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Competition law: New Challenges, New Contexts, Old Practices?

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Editorial

Competition often reflects two very different worlds for business leaders: one of emulation competition and innovation, which they find stimulating; and the other of competition law, where the authorities in charge are perceived by them primarily as a constraint on the implementation of their business strategies.

Yet, it is a challenge to be liberal without subscribing to the idea that preserving competition is essential to the strength of our economies. Furthermore, how can you be committed to entrepreneurship without recognising that the authorities in question play a key role in the creation of value?

However, efficiency in a given market requires all stakeholders to take their part, including competition authorities.

> “ It is essential for the authorities to have a dynamic vision of how markets operate, going beyond an analysis of their state at a given point in time. ”

It is therefore their responsibility to be aligned with the economic realities of the markets and therefore also with the way companies operate. It is also critical that the authorities take into account the consequences of their decisions, by having a more dynamic outlook on the competitive functioning of markets which goes far beyond an analysis of their situation at a particular moment in time.

What is at stake is neither more nor less than the existence within the company of genuine consideration for competition law and the willingness to abide by its rules. Although many companies have this commitment, they are still often misunderstood or hindered.

For example, addressing the challenges of the energy transition process requires extensive cooperation between companies, without which neither the major investments required nor the most radical innovations will be possible. In some cases, this would require companies to enter into agreements with one another, which may be anti-competitive, but which would also be virtuous in terms of sustainability objectives. However, competition authorities would have to be willing to consider this idea and change their analysis criteria in order to authorize such agreements in certain cases.

Another illustration: making competition law understood and therefore respected by operational and management staff requires that communication within the company be flowing and

straightforward when it comes to these subjects and practices. But how can this be achieved when suspicion prevails when dealing with the authorities? Moreover, what methods can be implemented without legal privilege for legal directors, or protection for information reported by internal audits, even though these are invaluable tools for identifying and addressing concerns?

We are delighted to have brought together to discuss these issues outstanding external experts as well as two top-level representatives of the business world, confronted on a daily basis with these topics in their decision-making. We hope you enjoy reading their thoughts.

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Virtuous Anti-Competitive Agreements: Competition Authorities and the Challenges of Radical Innovation and Sustainability.

In terms of sustainability issues and radical innovation key to the future of the European Union, it is difficult to achieve major breakthroughs without them having repercussions on prices or, on occasion, without permitting certain cooperation between competitors. To date, competition authorities have been inflexible. They protect today's consumer from such effects and practices. However, they sometimes de facto deprive citizens of tomorrow of a healthier environment and a more value-creating economy. So how can we encourage the EU to move forward? And how can companies be drived towards the coordination of their actions if the risks are too high?

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Emmanuel Combe, economist, Professor at Paris 1 Panthéon-Sorbonne University, associate professor at Skema Business School, former Vice-President of the French Competition Commission (2012-2022), Aurélien Hamelle, Managing Director - Strategy and Sustainability at Total Énergies, and Faustine Viala, partner at Willkie Farr & Gallagher and head of the Competition & Antitrust department in Paris, took part in a discussion which revealed some critical developments. What are the likely tipping points?

The challenges generated by the energy transition process call for increased cooperation between companies, including competitors, which competition law may not allow. How should we deal with these developments?

Aurélien Hamelle : We operate in an industry that has a long tradition of partnership. Historically, we support very substantial and risky investments, both from an industrial and a geopolitical point of view, and we are never alone when developing a project. We are therefore always in a joint venture, with three or four partners in a given field, and our participation is a minority one. The same applies to very large renewable projects, mainly offshore wind, very capex intensive and with significant development risks.

This partnership culture is very strong and we are therefore well organised to manage such risks. In terms of competition rules, this consists of multiple lists of "do's and don'ts", very useful for non-lawyers when it comes to knowing what can be done, what can be said, what information can be shared during a meeting or at a conference. We use confidentiality agreements and "clean teams" in our companies' development projects.

When sustainability issues emerged, they were integrated into this body of rules and practices. Nevertheless, these must be handled differently, as they require much more industrial cooperation and economic development.

Whether it is CO2 capture, green hydrogen or low-carbon electricity, there is no business model, or this model is in the process of emerging. Cooperation will make it possible to lower purchasing prices, to reach an agreement on an economically realistic selling price. Cooperation allows the model to exist. And that is why, in my opinion, sustainability issues raise new questions. Agreement is not the most neutral word in competition law and so we must act with great rigour to move forward in compliance with the existing rules.

> "Sustainability issues must be handled differently, as they require much more industrial cooperation and economic development."

Aurélien Hamelle
MANAGING DIRECTOR - STRATEGY AND SUSTAINABILITY, TOTAL ÉNERGIES,

As a lawyer, how do you approach the implementation of these partnerships with your clients?

Faustine Viala : What Aurélien says, I notice in many companies, even though they are very mature, but sincerely worried when it comes to defining how far they can go in this type of cooperation.

> “It is not clear today whether we can restrict competition on the grounds that this is supposedly virtuous from a sustainability standpoint.”

Faustine Viala
PARTNER,
WILLKIE FARR & GALLAGHER

The tendency in companies is to consider that since progress in sustainability is virtuous, there is a need to go as far as possible. And there is the idea that the legal framework must allow this. However, the rules of competition law must apply and must not, on the face of things, be limited by the objective of sustainability.

