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**QUESTIONNAIRE TOPIC II: THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES**

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## INTRODUCTION

Shortly before the World Health Organization declared COVID-19 to be a pandemic, the European Commission announced a new industrial strategy for Europe.<sup>1</sup> In May 2021, it updated that strategy.<sup>2</sup> Under that strategy, all industrial value chains must play a critical role in achieving the European Union's objectives to become climate neutral by 2050 and to develop a digitalised economy. Overall, the European Union's industrial policy is increasingly value-driven.

The European Union's new trade policy seeks to promote its "open strategic autonomy". In its Communication of 18 February 2021, the European Commission set out the design of an "open, sustainable and assertive trade policy" which it proposes that the European Union should pursue.<sup>3</sup> The focus of that new policy is on "the EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values".<sup>4</sup> Through that new direction, the European Commission envisages that the European Union will become more assertive in defending its trade interests, reacting to unfair trade practices, enforcing a level playing field, and becoming more resilient in strategic sectors.

This assertiveness is exemplified in notably the EU Green Deal and EU Digital Strategy, focusing on the green and digital transition of the European Union's economy. It is also visible in specific proposals seeking to introduce responses to distortions caused by foreign subsidies as well as foreign direct investment creating risks to security or public order in the European Union, mandatory due diligence standards in supply chains, a carbon border tax adjustment

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<sup>1</sup> European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A New Industrial Strategy for Europe, COM(2020) 102 final (10 March 2020), at < [https://ec.europa.eu/info/sites/default/files/communication-eu-industrial-strategy-march-2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication-eu-industrial-strategy-march-2020_en.pdf) >.

<sup>2</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovering, COM(2021) 350 final (5 May 2021), at < [https://ec.europa.eu/info/sites/default/files/communication-industrial-strategy-update-2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication-industrial-strategy-update-2020_en.pdf) >.

<sup>3</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, at < [https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF) >.

<sup>4</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, at < [https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF) >, at p. 4.

mechanism (“CBAM”) and other proposals seeking to address the “geopolitics of supply chains”, such as the forthcoming proposal relating to microchips production. Moreover, the European Union is taking a more forceful role in seeking to gain a competitive advantage by setting global standards and enforcing existing commitments (whether through trade defence instruments, third party adjudication or conditioning market access on compliance with various international agreements). Increasingly, this results in actions that are at the intersection of trade and the protection of the environment, labour standards and human rights. As part of that overall strategy, the Commission has also proposed an anti-coercion instrument, which, if adopted, would enable the European Union to apply trade, investment or other restrictions in respect of any non-EU country unduly interfering in the policy choices of the EU or its Member States.<sup>5</sup>

Supply shortages, vulnerabilities in supply chains and crisis-related State aid measures in 2020 have redefined the European Union’s competition policy. That policy now serves to support a green and digital recovery and to promote investments in key sectors.<sup>6</sup> The main initiatives include the proposal for a Digital Market Act and new rules for preventing the distorting effects of foreign subsidies on the EU internal market. The European Commission is also developing a “green” competition policy, affecting merger control review, the enforcement of competition law and State aid. In a September 2021 Policy Brief, the European Commission explained how competition policy can support the EU Green Deal.<sup>7</sup> State aid control must focus on ensuring that State aid measures are consistent with Green Deal policies, as reflected in the new Climate, Energy and Environment Aid Guidelines, the revision of the General Block Exemption Regulation and the rules on Important Projects of Common European Interest. Competition enforcement must be guided by, notably, the understanding that forms of cooperation in sustainability initiatives are possible without infringing Article 101(1) TFEU and that sustainability benefits (as qualitative efficiencies) may be taken into account in assessing exemptions under Article 101(3) TFEU. In merger control, the European Commission envisages that consumer preferences for sustainable products, the impact of sustainability regulations and innovation theories of harm will play a more significant role.

At the same time, questions are being raised as to whether, in certain cases, European industrial policy considerations should prevail over technical European competition policy concerns in order to allow for the creation of “European champions” able to compete with powerful non-European companies in international markets.

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<sup>5</sup> European Commission, Proposal for a regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, 8 December 2021, COM(2021) 775 final, at < [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_6643](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6643) >

<sup>6</sup> See, for example, European Commission, Commission Staff Working Document, accompanying the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on Competition Policy 2020, SWD(2021) 177 final, at < [https://ec.europa.eu/competition-policy/system/files/2021-07/annual-competition-report\\_2020\\_report\\_part2\\_swd\\_en.pdf](https://ec.europa.eu/competition-policy/system/files/2021-07/annual-competition-report_2020_report_part2_swd_en.pdf) >.

<sup>7</sup> European Commission, Competition Policy Brief, Competition Policy in Support of Europe’s Green Ambition, September 2021, at < <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF> >.

