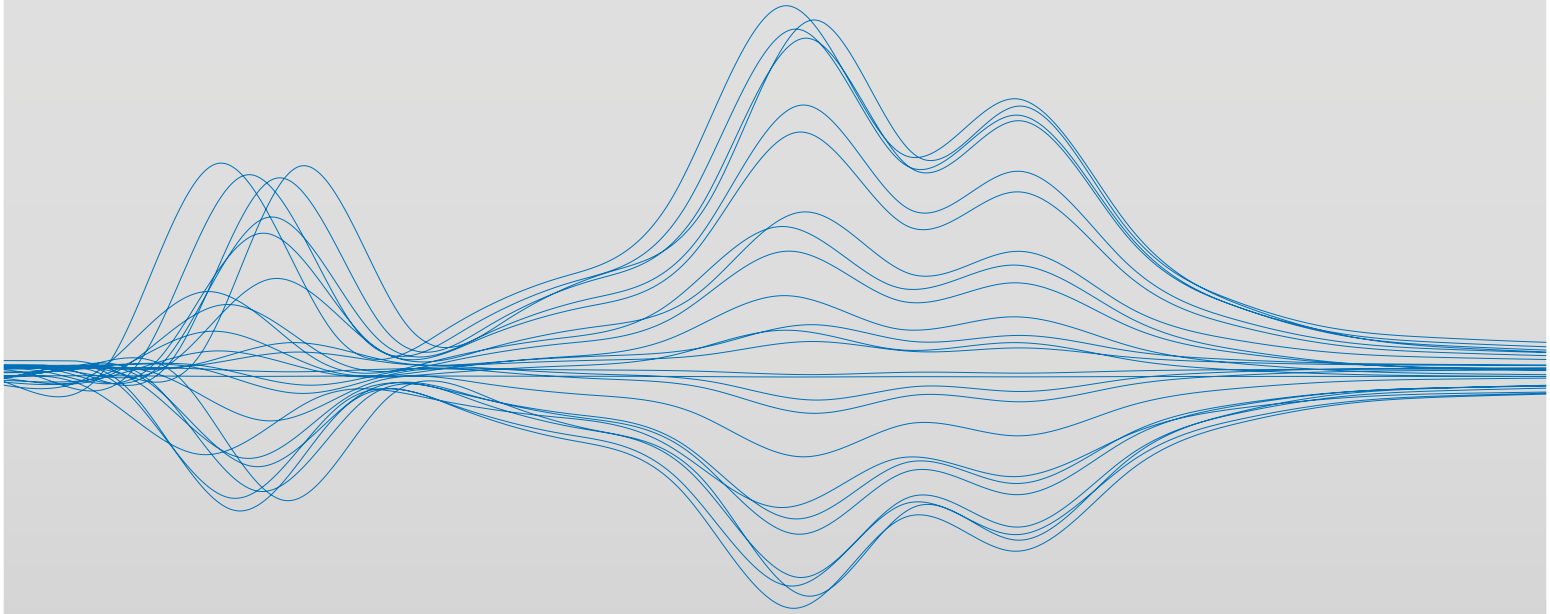
DECEMBER 2020

Antitrust Matters



Our contribution to the European Commission's latest public consultations on Big Tech, sustainability, foreign subsidies and other topics

DLA PIPER

SPECIAL EDITION

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Editorial

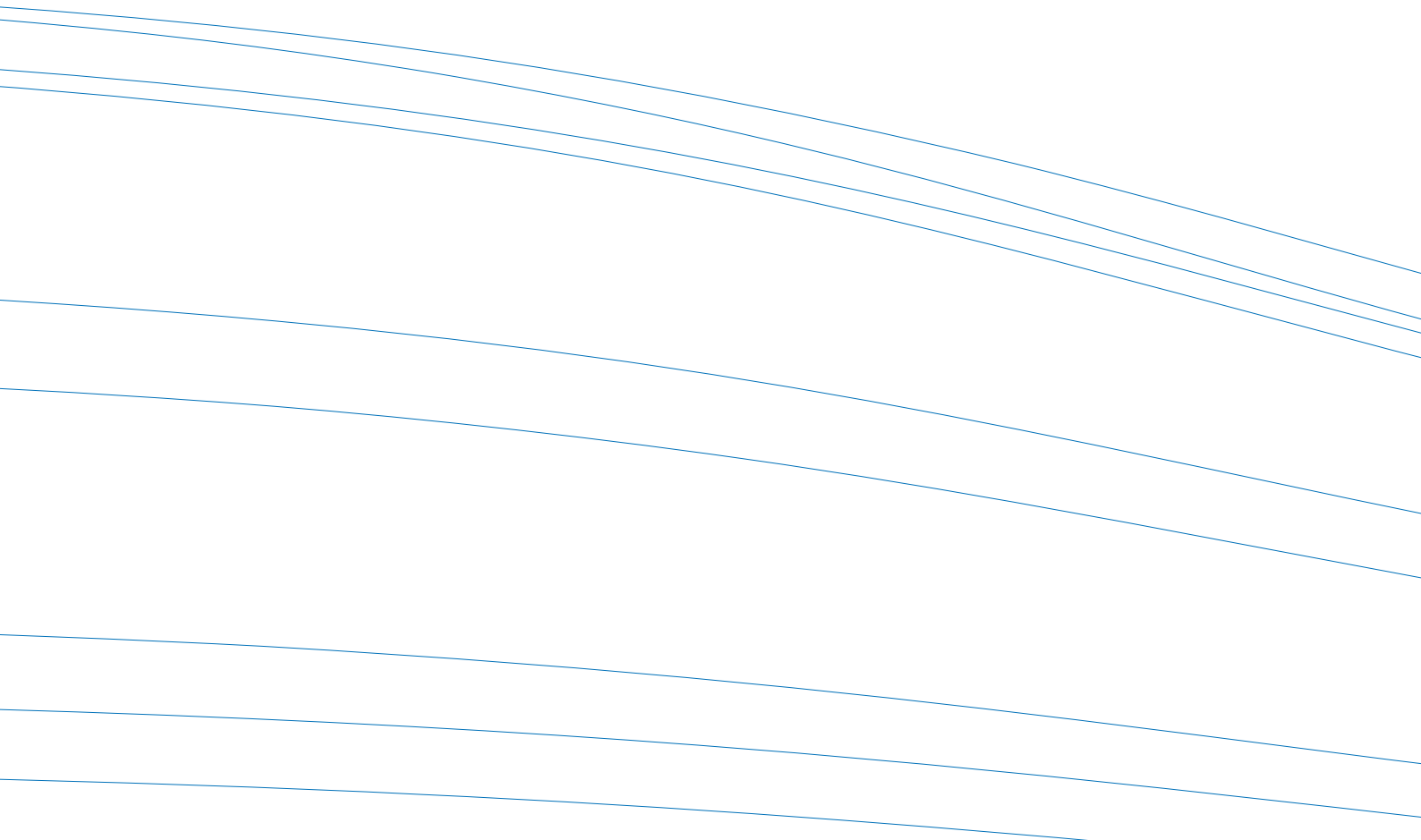
Dear Readers:

2020 was a year unlike most others. Some may have lost loved ones to the pandemic. Others may have lost their jobs or may be under threat of losing it. We all had to change our way of living. At the same time, our minds were kept busy by the European Commission's biggest-ever overhaul of antitrust tools. Consultation after consultation was coming out of the system, on a wide variety of issues ranging from market definition to foreign subsidies, via digital services and new competition tools. The direction is clear: EU antitrust law and policy must be fit for a digitalized and geopolitically complex world.

DLA Piper prides itself as a public voice in matters of societal concern, not least in areas such as SESG, diversity and inclusion, and disability in the workplace. The development of antitrust law and policy is one such concern, and we are proud to have contributed to the shaping of our regulatory future by thoughtfully taking part in the EU debate. Throughout the year, we provided responses to many public consultations, and this issue of Antitrust Matters gathers together these responses for your use.

We wish everyone a peaceful year end, a smooth transition into 2021, and a healthy, joyful and successful 2021.

Bertold Bär-Bouyssière, on behalf of DLA Piper's Antitrust community



New competition tool and ex ante regulation of gatekeeping platforms

Introduction

Over the summer of 2020, the European Commission conducted several public consultations, including two interrelated consultations of significant importance to the Commission's digital agenda.

First, the consultation on the Digital Services Act (DSA) sought to collect feedback on the introduction of stricter liability rules for e-commerce (ie, revision of the 2000 e-Commerce Directive) and on ex ante regulation of large online platforms acting as gatekeepers. The Commission put forward two alternative/cumulative options for ex ante regulation of gatekeepers under the DSA package: (i) a list of do's/don'ts for tech platforms and (ii) a case-by-case tool to impose possibly data-focused tailored remedies on gatekeeping platforms.

Second, the Commission launched a consultation on the New Competition Tool (NCT) presented as a new enforcement tool allowing for early intervention by the Commission to address structural market issues and failures in the absence of a finding of infringement of competition law rules. One of the main topics of the consultation was to determine the scope of the NCT, including whether it should apply to all sectors or only specific sectors (namely the digital sector).

Although the precise scope of the DSA gatekeeper rules and the NCT were not yet defined, many observers noted a clear potential for overlap between the two legal instruments. Due to a lack of clarity as to what the Commission would ultimately propose, including as to which tool would be used in which situation, there was a sense of confusion as to what the proposals would ultimately look like.

In autumn 2020, the Commission clarified its position and announced it would be putting forward two proposals: the DSA and the Digital Markets Act (DMA) – the latter featuring two complementary pillars, a list of do's/don'ts for gatekeeping platforms, and case-by-case enforcement narrowed down to digital markets. The Commission then announced that it would present the DSA and DMA proposals on December 15, 2020.

Our contributions

As a preliminary remark, please note the content of our submissions to these two consultations (including our position paper on the NCT) is summarised in the below section. These summaries are non-exhaustive and focus on our key messages to the Commission.

