

## HIGHLIGHTS FROM THE CHATHAM HOUSE CONFERENCE ON GLOBAL COMPETITION POLICY: POLITICS, BREXIT AND CHALLENGING THE CONSENSUS

The annual Chatham House conference on competition policy took place on 16 June 2017. Participants debated the implications of recent major political and populist developments for competition policy-making frameworks, and how they may reshape existing approaches to regulation, as well as the rules governing merger controls, state aid and antitrust enforcement. Clifford Chance is a sponsor of the Chatham House competition conference.

The discussions, which were all under the Chatham House rule, centred on the following themes and topics.

### **TO WHAT EXTENT SHOULD COMPETITION POLICY INCORPORATE PUBLIC POLICY OBJECTIVES?**

An over-arching discussion throughout the day related to the degree to which competition policy should incorporate non-economic public policy objectives and whether the historic consensus that it should not has started to change.

It was noted that there has been significant attention in academia, the press and some political administrations to the ideas that increased levels of concentration lead to inequality and loss of entrepreneurialism and that the perceived benefits of mergers (e.g. less efficient companies becoming managed by more efficient ones) may be lower than previously thought, with some empirical studies appearing to support those assertions. More broadly, there are increasing (albeit amorphous) concerns about the power of large corporations and antitrust policy is often perceived by the public, rightly or wrongly, as having a goal of restricting or limiting such power, even when unrelated to competition. One panellist considered that increased reference to fairness and reduced inequality as an antitrust objective could spell the beginning of the end of competition policy as we know it.

Antitrust enforcers do not operate in a vacuum, so are likely to be influenced by these developments. For instance, one participant described evidence that for large, transformational mergers, the major antitrust agencies have become slightly stricter so that, for example, a reduction in the number of competitors from four to three now has a lower chance of success, and there is more scrutiny of mergers which appear complementary at first sight, e.g. assessing their impact on future competition through innovation.

#### **Key issues**

- To what extent should competition policy incorporate public policy objectives?
- Mergers and foreign takeovers
- The effects of Brexit on competition policy
- State aid

Most participants agreed that antitrust policy does not easily accommodate legitimate public interest objectives beyond the avoidance of economic consumer harm and, indeed, that those objectives may conflict. Taking non-economic factors into account in enforcement decisions will often entail a sacrifice of economic output. Moreover, basing antitrust policy on economic considerations creates legal certainty and therefore accountability, which may be lost when less certain or predictable factors become influential - non-economic objectives do not create administrable tests. Those proposing protectionist policies, observed one participant, should always be asked the cost of their policies in terms of higher prices for consumers.

The proliferation of antitrust regimes – over 130 jurisdictions, each of which is engaged in bilateral and multilateral relations with others – increases the importance of common standards based on economic rationality, as does the "weaponisation" of antitrust enforcement in many countries, through increased criminalisation and private litigation. One panellist noted that this was particularly important when applying antitrust laws to digital markets: these often have no borders, which means a coordinated approach by national competition authorities – acting under the same broad objectives and sharing knowledge and experience between them - is vital, as different national approaches bifurcate the competition problems instead of solving them.

The traditional policy response has been to advocate separate legal tools for objectives unrelated to efficiency, e.g. employment, data protection, privacy or the promotion of national champions, and that separation is often recognised even in many of the most interventionist jurisdictions. Some participants, however, questioned whether this was still enough. Does antitrust need to do more to justify itself to the public?

One panellist observed that enforcers are increasingly turning to narratives of "fairness" to explain the public benefits of antitrust enforcement. But fairness means different things to different people. Antitrust enforcement creates fairness by reducing prices and therefore inequality, but may be seen as unfairly failing to protect smaller, less efficient firms, or employees laid off after a merger. Perceptions also differ between countries. One participant noted that in countries that deregulated in the 1980s, there are now generations of consumers who do not remember the benefits that were brought by such deregulation. Another considered that in some countries, younger consumers may have more positive views of foreign brands and so be more predisposed to the benefits of competition than their elders, but that, in any event, understanding of the role of competition law is largely restricted to businesses, not consumers.

## **Mergers and foreign takeovers**

Much of the discussion around increased protectionism centred on increased scrutiny of foreign takeovers that has been seen in recent years. The drivers for this go beyond governments' promotion of national champions and extend to a desire for reciprocity of investment opportunities for domestic businesses. In the UK, the rhetoric of "taking back control" links both the moves towards greater scrutiny of foreign takeovers and the departure of the UK from the EU.

The long standing consensus on the need to focus merger control on markets, not public policy factors, was considered to have been under sustained challenge for the past two years. One participant outlined three phases in the global merger control environment.

- The 1990's and early 2000's, when there was early pressure to take account of industrial policy considerations and decision making under the EU Merger Regulation was often subject to vigorous debate in the College of Commissioners.
- The 2000s, when global merger control took off and agencies became more politically independent and generally committed to applying a pure competition test.
- The modern era where relatively new agencies (e.g., South Africa and China) have elevated employment, the protection of small businesses and other considerations in applying their respective merger control rules, and legislatures (e.g, the US, Australia, and Canada) started to apply, or increased their use of, foreign investment filing regimes or public interest criteria restricting foreign takeovers of national champions. The past year or so has seen an acceleration of this trend, with proposals for stronger restrictions on foreign takeovers in numerous jurisdictions including the UK, Australia and even under discussion within the EU institutions. This has complicated an already complex landscape for corporate counsel

The different legal mechanisms for public interest considerations to be taken into account in foreign takeovers in France, Germany and the UK were discussed. It was noted that the UK has historically been very open to foreign investment, with government needing little persuasion of the benefits of strong competition laws. A panellist observed that recent UK government proposals to scrutinise foreign investment more carefully will need to find a balance between capturing transactions involving a legitimate public policy issue - such as national security or potentially transactions driven solely by tax or financial engineering - and harming the beneficial synergies that drive desirable M&A.