For the past two years, we have had more targeted texts, particularly from the European Commission, with horizontal guidelines on sustainability agreements. Nevertheless it is not clear today whether we can restrict competition on the grounds that this is supposedly virtuous from a sustainability standpoint.

The authorities, in particular the French Competition Authority, are inviting companies to come and see them to work together on their projects. Companies are still very reluctant because they feel that the limits have not been pushing far enough and that these sustainability goals, or even innovation in sustainability or efficiency gains in sustainability, are not an excuse to go a little further in cooperation between competitors.

How can we assess the limit between a partnership that is virtuous and good for competitiveness and innovation, and an agreement which restricts competition?

Emmanuel Combe : The situation is quite new. Firstly, because sustainable development requires companies to comply with new legal obligations (for example in terms of emissions). Companies are also facing the challenge of radical innovation. This situation is therefore raising specific questions, especially in terms of risk taking, the famous “first mover disadvantage” – I will come back to this. Finally, we must take into account the rather contradictory behaviour of consumers who say they want green without always being willing to pay the price.

We are therefore in a very new legal and economic context when it comes to these subjects. However, as you know when assessing in law the degree of seriousness of an allegedly anti-competitive agreement, the economic and legal context must be taken into account. This does not mean that the context justifies all behaviours. But it does make it possible to qualify the anti-competitive agreement as a restriction by object or by effect, which is not the same thing.

For me, the line is quite clear: we must always look at what the objective is, the intention behind the agreement. Two polar cases are possible. The first is an agreement that aims to do less than the companies would have done had they been in competition. The agreement is therefore not virtuous. This in fact involves condemning agreements designed to hinder the environmental transition process. Many examples exist, such as the AdBlue case, the floor coverings affair or the trucks cartel case related to Euro6 standard. The anti-competitive agreement consisted of not communicating on environmental variables or not anticipating the standard and turning this into a competitive advantage.

The competition authorities need to go beyond this one single approach. It is indeed based on the assumption that the consumer wants sustainability. That is to say, that actors in this market supposedly make a spontaneous offer of sustainability, as this is a competitive argument. This is however not always the case: the consumer is not necessarily asking for 'green' or is not willing to pay the price. An agreement can therefore be beneficial if it makes it possible to meet consumer expectations in terms of sustainable development. Therefore, this leads to the second polar case of an agreement, which is somewhat virtuous: it will allow real progress to exist on an environmental level, despite the passivity of the consumer.

This is the example of the decision of the Dutch competition authority, known as Chicken of tomorrow, named after a set of standards on animal welfare. This was an agreement reached between all chicken distributors and producers to improve animal welfare. The authority did not conclude that the conditions were met to grant an exemption for this anti-competitive but animal welfare-friendly agreement. Nevertheless, this decision is very interesting because it has provided useful guidance for the future evaluation of sustainability initiatives involving cooperation between competitors.

The agreement nevertheless represents a considerable risk. On these subjects, the goal is to achieve sustainability. But the economic models do not exist or are embryonic. And the authorities are very conservative at the moment. It is therefore unlikely that the first to launch will be rewarded.

E. C. : This indeed brings the company up against the famous "first mover disadvantage": why launch something only to bear all of the risk in the event of failure? An agreement to set a price on market launch, when there are high fixed costs, can then be an effective (albeit inherently anti-competitive) way to make progress on sustainability. This is the meaning of the Shell/Total Energies decision in Netherlands.

> "Competition authorities are developing on sustainability and innovation. The only question is determining which cases will lead to such developments and what the scale of such developments will be."

Emmanuel Combe

ECONOMIST, PROFESSOR,
PARIS 1 PANTHÉON-SORBONNE
UNIVERSITY, ASSOCIATE PROFESSOR,
SKEMA BUSINESS SCHOOL

Following on from the Aramis project, Northern Lights is the first major industrial carbon capture and storage project to be commissioned in 2024 in Norway, by Total Energies and its partners Equinor and Shell.

A. H. : The context for having sustainability considerations taken into account by competition law and policy is, I think, clearer today than five or ten years ago, with the guidelines of the European Commission. The application nevertheless remains full of uncertainty.

One good counter-example is that of the ACM, the Dutch competition authority, mentioned by Emmanuel, relating to the Aramis project. This involves the joint development by Total Energies and Shell of new CO2 capture and transport infrastructure for its offshore storage. In this case, public policy and the agreement are linked.

A European framework exists to reduce CO2 emissions. For this to work, you have to put a price on the ton of CO2, an externality that, until now, was free. And it is necessary for this price to be high enough for CO2 capture and storage projects to be viable. However, until now, even when this price peaked in Europe, at 100 euros, it was not enough, the target value being between 150 and 200 euros.

The ACM, in authorising the agreement between our two companies to set a sale price for one part of the capacity, made the Aramis project possible. Without this decision, the project would not have been possible.

Is it a competitiveness issue for the European Union nevertheless?

A. H. : For the European Union, this is a competitiveness issue because this type of project is much less expensive to carry out in the United States than in Europe. For 50 years, CO2 has been used there to boost oil production and they are lucky enough to have natural CO2 reservoirs on land or in shallow waters. Investments in certain types of infrastructure have therefore already been made and those to be carried out are on a lower level.
Reducing CO2 emissions is a global challenge. Regardless of where the reduction takes place, it therefore benefits all of humanity. Economically, it is therefore rational to go where it is cheaper to achieve. Without a clear framework, without ge-

nuine implementation in Europe, the counterfactual is that these projects are likely to be carried out elsewhere than in Europe.

