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5th Innovation Economics Conference for Antitrust Lawyers

#4 Sovereignty, Strategy Autonomy, Industrial Policy, Brexit …

Webinar - 30 April 2021*

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Competition policy has less and less to do with competition and more to do with everything else.”

Renato Nazzini

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Renato Nazzini began by pointing that today competition policy has less and less to do with competition and more to do with everything else. It now encompasses issues such as industrial policy, sustainability and the environment. There is also news on the foreign investments front as the United Kingdom's National Security Investment Tax recently received the Royal Assent. It will be significant because all investments in U.K. companies above the threshold of 25 per cent in seventeen sectors from the classic strategic sectors — defence and national infrastructure — to synthetic biology, artificial intelligence *inter alia* will have to be notified to a government unit for clearance pending a mandatory standstill period. The EU also published a White Paper on levelling the playing field with regard to foreign subsidies in June 2020 and the consultation that followed ended a few weeks ago. It is no secret that these efforts opened the way for a coming regulation.

One should remain wary of the impact on the economy of protective measures: as investments become riskier if they can be blocked at any time based on unclear tests, then investments can of course move away from countries where

> Fourth panel of the 2021 « Innovation Economics Conference for Antitrust Lawyers ». See synthesis of other panels on the Conferences section of concurrences.com (Webinar Series from April 27th to 30th)

* Tanguy Laurioz drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

these risks exist. The same adverse effects on innovation can be feared in the context of Covid where companies that develop a very successful product such as a vaccine end up running the risk of expropriation (via waiving of patent protection for instance). Expropriation through regulation is attractive in the short term but, in the long run, they pose a vital threat to the will of the private sector to undertake costly and risky investments towards innovation.

Lord Jonathan Hill

"The logic of Brexit is that Britain has to construct a more independent-looking and different economic policy, which might pave the way for growing tensions with the EU."

Lord Jonathan Hill

Lord Jonathan Hill also highlighted that, as final Brexit steps are currently being taken, industrial policy/competition policy will likely be an important topic in the future EU/UK relationship. Looking back to the 1980s, Leon Brittan was the first Commissioner to put competition policy at the forefront of the single market debate. By contrast, today, the discussion seems to move away from liberal economics, towards more government intervention, and in the end more politics in that debate. This trend appears to stem from greater power politics at the top level: the United States, China, and the European Union are all going through a period of greater self-assertiveness with more emphasis on self-identification. Covid-19 will likely turn out to be a massive accelerant of this dynamic. International competition on vaccines supply is an illustration. The rhetoric has also changed: politicians now use the word "resilience" which carries the idea of greater self-sufficiency. Experts and technocrats in the US and the EU are more and more under the pressure of the electorates: tensions between the Member States and the European Commission are rising, with yet again the handling of Covid-19 providing a good example of that force at work. Whether that is in digital or investment screening, the language around industrial policy — "industrial champions" or "open strategic autonomy," – defines a new direction of travel. Given that new context, if *Siemens/Alstom* came along today, would it get the same response that Margrethe Vestager gave it when it came up a few years ago? The UK and the EU are both increasing their regulatory power, with the irony being that some of the characteristics of the behaviour of the UK current government feeling more French in the way it thinks about the role of the State intervention. This Tory majority's instincts, behaviours, and policies are indeed a long way from the instincts, policies, and approaches of Ms. Thatcher's government. Over the recent crises, politicians turned more interventionist and are now reluctant to let go of this habit: recent public investments in space technologies are an example of this. In the post-Brexit world, the priority for the U.K. government in political terms is to show energy and drive, change, and progress, which explains its interest in tech and the military-industrial complex. The logic of Brexit is that Britain has to construct a more independent-looking and different economic policy, which might pave the way for growing tensions with the EU. This trend towards greater political interference means that we are going to have to live with less regulatory predictability and higher levels of political intervention. The government in the UK, with its agenda for levelling up and regenerating the economy after Covid-19, is going to incline even more to the view that it needs to be activist and interventionist – as this phenomenon is emerging in many different jurisdictions, it will mean more work for lawyers and advisors who are helping clients negotiate the maze of the regulatory landscape.

