ITIF Panel Discussion - 26th of March 2020

Reforming Antitrust Policy for an Era of Global Competitiveness

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Is Antitrust Policy Fit For Purposes?

- **Excessively precautionary and**
- **Insufficiently innovation-based**

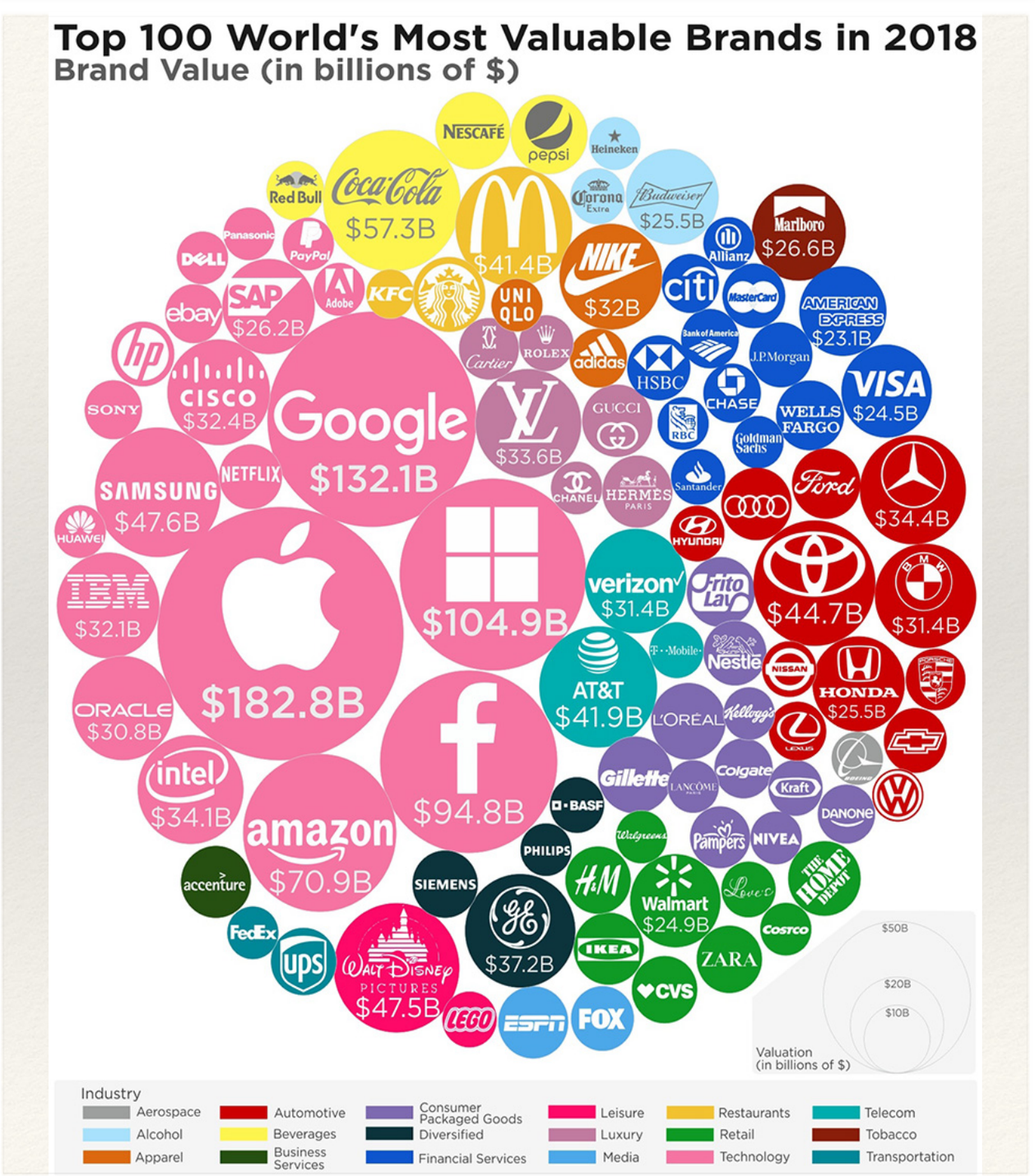
Two phenomenon evidence this claim:

