THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES

The proceedings of the XXX FIDE Congress in Sofia in 2023 are published in four volumes. This book (Vol. 2) contains the reports of the General Rapporteurs (Jean-François Bellis and Isabelle Van Damme), the Institutional Rapporteur (Ben Smulders) and the National Rapporteurs on Topic 2: The New Geopolitical Dimension of the EU Competition and Trade Policies

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THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES

LA NOUVELLE DIMENSION GÉOPOLITIQUE DE LA POLITIQUE DE CONCURRENCE ET DE LA POLITIQUE COMMERCIALE DE L'UE

DIE NEUE GEOPOLITISCHE DIMENSION DER WETTBEWERBS- UND HANDELSPOLITIK DER EU

THE XXX FIDE CONGRESS IN SOFIA, 2023
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FOREWORD FROM THE EDITOR

The second main topic of the XXX FIDE Congress (Sofia, Bulgaria, 31st May – 3rd June 2023), "***The new geopolitical dimension of the EU competition and trade policies"***, is cutting-edge, transformational and timely.

Today, the EU is at a cross-roads: at a time of significant and sustained international tensions which threaten to undermine the international legal order, the EU is in the process of reconsidering its decades-long stance on free markets, open competition and rule-based international trade. The various risks to European security stemming from foreign investment, from foreign-based digital giants or, yet, from foreign-controlled supply chains have all pushed the EU to revisit the very foundations of its competition and trade policy.

This topic is, moreover, a focal point for several different branches of EU law concerning competition, trade and investment examined through the prism of industrial policy. In that context, the objective of achieving the strategic economic autonomy of the Union has recently taken centre stage. At a time when EU competition and trade policy are being redefined, some key notions may need to be revisited in order to take the new realities into account. Issues such as the existence or the fostering of "European champions" or the lack thereof and finding the most appropriate balance between industrial policy considerations and competition policy concerns, killer acquisitions, security issues linked to foreign direct investment, foreign subsidies and the securing of strategic value chains, the application of EU policies by the national competition authorities (including sustainability considerations) are discussed in some detail in the reports contained in this volume. Those reports can be readily described as visionary.

Most of the issues debated in the present volume may be classified in the following sub-topics: the design of the Union's search for strategic autonomy and whether that blurs the lines between its internal market, competition, industrial and trade policies; the change of paradigm in EU merger control, State aid, and regulating foreign subsidies – from the 'invisible hand' to overt industrial policy; sustainability agreements and Article 101 TFEU; building European champions through competition law; the geopolitics of regulating supply chains and corporate sustainability, as well as the future of FDI control and the need to clarify EU and Member States' competences.

In particular, several recently adopted acts by the EU institutions are discussed in detail: the new Industrial Strategy for Europe[1], the EU Green Deal Industrial Plan[2], the Digital Markets Act[3] and the Digital Services Act[4], the new Climate, Energy and Environment Aid Guidelines[5], the revision of the General Block Exemption Regulation[6], the rules on important projects of common European interest[7], Regional State Aid Guidelines[8] and the proposal for a Single Market emergency instrument[9], the FDI Screening Regulation[10], the Foreign Subsidies Regulation[11] and the proposal for a Corporate Sustainability Due Diligence Directive[12].

This topic therefore has the potential to address and shape the new dawn in European policies on competition, trade and foreign direct investment. It raises fundamental questions about the economic physiognomy of the Union. Is "a new economic constitutionalism" gradually emerging – a concept which reflects a constitutional shift in the EU integration process? Can we thus identify the elements of a new 'political economy' of the Union ?

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[1] 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).

[2] 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 Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final (1 February 2023).

[3] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265, p. 1-66 (12 October 2022).

[4] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L 227, p. 1-102 (27 October 2022).

[5] European Commission, Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, OJ 2022 C 80, p. 1-89 (18 February 2022).

[6] See consolidated text of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L 187, p. 1-78 (26 June 2014).

[7] European Commission, Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2021 C 528, p. 10-18 (30 December 2021).

[8] European Commission, Communication from the Commission – Guidelines on regional State aid, OJ 2021 C 153, p. 1-46 (29 April 2021).

[9] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98, COM(2022) 459 final (19 September 2022).

[10] 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. 1-14 (21 March 2019).

[11] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022 L 330, p. 1-45 (23 December 2022).

[12] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final (23 February 2022), 2022/0051 (COD).

I express my gratitude to the general rapporteurs for this topic *Jean-François Bellis*, a veteran of EU competition and trade law, who teaches at several universities and is a founding partner of Van Bael & Bellis and *Isabelle Van Damme*, visiting professor at the College of Europe and partner at the same law firm. Their perspective as practitioners and academics is immensely valuable. I am also grateful to the institutional rapporteur *Ben Smulders*, Deputy Director General of the Directorate General for Competition of the European Commission, who has been personally involved in shaping EU's new competition and trade policies in an ever-more polarising world. Last but not least, I thank the authors of the national reports who give us the perspective of national authorities and stakeholders and which form the backbone of all FIDE congresses.

In conclusion, I believe that the present volume of FIDE's work will profoundly impact the Union's economic policies and will inform policy makers for years to come.

Assoc. Prof. Dr. Alexander Kornezov
Judge, President of the Eighth Chamber
of the General Court of the European Union,
Principal Scientific Coordinator for the XXX FIDE Congress

AVANT-PROPOS DE L'ÉDITEUR

Le deuxième sujet principal du Congrès XXX de la FIDE (Sofia, Bulgarie, 31 mai – 3 juin 2023), "***La nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'Union européenne***", est avant-gardiste, transformationnel et très actuel.

Aujourd'hui, l'Union est à un carrefour : à une époque de tensions internationales significatives et soutenues qui menacent de compromettre l'ordre juridique international, l'Union est en train de reconsidérer sa position de longue date sur les marchés libres, la concurrence ouverte et le commerce international basé sur des règles de droit. Les différents risques pour la sécurité nationale et européenne découlant des investissements étrangers, des géants du numérique basés à l'étranger ou encore des chaînes d'approvisionnement contrôlées par des tiers ont tous poussé l'Union à revoir les fondements mêmes de sa politique de concurrence et de commerce.

Ce sujet est, en outre, un point de convergence pour plusieurs branches différentes du droit de l'Union en matière de concurrence, de commerce et d'investissement, examinées à travers le prisme de la politique industrielle. Dans ce contexte, l'objectif d'atteindre l'autonomie économique stratégique de l'Union a récemment pris une place centrale. À une époque où les politiques européennes de concurrence et de commerce sont redéfinies, certaines notions clés peuvent devoir être réexaminées pour prendre en compte les nouvelles réalités. Des questions telles que l'existence ou la promotion de "champions européens" ou au contraire leur absence ainsi que la recherche du meilleur équilibre entre les considérations de politique industrielle et les préoccupations en matière de politique de concurrence, les killer acquisitions, les questions de sécurité liées aux investissements directs étrangers, les subventions étrangères et la sécurisation des chaînes d'approvisionnement stratégiques, l'application par les autorités nationales de la politique européenne de concurrence (telles que les considérations de durabilité), sont examinées de manière approfondie dans les rapports contenus dans le présent ouvrage. Ces rapports sont, ni plus ni moins, précurseurs.

La plupart des questions abordées dans le présent ouvrage peuvent être classées dans les sousthèmes suivants : la recherche d'autonomie stratégique de l'Union et le chevauchement entre les politiques du marché intérieur, de la concurrence, de l'industrie et du commerce ; le changement de paradigme dans le contrôle des fusions de l'Union, les aides d'État et la réglementation des subventions étrangères – de la "main invisible" à une politique industrielle ouverte ; les accords de durabilité et l'article 101 du TFUE ; la construction de champions européens grâce au droit de la concurrence ; la géopolitique de réglementation des

chaînes d'approvisionnement et de la durabilité des entreprises, ainsi que l'avenir du contrôle des investissements directs étrangers et la nécessité de clarifier les compétences de l'Union et des États membres.

En particulier, plusieurs actes récemment adoptés par les institutions de l'Union sont discutés en détail tels que la nouvelle stratégie industrielle pour l'Europe[1], le plan industriel du pacte vert[2], la législation sur les services numériques[3] et la loi sur les marchés numériques[4], les nouvelles lignes directrices concernant les aides d'État au climat, à la protection de l'environnement et à l'énergie[5], la révision des règles générales d'exemption par catégorie[6], les règles sur les projets importants d'intérêt européen commun[7], les lignes directrices régionales sur les aides d'État[8] et la proposition d'un instrument d'urgence pour le marché unique[9], le règlement sur le contrôle des investissements directs étrangers[10], le règlement sur les subventions étrangères[11] et la proposition de directive sur la diligence raisonnable en matière de durabilité des entreprises[12].

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[1] Commission européenne, Communication de la Commission au Parlement européen, au Conseil européen, au Conseil, au Comité économique et social européen et au Comité des régions, Une nouvelle stratégie industrielle pour l'Europe, COM(2020) 102 final (10 mars 2020).

[2] Commission européenne, Communication de la Commission au Parlement européen, au Conseil européen, au Conseil, au Comité économique et social européen et au Comité des régions, Un plan industriel du pacte vert pour l'ère du zéro émission nette, COM(2023) 62 final (1er décembre 2023).

[3] Règlement (UE) 2022/1925 du Parlement européen et du Conseil du 14 septembre 2022 relatif aux marchés contestables et équitables dans le secteur numérique et modifiant les directives (UE) 2019/1937 et (UE) 2020/1828 (règlement sur les marchés numériques), JO 2022 L 265, p. 1-66 (12 octobre 2022).

[4] Règlement (UE) 2022/2065 du Parlement européen et du Conseil du 19 octobre 2022 relatif à un marché unique des services numériques et modifiant la directive 2000/31/CE (règlement sur les services numériques), JO 2022 L 227, p.1-102 (27 octobre 2022).

[5] Commission européenne, Communication de la Commission – Lignes directrices concernant les aides d'Etat au climat, à la protection de l'environnement et à l'énergie pour 2022, JO 2022 C 80, p.1-89 (18 février 2022).

[6] Voir le texte consolidé du Règlement (UE) No 651/2014 de la Commission du 17 juin 2014 déclarant certaines catégories d'aides compatibles avec le marché intérieur en application des articles 107 et 108 du traité, JO 2014 L 187, p. 1-78 (26 juin 2014).

[7] Commission européenne, Communication de la Commission – Critères relatifs à l'analyse de la compatibilité avec le marché intérieur des aides d'État destinées à promouvoir la réalisation de projets importants d'intérêt européen commun, JO 2021 C 528, p. 10-18 (30 décembre 2021).

[8] Commission européenne, Communication de la Commission – Lignes directrices concernant les aides d'Etat à finalité régionale, JO 2021 C 153, p. 1-46 (29 avril 2021).

[9] Commission européenne, Proposition de Règlement du Parlement européen et du Conseil établissant un instrument du marché unique pour les situations d'urgence et abrogeant le règlement (CE) nº 2679/98 du Conseil, COM(2022) 459 final (19 septembre 2022).

[10] Règlement (UE) 2019/452 du Parlement européen et du Conseil du 19 mars 2019 établissant un cadre pour le filtrage des investissements directs étrangers dans l'Union, JO 2019 L 79I, p. 1-14 (21 mars 2019).

[11] Règlement (UE) 2022/2560 du Parlement européen et du Conseil du 14 décembre 2022 relatif aux subventions étrangères faussant le marché intérieur, JO 2022 L 330, p. 1-45 (23 décembre 2022).

[12] Proposition de directive du Parlement européen et du Conseil sur le devoir de vigilance des entreprises en matière de durabilité et modifiant la directive (UE) 2019/1937, COM(2022) 71 final (23 février 2022), 2022/0051 (COD).

Ce sujet a donc le mérite d'aborder et de façonner la nouvelle ère des politiques européennes en matière de concurrence, de commerce et d'investissement direct étranger. Il soulève des questions fondamentales sur la physionomie économique de l'Union. Un "nouveau constitutionnalisme économique" émerge-t-il progressivement – un concept qui reflète un changement constitutionnel dans le processus d'intégration de l'Union ? Peut-on ainsi identifier les éléments d'une nouvelle "économie politique" de l'Union ?

J'exprime ma gratitude aux rapporteurs généraux pour ce sujet : *Jean-François Bellis*, un pionnier du droit européen de la concurrence et du commerce, professeur dans plusieurs universités et associé fondateur du cabinet Van Bael & Bellis et *Isabelle Van Damme*, enseignant au Collège d'Europe et associée dans le même cabinet d'avocats. Leur perspective en tant que praticiens et universitaires est extrêmement précieuse. Je remercie également le rapporteur institutionnel *Ben Smulders*, directeur général adjoint de la direction générale de la concurrence de la Commission européenne, qui s'est personnellement impliqué dans l'élaboration des nouvelles politiques de l'Union en matière de concurrence et de commerce dans un monde de plus en plus polarisé. Enfin, je remercie les auteurs des rapports nationaux qui nous donnent le point de vue des autorités et des parties prenantes au niveau national et qui constituent l'épine dorsale de tous les congrès de la FIDE.

En conclusion, je suis convaincu que le présent ouvrage de la FIDE aura un impact profond sur les politiques économiques de l'Union et sur les décideurs politiques pour les années à venir.

Prof. Associé Dr. Alexander Kornezov

Juge, Président de la huitième chambre
du Tribunal de l'Union européenne,

Coordinateur scientifique principal
pour le XXXe Congrès de la FIDE

VORWORT DES HERAUSGEBERS

Das zweite Hauptthema des XXX FIDE-Kongresses (Sofia, Bulgarien, 31. Mai – 3. Juni 2023), „***Die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik***", ist zukunftsweisend, transformativ und aktuell.

Die EU steht heute an einem Scheideweg: in einer Zeit bedeutender und anhaltender internationaler Spannungen, die die internationale Rechtsordnung zu untergraben drohen, überdenkt die EU ihre jahrzehntelange Haltung zu freien Märkten, offenem Wettbewerb und regelbasiertem internationalen Handel. Die verschiedenen Risiken für die europäische Sicherheit, die sich aus ausländischen Investitionen aus im Ausland ansässigen Digitalgiganten oder aus ausländisch kontrollierten Lieferketten ergeben, haben die EU dazu veranlasst, die Grundlagen ihrer Wettbewerbs- und Handelspolitik gründlich zu überdenken.

Dieses Thema ist darüber hinaus ein Brennpunkt, in dem sich mehrere verschiedene Zweige des EU-Rechts mit Bezug zum Wettbewerb, zum Handel und zu Investitionen kreuzen und die durch das Prisma der Industriepolitik untersucht werden. In diesem Umfeld hat das Ziel, die strategische wirtschaftliche Autonomie der Union zu erreichen, in jüngster Zeit eine zentrale Rolle eingenommen. In einer Zeit, in der die EU-Wettbewerbs- und Handelspolitik neu definiert wird, müssen einige Schlüsselbegriffe möglicherweise überdacht werden, um den neuen Realitäten Rechnung zu tragen. Fragen bezügliche der Existenz oder der Förderung von „europäischen Champions" oder auch deren Nichtvorhandensein, die Suche nach dem angemessensten Gleichgewicht zwischen industriepolitischen Abwägungen und wettbewerbspolitischen Bedenken, sogenannten „Killer-Akquisitionen", Sicherheitsbedenken im Zusammenhang mit ausländischen Direktinvestitionen, ausländischen Subventionen und der Sicherung strategischer Wertschöpfungsketten und die Anwendung der EU-Politiken durch die nationalen Wettbewerbsbehörden (darunter Nachhaltigkeitsüberlegungen), werden in den Berichten in diesem Band mit einiger Vertiefung erörtert. Diese Berichte können zweifelsohne als visionär bezeichnet werden.

Die meisten der in diesem Band behandelten Themen lassen sich in folgende Unterkategorien einteilen: die Gestaltung der Suche der Union nach strategischer Autonomie und ob diese die Grenzen zwischen ihren Binnenmarkts-, Wettbewerbs-, Industrie- und Handelspolitiken verwischt; der Paradigmenwechsel in der EU-Fusionskontrolle, bei den staatlichen Beihilfen und der Regulierung ausländischer Subventionen – vom Konzept der „unsichtbaren Hand" zur offenen Industriepolitik; Nachhaltigkeitsabkommen und Artikel 101 AEUV; das Erschaffen europäischer Champions durch das Wettbewerbsrecht; die geopolitischen Einflüsse auf die Regulierung von Lieferketten sowie der Nachhaltigkeit von Unternehmen und die

Zukunft der Kontrolle von ausländischen Direktinvestitionen unter Berücksichtigung der Notwendigkeit, die Kompetenzen der EU und der Mitgliedstaaten zu klären.

Insbesondere werden mehrere kürzlich von den EU-Institutionen verabschiedete Rechtsakte im Detail diskutiert, darunter die neue Industriestrategie für Europa[1], der EU-Plan für eine grüne industrielle Revolution[2], die neuen Verordnungen über die digitalen Märkte[3] und Dienstleistungen[4], die neuen Leitlinien für Klima-, Energie- und Umweltbeihilfen[5], die Überarbeitung der Allgemeinen Gruppenfreistellungsverordnung[6], die Regelungen für wichtige Vorhaben von gemeinsamem europäischem Interesse[7], die Leitlinien für regionale Beihilfen[8] und der Vorschlag für ein Instrument zur Bewältigung von Störungen im Binnenmarkt[9], die Verordnung zur Überprüfung ausländischer Direktinvestitionen[10], die Verordnung über den Binnenmarkt verzerrende drittstaatliche Subventionen[11] und der Vorschlag für eine Richtlinie zur Sorgfaltspflicht von Unternehmen im Hinblick auf die Nachhaltigkeit[12].

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[1] Europäische Kommission, Mitteilung der Kommission an das Europäische Parlament, den Europäischen Rat, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Eine neue Industriestrategie für Europa, COM(2020) 102 final (10. März 2020).

[2] Europäische Kommission, Mitteilung der Kommission an das Europäische Parlament, den Europäischen Rat, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Ein Industrieplan zum Grünen Deal für das klimaneutrale Zeitalter, COM(2023) 62 final (1. Februar 2023).

[3] Verordnung (EU) 2022/1925 des Europäischen Parlaments und des Rates vom 14. September 2022 über bestreitbare und faire Märkte im digitalen Sektor und zur Änderung der Richtlinien (EU) 2019/1937 und (EU) 2020/1828 (Gesetz über digitale Märkte), ABl 2022 L 265, p. 1-66 (12 Oktober 2022).

[4] Verordnung (EU) 2022/2065 des Europäischen Parlaments und des Rates vom 19. Oktober 2022 über einen Binnenmarkt für digitale Dienste und zur Änderung der Richtlinie 2000/31/EG (Gesetz über digitale Dienste), ABI 2022 L 227, p. 1-102 (27. Oktober 2022).

[5] Europäische Kommission, Mitteilung der Kommission – Leitlinien für staatliche Klima-, Umweltschutz- und Energiebeihilfen 2022, ABI 2022 C 80, p. 1-89 (18. Februar 2022).

[6] Vgl. den konsolidierten Text der Verordnung (EU) Nr. 651/2014 der Kommission vom 17. Juni 2014 zur Feststellung der Vereinbarkeit bestimmter Gruppen von Beihilfen mit dem Binnenmarkt in Anwendung der Artikel 107 und 108 des Vertrags über die Arbeitsweise der Europäischen Union, ABI 2014 L 187, p.1-78 (26. Juni 2014).

[7] Europäische Kommission, Mitteilung der Kommission – Kriterien für die Würdigung der Vereinbarkeit von staatlichen Beihilfen zur Förderung wichtiger Vorhaben von gemeinsamem europäischem Interesse mit dem Binnenmarkt, ABI 2021 C 528, p. 10-18 (30. Dezember 2021).

[8] Europäische Kommission, Mitteilung der Kommission – Leitlinien für Regionalbeihilfen, ABI 2021 C 153, p. 1-46 (29. April 2021).

[9] Europäische Kommission, Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates zur Schaffung eines Notfallinstruments für den Binnenmarkt und zur Aufhebung der Verordnung (EG) Nr. 2679/98 des Rates, COM(2022) 459 final (19. September 2022).

[10] Verordnung (EU) 2019/452 des Europäischen Parlaments und des Rates vom 19.März 2019 zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen in der Union, ABI 2019 L 79I, p. 1-14 (21. März 2019).

[11] Verordnung (EU) 2022/2560 des Europäischen Parlaments und des Rates vom 14. Dezember 2022 über den Binnenmarkt verzerrende drittstaatliche Subventionen, ABI 2022 L 330, p. 1-45 (23. Dezember 2022).

[12] Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über die Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit und zur Änderung der Richtlinie (EU) 2019/1937, COM(2022) 71 final (23. Februar 2022), 2022/0051 (COD).

Dieses Thema hat daher das Potenzial, die neuen Ansätze in den europäischen Politiken in Bezug auf Wettbewerb, Handel und ausländische Direktinvestitionen nicht nur aufzugreifen, sondern auch zu prägen. Es wirft grundlegende Fragen zum wirtschaftlichen Erscheinungsbild der Union auf. Entwickelt sich so allmählich „ein neuer ökonomischer Konstitutionalismus" – ein Konzept, das einen Verfassungswandel im EU-Integrationsprozess widerspiegelt? Können wir darin die Elemente einer neuen „politischen Ökonomie" der Union identifizieren?

Ich möchte meine Dankbarkeit gegenüber den Hauptberichterstattern zu diesem Thema zum Ausdruck bringen, Herrn *Jean-François Bellis*, einem Veteranen des EU-Wettbewerbs- und Handelsrecht, der an mehreren Universitäten lehrt und Mitbegründer der Anwaltskanzlei Van Bael & Bellis ist, und Frau *Isabelle Van Damme*, Gastproffesorin am Europakolleg, Brügge und Partnerin in der gleichen Anwaltskanzlei ist. Ihre doppelte Perspektive als Praktiker und als Akademiker ist von unschätzbarem Wert. Gleichermaßen danke ich dem institutionellen Berichterstatter *Ben Smulders*, dem stellvertretender Generaldirektor der Generaldirektion Wettbewerb der Europäischen Kommission, der persönlich an der Gestaltung der neuen Wettbewerbs- und Handelspolitik der EU in einer immer stärker polarisierten Welt beteiligt war. Nicht zuletzt danke ich den Autoren der nationalen Berichte, die uns die Perspektive der nationalen Behörden und Interessengruppen darlegen und die das Rückgrat aller FIDE-Kongresse bilden.

Ich bin mir erwarten, dass der vorliegende Band der Arbeit von FIDE die Wirtschaftspolitik der Union nachhaltig beeinflussen wird und den Entscheidungsträgern auf viele Jahre hin eine prägende Entscheidungsgrundlage liefern wird.

Assoc. Prof. Dr. Alexander Kornezov

Richter, Präsident der Achten Kammer des Gerichts
der Europäischen Union,

Hauptwissenschaftlicher Koordinator
für den XXX FIDE-Kongress

FIDE XXX CONGRESS, SOFIA, 2023

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

GENERAL RAPPORTEURS: JEAN-FRANÇOIS BELLIS AND ISABELLE VAN DAMME

INTRODUCTION

Shortly before the World Health Organization declared COVID-19 to be a pandemic, the European Commission announced a new industrial strategy for Europe.[1] In May 2021, it updated that strategy.[2] 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.[3] 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".[4] 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.

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[1] 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 >.

[2] 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 >.

[3] 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 >.

[4] 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 >, at p. 4.

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 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 European Union or its Member States.[5]

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.[6] 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.[7] 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.

[5] 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 >.

[6] 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 >.

[7] 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 >.

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.

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.[8] 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.[9]

[8] 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.

[9] See, for example, the Netherlands Authority for Consumers and Markets, Guidelines on Sustainability Agreements – Opportunities within competition law (2nd 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).

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?

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[10] 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.

[10] 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.

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?

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.[11] 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

[11] 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 >.

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?

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,[12] 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?

[12] 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 >.

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 "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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QUESTIONNAIRE THÈME II: LA NOUVELLE DIMENSION GÉOPOLITIQUE DE LA POLITIQUE DE CONCURRENCE ET DE LA POLITIQUE COMMERCIALE DE L'UE

RAPPORTEURS GÉNÉRAUX: JEAN-FRANÇOIS BELLIS ET ISABELLE VAN DAMME

INTRODUCTION

Peu de temps avant que l'Organisation mondiale de la santé ne déclare l'état de pandémie de COVID-19, la Commission européenne a annoncé une nouvelle stratégie industrielle pour l'Europe.[1] En mai 2021, elle a mis à jour cette stratégie.[2] Dans le cadre de cette stratégie, toutes les chaînes de valeur industrielles doivent jouer un rôle essentiel dans la réalisation des objectifs de l'Union européenne visant à parvenir à la neutralité climatique d'ici à 2050 et à développer une économie numérique. Dans l'ensemble, la politique industrielle de l'Union européenne est de plus en plus axée sur les valeurs.

La nouvelle politique commerciale de l'Union européenne vise à promouvoir son "autonomie stratégique ouverte". Dans sa communication du 18 février 2021, la Commission européenne a exposé la conception d'une "politique commerciale ouverte, durable et ferme", qu'elle propose à l'Union européenne de mener.[3] Cette nouvelle politique met l'accent sur "la capacité de l'UE de faire ses propres choix et de façonner le monde qui l'entoure par son rôle de chef de file et par son engagement, à la lumière de ses intérêts stratégiques et de ses valeurs"[4]. Par cette

[1] Commission européenne, Communication de la Commission au Parlement européen, au Conseil européen, au Conseil, au Comité économique et social européen et au Comité des régions, Une nouvelle stratégie industrielle pour l'Europe, COM(2020) 102 final (10 mars 2020), consultable à l'adresse suivante: < https://ec.europa.eu/info/sites/default/files/communication-eu-industrial-strategy-march-2020_en.pdf >.

[2] Commission européenne, Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, Mise à jour de la nouvelle stratégie industrielle de 2020: construire un marché unique plus solide pour soutenir la reprise en Europe, COM(2021) 350 final (5 mai 2021), consultable à l'adresse suivante: < https://ec.europa.eu/info/sites/default/files/communication-industrial-strategy-update-2020_en.pdf >.

[3] Commission européenne, Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, Réexamen de la politique commerciale

– Une politique commerciale ouverte, durable et ferme, COM(2021) 66 final, consultable à l'adresse suivante: < https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF >.

[4] Commission européenne, Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, Réexamen de la politique commerciale

– Une politique commerciale ouverte, durable et ferme, COM(2021) 66 final, consultable à l'adresse suivante:

nouvelle direction, la Commission européenne envisage que l'Union européenne s'affirme davantage dans la défense de ses intérêts commerciaux, en réagissant aux pratiques commerciales déloyales, en mettant en œuvre des conditions de concurrence équitables et en devenant plus résiliente dans les secteurs stratégiques.