Against that background, the focus of this questionnaire is on whether and how these trade and competition policies are reflected at Member State level and what challenges Member States perceive in implementing them.

This questionnaire raises issues related to forthcoming or pending legislative proposals. As and when those proposals are published and/or adopted, the questionnaire will be updated.

## COMPETITION

### Green competition policy

Competition authorities have embraced the inclusion of sustainability considerations in competition cases with various degrees of enthusiasm.<sup>8</sup> The European Commission's 2021 Policy Brief has taken a more cautious approach by insisting that efficiencies related to sustainability must be "in-market", meaning that sustainability benefits must at least partially be realised in the market where competitive concerns have been identified. Certain Member State competition authorities have signaled a greater willingness to consider a wider range of sustainability claims in their reviews.<sup>9</sup>

#### *Question 1*

What is the position of the national competition authority in your Member State on the assessment of sustainability agreements?

In particular,

- a. Do you expect that the national competition authority would follow the European Commission's (more conservative) approach, or would it be willing to consider relevant sustainability benefits to the wider society under Article 101(3) TFEU when examining the effects of agreements between competitors? Please also comment on the available practice (both administrative and judicial decisions as well as any guidance notes) in your Member State, if any.
- b. Would national courts be competent and willing to consider sustainability arguments in a private action?

#### *Question 2*

What tools does your national competition authority have at its disposal to consider sustainability benefits in merger control?

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<sup>8</sup> For example, sustainability considerations could refer to the reduction of packaging waste, the elimination of the least energy efficient product models, or the use of sustainably produced forest products. For some, even improved animal welfare could be a relevant sustainability consideration.

<sup>9</sup> See, for example, the Netherlands Authority for Consumers and Markets, Guidelines on Sustainability Agreements – Opportunities within competition law (2<sup>nd</sup> draft, 26 January 2021); Roman Inderst, Eftichios Sartzetakis and Anastasios Xepapadeas, Technical Report on Sustainability and Competition, Report jointly commissioned by the Netherlands Authority for Consumers and Markets and the Hellenic Competition Authority (January 2021).

In particular,

- a. Would it be able to consider claims related to sustainability as recognisable efficiency benefits that can outweigh competitive harm?
- b. Conversely, could your competition authority consider a transaction's likely detrimental effects on the environment as competitive harm (for example, if it were to find that a merger would reduce recycling rates and lead to a greater use of raw materials)?

### *Question 3*

If sustainability benefits can be incorporated into your national competition authority's competition law analysis, how would it determine the trade-off between harm to competition and benefits to sustainability? What tools would it have to balance these interests?

### **European strategic autonomy, the promotion of “European champions” and competition law enforcement**

For many observers, EU State aid rules would be the most appropriate instrument in the Commission's wider competition toolbox to support the European Union's industrial policy goals, including the European Union's strategic autonomy and the support of “European champions”? However, it has also been argued that competition law enforcement under Articles 101 and 102 TFEU and merger control should be able to incorporate these industrial policy goals. However, this has not yet been reflected in the Commission's competition cases or competition policy documents.

There are various “entry points” for this type of industrial policy consideration in competition law, ranging from market definition, which is more receptive of arguments about entry by non-European players in the longer run (and therefore discounts high market shares of European firms), competitive assessment, which is more open toward future market entry by new players that could impose competitive constraints on European firms, or the outright inclusion of industrial policy concerns in the assessment of mergers.

### *Question 4*

In its review of the proposed *Siemens/Alstom* transaction, the European Commission was confronted with the argument of merging parties that the high market shares resulting from the proposed transaction should be discounted because the market would in the medium or longer term also include powerful non-European companies not yet active in the internal market. The parties also argued that the transaction should be assessed in the context of the world market in which they compete with those powerful non-European companies. The European Commission ultimately found these arguments to be insufficient with regard to overcoming concerns about the transaction's anticompetitive effects in the European market.

- a. What was the position of your Member State (the government and/or the national competition authority) during the Commission's investigation, especially concerning the industrial policy dimension of the case?

- b. Did market participants in your Member State intervene in the case, either in support of, or in opposition to, the proposed transaction?
- c. Has your national competition authority been confronted with similar arguments in comparable transactions? If so, how did the competition authority deal with them?

*Question 5*

Would your national competition authority be in a position to include industrial policy concerns in its review of mergers? For example, could it approve a merger that raises competition law concerns on the ground that the merger would create a more powerful European or world player, improve the European Union's strategic autonomy, address supply chain uncertainties, or have similar industrial policy benefits? Please also comment on the available practice (both administrative and judicial decisions as well as any guidance notes) in your Member State, if any.

If these considerations could be relevant in merger review, how could they be balanced against competitive concerns that the competition authority has identified?

