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Championing European industry?

Richard Bullard of APCO looks at the relationship between EU industrial policy and competition policy, after a proposed framework comes into force



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CHAMPIONING EUROPEAN INDUSTRY?

Richard Bullard examines the European Commission's proposed framework for a modern industrial policy, along with its impact on the relationship with EU competition policy

The European Commission will put the flesh on “An industrial policy of the globalised era,” one its seven “Europe 2020 Flagship Initiatives,” with a major Communication in the autumn of 2010. Under the auspices of commission vice president Antonio Tajani (Industry and Entrepreneurship), the Communication will define a framework “for a modern industrial policy” for the European Union (EU) to enable it to capitalise on the opportunities of the post-crisis global economy and the shift to a “green” or low-carbon economy.¹ In the spirit of joined-up policy, it will “develop a horizontal approach to industrial policy combining different policy instruments (e.g. “smart regulation,” modernised public procurement, competition rules and standard-setting).”²

What can we expect to see in the commission's proposed framework “for a modern industrial policy” and what will its impact be on the relationship between EU industrial policy and neighbouring competition policy?

The EU framework for industrial policy and competition policy

While competition policy was defined in the Treaty of Rome in 1957, it was not until the 1991 Treaty of Maastricht that industrial policy was enshrined as a formal EU competence. Title XIII, Article 130 (1) stated that: “The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist.”³ It is interesting to note that the then European Commission DG IV (Competition) Services had pressed hard for the inclusion of a Treaty provision explicitly saying that industrial policy measures must not distort competition.⁴

The Industry Article itself remained unchanged in substance through the Amsterdam and Nice revisions, and for the most part in its Treaty of Lisbon incarnation, under Article 173 (now

Title XVII). A perhaps more significant change was in the fundamental objectives of the Union (“Common Provisions”) with the removal of the provision that:

“(g) a system ensuring that competition in the internal market is not distorted;”⁵

While this was partially reinstated in Protocol 27 in the Treaty of Lisbon, several commentators have argued that this could be interpreted as a “downgrading” of the status of competition policy in the EU's overall “hierarchy” of objectives.⁶ Moreover, from an industrial policy perspective, Article 3 of the Treaty on the European Union (TEU) states that “the EU shall ... work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress ...”⁷

There is a view, including in some (but not all!) parts of the commission, that this implies a re-balancing of the relative weight of competition policy and industry policy in the EU's fundamental objectives. Has this had a practical effect since the entry into force of the Treaty of Lisbon? Probably little in practice, but some commentators and lawyers attach importance to the fact the European Courts often use the EU objectives and principles expressed in the preamble of the Treaties as a guide to interpretation of the EU law and policies, especially when faced with a conflict of different European “values” and policies.

Conflict or complementarity?

While largely viewed as mutually reinforcing, some degree of supposed conflict between industrial and competition policies runs through to the present day. In his 2010 Single Market Report, former Internal Market and Competition Commissioner Mario Monti acknowledges but contests this:

“There is in some quarters the concern that industrial policy and competition rules are antagonistic terms. In that logic, an industrial policy could only emerge in Europe through a softer enforcement of competition and a relaxation of state aid rules. A sound competition and state aid policy is not in contrast with a sound industrial policy. The opposite is true: competition is necessary to create the varieties, comparative advantages and productivity gains on which growth and innovation flourish. Europe needs an industrial policy that does not conflict, rather builds on its competition rules Europe needs champions that are able to grow on their own merits and to run with their legs in the global race”.⁸

“European champions” have supplanted the idea of national champions, and flourish at the European and global levels. EU competition rules have not prevented, but rather enabled the development of companies with the scale and ability to compete globally. This is not to skate over the issue of “European champions” competing on a level playing field at the global level. In fact, some argue that a more activist rules-based European industrial policy should do more to both promote wider adherence to European competition norms and rules in the absence of a global competition system, as well as in relation to public procurement and intellectual property rules, etc. I return to this point below.