1. Rise of big tech

2. Rise of big entrants

1. Rise of Big Tech

- From tech enthusiasm to techlash:
  - From Europe:
    - Google Shopping fined €1.49 billion in 2017
    - Google Android fined €4.3 billion in 2018
    - Google AdSense fined €1.7 billion in 2019
    - Facebook/WhatsApp fined €110 million in 2017
    - Google, Facebook, and Amazon under investigations since 2019
  - From US:
    - Google probed in 50 US States
    - Facebook and Amazon probed by FTC
    - Google, Facebook and Apple probed by DoJ
    - Ex post merger reviews wrt Alphabet, Amazon, Apple, Facebook, Microsoft, the FTC announced in 02/2020



Evidence of Techlash

- **Fine and regulate as public utilities !**
  - Google cases: search neutrality? Neutrality on Android products? Neutrality on search adverts?
  - Facebook at Dusserldorf
    - (September 26, 2019: Higher Regional Court Düsserldorf relieved Facebook from the FCO decision which prohibited Facebook from processing and implementing third parties' data with Facebook's)
- **Break them up !**
  - Amazon
  - Facebook, Google,… acquisitions

Techlash: A Revival of Antitrust Populism

- *« Populism, is reflected in calls (…) on the left and the right, to use antitrust **to dismantle** the highly successful companies or at least -- the so-called tech companies -- or at least regulate them as **public utilities**. These are misguided calls. For one thing, what a tech or digital company is is hard to know »*
- Timothy Muris, FTC Hearings September 13, 2018

Techlash:
Modern Antitrust Populism

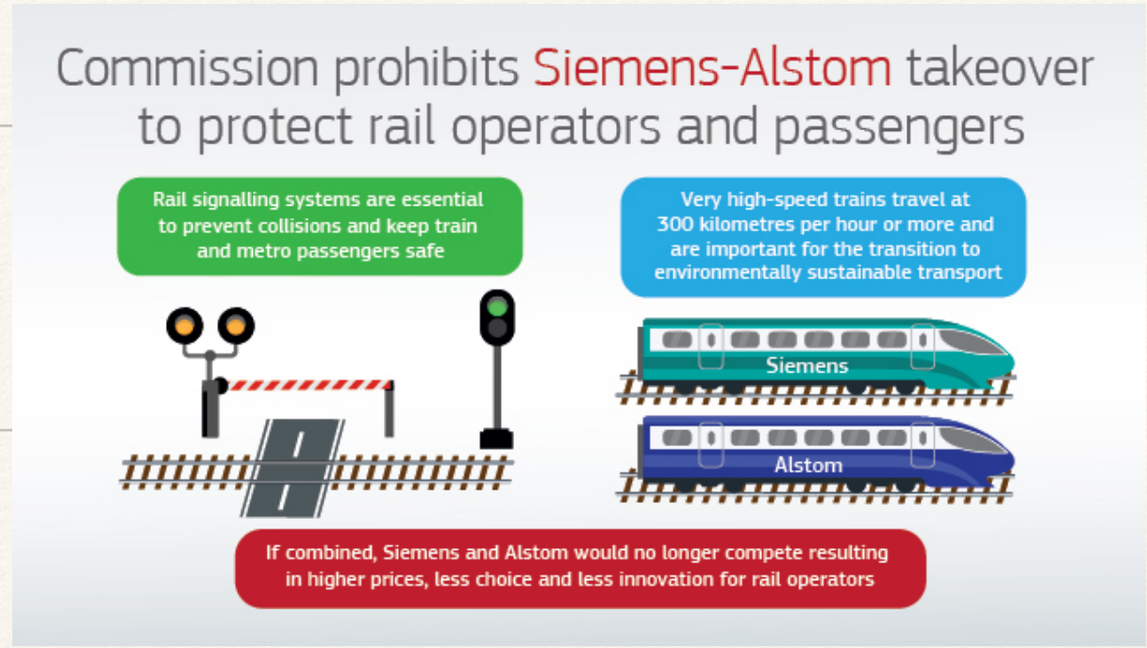
- Big-is-bad reactions
  - Conceptual antitrust populism
    - Consumer welfare standard to be repealed in favor of an « public interest standard » (Khan, Stiglitz, Stucke, Wu…) with focus on « structure » and on « process of the protection of competition »
    - Relevant markets defined narrowly and markets given preeminence
    - Allocative (static) efficiency with price analysis still prevalent instead of dynamic efficiency in zero-priced markets
  - Political antitrust populism
    - Antimonopoly movement (Hipster Antitrust): academics advocate protection of small businesses
    - Politicians discourses: « them v. Us »
    - Regulators choices

