

Europe

“Power, not Price”: On the Antitrust Agenda for the “Next World Order”

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The recent conference “*Antitrust, Regulation and the Next World Order*” (Homepage - Antitrust, Regulation and the Next World Order (bruxconference2024.com)) showed that while there is still a sizeable constituency in the antitrust world that is clinging to a narrow, technocratic, pro-corporate (and lucrative) recent past, there is also an expanding tribe embracing a very different vision of the present and future – one where language is evolving away from “efficiency” and towards bold terms like citizenship, justice, liberties, and democracy. The pendulum has swung as the neoliberal paradigm of “trickle-down economics” has come crashing down under the weight of multiple crises and a pile of resounding policy failures. Things have fundamentally shifted in the political economy, and recognizing the implications is proving hard for dwellers of the antitrust island.

For those who claim “we have *always* done things this way,” the reality is that European antitrust was essentially a collection of form-based legal rules with no economic underpinning until as recently as 2000, when we imported from the U.S. something we ended up calling “the more economic approach.” What we did back then (just over 20 years ago) was to align with a set of *political values* arising out of a deliberately *laissez faire*, pro-markets and pro-Wall Street redirection from the Reagan/Bush era. We adopted this view in the idealized belief that it was going to “purify” antitrust from “public interest” extraneous considerations, eliminating political interference in decision making and putting it in the hands of an unelected bureaucratic elite which would ensure “scientific” outcomes based on the pursuit of “efficiency” – all rendered eminently saleable by a marketing slogan like “consumer welfare.” While of course “more economic analysis” was useful (I certainly don’t want to “expel economics” from anywhere, contrary to silly claims), we have since lived through the

standardization of antitrust assessments around a handful of codified narrow “theories of harm,” with an expanding (lucrative) role for economists lending their “science” as advocacy to support claims that almost everything is “procompetitive” and “efficient”. But even from a principled perspective, what we have been doing for the past 20 years is not neutral – it embodies a *political* view of antitrust. Only current practitioners do not want to see it – it is more convenient to say that we follow the orthodoxy, an immanent truth imparted on us like Moses’ Tablets, and recent developments a temporary aberration.

Overlapping world crises have precipitated a questioning of the scope, breadth, and also the language of enforcement. We can no longer adopt the same benchmarks against incontrovertible evidence that antitrust “remedies” have not worked, that merger policy based on formulaic narrow market diagnoses has been too lax, that conduct has been allowed to fester and go uncensored for decades. But much more than this. It is clear that we need to broaden out: trade rules shape markets in other jurisdictions as much as competition rules do at home. They cannot be decoupled. We need strategic investments to lift ourselves up and how we assess their competitive effects will also shape markets. Understanding how these things intersect and connect requires intellectual curiosity, honesty, and openness.

The conference was intended to provide a platform for this broader vision. To showcase the way in which there is important economic thinking (not alas in the narrow field of IO) and in other disciplines about economic policy tools, their common roots, and their interplay. We are in election years for a large part of the globe. What is the vision citizens are going to be asked to vote on? We questioned the “need to do more, and different” in Europe in the opening conversation with Olivier Guersent and Andreas Schwab – much in common, but also different

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reflections on what competition policy can hope to achieve. The conference had a deliberate narrative arc starting from the first panel (*“Power, not Price? Reorienting Antitrust for the New Political Economy”*) with Luigi Zingales exposing in 4 minutes flat why the oft-repeated pushback (“what we are doing in antitrust is neutral and technical”) is just untrue, its the product of political choices made 40 years ago that were deliberately pro-corporate and pro-capital, scaffolded by complicit economics from the Chicago School, launching “consumer welfare” as the marketing slogan of the era. We are now seeing a problem with *power per se*, after 40 years which have been deliberately diverting attention from power accumulation and pursued the fiction that what matters is ultimately lowering prices and increasing output. The focus on the efficiency lodestar and lowering prices for consumers blinded everyone to the reality that as corporate concentration expanded, the power of workers, farmers, citizens, and the planet evaporated. The current challenge (as discussed by Andreas Mundt, Rebecca Slaughter, Tommaso Valletti and Doha Mekki) is how to reorient antitrust to deal with that power, not just price.

We segued from this into a discussion of *“Market Power Disfunctions”*: the multiple ways in which market power manifests itself in harmful ways – not just through traditional antitrust “abuses” but in multiple different guises: by enabling profit taking in periods of inflation (Isabella Weber), evading tax on a massive scale (Gabriel Zucman), flexing that power to appropriate rents and increase inequality (Jan Eeckhout).

We then really started to broaden to the “how.” What recent history has shown is that pursuing lower costs, prices, and efficiency has exposed us to massive risks of supply chain failures and left many impoverished and disenfranchised, with deindustrialization taking a huge toll in many parts of the world. How do we establish resilience, shore up national security, improve competitiveness? Public intervention is clearly needed as markets will not deliver alone, how do we get it right? And where is competition policy in all of this? Surely this is not just *someone else’s job*. Because resilience is closely linked to concentration in supply chains.

