* défendue par Robert Bork, selon laquelle le but de ce dernier était réductible à la seule efficacité économique. La déconcentration du pouvoir économique privé est au contraire vue comme la finalité de la législation *antitrust* [32]. Dans le même temps, la place de l'équité (*fairness*) est réaffirmée [33]. Le *Robinson-Patman Act* promulgué en 1936, qui visait à prévenir les discriminations entre les partenaires commerciaux en fonction de leur puissance économique et qui avait fait comme nous l'avons vu *supra* l'objet de vives critiques de la part de l'École de Chicago, est défendu dans cette perspective [34]. Enfin, le critère du bien-être du consommateur a fait l'objet de nombreuses critiques et de propositions de remplacement par des critères portant sur la structure même de la concurrence, et non plus sur les effets du comportement de l'entreprise dominante [35].

Il ne relève pas de cette contribution de s'attacher à la conformité de ces propositions avec la pensée même de Louis Brandeis [36] ou d'établir de quelle façon elles se sont effectivement traduites dans la politique de concurrence états-unienne. Le bilan est en effet difficile à établir au regard de la durée des procédures. Notons en outre, que si l'action du DoJ s'est principalement fondée sur des critères standards [37], avec des résultats assez probants [38], les initiatives portées par la FTC ont imprimé une plus nette inflexion vis-à-vis du consensus *antitrust* en ce qu'elles sont basées sur des théories du dommage plus larges [39]. Le paradoxe est que la nouvelle administration républicaine, mise en place en 2025, se revendique également comme s'inscrivant en rupture avec cette même approche.

3. Le conservatisme *antitrust* contre l'approche par les effets

4 - Il est difficile de tracer les perspectives de la nouvelle politique républicaine au regard de l'*antitrust*. Celle-ci se caractérise dans certains cas par une application résolue des règles [40], dans d'autres par un très grand pragmatisme [41]. S'il se dégage une tendance en faveur d'une politique de moins en moins agressive vis-à-vis des Big Tech [42], elle semble moins répondre à une évolution dans l'appréciation économique des effets de leurs pratiques qu'à des enjeux de politique industrielle et commerciale ou des rapports de force entre les différentes sensibilités constituant la majorité républicaine. Celle-ci s'avère en effet des plus composites, réunissant notamment des techno-libertariens, des paléo-conservateurs influencés par Murray Rothbard, mais également des conservateurs s'inscrivant dans une logique post-néolibérale.

Le cas de ces derniers est particulièrement intéressant à considérer pour notre propos, en ce qu'ils se caractérisent par deux traits très spécifiques. Un premier tient à une philosophie politique jeffersonienne insistant sur la nécessité de disperser le pouvoir économique [43]. Un second tient à un rejet du recours à l'approche par les effets – et donc au critère de la maximisation du bien-être du consommateur au sens chicagoéen du terme, c'est à dire un critère d'efficacité totale – comme outil d'évaluation de la licéité des pratiques de marché [44].

Cette sensibilité revêt paradoxalement quelques points communs avec le courant néo-brandeisien mentionné *supra*. Cette convergence a même donné lieu à une appellation spécifique : le *Khanservatism* [45]. Il s'agit de présenter cette approche conservatrice en

30. « *Ironically, the greatest burst of antitrust enforcement* [...] *was accompanied by an effort to tone down the political content. Thurman Arnold, who brought antitrust and competition policy to the center of the Roosevelt Administration's economic policy, downplayed the political problems of scale and concentration, and focused on the economic harms* » ; TEACHOUT Zephyr et KHAN Lina, *op. cit.*, p. 63.
31. BRITTON-PURDY Jedediah, SING GREWAL David, KAPCZYNSKI Amy et al., *op. cit.*
32. PAUL Sanjukta, « *Recovering the Moral Economy Foundations of the Sherman Act* », *Yale Law Journal*, 2021, vol. 131, n° 1, p. 175-255.
33. KHAN Lina, « *The New Brandeis Movement : America's Antimonopoly Debate* », *op. cit.*
34. CALLACI Brian, HANLEY Daniel et VAHEESAN Sandeep, « *The Robinson-Patman Act as a Fair Competition Measure* », *Temple Law Review*, 2025, vol. 97, n° 2, p. 185-226.
35. STEINBAUM Marshall et STUCKE Maurice, « *The Effective Competition Standard : A New Standard for Antitrust* », *University of Chicago Law Review*, 2020, vol. 87, n° 2, p. 595-623.
36. WÖRSDÖRFER, Manuel, « *Louis D. Brandeis and the New Brandeis Movement : Parallels and Differences* », *Antitrust Bulletin,* 2023, vol. 68, n° 3, p. 440-459.
37. Herbert Hovenkamp prend notamment comme exemple, pour étayer ce point, la plainte du DoJ contre Apple en juin 2024 (*First Amended Complaint, United States v. Apple Inc.*, No. 24-cv-04055, District of New Jersey, 11 juin 2024). V. HOVENKAMP Herbert, « *The Future of Antitrust Populism* », *Florida Law Review*, 2025, vol. 77, n° 2, p. 417-463.
38. *Ibid*. Notons que parmi les actions initiées devant les juridictions, celles de la Division Antitrust du DoJ sous la direction de Jonathan Kanter se sont avérées les plus « efficaces ».
39. Un exemple frappant de l'inflexion imprimée peut tenir aux nouvelles lignes directrices relatives aux opérations de concentrations qui ont reçu un accueil particulièrement critique de la part de la doctrine *antitrust* traditionnelle mais qui n'ont pas été remises en cause par la nouvelle administration.
40. V., par exemple, la confirmation des demandes de remèdes structurels initialement formulées par l'administration démocrate dans l'affaire *Google Search*.
41. V., par exemple, la procédure négociée conclue en septembre 2025 entre la FTC et Amazon.
42. Rappelons que l'affaire *Google Search* mentionnée *supra* avait été initiée en 2020 durant le premier mandat du Président Trump : *U.S. et al. v. Google LLC*, plainte (*Complaint*), U.S. District Court for the District of Columbia, 20 octobre 2020.
43. Le discours anti-monopole est repris par la nouvelle administration dans un sens qui n'est plus celui de l'*antitrust* chicagoéen pour lequel il s'agissait de sanctionner des pratiques préjudiciables en termes d'efficacité économique. Par exemple, pour Mark Meador, commissaire à la FTC : « This dehumanization of economic life is happening because, all around the country and the world, the size and power of the largest companies have ballooned to unprecedented levels ».
Federal Trade Commission, Office of Commissionner MEADOR Mark, « *Antitrust's Populist Soul* », *Remarks*, 13th Bill Kovacic Antitrust Salon, Washington (D.C.), 15 septembre 2025, Federal Trade Commission.
44. L'approche conservatrice s'écarte du bien-être du consommateur défini comme un critère d'efficacité totale (permettant une compensation hypothétique des consommateurs dans une logique à la Kaldor-Hicks) pour retenir un critère prenant en compte les consommateurs, les partenaires commerciaux et les concurrents de petite taille. Il s'écarte en ceci de l'approche défendue par l'École de Chicago. Le fait de ne plus raisonner sur le surplus total permettrait sur le principe de ne plus admettre des pratiques conduisant à des situations dans lesquelles les consommateurs sont perdants. Un second écart par rapport à l'approche chicagoéenne tient au fait que la définition du consommateur intègre, dans la perspective conservatrice, les partenaires commerciaux.
LAMBERT Thomas, « *'New Right' Antitrust* », *Regulation*, 2025, hiver 2025-2026, p. 20-25.
45. FOX Eleanor, « *The Rise of the Antitrust Consensus Against Neoliberalism* », ProMarket [en ligne], publié le 19 novembre 2024, [consulté le 23 janvier

insistant sur ses divergences avec l'approche chicagoéenne classique [46].

L'influence conservatrice a été particulièrement invoquée au sein de l'administration américaine concernant l'*antitrust* : tant à la division *antitrust* du DoJ qu'au sein de la FTC, les dirigeants mis en place par la nouvelle administration se sont immédiatement et explicitement inscrits dans ce paradigme de politique publique. Le terme même est apparu à quelques jours d'intervalle entre le 28 avril et le 1er mai 2025 dans des discours programmatiques du Procureur Général Adjoint (*Assistant Attorney General*), Gail Slater, et du commissaire de la FTC, Mark Meador [47]. Ces deux textes sont fondamentaux en ce qu'ils définissent le cadre théorique de la politique *antitrust* américaine et le placent sous un cadre « conservateur » s'inscrivant non seulement en rupture avec l'administration précédente mais également, et peut-être surtout, avec celle suivie par les administrations républicaines et démocrates des décennies précédentes. Il n'est en rien acquis que la pratique décisionnelle soit effectivement guidée par ce cadre mais il permet d'apprécier la volonté de rupture avec le cadre traditionnel de l'*antitrust* américain.

À l'instar du mouvement néo-brandeisien, la nouvelle administration s'inscrit en matière *antitrust* dans une logique post-néolibérale. Il s'agit de doter ce dernier d'une finalité qui ne serait plus réductible à la minimisation des prix et à la maximisation de l'*output*. De la même façon, la lecture qui est faite des règles de concurrence n'est plus une lecture en termes d'efficacité mais de préservation des libertés [48]. Le refus des monopoles est de nouveau relié à l'histoire anglaise, à celle des Treize Colonies et à la dynamique historique qui a abouti au *Sherman Act*. À l'instar des positions qui étaient celles de Teachout et Khan présentées *supra* [49], la question est à nouveau celle du pouvoir économique. Cependant, celle-ci ne s'articule plus avec une approche progressiste mais conservatrice, orientée vers des valeurs traditionnelles se revendiquant d'un héritage contre-révolutionnaire. Dans cette perspective, l'*America First Antitrust* est défini comme un « *antitrust enforcement [that] serves the deep-rooted conservative goal of protecting individual liberty from the tyranny of coercive monopoly power* » [50]. L'insistance sur l'impact de la concentration sur le marché des idées constitue également une évolution importante par rapport au cadre habituel du *technical antitrust* en ce qu'elle conduit à refuser la séparation des sphères économique et politique qui était à la base de l'approche défendue par l'École de Chicago depuis l'après-guerre [51].

Un élément essentiel de rupture avec l'approche par les effets tient à la conception choisie en matière de traitement des contentieux concurrentiels. La nouvelle administration revendique la mise en œuvre d'une méthode fondée sur l'originalisme : « *a truly conservative approach to antitrust law starts first with principles and text* [52] ». Le précédent l'emporte sur l'analyse économique des effets au cas par cas. L'originalisme, qu'il repose sur une analyse historique de la promulgation des textes ou de leur analyse textuelle [53], est vu comme menant, à l'instar de la *Law and Economics* chicagoéenne, à des décisions « conservatrices » en ce qu'elles se caractériseraient par des biais pro-défendeurs ou défavorables aux interventions gouvernementales [54]. Pour autant, l'originalisme a toujours été rejeté par les tenants de l'approche chicagoéenne en ce que la décision est vue davantage comme répondant à la discrétion du juge que procédant d'une analyse des effets économiques pouvant faire l'objet d'un débat contradictoire. Pour Richard Posner, « *textual originalism is a 'gotcha' jurisprudence* [55] ». Son rejet est identique pour l'originalisme historique, plaçant en épigraphe de son chapitre *interpretation* dans ses *Reflections on Judging*, une citation de Leon Wieseltier : « *Originalism is just the search of a convenient past* [56] ».

Richard Posner considère l'originalisme comme étant intrinsèquement conservateur, alors que la *Law and Economics* est vue comme ne portant pas de valeurs autres que la promotion de l'efficience. Cette neutralité est centrale dans l'approche chicagoéenne. Mark Meador rattache à l'inverse le conservatisme *antitrust* à une analyse des intentions du législateur [57]. Dans une conception originaliste, le Congrès est vu comme motivé en 1890 par la question du pouvoir économique et non par celle de l'efficience. Un juge ne peut s'abstraire dans sa décision des intentions du législateur et n'a pas à déléguer le règlement des différends aux économistes [58]. Paradoxalement, l'originalisme défendu par la nouvelle administration est présenté comme le vecteur d'une application plus résolue des règles de concurrence face à une réticence des tribunaux à traduire l'intention du législateur, du fait notamment de l'influence de l'approche économique [59].

En matière de mise en œuvre des règles de concurrence, il en découle une volonté d'analyser les cas sur une base essentiellement juridique avec des analyses « *that are less deferential to clai-*

2026]. <http://www.promarket.org/2024/11/19/the-rise-of-the-antitrust-consensus-against-neoliberalism/>.

46. MARTY Frédéric, « Du conservatisme antitrust en Amérique : Principes et limites », *Concurrences*, 2025, éditorial, n° 12-2025, article 129874.
47. SLATER Gail, « *The Conservative Roots of America First Antitrust Enforcement* », faculté de droit de l'université de Notre Dame, discours, 28 avril 2025, [consulté le 24 janvier 2026]. <http://www.justice.gov/opa/speech/assistant-attorney-general-gail-slater-delivers-first-antitrust-address-university-notre.> ; Federal Trade Commission, Office of Commissioner MEADOR Mark, « *Antitrust for the Conservative* », États-Unis, 1er mai 2025.
48. Le conservatisme *antitrust* se détache du néolibéralisme en ce qu'il s'écarte de l'hypothèse d'efficacité des marchés et de celle de leur caractère autorégulateur : « *Free markets are good, but they're not self-perpetuating : it is the interest of many large companies to try to dominate the free market and control it in order to maximize profits* ».
49. TEACHOUT Zephyr et KHAN Lina, *op. cit.*
50. SLATER Gail, *op. cit.* Traduction libre de l'édition : « l'application d'une politique *antitrust* au service de l'objectif 'conservateur' profondément enraciné de protéger la liberté individuelle contre la tyrannie du pouvoir monopolistique coercitif ».
51. MARTY Frédéric et KIRAT Thierry, « Les mutations du néolibéralisme américain quant à l'articulation des libertés économiques et de la démocratie », *Revue Internationale de Droit Économique*, 2018, volume XXXII, n° 2018-4, p. 471-498.
52. SLATER Gail, *op. cit.* Traduction libre de l'édition : « Une approche véritablement conservatrice des règles *antitrust* commence d'abord par les principes et le texte. »
53. KIRAT Thierry et MARTY Frédéric, « *The Originalism of American Federal Judges or the Establishment of Constitutional Foundations for Economic Liberalism Since the 1970s* » *in* LÉVY Nathalie et al. (dir.), *The Anglo-American Model of Neoliberalism of the 1980s*, Cham, Palgrave Macmillan, 2022, p. 137-153.
54. ASH Elliott, CHEN Daniel et NAIDU Suresh, « *Ideas Have Consequences : The Impact of Law and Economics on American Justice* », *Quarterly Journal of Economics*, 2026, vol. 141, n° 1, p. 845-887.
55. POSNER Richard, *Reflections on Judging*, Cambridge, Harvard University Press, 2013, p. 182. Traduction libre de l'édition : « L'originalisme textuel est une jurisprudence 'piège'. »
56. WIESELTIER Leon, « *Specks of War* », *The New Republic*, 14 mars 2012, cité par POSNER Richard, *id.*, p. 178. Traduction libre de l'édition : « L'originalisme n'est que la recherche d'un passé commode. »
57. Federal Trade Commission, Office of Commissioner MEADOR Mark, *op. cit.*, p. 17.
58. « *By calling on judges to weigh and compare the economic benefits to competing constituencies and to substitute legal reasoning with economic speculation, Bork's version of consumer welfare, ironically, comes dangerously close to the very kind of political decision-making he claims to oppose. Perhaps even worse, it implicitly requires deference to economists in how we decide legal questions* ».
Federal Trade Commission, Office of Commissioner MEADOR Mark, *op. cit.*, p. 22.
59. MEADOR Mark, « *Antitrust and the Rule of Law* », *op. cit.* Mark Meador soulève ici une question fondamentale. Les juridictions chargées de l'application des règles de concurrence n'ont-elles pas au fil de l'histoire de l'antitrust américain appliqué des raisonnements plus restrictifs que nécessaires obligeant le législateur à ajouter de nouvelles dispositions pour que la politique puisse répondre à ses objectifs (songeons par exemple au FTC Act de 1914) ? En ce, l'antitrust serait le seul domaine dans lequel l'originalisme ne serait pas appliqué : « *to be truly faithful to the text of antitrust laws, however, enforcers must return to following Congress's direction, evincing an appropriate concern about underdeterrence and underenforcement, not just the reverse* ».

med efficiencies and defenses of mergers and anticompetitive conduct [60] ».

Si les tenants de la *Law and Political Economy* rejetaient une analyse économique conçue comme excessivement réductrice, l'opposition des conservateurs se fonde sur sa légitimité même dans la décision concurrentielle [61]. Dans cette perspective, l'efficience n'est pas tenue comme l'objet de la législation [62], au même titre que les sujets des règles de droit ne sont pas réductibles à leur nature de consommateurs. En ceci, le conservatisme *antitrust* se rattache à une approche se qualifiant elle-même de *post-néolibérale* [63], axée sur la notion de bien commun [64] et non sur le primat de l'efficacité économique [65] comme cela pouvait être le cas dans les administrations républicaines précédentes [66].

Doit-on en déduire que la pratique décisionnelle sera de plus en plus fondée sur les règles et à ce titre plus prévisible que celle résultant d'une approche au cas par cas, surtout si elle se base fidèlement sur les précédents ? Deux axes de critiques se dégagent. L'un porte sur la cohérence de la pratique décisionnelle de la première année de l'administration républicaine avec ce cadre théorique. L'autre porte sur la capacité intrinsèque de l'approche conservatrice à guider à elle seule le *public enforcement*. Nous considérons *infra* cette seconde dimension.

4. Les limites du conservatisme *antitrust*

5 - Plusieurs types de critiques peuvent être formulées à l'encontre du conservatisme *antitrust*. Nulle place ici pour porter un projet de transformation sociale au travers de l'application des règles de droit. Symétriquement, des critiques pourraient émaner de la majorité républicaine elle-même, notamment dans ses versants les plus techno-libertariens, voire néo-réactionnaires, lesquels portent un autre projet de transformation sociale. De surcroît, ces derniers ne s'opposent en rien à la concentration du pouvoir économique [67].

De la même façon, pour les tenants d'une approche traditionnelle de l'*antitrust*, que celle-ci soit basée sur la *Law and Economics* (c'est-à-dire attachée aux questions d'efficience) ou d'une approche basée sur des logiques de concurrence dynamique (axée sur des questions d'innovation [68], la problématique de la position de marché n'est pas cruciale [69]. Se concentrer sur celle-ci est susceptible d'éloigner l'application des règles *antitrust* de l'aiguillon de l'efficacité économique au détriment tant de l'efficacité économique que de la compétitivité des firmes [70]. Cette dernière dimension est d'autant plus fondamentale que la rivalité systémique avec la Chine pèse sur les choix de politique publique. La prise en compte de ces tensions – notamment dans des dimensions de politiques industrielles et commerciales stratégiques – couplées peut conduire à une application des règles *antitrust* plus erratique.

En outre, la cohérence même du conservatisme *antitrust* a pu être contestée. Assignant une pluralité d'objectifs à l'*antitrust*, refusant de mettre en œuvre une balance des effets et considérant la puissance économique comme un problème en lui-même, ne risque-t-elle pas de donner lieu à des décisions sinon incohérentes du moins exposées au risque de politisation qui était reprochée à la précédente administration [71] ? Cette doctrine ne risque-t-elle pas également d'être mise à l'épreuve de préférences politiques et d'impératifs stratégiques comme nous venons de le noter ?

En effet, l'analyse économique appliquée aux décisions de concurrence présente l'avantage – quelles que soient ses limites intrinsèques – de cadrer la décision concurrentielle dans un processus qui renforce sa redevabilité et qui facilite le contrôle juridictionnel [72]. Sa marginalisation peut donc accroître le risque de décisions plus discrétionnaires [73], sauf à appliquer l'approche conservatrice dans son acceptation la plus restrictive, celle du précédent, au prix éventuel de gains d'efficience.

Ce risque d'incohérence a pu être mis en évidence pour la Cour Suprême. Mark Lemley, dans son article « *The Imperial Supreme Court* [74] », décrit une Cour qui, mue par des préférences politiques, s'affranchit d'une ligne cohérente. Il considère que malgré l'originalisme revendiqué, les méthodes interprétatives utilisées par la

60. Federal Trade Commission, Office of Commissioner MEADOR Mark, *op. cit.*, p. 25.
Traduction libre de l'édition : En matière de mise en œuvre des règles de concurrence, il en découle une volonté d'analyser les cas sur une base essentiellement juridique avec des « analyses moins favorables aux arguments avancés en faveur de l'efficacité et à la défense des fusions et des pratiques anticoncurrentielles ».
61. « *Conservatives must rehabilitate the understanding of the laws as primarily an exercise in law and policy and morality, not in economics* ».
Federal Trade Commission, Office of Commissioner MEADOR Mark, 2025, *op. cit.*, p. 26.
62. « *An obsessive preoccupation with efficiency is deeply unconservative. Soviet housing projects were « efficient ». But the conservative pursues beauty, excellence, and virtue, not mere efficiency* ». *Ibid.*, p. 27.
63. Le terme de néo-libéral joue ici le même rôle que la *synthèse du 20ème siècle* chez les tenants de la *Law and Political Economy*. Si le point commun est un rejet du critère de l'efficacité comme outil de décision mais également de construction de la règle, il ne s'agit pas ici de jouer sur les règles à des fins de réduction des inégalités mais au contraire de se rapprocher de règles jugées *naturelles*.
64. VERMEULE Adrian, *Common Good Constitutionalism*, Cambridge, Polity Books, 2022.
65. EHRETT John S., « *Antitrust for the Common Good* », *Southern California Interdisciplinary Law Journal*, 2024, vol. 33, n° 3, p. 477-506.
66. La tradition conservatrice américaine qui s'était constituée en opposition au *New Deal* a longtemps reposé sur une adhésion aux principes de marchés considérés comme complémentaires à ses vues. V. JACOBS Alexander, « *The Crisis of American Conservatism* », *Modern American History*, 2025, vol. 8, n° 2, p. 255-271.
La défiance vis-à-vis des effets de la concurrence et un souci croissant en termes d'équité et de justice sociale, qui n'est pas sans rappeler les arguments de la *Law and Political Economy*, se retrouvent dans les positions de publicistes tels Sohrab Ahmari dont les positions conservatrices conduisent à une réévaluation des effets de l'État Providence. V. AHMARI Sohrab, *Tyranny, Inc. : How Private Power Crushed American Liberty – and What to Do About It*, New York, Forum Books, 2023.
67. La tolérance vis-à-vis de situations de monopole est bien plus forte. Même si celles-ci peuvent être préjudiciables à court terme en matière de bien-être du consommateur, elles sont vues comme la récompense nécessaire à la prise de risque et comme une incitation donnée aux concurrents pour innover et acquérir cette position. La concentration du pouvoir économique qui faisait l'objet de critiques croisées de la part des progressistes et des conservateurs, n'est plus ici considérée comme un problème : « *Monopolies drive progress because the promise of years or even decades of monopoly profits provides a powerful incentive to innovate. Then monopolies can keep innovating because profits enable them to make the long-term plans and to finance the ambitious research projects that firms locked in competition can't dream of* ».
THIEL Peter, *Zero to One – Notes on Startups, or How to Build the Future*, Crown Business, 2014, p. 36-37.
68. SIDAK Gregory et TEECE David, « *Dynamic Competition in Antitrust Law* », *Journal of Competition Law and Economics*, 2009, vol. 5, n° 4, p. 581-631.
69. CONIGLIO Joseph, « *Toward a Truly « America First » Antitrust : Responding to Commissioner Meador* », ITIF – Information Technology & Innovation Foundation [en ligne], publié le 2 décembre 2025, [consulté le 24 janvier 2026]. <http://itif.org/publications/2025/12/02/toward-a-truly-america-first-antitrust-responding-to-commissioner-meador/>.
70. « *In the face of the perilous journey that lies ahead in defending and restoring Western Civilization, conservatives, and not least those crafting policy in the new Trump Administration, must like vary Odysseus take care to avoid the neo-Brandeisian Scylla and the national Charybdis respectively championed by former Chair Khan and commentators as Ahmari, which are respectively tantamount to Fabian communism and a renegade Christian Socialism* ».
CONIGLIO Joseph, « *A Tale of Two Populisms : Deconstructing The Neo-Brandeisian and National Conservative Models of Antitrust Law and Political Economy* », *AIER Papers*, 2025, n° 9.
71. LAMBERT Thomas, *op. cit.*
72. NEVO Aviv, « *What Is the Role of Economics in Conservative Antitrust?* », *ProMarket* [en ligne], publié le 16 octobre 2025, [consulté le 24 janvier 2026]. <http://www.promarket.org/2025/10/16/what-is-the-role-of-economics-in-conservative-antitrust/>.
73. LAMBERT Thomas, « *New Right vs. Conservative Antitrust* », *ProMarket* [en ligne], publié le 14 octobre 2025, [consulté le 26 janvier 2026]. <http://www.promarket.org/2025/10/14/new-right-vs-conservative-antitrust/>.
74. LEMLEY Mark, « *The Imperial Supreme Court* », *Harvard Law Review Forum*, 2022, vol. 136, p. 97-118.

Cour Suprême ces dernières années sont incohérentes et inconstantes. Seuls les résultats sont convergents : la limitation des pouvoirs des agences fédérales, des cours de rang inférieur, des États fédérés mais également du Congrès...

Comme le note Mark Lemley, la tendance de la Cour est d'utiliser son pouvoir de façon arbitraire pour éroder tous les pouvoirs, sauf le sien. Ce faisant, la Cour affaiblit le respect des procédures et l'équilibre des pouvoirs constitutifs du modèle états-unien et brouille ainsi toutes les clés de lecture traditionnelles (Congrès vs agences administratives, état fédéral vs états fédérés...). Une telle tendance conduit à une discrétionnarité qui verrait les juges décider en fonction de leurs préférences politiques en relâchant l'exigence de cohérence d'une décision à l'autre [75].

Une philosophie conservatrice ne saurait être compatible avec une telle pratique. Une politisation de la Cour suprême pourrait, comme le relève Lemley, mettre en cause son magistère et sa crédibilité. Une autre conséquence pourrait être l'affaiblissement radical de ce contre-pouvoir au moment même où la théorie de l'exécutif unitaire est réactivée pour renforcer le pouvoir présidentiel [76].

5. Conclusion : Règles ou discrétion ?

6 - La *convention* (coutume) dans le cadre de laquelle se déploie l'application des règles de concurrence depuis la fin des années 1970 se caractérise par deux éléments fondamentaux du point de vue procédural [77]. Le premier est l'utilisation de l'analyse économique comme élément de structuration du débat contradictoire dans le contentieux concurrentiel. Le second est l'application de règles strictes, nécessaires au plein exercice des droits de la défense et à la prévention de décisions discrétionnaires. Les résultats de cette *convention* ont pu être légitimement contestés. Les coûts et la complexité de la procédure induisent un biais pro-défendeur [78], l'analyse sur la base des effets méconnaît les effets distributifs des pratiques de marché et les conséquences des abus de pouvoir de régulation privée. Cette approche peut *in fine* se traduire par une application sous-optimale des règles en réduisant l'intensité du *public enforcement* et en accroissant les contraintes pour le *private enforcement*.

Cependant, cette *convention* présente l'avantage de protéger les parties prenantes contre l'arbitraire et de leur assurer une sécurité juridique. Pablo Ibanez Colomo illustre ces enjeux dans le numéro d'octobre 2025 du *Journal of European Competition Law and Practice* [79]. Il montre que la place économique des Big Techs conduit à une concentration du pouvoir économique dans des proportions inédites et dans des conditions qui rendent difficiles la mise en œuvre efficace des règles de concurrence pour y remédier. Cette concentration favorise des tendances oligarchiques lesquelles peuvent conduire à des alliances entre les opérateurs en question et les pouvoirs publics pour se protéger de la concurrence tant nationale qu'internationale. Il peut être reproché aux modèles actuels d'application des règles de concurrence de nous avoir conduit à cette situation. Ibanez Colomo souligne que les deux facteurs mentionnés *supra*, l'approche par les effets et les garanties procédurales, ont participé à ce résultat en élevant les standards de preuve et en complexifiant les procédures.

Cependant, relâcher les règles procédurales n'aurait pour effet que de faire reculer, au pire moment, les principes de l'État de droit ; tout comme se défaire de l'approche économique conduirait à éloigner la décision de l'expertise. S'appuyer sur des règles n'est pas toujours un gage de neutralité [80], d'efficacité ou une garantie d'adaptation aux circonstances mais protège de l'arbitraire [81].■

75. Les modes de nomination et le fonctionnement même de la Cour Suprême conduisent à une forme de politisation. La Cour a pu avoir des préférences conservatrices qui ont pu faire obstacle dans la première partie du 20ème siècle à des régulations publiques progressistes (durant l'ère Lochner) ou s'opposer à la politique menée par le Président Roosevelt dans les premières années du *New Deal*. Réciproquement dans les années 1960, sous l'ère Warren, la Cour s'inscrivit dans une dynamique particulièrement progressiste, notamment en matière *d'antitrust*. L'approche chicagoéenne s'imposa en grande partie dans les années 1970 sous l'effet d'un renouvellement de la composition de la Cour (ère Burger). L'ère Roberts ouverte en 2005 marque une très nette inflexion conservatrice dans la pratique décisionnelle de la Cour.
WHITEHOUSE Sheldon, « *Conservative Judicial Activism : The Politicization of the Supreme Court Under Chief Justice Roberts* », *Harvard Law and Policy Review*, 2015, vol. 9, p. 195-210.
76. BAKER Jonathan, « *Trumpian Populism and the Changing Intellectual Landscape in Antitrust : Century-Old Resonances, the New Right and the Possible End of an Era* », *Antitrust Law Journal*, 2025, vol. 87, n° 1, p. 283-326.
77. MARTY Frédéric, « *Towards an Economics of Convention-Based Approach of the European Competition Policy* », *Historical Social Research*, 2015, vol. 40, n° 1, p. 94-111.
78. CHOPRA Rohit et KHAN Lina, « *The Case for « Unfair Methods of Competition » Rulemaking* », *University of Chicago Law Review*, 2020, vol. 87, n° 20, p. 357-379.
79. IBÁÑEZ COLOMO Pablo, « *Law and technocracy to protect democracy* », *Journal of European Competition Law and Practice*, octobre 2025, p. 341.
80. Rappelons que l'analyse chicagoéenne ne traite que d'efficacité et exclut de l'analyse les questions d'équité et de redistribution du champ de l'analyse concurrentielle.
81. SUNSTEIN Cass, « *The Rule of Law* », *American Journal of Law and Equality*, 2024, vol. 4, p. 498-518.

8 Structurer les marchés, préserver la démocratie : les mutations silencieuses du droit des concentrations



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Cet article soutient que le droit des concentrations est marqué depuis quelques années par l'affaiblissement du paradigme apolitique issu de l'École de Chicago et par l'émergence d'interventions de plus en plus structurantes des autorités de concurrence, c'est-à-dire des interventions qui visent à façonner activement les configurations de marché en fonction de résultats jugés souhaitables. Alors même que le contrôle des concentrations s'intensifie, la concentration économique continue de progresser et ses effets débordent désormais la sphère économique pour atteindre les processus démocratiques. L'article montre que la prétention à la neutralité économique qui a régné jusqu'à récemment a masqué des choix normatifs profonds, aujourd'hui rendus visibles par l'évolution de la théorie de la concurrence et par la transformation des marchés contemporains. Il défend l'idée qu'un contrôle des concentrations explicitement normatif, fondé notamment sur des présomptions structurelles renforcées et sur une meilleure coordination avec les autres politiques publiques, peut constituer un instrument de structuration des marchés et un contre-pouvoir démocratique, à condition d'être institutionnellement encadré et transparent.

1 - Le droit de la concurrence est de plus en plus en visible dans le paysage juridique tout autant que dans le paysage politique. D'un côté, le contrôle des concentrations a connu un essor considérable ces dernières années. Entre 2015 et 2024, le nombre de notifications a augmenté d'environ 20% au niveau mondial [1]. Sur cette même période, le taux d'intervention des autorités des pays de l'OCDE a également progressé, la Commission européenne et d'autres autorités européennes figurant parmi les dix autorités ayant le plus d'interdictions d'opérations à leur actif [2]. Cette intensification des interventions a été accompagnée par l'émergence de nouvelles théories du préjudice ou encore par un recours élargi à des instruments juridiques permettant d'appréhender des opérations auparavant hors du champ du contrôle des concentrations. Ensemble, ces indicateurs traduisent une volonté croissante de régulation proactive des marchés et du processus concurrentiel.

Pourtant, de nombreuses études empiriques montrent que les niveaux de concentration ont continué d'augmenter (en moyenne de cinq points de pourcentage entre 2000 et 2019 dans quinze pays européens [3], tout comme les marges [4], suggérant un affaiblissement des dynamiques concurrentielles, y compris en Europe. Ces tendances s'expliquent en partie par les activités de fusions-acquisitions de certains acteurs dominants [5]. Le contraste entre l'intensification du contrôle des concentrations et la persistance ou, pire, l'aggravation des niveaux de concentration des marchés invite ainsi à s'interroger sur l'efficacité du cadre analytique et normatif qui gouverne aujourd'hui cette matière.

Au-delà de la seule sphère économique, de nombreux travaux mettent en lumière les conséquences d'une concentration croissante des marchés sur les processus démocratiques. En effet, la concentration économique peut aussi inciter certains acteurs économiques dominants à s'investir dans la sphère politique pour y défendre leurs intérêts, parfois au détriment de valeurs démocratiques [6]. Le droit de la concurrence est à la fois le produit de processus politiques et démocratiques et une condition de leur fonctionnement [7]. Ces conclusions ne sont pas seulement théoriques : des études empiriques montrent que le pouvoir de marché accru de certaines entreprises est directement lié à un sentiment de déclin démocratique [8]. Le paradoxe contemporain du droit des concentrations est donc le suivant : jamais il n'a été aussi actif, jamais pourtant la concentration du pouvoir économique n'a été aussi visible, et jamais, peut-être, les effets de cette concentration sur les piliers démocratiques n'ont été aussi tangibles.

Ces tendances sont désormais bien connues. Ce qui l'est moins est la manière dont le droit des concentrations a évolué, et peut évoluer, à l'aune de la dialectique croissante entre marchés et politique. Pour la comprendre, il faut dans une première partie resituer

1. OCDE (Organisation de coopération et de développement économiques), *A Decade of OECD Competition Trends, Data and Insights*, Paris, OCDE, 2025, chap. 2.
2. *Ibidem*. Le taux d'intervention est mesuré par le nombre d'approbations sous conditions, les remises en question ou interdictions d'opérations en fonction du régime légal applicable à chaque juridiction.
3. CALLIGARIS Stefano, et al., « Industry concentration in Europe : Trends and methodological insights » *OECD Science, Technology and Industry Working Papers*, n°2024/06, Paris, 2024.
4. CALLIGARIS Stefano, CRISCUOLO Chiara, MARCOLIN Luca, « Mark-ups in the digital era« (2018) 2018/10 OECD Science, Technology and Industry Working », *OECD Science, Technology and Industry Working Papers*, n°2018/10, Paris, 2018.
5. Commission européenne, « Protecting competition in a changing world, Evidence on the evolution of competition in the EU during the past 25 years », Paris, 2024.
6. TEACHOUT Elizabeth, KHAN Lina, « Market Structure and Political Law : A Taxonomy of Power », *Duke Journal of Constitutional Law & Public Policy*, vol. 9, 2014, p. 37. ; WU Tim, *The Curse of Bigness : How Corporate Giants Came to Rule the World*, 1ère éd., Londres, Atlantic Books, 2020.
7. TEACHOUT Elizabeth, « Democracy and Law in the New American Antitrust » *SSRN Electronic Journal*, 2023.
8. BASIHOS Stefanos, « (Market) Power Is (Political) Power! The Pressure of Declining Competition on Democracy » *Journal of Comparative Economics*, vol. 53, n° 4, 2025.

le droit de la concurrence en fonction de ses évolutions théoriques. En effet, le droit de la concurrence s'est, depuis quelques années maintenant, présenté comme un domaine essentiellement technique, séparé de toute influence politique notamment en raison de l'empreinte encore marquée de l'École de Chicago et du consensus post-Chicago. Bien qu'étant prépondérant principalement aux Etats-Unis, ce courant a également trouvé racine dans l'approche de la Commission européenne, de manière sélective certes, la Commission conservant ses propres objectifs d'intégration du marché et de protection des consommateurs. Cette réception sélective s'explique en partie par la convergence progressive des autorités de concurrence américaines et européennes et par la diffusion d'un cadre analytique commun à travers des programmes de formation économique et des cercles d'expertise. L'analyse par la Commission des concentrations continue de refléter en partie la pensée économique néoclassique (neutralité des concentrations horizontales qui ne doivent pas être autorisées ou interdites *per se*, présomption de licéité des fusions verticales en l'absence de pouvoir de marché significatif, usage analytique et non normatif des indicateurs de concentration, permissivité et attachement à éviter les erreurs de Type I).

Souvent décrits comme une modernisation scientifique du droit de la concurrence, ces courants ont reposé sur des postulats normatifs largement invisibilisés, en particulier l'idée selon laquelle le processus concurrentiel relèverait exclusivement de considérations économiques et pourrait être dissocié des choix politiques. Cette apparente neutralité liée à un engagement théorique sur le domaine de l'analyse économique principalement et non ses aspects normatifs a contribué à déplacer le débat vers des questions techniques, laissant en retrait les liens entre concentration et démocratie. Comme il sera observé plus loin, le courant néo-Brandésien a mis à mal ces schémas depuis quelques années mais peine à trouver une résonance institutionnelle malgré quelques réapparitions récentes dans les discours officiels [9], ou à travers les récentes initiatives de la Commission que l'article adresse plus en détails ci-après.

Cette neutralité apparaît aujourd'hui moins comme une absence de choix que comme un choix devenu invisible. Les transformations profondes des marchés contemporains, marqués par la montée en puissance d'acteurs structurellement incontournables, ont rendu manifeste ce que le cadre analytique dominant s'efforçait de contenir : la concentration économique produit des effets systémiques au-delà des marchés, dans la sphère politique, dans la formation de l'opinion et dans la capacité des institutions publiques à gouverner l'économie. Parmi d'autres, les autorités de concurrence ont été amenées à ajuster progressivement leurs pratiques, intensifiant et transformant leurs interventions vers des formes plus structurantes. Ce faisant, il s'opère nécessairement des choix normatifs qui excèdent la seule protection du bien-être des consommateurs et s'accompagnent d'une politisation croissante.

Le fait qu'il y ait encore un engagement encore limité des autorités et du législateur avec ces dynamiques les expose à un double risque : celui d'une efficacité limitée face aux nouvelles tendances à l'œuvre sur de nombreux marchés et une perte de légitimité.

Partant de ce constat, le présent article soutient dans une seconde partie que le droit des concentrations peine à résoudre le débat sur ses finalités et à trouver une nouvelle essence. L'affaiblissement du paradigme apolitique du droit de la concurrence rend nécessaire une reconceptualisation du contrôle des concentrations comme instrument normatif de structuration des marchés. L'enjeu n'est pas de soumettre le droit des concentrations à des considérations politiques contingentes, mais d'assumer et d'encadrer la dimension politique qu'il exerce déjà *de facto*, afin de renforcer à la fois son efficacité et sa légitimité.

9. Voir notamment VESTAGER Margrethe, « Speech on technology and politics at the Institute for Advanced Study », discours prononcé le 9 avril 2024.

1. Retour d'une normativité longtemps occultée

A. - Construction et érosion du paradigme apolitique

2 - Loin d'avoir toujours été conçu comme un domaine technique et apolitique, le droit des concentrations l'est devenu au fil de nombreuses ruptures théoriques qui lui ont permis de s'affirmer comme une discipline autonome à l'égard de toute considération politique.

Aux États-Unis, les textes fondateurs du droit de la concurrence (le *Sherman Act* de 1890 et le *Clayton Act* de 1914) étaient principalement motivés par des considérations juridiques et politiques concernant le pouvoir de grandes corporations. Ce n'est que plus tard que la matière économique, à travers notamment les travaux de Joe S. Bain, s'est progressivement imposée comme un cadre analytique central du droit de la concurrence. Cette approche a notamment culminé dans l'adoption des *Department of Justice Merger Guidelines* de 1968 [10].

Toutefois, une première rupture s'est opérée avec la critique de l'École de Chicago remettant en question le structuralisme et soutenant que la concentration des marchés pouvait être le signe d'une concurrence accrue [11]. Un nouveau modèle s'est imposé, fondé principalement sur la théorie néoclassique des prix pour analyser les causes et conséquences des activités économiques. Ce dernier décrit la capacité des marchés à s'autoréguler et tient dans l'assertion que le droit de la concurrence se réduit à un objectif, celui du bien-être du consommateur se mesurant principalement à travers l'augmentation ou la diminution des prix [12].

Cette théorie a eu un écho tout particulier par son ralliement à une méthode décrite comme scientifique et un attachement profond à une approche plus économique et centrée sur les effets. Les *Lignes directrices de la Commission sur les concentrations* de 2004 et de 2008 constituent une manifestation d'un renversement de présomptions dures vers une analyse au cas par cas. A ce titre, elles sont davantage attachées à l'analyse économique et intéressées à empêcher la réalisation des opérations qui priveraient les consommateurs des avantages de la concurrence notamment en augmentant les prix, réduisant la production, les choix ou la qualité des produits [13]. En d'autres termes, la Commission considère que le test de l'entrave significative à la concurrence effective [14], est plus restrictivement rempli par l'atteinte au bien-être du consommateur [15]. Le droit de la concurrence modernisé a essentiellement adopté l'idée selon laquelle l'économie informe l'essence même des normes du droit de la concurrence et devrait être le guide ultime dans leur mise en œuvre [16].

10. COWAN Simon, ORMOSI Péter, PERKINS John, « New Directions in Competition Policy : An Overview », *Oxford Review of Economic Policy*, vol. 40, n° 4, 2024.
11. BROZEN Yale, « The Antitrust Task Force Deconcentration Recommendation », *The Journal of Law & Economics*, vol. 13, n° 2, 1970.
12. COWAN Simon, ORMOSI Péter, PERKINS John, « New Directions in Competition Policy : An Overview », *Oxford Review of Economic Policy*, vol. 40, n° 4, 2024..
13. Commission européenne, *Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises*, JO C 31/03, 2004, para. 8.. ; Commission européenne, *Lignes directrices sur l'appréciation des concentrations non horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises*, JO C 265/07, 2008, para. 10.
14. Conseil de l'Union européenne, Règlement (CE) n° 139/2004 du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises (*Texte présentant de l'intérêt pour l'EEE*), Journal officiel de l'Union européenne, L 024, 29 janvier 2004, p. 1?22, art. 2(3).
15. WITT Alexander, « The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning? », *Antitrust Bulletin*, vol. 64, n° 2, 2019.
16. GERBER David, « Global Competition Law Convergence : Potential Roles for Economics », in EISENBERG T., RAMELLO G.B. (dir.), *Comparative Law and Economics*, Londres, Edward Elgar, 2016, p. 206.

Cette évolution appelle pourtant des interrogations sur la méthode qu'elle consacre. Sous couvert d'une prétention à l'objectivité, l'analyse économique mobilisée repose sur des partis pris normatifs importants qui ont été révélés par des théories critiques modernes et notamment le courant néo-Brandésien.

Si le consensus post-Chicago s'est imposé avec autant de force, c'est en raison de la facilité explicative et analytique face à des problèmes complexes [17]. Bien sûr, la critique post-Chicago a apporté des correctifs au modèle précédent mais ces derniers n'ont concerné que la dimension descriptive de la théorie et non les assises normatives [18], qui ont été de ce fait considérablement renforcées. Par la suite, les autorités et les cours ont adopté cette dimension descriptive en traduisant ses tenants et aboutissants en notions et critères juridiques. Cette transformation juridique a pu renforcer la légitimité apparente de ces postulats, tout en déplaçant le débat vers des considérations techniques et en masquant ainsi la portée politique.

Les postulats sous-jacents à ce cadre analytique sont désormais bien identifiés [19]. Premièrement, ils reposent sur une conception désocialisée de l'acteur économique, supposé rationnel et guidé par la maximisation de l'utilité. Deuxièmement, ils présupposent une séparation entre les différentes sphères sociales, et notamment entre le marché et la politique. Troisièmement, ils font du prix l'indicateur privilégié des préférences individuelles, en ignorant d'autres dimensions du processus de décision.

Ces hypothèses ont eu pour conséquence d'exclure durablement du champ du droit de la concurrence toute considération explicite relative aux enjeux sociaux, politiques, de justice ou d'équité [20]. De même, l'indépendance des autorités de concurrence dans de nombreux pays a facilité l'étanchéité entre ces différentes sphères dans l'analyse concurrentielle. Ensemble, ces éléments ont contribué à considérer le droit de la concurrence comme un domaine distinct relevant de l'expertise [21]. Cette technicisation est d'autant plus palpable en droit des concentrations où le recours quasi-systématique à des études économiques complexes et à des cabinets d'experts est devenu la norme, au point que certains auteurs ont pu évoquer des stratégies de *spamming* des autorités [22].

Cet article ne prend pas parti quant à la véracité ou la légitimité de ces postulats, ni des choix institutionnels subséquents, mais cherche à montrer à quel point ils se sont imposés et n'ont que rarement été questionnés par les autorités ou le législateur jusqu'à encore récemment.

B. - Préserver ou structurer : nouvelles politiques du droit des concentrations

3 - Le droit des concentrations, présenté comme apolitique et strictement économique, souffre des transformations profondes des marchés contemporains. À mesure que ces derniers sont caractérisés par un dynamisme accru, des ruptures technologiques fréquentes et une propension structurelle à la monopolisation, les autorités de concurrence ont graduellement modifié la nature de leurs interventions. Sans remise en cause explicite du cadre analytique dominant, les autorités de concurrence sont passées d'une logique majoritairement protectrice à des formes d'intervention beaucoup plus actives qui participent *de facto* à la structuration des marchés. Ces dernières, encore inachevées et largement implicites, sont de nature beaucoup plus normative.

Traditionnellement, le contrôle des concentrations s'inscrit dans une logique de protection des marchés, et depuis plus récemment, dans une logique de détection des opérations qui peuvent présenter un risque anticoncurrentiel [23]. Ces deux registres coexistent et visent à préserver un processus concurrentiel supposé s'autoréguler, l'intervention des autorités demeurant ciblée et exceptionnelle. Les décisions d'interdiction et la jurisprudence qui les entoure ont ainsi longtemps eu pour fonction première de stabiliser un cadre juridique prévisible en précisant des notions et critères centraux au contrôle des concentrations à travers des affaires souvent complexes. À cet égard, l'affaire *CK Telecom* est emblématique. La Commission avait initialement interdit le passage de quatre à trois acteurs sur le marché des télécommunications [24]. Cette opération interrogeait un cas de potentielle entrave significative à la concurrence effective, sans création ou renforcement d'une position dominante. Le Tribunal de l'Union européenne (TUE) et la Cour de justice de l'Union européenne (CJUE) ont par la suite été saisis [25]. Cette dernière, donnant raison à la Commission, a précisé la marge discrétionnaire importante dont disposait la Commission et le standard de preuve, fondé sur la balance des probabilités, applicable de manière générale au droit des concentrations.