Rise of Big Entrants

- **Globalisation, Competitiveness, and Antitrust Policy**
  - Despite July 2004 post-Cancun decision by the WTO, interactions between trade and antitrust are numerous
  - Ability to merger, to gain level-playing field through scale economies are determinant for global competitiveness when markets open up to new sectors

- **The case of the blocked merger Alstom / Siemens**
  - February 6, 2019: blocked merger between the French Alstom and the German Siemens in order to gain scale economies and to innovate in the railway sector ahead of the Chinese CRRC imminent arrival in Europe
  - Over the past 10 years, the EU executive approved 3,000 mergers and rejected seven acquisitions
  - Vestager said that neither in the business of signalling systems nor in the high-speed train sector was the arrival of Chinese competitors in the European market expected “in the foreseeable future”.

Alstom / Siemens : train wreck



- **Right decision from a legalistic perspective**
  - 2 relevant markets: signalling systems; high-speed trains
  - EU Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para 74, « *The Commission examines whether entry would be sufficiently swift and sustained to deter or defeat the exercise of market power. What constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants(100). However, entry is normally only considered timely if it occurs* ***within two years*** »
  - Form Co Relating to the Notification of a Concentration Pursuant to Regulation (EC) No 139/2004 annexed to the EUMR 802/2004: « *8.4.* ***Over the last five years****, has there been any significant entry into any affected market? If so, identify such entrants and provide an estimate of the current market share of each such entrant* »