Monti’s successor in the Competition portfolio, Neelie Kroes, acknowledged that to some extent the apparent conflict between industrial policy and competition policy reflects a deeper and long-standing cleavage between two pre-eminent schools of economic thought:

“Industrial policy and competition policy! For Europeans just putting these two notions in one sentence still tends to conjure up a great ideological divide. A divide between Colbertian “dirigistes” and economic libertarians.... This ideological divide has always been something of a caricature, but it has lasted because there is some truth underlying it. And as a result, to put it bluntly, “industrial policy” has been rather bad-mouthed by the advocates of competition policy.”⁹

Yet for Kroes, even in acknowledging this scope for “conflict” in two contrasting views of the role of the state, came to the conclusion like her predecessor that:

“I think it makes no sense to speak of industrial policy and competition policy as distinct one from the other, let alone as antagonistic policies. I would rather define industrial policy as one which frames the structural conditions necessary to ensure economic success in a globalising economy. And I therefore

have no qualms in saying that competition policy forms – or should form – a central plank in any industrial policy.”¹⁰

Herein surely lies the rub: “modern” European industrial policy as it has been termed by the European Commission since 2005 is about equipping European industry to compete on the global stage. Late 2008 through 2009 saw a return to an outmoded concept of “Colbertian” industrial policy. The impulse for national dirigiste state intervention almost inevitably drowned out calls for European solidarity and a shared policy approach at European level as the scale of the crisis hit and domestic political and electoral imperatives came dramatically to the fore.

Industrial policy: Europe to national and back to Europe again?

The unprecedented global economic crisis of the last two years once again threw the relationship between the two policies into sharp focus. Shrill calls were heard from European politicians at the height of the crisis in late 2008/early 2009

for the relaxation of EU Single Market and competition rules in the name of a more activist European “industrial policy” to compete with similar policies to defend “national industry,” notably as was frequently cited, in the US.

For many prominent European politicians, “European industrial policy” at this time was of course ill-disguised code for the freedom to pursue industrial policy measures

at the national level that ran counter to Single Market rules. The commission stood charged with policy inertia that disadvantaged European industry as activist policy elsewhere created a non-level playing field.

In fact, many commentators warned of the “breaking of the Single Market” itself and an irreversible weakening of the commission’s role as Single Market and competition referee if the core rules were relaxed or suspended. The European Commission held firm and arguably deserves greater credit than it has received to date for steadfastly preserving one of Europe’s greatest achievements. The commission’s success lies in large part in carefully and effectively defining the necessary degree of flexibility within the competition rules without undermining those rules or its role as referee. The state aid rules to the banking sector and the Temporary Framework under the EU State Aid rules for the “real economy” to access finance are the most high-profile examples of this “flexibility within the rules.”

Paradoxically, the “logic” of the Single Market has emerged stronger from the crisis as the degree of economic interdependence between Europe’s economies was laid bare.

A major issue to emerge during the crisis and within the context of industrial policy is the impact of antitrust (Article 101) sanctions

Today, few European leaders would argue anything other than the fundamental importance of strengthening the Single Market and “modern” European industrial policy as critical to a successful exit from the crisis and to Europe’s chances of a “sustainable recovery” rather than a “lost decade” to reprise the categorisation of Europe 2020.¹¹

Towards a “new” European Industrial policy?

A second paradox emerges here. The exit from the crisis and search for sustainable economic growth has revived European industrial policy as a rules-based, market economy principles-driven concept. This is captured most eloquently again by Mario Monti in his May 2010 report:

“The word (sic) [Industrial Policy] is no longer taboo. Europe’s leaders are discussing again the merits, and limits, of an active industrial policy. The return of interest for industrial policy goes in parallel with a renewed attention to the importance of manufacturing for Europe’s economy and a wide concern for the profound transformation of the European industrial base triggered by the crisis.”¹²

Even allowing for the impact of the crisis, European and national industrial policies are being redesigned to support nearly half of the EU’s economic output.¹³ A framework “for a modern industrial policy” and its harmonious alignment with national industrial policies and EU competition policies matter a great deal. What are the challenges ahead for this “new” EU industrial policy in relation to EU competition policy?