CONTRIBUTION ON THE NEW COMPETITION TOOL

1. We wish to highlight that the ultimate decision as to whether to adopt a new enforcement tool should be primarily shaped by the views of the business community and politicians (rather than lawyers). However, if a new competition tool is deemed necessary and appropriate, it is important to ensure from a legal perspective that the tool is fit for purpose and limited to only enable intervention when there are clearly identified *prima facie* concerns (or it will stifle innovation). In particular, the tool must also provide the necessary clarity for businesses, ensure legal certainty and protect the rights of defence, and not result in wide-swept micro-regulation of industries and markets.

2. As a preliminary point, the new competition tool will in our view have to remain within the boundaries of the Treaty provisions, unless those are modified, and most particularly the fundamental distinction between unilateral conduct on the one hand and bi – and multilateral conduct on the other. Further, the intervention thresholds (categories of competitive harm) should be as clearly defined as possible to the prerequisite legal standard in order to be foreseeable by companies and judiciable on appeal. The mere fact that no fine is imposed does not guarantee that intervention will not come at a significant cost to the companies concerned, as it may devalue important investments.

3. In terms of functionality, the tool should have a wide scope of application, in order to avoid arbitrarily excluding certain sectors/markets from its application. In particular, it is important to ensure that sectors or markets where structural issues are not currently prevalent are not prematurely excluded from the scope of the tool (as competition issues could arise in the future), otherwise this could lead to a regulatory driven distortion of the development of new products and competition.

4. Any new tool should focus on filling a gap in the current enforcement toolbox. This means that certain market scenarios can and should still be addressed through the Commission's existing enforcement powers (ie, Articles 101 and 102 TFEU). The new tool should focus on adequately addressing both structural competition issues as well as data transferability issues. Further, in order to ensure that the tool is able to apply effectively to a wide range of different platforms, it should eschew an excessive focus on granular rules in favour of setting out high-level governing principles.

5. If adopted, the new tool should allow an earlier intervention by the Commission in order to *preserve* competition, shifting away from an exclusively *ex-post* dominance-based intervention system (based on a fine-based infringement enforcement). Enabling the Commission to intervene irrespective of dominance can be viewed as a natural extension of the existing power to conduct sector inquiries, but given the intrusive nature of any regulatory intervention, should be limited to those instances where there are clear network/economies of scale effects that justify such intervention. There needs to be clear criteria as to when there are *prima facie* concerns that justify an early intervention, at which point the Commission should be able to utilise the new enforcement tool in a timely and proactive manner in order to address competition issues as they arise, even in the absence of dominance.

6. In terms of specific applications, we consider it important that the new tool includes:

    6.1 Powers to intervene in situations where the increasing market power of an online platform leaves few credible alternatives and where consumers or sellers are prevented from easily switching to other providers (ie, where the market is unable to self-correct due to exclusionary behaviour); and

    6.2 Powers to adequately intervene in tipping markets to prevent such a tipping point arising in the first place (with the risk that entry barriers become very high). Any allegations of inappropriate conduct/abuse by the player(s) remaining post-tipping can be addressed through existing enforcement powers (in particular, Article 102 TFEU).

7. In addition to ensuring an adequate scope of application, it is important that the tool is supported by a sufficiently wide range of remedies so as to enable the Commission to tailor its remedies/actions to the needs of a particular situation. Such remedies may include suggestions for new legislation (the design, implementation and monitoring of which can be left to the sector specific regulator where one is concerned), binding and non-binding recommendations and binding remedies. There should be a clear set of rules the Commission can refer to in deciding when a particular remedy is the most appropriate and proportionate. In particular, structural divestments under the new enforcement tool should not be used or only be enforced as measures of last resort. The emphasis should be on finding a workable and proportionate solution rather than the Commission imposing a costly and difficult to implement remedy – which will only be possible if sufficient time for industry-wide consultation is allowed.

8. In addition to responding to particular cases, the Commission should also have the power to proactively address wider systemic issues which contribute to structural competition issues across different platforms. While we acknowledge that allowing the Commission to introduce potentially sweeping structural changes can raise issues of institutional competence and democratic mandate, a requirement on the Commission to consult stakeholders prior to introducing such changes and ensuring a sufficient transition period will, along with the normal appeal avenues, help ameliorate issues of the Commission's competence to introduce any structural changes.

9. Finally, it is important to ensure that the tool fits and interacts appropriately with existing sector-specific legislation. This will require a thorough assessment of the existing body of sector-specific regulation which is likely to be impacted by the new tool. A smooth introduction and operation of the new tool can also be ensured by:

    9.1 Providing a sufficient time gap between the date on which the new enforcement tool is announced and the date on which it can first be exercised by the Commission, in order to allow relevant stakeholders to assess the tool and make necessary adjustments; and

    9.2 Requiring the Commission to consult on a timely basis with all relevant national sector-specific regulators before the Commission exercises the tool in sectors covered by the relevant sector regulator

CONTRIBUTION ON EX ANTE REGULATION OF GATEKEEPING PLATFORMS (PART OF THE DSA PACKAGE)

1. The Commission's proposal should include a clear definition of what constitutes a gatekeeping platform. Such definition should be based on a set of transparent criteria/indicators.

    1.1 In relation to indicators suggested by the Commission (eg, large user base, wide geographic coverage in the EU), it is essential for such indicators to be based on as clear and quantifiable thresholds as possible, for example linked to the physical presence and turnover achieved by the platform in the EU.

    1.2 In relation to the "ability to leverage assets for entering new areas of activity" criterion, it is important to highlight that platforms should not be discouraged from entering new areas of activity, as this may create many pro-consumer efficiencies. Conceptually, there may be a potential risk that by expanding their activities to adjacent markets, platforms may cause markets to tip in their favour, but there should be no presumption that this would be to the detriment of innovation.

1.3 Another relevant indicator would be, to a certain extent, whether the market, based only on its nature and characteristics (ie, independently from interoperability considerations), is one where consumers often switch or multi-home.

1.4 As a matter of principle, it is important to remember that in a free market economy, profit-seeking behavior should be accepted as the norm, and should not be suspected of being anti-competitive without objective and facts-based reason. In a recent judgment, a US court found that an allegedly unlawful behavior was hypercompetitive rather than anti-competitive. This remains an important distinction for antitrust enforcement globally. It should be based on objective facts, and ask whether these facts are the result of hypercompetitive behavior or anti-competitive behavior. If, for a number of reasons, a particular offering attracts many customers because of its convenience, this is not in itself sufficient ground for concern. Very large platforms may have a negative impact on smaller ones, but it is not always clear whether that is the result of anti-competitive or hypercompetitive conduct.

2. Should dedicated regulatory rules for gatekeepers be adopted, practices caught under such rules would need to be carefully identified and formulated – the problem is that in such a rapidly evolving world, specific prohibitions may be quickly outdated, and general prohibitions might not satisfy the test of legal certainty.

3. In relation to online platform practices which may be considered anti-competitive, self-preferencing practices is one of the key practices discussed. Despite the ambiguous nature of the concept of self-preferencing, which may be considered the normal reflex of the property rights on which a free market economy is built, the real question is that of the threshold of intervention which in any case should be based on objective criteria.

4. In terms of data-related challenges, there is a risk of data sharing breaching data protection law. If the data can be shared without breaching data protection laws, the refusal by the platform to share data (including data on competing business users' operations) may potentially be anti-competitive where the platform holds a dominant position. Over-enforcing data access can ultimately frustrate investment and innovation in the mid-term.

5. In relation to so-called killer acquisitions, startups are rarely listed on the stock exchange, meaning they can only be bought if they are up for sale. Further, the entrepreneurial model of modern times no longer aims at duration and legacy. Even the EU state aid guidelines on risk capital are built on the model of the launch of innovative startups by (young) entrepreneurs who launch an activity with the declared aim of selling it once it becomes successful or promising. Finally, it is questionable whether buyers would normally acquire a technology to "kill" it if it is better than their own. Furthermore, dependency of startups (on large online platforms) is a relative concept in times of rapid and exponential innovation.

6. No platform-dedicated regulatory authority would be needed to enforce the platform-dedicated framework. All potential harms (eg, anti-competitive conduct, false advertising, defamation) can appropriately be dealt with by existing authorities.

7. The need for dedicated regulatory rules for gatekeepers should be assessed against the changes brought about by the NCT.

White paper on foreign subsidies

Introduction

The Commission's White Paper on Foreign Subsidies, which was under public consultation until 23 September 2020, focuses on how to address distortions caused by foreign subsidies in the EU.

It proposes three alternative/cumulative "modules" to control foreign subsidies granted to undertakings operating in the EU: (1) ex post monitoring of foreign subsidies, (2) ex ante monitoring of foreign state-subsidised acquisitions of EU target companies and (3) ex ante monitoring of foreign subsidies in the context of public tender procedures.

In October 2020, the Commission published its inception impact assessment laying down four policy options: (1) do nothing (baseline scenario); (2) developing "soft" guidance; (3) taking legislative action by amending the current rules and/or creating new rules; and (4) improving international rules. The Commission is now in the process of drafting legislation and the accompanying impact assessment. The indicative date for legislation is the second quarter of 2021.

Our contribution

As a preliminary remark, please note that most of the public consultation questions were formatted in such a way that the respondent first selects a "yes/no/other" answer (answer chosen in bold in the below) and then provides an explanation for this answer.

QUESTIONS RELATING TO THE THREE MODULES – GENERAL QUESTIONS

1. **Do you think there is a need for new legal instruments to address distortions of the internal market arising from subsidies granted by non-EU authorities ("foreign subsidies")?**

   Yes – No – Other

   There currently is an enforcement gap, as certain third countries grant subsidies that would be problematic if granted by EU member states and assessed under EU state aid rules. In this context, it is as such legitimate to propose new legal instruments.

   However, the scope and set-up of such instruments need to be targeted, based on clear legal standards and should not lead to unnecessary procedural delays.

