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Anti-trust v. Anti-globalisation

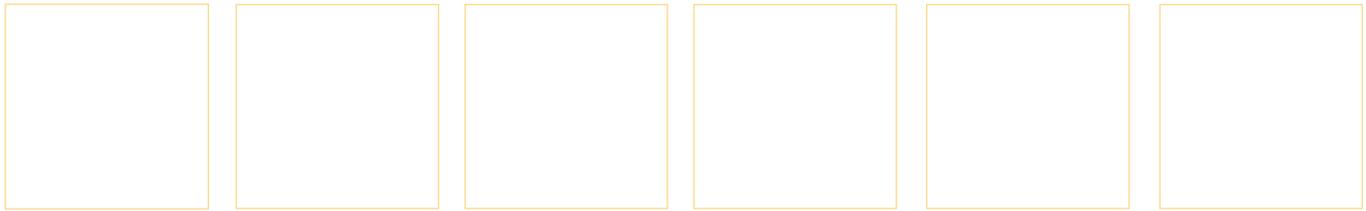
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Abstract

On 20 – 21st October 2017 the Robert Schuman Centre for Advanced Studies hosted the second Annual Conference of the Florence Competition Programme (FCP) at the European University Institute (EUI) campus in Florence. The event was organised in cooperation with the Organisation for Economic Cooperation and Development (OECD). The conference discussed the future of competition policy in light of the growing anti-globalisation and populist political movements around the world. The event was opened with a keynote speech that was delivered by Kris Dekeyser, Director for Policy and Strategy of DG Competition of the European Commission. The conference was divided into four panels which dealt respectively with i) Private enforcement of competition law after Brexit; ii) State aid law enforcement after Brexit; iii) US antitrust enforcement under the Trump administration; and iv) Anti-globalisation and the future of antitrust enforcement around the world. The event gathered different stakeholders, including competition enforcers as well as representatives from academia, industry, law and economic consulting firms. The diversity of views ensured a lively debate. This Policy Brief summarises the main points raised during the discussion and seeks to stimulate further debate.

POLICY
BRIEF



I. Background Discussion: Competition Policy and Globalisation

Since WWII, worldwide trade has substantially increased, and companies have started to operate in global markets. Globalisation has increased the inter-dependency of countries and has introduced competition into industries where it would have been unforeseeable a few decades ago. However, globalisation has also caused an increase in the “size” of the corporations, making it more difficult for national governments to ensure that transnational economic operators comply with national rules, including competition rules.

A first issue at the crossroads between competition policy and economic globalisation is the extra-territorial enforcement of competition rules. As recognised by the Court of the Justice of the European Union (CJEU) in *Gencor*¹, and, more recently, in *Intel*,² EU competition law is applicable *vis à vis* anti-competitive conduct that takes place outside the EU, and which has a foreseeable and substantial effect on the EU market (the ‘qualified effects’ doctrine). The extra-territorial enforcement of competition rules is a principle that is well established in EU competition law, as well as in most of the antitrust jurisdictions around the world. Extra-territoriality, however, raises a number of issues for competition enforcers. Among the most relevant are practical challenges for authorities concerning the collection of evidence for anti-competitive conduct taking place outside of the authority’s jurisdiction. The same is true with reference to the effective implementation of fines or remedies that are imposed on companies based in another jurisdiction. Furthermore, extra-territorial enforcement of competition law may raise conflicts with foreign governments, where the remedy impinges on the sovereignty of another jurisdiction.

During the past twenty years, the spread of competition law jurisdictions around the world has increased the number of cases of extra-territorial enforcement of competition rules, calling for enhanced forms of cooperation amongst competition authorities. Authorities discuss areas of coordination within the International Competition Network (ICN), the OECD and, increasingly, they cooperate at the bilateral level.

1. Case T-102/96, *Gencor v. Commission*. ECLI:EU:T:1999:65.
2. Case C-413/14 P, *Intel v. Commission*, ECLI:EU:C:2017:632.