Cependant, cette approche, bien qu'indispensable à la sécurité juridique, révèle progressivement ses limites en termes d'efficacité face à l'augmentation des niveaux de concentration. Les autorités et les cours ont donc aussi orienté l'intervention à travers des instruments de détection afin d'appréhender un plus grand nombre d'opérations susceptibles d'être nocives [26]. Les cas désormais bien connus : (i) des Orientations de la Commission sur l'Article 22 [27], publiées après l'affaire *Illumina / Grail* dans le but de bloquer les « *killer acquisitions* », désormais retirées [28] à la suite d'une censure de cette pratique par la CJUE [29] (ii) l'arrêt *Towercast* [30], permettant le recours à l'article 102 du TFUE dans le cas du rachat d'un concurrent et sa récente application concrète en France dans la décision *Doctolib* [31], traduisent une volonté d'étendre le champ d'application du contrôle des concentrations, en adaptant les outils sans changer le cadre.

Néanmoins, l'application de ces politiques de protection et de détection à des marchés dominés par des effets de réseau, des économies d'échelle massives et des dynamiques d'innovation rapide a mis en lumière une difficulté plus profonde : dans ces environnements, les structures de marché tendent à se figer précocement et à converger vers des situations quasiment monopolistiques. Confrontées à ces limites, les autorités ont, par touches successives,

17. LIANOS Ioannis, « Polycentric Competition Law », *Current Legal Problems*, vol. 71, n° 1, 2018.
18. KHAN Lina, « The End of Antitrust History Revisited », *Harvard Law Review*, vol. 133, 2020.
19. Pour une discussion exhaustive sur ces postulats voir LIANOS Ioannis, « Polycentric Competition Law », *Current Legal Problems*, vol. 71, n° 1, 2018.
20. LIANOS Ioannis, « Polycentric Competition Law », *Current Legal Problems*, vol. 71, n° 1, 2018. ; LIANOS Ioannis, « Polycentric Competition Law », *Current Legal Problems*, vol. 71, n° 1, 2018.
21. COYLE Daniel, DAHMEN Hanna, « The Political Economy of Competition Policy », in DEUTSCHER E., LINDEBOOM J., MAKRIS S. (dir.), *Cambridge Handbook on the Theoretical Foundations of Antitrust and Competition Law*, Cambridge, Cambridge University Press, 2024 (à paraître).
22. JUGL Martin, et al., « Spamming the Regulator : Exploring a New Lobbying Strategy in EU Competition Procedures », *Journal of Antitrust Enforcement*, vol. 12, n° 1, 2024.
23. Sur plusieurs de ces notions, v. notamment IBÁÑEZ COLOMO Pablo, *The New EU Competition Law*, Oxford, Hart Publishing, 2023.
24. Commission européenne, Décision du 11 mai 2016, Hutchison 3G UK / Telefónica UK (M.7612).
25. Tribunal de l'Union européenne, Affaire T-399/16, *CK Telecoms UK Investments Ltd c/ Commission européenne*, arrêt du 28 mai 2020. ; Cour de justice de l'Union européenne, Affaire C-376/20, *Hutchison 3G UK Ltd et Telefónica Europe plc c/ Commission européenne*, arrêt du 13 juillet 2023.
26. COLINO Sandra, CHUNG Kim, « Reshaping EU Merger Control : From Harm Detection to Harm Control », *Journal of European Competition Law & Practice*, vol. 15, n° 6, 2024..
27. Commission européenne, *Orientations de la Commission concernant l'application du mécanisme de renvoi établi à l'article 22 du règlement sur les concentrations à certaines catégories d'affaires*, Journal officiel de l'Union européenne, C 113, 31 mars 2021, p. 1.
28. Commission européenne, *Communication concernant le retrait de l'acte 2021/C 113/01*, Journal officiel de l'Union européenne, C/2024/7190, 2024.
29. Cour de justice de l'Union européenne, Affaires jointes C-611/22 et C-625/22, *Illumina Inc. et Grail LLC c/ Commission européenne*, arrêt du 3 septembre 2024.
30. CJUE, 16 mars 2023, *Towercast c/ Autorité de la concurrence et Ministère de l'Économie*, aff. C-449/21, ECLI:EU:C:2023:207.
31. Autorité de la concurrence, Décision n° 25-D-06 du 6 novembre 2025 relative à des pratiques mises en œuvre dans le secteur de la prise de rendez-vous médicaux en ligne et des solutions de téléconsultation médicale.

amorcé un glissement vers des interventions plus explicitement structurantes.

Depuis quelques années, la Commission européenne a affiné sa connaissance des marchés numériques, démontrant une volonté de confronter directement les structures de ces marchés. C'est ce que l'on désignera au cours de cet article par des interventions structurantes à savoir des interventions dont l'objet n'est pas de remédier à des atteintes ponctuelles, précises et identifiées mais d'infléchir durablement la morphologie des marchés et proche d'une logique de régulation.

La décision de la Commission *Booking / eTraveli* [32] constitue sans doute le point d'aboutissement dans une lignée de décisions entamant cette inflexion [33]. Plutôt que de s'en tenir à l'analyse classique des effets non-horizontaux, la Commission a cherché à démontrer comment la transaction allait modifier en profondeur les structures des marchés. Selon la Commission, la transaction aurait permis à Booking de renforcer sa position dominante en tant qu'agence de voyage en ligne (AVL) dans le domaine hôtelier en y adjoignant le plus gros canal d'acquisition de clients, à savoir le domaine de voyage aérien où est présent eTraveli. Booking aurait structurellement étendu son écosystème de services de voyages en mêlant ces services proches, connexes et complémentaires et augmentant les effets de réseau, les barrières à l'entrée et le développement des AVL concurrentes. En d'autres termes, la théorie développée par la Commission dans cette décision s'intéressait plus au préjudice résultant d'un changement de structure de marché (effets de réseau, image de marque, inertie de clientèle) plutôt qu'à des comportements résultant de la concentration comme ceux visant à directement exclure des concurrents.

L'analyse retenue, tout autant que la décision d'interdiction qui en découle, emporte ainsi des conséquences significatives sur la structure des marchés concernés. Elle illustre une conception du contrôle des concentrations qui ne se limite plus à prévenir des effets anticoncurrentiels identifiables à court terme, mais qui vise à empêcher l'émergence ou la consolidation de configurations de marché jugées structurellement problématiques. Cette approche se retrouve également dans le recours croissant aux décisions d'engagements, devenues plus fréquentes et plus proactives dans les marchés numériques, à mesure que la Commission a développé une expertise plus fine de ces environnements. Il en va pour preuve que de nombreuses théories du préjudice et de nombreux engagements imposés dans le cadre du contrôle des concentrations ont directement inspiré certaines dispositions du *Digital Markets Act* (DMA) [34], pièce majeure dans cette nouvelle approche.

À travers ces évolutions, le contrôle des concentrations ne se limite plus à corriger des défaillances ponctuelles, mais tend à définir les conditions mêmes de l'exercice de la concurrence. En d'autres termes, ces politiques n'ont pas pour seul objectif de préserver un processus concurrentiel préexistant, mais de l'altérer pour l'améliorer [35]. Une telle évolution n'est pas sans conséquences. Ces interventions sont susceptibles de modifier en profondeur les modèles économiques de certains opérateurs, voire de conduire à une reconceptualisation des produits et services offerts sur les marchés. En assumant, souvent implicitement, une fonction d'architecte des marchés, le droit des concentrations franchit un seuil normatif important. Cette transformation soulève alors une question centrale : celle de la légitimité des autorités de concurrence à opérer de tels choix, dès lors qu'ils dépassent la simple application technique de règles concurrentielles pour s'inscrire dans une véritable politique de l'organisation des marchés [36].

2. Reconstruction normative du droit des concentrations

A. - Une normativité en inévitable tension

4 - La rupture du consensus théorique autour du droit de la concurrence démontre bien que des choix normatifs et, partant, politiques, sont et doivent être envisagés. Cette évolution est d'autant plus manifeste que le débat ne se limite plus aux cercles d'experts et porte désormais sur des interrogations fondamentales relatives aux finalités mêmes du droit de la concurrence [37]. La remise en cause doctrinale n'est pas seulement théorique, elle a contribué à redéfinir la nature des interventions des autorités aux États-Unis comme en Europe, notamment en matière de contrôle des concentrations où l'émergence de mesures plus interventionnistes et plus structurelles renforce mécaniquement leur rôle politique.

Le mythe d'une isolation du droit de la concurrence à l'égard de toute considération normative ou politique tend à se dissiper. À mesure que s'affirme une politisation croissante de sa mise en œuvre [38], de nouvelles frontières entre droit et politique de concurrence se dessinent. Plus l'intervention des autorités touche des marchés évolutifs atteignant un large public – tels que les marchés numériques – moins leurs décisions sont perçues comme la simple application de règles : elles constituent au contraire des actes de structuration des marchés [39]. Or, la façon dont nous structurons les marchés est avant tout politique [40]. En droit des concentrations plus encore qu'ailleurs, où l'objet même de l'intervention consiste à anticiper et à corriger des configurations de marché à moyen terme, la frontière entre technique juridique et orientation normative devient poreuse.

Cette mutation se reflète également dans le discours institutionnel, au sein duquel le droit de la concurrence plus généralement se conçoit non comme une mise en œuvre du droit, mais comme un instrument au service d'objectifs plus larges et plus politiques que la protection du bien-être des consommateurs. La Lettre de mission de la Présidente von der Leyen à la Vice-Présidente Exécutive Teresa Ribera démontre bien que la concurrence est mobilisée au soutien de la compétitivité, de la durabilité, de l'équité sociale ou encore de la sécurité [41]. Ces aspirations ont été réaffirmées dans de nombreuses communications de la Commission postérieures, notamment dans le plan industriel du pacte vert [42] ou encore dans la Boussole européenne pour la compétitivité [43].

32. Commission européenne, Décision du 25 septembre 2023, *Booking Holdings / eTraveli Group* (M.10615).
33. MAGGIOLINO Marco, ZOBOLI Luca, « Knowledge Shapes Decisions : The Evolving EU Experience with Tech Giant Mergers », *GRUR Int*., 2025, vol. 74, n°12, p. 1127.
34. *Ibid*. Cet article cite par exemple les cas *Google/Fitbit* et *Apple/Shazam* comme des décisions précurseuses de l'art. 6(2) du DMA. Mais on peut citer aussi d'autres exemples comme les dispositions de l'art. 5(2) qui font directement référence à la décision *Facebook/Whatsapp*.
35. IBÁÑEZ COLOMO Pablo, *The New EU Competition Law*, Oxford, Hart Publishing, 2023, p.19.
36. TIROLE Jean, « Competition and the Industrial Challenge for the Digital Age? », *Annual Review of Economics,* 2023, vol° 15, n°1, p. 573.
37. KHAN Lina, « The End of Antitrust History Revisited », *Harvard Law Review*, 2020, vol° 133, p. 1655.
38. Pour une discussion exhaustive des indices qui tendent à montrer une imbrication plus profonde entre politique et droit des concentrations, voir BRANDENBURGER Roger, FAULL Bill et BROWNE Laura, « Merger control : The Increasing 'Politicisation' of Merger Control and the Role of Government Affairs », *Merger control Review, 2024,* vol. 15.
39. COYLE Diane, « Everything Everywhere All At Once : competition policy and industrial policy choices in an era of structural change », *Oxford Review of Economic Policy*, 2024, vol. 40, n°4, p. 718.
40. WU Tim, « The Curse of Bigness : How Corporate Giants Came to Rule the World », *Atlantic Books*, 2020, p.33.
41. VON DER LEYEN Ursula, « Lettre de mission à Teresa Ribera Rodríguez Vice-Présidente exécutive chargée d'une transition propre, juste et compétitive », 17 septembre 2024. [https ://commission.europa.eu/document/download/5b1aaee5-681f-470b-9fd5-aee14e106196_en?filename=Mission%20letter%20-%20RIBERA.pdf].
42. Commission européenne, « Un plan industriel du pacte vert pour l'ère du zéro émission nette », 1 février 2023, COM(2023) 62 final, [https ://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX :52023DC0062].
43. Commission européenne, « Boussole pour la compétitivité », 29 janvier 2025, COM/2025/30 [https ://commission.europa.eu/document/download/

Cependant, un contrôle des concentrations plus normatif et plus politique n'est pas dépourvu d'effets. Cette nature l'amène à interagir beaucoup plus largement avec d'autres sphères politiques mais également avec les objectifs d'autres politiques publiques. Cette interaction du droit de la concurrence avec d'autres politiques publiques est à la fois une manifestation d'une politisation du droit de la concurrence et une conséquence de celle-ci.

Cette politisation se manifeste, premièrement, par des formes d'instrumentalisation directe [44], notamment à travers la désignation ou la révocation de dirigeants d'autorités de concurrence. Le Royaume-Uni et les États-Unis ont récemment illustré la porosité entre indépendance institutionnelle et agendas gouvernementaux, créant pour les opérateurs une incertitude juridique accrue. Au Royaume-Uni, le congédiement du *Chairman* de la *Competition and Markets Authority* (CMA), Marcus Bokkerink, est intervenu en janvier 2025 à la suite de préoccupations du gouvernement quant à une mise en œuvre du droit de la concurrence nuisible aux politiques de croissance. Peu après, la CMA aurait ajusté ses interventions en autorisant l'acquisition de CWT par American Express, malgré des inquiétudes précédant le remaniement [45].

De manière plus frappante encore, aux Etats Unis, la *Federal Trade Commission* (FTC) a été témoin d'un limogeage de deux commissaires d'appartenance démocrate peu de temps après le départ de Lina Khan. Cette intervention du président Trump est susceptible de remettre en cause une jurisprudence de la Cour suprême quasi-centenaire [46], et d'ainsi permettre une avancée plus rapide de l'agenda républicain du Chairman de la FTC, Andrew Ferguson. Au-delà des implications majeures sur la séparation des pouvoirs et l'indépendance de la FTC, des conséquences pratiques apparaissent d'ores et déjà. En effet, cette situation place nécessairement les parties aux concentrations dans une insécurité juridique à l'égard des décisions prises par la FTC, dans l'attente d'une décision de la Cour suprême au mois de juin, qui ira probablement dans le sens du gouvernement. Elle suppose aussi des avocats une prise en compte croissante de considérations plus politiques, à l'égard desquelles ils ne sont pas toujours familiers.

Deuxièmement, l'interventionnisme des autorités de concurrence vers un rôle structurant des marchés est aussi susceptible de rencontrer l'activisme croissant des gouvernements dans d'autres politiques, particulièrement celles industrielles.

Plusieurs événements ont en effet accéléré un retour des politiques industrielles et un interventionnisme plus poussé dans les politiques économiques. Parmi les facteurs explicatifs figurent notamment la crise financière de 2008, la crise de la COVID-19 ou encore la perception selon laquelle le droit de la concurrence n'aurait pas contribué substantiellement à améliorer les performances économiques [47]. Ces interventions croissantes ont débuté dans les années 2010 et se sont accentuées récemment [48].

L'Union européenne ne fait pas exception à cette dynamique. Plusieurs initiatives transforment le rôle de l'Union, passant d'arbitre à acteur [49]. Or, traditionnellement, la logique concurrentielle fondée sur l'ouverture des marchés et le bien-être des consommateurs s'oppose à des politiques favorisant l'intervention du gouvernement en faveur de groupes ou d'industries privilégiés [50].

L'opposition frontale entre politique industrielle et droit de la concurrence s'est manifestée d'autant plus ouvertement dans le contexte du contrôle des concentrations. À ce titre, la réticence de la Commission européenne au projet de fusion entre Alstom et Siemens a ravivé le débat sur la prise en compte des politiques industrielles au titre du contrôle des concentrations [51]. La France et l'Allemagne avaient alors appelé à une réforme du contrôle des concentrations, notamment en autorisant les parties à faire appel au Conseil de l'UE pour annuler les décisions d'interdiction de la Commission afin d'assurer un pied d'égalité à des champions européens dans la concurrence internationale [52]. D'autres projets de concentration sont aujourd'hui soumis à l'analyse de la Commission, comme le projet de fusion entre Airbus, Thales et Leonardo pour leurs activités spatiales [53]. Une comparaison entre ces deux projets sera également instructive pour déceler d'éventuelles évolutions dans son analyse. Plus particulièrement, il sera intéressant de déterminer comment ces entreprises articuleront leur argumentaire autour de la concurrence internationale et de la politique industrielle dont on sait que la défense et le spatial jouent un rôle déterminant dans le contexte géopolitique actuel.

Le droit des concentrations s'affirme ainsi comme un lieu de confrontation entre diverses dynamiques politiques. Il ravive, entre autres, des tensions avec la politique industrielle car son rôle politique est souvent ignoré et, faute d'une politique générale, les reconfigurations institutionnelles ne sont pas envisagées.

B. - Reconceptualiser le droit des concentrations : ne pas abandonner le rôle structurant des autorités de concurrence

5 - Les crises de légitimité que traverse aujourd'hui le droit des concentrations [54], ainsi que les tensions croissantes avec d'autres domaines de l'action publique, pourraient mener à une tentation de repli : celle d'un retour à un contrôle plus étroit, strictement économique et prétendument apolitique. Une telle évolution serait pourtant profondément illusoire. Loin de constituer une dérive, la dimension normative et structurante du contrôle des concentrations apparaît au contraire comme une réponse nécessaire à une transformation plus profonde du capitalisme contemporain.

Le renouveau de l'analyse structurelle de l'antitrust a en effet mis en lumière la capacité des entreprises dominantes à redessiner durablement les structures de marché afin de consolider des positions de pouvoir qui excèdent largement la sphère économique [55].

10017eb1-4722-4333-add2-e0ed18105a34_en?filename=Communication_1.pdf&prefLang=fr].

44. EZRACHI Ariel, « The Political Instrumentalization of Competition and Antitrust Enforcement », 31 octobre 2025, [https ://www.promarket.org/2025/10/31/the-political-instrumentalization-of-competition-and-antitrust-enforcement/].
45. RING Steven, « UK competition watchdog cleared every merger in 2025 after government pressure », *Financial Times*, 12 janvier 2026, [https ://www.ft.com/content/e8cd577b-ea1d-4d30-8709-273310a24ea5].
46. *Humphrey's Executor v. United States,* 295 U.S. 602 (1935).
47. JENNY Frédéric, « European Industrial Policy : A Challenge and a Chance for Competition Policy », *ESSEC Business School Research Paper,* 2025.
48. Voir par exemple : EVENETT Simon, JAKUBIK Andrei, MARTIN Fernando et RUTA Michele, « The Return of Industrial Policy in Data », *IMF Working Paper*, 2024, n° 24/1.
49. Quelques exemples : la Stratégie industrielle de 2020, révisée en 2021, ou encore le Pacte vert pour l'Europe de 2019 qui engageait un investissement public massif dans certains secteurs, et qui sera poursuivi par le Pacte pour une industrie propre en 2025. Ensemble, ces deux derniers instruments semblaient initier l'idée que la politique industrielle européenne passerait par l'assouplissement des règles de concurrence et notamment des aides d'Etat.
50. SOKOL Daniel, « Tensions between Antitrust and Industrial Policy », *George Mason Law Review*, 2015, vol. 22, p. 1247.
51. *Siemens / Alstom* (M.8677), *Décision de la Commission européenne*, 6 février 2019.
52. Direction générale du Trésor, « Manifeste franco-allemand pour l'industrie », 19 février 2019 [https ://www.tresor.economie.gouv.fr/Articles/2019/02/19/manifeste-franco-allemand-pour-l-industrie].
53. PINAUD Olivier, « Airbus, Thales et l'italien Leonardo s'unissent dans les satellites pour contrer Starlink, l'entreprise d'Elon Musk », *Le Monde*, 23 octobre 2025 [https ://www.lemonde.fr/economie/article/2025/10/23/airbus-thales-et-l-italien-leonardo-se-marient-dans-les-satellites-pour-contrer-starlink_6648981_3234.html].
54. Pour n'en citer que quelques-unes : certains PDG européens, notamment Patrick Pouyanné et Roland Busch, ont adressé une lettre au Président Emmanuel Macron et au chancelier fédéral Friedrich Merz dénonçant les règles européennes comme contraignantes pour la compétitivité face aux Etats-Unis et la Chine ; les critiques de Trump à l'égard de la régulation des entreprises numériques prétendument en défaveur des entreprises américaines ; les attaques de Elon Musk, notamment après les sanctions prononcées par la Commission européenne à l'encontre de X pour manquement au DSA.
55. Voir en particulier : TEACHOUT Zephyr et KHAN Lina, « Market Structure and Political Law : A Taxonomy of Power », *Duke Journal of Constitutional Law & Public Policy*, 2014, vol. 9, p. 37.

Dans les marchés numériques en particulier, le contrôle d'infrastructures essentielles, de données ou d'écosystèmes entiers permet non seulement d'exclure des concurrents, mais aussi d'influencer les normes sociales, les flux d'information et, *in fine*, les processus démocratiques eux-mêmes [56]. Le pouvoir de marché devient ainsi un vecteur d'accès au pouvoir politique, mobilisable par le lobbying, la captation réglementaire ou l'imposition de standards privés.

En intervenant en amont sur les structures de marché, avant que les positions de pouvoir ne deviennent irréversibles, les autorités de concurrence contribuent à préserver les conditions mêmes du pluralisme économique et, indirectement, politique.

Si l'on admet que le contrôle des concentrations doit assumer cette fonction structurante et démocratique, les évolutions actuellement envisagées apparaissent alors nécessaires, mais insuffisantes. La révision en cours des lignes directrices de la Commission européenne témoigne d'une prise de conscience bienvenue, notamment par l'intégration de paramètres jusqu'à récemment marginalisés, tels que l'innovation, la résilience ou la durabilité [57]. Toutefois, ces ajustements ne remettent pas en cause le cadre plus global, n'atteignent pas un engagement critique d'un public plus vaste [58], et surtout ignorent les implications institutionnelles que fait naître une prise en compte de la dimension normative du contrôle des concentrations.

L'approche traditionnelle du contrôle des concentrations montre ses limites. Pour n'en citer que quelques-unes, elle impose aux autorités un standard de preuve élevé pour démontrer une atteinte au bien-être du consommateur – critère qui a justement été fortement critiqué. Dans ces contextes, l'exigence d'une preuve tend à favoriser les acteurs les plus puissants, seuls capables de mobiliser des ressources informationnelles et contentieuses considérables. Elle ignore aussi en partie, car trop spéculative, l'élimination de concurrents potentiels.

C'est pourquoi le recours à des présomptions structurelles réfutables mérite d'être étudié [59]. Ces présomptions pourraient s'appuyer sur des indicateurs de structures de marché comme les niveaux HHI (Indice Herfindahl-Hirschman) mais également sur les caractéristiques des entreprises concernées comme le fait actuellement le DMA pour définir les *gatekeepers*. L'instauration de présomptions réfutables d'illégalité pour les concentrations impliquant des acteurs dominants ou intervenant sur des marchés déjà fortement concentrés permettrait non seulement de rééquilibrer la charge de la preuve, mais aussi de clarifier le régime des gains d'efficacité (y compris ceux hors-marché qui ne sont actuellement pas pris en compte). Une telle approche serait cohérente avec les enseignements empiriques, qui montrent que les opérations de croissance externe des acteurs dominants tendent, dans un nombre significatif de cas, à réduire la concurrence et l'innovation [60], et avec la pratique décisionnelle qui a déjà considéré ce type de théorie du préjudice [61].

Loin de constituer une rupture radicale, ces présomptions s'inscriraient dans la logique même du contrôle des concentrations : prévenir des risques structurels avant qu'ils ne se matérialisent de manière irréversible. Elles peuvent en outre influer *ex ante* sur les stratégies de croissance externe, incitant les entreprises à privilégier l'innovation interne plutôt que l'acquisition régulière de concurrents.

Ces ajustements procéduraux et analytiques, aussi nécessaires soient-ils, doivent s'accompagner d'un changement fondamental de paradigme. Ces changements doivent amener des questions plus essentielles sur les finalités mêmes du droit des concentrations et sur l'architecture institutionnelle chargée de les poursuivre. Les réponses à la consultation publique de la Commission vont d'ailleurs en ce sens [62]. Le droit des concentrations doit-il s'arrêter au bien-être des consommateurs ? Dans quelle mesure doit-il contribuer à la résilience économique, à la transition écologique ou encore à l'équilibre des pouvoirs ? Les objectifs que l'on assigne au droit des concentrations ne peuvent être définis indépendamment de la question de savoir quelle autorité est la mieux placée pour les poursuivre, et selon quelles modalités de coordination avec les autres politiques publiques. Certains de ces objectifs recoupent des missions que d'autres organes politiques poursuivent déjà, parfois selon des logiques convergentes, parfois selon des logiques contradictoires [63]. Il n'est plus possible, dans ce contexte, de traiter les autorités de concurrence comme des institutions étanches, dont l'action se déploierait sans répercussion sur d'autres domaines de l'action publique, ni d'attendre d'elles qu'elles arbitrent seules ces tensions. De tels compromis appellent un débat d'une autre envergure que la révision des lignes directrices.

La consultation publique de la Commission, aussi utile soit-elle, ne saurait constituer ce cadre. Par sa nature technique et sectorielle, elle confine le débat aux acteurs déjà familiers du droit de la concurrence. Aussi ambitieux que cela soit, il est nécessaire d'envisager un cadre délibératif d'une autre nature capable d'amener un changement fondamental du cadre juridique et non des outils d'application, d'engager un réel débat démocratique, de poser explicitement la question des finalités du droit européen et envisager un arbitrage des tensions entre divers objectifs. Ces questions ne sont pas techniques. Elles portent sur la répartition des compétences entre institutions, sur la hiérarchie des objectifs collectifs et sur les mécanismes de responsabilité démocratique qui doivent encadrer des choix aux conséquences profondes sur l'organisation des marchés et, au-delà, sur les équilibres politiques. Elles sont donc politiques au sens plein du terme, et méritent d'être traitées comme telles.

À défaut, le risque est double : d'une part, la marginalisation progressive du droit des concentrations face à d'autres politiques comme la politique industrielle de plus en plus affirmées sans égard pour la logique concurrentielle ; d'autre part, la politisation informelle et peu contrôlée des autorités de concurrence intégrant des objectifs qu'elles n'ont pas les moyens d'arbitrer de façon légitime, préjudiciable à la sécurité juridique comme à l'indépendance des autorités. L'enjeu n'est plus seulement économique. En laissant se consolider des structures de marché génératrices de pouvoirs privés, le risque est celui d'une érosion silencieuse des équilibres démocratiques. Un contrôle des concentrations structurant, transparent et coordonné apparaît dès lors moins comme une option que comme une condition de préservation démocratique.■

56. WU Tim, « The Age of Extraction », Penguin, 2025.
57. Voir les sujets soumis à consultation publique par la Commission européenne [https ://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_en].
58. Sur ce dernier point, il est intéressant de noter que les consommateurs, les universitaires et les PME représentent ensemble une part bien moins large (environ 16%) des personnes ayant répondu à la consultation publique que les grandes entreprises (environ 33%).
59. À cet égard, il est intéressant de noter que les *Horizontal Merger Guidelines* de 2023 aux Etats-Unis ont effectivement créé ce type de présomptions sur la base de l'indice Herfindahl-Hirschman et des parts de marché.
60. LANCIERI Filippo et VALLETTI Tommaso, « Towards an effective merger review policy : a defence of rebuttable structural presumptions », *Oxford Review of Economic Policy*, 2024, vol. 40, n°4, p. 763.
61. Voir par exemple concernant la théorie du préjudice fondée sur l'innovation dans les *Dow/DuPont* (M.7932), *Décision de la Commission européenne*, 28 juillet 2017 et *Bayer / Monsanto* (M.8084), *Décision de la Commission européenne*, 29 mai 2018.
62. Voir notamment Commission européenne, « Overview of the main trends identified in the replies to the general and in-depth consultation on the review of the horizontal and the non-horizontal merger guidelines » [https ://competition-policy.ec.europa.eu/document/download/5a34ea69-5876-4cd9-a9ff-bc475cd6150e_en?filename=merger-guidelines-review-consultations-2025_overview-of-main-trends.pdf].
63. COYLE Diane, « Everything Everywhere All At Once : competition policy and industrial policy choices in an era of structural change », *Oxford Review of Economic Policy*, 2024, vol. 40, n° 4, p. 718.

Chapitre III
IA, innovation et propriété intellectuelle

Chapter III
AI, innovation and intellectual property

9 Bargaining in the Shadow of Regulation : Circular Deals and the Limits of Antitrust



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This paper argues that the rise of 'circular deals' in the AI industry reflects a new organizational form shaped by the material requirements of frontier AI development – namely access to large-scale compute, data, and capital. Unlike traditional vendor finance, these arrangements combine equity investment with long-term infrastructure commitments, embedding durable dependencies between AI developers and hyperscalers and concentrating control over scarce inputs. As a result, they reallocate strategic leverage and entrench private power over a general-purpose technology with unprecedented societal stakes. The paper contends that competition law, historically a gatekeeper of permissible coordination, offers a partial but important lever for scrutinizing these arrangements. While antitrust alone cannot supply democratic legitimacy to AI governance, it can play a strategic role within a broader regulatory framework aimed at injecting accountability into the AI economy.

1. Setting the Scene : Technological Change and Organizational Adaptation

1 - Discussions about technological change typically revolve around its outputs : new products, services, and processes that alter how we live, work, and entertain ourselves. In the context of Artificial Intelligence ('AI'), the global conversation has been dominated by topics such as the impact of AI models on systems on the labor market, [1] social and intimate relationships, [2] and our collective trajectory as a species. [3]

Nonetheless, new technologies do not only affect individual and collective actions, but also reconfigure patterns of social coordination and economic and political organization. For example, the Roman roads network has led not just to an improvement in transportation, but also to a change in organizational structures. The roads supported the expansion and management of the empire – for better and for worse [4] – through facilitating military efficiency, administrative control, and supporting trade and commerce. Recent research shows that the network of Roman roads still impacts the degree of economic activity in European regions, with greater road density leading to superior economic activity in the current times. [5] As this example highlights, technological developments can act as catalysts for new organizational forms with long-lasting consequences.

This insight has been central to organization theory for decades. In the context of economic organizations, a substantial body of literature studies how technological shifts shape firm boundaries, internal hierarchies, and inter-firm relationships. [6] In particular, Carlyss Baldwin's work offers a theoretical framework for understanding how new technologies drive organizational evolution. The starting premise is simple : 'technologies impose material requirements and provide rewards to organizations implementing the technologies'. [7] As a result, market economies tend to reward organizational forms that can find the resources required to adapt new technologies, and disadvantage those that donot. [8]

This explains, for instance, the rise of platform businesses in the 1980s in the IT sector. Due to the fast pace of technological change, individual hardware and software components were updated at a faster rhythm than the personal computers (PCs) that they were a part of. In simple words, creating an innovative keyboard or floppy disk operating system was faster and cheaper than delivering an entire new PC. This forced computer makers such as IBM and Intel to transform themselves into platforms. Whereas the meaning of the concept of platform is highly contested, [9] Baldwin defines it as an organization tasked with 'coordinating design, production, and exchange' and which features a distributed governance structure in which 'each member has the right to make certain decisions'. [10]

To adapt to the fast pace of technological progress, instead of producing everything in-house, IBM 'created an ecosystem of suppliers, distributors, and complementors making hardware and

1. E. Brynjolfsson, D. Li and L. Raymond, 'Generative AI at Work' (2025) 140(2) *Quarterly Journal of Economics* 889 (analyzing the impact of generative AI technologies on worker productivity across different demographics).
2. L.A. Kaffee, G. Pistilli and Y. Jernite, 'INTIMA : A Benchmark for Human-AI Companionship Behavior' (2025) arXiv :2508.09998v1 <http://arxiv.org/abs/2508.09998v1> (assessing companionship behavior in different language models) accessed 21 February 2026.
3. E. Yudkowsky and N. Soares, *If Anyone Builds It, Everyone Dies : Why Superhuman AI Would Kill Us All* (Little, Brown and Company 2025) (showing the risks of superhuman AI for the future of humanity).
4. J. Knapton, 'The Romans and Their Roads – The Original Small Element Pavement Technologists' (1996) in 5th International Concrete Block Paving Conference, Tel-Aviv, Israel (explaining that the Roman roads system facilitated slave trade).
5. C.-J. Dalgaard, N. Kaarsen, O. Olsson and P. Selaya, 'Roman Roads to Prosperity : Persistence and Non-Persistence of Public Infrastructure' (2022) 50(4) Journal of Comparative Economics 896-916.
6. M. L. Tushman and P.Anderson, 'Technological Discontinuities and Organizational Environments' (1986) 31(3) Administrative Science Quarterly 439-465 ; Bill McKelvey, 'Organizational Systematics : Taxonomic Lessons from Biology' (1978) 24 Management Science 1428-1440.
7. C.Y. Baldwin, *Design Rules, Volume 2 : How Technology Shapes Organizations* (MIT Press 2024) 6.
8. *ibid.*
9. For example, *see* P. Belleflamme and M. Peitz, *The Economics of Platforms : Concepts and Strategy* (Cambridge University Press 2021) 29 (defining platforms as 'entities that bring together economic agents and actively manage network effects between them') ; C. Cennamo, 'Competing in Digital Markets : A Platform-Based Perspective' (2021) 35(2) *Academy of Management Perspectives* 265, 272 (defining platforms as 'market infrastructures that directly connect sellers and buyers, and facilitate value-exchange transactions among them').
10. *ibid.*

software compatible with the PC'. [11] Consequently, the organizational structure of IBM evolved from a hierarchically-governed independent producer to that of a 'platform sponsor' tasked with recruiting and coordinating networks of firms that provided key inputs and processes. [12] As this story shows, technological advancements in the hardware and software industries gave rise to a new economic organization.

Half a century later, the current period of massive AI financing, research, and adoption showcases a new organizational shift. To understand why, following Baldwins' reasoning, we first need to look at the material requirements of AI development and deployment. Three primary resources are required : high-magnitude compute, large-scale data, and top engineering talent. [13] To tap into these resources, all of the world's top AI developers rely on external partners for capital, compute, and data access. The poster child of frontier AI research, OpenAI, is 'at the centre of a $1 trillion network of deals' involving capital in exchange for compute credits, chips, and data centre capacity coming from firms like Microsoft, Nvidia, CoreWeave, AMD and Oracle. [14] Similarly, Anthropic has deals with Amazon, Google, Microsoft and Nvidia for chips and cloud services. Consequently, rather than being exclusive, these deals create an interwoven texture of collaborations that undergird the whole AI ecosystem and tie together different layers of the AI supply chain, or, in industry parlance, the AI stack. [15]

These agreements were initially conceptualized as AI partnerships, a term meant to emphasize their collaborative nature that falls short of representing a traditional merger or acquisition. As these collaborations evolved and matured over the past three years, they have been re-conceptualized as 'circular deals'. [16] According to financial analysts, a circular deal is 'an arrangement in which one company invests in another firm that buys its products and services' with the outcome that 'the businesses effectively bind their fortunes to one another'. [17] To make matters more concrete, take the example of Microsoft's investment into OpenAI : OpenAI received $13 billion from Microsoft, but then used this money to buy cloud computing power from Microsoft. As the figure below shows, the deal is 'strangely circular' : [18]

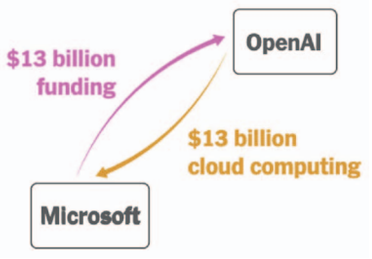


Figure 1. *Microsoft – OpenAI deal* [19]

This deal structure is becoming 'the playbook of the AI community'. [20] Cutting-edge AI companies 'receive billions from tech companies before sending those billions back to the same companies for computing power and other services,' [21] leading to 'an increasingly interconnected web of dependencies between technology manufacturers and AI start-ups'. [22]

Sam Altman, OpenAI's CEO, has acknowledged the instrumental role these deals play in supporting AI research and development. As he put it, 'there is always a lot of focus on technological innovation. What really drives a lot of progress is when people also figure out how to innovate on the financial model'. [23] This declaration reads like a vulgarization of Baldwin's framework : technological progress forces organizations to evolve and find innovative ways to access capital. Nonetheless, Altman's words miss half the point : these deals are not just about financing, but also about accessing key inputs, from computing power to data centers. Furthermore, some of the more recent deals seek to expand the available sources of supply. As of March 2025, OpenAI has a deal with CoreWeave, a data center builder, which involves a $22 billion payment for computing power in exchange for $350 million in stock, which would ultimately help OpenAI pay for this computing power. [24]

Some commentators have argued that these circular deals create dangerous dependencies. For example, if OpenAI's revenue does not grow as fast as predicted, it may not be able to honor its orders for Microsoft's cloud computing capacity. This means that Microsft would lose twice : it loses an important customer, and the value of its OpenAI shares decreases. At the same time, others have pointed out that the critiques of the circular deals fail to acknowledge the fact that the advanced chips required for frontier AI research are still scarce. Consequently, these deals are a mechanism for ensuring the continuous supply of a key input by 'pairing long-term buying commitments with financing agreements'. [25] As the example of the OpenAI – CoreWeave deals shows, some of these agreements are explicitly targeted at securing and expanding supply sources.

Despite these concerns, circular deals have helped AI start-ups grow while also cementing the position of technology providers. OpenAI is reported to aim to launch an initial public offering (IPO) as soon as the end of 2026 for a valuation of $1 trillion, despite the fact that its revenues for the past year stood at $13 billion. Nvidia, the chipmaker that powers several of the circular deals that define the AI landscape, is the world's largest company by market capitalization. The following four are also Big Tech players boasting massive AI deals – Alphabet, Apple, Microsoft, and Amazon. [26] This dynamic further confirm Baldwin's theory, namely that markets reward organizations that adapt to technological changes.

11. *ibid., 2.*
12. *ibid.*
13. T.N. Narechania and G. Sitaraman, 'An Antimonopoly Approach to Governing Artificial Intelligence' (2024) 43 *Yale Law & Policy Review* 95, 108 (offering an overview of the material resources required to build AI) ; Danielle Kost, 'Winning with AI Starts With »Talent Density« : Interview with Boris Groysberg' (Harvard Business School Working Knowledge, 14 January 2026) <http://www-.library.hbs.edu/working-knowledge/winning-with-ai-starts-with-talent-density > (highlighting the key role that top talent plays in AI development) accessed 21 February 2026.
14. R. Waters, 'How OpenAI Put Itself at the Centre of a $1tn Network of Deals' Financial Times (10 October 2025) <http://www.ft.com/content/4e39d081-ab26-4bc2-9c4c-256d766f28e2> accessed 10 January 2026.
15. Narechania and Sitaraman (*supra* n 13) ; L. M. Khan, 'Remarks at the FTC Tech Summit' (Federal Trade Commission, 25 January 2024) <http://www.ftc.gov/system/files/ftc_gov/pdf/2024.01.25-chair-khan-remarks-at-ot-tech-summit.pdf> (mentioning the 'different layers of the AI stack') accessed 21 February 2026.
16. C. Sam, R. Dottle, A. Ghosh and K. Kim, 'A Guide to the Circular Deals Underpinning the AI Boom' (Bloomberg, 22 January 2026) <http://www.bloomberg.com/graphics/2026-ai-circular-deals/> (providing an overview of these deals and the meaning of circularity) accessed 26 February 2026.
17. *ibid.*
18. J. Gu and C. Metz, 'How OpenAI Uses Complex and Circular Deals to Fuel Its Multibillion-Dollar Rise' (*New York Times*, 31 October 2025) <http://www.nytimes.com/interactive/2025/10/31/technology/openai-fundraising-deals.html> accessed 26 February 2026.
19. *ibid.*
20. Gu and Metz (*supra* n 18).
21. *ibid.*
22. Sam *et al.* (*supra* n 16).
23. Quoted in Gu and Metz (*supra* n 18).
24. *ibid.*
25. Sam *et al.* (*supra* n 16).
26. CompaniesMarketCap, 'Largest Companies by Market Capitalization' <http://companiesmarketcap.com/> accessed 10 January 2026.

2. What's New?

2 - These circular deals are more than a new chapter in the story of technological innovation driving organizational adaption. This is because what is at stake this time around is the development and deployment of AI models and systems, which are far more consequential than the new technologies of the past. Even when compared to the personal computers enabled by the 1980s platforms, AI still stands out. To begin with, both technologies belong to the class of general purpose technologies (GPTs), defined by pervasiveness across the economy, rapid improvement, and capacity to generate complementary innovations. [27] Electricity, the steam engine, and the internet are other canonical examples. But AI is distinctive even within this narrow category. Because its purpose is to automate intelligence itself, its potential applications are effectively unbounded, and so are its possible consequences, both negative and positive.

At this point, it is important to emphasize that out of all AI technologies, the most sensitive ones to date are foundation models, i.e. models trained on broad data that can be adapted to a wide range of downstream tasks. [28] However, most lay people are familiar with user-facing chatbots such as ChatGPT or Claude built on foundation models developed by OpenAI and Anthropic. As I have argued elsewhere, these models serve as the infrastructure of the AI economy, as they represent the key input that most of today's AI applications are built on. [29]

In an optimistic scenario, the circular deals of the AI industry will support the development of foundation models used to solve the climate crisis, cure cancer, and help spread literacy. [30] In a pessimistic scenario, they will feed into downstream technologies that provoke large-scale economic disruptions and potentially the extinction of our species. [31]

While predictions about the future of AI are mushrooming, their content remains largely speculative. [32] Contrastingly, it is certain that decisions regarding the direction of frontier AI research are not the product of democratic consultations but rather the choices of the world's largest companies and AI start-ups. Today, neither the US nor the EU impose any requirements on the public release or scaling of foundation models. However, there is an alternative scenario where these choices would be subject to public scrutiny or regulatory approval. [33] China has already put in place such safeguards, [34] but none of the frontier models developed by the companies at the heart of the ecosystem of circular deals are available there.

The fact that industry leaders get to decide on the trajectory of a technological shift is nothing new. We have seen the same dynamic play out with digital platforms, [35] where regulatory interventions came out only once the technology had matured and its corrosive effects on the social fabric and individual well-being were amply documented. [36] However, whereas all large-scale technological shifts impact societal welfare, the potential scale of the effects of AI development and deployment is unprecedented.

Given what is at stake, the question is what could regulators do to ensure that AI research and deployment is aligned with the public interest. A potential and underexplored answer is to intervene at the level of the organizations that research, develop, and market AI technologies. Because of the extraordinary costs, compute, and cloud demands of the AI industry, no player can engage in frontier AI research in isolation. Consequently, the circular deals described are not just a byproduct of this technological shift but rather the main enablers of frontier AI research.

The novelty of these organizations gives us a window of opportunity to question whether they should be legal in the first place, and, if so, what governance structures they should be subjected to. Nonetheless, some have argued that the AI circular deals are nothing new. This line of reasoning compares them with vendor finance, a time-tested process through which producers finance their customers to buy their products. [37] For example, airplane producer Airbus routinely helps airline customers willing to expand their fleet but unable to secure full commercial funding. [38] However, vendor financing is a credit device, where a seller extends credit to complete a transaction and earns a fixed return as a creditor. The circular deals emerging in the AI industry are structurally different, as they combine equity investment by a cloud provider (Microsoft injects $13 billion into OpenAI) with long-term commitments by the AI firm to purchase its compute services (OpenAI commits to buy cloud computing from Microsoft). Consequently, the cloud provider's return combines equity upside, recurring cloud revenue from the AI firm's contractual commitments, and the strategic advantage of anchoring that firm to its infrastructure. Even if OpenAI were to find other investors, switching to alternative computing providers comes with important barriers : AI systems are deeply integrated into a specific provider's technical infrastructure, rely on vast datasets that are costly and complex to migrate, and depend on access to specialized hardware and proprietary tools that are not easily replicated elsewhere. Moreover, cloud computing is a scarce resource, meaning that the available sources of supply are limited to a handful of players. [39]

Ultimately, AI circular deals go well beyond financing agreements that allocate capital to start-ups. They are problematic in two key respects. First, they fuel an industry whose expansion and development should be subject to public scrutiny. Second, they shape

27. N.Crafts, 'Artificial Intelligence as a General-Purpose Technology : An Historical Perspective' (2021) 37(3) Oxford Review of Economic Policy 521-536 ; T. Parikh, 'Erik Brynjolfsson : »This Could Be the Best Decade in History – or the Worst« ' Financial Times (31January 2024) <http://www.ft.com/content/b71759fe-397b-4688-bc81-b082edb25f31> accessed 10 January 2026.
28. R. Bommasani and others, 'On the Opportunities and Risks of Foundation Models' (2021) arXiv :2108.07258 <http://arxiv.org/abs/2108.07258> accessed 21 February 2026.
29. T. Groza, 'AI Foundation Models as Self-Improving Infrastructures' (presentation at the AI and Law Conference, Tübingen, 6 November 2025).
30. G. Camps-Valls *et al.*, 'Artificial Intelligence for Modeling and Understanding Extreme Weather and Climate Events' (2025) 16 Nature Communications 1919 ; Institut Curie, 'Institut Curie Partners with Google to Advance Cancer Research and Treatment Using AI' (Press release, February 12, 2025) <http://presse.curie.fr/institut-curie-partners-with-google-to-advance-cancer-research-and-treatment-using-ai/?lang=en> accessed 10 January 2026.
31. Yudkowsky and Soares (*supra* n 3).
32. For the latest viral premonition, see M. Shumer, 'Something Big Is Happening' (9 February 2026) <http://shumer.dev/something-big-is-happening> (arguing that AI will eliminate entry-level white-collar jobs within a much shorter time horizon than expected) accessed February 21 2026.
33. G. Malgieri and F. Pasquale, 'Licensing High-Risk Artificial Intelligence : Toward Ex Ante Justification for a Disruptive Technology' (2024) 52 *Computer Law & Security Review* 105899 (proposing a licensing requirement for foundation models).
34. In China, providers of general-purpose or »foundation« models must obtain regulatory approval before making them available to the public. Under the Interim Measures for the Management of Generative Artificial Intelligence Services (2023), issued by the Cyberspace Administration of China and other authorities, generative AI services offered to the public are subject to certain obligations <http://www.chinalawtranslate.com/en/generative-ai-interim/> accessed February 21 2026.
35. K. Klonick, 'The New Governors : The People, Rules, and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1598 (showing the power of social media companies to act as governors of online speech).
36. E. Bietti, 'A Genealogy of Digital Platform Regulation' (2023) 7 *Georgetown Law Technology Review* 1 (tracing the evolution of digital platform regulation).
37. N. Smith, 'Should We Worry About AI's Circular Deals? AI Companies Are Borrowing More Money to Invest More in AI' (22 October 2025) <http://www.noahpinion.blog/p/should-we-worry-about-ais-circular> accessed February 21 2026.
38. Airbus Bank, Aerospace ('Airbus Bank offers short, medium and long-term financing along the value chain of the aviation industry. We offer our clients tailor-made investment and working capital financing, e. g. for production facilities, raw materials, quality and production improvements') <http://www.airbusbank.com/en/aerospace/> accessed 21 February 2026.
39. OAI couldn't get all the computing power it wanted from Microsoft => it started signing cloud computing contracts with other companies, including Oracle and start-ups like CoreWeave. OAI agreed to pay them more than $22 billion for computing power, and received $350 million in stock, which could ultimately help pay for this computing power.

the power dynamics of the industry by creating strong dependencies that are embedded in long-term contractual agreements and commitments. Both questions touch on the same issue – that these deals represent new forms of concentration of private power that are currently unaccountable. The fact that these centers of private power are the sites for the development and deployment of the most powerful technologies ever created dramatically elevates the salience and importance of this issue.

