The not so invisible hand : raise, fall and current resuscitation efforts of antitrust norms

While public debts have increased drastically with the health crisis[1], states are seeking to broaden their tax bases. It is in this context that the debate on antitrust laws and GAFAs is reopening in the United States but also in Europe through the national and supranational laws of the OECD[2]. The issue of antitrust and GAFAs has been debated at the G20[3]. Are unicorns turning into hydras ? Could a regulatory policy re-stabilize the system ?

If the concept of the Smithian invisible hand as it is used today claims to naturally, spontaneously, settle monopolies, one now know that without antitrust legislation, there is no natural equilibrium tending to fairly regulate the market. Competition is necessary for the economy to run smoothly in order to defend the interests of consumers. At the end of the 19th century, John Sherman was speaking out against the power of Standard Oil, which was accused of abusing a dominant position. If you want to know more about that time and its relation to our current predicaments, you could start here[4]. On July 1890, the United States introduced the Sherman Antitrust Act limiting the anti-competitive behavior of cartels, a modern competition law, aimed at guaranteeing

1 https://www.reuters.com/article/us-global-debt-iif-idUSKBN2AH285
2 https://www.touteleurope.eu/economie-et-social/qu-est-ce-que-la-taxe-gafa/
3 https://www.competitionpolicyinternational.com/oecds-tax-reform-on-big-tech-will-be-presented-at-g20%E2%80%AF/
4 https://www.jalopnik.com/a-brief-history-of-gasoline-how-standard-oil-built-its-1847307606

respect for free competition within a market economy. In 1914, the Clayton Antitrust Act reinforced the Sherman Antitrust Act, by making price discrimination illegal between buyers, if it creates a monopoly situation, exclusive sales and tied selling, the concentration of companies restricting competition by running several competing businesses, and allowing businesses to seek punitive damages against businesses doing so.

From the beginning of the 20th century, competition appeared more and more as a form of organization and no longer as a natural state. The law imposes some restrictions, (mutual ignorance by barriers to exchange of trade information, mostly) that are believed to promote competition, and monitors the effectiveness of such interventions on some market concentration parameters…, in order to protect the macroeconomic functioning of the market and in particular the search for economic efficiency as the greatest satisfaction of the consumer by the producers taking into account the scarcity[5] of the community's overall resources.

The ultimate goal is to prevent market concentration and fragility... It is a question of remedying among other things, predatory prices, i.e. a very low price practice allowing a company to protect or extend its market share to the detriment of its present or future competitors, so as to take advantage of a dominant position and regulate market prices. While classical analysis recognizes the reality of the notion of predatory prices, this concept is not unanimous among economists at the Chicago School. J.S. Mc Gee was the first to question the relevance of the accusations made against Standard Oil.

5 As opposed to the economy of abundance, in political economy.

Analyzing the economic policy of Rockefeller's company, he concludes that its practices were not predatory, (practices too costly and irrational), while mergers and acquisitions are less expensive and make it possible to acquire a monopoly position, and develop the skills of these large trusts. According to the Chicago school, predation is not supported by any solid argument, and is rather a matter of lobbying activity on the part of beaten competitors.

Nevertheless, the contribution of game theory makes it possible to bring rationality back to predation theory. Predatory pricing can become rational when there are barriers to entry, information imperfection and / or financial asymmetry between firms. In the presence of experience savings, one see that production capacities are not reusable because it is difficult for a company subject to this kind of practice to come back to market. In other words, a firm that stops producing and then resumes production will have a higher cost function than a firm that has not stopped production.

Here, it is a question of reasoning in term of economic externality, such as the externality of network to competition of technologies, i.e. by evaluation of the real utility of a technique or a product compared to the number of users. In the 1990s, all start-ups relied on this network effect to justify their rapid growth becoming more decisive than immediate profitability, in particular the determination of marketing and technological standards, which seemed to call into question the form of the competition, itself. However, since growth is not infinite, it appears to be conditioned by a threshold effect, a

critical mass effect, the number of users for social networks reaching saturation, any new entrant causing lose network quality to previous subscribers. In this case, one comes to the breaking point of Metcalfe's law stating that the value of a network is proportional to its number of users.

Another parameter to be taken into consideration is the Nash equilibrium which theorizes that when each player correctly foresees the choice of the others, all of them maximize their gains, without the balance necessarily being optimal.