For instance, DG Competition has recently concluded a second-generation cooperation agreement with the Swiss competition authority;³ furthermore, it is negotiating similar agreements with Canadian and Japanese competition authorities to allow for the exchange of evidence.

Even with the lack of a formal bilateral agreement, competition authorities often cooperate when investigating the same cross-border competition law case. In particular, in a number of international cartel cases, DG Competition at the EU Commission has coordinated the timing of dawn raids with many other competition authorities outside Europe. International cooperation among different authorities has increased particularly in the field of merger control. Between 2010 and 2015, in more than half the complex merger cases DG Competition dealt with, it has exchanged information with extra-European competition authorities. At the multilateral level, the ICN has developed a confidentiality waiver model, whereby the merging parties may authorise reviewing authorities to exchange confidential information in order to avoid diverging assessments of the same transaction.⁴

In spite of the harmonisation process and the higher degree of cooperation among competition authorities, a number of major challenges still affect the enforcement of competition policy in cross-border cases:

1) Procedural differences in merger control: in the field of merger control, substantial procedural discrepancies still affect the reviews carried out by different authorities on the same concentration. In this regard, during the workshop it was noted that the ICN merger-working group is currently updating its recommendations in order to achieve a greater degree of procedural convergence.

2) Multi-jurisdictional cartel leniency applications: workshop participants stressed that disincentives to apply for leniency could arise from the proliferation of regimes as potential applicants face an increased administrative burden and a greater exposure to fines. Overall, incentives to apply still outweigh the disincentives as the risks of heavy sanctions can only be eliminated by being

3. <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/swiss-cooperation-agreement-competition-enforcement-enters-force> (4.12.2017).

4. <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx> (4.12.2017).



the first to apply for leniency. However, to maintain the attractiveness of leniency, authorities need to face certain challenges such as ensuring protection from prosecution of employees of applicants and developing an effective *ex officio* strategy to increase the chances of detection, which serves to bring applicants forward.

3) Double sanctions in multi-jurisdictional cases: corporations often claim that they are exposed to “double” sanctions by different NCAs authorities. The issue is particularly relevant in relation to fines imposed on cross-border cartels, but it also affects structural and behavioural remedies in merger control and cases of unilateral conduct. During the workshop, it was noted that the *ne bis in idem* principle is not applicable to cross-border parallel competition law cases investigations *per se*. NCAs Authorities cannot take into consideration the fines that have already been imposed by other authorities for the same violation if the geographic market affected is different; furthermore, the nature of this type of infringement does not make it very easy for a national authority to calculate the amount of the fine so as to realistically sanction conduct that has occurred only within a single jurisdiction. However, principles of comity and proportionality argue for imposing fines that reflect the territorial jurisdiction of the particular agency and addresses the harm to consumers within that territory.

II. Consequences of Brexit for the Private Enforcement of Competition Law

The rise of anti-globalisation and populist political movements has posed particular challenges to the enforcement of competition policy. From a legal point of view, it was remarked during the workshop that Brexit would impact on a number of aspects relating to competition law enforcement in the UK and in the EU. In particular, Brexit will have the following effects on the public enforcement of EU competition law:

1) Application of Art. 101-102 TFEU: the UK Competition and Market Authority (CMA) will no longer have jurisdiction to enforce Art. 101-102 of the Treaty on the Functioning of the European Union (TFEU); the CMA will be able to rely only on the corresponding national provisions sanctioning anti-competitive agreements and the abuse of dominance. The CMA will therefore take into consideration the impact of anti-competitive conduct

within the UK, without assessing the effect in other EU Member States. Similarly, the EU Commission will only sanction anti-competitive conduct affecting the EEA.