- **Wrong decision from a dynamic perspective**

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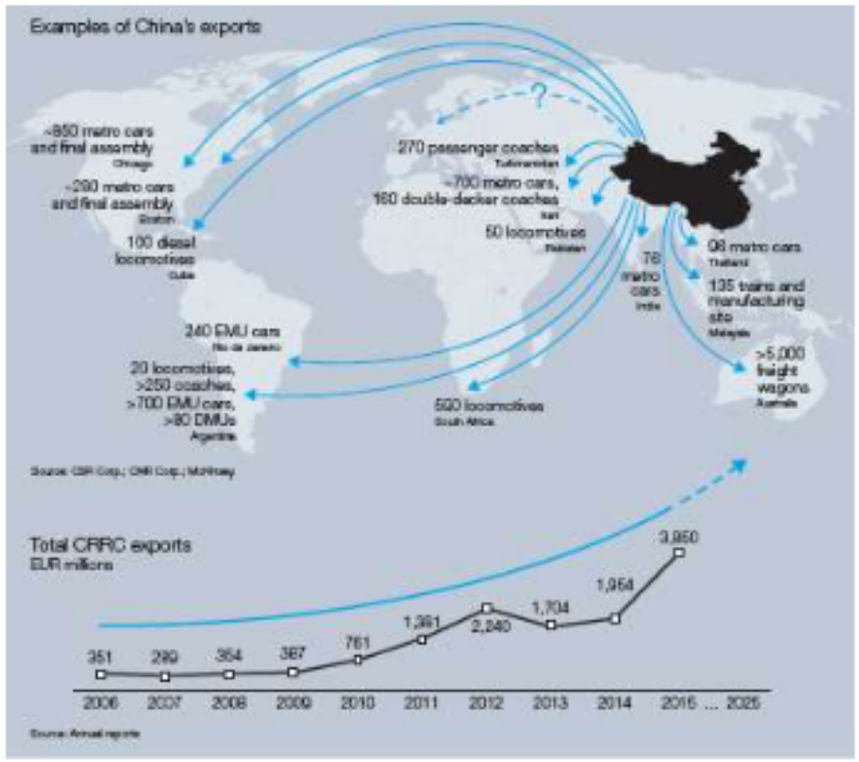
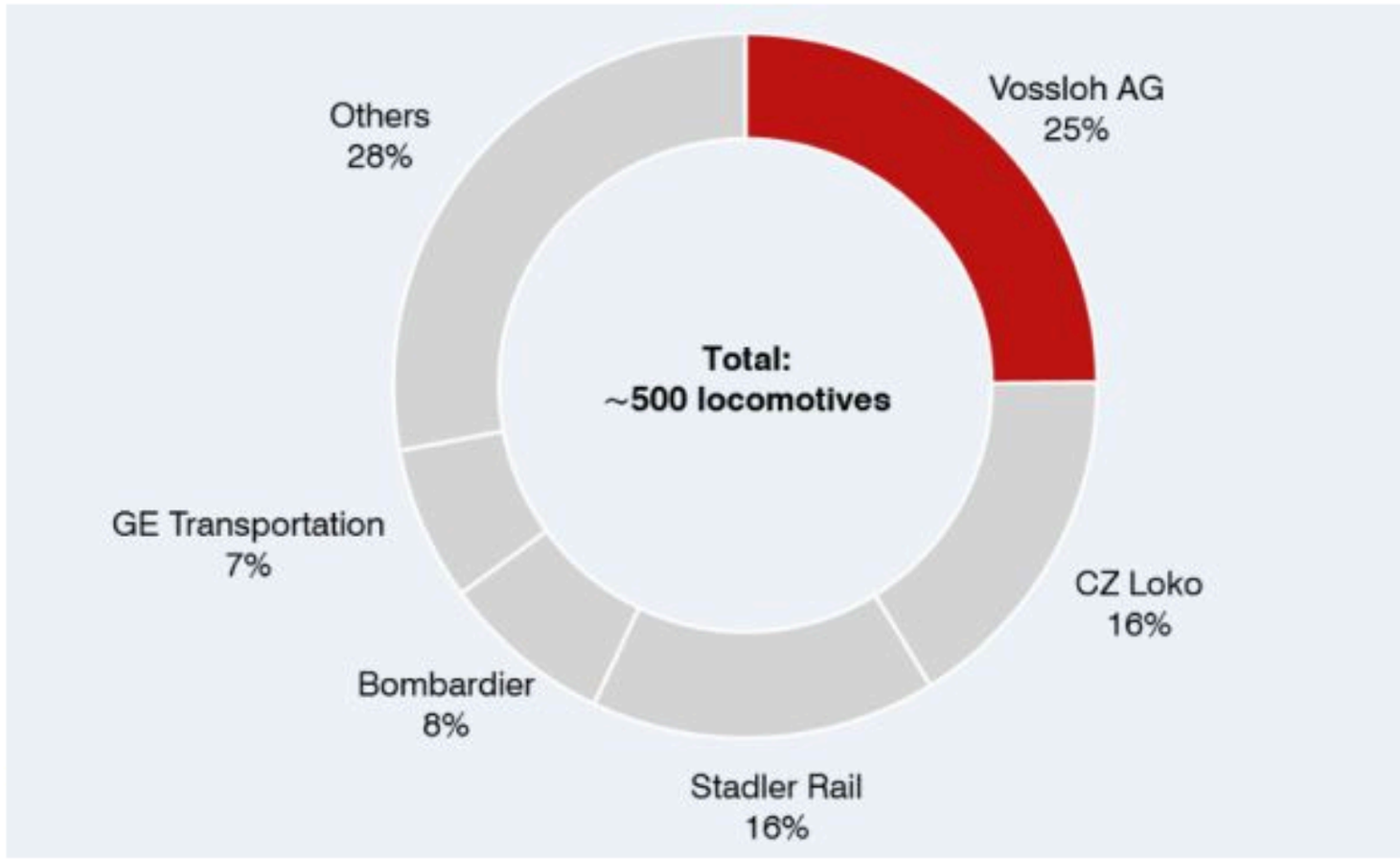
No entry ?



Examples of CRRC Exports in 2016 and Export Projections until 2025 (€ Million).

