STRATEGIC FIRM-AUTHORITY INTERACTION IN ANTITRUST, MERGER CONTROL AND REGULATION

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PROTECTING ANTITRUST AGENCIES FROM SPECIAL INTEREST INFLUENCES: LESSONS FROM THE FRENCH CASE

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Introduction

- Antitrust laws and policy are a constraint on firms strategies, especially when firms have significant market power;
- The value at stake may be high, it is thus natural for the firms managers to think of using some influence on the policymakers.
  - At the stage of the design of the rules
  - In the implementation of the existing rules and policies

- 1. Why and how antitrust agencies need to be protected from special interest influences ?
- 2. Lobbying actions on antitrust issues in France
- 3. Remaining loopholes in the French antitrust system
- 4. Suggestions for further reform

1. Why and how antitrust agencies need to be protected from special interest influences ?

- The answer to the question **why** is rather obvious assuming that antitrust policy has an objective of increasing economic welfare
  - If special interests succeed in obtaining more lenient decisions toward themselves, persistence of inefficiencies which could have been cured
  - Unequal treatment of firms undermines the whole institution and the credibility of antitrust policy, generating further incentives to rent-seeking activities and regulatory capture

- Although lobbying activities might sometimes produce efficient outcomes, for example when they provide more accurate information about the functioning of competition in a given market (it might help the authority to make a better judgment in a merger case for instance).
- But over the long run, if firms implement lobbying strategies, it must be because they succeed at least part of the times. Is it worthwhile to let them think they have a chance to succeed in order to have some revelation of information ?

- The answer to the question **how** comes from the modern economic literature on governance and regulation.
- From Maskin and Tirole (2004; see also Tirole, 2007) we know that the type of questions raised by antitrust laws and policy should be dealt with by an independent agency and not by the politicians.

- One can even go a step further and argue that among the non-market forms of enforcement of socially desirable outcomes antitrust must be less close to the government than is regulation.

- Following Shleifer (2005), one can assess the circumstances under which a social objective can be enforced.
  - Socially desirable objectives can be enforced by four kinds of institutions: market discipline, private litigation, public enforcement through regulation, and state ownership.

- Shleifer (continuation)
  - There is always a trade-off between the social costs of the disorder of markets (private expropriation) and the social costs of state expropriation (dictatorship).
  - Intermediate solutions between pure market and pure state control are private litigation and regulation. Shleifer shows how the different strategies might be more or less costly in different institutional environments

- One of the conclusions is that, in developed countries, where the judicial system is relatively well insulated from special interests « *courts – especially specialised courts – are becoming an increasingly attractive alternative to regulation* » (Shleifer, p. 449).

- It happens that antitrust does exist in the first place because the market discipline does not solve, or not quickly enough, the inefficiencies resulting from monopoly power (at least the one which does not contribute to innovation and growth).
- But the optimal solution is certainly not in the direction of state intervention. Private litigation, or private enforcement of public statutes , possibly with a minor role given to an independent public agency can minimize the social cost of the enforcement of socially desirable outcomes.

- In the field of Law studies, some authors like Gal (2006) have also suggested to use institutional mechanisms to insulate antitrust authorities from political influences (and through them from private interest influences):
  - Autonomous agency
  - Independent budget
  - Legal limitations of discretion
  - Transparency of decisions
  - Criminalization of antitrust proceedings

2. Lobbying actions on antitrust issues in France

- **An empirical survey** :
  - in 2004 an empirical survey was designed by a team of lawyers and economists (see Bougette and al.) and sent to nearly 100 of the largest French companies;
  - 29 questions were asked to the management of these companies, about the relationship between their strategies and competition policy, among which 3 questions were directly targeted at lobbying issues;
  - 61 companies sent back full answers to the questionnaires (average number of employees: 56 000). A wide exploitation of the questionnaires is given in Bougette and al.

- Several questions were focused on lobbying issues:
  - Three questions were dealing directly with lobbying (questions 11, 14 and 21);
  - A few others were indirectly linked to lobbying problems.

