

Competition and digital technology: An interview with Bernard Benhamou, secretary-general of the Institut de la Souveraineté Numérique

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Abstract:

Competition in the digital economy and the application of competition law in various sectors of this economy are two topics that have aroused interest in Europe and the United States: both in general (questions about the economic effects of oligopolies in the digital economy and the impact of digitization on firms) or in particular (questions about the competitive situation of segments in the digital economy). Two dissonant voices are heard, the one satisfied with the current situation, the other worried about the trends stemming from a limitation of competition in certain segments and the negative side-effects on the whole economy. Bernard Benhamou has been asked about his views on the current situation and recent trends, and about the actions that he deems useful in relation to competition law and to the articulation of competition policy with other major policies.



— **Digital Issues [DI]**: Is the competition in various digital technology markets satisfactory for our economies? Are the markets moving in the right direction?

— **Bernard Benhamou [BB]**: The simple answer is “no”!¹

The current situation is definite proof of a lack of foresight about competition between big high-tech firms (and not just them). An obvious shortcoming is that market realities have not been taken into account. I’ll give you an example: the regulation of telecommunications, with which I became familiar when I had the honor of working for a long time with the former director of ART [which would become ARCEP],

Jean-Michel Hubert, who crafted sub-loop unbundling in France. At the time, a strong political determination was necessary to do this, since unbundling was a pioneering measure, which several countries would admire and the United States would study. This implied plans for regulating this sector. Now there is ARCEP, which is supposed to regulate the “pipelines”; but it constantly has tense relations with the big players on this market, evidence of this being the slue of conflicts between telecommunication operators and the giants of the Internet (*cf.* Free vs. YouTube on peering and the pricing of interconnections).

We’ll soon have to imagine a reform for exercising control over this new, industrial and technological, world in which we have entered. We can no longer be satisfied with ideas about coverage or connectivity, which are, of course, important for the rollout of 5G, and perhaps soon 6G. We have to better understand the “how” of innovation, of the adoption of business models, of the saturation of the market by certain players. The absolute reference mark is no longer the price, which used to be the fundamental factor for thinking about competition. Local loop unbundling provided leverage for bringing down prices for consumers; but nowadays, given the volume of for-free Internet services, the concept of price no longer has the same meaning, nor the same value, as a guide for regulatory authorities.

— **DI**: Edward Snowden has been present recently in the press. For him, the domination of the Internet giants has but a single reason: the absence of alternative solutions.

— **BB**: That’s both true and false.

I have immense respect for Edward Snowden and infinitely regret that our authorities have never considered granting him asylum. There’s a problem of alternatives but, more broadly, of “industrial policy”. This essential phrase has been depreciated in the view of so many leaders today. Mariana Mazzucato said that the best kept secret of the American State Department is its interventionism in technology. This economist even said that every innovation — including iPhone, artificial intelligence (AI) touch screens, WiFi and even the Internet (in short, all the major innovations we have in mind when talking about the “GAFA”) — has been heavily subsidized by federal or local funds in the United States. By definition, there is definitely a problem of alternatives and of the room for them (local, as Snowden said: we are not forced to make things so big). But let me mention too Tommaso Valletti. According to this economist who headed the EU’s Directorate

¹ This article has been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor’s approval, added a few bibliographical references.

General for Competition, Facebook led the European Commission astray when it acquired WhatsApp... by claiming to uphold the GDPR and to see to the separation between these platforms so that personal data would not be communicated between them. Ultimately, it did the exact opposite. The result has been to bring Facebook's services, Instagram and WhatsApp, closer to the tentacular WeChat. This reminds us of what happened when Microsoft was summoned to separate Internet Explorer from Windows, and surprised the European Commissioners by saying that it no longer had the code, that the code was constantly changing and they no longer had it. This astounding reply amounted to saying that the two software programs were so tightly integrated that it was impossible to separate them (structurally or functionally).

