

UK Competition Policy Post-Brexit: In the Public Interest?

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Abstract

This paper provides an analysis of the UK's future Competition Policy, following its withdrawal from the EU. It is focused on whether the UK should make greater use of public interest tests in merger regulation, implement industrial policies aimed at protecting UK industries, or allow antitrust rules to diverge from those of the EU. We find that some of the new freedoms achieved by Brexit will be damaging to competitive markets. It may be necessary to legislate to limit these effects.

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Keywords: Competition Policy; Public Interest; Industrial Policy; Merger Control; State Aid; Brexit

1. Introduction

In the months following the referendum to leave the European Union, it has become clear that the UK is heading towards a 'Hard Brexit'. Drawing on two of the three most high-profile debating points of the Brexit campaign, the Conservative Government has interpreted the vote to mean that there will be red lines against free movement of people into the UK and an end to the supremacy of EU law.² These red lines provide our definition of Hard Brexit. The implication, confirmed by numerous European Commission and Member State leaders, is that the UK can no longer be a member of the European Single Market. There are political and legal reasons for this. Politically, the 'four freedoms' of the Single Market (i.e. the free movement of goods, capital, services, and people) are central to the vision of an integrated Union and ensuring the market is not segmented along national

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² The third, regarding the repatriation of £350m per week in gross EU contributions, is no longer mentioned.

lines. Legally, there is a need for consistency and for infringements of the law to be dealt with at EU level, where appropriate. For this reason, the European Commission oversees the Single Market in conjunction with Member States and their actions are subject to judgments and guidance from the Court of Justice of the European Union (CJEU).³

This is of great significance for *Competition Policy* because the most likely ‘Soft Brexit’ outcome – membership of the European Economic Area (EEA) – would have meant very little change in the UK’s Competition Law. EEA members are part of the Single Market but not part of the EU Customs Union. This means they can pursue their own trade deals (subject to rules of origin) but must adhere to the rules of the Single Market. For example, Articles 53 and 54 of the EEA Agreement directly mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Indeed, in its application of both antitrust and merger control, the European Commission’s jurisdiction extends to the EU and the EEA, where the arrangement or merger has a Union and EEA dimension.⁴ EEA Members are also subject to the same State Aid rules and jurisdiction of the CJEU.⁵ ‘Hard Brexit’ rules this out.

A central argument of this paper is that the consequences of a hard Brexit must be understood in the wider context of a revival of interest in *Industrial Policy*. The financial crisis, economic slowdown and stagnation of real wages over the last eight years have undermined confidence in the economic system, including the ability of competitive markets to provide the best economic outcomes. Instead of interventions only to restore or extend competition, politicians from both ends of the political spectrum are beginning to believe that government should use more instruments for intervening in market forces. The

³ Those in favour of Brexit focussed on the economic arguments of mutual benefit from free trade to suggest that free access to the Single Market would continue, but these were never likely to trump the political and legal arguments.

⁴ This means the arrangement, conduct or merger affects more than one EU or EEA member. See EEA Agreement [1994] OJ L1/1, arts 55-57. Where cases have an EEA-only dimension, they are dealt with by the EFTA Surveillance Authority and the EFTA Court.

⁵ EEA Agreement (n 4), arts 61-64. Article 61 is the equivalent of Article 107 TFEU. On the status of CJEU jurisprudence, Article 105(2) of the EEA Agreement states: ‘The EEA Joint Committee shall keep under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court. To this end, judgments of these courts shall be transmitted to the EEA Joint Committee which shall act as to preserve the homogenous interpretation of the Agreement’. In addition, Protocol 34 to the EEA Agreement allows the EFTA court to ask the CJEU to decide on the interpretation of an EEA rule.

UK Government, under Prime Minister Theresa May, has announced it will review the public interest regime in UK merger control and consider greater controls on foreign investment.⁶ Perhaps most tangibly, she created a Department for Business, Energy and Industrial Strategy, the third element of which is suggestive of intervention or planning at a level that has not been seen in the UK for decades.⁷ This department sponsors and oversees the UK's independent competition authority, the Competition and Markets Authority (CMA) which is responsible for the primary enforcement of competition law. In addition to the Government's apparent shift towards greater interventionism, Jeremy Corbyn, leader of the opposition Labour party, is hostile to free markets and EU State Aid rules, explicitly advocating industrial subsidies and state ownership.⁸

In the context of these cracks in the pre-crisis consensus on the benefits of competition, and the return of pressure for public interest interventions from both wings of the political spectrum, this paper examines some of the implications of 'Hard Brexit' for competition policy. After some background on current UK policy and the regime that it replaced, this paper focuses on three issues: (i) public interest tests in merger control; (ii) state aid to help British firms; and (iii) antitrust enforcement. By exploring these three areas, the paper identifies several new freedoms that the UK could utilise to shape its competition policy outside the EU, but also warns that these freedoms entail a number of costs – it may even be desirable to legislate limits to some of them. The paper cautions against changes to UK competition policy without very strong justification. Any move towards a more interventionist approach, or a significant divergence from EU competition rules, would risk future negotiations on access to the Single Market, the efficient development of UK-based firms, and investment in the UK.

2. Background

⁶ See, Department for Business, Energy & Industrial Strategy, 'Government confirms Hinkley Point C project following new agreement in principle with EDF' (Press Release, 15 September 2016); and George Parker and Arash Massoudi, 'UK set for US-style investment regime as May clamps down on foreign deals' *The Financial Times* (London, 10 October 2016).