   At a jurisdictional level, triggering thresholds should be clear-cut, quantitative and mechanical. There should also be clear allocation mechanisms if both member states and the Commission are competent to review such cases.

   On the procedural level, the expedite treatment of unproblematic cases should be guaranteed, and the duplication of procedures should be avoided.

   In terms of substantive assessment, the new legal instruments should be aligned to the greatest possible extent with existing legal concepts established under EU state aid rules.

2. **Do you think the framework presented in the White Paper adequately addresses the distortions caused by foreign subsidies in the internal market?**

   Yes – No – **Other**

   The framework centres around three modules. These three modules, as presented in the White Paper, will have a wide scope of application and therefore are intended to catch all scenarios where a foreign subsidy could have distortive effects on the EU internal market. The current envisaged set-up may lead to duplications and unnecessary bureaucracy.

   In our view it would be preferable to work Module 2 into the existing merger control rules rather than to create an additional layer of bureaucracy (we already have merger control and FDI screening). This would also avoid a duplication of remedies negotiations, if any.

   Module 3 could be worked into the existing public procurement rules in order to leave it to the contracting authorities to deal with the subsidies issues.

MODULE 1

1. **Do you consider that Module 1 appropriately addresses distortions of the internal market through foreign subsidies when granted to undertakings in the EU?**

   Yes – No – **Other**

   Module 1 gives a broad scope of intervention to the Commission, rendering the need for a clear jurisdictional, procedural and substantive framework all the more necessary.

The White Paper indicates that the notion of foreign subsidy is built around the subsidy definition of the EU Anti-Subsidy Regulation. However, footnote 65 of the White Paper also makes a reference to the Commission Notice on the notion of state aid, which suggests that the scope may be broader. In any case, the definition of foreign subsidies should not be overly broad and should be coherent with the gap in trade defence instruments the Commission aims to address.

The indicators listed in section 4.1.3.2 seem very broad and will not contribute to clarifying the scope of subsidies caught under the definition. In this context, it may be preferable to focus the assessment of Module 1 on pre-defined categories of subsidies likely to distort the internal market (as outlined in section 4.1.3.1).

2. Do you agree with the procedural set-up presented in the White Paper, ie, two-step investigation procedure, the fact-finding tools of the competent authority, etc.? (See section 4.1.5. of the White Paper)

Yes – No – Other

The procedural set-up as such seems adequate but the precise procedural framework still needs to be further clarified. A 2-step investigation procedure means that in-depth review will be limited only to those more problematic cases (as in merger control). Such a system is efficient.

However, from a jurisdictional perspective it appears relevant to clarify the sequence in which each authority (EU and national) will be allowed to conduct its own investigation. There should be clear communication, coordination and cooperation between the various authorities throughout the procedure to make sure the procedure is as efficient as possible. Furthermore the statute of limitation should be short in order to guarantee that investigations take place in a timely manner.

In relation to fact-finding tools, on-site visits in third countries may be difficult. As for information requests, large private groups may find it difficult to trace where and when a subsidy has been granted.

3. Do you agree with the substantive assessment criteria (section 4.1.3) and the list of redressive measures (section 4.1.6) presented in the White Paper?

Yes – **No** – Other

In relation to the substantive assessment criteria, apart from the indicators listed in section 4.1.3.2 which appear to be vague, another issue is the notion of "distortion of the internal market" which is somewhat unclear. It may be preferable to refer instead to distortions of competition in order to have a clearer view on the types of harm caught under the definition.

On a more general note, applying existing substantive concepts developed under EU state aid rules would allow relevant stakeholders to rely on existing case-law and guidance to have a clear understanding of the concepts used.

The list of redressive measures in section 4.1.6 is heavy and fragmented but may also raise problems to the extent that foreign governments are involved (eg, redressive payments to the EU or member states).

4. Do you consider it useful to include an EU interest test for public policy objectives (section 4.1.4) and what should, in your view, be included as criteria in this test?

Yes – No – Other

The EU interest test as presented in the White Paper should allow the distortion caused by foreign subsidies to be exempted (ie, case closed) to the extent that the subsidy in question serves a wide range of EU interests. This test would be similar to the efficiencies test developed under Article 101(3) TFEU. In our view, it is good to have such a flexible test as it allows to avoid rigidity and false negatives. However, to make sure this test is able to serve its purpose, it should not make it too difficult to demonstrate the positive impact of the foreign subsidy in question. This test needs to be practical and sufficiently broad to take into account all EU policy interests.

Furthermore, at a minimum the existing body of EU state aid policies could be used as a benchmark to determine what are the EU interests. Indeed, where specific aid would be compatible if granted by an EU member state, it should also be compatible where granted by a foreign government.

5. Do you think that Module 1 should also cover subsidised acquisitions (eg, the ones below the threshold set under Module 2)? (section 4.1.2)

Yes – **No** – Other

The idea of introducing thresholds under Module 2 is to create legal certainty by limiting the number of situations in scope of the Commission's review. It would seem counterproductive to also allow the review of a foreign subsidy which does not fulfil the thresholds of Module 2 under Module 1. Modules 2 and 3 should be viewed as "lex specialis" to Module 1.

6. Do you think there should be a minimum (de minimis) threshold for the investigation of foreign subsidies under Module 1 and if so, do you agree with the way it is presented in the White Paper (section 4.1.3)?

Yes – No – Other

A de minimis threshold is indeed needed should be set at a much higher threshold in the wider context of foreign subsidies from third countries, in particular where the subsidy is granted in the home country of the company.

7. Do you agree that the enforcement responsibility under Module 1 should be shared between the Commission and member states (section 4.1.7)?

Yes – No – Other

A sharing of institutional oversight has upsides and downsides. Local cases are better dealt with locally. It will be of paramount importance to limit the risk of parallel investigations with contradictory outcomes. There should also be time-limits in which follow-on investigations can be opened by other member states. Where two or more member states investigate, a referral mechanism to the Commission might be helpful. Generally, the Commission should have jurisdiction by default; this seems only logical considering the Commission has the last word on the application of the EU interest test and is the only authority able to make an "internal market" assessment of the distortive effects of the foreign subsidy in question.

MODULE 2

1. Do you consider that Module 2 appropriately addresses distortions of the internal market through foreign subsidies that facilitate the acquisition of undertakings established in the EU (EU targets)?

Yes – No – **Other**

The difficulty in applying such a tool lies in establishing the causal link between the foreign subsidy and the acquisition in question. Further, the concept of "potentially subsidized acquisition" is not sufficiently detailed and it will be difficult for large companies to determine when and where a subsidy was granted and whether it facilitated a specific acquisition.

2. Do you agree with the procedural set-up for Module 2, ie, ex ante obligatory notification system, 2-step investigation procedure, the fact-finding tools of the competent authority, etc.? (See section 4.2.5 of the White Paper)

Yes – No – **Other**

The timing of a Phase I review should be aligned with the timeline of a merger control Phase I review to avoid unnecessary delays. A general mandatory notification, however, seems excessive. Such an obligation should be limited to specific cases, eg, where the company was found to have received Module 1 subsidies in the past.

Another option could also be to incorporate this procedure into the merger control procedure by modifying the EUMR to cover subsidies assessment.

3. Do you agree with the scope of Module 2 (section 4.2.2) in terms of definition of acquisition, definition and thresholds of the EU target (4.2.2.3) and definition of potentially subsidised acquisition?

Yes – No – **Other**

Thresholds should be clear-cut and quantitative.

The notion of "material influence" has never been applied before at EU level and is not a standard used under EU merger control. Using such a standard which allows for the review of an acquisition of non-controlling stakes in the context of an already complex tool is likely to lead to inconsistencies. Furthermore it is unclear how an acquirer of a non-controlling stake could distort the internal market. Venture capital investments and/or portfolio investments should in any case be excluded from the scope of review.

In relation to the definition of an EU target, one of the thresholds suggested is based on expected revenues. Using such a non-quantifiable threshold is likely to lead to diverging interpretations and ultimately legal uncertainty.

Finally, in relation to the notion of potentially subsidised acquisitions, including within the scope future foreign subsidies carries a risk of legal uncertainty.

4. Do you consider that Module 2 should include a notification obligation for all acquisitions of EU targets or only for potentially subsidised acquisitions (section 4.2.2.2)?

Yes – **No** – Other

Subject to the above, only potentially subsidised acquisitions should be notified to not unduly increase the administrative burden of foreign investors and/or restrict business activities.

Furthermore, a constitutional question could be raised over the Commission's competence in intervening in relation to all acquisitions of EU targets (ie, de facto FDI control by the Commission).

5. Do you agree with the substantive assessment criteria under Module 2 (section 4.2.3) and the list of redressive measures (section 4.2.6) presented in the White Paper?

Yes – **No** – Other

The range of remedies should be aligned with that available under EU state aid (recovery).

6. Do you consider it useful to include an EU interest test for public policy objectives (section 4.2.4) and what should, in your view, be included as criteria in this test?

Yes – No – Other

See answer in relation to the EU interest test under Module 1.

7. Do you agree that the enforcement responsibility under Module 2 should be for the Commission (section 4.2.7)?

Yes – No – Other

This would be consistent with the scope of the tool which is limited to EU targets, meaning targets with a certain level of activities/turnover in the EU.

MODULE 3

1. Do you think there is a need to address specifically distortions caused by foreign subsidies in the specific context of public procurement procedures?

Yes – No – Other

This is an area where the need for a monitoring tool is most pressing in order for contracting authorities to be able to take into account foreign subsidies and their potentially distortive effects which may have a strong impact on public procurement procedures (namely by allowing a bidder to bid significantly below market price or below cost).

However, it may be questioned whether a new procedural layer is needed or whether this issue could be dealt with through a modification of existing public procurement rules to allow contracting authorities to deal with subsidies.

2. Do you think the framework proposed for public procurement in the White Paper appropriately addresses the distortions caused by foreign subsidies in public procurement procedures?

