

CORONAVIRUS CRISIS AND EU ANTITRUST – JUST TEMPORARY ADAPTATIONS OR LONG-TERM CHANGES?

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Abstract: *The European Commission and the competition authorities of the EU member states responded to the coronavirus crisis with assurances about sufficient flexibility of their instruments. They enabled temporary cooperation between competitors to ensure the supply of essential medical products and services. At the same time, they warned against any misuse of the crisis for overpricing or other monopolistic practices. However, the crisis has also intensified long-term pressures for a fundamental adaptation of European competition rules. The first challenge is represented by Chinese state-backed enterprises as potential acquirers of weakened European competitors. The second source of pressure is the increasingly dominant role of global online platforms. Their role as an irreplaceable infrastructure for management, communication, counselling and distance learning was reinforced in the coronavirus crisis. The Commission and other experts are already discussing appropriate responses. This paper maps the discussion on possible EU responses to these challenges, and tries to show the strengths and weaknesses of the proposed solutions and on this basis to estimate the future development of EU anti-trust in the post-coronavirus period.*

Keywords: *Coronavirus, Antitrust, European Commission, Chinese State-owned enterprises, Online platforms.*

1. INTRODUCTION

Antitrust in coronavirus times will surely become the topic of many analyses carried out from different angles. The following analysis tries to predict what “antitrust legacy” the coronavirus will leave us in the long-term. The micro-management of the crisis in March-May 2020 conducted by the European Commission (its DG Competition) and national competition authorities surely produced valuable guidance for undertakings in order to prevent them from abusing the shortages of medical and protective goods and services, and also to clarify for them what kind of cooperation would still be considered permissible in the middle of an emergency. This part of the EU antitrust vs. coronavirus match would not, we dare to predict, have a changing effect on EU competition law and policy as no brand-new instruments have been introduced and with the upcoming calming down of the situation everything will return to normal.

The present analysis, however, argues that the coronavirus crisis, rather than unexpectedly reshaping European antitrust, has accelerated tendencies present and well-known already before the crisis, which would soon bring about changes with a qualitative long-term impact. Even if the pandemic will not produce a new world order dominated by China, it is quite obvious that the influence of Chinese state-owned enterprises (SOEs), especially their take over appetite and capability, will provoke a structural adaptation of EU competition law in order to maintain its efficiency and equal impact vis-a-vis market players with systemically different political and economic backgrounds. In parallel, the coronavirus crisis highlighted another prevailing

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tendency that requires a response from European antitrust. The irreplaceable role of online platforms and their Internet applications, which overshadowed during the coronavirus some traditional public utilities, raises the question of their further regulation. Our societies have become too dependent on them without controlling them enough to secure their smooth, stable and socially responsible availability.

The proposals and possibilities to tackle these two categories of issues will be critically analysed in the following paper. The goal is to show where the developmental trends accelerated by the coronavirus epidemic are heading and what new antitrust rules we can expect in Europe.

2. EU RESPONSE TO CHINESE CHALLENGE

Competition Commissioner and European Commission Vice-President, M. Vestager, declared in an interview with the *Financial Times* on April 12, 2020, that the Commission would not object to EU Member States buying shares in companies to prevent their takeovers by foreign state-owned enterprises. Economic consequences of the COVID-19 crisis can make European companies vulnerable and an easy prey for Chinese takeovers, which is a threat that the Commission would consider one of its priorities. A more elaborated proposal of the EU's response to this threat could be expected as early as in June 2020, however it will only be the start of the legislation process, not an immediately applicable measure (Espinoza, 2020).

The impression of urgency should not overshadow the fact that this is a matter that has been debated well before the outbreak of the COVID-19 pandemic (European Commission, 2017; De Kok, 2017). The EU's antitrust problem with Chinese SOEs can be briefly summarised as follows: it is more than likely that successful Chinese corporate giants are controlled and supported by the Chinese state (and the Communist Party), which puts them in a better position to compete with European companies and, at the same time, allows them to avoid standard EU competition law instruments.