Cette fermeté est illustrée notamment par le pacte vert pour l'Europe et la stratégie numérique de l'UE, qui mettent l'accent sur la transition verte et numérique de l'économie de l'Union européenne. Elle est également visible à travers des propositions spécifiques visant à apporter des réponses aux distorsions causées par les subventions étrangères ainsi qu'aux investissements directs étrangers créant des risques pour la sécurité ou l'ordre public dans l'Union européenne, des normes de diligence raisonnable obligatoire dans les chaînes d'approvisionnement, un mécanisme d'ajustement carbone aux frontières ("MACF") et à travers d'autres propositions visant à aborder la "géopolitique des chaînes d'approvisionnement", telles que la future proposition relative à la production de puces électroniques. En outre, l'Union européenne joue un rôle plus actif dans la recherche d'un avantage concurrentiel en fixant des normes mondiales et en faisant respecter les engagements existants (que ce soit au moyen d'instruments de défense commerciale, d'un arbitrage par une tierce partie ou en subordonnant l'accès au marché au respect de divers accords internationaux). Il en résulte de plus en plus des actions qui se trouvent au croisement du commerce et de la protection de l'environnement, des normes du travail et des droits de l'homme. Dans le cadre de cette stratégie globale, la Commission a également proposé un instrument anticoercitif qui, s'il était adopté, permettrait à l'Union européenne d'appliquer des restrictions en matière de commerce, d'investissement ou autres à l'égard de tout pays tiers interférant indûment dans les choix politiques de l'Union européenne ou de ses États membres.[5]

En 2020, les pénuries d'approvisionnement, les vulnérabilités des chaînes d'approvisionnement et les aides d'État liées à la crise ont redéfini la politique de concurrence de l'Union européenne. Cette politique sert à présent à soutenir une reprise verte et numérique et à promouvoir les investissements dans des secteurs clés.[6] Les principales initiatives comprennent la proposition d'une

< https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF >, p. 4.

[5] Commission européenne, Proposition de règlement du Parlement européen et du Conseil relatif à la protection de l'Union et de ses États membres contre la coercition économique exercée par des pays tiers, 8 décembre 2021, COM(2021) 775 final, consultable à l'adresse <https://ec.europa.eu/commission/presscorner/detail/fr/qanda_21_6643 >.

[6] Voir, par exemple, Commission européenne, Document de travail des services de la Commission accompagnant le rapport de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, Rapport sur la politique de concurrence 2020, SWD (2021) 177

législation sur les marchés numériques et de nouvelles règles visant à prévenir les effets de distorsion des subventions étrangères sur le marché intérieur de l'UE. La Commission européenne élabore également une politique de concurrence "verte", qui affecte l'examen du contrôle des concentrations, l'application du droit de la concurrence et les aides d'État. Dans une note d'orientation de septembre 2021, la Commission européenne a expliqué comment la politique de concurrence peut soutenir le pacte vert pour l'Europe.[7] Le contrôle des aides d'État doit s'attacher à garantir la cohérence des mesures d'aide d'État avec les politiques du pacte vert pour l'Europe, comme le montrent les nouvelles lignes directrices concernant les aides d'État au climat, à la protection de l'environnement et à l'énergie, la révision du règlement général d'exemption par catégorie et les règles relatives aux projets importants d'intérêt européen commun. L'application des règles de concurrence doit être guidée, notamment, par la prise en compte du fait que des formes de coopération dans le cadre d'initiatives de durabilité sont possibles sans enfreindre l'article 101, paragraphe 1, du TFUE et que les avantages en matière de durabilité (en tant que gains d'efficacité qualitatifs) peuvent être pris en considération dans l'appréciation des exemptions au titre de l'article 101, paragraphe 3, du TFUE. Dans le cadre du contrôle des concentrations, la Commission européenne envisage que les préférences des consommateurs pour les produits durables, l'impact des réglementations sur la durabilité et les théories du préjudice en matière d'innovation joueront un rôle plus important.

Dans le même temps, des questions sont soulevées quant à la question de savoir si, dans certains cas, les considérations de politique industrielle européenne devraient prévaloir sur les préoccupations techniques de la politique européenne de concurrence afin de permettre la création de "champions européens" capables de concurrencer les puissantes entreprises non européennes sur les marchés internationaux.

Dans ce contexte, le présent questionnaire se concentre sur la question de savoir si et comment ces politiques commerciales et de concurrence sont reflétées au niveau des États membres et quels défis les États membres perçoivent dans leur mise en œuvre.

Le présent questionnaire soulève des questions relatives aux propositions législatives à venir ou en instance. Au fur et à mesure de la publication et/ou de l'adoption de ces propositions, le questionnaire sera actualisé.

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final, consultable à l'adresse suivante: < https://ec.europa.eu/competition-policy/system/files/2021-07/annual-competition-report_2020_report_part2_swd_en.pdf >.

[7] Commission européenne, Competition Policy Brief, Competition Policy in Support of Europe's Green Ambition, septembre 2021, consultable à l'adresse suivante: < https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF >.

CONCURRENCE

Politique de concurrence verte

Les autorités de concurrence ont intégré les considérations de durabilité dans les affaires de concurrence avec divers degrés d'enthousiasme[8]. La note d'orientation 2021 de la Commission européenne a adopté une approche plus prudente en insistant sur le fait que les gains d'efficacité liés à la durabilité doivent être "sur le marché", ce qui signifie que les avantages en matière de durabilité doivent être réalisés, au moins en partie, sur le marché où des problèmes de concurrence ont été recensés. Certaines autorités de concurrence des États membres ont fait état d'une plus grande volonté d'examiner un éventail plus large des revendications de durabilité dans le cadre de leurs examens.[9]

Question 1

Quelle est la position de l'autorité nationale de concurrence de votre État membre en ce qui concerne l'évaluation des accords de durabilité?

En particulier,

a. Pensez-vous que l'autorité nationale de concurrence suivrait l'approche (plus conservatrice) de la Commission européenne, ou serait-elle disposée à prendre en considération les avantages pertinents en matière de durabilité pour la société au sens large, conformément à l'article 101, paragraphe 3, du TFUE lors de l'examen des effets des accords entre concurrents? Veuillez également formuler des commentaires sur les pratiques disponibles (décisions administratives et judiciaires ainsi que toute note d'orientation) dans votre État membre, le cas échéant.

b. Les juridictions nationales seraient-elles compétentes et disposées à examiner les arguments de durabilité dans le cadre d'une action privée?

[8] Par exemple, les considérations de durabilité peuvent concerner la réduction des déchets d'emballages, l'élimination des modèles de produits les moins efficaces sur le plan énergétique ou l'utilisation de produits forestiers produits de manière durable. Pour certains, même l'amélioration du bien-être des animaux pourrait constituer une considération pertinente en matière de durabilité.

[9] Voir, par exemple, Autorité néerlandaise des consommateurs et des marchés, Lignes directrices sur les accords de durabilité – Opportunités dans le cadre du droit de la concurrence (deuxième projet, 26 janvier 2021); Roman Inderst, Eftichios Sartzetakis et Anastasios Xepapadeas, Rapport technique sur la durabilité et la concurrence, Rapport commandé conjointement par l'Autorité néerlandaise des consommateurs et des marchés et de l'Autorité hellénique de la concurrence (janvier 2021).

Question 2

Quels sont les outils dont dispose votre autorité nationale de concurrence pour examiner les avantages en matière de durabilité dans le cadre du contrôle des concentrations?

En particulier,

a. Serait-elle en mesure de considérer les revendications relatives à la durabilité comme des gains d'efficacité reconnaissables qui peuvent l'emporter sur le préjudice concurrentiel?

b. À l'inverse, votre autorité de concurrence pourrait-elle considérer les effets préjudiciables probables d'une opération sur l'environnement comme un préjudice concurrentiel (par exemple, si elle devait constater qu'une concentration réduirait les taux de recyclage et conduirait à une utilisation accrue des matières premières)?

Question 3

Si les avantages en matière de durabilité peuvent être intégrés dans l'analyse du droit de la concurrence de votre autorité nationale de la concurrence, comment déterminerait-elle le compromis entre l'atteinte à la concurrence et les avantages en matière de durabilité? De quels outils disposerait-elle pour équilibrer ces intérêts?

Autonomie stratégique européenne, promotion des "champions européens" et application du droit de la concurrence

Pour de nombreux observateurs, les règles de l'UE en matière d'aides d'État seraient l'instrument le plus approprié dans la boîte à outils plus large de la Commission en matière de concurrence pour soutenir les objectifs de la politique industrielle de l'Union européenne, notamment l'autonomie stratégique de l'Union européenne et le soutien aux "champions européens". Toutefois, il a également été avancé que l'application du droit de la concurrence en vertu des articles 101 et 102 du TFUE et le contrôle des concentrations devraient être en mesure d'intégrer ces objectifs de politique industrielle. Cependant, cela n'a pas encore été reflété dans les affaires de concurrence ou les documents relatifs à la politique de concurrence de la Commission.

Il existe différents "points d'entrée" pour ce type de prise en compte de la politique industrielle dans le droit de la concurrence, allant de la définition du marché, qui est plus réceptive aux arguments relatifs à l'entrée d'acteurs non européens à plus long terme (et qui ne tient donc pas compte des parts de marché élevées des

entreprises européennes), à l'évaluation de la concurrence, qui est plus ouverte à l'entrée future sur le marché de nouveaux acteurs susceptibles d'imposer des contraintes concurrentielles aux entreprises européennes, ou à l'inclusion pure et simple de préoccupations de politique industrielle dans l'évaluation des concentrations.

Question 4

Lors de son examen de l'opération envisagée Siemens/Alstom, la Commission européenne a été confrontée à l'argument des parties à la concentration selon lequel les parts de marché élevées résultant de l'opération envisagée devraient être écartées car le marché comprendrait également, à moyen ou long terme, de puissantes sociétés non européennes qui ne sont pas encore actives sur le marché intérieur. Les parties ont également fait valoir que l'opération devait être appréciée dans le contexte du marché mondial dans lequel elles sont en concurrence avec ces puissantes entreprises non européennes. La Commission européenne a finalement considéré que ces arguments étaient insuffisants pour dissiper les préoccupations concernant les effets anticoncurrentiels de l'opération sur le marché européen.

a. Quelle a été la position de votre État membre (le gouvernement et/ou l'autorité nationale de concurrence) au cours de l'enquête de la Commission, notamment en ce qui concerne la dimension de politique industrielle de l'affaire?

b. Des acteurs du marché de votre État membre sont-ils intervenus dans l'affaire, soit à l'appui, soit en opposition à l'opération envisagée?

c. Votre autorité nationale de concurrence a-t-elle été confrontée à des arguments similaires dans le cadre d'opérations comparables? Dans l'affirmative, comment l'autorité de concurrence les a-t-elle traités?

Question 5

Votre autorité nationale de concurrence serait-elle en mesure d'inclure des préoccupations de politique industrielle dans son contrôle des concentrations? Par exemple, pourrait-elle approuver une concentration qui soulève des préoccupations en matière de droit de la concurrence au motif que la concentration créerait un acteur européen ou mondial plus puissant, améliorerait l'autonomie stratégique de l'Union européenne, répondrait aux incertitudes de la chaîne d'approvisionnement, ou aurait des avantages similaires en matière de politique industrielle? Veuillez également formuler des commentaires sur les pratiques disponibles (décisions administratives et judiciaires ainsi que toute note d'orientation) dans votre État membre, le cas échéant.

Si ces considérations pouvaient être pertinentes dans le cadre du contrôle des concentrations, comment pourraient-elles être mises en balance avec les préoccupations en matière de concurrence que l'autorité de concurrence a identifiées?

Question 6

Si le mandat de votre autorité nationale de concurrence se limite aux questions liées au droit de la concurrence, le gouvernement (par exemple, un ministère) pourrait-il annuler, pour des raisons de politique industrielle de l'UE une décision bloquant une concentration sur la base du droit de la concurrence? Une décision de votre autorité nationale de concurrence a-t-elle été annulée au cours des dernières années et, dans l'affirmative, pour quelles raisons?

Question 7

La souveraineté numérique est l'un des principaux objectifs de la politique industrielle de l'Union européenne. Ni l'application des règles relatives aux pratiques anticoncurrentielles à l'encontre des grandes plateformes numériques ni la proposition de législation sur les marchés numériques ne sont considérées comme directement liées à cet objectif stratégique. Il n'en demeure pas moins que les grandes plateformes numériques qui ont été visées par l'application des règles relatives aux pratiques anticoncurrentielles, et qui seraient les principales cibles de la législation sur les marchés numériques, sont presque toutes basées aux États-Unis, tandis que les plaignants et les parties favorables à des règles plus strictes en vertu de la législation sur les marchés numériques sont souvent basés dans l'Union européenne. Ainsi, de manière au moins indirecte, l'application des règles relatives aux pratiques anticoncurrentielles et la proposition de législation sur les marchés numériques pourraient être considérées comme susceptibles de contribuer à une économie numérique européenne plus dynamique et à une plus grande souveraineté numérique européenne, une idée qui a parfois été rendue plus explicite lors du débat du Parlement européen sur la proposition de législation sur les marchés numériques.

a. Votre autorité nationale de concurrence a-t-elle intenté des actions en justice contre l'une des grandes plateformes numériques américaines? Dans l'affirmative, qui étaient les plaignants?

b. Peut-on considérer que l'issue de l'affaire, en particulier les mesures correctives imposées aux plateformes numériques, contribue à une économie numérique européenne plus dynamique et à une plus grande souveraineté numérique européenne?

On peut s'attendre à ce que les principaux pouvoirs d'exécution au titre de la législation sur les marchés numériques, qui imposeraient un large éventail d'obligations et d'interdictions réglementaires aux grandes plateformes numériques, reviennent à la Commission européenne, avec un rôle limité pour les autorités nationales de concurrence.

c. Comment la législation sur les marchés numériques affecterait-elle la capacité de votre autorité de concurrence à intenter ses propres actions en justice, fondées sur le droit de la concurrence, contre les grandes plateformes numériques?

d. Est-il utile, dans ce scénario réglementaire, que les autorités nationales de concurrence poursuivent leurs propres actions en justice contre les grandes plateformes numériques, ou existe-t-il un risque d'incohérences ou d'application trop stricte de la législation qui, en fin de compte, pourrait porter préjudice non seulement aux consommateurs européens, mais aussi aux entreprises européennes qui dépendent des services de grandes plateformes numériques?

Question 8

La politique et la pratique décisionnelle en matière d'aides d'État (et la compétence exclusive de la Commission européenne) constituent-elles un outil approprié pour prendre en considération les objectifs de la politique industrielle européenne, en particulier la création de champions industriels européens, par exemple en considérant que l'absence d'un acteur industriel fort en Europe peut être qualifiée de "défaillance du marché" à laquelle il convient de remédier en autorisant des mesures d'aide d'État? De telles préoccupations en matière de politique industrielle ont-elles joué un rôle dans la pratique décisionnelle de la Commission?

En réaction à la crise économique déclenchée par la pandémie de COVID-19, la Commission européenne a adopté de nombreuses décisions autorisant les aides d'État pour assurer la survie d'entreprises ou de secteurs industriels en difficulté. Peut-on tirer des enseignements de cette expérience pour la question plus large de savoir comment la politique et les règles en matière d'aides d'État peuvent être utilisées pour soutenir l'économie européenne? Par exemple, la viabilité à long terme d'un secteur industriel européen stratégique pourrait-elle ou devrait-elle être considérée comme un facteur pertinent dans les futures décisions en matière d'aides d'État?

Question 9

D'un point de vue national, les juridictions nationales utilisent-elles les recours juridictionnels et d'autres outils disponibles [y compris en vertu de l'article 29, paragraphe 1, du règlement (UE) 2015/1589 du Conseil] pour obtenir des éclaircissements et des certitudes quant au champ d'application de la législation en matière d'aides d'État ou ces juridictions interprètent-elles le champ d'application des règles de l'UE en matière d'aides d'État sans recourir à la collaboration avec la Commission ou aux recours devant la CJUE?

Instruments géopolitiques, instruments de défense commerciale et politique de concurrence

De nombreux instruments "géopolitiques" développés ou envisagés par la Commission européenne réduiraient l'accès au marché de l'Union européenne pour les acteurs extérieurs à l'UE. C'est le cas, par exemple, du contrôle accru des IDE, de la proposition de subventions étrangères et de divers autres instruments de "conditions de concurrence égales" qui permettraient à l'Union européenne de limiter l'accès au marché pour les acteurs étrangers soumis à des règles moins strictes sur leur territoire national. Ces effets seraient moins directs que ceux des mesures commerciales (de défense) traditionnelles, telles que les mesures antidumping, mais pourraient néanmoins être généralisés et profonds.

Dans de nombreux cas, les mesures que l'Union européenne poursuit à l'appui de ses ambitions géopolitiques auront des effets diamétralement opposés aux objectifs poursuivis par le droit de la concurrence et la politique de concurrence, à savoir garantir l'ouverture des marchés, encourager les entreprises collaboratives, l'innovation et l'investissement et protéger les consommateurs contre des limitations de l'offre qui entraîneraient des prix plus élevés.

Question 10

Votre autorité nationale de concurrence a-t-elle enquêté sur des affaires dans lesquelles des instruments commerciaux existants avaient une incidence sur son analyse du droit de la concurrence, par exemple parce que les mesures de défense commerciale limitaient l'approvisionnement en provenance de pays tiers et que, par conséquent, les marchés étaient définis de manière plus étroite, ou parce que la pression concurrentielle exercée par les entreprises de pays tiers n'était pas prise en compte parce que leur capacité à accroître leur approvisionnement dans l'UE était limitée par les instruments de défense commerciale? Pensez-vous que des considérations similaires pourraient être pertinentes lorsque les nouveaux

instruments "géopolitiques" seront utilisés plus régulièrement et pourraient produire des effets similaires à ceux des instruments traditionnels de défense commerciale?

COMMERCE

Contrôle des IDE

Le règlement relatif au filtrage des IDE[10] établit le cadre pour le contrôle des IDE au niveau des États membres. Si le contrôle des IDE relève de la politique commerciale commune, les États membres jouent un rôle important en raison de leur compétence en matière d'ordre public et de sécurité. Dans l'ensemble, le règlement vise à trouver un équilibre entre le respect des compétences des États membres et la garantie d'un contrôle suffisant de l'UE ainsi que d'une coopération entre les États membres.

Question 11

Veuillez identifier et décrire les principaux instruments juridiques nationaux qui ont été introduits dans le cadre de l'application du règlement relatif au filtrage des IDE au niveau national.

a. Quels sont les principaux défis liés à l'application du contrôle des IDE au niveau des États membres? Veuillez expliquer en vous référant à des exemples concrets fondés sur les pratiques disponibles dans la juridiction de votre État membre.

En vertu de la législation actuellement applicable et des pratiques disponibles de l'État membre:

b. Le règlement relatif au filtrage des IDE est-il directement appliqué ou les règles des États membres vont-elles au-delà de l'harmonisation réalisée par ce règlement (en termes de champ d'application et/ou de rigueur du contrôle)?

c. Quels investissements et investisseurs sont soumis au contrôle des IDE?

d. Quels sont les secteurs soumis au contrôle des IDE?

e. Comment un risque pour l'ordre public ou la sécurité publique est-il évalué au niveau des États membres?

f. Le contrôle des IDE peut-il faire l'objet de considérations de concurrence, par exemple, pourrait-il être pertinent de soutenir que la cible deviendrait un

[10] Règlement (UE) 2019/452 du Parlement européen et du Conseil du 19 mars 2019 établissant un cadre pour le filtrage des investissements directs étrangers dans l'Union, JO 2019 L 79I, p. 1.

concurrent plus efficace si elle était acquise par l'entreprise étrangère qui est prêt à investir de manière significative dans la cible?

g. Les mécanismes d'échange d'informations entre la Commission et les États membres fonctionnent-ils de manière efficace et adéquate?

h. Quelles sont les voies de recours disponibles pour contester les décisions des autorités nationales relatives aux IDE?

i. La pandémie de COVID-19 a-t-elle affecté l'application du contrôle des IDE?

Défense commerciale et marchés publics – subventions étrangères

Le 5 mai 2021, la Commission européenne a publié sa proposition de règlement visant à remédier aux distorsions causées par les subventions étrangères au sein du marché unique.[11] Si elle est adoptée, cette proposition de règlement introduit une nouvelle boîte à outils. L'objectif de ces outils est d'éviter les effets de distorsion causés par les subventions étrangères et le risque que ces subventions nuisent à l'égalité des conditions de concurrence dans le marché intérieur. Ces outils comprennent: i) les enquêtes sur des concentrations dépassant un seuil impliquant une contribution financière d'un gouvernement étranger, à la suite d'une notification; ii) les enquêtes sur des offres dans des marchés publics dépassant un seuil particulier impliquant une contribution financière d'un gouvernement étranger, à la suite d'une notification; et iii) les enquêtes sur toutes les autres situations de marché, les concentrations plus petites et les procédures de passation de marchés publics, sur la base de la propre initiative de la Commission ou à la suite d'une notification ad hoc.

Question 12

Au niveau des États membres, y a-t-il une réelle préoccupation quant à l'existence et à l'impact des subventions étrangères et donc un soutien à la proposition de l'Union européenne?

En outre, au niveau des États membres, existe-t-il un risque que le contrôle des subventions étrangères par la Commission européenne interfère avec des questions relevant de la compétence des États membres (y compris, mais sans exclusivement, le filtrage des IDE)?

[11] Commission européenne, Proposition de règlement du Parlement européen et du Conseil relatif aux subventions étrangères faussant le marché intérieur, COM(2021) 223 final (5 mai 2021), consultable à l'adresse suivante: < https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf >.

La proposition confère à la Commission, notamment le pouvoir, sur notification préalable à l'attribution d'un marché public ou d'une concession, d'évaluer les informations sur les contributions financières étrangères aux entreprises participantes à une procédure de passation de marché public. Les subventions étrangères qui permettent à une entreprise de présenter une offre indûment avantageuse sont des subventions étrangères qui causent ou risquent de causer une distorsion dans une procédure de passation de marché public.

Quel est l'impact de la proposition sur l'autonomie procédurale des États membres dans l'organisation des procédures de recours en matière de passation des marchés publics? Outre le contexte spécifique de la passation des marchés publics, existe-t-il des préoccupations au niveau des États membres quant à la portée des pouvoirs conférés à la Commission par la proposition, notamment en ce qui concerne les normes en matière de preuve et les garanties de procédure régulière à appliquer lors de l'examen de l'existence d'une subvention étrangère et de ses effets?

Question 13

Les trois modules introduits dans la proposition de la Commission sur les subventions étrangères visent à transposer les cadres existants en matière de concurrence, de marches publics et de défense commerciale aux subventions étrangères. Estimez-vous qu'il existe des limites à cette approche, compte tenu de l'objectif de la proposition relative aux subventions étrangères et des objectifs, notamment, du droit de la concurrence et des règles de défense commerciale de l'UE?

Diligence raisonnable obligatoire et régulation des chaînes d'approvisionnement

La Commission européenne publiera en 2022 sa proposition législative sur la "gouvernance d'entreprise durable", visant à introduire des exigences obligatoires de diligence raisonnable en matière de droits de l'homme et d'environnement, et éventuellement des normes de gouvernance d'entreprise. Cette initiative s'appuie sur les mesures prises au niveau des États membres pour imposer aux entreprises des obligations de diligence raisonnable applicables. Elle est également soutenue par le Parlement européen qui, dans une résolution du 10 mars 2021,[12] a présenté un projet de directive et a appelé l'Union à "adopter de toute urgence des exigences

[12] Parlement européen, Devoir de diligence et responsabilité des entreprises, Résolution du Parlement européen du 10 mars 2021 contenant des recommandations à la Commission sur le devoir de vigilance et la responsabilité des entreprises (2020/2129(INL)), consultable à l'adresse suivante: < https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf >.

contraignantes imposant aux entreprises d'identifier, d'évaluer, de prévenir, de faire cesser, d'atténuer, de surveiller et de communiquer les effets préjudiciables potentiels et/ou réels pour les droits de l'homme, l'environnement et la bonne gouvernance dans leur chaîne de valeur". Cette initiative complète les efforts déployés par l'Union européenne pour inciter ses partenaires commerciaux, dans le cadre d'accords de libre-échange, à respecter notamment les accords multilatéraux en matière d'environnement et les normes fondamentales du travail.

Question 14

En vertu de la législation actuellement en vigueur dans les États membres, existe-t-il un devoir de vigilance/diligence applicable aux entreprises pour respecter les droits de l'homme et le droit de l'environnement tout au long de la chaîne d'approvisionnement et qui peut être mis en œuvre par le biais de voies de recours judiciaires ou autres?

Veuillez identifier et décrire les principaux instruments juridiques nationaux (le cas échéant) qui ont été introduits pour imposer des exigences obligatoires en matière de diligence raisonnable.

Si une obligation de vigilance/diligence s'applique et/ou si une législation spécifique introduisant des exigences obligatoires en matière de diligence a été adoptée ou proposée:

a. Quelles sont les entreprises soumises à cette obligation/législation?

b. Quelles obligations les entreprises doivent-elles respecter?

c. Les entreprises peuvent-elles être tenues responsables des actions d'autres entreprises/personnes sous leur contrôle et/ou tout au long de la chaîne d'approvisionnement? Dans l'affirmative, dans quelles conditions?

d. L'obligation de vigilance/diligence a-t-elle des effets extraterritoriaux?

e. Quels sont les recours disponibles et à qui sont-ils accessibles?

f. Quel est le champ d'application du régime de responsabilité?

Question 15

Quels sont les principaux défis, au niveau des États membres, dans l'application et la mise en œuvre de l'obligation de vigilance/diligence raisonnable/de la législation?

En supposant que la proposition législative soit disponible au moment de remplir ce questionnaire, quels défis identifiez-vous dans la mise en œuvre de la proposition législative de la Commission sur la "gouvernance d'entreprise durable" (lorsqu'elle sera disponible)? Quelle est l'incidence des mesures proposées par l'UE sur les législations existantes des États membres?

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FRAGEBOGEN THEMA II: DIE NEUE GEOPOLITISCHE DIMENSION DER WETTBEWERBS- UND HANDELSPOLITIK DER EU

HAUPTBERICHTERSTATTER: JEAN-FRANÇOIS BELLIS UND ISABELLE VAN DAMME

EINLEITUNG

Kurz bevor die Weltgesundheitsorganisation COVID-19 zu einer Pandemie erklärte, kündigte die Europäische Kommission eine neue Industriestrategie für Europa an.[1] Im Mai 2021 aktualisierte sie diese Strategie.[2] Im Rahmen dieser Strategie müssen alle industriellen Wertschöpfungsketten eine entscheidende Rolle bei der Verwirklichung der Ziele der Europäischen Union spielen, bis 2050 klimaneutral zu werden und eine digitalisierte Wirtschaft zu entwickeln. Insgesamt ist die Industriepolitik der Europäischen Union zunehmend wertorientiert.

Ein Ziel der neuen Handelspolitik der Europäischen Union besteht darin, die „offene strategische Autonomie" der Union zu fördern. In ihrer Mitteilung vom 18. Februar 2021 hat die Europäische Kommission das Konzept einer „offenen, nachhaltigen und entschlossenen Handelspolitik" dargelegt, das die Europäische Union verfolgen sollte.[3] Der Schwerpunkt dieser neuen Politik liegt auf der „Fähigkeit der EU, ihre eigenen Entscheidungen zu treffen und die Welt um sie herum durch Führungsstärke und Engagement zu gestalten, wobei ihre strategischen Interessen und Werte zum Ausdruck kommen".[4] Durch diese

[1] Europäische Kommission, Mitteilung der Kommission an das Europäische Parlament, den Europäischen Rat, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Eine neue Industriestrategie für Europa, COM(2020) 102 final (10. März 2020), abrufbar unter < https://ec.europa.eu/info/sites/default/files/communication-eu-industrial-strategy-march-2020_en.pdf >.

[2] Europäische Kommission, Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Aktualisierung der neuen Industriestrategie von 2020: einen stärkeren Binnenmarkt für die Erholung Europas aufbauen, COM(2021) 350 final (5. Mai 2021), abrufbar unter < https://ec.europa.eu/info/sites/default/files/communication-industrial-strategy-update-2020_en.pdf >.

[3] Europäische Kommission, Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Überprüfung der Handelspolitik – Eine offene, nachhaltige und entschlossene Handelspolitik, COM(2021) 66 final, abrufbar unter < https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF >.