3. What Can Be Done? Antitrust and the Limits of Permissible Cooperation

3 - Competition law may appear as an unlikely candidate for addressing AI governance challenges, and understandably so. The field is conventionally understood as a regulatory area tasked with promoting market competition and keeping market power in check. Yet, as this section argues, antitrust has long functioned (albeit implicitly) as a site where decisions about the permissibility of organizational forms are made. In the context of AI, where the stakes of organizational choice extend far beyond market outcomes, this underappreciated role is brought to the forefront.

Throughout history, novel organizational forms have been engineered primarily through private ordering. [40] Sophisticated contractual arrangements and bespoke legal entities have been devised to manage risk, allocate control among heterogeneous stakeholders, and coordinate incentives under conditions of uncertainty. Public law has largely remained in the background of these processes of organizational adaptation, either by failing to respond altogether or by accommodating innovation *ex post* through the creation of enabling legal frameworks.

Nonetheless, antitrust law has profoundly influenced how economic organizations are governed, why they are created, and in the first place, whether they are even permitted to exist. In the process of identifying and prohibiting anticompetitive conduct, antitrust law has also drawn the boundaries of permissible economic cooperation. By distinguishing between coordination that is prohibited and coordination that is tolerated, antitrust does not merely regulate behaviour within markets but also actively shapes the organizational landscape of the economy. As Sanjukta Paul put it, antitrust serves the function of 'allocating coordination rights'. [41]

To illustrate how this plays out in practice, take the following two examples – one going back to the early days of antitrust policy, and one that goes to the crux of today's platform economy. The first example concerns the most famous legal structure of economic activity : the corporation. In the early development of the corporate form, its compatibility with antitrust law was far from self-evident. In *United States v. Joint Traffic Association*, the Supreme Court had to decide whether the formation of a corporation by thirty-one railroad companies violated §1 of the Sherman Act's prohibition of contracts in restraint of trade. [42] The Court explicitly acknowledged that the arrangement 'destroy[ed] competition' and maintained prices 'above what competition might produce' – effects that were indistinguishable, in economic terms, from those of a cartel. [43] Yet it nonetheless held that the formation of corporations had never been regarded as a contract in restraint of trade.

The decisive factor was not economic substance, but legal form and institutional provenance. As Daniel Crane observes, the Court in *Joint Traffic* recognized that the liberalization of the corporate form had enabled precisely the concentration of economic power that the Sherman Act sought to address, describing 'the combination of these large and powerful corporations' as the 'alleged evil' targeted by Congress. [44] Nevertheless, the Court drew a sharp distinction between corporations and trusts. While both facilitated the accumulation of capital and the suppression of competition, trusts were viewed as creatures of private contract, whereas corporations were understood as creations of the state.

This distinction was explicit in the legislative history. As Crane documents, Senator Sherman repeatedly emphasized that Congress did not oppose corporations as such, but rather the trust as a novel form of combination that 'seeks to avoid competition' by privately unifying firms and assets under centralized control. [45] The problem, in other words, was not the scale of economic power, but its source : privately engineered coordination, unmediated by public authorization, was suspect, whereas state-sanctioned organizational forms were tolerable. Antitrust did not eliminate large-scale coordination, it merely selected the organizational vehicles through which it could legitimately occur.

This episode illustrates the role of antitrust in determining which organizational forms may lawfully concentrate economic power. The corporate form survived antitrust scrutiny not because it was competitively benign, but because it was embedded in public ordering. Antitrust, from its inception, operated not only as a law of competition, but as a gatekeeper of organizational legitimacy. This role persisted throughout decades and across antitrust jurisdictions.

A similar logic can be observed more than a century later in the 2018 *Webtaxi* decision of the Luxembourg Competition Council. [46] The case concerned a booking platform and mobile application jointly established by incumbent taxi operators to organize the provision of taxi services. Through the platform, ride requests were centrally allocated and fares were determined algorithmically, replacing bilateral price negotiation between drivers and passengers. From a doctrinal perspective, the arrangement appeared to fall squarely within the contours of a horizontal price-fixing agreement : competing taxi operators had agreed to delegate trip allocation and price-setting to a common intermediary.

The antitrust authority did not contest this characterization. It explicitly recognized the arrangement as a horizontal agreement involving centralized pricing and coordination. Yet, rather than condemning the platform as a price-fixing cartel, the Competition Council granted an exemption under the national equivalent of Article 101(3) TFEU. The decisive consideration was not the absence of coordination, but its functional role within a broader governance structure. The authority found that the platform generated efficiency gains by improving the allocation of taxi resources and access to services, that consumers received a fair share of the resulting benefits in the form of lower prices and improved service quality, and that centralized pricing was necessary to achieve these efficiencies.

Much like *Joint Traffic*, *Webtaxi* illustrates that antitrust law is repeatedly called upon to assess whether a novel economic organization should be treated as impermissible collusion or acceptable organizational innovation. The platform was tolerated because the coordination it enabled was framed as efficiency-enhancing and beneficial for consumers. Once again, antitrust functioned as a gatekeeper of organizational legitimacy, distinguishing privately harmful collusion from collective governance structures deemed to be welfare-enhancing.

40. J. W. Jenks, 'Trusts in the United States' (1892) 2(5) The Economic Journal 70 ; R. Tallarita, 'AI Is Testing the Limits of Corporate Governance' Harvard Business Review (*Harvard Business Review*, December 2023) <http://hbr.org/2023/12/ai-is-testing-the-limits-of-corporate-governance> accessed 10 January 2026.
41. S. Paul, 'Antitrust as Allocator of Coordination Rights' (2020) 67 UCLA Law Review 378.
42. United States v. Joint Traffic Association, 171 U.S. 505 (1898).
43. *ibid.*
44. *ibid.*
45. D. Crane, 'The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal' in N. R. Lamoreaux and W. J. Novak (eds.), Corporations and American Democracy (Harvard University Press 2017).
46. Luxembourg Competition Council, *Decision No 2018-FO-01, Webtaxi S.à.r.l.* (7 June 2018).

4. Bargaining in the Shadow of Regulatory Alternatives

4 - As the previous section has shown, antitrust has historically decided on the legality of new organizational forms. However, to establish whether it could be invoked to intervene in the ecosystem of circular deals, three further questions need to be tackled : first, are the issues raised by circular deals in the perimeter of antitrust policy ; second, does antitrust possess the required toolkit to intervene ; and third, given the existential stakes, is antitrust best positioned to take action?

There is no question that the circular deals described above cause significant competition concerns. Several competition authorities have already extensively documented them : increased market concentration, heightened barriers to entry, foreclosure effects, increased switching costs and the sharing of sensitive information among competitors. [47] Furthermore, alongside these orthodox competition issues, circular deals bind AI developers into revenue-driven feedback loops that prioritize short-term monetization over long-term societal considerations. Reliance on private capital and infrastructural dependence on Big Tech firms create structural incentives to increase revenues rapidly, often at the expense of social welfare. Decisions such as the relaxation of internal ethics policies to allow more commercially attractive uses of AI systems, [48] or the prioritization of automating entry-level cognitive labor to expand revenue streams, illustrate how market pressures shape AI development in ways that are at odds with broader societal interests. [49]

The harder question is whether antitrust possesses the toolkit to intervene. There are two tools of antitrust intervention against coordinated conduct – merger control and the prohibition of cartels. The lever most frequently invoked by antitrust agencies is merger control, which enables the agencies to screen acquisitions that raise competitive concerns. The standards differ across jurisdictions, with an important difference being that, in the EU, a deal needs to lead to the acquisition of control over one entity over another. Contrastingly, in the US, the question is not whether the acquirer gains decisive influence, but whether the acquisition may substantially lessen competition or tend to create a monopoly. In my previous work, I have written extensively about why the merger control framework is ill-suited to address these organizational forms. [50] Watching these deals evolve and witnessing the trajectory of the AI labs [51] at the center of these agreements has made me change my view over their merits and has made me become skeptical of the benefits of these collaborations in their current, publicly unaccountable design. Nonetheless, I still consider that merger control is a suboptimal policy lever, for the following reasons.

First, and this argument applies primarily to enforcement in the EU, the aim of these deals is not to gain control over one company or another, but rather to create strategic long-term dependencies that reduce uncertainty in the landscape of the industry and enable today's big players to ensure that they will be tomorrow's even bigger players. Microsoft does not seek to control AI, rather, it seeks to position itself as a key supplier of an existential input to one of the biggest (and growing) customers. To take this point even further, take the example of Microsoft's 2025 $10 billion investment in Anthropic, OpenAI's close competitor. The deal displays the same familiar circular structure. If Microsoft would have wanted to control OpenAI, its investment in Anthropic would make little sense. Nonetheless, if we understand the investment as an attempt by Microsoft to hedge its bets by diversifying the pool of customers for its growing cloud computing capabilities, the deal makes perfect sense.

Second, the crux of merger control is that it applies to specific transactions that it can bless or prohibit. The other antitrust policy levers also intervene in specific instances of anti-competitive conduct, but the impact of intervention is different. Let us go back to the example of the *Joint Traffic Association* case, where the US Supreme Court could have ruled that the corporate form represents an illegal cartel. The ruling would have not automatically rendered all the other corporations illegal, but it would have exposed them to private enforcement and would have strongly disincentivized any economic actors from relying on this organizational structure. The same would be true if any of today's circular deals would be found to represent an anti-competitive agreement. Indeed, these deals are not all the same, and it is unlikely that they could all be considered as illegal anti-competitive agreements. Some of them, like OpenAI's deal with CoreWeave, which aims to decrease dependency on Microsoft and expand sources of supply, may even be pro-competitive. However, any such action would send shockwaves across the entire industry.

There are many challenges to bringing such action against any or all of the circular deals. A big source of complexity is that it is hard to cabin them to the vertical / horizontal distinction that antitrust policy operates with. Because these agreements bind together different levels of the AI stack and have effects at different levels, they create a conglomerate structure tied by interlinked dependencies. Despite the fact that merger control recognizes the special case of conglomerate mergers, there is so far no doctrine of conglomerate agreements, and reducing circular deals to either horizontal or vertical effects would fail to underscore their peculiarities. Nonetheless, the existence of competitive concerns is clear. Without zooming in on the specifics on any deal, running through the checklist of Article 101(1) TFEU already reveals that many risks may be present. These deals can limit production and technical development because they lock up scarce compute resources and reduce rivals' access to this critical input. Some of them could amount to sharing sources of supply because they implicitly

47. Autorité de la concurrence (France), *Avis 24-A-05 du 28 juin 2024 relatif au fonctionnement concurrentiel du secteur de l'intelligence artificielle générative* <http://www.autoritedelaconcurrence.fr/fr/avis/relatif-au-fonctionnement-concurrentiel-du-secteur-de-lintelligence-artificielle-generative> accessed 10 January 2026 ; US Federal Trade Commission, *Partnerships Between Cloud Service Providers and AI Developers : FTC Staff Report on AI Partnerships and Investments (6(b) Study)* (January 2025) <http://www.ftc.gov/system/files/ftc_gov/pdf/p246201_aipartnerships6breport_redacted_0.pdf> accessed 10 January 2026 ; Hungarian Competition Authority, *Examining the Impact of Artificial Intelligence on Market Competition and Consumers : Study Summarising the Results of the Market Analysis no AL/234/2024* (Budapest 2024) <http://www.gvh.hu/en/resolutions/sectoral_inquiries_market_analyses/market_analyses/examining-the-impact-of-artificial-intelligence-on-market-competition-and-consumers> accessed January 10 2026.

48. L.ily Jamali and L.iv McMahon, 'ChatGPT Will Soon Allow Erotica for Verified Adults, Says OpenAI Boss' *BBC News* (*BBC News*, 15 October 2025) <http://www.bbc.com/news/articles/cpd2qv58yl5o> accessed 10 January 2026.

49. O. El Chmouri and Bloomberg, 'OpenAI Looks to Replace the Drudgery of Junior Bankers' Workload' *Fortune* (*Fortune*, October 21, 2025) <http://fortune.com/2025/10/21/openai-entry-level-banking-finance-jobs-automated/> accessed 10 January 2026.

50. T. Groza and P. Oudin, 'Big Tech-Small AI Partnerships' (Oxford Business Law Blog, 19 July 2024) <http://blogs.law.ox.ac.uk/oblb/blog-post/2024/07/big-tech-small-ai-partnerships> accessed 10 January 2026 ; T. Groza and A. Wierzbicka, 'Mergers by Other Means? AI Partnerships and the Frontiers of (Post-)Industrial Organization' in Alden Abbott and Thibault Schrepel (eds), *Artificial Intelligence and Competition Policy* (Concurrences 2025) 47.

51. An important turning point has been the gradual erosion of OpenAI's commitment to its initial charitable mission and its transformation into a for-profit entity, as well as its recent monetization practices. See L. Jamali, 'OpenAI Completes Shift to Becoming For-Profit' (BBC News, 28 October 2025) <http://www.bbc.com/news/articles/cvgv38py7ewo> (explaining OpenAI's transformation into a for-profit entity) accessed 21 February 2026 ; Agence France-Presse, 'OpenAI Will Allow Verified Adults to Use ChatGPT to Generate Erotic Content' (*The Guardian*, 14 October 2025) <http://www.theguardian.com/technology/2025/oct/14/openai-chatgpt-adult-erotic-content> (explaing that OpenAI now allows ChatGPT users to generate graphic content) accessed 21 February 2026 ; OpenAI, 'Testing Ads in ChatGPT' (9 February 2026) <http://openai.com/index/testing-ads-in-chatgpt/> (describing the new policy of rolling out ads in ChatGPT) accessed 21 February 2026.

segment leading AI developers to certain cloud providers (although this concern has diminished overtime as investments have diversified). Lastly, they may apply dissimilar conditions to similar transactions, as selected partners can receive preferential pricing and / or priority access to GPUs.

Antitrust could certainly play a key role in shaping the evolution of the AI industry, but the question that remains is whether it is rightly positioned to do so. The concern we are facing is not that AI development and deployment is happening, but rather, that it is largely unaccountable to the public. It is true that, as the previous section has shown, antitrust's foundational objective was to inject accountability into concentrations of economic power and to prevent the emergence of unaccountable private dominance. Nonetheless, we need to distinguish between what antitrust intervention can and cannot do. If our goal was to stop AI research and deployment altogether by rendering circular deals illegal, then the prohibition of anti-competitive agreements would be a good way forward. My position is different, as I believe that frontier AI research can lead to significant societal improvements if steered in the right direction. Consequently, I would argue that the goal is not render circular deals illegal, but to make sure that the research and products they finance are accountable to the public.

If democratic accountability is to be meaningfully injected into AI development, antitrust cannot bear this responsibility alone. Other policy instruments – sector-specific regulation, institutional oversight, and public-law constraints on technological development – are better suited to addressing questions of societal purpose, risk distribution, and collective values. The challenge, therefore, is not merely to adapt antitrust doctrine to these new organizational structures, but to recognize its limits and situate it within a broader governance framework capable of addressing the exceptional stakes posed by AI.

Nonetheless, the threat of antitrust intervention can serve as a powerful rhetorical device. As Novak put it, we are 'continuously bargaining in the shadow of the possibility of future legislation and regulation'. [52] In this sense, the threat of using the prohibition of cartels as a policy lever is a powerful weapon : if the circular deals that enable today's frontier AI research are deemed incompatible with antitrust policy, the entire structure of the industry is threatened. We could use this threat as a bargaining chip and instead require less intrusive forms of democratic accountability, such as the imposition of licensing requirements before the introduction of new features or the placement on the market of more powerful models. Whereas today such measures may sound strongly interventionist, when compared with the threat of illegality, they sound rather moderate.

Conclusion

5 - Antitrust is one of the few legal frameworks that can interrogate and constrain novel forms of coordination. Its role has always extended beyond policing anti-competitive conduct to delimiting permissible organizational forms, and circular deals sit squarely in that tradition. However, the most plausible path is not to treat antitrust as a substitute for AI governance, but as a lever within it : the credible threat of intervention can shift bargaining power and help secure more direct accountability mechanisms – licensing, oversight, and transparency – before these organizational structures harden into the default constitution of an unaccountable AI economy.■

52. W. J. Novak, '4. The Public Utility Idea and the Origins of Modern Business Regulation' in Corporations and American Democracy 139, 162.

10 Challenges for Competition Policy in Pharmaceutical Markets



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Introduction

1 - Pharmaceuticals are an essential component of healthcare. Innovations in many areas – antibiotics and antivirals for infectious diseases, insulins and now GLP-1 inhibitors for diabetes, immunotherapies for cancers – have extended life expectancy and increased quality of life. However, the prices of innovative therapies have long been controversial from an international perspective, even among developed countries : in the United States (US), prices for on-patent drugs are several times higher than those in other high-income countries, such as France, Germany, Japan, and the United Kingdom. [1] Despite having lower prices than the US, European countries devote a larger share of their healthcare budgets to pharmaceuticals, and their costs are a salient budgetary issue. [2] This article considers how competition authorities in Europe and the US have approached pharmaceutical markets.

Pharmaceutical markets are vulnerable to market failures for various reasons. The composition of a pharmaceutical product is difficult for a patient or consumer to determine from physical inspection alone ; the positive and negative effects from its consumption are even more challenging to understand. This information asymmetry can result in tragic outcomes, such as the use of thalidomide by pregnant women in the 1950s, and motivates the creation of regulatory agencies like the Food and Drug Administration (FDA) in the United States or the European Medicines Agency (EMA) in Europe. [3] These agencies grant marketing authorizations to the producer of a pharmaceutical treatment upon sufficient clinical trial data to establish safety and efficacy.

The provision of that information leads to another potential market failure. Pharmaceutical innovations usually require substantial investments in research and development (R&D) both to discover or create a molecule but also to produce the necessary information on its effects. Information is non-rivalrous, so once a drug candidate's safety and efficacy are established, competing firms can easily copy it. An innovator, expecting margins to be competed away, invests less as a result. Intellectual property rights (IP rights), such as patents or data exclusivity, address this market failure by shielding the innovator from competition for a fixed term. [4]

Even with a regulator's imprimatur, a patient (consumer) faces information asymmetries : they are unlikely to know what treatment is best for their condition. Most drugs are therefore only available by obtaining an expert's (doctor's) prescription. Because of the potential conflict-of-interest in this principal-agent relationship, pharmacies – not doctors – sell the drugs prescribed. In addition, most patients in the US and Europe benefit from insurance coverage and do not face the full price of the treatments they consume. Economic models suggest that because both doctors and patients are less sensitive to price, the producer of a treatment is able to set a higher price. [5] In the case of innovative products protected by patents and other IP rights, the producer has substantial market power to demand a high price and consumption will be high due to insurance coverage. Consequently, most governments that provide that insurance seek to restrain drug prices with a variety of regulatory tools. [6]

Price regulation, however, presents numerous challenges. Should the government seek to minimize its current expenditures or maximize access for patients, it will be tempted to fix prices close to the marginal cost of producing the treatment. The producer would then be unable to recoup the sunk costs incurred to develop it. Pharmaceutical firms, anticipating this outcome, will invest less in innovation. A forward-looking government that seeks to reward innovation may be willing to accept higher prices, so that an innovator sees a return on R&D, but in practice may lack commitment to this policy. Faced with budget pressures, term-limited politicians are likely to endorse policies that favor the present over the future, i.e. setting lower prices today at the cost of losing future innovation. In addition, the market for most pharmaceutical treatments is global. Thus, a small country has little influence on global profits, and can therefore free-ride on the incentives created elsewhere. [7]

Attempts to address each of these market failures thus introduce other complications. Entry barriers created by IP rights and regulatory requirements necessarily limit competition. Insurance coverage contributes to inelastic demand. Price regulation to countervail market power usually attempts to balance access and affordability, but the inability of policymakers to commit to dynamic rewards and international free-riding are likely to result in underinvestment in innovation. [8] This article examines three critical areas where policy could enhance competition and innovation : encouraging price discrimination for innovative products, generic competition for off-patent medicines, and careful use of competition laws to avoid undercutting innovation.

1. A.W. Mulcahy *et al.*, 'International Prescription Drug Price Comparisons' (2021) RAND Corporation, 12-14 ; M. Kyle, 'Lessons for the US from Pharmaceutical Regulation Abroad' (2025) 39(2) Journal of Economic Perspectives 53, 53.
2. OECD, '*Health at a Glance 2025 : OECD Indicators'*, (OECD Publishing 2025) <https://doi.org/10.1787/8f9e3f98-en\> accessed 19 February 2026.
3. M. Kyle, *supra* n. 53.
4. M. Kyle, 'Potential and Effective Exclusivity of New Drugs in Europe' *in* J. Barnett, B. Heiden (eds) *Bringing Medicines to Life : How Intellectual Property Enables Innovation in the Life Sciences* (Cambridge University Press, forthcoming 2026).
5. Kyle, *supra* n. 1, 55.
6. *ibid*.
7. Kyle, *supra* n. 1, 57 ; G. Grossman, E. Lai, 'Parallel imports and price controls' (2008) 39(2) RAND Journal of Economics 378, 381.
8. Kyle, *supra* n. 1, 55.

1. Price Discrimination for Innovative Products

2 - The term 'price discrimination' or differential pricing in economics refers to the use of different prices for different buyers, according to the willingness-to-pay or demand elasticity of different buyers. Usually, price discrimination is more efficient (as defined in economics) and yields higher total welfare than uniform pricing. For example, a firm that can sell a treatment at $100 in France and the same treatment at $1 in South Africa will generate more sales and profits than if it had to set the same price in both countries, and more patients – especially in South Africa – will have access to the treatment. While price discrimination improves overall welfare, not everyone is better off in the short run : drug firms will want to charge higher prices in rich countries than in poorer countries. Because pharmaceutical firms invest a high percentage of their sales in R&D, [9] all countries potentially benefit from future innovative treatments that result from this investment. [10]

Price discrimination is feasible only if sellers can prevent arbitrage between countries, often relying on regulatory barriers or patent law to do so. The European Union's (EU) goal of creating a single market has led to the elimination of many such barriers between member states. In particular, parallel trade arises from the EU's foundational principle of free movement of goods, as enshrined in Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU). Once a product is lawfully marketed in one Member State, the doctrine of exhaustion of IP rights prevents the manufacturer from blocking its resale elsewhere in the EU. [11] A firm with patents in Germany cannot rely on its German patents to block the sale of its products in Germany by a third party that has purchased the products in France, for example, because the patent rights are exhausted once the product is sold in any EU country. This allows parallel traders to purchase products in countries with low prices and resell them where prices are higher. The possibility of parallel trade affects the pricing strategies of many firms, and in many cases results in less price variation across EU markets. [12]

An important difference between pharmaceuticals and other goods is that drug prices are negotiated between firms and national governments. Indeed, healthcare is a national competence in the EU, and this is inconsistent with healthcare goods and services having a single, pan-EU market. Wealth per capita varies considerably across countries, as does willingness-to-pay ; negotiated prices can therefore be very different. The EU-level policy on exhaustion of IP rights, free movement of goods and parallel trade undermines the ability of pharmaceutical firms to maintain this price discrimination. [13]

While many other products may be similarly affected, a key difference with pharmaceuticals is the role of national governments in setting regulated prices. An electronics producer, for example, is free to adjust prices and may choose to eliminate parallel trade entirely by setting a uniform price that maximizes its profits across all of Europe – though this uniform price usually results in lower profits than would be the case if it could price discriminate. In contrast, the manufacturer of a drug cannot unilaterally raise its price to reduce arbitrage opportunities. If these firms were to supply unlimited volumes to countries with the lowest prices, the European price would converge to the minimum across Europe, representing an even larger profit loss.

Because of the negative impact on profits, many pharmaceutical firms devised strategies to limit parallel trade. [14] Competition enforcers consider many of these to be illegal. Attempts by manufacturers to restrict parallel exports – such as through dual pricing or supply quotas – have been scrutinized under Article 101 TFEU, with the Commission treating such restrictions as 'hard-core' infringements. [15] In *GlaxoSmithKline*, the European Commission found that dual pricing systems designed to limit parallel trade violated competition law, a position largely upheld by the General Court of the Court of Justice of the European Union (CJEU). [16] Similarly, in *Sot. Lélos kai Sia*, the CJEU held that supply restrictions aimed at impeding parallel exports could constitute an abuse of dominance under Article 102 TFEU. [17]

Country-level policies can also weaken price discrimination. Reference pricing involves the use of the price of a product in other countries as a criterion in setting the domestic price. 'Fairness' is a common justification for this policy : many voters and/or their representatives dislike the idea that one's neighbors are getting a better deal than the local taxpayer. [18] Indeed, proposals by the Trump administration to cap the US price at European levels reflect this perception. [19]

The consequence of reference pricing, unfortunately, is reduced access to innovative treatments in EU countries with relatively low-income levels. While drug firms might be willing to sell at very low prices in countries like Bulgaria and Romania, doing so has the effect of undercutting profits in the rest of Europe. Parallel traders displace their sales in countries with higher prices, or countries with higher income levels use external reference pricing to set lower prices. [20] Consequently, drug firms delay launch or forgo it entirely in those countries with lower prices. The introduction of a reference pricing policy in the US may have similarly negative effects on access, even in large EU countries. For example, the CEO of Pfizer explicitly stated : 'When [we] do the math, shall we reduce the US price to France's level or stop supplying France? We [will] stop supplying France.' [21]

Policies that undercut price discrimination reduce both static and dynamic welfare. While some countries (those with high prices under differential pricing) may benefit from a uniform price, payers or patients in countries where prices would be low under differential pricing pay more. For example, the GLP-1 treatment semaglutide in 2023 was sold at $83 in France and $203 in the Netherlands. Under uniform pricing, the French would probably pay more while the Dutch would pay less. Moreover, in many cases, firms prefer to maintain high prices in a subset of countries while delaying or forgoing launch of innovative products in others – in which case no party is better off than under differential pricing, and the EU is no closer to a 'single market' either because products are not available in all member states. Fewer than one-fifth of the products approved by the EMA between 2019-2022 had been

9. Publicly-traded US pharmaceutical firms spent an average of 19% of net sales on R&D, compared to an average of 3% for the S&P Total Market Index. Congressional Budget Office, 'Research and Development in the Pharmaceutical Industry' (2021) <http://www.cbo.gov/publication/57126> accessed 19 February 2026.
10. Kyle, *supra* n. 1, 57.
11. Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton* [2008] ECR I-7139, §78.
12. M. Kyle, 'Strategic Responses to Parallel Trade' (2011) 11(2) The B.E. Journal of Economic Analysis & Policy, Article 2, 1.
13. *ibid*.
14. *ibid*.
15. European Commission, 2022/C 248/01 *Guidelines on Vertical Constraints* [2022], §209.
16. European Commission, 2001/791/EC *Glaxo Wellcome* [2001], §189.
17. *Sot. Lélos kai Sia, supra* n. 11, §78.
18. Kyle, *supra* n. 1, 63.
19. The White House, 'Fact Sheet : President Donald J. Trump Launches TrumpRx-.gov to Bring Lower Drug Prices to American Patients' (5 February 2026) <http://www.whitehouse.gov/fact-sheets/2026/02/fact-sheet-president-donald-j-trump-launches-trumprx-gov-to-bring-lower-drug-prices-to-american-patients/> accessed 11 February 2026.
20. L. Maini, F. Pammolli, 'Reference Pricing as a Deterrent to Entry : Evidence from the European Pharmaceutical Market' (2023) 15(2) American Economic Journal : Microeconomics 345, 345.
21. P. Temple-West, 'US drugmakers threaten to withhold products from Europe over prices' (Financial Times, 18 January 2026) <http://www.ft.com/content/098813a5-c35f-45b6-b0b4-0bbdea549cce> accessed 11 February 2026.

launched in the Baltics and Romania by 2024. [22] Given that profits from innovation are lower, the revenues available to invest in R&D and the incentive to do so are also lower. This means that fewer innovative products are developed, with negative consequences for competition in the future as well. [23]

Carving out an exception for pharmaceuticals from free movement of goods would eliminate the negative effects of parallel trade. While inconsistent with one pillar of the European single market, an exception already exists : healthcare, including pharmaceuticals, is a national competence. Prices for pharmaceuticals are negotiated at the national or subnational levels, not the European level. National policy choices have unfortunately also reduced the scope for lowering prices in poorer Member States, and by limiting the availability of innovative products there, reduced competition. Price negotiations should consider the value of the innovation to the domestic market, but there is little justification for referencing the price in other countries when doing so harms those Member States. Though not in the scope of competition law, reform of these policies would enhance competition both in the short and long run by encouraging the development and wide launch of innovative products. [24]

2. Generic Competition for Off-Patent Products

3 - Patents and other IP rights are important tools of innovation policy, but critically, they are of limited duration. The threat of losing the market power afforded by patents induces firms to continue investing and improving. In addition, price competition following patent expiration has the potential to generate budgetary savings that can be used for more recent pharmaceutical innovations or other priorities, such as expansion of healthcare benefits or indeed any other category of government spending. [25]

The US experience is illustrative. The Hatch-Waxman Act (1984) facilitated generic entry by creating an easier regulatory pathway to approval, allowing producers to show only that their products are bioequivalent to the original product rather than conducting additional clinical trials. It also created an incentive for challenging patents on innovator products, known as the 'Paragraph IV' challenge. Most US states passed laws requiring prescriptions to be filled by generics when available, and most payers use pricing structures to encourage patients to substitute generics for the originator version. In 2025, over 85% of prescriptions in the US were filled by generics, and intense competition has resulted in average prices that are lower than in European markets. [26]

Regulatory barriers in Europe are broadly similar to those in the US. Both patents and regulatory exclusivity limit generic entry for some period. Unlike the US, the EU does not have a formal system of patent linkage, meaning that regulatory approval of generics is not contingent on the expiry or invalidation of relevant patents. There is no 'Paragraph IV' equivalent, so any generic firm that does challenge patents removes the barrier for itself as well as for other generic firms, reducing the incentive to incur the legal costs of doing so. Patent owners can apply for supplementary protection certificates (SPCs) that extend the period of patent protection. SPCs are granted by national patent offices, and information about their status – where they are in force, and when they expire – is not centralized. Thus, there is more uncertainty about patent barriers at the national level in the EU than exists in the US, though it is unclear how much of an impediment to generic entry this represents. [27]

More importantly, incentives for generic entry and use vary across Member States. Policies such as mandatory generic substitution, internal reference pricing, and centralized procurement have been effective in promoting generic uptake in countries like Germany and Sweden. However, relatively low branded drug prices – due to price regulation – can make generic entry less attractive, particularly in smaller or lower-income markets. Because of generous insurance coverage (i.e., relatively small out-of-pocket payments) of patients, many prefer to use branded products even when a generic one is available. Pharmacists in many countries also have little interest in promoting the use of generics. [28]

In Europe, while prices of originator products are lower than in the US, generic entry is less common, and price competition is less vigorous. The effective market life of pharmaceuticals in Europe remains similar to that in the US, but with significant variation across Member States. Delays in both originator and generic launches are often attributable to national price regulation and market attractiveness, rather than to intellectual property barriers. [29]

3. Competition Policy Enforcement in Pharmaceuticals

4 - Competition policy in pharmaceuticals must balance the imperative to prevent abuses of market power and the long-run interest in rewarding innovation – recognizing that a key policy lever for doing so is the granting of IP rights, which explicitly allow their owners to block (some) competition. Within the EU, the situation is further complicated by market power on the buyer side, as governments negotiate or set prices, and by conflicting policies around the single market and national competencies.

Over the last two decades, competition authorities have focused their efforts on two main areas. The first involves patenting. The European Commission's 2009 Pharmaceutical Sector Inquiry highlighted the use of 'patent thickets' and 'evergreening' strategies to delay generic competition. [30] These result from efforts to patent not the molecule itself (i.e., drug product or drug substance patents), but its methods of manufacturing, additional uses, salts, etc. Because such patent applications are filed later than the initial patents, they expire later, leading to concerns that the total period of market exclusivity enjoyed by an innovator exceeds what was intended by policymakers. [31] Another criticism is that these patents represent less important innovations ; this is an issue with the patent system generally, in that the term of protection is fixed at 20 years from the application regardless of the value of the innovation. Secondary patents do tend to be weaker than primary, in the sense that they can be invented around by competitors or invalidated. However, these issues are appropriately addressed by the relevant patent office (in rejecting patent applications that are invalid) or changes to the patent system at the national or regional level (in adjusting the patent term or inventive step requirement, for example). [32]

The European Patent Office (EPO) applies stricter standards than its US counterpart. In an analysis comparing US and European pharmaceutical patents, secondary patents are more likely to be rejected and abandoned in Europe. [33] As a result, the number of patents protecting innovator products in Europe is smaller than in

22. EFPIA, 'EFPIA Patients W.A.I.T. Indicator 2023 Survey' (2024) <http://www.efpia.eu/media/vtapbere/efpia-patient-wait-indicator-2024.pdf> accessed 19 February 2026.
23. Kyle, *supra* n. 1, 55.
24. *ibid*.
25. Kyle, *supra* n. 4.
26. Mulcahy, *supra* n. 1, 14-16.
27. Kyle, *supra* n. 4.
28. Kyle, *supra* n. 4.
29. *ibid*, 16-18 ; see also Table 4 and Figure 7.
30. European Commission, 'Pharmaceutical Sector Inquiry : Final Report,' SEC(2009) 952, 8 July 2009, 192.
31. *ibid* ; Kyle, *supra* n. 4.
32. *ibid*.
33. *ibid* 21-22.

the US, suggesting that patent-related barriers to generic entry are lower. However, as in the US, European competition authorities have pursued abuses of the patent system. In the *AstraZeneca* case, the General Court of the CJEU found that misuse of the patent system and regulatory procedures to delay generic entry constituted an abuse of dominance under Article 102 TFEU. [34]

The European Commission has also targeted patent settlements between originator and generic firms, particularly those involving reverse payments or 'pay-for-delay'. In *Lundbeck* and *Perindopril (Servier)* the Commission established that such agreements can restrict competition by delaying generic entry, even in the absence of a finding that the underlying patents are invalid or not infringed, a violation of Article 101 TFEU. [35] The General Court's judgments have largely upheld the Commission's approach, emphasizing the need to assess the actual or potential competitive effects of such settlements.

The second main area of competition policy enforcement involves interference with the free movement of goods. As explained above, parallel trade generally lowers manufacturers' profits. In response, they have attempted to counter parallel trade through supply quotas, dual pricing, or contractual restrictions. The CJEU jurisprudence, from *de Peijper* onwards, has consistently prioritized the principle of exhaustion of IP rights, limiting the ability of manufacturers to segment markets within the EU. [36] The Commission has treated attempts to restrict parallel exports as serious infringements of competition law, as in the *GlaxoSmithKline* and *Sot. Lélos kai Sia* cases. [37] Competition from parallel imports is significant in only a few countries, and there is little evidence that it benefits patients or even large payers. [38] In this situation, enforcement actions by competition authorities may have worsened the competitive situation in countries that face delayed launch or no access at all to some treatments.

In recent years, national competition authorities and the European Commission have pursued firms for violating laws on excessive pricing. These include Aspen (European Commission), [39] Pfizer/Flynn (UK), [40] and CD Pharma (Denmark). [41] Such cases, which involve products with dramatic price increases for essential medicines and can constitute an abuse of dominance under Article 102(a) TFEU. [42] These cases typically rely on cost-plus and benchmarking analyses to assess whether prices are 'excessive' and 'unfair.' Thus far, these have concerned off-patent rather than innovative treatments, and given the slow speed at which these cases move, correcting the root causes of high prices (insufficient generic entry or abuse of regulatory loopholes) would likely be more effective. Application of similar analyses to on-patent products would risk both innovation incentives and access. Pharmaceuticals usually have marginal costs of production that are low relative to the costs of development. Excessive pricing laws that limit markups over marginal costs in this context would drastically reduce an innovator's ability to recoup its R&D investment. Benchmarking prices to those in other countries undermines differential pricing, the consequences of which are explained above. In addition, public payers generally negotiate the prices of on-patent products with their producers. It is unlikely that a competition authority is better positioned to evaluate the appropriate price of a pharmaceutical treatment than the ministry of health or other agency responsible for overseeing this market. [43]

Conclusion

5 - Competition policy in pharmaceutical markets faces the dual challenge of promoting access and affordability while preserving incentives for innovation. Some of the key barriers to access are out of the purview of competition law, such as the use of reference pricing. Competition authorities can nevertheless be helpful in identifying persistent barriers to generic entry, even if they lack the tools to address them. However, some types of enforcement – concerning parallel trade and excessive pricing – risk harming both access and innovation. Ultimately, effective competition policy must be tailored to the specificities of pharmaceutical markets, balancing static (access to innovation today) and dynamic (incentives to innovate in the future) efficiency to ensure both affordable access and continued innovation.■

34. Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-02805.
35. European Commission, Case AT.39226 *Lundbeck* (2013) ; European Commission, Case AT.39612 *Perindopril (Servier)* (2014).
36. *Sot. Lélos kai Sia, supra* n. 11, §78 ; Case 104/75 *SA de Peijper* [1976] ECR 613.
37. European Commission, 2001/791/EC *Glaxo Wellcome* (2001), §189 ; Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia, supra* n. 11, §78.
38. Kyle, *supra* n. 11, 1.
39. European Commission, Case AT.40394 Aspen (2021).
40. United Kingdom, Decision of the Competition and Markets Authority, Case CE/9742-13 Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK [2016].
41. Denmark, Danish Competition Council, Case 14/08469 *CD Pharma AB* [2018].
42. European Commission, Case AT.40394 *Aspen* (2021) ; United Kingdom, Decision of the Competition and Markets Authority, Case CE/9742-13 *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK.* [2016] ; Denmark, Danish Competition Council, Case 14/08469 *CD Pharma AB* [2018].
43. Kyle, *supra* n. 1, 53.

11 Challenges of subject matter jurisdiction and expertise on the IP-Competition Interface

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Introduction

1 - Legal doctrine neither emerges nor exists independently of the institutions that create and implement it. Shaped by few fundamental legislative provisions, competition law has effectively adopted a model of lawmaking in the common law tradition. Similar points can be made about most parts of intellectual property (IP) law, though their more detailed statutory foundation means that this has happened in a less extreme manner – the emergence of new technology has however consistently required statutory and common law adaptation.

This article critically assesses the way that UK and EU 'common law' institutions are set-up at the interface between IP and competition law ('the Interface'). Beyond the oscillation between the dominance of one set of norms above the other over time (a story much better told elsewhere), [1] the institutional set-up has enabled the bifurcation of competition and IP law as distinct sets of norms which can be assessed in an interrelated manner only in certain types of proceedings.

This short article takes a birds-eye view of how IP and competition law's institutional bifurcation came about and diagnoses two issues with this institutional set-up : first, the issue of limited subject matter jurisdiction ; and second, the issue of judicial expertise. Institutional reform could put the Interface on a firmer footing in the future in providing sufficient expertise, but the challenge of limited subject matter jurisdiction will be difficult to surmount.

1. Some points of history

2 - First, a trite but necessary point. As a matter of legal doctrine, IP and competition law are separate, though evidently interfacing, areas of law. Yet, the constriction of competition by intellectual property rights (IPRs) is the very principle by which IP operates. The combination of these two facts gives rise to the Interface.

Naturally, the conditions under which IPRs subsist and are granted – as well as the breadth and length of those rights – is determinative of the market power they grant. Accordingly, this is where the focus lies in the wake of the establishment of an IP system. Only with time came the recognition that grants may be abused, in the sense that the owner's rights may have to be constrained in light of the actions they have decided to take, or not to take, in respect of those rights. In the United States, in several pre-*Sherman Act* (1890) patent licensing cases, patentees were accused of unlawfully extending their monopoly beyond the statutory term. Among the resultant principles were that the patent grant is limited by the first sale doctrine [2] and ends specifically when title is passed to a purchaser. [3] Similarly, abuses could be addressed by compulsory licensing. For example, in the early 20th century English case of *Re Cathro's Application*, a private party applied for a compulsory licence in respect of three patents relating to screen grid thermionic valves under section 27 of the Patents and Designs Act 1907 (as amended subsequently). [4] Under the pre-TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights Agreement) compulsory licensing regime, the failure to work a patent in the jurisdiction constituted a clear ground for issuing a compulsory licence under sub-section (2) of section 27. Compulsory licensing addresses what is fundamentally a problem of competition economics : a patentee can refuse to work on an invention that would yield welfare improvements and can bar another from working on the invention through enforcement of the patent. The imposition of a compulsory licence cures this problem by allowing a claimant to work on the invention while compensating the inventor with a licence fee.

However, some years later, IP law seemed to reach its limits ; competition law started to step in as the dominant paradigm in restraining the exercise of market power through IPRs. The case I see as emblematic of this development is *Motion Picture Patents*, a United States Supreme Court case involving the Edison Trust's control over film projectors. [5] In prior case law such as *AB Dick*, the Supreme Court had allowed a claim for contributory infringement, in a context which enforced the tying of unpatented stationary supplies to the use of a patented rotary mimeograph (a predecessor of the photocopier). [6] The Clayton Act came to the rescue in *Motion Picture Patents*, with the Supreme Court holding that section 3 of the *Clayton Act* prohibited the tying of film stock to the sale of film projectors by means of notices affixed to said projectors. The boundaries of IP law no longer sufficed to police certain abuses, at least those relating to the tying of unpatented goods to patented goods. IP law becoming insufficient to police abuse is the genesis of the modern IP-Competition Interface.

2. Subject Matter Jurisdiction

3 - Today, the dominance of the competition law paradigm on the Interface is self-evident to any student or practitioner. In Europe, when we speak of seminal decisions on the IP-Competition Interface, much is often made of the *Magill* line of decisions by the Court of Justice of the European Union (Court of Justice) on refusals to

1. See e.g. A Heinemann, *Immaterialgüterschutz in der Wettbewerbsordnung : Eine grundlagenorientierte Untersuchung zum Kartellrecht des Geistigen Eigentums* (Mohr Siebeck 2002).
2. *Bloomer v McQuewan* 55 US 539 (1852) ; *Mitchell v Hawley* 83 US (16 Wall) 544 (1872).
3. *Adams v Burke* 84 US (17 Wall) 453 (1873)
4. *Re Cathro's Application* (1934) 51 RPC 75. Screen grid thermionic valves improve the performance and stability of radio frequency amplifiers.
5. *Motion Picture Patents Co v Universal Film Co* 243 US 502 (1917)
6. *Henry v AB Dick Co* 224 US 1 (1912).

supply under Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the abuse of a dominant market position, a jurisprudence now culminating in *Google Shopping* and *Android Auto*. [7] There are additional lines of case law in which the Court of Justice has set out its approach to the Interface, occasionally with more clarity. The case law on vertical restraints from *Coditel* to *Valve* merits study, as does the jurisprudence on the fundamental right to (intellectual) property in the context of competition law enforcement. [8] A comprehensive analysis of this exceeds the scope of this piece, but let it be said here that the Court of Justice has consistently refrained from allowing IP norms to limit its powers.

While I attempt not to retread well-trodden ground, some points are necessary to illustrate a specific aspect of *Magill*. *Magill* concerned a claim under Article 102 TFEU by an economic operator seeking to enter the market for TV magazines. To effectively compete in this market, it was necessary to include the listings for TV programmes (timings, shows, etc.) in the magazine. The then-dominant channels in Northern Ireland asserted copyright over such listings. That copyright subsisted in TV listings as a matter of Northern Irish law is, to put it mildly, perhaps surprising as a matter of copyright law. Some have pointed to this fact as a motivating factor for the ruling in *Magill*. [9] At a minimum, the protection granted was certainly wider than in other European jurisdictions. [10] At the time of the decision of the Commission, there had also been no adjudication of this question in the Northern Irish Courts. The High Court of Northern Ireland subsequently held that the copyright did subsist. Two points arise from this judgment : first, there was no prospect that the subsistence question could be determined in the context of the European courts, due to the lack of subject matter jurisdiction over questions of copyright subsistence ; in short, European competition law must take what is given by national IP law – almost paradoxically, at the same time, national courts are frequently dictated competition policy by the European Courts. It is often said that hard cases lead to bad law ; this is true not just of hard cases, but also of cases where one may reach the correct result only by going down the wrong path. Though this is not to suggest that the right path can be unlocked by doubting decisions of national courts. Where a decision on the merits of subsistence has been handed down by a competent court, it would obviously be wrong to revisit the question outside of an appeal as a matter of *res judicata*.

Second, the Commission and the Court of Justice had to examine the legitimacy of a refusal to license in the absence of safe facts on the issue of IP protection. It is now increasingly recognised that appeals should not be determined on hypothetical facts, but the institutional set-up of IP and competition law makes hypothetical considerations of subsistence and infringement questions at times unavoidable.

At its core, decisions by European courts must be read in light of the Court of Justice 's lack of subject matter jurisdiction over vast swathes of IP law, both in relation to validity and questions of infringement. A similar gap exists at the enforcement level : competition agencies have no institutional role in IP matters and cannot adjudicate on the validity and infringement of rights. While national courts generally have jurisdiction to resolve all IP and competition legal issues submitted before it, European legal case law originating from the Court of Justice has led national courts to adopt the European IP-Competition bifurcation.

In contrast and in principle, the United States has a more suitable institutional arrangement. The Federal Courts have exclusive jurisdiction over IP matters and federal antitrust laws. The spanner in the works has instead been an utter failure to shape a coherent policy across circuits and a Supreme Court disinterested in the Interface and unwilling to resolve severe circuit splits. For example, it remains unresolved whether a refusal to license allegations in relation to IP is available under any circumstances under federal antitrust laws ; there exist no less than three different views on this issue. [11]

3. Managing expertise : Case Management and Judicial Panels

4 - Modern case management favours the efficient disposal of the issues before the court over the resolution of points of law on which a case does not turn. This has obvious merits, as civil adjudication is a public good provided by the state to allow parties to resolve disputes under the law and it should be capable of resolving those disputes efficiently. Yet, this has implications for the IP-Competition Interface. Even technically competent courts may well favour a largely separate disposal of issues, in part due to the organization of courts into specialist tribunals, which is a double-edged development when seen from the IP-Competition Interface angle.