2) CJEU preliminary rulings: after Brexit, UK courts will not be able to ask for preliminary rulings from the CJEU. In addition, as recently pointed out by Art. 6 of the UK Withdrawal Bill,⁵ British courts will no longer be bound by the jurisprudence of the Luxembourg courts. According to some participants, the lack of preliminary rulings and of the binding effect of CJEU case law may, in the long term, affect the coherence of the enforcement of UK and EU competition rules. By contrast, other panellists pointed out that although the jurisprudence of the CJEU will not be binding for British courts, the latter will probably rely on such case law as guidance, thus minimising the risk of potentially inconsistent interpretation of UK and EU competition rules.

3) The status of CMA within the European Competition Network (ECN): after Brexit, the CMA will no longer be part of the ECN. In order to preserve the current system of cooperation, the EU Commission and the competition authorities of each EU Member State will have to conclude separate cooperation agreements with the CMA.

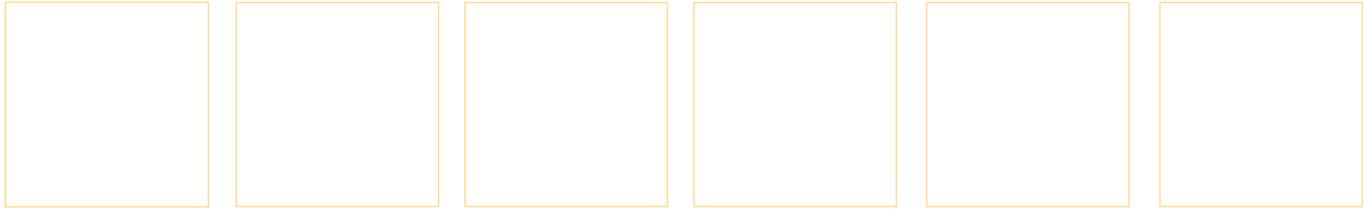
Brexit will also affect the private enforcement of EU competition law:

1) EU Commission decisions will not be binding for UK courts: after Brexit, Art. 16 Reg. 1/2003 will no longer be applicable in the UK. Consequently, EU Commission decisions sanctioning a cartel will not be binding for the UK courts in follow-on damage actions. During the debate, a number of panellists pointed out that this change will decrease the attractiveness of British tribunals in follow-on damage cases. On the other hand, other participants stressed that Brexit will not have an impact on the number of stand-alone cases. The latter already represent the majority of claims that are started at the Competition Appeal Tribunal (CAT) in cases of an abuse of dominance.

2) Brussels Regulation: this piece of legislation governs the mutual recognition and enforceability of civil judgements among EU Member States.⁶ The Brussels Regulation is

5. <https://services.parliament.uk/bills/2017-19/europea-unionwithdrawal.html> (5.12.2017).

6. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001R0044> (5.12.2017).



crucial to the current system for the private enforcement of competition law: in a cross-border competition law case, a claimant can select as a forum the national court of any EU Member State and ask for the recognition of the ruling in another of the EU Member States. After Brexit, the UK will still be bound by the Lugano Convention,⁷ which regulates the court jurisdiction and mutual recognition of rulings in civil cases among the countries that are part of the European Economic Area (EEA). According to some participants, the shift from the Brussels Regulation to the Lugano Convention will create doubts as to the recognition of rulings of British courts in continental Europe. By contrast, a number of participants pointed out that the content of the Lugano Convention is very similar to that of the Brussels Regulation. In the view of those participants, the shift from the Brussels Regulation to the Lugano Convention will therefore not affect legal certainty for claimants who choose the UK as a forum in cross-border competition law damage claims.

Besides Brexit, the Damages Directive will also influence the private enforcement of competition law in Europe in the coming years.⁸ The Directive, in fact, harmonises a number of procedural rules that are relevant in competition law damage cases, and it increases the role of economic analysis in cases of the private enforcement of competition law. Firstly, by broadening the disclosure of evidence in court proceedings, the Directive encourages economic analysis in damage claims: external economic experts hired by the parties, in fact, will be able to rely on a larger amount of data in their analysis. Secondly, together with the Damages Directive, in June, 2013, the EU Commission published a Practical Guide that was addressed to national courts.⁹ This soft law document provides an overview of the methods followed by economists to quantify the antitrust damage, which is expected to increase the understanding of national courts in this respect.