Chinese entry into European locomotive business is no surprise

THE Chinese market entry into Europe by purchasing their own production facility from Vossloh in Kiel, Germany, is not a surprise, but – measured by the expectations of both the Europeans and the Chinese – rather overdue.



European diesel locomotive market in 2014-2018 in units. © SCI Verkehr

In April 2014, the International Railway Journal reported that China Rail Corporation signed agreements with Rail Authorities in Russia, Belarus, Mongolia, Kazakhstan, Germany, and Poland, to deepen bilateral China-Europe collaboration on provision of intermodal rail freight services whose target is to connect 27 Chinese industrial cities with 28 destinations in Europe through OBOR, "One Belt and One Road" investment initiative.

e 9: Major Makers of Rail Vehicles by Revenue for Sales of Rail Vehicles (Billion US $)
Source: Statista 2017

Non-Dynamic Antitrust Policy: Another Revival of Antitrust Populism

- **Big-is-good reactions**
  - « European champions » needed - « Airbus of the rail »
  - February 2019, Franco-German 14-point Manifesto for a « European industrial policy » including, point 8, an discretionary political intervention by which the European Council can appeal merger decisions of the European Commission
  - July 2019, French-German-Polish ministers submit proposals for « big mergers » in order to allow for « Global Champions »

- **Antitrust policy for industrial policy purposes**
  - Numerous calls for less interventionist competition policy in so-called « strategic sectors »
  - Not economic arguments - political arguments with discretion

- **Antitrust policy for National/European champions….but not for tech champions ?**
  - Irony of calling for bigness in some industrial sectors and to blame bigness
  - Scale and scope economies make sense in both instances, no rationale to delegitimize them in the digital sector with increased network effects

Antitrust Fraught With Political Discretion

- Popular beliefs followed by politicians and regulators
  - Big-is-bad motto against tech companies
  - Big-is-good motto against foreign entrant companies

Antitrust Insufficiently Dynamic

- Antitrust as knowledge discovery process
  - An evolutionary / Hayekian perspective on competition would allow for information-gathering and solving coordination problems

- Neo-liberal paradigm of zero marginal profit unfit:
  - What about innovation/investments ?
  - What about unpredictable losses ? See Covid-19

Antitrust Excessively Precautionary

- **EU Precautionary Principle has already entered Antitrust**
  - Absent full knowledge, absent actual harm, no reason not to adopt ex ante regulation in order to prevent potential risks
  - Ex ante regulation (interim measures & definitive measures)
  - Reversed burden of proof: companies must evidence innocuous behaviors
  - Proposed in Furman Report & Cremer Report !

Alternatives to the balance of harms approach considered by the Panel

3.101 The principal alternative considered by the Panel has been the introduction of a legal presumption against acquisitions by large digital companies, with the burden placed on parties involved to provide proof that the merger will not be anti-competitive.

We propose that competition law should not try to work with the error cost framework case by case, but rather should try to translate general insights in error costs into legal tests. For EU competition law, as for US antitrust law, the specificities of many digital markets have arguably changed the balance of error cost and implementation costs, such that some modifications of the established tests, including the allocation of the burden of proof and the definition of the standard of proof, may be called for. In particular, in the context of highly

The error cost framework. We propose that competition law should not try to work with the error cost framework on a case by case basis. Rather, competition law should try to translate general insights about error costs into legal tests. The specific characteristics of many digital markets have arguably changed the balance of error cost and implementation costs, such that some modifications of the established tests, including allocation of the burden of proof and definition of the standard of proof, may be called for. In particular, in the context of highly concentrated markets characterised by strong network effects and high barriers to entry (i.e. not easily corrected by markets themselves), one may want to **err on the side of disallowing potentially anti-competitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct.** This may be true especially where dominant platforms try to expand into neighbouring markets, thereby growing into digital ecosystems, which become ever more difficult for users to leave. In

October 2019:

« Interim measures are warranted to prevent **serious and irreparable damage to competition** from occurring in certain markets for systems-on-a-chip for TV set-top boxes and modems »

Towards a reversed burden of proof for tech companies?