While the unfair advantage enjoyed by competitors backed by public resources is easily understandable, their possible avoiding EU competition scrutiny requires further explanation. EU competition rules are addressed to undertakings which they consider to be entities independently carrying out an economic activity consisting in offering goods and services on the market (Court of Justice, 1991, para 21). If an entity does not have sufficient decision-making autonomy, it is part of the undertaking that controls it, or of a so-called "single economic unit". Agreements and transformations within this single economic unit fall outside the scope of EU competition law as mere internal changes inside one and the same undertaking. If a business entity is closely controlled (not just owned) by a State, all business entities subject to the same control form, in theory, one undertaking. Agreement or merger of two or more subsidiaries of Chinese SOEs on EU markets would thus fall outside of the reach of EU competition rules. Only if their market position becomes a dominant one, they would be subject to the Article 102 TFEU prohibition of its abuse. But after Chinese SOEs become dominant in Europe, it could be too late to react for their EU competitors.

An immediate question arises why the entry of such companies into EU markets is not strictly controlled? Under the EU Merger Regulation (No 139/2004), Article 1, the EU's control is applied only to mergers between undertakings with an important turnover not only worldwide, but also in the EU at the same time. If a Chinese SOE newly enters the EU through a takeover of a

European competitor, it has not yet a turnover and market share there (or not an important one) to be bothered by EU Merger Regulation as a potential threat to competition. To prevent easy takeovers of companies strategically important for Member States, the EU adopted in March 2019 the so-called FDI Screening Regulation (No 2019/452) that calls for (but does not commit) EU Member States to introduce national screening mechanisms in order to check whether a third country direct investor does not pose a threat to national security or public order. In the middle of the COVID-19 pandemic, the Commission issued a *Guidance* accompanying this new Regulation so that “Europe’s strategic assets” get better protection (European Commission, 2020a). This “emergency appeal”, however, is only about a more active and flexible use of existing mechanisms and is by no means a new instrument for protecting competition in the EU.

The qualitatively new instrument that the takeover threat boosted by COVID-19 should bring to light – at least judging by comments for the media made by Commissioner Vestager (CPI, 2019) - will probably be inspired by the so-called *Dutch proposal* from December 2019. The media called “sweeping new power submitted by the Dutch government” (Espinoza & Fleming, 2019) was presented in a two-page-long document accompanied with a single page graphic, titled “Non-paper – Strengthening the level playing field on the internal market” (Kingdom of the Netherlands, 2019).

The companies coming from countries where they receive government support or enjoy an unregulated dominant position in a third-country market would, upon their entry into the EU market, be submitted *ex-ante* to scrutiny by the Commission which would consist in application of a well-known market economy private operator test (Cyndecka, 2016). And if it is established that a company under review can disregard the market constraints that any private operator in a market economy must cope with, certain limitations on its behaviour on EU markets can be imposed. They may include for instance ban on certain pricing and selling strategies, investments in assets with no apparent business case; in short, they would be treated from the outset as if they were already dominant in an EU market.

This would restrain their appetite for acts that would endanger the competitive structure there and thus the level playing field for private and state-owned companies irrespective of their nationality would be maintained in the EU. The devil of course is, as always, hidden in the details, and they must be addressed in the promised legislative proposal. It has to be clarified how the new measures would comply with WTO commitments as by now it looks as if the EU wants to put in place rules and measures going beyond what has been agreed on at the international level, however, not only these international legal and political aspects of the new instrument, but also the purely competitive ones, require careful consideration (Kaeseberg, 2020).

Maybe the least revolutionary would be the application of the new instrument in merger cases. Unless the new instrument creates a parallel mode to control concentration, the EU Merger Regulation will have to be amended (by unanimous vote in the Council of the EU!), so that it becomes applicable also to foreign state-backed companies without the required turnover in the EU market. Then the companies involved will have to notify the Commission well ahead of their merger or acquisition, supply the necessary information that would allow a thorough assessment of their combined market strength and the plausible uncoordinated and coordinated effect of the merger at issue. After that, depending on the outcome of such scrutiny, the merger would either be prohibited or permitted with conditions or without them. It is not excluded yet that some new theories of harm would have to be introduced as state-backed companies’ merg-

ers might not have the same impact on competition, as mergers between market players that already dispose of big market shares in the EU and aim at further strengthening of their position.