- Relevant results:
  - Despite the very straightforward and confidential aspects of question 11, 62% of the firms admitted practicing lobbying activities
  - When the replies are linked with other questions, one can notice that the percentage rises to 79% for the companies that declare to be very knowledgeable of the European and French decisions in antitrust.

- When asked if firms are treated equally by the authorities, only 42% answer positively.
- We checked the differences in the replies from firms that use lobbying and those which do not implement lobbying activities.
- The result are interesting:
  - The companies active in lobbying have 45% of positive answers
  - The firms that do not use lobbying have only 35% of positive answers.

- Two possible interpretations:
  - Firms that do not use lobbying may overestimate its outcome; while firms which use it are conscious of the high chances of failure;
  - Firms which use lobbying deliberately undervalue the chances of success.

- Another related topic is whether the firms would prefer to have their case examined in France or at Brussels.
  - 38% show a preference for France and 28% for the European authority (this result may have several explanations: better understanding of the French laws, business centered in France, but also a better way to express national interests).

- The firms which do not use lobbying are strictly indifferent on average
- The firms which have lobbying activities show a more significant preference for a treatment of the case in France (49% against 28%).

- **Three interesting cases**:
  - The lobbying game between **Coca-Cola/Pepsico about the acquisition of Orangina**
    - Discussed in the medias (see the magazine Capital, novembre 1998, p. 34)
    - Lobbying from both sides (a kind of prisoners' dilemma), the ministry of the Economy finally following the opinion of the Conseil de la concurrence (Competition council).

- **The French beer market**: (see J. Sutton, 1991).
  - First the government agrees on the development of a dominant player BSN (now Danone) which builds Kronenbourg by acquiring a series of breweries.
  - In a second stage, the government favors the development of a second large player Sogebra (Heineken).
  - When Sogebra wants to buy Fisher in 1996, the Competition council expresses a negative opinion, but the ministry agrees, with minor remedies (sales of a few wholesalers).

- Beer (continuation)
  - Finally, during the years 1996 to 2005: acceptation of a wide process of vertical integration (at the wholesale level) by Kronenbourg and Sogebra.
  - Strong actions of lobbying involving threats on employment, while the last actions of integration are disputed by a third competitor Interbrew, now Inbev.

- **Acquisition of Jeppesen by Boeing**:
  - Jeppesen: a firm providing services for airlines companies (travel maps, etc…), acquired by Boeing in 2001.
  - Strong lobbying by Airbus at the ministry level
  - Favorable opinion from the Competition Council
  - Final agreement accompanied by minor behavioral remedies.

- All the previous examples are in the field of merger control
- However it is also true that some firms have lobbying activities in order to get exemptions or favorable treatments in the fields of collusion or abuse of dominant position.
- In the past there are examples of terminated actions against cartels (now less true ?)
- Finally, it is difficult to interpret the relatively mild outcome of several actions against former public monopolies without thinking of preferred treatment: La Poste is a recent example.

3. Remaining loopholes in the French antitrust system

- **General problem with the French economic institutions**:
  - Transparency international (see Auriol, 2007): France is not doing well compared to other OECD countries; particular problems with public procurement procedures
  - Politically connected firms (Faccio 2006, Bertrand et al.):
    - France appears to be one the countries in the world where a significant percentage of firms are politically connected

- 11% of firms publicly traded in the stock exchange over the period 1988-2002 are managed by a former high level public servant
- Since the firms in question are among the most important, one can notice that they represent 63% of the total financial assets traded in the stock exchange over the period
- The percentage of assets controlled by former ENA students has raised from less than 30% in 1993 to more than 50% in 2002.