The Damages Directive establishes a level playing field among EU Member States, in terms of procedural rules that are applicable to damage claims. According to some

participants, claimants that previously relied on the more favourable UK procedural rules (e.g., broader disclosure rules) will thus have fewer incentives to bring claims in UK courts. On the other hand, other panellists pointed out that, unlike other courts in continental Europe, the CAT and the UK High Court have specialised judges in competition law. Accordingly, this aspect may preserve the UK's leading role in this field.

Overall, the impact of Brexit on trends in private enforcement of competition law is still unclear and was subject to a lively debate during the FCP Annual Conference. The implementation of the Damages Directive will also play an important role to this regard.

III. Brexit and State Aid Law

The EU is the main trading partner for the UK, covering 45% of UK exports and 50% of UK imports. The impact of Brexit on UK GDP has been analysed in a number of studies. According to a recent report, published by Rabobank in October, 2017, UK GDP will decrease by between 10% and 18% GDP until 2030, in comparison to the pre-Brexit expectations.¹⁰ Brexit will also have a negative impact on EU GDP, which is estimated to be at least 1% of EU GDP. Ireland, Netherlands and Belgium are the countries that will be most negatively affected by Brexit, due to their close economic links with the UK.

Participants agreed on the fact that the UK has a history of a low subsidisation of its economy. Most of the granted subsidies are horizontal aid schemes put in place to promote renewable energy sources, broadband development, R&D and risk capital; the subsidies granted in the UK rarely have a distortive effect on competition in the market. It is therefore debatable whether a new system of subsidy control will have to be put in place after Brexit. Nevertheless, the expected negative effects, caused by Brexit, on the British economy in the near future may lead the British government to increase the degree of subsidisation of the economy, especially to attract FDIs. It therefore seems unlikely that Brexit negotiations will be concluded unless the UK establishes a form of subsidy control.

7. <https://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm> (5.12.2017).

8. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG (5.12.2017).

9. http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html (5.12.2017).

10. <https://economics.rabobank.com/publications/2017/october/the-permanent-damage-of-brexit/> (5.12.2017).



An issue debated during the FCP Annual Conference concerned the ways in which a new State aid law regime might be established in the UK after Brexit, and how it might work in practice. A number of possible scenarios were discussed during the Annual Conference:

1) Transitional model: during a transitional phase, the UK could continue to be subject to EU State aid control from the EU Commission. Due to the possible extension of the Brexit negotiations, this may be a likely scenario in the coming years. In addition, even after Brexit, the UK may be subject to EU State aid rules for a few years before establishing an alternative internal system of control. The major issue in this scenario would be the jurisdiction of the CJEU in the enforcement of State aid law; jurisdiction that would not be acceptable to the British government.

2) The CMA, as the State aid monitoring authority: With reference to the internal system of State aid control, the EU usually requires the establishment of an internal system of State aid control in bilateral trade agreements concluded with third countries. Participants stressed that in the framework of Brexit negotiations, the EU Commission would probably put forward a similar request. The future EU-UK bilateral agreement might require the United Kingdom to introduce an internal system of State aid control that would be enforced by an independent authority, like the CMA. The major issue in this scenario would concern the effective degree of the independence of the State aid monitoring authority from the British government. Unlike competition law, State aid law is a politically sensitive subject.

3) The EFTA Court: In the EEA, the enforcement of State aid rules is conferred on supranational authorities, such as the EFTA Surveillance Authority and the EFTA Court.¹¹ In her recent Florence speech on Brexit, Prime Minister May rejected the EEA model for the UK.¹² However, some aspects of the EEA model may be used to find a middle-ground institutional solution that is suitable for both the EU and UK. In particular, while the CMA may be in charge of State aid control at the domestic level, its decisions could be appealed before the EFTA Court, rather than before a British tribunal. A British judge could join the members of the EFTA Court in every

case involving the UK. The CJEU's President Lenaerts has recently proposed to extend the jurisdiction of the EFTA Court to solve any EU-UK disputes after Brexit. The EFTA Court would be an alternative to the CJEU's jurisdiction, which will not be acceptable to the British government after Brexit.

