TASK FORCE
WORKING GROUP
REPORT

COMPETITION POLICY AND STATE AID

DEFINING A SUSTAINABLE PATH FOR EUROPE'S RECOVERY

Towards a Resilient and Sustainable Post-Pandemic Recovery

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Task Force Working Group Report

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INTRODUCTION

Competition policy has traditionally been considered separate, if not antithetical, to industrial policy. Antitrust law and state aid have tended to centre on the idea of protecting market efficiency, thus challenging conduct that generates market failures. This approach has coexisted for decades with other peculiar aspects of EU competition law, such as its orientation towards market integration and its emphasis on preserving a competitive market structure by safeguarding the entry and survival of 'as-efficient' competitors. In this antitrust paradigm, the role of governments has been limited to enforcing free and fair markets as opposed to engaging in interventionist policies. It has also been acknowledged that state intervention, for example in the form of subsidies or by picking winners and losers, can result in government failure and further distort the market. All of this has translated into a "consensus on the benefits of competition and free (self-correcting) markets [...] accompanied by strong scepticism about traditional industrial policy".[1] **Today, however, competition policy is increasingly becoming an ally of industrial policy and of the transition towards a sustainable economy.**

In a recent call for contributions launched in January 2021, the European Commission noted that "[c]ompetition policy is not in the lead when it comes to fighting climate change and protecting the environment. There are better, much more effective ways, such as regulation and taxation".[2] Instead, the Commission observed, competition policy "can complement regulation and the question is how it could do that most effectively".[3] At the same time, Executive Vice-President in charge of competition policy Margrethe Vestager told the Organisation for Economic Co-operation and Development (OECD) Global Forum for Competition that "[c]ompetitive markets can support the green transition, by driving companies to make better, more efficient use of resources." She added that "competition means that businesses have no choice but to respond to consumers' demand for greener products".[4] These remarks suggest that the Commission recognises the need for competition policy to be streamlined in alignment with sustainable development and the protection of the environment (as required by the Treaties), and with the overarching goals of the Green Deal. At the same time, the extent to which competition policy can, and should, become a primary tool for achieving these goals is not yet certain. On the other side of the 'twin transition', the Commission seems to be quite ambitious about finding the appropriate mix of market regulation and competition policy to address the challenges posed by the increasing digitalisation of our economies and the accompanying structural market changes. The proposed Digital Markets Act (DMA) provides an example of this.

The recognition that many EU industries are lagging behind their Chinese and American counterparts has increasingly drawn the Commission's attention to the need to strengthen Europe's global competitiveness. Amid the geopolitical shifts in the global economy, competition policy can be a tool to sustain the European Union's open strategic autonomy and support the 'geopolitical Commission' in its efforts, while promoting sustainable development and a social market economy. However, the EU should develop its own tools instead of resorting to the type deployed by big competitors like China and the United States, for example the heavy subsidisation of domestic companies or the exclusion of foreign companies from key domestic markets. The geopoliticisation of competition law should not be equated with protectionist policies and radical shifts in the current model of competition policy enforcement by, for example, facilitating the creation of European champions through relaxed state aid and merger control. Instead, the notion of *open* strategic autonomy justifies the current approach, centred on the strict enforcement of competition rules. Under this paradigm, the role of competition law is to strengthen competition in the internal market and consequently to increase the competitiveness of European companies.[5]

There was consensus in the Working Group that strong competition policy can, and should, be part of the solution to protect the interests of consumers, ensure fairness in markets, preserve Europe's competitiveness on the global stage and pave the way towards an increasingly digitalised and sustainable economy. Attempts to use competition policy to boost industry concentration and to create European champions appear to be too far-reaching when compared with the nature and objectives of this well-established domain of EU law. At the same time, there is a clear need to ensure that the practice of competition law is adapted to the increasingly global nature of competition. Broadening the scope and expanding the toolkit of EU competition policy should not be seen as taboo, as exemplified by the EU's proposed reforms of the treatment of large-scale online platforms and the revision of the Notice on Market Definition, which considers developments such as digitalisation and globalisation.

The Working Group's recommendations reflect the discussions on how competition, sustainability and resilience can be promoted simultaneously. Effective enforcement of competition rules and a proper regulatory environment are necessary to achieve the respective goals of the green and digital transitions. The EU should strive to create a regulatory environment that can provide legal certainty at home and set an example for the rest of the world.

KEY POLICY RECOMMENDATIONS

R1. Ensure that competition policy remains competition policy.

Competition law has to be enforced for the single market to function properly. It is a key tool for levelling the playing field and increasing consumer choice in the EU, and for supporting the global competitiveness of European companies. Accordingly, competition policy should play a central role in the EU's industrial strategy.

At the same time, the Working Group believes that **competition policy should remain a mainly technical field, shielded as much as possible from broader industrial policy objectives**. The strict and independent enforcement of competition rules – by both the European Commission and national competition authorities – is the most effective way to achieve lower prices, high levels of consumer choice, fairness, sustainable and productive growth, innovation and competitive undertakings, and to prevent the abuse of market power.

The Working Group firmly supports the Commission's position on the current revision of the EU competition policy framework. Indeed, all relevant EU policies need to contribute to the overarching objectives of climate neutrality and the digital transition. Competition policy in the EU should therefore be an ally of industrial policy and should support the digital and green transitions. These goals, however, should not be realised by turning competition policy upside down in the name of questionable industry consolidation objectives.

R2. Update the tools and scope of competition policy to make it compatible with a modernised industrial strategy and the peculiarities of the digital economy.

While the strict and independent enforcement of competition rules should continue to be a priority for the EU, it is important to recognise that the economic and political environment in which competition law operates has changed dramatically over the past decade. This calls for a revision of the current competition law framework at EU level. Indeed, competition law does not operate in a socioeconomic vacuum; it needs to take the changing policy environment into account and adapt to contribute to policy coherence.

The digital transformation of our economies has been a crucial factor in the need for adjustments to competition enforcement. The constant increase in computational capacity (so-called Moore's Law) the emergence of 'tipping' effects, the end-to-end architecture of the internet, the rise of large-scale digital platforms and the growing use of artificial intelligence (AI) all call for a revised toolkit in competition policy.[6] This is becoming even more urgent as the digital transformation reaches into the whole economy, including key European sectors such as manufacturing, finance, energy and health.

The following changes brought about by the rise of digital markets are some of the most relevant to competition policy:

- **Returns to scale** tend to be much higher in digital markets compared with traditional markets. This is because production costs do not increase significantly over time as the customer base increases, placing incumbent firms in an advantageous competitive position. Digital products can therefore be duplicated without loss of quality at a marginal cost close to zero.[7]
- **Network externalities** are particularly strong in the platform economy. Competitors can no longer simply attract customers with lower prices or better product quality. In fact, the bigger the customer base of platform A, the harder it is for platform B to convince the customer to migrate to its platform.[8] Subsequently, such networks also tend to create lock-in effects for all categories of users.
- **The role of data** is becoming central to many products, services and processes. Today, companies can collect, store, combine and put massive amounts of data to use. Their access to large amounts of data can help accumulate market power and foreclose competition.[9] Data concentrations have therefore become increasingly useful for identifying relevant markets and potential distortions of competition.[10]

Furthermore, one of the most important **structural changes** that has occurred in markets in the process of digital transition is the emergence of so-called **business ecosystems**. These are "groups of connected firms, drawing on (digital platforms) which leverage their complementors and lock-in their customers, exploiting the 'bottlenecks' that emerge in new industry architectures."[11] The new dynamics of these ecosystems have altered the arena for competition: the relevant unit of analysis is no longer the product market but the "ecosystem of various complementary products and associated complementor firms".[12] It should be noted, however, that the notion of ecosystem that is currently being introduced in EU competition policy differs significantly from the one that has been in use in the field of research and innovation since the Juncker Commission,[13] and from the notion of industry ecosystems adopted by the 2020 EU industrial strategy.[14]

The unique features of the digital economy have created significant challenges for competition authorities: the need to speed up enforcement in constantly changing markets; the need to define the relevant product market in the context of tipping effects and platform competition; zero-price products and services; multisided platforms; and reliance on consumer welfare measures. These issues have been further exacerbated by a broader problem of enforcement. Devising suitable remedies has proved very difficult over the past three decades, and a general shift from ex post scrutiny to ex ante regulation has become inevitable.

The dynamic environment also makes it extremely important to start analysing the interactive effects of complementary modes of enforcement, such as ex ante merger control, rules on horizontal cooperation agreements and on research, development and innovation (RDI), and ex ante and ex post approaches to dominance and gatekeeping power. For example, active enforcement in domains such as merger control might have second-order consequences for the application of other rules (e.g. horizontal cooperation agreements). Competition authorities should sharpen their tools to be able to appraise the impact of new competitive dynamics (i.e. the ecosystem approach) and to ensure the efficient and swift enforcement of competition rules in these new environments.

R3. Consider the adoption of an effective and sustainable competition standard in antitrust decisions.