The same problem becomes even sharper in the case of unilateral market practices of state-backed undertakings. The new instrument may be only partially a parallel to the prohibition of abuse of a dominant position where the Commission intervenes *ex-post*, first establishes that the suspicious undertaking holds a dominant position and then detects the abusive effects of its exploitative or exclusionary practices. In case of foreign-state-backed companies it is proposed that “the European Commission may conduct an *ex-ante* investigation into a company’s conduct” (Kingdom of the Netherlands, 2020, p. 2). Also, the companies will be allowed to submit themselves *ex-ante* to an investigation, in order to learn ahead whether their market behaviour would be subject to the scope of this proposal.

Having established the foreign-state-backed status of an undertaking and thus the applicability of the new instrument to it, the positive law will have to warn the undertaking that certain practices, such as supply constraints that are not in line with market conditions; price and product differentiation between different market operators on comparable transactions; tied selling, whereby additional conditions are imposed with no (apparent) relationship to the transaction; wholesale/retail pricing that is not a reflection of market prices and/or production costs, etc., are furthermore prohibited. And the Commission will have to monitor the undertaking’s market behaviour and intervene when it enters the forbidden area.

In this *ex-post* investigation, the Commission’s procedure may become at last similar to dealing with cases of abuse of dominance, although it is uncertain whether the same standards of harm (i.e. criteria for determining when a particular commercial practice becomes harmful to competition) used to sanction dominant companies’ abuses would really fit here. Before a certain amount of empirical data (and ultimately case law) on effects of foreign-state-backed companies’ behaviour is accumulated, it may be difficult to give those companies enough certainty about barriers in which they are to operate in EU markets. All in all, this new instrument is needed and welcomed but no one should expect that EU competition law would become *merely a bit more* complicated after its introduction.

3. BIG TECH AS PUBLIC UTILITIES OR SOMETHING ELSE?

“Coronavirus crisis shows Big Tech for what it is - a 21st century public utility”, according to one of *POLITOCO*’s comments published in March 2020 (Scott, 2020). Official and business work, as well as private communication shifted to the Internet and its applications in a previously unseen dimension. If these services were suddenly switched off, the losses and damage caused by the pandemic could have been much greater. The COVID-19 pandemic posed with all urgency the question of whether Internet search and communication platforms should not be placed in the same category as traditional public service providers in energy, transport or telecommunications sectors. This regulation of global Internet and online platforms goes inevitably further than the protection of economic competition. Nevertheless, competition law also has an irreplaceable role in looking for solutions of some of these issues.

A strictly pro-competitive approach would recognise that it has been so far the fierce and dynamic competition that provided us with a number of freely selectable (and also freely consumable) Internet services and all we have to do is to fight against anti-competitive effects of exces-

sive market power of Big Tech giants. It could ultimately mean to break up Amazon, Google, Facebook and Apple as for instance was proposed by US Senator E. Warren (Stevens, 2019) and supported by part of academic literature (Galloway, 2017, p. 255). The integration of various related online services will be banned, the monopolisation of the entire Internet ecosystem will be averted, although the division of fast-growing Internet companies may need to be repeated in each generation. This, however, does not seem to be the European way, although it should be emphasised that sanction by forced splitting must remain on the list as a last resort, otherwise milder sanctions will lose some of their effect.

Commissioner Vestager is against the breaking up option as the real splitting up of these companies would be difficult to manage and no one can prevent that network effect would immediately work in favour of a new Internet “gatekeeper”. A new *ex-ante* regulatory tool is thus the preferable solution (Chotiner, 2020) and the crucial question is “how to intervene before it is too late” (Crofts, 2020a, p. 60). The classical *ex-post* antitrust enforcement of bans against abuses of dominant (even monopolistic) position may really be too slow to enforce and their standards of proof too complicated to effectively catch and sanction anti-competitive behaviour on very dynamic, fluid markets prone to tipping towards monopolistic structures (UNCTAD, 2019, p. 11).