Let me point out that Europe already had, at the start of this century, the occasion to flex its antitrust "muscles" during the planned-for rapprochement between General Electrics and Honeywell, which would have created a quasi monopoly over airplane turbines. Europe prevented the merger of these two American firms. I don't see any similar level of determination in dealing with high-tech players.

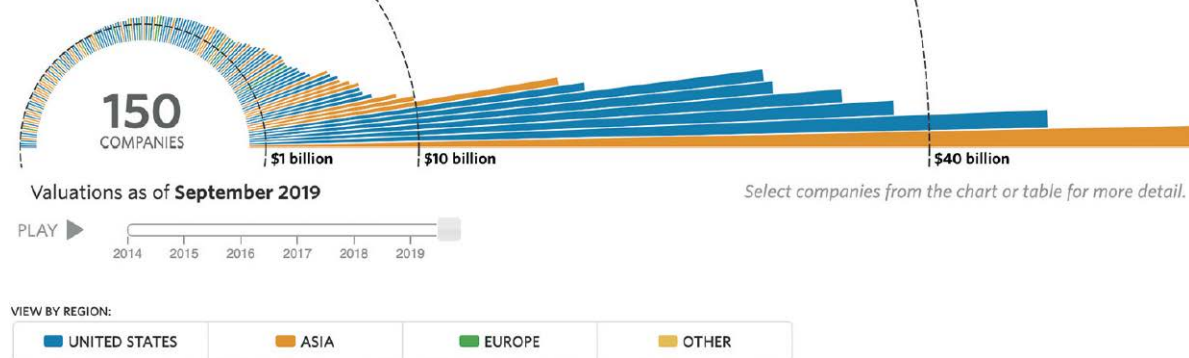
Besides the lack of vision, we observe an extreme form of *laissez faire*, which has led Europeans to set up *de facto* monopolies (which have nothing to do with natural monopolies) or to react too late to "abuses of dominant position". Rather than threatening with *ex post* sanctions, which require an enormous amount of time, I would prefer, as some MPs have demanded, the adoption of interim protective measures that would restrain such a merger until the army of attorneys hired by the firms in question has exhausted all means of legal recourse.

Whereas telecommunications formed a market that took shape over more than a hundred years, the speed characterizing high tech has caught many observers and regulators unawares. This has not been analyzed with the requisite lucidity so that Europe not find itself in vassalage, a "*digital colony of two other continents*" in the words of Senator Catherine Morin-Desailly. I am among those who think that this has not at all been a matter of fate.

— **DI**: Are competition law and its procedures flexible and adaptable enough to respond to the issues raised by digital technology?

— **BB**: I think the laws passed in this area have to be temporary. We have to give ourselves possibilities for "reviewing" the situation in order to adjust laws. At present, we only hear about the capacity for competition in industry, but there are other questions that concern the state as a regulator... questions about protecting citizens and freedoms. We are moving beyond the focus on personal data we had a few years ago. We now have an obligation to step up regulations and move toward an industrial policy. The point I would like to make is that there is no regulation without a strategy. If our approach to regulation is to comply with the Anglo-American doctrine of a free market without distortions, that will not work. It will not create alternatives. The proof is that we Europeans are still asking ourselves questions to understand why we don't have unicorns capable of growing up to an international size.

Companies valued at \$1 billion or more by venture-capital firms



Source : *Financial Times*

Given our market capacity and the excellence of our research and systems of education, the absence of European countries behind the big acronyms (on par with GAFA, NATU or BATX) is not an accident of industrial development. The Villani report² pointed to the excellent quality of research in France on artificial intelligence, and was delighted that Yann Le Cun was head of research in AI at Facebook.... That does not delight me; it's a disappointment because European firms are unable to retain exceptional talents. When we see firms (and investment funds) from outside Europe come do their "shopping" in our small and medium-sized companies (SMEs) and our start-ups, or directly at the CNRS research center, or even in the cradle of universities and laboratories, this is no accident. The dismantlement of key, strategic industries — the fact that there is not a single manufacturer today of meaningful size that makes mobile telephones, that there are no European platforms or operating systems, etc. — all this is something that was not inevitable. In my opinion, we have dressed up a "soft" renunciation or resignation as an inevitable industrial trend. To reform competition law in this area, our ambitions clearly have to be based on a strategy and policies.

