SUMMARY OF CHATHAM HOUSE 2019 COMPETITION POLICY CONFERENCE: NEED FOR A PARADIGM SHIFT?

Competition policy has moved to the first rank of policy debate around the world, and has even become the subject of slogans in political campaigns. Speakers at the Chatham House Competition Policy Conference on 23 May 2019 identified various issues that are driving public discontent, such as the performance of the economy and of certain companies, a case-by-case approach to enforcement by antitrust agencies, which may miss the "bigger picture" of systemic cumulative effects of individual actions and transactions, and a "new economic order" in which monopolies and oligopolies are the rule.

The broad consensus among speakers was that these concerns do necessitate some changes to competition policy and enforcement tools. Much of the debate focused on what those changes should be, and the extent to which some problems are rooted in other kinds of social policy failures and are therefore better addressed by other forms of regulation. The following broad themes emerged from the various different sessions.

Applying new thinking and theories of harm

It was observed that developments in economics and decision science – such as better understanding of vertical effects and of the treatment of risk and uncertainty - could be brought to bear on enforcement to improve efficiency. One competition authority official expressed concerns that there is too much resistance to incorporating new economic thinking into enforcement actions. However, a speaker in another session complained that when novel economic theories are applied in live merger cases, merging parties become the subjects of an experiment and have no useful route of appeal if that experiment goes wrong.

There was also a panel discussion of the increasing focus, in the US in particular, on arrangements – such as "no poaching agreements" and mergers giving rise to so-called "labour market monopsony" - that harm workers, as distinct from consumers. An agency official commented that this focus was

not necessarily driven by a desire to "defuse" populist sentiments, but rather because monopsony and supply-side issues with respect to workers are the right things for antitrust enforcers to prioritise and are very much within the mandate of the law. A different competition authority official considered that, in the context of mergers, labour market monopsony issues were unlikely to arise in mergers involving national markets where there was no competition problem on the downstream selling market, but that it would be entirely appropriate to analyse those issues for a regional merger.

Adapting presumptions and standards of proof

Some participants advocated consideration of new presumptions and different standards of proof, such as the recommendation in the report for the UK government prepared by Furman and others (the UK Report) that certain mergers should be assessed on the basis of a "balance of harms" test (described below). Such presumptions, it was asserted, would make enforcement cases quicker and less resource-intensive, so allowing authorities to intervene before it is too late. One agency official considered that competition policy has moved from relying on too many presumptions, historically, to too few, now and that most plausible economic models provide good support for using, for instance, a presumption against 3-to-2 mergers. They considered that overall, mergers between competitors are bad for consumers unless there are compensating efficiencies, so there should be more consideration of who should bear the burden of proof that a merger merits clearance. In the area of dominance, the speaker noted that a dominant company can already extract the available consumer surplus and that, consequently, over-enforcement was unlikely to have much effect on consumers, whereas under-enforcement led to significant consumer detriment.

A different speaker cautioned that presumptions in the area of merger control resulted in merging parties being required to prove efficiencies, which in the past has been a "kiss of death" for mergers, due to the unachievable standards of proof imposed by antitrust authorities.

Globalisation

One competition authority official set out their view that stresses and challenges in the globalised economy derive from a combination of:

- increasing trans-national monopolistic practices and cartels;
- greater difficulty in cross border law enforcement, with over 120 countries having competition laws that often diverge, and enforcement and harm that arises in a different location to that of the monopolistic behaviour, which creates difficulties in evidence gathering; and
- increasingly prominent conflicts between trade policy and competition policy, caused by the global market downturn and increased protectionism in some countries. In this respect, they considered that antitrust agencies should seek to avoid competition policy becoming a tool of trade protectionism and should cooperate in this objective.

The same speaker considered that these stresses and challenges could be addressed through strong enforcement that is aimed at private domestic companies, State-Owned Enterprises (SOEs) and multinational businesses alike, while adhering to the principle of competitor neutrality and standardising the boundaries of government power. For instance, in the past decade, China's antimonopoly law enforcement agencies have investigated over 220

cases of abuse of administrative power that restricted competition and this has had a deterrent effect on administrative bodies. Suggested revisions to China's Anti-Monopoly Law included the strengthening of international exchange and cooperation, negotiation and resolution of policy conflicts and the joint building of a global, unified and open system of competition policy governance rules, with a view to safeguarding fair competition on global markets, protecting consumers and promoting growth of the world economy.