⁷ Previous names for the business ministry going back to pre-EU membership 1970 (with most recent first) include: Department for Business, Innovation & Skills; Department for Business, Enterprise and Regulatory Reform; and Department of Trade and Industry.

⁸ See, for example, Jeremy Corbyn, 'Keynote speech' (Labour Party Annual Conference 2016, Liverpool, 28 September 2016): "our own Brexit agenda including the freedom to intervene in our own industries without the obligation to liberalise or privatise our public services...".

Prior to 2003 the UK's competition policy regime was based around the notion of the 'public interest', which has its origins in the Monopolies and Restrictive Practices Act 1948. When the UK's merger control regime was formalised under the Monopolies and Mergers Act 1965 and later the Fair Trading Act 1973, it afforded decision-making powers to the Secretary of State, who would receive advice from an independent competition authority on whether the merger 'operates, or may be expected to operate against the public interest'. The Secretary of State would then decide how any adverse effects to the public interest could be remedied by, for example, blocking the merger, requiring divestitures, or extracting appropriate behavioural undertakings from the merging parties.

A common criticism directed at the UK merger regime during its formative years was that the concept of the 'public interest' was kept intentionally broad and ill-defined. Governments were reluctant to draft a more precise definition because of fears it would excessively restrict the scope of the competition authority's inquiries.⁹ This created uncertainty and inconsistencies between merger decisions.¹⁰ Moreover, these statutory shortcomings were further compounded by additional anxieties expressed towards the regime's use of ministerial decision-making, which embedded an inherent subjectivity at the heart of the assessment process. This subjectivity manifested itself in the form of notable inconsistencies between 1973 and 2001, where – upon receiving advice from the Director General of Fair Trading (DGFT) on whether or not to refer a merger – Secretaries of State acted contrary to the DGFT's advice on 31 occasions.¹¹ Indeed, the inference from a number of commentators is that this allowed some Secretaries of State to take a 'softer approach' to merger control than others.¹² Only a small number of mergers were ever blocked under the 1973 Act, but as each of these cases were determined on slightly different grounds, the

⁹ See eg C.K. Rowley, 'Mergers and public policy in Great Britain' (1968) 11 *Journal of Law and Economics* 75, 82.

¹⁰ See eg Andrew Scott, Morten Hviid and Bruce Lyons, *Merger Control in the United Kingdom* (OUP 2006) 5; *ibid* 83; T Ellis, 'A survey of the government control of mergers in the United Kingdom' (1971) 22 *NILQ* 251.

¹¹ S Wilks, *In the Public Interest: Competition policy and the Monopolies and Mergers Commission* (MUP 1999) 226.

¹² *ibid* 226-7. For example, in 1990, Trade Secretary Peter Lilley decided acquisitions by foreign state-owned firms would be subject to greater scrutiny (under what became known as the 'Lilley Doctrine').

result was that merging parties found it more difficult to predict outcomes and lawyers struggled to provide advice with a high degree of certainty.¹³

The UK's approach to cartel enforcement during this period was also based on public interest tests. The Restrictive Trade Practices Acts of 1956 and 1968 required the public registration of cartel agreements and gave their Registrar (and later the Office of Fair Trading) the power to refer such agreements to the Restrictive Trade Practices Court, if they appeared to operate against the public interest. A similar public interest test was applied to various forms of exploitative and exclusionary behaviour.¹⁴ Certain cartel agreements were exempted from the registration process where they were deemed to be of significant importance to the UK or where their main purpose was to increase efficiency.¹⁵ Few enforcement powers were available during this period and many industries avoided registration by relying on informal cartel arrangements that fell short of an explicit agreement.¹⁶ When the UK joined the European Community in 1973, cartel arrangements with a Community dimension became subject to punitive penalties, but the UK's domestic enforcement regime under the Restrictive Trade Practices Act 1976 retained the registration system for domestic agreements. This was out of step with how cartel arrangements were increasingly being viewed by the wider academic and policymaking communities. By the 1980s, they were almost universally accepted as being harmful to consumers and the wider economy by raising prices, lowering output and undermining the incentives to innovate.¹⁷ The Competition Act 1998 finally replaced the public interest regime, introducing new investigatory powers and penalties that brought the UK into line with the Antitrust laws of the EU, US and many other jurisdictions.

During the 1970s, UK governments also pursued industrial strategies which were directly at odds with regulation on competition grounds. In particular, sections 7 and 8 of the Industry Act 1972 – relating to financial assistance for industry – included 'some of the most

¹³ Martin McElwee, 'Politics and the UK merger control process: the public interest exceptions and other collision points' (2010) 9 *Competition Law Journal* 77, 80.

¹⁴ Roger Clarke, Stephen Davies and Nigel Driffield, *Monopoly Policy in the UK* (Edward Elgar 1998).

¹⁵ Michael O'Kane, *The Law of Criminal Cartels: Practice and Procedure* (OUP 2009), 1-43.

¹⁶ See G.C. Allen, *Monopoly and Restrictive Practices* (Allen & Unwin 1968) 145.