[4] Europäische Kommission, Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Überprüfung der Handelspolitik – Eine offene, nachhaltige und entschlossene Handelspolitik, COM(2021) 66 final, abrufbar

Neuausrichtung will die Europäische Kommission erreichen, dass die Europäische Union eine größere Entschlossenheit an den Tag legt, wenn es darum geht, ihre Handelsinteressen zu verteidigen, auf unlautere Handelspraktiken zu reagieren, gleiche Wettbewerbsbedingungen durchzusetzen und die Widerstandsfähigkeit strategischer Sektoren zu stärken.

Beispielhaft für diese Entschlossenheit sind insbesondere der europäische Grüne Deal und die Digitalstrategie der EU, in deren Mittelpunkt der grüne und digitale Wandel der Wirtschaft der Europäischen Union steht. Sie zeigt sich aber auch an spezifischen Vorschlägen, mit denen auf Verzerrungen durch drittstaatliche Subventionen sowie ausländische Direktinvestitionen (ADI) reagiert werden soll, die Risiken für die Sicherheit oder die öffentliche Ordnung in der Europäischen Union darstellen. Ferner zeigt sich die Entschlossenheit an verbindlichen Standards bezüglich der Sorgfaltspflicht in Lieferketten, einem CO2-Grenzausgleichssystem (CBAM) und anderen Vorschlägen, mit denen die „Geopolitik der Lieferketten" angegangen werden soll, etwa dem bevorstehenden Vorschlag zur Produktion von Mikrochips. Darüber hinaus bemüht sich die Europäische Union verstärkt um Wettbewerbsvorteile, indem sie globale Standards festlegt und bestehende Verpflichtungen durchsetzt (sei es durch handelspolitische Schutzinstrumente, die Beilegung von Streitigkeiten durch Dritte oder die Verknüpfung des Marktzugangs mit der Einhaltung verschiedener internationaler Abkommen). Dies führt zunehmend zu Maßnahmen, die sich an der Schnittstelle zwischen Handel und Umweltschutz, Arbeitsnormen und Menschenrechten befinden. Darüber hinaus hat die Kommission im Rahmen dieser Gesamtstrategie ein Instrument gegen Zwangsmaßnahmen vorgeschlagen, das es der Europäischen Union im Falle seiner Verabschiedung ermöglichen würde, Handels-, Investitions- oder andere Beschränkungen gegenüber Drittländern anzuwenden, die in unzulässiger Weise in die politischen Entscheidungen der Europäische Union oder der EU-Mitgliedstaaten eingreifen.[5]

Versorgungsengpässe, Schwachstellen in Lieferketten und krisenbedingte staatliche Beihilfemaßnahmen im Jahr 2020 haben zu einer Neuausrichtung der Wettbewerbspolitik der Europäischen Union geführt. Dieser Politikbereich dient nun der Unterstützung eines grünen und digitalen Aufschwungs sowie der

unter < https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF >, S. 5.

[5] Europäische Kommission, Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über den Schutz der Union und ihrer Mitgliedstaaten vor wirtschaftlichem Zwang durch Drittländer, 8. Dezember 2021, COM(2021) 775 final, abrufbar unter < https://ec.europa.eu/commission/presscorner/detail/de/qanda_21_6643 >.

Förderung von Investitionen in Schlüsselsektoren.[6] Zu den wichtigsten Initiativen zählen der Vorschlag für ein Gesetz über digitale Märkte sowie neue Vorschriften zur Verhinderung der verzerrenden Auswirkungen drittstaatlicher Subventionen auf den EU-Binnenmarkt. Darüber hinaus entwickelt die Europäische Kommission eine „grüne" Wettbewerbspolitik, die Auswirkungen auf die Überprüfung der Fusionskontrollvorschriften, die Durchsetzung des Wettbewerbsrechts und staatliche Beihilfen hat. In einem Policy Brief vom September 2021 erläutert die Europäische Kommission, wie die Wettbewerbspolitik den europäischen Grünen Deal unterstützen kann.[7] Bei der Kontrolle staatlicher Beihilfen gilt es vor allem sicherzustellen, dass staatliche Beihilfemaßnahmen mit den Maßnahmen des Grünen Deals vereinbar sind, wie dies in den neuen Leitlinien für Klima, Energie- und Umweltschutzbeihilfen, der Überarbeitung der allgemeinen Gruppenfreistellungsverordnung und den Vorschriften für wichtige Vorhaben von gemeinsamem europäischem Interesse zum Ausdruck kommt. Die Durchsetzung des Wettbewerbsrechts muss sich insbesondere an der Erkenntnis orientieren, dass Formen der Zusammenarbeit bei Nachhaltigkeitsinitiativen möglich sind, ohne gegen Artikel 101 Absatz 1 AEUV zu verstoßen, und dass Nachhaltigkeitsgewinne (in Form von qualitativen Effizienzgewinnen) bei der Prüfung von Freistellungen nach Artikel 101 Absatz 3 AEUV berücksichtigt werden können. Im Bereich der Fusionskontrolle geht die Europäische Kommission davon aus, dass die Präferenzen der Verbraucher für nachhaltige Produkte, die Auswirkungen von Nachhaltigkeitsvorschriften und Innovationstheorien über Schäden eine gewichtigere Rolle spielen werden.

Gleichzeitig werden Fragen dahin gehend aufgeworfen, ob europäische industriepolitische Erwägungen in bestimmten Fällen Vorrang vor technischen Belangen der europäischen Wettbewerbspolitik haben sollten, um die Schaffung von „europäischen Champions" zu ermöglichen, die auf internationalen Märkten mit leistungsstarken Drittstaatsunternehmen Schritt halten können.

Vor diesem Hintergrund soll durch diesen Fragebogen vor allem ermittelt werden, ob und wie diese Handels- und Wettbewerbspolitik auf der Ebene der Mitgliedstaaten zum Ausdruck kommt und welchen Herausforderungen sich die Mitgliedstaaten bei ihrer Umsetzung gegenübersehen.

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[6] Siehe z. B. Europäische Kommission, Arbeitsunterlage der Kommissionsdienststellen, Begleitunterlage zum Bericht der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Bericht über die Wettbewerbspolitik 2020, SWD(2021) 177 final, abrufbar unter < https://ec.europa.eu/competition-policy/system/files/2021-07/annual-competition-report_2020_report_part2_swd_en.pdf >.

[7] Europäische Kommission, Competition Policy Brief, Competition Policy in Support of Europe's Green Ambition (Kurzinfo zur Wettbewerbspolitik, Wettbewerbspolitik zur Unterstützung der grünen Zielsetzungen Europas), September 2021, abrufbar unter < https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF >.

In diesem Fragebogen werden Fragen im Zusammenhang mit bevorstehenden oder anhängigen Legislativvorschlägen behandelt. Sobald diese Vorschläge veröffentlicht und/oder angenommen sind, wird der Fragebogen aktualisiert.

WETTBEWERB

Grüne Wettbewerbspolitik

Die Wettbewerbsbehörden berücksichtigen Nachhaltigkeitserwägungen in Wettbewerbsfällen mit unterschiedlichem Nachdruck.[8] Die Europäische Kommission hat in ihrem Policy Brief von 2021 einen zurückhaltenderen Ansatz gewählt; demnach müssen Effizienzgewinne im Bereich der Nachhaltigkeit „auf dem Markt" erzielt werden, d. h., Nachhaltigkeitsgewinne müssen zumindest teilweise auf dem Markt realisiert werden, bezüglich dessen wettbewerbsrechtliche Bedenken festgestellt wurden. Die Wettbewerbsbehörden bestimmter Mitgliedstaaten haben eine größere Bereitschaft signalisiert, bei ihren Überprüfungen ein breiteres Spektrum von Angaben zur Nachhaltigkeit zu berücksichtigen.[9]

Frage 1

Welche Haltung vertritt die nationale Wettbewerbsbehörde in Ihrem Mitgliedstaat bezüglich der Bewertung von Nachhaltigkeitsvereinbarungen?

Insbesondere:

a. Gehen Sie davon aus, dass die nationale Wettbewerbsbehörde dem (konservativeren) Ansatz der Europäischen Kommission folgen würde, oder wäre sie bereit, bei der Prüfung der Auswirkungen von Vereinbarungen zwischen Wettbewerbern einschlägige Nachhaltigkeitsgewinne für die Gesellschaft gemäß Artikel 101 Absatz 3 AEUV zu berücksichtigen? Bitte machen Sie auch Angaben zu der gegebenenfalls in Ihrem Mitgliedstaat bestehenden Praxis (sowohl Verwaltungs- und Gerichtsentscheidungen als auch etwaige Leitfäden).

[8] Nachhaltigkeitserwägungen könnten sich beispielsweise auf die Verringerung von Verpackungsabfällen, die Abschaffung der am wenigsten energieeffizienten Produktmodelle oder die Verwendung nachhaltig erzeugter Forstprodukte beziehen. Für einige könnte sogar ein verbessertes Tierwohl eine relevante Erwägung in Bezug auf Nachhaltigkeit sein.

[9] Siehe z. B.: Niederländische Behörde für Verbraucher und Märkte, Guidelines on Sustainability Agreements – Opportunities within competition law (Leitlinien zu Nachhaltigkeitsvereinbarungen – Chancen im Wettbewerbsrecht) (2. Entwurf, 26. Januar 2021); Roman Inderst, Eftichios Sartzetakis und Anastasios Xepapadeas, Technical Report on Sustainability and Competition (Technischer Bericht über Nachhaltigkeit und Wettbewerb), gemeinsam von der Niederländischen Behörde für Verbraucher und Märkte und der Griechischen Wettbewerbsbehörde in Auftrag gegebener Bericht (Januar 2021).

b. Wären die nationalen Gerichte zuständig und bereit, Argumente in Bezug auf Nachhaltigkeit im Rahmen einer zivilrechtlichen Klage zu berücksichtigen?

Frage 2

Welche Instrumente stehen Ihrer nationalen Wettbewerbsbehörde zur Verfügung, um Nachhaltigkeitsgewinne im Rahmen der Fusionskontrolle zu berücksichtigen?

Insbesondere:

a. Wäre sie in der Lage, Angaben zur Nachhaltigkeit als zu berücksichtigende Effizienzgewinne zu betrachten, die Wettbewerbsbeeinträchtigungen aufwiegen können?

b. Könnte Ihre Wettbewerbsbehörde umgekehrt die wahrscheinlichen nachteiligen Auswirkungen eines Vorhabens auf die Umwelt als Wettbewerbsbeeinträchtigung betrachten (wenn sie z. B. feststellt, dass ein Zusammenschluss zu niedrigeren Recyclingraten und einem höheren Rohstoffverbrauch führen würde)?

Frage 3

Falls Nachhaltigkeitsgewinne bei der wettbewerbsrechtlichen Analyse Ihrer nationalen Wettbewerbsbehörde berücksichtigt werden können, wie würde diese dann die Abwägung zwischen der Beeinträchtigung des Wettbewerbs und den Vorteilen im Bereich der Nachhaltigkeit vornehmen? Welche Instrumente stünden ihr zur Verfügung, um diese Interessen gegeneinander abzuwägen?

Europäische strategische Autonomie, Förderung „europäischer Champions“ und Durchsetzung des Wettbewerbsrechts

Für viele Beobachter sind die EU-Beihilfevorschriften das geeignetste Instrument im allgemeinen Wettbewerbsinstrumentarium der Kommission, um die industriepolitischen Ziele der Europäischen Union, einschließlich der strategischen Autonomie der Europäischen Union und der Förderung „europäischer Champions“, zu unterstützen. Andere sind jedoch der Meinung, dass es im Rahmen der Durchsetzung des Wettbewerbsrechts gemäß den Artikeln 101 und 102 AEUV und der Fusionskontrolle möglich sein sollte, diese industriepolitischen Ziele einzubeziehen. Dies hat sich jedoch noch nicht in den Wettbewerbsfällen oder wettbewerbspolitischen Dokumenten der Kommission niedergeschlagen.

Es gibt verschiedene „Ausgangspunkte“ für diese Art von industriepolitischen Erwägungen im Wettbewerbsrecht; diese reichen von der Marktabgrenzung, die

für Argumente über den längerfristigen Markteintritt außereuropäischer Akteure empfänglicher ist (und daher hohe Marktanteile europäischer Unternehmen unberücksichtigt lässt), über die wettbewerbliche Bewertung, die offener für den künftigen Markteintritt neuer Akteure ist, von denen Wettbewerbsdruck für europäische Unternehmen ausgehen könnte, bis hin zur vollständigen Einbeziehung industriepolitischer Belange in die Bewertung von Fusionen.

Frage 4

Bei der Prüfung des geplanten Zusammenschlusses von Siemens und Alstom sah sich die Europäische Kommission mit dem Argument der fusionierenden Unternehmen konfrontiert, dass die hohen Marktanteile, die sich aus dem geplanten Zusammenschluss ergeben würden, nicht berücksichtigt werden sollten, da der Markt mittel- oder längerfristig auch leistungsstarke außereuropäische Unternehmen umfassen würde, die noch nicht auf dem Binnenmarkt tätig sind. Die Parteien argumentierten zudem, dass der Zusammenschluss im Kontext des Weltmarktes bewertet werden sollte, auf dem sie mit diesen leistungsstarken außereuropäischen Unternehmen im Wettbewerb stehen. Die Europäische Kommission erachtete diese Argumente letztlich als unzureichend, um die Bedenken hinsichtlich der wettbewerbswidrigen Auswirkungen des Zusammenschlusses auf dem europäischen Markt auszuräumen.

Welchen Standpunkt vertrat Ihr Mitgliedstaat (die Regierung und/oder die nationale Wettbewerbsbehörde) während der Untersuchung der Kommission, insbesondere im Hinblick auf die industriepolitische Dimension des Falles?

Haben sich Marktteilnehmer in Ihrem Mitgliedstaat zu diesem Fall geäußert und sich für oder gegen den geplanten Zusammenschluss ausgesprochen?

War Ihre nationale Wettbewerbsbehörde bei vergleichbaren Zusammenschlüssen mit ähnlichen Argumenten konfrontiert? Falls ja, wie ist die Wettbewerbsbehörde mit ihnen umgegangen?

Frage 5

Wäre Ihre nationale Wettbewerbsbehörde in der Lage, industriepolitische Belange in ihre Prüfung von Fusionen einzubeziehen? Könnte sie beispielsweise eine wettbewerbsrechtlich bedenkliche Fusion mit der Begründung genehmigen, dass durch sie ein mächtigerer europäischer oder weltweiter Akteur entstünde, die strategische Autonomie der Europäischen Union verbessert würde, Unsicherheiten in Lieferketten beseitigt würden oder sich ähnliche

industriepolitische Vorteile ergäben? Bitte machen Sie auch Angaben zu der gegebenenfalls in Ihrem Mitgliedstaat bestehenden Praxis (sowohl Verwaltungs- und Gerichtsentscheidungen als auch etwaige Leitfäden).

Wenn derartige Erwägungen bei der Prüfung von Fusionen relevant sein könnten, wie könnten sie gegenüber den von der Wettbewerbsbehörde festgestellten wettbewerbsrechtlichen Bedenken abgewogen werden?

Frage 6

Wenn der Zuständigkeitsbereich Ihrer nationalen Wettbewerbsbehörde auf wettbewerbsrechtliche Belange beschränkt ist, könnte die Regierung (z. B. ein Ministerium) eine Entscheidung, durch die eine Fusion aus wettbewerbsrechtlichen Gründen untersagt wird, aus industriepolitischen Gründen aufheben? Ist eine Entscheidung Ihrer nationalen Wettbewerbsbehörde in den letzten Jahren aufgehoben worden, und wenn ja, aus welchen Gründen?

Frage 7

Die digitale Souveränität ist eines der wichtigsten industriepolitischen Ziele der Europäischen Union. Weder die Durchsetzung des Kartellrechts gegenüber großen digitalen Plattformen noch das vorgeschlagene Gesetz über digitale Märkte gelten als unmittelbar mit diesem politischen Ziel verbunden. Tatsache ist jedoch, dass die großen digitalen Plattformen, die Ziel der kartellrechtlichen Durchsetzung sind und Hauptadressaten des Gesetzes über digitale Märkte wären, fast alle in den USA ansässig sind, während die Beschwerdeführer und Parteien, die strengere Vorschriften im Rahmen des Gesetzes über digitale Märkte befürworten, häufig in der Europäischen Union ansässig sind. Somit könnten die Durchsetzung des Kartellrechts und das vorgeschlagene Gesetz über digitale Märkte zumindest indirekt als potenzieller Beitrag zu einer dynamischeren digitalen Wirtschaft und größeren digitalen Souveränität Europas betrachtet werden – ein Gedanke, der in der Debatte des EU-Parlaments über das vorgeschlagene Gesetz über digitale Märkte mitunter deutlicher zum Ausdruck kam.

a. Hat Ihre nationale Wettbewerbsbehörde Verfahren gegen eine der großen in den USA ansässigen digitalen Plattformen eingeleitet? Falls ja, wer waren die Beschwerdeführer?

b. Kann der Ausgang des Verfahrens, insbesondere gegenüber den digitalen Plattformen verhängte Abhilfemaßnahmen, als Beitrag zu einer dynamischeren digitalen Wirtschaft und größeren digitalen Souveränität Europas gesehen werden?

Es ist davon auszugehen, dass die wichtigsten Durchsetzungsbefugnisse im Rahmen des Gesetzes über digitale Märkte, mit dem großen digitalen Plattformen ein breites Spektrum an regulatorischen Verpflichtungen und Verboten auferlegt würde, bei der Europäischen Kommission liegen werden, während die nationalen Wettbewerbsbehörden nur eine begrenzte Rolle spielen werden.

c. Wie würde sich das Gesetz über digitale Märkte auf die Fähigkeit Ihrer Wettbewerbsbehörde auswirken, eigene, wettbewerbsrechtliche Verfahren gegen große digitale Plattformen einzuleiten?

d. Ist es in diesem Regulierungsszenario überhaupt sinnvoll, wenn nationale Wettbewerbsbehörden ihre eigenen Verfahren gegen große digitale Plattformen führen? Oder könnte die Gefahr von Unstimmigkeiten oder einer übermäßigen Durchsetzung bestehen, die letztlich nicht nur europäischen Verbrauchern, sondern auch europäischen Unternehmen, die auf die Dienste großer digitaler Plattformen angewiesen sind, schaden könnte?

Frage 8

Ist die Politik und Entscheidungspraxis im Bereich der staatlichen Beihilfen (und die ausschließliche Zuständigkeit der Europäischen Kommission) ein geeignetes Instrument, um den industriepolitischen Zielen Europas Rechnung zu tragen, insbesondere der Schaffung europäischer Industrie-Champions, beispielsweise durch die Überlegung, dass das Fehlen eines starken Akteurs in der europäischen Industrie als „Marktversagen" bezeichnet werden kann, das durch die Genehmigung staatlicher Beihilfemaßnahmen behoben werden sollte? Haben solche industriepolitischen Aspekte in der Entscheidungspraxis der Kommission eine Rolle gespielt?

Als Reaktion auf die durch die COVID-19-Pandemie ausgelöste Wirtschaftskrise hat die Europäische Kommission zahlreiche Entscheidungen zur Genehmigung staatlicher Beihilfen erlassen, um das Überleben notleidender Unternehmen oder Industriezweige zu sichern. Lassen sich aus dieser Erfahrung Lehren für die allgemeine Frage ziehen, wie Politik und Vorschriften im Bereich der staatlichen Beihilfen zur Unterstützung der europäischen Wirtschaft eingesetzt werden können? Könnte oder sollte beispielsweise die langfristige Lebensfähigkeit eines strategischen europäischen Industriezweigs als relevanter Faktor bei künftigen Entscheidungen über staatliche Beihilfen berücksichtigt werden?

Frage 9

Aus nationaler Sicht: Machen die nationalen Gerichte von den Rechtsmitteln und anderen (unter anderem gemäß Artikel 29 Absatz 1 der Verordnung (EU) 2015/1589 des Rates) verfügbaren Instrumenten Gebrauch, um Klarheit und Gewissheit über den Anwendungsbereich des Beihilferechts zu erlangen, oder legen diese Gerichte den Anwendungsbereich der EU-Beihilfevorschriften aus, ohne mit der Kommission zusammenzuarbeiten oder auf die Rechtsbehelfe vor dem EuGH zurückzugreifen?

Geopolitische Instrumente, handelspolitische Schutzinstrumente und Wettbewerbspolitik

Viele der von der Europäischen Kommission entwickelten oder in Erwägung gezogenen „geopolitischen" Instrumente würden den Marktzugang für außereuropäische Akteure in der Europäischen Union einschränken. Dies gilt beispielsweise für die verstärkte Kontrolle von ADI, den Vorschlag über drittstaatliche Subventionen und verschiedene andere Instrumente zur Schaffung gleicher Wettbewerbsbedingungen, die es der Europäischen Union ermöglichen würden, den Marktzugang für drittstaatliche Akteure, die in ihren Heimatländern weniger strengen Vorschriften unterliegen, zu beschränken. Diese Auswirkungen wären zwar weniger direkt als die traditioneller handelspolitischer (Schutz-) Maßnahmen wie z. B. Antidumpingmaßnahmen, könnten aber dennoch weitreichend und tiefgreifend sein.

In vielen Fällen werden Maßnahmen, die die Europäische Union zur Unterstützung ihrer geopolitischen Ambitionen ergreift, Auswirkungen haben, die den Zielen des Wettbewerbsrechts und der Wettbewerbspolitik – Gewährleistung offener Märkte, Förderung gemeinschaftlicher Projekte, Innovation und Investitionen sowie Schutz der Verbraucher vor Beschränkungen des Angebots, die zu höheren Preisen führen würden – diametral entgegengesetzt sind.

Frage 10

Hat Ihre nationale Wettbewerbsbehörde Fälle untersucht, in denen sich bestehende Handelsinstrumente auf ihre wettbewerbsrechtliche Analyse ausgewirkt haben – z. B. weil handelspolitische Schutzmaßnahmen das Angebot aus Drittstaaten eingeschränkt haben und daher Märkte enger definiert wurden – oder in denen der von Unternehmen aus Drittländern ausgeübte Wettbewerbsdruck außer Acht gelassen wurde, weil ihre Möglichkeiten zur Ausweitung des Angebots

in der EU durch handelspolitische Schutzinstrumente eingeschränkt waren? Gehen Sie davon aus, dass ähnliche Überlegungen relevant sein könnten, wenn die neuen „geopolitischen" Instrumente regelmäßiger angewendet werden und ähnliche Auswirkungen haben könnten wie die traditionellen handelspolitischen Schutzinstrumente?

HANDEL

Kontrolle ausländischer Direktinvestitionen (ADI)

Mit der Verordnung über die Überprüfung von ADI[10] wird der Rahmen für die Kontrolle von ADI auf Ebene der Mitgliedstaaten festgelegt. Die Kontrolle von ADI fällt zwar in den Anwendungsbereich der gemeinsamen Handelspolitik, dennoch spielen die Mitgliedstaaten aufgrund ihrer Zuständigkeit für die Gewährleistung der öffentlichen Ordnung und Sicherheit eine wichtige Rolle. Ein übergeordnetes Ziel der Verordnung besteht darin, ein Gleichgewicht zwischen der Wahrung der Zuständigkeiten der Mitgliedstaaten und der Gewährleistung einer ausreichenden Kontrolle durch die EU sowie der Zusammenarbeit zwischen den Mitgliedstaaten zu finden.

Frage 11

Bitte nennen und beschreiben Sie die wichtigsten nationalen Rechtsinstrumente, die im Zusammenhang mit der Anwendung der Verordnung über die Überprüfung von ADI auf nationaler Ebene eingeführt wurden.

a. Worin liegen die größten Herausforderungen bei der Anwendung der Kontrolle von ADI auf der Ebene der Mitgliedstaaten? Erläutern Sie dies bitte anhand konkreter Beispiele aus der gängigen Praxis in Ihrem Mitgliedstaat.

Im Rahmen der derzeit geltenden Rechtsvorschriften und der gängigen Praxis Ihres Mitgliedstaats:

b. Wird die Verordnung über die Überprüfung von ADI direkt angewandt oder gehen die Vorschriften Ihres Mitgliedstaats (in Bezug auf den Anwendungsbereich und/oder die Strenge der Kontrollen) über die mit dieser Verordnung erreichte Harmonisierung hinaus?

[10] Verordnung (EU) 2019/452 des Europäischen Parlaments und des Rates vom 19. März 2019 zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen in der Union, ABl. L 79I vom 21.3.2019, S. 1.

c. Welche Investitionen und Investoren unterliegen der Kontrolle von ADI?

d. Welche Sektoren unterliegen der Kontrolle von ADI?

e. Wie werden Risiken für die öffentliche Ordnung oder Sicherheit auf Ebene Ihres Mitgliedstaats bewertet?

f. Besteht bei der Kontrolle von ADI Raum für wettbewerbsrechtliche Erwägungen, z. B. für das etwaige Argument, dass das Zielunternehmen zu einem leistungsfähigeren Wettbewerber würde, wenn es von dem ausländischen Unternehmen übernommen würde, das bereit ist, erhebliche Investitionen in das Zielunternehmen zu tätigen?

g. Funktionieren die Mechanismen des Informationsaustauschs zwischen der Kommission und den Mitgliedstaaten wirksam und angemessen?

h. Welche Rechtsmittel stehen zur Verfügung, um Entscheidungen der nationalen Behörden über ADI anzufechten?

i. Hat die COVID-19-Pandemie die Anwendung der Kontrolle von ADI beeinflusst?

Handelspolitischer Schutz und öffentliche Auftragsvergabe– drittstaatliche Subventionen

Am 5. Mai 2021 hat die Europäische Kommission ihren Vorschlag für eine Verordnung über die Auswirkungen drittstaatlicher Subventionen auf den Wettbewerb im Binnenmarkt veröffentlicht.[11] Im Falle ihrer Annahme würde durch diese vorgeschlagene Verordnung ein neues Instrumentarium geschaffen. Ziel dieser Instrumente ist es, die verzerrenden Auswirkungen drittstaatlicher Subventionen zu verhindern und das Risiko zu vermeiden, dass diese Subventionen die fairen Wettbewerbsbedingungen auf dem Binnenmarkt beeinträchtigen. Es handelt sich unter anderem um folgende Instrumente: i) im Anschluss an eine Meldung erfolgende Untersuchungen von Zusammenschlüssen, die einen bestimmten Schwellenwert überschreiten und eine finanzielle Zuwendung durch eine drittstaatliche Regierung umfassen; ii) im Anschluss an eine Meldung erfolgende Untersuchungen von Angeboten in öffentlichen Vergabeverfahren, die einen bestimmten Schwellenwert überschreiten und eine finanzielle Zuwendung durch eine drittstaatliche Regierung umfassen; und iii) auf eigene Initiative

[11] Europäische Kommission, Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über den Binnenmarkt verzerrende drittstaatliche Subventionen, COM(2021) 223 final (5. Mai 2021), abrufbar unter < https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf >.

der Kommission oder im Anschluss an eine Ad-hoc-Meldung erfolgende Untersuchungen aller anderen Marktsituationen sowie von Zusammenschlüssen und Vergabeverfahren mit geringerem Umfang.

Frage 12

Gibt es auf der Ebene der Mitgliedstaaten ernsthafte Besorgnis über drittstaatliche Subventionen und deren Auswirkungen und daher Unterstützung für den Vorschlag der Europäischen Union?

Besteht darüber hinaus auf der Ebene der Mitgliedstaaten die Gefahr, dass die Europäische Kommission im Rahmen der Kontrolle drittstaatlicher Subventionen in Angelegenheiten eingreift, die in die Zuständigkeit der Mitgliedstaaten fallen (unter anderem die Überprüfung von ADI)?

