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# KEYNOTE ADDRESS

## Towards a new "agile competition law" paradigm

## Speaking Points included

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# Towards a new ‘agile competition law’ paradigm


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**Personal views only – do not represent the views of the UK CAT**

# The opening of competition law

- The 'Consumer Welfare' Paradigm as an Attempt at Substantive Global Convergence of Competition Law
- Opening the ‘consumer welfare’ paradigm
  - The ‘expansive consumer welfare’ standard
  - Reasonable competition conduct standard
  - Protection of competition standard
- Towards a dissolution of the ‘consumer welfare paradigm’?
    - Labour and buyer restrictions of competition
      - Restrictions of competition in labour markets as an independent concern for competition law? (e.g. wage markdowns)
      - Do the interests of labour and consumers always align? Addressing conflicts
    - Protecting digital ecosystem complementors?
    - At which level should ‘competition’ be protected?

# New points of tension

- Competition Law and the Sustainability Agenda
  - Social sustainability
  - Environmental sustainability
- Competition Law and Innovation
  - The level of innovation
  - Varieties and Direction of innovation
- Competition Law, Industrial Policy and Growth

# Industrial Policy: (Techno)nationalism v. (Techno)globalism

| | Traditional Techno-nationalism | New Techno-nationalism | Techno-Globalism |
|---|---|---|---|
| **Dominant logic** | Mainly developmental purpose | Mainly national security logic and domination of global economy | Mainly pursuing Global Sustainable Development Goals (SDGs), such as green transition and sustainable development |
| **Strategic intent** | Strengthening national competitiveness of domestic industries | Weaken foreign companies; competitiveness and access to the domestic or foreign markets | Strengthening global competitiveness |
| **Type of interaction** | Possibility of win-win game, although asymmetrical distribution of benefits | Zero-sum or win-lose game | Win-Win game with more or less symmetrical distribution of benefits |
| **Technology & Innovation diffusion** | Limited global diffusion of technological opportunities and innovation to conform to national developmental purposes | Restricted global diffusion of technological opportunities and innovation to conform to geoeconomic and geopolitical interests | Global diffusion of technological opportunities and innovation to enhance the achievement of SDGs |
| **Application** | Territorial | Extra-territorial | Territorial, Extra-territorial |
| **Policy areas** | Key manufacturing industries | A more expansive list of strategic industries | Horizontal application |
| **Selectivity of interventions** | Sectors, Industries | Firms, Sectors, Industries | Those satisfying the SDGs goals |

*Source*: Petros Boulieris , Bruno Carballa-Smichowski , Maria Niki Fourka and Ioannis Lianos, Competition Law and Industrial Policy: A Computational Approach (2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5183806