Are the current criteria for analysing agreements adapted to these issues?

F. V. : This is without doubt the fundamental point. One of the four criteria assessed by the European Commission in its analysis of sustainability agreements between competitors consists of looking at the impact of the agreement on the relevant market. However, for the type of agreement mentioned by Aurélien, which engages European competitiveness and sustainability, it is the impact on the global market that should be measured. An approach focused solely on the European product market or the national market does not work. Behind this, it is in fact a matter of industrial policy, an impulse to go beyond what can be addressed as things currently stand by this system of criteria for analysing an agreement between competitors. Our clients do not understand that there has been no progress on this point, precisely when it comes to sustainability.

E. C. : Adding instruments to address sustainability agreements is not useful. Rather, the question is whether the authorities are prepared to change their application in the light of current challenges. On the first criterion for the exemption of an anti-competitive agreement, namely "contribution to technical and/or economic progress", companies may have genuine arguments to make. On the criterion of necessity, this is also the case: without agreement, the project would not be carried out and the agreement is therefore necessary in order to achieve the objective of sustainability.
I have more doubts about the other two criteria. Regarding the requirement to pass-on to consumers the benefits resulting from the agreement: which consumer are we talking about? When we talk about CO2 emissions, the benefit is indeed universal. It is therefore necessary to evolve and to make a broader assessment of this point. We can act in this manner geographically, and we can also do it by taking into account future generations. Finally, the last criterion is the most problematic for me. It requires that competition not be eliminated in a substantial part of the market. However, if the objective is to force the consumer to change, everyone must at a given moment be in agreement in order for a radically new market to emerge.

There are multiple economic arguments showing that, in the absence of a regulatory or legislative initiative or an agreement, the consumer will be passive and therefore nothing will change. This does not yet seem to have been integrated into the approach adopted by the authorities.

So, then, what advice do you give to companies?

F. V. : When working on this type of agreement, the advice we give is to document as conscientiously as possible the objective of the agreement as and when meetings are held, the reasoning, the process, to justify entering into something virtuous, which defends sustainability, which is pro-competitive. It must be possible for all this to be used before an authority.

E. C. : Basically, what we must be seeking to demonstrate here is an efficiency gain. However, companies are not used to doing this, because authorities have always rejected this type of approach in other areas such as mergers. But in the long term, I think that the authorities will go and look at companies' internal documents, in particular the business plans…

A. H. : For this, it is essential that those first concerned, the companies, have a vision of the evolution of their market. Without a vision, it is impossible to make a transition possible.

Take maritime transport. Until recently, the world's largest shipowners did not have a common vision on the right energy vector to choose for decarbonisation. We were therefore unable to invest, because we were not capable of making fuel chains profitable without logistical uniformity in production, transport and bunkering. Alignment is

essential because there are no global regulations in this area.

Recently, their choice converged towards liquefied natural gas: the market is visible. This convergence is essential, this is the fourth criterion that Emmanuel and Faustine mentioned. And I would come back to the counterfactual as, without this, we do not know how to create new markets.

Is it not the question of the articulation between competition policy and industrial policy that arises?

E. C. : Within the current legal framework, what will really make it possible to make progress in terms of sustainability, with regard to agreements, is to make changes to criteria 3 and 4 of which we have just spoken. Nevertheless, it must be borne in mind that it will not be possible to include certain criteria in the method used to analyse agreements, I am thinking of resilience, sovereignty... I do not think that it would be appropriate to introduce into the law objectives that do not related to efficiency gains and which are, moreover, not measurable.

If a competition authority starts to have to pursue multiple objectives, I think this will change its mission and have a negative impact on its effectiveness. So what should be done? The French system seems to me to be the right one in some ways. If I take the example of merger control, this allows France's Minister of the Economy to override a decision of the French Competition Authority and to authorise or prohibit a merger for reasons other than competition, including sovereignty, industrial competitiveness, etc.

The Draghi report highlights the vital challenges for the EU, in particular, innovation and competitiveness, and proposes ways to promote them. Are competition law and policy drivers to be activated?

A. H. : It's not all about competition law. But there is already an important factor in European regulation which is that it is not very technologically neutral. Innovation presupposes that regulation is neutral from a technological point of view.

On competition law itself, this refers to the debate we have just had and, more specifically, to the third criterion which is that of the benefit to the consumer. In fact, an innovation policy is not necessarily favourable to the consumer, that is, it is not necessarily favourable to the price to the consumer because innovation can be - and it is, when it comes to the energy transition - more expensive.

In other words, innovation refers not to the interest of the consumer, in the short term at least, but to the interest of the citizen because the citizen actually wants us to live in a world that is cleaner and more respectful of our ecosystems. But innovation also resonates with the interest of workers, because the existence of good, skilled and well-paid jobs presupposes being able to produce things that we sell more expensively.

Sovereignty, sustainability, military self-defence capability are themselves major issues that cannot be ignored when they come up against competition law or policy. Politics must be bring back into these types of decisions, even if this is not the traditional role of the competition authorities.