*Question 6*

If your national competition authority's remit is limited to competition law concerns, could the government (e.g., a ministry) overrule on EU industrial policy grounds a decision blocking a merger on competition law grounds? Has a decision of your national competition authority been reversed in recent years, and, if so, on what grounds?

*Question 7*

Digital sovereignty is one of the European Union's key industrial policy goals. Neither antitrust enforcement against large digital platforms nor the proposed Digital Markets Act is considered to be directly related to this policy goal. The fact remains, however, that the large digital platforms that have been the targets of antitrust enforcement, and would be the principal targets of the Digital Markets Act, are almost all US-based, whereas frequently complainants and parties supporting stricter rules under the Digital Markets Act are based in the European Union. Thus, at least indirectly, antitrust enforcement and the proposed Digital Markets Act could be seen as potentially contributing to a more vibrant European digital economy and greater European digital sovereignty, an idea that was sometimes made more explicit during the EU Parliament's debate on the proposed Digital Markets Act.

- a. Has your national competition authority brought cases against any of the large US digital platforms? If so, who were the complainants?
- b. Can the outcome of the case, in particular remedies imposed on the digital platforms, be seen as contributing to a more vibrant European digital economy and greater European digital sovereignty?

It can be expected that the principal enforcement powers under the Digital Markets Act, which would impose a wide range of regulatory obligations and prohibitions on large digital platforms,

will reside with the European Commission, with a limited role for national competition authorities.

- c. How would the Digital Markets Act affect your competition authority's ability to bring its own, competition law-based cases against large digital platforms?
- d. Is it useful at all, in this regulatory scenario, if national competition authorities pursue their own cases against large digital platforms, or could there be the risk of inconsistencies or over-enforcement which could ultimately harm not only European consumers, but also European businesses that rely on the services of large digital platforms?

#### *Question 8*

Is State aid policy and decisional practice (and exclusive competence of the European Commission) a suitable tool to consider European industrial policy goals, in particular the creation of European industrial champions, for example by considering that the lack of a strong industrial player in Europe can be characterized as a “market failure” that should be remedied by allowing State aid measures? Have such industrial policy concerns played a role in the Commission's decisional practice?

In reaction to the economic crisis triggered by the COVID-19 pandemic, the European Commission has adopted numerous decisions authorising State aid to ensure the survival of ailing companies or industry sectors. Can any lessons be drawn from this experience for the broader question of how State aid policy and rules can be used to support the European economy? For example, could or should the long-term viability of a strategic European industry sector be considered a relevant factor in future State aid decisions?

#### *Question 9*

From a national perspective, are the national courts using the judicial remedies and other tools available (including under Article 29(1) of Council Regulation (EU) 2015/1589) to seek clarification and certainty about the scope of State aid law or are those courts interpreting the scope of EU State aid rules without resort to collaboration with the Commission or the remedies before the CJEU?

### **Geopolitical instruments, trade defence instruments, and competition policy**

Many of the “geopolitical” instruments developed or under consideration by the European Commission would reduce market access in the European Union for non-EU players. This is the case, for example, with increased FDI control, the proposed foreign subsidies proposal, and various other “level playing field” instruments that would allow the European Union to limit market access for foreign players that are subject to less stringent rules in their domestic territories. These effects would be less direct than those of traditional trade (defence) measures, such as antidumping measures, but could nevertheless be widespread and profound.

In many cases, measures that the European Union pursues in support of its geopolitical ambitions will have effects that are diametrically opposed to the goals pursued by competition law and competition policy – ensuring open markets, encouraging collaborative ventures,

innovation and investment, and protecting consumers against limitations of supply that would result in higher prices.

*Question 10*

Has your national competition authority investigated cases where existing trade instruments affected its competition law analysis, for example, because trade defence measures limited supply from non-EU countries and therefore markets were defined more narrowly, or the competitive pressure exercised by third country firms was discounted because their ability to expand supplies in the EU was limited by trade defence instruments? Do you expect that similar considerations could be relevant when the new “geopolitical” instruments will be applied more regularly and might produce effects similar to those of traditional trade defence instruments?

**TRADE**

**FDI control**

The FDI Screening Regulation<sup>10</sup> establishes the framework for FDI control at Member State level. Whilst the control of FDI falls within the common commercial policy, Member States play a significant role due to their competence for public order and security. Overall, the regulation seeks to find a balance between respecting Member States’ competences and ensuring sufficient EU control as well as cooperation between the Member States.

*Question 11*

Please identify and describe the main national legal instruments that have been introduced in the context of the application of the FDI Screening Regulation at national level.

- a. What are the main challenges in applying FDI control at Member State level? Please explain by reference to concrete examples based on available practice in your Member State jurisdiction.