State aid

The commission has clearly signposted the end to the flexible arrangements of aid to the banking sector and through the Temporary Framework which expires at the end of 2010. However, the challenge remains of supporting the “vertical” sectors of the European economy hardest hit by the economic crisis. In the words of one Brussels think-tank, the commission must contain (national) support that leads to the “zombification” of sectors of the European economy where businesses are no longer viable in their current form.¹⁴ Yet the commission must define the right support framework for sectors where adjustment is geared towards competing on the global stage.

A further challenge lies in the continuing alignment with state aid policy and meeting the EU’s ambitious climate change targets. The commission’s focus here is on Member State support for “horizontal” rather than sector-specific measures that support research and development and innovation activities, such as the EC-approved German government support of 30 million euros to ArcelorMittal’s “Top Gas Recycling” project.

Mergers

The relatively low level of merger activity – with no prohibitions – during the economic crisis does not preclude mergers with a national or European “industrial logic” re-appearing as merger activity picks up. The recent approval of BA’s merger with Iberia (and their three-way alliance with American Airlines) is the consequence of an industrial “logic” with the consolidation and liberalisation of a sector already advancing, accelerated by the major financial challenges of the economic crisis.¹⁵

A wider issue is access to strategic resources and the related issue of market definition. Arguably, the growing importance of access to strategic resources with increasingly globalised but fragmented supply chains, require market definitions in the context of mergers (and Article 102) that better reflect the market advantage or constraints imposed, notably by the emergence of Asian competitors. This also implies, potentially, widening the definition of geographical markets.

Antitrust

A major issue to emerge during the crisis and within the context of industrial policy is the impact of antitrust (Article 101) sanctions, notably in relation to a firm’s ability to pay fines in times of significantly reduced revenue and access to credit. While the underlying importance of deterrent and punitive sanctions is not in doubt, the level of sanctions in what some characterise as a policy of “ever-higher” fines has been openly questioned, including in relation to the competitiveness of European firms or sectors.^{16 17} The bankruptcy of Novacke Chemicke Zavody in 2009 in the calcium carbide cartel, but moreover the subsequent bathrooms fixtures case, brings this issue into focus. In the latter case, industrial policy concerns have particularly focused on the sheer number of European parties impacted by fines and the question of whether the negative supply chain effects of multiple firms affected may result in a collective weakening of a sector to the detriment of the health of the sector or vulnerability to takeover, notably by Asian players. The commission’s new approach to “inability to pay” will be put to the test on a much larger scale still, with the air-cargo cartel decision expected in autumn 2010.

Amid criticism of the commission’s partial attachment to an “effects-based” approach to determining antitrust fines, the question has arisen as to whether public-policy considerations demand that wider criteria should be taken into account. German Socialist MEP Bernhard Rapkay suggested that “social criteria” (i.e. the impact on jobs) should feature in the EC’s assessment.¹⁸ This relatively unexplored notion is further developed in a recent study by Oxford Economics, which analyses the impact of current levels of EC antitrust fines in terms of employment and investment both on the company sanctioned as well as the broader economy.¹⁹ The study raises the question as to what consideration the commission should

give to the employment and investment dimensions in its sanctions policy and its practical application.

While the commission has applied the brake to the “Kroes” proposals for private damages actions, the issue of aligning public and private enforcement also arises. Again, few would argue the merits of compensating the victims of anticompetitive behaviour and an additional level of deterrence, but some form of safeguard must be considered to account for the public sanction and private recompense to prevent a disproportionate “double sanction” on businesses.

A global level playing field?

In a “globalised era,” the scope of European industrial policy by definition extends well beyond the confines of the Single Market. European business increasingly seeks an activist policy in key international markets. This encompasses promoting the predictability and norms of the EU competition enforcement system as emerging markets develop their own competition regimes, and confronting *inter alia* the absence of a fully-fledged global state aid framework (beyond the WTO), patent “theft” and distortions in public procurement. The international dimension of competition policy and industrial policy is likely

to gain in importance as the EC will, in the first instance, be urged by European business to develop a cross-cutting and more “front-foot” policy than hitherto.