E. C. : The barriers to innovation are not primarily found in the competition rules. And it is a great overstatement to claim that our technology gap can be explained by the fact that we prevented 55 mergers within the European Union over the last 20 years, such as that of Alstom and Siemens. The real subject, documented a thousand times, is that of the absence of a capital market and the difficulty of financing radical innovation with venture capital. Because Europe's disengagement is not primarily about incremental innovation but about disruptive, radical innovation.

Competition policy plays a minor role in this disengagement but it can help to bridge it through two very important levers. The first lever, which already exists and should be further developed, consists in avoiding overly stringent rules on state aid for

SANTIAGO URQUIJO

Mario Draghi's report, officially entitled "EU Competitiveness: Prospects for the Future", was published on September 9, 2024 by the European Commission.

everything to do with upstream research and development funding. This is what the European Commission has been doing since 2018 with IPEC, Important Projects of Common European Interest. To achieve radical innovations, there is a need to bring together a large number of companies, competitors and others, so that they can work together on very large cross-sector projects, while benefiting from public funds.

The second driver, not considered at all until now, would be for the competition authorities to recognise that a merger does not only have the effect of raising prices, but that it also makes it possible to achieve static or dynamic efficiency gains, that is to say in terms of innovation.

A company could quite well want to carry out a merger in order to obtain this type of benefit, in order to invest this in the development of its research. For now, this argument is not considered to by the authorities, either in France or within the European Union. Yet no clear relationship has been established, in either direction, between concentration and innovation. So we need to be empirical. Everything depends on the market configuration.

F. V. : Being more flexible in terms of State aid at the European level is essential because our competitors, China and the United States, are clearly taking this approach. This cumbersomeness is found even when the European Union implements the Foreign Subsidy Regulation, which is supposed to protect the European market from foreign State aid. This system, which was supposed to trigger just a few notifications only, has already generated more than 100 in less than one year, including notifications made by French companies buying European companies. While the Commission has set up teams dedicated to the FSR process, some adjustments and flexibility in the implementation of the instrument could certainly avoid a certain administrative burden for European companies.

Moreover, regarding the use of political decision-making as a last resort, for agreements, this would be a good system. But, for merger controls,

where it already exists, it has only been used once. So I wonder if there is work to be done to make this less exceptional even before expanding it. And I share your two opinions on the point that this should not be the responsibility of the competition authorities.

Finally, the tools at our disposal can make it possible to move into the field of gains in efficiency. One recent example shows this, albeit outside of the European Union: the Vodafone/Three decision, taken by the UK's Competition and Markets Authority (CMA), but with a legal framework very similar to ours. By this decision, the CMA approved the reduction from 4 to 3 telecoms operators in the UK subject to guaranteeing efficiency gains in operations via a substantial commitment by the purchaser to invest in the network. So it is possible.

Several economists defend the concept of dynamic competition. This focuses on the dynamic process of rivalry between companies, rather than on the static state of the market at any given time. This concept is closely linked to innovation as it recognises that competition also includes the creation of new products, services and technologies. This must be used.

As a former member of the authority and a keen observer of the competition authority ecosystem, are you confident about the future?

E. C. : I am confident about the future: I believe that if the authorities do not proceed with this aggiornamento, they will be marginalised in the public debate, at a time of sustainable development, trade war and technological disruption. I think they are aware of this and they are moving forward on both topics, sustainability and innovation. The only question is determining which cases will lead to developments and what the scale of such developments will be.

Conversation

ANASTASIA SUDINKO/GETTY IMAGES

Competition Law and Economic Realities: So Far, So Close

Competition law and policy are supposed to be intrinsically connected to economic reality, thus contributing to the predictability of authorities' decisions and to legal certainty, factors driving growth and economic stability. However, these virtuous relationships are not automatic. Gaps and shortcomings in the legal privilege afforded to the work product of in-house counsel, correspondence between lawyers and clients and sometimes defence rights, can disrupt them, particularly in France.

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Kelig Bloret-Dupuis, Legal Director Competition & Antitrust of the EssilorLuxottica group and lecturer at the University of Rennes, and Faustine Viala, partner at Willkie Farr & Gallagher and head of the Competition & Antitrust department in Paris, provide a practical and constructive perspective on these issues.

In competition law in particular, the question of legal privilege for in-house counsel remains a hot topic, despite the many about-turns in the numerous projects which have sought to introduce this. What are the challenges with regard to your practice?

Kelig Bloret-Dupuis : I see three main challenges today. First, psychological barriers still need to fall. A number of participants still consider that legal privilege would prevent companies from being prosecuted, or practices from being identified and qualified. The experience in other countries in the English-speaking world for example, shows that this does not interfere with the proper administration of justice or with the interventions of regulatory authorities and judges.

Then there is an issue related to legal practitioners in general. In-house counsel or lawyers in private practice all participate in applying and explaining the rules of law, in finding solutions in accordance with the rules. Therefore, it is difficult to consider that, on the same subject, the protection of an opinion depends solely on the identity of the professional who issues it. This does not make sense.

Finally, the fact of not benefiting from legal privilege still has some negative consequences. In particular, there is some case law in which the work product of in-house counsel has been used against the company. Therefore, in order not to harm the interests of the company, since you cannot protect your work product, you produce fewer written documents. It is therefore more complicated to have issues shared and understood by as many people as possible within the company. This is not beneficial to anyone.