Yes – No – **Other**

In terms of procedural set-up it is important for the notification procedure to impose a minimal burden on foreign bidders and contracting authorities alike.

The set of information required in the notification as detailed in the White Paper is broad (including information on subcontractors and suppliers) and includes "expected subsidies" to the detriment of legal certainty.

3. Do you consider the foreseen interplay between the contracting authorities and the supervisory authorities adequate, eg, as regards determination of whether the foreign subsidy distorts the relevant public procurement procedure?

Yes – No – **Other**

Review timelines of supervisory authorities would have to be short but also aligned with the timeline of the tender process.

If existing public procurement rules could be modified to authorise public authorities to take into account foreign subsidies, one might question whether Module 3 and the involvement of a supervisory authority is in fact needed.

Furthermore, the involvement of a supervisory authority in bidding procedures by constitutionally autonomous contracting authorities could raise constitutional and subsidiarity issues under EU and member state law.

4. Do you think other issues should be addressed in the context of public procurement and foreign subsidies than those contained in this White Paper?

Yes – **No** – Other

INTERPLAY BETWEEN MODULES 1, 2 AND 3

1. Do you consider that (a) Module 1 should operate as stand-alone module, (b) Module 2 should operate as stand-alone module, (c) Module 3 should operate as stand-alone module, (d) Modules 1, 2 and 3 should be combined and operate?

Yes – No – **Other**

The White Paper suggests that subsidised acquisitions of EU targets falling outside the scope of Module 2 and subsidised bidding in public procurement procedures falling outside the scope of Module 3 could still be reviewed under Module 1.

However, the three modules should operate independently in order to guarantee legal certainty and could in fact be integrated into existing legislation (at least in the case of merger control and public procurement).

QUESTIONS RELATING TO FOREIGN SUBSIDIES IN THE CONTEXT OF EU FUNDING

1. **Do you think there is a need for any additional measures to address potential distortions of the internal market arising from subsidies granted by non-EU authorities in the specific context of EU funding?**

   Yes – No – **Other**

   Economic operators competing for EU funding should also be able to operate on a level playing field. It would seem sufficient to modify the Financial Regulation in order to include foreign subsidies within its scope.

2. **Do you think the framework for EU funding presented in the White Paper appropriately addresses the potential distortions caused by foreign subsidies in this context?**

   Yes – No – **Other**

   See answer above.

Market Definition Notice

Introduction

The public consultation on the 23-year-old Market Definition Notice was launched over the summer of 2020. The objective behind this consultation is to determine whether the Notice is still fit for purpose and if/how it can be improved to better reflect new market developments.

Market definition often plays a pivotal role in the application of the competition rules. There is a continued need for a market definition notice that provides methodological guidance on defining relevant markets for the purpose of competition law. For undertakings, legal practitioners, national competition authorities and the national courts, the Notice is an important tool to validate their approach.

However, since 1997, the case-law has brought new perspectives and methods on how to define a relevant market for the purposes of EU competition law. We explain in our contribution how this can be reflected in the revised Notice.

In terms of next steps, the Commission aims to publish the results of the evaluation phase in mid-2021. Adoption of the new Notice could take place in the course of 2022.

Our contribution

As a preliminary remark, please note that most of the public consultation questions were formatted in such a way that the respondent first selects a "yes/no/other etc." answer (answer chosen in bold in the below) and then provides an explanation for this answer.

I. GENERAL QUESTIONS ON THE NOTICE

I.1. In the last five years, have you or your company/ (business) organisation been required to assess the relevant product and geographic market for competition law purposes?

Yes – No – Do not know – Not applicable

I.2. If your reply to question I.1. was yes, please specify the type of competition law assessment

Assessment of a concentration between undertakings under Council Regulation N° 139/2004 (the EU Merger Regulation); assessment of concerted practices and agreements between companies under Article 101 of the Treaty; assessment of abuse of dominance by an undertaking under Article 102 of the Treaty; assessment under the national competition law of one of the 30 states of the European Economic Area; assessment under the national competition law of a jurisdiction outside of the European Economic Area; other: civil law proceedings (to assess whether undertakings are competitors, eg, in relation to tort of unfair competition or breach of confidentiality); state aid analysis (to assess potential impact on competition).

I.3. How often do you consult the Notice?

Frequently (several times per year).

I.4. Do you consult the Notice for any purpose other than competition law assessment?

Yes – No – Do not know – Not applicable

In certain civil law proceedings (as specified above under (I.2).

II. RELEVANCE

II.1. Is there still a need for a Notice to provide correct, comprehensive and clear guidance on market definition?

Yes – No – I do not know

II.1.1. Please explain your reply

We believe there is a continued need for a market definition notice that provides methodological guidance on defining relevant markets for the purpose of competition law. Market definition often plays a pivotal role in the application of the competition rules (eg, to assess the applicability of a block exemption). For undertakings, legal practitioners, national competition authorities and the national courts, the Notice is an important tool to validate their approach.

This being said, it is important to emphasize that the Notice is 23 years old and needs to be revised to ensure that it also provides sufficient guidance when delineating dynamic and innovative markets. The Notice focusses mainly on short-term demand substitutability, and it lacks proper guidance as to the qualification of innovation as an important parameter of competition in dynamic market environments.

In practice, partly due to the abstract nature of the Notice and partly due to practical difficulties in gathering the required data for making a price elasticity analysis, we consider that it is often difficult to apply the Notice. For this reason, the market definitions adopted in previous cases are often a better suited tool to predict how the relevant market should be defined. In particular, the Commission's database of merger decisions is used extensively by practitioners.

We believe that it would be beneficial if the Notice were to be supplemented by additional tools to aid with market definition. In this regard, we think it would be very helpful if a more extensive database would be available, containing product and geographic market definitions from past cases and categorized by NACE code, with a brief explanation of the relevant factors. We are aware of the existence of certain commercial services, but we believe a database should be available that is accessible to all undertakings free of cost. This could, in our view, significantly reduce (legal) advisory and compliance costs.

III. EFFECTIVENESS

III.1. Have the following aspects within "Definition of relevant market" (paragraphs 7 – 12) provided correct, comprehensive and clear guidance?

- Definition of relevant product market and relevant geographic market (7-9): Yes – **Partially** – No – I do not know.
- Concept of relevant market and objectives of Community competition policy (10-11): **Yes** – Partially – No – I do not know.
- Differences between market definition in assessing past behaviour (antitrust) and in assessing a change in the structure of supply (merger control) (12): Yes – **Partially** – No – I do not know.

III.1.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

In spite of the rise of emerging dynamic markets, the definition of the relevant product and geographic market and the paragraphs providing background to the objectives of market definition (paras. 7-11) in our view largely remain unchanged.

In relation to para. 7, we note that the current Notice defines a relevant product market as those products which a consumer regards as substitutable on the basis of the product's (i) characteristic, (ii) price, or (iii) use. Yet, further clarification should be given in relation to whether these are alternatives or if a hierarchy exists between them (which appears not to be the case in light of para. 25 of the Notice). However, undertakings and legal practitioners are often left with the sense that the Commission's own practice suggests the SSNIP test is the "gold standard" by which market definition is outlined. In our view, it is not clear when the Commission can simply revert from a SSNIP test to a characteristics test to define the market and/or how much weight a competition authority should place on a product's *characteristic* or *use* in such a price analysis – and the wording of para. 36 is not overly informative as to how this weighting process should take place.

In relation to para. 12, we believe the current text is open to misinterpretation. We agree that there may be differences when making a retrospective analysis (aimed at defining the relevant market for a situation occurring in the past) as opposed to a prospective analysis (taking into account anticipated future developments). However, we consider it important to point out that a prospective analysis is not only required in relation to concentrations, but also often when advising on undertakings' anticipated behaviour from the perspective of Art. 101 or 102 TFEU (eg, in relation to a new cooperation to be set up or a new policy to be adopted). As currently drafted, para. 12 could be misinterpreted as indicating a distinction between market analysis in merger cases as opposed to cartel or abuse of dominance cases, whereas the proper distinction should be between past, current and future situations, regardless of the area of competition law.

III.2. Have the following aspects within "Basic principles for market definition" (paragraphs 13-24) provided correct, comprehensive and clear guidance?

- Competitive constraints (13-14): Yes – **Partially** – No – I do not know.
- Demand-side substitutability (15-19): Yes – **Partially** – No – I do not know.
- Supply-side substitutability (20-23): Yes – **Partially** – No – I do not know.
- Potential competition (24): Yes – **Partially** – No – I do not know.

III.2.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

Para. 14 indicates that demand substitution is the most immediate and most effective disciplinary force on undertakings. Whilst in traditional markets this will often be correct, it is not always the case in dynamic,

fast-evolving tech markets. In those markets, the threat of potential market entry of fully new (disruptive) technologies and products is often equally or more important than the competitive constraints exercised by existing substitutes. This dynamic aspect of market definition in our view is not sufficiently reflected in the Notice.

Paras. 15-19 on demand substitution are exclusively focussed on price competition and therefore do not capture other important factors of competition. Non-price competition may result in equally important competitive constraints, for instance in relation to sustainability, and should in our view also be reflected in the Notice.

In addition, the Notice should in our view provide guidance for markets where the SSNIP-test cannot easily be applied for other reasons. We believe it would be beneficial if the Notice were to address how demand substitution can be measured in tipped markets, multi-sided markets and zero price markets.

A tipped market is characterized by network effects, and user demand is locked in due to high adoption rate of the same product by other users. In such markets, price competition is often not a relevant factor. This is even more the case for multi-sided markets, where an undertaking's competitive behaviour on one side of the market may not be driven by price elasticities at all, if it is driven by considerations relating to the other side of the market. The SSNIP-test also cannot be applied to the increasing number of zero-priced markets developing, in particular in relation to online platforms. For zero-priced markets, a potential alternative for assessing demand elasticity could be an analysis focussing on quality, namely based on a small but significant non transitory decrease in quality (SSNDQ).