It is a long-established doctrine in the EU that the promotion of consumer welfare and the prevention of consumer harm are main goals of competition law.[15] It can also be observed in well-established case law that "the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers".[16] For many decades, a general legal and political consensus existed that framed consumer welfare as the only policy goal worth pursuing. However, in recent years, as the goals of competition law have been reinterpreted, the traditional consumer welfare paradigm has also been increasingly challenged.

We take the view that it is high time to give new meaning to the notions of 'competitive market' and 'consumer welfare' in the competition policy paradigm. We argue that, in light of the changing nature of markets and the challenges faced by society, **the traditional consumer welfare standard used in EU competition law – which is deeply rooted in neoclassical economic theory – should be reinterpreted to incorporate sustainability and resilience goals as well as technical progress.**[17] Indeed, a growing body of post-growth literature stresses that, in light of planetary boundaries and the unsustainable patterns of production and consumption, we need to recalibrate the centre of gravity of our notion of 'welfare'.[18] The measures that need to be taken to achieve the objectives of the EU Green Deal and digital transformation have inevitable distributional consequences for consumers that competition law can no longer ignore. Our post-Covid societies are arguably seeing new social contracts drawn up between the state, the citizen and the private sector. Therefore, in light of the EU's broader industrial strategy, competition law must also move towards a post-GDP welfare standard in which short-term consumer price effects are no longer the only indicator of economic welfare and social progress.

The Commission should make an effort to develop new analytical perspectives on welfare and well-being to adopt an effective and sustainable

competition standard that incorporates sustainability, planetary boundaries, social progress, digitalisation and economic resilience goals to the same extent as the goal of effective competition. There is a need to assess the empirical impact of sustainability and digitalisation initiatives on consumer and societal welfare, and to engage in discussion on how ecosocial policies for sustainable welfare beyond gross domestic product (GDP) growth can be accounted for within the competition law framework. It should further be noted that no market conduct that results in lower prices should be justified, even under the traditional consumer welfare standard. By focusing on the effects of anticompetitive practices on the structure of competition, EU competition law has traditionally favoured a longer-term perspective of competition than its US counterpart, which focuses on short-term efficiencies. This is well evidenced, for example, in the body of case law on predatory pricing.

With this in mind, we argue that competition policy could become a more effective ally of the industrial strategy. The potential benefits of sustainability and digitalisation should be taken into account when appraising the effects of allegedly anticompetitive conduct, mergers, certain aspects of state aid rules (e.g. on Important Projects of Common European Interest (IPCEIs) and certain types of horizontal cooperation (e.g. for data space network sharing agreements). Rather than only analysing the impact of efficiencies on a small group of direct consumers, the Commission should consider the welfare-enhancing effects of market conduct on a larger segment of the population, including the benefits for future generations. A more inclusive interpretation of the consumer welfare standard would also be more in line with the promotion of the EU values set out in the Treaties, which are also binding on EU competition law.

STATE AID AFTER COVID-19

R4. Guarantee a smooth exit from the temporary framework.

The exceptional flexibility currently offered by the Commission's temporary framework for state aid needs to be balanced against the strong conditions that otherwise need to be satisfied under state aid policy. In the short-to-medium term, the temporary framework's main challenges include the need to prevent state aid being used to facilitate the operations of some firms while undermining others in member state markets; in the medium-to-long term, the challenge seems to centre on the question of how to 'build back better' instead of facilitating a return to the status quo ante. While it is understandable that the emergency liquidity support cannot facilitate overarching policy goals alone, conceptualising a smooth exit strategy from the crisis is already a necessity. Such an exit strategy must be designed to deal with the lasting structural changes in many sectors of the economy. It must set the scene for boosting policy coherence within the state aid framework, as well as with the overall industrial policy objectives of the EU, such as the goals of the Green Deal, the digital transition and the Just Transition framework. Undertaking simultaneous revision of multiple guidelines of the state aid framework creates the ideal conditions in which these ambitions can be met.

The temporary framework has been a well-received, timely response to the exceptional economic downturn caused by the Covid-19 crisis. Nevertheless, extending its application opens the door to significant concerns. For a start, because state aid schemes operate at the national instead of EU level, the temporary framework might contribute to an uneven playing field for undertakings based in member states with different spending power (Muscolo, 2020). Motta and Peitz (2020) warn that this might set off a domino effect and decrease productivity in the long run by creating "artificially more competitive" firms in some countries, which may in parallel force "equally or more efficient rival companies" out of the market in other member states and trigger further cycles of a "subsidy race". The risk of wasteful public spending is especially high in sectors that may face long-term shocks as a result of the pandemic, and which might never return to the status quo ante.

Given that the role of national governments in the economy has been significantly escalated during the pandemic, "hot political debates about normalising the market mechanism and reinstating state aid rules can be expected over the next years" (Körner, 2020). Many expect that, even after the pandemic, there will be continued support for upholding the relaxed state aid framework and providing additional support to companies.[19] This is likely to be popular in large and/or richer member states that wish to continue pursuing a strong national industrial policy, meaning that some member states might adopt national recovery and reform plans that display aggressive state aid policies. This would raise an important question about whether such measures need to be assessed differently from normal state aid.

While we do not advocate extending the temporary framework beyond the current pandemic-induced crisis, as this could create lasting distortions in the single market, a smooth and proportionate exit from the temporary framework is advisable.[20] At the same time, we believe that national recovery should be carried out in accordance with the notions of resilience and sustainability, and the protection of undistorted competition in the internal market. While guaranteeing a progressive reduction of the flexibility granted by the temporary framework in accordance with the evolution of the crisis, **the Commission should assume a coordinating role to ensure that national recovery plans are synchronised with the EU's Recovery and Resilience Facility and with the state aid framework.** Rather than engaging in fragmented national industrial policy, a truly pan-European industrial strategy would be strongly preferable, especially in light of the need for a sustainable and resilient recovery.

R5. The next R&R guidelines: out of the pandemic towards healthy support for European companies.

It would be extremely narrowly focused, when discussing possible improvements to the rescue and restructuring (R&R) guidelines,[21] not to take into account the enormous repercussions of the pandemic for the European economy and its impact on state aid policy and control. This is, however, not the place to reopen a debate on the soundness of the Commission's new rules, as codified in the temporary framework, and the effectiveness of EU member states' support measures.[22] The consensus in the Working Group is that those measures should be strictly limited to the emergency context in which they have been devised and applied. Accordingly, their migration to future state aid policy should be considered as ill advised. It should instead be reaffirmed that R&R is also one of most distortive types of aid and detrimental to a healthy industrial policy, so that its activation should only be allowed under very strict and well-defined conditions.

However, there may be certain aspects of the temporary framework that could contribute some useful lessons to the reform of the 2014 R&R guidelines, especially when considering the Commission's limited practice in this area to date. These aspects are briefly summarised below.

Definition of an undertaking in difficulty

In general, the tightening of the conditions in the 2014 R&R guidelines has been conducive to better identifying a workable definition of an undertaking in difficulty (UID). The following comments could, however, be taken into account:

i. Because of the concurrent application of the nearly identical provisions in the General Block Exemption Regulation (GBER), effort should also be made to provide certainty for all national authorities. In particular, the criterion of "disappearing capital" has proved difficult to apply.[23] The indicator provided with respect to capital in Article 2(18) point 20 of the R&R guidelines is the loss of "subscribed share capital". Article 2(18) GBER, however, specifies that the loss of more than half of the subscribed capital also occurs when the "deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital". Thus, the provision emphasises whether the sum of the net losses exceeds 50% of the subscribed capital in practice, instead of relying on whether the subscribed capital is formally reduced or not.[24] This specification could perhaps be inserted into the R&R guidelines as well.

ii. Further reflection seems necessary on whether the UID definition may be too all-encompassing, in that it catches all types of undertakings, even those that hardly seem to fit what is intended to be caught (e.g. undertakings without legal requirements on capital). Although, in practice, aid granted to those types of undertakings may be block exempted, clarification may be useful, as some simplified rules may be more conducive to fostering innovation and providing certainty. In this respect, it is noted that the temporary framework subjects all micro and small companies (undertakings with fewer than 50 employees and less than €10 million of annual turnover and/or annual balance sheet total) to much more flexible conditions in order to benefit from aid. Indeed, aid can be granted to small and micro companies that were already in difficulty before the outbreak of the pandemic, provided that they are not subject to collective insolvency procedures.[25]

Anticompetitive measures

Despite several concerns over its adoption, the temporary framework contains additional requirements for restructuring aid to be cleared, as it sets out more detailed provisions in comparison with the current R&R guidelines. There are general rules applicable to beneficiaries of R&R aid, and specific rules for companies benefiting from aid above €250 million. The future R&R guidelines should thus usefully include some of those specific requirements. The current R&R guidelines provide that aid should be "as short as possible", in order to restore long-term viability.[26] Under the temporary framework, member states are required to set out a "credible and detailed exit strategy", including a plan on the continuation of the beneficiary's activity, the use of funds invested by the state and further measures that both the state and the beneficiary will need to take to satisfy the terms of the repayment schedule.[27] Moreover, if – after six years from the act of recapitalisation – the state's intervention has not been reduced below 15% of the beneficiary's equity, a restructuring plan in accordance with the R&R guidelines must be notified to the Commission for approval.[28] Moreover, while the current guidelines do not distinguish between companies where the state is an existing shareholder and all other companies, the temporary framework deals with this differentiation explicitly. For instance, it states that if private participation is in any way significant and the state injects new equity under the same conditions as private investors and pro rata to its existing shareholding, no specific conditions are imposed with regard to the state's exit.[29] Accordingly, the new R&R guidelines should take stock of the temporary framework's specific requirements and obligations on beneficiaries with an existing public shareholding.