Take the English example : the (confusingly named) Competition Appeals Tribunal (CAT) is the relevant first-instance tribunal for private enforcement claims under the prohibitions of the Competition Act 1998 (equivalent to Articles 101 and 102 TFEU). Actions for patent infringement are however tried in the High Court and specifically in its specialist Patents Court which has a docket of specialist judges. Meanwhile, non-patent IP actions are assigned to the Intellectual Property List of the Chancery division – which has a partially overlapping set of judges assigned to it. The Chancery division does still have jurisdiction over matters of competition law as part of its more general jurisdiction.

Modern case management has started to favour split trials to be tried separately, including between IP and competition matters, where doing so would increase efficiency. There are good reasons for the increase in active case management from the position of reducing the parties' costs and increasing the likelihood of settlement. For example, the currently pending proceedings in *Roadget v Whaleco* were bifurcated by order of the docketed High Court Judge, [12] with the competition counterclaim (which could constitute a complete defence to the IP infringement claims) to be tried separately in later proceedings. Bifurcating proceedings may also have the benefit of providing a judge with more expertise in the subject matter. But it is no guarantee that bifurcation is a realistic option on particular facts, and bifurcation may conversely increase

7. Joined Cases C-241/91 and C-242/91 P *RTE v Commission* ('Magill') [1995] ECR I-808 ; Case C-7/97 *Bronner* [1998] ECR I-7817 ; Case C-418/01 *IMS Health* [2004] ECR I-5069 ; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3619 ; Case C-48/22 P *Google and Alphabet v Commission* ('Google Shopping') [2024] ; Case C-233/23 *Alphabet and Others* ECLI :EU :C :2025 :110 [2025].
8. Case 262/81 *Coditel v Ciné Vog Films* [1982] ECR I-3382 ; Case T-172/21 *Valve v Commission* [2023].
9. See e.g. V Korah, 'The Interface between Intellectual Property and Antitrust : The European Experience' (2002) 69 Antitrust Law Journal 801, 810-813 ; M Delrahim, 'Forcing Firms to Share the Sandbox : Compulsory Licensing of Intellectual Property Rights and Antitrust' (2004) 15 European Business Law Review 1059, 1064 ; C Ritter, 'Refusal to Deal and »Essential Facilities« : Does Intellectual Property Require Special Deference Compared to Tangible Property?' (2005) 28 World Competition 281, 285-286 ; KA Czapracka, *Intellectual Property and the Limits of Antitrust : A Comparative Study of US and EU Approaches* (Edward Elgar 2009) 47 ; IS Forrester and KA Czapracka, 'Compulsory Licensing in European Competition Law : The Power of the Adjective' in S Anderman and A Ezrachi (eds), *Intellectual Property and Competition Law : New Frontiers* (Oxford University Press 2011) 158.
10. See Korah, *supra* n 9, 831 ; Case C-7/97 *Bronner* [1998] ECR I-7817, Opinion of AG Jacobs, para 63.
11. Compare *Image Technical Services, Inc v Eastman Kodak Co* ('Kodak II') 125 F3d 1195 (1997) (9th Cir) ; *Data General v Grumman Systems Support* 36 F3d 1147 (1994) (1st Cir) ; *In re Independent Service Organizations Antitrust Litigation* ('Xerox') 203 F3d 1322 (2000) (Fed Cir).
12. *Roadget Business Pte Ltd and another v Whaleco UK Ltd* (Transfer Order, High Court of Justice, Business and Property Courts of England and Wales, Intellectual Property List (ChD), Mrs Justice Bacon, 29 July 2025).

the lack of integration between the areas of law by treating issues that are interrelated as unrelated. In other words, there are advantages as well as perils to bifurcating IP-Competition proceedings.

At its core, my argument here may well be a rehearsal of a common complaint about the organisation of legal education, legal practice, and legal reasoning. By categorising legal norms, reasoning within those categories is preferred to reasoning between them. But it goes without saying that such categories are unavoidable. Accordingly, especially for technical subject matter like particularly complex patent litigation, the establishment of specialist courts is desirable. Similarly, the CAT is a step in the right direction with the ability to have IP practitioners, competition economists and academics sitting on a panel with a High Court judge. [13] Such *ad hoc* panels may well be desirable in other cases ; yet, they are currently restricted to cases tried in the CAT. Having multiple specialists on the bench, at best, tempers thinking in narrow categories, and, at worst, allows each specialist to hone in on the aspect of the case to which their expertise and judgment is most suited.

There is a straightforward example of this. Recent years have been dominated by decisions relating to telecommunication standards in the context of the fair, reasonable, and non-discriminatory (FRAND) licensing commitments. Development of FRAND has morphed into a virtually self-contained discipline, which now has exceedingly little to do in Europe with its purported basis in Article 102 TFEU. Yet, such actions are often dealt with by generalist judges in the UK, frequently patent practitioners, where competition law expertise and economics may be complementary, particularly under the English approach of engaging in active rate-setting.

4. Reform

5 - In this article, I have described two potential issues with our institutions on the IP-Competition Interface : first, the issue of subject matter jurisdiction, i.e. of law being made by institutions without the competence to address relevant issues – a criticism aimed at the institutions of competition law specifically ; second, the issue of how cases are dealt with where subject matter jurisdiction exists with sufficient expertise and a willingness to engage with the Interface.

I am pessimistic as to the resolution of the first, at least at EU level. For better or worse, there is currently little prospect of a truly EU-wide IP regime and no realistic prospect that the Court of Justice would retreat in its march towards subjecting IP to competition law scrutiny. On the second issue of case management and judicial panels, perhaps the easiest way to improve our current system is to expand judicial panels where necessary and desirable on an *ad hoc* basis.

Resolving these institutional roadblocks is complementary to a more fundamental rethinking of the construction of legal doctrine on the Interface. Competition law is not a panacea ; the causes of action within it address specific market failures which are not equally applicable to scenarios involving IPRs and scenarios which do not. For this reason, I have pleaded in a different paper for a return to thinking about IP-derived market power within the confines of IP law ; there are options worth exploring there, among them the discretion to deny injunctive relief and the compulsory licensing regime. [14] Given the limited subject matter jurisdiction of the European apex court, this almost necessarily involves a unilateral retreat of competition law doctrine. There also seems to be little appetite for this at the time of writing. It may be hoped that England could tread a path to be followed with its newfound independence from the Court of Justice. A complementary impetus for IP to deal internally with questions of abuse of market power could then arise. However, during the retreat of competition law to provide that impetus, a vacuum may well remain for some time, and it seems inevitable that this process of adjustment will be costly for exactly those that competition law seeks to protect.■

13. See 'Personnel' (Competition Appeal Tribunal) <http://www.catribunal.org.uk/about/personnel> accessed 18 February 2026 for a list of chairs and panel members.

14. Q Schäfer, 'Reconsidering the Limits of EU Competition Law on the IP-Competition Interface'(2024) 15(3) Journal of European Competition Law & Practice 188-196.

Chapitre IV
DMA et concurrence



Chapter IV
DMA and competition



12

Presque deux ans du règlement sur les marchés numériques (DMA) : quelques perspectives



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Cet article fait le point sur la mise en œuvre et l'application par la Commission européenne de la législation historique sur les marchés numériques, qui vise à favoriser des marchés numériques équitables et contestables. Il offre une perspective interne sur les mesures d'exécution prises par la Commission au cours de la première année et demie d'application du règlement sur les marchés numériques. Cet article décrit comment l'application du règlement par la Commission combine plusieurs outils, tels que le dialogue réglementaire, les procédures de spécification et les enquêtes de non-conformité. Pris ensemble, ces outils répondent à la promesse d'une mise en œuvre rapide. Cet article met également en évidence d'autres caractéristiques essentielles de la mise en œuvre du règlement sur les marchés numériques, notamment la collaboration étroite de la Commission avec les autorités nationales de concurrence et autres régulateurs.

Introduction

1 - Le règlement européen sur les marchés numériques (*Digital Markets Act* ou DMA) n° 2022/1925 du 14 septembre 2022 [1] a pour objectif de contribuer au bon fonctionnement du marché intérieur en établissant des règles visant à garantir la contestabilité et l'équité des marchés dans le secteur numérique.

Pour ce faire, le DMA établit un ensemble de critères objectifs clairement définis pour identifier les « contrôleurs d'accès ». Ces derniers sont de grandes plateformes numériques qui fournissent des « services de plateforme essentiels », tels que les moteurs de recherche en ligne, les navigateurs internet, les réseaux sociaux, les services d'intermédiation en ligne (comme les boutiques d'applications logicielles) ou les systèmes d'exploitation.

Le 6 septembre 2023, la Commission européenne a désigné six entreprises comme contrôleurs d'accès pour un total de vingt-deux services de plateforme essentiels [2] :

- Alphabet (Chrome, Google Android, Google Ads, Google Maps, Google Play, Google Search, Google Shopping, YouTube) ;
- Amazon (Amazon Ads, Amazon Marketplace) ;
- Apple (App Store, iOS, Safari) ;
- ByteDance (TikTok)
- Meta (Facebook, Instagram, Messenger, Meta Ads, Meta Marketplace [3], WhatsApp)
- Microsoft (LinkedIn, Windows PC OS)

La Commission a désigné Apple [4] comme contrôleur d'accès pour iPadOS le 29 avril 2024 et Booking pour son service Booking.com le 13 mai 2024. À ce jour, ce sont donc sept contrôleurs d'accès pour un total de vingt-quatre services de plateforme essentiels qui ont été désignés dans le cadre du DMA [5].

Les contrôleurs d'accès désignés ont six mois à compter de la date de leur désignation pour se mettre en conformité avec le DMA et respecter la vingtaine d'obligations et d'interdictions énumérées dans le règlement. Ilsdoivent, par exemple, permettre à des tiers d'interopérer avec les propres systèmes d'exploitation ou assistant virtuel du contrôleur d'accès dans certaines situations spécifiques, ou permettre l'installation et l'utilisation effective d'applications logicielles ou de boutiques d'applications logicielles de tiers. A l'inverse, il leur est par exemple interdit de traiter leurs services et produits plus favorablement, en matière de classement ainsi que pour l'indexation et l'exploration qui y sont liées, que les services ou produits similaires proposés par des tiers sur la plateforme du contrôleur d'accès.

Presque deux ans se sont écoulés depuis mars 2024, date à laquelle les obligations prévues par le DMA ont commencé à s'appliquer aux contrôleurs d'accès désignés en novembre 2023.

Mars 2024 est donc le vrai point à partir du DMA. Se pose alors la question suivante : quelle est l'efficacité du respect des règles du DMA par les contrôleurs d'accès presque deux ans plus tard?

Le mois de mars 2024 a également permis à la Commission d'exercer pleinement ses pouvoirs de contrôle et d'exécution. Si la Commission s'est employée de manière intensive à orienter la mise en conformité des contrôleurs d'accès, il ne faisait guère de doute qu'une mise en conformité effective nécessiterait un suivi

Ndlr : Les opinions exprimées dans ce texte n'engagent que son auteur et ne reflètent pas nécessairement l'avis des institutions auxquelles l'auteur appartient.

1. Règlement (UE) 2022/1925 du Parlement européen et du Conseil du 14 septembre 2022 relatif aux marchés contestables et équitables dans le secteur numérique et modifiant les directives (UE) 2019/1937 et (UE) 2020/1828 (règlement sur les marchés numériques), JO L 265.
2. Commission européenne, « Digital Markets Act : Commission designates six gatekeepers », Communiqué de presse IP/23/4328, 6 septembre 2023.
3. Par décision du 23 avril 2025, la Commission a décidé que Facebook Marketplace n'était plus un service de plateforme essentiel remplissant les conditions du DMA. Commission européenne, Décision du 23 avril 2025, C (2025) 4223.
4. La Commission a également reçu une notification d'Apple le 27 novembre 2025 indiquant que ses services Apple Ads et Apple Maps étaient au-dessus des seuils établis dans le DMA. Le 5 février 2026, la Commission a décidé de ne pas désigner Apple Ads et Apple Maps.
5. Le 18 novembre 2025, la Commission a également lancé deux enquêtes de marché afin de déterminer si Amazon et Microsoft doivent être désignés comme contrôleurs d'accès pour leurs services d'informatique en nuage (*cloud*), à savoir Amazon Web Services et Microsoft Azure.

étroit et une mise en œuvre rigoureuse. Comment la Commission s'est-elle organisée pour y parvenir?

Cet article vise à éclairer ces deux questions.

1. L'art du « dialogue réglementaire » entre la Commission et les contrôleurs d'accès

2 - Les sept enquêtes de non-conformité initiées à ce jour par la Commission ne constituent pas le point de départ de l'application du DMA. Plutôt, l'épine dorsale du DMA est le dialogue réglementaire. Si les cas de non-conformité constituent un élément important de l'application du DMA, ils ne constituent que la partie visible de l'iceberg. Le dialogue réglementaire constitue la majeure partie du processus de mise en conformité et c'est là que la plus grande part des ressources de la Commission est allouée. Si ce dialogue réglementaire n'a pas d'existence officielle (il n'est pas mentionné explicitement dans le règlement), il est le fruit de la pratique et de la culture propre à l'équipe chargée de la mise en œuvre du DMA. Le dialogue réglementaire vise à encourager les contrôleurs d'accès à améliorer, si cela s'avère pertinent, leurs solutions en matière de conformité à la lumière des retours d'information de tiers. Le point de départ n'est pas tant une approche contentieuse mais au contraire une approche propice à la création de cercles vertueux au sein desquels les parties concernées (Commission, contrôleurs d'accès, tiers, etc.) dialoguent afin de faire ressortir la meilleure solution de conformité aux obligations du DMA. Les solutions arrêtées font souvent l'objet d'un communiqué officiel de la part des contrôleurs d'accès, ou sont tout au moins décrites dans leur rapport annuel de conformité.

Le dialogue réglementaire – lorsqu'il est mené de bonne foi – peut donner lieu à des résultats plus rapides qu'une approche contentieuse. Pour la Commission, le dialogue réglementaire est une occasion de façonner le respect des règles par les contrôleurs d'accès sans les frais d'une enquête formelle de non-conformité. Il constitue un canal de communication constructif avec les contrôleurs d'accès et permet d'atteindre une solution de conformité appropriée. Par exemple, le fait qu'un compte Gmail ne soit plus nécessaire pour s'inscrire à d'autres services d'Alphabet (tels que YouTube) est le fruit de ce dialogue réglementaire. De même, la Commission a travaillé main dans la main avec les contrôleurs d'accès afin qu'ils assurent la portabilité effective des données des utilisateurs. Ceci a déjà donné lieu à des bénéfices concrets, certaines parties tierces en profitant pour développer leurs gammes de produits et services [6]. La Commission a également demandé à Apple de simplifier son processus d'installation de boutiques d'applications tierces. À la suite de l'intervention de la Commission, certains développeurs tels qu'EPIC Games ont fait part d'une nette amélioration du taux de réussite d'installation de leur boutique d'applications [7].

Pour le contrôleur d'accès, le dialogue réglementaire peut constituer un canal de communication privilégié avec la Commission, pour autant que l'engagement soit constructif. Cela étant, le fait qu'un tel dialogue soit en cours sur une obligation du DMA ne signifie pas que la Commission ne peut pas décider d'ouvrir une procédure formelle de non-conformité lorsque le dialogue réglementaire est bloqué ou que la collaboration est infructueuse. À l'inverse, le fait que la Commission n'ouvre pas de procédure de non-conformité ne doit pas être interprété comme signifiant que les mesures du contrôleur d'accès sont conformes.

De même, cet outil ne remplace pas la consultation des acteurs du marché ni d'autres formes de retour d'information des parties tierces. Au contraire, le retour d'information du marché fait toujours partie du dialogue réglementaire, et la Commission entretient un dialogue permanent avec des parties tierces afin de recenser les lacunes en matière de conformité et d'étudier les améliorations à apporter.

2. Rapports et ateliers de conformité : de la transparence dans le cadre du DMA

3 - Le DMA prévoit la transparence en ce qui concerne le respect de ses obligations par les contrôleurs d'accès, et la Commission a pris des mesures allant au-delà des exigences du règlement pour créer une transparence supplémentaire.

L'article 11 du DMA dispose que les contrôleurs d'accès doivent produire un rapport de conformité dans un délai de 6 mois à compter de leur désignation et mettre à jour ce rapport au moins une fois par an [8]. Le contrôleur d'accès doit également présenter un résumé public du rapport, que la Commission publie sur son site internet. Le principal objectif de ces rapports est de donner aux parties tierces un aperçu des efforts déployés par les contrôleurs d'accès pour se conformer au DMA, afin de leur permettre d'évaluer le respect des règles de manière indépendante.

En mars 2024 et en juillet 2025, dans le but d'accroître la transparence autour des mesures de conformité des contrôleurs d'accès, la Commission a organisé une série d'ateliers de conformité. Ces ateliers offrent un cadre structuré, transparent et collectif dans lequel la Commission réunit les contrôleurs d'accès désignés et les parties tierces intéressées (entreprises utilisatrices, associations sectorielles, organisations de la société civile et universitaires) pour discuter de la mise en œuvre des obligations du DMA. Certains contrôleurs d'accès ont également organisé leurs propres ateliers pour mieux expliquer les mesures prises pour se conformer au DMA.

Les ateliers sur la conformité ne sont pas destinés à faire l'objet d'un débat technique approfondi sur le respect des règles par les contrôleurs d'accès, mais permettent plutôt d'avoir un retour (souvent critique) sur les mesures de mise en conformité des contrôleurs d'accès. Ces ateliers sur la conformité peuvent donc constituer la base d'un dialogue accru entre la Commission et des parties tierces intéressées.

3. La lutte contre la non-conformité

4 - Le dialogue avec les contrôleurs d'accès et les parties tierces, à partir de l'entrée en vigueur du DMA fin 2022, a permis à la Commission de voir les solutions de conformité prendre forme et de recenser leurs faiblesses. À l'approche du délai de mise en conformité en mars 2024, la Commission disposait d'une bonne vue d'ensemble des zones problématiques qu'elle a clairement communiquées aux contrôleurs d'accès concernés.

Ceci a permis à la Commission d'être rapide et décisive pour lancer ses premières enquêtes de non-conformité. Cela était nécessaire pour tenir la promesse du DMA : parvenir rapidement à des changements concrets qui favorisent l'équité et la contestabilité des marchés numériques.

Toujours au cours du mois de mars 2024, 18 jours après le délai de mise en conformité, la Commission a ouvert cinq enquêtes de non-conformité : deux enquêtes sur les règles de pilotage (*steering*) concernant les boutiques d'applications d'Alphabet et d'Apple, l'une sur les pratiques d'autopréférence d'Alphabet sur Google Search, l'autre à l'encontre d'Apple pour ses choix à l'écran pour les navigateurs web, et finalement une enquête sur le modèle

6. Par exemple, la société onFabric utilise les interfaces de programmation des contrôleurs d'accès afin d'assurer une portabilité des « identités virtuelles » des utilisateurs.
7. Voir MEHTA Ivan, « Epic Games says Apple's new install process cuts user drop-offs by 60% » [en ligne], TechCrunch, 1er octobre 2025 [consulté le 12 janvier 2026].
8. En outre, l'article 15 DMA impose aux contrôleurs d'accès de publier un rapport sur le profilage des consommateurs au moins une fois par an.

« consentir ou payer » de Meta. Depuis lors, la Commission a ouvert deux enquêtes supplémentaires : l'une à propos des conditions commerciales d'Apple pour la distribution alternative d'applications sur son système d'exploitation iOS, et l'autre à l'encontre d'Alphabet concernant sa politique d'abus de réputation de site sur Google Search. Si une enquête sur les cas de non-conformité peut aboutir à la constatation d'un manquement et à des amendes, il n'est pas nécessaire que tel soit le cas. Sur les trois dossiers clôturés à ce jour, un cas a été clôturé sans constatation de non-conformité et avant que la Commission ne formule des conclusions préliminaires. La Commission a clôturé le 23 avril 2025 son enquête sur le respect par Apple des obligations de choix à l'écran pour les navigateurs web [9]. La clôture a fait suite à un dialogue productif entre la Commission et Apple, qui a entraîné de nombreuses modifications des mesures qu'Apple avait initialement introduites pour se conformer à ses obligations. Apple a également facilité la modification des paramètres par défaut. La Commission a clos le dossier par voie de décision [10], mais cette décision ne confirme pas pour autant la conformité par Apple à ses obligations en la matière ; la Commission continue de surveiller les mesures mises en œuvre par Apple et peut toujours décider de prendre des mesures coercitives si elle constate que les mesures sont contraires au DMA.

Dans le cadre de deux autres enquêtes, la Commission a constaté que les contrôleurs d'accès ne s'étaient pas conformés au DMA et a adopté des décisions infligeant des amendes et ordonnant aux contrôleurs d'accès de mettre fin à leurs mesures non-conformes.

La première affaire concernait les règles de pilotage dans l'App Store d'Apple. En vertu de l'article 5(4) DMA, les développeurs d'applications qui distribuent leurs applications par l'intermédiaire de l'App Store d'Apple doivent être en mesure de communiquer et promouvoir gratuitement aux utilisateurs d'autres offres en dehors de l'App Store, de les orienter vers ces offres et de leur permettre d'effectuer des achats.

La Commission a constaté qu'Apple ne respectait pas cette obligation. En raison d'un certain nombre de restrictions imposées par Apple (par exemple, restrictions quant à la page de destination après pilotage, écrans informatifs « intimidants »), les développeurs d'applications ne pouvaient pas bénéficier pleinement des avantages offerts par d'autres canaux de distribution en dehors de l'App Store. De même, les consommateurs ne pouvaient pas tirer pleinement parti d'autres offres moins chères via d'autres canaux de distribution, étant donné qu'Apple empêche les développeurs d'applications d'informer directement les consommateurs de ces offres (par exemple, les développeurs étaient restreints dans la manière dont ils pouvaient communiquer et informer les utilisateurs d'offres alternatives). La Commission a considéré qu'Apple n'a pas démontré que ces restrictions étaient objectivement nécessaires et proportionnées.

Elle a ordonné à Apple de supprimer les restrictions techniques et commerciales concernant l'orientation des utilisateurs par les développeurs d'applications, et de s'abstenir de perpétuer le comportement non conforme à l'avenir. Une amende de 500 millions d'euros a également été imposée à la société. Apple a fait appel de la décision. À ce jour, la procédure devant le Tribunal de l'Union est en cours [11].

La seconde affaire concernait le non-respect du modèle de « consentir ou payer » de Meta. En vertu de l'article 5(2) DMA, les contrôleurs d'accès doivent obtenir le consentement des utilisateurs pour combiner leurs données à caractère personnel entre services. Les utilisateurs doivent pouvoir choisir librement d'adhérer à ces pratiques de traitement de données en ayant un accès à une alternative moins personnalisée mais équivalente de la plateforme offerte par le contrôleur d'accès.

En novembre 2023, Meta a introduit un modèle publicitaire binaire enjoignant les utilisateurs finaux à « consentir ou payer ». Selon ce modèle, les utilisateurs européens de Facebook et d'Instagram avaient le choix entre consentir à une combinaison de données à caractère personnel pour la publicité personnalisée ou payer un abonnement mensuel pour un service sans publicité.

La Commission a constaté que ce modèle n'était pas conforme au DMA. D'une part, Meta ne proposait pas aux utilisateurs finaux un choix spécifique leur permettant d'opter pour une alternative équivalente, mais moins personnalisée, à ces services. D'autre part, le modèle de Meta ne permettait pas aux utilisateurs d'exercer leur droit de consentir librement à la combinaison de leurs données à caractère personnel.

L'amende infligée à Meta tient également compte de la gravité et de la durée de la non-conformité, ainsi que la complexité de l'environnement réglementaire auquel Meta fait face, tout en notant que les décisions prises à l'encontre d'Apple et de Meta sont les premières décisions de non-conformité adoptées au titre du règlement sur les marchés numériques.

Pour ce défaut de conformité, la Commission a imposé une amende de 200 millions d'euros à Meta, qui a fait appel de la décision. À ce jour, la procédure devant le Tribunal de l'Union est en cours [12].

4. La « spécification » : une innovation du DMA

5 - Le DMA dispose d'un nouvel outil, la « spécification ». Les procédures de spécification servent à détailler les mesures que les contrôleurs d'accès doivent mettre en œuvre pour se conformer aux obligations énoncées aux articles 6 et 7 DMA.

Les procédures de spécification diffèrent des procédures de non-conformité. Elles ne constatent pas de non-respect du DMA et n'imposent pas d'amendes. A la place, les procédures de spécification sont appropriées notamment pour fournir des orientations ou des précisions supplémentaires sur les mesures requises pour se conformer à une obligation du DMA. La Commission peut décider d'ouvrir une procédure de spécification de sa propre initiative ou à la demande d'un contrôleur d'accès. Toutefois, elle conserve une marge d'appréciation quant à l'ouverture d'une procédure (elle n'en a pas l'obligation). Jusqu'à présent, les contrôleurs d'accès n'ont, ironiquement, jamais demandé l'ouverture d'une procédure de spécification.

À ce jour, la Commission a ouvert quatre procédures de spécifications ; les deux premières à l'encontre d'Apple [13] et les deux dernières à l'encontre de Google.

Les procédures de spécification à l'encontre d'Apple concernaient les obligations d'interopérabilité lui incombant en vertu de l'article 6(7) DMA. D'après cet article, les contrôleurs d'accès doivent assurer une interopérabilité effective avec les mêmes caractéristiques matérielles et logicielles de leurs systèmes d'exploitation. Afin de permettre une interopérabilité supplémentaire avec ses systèmes d'exploitation iOS et iPadOS, Apple a mis en place un portail par l'intermédiaire duquel les développeurs peuvent demander l'interopérabilité avec iOS et iPadOS [14]. La Commission n'a cessé de dialoguer avec Apple sur le déploiement de ce processus d'interopérabilité. Six mois plus tard, la Commis-

9. L'article 6(3) DMA impose aux contrôleurs d'accès de permettre aux utilisateurs finaux de désinstaller facilement des applications et de modifier les paramètres par défaut, par exemple au moyen de choix à l'écran.
10. Commission européenne, Décision du 23 avril 2025, C (2025) 2562.
11. Affaire T-438/25.
12. Affaire T-435/25.
13. Les procédures de spécification ont été ouvertes le 19 septembre 2024 et conclues le 19 mars 2025 ; Commission européenne, Décision C (2024) 6661 et Décision C (2024) 6663.
14. Voir Apple, « Requesting interoperability with iOS and iPadOS in the European Union »
[en ligne], [consulté le 12 janvier 2026]. <http://developer.apple.com/support/ios-interoperability/>

sion a observé que, pour que le processus porte ses fruits, elle devait reprendre les cartes en main.

En réponse, la Commission a ouvert deux procédures de spécification : l'une visant à préciser les mesures relatives au processus de demandes d'interopérabilité et l'autre visant à préciser les mesures relatives à l'interopérabilité pour certains objets connectés (tels que les montres connectées). Les décisions finales dans ces affaires, qui ont suivi six mois de dialogue intensif avec Apple et de consultation avec des parties tierces, fixent un cadre et des délais clairs pour assurer l'interopérabilité de certains objets connectés.

Les procédures de spécification à l'encontre de Google (initiées le 27 janvier 2026) concernent les articles 6(7) et 6(11) DMA. La procédure au titre de l'article 6(7) DMA se concentre sur les caractéristiques utilisées par les services d'intelligence artificielle (IA) de Google, tels que Gemini. La Commission entend préciser comment Google doit accorder aux fournisseurs tiers de services d'IA un accès tout aussi efficace aux mêmes caractéristiques que celles auxquelles ont accès les services de Google.

La seconde procédure concerne l'obligation qui incombe à Google au titre de l'article 6(11) DMA d'accorder aux fournisseurs tiers de moteurs de recherche en ligne l'accès aux données anonymisées concernant les classements, requêtes, clics et vues détenues par Google Search à des conditions équitables, raisonnables et non discriminatoires (conditions FRAND). Ces procédures concernent la portée des données, la méthode d'anonymisation, les conditions d'accès et l'éligibilité des chatbots IA quant à leur accès à ces données. Le respect effectif des conditions et l'accès à un ensemble de données utile permettront aux fournisseurs tiers de moteurs de recherche en ligne d'optimiser leurs services et offriront aux utilisateurs de véritables alternatives à Google Search.

La première expérience de la Commission en matière de procédures de spécification a montré que la procédure requiert une bonne organisation et une collaboration étroite avec le contrôleur d'accès concerné. Les procédures de spécification disposent d'un délai légal de six mois, au cours duquel la Commission doit communiquer ses conclusions préliminaires au contrôleur d'accès (dans un délai de trois mois) et mener une consultation publique sur les mesures proposées dans les conclusions préliminaires.

5. Collaboration avec les autorités nationales de concurrence et autres autorités de régulation

6 - Si la Commission est la seule instance habilitée à faire appliquer les dispositions du DMA, elle coordonne étroitement avec les autorités nationales de concurrence (ANC) des États membres, ainsi qu'avec d'autres régulateurs actifs dans l'espace numérique. Le DMA prévoit des mécanismes de coordination visant à garantir sa complémentarité avec l'application des règles en matière d'ententes et d'abus de position dominante. Lorsque le comportement relève clairement du champ d'application du DMA, il s'agit probablement de l'outil le plus approprié, car sa nature *ex ante* permet une mise en œuvre plus rapide. À l'inverse, la mise en œuvre des règles antitrust est plus souple et peut englober des pratiques qui ne sont pas couvertes par le DMA. Ensemble, ce règlement et les règles antitrust forment un système homogène sans lacunes.

En vertu des dispositions relatives au partage d'informations du DMA [15], la Commission et les ANC procèdent à un échange proactif d'informations. Cela garantit que les efforts de mise en œuvre sont complémentaires et non redondants, et que les résultats des actions soient cohérents, en évitant une application contradictoire, ce qui porterait préjudice au bon fonctionnement du marché intérieur. Il permet également un échange d'informations précieux. Dans la pratique, les échanges entre la Commission et les ANC sont très fréquents. Ils s'appuient sur la coopération de longue date au sein du réseau européen de la concurrence (REC), qui garantit une structure de coordination très efficace.

Au-delà de la coordination, le DMA ouvre la voie à de nouveaux modes de coopération entre la Commission et les ANC. Celles-ci disposent de plusieurs moyens pour soutenir l'application du DMA, garantissant ainsi son efficacité. Certaines ANC (par exemple, Italie et Pays-Bas) ont détaché du personnel spécialisé auprès de l'équipe DMA de la Commission. Les ANC peuvent également mener des enquêtes sur un éventuel non-respect du DMA, à condition que des lois nationales aient été promulguées leur conférant des pouvoirs d'enquête spécifiques (Belgique et France entre autres). Dans de tels cas, la Commission peut reprendre et, le cas échéant, adopter une décision constatant un manquement au titre du DMA.

Le DMA prévoit également une coordination avec d'autres régulateurs. Le groupe de haut niveau des régulateurs numériques offre un forum d'échanges entre les organes et réseaux européens afin de garantir une mise en œuvre efficace et cohérente du DMA et d'autres réglementations sectorielles [16]. Les réunions entre régulateurs se sont révélées très utiles : par exemple, afin de cartographier les problématiques liées à l'IA ou jeter les bases pour l'élaboration de lignes directrices sur l'interaction entre le DMA et le règlement général sur la protection des données (RGPD) [17]. Pas moins de neuf réunions ont été utiles à ce jour.

Presque deux ans après la mise en œuvre du DMA, la coordination entre les régulateurs a déjà donné des résultats concrets. À la suite d'un effort conjoint de la Commission et du comité européen de la protection des données lancé en septembre 2024, une consultation publique a été lancée d'octobre 2025 à décembre 2025 sur un projet de lignes directrices communes sur l'interaction entre le DMA et le RGPD [18]. Les lignes directrices apporteront de la clarté aux entreprises qui sont soumises aux deux règlements.

Conclusion

7 - Il s'agit de presque deux ans de confirmation pour le DMA, avec les premières désignations de contrôleurs d'accès, les premières enquêtes de marché, les premières enquêtes de non-conformité et les premières procédures de spécification. Certaines de ces mesures font l'objet de recours devant les juridictions de l'Union. Jusqu'à présent, le DMA a obtenu un premier gain de cause lorsque le Tribunal a rejeté le recours formé par Bytedance contre sa décision de désignation [19]. D'autres arrêts importants suivront, et la clarté juridique qu'ils apporteront sera saluée et façonnera l'application du DMA.

Le DMA a déjà obtenu des résultats encourageants. Les navigateurs concurrents ont connu une croissance sans précédent en raison de leur apparition dans les écrans de choix de navigateur imposés par le DMA. Des boutiques d'applications alternatives ont été lancées sur iOS pour la toute première fois, comme l'illustre le cas d'EPIC Store. Cela montre que le DMA a déjà entraîné des changements tangibles sur le marché, et que d'autres sont sûrs de suivre.

15. Par exemple, Art. 38(1), Règl. (UE) 2022/1925 du 14 sept. 2022 (DMA).

16. Art. 40, Règl. (UE) 2022/1925 du 14 sept. 2022 (DMA).

17. Règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données (règlement général sur la protection des données), JOUE L 119, 4 mai 2016.

18. Direction générale de la concurrence & Direction générale des réseaux de communication, du contenu et des technologies, « Commission and EDPB gather feedback on draft guidelines on interplay between DMA and GDPR » [en ligne], [consulté le 12 janvier 2026]. <http://digital-markets-act.ec.europa.eu/public-consultation-joint-guidelines-interplay-between-dma-and-gdpr-2025-10-09_en>

19. CJUE, Arrêt du 17 juillet 2024, *Bytedance Ltd/Commission européenne*, Affaire T-1077/23. ByteDance a formé un pourvoi devant la Cour de justice le 25 octobre 2024 (affaire C-627/24 P).

Nous avons également vu que si le DMA crée des possibilités pour les entreprises et les utilisateurs finaux, il faut du temps aux utilisateurs pour saisir ces possibilités. La sensibilisation des entreprises utilisatrices au DMA et aux changements que ce règlement apporte constitue un défi. Un autre enjeu réside dans le fait que les consommateurs doivent adopter l'habitude d'exercer leur capacité à choisir dans des domaines où un véritable choix a été refusé pendant des années. D'autres défis persistent, inhérents à la nature du DMA. L'asymétrie d'information subsiste. Le fait que la Commission et les tiers n'aient pas toujours accès aux mêmes informations que les contrôleurs d'accès peut constituer un frein à la vérification de la bonne conformité de ces contrôleurs d'accès. De même, le DMA n'a pas nécessairement un soutien indéfectible en dehors des frontières de l'Union, ce qui a pu se traduire par des pressions extérieures. À ce jour, la Commission a vigoureusement défendu le DMA et réfuté les allégations de protectionnisme ou de discrimination du DMA.

Bien qu'il en soit un début, le premier réexamen du DMA frappe déjà à la porte. La Commission doit établir son premier rapport en mai 2026 [20]. Cet examen est l'occasion de réfléchir aux premiers impacts du DMA et de consulter un large groupe de parties prenantes sur les aspects qui ont plus ou moins fonctionné au cours des deux dernières années. En même temps, il faut reconnaître que le règlement n'en est qu'à ses débuts, ce qui limite les conclusions que nous pouvons en tirer. D'autres réexamens suivront tous les trois ans et bénéficieront d'une expérience accrue quant à sa mise en œuvre. En outre, les marchés numériques auront probablement évolué d'ici là. Grâce aux réexamens périodiques et à ses autres dispositions visant à assurer sa pérennité [21], le DMA peut être mis à jour pour tenir compte de ces changements et des enseignements tirés de la pratique. Cela inclut la possibilité de désigner qualitativement des services de plateforme essentiels, comme cela a été fait précédemment pour iPadOS, et de mettre à jour la liste des obligations du DMA au moyen d'actes délégués. Ces outils peuvent servir à compléter le règlement lorsqu'il existe des lacunes dans son application. Ils permettent également de capturer de nouvelles pratiques en marge du champ d'application du DMA et de contribuer à contrecarrer d'éventuelles stratégies de contournement. À mesure que l'application du DMA progresse, nous pouvons nous attendre à ce que la Commission utilise de plus en plus la flexibilité dont elle dispose pour s'attaquer à un éventail plus large de pratiques et s'adapter aux évolutions technologiques.

Il en découle que le DMA est une législation dynamique, qui peut se développer en harmonie avec les évolutions des plateformes qu'il vise à façonner et rester un instrument efficace pour rendre les marchés numériques équitables et contestables en Europe.■

20. La Commission a publié le 8 janvier 2026 un résumé des réponses reçues dans le cadre de la consultation lancée en juillet 2025 au sujet du réexamen du DMA.

21. Par exemple, Art. 12, Règl. (UE) 2022/1925 du 14 sept. 2022 (DMA).

13 The Digital Markets Act : Taking Stock of Two Years of Implementation



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Introduction

1 - The Digital Markets Act (DMA) was adopted on 14 September 2022 with the stated ambition of ensuring contestability and fairness in digital markets. The DMA's core logic is to impose a set of *ex ante* obligations on designated 'gatekeepers'. The first gatekeepers were designated in September 2023, and the DMA's substantive obligations became effective in March 2024. As we approach the second anniversary of the DMA's entry into force, this becomes the opportune moment to assess whether the new framework has begun to deliver on its objectives in practice.

This short publication does not seek to be exhaustive. Its purpose is instead to provide a concise stocktaking of the European Commission's early DMA enforcement activity (Section 2), to draw selected comparisons with the enforcement of EU competition rules in the digital sector (Section 3), and to conclude with a number of preliminary observations on the relationship between DMA enforcement and traditional antitrust tools (Section 4). In our view, while it still requires further maturation, the DMA has already proved to be an effective and innovative instrument for addressing market imbalances and potential abuses in the digital economy. Combined with competition law, it offers litigants a powerful toolkit to promote unfettered competition, contestability, and fairness in these markets.

1. Two Years of DMA Enforcement : A State of Play

A. - Designation Under the DMA : Purpose, Legal Nature, and Designations to Date

2 - The designation mechanism is the DMA's jurisdictional 'gateway'. Its function is to (i) identify the undertakings that qualify as gatekeepers and (ii) define which 'core platform services' (CPS) they provide that fall within the DMA's regulatory perimeter. Only once an undertaking and specific CPS are designated do the substantive obligations (Articles 5-7) apply to that CPS.

Designation is made by a decision of the Commission under Article 3 DMA. The Commission designates an undertaking as a gatekeeper where three cumulative conditions are met : a significant impact on the internal market, operation of a CPS that constitutes an important gateway for business users to reach end users, and an entrenched and durable position (or a foreseeably durable position).

The DMA operationalises these criteria through quantitative thresholds that create a rebuttable presumption of gatekeeper status. Undertakings meeting the thresholds must notify the Commission (Article 3(3)), after which the Commission must designate them 'without undue delay' and within 45 working days of receiving complete information (Article 3(4)).

On 6 September 2023, the Commission designated six undertakings meeting the thresholds as gatekeepers – Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft – covering 22 CPS in total. [1] In April 2024, Booking was also designated as a gatekeeper in respect of its online intermediation service Booking.com. [2]

Designation is not purely mechanical. The DMA provides for two main 'corrective' mechanisms.

First, even where thresholds are met, the notifying undertaking may submit sufficiently substantiated arguments calling the presumption into question, prompting a market investigation and potentially a non-designation decision for the relevant CPS. Following market investigations, the Commission concluded on 13 February 2024 that Apple's iMessage and Microsoft's Bing, Edge, and Microsoft Advertising should not be designated. [3] On 16 October 2024, the Commission concluded that X (formerly Twitter) should not be designated as a gatekeeper for its online social networking service. [4]

Second, and conversely, the Commission may designate an undertaking (or a CPS) even if quantitative thresholds are not met, following a market investigation that establishes the qualitative criteria. This avenue was used for Apple's iPadOS, which was designated after investigation despite not meeting the thresholds. [5] The Commission has also recently launched several market investigations in the cloud computing sector, including investigations into Amazon Web Services (AWS) and Microsoft Azure with a view to possible gatekeeper designation, as well as a broader inquiry into whether practices in cloud services limit contestability and fairness. [6]

Designation decisions are also dynamic. The DMA allows the Commission to update the scope of designation, including removing a CPS where it no longer satisfies the relevant conditions. The Commission's 2025 decision to remove Facebook Marketplace

1. See *Alphabet* (Case *Apple* (Case DMA.100123) [2023] ; *ByteDance* (Case DMA.100138) [2023] ; *Meta* (Case DMA.100159) [2023] ; *Microsoft* (Case DMA.100160) [2023].
2. *Booking – Online Intermediation Services – Verticals* (Case DMA.100019) Commission Decision C/2024/4360 [2024] OJ C/2024/4360, 4.7.2024.
3. *Apple – number-independent interpersonal communications services* (Case DMA.100022) Commission Decision C/2024/2710 [2024] OJ C/2024/2710/ 18.4.2024.. See also, *Microsoft – Online Search Engines* (Case DMA.100015) Commission Decision C/2024/2709 [2024] OJ C/2024/2709 ; *Microsoft – Web Browsers* (Case DMA.100028) Commission Decision C/2024/2709 [2024] OJ C/2024/2709 ; *Microsoft – Online Advertising Services* (Case DMA.100034) Commission Decision C/2024/2709 [2024] OJ C/2024/2709.
4. *X – Online Social Networking Service* (Case DMA.100041) Commission Decision [2024] Press Release MEX/24/5324.
5. *Apple – iPadOS* (Case DMA.100047) Commission Decision C/2024/4374 [2024] OJ C/2024/4374
6. *Amazon – Cloud Computing Services* (Case DMA.100033) Commission Decision [2025] Press Release IP/25/2717 ; *Microsoft – Cloud Computing Services* (Case DMA.100032) Commission Decision [2025] Press Release IP/25/2717 ; *Cloud – Article 19* (Case DMA.100236) Commission Decision [2025] Press Release IP/25/2717.

from Meta's designated CPS list is the first prominent example of such an 'undesignation' process. [7]

As of the time of writing, **seven** undertakings are designated as gatekeepers, covering 23 CPS. A few gatekeepers appealed their designation to the General Court, namely ByteDance, [8] Apple [9], and Meta. [10] So far, the court has rejected the ByteDance request?, and other appeals are pending, and other appeals are pending.

From an enforcement perspective, designation has immediate consequences. Following designation, gatekeepers must comply with the full set of substantive obligations within six months. [11] A parallel can be drawn between dominance under Article 102 TFEU and designation under the DMA. Both trigger a set of obligations – a special responsibility not to abuse the dominant position under Article 102 and a set of predefined obligations under the DMA. However, gatekeeper designation is typically simpler, since it is generally based on thresholds ; by comparison, establishing dominance in competition law cases can require a complex economic analysis (market definition in particular). In addition, a gatekeeper need not be in a dominant position. This allows the Commission to address situations of oligopolistic market structure or markets in which an undertaking holds market power but may not be in a 'dominant position' under Article 102 TFEU. A further difference with Article 102 TFEU comes from the fact that the DMA obligations are essentially *per se* rules in that they do not require the showing of foreclosure.

B. - Enforcement of DMA Obligations to Date

3 - At the time of writing of this publication, the Commission has adopted two fining decisions and two so-called 'specification decisions'. Several other investigations are ongoing.

1° The Apple Anti-Steering Decision Based on Article 5(4) of the DMA

4 - On 23 April 2025, the Commission fined Apple for a breach of the DMA's anti-steering obligation (Article 5(4)) in relation to the App Store. [12] Under this provision, app developers distributing via the App Store must be able – free of charge – to inform customers about alternative offers outside the App Store, steer them to those offers, and allow purchases through those alternative channels.

The Commission concluded that Apple failed to comply because it imposed 'a number of restrictions' – including high fees – that prevented developers from fully benefiting from alternative distribution channels, and consumers from fully benefiting from alternative and potentially cheaper offers since they could not be directly informed by developers. Apple did not demonstrate that the restrictions were objectively necessary and proportionate.

As a consequence, the Commission (i) imposed a €500 million fine (reflecting the gravity and duration of the non-compliance) and (ii) ordered Apple to remove the technical and commercial restrictions on steering and to refrain from equivalent conduct going forward. Apple was ordered to comply within 60 days, failing which it may face periodic penalty payments. While Apple published new terms in June 2025 in response to the decision, the Commission has not indicated that these terms are compliant, and several stakeholders have voiced strong concerns about this. [13]

The decision is under appeal before the General Court. [14]

2° The Meta Decision Based on Article 5(2) DMA

5 - On 23 April 2025, the European Commission fined Meta for a breach of Article 5(2) DMA in relation to its 'Consent or Pay' advertising model for Facebook and Instagram. [15] Article 5(2) requires that where a gatekeeper seeks to combine personal data across services for advertising purposes, it must obtain users' consent and offer non-consenting users a 'less personalised but otherwise equivalent' alternative.

The Commission considered that Meta's model – offering users a binary choice between (i) consenting to data combination for personalised ads or (ii) paying a subscription for an ad-free service – did not provide the required specific choice of an equivalent service using less personal data, and furthermore did not offer users the option to freely consent to the combination of their data. The Commission therefore imposed a €200 million fine and ordered Meta to comply within 60 days, with the possibility of periodic penalty payments in case of continued non-compliance.

In an 8 December 2025 Commission announcement, the Commission acknowledged Meta's undertaking to bring its model into compliance by offering EU users an additional option on Facebook and Instagram that would show less personalised ads – i.e. a less data-intensive experience with limited ad personalisation. [16] The Commission stated that this would be the first time such a choice is offered on Meta's social networks in the EU, that users are expected to see the new choice from January 2026, and that the Commission will monitor the implementation and gather evidence and feedback on its use and effects after its rollout.

The decision is currently under appeal before the General Court. [17]

3° The Apple Specification Decisions Based on Article 8 DMA

6 - On 19 March 2025, the European Commission adopted two so-called 'specification decisions' under Article 8 of the DMA. [18] These decisions do not impose fines ; rather, they specify the concrete measures Apple must implement to comply with Article 6(7) DMA (interoperability) for iOS and iPadOS, following two specification proceedings the Commission opened on 19 September 2024.

