THE NEW TENTACLE OF EU COMPETITION LAW: TOOLS TO CONTROL FOREIGN-SUBSIDISED ACQUISITIONS AND MARKET DISTORTIONS

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I. THE SPONGE AND THE JELLYFISH

For those of us who have more grey hairs than we would like, EU competition law seems rather different today to what it was like when we started our journey. And the pace of change in the last few years seems to be faster than ever before.

Antitrust can be viewed as a sponge, as it picks up and is influenced by other disciplines, by ideas from other fields and by events.[2] This is to be expected given competition law reflects the political decision on how society decides to shape its economy. What is unusual in the last few years is how many new ideas and new influences there have been. This may be due to the stresses in the economy in the past decade since the global financial crisis as well as the rapid advance of technology.

We've seen hipster antitrust.[3] We've seen fairness being increasingly cited as a concept/goal.[4] We've seen the goal of curing wealth inequality as a new concept/goal.[5] We've seen antitrust get very close to other areas of regulation, including pharmaceutical regulatory law[6] and most recently data protection/privacy.[7] We've seen sustainability and environmental law be cited as goals of antitrust.[8] And, of course, very recently, we've seen antitrust authorities tweak their approaches and make new rules to adapt to the changed economic situation caused by the COVID-19 health crisis.[9]

2 Ariel Ezrachi, "Sponge," (2017) 5(1) JAE 49, 50.

3 See, e.g. Marco Botta & Silvia Solidoro, "Hipster Antitrust, the European Way?," (2020) EUI - Robert Schuman Centre for Advanced Studies Policy Brief 1; Adi Ayal, "The Market for Bigness: Economic Power and Competition Agencies' Duty to Curtail it," (2013) 1 JAE 221. For a critical account on this concept see, e.g. Joshua D. Wright *et al.*, "Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," (2019) 51 Arizona State Law Journal 293.

4 See, e.g. Damien Gerard, Assimakis Komninos & Denis Waelbroeck (eds), *Fairness in EU Competition Policy: Significance and Implications* (Larcier/Bruylant 2020); Sandra Marco Colino, "The Antitrust "F" Word: Fairness Considerations in Competition Law," (2019) 5 Journal of Business Law 329; Ariel Ezrachi & Maurice E Stucke, "The fight over antitrust's soul," (2017) 9 JECLP 1; Edwin J. Hughes, "The Left Side of Antitrust: What Fairness Means and Why it Matters," (2009) 77 Marq L Rev 265, 282-283; John B. Kirkwood & Robert Lande, "The Fundamental Goal of Antitrust: Protecting Consumers not Increasing Efficiency," (2008) 84 Notre Dame LRev 191.

5 See, e.g. Lina A. Khan, "The New Brandeis Movement: America's Antimonopoly Debate," (2018) 9 ECLP 131, 131; Lina A. Khan & Sandeep Vaheesan, "Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents," (2017) 11 Harvard Law & Policy Review 235. See also Florian Kraffert, "Should EU competition law move towards a Neo-Brandeis approach?," (2020) 16 European Competition Journal 55.

6 See, e.g. Case C-457/10 P, *AstraZeneca v. Commission*, ECLI:EU:C:2012:770.

7 Federal Cartel Office, Decision of February 6, 2019 in B6-22/16 – *Facebook*, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=8.

8 See, e.g. Maurits Dolmans, "Sustainable Competition Policy," (March 22, 2020, CLPD), available at https://ssrn.com/abstract=3608023.

9 See, e.g. Commission Implementing Regulation (EU) 2020/593 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the potatoes sector

But antitrust is not just a sponge, picking up ideas from elsewhere. It is also like a jellyfish. It can grow new tentacles, which can sting. We have seen many new tools being proposed in recent years. Indeed, two were proposed by the European Commission in the last month alone!