The current R&R guidelines set out in rather generic terms the Commission's duty to take into account "possible commitments" from the member states.[30] Furthermore, the Commission assesses restructuring aid by considering measures to limit the distortion of competition, so that "possible and positive effects outweigh any adverse ones".[31] However, the temporary framework specifies a number of behavioural and structural commitments that the Commission should look at when clearing aid measures above €250 million. These additional provisions draw directly on merger control tools.[32]

In particular, under the current R&R guidelines, beneficiaries should refrain from acquiring shares in any company during the restructuring period or from engaging in commercial behaviour aimed at its rapid expansion in the market.[33] However, the temporary framework more specifically prevents beneficiaries from acquiring more than a 10% stake in competitors or other operators in the same line of business, and imposes a limit on management remuneration at the fixed part of its remuneration on 31 December 2019, until at least 75% of the Covid-19 recapitalisation measures have been redeemed. Moreover, undertakings that receive restructuring aid cannot engage in actions such as dividend payments, non-mandatory coupon payments or buying back shares, other than in relation to the state, as long as the Covid-19 recapitalisation measures have not been fully redeemed.[34]

R6. Update the common assessment principles in the state aid framework to accommodate the objectives of the Green Deal.

As stated above, the temporary framework should not become the 'new normal'. In addition, the 'old normal' should become obsolete. This is because state aid is too often implemented in support of unsustainable market actors. Instead, there is a need to adopt a forward-looking state aid framework that can help us **build back better** and **enable a green and socially just economic recovery from the Covid-19 crisis.**

To achieve the goals of the Green Deal, large amounts of state support will need to be invested in our economies, which requires a revision of the state aid framework. This issue is nothing less than urgent considering that the economic transformations necessary to achieve climate neutrality by 2050 should already be well underway. The Commission will therefore need to adjust the state aid framework to facilitate this process as soon as possible.

Commissioner Vestager already announced in January 2020 that state aid rules would be adjusted to "give governments more room to support companies to decarbonise and electrify production".[35] This statement was confirmed by the results of the fitness check, which revealed that adjustments would be necessary to bring state aid rules in line with the objectives of the Green Deal.[36] In addition to the Green Deal's objectives, adjustments to the state aid framework are now also necessary to enable a green economic recovery from the pandemic – an objective that was not foreseen at the time of the launch of the fitness check.

As part of the state aid modernisation package, the Commission introduced "common assessment principles" in a number of state aid guidelines (e.g. energy and environmental state aid guidelines (EEAG), regional aid guidelines and the RDI framework). These are used to assess the compatibility of state aid with the internal market and ensure the consistent application of the rules, including the proportionality test, which requires balancing the positive and negative effects of a state aid measure. While the common assessment principles are certainly fit to ensure that state aid is cost effective, does not hinder private investment, is proportionate and does not distort competition in the market, some adjustments are necessary to guarantee that the Green Deal's objectives are met.

According to recent case law of the European Court of Justice (e.g. the *Hinkley Point* C judgment),[37] when assessing the compatibility of a state aid measure that facilitates the development of certain economic activities pursuant to Article 107(3)(c), but does not include environmental objectives, the Commission is under no obligation to assess the negative impact of the project on the environment. The regrettable outcome of this judgment is in line with a conservative reading of the proportionality test incorporated in the common assessment principles.

We therefore recommend that the Commission update the common assessment principles and adopt new guidelines that spell out how sustainability considerations should be taken into account. When assessing the compatibility of aid, the assessment principles should have due regard to social and environmental considerations, and balance them against the potential negative effects on trade and competition. The 'do no harm', 'precautionary' and 'polluter pays' principles should apply to EU state aid control, in order to prevent competitiveness based on poor social and environmental standards.

Updating these assessment principles appears to be a feasible way forward, considering that the Commission possesses a large margin of discretion over their content.[38] Furthermore, the EEAG already contains references to this effect. For example, the guidelines state that when granting tax reductions or exemptions from environmental taxes, "the overall objective of the environmental tax to discourage environmentally harmful behaviour should not be undermined" (paragraph 168). Furthermore, the EEAG notes that in cases where aid is granted for generation adequacy,[39] "member states should [...] primarily consider alternative ways of achieving generation adequacy which do not have a negative impact on the objective of phasing out environmentally or economically harmful subsidies" (paragraph 220).

R7. Clarify the meaning and application of the technology neutrality principle in energy and environmental state aid.

There is a common critique that market distortions in the energy sector are often due to the design of the regulatory framework, which increasingly favours renewable energy.[40] Against this background, an appropriate regulatory framework that includes strong preconditions for the approval of state aid can address the challenges posed by climate change while avoiding distortions in the market. This was also emphasised in Commission Staff Working Document (2013) 439.[41]

The state aid guidelines aim to minimise market distortions that are created by selection biases in state aid measures. One important element of the EU state aid framework is the principle of so-called technology neutrality, which needs to be satisfied by all aid measures and has been in operation since 2017. Applied literally, the concept would aim to ensure that state aid measures are not tilted towards green energy projects but awarded on the grounds of cost efficiency and regardless of the source and nature of the technology in consideration.[42] While the mechanism incorporates some degree of flexibility – via the use of exemptions and opt-out mechanisms – its application does not fully appreciate the specific characteristics of the renewable energy sector and hence creates an obstacle in meeting the ambitions of the Green Deal.

However, while at first sight the principle of technology neutrality seems attractive from the perspectives of fairness and the protection of competition, in practice it can lead to market distortions and harmful impacts on the environment.

There was consensus in the Working Group that **a fully technology-neutral and traditional market-based approach to state aid in the area of energy and the environment would not deliver on the promise of European economies being carbon neutral by 2050.** In fact, this approach is not neutral but rather biased towards incumbent energy technologies, and forces a one-size-fits-all approach on a very complex market known for its diversity of technology profiles.[43] The forest biomass industry, which represents more than half of the EU's renewable energy sources, provides an illustrative example in this respect. Recent arguments have been made that "[n]ot factoring the external costs of forest biomass may result in an inherently preferential treatment of solid biomass and hinder the development of other – more innovative and cleaner – technologies".[44] This means that the technology neutrality principle can create lock-in effects of mature technologies even in the arena of renewable energies, not to mention mature energy generation technologies. Furthermore, while references to the concept of technology neutrality can be found in different guidelines and framework documents, such as the EEAG, its concrete application is unclear, especially when specific, concomitant policy goals also need to be pursued. For example, the application of the principle of technology neutrality can lead to various forms of fossil-fuel production being maintained, or the disappearance of clean and renewable energy technologies which, without the continued financial support of member states, would have left the market already. At the same time, technology neutrality may jeopardise or delay the introduction of economically and environmentally sustainable solutions. In the long run, this can harm energy efficiency and security, prevent adequate investment and delay the transition to more sustainable and resilient energy systems. Therefore, the state aid framework and technology neutrality principle need to be reassessed in order to enable and promote the deployment of various types of renewable-based energy technologies.

Against this backdrop, **the Commission should clarify the content of the notion of technology neutrality in energy state aid and explain how it intends to apply it in the future, especially in light of the Commission's overarching commitment enshrined in the Green Deal to phase out fossil fuels**. In addition, we invite the Commission to consider adapting the state aid framework in a way that enables **differentiation between technology profiles in the energy sector**, while upholding the cost-effectiveness criteria. This differentiation should relate to the technical characteristics of a given technology, including the "cost, size, risk profile, project lead time [and] ability to provide system services", as well as its potential to contribute to the decarbonisation of the EU economy.[45]