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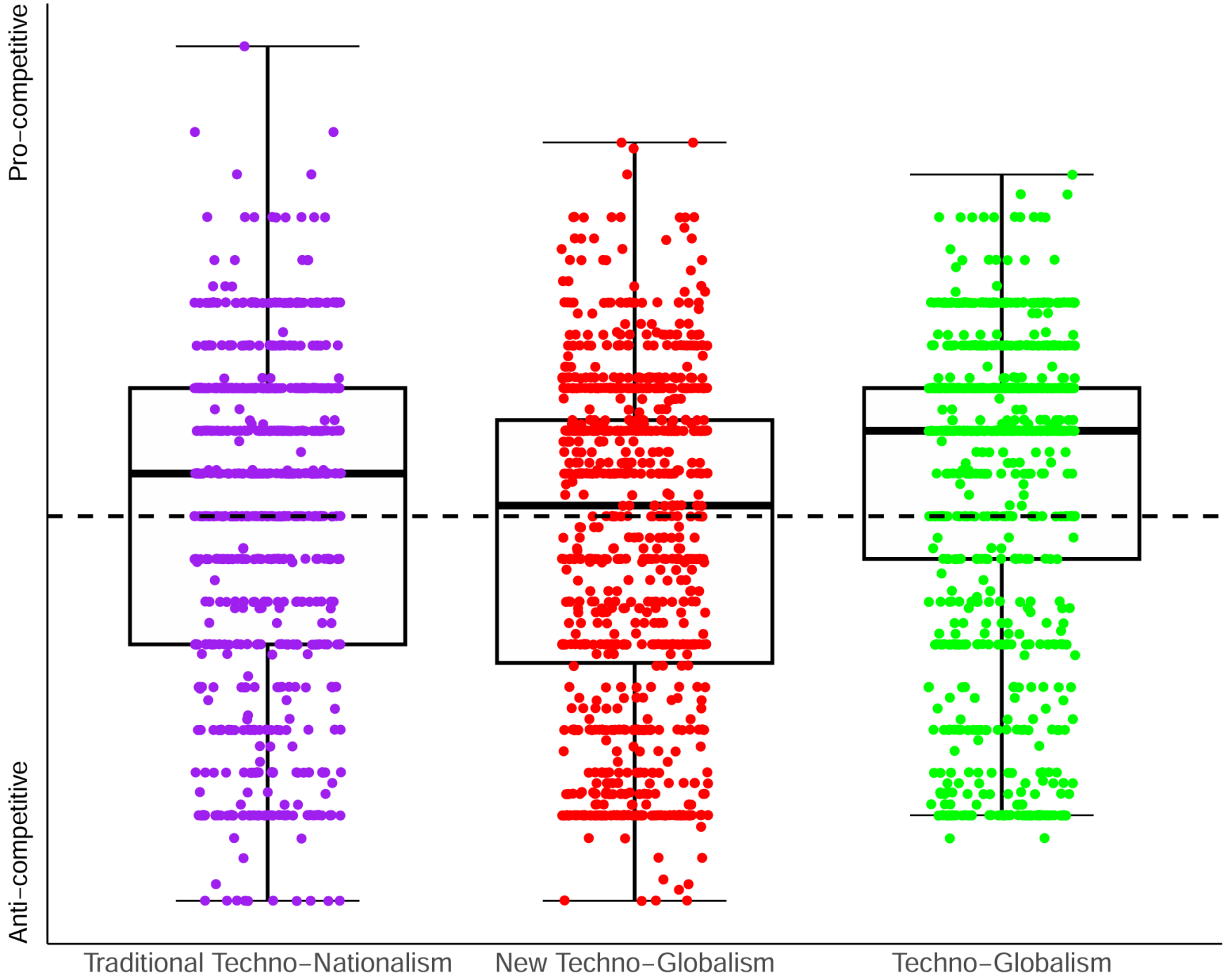

# The Complexity of Digital Competition Law as an Illustration

**'Enterpreneurial State' considerations**
- Scientific progress
- Dynamic efficiency and increase of the total factor productivity
- Increased incentives to invest in socially valuable technological innovations
- Industrial policy

**Sovereignty/Security/Polyarchy**
- Digital Sovereignty
- Systemic Resilience: Reduce the Digital Divide
- Pluralism

**Digital Competition Law: Managing externalities**

**Broader public interest goals**
- Fair access to technology & ensuring a level playing field
- Fair remuneration of the contribution of ecosystem participants & stakeholders
- Sustainable Development Goals

**'Core' Competition harms**
- Affordable prices and Larger Output
- Higher Quality
- Consumer Choice & Variety
- Equality of competitive opportunity
- Competitive Market Structures
- Innovation
- Privacy?
- Sustainability & Resilience?

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# From convergence to interoperability: the development of an agile competition law system

- Responsive competition law and the social contract(s)
- Agile Competition Law Systems
  - Accepting institutional differentiation and bespoke competition tools
  - Beyond the competition goals debate
- Implications for the global governance of competition law
  - The futile quest for convergence
  - ‘Semantic interoperability’ between competition law systems
  - Establishing New Forms of Global Cooperation


**Keynote speech UNCTAD**

Thank you, Chair.