- **Regulation is still perceived as very attractive**
  - A majority of politicians (both right and left) seems to believe that regulation of economic activities is the only way to obtain some socially desirable outcomes:

- « Titre IV » of the antitrust laws on the relationships between producers and resalers (augmented by loi Galland, and now Dutreil-Jacob). Designed for protecting small retail business. Requires transparency of prices, non-discrimination. Resale with a loss forbidden. Many perverse effects: lessened competition.
- Difficulties in deregulating former public monopolies (energy, telecommunications, post-office, airlines, railways)

- **Merger control**:
  - Two bodies: DGCCRF, a branch of the Ministry of the Economy and Conseil de la concurrence, an independent agency.
  - The Council is only consulted for a free opinion that the ministry can follow or not.
    - Several examples of divergence (3M/Spontex; Heinken/Fisher; Caillebaut/Barry).

- Now, a very strong level of expertise has been developed at the DGCCRF and the Council is less and less consulted
- It may happen that it does not make a real difference, however the feeling might be that decisions are often politically oriented.These possible interpretations undermine the whole system.

- According Cot and De la Laurencie (2003)
  - « *The notifying companies […] target the summit of the hierachy and go and see directly the Ministry cabinet. Taking into account the political aspects of the final decision, this behavior cannot appear as deviant or choking* »… « *However these interventions are not necessarily very successful* ». (p. 406)

- **New instruments of competition policy**:
  - Leniency in cartel and collusion cases
  - Settlements in order to shorten the antitrust procedures
- Positive effects:
  - Reduces the costs of conflicts, both for the antitrust authority and for the firms
  - Scarce resources of the authority focused on more serious cases

- But some risks of special interest interference in the bargaining process between the firms and the authority:
  - In a case of settlement, the firm which benefitted so far of the better treatment is former public monopoly La Poste (fine reduced by 90% by the Competition Council while the ministry was asking for a reduction of 40% to 50%).

4. Suggestions for further reform

- Since the 1980s, long move from administered prices and all sorts of regulations to a modern market economy
- One can measure the progress accomplished
- But further reforms away from regulation would be welcome

- 1986 has been the time of an important change in the French antitrust laws, especially because an independent agency was created, « le Conseil de la concurrence ».
- Notice that the group of experts who contributed to the design of the new institutions had not dared to suggest the creation of an entirely independent body. Fortunately, the ministry himself removed the veto right left to the governement over the decisions of the Competition council.
- However, the power of the government remained for merger control

- Hoj and Wise (2006):
  - On one side aknowledge the improvement in the French system:
  - « *Now the legal system of antitrust in France is functioning well, although one could have thought at the beginning that its enforcement was not very active. The situation has considerably improved at the end of the 90s* »
  - « *France is not far from the best practive concerning the reform of competition policy* »

- But on the other side suggest that things could still be significantly improved:
  - « *All the studies and international comparisons suggest that a reinforcement of the intensity of competition would permit to increase significantly the economic performances* »
  - « *The public policy should increase the weight of consumer welfare as opposed to special interests, relatively limited but still very active* ».

- Owing to the risks of lobbying and political influences remaining in the institutions of antitrust in France, some reforms may still be welcome in the direction suggested by Shleifer and Gal (see section 1).
- This is true even if the current system is more credible and reliable than ever.
- The risk of misinterpretations of some decisions is too strong to be without negative effects on the performance of the whole institution over the long run.

- Removal of the regulations contained in the antitrust laws and which takes a large part of the resources of DGCCRF
- Separation of the regulation activities and competition activities of the DGCCRF
- Reinforced independence of the Conseil de la concurrence

- Merger control by the Conseil (possibly with a veto by the ministry)

[for similar suggestions on the four previous points, see also see H?j and Wise, OECD, 2006]

- Progressive institutional change towards an enforcement of the rules by the courts

Conclusion

- The social costs of the remaining loopholes in the antitrust policy might be high:
  - Inefficiencies that could be reduced: difficult to assess in terms of welfare, but could be high since the firms which have a chance to succeed in their lobbying activities are the biggest ones (the ones that have a heavy weight in consumer welfare).
  - Lack of credibility of the entire institution

- According to some recent work, half of the gap of GNP per head between the USA and Europe could come from a the relative forces of competition. Since France is not particularly doing well in this respect compared to its neighbours one can evaluate the gains in welfare which may depend on an improvement in competition policy.

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