And let is not forget that last year's reform was not supposed to "open the floodgates" on this issue. It was intended solely to grant the possibility of issuing protected consultations to a small number of legal professionals – in fact, mostly chief legal officer – addressing company management.

> "In competition law, not being able to write things down means wasting time, creating tensions, partial understandings, sources of dissatisfaction and the transmission of incomplete or incorrect information."

Kelig Bloret-Dupuis
LEGAL DIRECTOR
COMPETITION & ANTITRUST,
ESSILORLUXOTTICA GROUP

Does this make it more difficult to ensure that the operational staff most concerned by competition law are fully acquainted with its requirements?

K. B.- D. : Competition law is primarily concerned with business and marketing strategies and practice. Our role on a day-to-day basis is in this area. However, projects often evolve quickly and responsiveness is the key to efficiency. Not being able

to write things down and, therefore, provide guidance, not being able to clearly propose options in writing means wasting time, creating tensions, partial understandings, sources of dissatisfaction and the transmission of incomplete or incorrect information.

Faustine Viala : The most important thing is to ensure the best possible cooperation within the company, between legal teams, managers and teams, and also with the company's outside counsel. In recent years, clients have asked us for training on legal privilege and how it is applied in the U.S, the UK and other countries and continents. The aim is to know what a in-house can and cannot put in writing and how to handle this information, depending on the addressee, the countries concerned, etc.
This de facto limits the role of the French in-house counsel instead of creating a virtuous, positive effect for compliance with the law, particularly in terms of competition law, where sharing knowledge to managers and operational staff is key. If application of the law is managed by the in-house counsel, we will have fewer cases arising and fewer violations of competition law. It is difficult to understand this defiance from public authorities, which is more noticeable in France than elsewhere.

OLRAT/GETTY IMAGES

In a ruling handed down on September 26, 2024, the European Court of Justice reaffirmed the importance of protecting exchanges between a client and his lawyer, whereas the French Court of Cassation does not recognize the protection of professional secrecy for lawyers' legal advice activities.

The other dimension of the protection of the company's interests in competition law is its defence rights, in particular in the context of litigation. Should we consider that these rights have been weakened?

K. B.- D. : Whether in France or in Europe, we have an institutional structure, a rule of law, which establishes and protects the rights of litigants before the authorities and the courts of appeal. I also think that, under the impetus of the European Commission, through the instruments it adopts or through its initiatives – at least in competition law - the idea is always to develop these rights and to ensure that in the different Member States these rules exist, are applied and respected. Today, it seems to me that this institutional framework is a major keystone for the European Union and its member-states that must be preserved. Nevertheless, improvements are both possible and desirable, without necessarily however requiring legislative evolution.

For example, the conduct of litigation proceedings would be improved if companies could be heard at different stages of the proceedings. In litigation, there are two successive phases: first the investigation and then the adversarial proceeding. The second begins with the sending of a statement of objections to companies, setting out the charges being made against them and their qualification in law. The defence process consists of responding to these objections. However, this response is part of a highly formal exercise in which companies must react according to the analysis grid established by case law to contest the facts and the qualification of a practice. This is not an explanation but a defence. The exercise of the rights of the defence should however take place before we

reach this stage, that is to say during the investigation phase.

Indeed, the company is often not heard during the investigation phase even though competition law is, in essence, an economic right: by definition, the approach of the authorities is based on the identification of a market, requires an understanding of its dynamics, its actors, the products and services that are exchanged there, the type of competition that is exercised there. All these economic realities are prerequisites for achieving legal qualifications of practices. The value of an exchange of views at this stage, i.e. in the early stages of the investigation, seems to me to be important in clarifying the facts. The authorities themselves have nothing to lose. Such hearings did exist in the past. There is no objective reason why they should not be possible again.

In addition, we may be required to assert our defence rights in the context of procedures such as dawn raid. It is difficult to hear the representatives of the authorities complaining about this and indicating that the length of the proceedings, of which we are also critical, can supposedly be explained by the exercise of our defence rights.

F. V. : This question also concerns timing. The speed with which the competition authorities' procedures take place is not the speed with which business is conducted. As soon as the Commission sends requests for information, the companies concerned do not know what is happening. And they can be left without additional information for years, without knowing whether or not they need to change practices, or knowing exactly which ones are involved. This lack of transparency and celerity does not necessarily produce the best effects on the market.

In the context of this defence, in the absence of any legal privilege for in-house counsel, the confidentiality of communications between the company and its outside legal counsel plays a major role. Is this in danger?

F. V. : It is, and this is nothing new. The entire profession is mobilized because the legal privilege of the lawyer in private practice is being undermined. This is in danger, especially in France. This movement is based on the case law of the Criminal Division of France's Court of Cassation which explains to us, consistently and very recently in September 2024, that client-attorney correspondence can be seized as long as it is not covered solely by defence rights. This approach significantly narrows the scope. However, what would be in line with the case law of the Court of Justice and the European Court of Human Rights is for not all attorney-client correspondence to be seized, including any in which the lawyer in private practice is providing advice, and not just that relating to defence rights.

> “Extending legal privilege to in-house counsel would ensure smoother and more effective communication within companies to prevent anti-competitive practices.”

Faustine Viala
PARTNER,
WILLKIE FARR & GALLAGHER

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> “With internal audits and investigations, the main challenges are complying with all the existing legal frameworks, as well as safeguarding the reported information and addressing potential conflicts between the company’s interests and those of the employees concerned.”