It is both an honour and a deeply personal moment for me to deliver this keynote address today. Nearly twenty years ago, one of my first academic publications explored 'The Contribution of the UN to the Global Governance of Competition Law'. Standing here today feels like coming full circle. My heartfelt thanks to Teresa Moreira and the UNCTAD team for this opportunity.

Let me start by highlighting the extraordinary evolution we have witnessed in global competition law, the last five decades. At the mid-1970s, only nine jurisdictions worldwide had competition law. Today, in 2025, more than 130 jurisdictions have adopted and actively implement competition law. This proliferation sets important challenges for the global governance of competition law, by which concept I refer to the management of the risks generated by the increased interconnectedness of cross-border enforcement of competition law and business activity having global scale or implications.

The primary risk we face is 'cross-jurisdictional disagreement' – by which I mean the situation in which different competition authorities may reach

conflicting conclusions about the same business conduct. These disagreements, although natural, may affect the effectiveness of competition law enforcement for consumers, as it is increasingly more difficult for competition law regimes to design remedies that consider the negative externalities imposed by the specific anticompetitive conduct only on their own consumers, without this having spillover effects in other jurisdictions.

Despite significant efforts within UNCTAD, including the development of the UN Set and the New International Economic Order programme - whose fiftieth anniversary we celebrated last year - we still lack an effective global competition law regime. I will not engage here in the normative question of whether a global substantive competition regime is normatively desirable. The global governance of distinct competition law regimes is a different issue altogether.


Since the mid-2000s, the primary response to the costs of 'cross-jurisdictional disagreement' has been pursuing 'policy convergence'—reducing conflicts by harmonizing approaches across jurisdictions to ensure that cross-jurisdictional spillovers are not negative. For three decades, the convergence point has been the economics-based model centered on the "consumer welfare standard" - maximizing consumer

surplus, the net benefit consumers receive from purchasing products or services.

This learned audience requires no introduction to the consumer welfare standard. Its key characteristic is treating final consumers as the ultimate beneficiaries of market competition and competition law, focusing on consumer welfare in the specific market analyzed rather than economy-wide. While it permits both static (short-run) and dynamic (long-run) welfare considerations, trade-offs between static price effects and dynamic innovation effects remain notoriously difficult and rarely explicitly addressed.

**I will not challenge here the substance of the 'consumer welfare' standard or its underlying equilibrium economics. I will simply argue that the 'consumer welfare' paradigm has expanded so significantly in recent years that it barely resembles what I described above.**

First, consider Carl Shapiro and Fiona Scott Morton's 'expansive consumer welfare standard' - one that looks beyond consumers to include trading partners' welfare. When we analyse firm behavior, we ask not just "How does this affect consumers?" but also "How does this affect the workers, suppliers, and business customers who deal with this firm?" It remains consumer welfare at its core, but expanded to capture additional competitive dimensions

Second, Steven Salop has proposed the 'reasonable competitive conduct standard'. For dominant firms in vertically related markets, Salop argues we should explicitly consider counterparty welfare - workers, small suppliers, downstream customers. The key point: under his standard, harm to trading partners should not be dismissed simply because consumers elsewhere might benefit. This represents a fundamental shift in weighing competing interests.

This approach brings the standard closer to the 'protection of (polycentric) competition standard', which evaluates firm conduct through its impact on competition and the competitive process rather than consumer welfare. Under this standard, conduct restricting the competitive process is undesirable regardless of consumer impact. This

rests on the premise that consumers and the public benefit from vibrant competitive processes; thus, preserving competition is essential to prevent prolonged departures from optimal outcomes. The standard recognizes that reduced market competition and increased concentration can adversely affect not only consumers but society as a whole.

**To these adaptations, I would add competition law's expansion to target not just selling market power but also buyer power and monopsony - developments that progressively undermine the unity of the 'consumer welfare' standard.**

Let me illustrate this evolution with concrete examples from competition law interventions focusing on labour markets. Competition authorities - initially in the United States but now expanding globally - are increasingly focusing on labour market power. This encompasses not only situations of monopsony but rather what we might characterize as systematic imbalances between the relative bargaining strength of firms and workers, resulting in compensation and employment conditions that deviate from workers' marginal productivity.