Political pressure

It was noted that some politicians are calling for weaker competition policy to counter the increased competitive pressure on domestic businesses from global competitors. Speakers gave the examples of the political pressure on the European Commission to clear the Siemens/Alstom merger and subsequent proposals for a political veto of European Commission prohibition decisions, as well "enormous" political pressure on the US Federal Trade Commission to abandon its (recently won) case against Qualcomm on the basis that it was a national champion and that its status as such was a matter of national security.

Panel participants considered these calls for weaker competition policy to be misguided, taking the view that, while there may be valid concerns about unfair competition by subsidised SOEs, those concerns are best addressed through trade policy, not antitrust and that national security is enhanced by competition, not monopolisation.

Competition in digital markets

Speakers observed the various characteristics of competition in digital markets, including network effects, consumer inertia, dynamic competition, online/offline integration, big data and reliance on innovation.

One speaker commented that when digital services are priced at zero, that is still a price, and that pricing could even be negative, e.g. where a platform provider pays consumers to use its services and share their data. Another observed that the rise of digital platforms has led to disintermediation of commercial relationships between service providers (such as apps) and their users, and the appropriation of connected data.

There was a discussion of two recent reports on digital competition – the UK Report by Furman and others`, and another prepared for the European Commission by Schweitzer, Cremer and de Montjoye (the EU Report). It was noted that while those reports are largely consistent in their analysis of how competition in digital markets operates and the competition concerns that arise, they disagree to some extent on how to address those concerns. In particular, while both reports emphasise the need for clear rules and advocate the greater use of presumptions, the UK Report considers that this should be implemented through a move to regulation while the EU Report favours the use of competition rules, e.g. by applying a presumption that self-preferencing by dominant platforms is illegal.

Antitrust enforcement in digital markets

One speaker pointed out that, in contrast to the pressure for weaker competition enforcement due to globalisation, the perceived dominance of businesses in some digital markets has led to calls for much stronger enforcement. Another speaker described different factors that may have led antitrust authorities to under-enforce in this area, such as under-estimation of lock-in effects, a conservative approach to market definition (looking at narrow

relevant markets rather than wider eco-systems), insufficient consideration of conglomerate effects and potential competition and over-optimism that issues would be resolved by competition "for the market".

A different speaker doubted claims that dynamic competition acts to prevent long-term dominance in digital markets, pointing out that the example often given – of competition between Facebook and MySpace – occurred at a time when the market was nascent, such that dynamic competition could be expected, whereas, once established, digital platforms such as Google and Facebook stayed dominant for decades. That speaker took the view that antitrust enforcement is too slow and while interim measures would be a useful enforcement tool, their use is held back by a lack of precedent cases. Another likened the slow pace of investigations to an archaeological dig, with enforcers digging up the bones of dinosaurs and trying to ascertain whether they were killed off by a comet, a glacier or starvation, with the result that potential complainants are deterred.

Panellists considered different approaches to remedies (this topic also arose in relation to data – see below). One speaker expressed doubt as to whether the fines of around €9 billion imposed on Google had any deterrent effect, and explained how "cease and desist" orders had resulted in years of back and forth between the Commission and the addressee of the order to determine how to implement it. The speaker contrasted this with the Bundeskartellamt decision against Facebook, in which no fine was imposed, but the authority made it relatively clear how it expected Facebook to change its conduct. Another speaker considered that enforcement and remedies in relation to digital platforms should be based on long-standing principles such as interoperability and non-discrimination. Another favoured the imposition of remedies through the merger control process, as this is quicker and can be used as a form of ex-ante regulation (as has happened in other markets in the past). For example, if a digital monopolist acquires a company for its data, that transaction could be cleared subject to a requirement to share some of that data to create a level playing field.

One competition authority official took the view that, in the digital sector, if antitrust authorities do not expand their horizons and change the paradigms of the way they work they risk becoming irrelevant, and policymakers will regulate the sector instead. However speakers on another panel did consider ex ante regulation to be an appropriate policy response to issues arising in the digital sector.

Fairness and other "non-competition" factors

Some competition officials considered that antitrust policy has a legitimate role in dealing with public perceptions of unfairness. One pointed to US studies showing tendencies towards industry concentration, higher margins and a lower wage share (i.e. the share of national of income allocated to wages, as opposed to capital and profits), which they considered resulted in perceptions that workers do not have fair chances to succeed. They contended that competition policy has a direct bearing on this, as it is inherently concerned with giving people the opportunity to "make it" on their own. Other participants considered that it was more appropriate to use the notion of fairness as a way to communicate the benefits and positive externalities of competition policy to consumers, rather than as a policy aim in and of itself. For example, lower barriers to entry to the legal profession create more opportunities and equality, and lower food prices have the effect of redistributing wealth to the less well-off.