¹⁷ See Wilks (n 11) 24.

interventionist powers to direct and subsidise industry ever taken outside wartime'.¹⁸ Wilks notes how this brought to an end any commitment at the time to tackle anti-competitive behaviour, in favour of co-operation, agreements, scale and national champions.¹⁹ These included initiatives aimed at protecting British manufacturing from loss of control and unacceptable foreign ownership. This policy proved ineffective and was criticised in 1978 for creating unsustainable tensions with competition policy.²⁰

Although the broad public interest test in mergers under the 1973 Act would formally endure until 2003, its application in practice came to an abrupt end in 1984. Norman Tebbit MP, the Secretary of State for Trade and Industry, announced procedural changes that would see mergers assessed primarily on the basis of their effect on competition, with wider public interest concerns only considered in exceptional circumstances.²¹ By the late 1990s, references to the competition authority were largely made on competition grounds, but the presence of a broad public interest test risked deterring mergers and acquisitions that would benefit the economy.²²

The Enterprise Act 2002 remedied this by putting an end to 'substantial room for the exercise of political preferences'²³ and setting out a formal competition test. This test inquires as to whether the merger 'has resulted, or may be expected to result, in a substantial lessening of competition' within the relevant markets (s. 22) – widely interpreted as an economic effects-based test. Importantly, the test would be applied by a panel of experts sitting in an independent competition authority. They would be determinative and no longer have to make recommendations to the Secretary of State. While this approach is sometimes described as free market oriented, it is important to note

¹⁸ *ibid* 182

¹⁹ *ibid* 183.

²⁰ See the Liesner Committee's Green Paper; Department of Trade and Industry, *A Review of Monopolies and Mergers: A Consultative Document* (Green Paper, Cmnd 7198, 1978), discussed in Wilks (n 11) 41. This period of the mid-1970s also brought a combination of rising unemployment and rising inflation.

²¹ HC Deb 5 July 1984, vol 63, cols 213-14W. In practice, the Tebbit doctrine had an immediate impact and wider public interest goals were almost completely ignored by the competition authority; see Charlie Weir, 'The implementation of merger policy in the U.K. 1984–1990' (1993) 38 *Antitrust Bulletin* 943, 962.

²² Scott et al. (n 10) 6.

²³ Wilks (n 11) 228.

that economics based effects tests are mainly about protecting consumers by controlling concentrations of economic power and avoiding monopoly and cartel outcomes. The test is also clearly focused so all parties can reasonably predict the issues that will be addressed.²⁴

Notwithstanding this effects-based approach, the merger provisions of the Enterprise Act retain a limited role for public interest considerations, which afford a basis for the Secretary of State to intervene in merger assessments.²⁵ Under section 57, the CMA Board has a duty to notify the Secretary of State where it believes a merger raises a public interest issue specified in section 58, including: (i) national security, (ii) certain issues relating to media plurality and the presentation of news, and (iii) stability of the UK financial system.

Moreover, subject to the approval of Parliament,²⁶ the Secretary of State can add to this list of public interest criteria. Indeed, this occurred during the financial crisis when the Government added (iii) to the explicit list of public interests so it could force through the merger of Lloyds and HBOS, even though it raised competition concerns.²⁷ So, in principle, the Government can keep adding to the list of public interest considerations without the need to pass an Act of Parliament.

While the current UK antitrust enforcement regime has been fairly uncontroversial, calls for greater public interest scrutiny of mergers have been gaining momentum in recent years, driven by fears surrounding the perceived ease with which foreign firms acquire UK businesses.²⁸ In particular, some fear the lack of government protection and intervention is resulting in job losses and asset stripping. Perhaps the starkest illustration of this was Kraft's acquisition of Cadbury plc in 2010, which – despite commitments from Kraft to the contrary – was later followed by the closure of the Cadbury Somerdale factory with a loss of 400 jobs.

²⁴ The question of the extent to which such tests are stable or predictable is explored in Ariel Ezrachi, 'Sponge' (2016) *Journal of Antitrust Enforcement* (forthcoming).

²⁵ *ibid*, s 42(2) affords the Secretary of State the power to intervene on public interest grounds.

²⁶ Enterprise Act 2002, s 42(7) confers a duty on the Secretary of State to 'finalise' proposals for new public interest criteria, which – by virtue of s 42(8)(b) – includes obtaining Parliamentary approval.

²⁷ See Andreas Stephan, 'Did Lloyds/HBOS mark the failure of an enduring economics-based system of merger regulation?' (2011) 62(4) *NILQ* 529, 548.

²⁸ See, for example, the views of the former Business Secretary, Sir Vince Cable, in the wake of Pfizer's failed bid for AstraZeneca in 2014; Vince Cable, 'Strengthening confidence in the UK's takeover laws' (*Liberal Democrat Voice*, 13 July 2014) <www.libdemvoice.org/vince-cable-writesstrengthening-confidence-in-the-uks-takeover-laws-41522.html> accessed 18 October 2016.

The Labour Business Secretary at the time, Lord Mandelson, rejected calls for ‘a political test for policing foreign ownership’, saying it ran ‘the risk of becoming protectionist and protectionism is not in our interests’.²⁹ The issue surfaced once again in 2012, when Prime Minister David Cameron’s Coalition Government commissioned an independent review on economic growth, to be undertaken by the Conservative peer Lord Heseltine.³⁰ The findings of the review included a recommendation for the Government to show a ‘greater willingness’ to use its public interest powers under the Enterprise Act 2002,³¹ one of the few recommendations the Government chose to reject in its response to the review.³² Indeed, Cameron’s Conservative party were the only major party not to propose extending the public interest test in their 2015 General Election manifesto. However, UK politics is moving rapidly. The EU referendum result has heightened calls to protect British industry and Theresa May’s Government is setting a very different course to that of her predecessor.

