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# How the Digital Economy Challenges the Neoliberal Agenda: Lessons from the Antitrust Policies

David Cayla<sup>1</sup>

## **Abstract:**

Conceived in the 1930s as a way to renew free market liberalism, neoliberal doctrines aim to institute a competitive order that would regulate the market as well as society. Yet, interpretations of how competition should be enforced have varied throughout history. The European Union, with its ordoliberal origins, tends to follow an interventionist approach while the United States, where the Chicago School has gained influence, fears that inadequate public interventions may diminish global efficiency. The digital revolution and the appearance of the Tech Giants introduces a new challenge. Faced with massive increasing returns to scale, the competition authorities initially reduced their interventionism to enjoy more market efficiency. But the emergence of digital platforms and the will to protect personal data from abusive uses pushes them now to adopt a new strategy for more interventions that goes beyond the economic and efficiency issues.

This paper argues that the neoliberal vision is no longer accurate to regulate the digital economy. It shows that the platform economy is not an alternative way to manage the market, but an alternative to the market itself. To face these issues, a completely new conception of public regulation is therefore needed.

**Keywords:** Digital economy, Personal data, Competition policy, Neoliberalism, Ordoliberalism.

**JEL Classification Codes:** B05, K21, L40, M15.

## **1. Introduction**

In his 2018 speech at the World Economic Forum, George Soros warned of the disastrous consequences that could arise from the digital economy if state regulation was not strengthened. Not only do companies in this sector enjoy “exceptional profitability,” but “the fact that they are near-monopoly distributors makes them public utilities and should subject them to more stringent regulations, aimed at preserving competition, innovation, and fair and open universal access.” Because they may engineer addictions and manipulate their users’ attention, “social media companies are inducing people to give up their autonomy,” claimed Soros (Soros 2018).

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This concern about the economic and social consequences of the digital revolution and how to regulate it is not new, but it has increased in recent years, particularly in the academic field. In a remarked monography, Harvard Professor Shoshana Zuboff predicted the advent of a new age of capitalism, “surveillance capitalism,” based on the ability of digital companies to extract and exploit the data created by digital behavior in order to predict and manipulate individual choices. In a reference to Karl Polanyi’s *The Great Transformation* (1944), Zuboff (2019) interrogates the meaning of this new “fictitious commodity”:

Industrial capitalism transformed nature’s raw materials into commodities, and surveillance capitalism lays its claims to the stuff of human nature for a new commodity invention. Now it is human nature that is scraped, torn, and taken for another century’s market project. (Zuboff 2019, 94)

French economist Cédric Durand broadened Zuboff’s criticisms by emphasizing the systemic and political consequences of the digital economy. Durand believes that the nature of capitalism is about to change. Monopolistic digital companies exploit the data created by their captive consumers in the same manner that feudal lords would, in the Middle Ages, take advantage of the fruits of the land cultivated by their serfs. A techno-feudal mode of production based on rivalries between digital fiefs is therefore emerging (Durand 2020).

Zuboff’s and Durand’s criticisms can be seen as responses to a conventional discourse praising the digital revolution. One of the revolution’s main prophets is Google’s Chief Economist Hal Varian. For Varian (2010), the digital revolution is a source of innovation, growth, and individual opportunities. It facilitates informational exchanges and standardization, and therefore eases technological recombination to develop continuous inventions. According to Varian (2010), digital data exploitation also increases global welfare: it allows more personalization, more efficient contracts, accurate advertisements, and continuous improvements. Moreover, with the development of information technologies, the entry cost to access the best technological tools is reduced. The services provided by platform companies help firms collaborate remotely, generating a new kind of companies that Varian (2016) calls “micro-multinationals.”

Today even tiny companies with a handful of employees have access to communication services that only the largest multinationals could afford 20 years ago. (...) These micro-multinationals can operate on a global scale because the cost of computation and communication has fallen dramatically. (Varian 2016)

Thanks to digital innovations, Varian believes that monopolies are no longer an issue. He claimed that the tremendous amount of data collected by the digital giant companies may not harm consumer welfare, as long as free entry is guaranteed: “a perfectly discriminating monopolist can capture all surplus for itself and therefore produce Pareto efficiency output, and competition among perfectly discriminating monopolists will

transfer this surplus to consumers, yielding the same outcome as pure competition.” (Varian 2005, 28-29)

The Varian approach had a strong influence on competition policies. With the rise of intangible capital and the fall of marginal costs, the principle of efficiency favors concentration. As a result, European competition authorities have adapted their doctrine by accepting the monopolistic situation of many firms in the digital economy. However, because social and economic questions raised by the digital economy are not limited to efficiency anymore and now include the issue of democracy, this compromise has come under fire. But how can competition and antitrust policies take these issues into consideration?