The first is the new "market investigation tool,"[10] which was put forward on June 2, 2020. It would give the Commission new powers to initiate market investigations without any prior finding, and independent of, any infringement of the competition rules. It would allow the Commission to impose behavioural or structural remedies unilaterally to address any structural competition problems that it uncovered. From *ex post* competition enforcement, the EU would move to an environment combining *ex post* and *ex ante* tools. While this tool would be novel in Brussels, some other countries do have similar tools like the UK, Greece, Israel, and Mexico.

Remarkably, this radical initiative is already old news! There has been another new tool proposed in the last month. It is different, but also potentially equally radical. It aims to counter the effects of foreign subsidies on the EU internal market and thus fill a gap between antitrust (merger control and State aids), foreign direct investment rules, public procurement rules, and trade defence instruments.[11]

The announcement of the new tool was made by a Commission White Paper called "Levelling the Playing Field with regards to Foreign Subsidies," published on June 17, 2020 ("White Paper").[12] The White Paper proposes three new tools to control the acquisitions and activities of foreign subsidised companies in the EU: (i) a general *ex post* control mechanism to review competitive distortions, (ii) a mandatory *ex ante* notification mechanism that would allow the Commission to review foreign subsidised acquisitions, including certain minority investments, and (iii) the possibility to exclude bidders that have received distortive foreign subsidies from public contracts tendered by the EU and Member State authorities.

This paper will look at what the new tool includes and then offer one or two concluding thoughts on whether there are limits to where competition law should tread. This new tool, like the new market investigation tool, is just a proposal at this stage – and its scope is likely to be clarified during the legislative process.

II. WHY ANOTHER NEW TOOL?

The Commission already has a range of powers to tackle subsidies, both home-grown and international: it can apply EU competition law and the WTO trade rules. In addition, it recently acquired powers to ensure the protection of certain strategic EU assets from foreign investors from a national security or public order perspective.

The reason for the new tool, according to the Commission, is that these instruments leave an enforcement gap,[13] both when it comes to the review of acquisitions of EU companies by subsidised non-EU companies, and for the distortive effects of certain foreign subsidies on the internal market.

First, as the White Paper notes, neither EU antitrust rules nor EU merger control regulations "*specifically take into account whether an economic operator may have benefited from foreign subsidies (even if in principle it could form part of the assessment) and they do not allow the Commission (or Member States) to intervene and decide solely or even mainly on this basis.*"[14]

[2020] OJ L140/13. There were pushes for price regulation in the COVID-19 context too, e.g. French Ministry for the Economy, Directorate General for Competition, Consumption and Anti-Fraud Action, "Control of prices for hydroalcoholic gels – FAQs," (March 11, 2020), available at https://www.economie.gouv.fr/dgccrf/encadrement-des-prix-pour-les-gels-hydroalcooliquesvoir-la-faq.

10 For which the Commission opened a public consultation on June 2, 2020. See European Commission, "Antitrust: Commission consults stakeholders on a possible new competition tool," (June 2, 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977.

11 For the non-trade lawyer, this typically covers anti-dumping, countervailing duty and safeguard cases, which are all permitted under (and to an extent governed by) WTO law.

12 European Commission, "White Paper on levelling the playing field as regards foreign subsidies," (June 17, 2020), available at https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf ("White Paper").

13 White Paper (op. cit.) p. 9.

14 *Ibid.*

Second, the White Paper notes that financial support granted by third countries (either to undertakings active in the EU or to their parent companies outside the EU) is not covered by EU State aid rules.[15]

Third, under national FDI screening mechanisms and the EU FDI Screening Regulation,[16] authorities may assess and block FDI based on security and public order grounds, but this does not explicitly include considerations of foreign state subsidies.[17]

Finally, EU anti-dumping and anti-subsidy rules, themselves based on WTO Agreements, apply to the import into the EU of goods only, and – importantly – do not cover trade in services, acquisitions of EU companies or other financial flows in relation to the activities of undertakings in the EU. It is also difficult to apply anti-subsidy duties to subsidies granted by Country A, which benefit a company that is exporting to the EU from a factory located in Country B – although the EU has recently adopted measures on this basis in rather specific circumstances.[18]

It is this enforcement gap relating to the distortive impact of foreign subsidies on the EU's internal market, which lies between the boundaries of traditional competition and trade rules, that the White Paper is proposing to close.