Vestager considers shifting burden of proof for big tech

Emily Craig
31 October 2019

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EU Precautionary antitrust ?

European Parliament

BG ES CS DA DE ET EL EN FR GA HR IT LV LT HU MT NL PL PT RO SK SL FI SV

Parliamentary questions

5k 15k

5 July 2017

E-004559-17

Question for written answer E-004559-17
to the Commission
Rule 130
Ramón Luis Valcárcel Siso (PPE)

Subject: Applying precautionary measures in antitrust cases

Answer in writing

The Commission has fined Google EUR 2.424 billion for violating competition rules in the online search engine market. The sanction is the result of an investigation that has been going on for more than seven years.

The decision could not be reached until the end of the investigation. However, companies affected by the unfair practices identified have reported that their business was severely damaged as a result of those practices during the years that DG Competition took to come to a verdict.

In the face of this situation, Commissioner Vestager has suggested that temporary measures may be introduced to oblige companies being investigated in antitrust cases to cease unfair practices even before those practices have been proven to exist.

The aim of those measures would be to have DG Competition respond to any sign of unfair practices in such a way that those affected by the practices would not have to wait the several years that it usually takes to close investigations of that type. However, the type of signs that could warrant introducing those measures has not yet been established, nor what type of measures they would be. Could the Commissioner provide more detailed information on the proposal?

The emergence of precautionary antitrust…

European Parliament

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Parliamentary questions 7k 18k

21 September 2017 E-004559/2017(ASW)

Answer given by Ms Vestager on behalf of the Commission

Question reference: E-004559/2017

The Commission already has the power to impose so-called interim measures. Such measures ensure that whilst an investigation is being carried out, no serious and irreparable damage is caused to competition that could not be remedied at the conclusion of the Commission procedure.

The power of the Commission to impose interim measures is set out in Article 8 of Council Regulation (EC) No 1/2003[(1)]. This article codifies the two conditions outlined by the Court of Justice of the European Union in its case law on interim measures[(2)]. These two conditions are cumulative:

a) There must be a prima facie finding of an infringement; and

b) There must be an urgent need for protective measures due to the risk of serious and irreparable harm to competition.

The Commission recognises that the speed and timely nature of an intervention, if necessary, may be crucial in antitrust cases. For this reason, the Commission carefully analyses in each case whether the imposition of interim measures is appropriate. This analysis is based on Article 8 of Council Regulation (EC) No 1/2003, as well as on the case law of the Court of Justice on interim measures.

In addition, the Commission is particularly attentive to lessons that can be drawn from national competition authorities in the European Competition Network as regards the use of interim measures. The Commission will not hesitate to decide on interim measures in suitable cases.

EU citizens and businesses that have suffered damages as a consequence of an infringement of EU antitrust rules have a right to full compensation. Most Member States have by now implemented Directive 2014/104/EU on Antitrust Damages Actions[(3)] into their national systems.

(1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 4.1.2003, p. 1.

(2) Case 792/79R, Camera Care v. Commission, Case T-44/90, La Cinq v Commission, Case T-184/01R, IMS Health Inc. v Commission.