Recent empirical analysis by Kariel, Schneebacher, and Walker demonstrates that enforcement actions with labour market dimensions have increased sixfold over the past decade, with wage-fixing cartels and no-poach agreements constituting the primary enforcement focus.

The 2023 US Horizontal Merger Guidelines represent a significant shift, explicitly authorising intervention in mergers based solely on labour market effects, and independent of any consumer harm in product markets. This creates interesting analytical possibilities for assessing competitive effects across multiple, potentially uncorrelated markets. European competition law does not exclude this possibility either, though as the Commission acknowledged in its recent merger guidelines consultation, practical experience remains virtually non-existent, and the recent Market Definition Notice conspicuously omits labour market considerations.

Note that the concern here extends beyond economic efficiency and output - as would occur with a monopsony focus alone - to include purely distributive consequences from bargaining imbalances, such as surplus shifting from workers to firms.

**But what if worker and consumer interests diverge? What about trade-offs?**

This assumes we can focus on intermediate competition levels without necessarily linking to final consumer impact.

Here things are not that clear. Although the EU Priority Guidance on Art. 102 notes that regarding 'identification of likely consumer harm', the Commission will address anti-competitive foreclosure at intermediate or final consumer levels, or both, indicating possible focus on an intermediate market impact alone (a labour market), and AG Emiliou in *Tondela* (Case C-133/24) suggests no poach agreements can restrict competition by object when labour markets are harmed through 'suboptimal allocation of human resources', he also mentions that harm to consumers should be evaluated.

Concretely, what happens when firm agreements create wage markdowns in labour markets but enable cost reductions and lower consumer prices? Should such trade-offs be permitted? Who bears the burden of proof to show that labour markdowns will lead to lower consumer prices? The Commission/plaintiff or the defendant?

This issue affects both regimes with an impediment of effective competition standard and also those with broader public interest standards (focusing beyond markdowns to employment losses).

In the recent 2024 Guidelines of the South African Competition Commission regarding employment effects (as a public interest-based ‘theory of harm’ for a merger), it is noted that even if a merger leads to employment reduction, it is possible for the merging parties to save the merger, and produce, bearing the burden of proof, substantive evidence that the merger will lead to lower prices for consumers because of the merged entity’s lower cost base. They also need to show that this lower

cost base can only come about or is materially dependent upon the proposed employment reduction. Could parties make similar arguments when agreeing to wage markdowns in the context of a competition?

Similar concerns arise with exploitative practices by digital platforms orchestrating ecosystems, such as imposing anti-steering obligations on complementors. In *EU Apple/Spotify*, this was framed as exploitative unfair trading conditions. Apple unilaterally imposed anti-steering provisions on complementors in music streaming services. However, these rules were found illegal only after the Commission showed detrimental effects to iOS users, who paid higher subscription fees than on other devices and couldn't choose from various distribution options. Although abusive conduct occurred in the platform-business relationship, the Commission focused on anticompetitive effects on end-users.

These cases raise the question: 'At which level should competition be protected?'

Some may argue at each level is necessary. If yes, then it becomes important to discuss how trade-offs between different 'users' (using EU treaty terminology) protected by competition law might be made, if at all possible.

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**New points of tension have recently emerged beyond those from the openness of the 'consumer welfare' standard.**

Social and environmental sustainability concerns may now be considered, particularly in EU competition law. Some labour effects are integrated into **social sustainability principles** to justify competition restrictions, such as minimum wage protections. Several competition authorities have approved on this basis voluntary agreements promoting living wages for instance in the banana supply chains or other fair trade products (Germany, Belgium, UK, Brazil).

These concerns may be linked to the broader requirements of the social contract prevailing in some jurisdictions with constitutional value principles (such as fundamental socio-economic rights) weighing more and more in competition law hermeneutics.