This article investigates these questions. The plurality of objectives that competition policy can follow will be discussed first, and the way the digital economy challenges the competition regulation will then be analyzed. Finally, the concluding section explains the reasons why the digital world generates new systems of coordination which substitute to markets and explain why our conceptions of state regulation should be thoroughly rethought.

## **2. The plurality of objectives of the competition policies**

The aims of the public regulation of competition are multiple and varied throughout history.

According to Patrice Bougette, Marc Deschamps, and Frédéric Marty, the 1890 Sherman Act had almost non-economic aims. It was primarily a response to the many letters received by the senator from small oil producers who were upset about the unfair competition they were facing from Standard Oil (Bougette, Deschamps and Marty 2015, 321-322). Clearly, the law was designed to defend neither the interests of consumers nor global welfare. “Neither the economists nor the lawyers of the day lobbied for the Sherman Act as a way of preventing monopolistic pricing,” confirmed Anne Mayhew (Mayhew 1990, 390).

Most economists were first reluctant to accept the antitrust legislation. Even Allyn Young, although he supported the law, admitted that its scope and application needed clarification (Young 1915). The full acceptance of the law took place during the 1930s. Confronted to the National Industrial Recovery Act period of the New Deal, conservative economists of the Chicago School finally began supporting the principle of an interventionist antitrust policy aiming at avoiding excessive market concentration because they considered that it was a lesser evil than state interventionism (Bougette, Deschamps and Marty 2015).

In Europe, the idea that competition must be enforced by the state was developed by economists and legal scholars of the Freiburg school during the same period. Walter

Eucken, Franz Böhm and Hanns Grossmann-Doerth argued that the market needs to be embedded in a “constitutional” framework “to protect the process of competition from distortion, to assure that the benefits of the market were equitably distributed throughout society and to minimize governmental intervention in the economy” (Gerber 1994, 25-26). German neoliberalism, as David Gerber called this school of thought – which is also referred to as ordoliberalism – considers that Nazism had prospered in reaction to a market malfunctioning. Its founders believed that the cartelization of the economy pushed German citizens to turn away from liberalism and ask for more state intervention.

Each had concluded that the lack of an effective, dependable legal framework had led to the economic and political disintegration of Germany. Each believed that the core of the problem had been the inability of the legal system to prevent the creation and misuse of private economic power.” (Gerber 1994, 29-30)

The question of competition regulation became an intense debate among free-market advocates in the 1930s. During the Walter Lippmann Colloquium that took place in Paris in the summer of 1938, two visions were in confrontation. On one side, German economists Wilhelm Röpke and Alexander Rüstow believed that “there is a trend toward concentration which is of a purely economic type” (Reinhoudt and Audier 2018, 124) and that this natural trend makes strict state regulations necessary. As Rüstow explained, “it is not competition that kills competition. It is rather the intellectual and moral weakness of the State that, at first ignorant of and negligent in its duties as policeman of the market, lets competition degenerate” (Reinhoudt and Audier 2018, 124). Following the ordoliberal point of view, Rüstow claimed that the market economy is “based on very specific institutional conditions, created and maintained voluntarily by men, and that it can function without friction and effectively only if a strong and independent State ensures the precise observance of these conditions” (Reinhoudt and Audier 2018, 160).

On the other side, Austrian economists Ludwig von Mises and Friedrich Hayek claimed that “the capitalist system does not constitute a favorable field for the natural development of monopolies” (Reinhoudt and Audier 2018, 121). Furthermore, Mises did not believe that technological progress mechanically induces a trend towards concentration. Monopolies cannot be explained by the “negligence” of the state, he argued, but by its interventionism. Either the state directly favors cartels by imposing regulations that hinder competitive dynamics, or it favors them indirectly by restricting international trade through protectionism. More fundamentally, Mises criticized the “romantic bias” of Rüstow who seemed to long for an economy composed of a multitude of small independent businesses. But, as Mises explained, the danger is not in the monopoly but in its consequences on price market:

A large number of producers in fact have exclusive control of the market (...). But most of them would not be able to increase the price without risking to a considerable decrease in profits due to a fall in their sales. These producers have the monopoly of production and of sale, but they are not in a position to obtain monopoly prices. (Reinhoudt and Audier 2018, 125)

During the 1950s, with the influence of Austrian ideas and under the direction of Aaron Director, the Chicago School changed its perspective to adopt a new approach of competition policies. This “second Chicago School,” as Bougette, Deschamps and Marty (2015) call it, aims at limiting discretionary interventions of courts. Instead of punishing economic behavior such as predatory pricing, price discrimination, and vertical integration, courts should observe the consequences of these practices for consumer welfare and not interfere if they benefit consumers.

	<b>Populist</b>	<b>Ordoliberal</b>	<b>Second Chicago school</b>
<b>Aims</b>	To protect small businesses from the predatory behaviors of monopolists.	To guarantee a fair access to the market.  To create a “market social economy.”	To achieve market efficiency.  To protect the consumer welfare.