Conclusions

As Europe emerges from the effects of the unprecedented global economic crisis, a newly “modernised” European industrial policy is taking shape. It will be freed to a greater (or lesser) extent from the powerful force of economic and industrial “nationalism” as Europe re-focuses on “winning” on the global stage. As the extreme pressures of the crisis abate, so competition policy and industrial policy are likely to re-align still closer in what is largely a mutually reinforcing relationship. Challenges remain in several areas, and neither policy area is of course ever static. Among the emerging challenges are the definition and projection of a European industrial policy onto the global stage, one which reinforces but does not compromise the EU’s competition policy leadership. ■

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Footnotes

- 1 The Communication will be the first part of the “Competitiveness Package”; the second instalment, due in early 2011, will be a Communication on Member States’ Competitiveness policies. Interestingly, it may contain an “inventory” of the links between competition and enterprise policies, last conducted in the 2002 Competitiveness Report.
- 2 *Europe 2020: A European strategy for smart, sustainable and inclusive growth*, Communication from the European Commission, COM(2010) 2020, Brussels, March 2010, page 15.
- 3 *Treaty on European Union* (“Treaty of Maastricht”), Official Journal (OJ) C 191, 29 July 1992.
- 4 *Competition Law and Industrial Policy in the EU*, Wolf Sauter, Oxford (1997), page 112.
- 5 Article 3 (g) of the Treaty of Nice, OJ C 321, page 44.
- 6 See for example, *The EU Reform Treaty & the Competition Protocol: Undermining EC Competition Law*, Alan Riley, CEPS Policy Brief No. 142, September 2007.
- 7 Article 3(3) TEU.
- 8 *A new strategy for the Single Market at the service of Europe’s economy and society*, report to the President of the European Commission, José Manuel Barroso, by Mario Monti, 9 May 2010, page 86.
- 9 *Industrial policy and competition law & policy*, speech at Fordham University School of Law, New York City, 14 September 2006.
- 10 *Ibidem*.
- 11 *Europe 2020: A European strategy for smart, sustainable and inclusive growth*, Communication from the European Commission, op cit, page 7.
- 12 *A new strategy for the Single Market at the service of Europe’s economy and society*, report to the President of the European Commission, José Manuel Barroso, op cit, page 86.
- 13 Prior to the economic crisis, manufacturing accounted for 17.1% of EU GDP and 22 million jobs (in 2007). However, on a wider measure and factoring in the productive sector (e.g. power generation and construction and power generation) and associated business services, the share of GDP is 37%. Going wider still, the “servo-industrial” economy which also includes market services on which industry depends or which depend on industry (e.g. transport, communications, financial services and real estate etc.) accounts for 47% of EU GDP. Source: *EU Manufacturing Industry: What are the challenges and opportunities for the coming years?* European Commission Report to the 2nd high-level conference on industrial competitiveness, 26 April 2010.
- 14 *Europe’s economic priorities 2010-2015: Memos to the new Commission*, edited by André Sapir, Bruegel, 2009, page 53.
- 15 See *Up in the air*, Dafydd Nelson, MLex Magazine, Issue 2, July-September 2010, page 12.
- 16 Between 2000 and 2010 the Commission imposed on companies fines in the total amount of 14.893 billion EUR (whereas between 1990 and 1999 it was only 833 million EUR). The highest fines imposed on individual companies amounted to 896 million EUR (Saint Gobain in car glass cartel), 553 million EUR (E.On and GDF in gas cartel) or 480 million EUR (ThyssenKrupp in elevators and escalators cartel).
- 17 See for example, *Healthy Competition*, article by Jean-Paul Gauzès (MEP, France, EPP) in *Parliament Magazine*, 16 November 2009, page 22.
- 18 Raised in a question at Vice-President Joaquín Almunia’s European Parliament approval hearing, February 2010.
- 19 Oxford Economics, *An analysis of the follow-on effects of cartel fines on investment and employment*, May 2010, available at <http://www.oef.com/samples/cartels.pdf>. The executive summary of the study is available at <http://www.oef.com/samples/cartelses.pdf>.