What matters is to keep an equal distance from two technological risks facing our societies. The first is what Shoshana Zuboff, professor emeritus at Harvard Business School, has called "surveillance capitalism".³ The high-tech giants, now "hyperdependent" on users' data, have become economic instruments at the service of a society that, day after day, restricts the freewill of individuals/consumers. The other technological risk is the Chinese option of a technology-based system of social credits for the surveillance and manipulation of a quarter of humanity. This system scores each individual's behavior. Chinese citizens with scores too low will not dispose of fundamental freedoms, such as the freedom to move, the access to loans, or promotions at work. These two technological and political "antimodels" are already in operation, bolstering each other.

² VILLANI C., (2018) *Donner un sens à l'intelligence artificielle. Pour une stratégie nationale et européenne* (Paris: Prime Minister's Office), 235p., available via: https://fichiers.acteurspublics.com/redac/pdf/2018/2018-03-28_Rapport-Villani.pdf.

³ ZUBOFF S. (2019) *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: Public Affairs).

Owing to a lack of understanding of the mechanisms at work, Europeans are already faced with this uberization. This holds for television (Canal+ carrying Netflix), the retail business (Monoprix and Amazon, Auchan, etc.), and might soon hold for the automobile industry. Dieter Zetsche, Daimler's chairman of the board and managing director, declared that automobiles are becoming "smartphones on four wheels".

Faced with these technological trends, we Europeans have the task, but also the burning need, to open a third path for upholding European citizens' principles and values. The current problem is that we have not struck out on this path because so much political effort is needed to redesign the industrial landscape. For want of this effort, every industry will be gradually uberized in a domino effect, from one firm to the next. The next industries in the line of sight might be the banks, insurance or even the health industry; and this will have political and social consequences more important than in the past.

— **DI**: Are current trends in the governance and regulation of digital technology in Europe (privacy, security, intellectual property rights, etc.) going to significantly affect the competitiveness of markets?

— **BB**: Yes, they've had a significant effect on the structure of markets, on competitiveness.

The GDPR, for example (with all my respect for this long work), is but a first phase.⁴ It was drafted at a time when the social networks were growing but not like now, a time when all sorts of connected devices did not yet exist... for cars, houses, personal assistance and, soon, even connected clothes, food and medicine. This network effect and its acceleration raise completely different problems. Legal texts have to be updated (not just the GDPR and e-Privacy) to take account of the new technology related to the Internet of things (IoT), which is still one of the blind spots in existing regulations. During various European ministerial meetings, I had the occasion to plead for a "right to chip silence", so that users are able to disconnect devices or machines in order to keep them from speaking without (or against) the user's consent. That's still a long ways off, but I think it's necessary to move toward integrating this preoccupation in the very design of the architecture of connected devices so that the protection of privacy is taken into account upstream in the production process — instead of waiting until the high-tech giants produce a technology that systemically introduces devious effects.

New grounds will have to be laid for competition law, grounds based on industrial policies, on the Small Business Act — the ability to orient part of the orders passed by public administrations toward small, innovative companies. It is more than ever necessary to put this measure back on the agenda, a measure that our European (in particular British) partners often used to oppose. From the start, SMEs have to have not just haphazard sources of funding but solvable clients in order to be capable of quickly improving their products and services. According to several European jurists, the Small Business Act could be applied to public procurement in France without violating European law.

— **DI**: The digital economy has no borders. Is there a satisfying form of international governance and cooperation, a convergence on the definition and application of competition law? What should we do first? What is the right basis? Geographic? Geopolitical?