Durch den Vorschlag erhält die Kommission insbesondere die Befugnis, vor der Vergabe eines öffentlichen Auftrags oder einer Konzession Informationen über drittstaatliche finanzielle Zuwendungen zu prüfen, die die beteiligten Unternehmen im Zusammenhang mit einem öffentlichen Vergabeverfahren erhalten haben. Drittstaatliche Subventionen, die ein Unternehmen in die Lage versetzen, ein ungerechtfertigt günstiges Angebot abzugeben, sind drittstaatliche Investitionen, die ein öffentliches Vergabeverfahren verzerren oder zu verzerren drohen.

Welche Auswirkungen hat der Vorschlag auf die Verfahrensautonomie der Mitgliedstaaten bei der Durchführung von Nachprüfungsverfahren für öffentliche Aufträge? Gibt es – abgesehen vom spezifischen Kontext der öffentlichen Auftragsvergabe – auf der Ebene der Mitgliedstaaten Bedenken hinsichtlich des Umfangs der Befugnisse der Kommission im Rahmen des Vorschlags, auch in Bezug auf die Beweisanforderungen und die Garantien für ein ordnungsgemäßes Verfahren, die bei der Prüfung des Vorliegens einer drittstaatlichen Subvention und ihrer Auswirkungen anzuwenden sind?

Frage 13

Durch die drei Module des Kommissionsvorschlags zu drittstaatlichen Subventionen sollen die bestehenden Rahmenregelungen für Wettbewerb, öffentliche Auftragsvergabe und handelspolitischen Schutz auf drittstaatliche Subventionen übertragen werden. Sind Sie angesichts des Ziels des Vorschlags zu drittstaatlichen Subventionen sowie der Ziele insbesondere des EU-Wettbewerbsrechts und der handelspolitischen Schutzvorschriften der Ansicht, dass dieser Ansatz Grenzen hat?

Verbindliche Sorgfaltspflichten und Regulierung von Lieferketten

Die Europäische Kommission wird 2022 ihren Legislativvorschlag zur „nachhaltigen Unternehmensführung" veröffentlichen, mit dem sie verbindliche Sorgfaltspflichten in Bezug auf Menschenrechte und Umwelt sowie möglicherweise Standards für die Unternehmensführung einführen will. Diese Initiative baut auf Maßnahmen auf, die auf der Ebene der Mitgliedstaaten ergriffen wurden, um durchsetzbare Sorgfaltspflichten für Unternehmen einzuführen. Darüber hinaus wird sie vom Europäischen Parlament unterstützt, das in einer Entschließung vom 10. März 2021[12] einen Richtlinienentwurf vorgelegt und gefordert hat, „dass die Union dringend verbindliche Anforderungen annehmen sollte, um Unternehmen zu verpflichten, potenzielle und/oder tatsächliche nachteilige Auswirkungen auf die Menschenrechte, die Umwelt und die verantwortungsvolle Führung in ihrer Wertschöpfungskette zu ermitteln, zu bewerten, ihnen vorzubeugen, sie zu beenden, zu verringern, zu überwachen, zu kommunizieren, Rechenschaft darüber abzulegen, sie anzugehen und zu beheben". Diese Initiative ergänzt die Bemühungen der Europäischen Union dahin gehend, ihre Handelspartner in Freihandelsabkommen dazu zu verpflichten, insbesondere multilaterale Umweltabkommen und grundlegende Arbeitsnormen zu einzuhalten.

Frage 14

Besteht nach den derzeit geltenden Rechtsvorschriften der Mitgliedstaaten für Unternehmen eine Sorgfaltspflicht zur Einhaltung der Menschenrechte und des Umweltrechts in der gesamten Lieferkette, die durch gerichtliche oder andere Rechtsbehelfe durchgesetzt werden kann?

Bitte nennen und beschreiben Sie die wichtigsten nationalen Rechtsinstrumente (falls vorhanden), die eingeführt wurden, um verbindliche Sorgfaltspflichten einzuführen.

Falls eine Sorgfaltspflicht gilt und/oder spezifische Rechtsvorschriften zur Einführung verbindlicher Sorgfaltspflichten erlassen oder vorgeschlagen wurden:

a. Welche Unternehmen unterliegen dieser Pflicht/diesen Rechtsvorschriften?

b. Welche Verpflichtungen gelten für die Unternehmen?

[12] Europäisches Parlament, Sorgfaltspflicht und Rechenschaftspflicht von Unternehmen, Entschließung des Europäischen Parlaments vom 10. März 2021 mit Empfehlungen an die Kommission zur Sorgfaltspflicht und Rechenschaftspflicht von Unternehmen (2020/2129(INL)), abrufbar unter < https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf >.

c. Können Unternehmen für Handlungen anderer Unternehmen/Personen unter ihrer Kontrolle und/oder entlang der Lieferkette verantwortlich gemacht werden? Wenn ja, unter welchen Bedingungen?

d. Hat die Sorgfaltspflicht extraterritoriale Auswirkungen?

e. Welche Rechtsbehelfe stehen zur Verfügung, und wem stehen diese Rechtsbehelfe zu?

f. Welchen Umfang hat die Haftungsregelung?

Frage 15

Welches sind die größten Herausforderungen auf der Ebene der Mitgliedstaaten bei der Durchsetzung und Umsetzung der Sorgfaltspflicht/der Rechtsvorschriften?

Angenommen, der Legislativvorschlag liegt zum Zeitpunkt der Beantwortung dieses Fragebogens vor: Welche Herausforderungen sehen Sie bei der Umsetzung des Legislativvorschlags der Kommission zur „nachhaltigen Unternehmensführung" (sobald er vorliegt)? Wie wirken sich die vorgeschlagenen Maßnahmen der EU auf die bestehenden Rechtsvorschriften der Mitgliedstaaten aus?

GENERAL REPORT

The New Geopolitical Dimension of EU Competition and Trade Policies

Jean-François Bellis and Isabelle Van Damme[1]

Introduction

Shortly before the World Health Organisation declared COVID-19 a pandemic, the European Commission announced a new industrial strategy for Europe.[2] In May 2021, it updated that strategy.[3] 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. More recently, the European Commission also proposed an EU Green Deal Industrial Plan.[4] Overall, the European Union's industrial policy is at a turning point and increasingly reactive and value-driven.

The European Union's new policy seeks to promote its "open strategic autonomy". Depending on the interlocutor commenting on this strategy, the emphasis is put on either "open" or "strategic", not on how to reconcile both qualifications of the new policy. 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 the European Union should pursue.[5] The focus of this 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".[6] Through

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The rapporteurs are grateful to Andreas Reindl, Frenkchris Sinay, and Sophie Sundaram for their helpful assistance in preparing this report and the questionnaire.

[2] 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).

[3] 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).

[4] 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 Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final (1 February 2023).

[5] 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 (18 February 2021).

[6] Ibid, at p. 4.

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. In other words, the policy is about making the European Union and its market more resilient against external pressures.[7]

This assertiveness is exemplified in notably the EU Green Deal and the 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 mechanism ("CBAM") and other proposals seeking to address the so-called "geopolitics of supply chains". As the European Council put it, in its conclusions of 15 December 2022, the European Union must focus on "the importance in the current global context of an ambitious European industrial policy to make Europe's economy fit for the green and digital transitions and reduce strategic dependencies, particularly in the most sensitive areas, while ensuring a level playing field".[8] The challenge is to address "the need for a coordinated response to enhance Europe's economic resilience and its global competitiveness while preserving the integrity of the Single Market".[9]

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, for example, 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 competition, and 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 European Union or its Member States.[10]

Supply shortages, vulnerabilities in supply chains and crisis-related State aid measures have also redefined the European Union's competition policy. That policy

[7] See also Institutional report, pp. 143-144.

[8] European Council, European Council meeting (15 December 2022) – Conclusions, para. 20.

[9] Ibid.

[10] 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, COM(2021) 775 final (8 December 2021).

now serves to support a green and digital recovery and to promote investments in key sectors.[11] The main initiatives include the Digital Markets Act[12] and new rules for preventing the distortive effects of foreign subsidies on the EU internal market.[13] 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.[14] 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,[15] the revision of the General Block Exemption Regulation[16] and the rules on Important Projects of Common European Interest.[17] Competition enforcement must be guided by, notably, the understanding that forms of cooperation in sustainability initiatives are possible without infringing Article 101(1) of the Treaty on the Functioning of the European Union ("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, industrial policy considerations should prevail over technical competition policy concerns in order to allow for the creation of "European champions", able to compete with powerful non-European companies in international markets. This debate has intensified after the United States announced its new subsidies programme, as part of the Inflation Reduction Act, to promote green transport. In particular,

[11] 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.

[12] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265, p. 1.

[13] FIDE, EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution, The XXIX FIDE Congress in The Hague, 2020 Congress Publications, Vol. 3.

[14] 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 >.

[15] European Commission, Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, OJ 2022 C 80, p. 1.

[16] See consolidated text of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L 187, p. 1.

[17] European Commission, Communication from the Commission Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2021 C 528, p. 10.

it has caused the European Union and its Member States to intensely reflect on whether to enter a subsidies race, grant similar preferences for use of local content and possibly loosen State aid control (at the risk of undermining the internal market in the pursuit of geopolitical objectives). At the centre of this discussion is the balance between responding to external threats to the competitiveness of the European Union and its green and digital agendas and preserving, at the internal level, the integrity of the internal market. The Commission's response is the proposed EU Green Deal Industrial Plan.[18] However, it remains debated whether that plan strikes that balance in the correct manner.

At the time of preparing the questionnaire for the national rapporteurs, two significant developments affecting the scope of this report had not yet occurred: (i) Russia's war in Ukraine and related high energy prices and (ii) as already mentioned, the visible risk of a "subsidy war", as a result of tensions between the United States and the European Union on how to achieve an industrial transformation at home, through subsidies, to achieve climate change objectives and to maintain the competitiveness of their industries. These developments are having a transformative effect on the European Union's industrial policy[19] and are possibly affecting the timeline of the European Commission's policy objectives, and also the discussion of this topic at the FIDE 2023 conference. They also show how climate change, security and competition-related interests are increasingly interrelated. As Commission President von der Leyen has put it, "[t]he net zero transformation is already causing huge industrial, economic and geopolitical shifts – by far the quickest and the most profound in our lifetime. … But we are on the brink of something far greater".[20]

The authors of this report express their sincere gratitude to the national rapporteurs and the institutional rapporteur for preparing detailed reports that have been invaluable for preparing this general report.

[18] 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 Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final (1 February 2023).

[19] A 2022 OECD study identifies the following global challenges as contributing to an increased use of subsidies: (i) government responses to COVID-19, (ii) greening of economies; (iii) industrial policy and different economic models; (iv) resilient global value chains; (v) recent energy crisis as a result of the war in Ukraine; and (vi) increasing digitalisation. OECD, Subsidies, Competition and Trade – OECD Competition Policy Roundtable Background Note (OECD, 2022), p. 8.

[20] European Commission, Special Address by President von der Leyen at the World Economic Forum, Davos (17 January 2023), at < https://ec.europa.eu/commission/presscorner/detail/en/speech_23_232 >.

2. Enforcing competition policy: Sustainability, Digital Economy, and Resilience

2.1. Introduction

The looming threat of climate change has rekindled the debate on considering non-competition interests in legal instruments regulating the market. Competition law enforcers have also had to address the specific challenges raised by the development of the digital sector. As a result, the concept of "industrial policy" which had largely disappeared from the vocabulary of EU policymakers in the last decades is making a comeback.[21]

The subsidies granted to domestic production in the United States under the Inflation Reduction Act have exacerbated the concern that foreign investment would leave the European Union for more profitable locations abroad. The subsidisation of "green" industries in the United States might also undermine the European Union's Green Deal objectives. All those concerns have led the Commission to develop the Green Deal Industrial Plan, which includes relaxing the State aid rules with a view to strengthening European industries.[22]

The FIDE institutional rapporteur stresses that the twin environmental and digital transitions to a more resilient Europe "require both internal and external action, across multiple policy areas, ensuring that all tools, including trade and competition, work in support of EU values and policy objectives".[23] In his assessment, competition policy and enforcement [24] play a key role in furthering "open strategic autonomy."

This part of the report investigates how competition rules could be enforced – especially at the national level – in this new geopolitical environment.

Over various decades, several instruments[25] have been introduced to integrate national competition law enforcement in the broader context of EU competition

[21] European Council, European Council meeting (15 December 2022) – Conclusions, para. 20.

[22] 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 Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final (1 February 2023).

[23] Institutional report, p. 420.

[24] Ibid.

[25] Compare EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty of 21 February 1962, OJ 1962, p. 204 with Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, p. 1 in conjunction with Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019 L 11, p. 3.

policy.[26] Previous general rapporteurs have rightly pointed out that "[t]here is not just one EU competition policy", but that "[t]here are [27]+ EU versions of it". Indeed, EU competition rules are enforced not only by the EU institutions but also by all the Member States, the Members of the European Economic Area, and Switzerland.[27] Against that background, consideration of national perceptions of how competition rules should be applied is indispensable to a proper understanding of how competition law enforcement can achieve the current European Union's objectives.

The new directions in competition policy discussed in this report (and described by the national rapporteurs) were not expected to be uniform. For the purposes of this report, the questionnaire focused on how national rapporteurs understand their respective competition landscape to engage with selected topics, namely the European Union's ambitions for sustainability, the issue of "European champions", the digital economy, and the competitiveness of European industry.

2.2. Sustainability and competition

2.2.1. Introduction

The question of whether non-competition interests, including sustainability, can be integrated in EU competition law enforcement has gained urgency. As the FIDE institutional rapporteur notes, the Commission has stated that sustainability and competition are not mutually exclusive.[28] However, the degree to which those concerns are reconcilable remains disputed.

2.2.2. National competition authorities and sustainability agreements

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings, or concerted practices which may affect trade between EU Member States and have as their object or effect preventing, restricting, or distorting competition within the internal market. Article 101(3) TFEU provides for an exemption from that prohibition for agreements meeting four conditions.

[26] See also, e.g., W.P.J. Wils, "Ten Years of Regulation 1/2003-A Retrospective", Journal of European Competition Law & Practice, Vol. 4, No. 4, 2013, pp. 293–301 and R. Perea Molleda, "The Ecn+ Directive and the Next Steps for Independence in Competition Law Enforcement", Journal of European Competition Law & Practice, Vol. 12, No. 3, 2021, pp. 167-180.

[27] N. Petit and P. Van Cleynenbreugel, "General Report Topic 3: EU Competition Law and the Digital Economy" in FIDE, EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution, The XXIX FIDE Congress in The Hague, 2020 Congress Publications, Vol. 3, p. 28.

[28] See, for example, 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 >.

First, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. Second, the agreement must allow consumers a fair share of the resulting benefit. Third, the agreement must not impose restrictions which are not indispensable to the attainment of these objectives. Fourth, the agreement must not enable the parties to eliminate competition in respect of a substantial part of the products in question. The 2004 Guidelines explain how these four conditions can be met.[29]

Additional guidance is provided in the recently adopted Draft Horizontal Guidelines which contain a novel chapter dedicated to sustainability.[30] The Commission presents its treatment of "sustainability agreements" in the context of the need to remedy market failures that are not adequately addressed by existing regulation.[31] The Commission suggests that, where market failures are addressed by appropriate regulation, such as the Emissions Trading System,[32] additional intervention in the form of cooperation agreements between undertakings might be unnecessary.

In assessing the consistency of a sustainability agreement with Article 101 TFEU, the first question to consider is whether the competition which the agreement might restrict is of the kind that is protected by Article 101(1) TFEU. If the competition at issue does not deserve protection, the restrictive agreement falls outside the scope of Article 101(1) TFEU and is therefore valid under EU competition law.

An example of a sustainability agreement that was found not to come within the scope of Article 101 TFEU is provided by a case handled by the Dutch NCA, which ruled that an agreement between garden centres aimed at curtailing the use of illegal pesticides by growers does not violate competition law. According to the Dutch NCA, competition rules are not meant to protect illicit competition such as competition based on the use of illegal pesticides.[33] As its Chairman commented, in its assessment of the legality of the conduct, the Dutch NCA will consider not

[29] European Commission, Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), OJ 2004 C 101, p. 97.

[30] The Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Draft Horizontal Guidelines") are available on the public consultation webpage, see European Commission, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, 1 March 2022, at < https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en >.

[31] Draft Horizontal Guidelines, paras. 545-546.

[32] Ibid, para. 546.

[33] Dutch NCA, ACM agrees to arrangements of garden centers to curtail use of illegal pesticides, 2 September 2022, at < https://www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides >.

only the national law applicable where the conduct takes place,[34] but also binding international treaties, international organisations' measures, or generally accepted principles of public international law.[35]

In their responses, the national rapporteurs have also addressed the conditions under which Article 101(3) TFEU may be relied upon to allow a sustainability agreement otherwise caught by the prohibition of Article 101(1) TFEU. One key point of contention concerns the condition relating to the "fair share" of the benefits resulting from the sustainability agreement that the consumers must receive.

At a general level, the majority of NCAs have developed a positive view of the application of Article 101(3) TFEU to sustainability agreements. There are, however, diverging views as to how Article 101(3) should be applied in practice. Also, some NCAs have not yet had the opportunity to define their approach to considering sustainability benefits to society.

With respect to the "fair share" for the consumer, some of the NCAs have developed a liberal interpretation of who are the consumers in relation to whom the benefits should be assessed while others tend to follow the more conservative approach embraced by the European Commission.

The European Commission appears to consider that the analysis of the benefits should be focused on current consumers in the relevant market. The institutional rapporteur stresses that sustainability benefits must at least partially be realised in the market where the authority identifies competitive concerns.[36]

This position is consistent with a long-held position of the European Commission to not overly widen the universe of consumers receiving the fair share of the restrictive agreement considered for eligibility under Article 101(3) TFEU.[37] Whether this approach based on the pre-modernisation interpretation of Article 101(3) should be maintained is open to debate. Under the interpretation of the concept of restriction of competition then applied by the Commission, almost any agreement imposing a restriction on the freedom of action of a party fell under

[34] M. Snoep, "What is fair and efficient in the face of climate change?", Journal of Antitrust Enforcement, forthcoming, 2023, at < https://academic.oup.com/antitrust/advance-article/doi/10.1093/jaenfo/jnad001/6987004?utm_source=authortollfreelink&utm_campaign=antitrust&utm_medium=email&guestAccessKey=1984b56c-23af-4b00-866d-6681aa68211e&login=false >, p. 3.

[35] Ibid.

[36] Institutional report, p. 123.

[37] 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 >. For a report on the 2022 Commission's Young Experts Conference, see C. Connor, "Vestager unwilling to consider out-of-market sustainability benefits", 3 February 2022, Global Competition Review, at < https://globalcompetitionreview.com/article/vestager-unwilling-consider-out-of-market-sustainability-benefits >.

the prohibition of paragraph 1 and needed an exemption under paragraph 3 to be valid. As a result, the balancing of the positive and negative effects of the agreement on competition was carried out under paragraph 3. Following modernisation and the introduction of the "more economic approach" to the interpretation of Article 101 TFEU, this balancing is carried out in practice exclusively within the context of Article 101(1) TFEU and no decision under Article 101(3) TFEU is adopted by the Commission. A more liberal interpretation of the conditions under which Article 101(3) TFEU may be applied might provide a new rationale for that provision which modernisation has *de facto* made obsolete.

As is clear from the reports of NCAs such as Luxembourg, Slovenia, Ireland or Bulgaria, a majority of the Member States appears unwilling to go beyond the European Commission's conservative approach. This is so even where NCAs express their support for an expansion of the scope of consumers (such as in Finland[38]), are able to incorporate sustainability benefits into terms such as "efficiency" (such as in Ireland[39]), or operate in a legal system in which environmental protection was included as a legitimate benefit justifying the use of the exception rule (such as in Hungary[40]).

Nevertheless, the Swedish NCA draws attention[41] to potential out-of-market efficiencies with reference to older case-law and decisional practice, such as *Wouters*.[42] The Portuguese report also stresses that any departure from the conservative approach should be based on a sound economic analysis, either qualitative or quantitative, and on finding (i) a market failure, (ii) the indispensability of the restrictive agreement, and (iii) the unavailability of a less restrictive alternative.

However, the Dutch and Greek NCAs are willing to consider sustainability benefits for a wider universe of consumers under Article 101(3) TFEU[43] and advocate also taking into account the long-term collective benefits for future consumers.

Interestingly, some national reports refer to linkages between competition laws and other instruments. To illustrate this point, the Italian NCA confirms that it

[38] Even though the President of the Finnish NCA suggested going beyond directly affected consumers where benefits are "clearly more significant", the Finnish NCA did not provide further guidance and instead awaits the Commission's guidance. See Finnish report, topic II, response to question 1, p. 207.

[39] Irish report, topic II, response to question 1, p. 425.

[40] Hungarian report, topic II, response to question 1, pp. 397-398.

[41] Swedish NCA, Konkurrenspolicy och den gröna given (4 November 2020), at < https://www.konkurrensverket.se/contentassets/1de995c322e94da2829d711504f5515b/20-0594-grona-given.pdf >.

[42] Case C-309/99, *Wouters and Others*, judgment of 19 February 2022, EU:C:2002:98.

[43] R. Inderst, E. Sartzetakis and A. 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).

could expand its interpretation in line with constitutional norms to protect the environment.[44]

Finally, it seems that, thus far, private enforcement of competition law with respect to sustainability agreements has taken place only sparsely, if at all. As many NCAs are still grappling with the question of how to address sustainability issues, it might take some time before sustainability arguments will be raised in private actions. In the meantime, it is premature to draw inferences from national practice to assess national courts' appreciation of sustainability agreements.

2.2.3. National competition authorities and sustainability benefits in merger control

Sustainability benefits might also be a factor in merger control. As the institutional rapporteur notes, the 2021 Policy Brief already hinted at the possibility of considering consumer preferences for sustainable products, theories of harm to green innovation, and "killer acquisitions" in green innovation.[45] Notably, the European Commission is already changing its views on the referral policy under Article 22 of the EU Merger Regulation ("EUMR") and is now revising the 1997 Market Definition Notice.[46]

Despite limited practice, many Member States have provisions in their national legislation that allow taking into account sustainability benefits. For instance, the Spanish NCA is expected to focus on efficiency benefits and avoidance of competitive harm which may include sustainability considerations.[47] The Greek NCA may expansively interpret "economic progress" in the relevant provision,[48] whereas the Bulgarian report stresses that a positive sustainability effect could in principle outweigh the negative anti-competitive effect.[49] In the latter case, there would have to be clear aims to modernise business, improve market structure and promote consumer interest.[50]

Moreover, some national reports expressly refer to environmental rules or principles or the public interest in general when the NCA is clearing the merger (see, e.g., Italy[51]) or when a Minister would have the opportunity to authorise an otherwise prohibited merger (see, e.g., Germany[52]).

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[44] Italian report, topic II, response to question 1, pp. 444-445.

[45] Institutional report, topic II, response to question 2, p. 124.

[46] Commission Notice on the definition of relevant market for the purposes of Community competition law OJ 1997 C 372, p. 5 ("1997 Market Definition Notice").

[47] Spanish report, topic II, response to question 2, p. 617.

[48] Greek report, topic II, response to question 2, p. 373.

[49] Bulgarian report, topic II, response to question 2, p. 172.

[50] Bulgarian report, topic II, response to question 2, p. 172.

[51] Italian report, topic II, response to question 2, p. 446.

[52] German report, topic II, response to question 2, pp. 307-310.

On this point, NCAs seem to be expecting further guidance from the European Commission due to the lack of available practice (see, e.g., Portugal[53]) or uncertainty about how to assess the value of environmental benefits or detriments (see, e.g., Poland[54]).

2.2.4. Sustainability versus competition

A fundamental question is whether, in general, NCAs are willing to accept the risk of harm to groups of consumers that might be outweighed by the benefits of sustainability initiatives.

First, a significant number of NCAs are reported to be able to balance sustainability and competition in favour of the former, at least in principle. Some Member States are receptive to the concept but find it difficult to identify the suitable tools for implementing it.[55] However, as the Irish report notes, if any outweighing could be done, this could take place along the lines of Article 101(3) TFEU. As discussed above, some Member States have developed favourable views on a dynamically expanding interpretation of Article 101(3) TFEU for sustainability agreements.[56] Thus, they agree on this point with the Dutch and Greek NCAs, which have commissioned a technical report for understanding how sustainability could bear benefits that are in line with competition law.[57] Rather than focusing on avoiding negative externalities, the Italian report stresses that sustainability efficiencies have not (yet) sufficiently been incorporated into, e.g., the criterion of finding a contribution to improving the production or distribution of goods or to promoting technical and economic progress under Article 101(3) TFEU.[58] The merits of this approach could become even more evident if one would expand the "perimeter of entities" benefiting from a sustainability agreement.[59] Furthermore, the Greek NCA developed a regulatory "sandbox"[60] for assessing whether environmental benefits outweigh any competition concerns, underpinned with economic analysis.[61]

[53] Portuguese report, topic II, response to question 2, pp. 552-553.

[54] Polish report, topic II, response to question 2, pp. 531-532.

[55] Polish report, topic II, response to question 3, p. 532; Croatian report, topic II, response to question 3, p. 180.

[56] French report, topic II, response to question 3, p. 230; Italian report, topic II, response to question 3, pp. 447-448.

[57] R. Inderst, E. Sartzetakis and A. 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).

[58] Italian report, topic II, response to question 3, pp. 447-448.

[59] Ibid.

[60] A "sandbox" could be defined as "a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question", see Financial Conduct Authority, 'Regulatory sandbox' November 2015, at < https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf >.

[61] Greek report, topic II, response to question 3, p. 374.

Despite different degrees of intended deviations from the European Commission's position, various national rapporteurs mention that the economic analysis could be enhanced in favour of balancing sustainability benefits against competitive restrictions. As raised in the Belgian report, EU competition law does not exclusively require a consumer welfare standard but also allows for using a total welfare standard. Assuming that an environmentally positive impact on society is reasonably evident, those out-of-market benefits may be duly accounted for in competition analyses.[62] However, as the Portuguese report observes, replacing welfare standards could go beyond current practice and usurp the role of the legislator.[63] Rather than following the balancing act put forward in this questionnaire's question, the Swedish report observes that the NCA does not weigh sustainability benefits against competitive restrictions, but indicates that those benefits are to be analysed as aspects of the function of the market and consumer behaviour.[64]

In addition, the Norwegian national report mentions that it would be possible to compare restrictions on competition with sustainability benefits in a given agreement or merger by, amongst others, considering the (draft) Horizontal Guidelines.

Second, some national rapporteurs see little space for sustainability benefits, including out-of-market benefits, to completely outweigh harm to other users in the market (see, e.g., Belgium[65], Czechia[66], and Slovenia[67]). In other words, those benefits cannot entirely *per se* outweigh harm to other users in the market. The German and Luxembourgish reports observe that these benefits must accrue to the same group that is harmed by the anticompetitive conduct following the sustainability agreement.

Third, it must be stressed that the vast majority of the Member States leave the balancing act between sustainability and competition undecided. Due to the lack of practice, NCAs seem hesitant to say that they will accept sustainability benefits over restrictions on competition. In addition, the European Commission has not gone as far as the Dutch and the Greek NCAs in its approach to sustainability and competition. Even though this balancing act would be possible under current national competition laws, NCAs are prudent to follow the European Commission (see, e.g., Ireland[68] and Italy[69]).