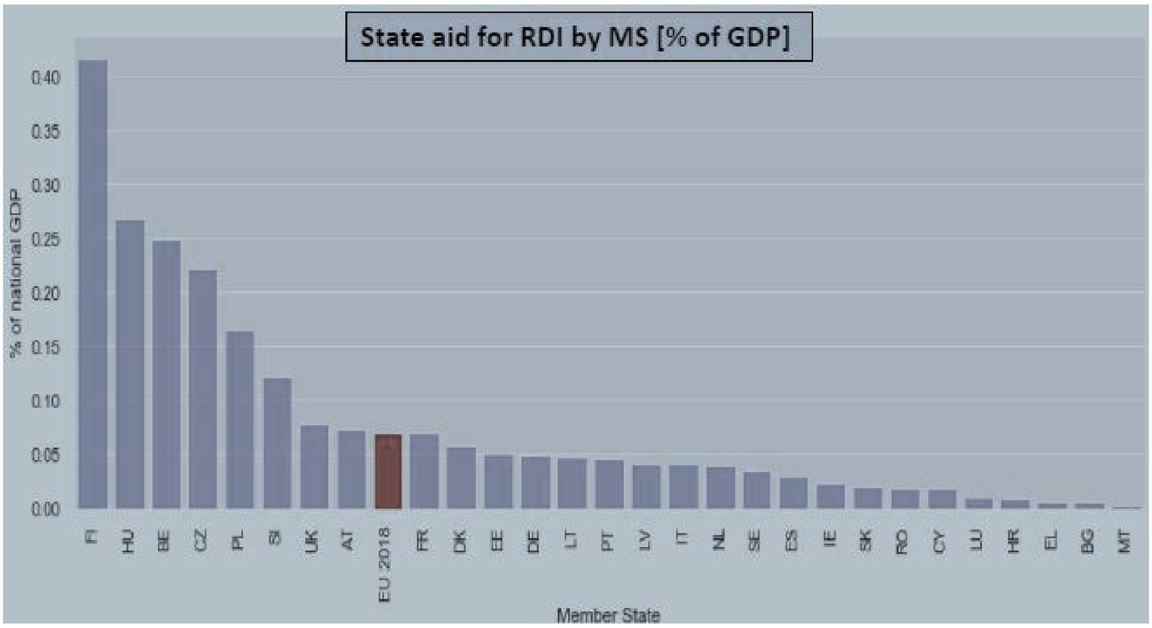
R8. Stimulate member state spending on RDI.

RDI is one of the most important building blocks of the EU's industrial strategy. However, while EU support to basic research appears to be extremely successful, the translation of research into innovative products and services, and even more the diffusion of innovation throughout the EU, appears to be in areas where progress is strongly needed. And even if the goal of spending 3% of GDP on research and innovation is not fully satisfactory in that it only represents an input indicator, it is true that the EU-27 have failed to achieve this target for decades, since it was first set out in the Lisbon strategy.[46] The US and Japan are way ahead of this figure, and China also seems to have caught up with Europe. However, the aggregate numbers do not necessarily show a representative picture: large variations exist between member states regarding their research and development (R&D) expenditure as a share of their GDP. By way of example, while Sweden, Austria, Germany, Denmark, Belgium and Finland spend around or more than 3% of their GDP on R&D, other countries such as Romania, Malta, Cyprus and Latvia do not even meet a 1% target. More generally, and beyond the 3% indicator, some European countries perform extremely well in international rankings on innovation, including notably the Scandinavian countries, the Netherlands and Germany.[47]

The EU's budget for RDI funding was €133 billion in the 2014-20 multiannual financial framework (MFF). More than half of this has been taken up by Horizon 2020 projects and the rest spent on structural funds. At member state level, in 2018 the figure spent on RDI was €11.3 billion, amounting to

9% of all state aid. This is the second largest category of aid after subsidies spent on environmental protection and energy efficiency. However, remarkably wide variation can be observed across member states regarding the amount of aid awarded for RDI on the basis of GDP as shown in Figure 1.

Figure 1. State aid for RDI by member state (% of GDP)



Source: Eurostat.

Based on the above considerations, it can be concluded that the wide variation of R&D spending and RDI state aid across member states might not be attributable to the inefficiency of the state aid framework at EU level and of the RDI framework in particular, but to member states' lack of willingness and ability to allocate aid in this area. More awareness-raising and capacity-building activities with member states is perhaps needed. The example of Finland, a country that stands out in international innovation rankings, could become a best practice model for many other member states.

The new MFF 2021-27 and the NextGenerationEU framework also allow for significant resources to be spent on R&D at EU and member state level. These activities and investments should, however, be carefully coordinated so that all investment and public spending in support of R&I converges towards medium-term resilience and sustainability, writ large. The adoption of sustainable development goal (SDG) pathways in Horizon Europe, as well as the implementation of the SDGs in the European Semester, are encouraging signals towards establishing stronger coherence in public support for RDI, and should be carefully monitored and scrutinised under the same lens. Similarly, large-scale collaborative projects such as IPCEIs and industry alliances should be closely aligned with the Industry 5.0 paradigm, as discussed in the general recommendations of the CEPS Task Force on the Industrial Strategy. This implies that large-scale funding incorporates a fairness- and sustainability-oriented enterprise model, a humancentric approach to technology deployment, a general orientation towards resilience, and results that are consistent with the EU's 2030 agenda and longer-term goals.

The Commission communication on IPCEIs must aim to promote cooperation between the member states and European industry. The joint construction or production of shared technological solutions by companies sometimes requires significant investment, particularly in environmental or digital RDI. Projects such as these can also strengthen the EU's leadership in the fight against climate change, in particular in certain key technological sectors (e.g. aerospace and defence, energy, microelectronics and automotive), and promote European strategic autonomy, given the competition from certain third countries whose businesses are receiving considerable support from the state.

MERGERS AND ACQUISITIONS

R9. Create a competitive environment in which European leaders may emerge.

There is growing political concern that some aspects of the current merger control framework hinder the attainment of broader competitiveness objectives. Assertions that merger rules should be relaxed in favour of promoting the international competitiveness of domestic European firms are certainly not new in the history of EU competition law. Today's discussion on merger control certainly fits into the broader debate over the rise of protectionist tendencies in national economic policies in Europe.[48]

While the current legal framework – in particular Article 21(4) of the EU Merger Regulation (EUMR) – allows member states in certain circumstances to prohibit mergers on certain limited public policy grounds, even when the transaction has been cleared on competition grounds, the current debate goes in the opposite direction. Should pan-European companies (so-called European champions) be created when there is also evidence that this may harm competition in the internal market? The main rationale cited in favour of relaxing merger rules in this manner is that "European firms need to reach a 'critical mass' and to reap economies of scale in order to compete with large, often state-owned, foreign competitors on global markets" (Lowe, 2020).

We strongly caution against using EU merger control to create European champions. If such industry leaders are to emerge, they should do so by thriving in a competitive environment, rather than being created artificially. Given that empirical evidence indicates that there is already a risk of under-enforcement of merger control – with a less than 7% prohibition rate between 2007 and 2017 and a two to three ratio of type II errors – then weakening the level of scrutiny over mergers risks the approval of "clearly anti-competitive mergers".[49] Conversely, there is no conclusive evidence supporting the creation of national champions through looser merger control standards: that by reaching critical mass, they would be able to compete more effectively on international markets.[50]

That said, the current framework for European merger control neither prevents nor encourages the emergence of European champions, and the scepticism expressed about them should not be interpreted as an attempt to simply demonise large players. European leaders can be created via mergers whenever this "brings about sufficiently strong synergies and complementarities".[51] When such efficiencies are not present, however, the basic premise of competition law dictates that the removal of competition between two undertakings may generate welfare-reducing restrictions of competition, both in the short and the long run. In the short run, such mergers would result in increased prices and reduced choice for consumers. In the long run (and in the absence of competitive pressure from third countries), "lower competitive pressure is likely to translate into lower incentives to innovate, invest, improve product offerings".[52] In this sense, such merged entities are not competitive and harm consumers.

Furthermore, empirical evidence suggests that market concentration, market power and the profitability of a chosen industrial champion can lead to dangerous self-reinforcing dynamics. As a result, "[p]rotected by barriers to entry, firms can merge and use any market power to raise markups and enjoy larger profits. Promoting European champions, without any regard to the regulatory context and the contestability of the markets in which firms operate, bears the risk of solidifying businesses['] structures, dismantling the competitive pressure that is still left in Europe´s economy".[53]

Therefore, both political economy and empirical reasons justify why industry consolidation in merger control should be minimised and should only be used where it genuinely aims to protect a narrowly defined public interest. We therefore recommend that the Commission retain its current strict economics-based approach to the substantive assessment of mergers.

Nevertheless, competition policy may not prevent European companies from exploiting economies of scale, or from becoming global players, as long as this does not lead to anticompetitive behaviour in the internal market. Therefore, the EUMR needs to adopt a more dynamic/strategic approach, e.g. by taking into account future market developments and the future strength of competitors from third countries, and providing guidance and support to companies in coordinating international export and investment strategies. Also, when defining the relevant markets, more attention should be paid to the ongoing evolution of value chains, including prices and levels of market concentration, which are essential to appraise the current and prospective competitive conditions in which the merged entity would end up operating. Distortions of competition in third countries and potential future competition and market entries should be considered in the overall assessment of mergers.

All in all, the best way to achieve industrial leadership in strategic value chains is to further strengthen the toolbox for industrial policy, giving direction to innovation, and by forging coalitions and supporting hi-tech clusters and networks of excellence.

R10. Adopt a more flexible interpretation of efficiencies in merger control to incorporate the notions of sustainability and resilience.

Merger control can, and should, be compatible with the ambitious targets of the Green Deal. As explained in Recommendation 3, we support the adoption of an effective and sustainable competition standard for antitrust enforcement. Based on the same consideration – the recognition that the narrowly defined consumer welfare standard does not sufficiently grasp the broader distributional effects of sustainability policies – we recommend that the Commission adopt a more flexible interpretation of the substantive framework in merger control in order to accommodate sustainability benefits in the context of its consideration of the concept of 'efficiencies'. To do this, the Commission needs to broaden its focus to enable the appreciation of non-price effects and a more sustainable interpretation of the notion of an as-efficient competitor. As will be demonstrated, this interpretation is in line with the EU's overarching environmental goals and can be performed under the current legal framework.