The panel *“Industrial Policy Revisited: Sovereignty, Resilience, Competitiveness and Innovation”* discussed empirical data for what works and doesn’t (Nathan Lane), the performance of innovation and growth (Ufuk Akcigit), the Biden administration’s thinking on industrial strategy (Heather Boushey) and a sobering view that the traditional European State Aid approach has just been *“opening the money bag this way or that way”* and now requires a complete progressive rethink – away again from the obsession with the “efficiency paradigm,” proactively supporting startups and directing public funds to European research (Rene’ Repasi).

Trade Ambassador Katherine Tai debated the nexus between trade and competition with James Hodge and Franziska Brantner – the U.S., the Global South and Europe together. To the question “why was a trade official at an antitrust conference?”: should we just talk among ourselves about market definition? There’s a huge common thread.

“A lot of the change vectors we are grappling with in trade are also things you are grappling with in antitrust... one is the fact that the globalization/free trade paradigm of the last few decades was built on a fixation on maximizing efficiency. Liberalization of trade became an end in itself (...). That meant that in justifying the policies we were pursuing, we hung our hat on the benefit of efficiency and lower prices. We have had a version of globalization that perpetuated a race to the bottom. The cutting of costs, the exploiting of people and planet. In the same way as antitrust has been detaching from the consumer welfare standard, we are thinking in trade about citizens and workers, not just consumers. (...) The injection of public interest is also a big theme in trade – we are breaking out of the proxy that what is good for the biggest corporate stakeholders equals what is good for Americans, benefits will trickle down to the company’s workers – but we’ve seen over time that just isn’t happening. So we are connected to our antitrust cousins and trying to accomplish the same goals, democratizing economic

opportunities.... And in this we are aligned with the Global South, away from a post-colonial view, and Europe too – because dealing with widening inequality is a problem around the world” (Katherine Tai).

The rethink of trade rules around digital flows, with the U.S. pausing its prior support to better align with antimonopoly efforts at home, is a great example of how rules initially conceived to favor large digital companies are coming into question in the Global North in manner that aligns with the Global South.

We then discussed the need for marketcraft and statecraft to fashion growth that is inclusive and sustainable, given the harsh and painful reality that many institutions have failed us comprehensively in the recent past and we now have the “*task of stitching together policymaking that rejects an incumbent-focused approach*” (Rohit Chopra). Because “*the world is on fire: the monopoly platforms are choking human autonomy today, they are crushing the free press today, amplifying the disinformation that is subverting our economy today, the concentration of capacity that we see in places like China and Taiwan threatens catastrophic breakdowns but also conflict and war. (...) Where is Europe in all this? Where is your answer? Where is your conversation to develop an answer?*” (Barry Lynn). We discussed “*Antitrust as Agent for Change*” on deploying antitrust as a complementary economic policy tool to support broader goals (Sarah Cardell, Benoit Coeure, Nuno Rodriguez, John Newman), a Fireside on the need to make AI “pro-human” with economist superstars Daron Acemoglu and Erik Brynjolfsson, and a lively and earnest final panel on “*The Great Digital Regulation Experiment*.”

The conference was groundbreaking, and the moniker “Woodstock of Antitrust” (in Politico) was appropriate not just because of the sheer size of the audience, but because the content was so rich and different. Of course, it was disconcerting and disturbing to the “*status quo*” brigade. As in all epochal shifts, the group that is very comfortable with the *status quo* would like nothing better than to continue with the same playbook: deals, retentions, instructions, billable hours, submissions, some pulped

version of economic analysis, rinse and repeat. Even without suggesting pure self-interest, there is intellectual resistance and clinging to the notion that “what we have been always doing is applying *the law* and that is pure.” The classic reaction of this group is misdirection:

- “You want antitrust to *become political!*”
- “We cannot do industrial policy through competition law!”
- “But trade has nothing to do with competition!”
- “We have scientific approaches which deliver for consumers!”

Except no, wrong. This is just failing to see reality – either deliberately, in the hope of rolling back times, or just because looking above the parapet is scary (“*you step back and clutch at your processes like a dowager clutching at her pearls*” – Barry Lynn).

But alongside this pushback and resistance and muttering in corners, there was also a large group (many young lawyers, students, corporates who know change cannot be rolled back) who said they were left with heads buzzing with ideas and inspiration. Because there is aspiration for change and for better outcomes, as citizens. This I hope will be a lasting legacy of the event.