[62] Belgian report, topic II, response to question 3, pp. 148-149.
[63] Portuguese report, topic II, response to question 3, p. 554.
[64] Swedish report, topic II, response to question 3, p. 638.
[65] Belgian report, topic II, response to question 3, pp. 148-149.
[66] Czech report, topic II, response to question 3, p. 198.
[67] Slovenian report, topic II, response to question 3, p. 596.
[68] Irish report, topic II, response to question 3, p. 428.
[69] Italian report, topic II, response to question 3, p. 448.

Finally, the Slovakian report notes that references to constitutional provisions could provide a way outside of the (national) competition law framework. In particular, Article 55 of the Slovakian Constitution provides that the national economy is based on principles of a "socially and ecologically oriented market economy'.

2.3. Digital economy and competition

2.3.1. Introduction

Making Europe fit for the digital age is the other side of the twin transition to a resilient Europe. In shaping Europe's digital future, the European Commission identifies "a fair and competitive economy" as one of the key pillars of its strategy.[70] As stressed by the institutional rapporteur, "the aim is to create a level playing field to allow innovative digital businesses to grow within the Single Market *and* compete globally".[71] Two objectives can be discerned from that statement which are reflective of a wider trend: protecting competition, whilst strengthening European industry. In the case of the digital economy, on the one hand, the European Commission seeks to ensure competitive conditions and safeguard the level-playing field in the digital Single Market. On the other hand, the European Commission aims to contribute to the global competitiveness of the European digital economy and serve its ambitions in digital sovereignty.

The question arises of whether these objectives are always aligned. "Digital competition enforcers" might take decisions that, at the surface, protect a European model of the digital market, while serving the European Union's industrial policy objectives to become globally competitive. As noted in the questionnaire, antitrust enforcement against large digital platforms and enforcement under the Digital Markets Act[72] have not been considered as being directly related to digital sovereignty. However, the fact that, under these instruments, the targets have been or would be mostly American and the complainants European might at least be indirectly connected to digital sovereignty. Therefore, part of the endeavour to understanding digital sovereignty as one of the European Union's key industrial policy goals, is to resolve how to enforce rules that regulate digital markets.

[70] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Shaping Europe's Digital Future, COM/2020/67 final (19 February 2020), p. 2.

[71] Institutional report, part III 'Competition Policy in the Context of European "Open Strategic Autonomy" (emphasis added).

[72] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265, p. 1.

To further the understanding of the interaction between "digital competition" and "digital sovereignty", the questionnaire focused specifically on cases against large digital US platforms, as well as the Digital Markets Act's expected impact on national authorities' antitrust enforcement.

2.3.2. Cases against large digital US platforms and other digital companies

Enforcing digital competition rules is commonly envisioned to protect free and fair competition in digital markets (as distinct from protecting digital sovereignty). As previous enquiries have focused on how this enforcement could contribute to safeguarding digital competition, the following briefly describes the legal framework applicable to protecting digital competition and subsequently discusses the national reports' findings on cases against large digital US platforms and other companies.

In charting the legal framework, it is useful to recall the recent addition of the harmonisation-based[73] Digital Markets Act to the antitrust disciplines. As the sibling of the Digital Services Act,[74] the Digital Markets Act shapes Europe's future digital economy by addressing concerns over "contestability" of digital markets and considerations of "fairness".[75] Once the European Commission has designated "gatekeepers", these providers of "core platform services"[76] will be subject to specific obligations and prohibitions to preserve "contestability" and "fairness". These *per se* prohibitions and obligations are largely derived from recent cases in EU competition law.[77] Corresponding to the concerns in the investigation into the Apple App Store,[78] gatekeepers may not prevent businesses from offering products at different prices through their own direct sales channel or third-party online intermediation services.[79] The Google Shopping case[80] can also be related to gatekeepers' obligation not to treat its products more favourably than those of a third party in ranking and indexing.[81] If the European Commission finds a gatekeeper at foul under the relevant obligations, it is to adopt a non-compliance

[73] Article 114 TFEU.

[74] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L 227, p. 1.

[75] Recital 7 of the Digital Markets Act.

[76] Article 2(2) of the Digital Markets Act.

[77] Articles 5, 6, and 7 of the Digital Markets Act.

[78] Case *AT.40437 Apple – App Store Practices (music streaming)*

[79] Article 5(3) of the Digital Markets Act.

[80] Commission's decision of 27 June 2017 in Case *AT.39740 – Google Search (Shopping*) and Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763.

[81] Article 6(5) of the Digital Markets Act.

decision,[82] which may include the imposition of fines[83] or periodic penalty payments.[84] Finally, the Digital Markets Act also emphasises that it is without prejudice to applying national competition law.[85]

Beyond the Digital Markets Act, traditional rules on agreements, dominance, mergers, and State aid have not lost their importance in regulating digital markets. As the institutional rapporteur observes, three instruments merit specific attention.[86] In particular, the Revision of the Horizontal Guidelines provides further clarity on data-sharing,[87] whereas the Revision of the Vertical Guidelines involves further refining of guidance for supply and distribution agreements.[88] However, most importantly, the recent Guidance on Article 22 EUMR might compel the Member States to submit important transactions, despite not meeting certain thresholds, to the European Commission.[89] With concurrence of the General Court in *Illumina/Grail*,[90] the European Commission could review proposed transactions that would normally escape its jurisdiction because the transactions do not satisfy the turnover thresholds as specified by the EU Merger Regulation. This is of particular importance in light of so-called "killer acquisitions", which denote a practice of larger established firms acquiring potential competitors. As start-ups' contributions to innovation in the digital economy have not gone unnoticed,[91] the recent Article 22 EUMR Guidance might be of particular relevance for protecting competition in digital markets.

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[82] Article 29 of the Digital Markets Act.

[83] Article 30 of the Digital Markets Act.

[84] Article 31 of the Digital Markets Act.

[85] Article 1(6) of the Digital Markets Act.

[86] Institutional report, part III 'Competition Policy in the Context of European "Open Strategic Autonomy".

[87] The Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Draft Horizontal Guidelines") are available on the public consultation webpage, see European Commission, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, 1 March 2022, at < https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en >. See in particular section 6 of the Draft Horizontal Guidelines.

[88] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2022, L 134, p. 4; European Commission, Communication from the Commission, Commission Notice: Guidelines on vertical restraints, OJ 2022 C 248, p. 1 ("Vertical Guidelines"). See in particular section 8.2.3 of the Vertical Guidelines.

[89] European Commission, Communication from the Commission: Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ 2021 C 113, p. 1.

[90] Case T-227/21, *Illumina v Commission*, EU:T:2022:447, which is currently on appeal, see Case C-611/22 P.

[91] See e.g. European Innovation Council and SMEs Executive Agency, The European Innovation Council Impact Report 2022, 2022, at < https://eic.ec.europa.eu/system/files/2023-02/2022-EIC-Impact-Report-141222.pdf >. Start-ups are a particular group of entities eligible for support under the European Innovation Council's programmes.

The institutional rapporteur recalls that the Digital Markets Act "minimises the detrimental structural effects of unfair practices *ex ante*, without limiting the ability to intervene *ex post* under EU and national competition rules".[92] Against that backdrop, the authors of this report stress that the manner in which digital competition policy is enforced – both by the European Commission and the NCAs – will be of great significance for protecting competition within the digital economy and the competitiveness of digital Europe.

As the XXIX[th] FIDE congress proceedings have demonstrated, enforcement at both the EU and Member State level is fundamental to achieving the European Union's objectives in data protection and the digital economy in the wider world. On the topic of protecting competition in the digital economy, many national reports signalled that competition enforcement should be "easier, faster, and stronger".[93] However, the general rapporteurs at that FIDE congress observed that aggressive enforcement regimes ignored that competition in digital markets takes place not within the market but *for* the market. They commented that competition authorities too aggressively enforce competition and deem digital firms easily dominant due to narrow market definitions and high market shares in their assessments.[94]

In contrast, this report sheds further light on enforcing digital competition that could serve the European Union's geopolitical ambitions. As suggested above, the division between US-based defendants and EU-based complainants could be an indication that enforcing antitrust rules and specifically the Digital Markets Act could be used to exclusively benefit Europe's vision of what a digital economy ought to be as well as to protect European digital sovereignty.[95] As such, it could be indicative of competition policy enforcement within the limits of the European Union's industrial policy.[96]

To further enquire into the potential instrumentalisation of digital competition enforcement, the questionnaire attempted to take stock of NCAs' enforcement against large digital US platforms, including the type of proposed remedies. In

[92] Institutional report, part III 'Competition Policy in the Context of European "Open Strategic Autonomy".

[93] N. Petit and P. Van Cleynenbreugel, 'General Report Topic 3: EU Competition Law and the Digital Economy' in FIDE, EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution, The XXIX FIDE Congress in The Hague, 2020 Congress Publications, Vol. 3, p. 57.

[94] Ibid.

[95] Schwab, Member of Internal Market Committee in the European Parliament, emphasised that the envisaged Brussels Effect to result from the Digital Markets Act and the Digital Services Act, see A. Schwab, "The EU ushered in a new era of digital regulation. Will the US follow suit?", The Parliament, 30 June 2022.

[96] M. Broadbent, "Implications of the Digital Markets Act for Transatlantic Cooperation", Center for Strategic & International Studies, 15 September 2021, at < https://csis-website-prod.s3. amazonaws.com/s3fs-public/publication/210915_Broadbent_Implications_DMA.pdf?VersionId=xiVAF5jjSEdwakIvtNE3v2dSWlVdIUTG>, p. 19.

addition, it enquired into NCAs' perception of how the Digital Markets Act could affect competition law-based cases against large digital platforms.

In the first place, the national reports show that NCAs have not shied away from finding against large digital US platforms. To illustrate, the newly added Section 19a of the German competition law enables the German NCA to exercise "preventive abuse control in the area of digital ecosystems" and intervene "earlier" compared to traditional antitrust proceedings.[97] In its proceedings initiated against Amazon, the German NCA has effectively increased access for customers to European retailers in online trade.[98] The Italian report identifies important cases against various so-called "GAFAM" companies.[99] For instance, the Italian NCA found against Google when it refused access to its Android Auto platform to allow for an electric mobility service.[100] For reserving the marketplace for own-branded products for some operators, the Italian NCA found against Apple and Amazon, as the reservation was not based on qualitative characteristics.[101] When only third-party sellers using Amazon's logistics service were granted increased visibility on the platform, the Italian NCA fined Amazon over one billion euros for abuse of dominance following an *ex officio* investigation.[102] In addition to sanctions, the Italian cases show that platforms and market conduct will be accordingly reconfigured in favour of the GAFAM companies' competitors. Already having looked into app stores in a market study,[103] the Dutch NCA found the requirement to use Apple's in-app payment services and accordingly pay a considerable commission to Apple an abuse of dominance.[104] Despite Apple's attempts to alleviate the NCA's concerns, it was subject to EUR 50 million in penalty payments.[105] After sharing an Issues Paper on Digital Ecosystems, the Portuguese NCA launched an investigation against Google in search advertising.[106] The latter was relieved from its investigation when the European Commission intervened to assume the investigation.[107]

[97] German report, topic II, response to question 7, pp. 319-323.

[98] See further German report, topic II, response to question 7, pp. 323-324.

[99] Italian report, topic II, response to question 7, pp. 455-456. For completeness, GAFAM refers to Google, Apple, Facebook, Amazon, and Microsoft.

[100] Case A529/2021, *Google/Compatibilità App Enel X Italia Con Sistema Android Auto*. See further Italian report, topic II, response to question 7, p. 456.

[101] Case I842/2021*, Vendita Prodotti Apple e Beats Su Amazon Marketplace*. See further Italian report, topic II, response to question 7, p. 456.

[102] Case A528/2021, *FBA Amazon*. See further Italian report, topic II, response to question 7, p. 456.

[103] Dutch NCA, Report: Market study into mobile app stores, 11 April 2019, ACM/18/032693.

[104] District Court of Rotterdam, 24 December 2021, ECLI:NL:RBROT:2021:12851 (Apple). See further Dutch report, topic II, response to question 7, p. 499.

[105] Ibid.

[106] Portuguese report, topic II, response to question 7, p. 560.

[107] Ibid.

Nevertheless, a sizeable number of NCAs has not brought any cases against large digital US platforms for various reasons. For many, such as the Belgian NCA, the digital market landscape has not required intervention, but they accept that intervention might be necessary at a later stage.[108] For some NCAs, it has not been possible to act. For example, the Greek NCA is still undergoing reform whereby its competence would be extended to matters falling outside the Digital Markets Act. Other Member States have shown no particular interest in those platforms.[109] Similarly, the Norwegian NCA has not brought cases against large digital US platforms either, especially since it focuses on enforcing EEA law, whereas the European Commission would be most suited to take actions against those platforms.[110]

Various national reports also cover NCAs' enforcement practice against digital companies other than large digital US platforms. In Czechia, the NCA has at least twice dealt with non-US digital companies that are indirectly related.[111] The Czech report observes that there is a claim for follow-on damages before the courts, which is related to a preliminary reference involving Google. As such, private enforcement might indirectly involve large digital US platforms. In Ireland, the NCA dealt with Booking.com and Ticketmaster, confirming that the competition rules apply in these digital spheres.[112]

Other national reports also focus on cases against large digital US platforms outside the realm of competition rules. Despite the absence of antitrust or merger cases against those platforms, Hungary's Supreme Court has dealt with a Google-adverse claim under the Hungarian law on unfair commercial practice asked, albeit without success for the claimants.

Finally, if NCAs do not have the requisite resources for bringing cases in general, they are even less keen to bring resource-draining cases against large digital US platforms. To illustrate, the Croatian report emphasises that, as a "young" organisation, the Croatian NCA's limited resources are already dedicated to enforcing competition law over the full spectrum and no particular attention is placed on large digital US platforms alone.[113]

[108] Belgian report, topic II, response to question 7, pp. 151-152.

[109] Swedish report, topic II, response to question 7, pp. 639-640; Slovenian report, topic II, response to question 7, p. 597; Slovakian report, topic II, response to question 7, p. 587.

[110] Norwegian report, topic II, response to question 7, p. 518.

[111] Czech report, topic II, response to question 7, p. 200.

[112] Irish report, topic II, response to question 7, pp. 431-432.

[113] Croatian report, topic II, response to question 7, pp. 183-184.

2.3.3. The Digital Markets Act's impact on NCAs' competition-based enforcement and risk of inconsistencies

The Digital Markets Act stresses that "[t]he Commission is the sole authority empowered to enforce this Regulation".[114] It is useful to recall the provisions of Article 1(5) and 1(6) of the Digital Markets Act. According to Article 1(5), the Member States may not impose further obligations on gatekeepers, but are not precluded from imposing further obligations for matters falling outside the Digital Markets Act. Article 1(6) of the Digital Markets Act provides that it is without prejudice to the application of Articles 101 and 102 TFEU and the EU Merger Regulation as well as their national equivalents as far as they do not concern "the imposition of further obligations on gatekeepers".

National reports, such as Romania's, merely confirm the possibility that the Digital Markets Act is applied in conjunction with applicable competition law.[115] Some stress that there is sufficient clarity or even welcome the degree of clarity on the scope of the Digital Markets Act in light of Articles 1(5) and 1(6) Digital Markets Act.[116] The Slovakian report also indicates not to expect any significant issues under the Digital Markets Act for its competition enforcement.

A variety of NCAs would certainly not exclude enforcing competition where the Digital Markets Act leaves appropriate scope. To illustrate, the Belgian NCA seems to be keen to intervene where it would consider this to be "necessary".[117] The Spanish[118] and Dutch[119] reports explicitly stress the need for clear coordination mechanisms to enable NCAs in their enforcement.

However, before an NCA may act, it needs to be clear at what point NCAs are left such a scope. Various national reports point to legislative developments in their jurisdictions that might call for – not more harmonisation or approximation – but an increased risk of fragmentation. Following the introduction of Section 19a of the German competition act, the German NCA may engage in "preventive abuse of control".[120] That control could include ordering divestiture when the German NCA finds disruptions of competition.[121] As the national rapporteurs keenly

[114] Digital Markets Act, recital 91.

[115] Romanian report, topic II, response to question 7, pp. 573.

[116] Swedish report, topic II, response to question 7, pp. 639-640; Polish report, topic II, response to question 7, pp. 538-539; Luxembourgish report, topic II, response to question 7, p. 482.

[117] Belgian report, topic II, response to question 7, p. 152.

[118] Spanish report, topic II, response to question 7, p. 623.

[119] Dutch report, topic II, response to question 7, pp. 500-501.

[120] German report, topic II, response to question 7, pp. 319-323.

[121] Ibid.

observe, the application of this new provision "depends on its classification as a norm under antitrust or regulatory law", which will eventually be clarified by the CJEU.[122] The Italian report shares various points of further reflection on the scope and effectiveness of Article 1(6) of the Digital Markets Act. First, like the German legislator, Italy has recently adopted an amendment to the provision on abuse of dominance that relates specifically to digital platforms.[123] A legal presumption of "economic dependence" would be present where a digital platform has a decisive role to reach end-users or suppliers.[124] Second, it could be argued that NCAs are at times better placed to promptly react to concerns in the digital economy.[125] Third, there could be a risk of breaching the principle of *ne bis in idem* if a decision under one set of rules precedes the other without any further guidance.[126]

At any rate, the differences in perception of NCAs might be explained by the fact that the Digital Markets Act will only start to apply from 2 May 2023 onwards[127] and, accordingly, has not yet been tested judicially.[128]

At this point in time, it remains speculation to concretely measure what impact the Digital Markets Act will have on NCAs' enforcement activities.

2.4. Industrial policy and competition

2.4.1. Introduction

In its focus on industrial policy, the questionnaire posed questions related to mergers, State aid, and the impact of trade considerations on competition law analysis.

2.4.2. Industrial policy in mergers

With respect to mergers, national rapporteurs were asked to report on *Siemens/Alstom*[129] in particular as well as the possibility of including industrial policy considerations in mergers.

The highly political *Siemens-Alstom* project was one of the most controversial transactions in recent years. According to the European Commission, the merger would have harmed competition in markets for railway signalling systems and very high-speed trains. The main arguments in favour of allowing the merger

[122] Ibid.
[123] Italian report, topic II, response to question 7, p. 458.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Article 54 of the Digital Markets Act.
[128] Portuguese report, topic II, response to question 7, pp. 560-561.
[129] Case M.8677 *Siemens/Alstom*, 6 February 2019.

related to the global nature of the markets in which the new entity would have been better able to withstand pressure from competitors around the globe.

The institutional rapporteur notes that during the evaluation of the procedural and jurisdictional aspects of EU merger control, the Commission Staff Working Document[130] explicitly avoided taking a position in these debates, because they do not discuss the procedural aspects and "in some cases, go well beyond EU merger control".[131]

The national reports display a variety of positions. As expected, a large number of the Member States is opposed to the transaction for exactly the reason the European Commission listed: the transaction would have restricted competition in the EU markets concerned. The Polish report, for example, notes that the situation did not warrant a "European champion", whereas having such a big group would have distorted competition with other undertakings on the internal market.[132] The Swedish report cites concerns over consumer welfare, transparency, and legal certainty.[133] Officials of several NCAs referred to the lack of economic foundation for the argument in support of the merger and warned against the risks of soft merger control.[134] Other national reports observe that their NCAs simply did not oppose the European Commission's decision, whereas several reports do not indicate any comments or clear positions from their NCAs.[135]

The impression from the national reports is that situations such as that in *Siemens/Alstom* have not arisen at Member State level but the Romanian report indicates that, in *Acetate*,[136] the NCA engaged in an analysis that took into account a number of likely entrants from China.[137]

When it comes to allowing industrial policy considerations at large in merger control, the national reports display a variety of views amongst NCAs.

Several NCAs are in favour of relying more on industrial policy. To illustrate, the French NCA has been receptive to a certain degree of industrial policy, but attempts

[130] Institutional report, Part III. Competition Policy in the Context of a European "Open Strategic Economy".

[131] European Commission, Commission Staff Working Document, *Evaluation of procedural and jurisdictional aspects of EU merger control*, 26 March 2021, SWD (2021) 66 final.

[132] Polish report, topic II, response to question 4, pp. 533-534.

[133] Swedish report, topic II, response to question 4, pp. 638-639.

[134] Portuguese report, topic II, response to question 4, p. 555.

[135] See e.g. Bulgarian report, topic II, response to question 4, p. 173; Czech report, topic II, response to question 4, p. 198; Greek report, topic II, response to question 4, p. 375; Croatian report, topic II, response to question 4, p. 181; Hungarian report, topic II, response to question 4, p. 400; Slovenian report, topic II, response to question 4, p. 596.

[136] Decision of the Competition Council 3/14.02.2007 – Celanese Corporation/Acetate Products.

[137] Romanian report, topic II, response to question 4, pp. 572-573.

to safeguard competition on the merits through testing three criteria,[138] namely the potential disappearance of the enterprise, the absence of a less restrictive acquirer, and the absence of consumer harm.[139] Italian law requires to take into consideration "the competitive situation of the national industry".[140] However, the Italian report observes that this requirement has become a dead letter, because the NCA has continued to control mergers purely based on competition considerations.[141] The Belgian NCA typically strictly adheres to the test of a significant impediment of effective competition ("SIEC"), but it considers that under a total welfare standard it might incorporate out-of-market-benefits.[142] Under Bulgarian law, a more dynamic interpretation of "improvement of the business activity" could also take account of industrial policy concerns. Notably, Irish law has been amended in order to account for killer acquisitions and harm to innovation as part of industrial policy.[143] Some NCAs could also integrate concerns over supply chains into industrial policy [144] or do not explicitly rule out that industrial policy is to be discarded.[145]

However, many NCAs prefer to limit the merger control analysis to competition concerns alone. As the Czech report finds, national merger control only allows for competition-based considerations whereby there is no place for industrial policy.[146] Even though the parameters of competition are employed in merger control, some jurisdictions would allow for government interference. For example, the decision following merger control in Germany may become subject to a ministerial authorisation procedure.[147] It is important to note that international competitiveness may be considered in such a procedure.[148] Similarly, various Member States envisage that the NCA's mandate is limited to competition concerns, but that a Minister or consortium of Ministers may assess concentrations based on general interest criteria other than competition.[149]

[138] French report, topic II, response to question 5, p. 235.

[139] Ibid.

[140] Italian report, topic II, response to question 5, p. 541.

[141] Ibid.

[142] Belgian report, topic II, response to question 5, p. 150.

[143] Irish report, topic II, response to question 5, p. 430.

[144] Croatian report, topic II, response to question 5, pp. 181-182.

[145] Dutch report, topic II, response to question 5, p. 497; Greek report, topic II, response to question 5, pp. 376-377.

[146] Czech report, topic II, response to question 5, p. 199. See also Finnish report, topic II, response to question 5, p. 214; Norwegian report, topic II, response to question 5, p. 517; Romanian report, topic II, response to question 5, p. 572-573; Swedish report, topic II, response to question 5, p. 639; and Slovakian report, topic II, response to question 5, pp. 585-586.

[147] German report, topic II, response to question 5, p. 313.

[148] Ibid.

[149] Compare Dutch report, topic II, response to question 5, p. 497; Spain report, topic II, response to question 5, p. 619; Portuguese report, topic II, response to question 5, p. 557; Hungarian report, topic II, response to question 5, p. 500.

Finally, there is one jurisdiction where there is no merger control, namely Luxembourg.[150]

It is hard to observe from the national reports whether a trend is visible. There are tools available, but the authorities are sparsely making use of them to strengthen industry. It is therefore unfortunate that the European Commission chose not to enter this debate in the above-mentioned Staff Working Document on EU merger control.

The above describes what has been or could be possible under the available national tools. However, for many jurisdictions, it appears that NCAs may, to some extent, incorporate concerns that are not traditionally considered "competition" concerns in their merger analyses. Even if the competition analyses do not permit for industrial policy considerations, some Member States allow for the government to overturn the decision. The question thus becomes to which extent policymakers want to reconfigure national competition tools for industrial policy goals.

One of those industrial policy goals could include EU industrial policy. A question arises of whether EU, and not national, industrial policy would be able to override competition considerations in mergers. Here, it is necessary to distinguish between the general interests that are national, European, or both. Depending on the jurisdiction, it could be argued that EU industrial policy could fit into examples of national industrial policy, such as security.[151] At any rate, if one were to accept the argument that certain markets have become truly global, then the degree to which one aspires to strengthen the national market might then depend on the rise of an industrial champion, at the national or even at the European level, to compete with large firms outside the European Union.

2.4.3. Industrial policy in State aid

Of all the areas covered by EU competition policy, State aid control is the one that lends itself most naturally to industrial policy-making.

In the early years of the European project, there was a fear that a subsidy race between the Member States would imperil the common market. In addition to a growing body of case-law, the institutional rapporteur rightly stresses that State aid policy has been refined through detailed guidelines and block-exemption rules over the last decades.[152]

[150] Luxembourgish report, topic II, response to question 5, p. 480.

[151] Security is further explored in Section 3 of the present report.

[152] Institutional report, Part IV. "Open Strategic Autonomy": A New EU Trade Policy and Relevant "Level Playing Field" Instruments.

Especially when antitrust and merger cases tend to more frequently appear before national courts, the questionnaire sought to establish whether national courts use the tools available to clarify the scope of State aid control.

The institutional rapporteur notes that "EU State aid rules play an important role in the Commission's wider competition toolbox to support the EU's industrial policy goals and its 'open strategic autonomy'".[153] As both Industrial Strategies strongly signal, State aid control is of great importance in building a resilient Europe: that control allows for support when the situation requires, whilst in principle it aims to preserve competition in the Single Market.[154] Both the COVID-19 Temporary Framework[155] and the Ukraine-related Temporary Crisis Framework[156] were important testing grounds for the available flexibilities. As the institutional rapporteur points out, State aid control was already undergoing various updates. To illustrate, first, the framework on Important Projects of Common European Interest ("IPCEI") was being revised.[157] Second, the Guidelines on State aid for climate, environmental protection and energy cover an entire framework for de-carbonisation and increased sustainability.[158] Third, the revised Regional State Aid Guidelines focusses on the development of least-favoured regions.[159] Additionally, REPowerEU was presented as one of the most recent instruments to deal with concerns over the energy dependency in Europe.[160]

Based on the national reports, a sizeable number of Member States supports the idea of using EU State aid to conduct industrial policy. Under the guidance encapsulated in the IPCEI Communication, many important projects could be

[153] Institutional report, Part III. Competition Policy in the Context of a European "Open Strategic Economy".

[154] 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); 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 recovery, COM(2021) 350 final (5 May 2021).

[155] European Commission, Communication from the Commission: Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ 2020 CI 91, p. 1.

[156] European Commission, Communication from the Commission: Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ 2022, CI 131, p. 1.

[157] European Commission, Communication from the Commission: Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2021 C 528, p. 10.

[158] European Commission, Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, OJ 2022 C 80, p. 1.

[159] European Commission, Communication from the Commission Guidelines on regional State aid, OJ 2021 C 153, p. 1.