3. Public Interest Tests in Merger Regulation

The stage is set for the public interest regime in UK merger control to undergo its most substantial reforms in over a decade. Within a few weeks of the new Prime Minister assuming office, her Government indicated its intentions to: (i) subject foreign takeovers to case-by-case scrutiny to determine whether their transaction is in the ‘national interest’,³³ and (ii) review the public interest regime under the Enterprise Act 2002 and to introduce ‘a cross-cutting national security requirement’ for ownership of critical infrastructure.³⁴ It is evident that the underlying philosophy of these proposals is to safeguard the public interest by subjecting foreign bidders to harsher scrutiny – a departure from the existing public interest test, which does not directly discriminate between foreign and domestic firms.³⁵ This raises a number of important questions concerning the way in which these legal

²⁹ Lord Mandelson, ‘Mansion House Speech’ (Trade and Industry Dinner, London, 1 March 2010).

³⁰ Lord Heseltine, *No Stone Unturned: In pursuit of growth* (Independent Report, BIS 2012); Department for Business, Innovation and Skills, *Government’s response to the Heseltine review* (Cm 8587, 2013).

³¹ *No Stone Unturned* (n 30), paras 5.102-5.111 and Recommendation 73.

³² Government’s response to Heseltine review (n 30) 59.

³³ These comments were made by the PM’s spokesperson in the wake of SoftBank’s £24.3bn bid for ARM Holdings in July 2016; George Parker and Yukako Ono, ‘ARM takeover puts focus on UK’s industrial strategy’ *Financial Times* (London, 18 July 2016).

³⁴ Greg Clark MP, ‘Hinkley Point C’ (Oral statement to Parliament, House of Commons, 15 September 2016).

³⁵ However, it should be noted that the ‘national security’ exception, under s 58(1) of the 2002 Act, will usually only take effect where a foreign firm is part of the transaction.

reforms are to be framed in legislation, and the institutional arrangement in which they will operate.

The current public interest gateways for UK mergers are used about once a year, with six interventions on national security grounds, three on media plurality grounds and the one on financial stability grounds since the Enterprise Act came into force in 2004.³⁶ Hard Brexit provides the Government an opportunity to enforce a more expansive public interest regime for *all* mergers affecting UK markets. As a member of the EU, the UK is currently subject to the provisions of the EU Merger Regulation (EUMR),³⁷ which states that mergers with a Union dimension will be assessed by the European Commission, rather than by national competition authorities (a process that has been dubbed ‘one-stop’ merger control), under a substantive test based on competition grounds.³⁸ This means that the Secretary of State may be unable to make a public interest intervention in some of the mergers that are most likely to have an impact on the public interest – namely, foreign takeovers of UK firms that have a Union dimension.³⁹ In such cases, the UK Government can currently submit an Article 21(4) notification to the Commission to request jurisdiction to rule on the public interest dimension of mergers that raise ‘legitimate national interest’ concerns.⁴⁰ However, the Commission has afforded a narrow interpretation to what constitutes a ‘legitimate interest’ in practice,⁴¹ and what measures a Member State can put in place to protect them.⁴²

³⁶ Submission from the CMA to the BIS [sic] Committee’s inquiry into the Government’s industrial strategy, 28 September 2016, p.9. It is clear that ‘national security’ is already fairly widely interpreted.

³⁷ Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L24/1.

³⁸ A merger will amount to having a Union dimension if it exceeds prescribed turnover thresholds; *ibid* art 1(2). Such a merger will be prohibited if it significantly impedes effective competition.

³⁹ Conceivably, a large-scale public interest merger could fall within the UK’s jurisdiction if the transaction meets the ‘two-thirds’ rule; *ibid*, art 1(3).

⁴⁰ EUMR, art 21(4).

⁴¹ Article 21(4) provides a non-exhaustive list of three legitimate interests: public security, media plurality and prudential rules. The provision has experienced a somewhat turbulent history, plagued by acts of protectionism, which has led the Commission to treat Article 21(4) requests with great suspicion.

⁴² In particular, the measures should be proportionate, non-discriminatory and necessary in the absence of less restrictive alternatives; see Michael Harker, ‘Cross-border mergers in the EU: the Commission v the Member States’ (2007) 3(2) *European Competition Journal* 503, 524.

There are two opposing perceptions of what the EUMR represents for UK merger control. On the one hand, it acts to obstruct the UK's ability to protect the public interest in large-scale mergers, while on the other hand, it provides an important safeguard against protectionism and undue political intervention from any one EU Member State, which could risk undermining the competition-based regime. Hard Brexit would give the Secretary of State much more freedom to intervene in the CMA's investigation, especially if that merger raises public interest concerns.⁴³ It is also very possible that the withdrawal of the UK from EU decision-making would lead to a resurgence of public interest interventions in the EU, possibly including discrimination against UK firms.⁴⁴

Even in the absence of reforms to the existing public interest regime, there is evidence to suggest that public interest interventions will become more prevalent post-Brexit. In 2014, for example, senior figures in the Coalition Government were reportedly weighing-up a public interest intervention when Pfizer's bid for UK-based AstraZeneca raised concerns over the future of the UK's science base. After it became apparent that the merger would amount to having an EU dimension under the EUMR, the Government was advised that an Article 21(4) request was unlikely to be approved by the Commission, thus forcing the Government to consider alternatives.⁴⁵ This is one instance where, had the UK not been a member of the EU, it is conceivable that the Secretary of State would have exercised their residual power under s.58(3) of the 2002 Act to propose a new public interest ground for 'protection of the UK science base'. Indeed, given the tough rhetoric that Theresa May's Government has recently taken on foreign investment, such outcomes are even more conceivable in the present day.

A return to the uncertainty witnessed under the old broad public interest regime is clearly undesirable, especially as it would multiply Brexit risks. The current economic effects-based

⁴³ However, the UK would not be entirely free to determine its own public interest regime because any trade agreements entered into by the UK would likely contain safeguards against any practices that might be seen as discriminating against foreign firms.