Faustine Viala
PARTNER,
WILLKIE FARR & GALLAGHER

France is not in line with what we see in Europe, including at the European Commission. Dialogue with companies, starting from the investigation phases, would allow the authorities to have better information. Extending legal privilege to in-house counsel would ensure smoother and more effective communication within companies to prevent anti-competitive practices. The absolute confidentiality of correspondence between lawyers in private practice and their clients is also a factor of compliance with the law.

When it comes to competition law, companies sometimes conduct internal investigations and audits, often in collaboration with external experts, including lawyers. Here again, there is the question of the processing and protection of the reporting information. Where are you involved?

F. V. : When it comes to audits related to competition law, we are involved under several circumstances. Clients may conduct general, financial and legal audits, including compliance with competition law. This is the case in particular when a group has recently acquired a new company. But the practice also exists, over time, within some subsidiaries, more sensitive than others. Further audits are triggered as a result of a suspicion and these must be completed in a more urgent manner. Finally, there are the actions taken by the company, within the framework of investigations by the European Commission, in order to identify elements making it possible to respond to the requests for information issued by the legal services. It is then necessary to be quite exhaustive and this involves an investigation covering email, cloud storage and WhatsApp messaging in particular. Cooperation by all employees is not necessarily guaranteed which makes it essential to fully and thoroughly collect all forms of exchanges so as not to miss any element.

What challenges do companies and their legal advisors face?

F. V. : I see these as falling into two categories. The first category covers issues concerning the performance of these operations. This is about respecting all of the frameworks that are imposed on us. In terms of employment law and also concerning data privacy, for personal or sensitive data. The difficulty arises from the diversity of rules in each of the countries concerned and also from the special status of certain countries. For example, if the investigation being carried out leads to sensitive information being sent to the US, this must be referred to France’s Strategic Information and Economic Security Service (SISSE) at the Ministry of Economy. There may also be ethical issues making it necessary to determine, for example, whether

or not it is appropriate to interview individuals in a position of proven weakness or fragility. As a general rule, the largest companies have dedicated departments (data, ethics, etc.) and internal rules that cover these situations. This makes it easier to carry out these operations.

The other category brings together issues relating to the results of this audit, in particular, the use and protection of the information that will have been reported via these internal audits and investigations. This requires a high degree of caution with the audit report that is drafted, including the format used, the framework and how to present it. On the most sensitive topics highlighted therein, strategic decisions are expected. Taken by management, these imply a smooth exchange of information between several players, which is in itself a risk factor. A good competition lawyer must be alert on these subjects. Finally, there is the issue of whether or not the company's interests are aligned with those of the employees concerned. If they are not, it must be explained to the manager, to the head of legal, that a given employee will have to appoint his or her own lawyer. Again, there would be a benefit to ensuring that these exchanges are better covered by attorney-client privilege.

Recent economic and geopolitical changes are leading stakeholders to adapt or change. Should competition law also be adapted so that it remains relevant in the light of these new economic realities?

K. B.- D. : This is an area of law that normally should really be in line with economic reality. And I acknowledge that the role of the authorities is not simple, particularly in terms of merger control, because they must make a prospective analysis of the potential effects of an acquisition or a merger on market dynamics.

This analysis is based on three pillars: market tests, the use of internal company documents and, finally, economic tests. To achieve these, simple indicators are used, such as the margin rate. However, they are not calculated in the same way by companies and by the authorities. They also use much more advanced tests such as UPP (Upward Pricing Pressure) or GUPPI (Gross Upward Pricing Pressure Index). However, these tools are not used by companies to determine the interest of a significant transaction or by law firms to assess the associated antitrust risks. Competition law is therefore based on economic theories on the basis of which analytical tools are forged that do not always reflect the economic reality as experienced by market participants.

It is not a matter of questioning these tests because they are also very useful. But care must be taken not to be overly theoretical. So, if economic tests conclude that there is a risk of a significant impact

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on competition in a market, they should only be considered by a competition authority if the theory is supported by internal company documents, by a strategy plan.

So, to answer your question about economic and geopolitical changes, we must first of all rely on the fundamentals of competition law and find or maintain a balance between market tests, internal documents and economic tests before concluding an analysis.

F. V. : As in litigation, there would need to be a little more transparency and discussion. This would make it possible in particular to explain to the authorities the economic rationality of a transaction at an earlier stage. The authorities regularly publish guidelines that are there to provide companies with better guidance and also consult the market upstream in order to obtain opinions on the wording of these guidelines. These are initiatives that are clearly appreciated by companies and practitioners but which still sometimes have a limited impact. Companies need even greater consistency, predictability and legal certainty in the application of competition law. In addition, in the current context, European industrial policy and the defence of our European champions, in particular, should be taken more into account.

K. B.- D. : As many professionals argue, if competition policy were considered in conjunction with industrial and innovation policies, the effects would generally be positive for markets, and consequently for consumers. It would also serve as a means of promoting Europe.

Should we expect changes in the practices of the US competition authorities?

K. B.- D. : This is a subject that is naturally being looked at with great attention and which requires the utmost caution, even if the US authorities have been very active for many years, including towards foreign companies.