III. THREE PROPOSED "MODULES" TO EXPAND THE EU'S COMPETITION RULES

In order to address potential distortions on the EU market, the Commission proposes three approaches, which can be applied in parallel.

A. Module 1: Addressing distortions caused by foreign subsidies given to an economic operator active in the EU market

With this first tool, the Commission envisages making an *ex post* review of the impact on the EU internal market of foreign subsidies granted to any company active in the EU, irrespective of its place of establishment. Such review would generally be initiated *ex officio* by the Commission or a national authority: they "*may act upon any elements* [they consider] *relevant indicating the granting of a foreign subsidy to a beneficiary active in the EU.*"[19] Both the Commission and Member States could conduct this review, with Member States having competence where the foreign subsidy impacts one Member State.

In a two-step review process to determine the impact of specific subsidies on the internal market, the authorities would consider indicators such as: the size of the subsidy, the situation, market conduct and level of activity of the beneficiary on the internal market and the general situation of the market concerned.

The White Paper envisages that certain categories of subsidies (e.g. subsidies in the form of export financing) are likely to create distortions in the internal market because of their nature and form. Even if a distortion is established, it could be balanced by a positive impact: for example, the subsidy may support the EU's own public policy objectives (e.g. creating jobs, environmental considerations, digital transformation, or public safety).[20] Interestingly, these public policy justifications are often not available in EU anti-subsidy investigations in the trade defence, so their inclusion here does show that this is a hybrid form of instrument between trade and competition. As a result, economic operators need to be prepared to present a convincing strategy in light of the Commission's concerns.

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15 *Ibid.*

16 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1.

17 White Paper (op. cit.) p. 10.

18 The recently concluded anti-subsidy investigation into imports of Glass Fibre Reinforcements from Egypt is a rare case in this direction: indirect Chinese subsidies (preferential financing) given to companies in the China-Egypt Suez Economic and Trade Cooperation Zone were attributable to Egypt because the latter had recognized and endorsed the preferential financial support of the Chinese authorities and adopted it as its own. See Commission Implementing regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt [2020] OJ L 189/1, paras 676-699 and 706-725.

19 White Paper (op. cit.) p. 13.

20 White Paper (op. cit.) p. 17.

If the Commission remains unconvinced, it has the possibility to impose so called "redressive measures," including structural remedies (e.g. divestments), behavioural measures (e.g. prohibition of certain investments, acquisitions or market conduct; third-party access; FRAND licensing) and redressive payments to the EU or Member States.[21] In addition, the EU authorities may impose severe sanctions for not supplying information or supplying incomplete, incorrect or misleading information, while also undertaking fact-finding visits at the EU premises of the alleged beneficiary of a foreign subsidy.

One other interesting import (evidence of the sponge at play) is the idea that if information is not provided then cases would be decided based on "facts available." For those of us who are familiar with trade defence instruments, and especially how the U.S. authorities use Adverse Facts Available in anti-dumping cases,[22] this seemingly small rule change could have important consequences for how competition law develops.

B. Module 2: Tackling the distortive effect of foreign subsidies facilitating the acquisition of EU targets

Under its second tool (which can be used cumulatively with the first one or on its own), the Commission proposes an *ex ante* review, based on a mandatory notification, of acquisitions of EU undertakings that have been facilitated by foreign subsidies. This is not only limited to direct subsidies that are linked to the acquisition, but also covers indirect subsidies that *de facto* increase the financial strength of the acquirer, which would then be used for an acquisition, and may give rise to a distortion of the internal market. As a result, this is a potentially extremely broad tool.