**Environmental sustainability concerns** may justify competition restrictions through collective and non-use benefits under EU competition law's new horizontal cooperation agreements guidelines. Sustainability also forms part of areas for which the Commission currently seeks in-depth public consultation while preparing new merger guidelines.

In contrast, other jurisdictions like the US may not permit such restrictions. Note recent US DOJ and FTC support for the Texas-led lawsuit against asset managers BlackRock, State Street, and Vanguard, alleging they acquired substantial stockholdings in every significant publicly held US coal producer to influence company policies toward reduced coal production through ESG initiatives. This follows other state attorneys' initiatives against ESG business schemes on antitrust grounds and US Congress' scrutiny of ESG initiatives from a competition policy perspective. This may for instance ultimately impact EU efforts to promote the Green Deal through industry cooperation frameworks.

Similarly, **different approaches exist regarding innovation**. While some take a Schumpeter mark II approach, emphasizing concentrated market structures and large firms' role in promoting innovation, focusing solely on R&D expenses and/or patent numbers, other jurisdictions advance innovation theories of harm considering innovation's variety and consider innovation direction, particularly when socially valuable. Assessing *Dow/Dupont*'s concentration effects on innovation, the Commission explained why crop protection innovation is crucial 'both from farmers' and growers' perspective' (the affected consumers) **and** 'from a public policy perspective' given increased effectiveness and positive impacts on food safety, environmental safety and human health.

This issue has both temporal dimensions - current consumers facing higher prices versus future consumers benefiting from higher innovation - and categorical ones - users on different platform sides, workers, and more broadly citizens. However, claims of incommensurable trade-offs should not obscure the profoundly sensitive 'political' choices required.

Industrial Policy: (Techno)nationalism v. (Techno)globalism

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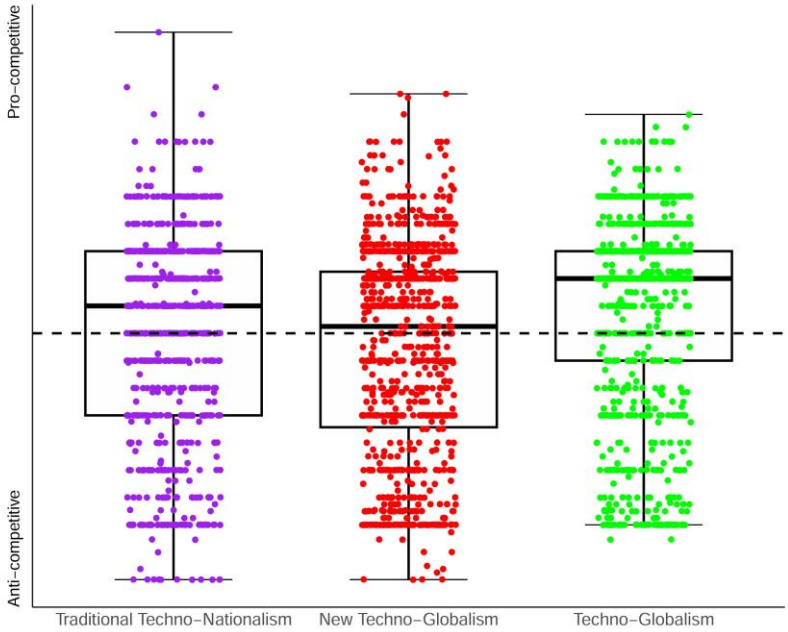
Recent discussions on integrating industrial policy, competitiveness and growth considerations in competition authorities' calculus also raise risks of cross-jurisdictional disagreements, particularly as not all industrial policies are pro-competitive. Empirical research I conducted with other colleagues of over 2,000 industrial policies since 2017 in the NIPO (New Industrial Policy Observatory) database shows industrial policies' differentiated impacts on competition.