4) WTO subsidy rules: participants noted that, in the case of a lack of agreement between the EU and the UK on the system of State aid control, the application of the current WTO rules on subsidies would be the fall back scenario. The latter rules, however, are only applicable to subsidies to goods, not those to services. In addition, WTO rules provide for a list of prohibited subsidies *per se* (e.g., red line subsidies, like export aids). However, most of the subsidies granted in the UK are horizontal aids that are not prohibited *per se*, and they would require a case-by-case assessment. Finally, the annual reporting obligations on subsidies included in the WTO agreement are usually not fully compliant with the WTO Member States. The WTO framework does not therefore seem to be a suitable solution or the introduction of an effective mechanism of State aid control into the UK.

5) Anti-dumping duties: closely connected to the previous scenario is the imposition of anti-dumping duties on imported UK products, in case the latter had been subsidised. In the EU, the anti-dumping mechanism starts with a complaint submitted by the affected Community producers to the EU Commission.¹³ Besides showing the presence of dumping, the complainant has to prove the presence of a material injury, a causal link between the dumping and the injury, as well as the existence of a Community interest to intervene. The burden of proof to activate the anti-dumping mechanism, therefore, is particularly high, and it is thus unlikely to replace a system of State aid control. In addition, the EU Commission can only impose anti-dumping duties on imported UK products that is equivalent to the value of the dumping. However, such a redress mechanism will not necessarily solve the injury suffered by the Community producers.

Another issue debated during the FCP Annual Conference concerned the future of EU State aid law after Brexit. Historically, the UK has influenced State aid law enforcement in the EU: first, since the UK is not a

11. <http://www.eftasurv.int/state-aid/> (24.10.2017).

12. <http://www.independent.co.uk/news/uk/politics/theresa-may-florence-speech-in-full-read-brexit-plan-eu-talks-single-market-divorce-bill-a7961596.html> (24.10.2017).

13. <http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/> (24.10.2017).



subsidy-oriented country, it has generally requested that the EU Commission strongly enforce State aid rules *vis-à-vis* other EU Member States. The question is thus whether the EU Commission will become more lenient in enforcing State aid rules after Brexit. Secondly, the UK has promoted a modern use of subsidies, one that is focused on risk capital, R&D, the promotion of renewable energy. In this respect, the question is whether this trend will change within the EU after Brexit. Finally, the UK has promoted the reliance on economic insights in EU State aid analysis; it is a question if Brexit may negatively affect economic analysis in EU State aid control.

IV. US Antitrust Enforcement Under Trump Administration: Continuation or Breakage With the Past?

During the third session of the Conference, participants analysed the challenges that are currently being raised by the Trump administration to antitrust enforcement in the USA. First, it was provided an overview of the institutional framework, describing the main features of the two agencies that are responsible for enforcing antitrust laws in the United States. It was remarked that the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DoJ) share this authority, but that each has specific expertise in particular industries. In addition, the DoJ, which is part of the executive branch and operates under the US Attorney General, is entrusted with criminal enforcement tasks.

Participants highlighted the fact that the FTC is a bipartisan, quasi-judicial federal agency that is technically independent of the Executive Branch, with the dual mission to protect consumers and to promote competition. Its core activities involve actions to protect competition, prevent fraudulent or misleading claims, and develop policies with regard to privacy, but it also focuses on competition advocacy and research work. Generally speaking, the FTC's approach should be driven by the principle of regulatory humility, according to which it is fundamental to recognise the inherent limitations of regulation in order for an enforcer to act in accordance with them.