Paras. 20-23 on supply substitution also focus on price changes as an incentive for market entry. These paragraphs fail to capture other relevant factors for market entry (such as economies of scale and scope in production, increasing network effects and levels of control of data) (or, indeed, for not entering a market, even if, from a pure price perspective, it might be profitable).

We believe the Notice should also address other competitive restraints than supply and demand substitution. In particular, in digital and dynamic markets, competitive pressure also arises from non-substitute products, services and business models. R&D and innovation competition can form important competitive restraints. Dynamic market contexts require the market analysis to incorporate behaviour that takes place before a relevant product market has properly emerged, due to the fact that this can have significant impact on innovation and competition.

Para. 24 of the Notice in our view is too dismissive of the role of potential competition – which is excluded from the market definition. This approach fails to capture that in dynamic markets, competitive constraints arising from potential competitors can be significant and should be incorporated in the market definition. It should further be borne in mind that especially in digital markets, undertakings often compete by supplying non-substitute products or highly imperfect substitutes. In particular, competitive pressure might be exercised by products relying on different technological infrastructures or supported by distinct business models. If competition on innovation and the uncertainties attached are addressed at the market definition stage, this prevents market shares from being relied upon too much in a dynamic market context.

One further point is that para. 24, in our view, inappropriately excludes potential competition from the market definition assessment – while at the same time, potential competition is properly included in other areas of competition policy, such as when defining the category of agreements which are capable of falling foul of Article 101 TFEU (ie, in the form of agreements between *potential* competitors) or subject of a block exemption regulation (eg,, Article 1(1)(c) of Regulation 330/2010). To the extent that there are justifiable policy reasons for sanctioning agreements between potential competitors, it is neither intuitive or consistent that the policy underpinning market definition would entirely exclude potential competition from its analysis.

III.3. Have the following aspects within "The Process of defining the relevant market in practice" (paragraphs 25-35) provided correct, comprehensive and clear guidance?

- Product dimension (25-27): Yes – **Partially** – No – I do not know.
- Geographic dimension (28-31): Yes – **Partially** – No – I do not know.
- Market integration in the Community (32): **Yes** – Partially – No – I do not know.
- The process of gathering evidence (33-35): Yes – **Partially** – No – I do not know.

III.3.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

As a general comment in relation to Section III of the Notice, we note that the Notice clearly reflects the Commission's position in gathering information and evidence for the purpose of market definition. It should be kept in mind that the Commission has a highly privileged position in this regard in comparison to undertakings, legal practitioners and (national) courts. While the Commission (as most NCAs) has the option of launching market surveys to gather evidence, bolstered by an obligation to cooperate for the addressees of surveys, this option is not, or only to a significantly lesser extent, available to undertakings and legal practitioners. Undertakings in particular have no way of making other market participants cooperate with surveys or information requests and very often they will find market participants reluctant to do so.

In particular, in view of the self-assessment approach adopted by the Commission since 2004, the limited availability of market information often poses a significant impediment to undertakings and their legal advisers to be able to advise on the application of competition law with sufficient precision. For this reason, as mentioned under II.1.1. above, we believe the Notice should be supplemented with additional tools such as a well-organized database of previous market definition decisions.

In relation to para. 25, we believe that the open approach to empirical evidence expressed in the last sentence is not fully aligned with the Commission's approach in practise. We believe that the approach taken (correctly, in our view) by the Commission and NCAs is to value evidence derived from actual behaviour higher than evidence derived from surveys. This approach reflects the fact that surveys are generally more susceptible to an incorrect outcome due to biases or alternate interests of participants. We believe this approach should be reflected in the Notice.

With respect to the last sentence of para. 29 we repeat the comment made under III.2.1. above that an exclusively price-focussed analysis may miss important other factors, on the basis of which customers may or may not decide to switch their demand to suppliers located elsewhere.

We note that it has become practice for the Commission and many NCAs to rely on undertakings' internal documents as a source of evidence. This should be incorporated in the Notice. In particular, the Notice should specify which types of internal documents may potentially be used and reflect on their evidentiary value.

III.4. Have the following aspects within "Evidence to define markets – product dimension" (paragraphs 36-43) provided correct, comprehensive and clear guidance?

- Introductory paragraphs (36-37): Yes – **Partially** – No – I do not know.
- Evidence of substitution and quantitative tests (38-39): **Yes** – Partially – No – I do not know.
- Views of customers/competitors and consumer preferences (40-41): Yes – **Partially** – No – I do not know.
- Barriers and costs of switching (42): **Yes** – Partially – No – I do not know.
- Different categories of customers and price discrimination (43): **Yes** – Partially – No – I do not know.

III.4.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

In the introduction (paras. 36-37) we believe an extra paragraph should be included which stipulates that competitive pressure in digital markets can be exerted by complementary and non-substitute products, services, and business models.

With respect to paras. 40-41, we refer back to our comments made under III.3.1 above in relation to the limited availability of and practical difficulties in obtaining such evidence. We believe more guidance would also be welcome on the value to be attached to market and consumer surveys as sources of evidence. In particular in relation to consumer surveys, we consider that the often low response rate and the corresponding issues for the representativeness of such surveys (ie, how to exclude that the survey is mostly responded to by a small minority of biased consumers while the majority of neutral consumers do not respond?) should be addressed.

III.5. Have the following aspects within "Evidence for defining markets – geographic dimension" (paragraphs 44-52) provided correct, comprehensive and clear guidance?

- Evidence of diversion to other areas (45): Yes – **Partially** – No – I do not know.
- Demand characteristics and views of customers and competitors (46-47): **Yes** – Partially – No – I do not know.

- Geographic patterns of purchases and trade flows (48-49): Yes – **Partially** – No – I do not know.
- Barriers and costs of switching (50): Yes – **Partially** – No – I do not know.
- Examples from Commission practice and relevance of different factors (51-52): **Yes** – Partially – No – I do not know.

III.5.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

With respect to evidence of diversion to other areas (para. 45) and current purchase patterns (para. 48) we note that indications of such diversion can indeed, as suggested in the Notice, be an indication of a wider geographic market, but that the opposite is not necessarily true. In the absence of a reason in the past to divert orders, customers may have chosen local suppliers but in itself that is not indicative of customer behaviour in response to a reason to divert (such as a price rise, reduced availability or other relevant factors).

The paragraph on switching barriers (para. 50) is focussed mainly on trade in physical goods (ie, transport costs, custom tariffs). We believe also other types of switching barriers, in particular in relation to (digital) services should be addressed in the Notice.

In relation to (digital) services, customers' switching costs and the barriers to purchase from foreign companies form less of a switching barrier. Other types of switching barriers that are more present within the digital services spectrum are consumer privacy, personal data protection and the lock-in effects of dominant platforms and gatekeepers.

III.6. Have paragraphs 53 to 55 on the "Calculation of market share" provided correct, comprehensive and clear guidance?

Yes – **Partially** – No – I do not know

III.6.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

In relation to para. 53, we refer back to our comments made under III.3.1 above in relation to the limited availability of market data. Unlike the Commission's position, it is not a realistic option for undertakings to ask their competitors about sales data (which moreover may be competitively sensitive information that cannot be exchanged in view of the cartel prohibition). In many cases, firms typically have a good general sense of their market share. However, the difficulties for firms to self-analyse their market share cannot be overstated and raise wider policy issues beyond the scope of the Notice, such as fairness and due process, as to when a firm's market share is used to identify or impose legal obligations. Such issues typically occur in the context of the application of merger control thresholds that adopt a market share test (eg, Spain and Portugal) or in the application of a block exemption regulation (eg, Regulation 330/2010). Often it is very difficult in practice to define the relevant market and to establish an undertaking's market share with the degree of precision that is required to apply hard thresholds carrying important legal consequences.

While, in itself, it seems correct, as mentioned in para. 55, that sales value information often may give a better impression of the relative position of undertakings, it should be kept in mind that in practice most often there is no option to choose, as sales value information often is not available.

III.7. Have paragraphs 56 to 58 on the "Additional considerations" provided correct, comprehensive and clear guidance?

Yes – Partially – No – I do not know

III.7.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

We believe that the points addressed in this section on primary and secondary markets and chains of substitution are valid and important. We do believe, however, that other additional considerations ought to be included in the Notice, in particular in relation to trade patterns in digital markets. In this regard, we refer back to our comment made under III.2.1. above in relation to tipped markets, multi-sided markets and zero price markets.

III.8. Do you consider that there are any major points of continuity (for example legal, economic, political, methodological, or technological) that have not changed since 1997 and that you consider should continue guiding the principles of the Market Definition Notice going forward?

Yes – No – I do not know

III.9. If yes, please identify in the following table the major points of continuity that have not changed since 1997 and that you consider should continue guiding the principles of the Market Definition Notice going forward.

	MAJOR POINTS OF CONTINUITY	SHORT EXPLANATION/ CONCRETE EXAMPLES	PARAGRAPHS OF THE NOTICE WHERE THOSE IDEAS ARE EXPRESSED
1.	Product and geographic aspects of relevant market	The product and geographic dimension of the market are almost always a suitable starting point to enable parties to self-assess the relevant markets within which competition occurs.	paras. 25-27 paras. 28-31
2.	Use of SSNIP test as default parameter for product market	The SSNIP test is often a good tool for identifying substitutability and indirectly is often also a relevant proxy for other competition-relevant features, eg, quality and pace of innovation.	para. 15
3.	Focus on trade patterns and trade flows for geographic market	Significant (international) trade flows generally should support the hypothesis of a broader geographic market. Potential increases in the level of trade can discipline producers in the event of price increases. This is also applicable in more dynamic markets.	para. 29

III.10. Do you consider that there are major trends and developments (for example legal, economic, political, methodological, or technological) that have affected the application of the Notice but are currently not reflected in it?

Yes – No – I do not know

III.11. If yes, please identify in the following table the major trends and developments that you consider have affected the application of the Notice but are currently not reflected in it. Please describe the specific shortcomings of the Notice in this regard, including concrete examples.