Industrial policies fall within three broad categories based on their goals:

- Traditional "techno-nationalist" policy seeks developmental goals like reindustrialization or technology sector expansion.
- New techno-nationalism focuses on national security or global economic supremacy, thus sometimes seeking negative externalities against foreign firms.
- Techno-globalist policies pursue SDG-linked global aims like climate change, strengthening global competitiveness amd focus on technological diffusion to enhance SDG achievement, providing symmetrical benefits to all participants.

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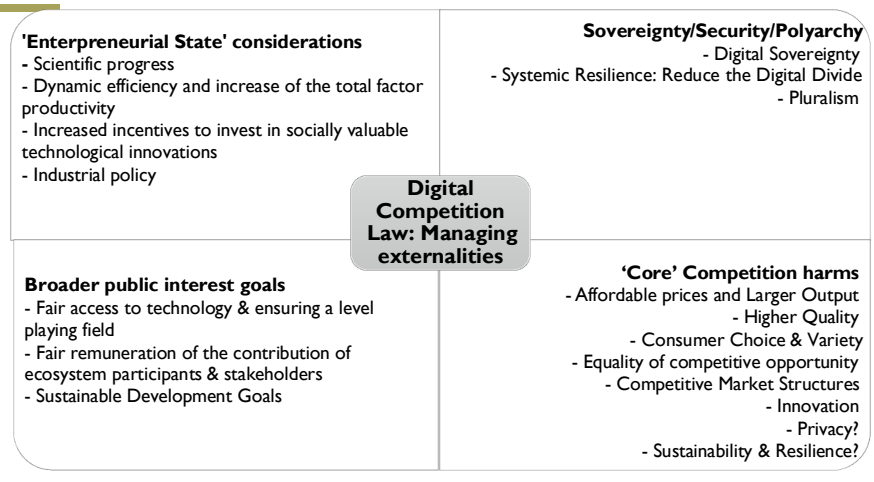
Our research shows techno-globalist policies exhibit mostly pro-competitive profiles primarily due to wider scope and lower entry costs. Results reveal different policies across jurisdictions. [*In China, new techno-nationalist policies predominate (70% of observations). The UK follows predominantly new techno-nationalist policy (54%+ of observations). In the US, traditional techno-nationalist policies are particularly high (38%), close to new techno-nationalist ones (41%). In the EU, techno-globalist policies represent nearly half (48%), followed by new techno-nationalist policies (34%)*].

The Complexity of Digital Competition Law as an Illustration



The increasing complexity of achieving substantive convergence is exemplified by various considerations potentially guiding competition law enforcement and competition-like regulation in digital spaces. If competition law aims to mitigate negative externalities from digital ecosystems orchestrated by powerful platform firms, the social costs/externalities produced vary: some (bottom right quadrant) align with 'core' competition law/antitrust concerns (some marked with question marks due to potential disagreement about their core status in some jurisdictions). While others (remaining quadrant parts) face greater difficulty integrating into consumer welfare/mainstream competition law enforcement and are often pursued by other policies with which competition law must connect or which may serve as useful hermeneutic guidance for enforcing competition law.

**If convergence becomes increasingly difficult due to considerable disagreements about convergence points, what is the future of global competition law governance, assuming we want order rather than chaos in managing 'cross-jurisdictional disagreements'?**

## From convergence to interoperability: the development of an agile competition law system

- Responsive competition law and the social contract(s)
- Agile Competition Law Systems
  - Accepting institutional differentiation and bespoke competition tools
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Re-conceiving global competition law governance should recognize that competition law is increasingly inspired by the responsive regulation model (Ayres & Braithwaite), that is, it adopts graduated enforcement approaches (from simple guidance to sanctions) emphasizing dialogue between competition authorities and stakeholders. Such approaches generate regulatory innovations, sometimes prioritizing cooperation and learning over coercion, although we should not forget that enforcement (coercion) is always valuable as it may serve as a catalyst for cooperation and learning. Governance also needs to allow experimentation and be polycentric, highlighting multiple decision-making centers that foster more resilient and adaptive frameworks.