⁴⁴ Evidence for this can be found in the national merger control regimes in Member States, including France, Germany, Italy, the Netherlands, Spain and Portugal.

⁴⁵ David Reader, 'Pfizer/AstraZeneca and the Public Interest: Do UK Foreign Takeover Proposals Prescribe an Effective Remedy?' (2014) 10(1) CPI Antitrust Chronicle.

approach is widely understood and offers a high level of predictability. The key question for the Government is whether it is able to incorporate a public interest test with sufficient clarity and safeguards to ensure that (i) it only trumps competition considerations where there is a legitimate justification, and (ii) it is never manipulated for short-term political gain. The UK is among a large majority of merger regimes worldwide that choose to assign a ‘restricted’ role to public interest considerations,⁴⁶ and if the Government does choose to expand the public interest regime, it is important that it maintains this restricted approach by specifying clear public interest ‘exceptions’ to the competition test. To resist temptation to concede to short-term siren calls, it may be helpful to repeal the Secretary of State’s residual power to propose new public interest criteria under s.58(3), as its existence leaves the door open for a post-Brexit influx of new criteria to be introduced in lieu of primary legislative reform.⁴⁷ At a more fundamental level, the Government must also decide whether merger control is the most appropriate forum in which to enforce its strategy of protecting UK firms from unwanted foreign investment, or whether this aim would be better served by corporate governance reform or a separate foreign investment review.⁴⁸

Public interest criteria do not sit neatly within the decision-making process of the CMA, which is essentially a body that is expert in competition and has no special understanding of wider public interest issues.⁴⁹ Equally, the prospect of requiring the CMA to incorporate public interest considerations within its assessments would inevitably sit at odds with its statutory duty to promote competition.⁵⁰ This implies a continued role for the Secretary of

⁴⁶ An estimated 81.3% of countries avoid considering public interest criteria or frame it narrowly; see David Reader, ‘Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights’ (2016) CCP Working Paper 16-3, 19.

⁴⁷ David Reader, ‘UK public interest mergers: uncertain times ahead’ (2013) 26 CCP Research Bulletin 18.

⁴⁸ For an account of the advantages of pursuing corporate governance reform over extending the public interest test, see Stephan (n 27) 548.

⁴⁹ See submission from the CMA to the BIS [sic] Committee’s inquiry into the Government’s industrial strategy, 28 September 2016, for a summary of the current decision-making procedure in public interest interventions.

⁵⁰ The CMA derives this duty under the Enterprise and Regulatory Reform Act 2013, s 25(3). Before the EU referendum, the CMA’s outgoing Chief Executive, Alex Chisholm, suggested that one of the ‘harder nuts to crack’ for the CMA going forward would be to deal with ‘challenges to the primacy of competition analysis when sensitive mergers give rise to calls for public interest interventions’; Alex Chisholm, ‘The CMA’s achievements over the last 2 years’ (Whitehall & Industry Group Breakfast Briefing, London, 11 May 2016) <www.gov.uk/government/speeches/alex-chisholm-on-the-cmas-achievements-over-the-last-2-years> accessed 31 October 2016.

State. While elected Secretaries of State bring democratic accountability to the decision-making role, their suitability has been brought into question by previous controversies regarding impartiality,⁵¹ and inherent issues surrounding subjectivity and political preferences. As such, the Government may seek to evaluate alternative options, such as an expert ‘public interest’ panel, sector regulators,⁵² or a ‘hybrid’ decision-making process.⁵³

Finally, hard Brexit would end ‘one-stop’ merger control,⁵⁴ so if a merger involving a UK firm also has an EU dimension, it will be subject to separate investigations by the European Commission (under the EUMR) and the CMA (under the Enterprise Act 2002). This duplication will be costly for firms and will put further stress on the CMA’s budget. If this is not increased, and if there is no increase for the added complexity of public interest issues, then the resources available for high quality merger assessment will be reduced with adverse effects on the clarity and predictability of merger decisions.

4. State Aid and Industrial Policy

State aid is regulated by Articles 107-109 TFEU. In particular, Article 107 prohibits aid which may distort competition, in so far as it also affects trade between Member States. The main potential exemptions are for regional development, social needs, important projects of a common European interest, or serious economic disturbance. The Treaty obligations are operationalised by specific rules on state aid to agriculture and fisheries, and particular guidance on certain other sectors, including aviation, broadband and energy. Cutting across these sectoral rules, there are horizontal rules relating to subsidies for regions, R&D and innovation, environment, services of a general economic interest, and rescue & restructuring aid. The EU state aid regime has been undergoing a lengthy ‘modernisation’

⁵¹ See eg Robert Winnett, Andrew Porter and Holly Watt, ‘Vince Cable stripped of responsibility for media competition after Rupert Murdoch comments’ *The Telegraph* (London, 21 December 2010).

⁵² A role for regulators has previously been proposed by the House of Lords Communications Committee in the context of Ofgem and mergers raising media plurality concerns; David Reader, ‘Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?’ (2014) 4(1) *CPI Antitrust Chronicle*.

⁵³ The hybrid system is very similar to the current decision-making arrangement, with the one difference being that the Secretary of State must either (i) accept the advice of the sector regulator (on the public interest) and the CMA (on competition), or (ii) ‘explain why that advice has been rejected’; Lord Leveson, *The Leveson Inquiry: An Inquiry into the Culture, Practices and Ethics of the Press* (Independent report, 2012), vol.3, Part 1, Ch 9, para 6.11.