According to the horizontal merger guidelines (HMG),[54] efficiencies created by a merger can "counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have". Article 2(1)(b) EUMR sets out the types of factors that can be taken into account when analysing efficiencies, including the "development of technical and economic progress provided that it is to consumers' advantage". When analysing the potential positive effects of a merger, therefore, efficiencies should be interpreted broadly to incorporate the notions of sustainability and resilience under the umbrella of 'technical and economic progress'. For instance, in addressing environmental concerns, the assessments should look, among others, into how a potential merger could affect the choice of environmentally friendly products, services or technologies. The assessment has to go beyond the conventional assessment of innovation, to include, for example, the effects on alternative (but not necessarily competing) markets or practices, possible disincentives to shift towards ecological production methods or technologies, or effects on biodiversity or public health. In other words, the Commission should consider positive sustainability factors as efficiencies and assess whether they might be able to outweigh the merger's otherwise negative effects on competition.

While the Commission has traditionally been reluctant to take into account non-price effects in the analysis of efficiencies, it has considered innovation effects in a number of merger cases.[55] It has done so based on the terms of the HMG, which provides that consumers may "benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation". Likewise, the Court of Justice of the European Union (CJEU) has also accounted for social considerations in its rulings such as T-12/93 *Vittel*. In light of this, without any substantive amendment, the Commission can, and should, adopt a new interpretative lens for the analysis of mergers, in order to appreciate the broader consumer benefits in the form of progress towards more sustainable production and services.

Environmental efficiencies can be assessed using the three-step test provided in paragraphs 79 to 88 of the HMG, where they must fulfil the following criteria:

1. **Be of benefit to consumers**

   To meaningfully account for sustainability and resilience benefits, the Commission must adopt a wider interpretation of the group of consumers being affected by the merger. Until now, the Commission has approached the issue of environmental sustainability and resilience benefits by focusing on short-term effects that can be quantified in terms of price by deploying (arguably flawed) notions, such as consumers' willingness to pay. This approach fails to appreciate long-term sustainability and resilience effects on a much wider group than the direct group of consumers of a given product or service.

2. **Be merger specific**

   In verifying the merger specificity of sustainability and resilience benefits, merging parties should prove that such efficiencies could not be realised in the counterfactual scenario. In other words, the parties must prove that the merger is the precondition for such sustainable benefits to materialise, meaning that they could not have been achieved via less restrictive means, such as horizontal cooperation agreements or the setting up of a joint venture.

3. **Be verifiable**

   The quantification of sustainability and resilience efficiencies is a difficult task, and requires the development of a thorough conceptual framework. The Commission should take steps in this direction. That said, the burden of proof should remain with the notifying parties to provide reasonable evidence of the positive sustainability and resilience externalities of the merger.

HORIZONTAL COOPERATION AGREEMENTS

R11. Adapt the legal framework for horizontal cooperation agreements to the needs of the green and digital transitions.

There are cooperation agreements (e.g. R&D agreements and production agreements) that are not considered harmful to competition and have a big role to play in achieving the EU's important high-level goals. For this reason, the Commission allows and encourages cooperation among potential competitors in a number of areas. These include standardisation agreements, rules on co-investment in the Electronic Communications Code, industrial alliances and IPCEIs. The protection of undistorted competition is important in the EU strategy for sustainable growth, as there is "no substitute for it if we wish to maintain dynamic incentives to continuous improvements of products and processes, in the ultimate interest of consumers" (Bruzzone, 2021). Therefore, without weakening the protection of competition, we recommend that a number of actions be taken to align the policy framework for horizontal cooperation agreements with the EU's goals under the twin green and digital policy transitions.

Undertaking a simultaneous revision of the Block Exemption Regulation and the horizontal cooperation guidelines would create the ideal conditions for increasing the predictability of the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to cooperative agreements that pursue the goals of the Green Deal.

i. Strengthen the role of individualised, ad hoc guidance

Companies planning to conclude horizontal cooperation agreements generally consult the established case law, the Block Exemption Regulation, the horizontal guidelines and other guidance documents to assess whether the envisaged cooperation is compatible with the prohibition of restriction of competition in Article 101(1) TFEU. However, in many cases, such as in the context of R&D projects and joint ventures requiring large investments, companies may prefer to 'test the waters' before embarking on these projects and to engage in an ex ante discussion with the Commission to avoid an adverse outcome. Since the entry into force of Regulation (EC) No 1/2003, there has only been very limited possibility for such individual guidance, because the Commission has been extremely reluctant to provide individual guidance on horizontal agreements even though a procedure exists for it. The Commission seems to be working under the assumption that given the availability of case law and decades of experience with the framework of Article 101(1) TFEU, undertakings can rely on the self-assessment process to determine their risks of non-compliance with Article 101 TFEU.[56]

Bruzzone (2021) notes that during the Covid-19 emergency, the Commission was more willing to provide individual guidance to companies in cases where they coordinated their efforts to tackle the shortage of essential products and services. In light of the potential benefits of such guidance for legal certainty, we recommend that the Commission extend this practice and continue to provide individual guidance to agreements that "pursue the key objectives of the EU strategy, namely innovation, competitiveness and sustainability".

Individual guidance can take the shape of informal guidance, comfort letters or non-infringement decisions pursuant to Article 10 of Regulation (EC) No 1/2003. Such measures can also have positive effects on the uniformity of decentralised enforcement of Article 101(1) TFEU.

ii. Update the horizontal cooperation guidelines to specify the scope of permissible horizontal agreements with environmental and connectivity goals

In updating the horizontal cooperation guidelines, the Commission should clarify which categories of horizontal cooperation agreements containing environmental and social connectivity goals do not infringe Article 101(1) TFEU.

a. Sustainability agreements with no appreciable impact on competition

There are many horizontal cooperation initiatives with environmental targets that do not appreciably impact the main competitive variables such as price, quality, choice and innovation. As a result, these agreements do not fall within the scope of Article 101(1) TFEU. This is often the case for agreements that lead to the substitution of existing products with new, environmentally friendly alternatives (e.g. initiatives to reduce plastic packaging).

b. Agreements on broad sustainability targets

There are many sectoral and cross-sectoral agreements in industries that establish broad environmental targets with no specific or defined obligations for individual parties to those agreements. Given their broad nature, these agreements are unlikely to have a direct adverse impact on competition under Article 101(1) TFEU.

c. Sustainability agreements that do not restrict competition compared to the counterfactual situation

There are agreements that might create some restrictions on competition, but do so to a lesser extent than the counterfactual scenario (i.e. the scenario under which there is no agreement). This is particularly common in the area of R&D agreements that aim to exploit a common pool of skills, assets and technologies in order to develop new innovative products that would not have been developed otherwise. While their actions restrict competition to some extent, the development of new products produces a better competitive outcome than the counterfactual scenario.

Permissible agreements must demonstrate effects that cannot be attained by any of the parties acting unilaterally, nor by public authorities, since it might require action to be taken outside the EU, for example. Above all, permissibility requires that the positive impacts and objectives in question cannot be achieved effectively through genuine competition under market conditions or, for example, through sectoral legislation. Cooperation must be limited to what is strictly necessary to achieve this aim and must not open the door to 'sustainability washing'.

d. Exchange of information for sustainability reasons

In the arena of sustainability initiatives, there are many instances where the exchange of information serves a legitimate reason and has no impact on competition because it concerns environment-related data, as opposed to commercially sensitive information. Such exchanges can, for example, serve the purpose of supporting compliance with environmental legislation, and take place in the context of industrial alliances or between parent companies and non-full-function joint ventures. The updated guidelines should specify which of these cases are considered permissible by the Commission.

e. Infrastructure-sharing agreements

Voluntary infrastructure-sharing agreements have many benefits, including cost savings, creation of innovative products and services, reduction of environmental impact, and speed and scale of European infrastructure deployment as a basis for more competition and choice in services. Such agreements facilitate the development of innovative digital services and the deployment of state-of-the-art networks across Europe to meet its ambition in terms of connectivity.

In particular, two types of agreements should benefit from greater legal certainty:

1. Voluntary radio access network (RAN) sharing agreements, whenever they demonstrably allow greater investment efficiency, quicker and wider rollout, a positive consumer surplus and fewer antennae, which can ease societal acceptance and reduce the environmental impact. Today, there is no harmonised assessment of RAN-sharing agreements by the Commission, and there is also a gap between the positions of regulatory and competition authorities. The review of the horizontal guidelines is an opportunity to clarify the legal framework and support such schemes by setting up a block exemption regulation for RAN-sharing agreements that fulfil predefined conditions in terms of scope, information sharing and competitive context at national level. This would also provide greater certainty for the assessment of other RAN-sharing agreements not meeting such criteria with a presumption as

to their compatibility with competition law, taking into account their important impact on the fast and robust growth of the European digital economy.