The regulator's goal should be to lead the various players, (in this case the firms), to ensure that none can modify its strategy without weakening its own position, thus allowing the market to tend towards a certain stability. The goal sought by the regulator should be the protection of the macroeconomic functioning of the market and in particular the search for economic efficiency, defined as the greatest consumer satisfaction by the producers of goods and services[6].

If you have followed the previous posts, you understand then, that the anti-trust laws put a stop to the Gournaysian doctrine of "let it go, let it pass" defined in an atomized market economy, carried by the craft industry, the trade and the small business.

Today one sees more and more the concentration of the market between a few actors, a cartel which distorts the play of competition and intervenes in all the new growth fields, eliminating any potential competition, and ultimately acting to the detriment of the consumer. In order to preserve the global economy, the regulator will therefore find itself obliged to

6 M. Mazzucato, *The Value of everything : Making and taking in the Global Economy*, 2017.

intervene in order to ensure respect for Articles 3, 81 and 89, on free competition, of the Treaty of Rome[7], establishing the European Community in 1957, as well as Articles 101 to 109 of the Treaty of Lisbon[8].

The system is unbalanced, with some receiving financial support from the state and others bearing all the risks. This asymmetry of competition, and more broadly of the development of firms in relation to potential competitors, distorts the game by introducing inherent inequity. More broadly, the system as it is currently allows large groups to maximize their profits by transferring risk to the various players in the game[9]. That is human nature, when an individual can afford anything without a safeguard, he sometimes pushes the system beyond his own limits. Faced with the threat posed by GAFAs today, an overhaul of antitrust laws may be necessary. In 2017, it was the work of young Yale doctoral student, Lina Khan[10], who once again raised the question of antitrust laws[11], proposing to reinject politics into the economy because enabling a small minority to amass outsized wealth, could be used to influence government. It would also occur by permitting "private discretion by a few in the economic sphere" to "control the welfare of all," undermining individual and business freedom. In the lead up to the passage of the Sherman Act, Senator George Hoar warned that monopolies were "a menace to republican institutions themselves[12]". Behind the "free" services

7 https://www.europarl.europa.eu/about-parliament/fr/in-the-past/the-parliament-and-the-treaties/treaty-of-rome

8 https://www.europarl.europa.eu/about-parliament/fr/powers-and-procedures/the-lisbon-treaty

9 N.N., Taleb, *Skin in the Game : Hidden Asymmetries in Daily Life*, Random House, 2018.

10 https://www.yalelawjournal.org/note/amazons-antitrust-paradox

11 https://www.vice.com/amp/en/article/y3d5/bidens-right-to-repair-executive-order-covers-electronics-not-just-tractors?_twitter_impression=true

12 *Idem*

offered by the giants of the Web, hides a massive capture of personal data, but moreover, the platforms in exchange for free services gain the right to arbitrate transactions above and beyond the law, to shape conversation by censorship and advertisement... It has become nearly impossible for a developer not to sell on the AppStore, or for a merchant to ignore Amazon, those platforms that take advantage of their dominant positions to sell similar products to the customers they host. These same platforms that take the opportunity to put a barrier in the form of a commission to competition, without applying it to their own services, thus distorting the game… The solution proposed by Lina Khan would be to broaden antitrust beyond price, by studying the complex mechanisms of predation, conflicts of interest and control of target data, most often monetized by collectors in full illegality. The example of software pre-installed on phones and computers illustrates the conflict of interest of tech giants, practices that sometimes resemble tied selling and / or forced selling when the consumer cannot choose the software integrated into the hardware.

After 16 months of investigation[13], the American Antitrust Commission, led by the Democrats, politically condemns the power accumulated by the GAFAs over the last two decades, denouncing the dominant position of firms having taken too much power to be the object of adequate monitoring and enforcement, because the economy and democracy depend on it. Beyond the dominant position, there is the question of the quality of the services offered by firms

13 https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html

which, once they have reached a monopoly position, allow the quality of their services to deteriorate, in terms of respect for privacy, dissemination of fake news, and negotiation with their clients... Postmarketing assistance is deteriorating heavily, since companies have substituted tribunals… This impacts also the halflife of products, and consumeristic behaviours shortening the life cycle of goods, against the overall push for greening.