⁵⁴ Richard Whish, ‘Brexit and EU Competition Policy’ (2016) 7(5) *Journal of European Competition Law & Practice* 297.

programme with a view to reducing bureaucracy and focusing as much as possible on economic effects. The aim has been to look more positively at aid which may help growth but to strengthen enforcement against aid which may distort trade in the Single Market.

Upon leaving the EU, the UK will no longer be subject to European State Aid rules. In principle, this frees up Government policy to provide greater assistance to industries it wishes to promote or protect. However, it will still be subject to WTO rules on state subsidies under the WTO Agreement on Subsidies and Countervailing Measures. This agreement prohibits export subsidies, aid contingent on the use of domestic over imported goods, or the affording of special treatment to individual businesses. It also contains a category of “actionable” subsidies where they have an adverse effect on the interests of another WTO Member.⁵⁵ Nevertheless, there is a level of transparency and enforcement powers within the EU state aid regime, including appeal to the CJEU, that far exceeds anything that can be achieved by the WTO. This undoubtedly leaves the UK with more discretion over state aid post-Brexit.

In this context, it is useful to recall the main reasons why national governments adopt the apparently paradoxical position of wanting both to grant state aid to firms located in their territory, and to submit to international rules that limit their ability to do so. The first set of reasons is that submitting to controls of their own behaviour is the price that must be paid for limiting the ability of other countries to gain an international advantage for their own firms. For example, R&D subsidies may give one country an advantage in product development, but that can be cancelled out if other countries do the same. Mutual control, at least to stop excessive subsidies, can prevent a mutually ruinous subsidy war. Similarly, subsidies or tax exemptions to high energy using firms, or other specific advantages, can distort an otherwise level playing field on which efficient firms can succeed in international competition. As can be seen from the recent cases involving Fiat, Apple and others, the European Commission’s state aid control can further reach into corporate tax deals offered

⁵⁵ For a comparison between EU State Aid Rules and WTO rules on subsidies, see Claus-Dieter Ehlermann and Martin Goyette, ‘The Interface between EU State Aid control and the WTO Disciplines on Subsidies’ (2006) 5(4) *European State Aid Law Quarterly* 695.

by some Member States to attract multinational firms (or their profit flows) away from more efficient locations (or where profits have been generated).

The above reasons relate to the advantages of rules that limit the ability of other countries to subsidise in ways that put a government's home firms at a competitive disadvantage. A second set of reasons why national governments might want state aid rules relates to self-control. Huge lobbying efforts and political pressure can result in 'irrational' subsidies being conceded, especially if that pressure comes from a marginal constituency or in the run-up to a general election.⁵⁶ In this context, it can be advantageous for a government to credibly tie its hands so that it cannot grant subsidies for short-term political gain. It greatly reduces lobbying pressure if everyone knows that there are clear limits as to what aid can be offered.⁵⁷

An important example of the type of aid that is tightly controlled by the EU state aid regime, and which will be far easier to grant post-Brexit, is rescue and restructuring aid (R&R aid). Aid to firms in difficulty puts a brake on the normal process by which the most innovative and efficient firms see their market share grow because they better serve the needs of consumers, while their less productive competitors shrink and possibly exit the market. Recent economic research confirms that much of productivity growth can be attributed to shifting market shares from less productive to more productive establishments. However, this insight is sometimes unpopular because it can be misrepresented as doctrinaire and even callous as closures have serious implications for individuals and their families. It is entirely appropriate to use public funds to help redundant workers to re-skill and ease economic transition, but it is not wise to subsidise senior managers (who may have been responsible for the financial difficulties) and shareholders (who may live in comfort elsewhere). For example, the prospect of subsidies can incentivise reckless behaviour by senior managers in weak firms, and the prospect of subsidies for a weak rival reduces the

⁵⁶ There may also be other political reasons why state aid is granted. See, for example, Mathias Dewatripont and Paul Seabright "Wasteful" Public Spending and State Aid Control' (2006) 4(2-3) *Journal of the European Economic Association* 513.

⁵⁷ Similar concerns used to be raised in connection to monetary policy before governments across the world realised that a more stable economy could be achieved by putting monetary policy in the hands of an independent national bank.

incentive for efficient rivals to compete.⁵⁸ The discipline provided by EU R&R state aid control, which is allowed only in limited circumstances and subject to incentive safeguards, is therefore systemically important for the nurture of efficient competition.

The key questions for Brexit are, first, whether an independent UK is able to limit state subsidies in other countries as effectively as the EU, and second whether future UK governments have the self-discipline to replace the credibility of an independent European Commission to limit the lobbying for subsidies in their own territory. The current UK political context discussed in Section 1 of this paper suggests that the second is unlikely, and a hard Brexit, without the UK being subject to enforcement by the CJEU, suggests that remaining EU members may be reticent to allow free access to the single market without very strong safeguards against potential UK state aid. The EU will also be less concerned if EU subsidies harm UK rivals. In short, the freedom from European state aid control is likely to come at considerable cost and it may be better to find ways to commit to limit that freedom.

5. Antitrust Enforcement

Chapters I and II of the Competition Act 1998 mirror Articles 101 and 102 TFEU. Where the CMA investigates a domestic cartel or dominance case that may affect trade between Member States, they are under an obligation also to apply Article 101 or 102 TFEU. By virtue of Regulation 1/2003, Article 3(2), Chapter I cannot prohibit agreements that would not amount to infringements of Article 101(1) or which would fulfil the conditions of the Article 101(3) exception. Chapter II, on the other hand, can be stricter than Article 102. Within UK law, consistency between domestic and EU competition law is ensured by s.60 Competition Act 1998. This states, "...so far as is possible... questions arising... are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community Law".