— **BB**: Our national authorities are legitimately punctilious with regard to questions of sovereignty and defense. As a federalist, I would not be shocked were a European policy on technology jointly worked out with our partners — but not within the current perimeter of the EU and, therefore, for

⁴ The GDPR (General Data Protection Regulation): "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data" available via: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1478961410763&uri=CELEX:32016R0679>.

sure not with 27 member states but, instead, with a core group of European countries. When there was a discussion about replacing the software Palantir at the General Directorate for Internal Security (DGSI), the question of a Franco-German project came up. I do not mean that the Franco-German motor would be enough. I lean toward the theory of concentric circles: the initial signatories of the EU treaty undertaking joint initiatives in strategic sectors (health, environment or even transportation).

The intent is to work out an industrial policy on a European scale and establish funding mechanisms other than the PCRD [EU Framework Programs for Research and Technological Development]. At that time, the key concern was to boost unicorns, but no European program in this field has delivered results. As proof: all the leaders we used to have in these sectors have been decapitated. So, we have to reform European procedures for funding innovation.

The XPrize Foundation in the United States set up innovative funding for connected health technology, specifically a mobile medical device for nonprofessionals that diagnoses patients. They called it the Tricorder XPrize (with reference to *Star Trek*). The principle was as follows: “We want this technology to exist, prove to us that you are able to develop it”; and the winners will share ten million dollars. Instead of several sources of funding with, as outcome, no technological breakthrough, new procedures should be set up. The orders passed by public authorities should go toward the most innovative SMEs; and rules should be laid down, including interim protective measures for avoiding the distortions wrought by the big firms — a cultural revolution that will affect financiers and, too, public servants and the whole European ecosystem of technology.

We probably have an odd opportunity arising out of various scandals (Snowden, Cambridge Analytica, etc.) and related to our realization that a business model centered around personal data and microprofiling (or microtargeting) is fatal to freedom — economically predatory and politically dangerous — since it fosters radical, populist movements. Europe must create a third path for technologies that uphold privacy and our vision of democracy, that preserve our European model of civilization! I would like to cite Paul Nemitz, the principal advisor on justice policy at the European Commission, who has said that data protection might be a chance for European industries to rebound. Even MIT’s very severe journal said, a few months ago, that Europeans were better placed in the protection of privacy and open banking. Why? Because we have an advantage linked to our tradition in these fields. Instead of feeling that the protection of personal data amounts to an insurmountable set of restrictions, we must see it as a lever for European countries, a hallmark, a label that could actually help open a third path in Europe.

— **DI**: How might the policies of competition and innovation back and enhance each other?

— **BB**: When technological innovations are the topic, the myth of the solitary entrepreneur often crops up. We have the impression that innovation comes from the private sector alone, provided that there is the appropriate funding (and financiers). This is far from the whole truth. Public authorities play an extremely important role in American technology. I think that DARPA (the American Defense Department agency, which financed initial work on the Internet) and public investment funds (like the CIA’s In-Q-Tel, which originally financed Palantir Technologies) are good examples of the structures that we should be examining more closely in France and Europe. We have not drawn enough inspiration from the past. I believe in the fundamental, structural role of public procurement policy, European or national or even local, when the orders are passed in compliance with texts that implement a coherent strategy for this technology.

— **DI**: How are the policies of sovereignty and competition interrelated?

— **BB**: I would say that an exciting field is opening in the regulation and governance of technology. The situation used to be much simpler, before the big platforms emerged. The issues are now

infinitely more complicated. All those who will be working on this, whether in firms or public administrations, will have an exciting job. I believe there is a real creation of value when thought is given to this field and when there is a granular strategic monitoring of trends in the industries and technologies now said to be inherent in our digital sovereignty: cybersecurity, financial technology, energy, transportation.... By thinking about what our counterparts in Europe or beyond are doing in these fields, we can seek to imprint European characteristics on the law to be applied.

— **Di**: What would you advise our subscribers to read on this topic?

— **BB**: I would recommend three books published in the past few months, each of which analyzes, from a different angle, current trends in the economy and technology, along with their political and social consequences: *The Curse of Bigness: Antitrust in the New Gilded Age* by Tim Wu, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* by Shoshana Zuboff and *Future Politics: Living Together in a World Transformed by Tech* by Jamie Susskind.