[160] 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 RePowerEU Plan.

initiated to strengthen the European industry.[161] Some national reports note that it is especially welcome if State aid contributes to the competitiveness of particular sectors as well as regions.[162] The Belgian report[163] also addresses the potential of a "matching clause", such as in the RDI Framework.[164] Such a clause refers to the circumstances where an applicant for State aid can demonstrate that a competitor enjoyed a higher aid intensity than is permissible under the RDI Framework for a comparable project in a third country. The aid intensity of the aid applicant would then be "matched" with that of the competitor. Other Member States, such as Poland and Sweden, seem less keen on using State aid to drive industrial policy.[165]

However, it appears that the Member States have not intensely relied on tools to clarify the scope of the State aid disciplines. Only a handful have actively sought guidance from the European Commission or the CJEU on matters of State aid.[166] In turn, the European Commission has submitted amicus curiae briefs in various State aid cases over Europe.[167]

The Green Deal is forcing the European Union to choose the extent to which its Single Market is purely based on competition on the merits. Recent experiences under the COVID-19 Temporary Framework and the Ukraine-related Temporary Crisis Framework have shown that State aid can be flexible when it needs to be.[168] However, the Green Deal Industrial Plan will go even further[169], underpinned by the Temporary Crisis and Transition Framework. At its core, the Green Deal Industrial Plan aims to "simplify, accelerate, and align incentives to preserve

[161] Compare Spanish report, topic II, response to question 8, p. 626; Finnish report, topic II, response to question 8, p. 217; French report, topic II, response to question 8, p. 251; Croatian report, topic II, response to question 8, p. 184; Hungarian report, topic II, response to question 8, p. 401; Italian report, topic II, response to question 8, p. 460; Luxembourgish report, topic II, response to question 8, p. 482; Romanian report, topic II, response to question 8, p. 576; Swedish report, topic II, response to question 8, pp. 639-641.

[162] Bulgarian report, topic II, response to question 8, p. 174.

[163] Belgian report, topic II, response to question 8, p. 153.

[164] European Commission, Communication from the Commission, Framework for State aid for research and development and innovation, C(2022) 7388 final, para. 97.

[165] Polish report, topic II, response to question 8, pp. 539-540.

[166] Compare Belgian report, topic II, response to question 9, p. 154; Greek report, topic II, response to question 9, p. 382; French report, topic II, response to question 9, pp. 252-253; Dutch report, topic II, response to question 9, pp. 501-502.

[167] Italian report, topic II, response to question 9, p. 464; Luxembourgish report, topic II, response to question 9, p. 483; Romanian report, topic II, response to question 9, p. 589; Swedish report, topic II, response to question 9, p. 642.

[168] European Commission, Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ 2020 C 91I, p. 1; European Commission, Communication from the Commission, Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ 2022 C 131I, p. 1.

[169] 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 Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final (1 February 2023).

competitiveness and attractiveness of the EU as an investment location for the net-zero industry".[170] In more concrete terms: ceilings are raised; deadlines are extended; and scope is expanded. Commissioner Vestager admits that the Temporary Crisis and Transition Framework entails a "significant risk for the integrity of the single market and for our cohesion".[171]

One instrument that might in the future interact with State aid is the Single Market Emergency Industry ("SMEI").[172] The European Commission envisages the SMEI to focus on removing obstacles to trade, preserving free movement, and making goods available that are essential in times of crisis. Even though the European Commission has stressed that the instrument will be in line with EU competition rules – which includes State aid control – it is not clear what the reach is of the without-prejudice clause under Article 2(5) of the proposed SMEI.[173] Despite the Member States' increased involvement under the SMEI, that cooperation would submit to the primacy of EU competition law as the European Commission steers the latter's course.

2.4.4. Impact of trade considerations on competition

As trade and competition policies might seem to converge, this report also considers whether there is any practice that takes into account the extent to which trade defence instruments might affect competition analyses.

As the Greek report recalls, legal or regulatory restrictions can be decisive for defining the relevant market.[174] The Greek report comments that legislative instruments on investment screening and foreign subsidies could also be considered indirect trade defence instruments. The Italian report[175] notes that, although the specific argument was not successfully raised, trade considerations are important for mergers, agreements, and unilateral conduct, which was confirmed by *Finbieticola/Eridania*.[176] Even though the Croatian report does not identify any case in which trade considerations affected the competition analysis, the authors

[170] Institutional report, Part III. Competition Policy in the Context of a European "Open Strategic Economy".

[171] János Allenbach-Ammann, "EU's Vestager warns of fragmentation risks, but expands state aid" (2 February 2023) *Euractiv.com*.

[172] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98, COM(2022) 459 final (19 September 2022).

[173] Article 2(5) of the SMEI reads: "This Regulation is without prejudice to Union competition rules (Articles 101 to 109 TFEU and implementing regulations), including antitrust, merger and State aid rules." On the potential friction between competition and non-competition rules in the context of a without-prejudice clause, see Section 2.3 "Digital economy and competition" above.

[174] Greek report, topic II, response to question 10, pp. 383-384.

[175] Italian report, topic II, response to question 10, p. 465.

[176] Competition and Market Authority, decision of 20 June 2002, C5151, *SECI-COPROB-FINBIETICOLA/ERIDANIA*, in Bollettino n. 24/2002.

of that report do not exclude the possibility that trade defence instruments can be a limiting factor in regard to third-country supply. As such, the Croatian report notes that the existence of trade defence instruments will be considered in defining the relevant market or estimating the level of market power.

Overall, despite a paucity of practice amongst NCAs, trade instruments can be conceptualised as factors impeding competition.

2.5. Conclusions

Under "open strategic autonomy", both competition and trade policy could be enforced in a way that aligns with the geopolitical dimension of European Union policymaking. Competition policy has long been practised with an inward perspective: how does certain market conduct affect competition in the internal market? At the same time, a question arises as to how competition in the internal market and the European Union's policy challenges affect one another, both inside and outside the borders of our continent?

To enquire into that relationship, this section considered the twin green and digital transitions into a resilient Europe as part of the European Commission's "open strategic autonomy" strategy. Therefore, it focused on how competition policy could be instrumentalised to advance objectives in respect of sustainability, the digital economy, as well as increasing the resilience of European industries.

Enforcing competition whilst pursuing sustainability objectives has stirred debate at the European and national levels. The national reports show that the integration of such a non-competition interest is possible, but that the degree to which sustainability is accounted for varies greatly amongst national regimes. When Article 101(1) TFEU applies, while the majority of NCAs have a positive view of sustainability agreements, there is a general hesitance as to how the balancing of environmental concerns and competition concerns should be carried out. This can be explained to some extent by the novelty of the issue and the lack of actual practice.

In respect of merger control, the diversity of the Member States' merger control provisions yield different outcomes. General competition provisions focusing on "economic progress", efficiency benefits, or the avoidance of competitive harm seem to be, to a certain extent, amenable to sustainability considerations. In integrating sustainability into merger control, some Member States' competition laws include explicit references to the environment, whereas, in other Member States, there should be reliance on other legal instruments such as the Constitution.

Building on years of competition law enforcement, the European Union has revised the legal framework in which it seeks to guarantee "contestability" and "fairness"

in digital markets. A remarkable step forward has been the introduction of the Digital Markets Act, which followed important developments in the decisional and judicial practice of the EU institutions as well as developments in several Member States. Several trends for the geopolitical dimension of EU competition policy can be discerned from the revised legal framework as contextualised by enforcement activity. First, the relevance of the digital economy for Europe's competitiveness has become a top priority for the European Commission in both its internal and external policymaking. Second, the Digital Markets Act has introduced additional powers for the European Commission to discipline gatekeepers through early involvement and setting fines. In addition to the recent Guidance on Article 22 EUMR, the European Commission could become more proactive in its interventions where it enjoys more space to take a decision to clear particular concentrations when the Member States notify otherwise "escaping" transactions. Third, the dividing line between the European Commission's and the Member States' prerogatives to enforce competition policy in digital markets has not been clearly demarcated. In addition to the "without prejudice" clause in Article 1(6) of the Digital Markets Act, the introduction of national laws specifically related to digital platforms might cause further fragmentation in the regulation of the digital economy.

Finally, the twin transition to a resilient Europe raises the question of whether public intervention in the structure of various markets may be justified by pursuing other policy goals. Until recently, the European Commission has not committed to taking sides in the debate of instrumentalising merger control for industrial policy reasons. In a number of Member States, there are certain merger control tools allowing for the incorporation of industrial policy under "economic progress" or similar qualifiers. In addition, a handful of Member States has had experience with ministerial intervention after a negative decision under merger control.

At the same time, the European Commission's activities in State aid control have exponentially increased. The national reports reveal that State aid is generally considered a suitable tool to drive industrial policy, but courts have only rarely interacted with the EU institutions in dealing with State aid-related issues.

3. Enforcing trade policy: FDI control, foreign subsidies, and supply chain due diligence

3.1. Introduction

EU trade and industrial policy has become more assertive and inward-looking. The European Union is seeking to protect critical infrastructure against security and public order threats, divert the impact of foreign subsidies on conditions of competition in the EU internal market, ensure access to critical products and services and overall ensure a level playing field in global trade in respect of environmental and social governance. That trade (and industrial) policy has resulted in a wave of new legal instruments, often attributing new powers to the European Commission.

Many of these "geopolitical" instruments developed or under consideration by the EU institutions will reduce EU market access and/or increase the costs of doing business in the European Union. This is the case, for example, with increased FDI control, the Foreign Subsidies Regulation,[177] and various other "level playing field" (proposed) instruments allowing the European Union to directly or indirectly limit market access for foreign players that are subject to less stringent rules in their jurisdictions. In practice, those effects might 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 might 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. At the same time, embedded in the European Union's "open strategic autonomy", is an attempt to reconcile the competitiveness of the EU economy, with sustainability and fairness as well as assertive rules-based cooperation with other trading partners.[178] As the institutional rapporteur puts it, the objective of the European Union is "to continue to build on (and benefit from) openness – consistent with its commitment to open and fair trade with diversified and sustainable global value chains – while assertively defending its interests, protecting the EU's economy

[177] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022 L 330, p. 1 ("Foreign Subsidies Regulation").

[178] 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 (18 February 2021), pp. 4-5.

from unfair trade practices and ensuring a level playing field both internally and globally".[179]

As part of this new policy, the European Union has defined three main objectives of its trade policy for the medium term: (i) supporting the recovery and fundamental transformation of the EU economy in line with its green and digital objectives; (ii) shaping global rules for a more sustainable and fairer globalisation; and (iii) increasing the European Union's capacity to pursue its interests and enforce its rights, including autonomously where needed.[180] To achieve these objectives, the European Union has earmarked six critical areas relating to: (i) WTO reform; (ii) supporting the green transition and promoting responsible and sustainable value chains; (iii) supporting the digital transition and trade in services; (iv) strengthening the European Union's regulatory impact; (v) strengthening the European Union's partnership with neighbouring, enlargement countries and Africa; and (vi) strengthening the European Union's focus on implementation and enforcement of trade agreements, and ensuring a level playing field.[181]

The new instruments aimed at protecting the level playing field discussed in this report (and covered by the responses of national rapporteurs to the questionnaire for this topic) are not designed in the same manner. Nor are those the sole instruments seeking to achieve this objective. As the institutional rapporteur notes, other instruments include, for example the anti-coercion, international procurement and single market emergency instruments, and the European Critical Raw Materials Act.[182] For the purposes of this report, the FDI Screening Regulation, the Foreign Subsidies Regulation and the proposal for a corporate sustainability due diligence directive ("CSDD proposal") were selected. However, that selection does not pre-empt the discussion of other relevant instruments at the FIDE Conference.

[179] Institutional report, topic II, p. 120.

[180] 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 (18 February 2021), pp. 9-10.

[181] Ibid., pp. 10-11.

[182] Institutional report, pp. 139-143.

3.2. FDI control

3.2.1. Introduction

Inward investment is more and more subject to regulatory controls. Increasingly FDI screening is used as a tool of government intervention into various types of security, public order and related risks linked with those investments.[183]

That control often applies together with merger control and also controls of the transactional financial sector.[184] Concerns have been raised about the potential interplay between FDI control and merger control. As explained by the institutional rapporteur, the object of these controls is different: one concerns security and public order risks, the other focuses on effects on competition.[185] That interplay is currently being considered by the CJEU after the Budapest High Court requested a preliminary ruling from the CJEU on whether the Hungarian FDI screening regulation complies with Article 65(1)(b) TFEU, taking into account the FDI Screening Regulation,[186] and whether the mere fact that the European Commission authorised a concentration under merger control precludes a Member State subjecting the same transaction to its FDI screening.[187] That ruling might affect how both types of control co-exist in practice.

Reasons for increased interest in FDI screening include new sources of FDI, the role of State actors in investments, access to data in a digitalised economy and geo-political and economic incentives.[188] Access to critical infrastructure and data, foreign control over supply chains and acquisitions of technology are all factors prompting many States (in and outside the European Union) to introduce or strengthen their FDI screening toolkit. Although FDI control is commonly described as not being part of the European Union's industrial policy,[189] nor is it entirely disconnected from it.

[183] There are also calls for restricting outward FDI. In its 2023 work programme, the Commission proposes to "examine whether additional tools are necessary in respect of outbound strategic investment controls". European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2023, A Union standing firm and united, COM(2022) 548 final (18 October 2022), p. 8.

[184] On the relationship between FDI control and merger control, see Case C-106/22, Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary) lodged on 15 February 2022 – Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter.

[185] Institutional report, p. 139. The institutional rapporteur also takes the view that where FDI consists of a concentration within the meaning of the EU Merger Regulation, Article 21 of that regulation applies.

[186] 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.

[187] Case C-106/22, Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary) lodged on 15 February 2022 – Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter.

[188] See, e.g., OECD, The Relationship between FDI screening and merger control reviews, OECD Competition Policy Roundtable Background Note (OECD, 2022), p. 9.

[189] Institutional report, p. 139.

On 11 October 2020, the FDI Screening Regulation entered into force.[190] Adopted in March 2019, it establishes the framework for FDI control at Member State level. In particular, it covers the Member States' procedures to assess, investigate, authorise, condition, prohibit or unwind FDI, and introduces cooperation between the Member States and with the European Commission. Apart from the FDI Screening Regulation and any EU delegated acts which might be adopted,[191] the European Commission also resorts to softer instruments to induce the Member States to apply screening in particular areas of investment or to investments of particular origin,[192] and engages in technical meetings and the exchange of best practices.[193]

Whilst FDI falls within the common commercial policy,[194] the Member States play a significant role due to their responsibility for safeguarding their national security (Article 4(2) of the Treaty on European Union ("TEU")) and their right to act for protecting their essential security interests (Article 346 TFEU).[195] Overall, the FDI Screening Regulation seeks to find a balance between respecting the Member States' competences and ensuring sufficient EU control as well as cooperation with and between the Member States.

The considerations underlying the need for FDI control are not entirely isolated from the causes for scrutinising the impact of foreign subsidies on conditions on the internal market (also discussed as part of this topic). In fact, there can be an overlap between FDI control and the control to be exercised over foreign subsidies. In part, this is recognised in Article 4(2)(a) of the FDI Screening

[190] The first evaluation of the functioning and effectiveness of the FDI Screening Regulation is scheduled for 12 October 2023 and every five years thereafter (see Article 15(1) of the FDI Screening Regulation).

[191] See Article 16 of the FDI Screening Regulation. For example, the Commission has amended the Annex to the FDI Regulation by Commission Delegated Regulation (EU) 2021/2126 of 29 September 2021 amending the Annex to Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, OJ 2021 L 432, p. 1.

[192] See, e.g., European Commission, Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ 2022 CI 151, p. 1, calling for, notably, systematically using screening mechanisms to assess and prevent the threats related to Russian and Belarusian investments on grounds of security and public order, and close cooperation between the authorities administering the sanctions and screening investments; European Commission, Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), OJ 2020 CI 99, p. 1, focusing on the role of FDI screening in the case of a public health emergency.

[193] European Commission, Report from the Commission to the European Parliament and the Council, Second Annual Report on the screening of foreign direct investments into the Union, SWD(2022) 219 final, COM(2022) 433 final (1 September 2022), p. 7.

[194] Article 207(1) TFEU; Opinion 2/15 (Singapore), Opinion of 16 May 2017, EU:C:2017:376, paras. 81-109. See also recital 6 in the preamble to the FDI Screening Regulation.

[195] See also Article 1(2) of the FDI Screening Regulation.

Regulation which states that, in assessing whether a FDI is likely to affect security or public order, account may be taken of the question of "whether the foreign investor is directly or indirectly controlled by the government, …, of a third country, including through ownership structure or significant funding". This potential overlap can also be illustrated by referring to the current interest of the European Union and the Member States in promoting and subsidising the EU microchips and semiconductor industry. At the same time, that domestic industry might be the target of foreign takeovers, causing the need to block that FDI and/or consider whether to block the takeover due to the impact of foreign subsidies.[196]

FDI screening protects national security interests by controlling investment in strategic undertakings. The purpose of the FDI Screening Regulation is limited to introducing a collaborative model with common standards for screening mechanisms, common screening grounds and rules for cooperation between the Member States, between the Member States and the European Commission, and between the European Commission and third countries. At the same time, depending on how the practice of FDI control evolves over time, it cannot be excluded that the European Commission might propose it assumes a greater role in the review of FDI, especially if there are significant cross-border effects within the European Union.

In order to implement the necessary operational requirements for the full application of the EU FDI Screening Regulation: (i) the Member States had to notify their existing national investment screening mechanisms to the European Commission;[197] (ii) the Member States had to establish national contact points and secure communication channels with the European Commission; and (iii) the Member States and the European Commission had to develop procedures to quickly react to FDI concerns and to issue opinions. The Member States also agreed to informally cooperate where a foreign investment could affect the EU single market.

The adoption of the FDI Screening Regulation has incentivised many Member States to introduce or modify FDI screening mechanism(s), in particular cross-sectoral FDI screening mechanisms. Although the FDI Screening Regulation has contributed to centralising and uniformalising types of FDI control, the regulatory landscape remains very fragmented, as detailed in the national reports as well as in the European Commission's own reports on FDI screening. In its second report

[196] See, e.g., P. Haeck, "Chinese chips takeover in Dutch government's crosshairs" (2 January 2023) *Politico*.

[197] A list of those notifications is available at < https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf >.

on the FDI Screening Regulation, the European Commission outlined the state of play in the Member States as follows:[198]

- national FDI screening mechanism in place: Austria, Finland, Malta, Poland, Portugal, Slovenia, Spain
- have amended an existing mechanism: France, Germany, Hungary, Italy, Latvia, Lithuania
- had a consultative or legislative process expected to result in updates to an existing mechanism: The Netherlands, Romania
- have adopted a new national FDI screening mechanism: Czechia, Denmark, Slovakia
- had a consultative or legislative process expected to result in the adoption of a new mechanism: Belgium, Croatia, Estonia, Greece, Ireland, Luxembourg, Sweden
- no publicly reported initiative underway: Bulgaria, Cyprus

However, the fragmentation goes beyond these different stages of proposing, adopting or amending FDI screening mechanisms. In certain Member States, cross-sectoral and (various) sector-specific mechanisms co-exist (not all of which are amended in light of the FDI Screening Regulation). Moreover, there is a varied practice among the Member States in respect of applying the screening to foreign investors, EU investors and/or national investors. Some Member States also do not yet have FDI screening legislation in place, though they use various other types of restriction on investments, including foreign ownership of property. Furthermore, as reported by various national rapporteurs, in some jurisdictions, there can be considerable uncertainty about what facts or conditions trigger the application of FDI screening and prompt the need for notifying a planned investment. Finally, as observed in some national reports (for example, the Swedish report), in practice, there can be doubts about whether a Member State itself considers its existing domestic screening mechanism to be an implementation of, and fall within the scope of, the FDI Screening Regulation.

In the wake of the adoption of the FDI Screening Regulation, which entered into force amid the COVID-19 pandemic, several (but not all) EU Member States newly introduced or reformed their screening mechanisms, mostly lowering screening thresholds, expanding the scope of the mechanisms and extending

[198] European Commission, Commission Staff Working Document – Screening of FDI into the Union and its Member States, Accompanying the document Report from the Commission to the European Parliament and the Council, Second Annual Report on the screening of foreign direct investments into the Union, SWD(2022) 219 final (1 September 2022), p. 9. On the notification obligations, see Articles 3(7) and (8) of the FDI Screening Regulation.

review periods. Many (but not all) national reports note that the COVID-19 pandemic affected the manner in which FDI screenings were executed or caused more transactions to be notified. In particular, in some Member States, various types of flexibility were introduced and more powers were given for screening authorities, and public health exemptions were added. For example, in Hungary, the pandemic (and subsequently the Russian war in Ukraine) caused a state of emergency to be declared and the Government to adopt legislation for protecting the economic interests of Hungarian companies in order to prevent a human pandemic threatening the safety of life and property. Likewise, the war in Ukraine and the ensuing energy crisis have highlighted the interest of the European Union and the Member States in protecting and controlling essential energy infrastructure in the European Union. This has resulted in increased scrutiny of energy transactions and the need to guarantee energy supplies.

The field remains dynamic, and further amendments are expected in several EU Member States. At the same time, several national rapporteurs comment that the number of notified transactions is increasing and the cases (including the ownership structure to be examined) are becoming more complex. To the same effect, in its Second Annual Report on FDI screening in the European Union, the European Commission reported that, in 2021, foreign investors (the majority originating from the United States and the United Kingdom) did over 4000 transactions in the European Union.[199] It is reported that 14% of foreign acquisitions involved the presence of public shareholding, meaning that a State-controlled body or company has a stake in a foreign investor.[200] Often, foreign investors' EU subsidiaries are used for those transactions.[201]

According to the European Commission, the Member States reported 1563 requests for authorisation and *ex officio* cases in 2021.[202] Around 29% of those cases were formally screened; the remaining cases involved ineligible applications or were considered not to require formal screening.[203] Out of those 29% cases, 73% were authorised without conditions, 23% were approved with conditions or mitigating measures, 3% were withdrawn and finally 1% were blocked.[204] Thus, whilst the number and complexity of screenings appear to increase, blocking

[199] European Commission, Commission Staff Working Document – Screening of FDI into the Union and its Member States, Accompanying the document Report from the Commission to the European Parliament and the Council, Second Annual Report on the screening of foreign direct investments into the Union, SWD(2022) 219 final (1 September 2022), pp. 3, 5 and 10.

[200] Ibid., p. 10.

[201] Ibid., p. 6.

[202] Ibid., p. 11.

[203] Ibid., p. 11.

[204] Ibid., p. 12.

decisions remain rare. In many Member States, overall the practice of FDI screening remains limited. Apart from the fact that this is still an emerging area of government intervention, an added complication, noted by several national rapporteurs, is that the use of confidential information in screening procedures and the fact that national security may be at issue often prevent publication of information about pending or completed procedures. Due to the design of certain screening mechanisms, it might even be difficult for foreign investors to ascertain whether their acquisition of a target undertaking is covered by the applicable rules (this is reported to be the case in, for example, Norway, where it is not known which Norwegian companies are subject to chapter 10 of the Security Act).

The increase in notified transactions and in the complexity of what is notified has resulted in concerns that authorities at Member State and EU levels are understaffed and that more resources are needed to properly and effectively administer FDI screening and cooperation mechanisms.

Overall, the main trends are that, first, more transactions are subjected to FDI control and, second, there is (to some extent) increased legal certainty about the applicable legal framework for FDI control (even if transparency and predictability regarding the outcome of a control are often lacking because many Member States do not publish details about specific investments being scrutinised).

3.2.2. The FDI Screening Regulation applies in respect of FDI and foreign investors but some Member States extend their screening to EU and national investors

The FDI Screening Regulation defines a "foreign direct investment" as "an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity".[205] A lasting and direct link is typically evidenced by the fact that an investor owns at least 10% of the voting power. Typically, FDI control is applied to indirect and direct acquisitions. Although the FDI Screening Regulation targets only FDI, it appears that some Member States (like, for example, Hungary) also apply FDI screening to portfolio investments.

[205] Article 2(1) of the FDI Screening Regulation.

The scope of the FDI Screening Regulation is limited to investments by a foreign investor.[206] A foreign investor is defined as "a natural person of a third country or an undertaking[207] of a third country, intending to make or having made a foreign direct investment".[208] In other words, investments by EU investors are not covered. Indirectly, an exception to this rule applies in case of "transactions which are part of a scheme of circumvention set up with the objective result of avoiding the application of the Regulation".[209] In particular, recital 10 in the preamble to the FDI Screening Regulation calls on the Member States with FDI screening to introduce measures (whilst respecting EU law, including the freedom of establishment and the free movement of capital) "to prevent circumvention of their screening mechanisms and screening decisions". That circumvention could take the form of "investments from within the Union by means of artificial arrangements that do not reflect reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country".[210] The European Commission has observed that: "[s]ome foreign investors for instance specifically state that the direct investor is a European holding company that they have set up for the purpose of the proposed transaction. Such an arrangement might be created for legitimate business reasons. However, even if evidence of a subjective intention to circumvent the Regulation is not available, the lack of economic activity of the investor company and the objective capability of the arrangements to avoid the rules laid down in the Regulation are sufficient to create the presumption that the arrangement is artificial". According to the European Commission, an example of circumvention is "where foreign investment into the Union is channelled through an EU-based pure "shell" or "letterbox company", which has neither directly nor indirectly a genuine economic activity but serves solely the purpose of being the legal vehicle for the investment".[211]

However, putting aside the circumvention scenario envisaged by the FDI Screening Regulation, several Member States' mechanisms go beyond the EU FDI screening mechanism by submitting also intra-EU transactions (and thus EU investors) to FDI screening (or a similar mechanism) as well as investments from the EEA

[206] Article 2(1) of the FDI Screening Regulation.

[207] An "undertaking of a third country" is "an undertaking constituted or otherwise organised under the laws of a third country", Article 2(7) of the FDI Screening Regulation.

[208] Article 2(2) of the FDI Screening Regulation.

[209] European Commission, Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ 2022 CI 151, p. 1.

[210] Recital 10 in the preamble to the FDI Screening Regulation.

[211] European Commission, Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ 2022 CI 151, p. 1.

and Switzerland.[212] Certain Member States apply separate rules, depending on the sector involved. For example, in Finland, for defence sector acquisitions, all investors domiciled outside Finland are considered to be foreign.

Moreover, in certain Member States, the (proposed new) FDI legislation might also impose obligations (such as notification obligations) on national investors. In others, EU/EFTA investors are subject to FDI control if it is shown that their ultimate beneficiary owners are based in third countries. Where the Member States decide to apply screening to EU investors, they must comply with EU law, notably the provisions on free movement of capital and freedom of establishment.[213] Although this is a matter for the Member States to decide, in its 2022 Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, the European Commission asked the Member States to also screen intra-EU investments "to pursue, in a proportionate manner, legitimate public policy objectives are strongly encouraged to use those mechanisms to the fullest extent in relation to investments ultimately controlled by Russian or Belarusian persons, or entities, to address the risks highlighted in this Communication".[214] To that effect, the Annex to that Communication set out conditions under which the Member States may impose restrictions on the free movement of capital and freedom of establishment.

3.2.3. Grounds of regulatory control

The FDI Screening Regulation recognises that the purpose of the regulatory control applied to FDI can be varied. It defines "screening" as "a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments".[215] FDI screening can result in various type of outcome: consent, conditional consent or opposition.

The FDI Screening Regulation focuses on screening of FDI "on the grounds of security and public order".[216] The criteria prompting the screening to apply are commonly reported as being the most challenging step in the mechanism. As the Swedish rapporteur put it, "[t]he key challenge is to know when the screening

[212] See, for example, Sweden, Hungary, Slovenia, Italy (certain sectors), Romania, The Netherlands and Norway.

[213] European Commission, Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ 2022 CI 151, p. 1.

[214] Ibid.

[215] Article 2(3) of the FDI Screening Regulation.

[216] Article 3(1) of the FDI Screening Regulation.

system applies".[217] This difficulty arises because the screening of a security sensitive activity might be required without defining what is security sensitive – the latter being a fluid notion that falls within the prerogative of the Member States to define.