It was noted that, in the last few years, the FTC has undertaken numerous efforts to preserve economic liberty while, at the same time, benefitting consumers. For example, the Acting Chair, Maureen Olhausen, has launched a massive advocacy effort to reform occupational licensing with the objective of minimizing the impact of the burdensome requirements that must be satisfied in order to provide certain services. Although the Trump administration may have a negative impact on the FTC's enforcement and policy-making actions, when the Chair was asked to express her opinion about it in Washington, D.C., just over a month after the presidential election, she stated: *"I have seen other transitions before so, just looking to the past as an indicator, I would say the FTC is very good at handing the baton from one administration to the next. And there has been a lot of consistency in data privacy and security issues."*

Secondly, the debate focused on the history of antitrust foundations in the US. In 'The Antitrust Paradox' (1978) Robert Bork, a prominent first-generation scholar of the Chicago School, criticised the state of US antitrust law in the 1970s. According to Bork, the only objective of the Sherman Act was to safeguard consumer welfare. Practices that are allegedly exclusionary, such as vertical agreements and price discrimination, did not therefore have to be prohibited, since they were not harmful to consumers. After thirty years of debate, the ideology behind antitrust seems clear: most commentators agree on the fact that consumer protection should be the only goal of antitrust law. Although there have been calls to expand the role of antitrust to include income inequality and anti-globalisation concerns, some panellists noted that antitrust enforcers and courts may not be effective at assessing those concerns and balancing them against consumer welfare.

However, as argued by Herbert Hovenkamp ('The Antitrust Enterprise', 2008), the focus of the problem has shifted towards the implementation dimension: antitrust rules remain highly unfocused and excessively complex. In order to solve the problem, as well as to manage the disarray that is typically associated with the antitrust rule of reason, Hovenkamp offered a good set of tools and a comprehensive policy approach, with the objective of making rules more manageable by the federal courts. In his view, antitrust appears to be a defensible enterprise only if it helps the microeconomics work well after



accounting for the considerable costs of operating the system.

Finally, panellists debated about the effectiveness of US antitrust policy during the past decades: some panellists argued that the scope of US antitrust policy has been progressively narrowed down due to its focus on consumer welfare, while other participants disagreed on this point. The Chicago School succeeded against the backdrop of the deep economic recession in the 1970s, and this led to a ground-breaking change in the general economic thinking and encouraged the rise of Margaret Thatcher and Ronald Reagan. However, more recently the faith in market forces has been put under attack, this is one of the consequences of the financial crisis in the USA and at the global level, the final effect on antitrust policy remain to be seen.

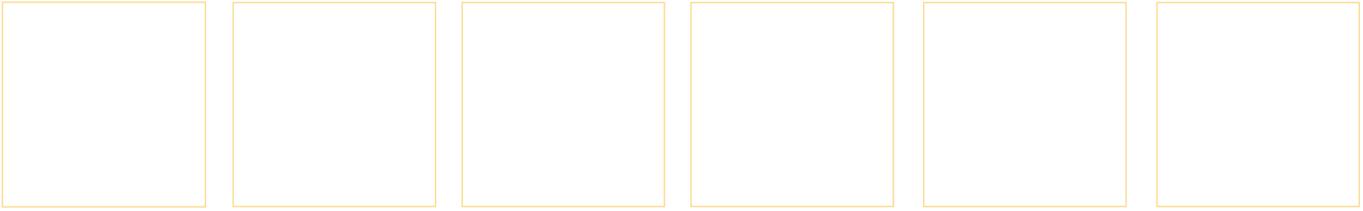
V. Anti-globalisation and the Future of Antitrust Enforcement across the World

Antitrust can be used in several different ways to achieve protectionist results. This is the case in China, where statutory objectives have been broadly defined so as to justify such policies. In this respect, participants pointed out that although the competition legal landscape is gradually evolving in Asia, through the enactment of modern competition laws, substantial concerns persist as to their application. First, it was observed that in certain countries, such as Vietnam, antitrust agencies lack effective independence and their own resources, with the main result being that they are subject to some influence by the Government. Furthermore, antitrust regulations have been criticised for not being sufficiently clear. Finally, it was remarked that exemptions protecting certain sectors from antitrust scrutiny have had the effect of excluding important activities that are held by the Government from the scope of the application of the law.