	MAJOR TRENDS/ CHANGES	SHORT EXPLANATION/ CONCRETE EXAMPLES	PARAGRAPHS OF THE NOTICE THAT MAY REQUIRE AN UPDATE	SPECIFIC SHORTCOMING OF THE NOTICE
1.	Impact of potential competition	Many markets have become more dynamic in character since 1997, which increases the competitive pressure exercised by potential market entry. It would be appropriate to reflect this in the Notice.	para. 24	Potential competition is not taken into account when defining markets under the current notice. Potential competition is only considered in the subsequent phase of the analysis. In markets with a dynamic character where innovation is at a stage at which it will reach the market with a certain predictability, potential competition may be an actual disciplinary factor on the existing market and should be taken into account in the market delineation phase. The Notice should reflect this.
2.	Developments in the way in which (mostly digital) products and services are offered and marketed	Developments not addressed by the Notice are tipped markets, multi-sided markets and zero price markets.	paras. 15 – 19	The Notice should address how demand substitution can be measured in tipped markets, multi-sided markets and zero price markets.

III.12. Is there any area for which the Notice currently does not provide any guidance, but which would be desirable?

Yes – No – I do not know

III.12.1. Please explain your reply

As mentioned above under III.2.1., we believe the Notice should address instances where classic market definition methodologies do not or not fully apply (eg, in relation to tipped markets, multi-sided markets and zero price markets) and set out the approach to be followed in relation to such markets.

IV. EFFICIENCY

IV.1. Are the net benefits – benefits net of costs – associated with following the guidance described in the Notice positive (compared to a situation without the Notice in place)?

Yes, the net benefits are positive (the benefits of having the Notice in place exceed the costs thereof).

IV.1.1. Please explain your reply and, if possible, quantify the magnitude of the (positive or negative) net benefits.

We believe the Notice provides important guidance on market definition which in itself is a significant benefit. As observed above, the methodologies described in the Notice may not in all cases be suitable or even possible to apply in practice, in particular in the context of a self-assessment. Nevertheless, even in such cases the Notice may have added value by identifying alternative methodologies and approaches. A new version of the Notice, addressing more alternative options, might increase its added value.

V. COHERENCE

V.1. How well do the different components set out in the Notice operate together?

The different components of the Notice work well together without apparent contradictions.

V.1.1. Please explain your reply, especially if you have identified any contradictions

We do not believe the Notice to be inherently contradictory. As observed above, we do believe the Notice to be incomplete in view of developments since 1997, in particular in digital markets.

V.2. Is the Notice coherent with other instruments that provide guidance on the interpretation of the EU antitrust rules (based on Articles 101 and 102 TFEU)?

Yes – No – I do not know

V.2.1. Please explain.

We believe that the Notice is, and should remain, value-neutral in relation to Articles 101 and 102 TFEU although the Notice raises certain inconsistencies in relation to potential competition – see III.2.1. above.

V.3. Is the Notice coherent with the Merger Regulation and with other instruments that provide guidance on the interpretation of the EU merger control rules, such as the Guidelines on the assessment of horizontal mergers and the Guidelines on the assessment of non-horizontal mergers?

Yes – No – I do not know

V.3.1. Please explain.

We consider the Notice to be one of the instruments that provides guidance on the application of the competition rules, on equal footing to the Guidelines mentioned.

V.4. Is the Notice coherent with the case law of the General Court and the Court of Justice of the European Union?

Yes – No – I do not know

V.4.1. Please explain.

We are not aware of case law that contradicts or deviates from the approach adopted in the Notice.

V.5. Is the Notice coherent with other existing or upcoming EU legislation or policies (including legislation and policies in fields other than competition law)?

Yes – No – I do not know

V.5.1. Please explain.

We are not aware of legislation or policy instruments that contradict the Notice.

VI. EU ADDED VALUE

VI.1. Has the Notice at EU level had added value in the assessment of relevant product and geographic market in the application of EU competition law (including application by national competition authorities)?

Yes – No – I do not know

VI.1.1. Please explain your reply. If your reply differs between product and geographic market, please also explain that.

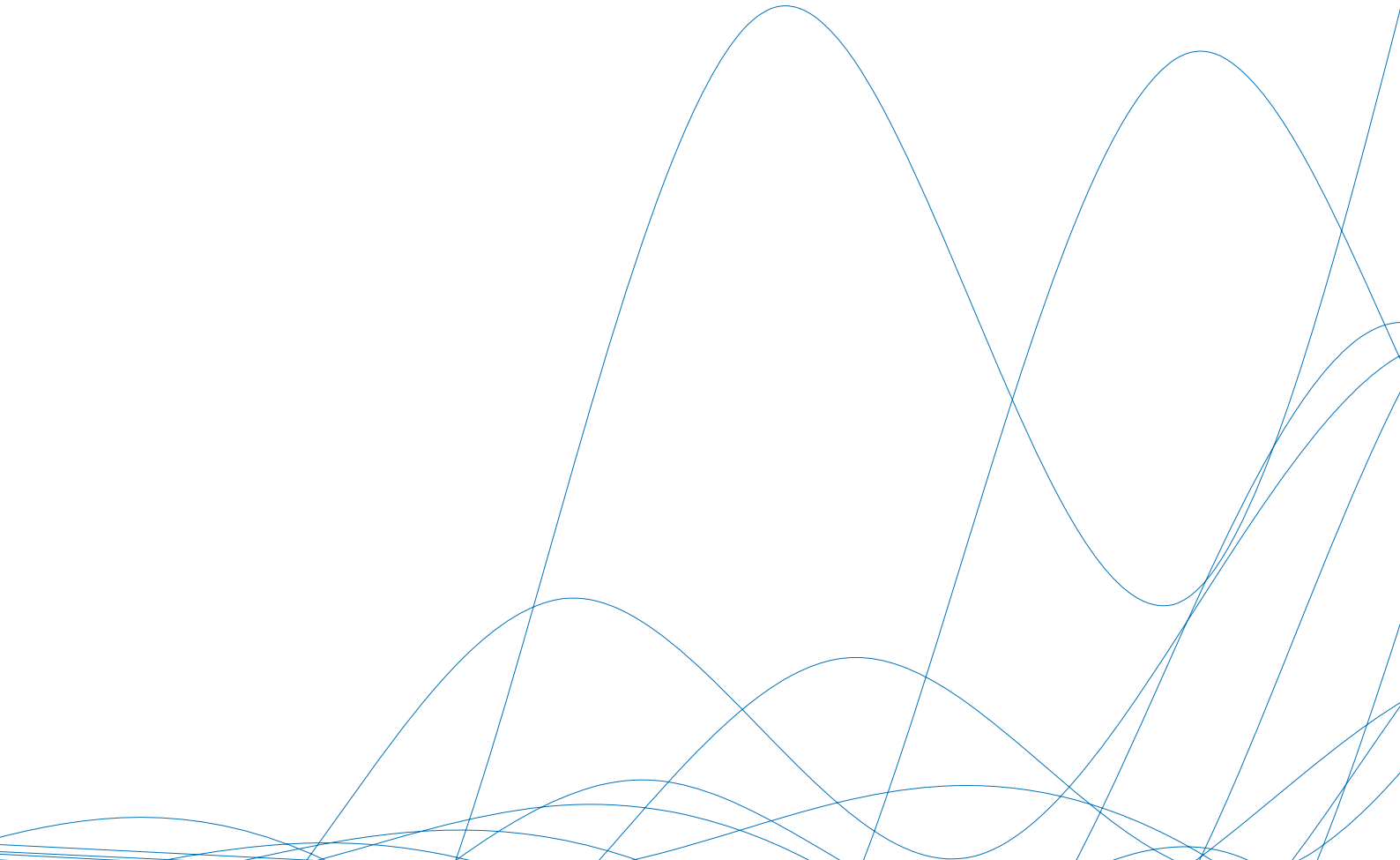
We believe the Notice provides important methodological guidance on defining relevant markets for the purpose of competition law. In particular with a view to the responsibility of undertakings to self-assess their market behaviour, guidance on how to define relevant markets is very important.

VI.2. Has the Notice helped in aligning the definition of the relevant markets by the national competition authorities of the EU member states and the European Commission?

Yes – No – I do not know

VI.1.1. Please explain your reply. If your reply differs between product and geographic market, please also explain that.

We believe the guidance set out in the Notice is applied by most NCAs and national courts and as such the Notice certainly has helped to align the approach on market definition between authorities and courts.



Competition policy and the Green Deal

Introduction

In October 2020, the Commission published a call for contributions on questions about how competition rules and sustainability policies work together. With this initiative, the Commission followed in the footsteps of several national competition authorities which had already issued guidance on the topic of competition and sustainability.

The call for contributions aimed to collect feedback in relation to sustainability cooperation agreements and the extent to which "green agreements" could warrant special treatment from competition authorities. The call for contributions, which also concerned state aid and merger control, ran until 20 November 2020. The Commission also announced that it would organise a conference on the topic in early 2021.

Our contribution

PART 1 – STATE AID CONTROL

1. What are the main changes you would like to see in the current state aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current state aid rules do not sufficiently support the greening of the economy and/ or where current state aid rules enable support that runs counter to environmental objectives.

We believe that any form of state aid that would contribute to meeting the Green Deal objectives should be encouraged. Article 11 TFEU sets out the overarching principle of integrating environmental protection into EU policies and Article 37 of the Charter refers to the need to preserve but also to improve the "quality of the environment." As a result, we consider there is sufficient legal basis for EU state aid rules to integrate the Green Deal objectives.

We believe that the current state aid rulebook already allows certain types of aid in areas covered by the Green Deal. The GBER includes a section on aid for environmental protection enabling, for example, aid that goes beyond EU standards for environmental protection or investment aid for energy efficiency measures. However, the list of aid measures under the GBER is limited and only concerns aid measures that are deemed not to unduly distort the market. It does not cover all types of aid which could be awarded in line with the Green Deal objectives.