Urs Haegler

Urs Haegler spoke about the interaction between industrial policy and competition policy as well as the conduct of industrial policy from an international trade and investment angle. He began by pointing out that industrial policy had been popular and widespread in the 1960s, then increasingly fell out of favour during the 1970s. At the time, there were many bailouts of loss-making firms that involved lots of government support through subsidies, either to prop up declining industries or to promote national champions – a number of these interventions however turned out to be costly failures. During the 1980s these policies were gradually replaced by a more market-oriented approach and economic liberalisation. However, we are now witnessing a reverse swing, with industrial policies' comeback and the appetite for more government. In the EU, this is visible in the field of State aids and merger control. It is being argued that EU State-aid rules are too restrictive, prevent sufficient funding for innovative activities, or more generally the pursuit of other public policy objectives. As an example, the Commissioner for the Internal Market recently announced that he wishes to see huge invest-ments in the European semiconductor industry as this would benefit especially the car industry and help it promote, e.g., connected driving. In merger control, on the other hand, one remembers the widely debated reaction by the French and German governments to the prohibition of the Alstom/Siemens transaction in 2019. Their manifesto extended their intense lobbying that already happened during the Commission's investigation, demanding merger control should not stand in the way of creating European champions, especially in the face of formidable Chinese companies competing with them. At the same time, the same governments called for more stringent antitrust enforcement and for tighter merger control though it is not clear whether they would take the same position if some of the "GAFAMs" were European com-panies. Antitrust practitioners have been sceptic towards these arguments, fearing that they may bring even greater politicisation of competition enforcement.

The proposed Digital Markets Act (DMA) is a further example of increased intervention in what are deemed to be "key industries". Whilst pointing to the need for more legal certainty and speed in addressing "gatekeepers" market conducts, it is not clear whether these two objectives will be reached through the DMA – and if they were, speed is not always a guarantee for good outcomes, as economics on these questions are complex.

Regarding the topic of trade defence measures, the Commission made clear in recent publications that it does not think that competition rules are the most effective tool to promote economic sovereignty and the goal of competitiveness of European firms more generally. The White Paper on foreign subsidies suggests new trade defence tools should be used to address unfair competition by state-funded non-European firms. On the other hand, there are two theoretical justifications for government support to its domestic firms: imperfect competition -drive to support domestic players, as well as positive externalities. To be carried out properly, however, state interventions require excellent information from the government.

To react to said interventions by other countries, the WTO allows for anti-dumping and anti-subsidy measures in the form of extra import duties, but those tools may not always be effective. With its White Paper on foreign subsidies, the Commission is trying to supplement the existing toolbox with redressive measures on trade and services (including procurement procedures). Given the current climate, one should remain aware that, according to the economic literature, policies that are designed to level the playing field may well lower the welfare of the countries that deploy them. Such measures may benefit domestic import-competing producers and industries to some extent, but they have severe drawbacks in the forms of higher consumer prices, harm to import-dependent companies and a loss of spillover effects for technology that is embedded in subsidised products. A recent empirical study by Jabbour et al. finds results that are broadly consistent with those theoretical predictions. The findings of this study, as well as general economic consensus, suggest that the shortest road to EU-based innovation and compe-titiveness might rather be to allow import-dependent firms to exploit the benefits of cheap imports, notwithstanding the risk of subsidised foreign competition.

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Christof Schoser

Christof Schoser followed up, asking whether the Commission's initiative on foreign subsidies should be seen as a sign of protectionism and more discretionary policymaking in the EU. In any event as point out by Lord Hill, such tendencies can be observed in the UK. Mr. Schoser would like to think that this instrument is not a sign of protec-tionism and discretionary policymaking, but rather that the objective is even the opposite. The objective is to ensure openness through fairness. The West is exhibiting a perception that governments — or the European Union in our case — need to reassert themselves, including the demand for a global level playing field. There are two fundamental principles of the EU that are relevant in the present context: Firstly, the EU is a rules-based system and, secondly, it is built around the idea of competition and trade. As to the first, the EU is a legal community based on treaty rules, as is illustrated by antitrust and merger systems. Moreover, it has a system for the control of subsidies that is the State-aid system. State aid control has been maintained even during the Covid pandemic, notwithstanding that its rules have been relaxed to some extent with the so-called Temporary Framework. The second constitutive element of the European Union is competition and free trade in the internal market. Those two features do contradict the tendency to more discretionary and protectionist decision-making. Under the pressure of demand for more sovereignty, these elements seem to shift towards a new consensus according to which the EU can only stay open if the condi-tions of its openness are fair. That is where this

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Christof Schoser

idea to address “foreign” subsidies comes about – and the urge to do so is well reflected in the White Paper. There was indeed large support from industry, from Member States, even from some third-country stakeholders, for the need to address foreign subsidies. However, we should not forget that many voices warned against the chilling effect on direct investment as Europe is still very much in need of capital and foreign direct investment. The instrument would not help if it stifled investment and innovation in the market.

The instrument also had to be done in such a way that it is compatible with the international rules, with the World Trade Organization rules. Another major concern is also that it could create a big administrative burden on companies and authorities, with adverse consequences on investments. To strike a balance, the White Paper proposed a hopefully light regulatory approach by requiring notifications of foreign subsidies only in very specific cases. The *Alstom/Siemens* controversy has given corn to grind to those who argue that European companies are treated more harshly than potentially non-European companies. The important element, however, is that there is not yet any control on how these companies are subsidised (to the extent that they are non-European). To conclude, the idea of controlling foreign subsidies is meant to preserve a level playing field, meant to preserve functioning competition and trade instruments. It should not be seen as an attempt to close off the European market. ■