⁵⁸ For more detail of the arguments in this paragraph, including relevant evidence and an analysis of the role of capital markets, see Bruce Lyons and Ulrich Soltész, 'Rescue and Restructuring Aid' in Vincent Verouden and Philipp Werner (eds), *EU State Aid Control: Law and Economics* (Kluwer International 2016) (forthcoming).

Upon leaving the EU, the UK would no longer be bound by Regulation 1/2003 and would only need to repeal s.60 Competition Act 1998 to break the link with EU competition law. The UK would then be free to pursue stricter or looser prohibitions under the Competition Act, as EU competition rules and jurisprudence would no longer be binding once the Brexit process is complete. There will be practical transitional issues to resolve, such as whether the UK will continue to have access to the CJEU in relation to conduct occurring, and cases initiated, before the date of the UK's formal withdrawal.

It is very unlikely that anyone would advocate a return to the pre-Competition Act treatment of cartels, especially as the UK is one of a minority of jurisdictions in Europe that have taken it upon themselves to criminalise hard-core cartel conduct under domestic law (something that is not currently possible under EU Competition Law). Indeed, leaving the EU potentially frees up the UK to employ more effective criminal cartel enforcement – considered by many as essential to the deterrence of damaging hard-core cartels.⁵⁹ In principle, the current regime does not prevent the UK from employing its cartel offence under the Enterprise Act 2002. In practice, however, there are obstacles to the UK (as well as other EU criminal jurisdictions, like Ireland) pursuing individuals responsible for the most damaging, multi-jurisdictional cartel cases. The main problem is that international cartels fall under EU competition rules and are investigated by the European Commission under a purely administrative process that can only levy corporate fines. There is no mechanism through which a Member State can hold up a Commission investigation pending the conclusion of criminal proceedings under national law.⁶⁰

⁵⁹ In particular, it is thought enforcement based purely on corporate fines may be ineffective. See Department of Trade and Industry, *A World Class Competition Regime* (White Paper, Cm 5233, 2001) para 7.33. For a discussion of the justifications for cartel criminalization, see Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (CUP 2014); and Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (OUP 2014).

⁶⁰ The only exception to this, the case of *Marine Hoses*, involved the arrest by the US Department of Justice of three UK nationals, who subsequently agreed to plead guilty to the UK cartel offence under a negotiated plea agreement with the US authorities. The case was concluded before the Commission proceeded with its investigation. See Andreas Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) 6 Crim LR 446; and *Marine Hoses* (Case COMP/39.406) [2009] OJ C168/6.

Where a case is investigated by the CMA but may nevertheless affect trade between Member States, the UK has long maintained that the cartel offence does not constitute 'national competition law' and is therefore not under the obligation to also apply Article 101 TFEU, pursuant to Article 3(1) of Regulation 1/2003.⁶¹ However, this rests on the argument that the cartel offence pursues an objective predominantly different from that of Article 101 TFEU, which is highly questionable given that the UK criminalised its cartel laws specifically to strengthen the deterrent effect of its existing administrative provisions.⁶² In addition, information exchanged with other EU competition authorities (discussed below) cannot be used by the receiving authority to impose custodial sentences.⁶³ The UK's withdrawal from the EU will allow the CMA to investigate international cartels that currently only fall under the jurisdiction of the European Commission and end the obligation to apply EU Law alongside national competition law. In principle, this will boost its ability to employ the criminal cartel offence.

However, the UK's freedom to shape its own prohibitions and enforcement strategies outside the EU also comes at a cost. The CMA currently enjoys membership of the European Competition Network (ECN), which facilitates case allocation and information exchange between national competition authorities and with the European Commission. Under Article 12 of Regulation 1/2003, this includes confidential information which can be used as evidence in both Article 101/102 cases and their domestic equivalents under national law. A notable limitation to this is leniency documents, which generally cannot be disclosed without the consent of the cooperating parties.⁶⁴ Although that information cannot be used

⁶¹ Department of Trade and Industry, *Modernisation – a consultation on the Government's proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998* (DTI2003) para 10.16; this was confirmed by the English Court of Appeal in *IB v The Queen* [2009] EWCA Crim 2575.

⁶² Andreas Stephan, 'Four Key Challenges to the Successful Criminalisation of Cartel Laws' (2014) 2(2) *Journal of Antitrust Enforcement* 333, 354-9; See DTI White Paper (n 59) para 7.44.

⁶³ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, arts 12(2) and (3).

⁶⁴ European Commission, *Cooperation within the Network of Competition Authorities* OJ [2004] C 101; discussed in Stephen Blake and Dominik Schnichels, 'Leniency following Modernisation: safeguarding Europe's leniency programmes' (2004) 2 Competition Policy Newsletter 7
<http://ec.europa.eu/competition/publications/cpn/2004_2_7.pdf> accessed 31 Oct 2016.

for evidence in a criminal prosecution that could result in a custodial sentence, the receiving authority can use it to guide its own criminal investigation.⁶⁵

When the UK leaves the EU (and assuming it does not join the EEA), it will have to replace its ECN membership with bilateral agreements on cooperation and the exchange of information.⁶⁶ This includes many such agreements currently entered into by the European Commission on behalf of EU Member States, either explicitly on competition or as part of trade agreements. While these arrangements can be very effective for informal communication and merger clearance, they do not generally allow for the exchange of any confidential information without the consent of the relevant parties.⁶⁷ Consequently the CMA will receive less information from its European partners about potential infringements, at a time when it will have to replicate the European Commission's international enforcement activities, to ensure the UK Treasury continues to receive its cut of the very significant Antitrust fines currently levied by the Commission.⁶⁸

While the UK has no way of preventing its departure from the ECN, there is a second cost to its new freedom that it does have some control over: the potential loss of consistency between UK and EU competition rules. Internationally there has been a gradual harmonisation of substantive rules and enforcement tools. Nevertheless, there is a real danger of divergence, not so much in the treatment of hard-core horizontal cartel arrangements, but in relation to horizontal conduct at the fringes (for example, whether an arrangement has the 'object' of restricting competition or should be subject to an 'effects' analysis) and to the treatment of vertical arrangements that currently benefit from EU block exemptions.