The first decision targets interoperability between iPhones/iPads and connected devices (e.g. smartwatches, headphones, and other connected hardware). The decision is intended to ensure 'free and effective interoperability' with key hardware/software features controlled by iOS/iPadOS, enabling third-party manufacturers and developers to have access to the same functionalities available on Apple's own devices. [19]

The second decision focuses on the procedural framework Apple must implement for interoperability requests – i.e. how Apple must

7. *Meta – online intermediation services – marketplace* (Case DMA.100044) Commission Decision C/2025/4223 [2025] OJ C/2025/4223, 30.7.2025.
8. Case T–1077/23, *Bytedance Ltd v European Commission* [17 July 2024] ECLI :EU :T :2024 :478 (17 July 2024) ; Bytedance appealed to the Court of Justice, see – Case C-627/24 P – *Bytedance Ltd v/ Commission* [(25 October 2024]).
9. Case T–1080/23 *Apple v Commission* [2023] OJ C/2024/563 8.1.2024. This concerns the single designation of app stores and the qualification of iMessage as a Number-Independent Interpersonal Communications Service (»NIICS«).
10. Case T–1078/23 *Meta Platforms v European Commission* [2024] OJ C/2024/561 8.1.2024. This concerns the designation of Messenger as NIICS and of Facebook Marketplace.
11. Article 3(10) DMA.
12. *Apple – Online Intermediation Services – app stores – AppStore – Article 5(4)* (Case DMA.100109) Commission Decision C/2025/3348 [2025] OJ C/2025/3348, 16.6.2025.
13. See European Publisher's Council, 'Letter : Apple is still defying the Digital Markets Act' [2025] EPC <https://www.epceurope.eu/post/letter-apple-is-still-defying-the-digital-markets-act> accessed 16 January 2026.
14. Case T–438/25 *Apple v Commission* [2025] ECR C/2025/5215 6.10.2025.
15. *Meta – Article 5(2)* (Case DMA.100055) Commission Decision C/2025/3466 [2025] OJ C/2025/3466, 27.6.2025.
16. European Commission, 'Meta Commits to Give EU Users Choice on Personalised Ads under Digital Markets Act' [2025] Press Release, MEX/25/2966 <https://ec.europa.eu/commission/presscorner/detail/en/mex_25_2966>.
17. Case T–435/25 Meta Platforms v Commission [2025] OJ C/2025/5214 6.10.2025.
18. *Apple – Operating systems – iOS – Article 6(7) – SP – Features for Connected Physical Devices* (Case DMA.100203) Commission Decision C/2025/4646 [2025] OJ C/2025/4646 ; *SP – Apple – Article 6(7) – Process* (Case DMA.100204) Commission Decision C/2025/5000 [2025] OJ C/2025/5000.
19. *ibid*.

receive, assess, and respond to requests from developers and businesses by specifying requirements linked to process, transparency, and timely. [20]

Unlike non-compliance decisions, which in their form and nature closely resemble antitrust infringement decisions, specification decisions have – in our view – much more of a regulatory character. Their goal is specifically to indicate to the addressee gatekeeper what to do to comply with a specific obligation in Article 6 of the DMA. In that sense, they are potentially much more effective than a non-compliance decision to solve market issues, as they are, indeed, solution-oriented.

The two decisions are currently under appeal before the General Court. [21]

C. - Ongoing Investigations and Pending Proceedings

7 - Beyond the limited number of final decisions adopted to date, the Commission has opened several DMA proceedings still pending, which in their ensemble provide a useful indication of the current enforcement priorities and the breadth of issues raised by the new regulatory framework.

First, Alphabet is the subject of two ongoing non-compliance investigations. One concerns Google Search under Article 6(5) DMA, relating to suspected self-preferencing given the unequal treatment of third-party services within Google's general search results. [22] The Commission has already issued preliminary findings indicating that certain design and ranking features may favour Alphabet's own services, but no final decision has yet been adopted. A second proceeding targets Google Play under Article 5(4) DMA, examining whether Google continues to impose restrictions that limit app developers' ability to steer users towards alternative purchasing channels. [23] The latter is very similar to the Apple case, and it would appear as if the Commission chose to leave that case on the backburner while trying to fully address the Apple case.

Second, the Commission is pursuing a further non-compliance investigation against Apple concerning the company's new business terms for alternative app distribution, including the introduction of a so-called (and controversial) Core Technology Fee. [24] The investigation assesses whether these contractual and financial conditions undermine the effectiveness of the DMA obligations intended to open iOS to alternative app stores and distribution mechanisms. While the Commission has issued preliminary findings, the procedure remains ongoing.

Third, in late 2025 the Commission opened a new investigation into Google Search focusing on the conditions under which media publishers' content is accessed and ranked, and in particular whether access is granted on fair, reasonable, and non-discriminatory (FRAND) terms. [25]

20. *ibid.*
21. Case T–354/25 *Apple & Apple Distribution International v Commission* [2025] OJ C/2025/5212 6.10.2025 ; Case T–359/25 *Apple & Apple Distribution International v Commission* [2025] OJ C/2025/5213 6.10.2025.
22. *Alphabet – Online Search Engine – Google Search – Article 6(5)* (Case DMA.100193) Commission Decision [2024] Press Release IP/24/1689.
23. *Alphabet – Online Intermediation Services – App Stores – Google Play – Article 5(4)* (Case DMA.100075) Commission Decision [2024] Press Release IP/24/1689.
24. *Apple – New Business Terms* (Case DMA.100206) Commission Decision [2024] Press Release IP/24/3433.
25. European Commission, 'Commission opens investigation into potential Digital Markets Act breach by Google in demoting media publishers' content in search results' [2025] Press Release IP/25/2675 <https://digital-markets-act.ec.europa.eu/commission-opens-investigation-potential-digital-markets-act-breach-google-demoting-media-publishers-2025-11-13_en>.

2. Comparison between DMA and competition law enforcement

8 - Somewhat a child of antitrust enforcement, DMA enforcement cannot avoid being compared to its forebearer. Criticisms levelled against competition enforcement, in particular enforcement of Article 102 TFEU include that it is too complex, slow, occasionally narrow, and therefore unsuited overall to fast-moving digital markets. The DMA was conceived partly to address these issues. Two years of DMA enforcement is too short a period to draw definitive conclusions as to whether the objectives were reached, but interesting comparisons can already be drawn.

A. - The Antitrust Anti-Steering Decision Versus the DMA Anti-Steering Decision

9 - In the antitrust anti-steering case [26], the Commission found that Apple abused its dominant position by imposing unfair terms on music streaming apps. The Commission imposed a €1.84 billion fine for an 8 year infringement period. The case started with a complaint filed by Spotify in March 2019 and was concluded on 4 March 2024. The 251-pages decision had a relatively narrow scope, covering only music apps, even though the underlying problem was broader.

By contrast, the DMA 67-page-long anti-steering decision [27] described above in section 2 was adopted in just over a year after the opening of proceedings. The fine imposed reached €500 million for the approximately 13 months of infringement. The decision found violations of the DMA across the board, i.e. not limited to any specific industry or type of app, which is a far more satisfactory solution. In addition, the Commission will closely examine the measures Apple will adopt to place itself in conformity with Article 5(4) of the DMA.

For the most part, the DMA delivered. The decision is short, and does not contain complex economic assessment but merely applies the letter of the law [28] to conclude that Apple was not compliant. In addition, the DMA delivered on its promise to speed up proceedings. While the Commission slightly exceeded the one-year indicative deadline to conclude proceedings, it managed to conclude them within thirteen months.

Now, two years after the antitrust steering decision and eight months after its DMA counterpart, the case has not yet been fully remedied. Even if Apple submitted revised terms and conditions in June 2025 to comply with the European Commission (EC) decision, the Commission is still evaluating these terms, and several stakeholders have expressed concerns about the suitability of these new terms (see above at para. 16). While Apple had announced that the new terms would apply as of January, this does not appear to have been implemented as of the time of writing.

All in all, we can say with confidence that the DMA has allowed faster and broader action by the Commission on the Apple App Store steering issue (by comparison to the antitrust action). However, as of today, the Commission has not yet managed to secure a remedy solving the non-compliance issue.

26. *Apple – App Store Practices (music streaming)* (Case AT.40437) Commission Decision C/2024/3554 [2024] OJEU C/2024/3554.
27. *Apple – Online Intermediation Services – app stores – AppStore – Article 5(4)* (Case DMA.100109) (n 13).
28. The letter of the law was however debated, as the Commission and Apple exchanged arguments on the very meaning of »free of charge« based on different language versions of Article 5(4). See paragraphs 140-143 and 149-162 of the decision.

B. - The Google Shopping Antitrust Decision Versus the Ongoing Procedure under Article 6(5) DMA

10 - On 27 June 2017, the Commission adopted a decision finding that Google abused its dominant position in the Search market. The abuse consisted essentially of a combination of the self-preferential promotion of Google's own price comparison service and the demotion of competitors in search results. The investigation concerned only the so-called 'shopping vertical', not other verticals such as travel or hospitality searches. The nearly 8-year long investigation was punctuated with several unsuccessful attempts to settle the case by commitments. Ultimately, the Commission adopted an infringement decision imposing a fine of approximately €2.42 billion, as well as ordering Google to bring the infringement to an end..

As mentioned above, shortly after the entry into application of the DMA obligations, the Commission opened a non-compliance case against Google for breach of Article 6(5), i.e. self-preference in ranking on the Search page (a CPS), i.e. the very same issue as in the antitrust (albeit concerning more verticals). The Commission has not complied with the soft 12-month deadline set forth in Article 29(2) to conclude the investigation. While the EC did issue preliminary findings, we are nearing two years of investigation without a conclusion in sight – let alone a remedy. On the other hand, the scope of the decision is understood to cover many search verticals, raising the prospect that, unlike the antitrust decision, the scope of the DMA decision will address non-compliance on a wider scope.

C. - The Specification Decisions : The True Expression of a New Regulatory Regime?

11 - As we seek to compare the two DMA specification decisions to antitrust enforcement, we find ourselves lacking comparators. Commitment decisions are perhaps what comes the closest to a specification decision, in that they render binding commitments (generally of a behavioral nature) proposed by undertakings concerned to comply in a specific way with a general obligation (e.g. not to abuse a dominant position) in a particular market situation. However, a commitment decision often requires a full investigation (a statement of objections or a preliminary assessment), is typically adopted after several years of investigation, and concerns a narrow set of facts. The risk of reverting to a fully-fledged infringement procedure is also often present.

By contrast, the purpose of the specification procedure is to 'assist' the regulated entity to comply with one or more obligations. [29] It can be initiated by the regulator or the regulated entity. Specification proceedings under Article 8 of the DMA are time-bound and, unlike the soft deadline under Article 29 DMA, have binding force. The EC must send preliminary findings to the undertaking within 3 months and adopt a decision within 6 months.

In the Apple case, compliance issues in relation to connected device manufacturers in the first 6 months of application of Article 6(7) DMA prompted the Commission to open proceedings under Article 8 on 19 September 2024. Within 6 months the Commission managed to adopt two specification decisions, one specifying certain iOS features that Apple is obliged to make available to connected device manufacturers, and one that set out a general process that Apple must follow to deal with any interoperability requests.

Two months after the connected device decision, Apple sought a waiver to apply certain measures included in the decision, but the Commission rejected this request. [30]

D. - Competition in AI Markets : The New Frontier Between DMA and Antitrust?

12 - In December 2025, the Commission made the headlines by opening two antitrust cases in the area of artificial intelligence (AI) within a few days of each other. [31]

The Meta case concerns the company's new WhatsApp business application programming interface (API) policy, announced on 15 October 2025, and the ban on all general-purpose AI (GenAI) assistants (except Meta AI) from WhatsApp, with effect on 15 January 2026. Meta's conduct in this case reflects many theories of harm applied in recent cases in digital markets : tying (*Facebook Marketplace* case), [32] self-referencing (*Google Shopping* case) [33] and access restriction (*Google Android Auto)*. [34] Despite a seemingly clear self-preferencing aspect, the Commission chose to apply competition law and not the DMA. This is presumably because WhatsApp, having been designated as NIICS, Article 6(5) was judged non-applicable.

The Google case investigates whether Google has abused its dominance in general search and video search by unfairly using the content of web publishers to provide its distinct AI-powered chatbot services 'AI Overviews' and 'AI Mode ;. Similarly, the EC is investigating allegations that Google has been unfairly using video content uploaded on the video-sharing platform YouTube to train its generative AI models. In particular, the EC investigates to what extent the generation of AI Overviews and AI Mode by Google as well as the training of AI models is based on third-party content without appropriate compensation, and without the possibility for content providers to refuse such uses without losing access to Google Search or YouTube. The EC is also concerned that, through these practices, Google may have gained an unfair competitive advantage *vis-à-vis* rival providers of GenAI services. While the case relates to two DMA CPSs – Google Search and YouTube – none of the practices concerned fell within the scope of the DMA, so the Commission chose to use competition law to tackle these new issues.

These two cases may exemplify the future articulation of competition law and the DMA. When new services emerge (e.g. AI), the services themselves or the platforms that host them may not have been covered by or designated under the DMA. When the DMA does not apply, competition law acts as a safety net to catch restrictive behavior. Of note, VP Commissioner Ribera announced that the Commission is contemplating interim measures in the Meta case. [35] If it were to do that, this would follow the Italian competition authority's adoption of interim measures on 22 December

29. See Process decision, para. 9 : »On 3 September 2024, the Commission informed Apple of its intention to assist Apple in its compliance efforts in relation to a selected field of use cases and to its general interoperability request process through opening of specification proceedings pursuant to Article 8(2) of Regulation (EU) 2022/1925.«

30. *Apple – Operating systems – iOS – Article 6(7) – SP – Features for Connected Physical Devices* (Case DMA.100203) (n 19).

31. European Commission, 'Commission opens antitrust investigation into Meta's new policy regarding AI providers' access to WhatsApp' [2025] Press Release IP/25/2896 <https://ec.europa.eu/commission/presscorner/detail/hu/ip_25_2896> accessed 20 February 2026 ; European Commission, 'Commission opens investigation into possible anticompetitive conduct by Google in the use of online content for AI purposes' [2025] Press Release IP/25/2964 <https://ec.europa.eu/commission/presscorner/detail/da/ip_25_2964> accessed 20 February 2026.

32. *Facebook Marketplace* (Case AT.40684) Commission Decision [2024] Press Release IP/21/2848.

33. *Google Search (Shopping)* (Case AT.39740) Commission Decision C/2018/009 [2017] OJEU C/2018/009 ; Confirmed by EU courts, see Case C-48/22 P *Google LLC, Alphabet Inc v Commission* [2024] ECLI :EU :C :2024 :726.

34. Case C-233/23 *Alphabet and Others v Autorità Garante della Conorrenza e del Mercato ('Google Android Auto')* Grand Chamber [2025] ECLI :EU :C :2025 :110.

35. Lewis Crofts and Anna Ferrari, 'EU working »faster than normal« as Ribera considers WhatsApp AI injunction' [2026] MLex <https://www.mlex.com/mlex/articles/2430014/eu-working-faster-than-normal-as-ribera-considers-whatsapp-ai-injunction> accessed 20 February 2026.

2025 that order Meta to suspend its new policy in Italy. [36] This shows that competition law can be used on an accelerated timeline to tackle *prima facie* abuses that risk causing serious harm to competition in digital markets (although it remains to be seen in this case how quickly the EC will adopt interim measures).

3. Conclusions – Antitrust and DMA Enforcement : Complementary or Substitutive Tools?

13 - At the end of this short overview, a few trends are emerging.

First, where the DMA squarely applies, it delivers some of its promises : quick action and broader reach. There is hope that non-compliance decisions will be adopted within 1-2 years instead of 5-7 years. It helps that the Commission does not have to define markets and that the red lines are clearer. Increased speed of action matters in the digital world, where markets evolved quickly and are prone to tipping. In addition, because the DMA obligations are defined in general terms, decisions cut across sectors and are no longer limited to a particular niche – a welcome improvement indeed.

Second, there is still room for improvement in relation to remedies. Competition law often fails to deliver effective remedies, especially as it pertains to fining decisions – think of Microsoft Windows Media Player, [37] Google Shopping, [38] Facebook Marketplace, [39] Apple steering [40] (all cases in which, in our view, the Commission struggled to impose an effective remedy). By contrast, the recent Microsoft Teams decision is much more focused on remedies, [41] and in its recent ad tech decision the Commission is contemplating the adoption of structural remedies. So far, the DMA has yet to produce any effective remedies in most non-compliance decisions (the Apple and Google cases),but the two specification decisions show that Article 8 may provide for an interesting pathway to reach solutions.

Third, the DMA will not solve all competition issues in the digital world. Unlike competition law, which remains a highly flexible instruments (both in terms of companies it can cover and the scope of investigations), the scope of the DMA limited to gatekeepers and to the existing obligations. New issues will likely need to be addressed under competition law, as illustrated by the two recently opened AI cases. The complementarity between the two tools is particularly powerful, as it provides litigants with multiple avenues for action.

Fourth, it is worth remembering that while the Commission holds a monopoly over DMA public enforcement, complainants may also bring cases in front of national courts. What is missing, however, is the possibility of bringing DMA cases before competition authorities. As the recent Meta/WhatsApp case shows, [42] a national authority can sometimes be much faster than the EC to tackle antitrust problems, thanks to less rigid procedures. [43] A future reform of the DMA should perhaps consider reopening this question and empower national competition authorities to increase the effectiveness of the DMA.■

36. See the AGCM's interim measures ordering Meta to suspend WhatsApp Business Solution Terms excluding competing AI chatbots at *Meta AI* (Case A576) Autorità Garante della Concorrenza e del Mercato [2025] Provvedimento n. 31728.
37. *Microsoft* (Case COMP/C 3/37.792) Commission Decision [2004] OJ L32/23.
38. *Google Search (Shopping)* (Case AT.39740) (n 34).
39. *Facebook Marketplace* (Case AT.40684) (n 33).
40. *Apple – App Store Practices (music streaming)* (Case AT.40437) (n 27).
41. *Microsoft Teams* (Case AT.40721) Commission Decision C/2025/6579 [2025] OJEU C/2025/6579. See also *Microsoft Teams II* (Case AT.40873) Commission Decision C/2025/6579 [2025] OJEU C/2025/6579.
42. European Commission, Press Release IP/25/2896 (n 32).
43. *Meta AI* (Case A576) (n 37).

14 Regulating the digital economy in the EU : an industrial policy perspective



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The term 'industrial policy' often beckons annoyance amongst competition lawyers. Yet, competition policy has long been a rather successful EU industrial policy tool especially in furthering the integration of the single market. This essay argues that the EU's tech regulations, in particular the DMA, are also an integral part of EU industrial policy with the aim to promote innovation with 'European values' in the internal market. Despite the backlash these regulations have faced, they are capable of improving the conditions for innovation to emerge by harmonising the fragmented digital rules of Member States. They are also attuned to the concerns about red tape and provide myriad ways to facilitate compliance. Finally, there is no doubt that they help protect the fundamental rights of EU citizens in both existing and novel technological domains. By presenting an industrial policy perspective to better understand the logic of these regulations, this essay contributes to the growing literature on competition policy, regulation, and industrial policy.

Introduction

1 - The current issue of the Sciences Po Law Review centres on a timely question : what is the role of competition law outside the narrow confines of market efficiency? This essay adopts an industrial policy perspective to make sense of the EU's regulation of the digital economy, in particular the Digital Markets Act (DMA). The DMA codifies some of competition law's established principles that prevent powerful firms from restricting access to their domains of economic activity. It is designed with a view to open digital markets to new entry – its 'contestability' goal. When read within the broader landscape of the EU's new wave of 'tech' regulations, this contestability goal takes on a specific meaning : it implies innovation imbued with so-called 'European values'.

This essay is structured in three parts. The first part defines industrial policy and explores the relationship between competition and industrial policy in the EU. The second part provides an overview of the EU's recent 'tech regulations' and how the objective to promote European innovation features in these regulations, with a focus on the DMA. The third part describes the criticism that these regulations stifle innovation instead of promoting it, most notably the Draghi Report (2024). It then explains why the EU's tech regulations may meaningfully contribute to the EU's industrial policy goal of promoting innovation in light of the EU's political and social make-up. It focuses on three factors : the harmonisation of rules across Member States, the practical and formal facilitation of enforcement which reduces the compliance costs on regulatees, and the logic of shaping the direction of innovation in line with 'European values' within the EU's market economy. Overall, the essay contributes to the growing scholarship on the relationship between competition policy, tech regulation, and industrial policy. [1]

1. The meaning of industrial policy

2 - 'Industrial policy' is a politically charged term with no established definition. [2] For purposes of this essay, and borrowing from Juhász, Lane and Rodrik, it is defined as 'government policies that explicitly target the transformation of the structure of economic activity in pursuit of some public goal.' [3] This goal, according to the authors, 'is typically to stimulate innovation, productivity, and economic growth, but it could also be to promote climate transition, good jobs, lagging regions, exports, or import substitution.' [4] The authors' definition distils contemporary approaches to industrial policy that combine diverse mechanisms to structure economic activity like subsidies, regulation, iterative forms of industry-government collaboration, and education. It goes beyond the traditional approaches to industrial policy characterised by top-down intervention in specific markets, for example in the form of subsidies to favoured industrial groups.

In recent years, competition lawyers heard the term industrial policy most prominently in 2018-2019 during the proposed merger between Siemens and Alstom, and then again in 2024 with the publication of the Draghi Report on the future of European competitiveness. [5] The European Commission blocked the Siemens/Alstom merger which would have created a near-monopoly in

1. For example, T. Wu, 'Antitrust and Industrial Policy : A Misunderstood Relationship' (2025) Columbia Public Law Research Paper No. 5936557, Columbia Law and Economics Working Paper No. 5936557 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5936557> accessed 28 February 2026 ; D. Coyle, 'Everything Everywhere All At Once : competition policy and industrial policy choices in an era of structural change' (2024) 40 Oxford Review of Economic Policy 718 ; P. Alexiadis and K. Lampropoulos, 'EU competition policy through an industrial policy lens : Adapting to the post-Draghi world' (2026) 1 Concurrences <https://www.concurrences.com/fr/review/issues/no-1-2026/article-6196/i-economic-context> accessed 28 February 2026.
2. D. Felisini and P. Paesani, 'Industrial Policy and its Funding at the Frontier of European Integration : Lessons from the Past and Present Challenges' (2025) 26 :2 Enterprise & Society 709-734, 710.
3. Juhász et al. 'The New Economics of Industrial Policy' (2024) 16 Annu. Rev. Econ. 2024. 213-42, 216 <https://drodrik.scholars.harvard.edu/sites/g/files/omnuum7106/files/annurev-economics-081023-0246380-final.pdf> accessed 23 February 2026.
4. *ibid*.
5. M. Draghi, 'The future of European competitiveness – A competitiveness strategy for Europe' (2024)6 <https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=the%20future%20of%20european%20competitiveness%20_%20a%20competitiveness%20strategy%20for%20europe.pdf> accessed 28 february 2026.

high-speed trains in the EU. [6] In the aftermath of the case, many commentators saw competition law as an obstacle to the creation of 'European champions' in tension with industrial policy. [7] The French and German governments published 'A Franco-German Manifesto for a European industrial policy fit for the 21st century' which argued that competition law must be changed to ensure European companies are capable of competing on the global stage. [8] Their proposed changes would have entailed – among other things – a right of appeal to the Council that could override the Commission decisions.

The Draghi report's approach to competition policy is nuanced [9] – it recognises that competition policy can support industrial policy. [10] The report, published in September 2024, is intended to serve as guidance for the European Commission during Ursula von der Leyen's second term as Commission president which runs from 2024 to 2029. The report proposes numerous changes to competition policy, ranging from additional guidance on novel types of agreements to the introduction of a 'New Competition Tool' which was previously on the table but was shelved with the adoption of the DMA. [11]

Seeing competition law as an obstacle to industrial policy [12] would be a crude interpretation of the rich history of EU industrial policy as distinct from national industrial policies of its Member States. [13] Competition law has long served as a tool of EU industrial policy to 'discipline member states' industrial policy and ensure competition and a level playing field in the single market. [14] As such, it has been instrumental in removing barriers to trade among Member States in support of the single market imperative which has guided EU industrial policy since the Treaty of Rome. [15]

In the aftermath of the Great Recession, EU industrial policy has gone beyond horizontal market regulation (including through competition law) and R&D funding which marked the period between 1980s-2000s, known as its 'neoliberal' period. [16] The current 'rise of EU industrial policy' is less horizontal, more sector-driven and mission-oriented, with a push for deeper market integration. [17] The EU's tech regulations can be seen as part of this new industrial policy framework as further explained below.

2. The EU's tech regulations

3 - The EU has passed a number of 'tech regulations' in recent years, most notably the Digital Markets Act (DMA, 2022), the Digital Services Act (DSA, 2022), and the AI Act (2024). The General Data Protection Regulation (GDPR, 2016) often features in the list even though it is less of a novelty today. Each of these tech regulations have an overarching goal that underlies the obligations that they set for their addressees. The DMA aims to ensure contestability and fairness in digital markets. The DSA has the primary objective of ensuring a safe, predictable and trusted online environment. The AI Act extends the product safety framework of the EU to AI models and systems to mitigate the risks that they pose to the health, safety and fundamental rights of European citizens. The GDPR aims to protect natural persons in relation to the processing of personal data in line with the fundamental right to the protection of personal data.

The DMA sits at the intersection of competition law and digital regulation. It is a type of asymmetric regulation : it applies only to a limited number of gatekeepers that provide 'core platform services'. These core platform services, defined in a closed list in Article 2(2) of the DMA, are the usual suspects of the digital economy : search engines, operating systems, messaging apps, app stores, etc. An undertaking is designated a gatekeeper if three cumulative conditions are satisfied : the undertaking has a significant impact on the internal market ; it provides a core platform service which is an important gateway for business users to reach end users ; and it enjoys or will foreseeably enjoy an entrenched and durable position in its operations (Article 3(1), which is supplemented with a quantitative presumption of gatekeeping in Article 3(2)).

The twin goals of the DMA are 'contestability' and 'fairness' in digital markets. The contestability goal addresses the near-total lack of new entry into the core platform service markets due to the entrenched positions of certain companies. The fairness goal concerns the 'unfair practices' that gatekeepers engage in *vis-à-vis* their business users, such as using business users' data in markets where the platform competes with them (e.g. Amazon and the third-party sellers on Amazon). If a company is designated as a gatekeeper, it must comply with the DMA obligations as regards its relevant core platform services.

The obligations in Articles 5 to 7 codify and supplement established Article 102 TFEU principles and enforcement with regards to the long-running business practices of the gatekeepers. [18] For example, Article 6(5) prohibits gatekeepers from treating their own services more favourably than similar third party services or products in ranking as well as related indexing and crawling. This provision mirrors the *Google Shopping* case which targeted Google's unfair demotion of rival comparison shopping services on its search engine. [19] As regards contestability, by forcing messaging gatekeepers like Meta to, for instance, interoperate with third-party messaging apps (Article 7) or allow third-party app stores on their ecosystems (Article 6(4)), the regulation aims to give compa-

6. *Siemens/Alstom* (Case M.8677) Commission Decision C(2019) 921 (2019) OJ C 300/14. For a summary of the decision, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj :JOC_2019_300_R_0007> accessed 23 February 2026.
7. For example, see K. Efstathiou, 'The Alstom-Siemens merger and the need for European champions' (Bruegel, 11 March 2019) <https://www.bruegel.org/blog-post/alstom-siemens-merger-and-need-european-champions> accessed 28 February 2026.
8. 'A Franco-German Manifesto for a European industrial policy fit for the 21st century' (2019) <https://presse.economie.gouv.fr/wp-content/uploads/2020/11/fd32d63828617cc973af75261e66209d.pdf> accessed 28 February 2026.
9. I. Liannos, 'What the Draghi Report Really Means for the Future of European Competition Policy' (Promarket, 31 October 2024) <https://www.promarket.org/2024/10/31/what-the-draghi-report-really-means-for-the-future-of-european-competition-policy/> accessed 28 February 2026.
10. M. Draghi, 'The future of European competitiveness – In-depth analysis and recommendations (Part B)' (2024) 298-304 <https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf> accessed 28 February 2026.
11. 'Impact Assessment for a possible New Competition Tool' (*European Commission*, 2020) <https://competition-policy.ec.europa.eu/public-consultations/2020-new-comp-tool_en> accessed 28 February 2026.
12. F. Scott Morton, 'The three pillars of effective European Union competition policy' (2024) 19 Policy Brief Bruegel 1-12 <https://www.jstor.org/stable/resrep63077?seq=1> accessed 28 February 2026 ; Liannos *supra* n 10.
13. For a historical account, see Felisini and Paesani *supra* n 3.
14. D. Di Carlo and L.P.H. Schmitz, 'Europe First? The Rise of EU Industrial Policy Promoting and Protecting the Single Market' (2023) 30(10) Journal of European Public Policy 2063, 2075.
15. A. Albors Llorens, 'The Ties that Will Always Bind : EU Competition Law and the Single Market' in J. Adams-Prassl and others (eds), *The Internal Market Ideal : Essays in Honour of Stephen Weatherill* (Oxford, 2024).
16. Felisini and Paesani *supra* n 3 719.
17. Felisini and Paesani *supra* n 3 ; Di Carlo and Schmitz *supra* n 15 ; Draghi *supra* n 6 ;E Letta, 'Much More Than a Market : Speed, Security, Solidarity – Empowering the Single Market to Deliver a Sustainable Future and Prosperity for All EU Citizens' (Report commissioned by the European Council, April 2024) <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf> accessed 28 February 2026.
18. It is not the purpose of this essay to examine or explain why the EU chose to introduce ex ante regulation to deal with the problems of competition law. For an overview, see F. Bostoen, 'Understanding the Digital Markets Act' (2023) 68(2) Antitrust Bulletin, 263.
19. C-48/22 P *Google and Alphabet v Commission* [2024].

nies wishing to provide these services some room for growth. [20] Under Article 7, Meta recently announced that two European messaging apps will now interoperate with WhatsApp. [21]

3. Tech regulation as industrial policy

4 - In addition to their overarching goals, the European Commission has repeatedly emphasised, directly and indirectly, that these tech regulations aim to support innovation in the EU's internal market. This point is reiterated across the recitals. A closer look at the regulatory proposals and recitals also shows that the EU aims to shape the direction of innovation towards products and services which embody so-called 'European values'. As such, the EU's tech regulations represent a strategic approach to regulation targeting the transformation of the structure of economic activity in pursuit of the goal to stimulate innovation imbued with 'European values'. This approach fits the industrial policy definition and the post-recession EU industrial policy trend explained above.

Taking a closer look at the regulations, the Commission stated in the DMA proposal that 'by promoting effective competition in digital markets and in particular a contestable and fair online platform environment, [the DMA] supports trust, innovation and growth in the single market.' [22] Similarly, recital 4 of the DSA states that 'this Regulation provides the conditions for innovative digital services to emerge and to scale up in the internal market.' Recital 8 of the AI Act similarly states : 'By laying down those rules as well as measures in support of innovation with a particular focus on small and medium enterprises (SMEs), including startups, this Regulation supports the objective of promoting the European human-centric approach to AI and being a global leader in the development of secure, trustworthy and ethical AI as stated by the European Council.'

Indeed, it is not just any kind of innovation that the EU would like to see in the internal market, it is innovation 'in accordance with Union values'. [23] The EU's aim to shape the direction of innovation was already visible in the GDPR. For example, its Recital 7 refers to 'the importance of creating the trust that will allow the digital economy to develop across the internal market.' The DMA and DSA similarly emphasise 'trust' in the single market and intermediary services. [24] The AI Act is even more specific about EU values. For example, Recital 1 reads

> The purpose of this Regulation is to improve the functioning of the internal market by laying down a uniform legal framework in particular for the development, the placing on the market, the putting into service and the use of artificial intelligence systems (AI systems) in the Union, in accordance with Union values, to promote the uptake of human centric and trustworthy artificial intelligence (AI) while ensuring a high level of protection of health, safety, fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union (the 'Charter'), including democracy, the rule of law and environmental protection, to protect against the harmful effects of AI systems in the Union, and to support innovation.

Taken together, these regulations aim for not just any innovation, but innovation that respects fundamental rights and helps create trust in digital services and AI.

4. Innovation vs. regulation?

5 - Most of these tech regulations were enacted in a context of increasing concern with growth rates in the EU, coupled with an 'innovation gap' between the EU and the US – and more recently China. Despite the regulations' common goal of promoting innovation, the so-called 'innovation gap' is attributed – at least in part – on 'inconsistent and restrictive regulations' as noted in the Draghi report. [25] The report is particularly critical of the AI Act and the GDPR. [26] For example :

> While the ambitions of the EU's GDPR and AI Act are commendable, their complexity and risk of overlaps and inconsistencies can undermine developments in the field of AI by EU industry actors. The differences among Member States in the implementation and enforcement of the GDPR (...) as well as overlaps and areas of potential inconsistency with the provisions of the AI Act create the risk of European companies being excluded from early AI innovations because of uncertainty of regulatory frameworks as well as higher burdens for EU researchers and innovators to develop homegrown AI. [27]

While the report is not categorically opposed to asymmetric regulations like the DMA – in fact it calls for strong DMA enforcement – it emphasises that 'their implementation must avoid producing administrative and compliance burdens and legal uncertainties as the GDPR's.' [28] Immediately after its publication, the report was perceived as a call to reduce the regulatory burden and red tape faced by European companies.

The Draghi Report does not clarify what these administrative and compliance burdens are, nor the legal uncertainties in the GDPR. Yet it is true that the exponential growth of the EU's tech regulations has created some confusion among companies, citizens, lawyers, and even regulators. The confusion emanates from conceptual uncertainties (e.g. the AI Act's definition of AI systems) and terminological disconnect (e.g. between the 'very large online platforms' of the DSA and the 'gatekeepers' of the DMA), not to mention the overlaps and clashes with other laws and jurisprudence (e.g. the potential overlap between systemic risks under the DSA and the AI Act). There remain uncertainties about compliance (e.g. the case of Meta's 'pay-or-consent' business model, which the CJEU seems to have endorsed, [29] while the European Commission found it to be a violation of the DMA). [30]

Despite the criticism directed at the EU due to the multiplicity and complexity of its tech regulations, there are several reasons why the DMA coupled with other tech regulations can contribute to EU industrial policy. First, in areas of strategic political importance like digital markets and AI, it makes sense for the EU not to leave regulation in the hands of 27 Member States. For example, by the time the DMA was enacted, Member States were planning and even passing similar rules addressing entrenched market power. As explained in Recital 6 of the DMA, '[t]his has created divergent regulatory solutions which results in the fragmentation of the internal market, thus raising the risk of increased compliance costs due to different sets of national regulatory requirements.' The DMA serves to approximate otherwise diverging national rules. Similarly, the AI Act was enacted in part because EU lawmakers wanted to

20. M. Meaker, 'Europe Is Breaking Open the Empires of Big Tech' (*Wired*, 6 March 2024) <https://www.wired.com/story/europe-dma-breaking-open-big-tech/> accessed 28 February 2026.
21. Meta, 'Messaging Interoperability : WhatsAppenables third-party chats for users in Europe' (14 November 2025) <https://about.fb.com/news/2025/11/messaging-interoperability-whatsapp-enables-third-party-chats-for-users-in-europe/> accessed 28 February 2026.
22. European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)', COM(2020) 842 final, 60.
23. 'Union values' is yet another highly contested term. For a critical history, see W. Weymans, 'A Critical History of the Use of 'European Values' in R. Polak and P. Rohs (eds) *Values – Politics – Religion : The European Values Study* (Springer, 2023).
24. See, e.g., recitals 4 and 9 of the DSA ; COM(2020) 842 final *supra* n 23.
25. Draghi, *supra* n 6, 6.
26. Draghi, *supra* n 6, 79.
27. *ibid*.
28. *ibid*.
29. C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt*, [2023] §150.
30. 'Commission finds Apple and Meta in breach of the Digital Markets Act' (*European Commission* 23 April 2025) <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1085> accessed 28 February 2026.

'create legal certainty and ensure that no obstacle to the cross-border provision of AI-related services and products emerge' by harmonising the rules on AI systems across the EU. [31] Article 114 TFEU provides the legal basis for the DMA, DSA, and AI Act. This provision is known as the 'Single Market Clause' and it is the main treaty provision which serves to harmonise and approximate Member State laws with a view to achieving the integration of the single market.

Meanwhile, the US is now facing a fragmented legal framework for AI as states across the political spectrum, such as California, Colorado and Texas, are passing laws to govern different aspects of the technology and its applications. [32] Start-ups looking to scale up in the EU will only have one set of rules to comply with for purposes of AI safety. In contrast, companies launching AI products in the US are facing different regulatory measures across different states, dealing with a divergent and piecemeal approach to AI safety. In fact, even Draghi conceded the importance of harmonised European rules to boost investment in innovation in the telecommunications sector. But these points made in the telecommunications chapter of the report were not repeated in the innovation chapter.

Second, criticism about regulatory burden and compliance costs on small companies may be unwarranted. The DMA is an asymmetric regulation which applies only to seven gatekeepers as of February 2026. After almost three years of enforcement, there have only been two non-compliance decisions under the DMA. [33] Its enforcement so far demonstrates that the Commission is open to dialogue with both gatekeepers and third-parties to clarify what compliance with specific provisions should look like. [34]

Similarly, the DSA's most onerous requirements apply only to 'very large online platforms' and 'very large online search engines'. While the AI Act provisions on prohibited, high and low-risk AI systems are applicable to all providers and deployers regardless of size, provisions on general purpose AI models with systemic risk are expected to apply only to a small number of companies at any given point in time. [35] Meanwhile, compliance with the high-risk AI system provisions which comprises the largest group of regulatees under the AI Act is primarily governed by self-assessment and European standards, which are currently being drafted by European standardisation organisations. Furthermore, the regulation includes provisions crafted to help start-ups and SMEs with compliance. For example, under article 62(1) of the AI Act, MS are obliged to 'organise specific awareness raising and training activities on the application of [the AI Act] tailored to the needs of SMEs including start-ups'. The regulation also includes R&D and free and open-source (FOS) exemptions. Under Article 2(6) of the AI Act, the regulation does not apply to 'AI systems and models, including their output, specifically developed and put into service for the sole purpose of scientific research and development.' Similarly, rules on GPAI do not apply to AI models released under FOS licenses, except where the model is a GPAI model with systemic risk (Article 53(2)). [36]

Third, the EU's political economy differs from that of its US and Chinese counterparts, each being underpinned by different varieties of capitalism – even though globalisation may give the impression that capitalism is homogenous around the world. [37] Irrespective of its merits and drawbacks, the EU framework requires private entities to be more attentive to the broader societal implications of their activities, whereas the US takes a markedly more permissive approach towards private experimentation. This permissiveness is reflected, for example, in the so-called 'beta mentality' of tech companies, whereby services remain perpetually in beta mode and are tested on users despite the known existence of flaws, as well as in mantras such as 'move fast and break things'. In a context marked by more robust public oversight of capitalist excesses, the EU cannot be expected to produce the same innovative output as a 'Wild West' model of capitalism. The regulations discussed above also reflect this brand of European political economy by endeavouring to shape innovative output in ways that, for example, put fundamental rights protections ahead of purely economic goals. The recent DSA investigation into Grok's widespread production and dissemination of sexually explicit images of women and children on X is a case in point. [38] Grok's 'spicy mode' which allowed the generation of these images is technically an innovation, but there is no doubt that the fundamental rights of EU citizens, especially women and children, are better protected without it.

This is not to say that the EU's strategic regulatory approach provides the magic formula to promote innovation. As discussed, the regulations are partly attuned with the direction of innovation that the EU intends to see in the internal market – namely innovation imbued with European values. Yet, they do not appear to distinguish between different types of innovation, for example based on the magnitude of innovation or its effects on existing value networks. [39] The DMA is essentially a backward-looking regulation : it cements established principles of competition law and allows for their swift application in a closed list of digital markets which have existed since the 2000s. As such, it is focused on opening up entry in existing digital markets. Meanwhile, AI is ushering in a 'technological revolution and the DMA may have ensured that AI markets remain open. But its closed list of core platform services prevents its effective application in the AI sector especially as regards the development of foundation models. [40]

Furthermore, none of these regulations are directly protective of European business in spite of how they might appear. The DMA has faced backlash because the great majority of designated gatekeepers are American. Statements by MEP Andreas Schwab, who was the rapporteur on the DMA and is known as its architect, during the negotiation phase of the DMA lend some support to the claim that it is a protectionist regulation. For example, he reportedly stated in 2021 that : 'Let's focus first on the biggest problems, on the biggest

31. European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts', COM(2021) 206 final.
32. IAPP maintains a list of US state legislation related to AI, available at C. Zweifel-Keegan, D. Botero, 'US State AI Governance Legislation Tracker' (*IAAP*, 6 October 2025) <https://iapp.org/resources/article/us-state-ai-governance-legislation-tracker> accessed 28 February 2026.
33. European Commission, 'Commission finds Apple and Meta in breach of the Digital Markets Act' (*European Commission*, 23 April 2025) <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1085> accessed 28 February 2026.
34. A. de Streel and others, 'The Anatomy of the DMA Process : An Example of Responsive Regulation' (2026) Journal of European Competition Law & Practice (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6177619> accessed 28 February 2026.
35. European Commission, 'General-Purpose AI Models in the AI Act – Questions & Answers' (European Commission, 9 September 2025) <https://digital-strategy.ec.europa.eu/en/faqs/general-purpose-ai-models-ai-act-questions-answers> accessed 28 February 2026.
36. This exemption does not apply to GPAI with systemic risk.
37. P.A. Hall and D. Soskice, 'An Introduction to the Varieties of Capitalism' in P.A. Hall, D. Soskice (eds) *Varieties of Capitalism : The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001) 1, 56.
38. For more information, see A. G. Yaşar, 'Digital Services Act as AI governance : do systemic risk provisions of the DSA apply to Grok?' (CREATe, 16 January 2026) <https://www.create.ac.uk/blog/2026/01/16/digital-services-act-as-ai-governance-do-systemic-risk-provisions-of-the-dsa-apply-to-grok/> accessed 28 February 2026 ; European Commission, 'Commission investigates Grok and X's recommender systems under the Digital Services Act' (European Commission, 26 January 2026) <https://ec.europa.eu/commission/presscorner/detail/en/ip_26_203> accessed 28 February 2026.
39. For a detailed discussion, see P. Larouche and A. de Streel, 'Will the Digital Markets Act Kill Innovation in Europe?' CPI Columns Europe <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/05/Europe-Column-May-2021-Full.pdf> (accessed on 28 February 2026)
40. A. Gizem Yaşar and others, 'Integration of Generative AI in the Digital Markets Act : Contestability and Fairness from a Cross-Disciplinary Perspective' LSE Legal Studies Working Paper No. 4/2024 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769439> accessed 28 February 2026.

bottlenecks. Let's go down the line – one, two, three, four, five – and maybe six with Alibaba (...) But let's not start with number 7 to include a European gatekeeper just to please [US president Joe] Biden.' [41] He also pushed for the gatekeeper definition to capture only those companies that provide at least two core platform services, [42] which would have excluded Booking.com from the list of gatekeepers. This proposal was not adopted, and the company is the only designated European gatekeeper as of February 2026.

It may well be true that the DMA would not have existed had its primary target been European companies. But it is also true that these regulations do not go beyond favouring innovation with 'European values' and do not guarantee an increase in homegrown innovation. To the extent the regulations are respected, any person or company can provide digital services in the EU regardless of where they come from. Overall, these regulations only function as supporting mechanisms of industrial policy. As Schumpeter emphasised time and again, the primary driver of innovation is the combination of entrepreneurship and capital, which market regulation can facilitate but cannot create from scratch. [43]

Conclusion

6 - This essay has proposed an industrial policy perspective to help make sense of the EU's novel tech regulations. Enacted in times of geopolitical uncertainty and of a race for global technological leadership, these regulations aim to foster innovation that respects EU values. Despite the constant criticism that they attract, there is more than one reason to believe that they may contribute to EU industrial policy. These regulations help harmonise digital rules across Member States, facilitate compliance in formal and informal ways, and increase fundamental rights protection across both established and novel digital services.■

41. Javier Espinoza, 'EU should focus on top 5 tech companies, says leading MEP' *Financial times* (Brussels, 31 May 2021) <https:///www.ft.com/content/49f3d7f2-30d5-4336-87ad-eea0ee0ecc7b> accessed 28 February 2026.
42. *ibid* ; European Parliament Committee on the Internal Market and Consumer Protection, 'Draft Report on the proposal for a regulation of the European Parliament and of the Council Contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD))', 2020/0374(COD) <https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf> accessed 28 February 2026.
43. All this is not to say that innovation is a wholly worthy pursuit. L. Soete, ' Is Innovation Always Good?' in J. Fagerberg, B.R. Martin, E.S. Andersen (eds.) *Innovation Studies : Evolution and Future Challenges* (Oxford University Press 2013), 134.

Chapitre V
Le droit de la concurrence au service d'objectifs sociétaux



Chapter V
Competition as a vector of social objectives



15 Enforcement for the Sake of Enforcement? The National EU Competition Law Scrutiny of Non-Compete Clauses

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Most discussions of EU competition law enforcement in labor markets have focused on wage-fixing and no-poach agreements. They have depicted labor antitrust in Europe as a matter of dealing with the employer collusions left unaddressed by national labor laws. In the process, they have held other issues, such as non-compete clauses, to fall outside the scope of Article 101 TFEU. Challenging this treatment of EU labor antitrust as a band-aid to cover the most glaring blind spots in European labor laws – notably, wage-fixing and no-poach agreements – this article explores how the National Competition Authorities enforced Articles 101 and 102 TFEU to scrutinize non-compete clauses as well. Correspondingly, it highlights how EU competition law can intervene in the relations between workers and employers, altering their protections and obligations – sometimes in line with national labor laws, sometimes in slight deviation from them. Rather than dealing only with issues unaddressed by national labor laws, these decisions infringe on what is usually considered the regulatory purview of national labor laws. That said, this article also explores how such enforcement may fracture and muddy the protections of workers due to the trappings of its focus on collusions and dominance. As much as the National Competition Authorities may try to aid workers through their enforcement of Articles 101 and 102 TFEU against non-competes, the bluntness of their tools constrains what they can achieve. Moreover, it highlights the lack of a normative justification undergirding the NCAs' decisions and calls into question the need for such divergent, muddied enforcement.

Introduction

1 - There is nothing EU competition law can do about non-compete clauses. This is the sentiment frequently shared by EU competition lawyers. [1] While the US Federal Trade Commission under Lina Khan pushed for a general ban on non-compete clauses under Section 5 of the FTC Act – albeit ultimately unsuccessfully – no comparable efforts were discussed in Europe. [2] At first glance, this disregard for non-competes in discussions of EU labor antitrust seems sound. Only the agreements and abuses of undertakings – the Union term for autonomous entities engaged in economic activity – are subject to Articles 101 and 102 TFEU. [3] Since workers are not undertakings [4], agreements between employers and their workers – such as non-compete clauses – are not subject to Article 101 TFEU scrutiny. Moreover, the EU lacks the equivalent of Section 5 of the FTC Act prohibiting « unfair or deceptive acts or practices in or affecting commerce. » [5] Such broad regulations are instead found in national unfair competition laws. Thus, it would appear that the doctrinal limits of EU competition law tie its enforcers' hands when it comes to non-competes. [6] By extension, EU competition law in labor markets is mostly understood as enforcement against no-poach and wage-fixing agreements. [7] Its role is not to govern the relations between workers and employers, but to prevent employer collusions – or, alternatively, worker collusions – that undermine competition in labor and product markets. [8] Scrutinizing non-competes or other employment terms does not fit into this narrow role – or so the story goes.