In parallel, the Guidelines on State Aid for environmental protection and energy 2014-2020 (EEAG guidelines) which have been prolonged until end 2022, are to be revised. In particular, the EU climate policies have significantly changed since the adoption of the EEAG guidelines. We believe that the revision of the EEAG guidelines will give an opportunity to the Commission to adapt the EEAG guidelines in line with the policy objectives of the Green Deal.

As we are living in times of fast technological progress, there is a risk that truly innovative projects may not exactly meet the criteria of the EEAG guidelines, even revised. There should therefore be a possibility or policy allowing the approval of atypical projects directly under the Treaty, provided the environmental benefits are sufficiently demonstrated.

Alongside the EEAG guidelines, the Commission's Communication on important projects of common European interest (IPCEI) is also up for review. We encourage the Commission to take this opportunity to assess how to reduce the procedural burden for qualifying for IPCEIs which may contribute to the objectives of the Green Deal. There is a perception, rightly or wrongly, that in practice IPCEI favour large national incumbents. It might therefore be worthwhile reflecting on how this concept can be opened up to projects involving smaller players with disruptive technologies.

We also see a window of opportunity in the context of the economic recovery from the COVID-19 crisis to promote "green aid." For example, the Temporary State Aid Framework adopted during the crisis included specific language on the possibility for member states to grant state aid that would support the green transition.

2. If you consider that lower levels of state aid, or fewer state aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

a. For projects that have a negative environmental impact, what ways are there for member states or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

If the aid is sought under the EEAG guidelines, the simplest way to avoid a negative environmental impact is to set the standards sufficiently high. The question is more difficult where two aid policies are in conflict.

The starting principle should be that any aid measure should be in compliance with other Treaty rules and objectives. However, in any legal system, the possibility of normative conflicts arises and has frequently been solved through balancing of interest techniques. The late German constitutional judge and scholar Konrad Hesse had developed, for the purposes of German constitutional law, the Konkordanz-Prinzip, which aimed at balancing conflicting interests in a way that both could be preserved to the greatest possible extent (eg, transferring the fish population into other waters).

Establishing a type of "green penalty" for activities with a negative environmental impact may create an imbalance between activities or projects pursuing Green Deal objectives and activities or projects based on other relevant policy objectives (eg, job creation).

In addition, there would be a risk of considerably delaying the approval of aid process. Indeed, incorporating this new assessment criterion would result in the Commission having to conduct a fully-fledged assessment of the environmental impact of each individual state aid measure, which would entail:

- for the aid beneficiary, to prepare and deliver some form of environmental impact report to the Commission (or other relevant documentation);
- for the Commission, to determine in each individual case whether the overall environmental impact of the project is positive or negative. Conducting such an assessment carries a certain risk, particularly in light of the evolutive nature of the Commission's green policy objectives which are likely to continue maturing throughout the existence of the aid measure. Furthermore, there may be a risk of granting too much discretionary power to the Commission to the detriment of effective judicial protection and legal certainty.

Finally, the Commission would be required to monitor compliance with the beneficiary's environmental obligations, with, ultimately, the risk of recovery of the aid (should the measure not meet its environmental targets over time). This creates legal uncertainty and may disincentivize stakeholders from entering into a "green" project.

3. If you consider that more state aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus")? If so, how should this green bonus be defined?

b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

Establishing a green bonus (as for the "green penalty") raises the question of how the Commission will quantify and rate the environmental benefits of each state aid measure. Furthermore, it is currently unclear how the Commission would determine the adequate amount of aid allowed based on the environmental benefits of the measure in question.

However, we see an analogy to the sustainability discussion in antitrust (see below), which contemplates to extend the concept of consumer welfare, as a matter of policy if not law, to include non-price external benefits for both the users of the product/service at stake and the wider public.

4. How should we define positive environmental benefits?

a Should it be by reference to the EU taxonomy and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?

We believe that the EU Taxonomy Regulation is currently the most appropriate framework of reference on sustainability and should serve as a starting point. The purpose of the Taxonomy Regulation is to create a uniform definition of what constitutes sustainable investment in the EU. As such, it would be appropriate if state aid rules referred to that Taxonomy when defining environmental benefits.

In addition, an advantage will be that market practice and market players will likely develop around the assessment of what constitutes a sustainable investment under the EU Taxonomy Regulation, which could also benefit the assessment of environmental benefits under state aid rules. The high level of detail of the Taxonomy, in particular once all regulatory technical standards will have been adopted, in addition guarantees that no undue discretion will be used in the assessment of environmental benefits.

Nevertheless, the Taxonomy Regulation should not be seen as a straightjacket. It is very likely that environmental innovation progresses at rapid speed and other types of environmental benefits will be identified over the next years; those should be assessed on a case-by-case basis based on a set of thorough, but not unreachable criteria.

Furthermore, we would encourage the Commission to consider environmental impact assessments carried out across the EU (in line with the Environmental Impact Assessment Directive) as basis to identify and quantify environmental benefits.

PART 2 – ANTITRUST RULES

1. **Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (eg, greener products or production processes).**

For reasons of professional secrecy, we are not in a position to provide actual examples. The range of theoretical examples is wide, and the valuable work carried out by the Dutch and Greek competition authorities provides some tangible examples.

Cooperation between firms to achieve the policy objectives of the Green Deal may be crucial in certain contexts and EU competition law rules should reflect new market developments linked with sustainability objectives. It just happens that the green transition coincides with an era in which many companies have developed innovative and disruptive business models. In particular, more and more innovative business models based on cooperation are emerging (eg, leasing of equipment or cooperation on sourcing raw materials) which makes the need for practical guidance on how to self-assess cooperation agreements all the more pressing.

Cooperation can be a means to develop and deliver greener products/processes in a shorter time frame (in order to meet the short-term Green Deal objectives) and to share costs (particularly in the context of expensive R&D). Similarly, cooperation may be needed where purchasing prices are higher as a result of sustainability commitments (eg, purchasing alliance to buy carbon-neutral steel).

Moreover, open cooperation creates a level-playing field by ensuring that smaller firms with little economies of scale are also be able to participate and eventually can offer the same more sustainable product/process to customers.

We believe that guidance on sustainability agreements should be based on a set of objective criteria and practical examples. For example, it should take into account the fact that certain sustainability agreements require a strong collective effort to be impactful which may entail extensive information sharing (eg, exchanges of information on raw materials or process technicalities).

Collaboration may be considered because it is objectively necessary (consortia), but also because it reduces financial and operation risk. An environmental innovator ready to invest in better technology may be concerned of being undercut on price by less environmental competitors. A fast food producer may worry about damaging the brand if the products are sold without the colorful carton boxes. In such cases, industry-wide concertation – based on the model of standard setting – may be a way to facilitate the adoption of environmentally friendly commercial decisions (that do not necessarily increase the price for the buyer).

2. **Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?**

Today, many companies are reluctant to enter into a sustainability agreement because of concerns that cooperation might be deemed restrictive under Article 101(1) TFEU or might not meet the criteria of Article 101(3) TFEU. As to the latter, it is very difficult to rely on efficiencies given the exposure to the risk that the regulator does not accept their demonstration as being to the requisite standard.

We therefore believe further clarification on the application of competition law rules to sustainability agreements would be needed to encourage parties to enter into such agreements. The below paragraphs focus on the different forms in which clarification could be given.

First, we believe rules on sustainability agreements should be included in the revised Commission's guidelines on horizontal cooperation agreements (HGL). The public consultation on the HGL clearly highlighted a lack of guidance in the area of sustainability agreements. However, sustainability initiatives may also concern parties in a vertical relationship meaning the review of the Vertical Block Exemption Regulation (VBER) should also focus on providing more guidance on the validity of sustainability agreements to ensure the overall legal framework on cooperation agreements is consistent. In order to guarantee legal certainty, the review of the HGL and VBER should also cover the situation where parties are potential competitors or where cooperating parties share both vertical and horizontal links.

Furthermore, we note that while the current HGL does not provide any language on sustainability, the previous HGL (2001 HGL) included a section on "environmental agreements". In particular, the 2001 HGL considered environmental agreements that covered "a major share of an industry at national or EC level" and "appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them" as agreements that may restrict competition. However, the 2001 HGL did not define a market share threshold below which the agreement would be exempted or deemed unlikely to restrict competition. By comparison, the ACM draft guidelines on Sustainability Agreements published in July 2020 (ACM guidelines) create a presumption of validity under Article 101(3) TFEU, for agreements between parties with a combined market share of less than 30 percent (ie, no quantification of effects required below this threshold). This safe harbour creates a level playing field and ensures a more swift and efficient process, likely to encourage companies to enter into sustainability agreements. In order to avoid forum shopping and to make sure an EU-wide approach to sustainability initiatives is adopted (of particular importance to global companies), a similar safe harbour should be adopted at EU level.