Another speaker remarked how unusual it was to see, in the US, populists on the right joining with progressives on the left, for example in their opposition to the AT&T/Time Warner merger. In their view, growing income disparities and the related polarisation of political views (caused in part by social media) leads to politicians seeking to fill the "empty vessel" of antitrust with policy objectives such as fairness, and the troubling prospect of cases being decided on the basis of highly subjective concepts, which undermines antitrust institutions themselves.

As regards measures of concentration, one speaker noted that data on European markets suggests that increases in concentration have been more moderate than in the US and there are big differences between the largest EU countries, although the trend of increasing profit margins was broadly similar. A different panellist argued that measures of industry concentration were not necessarily helpful in assessing whether there has been concentration in relevant economic markets, and that better data was therefore required before making changes to antitrust rules and parameters. For example, an increase in concentration in the "software" sector may reveal little about trends in concentration in the thousands of economic markets that make up that sector. A panellist also queried whether there was sufficient evidence that undue concentration had been caused by lax merger control enforcement.

As regards wider, "non-competition" policy considerations in general, there was a general consensus among speakers throughout the day that the role of such considerations in antitrust law should be strictly limited, even when the relevant policy objectives were highly desirable. Some speakers drew a distinction between taking such factors into account in the setting of enforcement priorities and selection of cases, on the one hand, and applying such considerations to justify pushing legal boundaries, on the other. For example, if an agency's finite resources can be applied to a case involving healthcare providers or plastic bottle manufacturers, then prioritising the former over the latter due to the greater social value of healthcare was considered legitimate, but pursuing such a case beyond the bounds of what was specifically authorised by legislation is more controversial and raises the question of whether such a decision should be for legislators or antitrust agencies. Another speaker observed that if a competition authority's enforcement cases have focused on car parts, beer and electric shavers then it was legitimate to ask whether gender equality issues should have been taken into account.

Data and privacy

Panellists discussed the question of whether antitrust should have a role in the regulation of privacy and data (personal or otherwise). One speaker stated that access to, and control over, data will be fundamental to future business success and is an asset with significant economic and competitive value, so it must form part of any competition law analysis. In contrast, while privacy pertains to the same subject matter – data – it raises wholly separate issues, such as user consent and ownership of personal data. Another speaker agreed, but took the view that the two regimes must nevertheless be interpreted and applied consistently. In particular, antitrust authorities should strive to facilitate competition for privacy.

Speakers discussed the question of whether breaches of privacy laws should be considered to also infringe the competition rules (as in the German Bundeskartellamt's case against Facebook). One asserted that if it is necessary to assess data as a parameter of dominance, then issues regarding

privacy and the General Data Protection Regulation inevitably come into play when assessing and remedying competition issues. Another observed that the Bundekartellamt's decision was not limited to concluding that privacy breaches by Facebook were exploitative abuses, but also found that they had an exclusionary element because they reinforced Facebook's dominance, and in the speaker's view both such elements should be present. A competition official considered that the relevance of privacy issues could be assessed by asking if the same privacy concern would arise if the dominant company were split into five: if it would not (e.g. because competition would result in consumers being paid for the use of their personal data) then it may be a competition problem.

Another competition official considered that if antitrust agencies want to take action to address the dominant position of certain digital market players it should be through measures that address their use of data, rather than measures to address the direct and indirect network effects from which they benefit, as network effects are an inherent feature of digital markets. They suggested three broad approaches to address data-related dominance:

- limiting a dominant company's ability to access, gather and process data, e.g. by requiring it to keep certain data separate and not combined;
- imposing data portability requirements to facilitate customer switching; and
- requiring the dominant company to grant third party access to data. This is particularly relevant where the value of the dominant company's data results from the combination of data from multiple sources.

Panellists in a different session discussed whether the first of these (internal separation of data) was an effective remedy. One was concerned that it would inhibit beneficial economies of scale and scope and they therefore favoured remedies that allowed the combination of data but, through data-openness and switching, limited the ability of the dominant company to achieve advantages that cannot be matched by rivals, i.e. enabling others to do more rather than requiring the dominant company to do less.