F. V. : Right now, it is hard to know what is going to happen. We must remain pragmatic. The new HSR form (file to be completed in merger control in the US) has been completely revised and it has become very cumbersome in terms of the information and analysis required (more similar to the European CO Form). Trump has not changed this, even though it was a project launched and validated under the Biden administration. Second, the trend under the Biden administration was to go to litigation very frequently over complex merger transactions, with zero predictability for the parties. Will this trend be stopped altogether? It is far too early to say. We remain very cautious about what is going to happen. Finally, for all major transatlantic operations, in addition to merger control, even greater consideration will have to be given to the impact of CFIUS (the inter-agency committee of the US government that reviews foreign investments in American companies for reasons of national security).

Investigations in Competition Law: Origins, Developments and Anticipation

Over the past five years, there have been some notable developments in competition law investigations. They have increased in number, been impacted by technological advances and changes in working methods, and their scope has expanded. These are all parameters that need to be familiarized with, in order to anticipate them more effectively and ensure the most appropriate response when required.

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In European and French practice, we identify at least four types of events that trigger an investigation, two of which are at the initiative of the company.

In the context of a leniency procedure, the company itself discloses the cartel in which it has participated, thereby granting immunity. If it is the first company to report the infringement, leniency implies a total exemption from penalties. For companies that come forward subsequently, immunity is partial and consists of a reduced fine. Leniency programmes are undoubtedly the most effective tool representing a powerful lever for detecting complex and sophisticated cartels[1] and for opening an investigation as a result.

The incentive to "repent" is the cornerstone of this mechanism. It relies both on the attractiveness of the fine exemption and on the vulnerability of these illicit alliances. Indeed, the functioning of the cartel presupposes that none of the member companies ever deviates from the cartel; however, while the maximisation of profits is the "affectio

> **The European Union has introduced new legislative powers for carrying out investigations. This extension raises questions about the extraterritorial application of competition law.**

societatis" valid in the short term, the companies nevertheless retain interests that may diverge in the long term. It should be noted, however, that leniency applications on a European level have declined in recent years. This trend necessarily raises methodological questions in the detection of anti-competitive practices.

Another existing tool at the service of the authorities is the individual denunciation by an employee of a company that is a member of a cartel. In this case, we are talking about "whistle-blowers" - a fairly recent concept in European and French competition law.[2] On a European level, it is interesting to note that whistle-blowing can take place either at the initiative of the employee or at that of the Commission which then contacts an employee to act as the whistle-blower.

This method is particularly useful for the detection of infringements that would otherwise be almost undetectable by an authority itself. Although it seems to be successful[3] , this mechanism raises difficulties in terms of the confidentiality of the information shared by the whistle-blower and his protection with regard to member companies of the cartel (disciplinary retaliation, civil and criminal liability).

The other two "triggering events" involve events external to the company: investigations launched by an authority following a complaint from a third party (competitor or client) or ex-officio investigation. The main concern with these investigations is the difficulty of obtaining conclusive evidence: if the complaint is anonymous or if an authority relies on insufficient evidence, the matter will be easier to dispute in the context of litigation.

Searches Helped by Technological Advances.

We note first of all, since the post-Covid 19 period, that the European Commission, the French Competition Authority and the US' Department of Justice (DOJ) have actively resumed dawn raids across all sectors of the economy, sometimes in a jointly coordinated approach[4], with nevertheless some innovations related to new professional and technological practices.

These include the increased development of dawn-raids of the private homes of managers and employees due to the generalisation of working from home; the use of mobile phones, tablets and other means of communication when these have been used for business purposes (BYOD – "Bring Your Own Device" policy)[5] or the widespread access to data stored in the cloud and on remote servers.[6]

Investigations with New Boundaries

Investigations have evolved by now focusing on new considerations that go beyond strict consumer welfare to include the labour market or sustainable development.

In the environmental sector, in addition to the well-known AdBlue case of 2021, in April 2025, the Commission imposed a total fine of 458 million euros on Volkswagen,

[1] Nearly 92% of the Commission's investigations into cartels between 2010 and 2017 were based on the leniency programme according to a report by the European Court of Auditors in 2020.
[2] The Commission relies on a directive that dates from November 2019 and the Authority has had this tool since 2023.
[3] The Authority indicated that it had conducted a dawn-raid in January 2024 following an alert by a whistle-blower a few months earlier.
[4] See in particular one of the most important dawn raids coordinated globally over the last 5 years: the four largest companies in the fragrance industry (Firmenich, Givaudan, IFF and Symrise) were searched simultaneously by the DOJ, the Commission, the CMA (UK authority) and by the Swiss authority.
[5] These new uses of mobile phones also involve the first decisions in this area: as part of the aforementioned investigation into the fragrance sector, IFF was fined 15.9 million euros on 24 June 2024 for obstructing the Commission's investigation because one senior company executive had deleted several WhatsApp messages exchanged with competitors.
[6] In particular, since 2020, European investigators have been able to access professional data that can be consulted from any targeted location and obtain the keys for its decryption.

Stellantis and other car manufacturers for their participation in a vehicle recycling cartel hindering objectives relating to the circular economy within the European Union.