Second, on the creation of general policy guidelines, we consider that such guidelines may not be required if sufficiently detailed guidance on sustainability agreements is provided in the revised HGL and VBER. On the other hand, should the Commission decide not to include substantial guidance on sustainability agreements in the revised HGL and VBER, sustainability guidelines may be required to provide further legal clarity. Either way, guidance should cover the following points:

- *The possibility for parties, before entering into a sustainability agreement, to seek the Commission's guidance on an informal basis on the validity of the agreement*. The Commission increasingly encourages informal discussions. Such consultations can be particularly useful for parties facing specific practical difficulties in applying the conditions of Article 101(3) TFEU. As a further incentive, the ACM guidelines also foresee that parties who seek the ACM's opinion before implementing the sustainability agreement in question, will be exempt of any fines if the agreement is later found to be incompatible with the Dutch Competition Act (subject to the condition that parties promptly implement the changes suggested by the ACM in case of incompatibility). This guarantee is likely to encourage parties to come forward with their sustainability agreements and to open a dialogue between the regulator and relevant stakeholders. A similar incentive at EU level would encourage more parties to enter into a sustainability agreement.
- *Guidance (and possibly, practical examples) on allowed exchanges of information in the context of sustainability agreements*. As explained above, a sustainability agreement may require extensive sharing of information. In line with the new business models developed to meet sustainability objectives, a new approach to information sharing may be required to ensure legal certainty. We believe it would be beneficial for parties involved to be able to refer to specific guidance (with examples) on which types of information can/cannot be exchanged based on their cooperation context.
- *Guidance on how to apply the criteria of Article 101(3) TFEU in the context of sustainability agreements*. The ACM guidelines propose to relax the "fair share" criterion for certain agreements called "environmental-damage agreements" (ie, agreements that aim to improve production processes that cause harm to humans, the environment, and nature). The fair share criterion will be deemed met by environmental-damage agreements if they contribute to a policy objective to which the Dutch government is bound and if society "as a whole" is better off (no full compensation to users required). However, agreements going further than the national/international standards to which the Dutch government is bound will not be considered an environmental-damage agreement and will not covered by this "relaxed" rule. Although the set of policy objectives to which the Dutch government is bound may be sufficiently wide to catch a majority of sustainability agreements, this rule may disincentivise certain companies from going a step further than the Dutch government's policy objectives. Furthermore, policy objectives will vary from one member state to another which would considerably complexify the task of multinational companies in establishing an EU-wide sustainability agreement. We would encourage the Commission to give further guidance on how to apply the objective criteria of Article 101(3) TFEU in the context of sustainability agreements.

Third, in relation to case-by-case assessments, the Commission may consider developing an open database with short descriptions of cooperation projects (in compliance with business confidentiality requirements) that have been approved by the Commission and/or national competition authorities in order to incentivize stakeholders to enter into similar cooperation projects. This would also help build a broader EU framework in the field of sustainability agreements.

For many multinational companies, the difficulty lies in implementing a global sustainability project covering different jurisdictions in and outside the EU. In this context, we consider it essential to launch a dialogue within the ECN and the ICN to make sure there is a sufficient level of communication and coordination (at least within the EU) on these issues.

3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (ie, which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

The answer is yes – but it depends on the circumstances of the particular case. In times of national emergencies (eg, war, natural disaster), a higher degree of collaboration is required that may not be appropriate in ordinary times. Where there is a great urgency of situation or a particular measure of great environmental benefit that can only be achieved by anti-competitive collaboration, that may be the price to pay.

There should be no a *priori* limitation on the list of policy objectives a particular sustainability agreement may serve and job creation/social objectives may be one of them. In relation to the Green Deal objectives specifically, these are often overarching long-term objectives which cannot be directly translated into a corporate policy (eg, reduction of greenhouse gas emissions by at least 55 percent by 2030, reduction of sale of antimicrobials for farmed animals and in aquaculture by 50 percent). While this means that many sustainability agreements are likely to fall into one of the "boxes" of the Green Deal, the main difficulty will be to prove that there are sufficient benefits to offset the restrictions of competition in line with Article 101(3) TFEU. In this context, we believe the determinant factor will be sufficient guidance on the application of the criteria of Article 101(3) TFEU to ensure the validity of *a priori* restrictive sustainability agreements.

In addition to the practical difficulties in applying the fair share criterion (already discussed above), further leeway would be needed in relation to the consumer benefit criterion. In particular a consumer benefit is defined under Article 101(3) TFEU as "improving the production or distribution of goods" or "promoting technical or economic progress." However, social improvements or improvements in terms of quality should also be taken into account. The Commission should consider expanding its interpretation of this criterion, namely by taking into account different objective grounds. This should be reflected in the Commission's guidance.

The third criterion of Article 101(3) TFEU (indispensability of the cooperation) may also be difficult to meet, for example where strong companies cooperate in relation to R&D (eg, development of new recycling techniques) or enter into a purchasing alliance ("greener" food also means higher purchasing prices). Stakeholders would greatly benefit from further guidance on how to apply the indispensability criterion in the context of sustainability agreements.

Finally, meeting the fourth criterion of Article 101(3) TFEU (no elimination of competition) may be difficult when companies with strong market power are involved. However, where there is sufficient room for competition on price, quality and innovation, the criterion should be considered to be met.

The question how to distinguish environmental policy goals from others is complex. At a recent competition policy conference, a key member of a competition authority described Article 101 TFEU as a well-enshrined principle of law that allows (under its umbrella) a potentially infinite number of policies. That raises interesting questions about the relationship between law and policy: is the policy a factor that may *de facto* facilitate the acceptance of a particular agreement, the regulator having discretion as to how much it wants to relax the standard of demonstration; or does the policy determine the reach of the law? Meaning: if two undertakings conclude an anticompetitive agreement that clearly advances other treaty or policy objectives (energy security, public safety, public security, gender diversity), would they not be entitled, as a matter of law, to the same more flexible standard of assessment than sustainability agreements, even though there is no similar policy effort underway? However, the risk of "today the hand, tomorrow the arm" should not deter DG COMP from making sustainability a top priority.

PART 3 – MERGER CONTROL

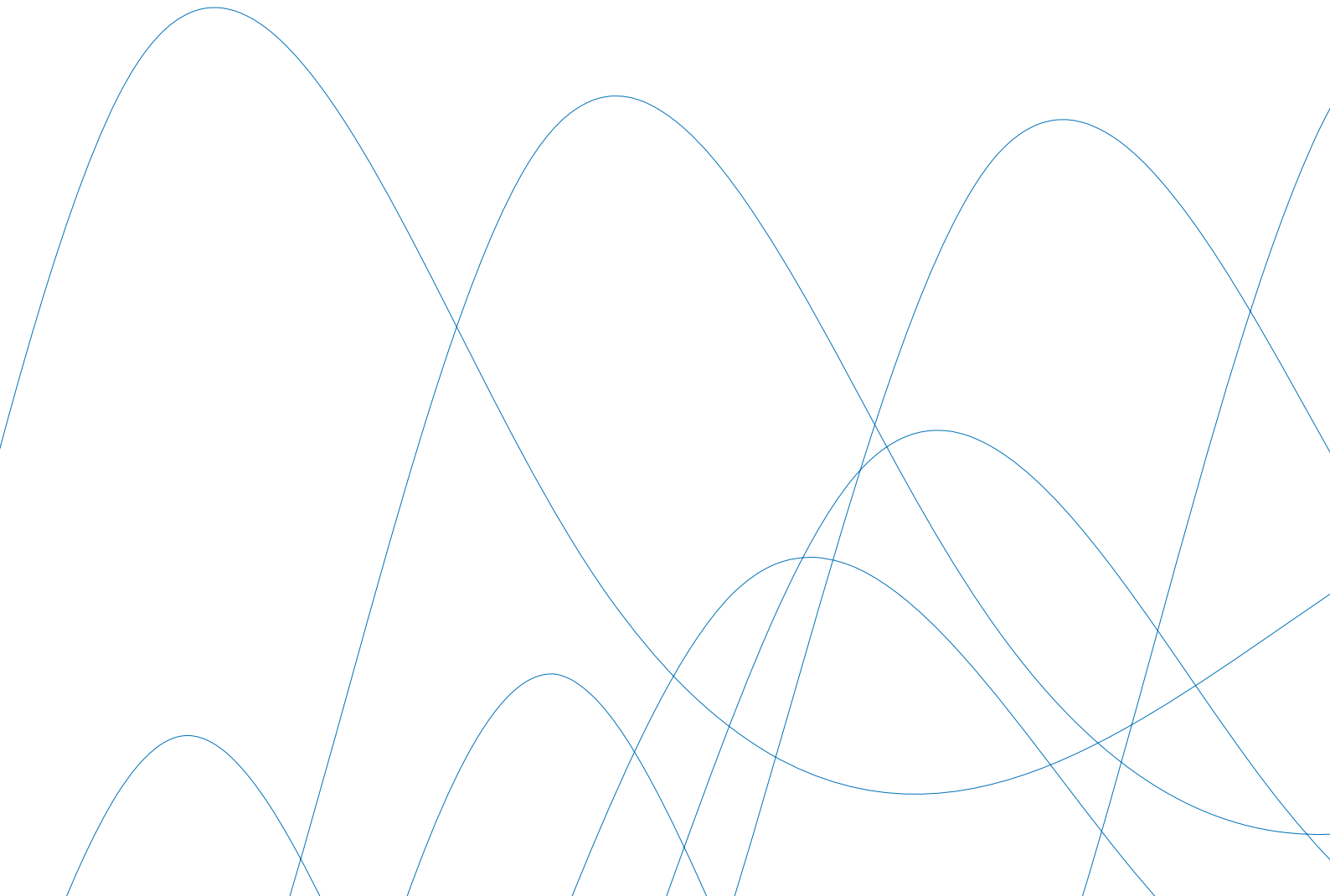
1. Do you see any situations when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies?

Sustainability in antitrust means recognizing non-price externalities beyond "economic consumer welfare" to allow what would otherwise be prohibited. The reverse would be problematic. No competition authority would find an agreement anti-competitive because it harms the environment. Similarly, it would seem problematic to prohibit a merger based on the ground that it may be environmentally harmful. To prohibit a merger that reduces the choice of environmentally friendly products/technologies resembles the discussion about innovation and should be answered based on the same methodologies – is there a legal basis in the current EUMR?

Hypothetically assuming that the EUMR standards for assessment are not limited to purely monetary aspects, potentially negative effects on the environment of a merger could simply be dealt with by means of imposing remedies to counter the negative effects identified in the course of the assessment of a merger by an authority, for example by divesting one of the two technologies.

2. Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?

Mergers are not normally driven by environmental considerations. However, where a merger produces sustainability effects, this could be an additional reason to clear it, unless it is blatantly anti-competitive. If one considers sustainability benefits as non-price externalities, the status of efficiencies in merger control has always been more ambiguous.



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