Consumer protection powers

In a number of jurisdictions, competition authorities also have separate powers to protect consumers and/or privacy. Two authority officials considered these powers to be of increasing importance as a complement to competition enforcement, in part due to a perceived public mistrust in market outcomes and a sense that competitive markets are not always delivering the best results for consumers. For instance, in some markets customers are "rewarded" for their loyalty by higher prices and the opportunity to search and switch to a better deal is not perceived by consumers to be a complete solution, particularly where vulnerable consumers are concerned. One competition official explained that, because of these issues, their authority considers whether reliance on a competitive market solution is appropriate in each case in which a consumer harm is identified. A different speaker noted that there can be tension between antitrust powers and other consumer protection objectives. For example, actions taken to address privacy problems can create competition problems and vice-versa.

Are antitrust authorities fighting for survival?

It was queried whether, if the public is losing faith in markets and institutions, competition authorities face the existential threat of being considered ineffective by politicians and written out of existence unless they expand their

powers and enforcement. One authority official agreed that societal changes and those arising from the digital economy are fundamental and long-term, and are necessitating more flexibility in the regulatory framework and agencies' enforcement tools. Another speaker took the view that if a digital markets regulator is created in the UK, as has been proposed, antitrust policy would probably no longer play a big role in digital markets. While panellists generally doubted that there was a threat to the existence of competition authorities, it was noted that their funding could be affected if they fail to fulfil their mandate.

National / regional champions and merger control

Panellists discussed the proposals of the French and German governments for a political "override" by EU governments (acting through the EU Council) of European Commission merger prohibition decisions, which arose in the wake of the Commission's prohibition of the Siemens/Alstom merger. One panellist considered that political considerations do sometimes appear to play an implicit role in the Commission's decision-making on mergers and, if that is the case, introducing a layer of political decision-making would allow case teams to focus on the competition aspects of a case. However, they also noted that it was difficult to imagine how such a system could work with 28 EU Member States having a say. Another noted that the proposed override would require unanimity and be subject to review by the EU Courts, and that a similar power under the State aid rules has been very rarely used.

A speaker noted that there had been calls for EU merger control to allow the creation of national or regional champions on a number of occasions in the past (e.g. the acquisition of De Havilland, Volvo/Scania, Schneider/Legrand and Deutsche Borse/LSE) but considered it to be the clear that the intention behind the creation of the EU merger control regime was that it should not be used as a way to impose industrial policy. The speaker remarked that Article 21(4) EUMR – which allows EU member states to prohibit or impose remedies on mergers that are under the Commission's EUMR jurisdiction if necessary to protect their legitimate interests – is open to abuse, as member states may have a very different opinion to the Commission of what interests are legitimate. For example, the French government secured considerable concessions from GE before allowing it to take over Alstom instead of the government's favoured suitor Siemens, and the Spanish government was found to have contravened Article 21(4) when it used domestic regulatory measures to deter E.on's acquisition of Endesa.

Panellists also discussed whether the promotion of national or regional champions through merger control was a valid response to centralised economies, such as China, that grant large amounts of State aid and reserve areas of their economy for national champions to grow and then enter markets in other jurisdictions. While the actions of those economies can distort the level playing field in international markets, a number of speakers expressed the view that trade policy, not competition policy, is the right tool to address such distortions and that rigorously-applied competition rules and exposure to competitive pressure were the best way to ensure that domestic businesses are well placed to compete in the global economy. One speaker noted that, in the Siemens/Alstom case, the merging parties were already champions as they were the first and second largest players in most regions, and their Chinese competitor CRRC had never sold a train outside China or even pre-qualified for a future contract in Europe. Another speaker considered that, while the Commission had assessed the likelihood of entry in 3-5 years' time

for that transaction - which was further into the future than usual – the fact that the Chinese government plans its industrial policy on the basis of 5-10 year development plans suggests that it might be desirable to look even further ahead in some cases.

Merger control procedures

One speaker called for procedural improvements in the European merger control regime, which they considered was imposing burdens that the European Commission, as well as merging parties, were becoming unable to handle (a panellist from the Commission disputed this). In their view, the Form CO filing form is a straightjacket from which merging parties cannot depart (as case teams are too reluctant to grant waivers), requests for information are often duplicative and phrased with innate bias in the questions, and there is excessive reliance on responses of third parties that have often not put much effort into those responses.

These views were echoed by a different panellist, who considered that the European Commission often displayed an excessive hunger for information and that national authorities were often better placed to assess mergers as they have more industry expertise and lower staff turnover.

