Future development of competition policy: Opportunities and threats

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Implications of Brexit for CP

- Prime Minister’s Brexit speech on Tuesday made clear that the UK will be leaving the EU Single Market, and that freeing the UK from ECJ jurisdiction is a priority.

- Likelihood is that in a little over 2 years’ time, UK will become a separate CP & regulatory jurisdiction:
  - European Commission precedents and ECJ rulings cease to have legal force in the UK.
  - End of “one-stop-shop” for mergers; European Commission will take no account of merger effects in the UK.
  - No requirement to follow EU treatment of antitrust issues.
  - Competition-based telecoms regulation in UK will be free from Commission oversight [Article 7 notifications].
Future development of CP in the UK: Opportunities and threats

I shall consider possible longer-term development of UK competition policy post-Brexit

3 main areas:

1. Possible divergence in interpretations of competition law principles
2. Expansion of “public interest” criteria in UK merger control
3. State aid controls
1. Divergence in interpretations of competition law

- CP is enshrined in UK law: no need to draft new statutes
- But interpretation of comp. principles in UK & EU could diverge
  - International variation: UK authorities could look at best practice across many jurisdictions (US, EU, Australia, NZ)
  - Divergence from EU might cause difficulties for companies subject to both UK & EU proceedings – already arises for EU / US
- EU approach not always coherent in view of economic effects
  E.g. resale price maintenance:
  - EU: hardcore restriction; *per se* illegal
  - US: rule of reason (since *Leegin*, 2007)
- UK could improve competition policy practice, perhaps side with US (or others) instead of EU
  - Better for UK consumers
  - Might increase pressure on EU to adopt effects-based analysis
2. Expansion of public interest criteria in UK merger control

- Some regulators seem to regard Brexit as an opportunity to expand the criteria applied in UK merger control
  - Sharon White, speech to Institute for Govt., 1 Dec 2016, said: “we have the opportunity to introduce a wider set of considerations in merger decisions, including policy or public-interest concerns where a company is deemed to have particular strategic significance for the UK.”

- Under Enterprise Act 2002, govt intervention already possible on certain “public interest” grounds:
  - National security
  - Media plurality
  - Financial stability (added in Oct 2008 to permit Lloyds/HBOS)

- Easy to expand this list: secondary legislation only [section 58]
Might additional criteria in merger control be desirable?

- Danger of diluting or overriding competition principles
  - Esp. if other consideration can trump competition: anticompetitive merger permitted in return for “goodies” offered by the Parties (investment, employment, financial bail-out...)
  - Perhaps less danger where the other consideration is applied in addition to competition assessment – e.g. media plurality test

- Greater political involvement, increased lobbying, less predictability
  - E.g. media plurality test: involvement of Secretary of State for CMS
  - Lack of clarity over how criteria will be measured and assessed

- CP unlikely to be the best, or even a good, instrument for other aims:
  - Mergers cover only small proportion of businesses; broader scope likely to be needed
  - Comes at cost of competition and consumers

- Use other instrument(s) with wider scope and less distortionary
  - Answer to weak financial regulation is not weak competition enforcement!
  - Cf. trade theory: tariff = production subsidy + consumption tax; latter is undesirable (instead raise revenue more broadly)
What additional criteria?  
(a) Foreign ownership

- History: Lilley doctrine (1990) restricted takeovers by foreign state-owned companies (seen as nationalisation by the back door)
  - In practice Lilley doctrine had little real effect – handful of referrals but no mergers actually blocked on this ground – and was soon abandoned

- Possible concern over acquisition of key infrastructure by companies under control of potentially hostile govts
  - But already captured by “national security” consideration

- Limits on foreign ownership in general seem inconsistent with the desirability of foreign direct investment
(b) Industrial policy
(also employment & regional development)

- History
  - Fair Trading Act 1973 “public interest” criteria included maintaining and promoting a “balanced distribution of industry and employment” [Section 84(d)]
  - Enterprise Act 2002, Cttee stage of bill: Govt resisted amendments to include employment and regional effects of mergers

- This govt wants a “modern industrial strategy” and seems willing to intervene in markets

- Query whether government intervention is desirable
  - Past performance in “picking winners” is mixed
  - Susceptible to lobbying to bail out losers

- Merger control is a poor instrument for these aims
  - Covers very few firms; far broader approach required
  - E.g. tackle labour market failings; promote training and R&D; provide funding for regional infrastructure that generates spillovers

- Undesirable to weaken competition enforcement
(c) National infrastructure

- This govt is making “national infrastructure” a priority
  - National Infrastructure Commission elevated to an “executive agency which will help plan, prioritise and ensure efficient investment” (Jan 17)
  - Role of national infrastructure in fiscal policy

- Two ways this could play into merger control
  - Parties to an anticompetitive merger might offer “goodies” in form of national infrastructure projects to gain clearance
  - Claims that merger is needed to promote investment
    - E.g. mobile telecoms mergers: argument accepted by EC until O2/Three
    - Economic analysis of relationship suggests competitive markets are the best stimulus for investment
    - Even if “inverted-U” relationship between competition and innovation, it is unlikely regulators can locate the peak (and these markets tend to be quite concentrated anyway)

- Anticompetitive mergers are not the answer to infrastructure needs
  - If there is a case for public subsidy do this directly, not at the expense of consumers in those markets
3. State aids

- Some (politicians) welcome freedom from EU state aid controls; still some constraint from WTO rules but weaker
  - Prospect of greater lobbying for subsidies by businesses, unions, etc.
  - Politicians may find it difficult to resist these calls, esp. where public support (e.g. Tata Steel)

- 2 benefits of agreeing to continue state aid restrictions
  - Self-imposed constraint may be desirable to “tie one’s hands”
    - EU has been a convenient scapegoat in the past
    - “Strategic delegation” to impose self-control is not uncommon: joining a fixed exch. rate regime, delegating monetary policy to central bank, establishing fiscal rules and watchdog (OBR)
  - “Concession” to EU-27 in bargaining for other things we want

- Is there the political will and foresight to do this?
  - Industrial policy promised by No. 10 & ministers suggest greater intervention in markets, so perhaps not
Note: Impact of trade barriers on market definition and competition assessment

- Possible that UK will erect trade barriers against imports from EU-27, if mutual free trade cannot be agreed.

- Geographic market definition
  - Imports from EU may no longer constrain pricing
  - Some markets currently subject to import competition from EU may need to be redefined as “national”

- Competition assessment
  - Some mergers cleared on basis of competition from EU may need to be reassessed
    - Open market investigation? – more pressure on CMA resources
  - Raising of trade barriers may pose a detriment to competition in a number of markets
    - Knock-on effect of exiting the Single Market; doubly bad for consumers…