The US report calls for the dismantling of dominant platforms and a questioning of the acquisition of Instagram by Facebook, and of Youtube by Google. It also proposes to strengthen the barriers to new takeovers of start-ups by these companies and to force them to offer data portability, while calling for the strengthening of antitrust laws by countering case law that has weakened them by reducing them to a single dimension, obtaining low prices for consumers. Congress, criticizing the Federal Trade Commission having validated the more than 500 acquisitions made by GAFAs since 1998, wants Antitrust laws designed for consumer protection to also apply to employees, contractors, and independent companies.

The application of a new antitrust that would defend a just economy and democratic ideals. Five major bills are proposed by Congress : the American Choice and Innovation Online Act, The Ending Platform Monopolies Act, the Platform Competition and Opportunity Act, the Increasing Compatibility and Competition and the Merger Filing Fee Modernization Act of 2021. All of these projects help curb anti-competitive behavior and restore fairness and competition between economic agents by leveling the playing field. Along with this action by Congress, small businesses are

coming together to confront Amazon and demand a review antitrust laws and the dismantling of GAFAs.

Paradoxically with this rise in monopoly of GAFAs, a question arises concerning innovation and R&D. Although their dominant position is questionable in many respects, the fact remains that these giant firms are the first to invest in research... because they acquire very early on the R&D made by public and SMEs. It is true that companies listed on the S&P are more likely to break records for buying their own shares than for investing in innovation, the effort of which is now being made outside of traditional models. The innovation argument is often used by defenders of the deregulated economy to perpetuate the current Venture Capital system. While Venture capital, which allows start-ups to finance high-risk projects, does indeed allow innovation to develop, it seems necessary to look at where the funds are coming from to finance these investments. As we have already shown in previous posts, Venture capital is largely assumed by states financing projects that no private investor would fund in their entirety. It is therefore public taxes that finance these highly profitable projects when they operate without any counterpart returning to the coffers of the Public Treasury. A lack of return on investment coupled with aggressive tax optimization allowing companies to evade taxes. A shortfall that we also saw expressed in 2008, when the States proceeded to the rescue of the banks, even when the main responsible had never been troubled by the authorities, highlighting the asymmetry of play[14]. A win-lose

14 Zoe Williams, « Skin in the Game by Nassim Nicholas Taleb review – how risk should be shared », *The Guardian, 22 février 2018.*

system. Winner for the giants of Tech, the world of finance, but loser for States, taxpayers, employees and citizens… and more generally the economic system as a whole whose balance is constantly threatened by financial bubbles including the very principle is to burst. Which brinngs us to the "trickle down" theory vs "helicopter money" match. One now know that the trickle down theory does not work and even that it does not exist, when the creation of money, (by central banks), reinjected into the economy *via* modest consumers revitalizes the economy and stimulates growth[15]…

Moreover, if it appears that an overhaul of the antitrust law becomes necessary because of the evolution of contemporary companies, this cannot be done without an overhaul of the tax system of companies so that they pay, at a fair measure of their fiscal and social obligations.

European taxation, an adjustment variable for improving national competitiveness, is based on a special so-called approval procedure. The Council of the Union must consult Parliament but without a binding opinion. It is therefore up to the ministers of the economy to come to an agreement on a proposal from the Commission, since the treaties require unanimity. A harmonized tax base project (CCCTB) aimed at stemming tax competition within the internal market was discussed for several years before being definitively blocked in the Council in 2017. In March 2018, the digital services project proposed to tax at 3% the turnover of net giants throughout Europe, and no longer simply the profits as in

15 https://www.poitivemoney.eu/2021/07/helicopter-money-effectiveness-research-review/

the classic system which has become obsolete in the face of such machines[16].

Faced with the reluctance of Germany fearing retaliation from the United States, in particular, on automobile imports, from the Nordic countries, but above all from Ireland and Luxembourg where Facebook, Google and Amazon base their economic attractiveness on favorable taxation, the discussion has been transferred to the OECD so as not to complicate international tax cooperation. While discussions at the OECD collapsed in 2020, the election of J. Biden rekindled the debate as digital giants in Europe are taxed half as much as traditional companies. Today, each country of the Union develops its internal taxation, the establishment of head offices having become a real issue, a competitive lever between members of the Union. GAFAs benefit greatly from this situation by offering their services on the web, targeting an international clientele, while setting up their head offices in low-tax countries. In 2018, Google France declared a turnover of 411 million euros and paid 17 million in taxes, yet the advertising revenue made on French territory would have generated a profit of around 2 billion according to the syndicate of internet agencies[17]… A tax loss for the community but also an unfair competition towards potential competitors… Other European countries such as the United Kingdom, Italy, the Czech Republic and Austria have implemented their own tax on giants digital, taxes which, in the event of an international agreement, should disappear[18]. Sensitive to these tax issues, the European executive wants to launch, by