Assessing potential future competition in merger control

Speakers discussed the recent phenomenon of large/dominant players acquiring a number of small players, which were not direct competitors at the time of the merger, but some of which might, in the future, have grown to become significant competitors. Such transactions, which are common in the digital sector, are sometimes referred to as "killer acquisitions". One speaker asserted that many of these deals pose no competition problems and are instead motivated by a desire to acquire the expertise of particular workers or a particular incremental feature that had been developed by the target which would enhance competition when incorporated into the dominant company's product. Other speakers highlighted the difficulties in determining the counterfactual. For example, what would have happened to Instagram without the investment by Facebook? Would a pharma target have found the funding to get its product to market? A competition authority official observed that none of these difficulties mean that competition authorities should not at least have a look at such mergers, or have the jurisdiction to do so. Moreover, the small number of such mergers in digital markets that have been reviewed by antitrust authorities indicated that there was significant under-enforcement in this area, in their view.

Panellists discussed the challenges in trying to identify in advance which targets were potential future competitors, and the standard of evidence required, given the finite resources of competition authorities and the impossibility of investigating every small transaction. In that respect, a number of speakers highlighted that in most jurisdictions the test for finding that a merging party is a potential competitor is stringent – even where the acquirer is dominant - and that internal documents are relied on heavily as a source of evidence, even though they may exaggerate the benefits of a transaction or the prospects of its success. One speaker described the conclusions of the UK Report on digital competition, which included a recommendation for a "balance of harms" approach to assessing such mergers (based on a cost-benefit analysis approach), whereby mergers could be blocked or subject to remedies if harm could not be shown to be likely but was nonetheless likely to be very large if it did arise. The separate EU Report

advocated a different approach of reformulating theories of harm, emphasising innovation-based theories of harm.

International cooperation

A number of panellists expressed pessimism about the future of international cooperation, even within bodies such as the OECD and ICN. While, historically, institutional arrangements for international trade and cooperation were viewed as enhancing national and international security, now there are concerns that interconnectedness and interdependence pose a threat to the economic order of prosperous countries and also to security. National security is becoming a catch-all rule for protectionism and there is less reliance on impartial rules. In this context, one speaker considered that competition authorities had become bargaining chips in international power struggles. As regards substantive convergence, while this would clearly benefit large companies, the speaker considered that in the current political climate (which demands results, not processes) it is not the job or the priority of a competition authority to deal with the complexities of the world on behalf of large companies.

Another speaker considered that divergence in competition policy was a natural consequence of divergence in trade policy, and expressed frustration that practices for which developing countries were previously condemned as they progressed towards global standards – such as protectionism and the creation of national champions – are now back up for debate. They also noted that substantive convergence is served when agencies issue reasoned decisions that others can refer to and in this respect contrasted the three page decision explaining why the US FTC closed its investigation into Google with the very lengthy decisions against Google issued by the European Commission.

Other speakers expressed more optimism for the future of international cooperation. One panellist noted that key drivers of important reforms in India had been opinions expressed to the head of the competition authority in forums such as the ICN, as well as rankings of competition regimes such as those produced by Global Competition Review. They suggested that it would be useful for bodies other than competition agencies to have access to the ICN, such as government officials and courts. Another noted that cooperation meets an important need, given increased complexity of cooperation which, according to an OECD measure, has increased by a factor of fifty three since 1990, due to the increase in the number of authorities and legal regimes and the fact that cooperation is bilateral in many cases. In that context, the current unprecedented levels of high-level political interest in competition policy and the perception that competition law is the answer to concerns in digital markets gives rise to opportunities for multi-jurisdictional solutions in the future, which could be limited to the digital sector, but could also be broader.

On the question of supranational bodies, there was a consensus that supranational competition authorities have benefits, but are not feasible outside the context of an integrated common market, such as the EU.

There was a discussion of measures that competition authorities could implement to improve cooperation. These included international standard setting, systems of mutual recognition, close collaboration between the EU and US (as the largest merger control authorities) and systems whereby one authority acts as the lead on an investigation. As regards the last of these, one speaker envisaged a mechanism whereby authorities would agree to

follow the lead investigator's decision on remedies to address concerns in global markets and would only impose additional remedies where necessary and justified to address purely national or local issues. To the extent that there were differences of opinion between agencies in such a system, international organisations such as the WTO, OECD or ICN could act as referees. Another speaker expressed the view that the greatest potential benefits of cooperation arise in the area of merger control, as increased complexity for large transactions is creating execution risks at present.

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