Article 4(1) offers guidance on what potential effects the Member States and the Commission "may" consider in determining whether a foreign direct investment is likely to affect security or public order. In particular, they may consider effects on:

> *"(a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;*
>
> *(b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 (1), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;*
>
> *(c) supply of critical inputs, including energy or raw materials, as well as food security;*
>
> *(d) access to sensitive information, including personal data, or the ability to control such information; or*
>
> *(e) the freedom and pluralism of the media."*

To determine whether FDI is likely to affect security or public order, Article 4(2) offers the following guidance on relevant factors that the Member States and the European Commission may take into account:

> *"(a) whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;*
>
> *(b) whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or*
>
> *(c) whether there is a serious risk that the foreign investor engages in illegal or criminal activities."*

This list of factors is not exhaustive. In practice, all relevant evidence may be taken into account. Factor (a) overlaps to some extent with the considerations

[217] Swedish report, topic II, response to question 11, p. 643.

relevant to the Foreign Subsidies Regulation and invites an assessment of how the foreign investor relates to the State (including to the possible attribution of that investor's conduct to the State). Factor (b) identifies prior and existing activities affecting security or public order in the same or other Member States. Factor (c) presupposes a risk assessment in respect of a foreign investor's involvement in illegal or criminal conduct. Some national reports commented that especially factor (c) lacks precision, in the sense that it does not indicate a type of threshold for illegal conduct to be sufficient as indicative of concerns to restrict FDI.

Taking into account the objective of the FDI Screening Regulation, most national reports confirmed, as expected, that there is no scope for competition considerations under their domestic FDI screening system and distinguished FDI control from merger control.[218] Both types of control have a distinct rationale. At the same time, several national reports hinted at the possibility that, in practice, competition considerations might indirectly be into account (including where, for example, the target company is in a dominant position in a security of supply critical value chain). The German report refers, in this context, to the fact that the competent authority has repeatedly underscored the risk of technology transfers to China and the need to ensure sufficient supplies to the German economy – which are considerations that can be assigned to the areas of competition and industrial policy. Finally, in some Member States, competition considerations might have a direct impact on FDI screening. For example, as the Polish report explains, the authorities in Poland take into account three types of consideration: (i) the importance of an undertaking in a sensitive industry; (ii) the extent of the foreign influence on the undertaking; and (iii) a comparison of the level of competition before and after the transaction. Thus, under the Polish FDI scheme, there is scope to consider whether, as a result of the transaction (and the investment made), the target undertaking will become more competitive.

3.2.4. Obligations governing the exercise of control

The Member States deciding to maintain, amend or adopt screening mechanisms must (i) identify the circumstances triggering screening and the grounds for screening and guarantee transparency of the applicable rules and procedures; and (ii) not discriminate between third countries.[219] Whilst the Member States remain free to define the applicable timeframes for the procedure, they must ensure that there is sufficient time to take into account, where relevant, other Member States' comments and the European Commission's Opinion.[220] Other obligations

[218] See, for example, Sweden, Portugal, Hungary, Slovenia and Spain.
[219] Article 3(2) of the FDI Screening Regulation.
[220] Article 3(3) of the FDI Screening Regulation, referring to Articles 6 to 8 of the same regulation.

relate to: (i) the need to protect confidential information; (ii) providing remedies against a screening decision; and (iii) adopting measures to identify and prevent circumvention of the screening mechanism and screening decisions.[221] Reporting obligations apply to both the Member States and the European Commission.[222]

3.2.5. Cooperation with the European Commission and between the Member States

Cooperation between the Member States and between the European Commission[223] and the Member States is a main feature of the framework established by the FDI Screening Regulation. That regulation sets out different cooperation obligations, in case a Member State decides to undertake FDI screening and in case no screening is to be applied to FDI. Separate rules apply in case the European Commission considers that FDI is likely to affect projects or programmes of Union interest. A central mechanism, for the purpose of this cooperation and overall the implementation of the FDI Screening Regulation, consists of the contact points established by the Member States and the European Commission for the purpose of this regulation.[224] Despite the fact that these mechanisms are main features of the FDI Screening Regulation, many national rapporteurs report that little is known on their effective and adequate operation due the lack of publicly available information.

In case FDI is undergoing screening, the FDI Screening Regulation establishes a close cooperation, through the exchange of information, between the European Commission and the Member States and between the Member States. They may share opinions and comments provided they are "duly justified".[225] Those opinions and comments must be given due consideration by the Member State undertaking the screening, though the responsibility for the final screening decision is with that Member State.[226]

The FDI Screening Regulation envisages, for this cooperation, a normal procedure and an urgent procedure.

Under the normal procedure, a Member State applying a screening to FDI must notify "as soon as possible" the European Commission and the other Member

[221] Articles 3(4)-(6) of the FDI Screening Regulation.

[222] Article 5 of the FDI Screening Regulation.

[223] The European Commission is also assisted by a Group of Experts, tasked with providing advice and expertise. See Article 12 of the FDI Screening Regulation; Commission Decision of 29.11.2017 setting up the group of experts on the screening of foreign direct investments into the European Union C(2017)7866 final. See further, at < https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3569 >.

[224] Article 11(1) of the FDI Screening Regulation.

[225] Article 6(5) of the FDI Screening Regulation.

[226] Article 6(9) of the FDI Screening Regulation.

States of that fact.[227] The information to be included in that notification includes:[228]

- (optional) a list of the Member States of which the security or public order is deemed likely to be affected; [229]
- (mandatory) whether the foreign direct investment is likely to fall within the scope of Regulation 139/2004;[230]
- information listed in Article 9(2):
  - the ownership structure of the foreign investor and of the undertaking in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital;
  - the approximate value of the FDI;
  - the products, services and business operations of the foreign investor and of the undertaking in which the FDI is planned or has been completed;
  - the Member States in which the foreign investor and the undertaking in which the FDI is planned or has been completed conduct relevant business operations;
  - the funding of the investment and its source, on the basis of the best information available to the Member State; and
  - the date when the FDI is planned to be completed or has been completed.

To obtain the information listed in Article 9(2), the Member State where the FDI is planned or has been completed may request the foreign investor or the target undertaking to provide that information without undue delay.[231] If a Member State, in exceptional circumstances and despite its best efforts, cannot collect this information, it must inform the Commission and the Member States without delay, state reasons and explain the best efforts undertaken.[232]

Following that notification,[233] other Member States and the European Commission have 15 days to indicate their intention to respond and possibly (duly justified)

[227] Article 6(1) of the FDI Screening Regulation.
[228] See also Article 9(2) of the FDI Screening Regulation.
[229] Article 6(1) of the FDI Screening Regulation.
[230] Article 6(1) of the FDI Screening Regulation.
[231] Article 9(4) of the FDI Screening Regulation.
[232] Article 9(5) of the FDI Screening Regulation.
[233] For example, the Italian report notes that "[f]rom October 2020 to 31 December 2021, the Italian Government sent 96 notifications of FDI in the Italian territory to the EU network and in 37 of such cases a phase 2 procedure was opened. In 29 cases, the Commission and other Member States made use of the possibility to request additional information. In the same period, Italy received from other Member States 375 notifications of FDI in their territories".

request additional information.[234] Their comments and opinion must be received no later than 35 days after receiving the information from the Member State undertaking the screening (but some flexibilities apply).[235]

In response, the Member States of which the security or public order is likely to be affected by a FDI being screened elsewhere, may provide comments to the Member State undertaking the screening (and the European Commission, which subsequently informs the other Member States that comments were filed).[236] They may also ask the European Commission to issue an opinion or other Member States to provide comments.[237]

Moreover, in response, the European Commission may send an opinion to the Member State undertaking the screening if it (i) considers that the FDI is likely to affect the security or public order in more than one Member State or (ii) has relevant information in relation to FDI undergoing screening.[238] That prerogative of the European Commission does not depend on whether other Member States have prepared comments. However, if at least one third of Member States consider that the FDI "is likely to affect their security or public order", the European Commission is required to issue an opinion "where justified".[239] If the European Commission decides to issue an opinion, it must notify it to the other Member States.[240]

The European Commission may issue a confidential opinion to the host Member State in respect of a transaction of particular concern for EU public order and/or security. In 2021, those transactions concerned less than 3% of the cases notified through the cooperation mechanism.[241] No information is available regarding those opinions because, according to the European Commission, "[d]isclosing information about the countries and sectors of origin of the investors related to these cases would seriously undermine the Commission's obligation to ensure the confidentiality of information transmitted under the cooperation mechanism".[242]

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[234] Article 6(6) of the FDI Screening Regulation.

[235] Article 6(7) of the FDI Screening Regulation. Additional flexibilities apply in respect of the European Commission's opinion.

[236] Article 6(2) of the FDI Screening Regulation.

[237] Article 6(4) of the FDI Screening Regulation.

[238] Article 6(3) of the FDI Screening Regulation.

[239] Article 6(3) of the FDI Screening Regulation.

[240] Article 6(3) of the FDI Screening Regulation.

[241] European Commission, Report from the Commission to the European Parliament and the Council, Second Annual Report on the screening of foreign direct investments into the Union, SWD(2022) 219 final, COM(2022) 433 final (1 September 2022), p. 19.

[242] Parliamentary question – E-003376/2022 (ASW) – Answer given by Executive Vice-President Dombrovskis on behalf of the European Commission (22 November 2022).

Under the urgent procedure, a Member State undertaking FDI screening and considering that "immediate action" is required for protecting its security or public order, must notify the other Member States and the European Commission of that intention without awaiting their comments and opinion, as envisaged under the normal procedure. In case of urgency, the other Member States and the European Commission must "endeavour to provide comments or to issue an opinion expeditiously".[243]

A separate cooperation mechanism is envisaged in case FDI is planned or completed in a Member States without FDI screening in that State, but another Member State considers that that FDI is likely to affect its security or public order or has relevant information relating to that FDI.[244] In that situation, the latter may nonetheless provide comments to the Member State where the FDI is occurring (and to the European Commission, which then notifies the other Member States).[245] Likewise, if the European Commission considers that that FDI is likely to affect the security or security in more than one Member State or has relevant information relating to the FDI, it may issue an opinion to the Member State where the FDI (and notify it to other Member States) where the FDI is planned or has been completed (regardless of whether other Member States have filed comments). The European Commission is required to provide such an opinion, where justified, after at least one third of the Member States consider than the FDI is likely to affect their security or public order.[246] The European Commission and other Member States may also require, from the Member State where the FDI is planned or has been completed, the information listed in Article 9.[247] Those requests for information must be duly justified, limited to the information necessary for delivering an opinion or issuing comments, proportionate to the request and not be unduly burdensome for the Member State receiving the request.[248] The European Commission must be informed of the requests made and the responses provided.[249] The Member State receiving the comments or opinion must give "due consideration" to them.[250]

Separate rules apply in case the European Commission considers that FDI is likely to affect projects or programmes of Union interest on grounds of security or public

[243] Article 6(8) of the FDI Screening Regulation.
[244] Timelines are specified in Articles 7(6) and 7(8) of the FDI Screening Regulation.
[245] Article 7(1) of the FDI Screening Regulation.
[246] Article 7(2) of the FDI Screening Regulation.
[247] Article 7(5) of the FDI Screening Regulation.
[248] Article 7(5) of the FDI Screening Regulation.
[249] Article 7(5) of the FDI Screening Regulation.
[250] Article 7(7) of the FDI Screening Regulation.

order.[251] The Annex to the FDI Screening Regulation lists projects or programmes of Union interest, which may be amended by the European Commission.[252] In that situation, the European Commission may also issue an opinion to the Member State where the FDI is planned or has been completed.[253] The procedures are similar to those set out in Articles 6 and 7. However, Article 8(2)(c) makes clear that the Member State where the FDI is planned or has been completed must "take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is not followed".

Finally, a Member State in which the FDI is taking place which is likely to affect its security or public order, may also take the initiative to ask the European Commission to issue an opinion or other Member States to provide comments.[254]

Although the cooperation mechanisms under the FDI Screening Regulation are based on an open exchange of information, including information regarding the investor and the investment made or planned, Article 10 of the FDI Screening Regulation seeks to protect the confidentiality of any information that is transmitted. It requires (i) transmitted and received information to be used only for the purpose for which it was requested; (ii) the protection of the confidentiality of that information, in accordance with EU law and applicable Member States' legislation; and (iii) classified information not to be downgraded or declassified without the prior consent of the originator. Separate rules apply to protect personal data.[255]

3.2.6. The fragmented structure and operation of Member States' FDI screening mechanisms

FDI screening schemes are not uniformly designed. Nor is the level of detail applied in defining the covered undertakings, the grounds for screening and the

[251] Those projects include "those projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order". Article 8(3) of the FDI Screening Regulation.

[252] Article 8(3) of the FDI Screening Regulation. The list, found in the Annex to the FDI Screening Regulation, includes: (i) European GNSS programmes; (ii) Copernicus; (iii) Preparatory Action on Preparing the new EU GOVSATCOM programme; (iv) Space Programme; (v) Horizon 2020 including research and development programmes pursuant to Article 185 TFEU, and joint undertakings or any other structure set up pursuant to Article 187 TFEU; (vi) Horizon Europe, including research and development programmes pursuant to Article 185 TFEU, and joint undertakings or any other structure set up pursuant to Article 187 TFEU; (vii) Euratom Research and Training Programme 2021-25; (viii) Trans-European Networks for Transport (TEN-T); (ix) Trans-European Networks for Energy (TEN-E); (x) Trans-European Networks for Telecommunications; (xi) Connecting Europe Facility; (xii) Digital Europe Programme; (xiii) European Defence Industrial Development Programme; (xiv) Preparatory Action on Defence Research; (xv) European Defence Fund; (xvi) Permanent structured cooperation (PESCO); (xvi) European Joint Undertaking for ITER; (xvii) EU4Health Programme.

[253] Article 8(1) of the FDI Screening Regulation.

[254] Article 7(3) of the FDI Screening Regulation.

[255] Article 14 of the FDI Screening Regulation.

sectors affected the same under each Member State scheme. In particular, the grounds for screening may not be limited to security and public order.

The organisation of FDI screening is structured differently depending on the Member State concerned. One model involves a screening mechanism applicable to all investments. Another model consists of a general screening tool combined with additional sectoral control (for example, in the areas of electricity, gas and telecommunications), or separate rules for State-owned enterprises. There are also Member States where a temporary scheme may apply due to a state of emergency, together with a permanent scheme for protecting national security and public order. Sometimes, an investment might be subject to more than one screening mechanism within a single Member State. Related thereto, there can be more than one government agency or department involved in or responsible for screening investments (sometimes depending on the sector concerned).

In many Member States, the wide range of sectors covered and the possible lack of investment thresholds can result in small investments being covered, and possibly an undue administrative burden. Time limit extensions and standstill obligations, combined, can also significantly delay transactions.

Most Member States' FDI schemes envisage that FDI screening takes place either *ex officio* or *ex ante* based on a notified transaction. Typically, FDI schemes envisage *ex ante* controls based on notifications. For example, in Czechia, foreign investments in target companies producing military material, dual use products or that are otherwise part of critical infrastructure or critical information infrastructure need to be notified and, based on an *ex ante* control, be cleared by the relevant ministry before those investments are implemented. For *ex ante* controls, there appears to be a mixed practice in respect of whether a notifiable transaction must be suspended as long as the screening is ongoing. *Ex officio* controls may be time-barred.[256] The FDI Screening Regulation does not preclude Member States from also screening an FDI transaction after its completion, on a retroactive basis.[257] Apart from *ex ante* control (based on a notification) and *ex officio* control, a third type of control is available in certain Member States. For example, in Czechia, a foreign investor may request a "consultation" within five years of implementing the investment (whether the screening starts depends on whether this is considered necessary by the relevant authority).

[256] For example, in Czechia, *ex officio* controls can be exercised within five years of implementation of the investment.

[257] See also European Commission, Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ 2022 CI 151, p. 1.

Failure to report a transaction can be subject to various types of legal remedy. For example, in Hungary, the failure to report may cause the transaction to be nullified and declared void, together with the party failing to report being subject to an administrative fine. Depending on the mechanism being applied, in Hungary, that administrative fine may range from approx. EUR 25,000 to up to 1% of the annual turnover of the Hungarian business which was targeted by the foreign investor. In certain other Member States (such as Slovenia), the amount of the fine that may be imposed in case of non or late notification might vary depending on the size of the company.

3.2.7. Conclusions

Since its inception at EU level, geopolitical considerations have further strengthened the need for FDI screening. For a considerable period, controls of FDI into the European Union were mostly lacking while the European Union's major trading partners were already applying various types of FDI screening.[258] Some Member States already had FDI screening legislation in place but EU intervention, through the adoption of the FDI Screening Regulation, has served as an effective catalyser for expanding FDI screening at Member State level.

At the same time, FDI screening is at the intersection of the European Union's exclusive competence for the common commercial policy and the Member States' responsibility for their security and public order. That delicate balance of competences on which the FDI screening regulation builds means that the Member States still enjoy considerable freedom in deciding whether to impose FDI control and, if so, how to design and organise that control. As the national reports show, this results, in practice, in fragmentation across and within Member States. That fragmentation might mean that certain Member States are seen as more attractive destinations by foreign investors. Overall, the current state of play in respect of FDI screening suggests that the FDI Screening Regulation is not the end of the European Union's regulatory initiative in this area. As the newly established coordination mechanism orders information in a systemised manner, the Member States and, in particular, the European Commission may now be better placed to document the potential impact of certain FDI. It could also be envisaged that, at some stage, the European Commission will intervene again in respect of certain FDI, such as FDI having cross-border effects, and make the case that more powers should be given to it in ensuring that a minimum level of protection regarding security and public order be guaranteed (even if this would upset the competences of the EU Member States).

[258] See also recital 5 in the preamble to the FDI Screening Regulation.

Apart from fragmentation, another theme emerging from the national reports is a concern about legal certainty. The wide set of sectors affected, together with the fact that the grounds for review (especially security-related grounds) are not concretely defined, results in considerable uncertainty for foreign investors. As the Slovenian report explains, in practice this can lead to over-compliance in the sense that investors might notify their transaction even if it is far from certain that it falls within the scope of the FDI screening mechanism. Understandably, in respect of security-related matters, ensuring transparency is a challenge. Nevertheless, to avoid undue effects of FDI screening, initiatives for publicising (albeit in redacted form) the practice of FDI screening and offering more guidance on the conditions triggering screening are to be welcomed.

Finally, the effects of FDI screening cannot be considered in isolation. FDI screening may capture some investments into the European Union benefitting from foreign subsidies, but that type of regulatory control has specific purposes and only indirectly relates to foreign subsidies. As the institutional rapporteur explains, the new instrument does not undermine the competences of the Member States (including in respect of FDI screening).[259] At the same time, to the extent that FDI screening and other types of control may intersect with the Foreign Subsidies Regulation, there could be some degree of overlap between the European Commission's powers and the national authority's powers in controlling FDI. At a time when the impact of foreign subsidies on the internal market will be scrutinised, sanctions and export controls are causing supply chains to be restructured and, in general, security risks are infiltrating many aspects of trade and investments relations, FDI screening will increasingly be used to manage geopolitical objectives.

[259] Institutional report, p. 139.

3.3. Foreign subsidies

3.3.1. Introduction

On 12 January 2023, the Foreign Subsidies Regulation, a regulation addressing foreign subsidies' effects on competition in the internal market, entered into force.[260] Following its proposal on 5 May 2021, the Council and the European Parliament quickly reached a provisional political agreement on 30 June 2022 (faster than initially envisaged). The Foreign Subsidies Regulation will apply as of 12 July 2023, meaning that starting from that day, the European Commission may start *ex officio* investigations. By that time, implementing rules will need to be adopted.[261] The notification obligation will become effective on 12 October 2023.

The Foreign Subsidies Regulation introduces a new toolbox for addressing the distortive effects, on the internal market, of subsidies granted by non-EU Member States. For that purpose, it establishes far-reaching powers of the European Commission,[262] when scrutinising mergers and acquisitions, tenders in public procurement, and more generally any economic activity in the European Union that might involve subsidies granted by a third country. Those powers include the possibility of organising investigations in third countries (subject to their consent), far-reaching remedies to address harmful effects to competition, and the imposition of strict penalties.

The new toolbox comprises three types of procedure for scrutinising transactions or other economic activity involving foreign subsidies: (i) investigations of concentrations involving a financial contribution by a foreign government, exceeding a threshold and following a notification; (ii) investigations of bids in public procurements involving a financial contribution by a foreign government, exceeding a particular threshold and following a notification; and (iii) investigations of all other market situations as well as concentrations and public procurement procedures not exceeding the relevant thresholds, based on the Commission's own initiative or following an ad-hoc notification.

As a result of the design of the new toolbox, the Foreign Subsidies Regulation risks significantly affecting any company engaged in economic activity in the EU internal

[260] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022 L 330, p. 1.

[261] On 6 February 2023, the European Commission published (and invited comments on) a draft implementation regulation "on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, Ares(2023)842946, 6 February 2023 ("draft implementing regulation of 6 February 2023").

[262] The European Commission's estimate is that around 145 officials will be needed for the administration and enforcement of the Foreign Subsidies Regulation.

market that has received more than *de minimis* financial contributions from third country governments. At a time when the industrial policy of many countries at home and abroad builds on subsidies to promote a green and digitalised economy and promote the post-COVID-19 recovery, the magnitude of economic activity benefiting from (foreign) subsidies cannot be underestimated. The more complex the financial relationship between a company and a third country government, and the greater the number of countries in which a company and its subsidiaries operate and have a financial relationship with the government, the greater the impact of the Foreign Subsidies Regulation will be. Moreover, any financial contribution is covered and thus might need to be notified. This also means that companies with EU activities must screen all of their activities to obtain an overview of all financial contributions they or their subsidiaries (have) receive(d) from third country governments. Many companies potentially falling within the scope of the Foreign Subsidies Regulation might not be (currently) reporting or collecting information regarding all types of financial contribution targeted by this regulation. They will also need to take into account the scrutiny under the Foreign Subsidies Regulation in planning transactions and negotiating deals.

EU State aid law covers only aid given by the Member States. In particular, this new toolbox seeks to avoid the distortive effects of foreign subsidies and the risk of those subsidies upsetting the level playing field in the internal market. In that sense, the Foreign Subsidies Regulation is a new competition instrument,[263] though it can only be properly understood against the background of EU trade remedies and international trade law (including the procedural mechanisms for which they provide). Moreover, although the focus is on protecting conditions of competition in the internal market, the Foreign Subsidies Regulation is an instrument that also serves external trade interests (and major trade partners have taken an interest in this type of regulation, introducing or contemplating similar checks on the impact of foreign subsidies[264]).

Moreover, in design, the Foreign Subsidies Regulation is different from EU State aid law because there is no presumption of distortive effects. Instead, those effects must be shown – meaning, in practice, a more fact-intensive process for meeting the required standard of evidence.

Although the implementing regulation still needs to be adopted and further Commission guidance still needs to be published, it is understood that, in the

[263] See also Institutional report, topic II, p. 17.

[264] The Merger Filing Fee Modernization Act of 2022, HR 3843, 117th Cong (2021-2022) at < https://www.congress.gov/bill/117th-congress/house-bill/3843 >; the Foreign Merger Subsidy Disclosure Act, S 4322, 117th Cong (2021-2022) at < https://www.congress.gov/bill/117th-congress/senate-bill/4322?s=1&r=29 >.

application of the Foreign Subsidies Regulation, the European Commission will take into the scope of the WTO SCM Agreement and Regulation 2016/1037 (as amended)[265] implementing that agreement, as well as the concern to avoid that foreign subsidies are treated less favourably than State aid. In particular, the European Commission has signalled that it will avoid remedying, under the Foreign Subsidies Regulation, subsidies for the production of goods in the granting State (which may be countervailed, under applicable trade defence instruments). In this manner, even if those subsidies might need to be notified under the Foreign Subsidies Regulation, it can be avoided that double remedies be applied in respect of the same subsidy. According to the European Commission, this helps to ensure compliance with SCM Agreement because the latter provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by [the SCM Agreement]".[266]

Likewise, the European Commission has indicated that it will ensure that there is a degree of parallelism in the application of the Foreign Subsidies Regulation and State aid control – so as to avoid that one category of subsidies is, based on origin, treated less favourably than the other category. The latter seems to respond to some of the concerns raised by the Member States and in the reports of the national rapporteurs, as discussed below.

Overall, as the national reports show, there is strong support in most Member States for this new legal instrument and the European Commission's role in its enforcement.[267] This is especially the case for those Member States having developed policies for restructuring their economy and creating development funds for that purpose (which rely on public tenders). Many national reports referred to a perceived gap in the existing tools available to the European Union to counter the effects of foreign subsidies. EU trade remedies are limited to imposing, at the border, countervailing duties on imports of goods originating from third countries where they benefited from subsidies. No countervailing duties may be imposed on subsidised services. At the same time, EU State aid law does not cover aid (that is, subsidies) granted outside the European Union.

[265] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ 2016 L 176, p. 55 (as amended).

[266] Article 32.1 SCM Agreement.

[267] See, for example, the Dutch Ministry of Foreign Affairs, Non-paper – Strengthening the level playing field on the internal market, 9 December 2019, at < https://www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2019/12/09/non-paper-on-level-playing-field/Dutch+nonpaper+on+Level+playing+field.pdf >.

Nevertheless, some concerns have been expressed about the application of the new instrument. For example, in Sweden, the Confederation of Swedish Enterprise emphasised that the instrument "must be proportionate, non-discriminatory and promote legal certainty" and not restrict foreign investments or be more restrictive that existing State aid rules.[268] The Slovenian rapporteurs also identify the need to avoid bottlenecks in public procurement procedures and a disproportionate administrative burden for the European Commission in administering the system. Moreover, some reports referred to the fact that, as things stand, exceptions to State aid rules are currently not available under the Foreign Subsidies Regulation.

3.3.2. Definition of a subsidy

A foreign subsidy is deemed to exist "where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries."[269] In essence, a foreign subsidy exists if there is (i) a financial contribution, (ii) provided directly or indirectly by a third country, (iii) conferring a benefit and (iv) limited, in law or in fact, to one or more undertakings or industries. This definition is informed by the concept of a subsidy within the meaning of EU trade defence law and WTO law as well as the concept of State aid in EU competition law.

The concept of a "financial contribution" is very wide. It includes (i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; (ii) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or (iii) the provision or purchase of goods or services.[270] So far, no guidance has been given in respect of what financial contribution are to prioritised, taking into account also the objective of the Foreign Subsidies Regulation. Moreover, so far, no *de minimis* threshold for establishing a financial contribution (to be notified) has been articulated. In practice, this means that companies otherwise meeting the thresholds need to engage in managed due diligence to identify, document and report any benefit potentially received from a foreign government.

[268] Swedish report, referring to Confederation of Swedish Enterprise, Swedish Enterprise on the proposed EU regulation on foreign subsidies, 14 May 2021, at < https://www.svensktnaringsliv.se/bilder_och_dokument/7m1hio_swedish-enterprise-on-the-proposed-eu-regulation-on-foreign-subsi_1170791.html/Swedish+Enterprise+on+the+proposed+EU+regulation+on+foreign+subsidies.pdf >.

[269] Article 3 of the Foreign Subsidies Regulation.

[270] Article 3(2) of the Foreign Subsidies Regulation.

A financial contribution is provided by a third country if it is given by (i) the central government or any other government authority of that third-country; (ii) foreign public entities, of which the actions can be attributed to that third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy; or (iii) any private entity of which the actions can be attributed to that third country, taking into account all relevant circumstances.[271]

A financial contribution is considered to confer a benefit to an undertaking if it could not have been obtained under normal market conditions. This assessment involves relying on comparative benchmarks, "such as the investment practice of private investors, financing rates obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service".[272] Significantly, a benefit may be passed through to an undertaking active in the EU market.[273]

Finally, the financial contribution must be specific, in the sense that it must be available (*de jure* or *de facto*) to specific undertakings or industries.[274] Undertakings may but need not be established in the European Union. It might be sufficient that they merely sell goods or provide services in the European Union.