2. Data-sharing agreements (also in the context of developing common open innovative projects) and pooling agreements require greater legal certainty to facilitate the pro-competitive design of common data spaces, as foreseen in the EU data strategy.

iii. Make use of experimental policymaking

There is an increasing appetite at the Commission for relying on experimental policymaking. The Commission has indicated that it would like to encourage national authorities to use this policymaking style for more innovative and engaging policies: the recent SME strategy for a sustainable and digital Europe encourages member states to develop proposals for regulatory sandboxes by launching a pilot;[57] and recent proposals (such as the proposed AI Act) make explicit reference to national regulatory sandboxes. The Council has expressly called on the Commission to identify policy areas and regulations in which additional experimentation clauses could possibly help to foster innovation and advance regulation; and has encouraged the Commission to consult in this respect with member states and stakeholders, for instance via the Fit for Future Platform or targeted consultations.[58]

We recommend that whenever the conditions apply, horizontal cooperation agreements could be facilitated through the adoption of experimental policymaking, whereby the authorities and the undertakings in question engage in a monitored sandbox. In this negotiated approach, and if relevant, undertakings could have the opportunity to prove to the authorities that their particular form of cooperation (e.g. exchange of information) does not constitute a collusive practice under Article 101(1) TFEU and is unlikely to lead to merit exemption under the four-pronged test in Article 101(3) TFEU.

THE DIGITAL MARKETS ACT

Current expert debates, as well as proposals at both national and EU level, emphasise the pressing need to adopt a new regulatory framework for the digital economy. Calls for policy contributions focus on the need to adopt stricter rules on potential abuses of market power and on structural competition problems that can react more efficiently and swiftly to the specific challenges posed by the digital economy, such as cross-market and data-related competition concerns. Furthermore, there seems to be a rising sentiment (not only in Europe) that large digital platforms should have clearer codes of conduct in order to safeguard competition and fairness in the markets affected by their conduct.

On 15 December 2020, the Commission unveiled its proposed Digital Markets Act (DMA),[59] which is extremely relevant with respect to the new industrial strategy for Europe, as well as a significant potential change to the EU's approach to competition policy in digital markets. The future impact of the DMA is hardly exaggerated in current discussions; indeed, it could change the very nature of market oversight and competition law in the digital sphere. The DMA would empower the Commission to impose behavioural and structural remedies for services provided by so-called gatekeepers where it identifies 'structural risks' such as tipping markets and unilateral practices by 'gatekeeper' firms, under the belief that such structural risks are not sufficiently dealt with under Article 102 TFEU. The DMA proposal represents the EU's growing ambition to strengthen scrutiny over large digital platforms and online services. In doing so, the EU is not alone, as many other jurisdictions around the world are debating their preferred method of intervention in digital markets. Accordingly, Europe will not be an international 'outlier' on this issue, but instead may serve as a benchmark jurisdiction for the preferred intervention regime in digital markets.

R12. Clarify the underlying legislative technique of the DMA.

Current debates on the DMA proposal point out a fundamental divergence among experts regarding its underlying legislative technique. In particular, the question has arisen as to whether the DMA is essentially a competition or a regulatory policy tool. It is of paramount importance that the Commission – as well as other institutional actors involved in the ordinary legislative procedure – clarify its stance in this debate, as this question has bearing on many other aspects of the proposal, such as the enforcement modes and the optimal institutional architecture.

At one level, it is possible to view the DMA as being fundamentally a competition policy tool whose primary rationale is to safeguard the competitive process in the market.[60] Against this background, it is often argued that traditional antitrust rules, and in particular the rules on abuse of dominance, cannot effectively deal with the structural problems caused in the market by the high concentration of a number of giant players. The rules on abuse of dominance – traditionally applied exclusively ex post – fail to provide timely and efficient remedies as they are based on lengthy investigations over complex markets. At the same time, digital markets are evolving at high speed. As a result, specific ex ante rules – such as those in the DMA proposal – are needed, as long as the competitive horizon with which they are dealing is relatively clear.

However, where some form of the concept of dominance is applied ex ante, this can also provide the basis for regulation. A prime exponent of this approach can be found in the telecommunications sector, which applies the concept of dominance (translated into 'significant market power' in that sector-specific setting) to predefined markets and which codifies a set of remedies related to dominance. Nevertheless, the fact that dominance is not a central tenet of the DMA creates some confusion, as the standard for intervention is now based on a new threshold of 'digital gatekeeper', which can fall well below the standard of traditional 'dominance'. As a result, the DMA can be characterised as a pro-competitive form of regulation, a new hybrid model between competition policy and regulation (which differs from the hybrid models currently in force in jurisdictions such as the United Kingdom and Australia). **However, taking such a middle ground might not be the optimal path, as it fuels confusion about the appropriate institutional design and the oversight and enforcement modes of the act.[61]**

On balance, however, the shift from ex post to ex ante design does not in itself imply a shift in the underlying legislative technique. It is the nature of the market failure being addressed that should determine the preferred legislative technique. Sectoral regulation is normally applied in sectors and markets in which "market forces alone are unlikely to result in a 'competitive' outcome", which consequently creates consumer harm.[62] Conversely, the basic assumption in traditional antitrust is that *a priori* market forces will usually be able to deliver competitive outcomes, and it is only in specific cases that competition authorities will need to intervene to put an end to isolated instances of anticompetitive conduct.[63] Consequently, institutional actors need to take a position and clarify their views on this question.

R13. Allow the legislative technique to determine the institutional design and enforcement model of the DMA.

As mentioned above, experts currently disagree on the question of who should enforce the DMA, and how. While the Working Group did not reach a final common position on this issue, we argue that, depending on what framing is offered to the DMA, the optimal institutional design and enforcement modes might change.

The structure of enforcement envisaged in the DMA proposal focuses on centralised public enforcement. As such, the Commission is foreseen as being responsible for: designating gatekeepers (Article 3); reviewing gatekeeper status (Article 4); monitoring effective implementation and compliance with the obligations in Articles 5 and 6; adopting non-compliance decisions (Article 25); and imposing fines (Article 26). In addition, the Commission would be responsible for: deciding on exceptional suspensions of the obligations (Article 8); determining public interest exemptions (Article 9); updating the obligations based on market investigations (Articles 10 and 17); undertaking additional market investigations to designate gatekeepers (Article 3); expanding the list of core platform services (Article 17); and assessing systematic non-compliance, which can result in the imposition of structural and behavioural remedies (Article 16).

The proposal does not specify the role of national authorities (whether competition or regulatory) or that of private enforcement. Indeed, in many respects, the Commission's role of centralised public enforcement is arguably the optimal enforcement mode for ensuring consistency across the EU. However, some experts argue that the enforcement of Articles 5 and 6 should be decentralised. This would enable national authorities to apply the rules directly to gatekeeper platforms upon the receipt of complaints made by small businesses harmed by their conduct. It is argued that this enforcement mode could speed up the process and reduce the workload of the Commission, which might not have sufficient resources to deal with all complaints centrally.[64] Others argue that this direct enforcement role might be unnecessary, but that a support role taking the form of market monitoring and checking the local conditions of remedy compliance is highly desirable.[65] This strikes at the heart of the DMA's hybrid character. Depending on the precise role to be played by national authorities, both national competition and regulatory bodies have a claim to being best positioned to fulfil delegated tasks, depending on their specific character.

Furthermore, it would be necessary to introduce clarification and articulation regarding coordination between the Commission and the national courts called upon to apply the DMA, to elaborate on what is already stated in Article 1, paragraph 7 of the DMA. More specifically, this explanation should be based on the detailed provisions of Articles 15 and 16 of Regulation (EC) No 1/2003.

Closely linked to the debate on the nature and legislative technique of the DMA and the appropriate enforcement modes is the question of its scope. It is possible to justify the DMA having a relatively broad scope, on the basis that there are many situations where we must depart from the application of traditional antitrust because of specific structural circumstances in the market. Alternatively, if the DMA is conceived as an ad hoc type of legislation that targets situations where specific ecosystems' dynamics are permanently and irremediably conditioned and altered by the presence of large players, then the scope will be more limited. In this case, the DMA can be seen as a separate province of competition rules, a form of *lex specialis*, which is applied in cases where traditional antitrust tools cannot provide an effective remedy.

In the former case, the DMA would apply to a large number of platforms. As a result, the Commission's Directorate-General for Competition (DG COMP) would most probably not have sufficient resources – time or human – to enforce the rules, and would arguably need to rely on the assistance of national authorities. However, if the scope is more limited, it can be argued that it is most appropriate for DG COMP to enforce the rules in parallel with traditional antitrust rules to ensure consistency. This is also supported by the observation that, given the pan-European status of the regulated entities, they produce pan-European effects that are best dealt with by the Commission, as opposed to local or national authorities.

Alternatively, it is possible to conceptualise different degrees of decentralised enforcement. For example, instead of national authorities having the competence to enforce the DMA, they could support the Commission in enforcing the DMA by acting as intermediaries, tasked with receiving complaints and referring cases to the Commission. This approach could alleviate concerns related to a lack of sufficient resources at the Commission level, and address the issue of possible forum-shopping or race-to-the-top (or bottom) problems inherent in a decentralised enforcement system. It also has its analogue in the Commission's exercise of powers under Article 22 EUMR[66] to obtain referrals from member states to review mergers, inter alia involving digital markets, even where, in such cases, the national competition authorities would certainly be the most relevant.