*Table 1: Three approaches of competition policies*

Table 1 synthesizes the three approaches of competition policies and their objectives. Born as a law to protect small business, antitrust has evolved into a new approach based on a broader rationale in which public regulation of competition aims to protect not only individual producers but the market itself.

### **3. The digital revolution and its challenges for the regulation of competition**

Although pursuing apparently different goals, the ordoliberal and the Chicago approaches share the same neoliberal framework: they both tend to use state regulation to serve the fairness and the efficiency of the market and to limit discretionary interventionism (Cayla 2021). For this reason, they must not be seen as in total opposition. Rather, they are two ways of arbitrating a welfare tradeoff between global efficiency and the preservation of competition (Williamson 1968). For the Chicago school, market power is acceptable if it favors efficiency without diminishing the consumer welfare, whereas for the Freiburg School the state should strongly limit every attempt of market manipulation even if it could result in less global efficiency, to ensure a fair access to the market to small producers. But there is room for a middle way between these two positions.

In practice, competition policies have evolved in both Europe and the United States. For instance, in the late 1970s, when the Chicago school gained influence, U.S. courts adopted a pro market doctrine based on the efficiency approach. On the European continent, the relative incompleteness of the legal texts establishing competition policy allowed for multiple interpretations (Marty 2014; Gerber 1994); however, the original ordoliberal

doctrine was preserved, leading to different decisions between the European and the American competition authorities (Bradford et al. 2019).

For the last twenty years, the development of the digital economy raised new challenges to competition policies. Cédric Durand and William Milberg (2019) identify four reasons why the digital economy generates structurally more concentration and market power than the non-digital economy.

1. It is based on intellectual property which is legally protected.
2. It rests on network effects that favor natural monopolies.
3. The intangible nature of its main assets creates production cost structures based on high fixed costs and almost zero marginal costs, which advantages the larger firms.
4. The ability to access original data from the users' behaviors help leading companies to extract a "data-driven innovation rent."

As the digital economy emerged, these phenomena were taken as if they were reinforcing the Williamsonian trade-off for less regulation and more efficiency. Under the supervision of commissioner Neelie Kroes, the EU competition policy seemed to move in this direction. But in the 2010s, with Joaquín Almunia and Margrethe Vestager at the helm of the European Competition Commission, another shift took place in the opposite direction and many digital firms were sanctioned for abusing their dominant position or for their ability to evade taxes (Bradford et al. 2019).

What pushed this change is that the European Commission realized that economic efficiency could not be the sole objective of a competition regulation. With the rise of intangible assets, digital company can easily escape national regulation and taxation, which alter the fair functioning of the European Single Market. Besides, defending the consumer welfare cannot be understood from an economic perspective only. As Zuboff (2019) explains, the extraction and use of personal data can run contrary to the principles of preserving individual rights and autonomy. This awareness was behind the EU adoption of the General Data Protection Regulation (GDPR) in 2016, a first step to impose norms to the unregulated practices of the digital firms.

Figure 1 below synthesizes the trade-off between the two conceptions of the neoliberal regulation of competition in the European Union and in the United States. As shown in the figure, the U.S. approach is less interventionist than the EU's since it switched toward a "pro trust antitrust" policy in the late 1970s (Bougette, Deschamps and Marty 2015).