The question is how the new regulation should look like if it must maintain the pace of technological innovation, wide availability of services and free competition at the same time. The most often repeated argument against submitting Google or Facebook to “public utility regime” says that their drive to innovate will be destroyed and rigidity, lack of flexibility, would become the norm (Cremer, Montjoy, & Schweitzer, H., 2019). Users that have got used to their free availability will have to be charged money for each entry as this is part of the deal of having access to services of general economic interests (Vilette, 2017; Harris, 2020). And last but not least, the current Article 106(2) TFEU stipulates that undertakings entrusted with the operations of services of general economic interest are subject to the rules on competition, *only in so far* as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Converting Google or Facebook into a public utility would thus only confirm their exceptional position. Even such a brief presentation of threats to the fundamental values of competition, consumer interest and the dynamics of innovation suggests that the new regulatory tool will not be easy to design and have approved.

Commissioner Vestager has recently announced a three-prong strategy: 1) new obligations on digital gatekeepers, 2) continued probes into illegal conduct, 3) new tool to stop markets “tipping” to keep the digital economy opened (Crofts, 2020b, p. 61-62). The Commission is therefore preparing two legal innovations, none of which go that far to call for any kind of socialisation of social media and platforms, not even to consider them as essential facilities (like electricity grids, railways, pipelines or major ports) (Connor, 2020). From what has been submitted to public consultation in June 2020 (European Commission, 2020b), we know that the Commission is preparing an instrument (possibly in the form of a regulation) imposing *ex-ante* prohibitions and obligations on those who may be called digital gatekeepers (i.e. the category of dominant players without need to prove their dominance in a traditional sense) like Facebook and Google.

It is more than probable that neither of the well-established statuses (service of a general economic interest, essential facility) will be chosen for “gatekeepers” of the Internet and social media. These concepts do not fit seamlessly to the situation in online markets as has been emphasised above, and their existing legal framework (completed largely by case law of the EU Court

of Justice) could be limiting for a completely new approach to the issue. The regulation should be drafted by the end of 2020. It will be interesting to watch to what extent it will narrowly focus the competition problems or would rather guide global online platforms to what they must and may not do in the EU in a broader sense.

If it is modelled on the manner of already existing EU Regulation on platform-to-business relations (No 2019/1150), the latter of the two aforementioned approaches is more plausible. That piece of legislation obliges online platforms to a certain higher social responsibility by means of transparent behaviour, by justifying their actions and not restricting the rights of their users. The now drafted new legislation thus could in the same vein prohibit *ex-ante* certain practices that could lead to the further consolidation and spread of market power from an already dominated market to new markets, e.g. by killing-acquisitions, tying services into pre-installed packages, locking-in existing customers, refusing interoperability with other providers, suppressing access to collected data, selling their own products of platforms alongside third parties' products, etc. (OECD, 2018; Funta, 2020).

All in all, it would mean that Big Tech form a new category of competitors, being neither ordinary nor dominant ones, belonging neither to general services providers nor to essential facilities, as the category of "digital gatekeepers" and the corresponding specific obligations would fit them the best.

4. CONCLUSION

If the above-performed analysis is correct, we are entering the phase of *ex-ante* antitrust. What has been thus far typical for mergers and state aids could become a standard also for foreign SOEs and Big Tech online gatekeepers. This *ex-ante* approach means that competition would be more regulated than just protected as the classical *ex-post* approach requiring thorough investigation, conviction and punishment of already committed infringements, has proved not entirely effective for the two biggest challenges facing European antitrust.

The first one consists in the massive penetration of European markets by foreign state-backed competitors coming from countries with very non-Western political and business standards. The second is also about "massive penetration", this time of our lives, of our ways of communicating, learning, working... by online platforms. Both challenges are imminent and threaten dominance that can overturn not only European markets but also European values. Competition law thus works (along with other tools) on the imaginary front line of defence. And on the front line, the speed and clarity offered by *ex-ante* measures are needed more than patient *ex-post* detection, evidence, conviction and judicial review.

We will have to accept that the "good old antitrust" was a Western game, the rules of which were formed for an environment built of brick and mortar and do not fit that well for the realities of the third decade of the 21st century. The COVID-19 pandemic did not cause that, but made it clearly visible and very urgent.

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