R14. Clarify the notions of contestability and fairness in the DMA.

The DMA proposal places a strong emphasis on the notions of **fairness** and **market contestability**. First, the proposed regulation will create specific obligations for gatekeepers and prohibit specific conduct deemed as unfair in order to safeguard the competitive process. Second, it aims to ensure market contestability (a form of ex ante fairness) by imposing specific asymmetric remedies on gatekeepers, which could facilitate the entry of new firms. By showing preference for new innovators (representing long-term competition) as opposed to intra-platform innovation (corresponding to short-term efficiencies), the proposal is seen as reflecting the traditional ordoliberal approach of European competition law.[67]

Nevertheless, the notions of contestability and fairness are left undefined in the proposal, which creates legal uncertainty regarding the amount of discretion available to the Commission in applying these concepts. This is especially worrying in light of proposed Articles 10v and 15, which enable the Commission to introduce new obligations and designate new gatekeepers following a market investigation. Therefore, there is a need to further clarify the legal significance of these notions.[68]

Again, the issue ties in well with the debate over the nature of the DMA. To some, its primary goals coincide with those of traditional antitrust, such as protecting the competitive process and preventing the exploitation of consumers. However, the proposal indicates that the goals might entail the protection of broader societal norms. While it is unclear what exactly those norms might be, the real problem seems to be that, by departing from the original antitrust meaning of these notions, the DMA lacks a clear normative framework.

First of all, market **contestability**, which has received a lot of attention recently, is a concept relevant to the regulation of digital platforms. However, there is currently ambiguity in the DMA as to its scope. The concept of a gatekeeper can only be understood as referring to an undertaking with an entrenched market position. Therefore, by definition, a market is not contestable when there is a market actor in an entrenched position that raises entry and exit barriers. Intuitively, one might argue that such cases should be addressed with structural, as opposed to behavioural, remedies. Nevertheless, there are examples from other sectors (e.g. telecommunications), where a combination of behavioural and structural remedies is effective in lowering barriers to entry.

Furthermore, the inclusion of the notion of contestability in the DMA rests on the assumption that complementor producers might one day manage to become the next gatekeepers. Current gatekeepers have had a stable, entrenched position for an extended period – some for over a decade – and careful monitoring will be needed to ensure that the rules proposed in the DMA can effectively restore the possibility for complementor producers to become platforms and eventually exert competitive pressure on current gatekeepers.[69] If rules end up being insufficient to this end, the DMA would only remain a viable instrument to foster fairer intra-platform competition.

The **notion of fairness**, understood mostly as intra-platform competition and fairness in the context of business-to-business relationships, is foreign to traditional antitrust as it pursues a clear non-economic objective. It is important to clarify whether fairness is understood as (i) relating to competition on the merits, (ii) relating to a competitive process that is not distorted by a gatekeeper's position, and (iii) aiming to prevent economic dependency; or whether it includes broader societal goals and notions related to consumer protection and unfair commercial practices known in contract law.

Contestability and fairness should become well-defined concepts of the regulation of digital platforms that may require additional clarification as stated above. Without a clear understanding of the content and nature of these notions, the DMA risks creating arbitrariness and engaging in 'regulatory creep'.

R15. Add an 'ecosystem' criterion to the generic gatekeeper criteria.

The concept of a gatekeeper has been used in antitrust and regulatory contexts in the past. However, its concrete meaning has not been clearly defined. Recent academic debates have drawn strong links between market power, the ability to control access to critical infrastructure and economic dependency.[70] To qualify as a gatekeeper under the DMA, a platform needs to fulfil a three-criteria test built on these concepts.

The criteria used to designate gatekeepers enshrined in Article 3 of the proposal are generally clear and sufficiently narrow.[71] They also create a rebuttable presumption based on purely economic considerations. Broader societal considerations are not included in the generic criteria. This prevents the application of too wide a margin of discretion.[72]

However, it can be argued that the criteria included in the proposal should be even stricter. Indeed, the original plan of the Commission's legal services was to adopt a stricter test, including a requirement that the gatekeeper would need to have control over at least two (as opposed to just one) core platform service.[73] The practical consequence of imposing this extra requirement would impact the scope of the DMA. Based on the criteria that are currently listed, the DMA could in principle bring approximately 10 to 15 platforms within its scope while, with the stricter requirements, the number of platforms would arguably fall to between five and seven.[74] We recommend opting for the stricter requirements. Given the exceptional nature of ex ante regulation and the fact that many welfare-balancing considerations are finely tuned under certain platforms, this seems to be the most proportionate response. By the same token, consideration should be given to the use of a fourth criterion, which would relate to the **"control and orchestration of an ecosystem composed of several core platform services"**.[75] According to some experts, this approach has the advantage of focusing on the "most obvious and pressing contestability issues which are related to the control and the extension in the digital economy".[76] It should be noted, however, that this additional criterion is to a large extent a qualitative one and might create significant trade-offs with legal certainty and accuracy, as well as increasing the time needed to establish the existence of a gatekeeper. Nevertheless, such trade-offs might be justified where one can establish a more future-proof framework that better achieves the goals of the legislation.[77] Therefore, it is **desirable that the Commission also explores the adoption of a clear definition of 'ecosystem' and clarifies the related assessment criteria.**

R16. Ensure that the DMA remains future-proof by introducing more general flexibility in the regulatory design.

The obligations imposed on gatekeepers controlling core platform services comprise existing obligations listed in the proposal and potential new obligations that can be added to adapt the DMA to changing technologies and markets. Indeed, it is important that the DMA framework remains flexible so that it is as future-proof as possible.

However, the finite nature of proposed regulatory obligations and the possibility that the list might be extended on the basis of the Commission's market investigation powers are not optimal policy choices. First, the adoption of new obligations might be an overly lengthy process that cannot be kept up to date with the evolution of markets. Second, unless the concept of fairness is clarified – in which case the degree of power of the Commission would not exceed the degree of power it has in enforcing Article 102 TFEU – the DMA confers too much power on the Commission and could upset the institutional balance with the legislature. **Therefore, we recommend the DMA be given more general flexibility from the outset in its regulatory design by default. Too many questions have already been raised about the lack of accountability in EU decision making to add another example to the list.**

Experts also note that a trade-off exists in the Commission's impact assessment of the DMA between having detailed rules and allowing for a significant degree of regulatory discretion.[78] While detailed rules have the advantage of increasing legal certainty and speeding up enforcement, this might not be the case for the digital economy, because of the rapid evolution of both market structures and technology. In light of these considerations, policy choices based on the pursuit of legal certainty might not be as robust. At the same time, there are strong arguments against the Commission having too wide a margin of discretion. Indeed, under the current proposal, the Commission enjoys significant discretion in its competence to expand the list of obligations and list of gatekeepers.

To tackle the above problems, while simultaneously increasing the general flexibility of the regulatory design, it is preferable **to introduce more principles-based obligations by drawing on the design of the Unfair Commercial Practices Directive**,[79] under which the Commission enjoys different degrees of discretion.[80] More specifically, the obligations listed under Articles 5 and 6 of the proposal should be expanded by adding an additional Article 6a, which introduces a **more generic definition of the main types of activities that are regulated by the DMA**. Some experts argue that this new provision should "include a more generic prohibition of conduct having the object and effect of limiting users from switching or multi-homing" and a "prohibition of conducts aiming at enveloping existing or potential competitors through bundling and self-preferencing".[81]

The benefit of adding more general flexibility from the outset in the regulatory design of the DMA, rather than leaving it up to the Commission to expand its remit at its discretion at some point in the future, is that it can be future-proofed and the need to add more obligations can be eliminated over time. As a result, a **new Article 6a could replace the current Article 10, which allows the Commission to adopt new obligations on the basis of a market investigation**.[82] Alternatively, the current wording of Article 10 could be kept in the regulatory framework to allow the Commission to eliminate those obligations that, as a result of the evolution of the market and technology, are no longer necessary to achieve the objectives of the regulation.[83]

R17. Introduce more room for specific individualisation of regulatory enforcement.

The list of obligations in the DMA proposal applies to all core service platforms identically offered by gatekeepers. This approach ignores the diversity of characteristics of the different entities regulated by the DMA and leaves little room for the individualisation of obligations. This shows a strong contrast in the increasingly effect-oriented approach of EU antitrust rules. Moreover, it tends to ignore the fact that, while digital platforms have many economic characteristics in common, they each play a unique role in different digital markets, which means that a balancing act between the loss of competition and the creation of welfare may need to be handled very differently between platforms. This will inevitably manifest itself in different responses from policymakers. Therefore, one of the main critiques argued by some on the obligations and prohibitions currently stipulated in the proposal relates to the seemingly 'one-size-fits-all' approach and the lack of balancing of pro- and anticompetitive effects of a given business practice. It is therefore argued by some that the regulation should contain more room for individualisation and provide further possibilities for the justification of specific conducts covered by the regulation.[84] This approach would be analogous to treating some prohibitions as falling within a 'grey list' of potential offences (as has occurred historically with block exemption regulations under competition law), which are susceptible to being justified in appropriate circumstances or subject to less onerous remedies.