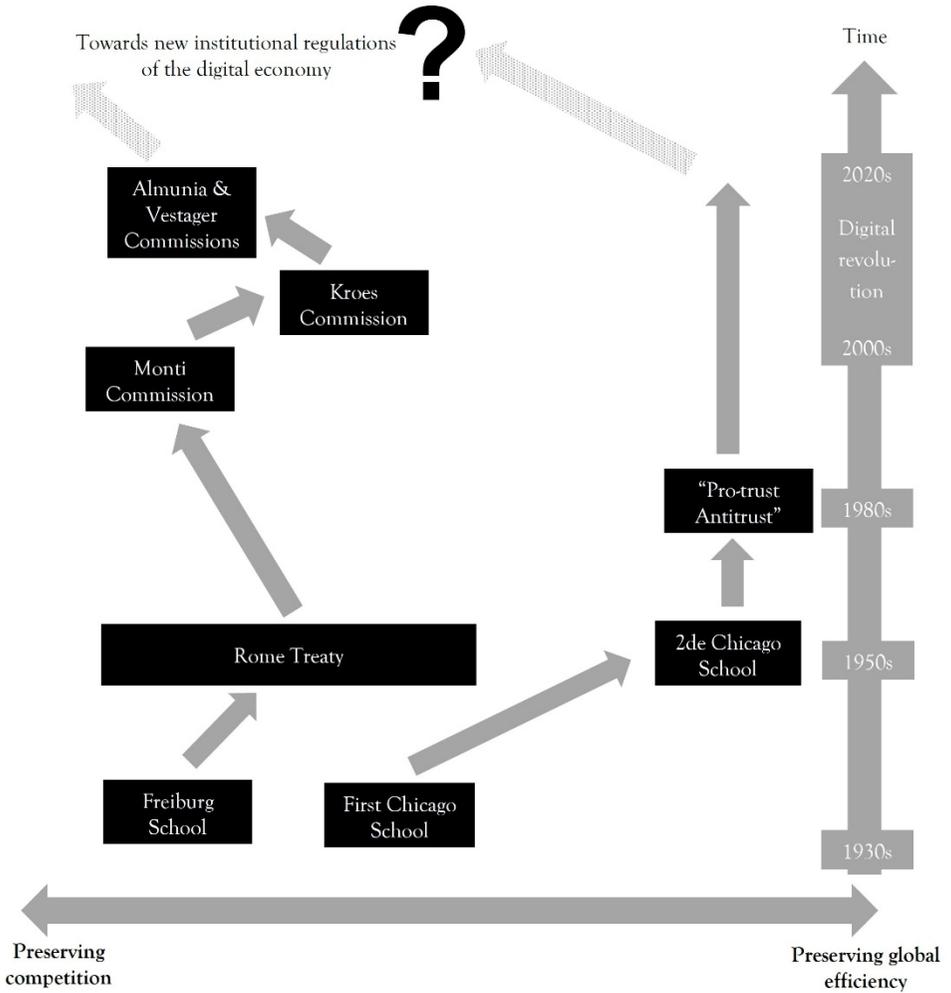


Figure 1: Schematic representation of competition policy changes

#### 4. Beyond neoliberalism

The ability of digital companies to manipulate not only the market but also information and individual behavior, their skill in accessing personal data and combining them into algorithms that reveal our intimacy raise new questions that go far beyond the economy. If Tech Giants are creating “fiefdoms,” as Durand (2020) explains, then the regulation of the digital world is a social and political issue that cannot be dealt with by antitrust policies alone.

In a sense, the European General Data Protection Regulation (GDPR) is a very limited regulation system. By organizing the consent of users for the extraction and exploitation

of their behavioral data, it recognizes implicitly the existence of a transaction. When we click on “yes,” we are in fact paying the price of the service we want. Therefore, the GDPR does not reduce the commodification logic denounced by Zuboff. On the contrary, it organizes and makes visible a new exchange: the acceptance of personal data exploitation against service.

But an interesting aspect of digital economy lays in what remains invisible. As previously explained, the logic for regulating competition is fundamentally a neoliberal one. Indeed, its goal is to achieve an efficient market order through the implementation of rules and limited public interventions. In that aspect, the GDPR follows the same neoliberal logic: it implements a market regulation of a new fictitious commodity: personal data. But important parts of the digital economy are in fact escaping market laws. For instance, the platform model of Uber aims at organizing private transactions between users that can be both consumers and producers. In such platforms, the prices and conditions of transactions are not organized through a free markets system but through a private algorithm.

Ronald Coase (1937) explains that the nature of the firm lies in its ability to propose an alternative way of coordinating transactions that avoids market costs. In Coase’s model, the firm coordinates transactions through hierarchy, whereas markets rest on a purely decentralized system based on autonomous agents. In this sense, the digital economy reveals the emergence of an entirely new system of coordination:

Soon, rich data will flow through markets comprehensively, swiftly, and at low cost. We’ll combine huge volumes of such data with machine learning and cutting-edge matching algorithms to create an adaptive system that can identify the best possible transaction partner on the market. It will be easy enough that we’ll do this even for seemingly straightforward transactions. (...) Of course, we’ll still use money as a store of value, and price will still be valuable information; but no longer being focused on price broadens our perspective, yields better matches, a more efficient transaction, and, we believe, less trickery in the market. (Mayer-Schönberger and Ramge 2018, chap. 1)

Although they do not explicitly state it, what Viktor Mayer-Schönberger and Thomas Ramge (2018) describes is nothing less than the disappearance of markets as the main coordination system of the economy. They show that digital firms are now able to do what Friedrich Hayek (1945) says impossible: aggregate data and knowledge into a centralized device that organizes transactions and reveals optimal prices without the usual transaction costs of the market.

In other words, the main issue raised by the digital economy is neither market concentration nor the ability to implement a fair competition and reduce Tech Giants market power: it is the issue of regulating an economy without markets at all, where prices are not the product of decentralized negotiations but are created by privately own algorithms that function like black boxes.

Another issue is that business practices in the digital world are wholly incompatible with the neoliberal framework. In this respect, they call for an entirely new conception of public regulation, which is still to be invented.

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