What of the post-conference controversy around “Europe v. U.S.” (*viz.* Rana Foroohar’s opinion piece in the Financial Times [The great US-Europe antitrust divide \(ft.com\)](https://www.ft.com/content/2019-03-14))? Two dimensions need to be factored in: one is *time*, the other is the notion of *effort v. outcomes*. On time, of course it matters also how we got here. While it is apparent that enforcers in the U.S. are articulate, affirmative, assertive, coherent, and joined up *today*, this cannot detract from the fact that Europe has been a pioneer of antitrust enforcement over the last 20 years – e.g. against digital giants – while the U.S. was asleep under a permafrost for nearly two decades after the 2001 *Microsoft* case. This cannot be taken away from Europe: enforcement here started early, and this is to our credit (indeed as far back as March 2019, I irritated the then-ABA leadership in DC by running a “fringe event” on the sidelines of the

Spring Meetings on “*Why are the Europeans so Far Ahead in Digital Enforcement?*”). We have also demonstrated our democratic ability to pass laws (DMA, DSA, Data Act, AI Act), that evidently just cannot be passed in the U.S. The U.S. only started turning the wagons around in 2019, most conspicuously with the Attorneys General gathering on the steps of the Supreme Court on 9 September 2019 to announce they were on the move. And it is also true that Europe was never explicitly wedded to a narrow notion of “consumer welfare” – there are reams written on this.

But at the same time, the European early effort on digital platforms is yet to deliver anything on the ground. Case after case has failed to produce changes in market structures. Ask the small digital SMEs of Europe. So the mountain birthed a mouse. Of course, this is for all sorts of reasons including the grotesque exploitation of procedural rules by incumbents, and the weak bite on remedies. True. But it is also a fact that we don’t have much to show.

With all this, the final major difference that the conference exposed to me is the growing *language gap* we seem to have developed in Europe at this point. Our antitrust timeline is still quite conventional. Our competition conversations are bland and all about “incremental change.” The advisory industry is convening the same stale pay-to-speak conferences with practitioners supporting client’s views, using regulators as bait to persist with a reassuring message that change is only incremental, either “we have always done this, depends on the case” or “we are doing this now, but it’s not a real major departure.” Regulators should consider carefully the message they are sending. Why this incrementality? What signal is this sending, at a time of urgency?

We haven’t pivoted in Europe to wonderfully evocative language like opportunities, democracy, liberties. Or I should perhaps say “pivoted back” – the current approach is not only quite recent (tracing to 2000 or so), but the reality is that Europe’s post-War posture was explicitly focused on protecting democracy, liberty, and security. We do not talk about “antimonopoly” today in Europe. We do not elevate antimonopoly as a pervasive thread.

This is a shift that has happened in the U.S. over the last 5 years, under pressure from the Brandeisian revolution, and the people who have made this language their own are now in office. AAG Kanter talked in his fireside chat about

“demystifying the language of antitrust away from the insular few, returning that language to the people (...). The antitrust laws were passed to protect people, farmers, small business owners, because protecting a competitive economy mattered to their liberties. People understand what is going on, they use words like power and democracy. They understand excessive concentration of power is a threat – they understand it’s not just about prices or output but it’s about freedom and liberty and opportunity. (...) they see the connection between antitrust enforcement and their future wellbeing, and they equate opportunity and freedom. That’s the American dream.”

Chair Khan talked about

“(t)he set of pathologies in antitrust enforcement over the last few decades, (stemming) from several blind spots. There was a gap between how antitrust conceived of markets and market power, and how those markets were actually functioning in the real world. This gap between theory, models, and reality motivated our effort to revisit the questionable assumptions that had underpinned our policy choices. (...) We are making sure we are hearing from people about the biggest pain points they are experiencing. People are connecting the dots between what happens in their daily life, and policy decisions which are made in DC. (...) Antitrust can determine in a very fundamental way whether people are experiencing in their daily lives real opportunities, real possibilities, and real freedom, or they are subject to unaccountable forces and the whim of these giants in ways that produces a feeling of coercion rather than of freedom and liberty.”

It is inevitable that when language is this affirmative, assertive, embracing, inclusive, democratic, even poetic and moving, it does come across as much more effective than technocratic bureaucratic speak about efficiency and the competitive process.

But this also brings up the question of language as a signifier of meaning. It cannot be surprising that the language gap comes across as a gap in posture and a gap in ideas.

There is of course no fundamental divergence between Europe and the U.S. on the really basic notion that competitive markets are to be pursued. But this is not really the question

today. What matters a lot more is the intellectual honesty to recognize that we have been pursuing siloed paths, we are past multiple inflection points, and there are major cross-sectional challenges which require things to be rethought; that “what we have always done” really in fact only dates back to 20 years ago, that it has not been an age of innocence; and that while the journey has been rewarding to some, it has not been unequivocally for the good of society and the world. The massive changes we are exposed to have created both a clear global demand, and a real opportunity, for connecting the dots and doing better.