The new measures would cover not only acquisitions of control of an undertaking, but also acquisitions above a certain percentage of the shares or voting rights (threshold yet to be determined) or any "material influence" over an undertaking (precise concept yet to be determined). Therefore, the Commission could also target certain acquisitions of non-controlling minority shareholdings.

Needless to say, as the rules pass through the legislative process we would expect guidance to be adopted as to what "material influence" would cover, particularly as the regime will be mandatory and not voluntary. On the one hand, the "material influence" test may be similar to the one used by the UK Competition and Markets Authority to capture acquisitions in which, even though de facto or de jure control is not reached, the acquirer is deemed to have material influence over the target by other means, such as relevant industry expertise that may influence decisions at the shareholder or board level. On the other hand, it could well also resemble the German "competitively significant influence" test.

The Commission recommends that only potentially subsidised acquisitions of EU targets, i.e. where the notifying parties have received a financial contribution by any third-country authority in the past three years, or expect such contribution in the coming year, would trigger a notification requirement requiring the transaction to be put on hold. It proposes to define an EU target as "*any undertaking established in the EU and meeting a certain turnover threshold in the EU, but other criteria could also be considered*" and then indicates that the turnover threshold "*could be set at for example EUR 100 million, but other values, thresholds or alternative approaches could also be envisaged*."[23]

Moreover, the notification requirement would be triggered where the financial contribution received by the acquiring undertaking in the three calendar years prior to the notification is in excess of a certain amount or of a given percentage of the acquisition price.[24] Being a triggering event, these criteria need to be clearly defined. As anyone who is familiar with anti-subsidy or State aid investigations would tell you, establishing the amount of the financial contribution with precision is not an easy task. This may potentially lead the threshold for financial contribution to be relatively low – which would allow authorities and companies to proceed on the basis that the threshold is met without having to first undertake a detailed analysis of the exact value of the potential financial contribution (which is a task that typically takes many months in trade cases). This being said, the fact that the approach to determining notifiable acquisitions relies on self-assessment, including as to past subsidy received, does increase legal uncertainty.

21 White Paper (op. cit.) p. 19.

22 See, e.g. in *Polyethylene Terephthalate Resin From Pakistan*, Final Determination of Sales at Less Than Fair Value, 83 Fed. Reg. 48,281 (U.S. Dep't Commerce, September 24, 2018).

23 White Paper (op. cit.) p. 25.

24 *Ibid.*

Similar to Module 1, the effects of the subsidy may be balanced against the overall positive impact of the transaction. If, however, the Commission finds a distortion, it may adopt a conditional clearance decision based on proposed commitments, or prohibit the proposed transaction. Again, the Commission envisages a sanction mechanism for violations of procedural rules, such as on the submission of incorrect or misleading information.[25]

Potentially, this new tool would lead to a significant number of transactions becoming notifiable on top of existing merger control and FDI rules. Clearly, efficient procedures and clear guidance would need to be put in place to avoid unnecessary red tape for foreign investment.

C. Module 3: Tackling distortive foreign subsidies in public procurement rules

Finally, the Commission proposes adjustments to EU public procurement rules, which would require bidders to notify contracting authorities whether they have received any foreign subsidy in the previous three years, or would receive such a contribution in the course of the contract. Such information would then be passed to the competent supervisory authority, which may start an investigation. If it is found that the bidder has received a distortive foreign subsidy, then the operator may be excluded from the specific tender process or even from all future public procurement procedures up to three years.[26]

IV. DOUBLE TROUBLE? HOW WILL THE NEW TOOL INTERPLAY WITH OTHER EU RULES?

Competition law's new tentacle is emerging in a busy part of the sea – there are many other regulations in this space. How will they all work together?