One speaker explained that, with the proliferation of merger control regimes, it is not uncommon to have to make 20-30 filings for a large cross-border merger. The application of vague public interest considerations greatly increases the complexity of managing those filings. Other participants pointed to the increased timing uncertainties, with pre-notification periods lasting longer - sometimes as much as 6 months even in cases that do not require remedies - and often used by agencies as a way to manage resources. However, one agency official countered that merging parties sometimes stagger their filings due to the perceived benefits of obtaining clearance in certain jurisdictions first and that this practice can harm their prospects and extend the clearance timetable, as it deprives authorities of the opportunity to obtain and exchange information and views with other authorities.

## **The effects of Brexit on competition policy**

The effects of Brexit were discussed, in terms of impact on both the UK and the EU.

As regards the impact on the EU, it was thought that Brexit was unlikely to reduce the influence of the EU: it will remain one of the most important global antitrust jurisdictions. However, the lack of UK influence on EU competition policy could mean fewer proponents of a more economic and "effects based" approach to antitrust enforcement and a greater role for an "ordoliberalist" approach. That could mean a greater emphasis on the form of conduct and, in particular, the potential for more conduct to be categorised as an "object" infringement for which harmful effects do not need to be proved (this may also be perceived as assuaging the public desire for faster enforcement action).

As regards the impact in the UK, one participant described a risk that the Competition and Markets Authority (CMA) will be expected to deal with more merger filings and cartel investigations with the same resources, leading to less antitrust enforcement by the CMA in other areas, although sectoral regulators might take up the slack. It was also considered that some divergence between substantive EU and UK competition laws is likely, through case law and court judgments, but will be slow. The law on abuse of dominance is one area that was thought most likely to diverge. Procedurally, a move to a prosecutorial model of antitrust enforcement was considered unlikely, given that it was considered and rejected by the UK government relatively recently.

One factor that could affect competition authorities on both sides of the Channel is the potential for reduced volumes of trade, and the attendant loss of competition (or potential competition) from imports. Addressing this will be part of the challenge of responding to Brexit for antitrust agencies in the EU.

### **State aid**

One of the day's sessions focused on the regulation of public subsidies: one area that could be most significantly affected by Brexit. In that respect, one of the speakers described a number of issues that would need to be addressed. For the first day following Brexit, the priority will be to avoid a cliff edge that would create uncertainty as to the status of ongoing investigations and new aid measures. As a transitional model, participation in the EEA Agreement, with State aid enforcement under the jurisdiction of the EFTA Surveillance Authority and the EFTA Court of Justice, would achieve that aim.

In the longer term, various models are possible for post-Brexit regulation of subsidies. A number of Free Trade Agreements (FTAs) between the EU and third countries contain obligations that go beyond the WTO Agreement on Subsidies and Countervailing Measures but they are still much weaker than obligations under EU State aid rules. The EU has already stated that it considers State aid obligations to be a condition of any UK/EU FTA and this will require appropriate enforcement and dispute resolution mechanisms. A panellist explained that one model for post-Brexit subsidy regulation would be to implement a system in the UK that closely mirrors the current EU State aid regime, with mechanisms contained in the relevant EU/UK FTA that allow for the regime to be amended should a future government decide to do something different.

While some thought that the CMA would be the most suitable domestic enforcer, others thought that adding State aid enforcement to its role would risk "polluting" its independence and prejudicing its relationship with government. A non-EU attendee concurred that such a risk would make them hesitant to support a role for regulating public subsidies for their domestic antitrust enforcer. One panellist considered that a solution to that problem for the UK would be for the CMA to bring cases before the courts for determination. Some form of supra-national dispute resolution body would also be required, such as a joint arbitration committee.

One participant described the difficult issues that would arise where aid is granted via primary legislation that conflicts with the UK's State aid obligations under an FTA. A domestic enforcer could not strike down primary legislation, so it may be that a court or tribunal would issue a "declaration of incompatibility" with the UK's FTA obligations, which would then be for Parliament to act upon or ignore.

As regards consequences for British businesses, a participant opined that it cannot be assumed that Brexit would prevent them from being exposed to future State aid investigations, e.g. into their transfer pricing arrangements. Also, there was some agreement that even if Brexit were to lead to a more relaxed regime for the grant of subsidies, there was no certainty that this would lead to more government support than is already possible under the EU State aid rules. The UK has traditionally granted much less aid than other EU member states, even within the confines of the State aid regime: only 0.35% of GDP in 2015 which was around half of the figure for France and a quarter of that of Germany. It was also pointed out that reliance on the WTO SCM Agreement would bring few benefits for businesses, given the limited scope of that regime (services are excluded), remedies are limited, the evidentiary thresholds for intervention are high and only governments (not businesses) have rights to enforce the relevant obligations.

A number of general advantages of subsidy regulation were noted. While the US may be held up as an example of a country that has a successful economy despite very few limits on the grant of government subsidies, there is research that indicates that the EU attracts comparable investments at significantly less cost to the taxpayer. One participant also noted that the absence of subsidy regulation in their non-EU jurisdiction could be linked to excessive lobbying, cronyism and corruption, and that in some cases this lack of discipline for State owned enterprises has meant that they lack dynamism, e.g. fixed line telecoms operators finding their customers are switching to new mobile operators.

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