It has been suggested that individualisation can be achieved by opening up the enforcement process into a regulatory dialogue. De Streel and Larouche propose that, under Article 7, there should be open coordination and **dialogue between enforcers and the regulated entities**. This could be a three-step process, which has many of the hallmarks used currently in the offer of commitments under competition rules and merger reviews: "(i) first, the designated gatekeeper proposes measures to implement the different obligations; (ii) then the Commission tests such measures with the business users and the competitors of the gatekeepers; (iii) then the Commission decides whether the measures are effective to achieve the objective of the obligation and proportionate given the characteristics of the gatekeeper".[85] The advantages of a more negotiated approach is that it increases legal certainty and motivates regulated entities to come forward with their own proposals for remedies.

Furthermore, by including more scope for individualised treatment, one specific change should relate to adding the possibility of a line of defence for undertakings regulated by the DMA. Such a defence could be put forward in the above commitment negotiation process to speed up the process. The main reason for the need for an explicit defence is that it is important to balance the positive and negative effects of different practices in the digital economy on contestability and fairness. The defence should not necessarily be an efficiency defence, as understood under competition law, but should rather relate to the overarching regulatory goal of the DMA, namely, to protect the competitive process. The **DMA should allow regulated entities to rely on the defence by demonstrating that their behaviour does not harm market contestability or the fairness of the competitive process**,[86] while ensuring an efficient process, especially in terms of time to decision. De Streel and Larouche emphasise that it should be different from the traditional efficiency defence in antitrust insofar as "it would not suffice to show that a practice generates short-run efficiencies if, at the same time, the practice increases market power and reduces long-term competition and innovation". This is because the notion of contestability prioritises long-term competition over short-term efficiencies.

FINAL RECOMMENDATION

R18. Reinforce the complementarity, sequential nature, and coherence of competition policy instruments.

We recommend that the Commission explore, clarify and reinforce the structural links between different competition policy tools. It is of utmost importance that stronger coherence is ensured between different instruments that often pursue different policy priorities.

For example, in a number of markets, particularly digital, there is a need for enhanced scrutiny in merger control, including for killer acquisitions below the EU threshold. In analysing potential mergers and acquisitions, the uncertainty that is linked to the future evolution of the market or future behaviour of the merged entity is very high. It should be considered whether ex post control, for example through the DMA, is sufficient to tackle this problem. **Depending on how the DMA is implemented, it could potentially be a substitute for deeper merger control**.[87] Otherwise, a more vigilant merger authority can also avoid harmful mergers.

Furthermore, a plethora of regulatory instruments in different economic contexts has been introduced only recently (such as IPCEIs and public-private partnerships), the common strategy of which is to confirm the idea that firms within different layers of a value chain in different markets should be able to cooperate and coordinate their operations to an extent that is mutually beneficial, while still delivering benefits to the consumer. This calls for an adaptation of the guidance on horizontal cooperation, and potentially for ad hoc sets of rules for specific cases falling under that guidance (for example, data-sharing agreements in relation to markets where access to data is a critical commercial input). Therefore, we consider that **the debate related to horizontal cooperation agreements is deeply related to the one on mergers and acquisitions**. Similarly, the upgrading of those sets of rules touches significantly upon what we hope to achieve with ex ante regulation.

More generally, the interplay between different competition policy and regulatory instruments with different timing and requirements (ex ante versus ex post, regulatory versus antitrust) should be addressed in a more systemic way, possibly also with reference to past cases in which ex ante intervention (or a lack thereof) has significantly impacted the evolution of the market, or of the ecosystem, in the years that followed. Such an approach to analysing the conduct of undertakings and the impact of public policy decisions would be useful to reconcile the need for both a viable and favourable business environment, and adequately timed and sufficiently stringent enforcement.

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LIST OF RECOMMENDATIONS

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STATE AID AFTER COVID-19

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- **Andrea Biondi,** Director of the Centre for European Law, King's College London
- **Catherine Banet,** Professor, University of Oslo, Faculty of Law; CERRE Academic Fellow

HORIZONTAL COOPERATION AGREEMENTS & MERGERS AND ACQUISITIONS AS INDUSTRIAL POLICY TOOL

- **Ginevra Bruzzone**, Deputy Director General of Assonime
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THE DIGITAL MARKETS ACT – FOR WHAT PURPOSE?

- **Heike Schweitzer**, Professor, Humboldt University Berlin, Law Faculty
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NOTES

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[28] Ibid., para. 85; Commission Decision *Lufthansa* (10), para. 251.

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[32] Temporary Framework for State aid (2) at Section 3.11.6 para. 72, which refers to the Notice on remedies acceptable under Council Regulation 139/2004 and under Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, pp. 1-39.

[33] R&R guidelines (6), paras 83-85.

[34] Temporary Framework for State aid (2) paras 74-78. See also Commission Decision *Lufthansa* (7), paras 66-68. In December 2020 and June 2021, the International Bar Association (IBA) Journal published a two-part article by Peter Alexiadis on the role of the state in the private sector, and the importance of handling its departure from it after Covid. The article will be updated and re-published later this year by Tilburg University.

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[60] See Heike Schweitzer (2021), "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal", 30 April. Forthcoming, ZEuP 2021, Issue 3, available at SSRN: https://ssrn.com/abstract=3837341.

[61] This is particularly the case now that the Commission has not pursued its "new competition tool" approach in tandem with its DMA package, in which it was solely responsible for the administration of that legal instrument.

[62] Martin Peitz and Massimo Motta (2020), "Market Investigations: A New Competition Tool for Europe?", EUI Florence, 16 November; Motta and Peitz (2020), "Intervention Triggers and Underlying Theories of Harm – Expert Advice for the Impact Assessment of a New Competition Tool", Expert report commissioned by the European Commission, 7 October; Peter Alexiadis and Alexandre De Streel (2020), Working Paper: Designing an EU Intervention Standard for Digital Platforms, Florence School of Regulation (https://Fsr.Eui.Eu/Working-Paper-Designing-an-Eu-Intervention-Standard-for-Digital-Platforms/).

[63] Peitz and Motta (n 62).

[64] Heike Schweitzer (2021), "The Digital Markets Act: Structure of Enforcement", The Digital Markets Act - what for?, CEPS Industrial Policy Task Force, 9 March; Heike Schweitzer (2021), "The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal", to be published in ZEuP 2021/3, available at https://ssrn.com/abstract=3837341.

[65] In performing this support role, it is arguably the national regulatory authorities (especially those operating in the electronic communications sector) that are best adapted to fulfilling these tasks, especially since they have their own focal point for centralising such a support role. See for example https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9411-berec-response-to-the-public-consultations-on-the-digital-services-act-package-and-the-new-competition-tool. Arguably the national authorities best placed to address either set of roles in a more decentralised DMA governance model are those institutions with dual competition and regulatory powers.

[66] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

[67] Cristina Caffarra and Fiona Scott Morton (2021), "The European Commission Digital Markets Act: A Translation", VoxEU.org, 5 January (https://voxeu.org/article/european-commission-digital-markets-act-translation).

[68] Heike Schweitzer (2021), "The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal", to be published in ZEuP 2021/3, available at https://ssrn.com/abstract=3837341.

[69] For a different view see Schweitzer (n 68).

[70] Alexandre De Streel and Pierre Larouche (2021), "The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution", *May 2021, Concurrences N° 2-2021, Art. N° 100432, pp. 46-63.*

[71] For a different view see Schweitzer (n 68).

[72] De Streel and Larouche (n 70).

[73] Impact assessment, paras 148 and 388.

[74] De Streel and Larouche (n 70).

[75] Ibid. For a different view see Schweitzer (n 68).

[76] De Streel and Larouche (n 70).

[77] Thorsten Käseberg (2020), "Antitrust 2.0: Governance of Oversight over Digital Gatekeepers with Europe's Digital Markets Act", Media@LSE, 15 December (https://blogs.lse.ac.uk/medialse/2020/12/15/antitrust-2-0-governance-of-oversight-over-digital-gatekeepers-with-europes-digital-markets-act/).

[78] De Streel and Larouche (n 70).

[79] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1585324585932&uri=CELEX%3A02005L0029-20220528[80] De Streel and Larouche (n 70).[81] Ibid.

[82] For a different proposal see Schweitzer (n 60).

[83] De Streel and Larouche (n 70).[84] Schweitzer (n 68); De Streel and Larouche (n 70).

[85] De Streel and Larouche (n 70).

[86] Alexandre De Streel (2021), "The European Proposal for a Digital Markets Act: A First Assessment"; Schweitzer (n 68).

[87] Schild, A. (ed.) (2020), "Symposium: Potential competition in merger control", *Competition Law & Policy Debate*, *6(2)*, pp. 16-72.

[88] Please refer to Part I of the "Principles and Guidelines for the Task Force and its Working Groups".