This neat story overlooks one detail : the National Competition Authorities (NCAs) have actually enforced Articles 101 and 102 TFEU – or their national equivalents – to scrutinize the non-competes and exclusivity clauses of workers. Though most of the regulation of non-competes still occurs under the respective national labor laws, the French, [9] Greek, [10] Hungarian, [11] Italian, [12]

1. E.A. Posner, C.A. Volpin, 'Labor monopsony and European competition law' (2020) 4 Concurrences 1, 5. See also C. McMahon, A. Eustace, 'Nothing to Lose but Their Restraints of Trade : Lessons for Employment Non-Compete Clauses from EU Competition Law' (2023) 52 Industrial Law Journal 409 and A. Aresu, D. Erharter, B. Renner?Loquenz, 'Antitrust in Labour Markets' (2024) 2 Competition Policy Brief 1, 4-5.
2. Federal Trade Commission, Non-Compete Clause Rule (Final Rule) (23 April 2024) https ://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf. Ryan LLC v. Federal Trade Comm'n, No. 3 :24-cv-00986-E, 2024 U.S. Dist. LEXIS 117418 (N.D. Tex. July 3, 2024)
3. Case C-41/90 Höfner and Elser v Macrotron GmbH EU :C :1991 :161, para 21. Case T-102/92 Viho Europe BV v Commission EU :T :1995 :205, para 51.
4. C-22/98 *Jean Claude Becu, Annie Verweire, NV Smeg, NV Adia Interim* [1999] ECR I-05665, §26.
5. 15 USC § 45.
6. Posner and Volpin, *supra* n 1. McMahon and Eustace, *supra* n 1. Aresu, Erharter and Renner-Loquenz, *supra* n 1.
7. Aresu, Erharter and Renner-Loquenz, *supra* n 1, 1-4.
8. Opinion of Advocate General Jacobs, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96, 1999 E.C.R. I-5751, para 193 (delivered 28 Jan 1999).
9. Autorité de la concurrence, *Décision n° 10-D-08 du 3 mars 2010 relative à des pratiques mises en œuvre par Carrefour dans le secteur du commerce d'alimentation générale de proximité* [Decision No. 10-D-08 of March 3, 2010 concerning practices implemented by Carrefour in the local general food retail sector] (3 March 2010) ; Autorité de la concurrence, *Décision n° 10-D-12 du 15 avril 2010 relative à des pratiques mises en œuvre par la société Hypromat France SAS dans le secteur du lavage automobile par haute pression* [Decision No. 10-D-12 of April 15, 2010, concerning practices implemented by Hypromat France SAS in the high-pressure car washing sector] (15 April 2010).
10. Hellenic Competition Commission (Επιτροπή Ανταγωνισμού), Απόφαση Αριθ. *430/V/2009* [Decision No. 430/V/2009] (30 January 2009). Hellenic Competition Commission (Επιτροπή Ανταγωνισμού), Απόφαση Αριθ. *580/VII/2013* [Decision No. 580/VII/2013] (15 November 2013).
11. *Nemak Exterior S.L.* (Vj-104/2016/25) GVH Decision (4 September 2019). *Enter Tomorrow Kockázati T?kealap* (Vj-19/2019/60) GVH Decision (29 June 2020).

and Swedish Competition Authorities have issued decisions dealing with non-compete clauses. [13] These decisions challenge the narrow understanding of EU labor antitrust often present in the academic literature and policy debates. More than that, they call into question how EU competition law can intervene in employment relations, and whether it should.

While this brief article by no means covers the whole range of EU competition law interventions into employment relations and labor market governance, it casts a shadow of doubt over narrow framings of EU labor antitrust. Though Articles 101 and 102 TFEU may be preoccupied with ensuring market competition, they are more than just technical tools to pursue an envisioned market structure. They also offer various paths to intervene directly in employment relations between employers and workers – paths the National Authorities have walked, even as the Commission has remained hesitant. Using the aforementioned NCA decisions on non-competes as a case study, this article explores one way in which Articles 101 and 102 TFEU help regulate employment terms usually considered within the exclusive purview of national labor laws.

In the process, this article also emphasizes the consequences of enforcing laws designed to ensure product market competition to regulate the relations between workers and employers across the Union. It highlights that the lack of case law and guidance on the matter has allowed NCAs to take strikingly different approaches to non-compete clauses. This includes the adoption of different standards, tests, and reasonings when dealing with non-compete clauses. In addition to these different interpretations of case law, the doctrinal limits of Articles 101 and 102 TFEU have also resulted in bizarrely differential treatments of workers, splintering their protections. Whereas non-competes coordinated by several employers or imposed by dominant employers are subject to EU competition law scrutiny, those concluded between individual employers and their workers are not. Thus, despite indirectly governing the relationship between workers and employers, the analyzed non-compete decisions remained beholden to a focus on process rather than substance. Just as EU competition law is preoccupied with the way in which prices are formed rather than the level of prices, these NCA decisions scrutinized how the employers imposed non-competes, rather than just the content of said non-competes. By extension, the NCAs' interventions into employment relations reflect their preoccupation with individual decision-making by employers in competitive markets rather than protecting workers. Even where the decisions benefit self-employed or employed workers, they are not motivated by worker harm or welfare considerations. Instead, they are guided primarily by their aversion to market foreclosure and joint decision-making.

In light of the resulting tensions with labor laws and fractured implications for workers and employers, this article disputes the desirability of EU competition law enforcement against non-competes as it has thus far manifested at the national level. Rather than accepting enforcement just for the sake of enforcement, it argues that the incoherent rules established by the NCAs add little value to the already existing national labor laws governing non-competes. To the contrary, they merely sow confusion and muddle the rights and obligations of workers and employers. Thus, as long as there is no coherent EU competition law approach to non-competes – backed by a clear normative vision – this article cautions against haphazard Article 101 and 102 TFEU enforcement that interferes with national labor laws for no good reason.

1. The Muddled NCA Decisions concerning Non-Compete Clauses

2 - Since Regulation 1/2003 entered into force on May 1st, 2004 – launching the decentralized enforcement of EU competition law – there have been at least twelve NCA decisions concerning non-compete clauses. Ten of those decisions were issued under Article 101 TFEU, two under Article 102 TFEU. These decisions did not frame themselves as regulations of non-competes. Instead, they focused on the coordination of economic activity by competing undertakings, or the exclusionary abuse of dominance by a dominant one. Nevertheless, they restricted the ability of employers to coordinate their non-compete clauses, as well as the ability of dominant undertakings to impose non-competes to prevent new entry. Crucially, though, the NCA decisions did not establish uniform rules but instead developed conflicting tests.

As for the non-competes addressed under Article 102 TFEU, only the Italian Competition Authority found a non-compete to be an abuse of dominance. The relevant decision concerned clauses imposed by the sole radio taxi service provider cooperative in Turin on its self-employed driver members. [14] The Authority held that there may be an abuse of dominance under Article 102 TFEU if a dominant cooperative imposes a non-compete obligation on its members, depending on how competition would have proceeded in the clause's absence. Specifically, it held that the non-compete may be justified if it pursues a pro-competitive objective and is necessary for and proportionate to this objective. Yet, if a dominant undertaking introduces a non-compete to prevent the market entry of a competitor, as was the case with the radio taxi service provider cooperative, there is an abuse in violation of Article 102 TFEU. [15] Meanwhile, the French Competition Authority entertained a complaint that a non-compete clause constituted an abuse of dominance, but did not elaborate on the feasibility of such a claim due to the lack of dominance in that case. [16]

As for the non-competes addressed under Article 101 TFEU, the NCAs primarily investigated three types of agreements. First, four Italian decisions scrutinized agreements by competing undertakings to impose non-compete clauses on their workers. Two of these decisions concerned efforts by radio taxi management services to prevent the entry of a new ride-sharing application into their markets by imposing non-competes on their self-employed drivers that deny the application the workers needed to operate. [17] Another decision concerned a consortium of transportation companies imposing non-competes on its employed and self-employed members, preventing them from competing for five years after exiting the consortium. [18] The final Italian decision addressed an agreement between the trade associations of promoters, agents, employees, and publishers in the market for producing and distributing secondary school textbooks to impose non-compete clauses on all commercial agents. [19] Second, a Hungarian and Swedish decision looked into merger agreements that imposed non-compete clauses on the sellers and their employees. Crucially, in both cases, the obligation was extended to the employees of the sold undertaking. The Swedish decision even explicitly addressed a merger agreement requiring the conclusion of non-compete

12. *AGCM Case A521 – Attività Di Intermediazione Della Domanda Di Servizi Taxi Nel Comune Di Torino* [Intermediation Activity For The Demand For Taxi Services In The Municipality Of Turin] (27 April 2021). *AGCM Case I801A – Servizio Di Prenotazione Del Trasporto Mediante Taxi – Roma* [Taxi Transport Booking Service – Rome] (27 June 2018). *AGCM Case I801B – Servizio Di Prenotazione Del Trasporto Mediante Taxi – Milano* [Taxi Transport Booking Service – Milan] (27 June 2018). *AGCM Case I848 – Problematiche Concernenti L'attività Di Promozione Nel Mercato Dell'editoria Scolastica* [Problems Concerning Promotional Activities In The School Publishing Market] (16 November 2021). *AGCM Case I717 – Transcoop-Servizio Trasporto Disabili* [Transcoop – Disabled Transport Service] (26 May 2010).
13. *Konkurrensverket* (Swedish Competition Authority), *Decision Dnr 792/2003* (5 May 2004).
14. *AGCM Case A521*, *supra* n 11, 1, 8, 33-35.
15. *ibid* 166-167.
16. *Décision n° 10-D-08 du 3 mars 2010, supra* n 8, 150-168.
17. *AGCM Case I801A, supra* n 11, 36-63, 75-83, 143-150. *AGCM Case I801B, supra* n 11, 31-55, 72-73, 131-139, 160-164, 196-197.
18. *AGCM Case I717, supra* n 11, 24-44, 85-86.
19. *AGCM Case I848, supra* n 11, 5-14, 18-20.

clauses between the selling undertaking and its employees. [20] Third, the French and Greek decisions also addressed non-competes imposed on franchisees that prevent them from either owning a competing undertaking or working for one. [21] The French decision was unique in that it concerned an agreement between the franchisor and franchisees to discriminate in the enforcement of the franchisees' non-compete clauses. [22]

Importantly, these Article 101 TFEU decisions did not establish coherent rules for assessing the three types of non-competes. Though all but one alluded to the possibility of exempting the scrutinized non-compete clause agreement as ancillary, [23] they established different tests to assess whether such exemptions apply. For one, some decisions automatically declared the non-compete agreements anticompetitive where they failed specific time and space criteria, while others added further conditions. The two Italian taxi decisions held that an agreement to impose non-compete clauses violates Article 101 TFEU where it exceeds what is absolutely necessary and forecloses new entrants by denying them the labor supplies needed to compete effectively. [24] Additionally, the Italian decision on commercial secondary school textbook agents treated the effort to homogeneously organize vertical relations between the agents and their employers throughout the industry as the crux of anticompetitiveness. [25] The remaining decisions focused on a simple threshold test : does the non-compete fit into the temporal and geographical limits of the exemption?

For another, the decisions that relied on concrete time and space criteria established different thresholds. The Swedish and Hungarian decisions against non-competes imposed as part of merger agreements applied a two-year threshold if the non-compete facilitates a transfer of value and goodwill, and a three-year one if it also helps transfer know-how. [26] By contrast, the two Italian taxi non-compete decisions applied a blanket five-year time limit on the existence of the non-compete as a whole – not just post-termination. [27] In turn, the Greek Authority prohibited franchise non-competes that extend beyond one year after the contract termination and are not limited to the geographical area in which the franchisee was active. [28] In short, the NCAs established different tests and thresholds for agreements to impose non-competes on employed, self-employed, and prospective workers.

In part, these different tests reflect the varying facts of the scrutinized agreements. The merger non-competes were assessed as part of agreements facilitating mergers ; [29] the Italian taxi non-competes as exclusionary agreements ; [30] and the Greek franchise non-compete as necessary for enabling the franchise. [31] But they also reflected different applications of the Commission's soft law. Most notably, the Italian and Greek Authorities interpreted Article 5 of Commission Regulation (EU) No. 330/2010 differently. That Regulation – as well as its predecessor, Commission Regulation (EC) No. 2790/1999 – exempted certain vertical agreements with conditions. Specifically, it withheld the exemption for two types of non-competes. First, it allows for « direct or indirect non-compete obligation[s] » that do not apply for longer than five years after the conclusion of the contract. [32] Second, it permits non-competes that do not apply beyond one year after the agreement's termination, are restricted to the premises on which the buyer operated, relate to the previously contracted goods and services, and are necessary to protect the transfer of know-how. [33] The two Italian non-compete decisions derived their five-year limit for the total duration of the non-compete by applying the former rule established under Article 5 of Commission Regulation (EU) No. 330/2010. [34] By contrast, the Greek franchise decision assessed the non-compete clause and a clause prohibiting the operation of another business under the latter one-year rule established by Articles 5 of Commission Regulation (EU) No. 330/2010 and Commission Regulation (EC) No. 2790/1999. [35] Neither decision, however, explained why they chose to interpret the non-compete clauses the way they did. The Italian non-competes extended beyond the lifespan of the underlying agreement, [36] just as the Greek franchise non-competes existed prior to the termination as well. [37] Moreover, neither explained how the prohibition to work for a competitor qualifies under the Regulations' definition of a non-compete as a « direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services ». [38]

This clear difference in standards applied makes it hard to argue that the NCAs established a coherent approach to non-compete clauses. Some treated them as by object anticompetitive agreements exempted under specific temporal and geographic conditions. Others demanded that the clauses have a foreclosing object as well. Likewise, the temporal thresholds they applied for exempting non-competes ranged from a one-year post-termination limit to a five-year total lifetime one. To justify these different thresholds, the NCAs also advanced different interpretations of the applicable Commission soft law. In short, though the NCAs may have enforced Articles 101 and 102 TFEU against agreements and abuses imposing non-competes on workers, their enforcement was incoherent.

2. The Puzzling Implications for Workers and Employers

3 - Though the enforcement of Articles 101 and 102 TFEU against non-compete clauses may seem beneficial to workers at first glance, the implications for both workers and employers are not that straightforward. Especially considering the divergent rules established by the NCAs, national enforcement seems destined to confuse the rights and obligations of workers and employers. The decisions may benefit some targeted employed and self-employed workers, but effectively fracture the legal protections granted to workers across the Union when it comes to non-compete obligations. Three fractures are particularly glaring.

Most obviously, the different temporal and geographical criteria established for non-competes create different rules for different workers. The decisions primarily diverged over the type and duration of temporal criteria. As for their type, most created thresholds for how long the non-competes may last following the termination of the ancillary agreement. But the Italian Authority twice established a threshold for how long the non-compete obligation may

20. *Decision Dnr 792/2003, supra* n 12, 10.
21. *Décision n° 10-D-08 du 3 mars 2010, supra n* 8. Απόφαση Αριθ. *580/VII/2013, supra* n 9.
22. *Décision n° 10-D-08 du 3 mars 2010, supra n* 8, 59, 113.
23. Απόφαση Αριθ. *430/V/2009, supra* n. 9.
24. *AGCM Case I801A, supra* n 11, 227, 251. *AGCM Case I801B, supra n* 11, 202, 225.
25. *AGCM Case I848, supra* n 11, 6-8, 38.
26. *Decision Dnr 792/2003, supra* n 12, 23. *Enter Tomorrow Kockázati Tokealap, supra* n 10, 48. *Nemak Exterior S.L., supra. n* 10, 7-11.
27. *AGCM Case I801A, supra* n 11, 221-222. *AGCM Case I801B, supra* n 11, 196-197. Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, arts. 1 & 5.
28. Απόφαση Αριθ. *580/VII/2013, supra* n 9, 151-156.
29. *Decision Dnr 792/2003, supra* n 12. *Enter Tomorrow Kockázati Tokealap, supra* n 10. *Nemak Exterior S.L., supra n* 10.
30. *AGCM Case I801A, supra* n 11. *AGCM Case I801B, supra* n 11.
31. Απόφαση Αριθ. *580/VII/2013, supra* n 9.
32. Commission Regulation 330/2010, art. 5(1).
33. Commission Regulation 330/2010, art. 5(3).
34. *AGCM Case I801A, supra* n 11, 221-222. *AGCM Case I801B, supra* n 11, 196-197.
35. Απόφαση Αριθ. *580/VII/2013, supra* n 9, 151-156.
36. *AGCM Case I801A, supra* n 11. *AGCM Case I801B, supra* n 11.
37. Απόφαση Αριθ. *580/VII/2013, supra* n 9.
38. Commission Regulation 330/2010, art. 1(1)(d).

last after its conclusion, not after the termination of the ancillary agreement. These different methods of counting are crucial : a five-year threshold may amount to a one-month post-termination threshold if the agreement is terminated after four years and eleven months. As for their duration, the NCAs advanced one-year, two-year, and three-year post-termination thresholds, as well as a five-year total lifespan threshold. Thus, depending on the NCA, employed and self-employed workers benefited from different temporal limits on their non-competes.

In a similar spirit, not all temporal and geographical criteria advanced by the NCAs stack up to national labor laws prohibiting non-competes in the same way. Generally speaking, the temporal criteria advanced by the NCAs differed from those established by the national labor laws and case law. Most notably, the Swedish and Hungarian decisions establishing three-year thresholds for non-competes imposed as part of merger agreements that transfer know-how as well as value and goodwill were more generous than the general limits imposed on non-competes by Swedish and Hungarian labor laws. Under Section 228 of Act I of 2012 on the Hungarian Labour Code, non-competes may not exceed two years and require consideration. [39] In Sweden, the Courts have relied on Section 38 of the Swedish Contracts Act to assess the reasonableness of non-competes, and a 2015 collective agreement framework established the requirement of compensation and a maximum duration of nine or eighteen months, depending on the employment. [40] Conversely, some of the NCA criteria established more concrete thresholds than exist under prevailing national labor and civil code case law. Both Greece and Sweden lack a statute setting a concrete temporal limit on non-competes, and have instead relied on the Courts to establish the reasonableness of non-competes as restrictive covenants. [41] Meanwhile, the Italian NCA established an entirely different assessment of non-competes under Articles 101 and 102 TFEU from that under Article 2125 of the Italian Civil Code. [42]

Finally, the doctrinal preconditions for Articles 101 and 102 TFEU enforcement against non-compete clauses limit the reach of the rules established. The requirement of a collusion between employers means that Article 101 TFEU can only govern how employers coordinate their employment terms, not individual employment contracts. Similarly, Article 102 TFEU can only scrutinize the non-competes imposed by dominant undertakings. By extension, the NCAs have only been able to govern non-competes of workers with dominant employers or employers that colluded with others to set their employment terms. This creates a division between the protections afforded to these workers and all other workers who are employed by undertakings that do not hold a dominant position and are not engaged in employment collusions. Such a division is especially baffling given the potential of implicit collusions throughout a market. As noted by Adam Smith, [43] employers tend to be engaged in tacit collusions on employment terms. Accordingly, the non-competes imposed on workers may be part of what is the implicit market standard : the contracts offered by all employers, since all other employers offer them. Do such tacit collusions warrant Article 101 TFEU enforcement? Or do only the workers of dominant or collusive employers benefit from the NCAs' governance of non-competes? Judging from the ECJ's case law on tacit collusions, [44] the latter seems to be the case, yielding a bifurcated protection of workers.

These fractures notwithstanding, the scrutinized NCA decisions illustrate how EU competition law can govern more than just wage-fixing and no-poach agreements. By prohibiting collaborations between employers, Article 101 TFEU can be applied to most employment terms, as long as they are coordinated between employers. By prohibiting exploitative and exclusionary abuses of dominance, Article 102 TFEU can be applied to employment terms that either exploit workers or prevent entry into downstream product markets or upstream labor markets. Moreover, as shown by the Italian taxi cooperative cases, Articles 101 and 102 TFEU can step into the void left by national labor laws when it comes to self-employed workers and extend non-compete protections to them. Either way, EU competition law can alter the relations between workers and employers – even if only in the context of collusions or abuses of dominance.

3. The Normative Void Undergirding NCA Decisions concerning Non-Compete Clauses

4 - Though the reviewed NCA decisions prove that limited enforcement against non-competes is possible, they also raise a more fundamental question : what is the point of this enforcement? The mere possibility of enforcement does not necessarily mean that there should be enforcement ; there ought to be a reason for enforcement as well. In the United States, the short-lived ban on non-competes rested on an unambiguous normative sentiment : the lack of legislation on non-competes has allowed employers to indiscriminately impose non-competes on workers, thereby harming them. [45] Yet, in the European Union, there is no such clear normative vision undergirding enforcement against non-competes.

Most notably, the reviewed NCA decisions cannot be justified as filling a regulatory gap. Each of the NCAs operated against the backdrop of existing national labor laws governing non-competes. These labor laws – the traditional regulatory mechanism for non-competes – were designed by the national legislatures, courts, and social partners to protect workers while leaving employers the possibility of imposing non-competes where necessary. Moreover, unlike the NCAs, these national labor laws are not constrained by the need to show market foreclosure or competition restrictions. Instead, they are free to create whatever rules they consider best suited for governing employment relations. Accordingly, they do not assess the legality of non-competes solely on the basis of market effects or crude temporal and geographic thresholds but also consider whether the affected workers receive adequate compensation for the time they are unable to work for competitors. [46] Briefly put, the NCA decisions have not filled a regulatory gap but added a more rigid layer of regulation on top of existing labor laws explicitly designed to govern non-competes.

In a similar vein, one is hard pressed to frame the decisions as being designed to protect workers or liberalize labor markets to the benefit of employers. None of the tests established by the NCAs appears to be consistently more protective of employed workers than their labor law counterparts. With the exception of the Greek

39. Act I of 2012 on the Labour Code (Hungary) §228.
40. Contracts Act (1915 :218) (Sweden) §38.
41. Roschier Attorneys Ltd, 'New Inventors' Agreement and Agreement on non-competition clauses adopted by Swedish Enterprise and PTK' (*Lexology*, 5 October 2015) ://www.lexology.com/library/detail.aspx?g=d123a436-f229-4f10-bb8a-af3261801425> accessed 2 February 2026. Lex Mundi, 'Greece – Employment Law Guide' (*Lex Mundi*, 3 April 2024) ://www.lexmundi.com/guides/employment-law-guide/jurisdictions/europe/greece/> accessed 13 February 2026.
42. Codice Civile (Italy), art. 2125.
43. A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1st edn, W Strahan and T Cadell 1776) vol I, 81-82.
44. Case 48/69 *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619, §8, §64. Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23, §§101-102. C-194/14 P *AC-Treuhand AG v European Commission* [2015] EU :C :2015 :717, §§30-38.
45. Lina M Khan, 'Remarks by Chair Lina M. Khan as Prepared for Delivery at the American Economic Liberties Project Anti-Monopoly Summit' (Federal Trade Commission, 21 May 2024) ://www.ftc.gov/system/files/ftc_gov/pdf/2024.05.21-remarks-by-chair-khan-at-the-aelp-anti-monopoly-summit.pdf> accessed 1 March 2026.
46. See n 38, 39, 40, 41.

one-year threshold, [47] the NCAs' two– to five-year thresholds do not afford more protection than the national labor laws. Furthermore, where the thresholds used by the NCAs were higher than the ones applied under national labor laws, employers hardly benefited from the decisions. The decisions merely provided another layer of regulation ; they did not replace existing labor law obligations. Indeed, the only uncontested beneficiaries of the scrutinized decisions are self-employed workers who, under the Italian decisions, gained non-compete protections they lack under labor laws. But even in those decisions, EU competition law did not provide protections equivalent to those enjoyed by employed workers under Italian labor law. [48]

Finally, given the NCA decisions' fractured implications for workers and employers, one cannot even justify the enforcement as harmonizing conditions for workers and employers across the Union. There are, of course, divergences between the national labor laws governing non-competes. Some set temporal, geographical, and compensation criteria for evaluating the clauses, while others have more ambiguous reasonableness tests for them. Additionally, their thresholds tend to differ. For instance, the temporal thresholds range from nine months to three years. But as illustrated above, the tests established by the NCAs are no more harmonious than these labor laws. Likewise, the enforcement against non-competes follows the whims of the National Authorities, not some uniform approach set by the Commission or the ECJ. Accordingly, the enforcement cannot even be framed as a competence grab by the Union.

None of this is to say that there can be no normative vision to justify EU competition law enforcement against non-competes. Providing a higher or more uniform level of protection for workers across the Union would certainly be a justification in line with the Article 9 TFEU horizontal objectives clause declaring that the Union policies « shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion. » [49] Even an attempt to use EU competition law to increase the Union's labor market competences could arguably provide a normative vision justifying EU competition law enforcement in labor markets. Yet, no such vision of how labor markets and employment relations ought to be governed appears to have driven the NCA decisions against non-competes. Instead, as explored above, their enforcement was motivated by their aversion to market foreclosure and joint decision-making. [50] Crucially, neither of these motivations provides a reason why the NCAs should intervene in employment relations already governed by national labor laws. As such, the NCAs stumbled into enforcement against non-competes while remaining stuck in a competition law mindset. Their enforcement lacks a coherent normative vision of employment relations to justify intervening in national labor laws. Their varied tests and standards reflect this normative void. In turn, the NCA decisions' fractured implications for workers and employers, undermining both labor laws and the Internal Market, are the price of such normative ambivalence.

4. Conclusion

5 - Looking at the NCA decisions against non-compete clauses and agreements to impose non-compete clauses, the scope of EU labor antitrust becomes more palpable. Articles 101 and 102 TFEU are not only technical tools that sometimes ensure the competitive setting of wages. They also intervene in the protection of workers and obligations of employers, structuring their relations. At the same time, however, these NCA decisions highlight the awkwardness of EU competition law in labor markets. As deep as EU competition law's intervention into employment relations may be, its preoccupation with process over substance has bifurcated the protections of workers. Requiring a concerted practice or dominant position for Article 101 or 102 TFEU to intervene in employment relations leaves workers without dominant or collusive employers exposed. Moreover, the lack of guidance by the Commission or Court on how to deal with non-compete clauses, as well as the absence of a normative vision of labor market governance to guide enforcement, has allowed the NCAs to advance different standards and tests. The end result is that national interventions in employment relations and labor market governance tend to be clumsy and disjointed. Advancing different rules in each Member State may benefit some workers only at the expense of others and the uniformity of European labor markets. Seeing as labor laws already establish limits on non-compete clauses, this divergent and uncoordinated enforcement appears out of place. Rather than being designed to benefit workers or employers, it effectively amounts to enforcement for the sake of enforcement. Therefore, even though EU competition law can be applied to employer agreements or abuses to impose non-competes, its enforcers have yet to provide a coherent approach and compelling reason for choosing this path.■

47. Απόφαση Αριθ. *580/VII/2013, supra* n 9, 151-156.
48. *AGCM Case A521*, *supra* n 11, 1, 8, 33-35, 166-167.
49. TFEU, art 9.
50. *AGCM Case I801A, supra* n 11, 227, 251. *AGCM Case I801B, supra n* 11, 202, 225. *AGCM Case I848, supra* n 11, 6-8, 38.

16

Using the abuse of dominance provisions to help fight climate change and unsustainable conduct

A call to arms!



Simon HOLMES,

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Climate change is an existential threat to humanity and fighting it as well as working towards a more sustainable economy is (and should be) a top priority in a clear majority of societies – as in the European Union and nearly all European countries.

The law prohibiting all abuses of a dominant position (notably Article 102 TFEU and national equivalents) is a very powerful tool. It is also a very flexible tool, the categories of abuse are not closed, and it has proved itself to be adept at challenging many new forms of harmful conduct.

There is therefore a very strong legal, economic, moral and environmental case for exploring how these laws can be used to combat unsustainable conduct where the firm responsible has a dominant position.

This article examines the relationship between market power and sustainability ; explores the potential to use Article 102 TFEU against unsustainable conduct ; summarises some of the cases so far ; and comments briefly on the draft Article 102 Guidelines of the European Commission.



Introduction

1 - This edition of the RJSP is very timely as in very different ways people are increasingly asking how competition policy can help solve many of today's pressing problems. This holds true whether the concern is a lack of economic growth, the dominance of tech platforms or a range of other perceived political, social or economic issues. It would therefore be very strange (indeed irresponsible) if we did not try to use a powerful policy tool like competition policy to tackle the most existential threat that we face : climate change.

So far the main focus has been on how we can ensure that competition law (or, more often, fear of competition law) does not unduly inhibit vital cooperation between firms which seek to put their industries on a more sustainable footing. This is reflected in :

- The work of writers such as myself ; [1]
- Guidelines issued by a number of competition authorities around the world – stand out examples being the European

Ndlr : All views expressed here are personal and cannot be attributed to any organisation with which Simon is connected. He has no conflicts to declare.

NdA : There are perhaps 3 potential audiences for an article of this sort. First, those who have yet to think how abuse of dominance provisions could be used to tackle unsustainable practices. Second, those who are open to using these provisions in this way but want to understand better how this can (and has been) done. Thirdly, those who are not open to the idea and look to put techno/ legal obstacles in its path. This short article is very much aimed at the first 2 audiences. Addressing the third audience would require a much longer treatise (and many in the latter camp are likely to be a lost cause).

1. For example, S. Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354 ; or M. Dolmans, 'Sustainable Competition Policy' (2020) 6 Competition Law & Policy Debate 4 <https://www.elgaronline.com/view/journals/clpd/6-1/clpd.2020.01.01.xml> accessed 12 February 2026.

Commission's guidelines on Sustainability Cooperation Agreements and the UK CMA's Green Agreements Guidance ; [2] and

- The renewed willingness of many competition authorities to give practical guidance in relation to particular projects – the so-called 'open door' or *porte ouverte* policy. [3]

This body of work supporting (or at least not impeding) *positive* initiatives to fight climate change and promote sustainability by the private sector is complemented by a clear willingness by competition authorities to sanction agreements *not* to compete on the basis of sustainability issues (where this is a relevant parameter of competition). [4]

It would be inconsistent (and I would suggest irresponsible) not to consider how unilateral conduct by dominant companies that similarly undermines the fight against climate change and/or which is detrimental from an environmental or wider sustainability perspective, might also be sanctioned by competition law – i.e. by using the laws prohibiting abuse of dominance.

In other words, why use Article 101 TFEU (and national equivalents) which prohibit anti– competitive agreements, and not use Article 102 TFEU (and national equivalents) which prohibit all abuses of a dominant position?

The abuse of dominance provisions have been used (generally quite appropriately) to tackle all sorts of technical issues like retrospective rebates, [5] but if competition law is to realize its potential, and be seen to be relevant outside the « competition bubble », it must be prepared to challenge the sort of unsustainable conduct that those outside that bubble would clearly see as abusive conduct.

This may mean a renewed focus on 'exploitative' abuses : i.e. those that directly harm consumers etc. – rather than just « exclusionary » abuses that only harm them indirectly by tending to exclude competitors. As Martijn Snoep, head of the Dutch competition authority (the 'ACM') has commented 'exploitative abuse....[is] a near forgotten family member with underenforcement as a result.' As a 'powerful tool to stop the exploitation of customers or suppliers by dominant companies' it is a 'gap' that needs to be plugged.' [6] Not only are 3/4 of the examples of abusive practices in Article 102 itself exploitative, exploitative abuses fit more easily with our innate sense of what is unfair and what an 'abuse' really is. In that sense, using the abuse of dominance provisions to help fight climate change and tackle unsustainable conduct, far from being new or radical, goes to the heart of what Article 102 is (or should be) about.

This article is structured as follows :

1. Market Power and Sustainability.
2. The Potential to use Article 102 TFEU against unsustainable conduct.
3. The Cases so far and case prioritisation.
4. The 'Draft 102 Guidelines' of the European Commission.
5. Conclusions.

1. Market power and sustainability.

2 - Particularly as we need to look at this issue across multiple jurisdictions, [7] it is worth standing back and making a few general comments about market power and sustainability :

(i). Whatever view is taken about the extent to which dominant companies are responsible for climate change and unsustainable business practices, [8] it should be accepted that, other things being equal, big companies are likely to have a bigger impact on the planet/markets than smaller ones, and are more likely to have a dominant position – or at least market power. If we have tools that can mitigate any negative impact of such companies on climate change (or other unsustainable practices) then we have, not only a moral duty to use them, but it makes sense from a basic efficiency of time and resources perspective to focus on these companies [9] – especially given the urgency of the task.

(ii). In the light of the growing recognition and evidence of increased concentration, and the impact that this has had on business dynamism, [10] we should not be too afraid to take a more robust approach to the concept of abuse – while, of course, staying within the limits of the law.

(iii). Those with the greatest power have the greatest responsibility to use it properly. Reflecting this, EU courts have made it clear that dominant firms have a 'special responsibility not to allow their conduct to impair genuine undistorted competition'. [11] The message is clear : in the face of extreme market power we should not feel the need to take a restrictive approach to challenging any abuse of that power.

2. For example, European Commission, 'Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements' (1 June 2023) ch 9 <https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised-_horizontal_guidelines_en.pdf> accessed 12 February 2026 ; Competition and Markets Authority, 'Green agreements guidance' (12 October 2023) <https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf> accessed 12 February 2026.
3. For example, the French *Autorité de la concurrence* 'Communiqué relatif aux orientations informelles de l'autorité en matière de développement durable' (21 December 2023).
4. For example, the *AdBlue* case where the Commission imposed a fine of 875 million euros on five German car manufacturers for restricting competition in emission cleaning technology for new diesel passenger cars (Commission Decision of 8 July 2021 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40178 – Car Emissions) C(2021) 5037 final.)
5. For example, C-95/04 P *British Airways plc v Commission of the European Communities* [2007] ECLI :EU :C :2007 :166.
6. M. Snoep, 'Plugging gaps in Antitrust Enforcement', Speech, 2 March 2023 (Authority for Consumers and Markets publication, 8 March 2023) <https://www.acm.nl/en/publications/speech-martijn-snoep-plugging-gaps-antitrust-enforcement> accessed 12 February 2026.
7. Much of this paper focuses on European Union (EU) law and, specifically, on Article 102 of the Treaty on the Functioning of the European Union (TFEU) which prohibits any 'abuse' of a 'dominant position'. This may seem like a narrow perspective but the national competition laws of many countries (not only in Europe but around the world) are modelled on EU law – with many containing identical wording. Furthermore, laws which use different wording (Such as Section 2 of the US Sherman act or Australian law with its »misuse of market power« provision) are generally tackling the same fundamental problem – the control of market power and its negative effects on the economy, consumers, society (and, in this context, the planet).
8. Views differ on this. See for example, S. Holmes, M. Meagher, 'A sustainable f uture : how can control of monopoly power play a part?' ; L. Filho et al, 'Towards a broader approach to competition and the environment : market power and environmental disasters' [2024] GRUR 1, 1-6, quoting 'the connection between profit-maximising behaviours emerging from market power and lower environmental practices by dominant firms' and noting that competition policy 'involves recognising the multifaceted nature of market power and shifting from a traditional regulatory perspective to incorporate wider social and political considerations, including environmental concerns'.
9. It has been estimated that just 100 companies have been responsible for over 70% of global emissions since 1988. See P. Griffin, 'The Carbon Majors Database : CDP Carbon Majors Report 2017' (CDP, July 2017).
10. This was recognised by the European Commission in launching its review of Article 102 TFEU (see part 4 below) where it stated that 'global and European economies have also undergone significant changes, with increasing evidence of market concentration at macro-economic level' (European Commission, 'Competition Policy Brief' Issue 1, March 2023). See also IMF, 'Rising Corporate Market Power : Emerging Policy Issues' Staff Discussion Note SDN/21/01, March 2021.
11. Case T-321/05 *Astra Zeneca v Commission* [2010] ECR II-2805.

2. The potential to use Article 102 TFEU against unsustainable conduct. [12]

3 - It is clear that the concept of an abuse is not a static one [13] and needs to be considered in the light of current economic, social and environmental priorities. [14] The fight against climate change is a number one global priority and this reality cannot be ignored when considering the use of the legal tools available to us. This has long been recognised by the Commission. As the 1992 Commission Report on Competition Policy put it : 'competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.' [15]

Consistent with this the EU courts have recognised that fundamental to the concept of an abuse is 'recourse to methods different from those which condition *normal competition* (emphasis added) or which deviates from « competition on the merits »'. [16] What is 'normal' may change over time and should reflect societies' values at any given time. Competition based on unsustainable practices is not 'normal' or 'on the merits' and full consideration should be given to using powers which can tackle this.

I recognise that exactly how Article 102 can be used to condone unsustainable conduct is a developing area of the law. However, in the light of the factors mentioned above, and the fact that the categories of abuse under EU law are not fixed, [17] with recent decisional practice showing Article 102 (and national equivalents) to be very flexible, [18] there is no reason why conduct inconsistent with climate change or which is otherwise unsustainable cannot be challenged under these provisions when committed by dominant firms. [19] For example, there is no reason why unsustainable practices such as burning toxic waste, dumping pollutants in rivers, or cutting down the Amazon jungle should not be recognised for what they are – abusive practices (and if perpetrated by dominant companies analysed as a potential abuse of dominance sanctioned by Article 102).

In other words, we can use the abuse of dominance provisions as a 'sword' to attack unsustainable practices to facilitate the transition to a sustainable economy consistent with other laws and regulations designed to transition our economies onto a sustainable basis (such as the 'green deal' in the EU). [20]

A. - An example and analysis

4 - One example might be the distortion of competition that arises when a dominant company avoids the cost of disposing of waste products responsibly : e.g. by dumping them on land or in rivers while small rivals properly incur those costs – thus suffering a competitive disadvantage. In the language of EU law, this could be an exploitative and/or an 'exclusionary' abuse of the former's dominant position.

12. Sustainability is potentially relevant to all three elements of an abuse of dominant position : dominance, abuse and objective justification. For a very recent discussion of this, see also V.G. Garcia, T. Klein, D. Moore, 'Sustainability and exclusionary abuse under Article 102 : navigating a developing EU framework' (2025) 24(2) Competition Law Journal 84, <https://www.elgaronline.com/view/journals/clj/24/2/article-p84.pdf> accessed 13 February 2026 ; M. Dolmans and S. DeTar, 'A consistent sustainable policy for all three areas of EU competition law' (forthcoming) Concurrences, Tributes to Oliver Guer sent. The focus of my article is on the abuse element.
13. See, for example *Astra Zeneca* (*supra* n 12).
14. See A. Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49, 49-74. See also EVP Teresa. Ribera, 'Keynote Speech at OECD Global Forum on Competition' (Speech 25/2869, 1 December 2025) 'In every decision, we are mindful of the economic and societal context in which businesses operate.' See further EVP Teresa Ribera, 'Speech at the CRA Brussels Conference' (Speech 25/2989, 9 December 2025) emphasizing that 'well-functioning markets requires us to [...] support other policy goals of our society' –an obvious example being combatting climate change.
15. European Commission, 'XXIInd Report on Competition Policy', CM-76-93-689-EN-C (1993). The Commission's approach has been consistent on this with the Director General of Competition, Olivier Guer sent, explaining in 2024 :' we work as part of the Commission and use our tools to support, whenever possible, the EU's wider goals.' (Olivier Guersent, '20 years of changes' (2024) No 3-2024, *Concurrences*.)
16. See, for example, C-85/76 *Hoffman-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 1979-00461.
17. See, for example *Astra Zeneca* (*supra* n 12).
18. As former EVP Vestager put it : 'competition rules have an in-built flexibility to adapt.' [European Commission, 'Competition : Commission Outlines Contribution of Competition Policy and Its Review to Green and Digital Transition, and to a Resilient Single Market', Press Release IP/21/6101, 18.11.2021.] For example, see cases like Google Shopping on »self preferencing« (C-48/22 *Google LLC and Alphabet Inc v European Commission* [2024] P) or the growing number of cases finding disparagement of competitors to be an abuse-for example Commission fine on Teva of 31 October 2024 (European Commission, 'Commission Fines Teva €462.6 Million over Misuse of the Patent System and Disparagement to Delay Rival Multiple Sclerosis Medicine', Press Release IP/24/5581, 31.10.2024.)
19. In this context note the recent comments of EVP Teresa Ribera (*supra* n 15) : 'Competition law is not a tool for controlling markets or advancing narrow economic interests. It is an essential pillar of open, fair and sustainable markets.' This is consistent with numerous comments by her predecessor, EVP Vestager, for example : 'Sustainability and competitiveness policies are an all-of – government effort. Competition enforcement will contribute to these goals'. (M. Vestager and S. Schrameck, 'Margrethe Vestager (EU Commission) : The Legacy Interview – Confidence in EU Competition Law for Competitive, Fair, and Innovative European Markets' [2024] Concurrences Review 0 <https://www.concurrences.com/en/review/issues/no-4-2024/interview/margrethe-vestager-eu-commission-the-legacy-interview-confidence-in-eu-121361> accessed 13 February 2026).
20. Equally, and most importantly, we should not lose sight of the fact that some dominant companies are amongst our largest and most successful companies with the greatest potential to play a part in fighting climate change. We therefore need to be careful not to wrongly classify actions taken to fight climate change, or to promote sustainability, as unlawful abuses of their position. For a discussion of sustainability as a 'shield' see (n 2) (n 9) and M. Iacovides and V. Mauboussin, 'Unilateral Conduct and Sustainability under EU Competition Law' (Edward Elgar Publishing 2024) <https://urn.kb.se/resolve?urn=urn :nbn :se :uu :diva-537197> accessed 13 February 2026 ; see also '2024 Article 102 Guidelines – Competition Policy – European Commission' <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 13 February 2026 (Part 5 discusses 'objective justifications').



B. - Exploitative abuse.

5 - This is clearly 'exploitative' on several levels :

- in the ordinary sense that it is disgusting behaviour exploiting the possibility to avoid costs and impose them on the local community and society at large ; [21]
- It is about as far as you can get (in any sane world) from 'normal' competition or 'competition on the merits' in the Hoffman La Roche sense ; [22] and
- It is clearly contrary to the 'public interest' and capable of causing both direct and indirect harm to consumers contrary to the fundamental purpose of Article 102 as recently stated by the Grand Chamber of the Court of Justice in the European Super League affair. [23]

While we might agree that the conduct discussed above is exploitative, not every instance of bad behaviour by a company (however dominant) will amount to an abuse in the Article 102 sense – or is even capable of amounting to such an abuse. [24] We therefore need some limiting principles. I think these could evolve over time from decisional practice but I would suggest two :

- If the practice in question infringes another area of law [25] – the most obvious example here being environmental laws ; [26] or
- If there is no infringement of hard law, I would suggest that another « vital clue » as to whether the conduct in question may amount to an abuse is whether it is inconsistent with legally binding commitments in relation to climate change (e.g. those made at at COPs such as that in Paris in 2015) or with internationally recognised norms and reports (such as those of the International Energy Authority or the IPCC) setting out what needs to be done to transition to a sustainable economy.

C. - Exclusionary abuse.

6 - If on the facts of a particular case such dumping of waste products was not found to be an 'exploitative' abuse, then we should also consider whether it was capable of amounting to an 'exclusionary' abuse.

The Commission's draft guidelines on exclusionary abuses (see part 4 below) suggest a cumulative 2 limb test for determining whether particular conduct is 'liable to constitute an Exclusionary abuse' : [27]

- Whether it 'departs from competition on the merits' (see the discussion above in the context of exploitative abuses) ; and
- Whether the conduct is 'capable of having exclusionary effects' (and given the cost savings postulated in my example, this would seem likely).[1]

D. - Objective necessity

7 - For completeness it should be mentioned that the dominant company could try to justify dumping its waste on the basis that this was 'objectively necessary'. [28] Once a prima facie abuse is established, this is usually difficult to do (and my own preference is to factor in the points raised when arguing objective necessity into the

21. In this sense see the Commission's comment in the Greek Lignite case where, in accusing the dominant Greek electricity producer of abusing its dominant position it refers to this resulting in higher emission levels and local pollution (see Part 3 below and *supra* n 39).
22. See above and *supra* n 17.
23. In European Super League, the grand chamber of the Court of Justice stated that :' the purpose of [Article 102] is to prevent competition from being restricted to the *detriment of the public interest*, individual undertakings and consumers,....that has the effect of hindering competition on the merits and is likely to cause harm to consumers, or which causes them harm indirectly by hindering or distorting that competition'.(emphasis added) [*European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* [2023] C-333/21, para 124].
24. For a discussion and examples of behaviour which fell far short of best practice but which did not amount to an abuse see the *Gutmann Trains* judgment of the UK Competition Appeal Tribunal on 17 October, 2025 (where I was one of the deciding judges) [2025 CAT 64]. In this case, failure by certain train companies to make customers more aware of certain train tickets that would have avoided them paying twice for part of their journey in many instances, and a failure to make those tickets more available, was held not to amount to an abuse of a dominant position.
25. See the Meta judgment of the Court of Justice where infringement of the GDPR was a 'vital clue' in order to establish whether the conduct in question amounted to an abuse of Meta's dominant position (C-252/21*Meta Platforms Inc and Others v Bundeskartellamt* [2023] ECLI :EU :C :2023 :537 ; See also C-21/23 *ND v DR* [2024] ECLI :EU :C :2024 :846.
26. It might be objected that there is no need for competition law to intervene here. However, in the real world there are numerous examples of failure to enforce laws and regulations by the state and independent agencies whether due to a lack of awareness, lack of resources, political pressures or I am tempted to say incompetence.
27. See section 3 of the Commission's draft guidelines (see Part 4 and *supra* n 46 below). The test draws heavily on the wording in a range of recent case law such as the European Super League case referred to above (and see *supra* n 24). Note however that some of these cases are on appeal (notably *Google Android*) and the Commission aims to publish revised draft guidelines sometime in 2026. For a discussion of the two– limb test and the current draft guidelines see, for example Garcia, Klein and Moore *supra* n 13.
28. See *Post Danmark* (Case C-209/10). Note also Section 5 of the Commission's draft Guidelines on Exclusionary abuses (see Part 4 and footnote 46 below). The Commission states that »to be objectively justified, the conduct must be objectively necessary (so called « objective necessity defence ») or produce efficiencies that counterbalance, or even outweigh, the negative effect of the conduct on competition (so-called « efficiency defence »). For a discussion of this see Garcia, Klein and Moore and Dolmans and DeTar *supra* n 13.

judgment as to whether there is, or is not, an abuse in the first place). [29]

Some further considerations.