Generally speaking, the State's intervention in the national economy may take several different forms, including regulation, loans at preferential interest rate, state subsidies, industrial policy, and direct ownership participation. Although the concept of protectionism is ever evolving, when the promotion of a level global playing field is at stake, close supervision over the role played by State Owned Enterprises (SOEs) and equivalent publicly-controlled entities, without doubt, becomes crucial. Participants highlighted the fact that the importance

of SOEs in the modern economy is certainly growing. SOEs account for 2% in a typical OECD jurisdiction, and around 10% in those developing countries where the role of the State in the market is particularly strong. The main concern is represented by the fact that SOEs are now acting at the global level and competing with private firms. Governments may be induced to grant SOEs or national champions certain advantages, ranging from fiscal advantages to preferential treatment in terms of bankruptcy, in return for possible public policy obligations, and this may have harmful spill over effects at the international level. As a matter of fact, 22% of the world's largest 100 firms are State controlled companies, and this is the highest percentage ever recorded for decades. Furthermore, SOEs operate in sectors that are important to international supply chains, such as public utilities, manufacturing, metals and mining, and petroleum. Notably, it was observed that these trends are likely to continue to increase in the near future.

Finally, the debate focused on the identification of the best policy instruments with which to address the challenges that are posed by the internationalisation of SOEs and the use of competition enforcement to promote national champions or foster protectionist policies. This was a growing threat, given the exponential growth in competition jurisdictions and globalisation, and one that needed to be addressed if the integrity of the global competition system was to be maintained. Participants agreed that promoting transparency; of authorities' decision-making, due process rules and imposing high standards of governance could help to reduce the ability to use competition enforcement inappropriately. In this respect, it was suggested that proper adjustments in investment policy frameworks, in the light of the maintenance of a level playing field, would be key to reduce the incentives to apply protectionist measures. Finally, yet importantly, the adoption of competition-related remedies with which to address market distortions arising from the State's intervention at the domestic level would make a significant contribution to the matter, as would identify potential solutions affecting multilateral rules on trade.



VI. Concluding Remarks

The second FCP Annual Conference debated the future developments of competition law enforcement around the globe. Besides the traditional issues posed by the globalisation of the economy, which has increased the number of cross-border competition law investigations, populist political movements also pose new challenges to competition law enforcement. To this regard, the consequences of Brexit, Trump administration and SOEs on competition law enforcement were debated during the conference in Florence.

The final part of the debate focused on the ambitious hypothesis of devising some sort of enhanced transatlantic cooperation on antitrust matters that may eventually lead to the adoption of a Treaty in a future that it is difficult to conceive now. First, it was pointed out that globalisation is not necessarily a constraint for the development of antitrust enforcement and may rather represent an opportunity. Thus, it was explained that although the opportunity of adopting a comprehensive approach does not sound realistic at present, it may appear logical from an efficiency point of view as since there is no apparent way back to globalisation. Participants agreed on the fact that the search for a compromise would be particularly challenging due to the numerous discrepancies in terms of cultural values as well as legal and economic traditions. These more complex and ambitious topics regarding the transnational governance of competition themes and conflicts could constitute the subject for a future Conference.

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Robert Schuman Centre for Advanced Studies

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The Florence Competition Programme

The Florence Competition Programme (FCP) in Law & Economics is a project of the Robert Schuman Centre for Advanced Studies at the European University Institute, which focuses on competition law and economics. FCP acts as a hub where European and international competition enforcers and other stakeholders can exchange ideas, share best-practices, debate emerging policy issues and enhance their networks. In addition, since 2011, the Robert Schuman Centre for Advanced Studies organises a training for national judges in competition law and economics co-financed by DG Competition of the European Commission - ENTraNCE for Judges.

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