16 https://ec.europa.eu/taxation_customs/sites/default/files/proposal_common_system_digital_services_tax_21032018_fr.pdf

17 https://www.touteleurope.eu/economie-et-social/qu-est-ce-que-la-taxe-gafa/

18 https://www.lalibre.be/economie/entreprises-startup/taxer-google-amazon-facebook-apple-et-microsoft-gafa-rapporterait-des-millions-d-euros-5e1d687a9978e270ae159ca8

2023, a reform of the distribution of taxing rights between member states, the BEFIT[19]. With Covid-19 and the 390 billion euros in subsidies allocated to states, the GAFAs tax, but also the issue of optimization and tax evasion are getting back on the table[20]. A massive tax evasion against which a first agreement in principle, the BEPS[21], bringing together 127 countries, seems to be taking shape in favor of fairer taxation of the digital economy. At the beginning of June, the G7, in order to fight against tax optimization, decided to put in place a worldwide tax of 15 on GAFAs, a tax that Amazon could indeed avoid[22]…

Beyond GAFAs, CAC-40 companies also benefit from tax optimization processes, with 1,454 subsidiaries in tax havens, including 284 for LVMH, 172 for BNP-Paribas, 133 for Société Générale, 131 for Crédit Agricole , and 130 for Total[23]. The increases in the profits of companies listed on the CAC-40 for the period 2009-2016 having increased by + 61% while their taxes only increased by 28% raise questions as to a fair distribution of the collective solidarity effort represented by tax[24]. An optimization, not to mention tax evasion, which, added to the tax credit, granted to large companies should question the sustainability of economic systems and contemporary solidarity in the medium and long term. Should we add to this the fact that the top bosses of these companies more often than not manage to legally evade taxes[25]? It is a system in

19 https://agenceurope.eu/en/bulletin/article/12721/3
20 https://ec.europa.eu/info/strategy/recovery-plan-europe_fr
21 https://www.oecd.org/tax/beps/beps-actions/
22 https://www.capital.fr/economie-politique/amazon-pourrait-echapper-a-la-future-taxe-mondiale-sur-les-societes-1405672
23 https://www.oxfamfrance.org/inegalites-et-justice-fiscale/cac-40-la-grande-evasion-fiscale/
24 *Idem*
25 https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax

which dominant companies have the power to kill or allow competition to survive, or to buy it out in order to develop their potential, companies whose turnover exceeds the GDP of certain states in the world. It is a hushed war that is being played out at this very moment, within the places of democratic debates and of power through powerful lobbies[26].

At the time of finishing this post, an American magistrate has just ruled that the evidence provided concerning a possible monopoly on Facebook's social networks was insufficient[27], the market capitalization of the firm rises above 1000 billion dollars[28]. Regarding the buyout of Instagram in 2012 and WhatsApp in 2014, the judge considered that there was prescription of the law. The non-portability of data pointed out by prosecutors was not retained by the judge as an obstacle to competition. The judge nevertheless leaves a door open by giving the FTC a 30-day deadline to represent new documents to support their charges.

In addition, other legal actions opposing the American antitrust authorities to the GAFAs are in progress, in the same way that Microsoft was targeted in the 1990s. A case to follow, therefore, which promises wide debates at the next G20, while the question of raw innovation[29], its nature, and its mechanisms does not seem to be on the program, which could ultimately lead to collateral damage because while good antitrust and fair regulation

26 https://www.oxfamfrance.org/inegalites-et-justice-fiscale/cac-40-la-grande-evasion-fiscale/

27 https://www.nytimes.com/2021/06/28/technology/facebook-ftc-lawsuit.html

28 https://www.businesstoday.in/latest/corporate/story/facebook-m-cap-over-1-trillion-after-court-dismisses-antitrust-lawsuits-299941-2021-06-29

29 https://philosophicaldisquisitions.blogspot.com/2021/06/the-shape-of-techno-moral-revolutions.html

could be a solution to the savage deregulation of recent decades, bad antitrust could also become a brake on innovation. The road to hell being paved with good intentions, it will be up to political decision-makers as well as magistrates to be vigilant so that this new antitrust is neither distorted nor emptied of its substance at the end.