In today's innovation economy, developing **agile competition law systems** emphasizes flexibility to address rapid technological changes, focusing on broad principles guiding conduct and relying on regulatory learning that allows ongoing adjustments to specific market conditions. This doesn't mean less enforcement but highlights the need for bespoke competition tools (such as sandboxes or new instruments allowing greater market intervention flexibility) beyond the quasi-criminal tort-based competition law framework, which is legally heavy and slow.

Agile competition law should also draw from diverse disciplinary sources than neoclassical price theory, evaluating interactions and feedback loops between actors at different levels (multi-level analysis), acknowledging non-linear processes, and integrating multidimensional performance standards. This polycentric approach contrasts with the prevailing "more economic approach" heavily influenced by neoclassical economics.

Such agile competition law will move the debate beyond the traditional focus on maximizing competition law goals and navigating difficult trade-offs between them - a debate that ignores the different institutional designs prevailing in each jurisdiction. It should not adopt the reductionist approach of maximizing one goal (e.g. wealth maximization), thus losing the ethical pluralism and nuance necessary for dealing with a

complex economy and society. The approach will be solutions-oriented, aiming to ensure productive linkages with other public policies than competition. Participatory policymaking through public consultations and constant stakeholder engagement, particularly with those inadequately represented in political processes due to lobbying, remains crucial.

**What are the implications of this agile competition law for the global governance of competition law?**

First, it demonstrates the futility of pursuing policy convergence as a global governance aim.

Second, it highlights the value of interoperability. Interoperability and convergence are related but distinct concepts. Interoperability refers to different systems' ability to connect and communicate, while convergence implies merging systems into a unified whole. Our discussion shows that integrating different systems requires consensus and understanding that are difficult to achieve, particularly given today's complex economy marked by non-linearity and entropy. Hence, interoperability is the only realistic goal.

Interoperability has typically applied to technical systems but equally suits institutional systems. Just as interoperability organizes inter-system interactions in global private governance of digital ecosystems, it provides value in managing cross-jurisdictional disagreements in global public governance of markets.

This cannot be merely **technical interoperability** – ensuring competition law concepts are understood across legal systems resolving disputes (formal venues like competition authorities, courts, arbitration, or informal interactions between undertakings and stakeholders). It also requires more than **syntactic interoperability** - information transmission between systems. It MUST achieve **semantic interoperability**, enabling different systems to exchange information with unambiguous shared meaning. Semantic interoperability requires

significant effort to agree not on competition law's substance, but on shared operational concepts' meaning, reaching understanding where we agree to disagree.

**More concretely, what does this mean for international cooperation?**

First, achieving semantic interoperability requires enhanced cooperation that cannot be achieved by expanding positive and negative comity doctrines. These superficial responses, developed decades ago to reduce inter-jurisdictional frictions when policy effects were contained within specific jurisdictions, cannot address today's highly interdependent global economy, characterized by cascade and spillover effects.

Second, this calls for new cooperation forms to ensure effective semantic interoperability. These cannot be usual bilateral agreements, regional trade agreements, or global networks like the ICN, which are agency-driven and follow specific choreography. These cannot produce the semantic interoperability levels we need, particularly amid mounting geopolitical tensions.

Our cooperation efforts must engage all actors in the competition law ecosystem beyond usual stakeholders - courts, civil society, academia, entrepreneurship. Cooperation needs greater flexibility with specific purpose vehicles or consortia between like-minded competition authorities addressing pressing common problems, even beyond regional boundaries.

For instance, Eleanor Fox suggested in 2018 a consortium among willing competition authorities to synchronize merger filing processes for mega mergers in emerging jurisdictions. UNCTAD's research partnership with academics exemplifies this broader cooperation conception, as do ASCOLA and OECD recent efforts to promote transparency and disclosure in corporate funding for academic research.

Since 2023, we have worked with global academics and civil society to launch a hackathon developing computational competition law tools using agentic AI for public policy purposes - launching this Fall. A similar

effort addresses holistic frameworks for evaluating competition authorities' work.

These are I believe small but necessary steps to build the agile global competition law system we need for the next fifty years.

Thank you for your attention!