⁶⁵ O'Kane (n 15), paras 7.04-7.07.

⁶⁶ For a list of bilateral agreements currently entered into by the European Commission, see DG COMP, 'Bilateral relations on competition issues' (*European Commission*, 2 October 2015) <<http://ec.europa.eu/competition/international/bilateral>> accessed 31 Oct 2016.

⁶⁷ European Union, *Improving International Co-Operation in Cartel Investigations* (Contribution to OECD Global Forum on Competition, 9 February 2012) <http://ec.europa.eu/competition/international/multilateral/2012_feb_cartels.pdf> accessed 31 Oct 2016.

⁶⁸ These have totaled around €22 billion since 2000 and are deducted from Member States' contributions to the European Union.

The obvious benefit of ensuring consistency between competition rules in the UK and the EU, is that it would minimise the cost to businesses of operating in both jurisdictions. The UK could adopt into domestic law any EU block exemptions that currently affect the scope of Chapter I, Competition Act 1998. In addition, the UK's Competition Appeals Tribunal (CAT) has already built up a significant body of case law that reflects the jurisprudence of the CJEU. The problem is that continued consistency would require the CAT to be guided by decisions of the CJEU after the UK has withdrawn from the EU. As with State Aid rules, consistency may be demanded as a condition of access to the Single Market, but this is at odds with the political imperative to "take back control" and cease being bound by the decisions of the CJEU.

While there is no suggestion that CJEU judgments should be *binding* on UK law in the event of a 'Hard Brexit', there is equally no reason why it should not be strongly persuasive in guiding the CAT. Indeed, EU Competition Law jurisprudence guides judicial decision-making around the world, because so many competition prohibitions are based on those of the EU.⁶⁹ This has contributed to the gradual convergence of competition rules internationally, through bodies like the International Competition Network. In addition, it is not unusual for UK courts to be guided by, or indeed, to adopt precedent from other parts of the Commonwealth.⁷⁰

6. Concluding Remarks

The analysis in this paper suggests it would be unwise to substantially amend competition policy in the UK, as part of its withdrawal from the European Union. The current regime provides a high degree of predictability and transparency to businesses operating and investing in the UK. A continued commitment to this regime would help mitigate some of the great uncertainties surrounding the UK's future relationship with the EU. Until the Brexit vote, the UK was a strong voice against advocates of wider public interest and distorting

⁶⁹ See, for example, Erdem Büyüksagis, 'The Impact of EU Law on Swiss and Turkish Regulation of Competition – With Specific Consideration Given to Abuse of Dominant Position Cases' in Franz Werro, Başak Baysal and Lukas Heckendorn Urscheler (eds) *L'influence du droit européen en Turquie et en Suisse* (Schulthess 2015), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579698> accessed 10 October 2016.

⁷⁰ For example, *Chester v Afshar* [2004] UKHL 41, which followed the Australian High Court decision in *Chappel v Hart* (1998) 195 CLR 232. See Neil Duxbury, 'The Law of the Land' (2015) 78(1) MLR 26.

State Aid in other Member States. Without that voice, it is more likely that any shift by the UK towards an interventionist direction will be reciprocated by the residual EU. In particular, leaving the EU means the UK is free from EU State Aid rules, but will no longer have a seat at the table to prevent them being used for ends that may disadvantage UK businesses. The net effect would harm consumers across the continent and significantly weaken the UK's negotiating position in reaching a trade agreement with the EU or retaining some form of preferential access to the Single Market. The UK government should be prepared to negotiate away some of its new freedom to subsidise in return for market access.

Brexit will provide the UK with an opportunity to be more interventionist in domestic industries, subject to WTO rules. But an industrial policy that is based on more frequent public interest interventions in mergers, and assisting specific industries with state aid, makes policy susceptible to lobbying, subjective decision-making and short-term political point scoring. History has shown that it is better to be cautious with such interventions and that an economics-based merger control system, administered by an authority that is independent of political interference, is the most effective approach. The current merger regime already allows for public interest considerations, but only in exceptional circumstances (national security, media plurality and stability of financial markets).

Following Brexit, the UK Government will be able to employ these existing considerations in any merger where there is a political need to protect UK firms from foreign acquisitions on these grounds. Any move to introduce an expanded public interest test alongside the competition test, risks dragging the UK back to the patchy and inconsistent policy of the past. In fact, it may be better to legislate to make the extension of public interest grounds more difficult.

Overall, it is in the UK's interests to remain broadly aligned with current EU Competition Policy and to avoid a divergence in substantive antitrust rules. This is important for keeping uncertainty to a minimum and averting unnecessary increases in the regulatory burden for firms operating in the UK. Policy shifts that compound Brexit uncertainties risk long-term damage to the efficiency, flexibility and dynamic success of UK firms and markets.