There is a strong legal case for factoring in environmental and other sustainability factors when considering whether conduct does, or does not, amount to an abuse when Article 102 is read (as it must be) in the light of the 'constitutional' provisions of the treaties. Of particular relevance are the goals in Article 3 of the Treaty on European Union of a 'high level of protection and improvement of the environment' and 'the sustainable development of the earth' ; as well as the clear requirement in Article 11 TFEU that 'environmental protection requirements must be integrated into [all EU]... policies and activities'. [30]

Many of the reasons for a reluctance on the part of competition authorities to make full use of the potential of Art.102 are not relevant to the climate change and sustainability concerns on which this article focuses. For example, while it can be argued (not always correctly) that the market will self-correct in the case of excessive prices, the same cannot be said for much unsustainable conduct (absent evidence of effective and timely regulatory intervention which meant there was no need to consider the application of competition law).

Furthermore, potential concerns over the risk of harm through intervention when no underlying harm exists ('false positives') are vastly outweighed by the risk of not intervening when harm is being done ('false negatives') in the face of climate change – particularly given the uncertainties of tipping points and recognition that much of the damage being done is irreversible. [31]

The approach which I advocate is in no way inconsistent with the so-called 'more economic' approach. On the contrary : it is an approach which is far more in tune with the original (and better) meaning of 'economics'. [32] In addition, the more economic approach does not necessitate competition law and economics focussing exclusively on a narrow 'Chicago version' of the consumer welfare standard or on neoclassical price theory – and certainly it does not require or permit an unduly narrow approach to Article 102. Furthermore, my approach to competition policy and sustainability provides *more*, not less, scope for the intelligent use of economics – especially environmental economics – for example its use in quantifying the cost of emissions or pricing carbon. [33]

Conclusion on the use of the sword.

Using the competition 'sword' would complement environmental (and potentially social sustainability) regulations – either because regulation is absent, or because it is not being properly enforced (or not enforced at all). [34]

3. The cases so far and case prioritisation

8 - Although there are limited cases in this area, national competition authorities are showing increasing willingness to recognise sustainability considerations in the assessment of abuse.

For example, in the Google/Enel X£100 million were imposed on Google by the Italian Competition Authority ('ICA'). The ICA took into account the 'possible negative effects [which] could occur to the diffusion of electric vehicles, to the use of « clean » energy and to the transition towards a more environmentally sustainable mobility'. [35]

Similarly, in the Corepla case, the ICA imposed a €27 million fine on a plastics supply chain consortium for abusing its dominant position in the market for the recovery and recycling of plastic packaging for food use. The ICA said its intervention contributed to the achievement of recycling and waste management-related environmental goals (as established by both EU and Italian legislation). [36]

Another example is the Engie II case in France. In this case, the French competition authority was concerned that various pricing and contractual provisions of Engie were an abuse of its dominant position. These included imposing an obligation on co-owners not to use energy sources other than gas for heating and hot water. The case was settled by means of commitments which included releasing co-owners associations from the obligation to use only gas for heating and hot water which would enable them to consider renewable energy sources for heating and hot water. [37]

Pending cases.

Moreover, the Commission and various national authorities and courts are considering a number of pending cases in this area. I focus on three of them below.

First, in the Greek Lignite case, in alleging that the dominant Greek electricity provider PPC has abused its dominant position by selling its electricity in the Greek wholesale electricity market below cost, the Commission's statement of objections alleges that, not only were independent power providers marginalised, but also investment into more environmentally friendly energy sources was deterred. In outlining the harm, the Commission explains how the conduct may have led, not only to higher prices for Greek consumers, but also to 'higher emission levels and local pollution' for consumers. [38]

In the UK water case, a collective action for damages was brought in the UK's Competition Appeal Tribunal (CAT) against several water and sewage companies. The allegation was that these companies infringed the Chapter 2 prohibition of the Competition

29. Note that unlike Article 101 TFEU, there is no two part test in the text of Article 102 TFEU itself. That said, the same facts may often lead to a conclusion that the conduct is not an abuse and/or that the conduct is 'objectively justified'. See, for example, *Gutmann Trains, supra* n 25, para 127.
30. Other relevant treaty provisions include Articles 7 and 191(2) TFEU.
31. See, for example, T.M. Lenton, 'Global Tipping Points Report 2025' (University of Exeter 2025) <https://global-tipping-points.org/download/1418/> accessed 13 February 2026.
32. See K. Raworth, *Doughnut Economics : seven ways to think like a 21st-century economist* (Random House Business Books, 2017), reminding us that 'economics' originally meant the 'art of household management' and throughout most of history the subject has been concerned with broader social and political concerns (as the term 'political economy' suggests). The neo-liberal approach, with its narrower focus on financial considerations (and, in the context of competition economics, short term price effects) is a relatively recent phenomenon. For an account of how the original and more holistic approach to economics has changed, see J. Aldred, *Licence to be Bad : How Economics Corrupted Us* (Penguin Group, 2019) ch 1.
33. There is an extensive body of literature on environmental economics. See, for example, A. Hussen, *Principles of Environmental Economics and Sustainability : An Integrated Economic and Ecological Approach* (4th edn, Routledge 2018) <https://www.taylorfrancis.com/books/9781351109109> accessed 13 February 2026. Chapter 7 looks at the economic valuation of environmental goods and services.
See also S. Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354.
34. See further, S. Holmes, *supra* n 2 ; Holmes and Meagher, *supra* n 9 Part II ; and M. Iacovides and C. Vrettos, 'Radical for Whom? Unsustainable Business Practices as Abuses of Dominance' in S. Holmes, D. Middelschulte and M. Snoep (eds.), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3815630> accessed 13 February 2026.
35. Italian *Autorità Garante della Concorrenza e del Mercato* ('AGCM'), 'ICA : Google fined over 100 million for abuse of dominance' (13 May 2021) Press Release ; C-233/23 *Alphabet Inc. and Others v Autorità Garante della Concorrenza e del Mercato and Enel X Italia* [2025] ECLI :EU :C :2025 :110 ('Google Android Auto').
36. AGCM, 'A531 – ICA : Sanction Of €27 Million To Corepla For Abuse Of Dominant Position In The Recovery Of Pet Plastic Packaging' (10 November 2020) Press Release.
37. French *Autorité de la concurrence*, Decision relating to practices implemented by the company Engie in the energy sector, *Engie vs Direct Energie*, 7 September 2017, n°17-D-16.
38. European Commission, 'Commission Sends Statement of Objections to PPC over Predatory Pricing in the Greek Wholesale Electricity Market' Press Release IP/24/672, 07.02.2024.

Act 1998 (the UK's equivalent of Article 102 TFEU) by providing misleading information to the relevant regulatory bodies in relation to pollution incidents. This alleged under– reporting resulted in the companies being allowed to increase prices to consumers for sewerage services. The claim was for over £1.5 billion and brought on behalf of over 30 million consumers. [39]

In the Italian Novamont case the Italian competition authority has launched an investigation into Novamont for allegedly abusing its dominant position in the bioplastic bag sector. It is said to have entered into exclusivity agreements both with food retailers and with manufacturers and distributors of plastic bags which may have prevented the emergence of alternative and more efficient bioplastics. The case illustrates neatly the interplay between competition policy and sustainability :

> Safeguarding an open competition process in the bioplastics sector helps achieve the environmental protection objectives pursued by European and domestic legislators, since it could encourage alternative and more efficient bioplastics than Mater-Bi and since it also favours, from a dynamic point of view, the development of cheaper or better quality eco-compatible products. [40]

So what's new?

While I believe there is scope to expand the categories of abusive conduct to include unsustainable practices by dominant companies (where these exclude rivals or exploit consumers), the above cases illustrate that this may not always be necessary where the theories of harm involve well established categories of abuse. In *Google/Enel X*, Google had refused to allow interoperability between its dominant Android operating systems and an app which allowed electric car drivers access to a range of charging services. Similarly, in the Greek Lignite case, PPC is alleged to have engaged in predatory pricing.In other words, the application of well established principles in the law of abuse to unsustainable practices is often all that is required to make a finding that there is an abuse contrary to Article 102 or national equivalent.

Case prioritisation.

In practice, competition authorities have considerable discretion when deciding which cases to pursue. A key consideration is whether taking action would be consistent with, and support, other policy goals. [41] Europe is a global leader in the fight against climate change and the EU is something of an antitrust superpower. Consistent with this, the Commission has progressively recognised that competition policy is a vital tool in the fight against climate change and in the pursuit of its net zero ambition. [42] Similarly, national competition authorities have frequently stated that their key objectives include supporting the green deal, sustainable development, the transition to a low carbon economy and the transition to net zero. [43] Logically, the choice of cases to pursue should reflect this and using a powerful tool like the abuse of dominance provisions to tackle unsustainable practices by dominant companies would be entirely consistent with this. [44]

4. The Draft Article 102 Guidelines

9 - On 31 July, 2024, the Commission published draft 'Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant companies' (the 'Draft 102 Guidelines') ; [45] The Commission consulted on this, but due to various anticipated judgments of the CJEU which are clearly relevant to the issue, the Commission has delayed revising the draft until sometime later in 2026. [46] Detailed analysis of the draft guidelines (and the thinking of the CJEU) is therefore left to a future article.

That said, the current version of the Draft 102 Guidelines are a missed opportunity in 2 key respects to, explain, clarify and potentially develop the law and practice in this area. In particular :

First, the absence of any detailed reference to sustainability considerations in the Draft 102 Guidelines. This stands in stark contrast to the updated Horizontal Guidelines in 2022 (the HGLs), which dedicated an entire chapter to 'sustainability agreements' ; [47] This sets out how businesses can work together to fight climate change ; put their industry on a more sustainable basis ; and achieve broader social sustainability objectives. While not perfect, the HGLs provide a clear framework by which businesses can enter into agreements on things such as green production, phasing out the use of dirty fuels, and sourcing inputs on a more sustainable basis.

Similarly, the Commission has published helpful guidance as to how sustainability considerations are taken into account in EU merger control. We don't yet know how this will be reflected in the revised merger guidelines but this guidance (and the Commission's workshop on 20 January, 2026 on the revision of the merger guidelines) suggests there is very likely to be substantive coverage of sustainability. [48]

In the light of such coverage of sustainability in both the guidance on horizontal agreements and on mergers, it would be totally anomalous not to have substantive coverage of sustainability in the guidelines on abuse.

I would therefore encourage the Commission to take a similar approach to the Draft 102 Guidelines, and provide a clear framework for taking into account sustainability considerations at all levels of the Article 102 assessment. Taking such an approach would be consistent with the Commission's statement regarding the importance of ensuring 'an efficient allocation of resources, thereby contributing to sustainable development and enabling strong and diversified supply chains, all of which contributes to the Union's resilience and long-term prosperity.' [49]

Secondly, they only cover exclusionary abuses, not exploitative ones. Much unsustainable conduct by dominant companies will

39. CAT Case no 1603/7/7/23. Although the CAT declined to certify the case for collective proceedings this was on a very narrow ground specific to this case ; i.e. that s 18(8) of the Water Industry Act effectively prevented the application of competition law to water and waste water companies in these circumstances. Furthermore, the CAT specifically said it would have certified the case to proceed but for the specific exclusion under the water act. [2025 CAT 17]. The CAT's judgment is being appealed to the Court of Appeal.
40. AGCM, 'A573 – Italian Competition Authority : Investigation Opened Against Novamont For Alleged Abuse Of Dominant Position' (9 April 2024) Press Release.
41. For example, EVP Ribera, *supra* n 15.
42. For example, European Commission, 'Competition Policy in Support of Europe's Green Ambition', 10.09.2021.
43. For example, the CMA's reference to its 'strategic objectives' in its Annual Plan in 2020/2021 (and subsequently) ['Annual Plan 2020 to 2021' (*GOV.UK*) <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2020-to-2021/annual-plan-2020-to-2021> accessed 13 February 2026] and various statements by the French *Autorité de la Concurrence* that sustainable development is one of its 'priority areas' [Autorité de la Concurrence and others, 'Accord de Paris et Urgence Climatique : Enjeux de Régulation ' (2020) <https://www.arcep.fr/fileadmin/user_upload/publications/cooperation-AAI/publication_AAI-API_Accord_de_Paris_052020.pdf> accessed 13 February 2026.]
44. It would also be consistent with the prioritisation principles used by authorities when deciding which cases to take on. These include the 'strategic significance' of the case – ie how action fits with the authority's objectives and strategy. See, for example, the CMA's 'Prioritisation Principles'? 30 October 2023 [CMA 188].
45. '2024 Article 102 Guidelines – Competition Policy – European Commission' <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en> accessed 13 February 2026.
46. For example, the Commission is likely to need to take account of what the CJEU says in the Google Android case (Case T-604/18 *Google LLC and Alphabet Inc v European Commission* [2022] ECLI :EU :T :2022 :541).
47. See Chapter 9 of the HGLs.
48. Competition Merger Brief : Issue 2/2023 01.09.2023. It also made numerous references to sustainability, decarbonisation and resilience in its consultation of May, 2025 on reform of the EU merger guidelines, including a helpful « Topic D » entitled « Sustainability and Clean Technologies » (European Commission, 'Review of the Merger Guidelines' (Competition Policy – European Commission, 2025) <https://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_enaccessed 19 February 2026.)
49. Draft 102 Guidelines, *supra* n 46, at footnote 4 therein.

be exploitative in nature (they are certainly exploiting nature or fellow human beings in the common understanding of that term – and generally customers). That said, many such actions will also have an exclusionary effect (the above example of cost cutting by dumping waste in a river or onto land rather than incur the costs of disposing of it responsibly illustrates both the exploitative and exclusionary effect that such conduct may have).

All is not lost, however, as even the current Draft 102 Guidelines contain elements which point to ways in which sustainability considerations can be taken into account when applying Article 102.

A. - Positive elements

10 - i). The Draft 102 Guidelines remind us that the list of practices set out in the text of Article 102 are just examples and 'does not exhaust the methods of abusing a dominant position' which are prohibited. It is self –evident from this that other practices and conduct can amount to an abuse (as is also clear from the decisional practice of the Commission and the judgements of the European courts).

ii). They also confirm that, while they only concern exclusionary abuses, the principles which they set out are 'also relevant for the assessment of other forms of abusive conduct, such as exploitative abuses'.

B. - Hooks

11 - The Draft 102 Guidelines already contain a number of 'hooks' by which sustainability considerations can be taken into account in the assessment of abuses. For example :

i) They confirm that the term 'quality' covers all 'aspects related to the quality of a given product, such as sustainability, resource sufficiency, durability... the image conveyed, and the resilience of supply chains'. [50] All of these are potentially relevant to sustainability and fight against climate change.

ii) The concept of 'competition on the merits' takes into account 'all legal and factual elements' notably 'the specific features of the conduct at stake' [51]. Conduct that offends against any sense of decent behaviour or is contrary to internationally accepted norms surely be relevant here.

iii) When looking at 'competition on the merits' the guidelines say one looks at the 'specific circumstances of the case' and a relevant factor may be where the dominant company 'violates rules in other areas of the law' where this affects a 'relevant parameter of competition' – including 'quality or choice' [52] (which brings one back to the first 'hook' considered above). Two points of note here. First, data protection is the example of another area of law given here but the point is equally relevant to environmental or other sustainability laws. Secondly, while the reference to quality or choice daily brings in sustainability considerations, I would welcome an express reference to sustainability here as a relevant parameter of competition.

C. - Conclusion

12 - I appreciate that the Commission does not have significant experience of cases taking sustainability into account in abuse of dominance cases. However, the same could also have been said in relation to sustainability cooperation agreements and this did not prevent the Commission from including an entire chapter on them in the HGLs.

The Commission can also draw on its substantial experience and analysis of sustainability considerations in the context of both sustainability cooperation agreements and in merger control. [53]

Furthermore, including sustainability considerations in the 102 guidelines would help ensure consistency across all 3 areas of EU competition law : Article 101, Article 102 and merger control. It would also help ensure consistency of approach to sustainability in the application of the abuse of dominance provisions across the EU and NGAs.

Climate change and putting the European economy on a more sustainable basis is absolutely critical and too important to ignore when considering any potentially relevant laws and policies. [54] The abuse of dominance provisions are no exception and I call upon the Commission to show leadership and take the opportunity to consolidate and clarify the law and practice in this area.

Conclusions

13 - The focus so far has, quite rightly, been on ensuring that competition policy does not stand in the way of vital cooperative action by businesses to fight climate change and help transition their industries onto a sustainable basis. However, climate change is an existential crisis for humanity and we must use all the tools and policies at our disposal to combat it.

The law prohibiting all abuses of a dominant position (notably Article 102 TFEU and national equivalents) is a very powerful tool. It is also a very flexible tool, the categories of abuse are not closed, and it has proved itself to be adept at challenging many new forms of harmful conduct.

There is therefore a very strong legal, economic, moral and environmental case for exploring how these laws can be used to combat unsustainable conduct where the firm responsible has a dominant position. Let's do so.

Including sustainability considerations in the Article 102 guidelines would also help ensure consistency of approach across the EU (Commission and NGAs) and across all 3 areas of EU competition law : Article 101, Article 102 and merger control.

As a next step, I hope to see the Commission consolidate and clarify the developing law and practice in this area in its up-coming revised draft guidelines on abuse.

EPILOGUE

Since this article was written, senior Commission officials have suggested in a meeting with me that the final guidelines on Article 102 are likely to include more on sustainability in the context of 'Objective Justification'. [55] This would seem to be on the basis that, in the Commission's consultation on the Draft 102 Guidelines, the majority of the contributions which discussed sustainability focused on this aspect (the so-called 'shield' aspect). This is hardly surprising since the comments came largely from large (and potentially dominant) companies and their paid legal and economic advisors (which one senior Commission official has termed 'the usual suspects'). Their comments in themselves are probably valid : we do not want to disincentivise such companies from making genuine efforts to fight climate change and promote sustainable practices.

However, this in no way detracts from the importance of clarifying how the abuse of dominance provisions can be used as a 'sword' to condemn unsustainable conduct by dominant companies. The Commission has shown how sustainability agreements can avoid infringing Article 101 TFEU —but at the same time condemned agreements not to compete on sustainability [56]. It should take the same balanced approach in the context of article 102 and clarify how Article 102 can sanction unsustainable unilateral conduct by dominant companies.■

50. Draft 102 Guidelines, *supra* n 46.
51. Draft 102 Guidelines, *supra* n 46, paragraph 57.
52. Draft 102 Guidelines, *supra* n 46, paragraph 55.
53. *Supra* n 49.
54. In case this is not self-evident, see the 'constitutional' provisions of the Treaty on European Union (TEU) and the TFEU. For example, Article 11 TFEU states : 'Environmental protection requirements must be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development' (emphasis added). There is no exception for competition law.
55. *Supra* n 29, and section 2. c) above.
56. *Supra* n 5 and 1. Introduction above.

17 Droit de la concurrence et RSE : une analyse comparée euro-américaine



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Lazare Maarawi est le lauréat du prix d'écriture 2025-2026 organisé par le cabinet d'avocats Bryan Cave Leighton Paisner, en partenariat avec la Revue des Juristes de Sciences Po. Cette deuxième édition portait sur le lien entre droit de la concurrence et responsabilité sociétale et environnementale des entreprises, dans une perspective comparée euro-américaine.

« *La crise consiste justement dans le fait que l'ancien se meurt et que le nouveau ne peut pas naître – pendant cet interrègne, on observe les phénomènes morbides les plus variés.* [1] »
Antonio Gramsci

1 - Le 11 décembre 2025, le Président Donald Trump a enjoint à la Federal Trade Commission (FTC) d'enquêter sur les *proxy advisors* – ces agences qui conseillent les grands investisseurs sur leurs votes en assemblée générale – lorsqu'elles soutiennent des politiques de diversité ou de durabilité (ESG ou RSE) [2]. En qualifiant ces initiatives collectives de « cartels climatiques [3] », Washington consacre un « conservatisme antitrust [4] », qui exclut toute finalité jugée extra-économique.

À l'inverse, le Royaume-Uni [5] et l'Union européenne [6] ont publié des lignes directrices pour sécuriser les accords de coopération horizontaux dits « durables ». Teresa Ribera, Vice-présidente exécutive de la Commission européenne chargée de la transition propre, juste et compétitive et commissaire à la Concurrence, porte le « *Clean Industrial Deal* [7] » et proposera d'ici la fin de l'année 2026 une révision des lignes directrices sur les concentrations [8]. Ce mouvement concrétise la « nouvelle approche de la politique concurrentielle pour supporter une relance industrielle [9] » prônée par Mario Draghi, qui pourrait intégrer la durabilité au cœur de la politique de concurrence afin d'encourager les comportements économiques vertueux nécessaires à la transition.

1. La RSE en dissonance transatlantique

2 - Aux Etats-Unis, l'absence d'exemption (*safe harbour*) sociale ou climatique fait l'objet d'un rare consensus [10]. Les procureurs généraux d'États républicains engagent des procédures contre les stratégies ESG, qualifiées de pratiques anticoncurrentielles, au motif qu'un tel engagement serait incompatible avec le devoir fiduciaire [11].

En août 2025, un tribunal fédéral a ainsi validé les poursuites engagées par des États républicains contre BlackRock, Vanguard et State Street [12]. L'accusation, soutenue par la FTC [13], assimile la coordination actionnariale au sein d'alliances climatiques à une entente illicite visant à restreindre la production d'énergies fossiles.

Le démantèlement du *Clean Truck Partnership* [14] confirme cette offensive : dans cette affaire, quatre constructeurs s'étaient engagés auprès de la Californie à respecter des seuils d'émissions. Pour la FTC, même validés par un État, les accords volontaires de décarbonation sont des cartels horizontaux qui restreignent la production, l'ESG ne pouvant « jamais justifier une collusion illicite [15] ».

1. GRAMSCI Antonio, *Cahiers de prison, 1929-1935*, trad. M. Aymard et F. Bouillot, Gallimard, 1996.
2. The White House, « *Protecting American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors* », *Executive Order*, 11 décembre 2025.
3. House Committee on the Judiciary (Republicans), « *Sustainability Shakedown : How a Climate Cartel of Money Managers Colluded to Take Over the Board of America's Largest Energy Company* », *Interim Staff Report*, 13 décembre 2024.
4. MARTY Frédéric, « Du conservatisme antitrust en Amérique : Principes et limites » [en ligne], *Concurrences*, N° 12-2025, Art. n° 129874, [consulté le 28 décembre 2025].
5. UK Competition and Markets Authority (CMA), « *Green Agreements Guidance : Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements* », 12 octobre 2023.
6. Commission européenne, « Lignes directrices sur l'applicabilité de l'article 101 du TFUE aux accords de coopération horizontale », JOUE C 259, 21 juillet 2023, chap. 9.
7. Commission européenne, « Un pacte pour une industrie propre (Clean Industrial Deal) pour la compétitivité et la décarbonation », Communication, 26 février 2025, COM(2025) 85 final.
8. Commission européenne, « La Commission sollicite un retour d'information sur la révision des lignes directrices de l'UE sur les concentrations », Communiqué de presse, 8 mai 2025, IP/25/1141.
9. DRAGHI Mario, « L'avenir de la compétitivité européenne », 9 septembre 2024, Partie B, Section 2, Chap. 4, p. 299.
10. KHAN Lina, « *ESG Won't Stop the FTC* » [en ligne], *The Wall Street Journal*, 21 décembre 2022, [consulté le 29 décembre 2025].
11. MAURITS Dolmans, WANJIE Lie, CHARITY Eunah Lee, « *Sustainable Antitrust Policy in the US – Hot Water or Hot Air?* », *American Bar Association*, 11 Mars 2025 [consulté le 4 janvier 2026].
12. US District Court for the Eastern District of Texas, Ordonnance du 1er août 2025, *Texas v. BlackRock, State Street and Vanguard*, Case No. 6 :24-cv-437-JDK.
13. FTC et DoJ, « *Statement of Interest in Energy Collusion Case* », 20 mai 2025 [consulté le 4 janvier 2026] <https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-doj-file-statement-interest-energy-collusion-case-against-blackrock-state-street-vanguard>
14. FTC, « *Statement of the Commission In the Matter of Clean Truck Partnership* », 12 août 2025 [consulté le 4 janvier 2026]. <https://www.ftc.gov/system/files/ftc_gov/pdf/clean-truck-partnership-closing-statement.pdf>
15. FERGUSON Andrew (FTC Commissioner), « *ESG goals can never justify unlawful collusion* », 12 août 2025 [consulté le 4 janvier 2026] <https://www.ftc.gov/system/files/ftc_gov/pdf/chairman-ferguson-joined-by-holyoak-and-meador-clean-trucks-statement.pdf>

L'Europe, à l'opposé, mobilise la politique de concurrence comme levier d'orientation, maniant l'incitation et la sanction [16].

Dans le champ des pratiques anticoncurrentielles, les lignes directrices de 2023 sécurisent les coopérations climatiques via une zone de sécurité informelle [17] ou une exemption individuelle [18] sous certaines conditions [19]. Les régulateurs européens et français adoptent une politique de « portes ouvertes », invitant les entreprises à un dialogue informel en amont de leurs projets de durabilité pour en valider la conformité. La Commission réprime les entraves à l'innovation durable, comme une concertation visant à freiner les technologies antipollution des moteurs diesel [20]. L'Autorité de la concurrence française sanctionne les stratégies de « silence environnemental [21] » ou les systèmes de notation concertés faussant l'arbitrage qualitatif du consommateur [22].

Dans celui du contrôle des concentrations, la Commission intègre la durabilité lors de la définition du marché en cause [23] ou comme facteur de progrès technique au sens du règlement 139/2004 [24]. Cette prise en compte reste toutefois strictement conditionnée à sa pertinence pour les clients du marché concerné. Ainsi, dans l'affaire Bayer/Monsanto, la Commission a rappelé son incompétence pour sanctionner des préoccupations environnementales étrangères à son mandat [25]. À l'inverse, la récente opération ADNOC/Covestro a été validée sous réserve du partage de brevets de durabilité [26].

A contrario, une convergence euro-américaine lie travail et concurrence. Pionniers, le département de la Justice des Etats-Unis (DoJ) et la FTC traitent le non-débauchage comme un cartel d'acheteurs [27]. L'UE qualifie la fixation salariale et le non-débauchage de restrictions par objet [28], thèse validée par l'arrêt Fifa [29]. En juin 2025, les sanctions contre Delivery Hero [30] et, en France, contre des accords isolés [31] actent cette nouveauté.

2. Vers un droit de la concurrence de résilience ?

3 - Cette divergence d'approches fragilise les opérations transatlantiques et traduit un choix opposé quant aux finalités du droit de la concurrence. Un accord de durabilité – qui organise la circularité économique d'une chaîne de valeur à une fin climatique – peut être validé en Europe puis requalifié en « *climate cartel* » aux États-Unis.

L'insécurité ainsi générée paralyse la capacité de multinationales engagées dans des plans de transition vers un horizon 2030/2050 à planifier des synergies rendues nécessaires par des objectifs climatiques contraignants [32]. À l'inverse, l'attentisme peut favoriser un risque contentieux au titre de sanctions administratives [33], du devoir de vigilance [34] voire du préjudice écologique [35]. Les gestionnaires de fonds comme BlackRock se trouvent ainsi pris en étau entre les procureurs généraux d'États républicains et la menace de retrait de capitaux de fonds de pension pour « inaction climatique [36] ».

Pour autant, la Vice-présidente socialiste de la Commission européenne Teresa Ribera semble vouloir porter un antitrust aligné sur le *Clean Industrial Deal* [37], une démarche qui contribuera à la cohérence de l'ensemble de la stratégie industrielle européenne [38] et à substituer aux tâtonnements actuels un cadre prévisible, capable d'inciter à la décarbonation lors des concentrations.

Pour ce faire, la Commission pourrait réinterpréter le test de l'entrave significative (*substantial impediment to effective competition* ou SIEC) et le régime des efficiences. Une approche holistique permettrait d'inclure la résilience et la durabilité comme paramètres qualitatifs au même titre que le prix, en valorisant notamment des gains d'efficacité dont la matérialisation est différée.

Les lignes directrices révisées pourraient préciser : *(i)* si la Commission les évaluera systématiquement en tant que paramètres de concurrence autonomes sur le marché pertinent ; *(ii)* la méthodologie et les sources retenues pour en établir la pertinence, sous réserve que les gains soient vérifiables et spécifiques à l'opération

16. BETTONI Lucas, « Droit de la concurrence – les accords de durabilité ou la promotion du développement durable par les droits des ententes » [en ligne], *Contrats Concurrence Consommation*, n° 3, Mars 2024 [consulté le 3 janvier 2026].
17. Art. 101 § 1 TFUE.
18. Art. 101 § 3 TFUE.
19. BETTONI Lucas., *op. cit.*.
20. Commission européenne, Décision du 8 juillet 2021, *Car Emissions*, aff. AT.40178.
21. Autorité de la concurrence, Décision du 29 décembre 2023, n° 23-D-15, relative à des pratiques dans le secteur de la fabrication et de la commercialisation de contenants alimentaires ; Autorité de la concurrence, Décision du 18 octobre 2017, n° 17-D-20, relative à des pratiques dans le secteur des revêtements de sols résilients.
22. Autorité de la concurrence, Avis du 9 janvier 2025, n° 25-A-01, relatif aux systèmes de notation sur le développement durable des produits et services de consommation.
23. Communication C/2023/6789 du 22 février 2024 de la Commission sur la définition du marché en cause aux fins du droit de la concurrence de l'Union, JOUE C 2024/1645 § 15.
24. Commission européenne, « *Competition Merger Brief* », n° 2/2023, p. 3 ; Règlement (CE) n° 139/2004 du Conseil du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises, JO L 24, art. 2, § 1, b).
25. Commission européenne, Décision du 21 mars 2018, *Bayer/Monsanto*, aff. M.8084, § 3017.
26. Commission européenne, « La Commission autorise l'acquisition de Covestro par ADNOC sous conditions », Communiqué de presse, 8 juillet 2025, IP/25/2687.
27. DoJ et FTC, « *Antitrust Guidance for Human Resource Professionals* », octobre 2016 ; DoJ, « *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* », Communiqué de presse, 24 septembre 2010,. Sur la création d'une équipe dédiée aux enjeux du travail en février 2025, voir FERGUSON Andrew (FTC Chairman), « *Memorandum re : Labor Task Force* », 26 février 2025.
28. ARESU Alessio, ERHARTER Dominik et RENNER-LOQUENZ Brigitta, « *Antitrust in Labour Markets* », 2024, European Commission Competition Policy Brief.
29. CJUE, Arrêt du 4 octobre 2024, *FIFA c/ BGP*, aff. C-650/22, ECLI :EU :C :2024 :824.
30. Commission européenne, Communiqué de presse, 2 juin 2025, aff. AT.40795, IP/25/1356.
31. Autorité de la concurrence, Communiqué de presse, 12 juin 2025, relatif aux accords de non-débauchage dans les secteurs de l'ingénierie et du conseil.
32. Ces trajectoires sont dictées par les objectifs sectoriels du Pacte vert pour l'Europe : par exemple, réduction de 90% des émissions de CO? des ventes de voitures d'ici à 2035, mandats d'incorporation de carburants durables (SAF) dans l'aviation (6 % en 2030, 70 % en 2050 selon ReFuelEU Aviation), réduction de l'intensité carbone des carburants maritimes (FuelEU Maritime).
33. À titre d'exemple, la BCE impose des astreintes pour lacunes dans l'identification des risques climatiques (sanctions contre ABANCA en 2025 et Crédit Agricole en 2026). Le SEQE-UE prévoit une amende de 100 € par tonne de CO? non couverte par la restitution de quotas. Le non-respect des normes d'émissions de flotte (CAFE) expose les constructeurs à des pénalités de 95 € par gramme excédentaire par véhicule immatriculé. Les règlements ReFuelEU Aviation et FuelEU Maritime prévoient des amendes proportionnelles au déficit d'incorporation de carburants plus respectueux de l'environnement.
34. Ce risque est illustré par la multiplication des actions judiciaires fondées sur le devoir de vigilance (*duty of care*) pour contraindre les entreprises à respecter l'Accord de Paris : *Milieudefensie v. Royal Dutch Shell* (Pays-Bas) ; *Greenpeace Italy v. ENI* (Italie) ; *Notre Affaire à Tous v. TotalEnergies* (France). Ces procédures visent à sanctionner l'insuffisance des plans de décarbonation par des injonctions de réduction d'émissions.
35. Cour d'appel de Paris, 18 juin 2024, *Amnesty International France et a.*, RG 23/14348, p. 23.
36. En novembre 2025, le New York City Comptroller a recommandé la révision des mandats confiés à BlackRock, évoquant un désengagement potentiel de 42 milliards de dollars en raison d'un alignement climatique jugé insuffisant. Des pressions comparables ont été exercées par le fonds de pension norvégien KLP ainsi que par CalPERS, le principal régime de retraite des employés publics Californiens.
37. Commission européenne, « *Topic D : Sustainability and clean technologies* », document de consultation, 8 mai 2025 ; MOENS Barbara, FOY Henry, « *EU will lose 'race to the bottom' on regulation, says competition chief* » *Financial Times* [en ligne], publié le 26 décembre 2025 [consulté le 4 janvier 2026]. EU will lose 'race to the bottom' on regulation, says competition chief
38. Cette cohérence repose sur l'articulation entre le droit de la concurrence et les instruments de régulation, notamment le Règlement relatif aux subventions étrangères (FSR), le contrôle des aides d'État ou le mécanisme d'ajustement carbone aux frontières (MACF).

afin de conjurer le risque de *greenwashing* [39] ; *(iii)* qu'elle définisse les critères d'une théorie du préjudice fondée sur une atteinte à la durabilité, tout en soumettant le grief de « *green killer acquisition* [40] » à un standard probatoire élevé afin que ne soient pas paralysées les synergies industrielles indispensables à la transition ; *(iv)* que le texte délimite le champ spatial des gains d'efficiences – en particulier ceux nés sur des marchés *out-of-market* [41] – et l'horizon temporel de l'analyse, afin que soit capturé le bénéfice environnemental de long terme au profit des « générations futures [42] » ; *(v)* que des garanties soient instaurées pour neutraliser des biais de définition de marché qui pénalisent indûment les pionniers de la transition face aux acteurs conventionnels [43].

De même, un assouplissement du critère de spécificité pourrait reconnaître qu'une fusion est parfois le moyen le plus rapide, donc le plus indispensable, pour déployer des technologies propres à l'échelle industrielle face à l'urgence climatique.

À défaut d'une telle (r)évolution, la politique de concurrence risquerait d'entrer en contradiction avec la transition qu'elle est pourtant appelée à accompagner. Une réalité qui vaut aussi bien en Europe où les pertes financières et économiques dues aux changements climatiques sont considérées comme des risques systémiques par les banques centrales [44], qu'aux États-Unis où les assureurs alertent sur l'inassurabilité croissante des propriétés immobilières [45]. Une réalité qui vaut, aussi, à Mar-a-Lago.■

39. La quantification des bénéfices environnementaux pourrait s'appuyer sur les référentiels du SEQE-UE, de la taxonomie verte ou sur les standards de reporting ESRS issus de la directive CSRD. L'autorité britannique de concurrence a utilisé le *Green Book* du Trésor britannique pour estimer l'abattement carbone. La Commission a évalué les émissions de CO_2 et de SO2 évitées dans l'affaire CECED (1999), et l'autorité australienne (ACCC) a mesuré les capacités renouvelables additionnelles en gigawatts résultant de l'opération *Origin Energy/ Brookfield* (2023).
40. Le risque de *green killer acquisition* survient lorsqu'une entreprise polluante rachète une start-up innovante pour neutraliser une technologie vertueuse. Ces cibles échappent souvent au contrôle de la Commission car elles se situent sous les seuils de notification. Depuis l'arrêt Illumina/Grail (3 sept. 2024), le mécanisme de renvoi à la Commission est neutralisé pour ces opérations. Les entreprises doivent donc réaliser elles-mêmes une auto-évaluation *ex-ante* complexe de leurs acquisitions sous les seuils.
41. La nature diffuse des gains de durabilité impose de comptabiliser les bénéfices générés hors du marché pertinent *(out-of-market)*. Faire fi de ces bénéfices de « non-usage » (la valeur accordée par les consommateurs à la préservation collective de l'environnement) reviendrait à sacrifier un intérêt environnemental collectif au profit d'intérêts particuliers. L'autorité de concurrence néerlandaise a retenu, dans l'affaire Mastercard (C-382/12 P), que l'appréciation des efficiences ne se limite pas aux seuls consommateurs des marchés se chevauchant. Elle peut inclure l'ensemble des bénéfices générés sur des marchés connexes. Cette approche permet de valider des projets de rupture dont les effets positifs dépassent les clients actuels du seul marché en cause.
42. La Commission reconnaît déjà, dans ses lignes directrices sur les coopérations horizontales, que des gains d'efficience se matérialisant à long terme n'excluent pas l'application de l'article 101(3) TFUE.
43. L'isolement d'un marché des « *produits durables* » risquerait de pénaliser les pionniers de la transition en leur prêtant une position dominante factice. Une telle segmentation occulterait la pression exercée par les acteurs conventionnels (*legacy products*) dont la compétitivité repose sur l'absence d'internalisation de leurs externalités environnementales. Ce biais persiste si l'analyse se fonde sur la « proximité de concurrence » entre *first movers*, érigeant indûment leur avance écologique en grief concurrentiel.
44. Banque centrale d'Angleterre, « *CP10/25 – Enhancing banks' and insurers' approaches to managing climate-related risks – Update to SS3/19* » sur *Bank of England Publications* [en ligne], publié le 30 avril 2025 [consulté le 4 janvier 2026] /25 – Enhancing banks' and insurers' approaches to managing climate-related risks – Update to SS3/19 / Bank of England> ; Banque centrale européenne, « *Risks from misalignment of banks' financing with the EU climate objectives* », Rapport, janvier 2024 ; KALDORF Matthias, ROTTNER Mathias, « *Climate Minsky Moments and Endogenous financial crises* », *Bank for International Settlements Working Papers*, 2025, n°1248.
45. US Senate Committee on the Budget, « *Next to Fall : The Climate-Driven Insurance Crisis is Here… And Getting Worse* », *Democratic Majority Staff Report*, 17 avril 2024 ; JONES David, « *The Uninsurable Future : The Climate Threat to Property Insurance, and How to Stop It* », Yale Law Journal, 2025, n°135 ; CLARK Pilita, « *How the Next Financial Crisis Starts* » sur *Financial Times* [en ligne].

Chapitre VI
Perspectives du Sud global



Chapter VI
Perspectives from the Global South



18 Delinking beyond Competition : Opportunity at a Crossroads in the Global South



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Introduction

1 - Over the past 30 years, competition laws have spread across countries in the Global South. They have become an increasingly central component of their legal and economic reform agendas. This is because they are often presented as the missing link for development and growth, indispensable to the ordering of developing markets. This expansion has been, to a large extent, facilitated by the dominant discourse around the relationship between competition and growth. [1] It has also been furthered by international organizations and international financial institutions (IFIs), such as the World Bank, the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD), as well as the European Union (EU), among others, who have persistently and relentlessly played a role in legal developments across countries in the Global South. They have supported a discourse that promised development and access to international markets, while imposing forms of pressure and coercion, often in the form of loan conditionality when countries did not follow the desired legal development. [2] The outcome has been a striking increase in the number of competition laws adopted across the Global South accompanied by a dominant understanding of competition law as a neutral, technical instrument aimed at promoting efficiency and facilitating market functioning.

Yet this framing obscures the extent to which competition law has been shaped by specific economic assumptions and normative commitments. These adopted competition laws have been grounded in a neoclassical conception of markets, structured around the ideal of perfect competition and oriented towards allocative efficiency, moves common to the neoliberal capitalism that spread from the 1970s onward. These assumptions have deeply informed both the design of competition statutes and their modes of enforcement, privileging private transactions, price effects, and a narrow definition of consumer welfare while sidelining broader social and distributive concerns.

This article examines recent developments within the competition law field that unsettle this orthodox framework. It focuses on the evolving objectives, justifications, and uses of competition law in the Global South, specifically paramount at a moment when confidence in efficiency-centered market regulation has been increasingly questioned. It argues that the cracks in the orthodox framing, currently not just visible but increasingly impossible to ignore, present a renewed opportunity to revisit the purpose of competition laws in the Third World. [3] The article argues that these shifts create space for alternative configurations of competition law that are not confined to the pursuit of efficiency or the preservation of market capitalism in its orthodox form. Drawing on developments in enforcement practice and legislative design, it highlights how competition law can be mobilized as part of broader economic strategies with alternative objectives.

The article is organized in two parts. The first part (I) examines the transplantation of Western competition laws into the Global South. It explores the mismatch between these laws being oriented towards static price efficiency goals while ignoring alternative objectives more closely tied to Third World concerns. The second part (II) turns to discuss alternative competition policy orientations that could ground competition law and policy in the Third World. It focuses on three issues. First, it discusses extending the reach of competition laws' objectives in the Global South beyond competition as part of a wider framework of public interest law. Second, it addresses industrialization and the balance between competition and cooperation as an alternative to the pursuit of ever more competition. Finally, it examines the role of South-South cooperation and the potential for delinking from the capitalist system driven by growth and expansion.

1. Transplantation and Competition Efficiency

A. - Legal Diffusion and Transplantation

2 - Legal diffusion and transplantation of Western laws into the codes of countries in the Global South has been a long process commencing with the era of colonization, where colonizers imposed their language, institutions, and laws to better control the local colonized communities. This resulted in the widespread adoption of European codes and Western ways of legal reasoning in the colonies. The local legal traditions and customs were undermined and seen as a hindrance to development and to being more *civilized*, which was often equated with being more *Westernized*.

This phenomenon did not end with the formal end of colonialism and was fortified with the push to modernize and liberalize the newly decolonized countries in the Global South. For example, most former Western colonies, under the auspices of the structural adjustment programs advocated by the World Bank and the IMF

1. D. I. Waked, 'Adoption of Competition Law in Developing Countries : Reasons and Challenges' (2016) 12 (2) Journal of Law, Economics and Policy 193.
2. D. I. Waked, 'Competition Law and Policy in the Global South : Power, Coercion and Distribution' (2023) 76 Current Legal Problems 375.
3. 'Third World' is used here interchangeably with 'Global South' and 'developing countries'. For the meaning of Third World, *see* A. Anghie, V. Nesiah, B.S. Chimni et al., eds., *Research Handbook on Third World Approaches to International Law (TWAIL)* (Elgar Press 2025) 3-5.

starting from the early 1970s onwards, have ushered in neoliberal reforms that obliged them to adopt Western laws and institutions, and follow models and patterns of their former colonizers. Even today, this phenomenon continues to take place in one form or another, often through treaty relations, which are one of the most prominent manifestations of legal diffusion between East and West, developing and developed countries. [4] For many countries, loan-conditionality of international lenders and access to global markets continued to be both the carrot and the stick used by IFIs and other international organizations to instigate and reinforce neoliberal, Western legal developments.

A further drive to adopt Western laws across the Global South has been advanced by a global agenda aimed at harmonizing laws following Western models. This is particularly evident in the European project, where harmonization of laws across the European block has been one of its hallmarks. It has also been one of the drivers of the EU's expansion programs and its treaties across the Mediterranean region, among others. Other IFIs, such as the OECD and the World Bank, have also promoted strong law harmonization agendas. These harmonization processes were, arguably, to bring conformity that facilitates cross-border trade and business in general. This, they alleged, would facilitate mobility and increase global welfare. Both the transplantation and harmonization efforts have concretely led to the reform and adoption of laws and regulations that aim at the realization of free markets with neoliberal characteristics, particularly economic efficiency or growth. These became the main drivers of legal reforms and policy orientations.

With regards to competition laws specifically, most countries in the Global South have adopted competition legislation modeled on those enacted in developed countries. [5] Treaties, such as the Accession Agreements signed by Eastern European countries to join the EU or the Euro-Mediterranean Partnership agreements signed by various non-European Mediterranean countries and the EU, imposed some of this modeling process. The aim was the creation of a free-trade area between the European Union and the Mediterranean signatories [6] These agreements call for the adoption of the EU's basic competition rules, especially with regards to collusive behavior, abuse of dominant position, and competition-distorting state aid insofar as they affect trade between the EU and the respective partner country [7] Cyprus, Malta, and Turkey were obliged to adopt competition rules patterned on the European Commission (EC) model as a prerequisite to joining the EU. [8]

For example, Article 72 of the Euromed agreement between the EC and Egypt states that a « financial cooperation package shall be made available to Egypt » focused among others on « the accompanying measures for the establishment and implementation of competition legislation. » [9] Moreover, a more striking provision in the Agreement calls for the adoption of EC-oriented competition laws by declaring : « while drafting its law, Egypt will take into account the competition rules developed within the European Union. » [10] Also, as in other Euromed Agreements, the treaty states that any application of competition rules must be in conformity with the EC secondary legislation : decisions of the Commission, the Court of First Instance and the Court of Justice of the EU. [11] This is a clear manifestation of a legal diffusion of a particular version of competition law and policy ; here, one modeled on the EU version. Similar provisions are included in other Euromed agreements across the Mediterranean region.