As regards the labour market, although no sanctions have yet to be identified, the number of investigations has increased across the European Union.[7] In the United States, the DOJ is probably one of the most active authorities in terms of no-poach agreements and wage-fixing agreements but it nevertheless encounters several difficulties in terms of standard of proof, which has led to a number of unsuccessful legal cases.[8]

Extensions of Investigations Specific to the European Union

The European Union has introduced new legislative powers to complete its toolbox for carrying out investigations. The main objective of the Digital Market Act (DMA) is to regulate platforms acting as gatekeepers. The Foreign Subsidies Regulation (FSR) makes it possible to address foreign subsidies which are distorting competition within the internal market.

It is in this context that, in 2024, the Commission simultaneously opened 5 formal non-compliance investigations on the basis of the DMA against Alphabet, Apple and Meta (which led to Apple and Meta being fined 500 million and 200 million euros respectively on April 23, 2025) as well as its first in-depth investigations based on the FSR. One of these led to a dawn raid conducted in the premises of the Chinese company Nuctech in the Netherlands. This extension of the Commission's investigative powers raises questions about the extraterritorial application of competition law.

Legal Privilege: Diverse Regimes, Complex Interactions

The protection of legal privilege is the keystone of dawn raid litigation and still remains extremely relevant today due to the fact that the definition of legal privilege varies from one country to another.


ANTON PETRUS/GETTY IMAGES

Coming into force in March 2024, the Digital Market Act enables investigations to be launched at the very first suspicion of non-competitive behavior, without having to wait for complaints to be filed and years of proceedings.

→ The approach at European Union level seems the most extensive since the recent CJEU[9] judgments allowing the protection of legal privilege for both consulting and litigation matters, above and beyond the just ongoing investigation having triggered the dawn raid.

→ In France, on the other hand, the Court of Cassation takes a restrictive approach in ruling that this protection applies only to correspondence related directly to the exercise of the rights of the defence in the context of the ongoing investigation.[10]

→ In the United States, legal privilege consists of client-attorney privilege, which protects confidential communications when the main purpose of the exchange is to obtain or provide legal advice, and of the

[7] Some authorities have already sent statement of objections to the companies concerned as is the case for the Authority or the Commission.
[8] See in particular United States v DaVita or United States v Jindal dated 2023.
[9] See CJEU, Ordre van Vlaamse Balies dated 8 December 2024 and CJEU, Ordre des avocats du barreau de Luxembourg [Professional Body of Attorneys at the Luxembourg Bar] v Administration des contributions directs [Direct Taxation Authority] dated 26 September 2024.
[10] Court of Cassation, 24 September 2024, no. 23-82.230.

On April 23, 2025, Apple and Meta were the first to be convicted under the European Digital Market Regulation (DMA).

'work product doctrine' which offers protection to documents prepared in anticipation of litigation.

Faced with these discrepancies in approach, many questions arise for large international companies present both in Europe and the United States which could be subject to coordinated dawn raids, requiring them to adapt to the different regime.

> When it comes to personal data, disputes are multiplying.

Issues relating to data privacy

With regard to personal data, the attention paid to their protection is increasing given the increase in remote work and new technologies. Disputes in this regard are multiplying. The whole question in fact lies in achieving a balance between the protection of these data and the effectiveness of the investigation. The now common practice of seizing mobile phones and personal computers, while deemed legitimate by the national courts, is generating growing tensions in terms of fundamental freedoms, including respect for privacy, especially when professional and personal data are mixed.[11]

> Internal audits allow for increased monitoring of individual behaviours that could constitute an infringement.

How should we manage the risk of a competition investigation?

For companies, internal audits are the starting point in order to detect potential anti-competitive practices as far upstream as is possible. The implementation of such procedures, carried out by an independent lawyer specialising in competition law, in addition to compliance programmes, allows for increased monitoring of individual behaviours that could constitute an infringement. In the event of the detection of suspicious elements, the company will have to work with its counsel to complete a thorough analysis and assessment of the competition law risk. The conclusion may determine a shift towards a request for leniency, for example.

Preparation for a possible dawn raid is one other very important point of anticipation for companies. Although lawyers can quickly deploy on the site, it is critical to prepare employees in advance to avoid any disorganization, fear or obstruction on the day investigators arrive at their premises or personal homes. Indeed, cooperation during

[11] See the Vivendi case in which the Commission – acting in the context of an investigation for 'gun-jumping' launched in 2023 – sent an extensive request for information involving in particular employees' personal communications which was contested by the company arguing the risk of interfering in the privacy of its employees.

the investigation is essential for the rest of the procedure and this must be carried out in strict compliance with the procedural rules both on the part of the company and also the investigators. To this end, it is advisable to carry out "mock dawn raids" with the help of the company's lawyers, which will allow each employee to have a clear organisational framework and knowledge of their basic rights to ensure any dawn raid runs smoothly.

Key Takeaways:

- The leniency programme remains the strongest legal instrument in the authorities' toolbox for initiating an investigation insofar as the evidence provided by the company itself will necessarily be more robust in the event of litigation.
- Over the last 5 years, the opening of investigations has increased across all sectors of the economy, also extending to new considerations such as the labour market or the environment. The Commission now has new powers of investigation in relation to DMA and FSR.
- Investigations continue to give rise to litigation concerning the protection of confidentiality of correspondence. There is also a significant increase in litigation concerning the protection of personal data against a background of massive working from home and hybrid use of communication tools (personal/business).
- To prepare for a competition law investigation, a company must first, with the help of a specialist lawyer, put in place internal audit procedures and prepare its employees for a possible dawn raid.

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