Under the currently applicable laws and available practice of the Member State:

- b. Is the FDI Screening Regulation directly applied or do Member State rules go beyond the harmonisation achieved by that regulation (in terms of scope and/or the strictness of the control)?
- c. What investments and investors are subject to FDI control?
- d. What sectors are subject to FDI control?
- e. How is a risk to public order or security assessed at Member State level?
- f. Is there room for competition considerations in the FDI control, for example, could it be relevant to argue that the target would become a more effective competitor if it were acquired by the foreign firm which is willing to significantly invest in the target?
- g. Do the information-sharing mechanisms between the Commission and the Member States operate effectively and adequately?

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<sup>10</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 L 79I, p. 1.

- h. What legal remedies are available to contest national authorities' FDI decisions?
- i. Has the COVID-19 pandemic affected the application of FDI control?

### **Trade defence and public procurement – foreign subsidies**

On 5 May 2021, the European Commission published its proposal for a regulation addressing foreign subsidies' effects on competition in the internal market.<sup>11</sup> If adopted, this proposed regulation introduces a new toolbox. The objective of those tools is to avoid the distortive effects of foreign subsidies and the risk of those subsidies upsetting the level playing field in the internal market. Those tools comprise: (i) investigations of concentrations exceeding a threshold involving a financial contribution by a foreign government, following a notification; (ii) investigations of bids in public procurements exceeding a particular threshold involving a financial contribution by a foreign government, following a notification; and (iii) investigations of all other market situations and smaller concentrations and public procurement procedures, based on the Commission's own initiative or following an ad-hoc notification.

#### *Question 12*

At Member State level, is there a genuine concern about the existence and impact of foreign subsidies and therefore support for the European Union's proposal?

Moreover, at Member State level, is there a risk of the European Commission's control of foreign subsidies interfering with matters falling within Member States' competences (including but not limited to FDI screening)?

The proposal confers on the Commission, notably the power upon notification prior to the award of a public contract or concession, to assess information on foreign financial contributions to the participating undertakings in a public procurement procedure. Foreign subsidies that enable an undertaking to submit an unduly advantageous tender are foreign subsidies that cause or risk causing a distortion in a public procurement procedure.

What is the impact of the proposal on the procedural autonomy of Member States in organising public procurement review procedures? Apart from the specific context of public procurement, are there concerns at Member State level about the scope of the Commission's powers under the proposal, including with regard to the evidentiary standard and due process guarantees to be applied when examining the existence of a foreign subsidy and its effects?

#### *Question 13*

The three modules introduced in the Commission's foreign subsidies proposal seek to transpose existing competition, public procurement and trade defence frameworks to foreign subsidies. Do you consider that there are limitations to that approach, taking into account the objective of the foreign subsidies proposal and the objectives of notably EU competition law and trade defence rules?

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<sup>11</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final (5 May 2021), at <[https://ec.europa.eu/competition/international/overview/proposal\\_for\\_regulation.pdf](https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf)>.

### **Mandatory due diligence and regulating supply chains**

The European Commission will publish in 2022 its legislative proposal on “Sustainable Corporate Governance”, seeking to introduce mandatory human rights and environmental due diligence requirements, and possibly corporate governance standards. This initiative builds on actions taken at Member State level to impose enforceable due diligence obligations on businesses. It is also supported by the European Parliament which, in a resolution of 10 March 2021,<sup>12</sup> presented a draft directive and called for “the Union [to] urgently adopt binding requirements for undertakings to identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate potential and/or actual adverse impacts on human rights, the environment and good governance in their value chain”. This initiative complements the European Union’s efforts to commit its trading partners, in free trade agreements, to compliance with notably multilateral environmental agreements and fundamental labour standards.

#### *Question 14*

Under the currently applicable laws of the Member States, is there a duty of care/due diligence obligation applicable to companies to respect human rights and environmental law throughout the supply chain that can be enforced through judicial or other remedies?

Please identify and describe the main national legal instruments (if any) that have been introduced to impose mandatory due diligence requirements.

If a duty of care/due diligence obligation applies and/or specific legislation introducing mandatory due diligence requirements has been adopted or proposed:

- a. Which companies are subject to this obligation/legislation?
- b. Which obligations must companies respect?
- c. Can companies be held responsible for actions of other companies/individuals under their control and/or along the supply chain? If so, under what conditions?
- d. Does the duty of care/due diligence obligation have extra-territorial effects?
- e. What are the available remedies and to whom are those remedies available?
- f. What is the scope of the liability regime?

#### *Question 15*

What are the main challenges, at Member State level, in enforcing and implementing the duty of care/due diligence obligation/legislation?

Assuming that the legislative proposal is available at the time of completing this questionnaire, what challenges do you identify in implementing the Commission’s legislative proposal on

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<sup>12</sup> European Parliament, Corporate due diligence and corporate accountability, European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), at < [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf) >.

“Sustainable Corporate Governance” (when it becomes available)? How do the proposed EU measures affect the existing laws of the Member States?

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