The reason why these agreements focus on the adoption of competition rules is often explained as due to the link between free trade and competition policy. It is understood that free trade is not secured through trade liberalization alone. Effective trade depends on competition law to remove obstacles to the free flow of goods and services, such as abuse of dominance, monopolization, import and export cartels, and vertical and horizontal restraints. Competition law also organizes merger activity and firm expansion in ways that facilitate market integration and the flow of goods and services across borders. This has been heavily argued in various WTO reports, especially those provided by the Working Group on the Interaction Between Trade Policy and Competition. [12]

These attempts at harmonizing and transplanting competition laws from the West to the rest of the world were already in motion before the EU's Mediterranean Agreements, [13] starting with the International Trade Organization (ITO) developed shortly after World War II, which proposed a charter aiming, among others, at harmonizing competition rules in the Havana Charter. [14] Another attempt to unify global antitrust took place in the 1950s by the UN Economic and Social Council (ECOSOC). Although these efforts failed at harmonizing competition laws, often due to US opposition, several other attempts followed. These included the most advanced efforts to create a globally harmonized competition framework at the Doha Ministerial Conference in 2001, which ultimately failed due to opposition from developing countries. More recent attempts at harmonizing competition rules have been, and continue to be, promoted by the International Competition Network as part of their standard setting efforts, among others. [15]

B. - Economic Efficiency and the Perfect Competition Model

3 - The universalized, standardized, and harmonized laws that spread across the Third World were built around a single model of competition. At their core was an imperative to increase compe-

4. D. Kennedy, 'The « Rule of Law, » Political Choices, and Development Common Sense' in D. Trubek and A. Santos (eds), *The New Law and Economic Development : A Critical Appraisal* (CUP 2006) 131 (« Many national regimes in the Third World implemented neoliberal reforms with enthusiasm. As countries emerged from state socialism in the late 1980s and 1990s, the initial desire to »do everything differently« fit smoothly into the neoliberal prescriptions to revise the interventionist policies of the postwar developmental states. But the adoption of neoliberal reform was also, and probably more importantly, the result of pressure and encouragement from international institutions. National development policy was increasingly set in negotiations with international financial institutions over debt restricting and aid, or in bilateral commercial, financial, and aid negotiations with developed nations. »).
5. A. E. Rodriguez and M. B. Coate, 'Limits to Antitrust Policy for Reforming Economies' (1996) 18 Hous. J. Int'l L. 312, 312.
6. Euro-Mediterranean Partnership/Barcelona Process <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en> accessed 19 February 2026.
7. B. Hoekman, 'From Euro-Med Partnership to European Neighborhood : Deeper Integration à la Carte and Economic Development' (July 2005) ECES Working Paper No. 103, 6 <https://www.researchgate.net/publication/242297256_From_Euro-Med_Partnership_to_European_Neighborhood_Deeper_Intergration_a_la_Carte_and_Economic_Development> accessed 20 February 2026.
8. S. Reimavuo and M. Händelin, 'Establishing a Credible Competition Authority – The Egyptian Case, Trade Enhancement Programme A (TEP-A) Component 2 Egypt-European Association Agreement' (March, 2005) 35 (unpublished report, on file with the author), at 34 (« Their candidate status required that they transposed in their domestic legal order the entirely of the EC Competition Law. »).
9. Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part (adopted 25 June 2001, entered into force 1st June 2006), Art 72.
10. *Ibid.* Joint Declaration on article 34.
11. D. Geradin, 'Competition Law and Regional Economic Integration : An Analysis of the Southern Mediterranean Countries' (2004) World Bank Working Paper No. 35, 36 <https://openknowledge.worldbank.org/server/api/core/bitstreams/4f71f159-19b6-55a6-91be-a3089219525e/content> accessed 20 February 2026.
12. *See* World Trade Organization, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council of the World Trade Organization*, WT/WGTCP/3 (1999) ; World Trade Organization, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council of the World Trade Organization*, WT/WGTCP/2 (1998).
13. D. I. Waked, 'Global Antitrust from the Global South : A Comparative Law Void' (2024) 18 Florida International University Law Review 865.
14. A. T. Guzman, 'Is International Antitrust Possible?' (1998) 73 New York University Law Review 1501, 1535.
15. C. Townley, M. Guidi and M. Tavares, *The Law and Politics of Global Competition : Influence and Legitimacy in the International Competition Network* (Oxford University Press 2022).

tition understood through the lens of perfect competition, an ideal that was both unrealistic and unattainable. Perfect competition, as neoclassical economic models state, meant that consumers could get prices at marginal cost of production, i.e., maximizing consumer welfare. This became the goal of competition law and policy : to maximize consumer welfare, narrowly defined in terms of price efficiency, as consumer welfare was understood to only mean consumer surplus. [16] This focus on prices diverted attention away from deeper and more harmful market transformations.

One consequence of this approach was the neglect of questions of market structure and concentration. When analysis was confined to price effects, what disappeared from view was the extent to which firms could become highly concentrated while still offering lower prices. Counterintuitively, when the focus shifted to perfect competition, understood through effect on prices, market concentrations increased. Amazon is the classic example. It eliminated competitors across multiple markets while continuing to satisfy prevailing consumer welfare standards as prices remained low. [17] As a result, the law remained largely indifferent to the erosion of competitive structures. This gave way to the neo-Brandeisian critique that has focused on how the turn to consumer welfare has shifted attention away from market structure and thereby concentrated market dominance, particularly in Big Tech. [18]

What was also lost with the turn to consumer welfare as the only goal of competition law, and this loss is particularly significant for developing countries, was attention to firms capable of pursuing objectives beyond price efficiency alone. Innovation, industrial upgrading, and international competitiveness were sidelined in favor of narrow price efficiency metrics. At the same time, concerns relating to inequality, distribution, and broader market outcomes were pushed aside, as if atomistic competition could resolve a wide range of social and economic problems. Low barriers to entry, open markets, and global trade came to be treated as hallmarks of sound economic governance, ignoring its detrimental effect on working conditions and environmental degradation, among others.

Critical voices repeatedly challenged this model. Many argued that it was ill-suited to the developmental conditions of countries in the Global South. They pointed out that Western countries had not followed these prescriptions during their own paths to industrialization, effectively kicking away the ladder once development had been secured. [19] Others went further, arguing that the model was not only inappropriate but undesirable. It would entrench existing hierarchies, enrich those already at the top, impoverish those at the bottom, and leave fundamental structural inequalities untouched. Critics of growth, particularly those writing on degrowth, have long been stressing that these problems are exacerbated with the endless pursuit of growth. [20] These critiques were largely ignored. Foreign experts were brought in, international demands were imposed, and conditionality spread the model of competition law and market arrangements around allocative price efficiency. With very few exceptions, countries in the Global South followed this path. [21]

This consensus held until a moment when the same policies and priorities became increasingly unwelcome in developed economies themselves. Trade wars, new barriers, and the resurgence of economic nationalism marked a clear shift. [22] From slogans such as « Make America Great Again » to calls for production alongside nationalist preferences, to trade barriers used as economic coercions, the departure from earlier commitments to openness and globalization has been striking. As a result, it has been difficult to deny that countries in the Global South are held to another standard, not just one that the Western economies did not follow themselves when they were developing, but one they are clearly no longer following now. It is against this backdrop, I argue, that the cracks in the system, already present, are now impossible to ignore by everyone, not just the critics who saw it all along. These moments of tension signal a clear crossroads, an opportunity to break with this model and pursue alternative approaches to markets and competition, which will be discussed next.

2. Alternative Competition Policy

4 - I will focus on three suggested alternative proposals of competition policy and enforcement that, I argue, are more desirable from the perspective of countries in the Global South.

A. - Goals and the Public Interest beyond Competition

5 - Competition has long been treated as an ideal to be pursued for its own sake. It is assumed to drive prices down, stimulate innovation, preserve smaller firm size, thereby ensuring accountability, and to prevent concentration and accumulation of power. The commitment to competition has been presented as a defining feature of capitalism, with aggressive and predatory forms of rivalry not only accepted but actively celebrated. What has received far less attention, however, are the consequences produced by this unqualified pursuit of competition. Competition has exerted sustained pressure on firms to reduce labor costs, often by suppressing wages, tolerating precarious or unlawful working conditions, and relying on exploitative practices, including child labor and sweatshops. It has also contributed to environmental harm, as firms externalize costs in the pursuit of surplus and continuous growth. These outcomes are neither incidental nor marginal. They are closely connected to a system in which competition is elevated above all other social and economic considerations.

An alternative, particularly relevant for countries in the Global South, is to use their competition laws for goals beyond competition. This might seem counterintuitive, since the laws are about promoting competition. Yet, I argue, they have not necessarily always been about competition per se. These laws, after all, are laws that shape markets, impact prices that firms set and consumers pay, and often dictate how firms and market players behave. They are also sufficiently malleable to achieve goals far beyond the narrow competition seeking efficiency-based goals that have dominated antitrust over the past 60 years. [23] It is important to recall that the language of competition, efficiency, and consumer welfare drawn from price theory has never been a neutral substitute for

16. D. I. Waked, 'Antitrust Goals in Developing Countries : Policy Alternatives and Normative Choices' (2015) 38(3) Seattle University Law Review 945.
17. L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710.
18. *See*, e.g., T. Wu, *The Curse of Bigness : Antitrust in the New Gilded Age* (Columbia Global Report 2018) ; M. Stoller, *Goliath : The 100 Year War Between Monopoly and Democracy* (Simon & Schuster 2019) ; J. Tepper and D. Hearn, *The Myth of Capitalism : Monopolies and the Death of Capitalism* (Wiley 2018) ; Z. Teachout, *Break 'Em Up : Recovering our Freedom From Big Ag, Big Tech and Big Money* (All Points Books 2020) ; B. Lynn, *Cornered : The New Monopoly Capitalism and the Economics of Destruction* (Wiley & Sons 2010).
19. H-J. Chang, *Kicking Away the Ladder : Development Strategy in Historical Perspective* (Anthem Press 2004).
20. J. Hickel, 'What Does Degrowth Mean? A Few Points of Clarification' (2021) 18 Globalizations 1105 ; J. Hickel, 'The Anti-Colonial Politics of Degrowth' (2021) 88 Political Geography 102404.
21. *See* D. I. Waked, 'Competition Law and Policy in the Global South : Power, Coercion and Distribution' (2023) 76 Current Legal Problems 375. (for a discussion of the public interest reaching racial justice under the public interest considerations of South African Competition Law).
22. L. Ghiotto, 'The False Dilemma Between Protectionism and Free Trade' (*Transnational Institute*, 22 May 2025) <https://www.tni.org/en/article/the-false-dilemma-between-protectionism-and-free-trade> accessed 5 December 2025 (« This reveals the true nature of the Trumpist economic project : not a rejection of neoliberalism or free trade in themselves, but a reconfiguration of the relationships between the State, corporations, and the world market, developing an economic nationalism with a strong impact on the electoral base. »).
23. Waked, *supra* note 2.

competition policy itself. Competition law has historically embodied a broader set of social values, of which economic efficiency was only one element. Isolating efficiency and narrowly defined economic considerations from this wider bundle reflects a political choice rather than a technical necessity. Such a choice calls for open debate, justification, and legitimate political contestation. [24] These laws need to be understood to be about more than just competition. They need to be understood as part of a wider public interest where its set objectives are inherently political, mirroring the prevailing consciousness of a given movement, power relations, and the social needs deemed most pressing at the time. [25]

For example, if we look to South Africa, its Competition Act has used the notion of the public interest to achieve equality and distributive racial justice. It advances a « broader range of considerations including the promotion of a more equitable spread of ownership as well as the 'interests' of workers. » [26] It specifies that « the purpose of this Act is to promote and maintain competition in the Republic in order to [among other goals] promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. » [27] According to the Act, one may be deemed a historically disadvantaged person « if that person [...] is one of a category of individuals who, before the Constitution of the Republic of South Africa [...] came into operation [in 1993], were disadvantaged by unfair discrimination on the basis of race [...]. » [28] This definition also applies to associations where the majority members are considered historically disadvantaged, as well as to firms controlled by such individuals. [29] The South African Competition Act also states that the Competition Commission may exempt an agreement or practice from the application of its competition rules if it contributes to the « promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive. » [30] And finally, the South African competition law allows a merger to be justified on public interest grounds. [31] This provision explains that the Competition Commission or the Competition Tribunal must consider, among other things, the effect that the merger will have on « the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive. » [32]

Recent cases in South Africa, particularly the 2021 Constitutional Court case in *Mediclinic*, [33] show a drastic evolution of the public interest and its framing in competition law considerations. This case was the first judgement where the Constitution of the Republic of South Africa and its Bill of Rights were incorporated into the interpretation of the public interest considerations in merger analyses. These are important goals to a country like South Africa, where its black majority has been discriminated against through most of its history. This is a move that signifies an important evolution of – and expansion to – the notion and coverage of public interest, which may now be deemed even wider than initially construed. [34] This could be the beginning of a new framing of competition policy's heterodox considerations in the Global South, where other countries look to South Africa for its pioneering public interest reach.

B. - Industrialization and the Cooperation-Competition Balance

6 - Once Global South countries have moved beyond competition, they could consider alternative, more suitable goals. One such goal is using competition laws to achieve industrialization. Today, there is a clear turn/return towards industrial policy, [35] protectionism, and economic nationalism. The American National Security Advisor Jake Sullivan called it '*modern* American industrial policy'. [36] It calls for deploying targeted public investment in strategic sectors foundational to growth to assure that American businesses can innovate, scale, and compete. [37] This approach is not new ; it has been followed by Japan and Korea, among others, during the years of their most rapid growth, where they « have deliberately restricted [competition] in many directions in order to increase their investment rate and to accelerate their technological development. » [38] Alice Amsden and Ajit Singh have shown that developing countries that have chosen to follow what they call *heterodox growth theory* have outperformed those that remained stuck in the perfect-competition deadlock. [39] Other than the Asian economies that have grown thanks to a *heterodox* market approach, never holding perfect competition as the ideal, evidence from Germany, France, Great Britain, Australia, and the United States, among others, is not short of the same. The dominant policy, at many moments in the development of the West, was that of protectionism over competitive markets. [40]

Even the European competition law was used by the European Commission to approve a 'crises cartel' to protect local production and shield it against foreign imports in the famous *Synthetic Fibers* case, as late as 1984. [41] The example from Europe can be interpreted in several ways. It may suggest that the particular competition model exported to the Global South, centered around efficiency and consumer welfare, has only come to be the model in Europe after alternative policies – often more acceptable to industrial strategies – have been followed at home. Alternatively, it may indicate that competition law has never been applied rigidly, but has rather

24. R. J. Peritz, 'Foreword : Antitrust as Public Interest Law' (1990) 35 New York Law School Law Review 767, 774.
25. D. I. Waked, 'Antitrust as Public Interest Law : Redistribution, Equity and Social Justice' (2020) 65(1) Antitrust Bulletin.
26. International Competition Network, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies'(2007) 18 [hereinafter ICN REPORT 2007] <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> accessed 21 February 2026.
27. South African Competition Act, Act No. 89 of 1998, ch. 1, para. 2(f) (S. Afr.).
28. *ibid*. at ch. 1, para. 3, § (2)(a).
29. *ibid*. at ch. 1, para. 3, § (2)(b)-(d).
30. *ibid*. at ch. 2, pt. C, para. 10, § (3)(iii).
31. *ibid*. at ch. 3, para. 16, § (3)(b)(ii).
32. *ibid*.
33. *Competition Commission of South Africa v. Mediclinic Southern Africa (Pty) Ltd and Another (CCT 31/20) [2021] ZACC 35 ; 2022 (5) BCLR 532 (CC) ; 2022 (4) SA 323 (CC) (15 October 2021)*.
34. *See* T. Msutu, 'From Massmart to Mediclinic (With a Drive-Thru Burger King) : The Development of the Public Interest Standard in Merger Regulation' (2025) 37(2) South African Mercantile Law Journal 198.
35. Industrial policy refers to : strategic government intervention promoting its industrial sector through protectionism and targeted regulation aimed to encourage advantageous trade terms (exports), employment, growth, and other development goals.
36. 'The Biden administration's international economic agenda : A conversation with National Security Advisor Jake Sullivan' (*The Brookings Institution*, 27 April 2023) <https://www.brookings.edu/wp-content/uploads/2023/04/es_20230427_sullivan_intl_economic_agenda_transcript.pdf> accessed 5 February 2025 (« A modern American industrial strategy identifies specific sectors that are foundational to economic growth, strategic from a national security perspective, and where private industry on its own isn't poised to make the investments needed to secure our national ambitions. It deploys targeted public investments in these areas that unlock the power and ingenuity of private markets, capitalism, and competition to lay a foundation for long-term growth. It helps enable American business to do what American business does best : innovate, scale, and compete. This is about crowding-in private investment, not replacing it. It's about making long-term investments in sectors vital to our national wellbeing, not picking winners and losers. And it has a long tradition in this country. »).
37. *ibid.*
38. A. H. Amsden and A.Singh, 'The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea' (1994) 38 European Economic Review 941, 949.
39. *ibid.*
40. T. A. Freyer, *Antitrust and Global Capitalism, 1930-2004* (Cambridge University Press 2006) 60-101.
41. *Synthetic Fibers*, OJ 1984, L 207/17, European Commission Decision 84/380/EEC of 4 July 1984.

been adjusted to align with prevailing economic and political interests.

It is therefore suggested that a more suitable competition policy in the Global South should be a combination of cooperation and competition between firms, which is referred to as « optimal degree of competition, » [42] rather than maximum competition. This is heavily in contrast to the policy of the US and EU antitrust law, which follows the motto of 'the more competition, the better'. It is also in direct contrast with current neo-Brandeisian policy recommendations which call for markets to only focus on structure to limit the consolidation of big, concentrated market players. At the same time, it is not pro-big business ; rather, it is a policy that on the one hand allows for deviation from the perfect competition ideal, while on the other hand constrains the ability of firms to consolidate market power. It is, thus, a combination of regulated competition and planned cooperation, with a central role for the state in these planning efforts. The aim is to realize goals beyond the narrow price and efficiency boundaries.

This policy framework can be considered *protective antitrust* policies aimed at achieving industrial policy. It is necessary so that countries in the Global South overcome the industrial and development gap between them and more industrialized nations. It is also necessary to escape being locked in the trap of exporting raw materials and importing industrialized products, a common pattern coercively imposed on Third World countries since colonial domination. In that respect, selectively enforcing antitrust laws to grant certain protective measures along an industrial plan might help developing countries counterbalance some of the legacies of colonialism cemented with further adopted neoliberal policies. The aim of these protective competition policies is to operate in conjunction with countries' broad industrial policies to rein in neoliberal reform that have forced much of the developing world to give up protectionist measures necessary for industrial catch-up and international competitiveness. These protective policies have been openly pursued by Western nations following the Covid pandemic, when a global turn towards local production and industrial policy was ushered in. It seems quite hypocritical to ask today's developing countries to follow an approach that developed countries themselves only adopted after reaching a certain level of development. It is equally problematic to forbid developing countries from using the very policies that enabled developed economies to industrialize in the first place, particularly when those policies are now being abandoned. [43]

The pursuit of industrial policy is often criticized, particularly in the context of developing countries, as it has the potential not only to concentrate the markets in the hands of fewer players, but also to lead to an increase in prices that affect affordability. It is important to stress that industrialization need not, and should not, come at the expense of the most vulnerable in the countries pursuing industrialization. The question should not be whether to industrialize or not, but how the benefits generated by firms' industrial growth are to be distributed across society. Rather than allowing gains to be captured exclusively by shareholders or concentrated economic actors, regulatory frameworks can be designed, outside of the strict competition law framing, to ensure that surplus is redistributed back to consumers, workers, and affected communities. For example, firms could be required to invest some of their surplus in the communities they are operating in through mandatory environmental, social, and governance (ESG) mandates. Alternatively, firms could be required to fund consumer or worker trusts that are then used to distribute surplus to workers through higher wages or to consumers through lower prices. [44] This requires taking seriously the possibility of socializing certain dimensions of firm activity through legal and regulatory mechanisms that embed redistributive obligations within market structures themselves. [45]

C. - Delinking and South –South cooperation

7 - Another important pathway that Third World countries are recommended to take is one that allows them to strengthen their cooperation. This is essential not only to achieve what Walter Rodney called « social solidarity to fight off the alienation of individualism, » but also as a form of « resistance to the destructive individualism of capitalism. » [46] Such cooperation should not be limited to trade agreements but can serve as a form of collective action aimed at addressing shared challenges. It also allows coalition-building that could recalibrate power dynamics. For example, by coordinating enforcement approaches and policy objectives, Third World jurisdictions can better resist asymmetric competitive pressures and structural disadvantages in global markets. This is what regional agreements have been aiming at achieving. These regional economic blocs have now begun to play a more active role in merger review, with certain transactions now subject to assessment at the regional and national levels before final review decisions are awarded. Examples include COMESA in Eastern and Southern Africa, which conducts merger assessments through its Competition Commission as well as national clearance by member states. [47]

Merger control is an important aspect of South-South cooperation. Many countries in the Global South approve large scale global mergers and acquisitions by way of rubber stamping. [48] No country on its own would have the power to stop these often-harmful global mergers, but as a coalition of countries, their power dynamics might allow such a resistance. Such collective merger enforcement could be used to address the concentration of economic power while also creating avenues to ensure that the surplus generated by merged entities is shared more broadly. Conditions attached to merger approval can be designed to prevent the costs of concentration from being borne by the most vulnerable, drawing inspiration from approaches that incorporate social and public interest considerations alongside traditional competition analysis, as well as regulation targeted at redistribution.

Beyond collective enforcement as a form of resistance, South-South cooperation also offers a means to displace the continued reliance on foreign consultants whose points of reference remain firmly anchored in European and North American models. Too often policy advice and legal design are filtered through frameworks that assume Western market experiences as universal benchmarks. Frantz Fanon warned explicitly against this tendency, urging postcolonial societies not to imitate Europe or reproduce its institutional forms, but to develop new concepts attuned to their own historical conditions and political aspirations instead. [49] This means to look to competition law as sites for conceptional development rooted in legal, socio-economic, and historical realities of the Global South.

Finally, as South-South cooperation and consultation become more structured and sustained, they open the possibility of moving

42. Amsden and Singh, *supra* note 38 at 41.
43. Sullivan, *supra* note 36 ('But at the end of the day, what we are trying to do is build the capacity to make things and deploy them and the resilience to be able to withstand the shocks of today's world, from the climate crisis to a global pandemic to a war. And if we can do those two things [build capacity and resilience] then whether it's the Russian invasion of Ukraine or COVID-19 or economic coercion from the PRC, we'll be able to deal with that. And we'll also be able to offer people a good paying job at a good wage, with a job that has the dignity of building something that is going to deliver the advanced industry and innovation of the future.').
44. For a detailed mechanism of how such a redistributive mechanism could work, *see* Waked, *supra* note 2, at 397-400.
45. *ibid.*
46. W. Rodney, *How Europe Underdeveloped Africa* (2012) (1972) 254.
47. Regulations on Competition within the Common Market for Eastern and Southern Africa (COMESA Competition Regulations), 2004, Arts 23-26.
48. Waked, *supra* note 2.
49. F. Fanon, *The Wretched of the Earth* (1968) 252.

toward a second and more demanding stage, one that Samir Amin described as delinking. [50] He stated that :

> Development of the countries on the periphery of the world capitalist system must therefore come through an essential 'rupture' with that system, a 'delinking' or refusal to subject the national development strategy to the imperatives of 'worldwide expansion'. But the meaning we give to the concept of 'delinking' is in no way synonymous with autarky. The meaning is as follows : pursuit of a system of rational criteria for economic options founded on a law of value on a national basis with popular relevance, independent of such criteria of economic rationality as flow from the dominance of the capitalist law of value operating on a world scale. [...] To choose 'the world capitalist law of value' means taking the reference price on which to found the rationality of development options from the system of dominant prices, those that reflect the levels of productivity achieved in the developed countries. [51]

In Amin's formulation, delinking does not imply withdrawal from global markets, but rather the ability to loosen the constraints imposed by externally defined priorities and development paths. Applied to competition law and market regulation, delinking points to the capacity of countries in the Global South to define objectives, institutional designs, and enforcement priorities on their own terms, informed by domestic social and economic needs rather than by the imperatives of convergence with dominant market models. The suggestions set out in this article seek to mark an initial move in that direction.

50. S. Amin, *Delinking : Towards a Polycentric World* (Bloomsbury Publishing 1990).
51. *Ibid* at 62-63.

Conclusion

8 - Competition laws in the Global South have been prescribed by international financial institutions through loan conditionalities and imposed by trade partners. The laws, as adopted, aimed at pure price efficiency and the pursuit of endless competition and growth. These goals are often unsuitable and unresponsive to the needs of the countries into which they are being transplanted. They are also narrow, static, and incapable of addressing the plethora of objectives that developing countries might benefit from pursuing. They are also very different from the laws and policies pursued in developed countries prior to their own development. A historical account is ignored in pushing for these so-called 'one size fits all' reforms. Similarly, they are oblivious to distributive outcomes that entrench these countries into more poverty, increase income gaps, and enrich a few local elites and international multinational corporations that capture the surpluses generated.

Alternative approaches to market regulation, centered around competition laws, are therefore imagined and discussed. These alternative pathways are more than suggestive, given the current unravelling of much of the liberal order as understood in the post-World War II period and under its subsequent Washington Consensus. Three specific alternatives are discussed in detail in this article. First, the expansion of the objectives of competition law to pursue goals beyond competition, such as racial justice as in South Africa, or redistributive goals. Most important is the effort to discredit the sole pursuit of consumer welfare, as well as aggressive competition, as desirable. This fits with the critiques of degrowth, which have shown that the endless pursuit of growth, much like the endless pursuit of competition, increases the ills of neoliberal capitalism, affecting workers, the environment, inequality, and market concentration, among others. Second, the pursuit of industrial policy and planned cooperation is examined as a potential alternative competition goal. And finally, the article explores potential benefits of South-South cooperation and, ultimately, a push for delinking from a capitalist system oriented exclusively toward growth, and, I would add, competition. The current world order places us at a crossroads and creates an opportunity for Third World nations to pursue these alternatives.■

19 Reenvisioning the International Competition Network and the Mexican Antitrust Commission



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As the International Competition Network (ICN) approaches its 25th anniversary, the moment calls for reflection and reenvisioning. On the one hand, it invites reflection on the lessons learned throughout the ICN's journey since its creation in 2001, an experience that stands as a resounding example of the value of voluntary, trust-based international cooperation. On the other hand, it requires reenvisioning to better tackle the challenges of the current economic and technological environment. In this context, in its own response to this complex global scenario, Mexico has enacted changes to its competition regime to reshape and strengthen competition policy as a cornerstone of public welfare.

1. Navigating complexity : the ICN's successful model of voluntary cooperation

1 - From its inception, the ICN was envisioned as a distinctive model for international cooperation. The virtual network was neither created through a formal treaty nor structured as a traditional hierarchical organization. Instead, it aimed to respond to the growing challenge of competition law enforcement becoming increasingly global, while legal frameworks and institutional capacities remain diverse. To meet these challenges, the ICN strives for knowledge exchange, best practices alignment and collaboration without compromising sovereignty. [1] Over time, this approach has strengthened mutual understanding and encouraged voluntary cooperation to tackle challenges.One of the first issues the ICN sought to address was a core concern of competition law : cartels. Only three years after its creation, the network had already recognized the inherently international nature of cartel conduct and the challenges this posed. These challenges include evidence dispersed across multiple jurisdictions, legal barriers to information sharing, the risk that insufficient cooperation could leave authorities unaware of cartel activity within their markets, and the possibility that cartels could avoid detection altogether. [2] Fully aware of the legal constraints affecting cooperation among agencies, ICN members developed a proposal for a Framework for the Promotion of the Sharing of Non-Confidential Information for Cartel Enforcement [3]. This proposal had a simple yet highly significant objective : to encourage a 'pick-up-the-phone' relationship among authorities. It introduced a voluntary registration system through which agencies willing to exchange non-confidential information could sign up and gain access to a contact list of officers. Agencies could request information on investigative procedures, share cartel enforcement experiences, and consult more seasoned agencies about past cases to receive practical guidance and strengthen their own enforcement efforts. [4]

Over the years, the ICN has remained true to its simple yet meaningful principle : competition matters – always, across sectors and borders. Its motto, 'competition, all the time', serves as a reminder that competitive markets are not just an abstract ideal but a practical engine for driving innovation, efficiency and consumer welfare. At the same time, it also underscores the need for competition policy to be proactive and adaptable, anticipating structural and technological shifts rather than reacting after these happen. Since its creation, a simple procedure through which the ICN ensures it remains up to date is its work-plan elaboration process. ICN is composed of five working groups : Advocacy, Cartels, Unilateral Conduct, Agency Effectiveness, and Mergers. Each working group is led by four co-chairs (member agencies), who are primarily responsible for selecting annual projects and activities. The co-chairs are renewed on a staggered basis each year, which helps ensure that work-plans remain relevant to a broad range of jurisdictions. Additionally, draft work-plans are circulated for member comments, and all members may propose topics for consideration. It is worth noting that each member of the ICN is entitled to select Non-Governmental Advisors (NGAs), who may come from academia or private law firms and provide comments to ICN documents on a voluntary basis. This process ensures that the ICN's work incorporates issues that are both timely and of practical importance to its membership.

The ICN's early years were characterized by significant achievements. Through its members' voluntary cooperation, ICN produced a global compendium of merger laws, templates to compare systems, and data on review costs. It adopted Guiding Principles

1. International Competition Network, 'ICN Factsheet and key messages' (2022).
2. International Competition Network, 'Report to the ICN Annual Conference Moscow' (2007). <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Cooperation.pdf> accessed 28 February 2026.
3. International Competition Network, 'Proposal for a Framework for the Promotion of the Sharing of Non-Confidential Information for Cartel Enforcement' (2016). <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_nonConfidentialInfoFramework.pdf> accessed 28 February 2026.
4. International Competition Network, 'Information Request Form to ICN's Framework for Sharing Non-Confidential Information for Anti-Cartel Enforcement' (2016) <https://www.jftc.go.jp/en/int_relations/icn_files/InformationRequestForm.pdf> accessed 28 February 2026.

and Recommended Practices at the Naples (2002) and Mérida (2003) conferences, covering thresholds, timing, review periods, transparency, and notification requirements. [5] At Mérida, five research papers on market definition, effects, barriers, and efficiencies were also presented. [6] For the Seoul Conference (2004), further practices and strategies for convergence were planned. [7] Other achievements include the launch of a long-term project on investigative processes in 2011, which led to the Recommended Practices for Investigative Process. [8]

As the Network matured, it consolidated its role as a leading international forum. Through its working groups, annual conferences, and engagement of NGAs, the Network developed an extensive catalogue of work products. These work products range from guiding principles and recommended practices to frameworks, toolkits and training modules that have shaped and influenced enforcement practice worldwide. [9]

At the same time, the Network also facilitated capacity-building for emerging authorities and created a space where both established and developing agencies can interact on equal footing. It is worth noting that just last year, Guatemala, Cabo Verde, the United Arab Emirates and the West Africa Economic and Monetary Union were admitted as members. With a membership that includes both mature agencies with long-standing experience in competition law and younger agencies, the Network has sought to bridge the gap between the two by sharing the expertise of established authorities with those still strengthening their institutional capacity. Young agencies, once they become members, benefit from ICN work products, workshops and conferences. By involving authorities from different regions and levels of experience, the Network has ensured that its initiatives reflect a wide range of perspectives and enforcement realities. 25 years after its foundation, the ICN has proved that voluntary cooperation, when grounded in technical expertise and mutual trust, can shape significant outcomes even in the absence of formal binding obligations.

2. Forward thinking : re– envisioning the ICN's role in the landscape of competition policy and international cooperation

2 - Markets have become increasingly digital, globalized, and data driven. Innovative and disruptive business models have challenged conventional assumptions regarding market entry and competitive constraints. Algorithms are reshaping concepts such as pricing and consumer access in ways that traditional analytical frameworks struggle to capture. In response, the ICN has also undertaken concrete efforts to address digitalization. Through its working groups, the Network has engaged with sector-specific issues, for example, the 2025 publication of the Theories of Harm and Remedies Concerning Unilateral Conduct in Digital Markets document, which deepens collective understanding of recent enforcement practices in digital markets and provides further guidance and enforcement experiences on the digital markets. [10]

Beyond technological transformation, competition policy is increasingly embedded within a broader and more complex public policy landscape. This reflects the growing overlap between antitrust enforcement and issues such as consumer protection, data governance, industrial policy and social concerns such as sustainability. While competition law has always had broader public policy implications, competition authorities have been given a mandate beyond preventing and sanctioning anticompetitive practices. [11] Governments currently face pressing challenges such as climate change, sustainability, supply chain resilience and economic inequality.

On May 9, 2025, the ICN published its newly reformed Operational Framework. [12] One very relevant change was included in Section 3.5. ICN members decided to add a provision stating that '[t]he term of appointment for the Chair and Vice Chairs is two years. The Chair and Vice Chairs may serve up to two terms' (emphasis added). Previously, the Operational Framework did not limit the terms for either a Chair or Vice Chair of the ICN Steering Group. The ICN's reaction to the challenges that digital markets entail was the creation of the Technologist Forum. [13] The Technologist Forum is an 'agency-only' group in which staff from competition authorities dedicated to deal with digital markets discuss digital enforcement tools and challenges. The Technologist Forum, formally created in 2024 through a statement signed by 24 antitrust agencies, represents the culmination of the work of former ICN Vice Chair Lina Khan, who was selected for this position because of her proposal to lead the network's work on digital economy issues. [14] The Technologist Forum held its first meeting in March 2024, hosted by the United States Federal Trade Commission. The Forum's second meeting took place during the 2025 ICN Annual Conference, organized by the United Kingdom's Competition and Markets Authority and led by Chief Executive Sarah Cardell, who has served as ICN Vice Chair since September 2025. This now-annual reunion has proven to be a valuable space where authorities exchange ideas and solutions on how best to address digital challenges.

Also in September 2025, Nuno Cunha Rodrigues of the Portuguese *Autoridade da Concorrência* was selected as Vice Chair. President Rodrigues proposes that the ICN engage in a 'cross-policy dialogue', meaning that competition authorities should interact with other institutions, such as financial regulators and central banks, to foster better mutual understanding. This dialogue would allow competition authorities to consider broader public-policy objectives, beyond market efficiency alone, while carrying out their

5. International Competition Network, 'Guiding Principles for Merger Notification and Review Procedures' (2002) <https://www.internationalcompetitionnetwork.org/portfolio/guiding-principles-for-merger-notification-review-procedure/> accessed 4 March 2026 ; International Competition Network, 'ICN Recommended Practices for Merger Analysis' (2002) <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2026/01/MWG-RPs-Merger-Analysis-2026.pdf> accessed 4 March 2026 ; International Competition Network, 'ICN Recommended Practices for Merger Notification and Review Procedures' (2002) <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf> accessed 4 March 2026.
6. International Competition Network, 'Project on Merger Guidelines' (2004) <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_MergerGuidelinesReport.pdf> accessed 4 March 2026.
7. R. Whish, 'The International Competition Network (ICN) : Two years on' (2003) International Competition Law Review.
8. International Competition Network, 'Recommended Practices for Investigative Process' (2019) <https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-for-investigative-process/> accessed 28 February 2026.
9. International Competition Network, 'ICN Work Product Catalogue : July 2025' (2025).
10. International Competition Network, 'Theories of Harm and Remedies Concerning Unilateral Conduct in Digital Markets' (December 2025), <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2025/12/Theories-of-harm-and-Remedies-Concerning-UC-in-Digital-Markets.pdf> accessed 27 February 2026.
11. W. Kovacic, J. Vickers, 'The politicisation of antitrust enforcement' *The Economist*, 14 March 2025).
12. International Competition Network, 'Operational Framework' (2025). <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2025/06/Operational-Framework-2025.pdf> accessed 28 February 2028.
13. International Competition Network, 'Technologist Forum Statement on building agency digital capacity' (2024) <https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/technologists/technologist-forum-statement-on-building-agency-digital-capacity/> accessed 27 February 2026.
14. International Competition Network, 'ICN Steering Group confirms Lina Khan, US FTC, as new ICN Vice Chair' (2022) <https://www.internationalcompetitionnetwork.org/news-events/newvc22022/> accessed 27 February 2026.

primary task of ensuring competitive markets. Vice Chair Rodrigues will lead the first Cross-Policy Dialogue panel at the next ICN Annual Conference in Manila in May 2026.

Looking ahead, the challenge for the ICN is to strike the right balance : maintaining the principles that have sustained its success while adapting to new realities. Competition policy cannot operate in isolation ; it increasingly intersects with broader regulatory and public policy objectives. The ICN must amplify its global voice without losing its inclusive, member-driven character, which remains a defining feature of its legitimacy and success.

As a result of these evolving dynamics, the ICN conducted its Third Decade project as a process of collective reflection aimed at preparing for future developments and challenges. [15] After ten years, the ICN launched a consultation asking its members for improvements needed in the organization. Following this exercise, former Chair John Fingleton presented the ICN Vision for its Second Decade in 2011. This self-assessment was also carried out by former Chair Andreas Mundt in 2021, calling it the ICN's Vision for its Third Decade. [16]

One of the strongest messages from the Third Decade project was the need for greater participation and inclusiveness. A truly global forum must reflect a diversity of experiences and perspectives, ensuring that every member has a meaningful opportunity to contribute. This concern was taken into account in the Chair's vision for 2025-2027, recognizing the need for diverse participation with an emphasis on young and smaller agencies, while acknowledging a need to provide opportunities for agencies to take on leadership roles regardless of their size and experience. [17]

To address the former, Michael Aguinaldo, Chairperson of the Philippine Competition Commission, was selected as the NGA Liaison for the ICN with the intention of encouraging academics and private practitioners from regions with a 'new' competition culture to have the opportunity to voice their suggestions and visions. To maintain a balance between addressing modern competition challenges and ensuring that younger economies can raise the issues they face, the Mexican CNA leads the ICN Younger Agencies/Bridging Project. During the last ICN Annual Conference, this project hosted a session titled 'Building a New Competition Agenda from the Perspective of Young and Small Agencies.'

Moving beyond the ICN's Third Decade, this is a moment to renew the collective commitment to competitive markets and to the public interest they serve. In doing so, it is ensured that competition remains not only *all the time*, but also fully responsive to the realities of contemporary markets and the expectations placed on public institutions. The ICN has well-established mechanisms to reenvision its mandate, now including a provision requiring the rotation of Vice Chairs and Chairs. This process continually brings fresh projects and perspectives, such as the Tech Forum and the Cross-Sectoral Dialogue. Moreover, evaluation exercises such as the Third Decade Project allow the ICN to recognize that its process of re-envisioning the network's future must also consider the challenges faced by younger agencies. Guided by shared experience, informed by reflection, and energized by its diverse membership, the ICN is well positioned to continue shaping the future of global competition policy.

15. International Competition Network, 'ICN's Vision for its Third Decade' (2022).
16. *ibid*.
17. International Competition Network, 'Chair Andrea's Marvan Vision for the ICN : Beyond the Third Decade (2025-2027)' (2025) <https://internationalcompetitionnetwork.org/wp-content/uploads/2025/05/ICN-Chair-Andrea-Marvins-Vision-for-the-ICN-Beyond-the-Third-Decade.pdf> accessed 28 February 2026.

3. Mexico's Competition Policy : Convergence with International Trends

3 - The current state of competition policy reflects a gradual adjustment of priorities. Competition policy operates within a broader public-policy framework, intersecting with areas such as digital transformation, social inclusion, industrial policy, and rising societal expectations. This intersection of competition with other policies can be observed both internationally and domestically. At the international level, the ICN is gradually incorporating these broader considerations into its work, reflecting a collective recognition of the need for a more integrated perspective.

At the domestic level, Mexico's recent competition law reform illustrates how this global trend is translated into national frameworks that are also converging with this broader approach, maintaining established economic objectives while gradually incorporating broader social and developmental considerations. This process began on December 20, 2024, when the Mexican Congress approved a constitutional amendment on organizational simplification. [18] The reform changed the legal status of the Mexican Antitrust Authority, transforming it from an autonomous constitutional body into an institution under the Ministry of Economy. Its mandate, as part of the Ministry of Economy, reflects the broader role of competition policy in supporting the State's objectives of inclusive growth and balanced development, ensuring that competition policy is fully integrated into a comprehensive economic strategy. This is reflected in the Commission's 2026 Annual Work Program, [19] which is aligned with Mexico's National Development Plan. [20] The goal is particularly in line with the Priority Objective 'Promote balanced economic growth and development across all regions of the country, respecting their diversity to create shared prosperity' and the Strategy 'Foster economic competition, competitiveness, and market formalization to improve the conditions for the creation and operation of businesses throughout the national territory'. It is also articulated in the 2025-2030 Sectoral Program of the Ministry of Economy under the Objective 'Promote innovation and competition in the domestic market' and through the Strategy 'Generate business environment conditions for healthy competition, competitiveness, and market formalization.' [21] In this way, the Antitrust Commission's work seeks to fulfill national goals in inclusive economic development, embedding competition policy, contributing to stronger domestic markets and a fairer environment for businesses, and the creation of conditions that foster innovation, investment, and long-term prosperity.

The reform is also a measure aimed at streamlining institutional structures, reducing administrative complexity, and strengthening the coherence of competition policy. As part of this restructuring, the Federal Economic Competition Commission and the Federal Telecommunications Institute were dissolved, and their competition powers were transferred to a new decentralized agency part of the Ministry of Economy with its own assets and full technical independence. Following this step, the Federal Economic Competition Law (LFCE or Competition Law) was amended, [22] formally establishing the National Antitrust Commission (Commission) as Mexico's sole competition authority entrusted with the enforcement of the Competition Law across all sectors of the economy.

18. Chamber of Deputies of Mexico, 'Constitución Política de los Estados Unidos Mexicanos (Reforma 268)', Federal Official Gazette, 20.12.2024.
19. National Antitrust Commission, 'Annual Work Program 2026' (2026). Government of Mexico.
20. Presidency of Mexico, 'National Development Plan 2025-2030' (2025). Government of Mexico.
21. Ministry of Economy, 'Sectoral Program of Economy 2025-2030' (2025). Government of Mexico.
22. Government of Mexico, 'Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de Competencia Económica y de la Ley Federal de las Entidades Paraestatales', Federal Official Gazette, 16.07.2025.

Becoming an institution attached to the Mexican Ministry of Economy places the National Antitrust Commission in a position where it can more easily engage in dialogue with other bodies within the same Ministry, such as the Federal Consumer Protection Institute and the Intellectual Property Institute. Moreover, in its new capacity as an institution formally integrated into the Mexican government, the Antitrust Commission is better positioned to engage in a cross-policy dialogue, ensuring that competition considerations are incorporated into the broader policy objectives pursued by the Mexican government.

4. Final remarks

4 - The ICN has demonstrated resilience and adaptability of voluntary, trust-based international cooperation thanks to its nature as a flexible non-binding Network which has successfully fostered convergence, capacity building and shared understanding across different jurisdictions. At the same time, it has recognized the growing complexity of markets and the rise of intersecting policy objectives which require renewed and forward-looking approaches to dialogue, inclusiveness and engagement. As it enters its third decade of existence, the Network remains true to its core principles while adapting its role to a policy environment in which competition increasingly interacts with broader objectives such as the green transition, sustainability, social fairness, and other policy objectives. In this context, competition policy is emerging as a key instrument to navigate complexity, strengthen markets, and promote inclusive and sustainable growth.

The recent competition reform in Mexico mirrors this change in global dynamics. The creation of the National Antitrust Commission and the revamp of the competition law signal a clear effort to position competition policy as part of a broader national strategy focused on fairness, inclusion and sustainable growth. By reinforcing institutional independence, improving enforcement tools, and offering incentives for compliance, Mexico is strengthening the role of competition as a cornerstone of market integrity and a driver of public welfare. This approach combines strong competition policy with legal certainty, due process, and the promotion of consumer welfare to ensure that markets work better for everyone.

Mexico's institutional reform and the ICN's ongoing evolution reflect a broader shift toward a more integrated vision of competition policy that recognizes its intersection with other public policies. The question is no longer whether competition should engage with these objectives, but how to do so while preserving rigor, due process, and effectiveness. Addressing this challenge requires cooperation, dialogue, and platforms such as the ICN, which currently has 154 members from more than 139 jurisdictions across the Americas, Europe, Africa, Asia and Oceania. [23] This gives the Network a truly global reach and the capacity to address these challenges at scale. Looking ahead, the relevance of competition policy will depend on its ability to stay adaptable while remaining anchored in its core principles. Competition will continue to matter – not just as a tool for efficiency, but as a foundation for fair, resilient, and forward-looking economic governance.■

23. ICN Members can be consulted at : <https://www.internationalcompetitionnetwork.org/members/>.

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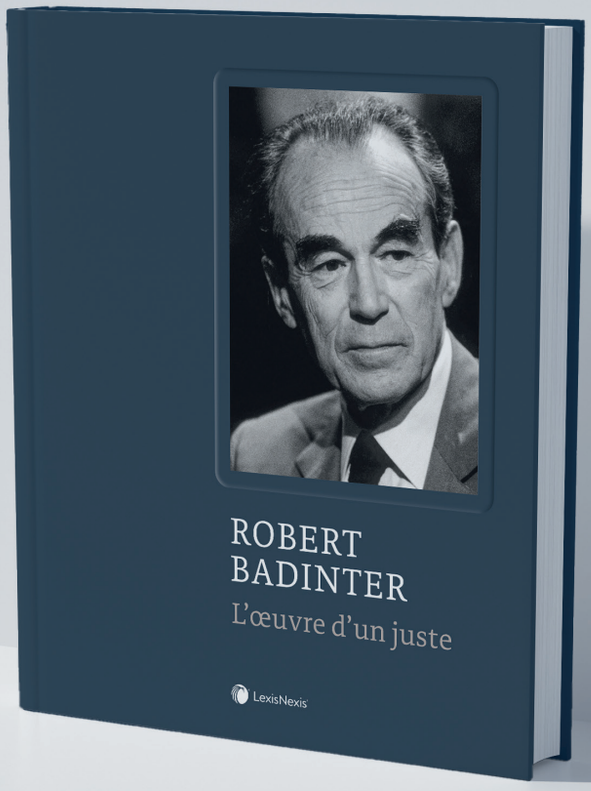
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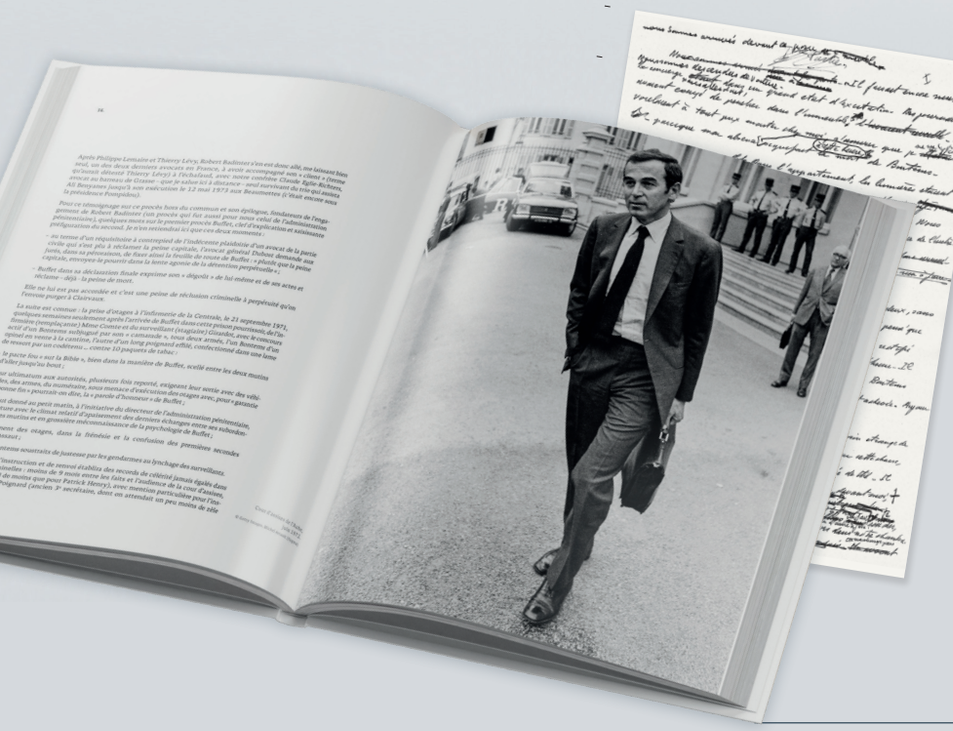
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