The White Paper notes that since the objective of the new tools is different from that of existing tools – focusing on the effects of foreign subsidies as such – the new tools are complementary to EU merger control and EU antitrust rules. In a situation where a transaction would have to be notified under both Module 2 and the EU Merger Regulation (or national merger control regulations), there would be parallel proceedings (albeit the review period for the Module 2 procedure has not yet been determined). The Commission notes that:

> "*while subsidies may be taken into account when assessing for instance the financial strength of the merged entity relative to its rivals, the focus of the analysis of the significant impediment to effective competition is on the structure of competition in a given market, not on the existence or effects of foreign subsidies as such. A new instrument would therefore with its different objective complement the Merger Regulation. If a given acquisition has to be notified under both such a new instrument and the Merger Regulation, the notification and possible assessment would be dealt with in parallel, but separately from each other under the respective instruments.*"[27]

Similarly, the Commission considers the new tools to be complementary to EU trade defence instruments and WTO Agreements. It notes that the new tools would not cover the subsidised import of goods from third countries to the EU, but only the subsidisation of an undertaking active in the EU (other than through trade in goods from the subsidising country) and the subsidised acquisition of an EU target.

The Commission also regards the new tools to be complementary to the FDI screening mechanisms which come into effect in October 2020.[28] While the FDI Screening Regulation is limited to soft harmonization of the assessment of threats to public security and public (i.e. critical or strategic) assets, and to introducing a cooperation mechanism between the Commission and the Member States, the newly proposed instrument would assess potential distortions in the internal market more broadly, without any limitation on the type of assets. Moreover, while the FDI Screening Regulation targets all types of FDI, the trigger for a review under the newly proposed tools is foreign subsidies that may or may not be linked to an investment. However, overlaps will exist if an FDI constitutes an acquisition that is facilitated by a foreign subsidy, but which also raises concerns with regard to security and public order.

25 White Paper (op. cit.) p. 28.

26 White Paper (op. cit.) pp. 30-31.

27 White Paper (op. cit.) p. 40.

28 White Paper (op. cit.) p. 43.

Overall, there will clearly need to be a lot of work on the procedures to make them efficient given the other parallel competences, which are closely related to this new tool.

V. NEXT STEPS FOR THE NEW FOREIGN SUBSIDIES TOOL

As the latest new tentacle of the competition law jellyfish, the White Paper is far-reaching and will add a new dimension to competition law enforcement. Indeed, if adopted into legislation, these tools would have significant implications for companies operating in the EU that receive some form of foreign subsidy, or acquisitions of EU companies financed by foreign subsidies.

At the moment, the White Paper only reflects a policy proposal (on which comments are invited by September 23, 2020). It is likely to be the subject of significant debate during the legislative process between the European Parliament and the Council. That debate will have to balance different interests: some EU governments need and want foreign investments, while others are concerned about the ability of subsidies to distort the playing field. It is likely to take two years for the White Paper to become law, depending on the degree of consensus among the different institutions. The Commission's proposals will no doubt be subject to debate and clarification/amendments along the way.

The devil will be in the detail here. The Commission's proposal will need to be clarified on a number of issues, which will be crucial to how they will work in practice. For example, the definition of "material influence," plus the level of financial contribution and size of the transaction caught by the new rules, will determine how many mandatory *ex ante* notifications will be made.

VI. CONCLUSIONS ON THE SPONGE AND THE JELLYFISH

There is a risk that when competition law goes beyond its core area it will lose its coherence and that its core principles will become diluted or difficult to distinguish. This applies whether we're talking about the sponge (e.g. using competition law to tackle environmental sustainability, privacy, fairness or just because we want to be hipster) or the jellyfish (with new tentacles like the one explored above tacking foreign subsidies). Without entering too deeply into that debate in this short article, it is clear that this risk has never been greater given the number of different new, innovative, and often radical tools and ideas/policy goals being considered.

The foreign subsidies White Paper possibly carries less risk of diluting core competition law principles than some of the other initiatives or ideas, in that it is *sui generis* in aiming to cover a perceived gap between a number of other sets of legal rules. However, it carries a different risk of overlap and inefficiency, which we could hope can be ironed out before the proposal becomes law.

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