(3) Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

Antitrust Insufficiently Innovation-Based

- Precautionary antitrust underpins EU Competition
- Precautionary antitrust looms US Antitrust
- Precautionary principle is oxymoron to innovation principle
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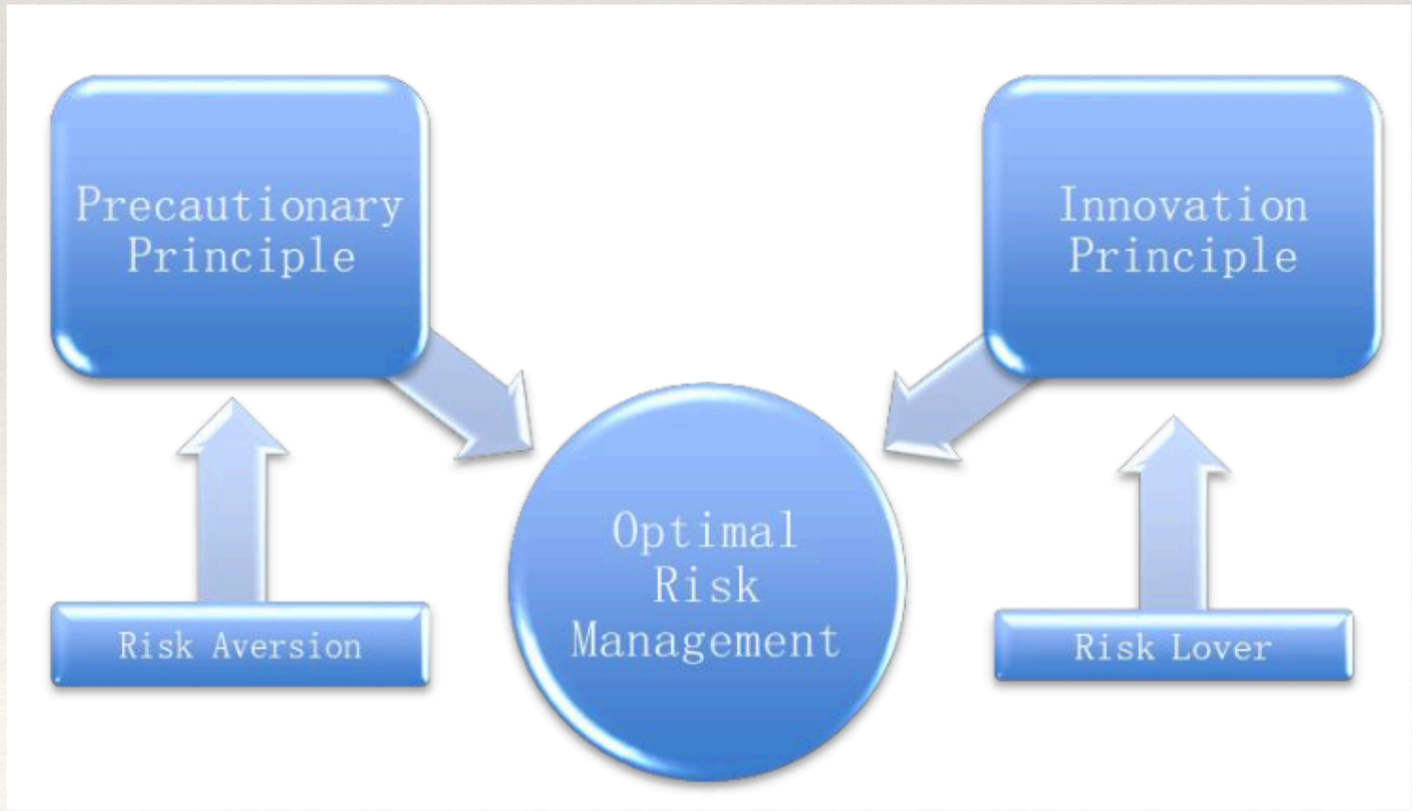

Tech, trade, and many other things…
How Antitrust Should Foster Innovation and Competitiveness

- **Recommendations from Reports to be reconsidered**
  - Categorisation of tech companies as different from other companies is flawed and lay down an arbitrary unequal footing
  - Reversed burden of proof is dangerous
  - Ex ante regulation is hasty and against antitrust's essence

- **New recommendations to be laid down**
  - Rule of reason generalized
  - Evidence-based antitrust
  - Economic efficiency core to antitrust (allocative efficiency = consumer welfare standard ; dynamic efficiency = innovation)
  - Innovation principle entails consideration for risk-loving arguments from defendants
  - Experts' role reinforced and insulated from politics
  - Regulators more independent from party-politics (see DG. Comp)

Conclusion

- **Debate is not about strict / lax antitrust enforcement**

- **Debate is about how to foster competition internally in order to render possible competitiveness externally**

- **Antitrust has a role to play through innovation**

- **Innovation-based antitrust can arise through a clear framework:**
  - *Avoid antitrust populism*
  - *Avoid precautionary antitrust*
  - *Embrace dynamic antitrust with a rule of reason*
  - *Use trade policy to redress unfair competition not antitrust*
  - *Use data protection to redress abusive use of data, not antitrust*

Thank you !

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