3.3.3. Foreign subsidies distorting the internal market

The Foreign Subsidies Regulation specifically targets foreign subsidies distorting the EU internal market. Such a distortion is deemed to exist "where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market".[275]

Factors that might assist in determining whether such a distortive effect exists include (i) the amount of the subsidy; (ii) the nature of the subsidy; (iii) the situation of the undertaking and the markets concerned; (iv) the level of economic activity of the undertaking concerned on the internal market; and (v) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.[276]

The Foreign Subsidies Regulation gives the European Commission the power to assess whether, as a result of a foreign subsidy, there is a distortion of the

[271] Article 3(2) of the Foreign Subsidies Regulation.
[272] See recital 13 in the preamble to the Foreign Subsidies Regulation.
[273] See recital 13 in the preamble to the Foreign Subsidies Regulation.
[274] See recital 14 in the preamble to the Foreign Subsidies Regulation.
[275] Article 4(1) of the Foreign Subsidies Regulation.
[276] Article 4(1) of the Foreign Subsidies Regulation.

internal market in the context of the concentration at issue.[277] The Foreign Subsidies Regulation suggests that the principal concern would be whether the foreign subsidy led to an inflated purchase price (i.e., distorted competition in the "M&A market" for European assets). But the European Commission has broad discretion to look at relevant indicators when assessing the extent of a distortion. In principle, all subsidies received by the parties can be distortive, regardless of the subsidy recipient's identity (EU or non-EU entity).

The Foreign Subsidies Regulation recognises that a foreign subsidy is unlikely to distort the internal market if its total amount is below EUR 4 million over a consecutive period of three fiscal years; if the total amount of a foreign subsidy does not exceed the amount of a *de minimis* amount[278] per third country over any consecutive period of three financial years; or if it is aimed at making good the damage caused by natural disasters or exceptional occurrences.[279]

The Foreign Subsidies Regulation lists foreign subsidies that are most likely to distort the internal market (implying the burden of the undertaking to demonstrate, during an investigation, that such distortive effects are not present), namely:[280]

- a foreign subsidy granted to an ailing undertaking, namely an undertaking which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and includes a significant own contribution by the undertaking;
- a foreign subsidy in the form of an unlimited guarantee for debts or liabilities of the undertaking, without any limitation as to the amount or the duration of that guarantee;
- an export financing measure that is not in line with the OECD Arrangement on officially supported export credits;
- a foreign subsidy directly facilitating a concentration; and
- a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking could be awarded the public procurement contract.

[277] Article 19 of the Foreign Subsidies Regulation.

[278] See Article 3(2), first subparagraph, of Regulation 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ 2013 L 352, p. 1.

[279] Article 4 of the Foreign Subsidies Regulation.

[280] Article 5 of the Foreign Subsidies Regulation.

So far, the European Commission has not (yet) recognised that certain foreign subsidies may be exempted because they are not likely to distort the internal market. Various national rapporteurs express concerns that, in practice, this means that foreign subsidies may be deemed more problematic than comparable Member State subsidies under existing State aid rules. They call for the European Commission to consider whether exceptions similar to Articles 107(2) and 107(3) TFEU or frameworks alike the General Block Exemptions should be introduced. As previously mentioned, it appears that the European Commission is aware of this concern and will seek to ensure parallelism in the application of the Foreign Subsidies Regulation and State aid control.

3.3.4. Balancing exercise

Even if the European Commission concludes on the existence of a foreign subsidy distorting the internal market, it may balance those negative effects against the foreign subsidies' positive effects on the development of the relevant subsidised economic activity in the European Union and on achieving relevant policy objectives.[281] This balance test also informs the redressive measures that the European Commission may impose at the end of an investigation.

Ex ante control of notified concentrations: concentrations tool

The Foreign Subsidies Regulation contains a mechanism to investigate whether a concentration distorts the internal market as the result of foreign subsidies. This concentrations tool allows for an *ex ante* investigation of concentrations where the acquiring party benefits from a foreign subsidy, subject to thresholds. The concentrations tool will operate separately from and in parallel with any merger control rules within the European Union that may apply to the transaction, namely the EU Merger Regulation at EU level, or the merger control regimes of the EU Member States (even if it shares many concepts with the EU Merger Regulation).

The Foreign Subsidies Regulation defines the existence of a concentration in the same way as the EU Merger Regulation: namely a change in control on a lasting basis resulting from:

- mergers of previously independent undertakings or parts of undertakings;
- the acquisition, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings; or

[281] Article 6 of the Foreign Subsidies Regulation.

- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.[282]

In sum, if a transaction would be considered a concentration for EU merger control purposes, it will also fall under the definition of a concentration from a Foreign Subsidies Regulation perspective.

The concentrations tool includes a mandatory notification requirement of a concentration meeting the notification thresholds before these transactions are implemented.[283] It also imposes a standstill obligation preventing parties from implementing a notifiable concentration until after the Foreign Subsidies Regulation investigation has been concluded.

A "notifiable concentration" arises where a transaction is a concentration meeting the thresholds defined in the Foreign Subsidies Regulation._Concentrations that meet the following turnover and financial contribution thresholds are subject to the mandatory notification (and standstill) requirement:

- the target, joint venture or at least one of the merging undertakings is established in the European Union and generates an aggregate turnover in the European Union of at least EUR 500 million; and
- the undertakings concerned (i.e., the acquiring party(ies) and the target combined) received from third countries an aggregate financial contribution of more than EUR 50 million in the three financial years prior to notification.[284]

The turnover threshold under the first point above is calculated broadly. It includes not only revenue generated from EU assets, but also sales into the European Union from other territories. Notably, the financial contribution threshold under the second point above does not require any EU nexus. In other words, the contribution received by one of the undertakings concerned does not need to relate to the EU operations of that entity, but could have been received by any other part of that entity operating globally. The concept of an "undertaking" is broader than the legal definition of the entities involved; it covers all entities (including parents and subsidiaries) in which control relationships exist.[285]

Finally, while these thresholds trigger the mandatory notification requirement, they do not limit the jurisdiction of the European Commission to instruct parties to notify other concentrations falling below the thresholds. The Foreign Subsidies

[282] Article 20(1) and (2) of the Foreign Subsidies Regulation.

[283] Article 21 of the Foreign Subsidies Regulation. See the draft standardised notification forms annexed to the draft implementing regulation of 6 February 2023.

[284] Article 20(3) of the Foreign Subsidies Regulation.

[285] See Article 2(1) of the Foreign Subsidies Regulation.

Regulation includes an *ex officio* tool allowing the European Commission to investigate a wide range of transactions in which subsidies might play a distortive role, at its own initiative.[286]

The Foreign Subsidies Regulation will require companies contemplating mergers or acquisitions to take Foreign Subsidies Regulation compliance obligations and potential European Commission investigations into account at each stage of a deal's lifecycle, including in:

- the initial decision-making process of identifying potential acquisition targets or potential buyers for a business;
- the due diligence needed to prepare for a deal;
- the regulatory clearance process; and
- the outcome of certain deals.

The Foreign Subsidies Regulation will increase the diligence burden on transaction parties. The information that must be gathered to assess whether a deal must be notified and to assess the related risks is materially different from information that is typically gathered in the course of ordinary deal diligence in either a business or a merger control context. Based on that due diligence, transaction parties should consider what conditions precedent to add to their agreements to manage the risk of (i) a notification obligation; (ii) a negative outcome; and (iii) potential remedies that may be required to get the deal through.

The Foreign Subsidies Regulation clearance timeline mirrors the EU merger clearance process. It includes a two-step process with statutorily set timeframes:[287]

- a first phase review lasting up to 25 working days from the time of notification; and
- an in-depth investigation that should be concluded within 90 working days.

However, in practice the two processes might diverge substantially, particularly if one process moves on to a second phase review and the other does not. Pre-notification discussions may also occur along different timelines. Even if both a Foreign Subsidies Regulation and a merger notification are submitted to the European Commission on the same day and proceed through both phases, the clock might be stopped in one process but continue to move forward in the other.

[286] Article 9 of the Foreign Subsidies Regulation.
[287] Article 25 of the Foreign Subsidies Regulation.

After conducting a review of a concentration under the Foreign Subsidies Regulation, the European Commission may decide to:[288]

- clear the acquisition;
- adopt a conditional clearance decision based on commitments offered by the acquirer (such as the repayment of the foreign subsidy); or
- prohibit the transaction.

Where the European Commission finds that a concentration has already been implemented and has led to distortions in the EU market, it may adopt measures to restore the situation prevailing prior to the implementation of the concentration.[289]

If the transaction substantially impedes effective competition (for merger review) or a financial contribution distorts the market (for Foreign Subsidies Regulation review), then it must be prohibited, or, the case being, can be approved only subject to remedies that remove these concerns. However, it is entirely possible for a transaction to raise concerns under one review and not the other. In that case, the European Commission could prohibit a transaction under the EU Merger Regulation and not the Foreign Subsidies Regulation (or vice-versa). Likewise, a deal that is not subject to EU merger control might be cleared under any applicable Member State merger control processes but prohibited b under the Foreign Subsidies Regulation (or vice-versa).

At the moment, nothing in the legislation requires the conditions offered in each process to be coordinated or consistent with the other. It is therefore conceivable that transaction parties might agree to one set of commitments under one review process, only to find that this set of remedies as deemed insufficient or even unacceptable under the parallel review process. It is therefore critical that any agreements between transaction parties take into account the wide spectrum of divergent outcomes that might arise with the entry into force of the Foreign Subsidies Regulation.

Ex ante control in the context of EU public procurement procedures: public procurement tool

The Foreign Subsidies Regulation also addresses foreign subsidies granted to an undertaking participating in a public procurement procedure in the European Union (subject to exemptions for procedures in the defence and security, in accordance with Article 346 TFEU). Similar to what is the case under the concentration tool, this public procurement tool consists of an *ex ante* control

[288] See Article 25(3) of the Foreign Subsidies Regulation.
[289] Article 25(6) of the Foreign Subsidies Regulation.

based on a notification obligation. Public contracts that have been awarded or procedures initiated before the date of the application of the Foreign Subsidies Regulation are excluded from its scope.

Tenderers in an EU public procurement procedure must notify foreign subsidies if:[290]

- the estimated total value of the public contract / framework agreement (excl. VAT) for which the tenderer is applying is equal to or greater than EUR 250 million; and,
- the economic operator (including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender) was granted aggregate financial contributions in the three financial years prior to notification equal to or greater than EUR 4 million per third country.
- if the public contract / framework agreement is divided into lots, there is an additional condition requiring that the value of the lot or the aggregate value of all the lots to which the tenderer applies is equal to or greater than EUR 125 million.

Even if the thresholds are not met, tenderers must still declare all foreign financial contributions received or confirm that the foreign financial contributions received are not notifiable.[291] Furthermore, if the European Commission suspects that a tenderer might have benefitted from foreign subsidies in the three years prior to the submission of the tender, the Commission may request notification or start an *ex officio* review.[292] However, that *ex officio* review cannot result in the cancellation of the award decision or the termination of a public contract.

In a one-stage public procurement procedure, the tenderer must submit its notification or declaration. In a multiple-stage public procurement procedure, the tenderer must (i) submit its notification or declaration together with its request to participate, as well as (ii) submit an updated notification or declaration together with its (final) tender.[293]

The notification obligation also applies if the foreign subsidies were received by main subcontractors and main suppliers known at the time of submission of the complete (updated) notification or declaration.[294] A main subcontractor or a main

[290] Article 28(1) and (2) of the Foreign Subsidies Regulation.
[291] Article 29(1) of the Foreign Subsidies Regulation.
[292] Article 29(8) of the Foreign Subsidies Regulation.
[293] Article 29(1) of the Foreign Subsidies Regulation.
[294] Article 29(5) of the Foreign Subsidies Regulation.

supplier is an undertaking, which by means of its participation in a tender ensures key elements of the contract performance, or, where the economic share of the contribution of the subcontractor or supplier exceeds 20% of the value of the submitted tender.[295] The responsibility to ensure the proper submission of those notifications or declarations rests with the main contractor.[296]

Upon receipt of the notification or declaration, the contracting authority/entity must transfer the documentation to the European Commission without delay.[297] If a notification or declaration is missing (or incomplete), the tenderer will be requested to submit the relevant document within 10 working days.[298] If the tenderer fails to submit the document (within this deadline), its tender will be rejected.[299]

Similar to what is the case under the concentration tool, a standstill obligation applies during the European Commission's preliminary review and, if relevant, the in-depth investigation.[300] This means that, pending the European Commission's assessment, all procedural steps in the public procurement procedure may continue, except for the award of the public contract. Exceptionally, a contract may be awarded to a tender participant that was not required to submit a notification and is considered to have made the most advantageous offer.[301] Failure to respect this standstill obligation may result in the European Commission imposing a fine of up to 10% of the tenderer's aggregate turnover, or even prohibit the awarding of the public contract.[302]

Following a preliminary review and an in-depth investigation, the European Commission may take several possible decisions:[303]

- a decision with commitments: the European Commission finds that the tenderer benefits from a foreign subsidy which distorts the internal market, but the tenderer offers commitments that fully and effectively remove the distortion on the internal market. These commitments may include the repayment of the foreign subsidy, or reducing capacity or market presence, refraining from certain investments, licensing, publishing R&D results, etc.;
- a decision prohibiting the award of the contract: the European Commission rejects the tender based on its finding that the tenderer did not offer

[295] Article 29(5) of the Foreign Subsidies Regulation.
[296] Article 29(6) of the Foreign Subsidies Regulation.
[297] Article 29(2) of the Foreign Subsidies Regulation.
[298] Article 29(3) of the Foreign Subsidies Regulation.
[299] Article 29(3) of the Foreign Subsidies Regulation.
[300] Article 32 of the Foreign Subsidies Regulation.
[301] Article 32(3) of the Foreign Subsidies Regulation.
[302] Article 33 of the Foreign Subsidies Regulation.
[303] Article 31 of the Foreign Subsidies Regulation.

commitments or the commitments are neither appropriate nor sufficient to fully and effectively remove the distortion of the internal market; or

- a no objection decision: the European Commission finds that the tenderer does not benefit from a foreign subsidy distorting the internal market; the investigation is closed without any consequences.

In addition to the general fines and periodic penalty payments under the Foreign Subsidies Regulation, the European Commission may impose the following fines in the context of public procurement:[304]

- if a tenderer intentionally or negligently supplies incorrect or misleading information in a notification or declaration (or a supplement thereto): the European Commission may impose fines not exceeding 1% of the tenderer's aggregate turnover in the preceding financial year;
- if a tenderer intentionally or negligently fails to notify foreign financial contributions: the European Commission may impose fines not exceeding 10% of the tenderer's aggregate turnover in the preceding financial year; and
- if a tenderer intentionally or negligently circumvents of attempts to circumvent the notification obligation: the European Commission may impose fines not exceeding 10% of the tenderer's aggregate turnover in the preceding financial year.

Ex officio control of all foreign subsidies (including concentrations/public procurement)

The *ex officio* control tool allows (but does not require) the European Commission to examine information from any source on its own initiative, conduct preliminary reviews, and initiate in-depth investigations of any alleged distortive foreign subsidies, including concentrations or public procurement procedures not satisfying the notification thresholds. In particular, it may investigate foreign subsidies received up to five years prior to 12 July 2023 if those subsidies distort the internal market after that date.[305] If the European Commission has a reasonable suspicion that foreign subsidies are distorting the internal market in a certain sector, it can carry out a full-fledged sector investigation.[306]

When the European Commission receives information that a distortive foreign subsidy might exist, irrespective of the source of the information, it is free to

[304] Article 33 of the Foreign Subsidies Regulation.

[305] Article 53(1) of the Foreign Subsidies Regulation. However, specific rules apply for public procurement, see Article 53(2)-53(4) of the Foreign Subsidies Regulation.

[306] Article 34 of the Foreign Subsidies Regulation.

examine those allegations. This applies also to transactions and procurement situations below the notification thresholds. This information may be sent to the European Commission by the Member States as well as any natural or legal person or association (including European undertakings competing with foreign subsidy beneficiaries).

If the European Commission considers a distortive foreign subsidy might exist, it may request the alleged foreign subsidy provider, recipient, or beneficiary to provide any additional information it considers necessary to verify whether a financial contribution exists, and whether it has a distortive effect on the internal market.[307]

The European Commission's preliminary review can have two outcomes:

- no sufficient indications of the existence of a foreign subsidy and an actual or potential distortion of the internal market: the European Commission will close the preliminary review and inform the undertaking under investigation and the Member State(s) that had been notified of the preliminary review, as well as the contracting authority/entity concerned (if applicable);[308] or
- sufficient indications of the existence of a foreign subsidy that distorts the internal market: the European Commission will initiate an in-depth investigation. This decision will contain a summary of the relevant factual and legal issues, as well as a preliminary assessment regarding the alleged distortive foreign subsidy. The European Commission will inform the undertaking under investigation, the Member State concerned and, if the in-depth investigation is initiated in relation to a public procurement procedure, the contracting authority/entity concerned. A notice of initiation will be published in the Official Journal of the European Union, inviting written submissions within a prescribed timeframe.[309]

During the in-depth investigation, the European Commission will seek to obtain all information it deems necessary to further assess the foreign subsidy that had been identified in the decision to initiate the in-depth investigation.[310] The possible outcomes of that investigation are:

- finding that a foreign subsidy exists but its distortive effects are outweighed by it positive effects: the European Commission will adopt an implementing act in the form of a "no objection decision", resulting in no further actions or measures;

[307] Articles 11-13 of the Foreign Subsidies Regulation.
[308] Article 10(4) of the Foreign Subsidies Regulation.
[309] Article 10(3) of the Foreign Subsidies Regulation.
[310] Articles 11-13 of the Foreign Subsidies Regulation.

- finding that a distortive foreign subsidy exists: the European Commission will adopt an implementing act in the form of a "decision with redressive measures": such as offering access under fair, reasonable, and non-discriminatory conditions, reducing market presence, repayment of the foreign subsidy, and divestment of certain assets;[311] and
- finding that a distortive foreign subsidy exists, and the undertaking concerned offers appropriate and sufficient commitments to fully and effectively remedy the distortion: the European Commission may adopt an implementing act in the form of a "decision with commitments", making these commitments binding on the undertaking (a decision accepting the repayment of the foreign subsidy concerned is a decision with commitments).

The European Commission will aim to adopt a decision within a period of 18 months from the opening of the in-depth investigation. These decisions may be revoked in certain circumstances.[312]

The European Commission may, under certain circumstances, impose interim measures.[313] This would be the case when (i) there are "sufficient indications" that a financial contribution constitutes a foreign subsidy and distorts the internal market; and (ii) there is a risk of serious and irreparable damage to competition in the internal market.

If an undertaking does not comply with a decision with commitments, a decision ordering interim measures or a decision imposing redressive measures, the European Commission may impose (i) fines not exceeding 10% of the aggregate turnover of the undertaking concerned in the preceding financial year; and (ii) periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking concerned in the preceding financial year for each day of non-compliance, starting from the day of the European Commission decision imposing such penalty payments, until the European Commission finds that the undertaking concerned complies with the decision.[314]

3.3.5. The European Commission's powers in a Foreign Subsidies Regulation investigation

In investigating concentrations under the Foreign Subsidies Regulation,[315] the European Commission enjoys powers similar to those exercised under EU

[311] More examples can be found under Article 6 of the Foreign Subsidies Regulation.

[312] Article 12 of the Foreign Subsidies Regulation.

[313] With respect to public procurement procedures, no interim measures may be taken.

[314] Article 17(5) of the Foreign Subsidies Regulation.

[315] Articles 10, 11(1), (3) and (4), 12, 13, 14, 15, 16 and 18 of the Foreign Subsidies Regulation apply to notified concentrations. The European Commission may also impose fines and periodic penalty payments as set out in Article 17.

competition law, in particular under the merger control procedure. Accordingly, the European Commission may carry out inspections within the European Union and, with the cooperation of third countries, also outside the European Union. It can issue requests for information, impose interim measures and fines. Notably, it may impose fines of up to 10% of the aggregate turnover of the undertaking concerned in the preceding financial year for failing to observe the notification and/or standstill obligations, and fines of up to 1% for providing incorrect/incomplete information (up to 1%). Unlike in the merger control context, a failure to notify does not prevent the European Commission from reviewing the transaction.

The European Commission has the right to request from undertakings, Member States and third countries the information it deems necessary to conduct reviews under the Foreign Subsidies Regulation. The investigative powers exist in the context of an *ex officio* investigation as well as during the review of notified transactions and tenders submitted in public procurements.[316] In requesting information from undertakings and third countries, the European Commission must indicate the legal basis and purpose of the request, the information required and a time limit within which the information is to be provided. The request must state that, in case of a lack of cooperation, the European Commission is authorised to take a decision based on the facts available. Similarly, at the European Commission's request, the Member States must provide information.

The European Commission may also conduct interviews with any consenting natural or legal person, when collecting information on a subject matter of the investigation. This interview may take place on the premises of the European Commission, by telephone or any other electronic means. In the event the interview is to take place on the territory of a Member State, the latter must be informed ahead of time. When the interview will take place in a third country, the European Commission is required to obtain an agreement in advance.

Where necessary, the European Commission may conduct inspections of undertakings and associations of undertakings.[317] Inspections carried out within the European Union must be notified to the relevant Member States prior to the inspection, including the date on which the inspection will begin. The European Commission may require assistance of national authorities.

To induce parties to cooperate, the European Commission may take a decision on the basis of facts available if a party to the investigation (an undertaking

[316] Article 13 of the Foreign Subsidies Regulation.
[317] Articles 14 and 15 of the Foreign Subsidies Regulation.

under investigation or a third country that granted a foreign subsidy) (i) provides incomplete, incorrect or misleading information in response to a request for information; (ii) fails to provide the information requested within the prescribed time limit; (iii) refuses to submit to the European Commission's inspection within or outside the European Union; or (iv) otherwise impedes the preliminary review or the in-depth investigation.[318] When applying facts available, the result of the procedure may be (and will likely be) less favourable to the undertaking/third country concerned than if it had cooperated with the European Commission. Where an undertaking fails to provide the necessary information to determine whether a financial contribution confers a benefit to it, that undertaking may be deemed to have received such a benefit.

3.3.6. Conclusions

Today, subsidies are seen as a necessary tool to achieve the European Union's green and digital agendas, ensure the competitiveness of EU companies as compared to their competitors, and build more predictable and stable supply chains with a strong domestic component. Those priorities are placing stress on the existing system of State aid control in the European Union and the multilateral disciplines found in the WTO SCM Agreement.

Against that background, the Foreign Subsidies Regulation has been conceptualised as filling perceived gaps in the State aid control and the SCM Agreement. The size of the problem that this new instrument seeks to remedy is, to a certain degree, unknown – taking into account the lack of transparency about subsidies granted in many jurisdictions. Indirectly, the mechanisms envisaged under the Foreign Subsidies Regulation will facilitate the mapping of subsidies given in the European Union's trading partners. To some extent, the European Union is not alone in identifying these gaps, as evidenced by the United States' initiatives in this area.[319] Indirectly, by adopting the Foreign Subsidies Regulation, the European Union also seeks to shape the multilateral negotiating agenda on how to ensure fair conditions of competition across trading partners.

In the absence of finalised implementing rules and further guidance, the concrete details of how the notifications and investigations, envisaged by the Foreign Subsidies Regulation, will operate in practice are missing. Whilst the European Commission has signalled that it will avoid double remedies in respect of subsidies

[318] Article 16 of the Foreign Subsidies Regulation.

[319] The Merger Filing Fee Modernization Act of 2022, HR 3843, 117th Cong (2021-2022) at < https://www.congress.gov/bill/117th-congress/house-bill/3843 >; the Foreign Merger Subsidy Disclosure Act, S 4322, 117th Cong (2021-2022) at < https://www.congress.gov/bill/117th-congress/senate-bill/4322?s=1&r=29 >.

for the production of goods and guarantee a level of parallelism with the State aid control, how those challenges will be managed, in applying the Foreign Subsidies Regulation, remains uncertain. However, it is clear that these new powers of the European Commission will affect deal-making and the due diligence to be undertaken by companies when acting in the EU market.

The Foreign Subsidies Regulation is likely to have a transformative effect on businesses at home and abroad. Companies want to comply and prepare for these new rules. However, they are limited in what they can do because the details of what they need to do are postponed to implementing and delegated rules and further guidance. Often those rules are adopted only shortly before the new legislation kicks in (and sometimes even afterwards), as is the case for the Foreign Subsidies Regulation. That is not a satisfactory way of legislating. If understandably more time is needed for the European Commission to develop these detailed rules, correspondingly longer implementation or transition periods need to be envisaged.

Finally, if the European Union seeks to treat domestic and foreign subsidies on equal footing, it means that as the level of State aid control is loosened, the scrutiny of foreign subsidies is correspondingly weakened. Thus, if the European Union wants to facilitate the grant of State aid for various green (tech) projects and investments, the assessment of subsidies given in its trade partners for the same purposes, but benefitting economic activity in the European Union, must likewise be weakened under the Foreign Subsidies Regulation. Yet, if the European Union's trading partners increasingly make their (green) subsidies dependent on using local content, those subsidies promote investments at home (and not abroad). Against that type of subsidy – a main concern of the European Union – the Foreign Subsidies Regulation is unlikely to provide a strong response.

3.4. Mandatory due diligence and regulating supply chains

3.4.1. Introduction

In 2022, the European Commission published its legislative proposal on "Sustainable Corporate Governance" ("the Corporate sustainability due diligence proposal" or "CSDD proposal"), seeking to introduce mandatory human rights and environmental due diligence requirements, and possibly corporate governance standards. The CSDD was proposed by the European Commission, as part of the European Green Deal. The CSDD Proposal aims to contribute to the European Union's transition to a sustainable economy and the promotion of sustainable development goals.[320] 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,[321] 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. It must also be considered together with other (proposals for) new instruments requiring due diligence and affecting supply chains, such as the proposed forced labour ban,[322] the Deforestation-free Products Regulation[323], the Batteries Regulation[324] and the Corporate Sustainability Reporting Directive.[325]

In particular, the CSDD Proposal seeks (i) to introduce mandatory due diligence obligations for certain EU and non-EU large and medium-sized companies and

[320] CSDD Proposal, recital 71.

[321] 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 >.

[322] Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, COM(2022) 453 final (14 September 2022).

[323] Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, Compromise text of 21 December 2022, 2021/0366(COD) ST 16298/22.

[324] Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, compromise text of 18 January 2023, 2020/0353(COD) ST 5469/23.

[325] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, p.15.

(ii) to establish the basis for those companies to incur liability for violating those due diligence obligations.[326] The obligations set out in the European Commission's Proposal aim to identify and mitigate potential or actual adverse impacts on human rights and the environment, generated throughout the life-cycle of production, the use and disposal of products or the provision of services connected with those companies' operations, subsidiaries and value chains.[327]

Whilst the European Commission's proposal has already had a troubled history,[328] it promises to play a central part in the 2023 EU legislative agenda. On 1 December 2022, the Council adopted its General Approach,[329] which will form the basis for the trilogue negotiations. The European Parliament is yet to publish its negotiation position. It is expected to vote on its position in May 2023.[330] On 4 April 2022, the Parliament referred the CSDD Proposal to the Committee on Legal Affairs. On 7 November 2022, the Committee on Legal Affairs published its draft report containing proposed amendments to the CSDD Proposal.[331] Although various positions are also being adopted within the European Parliament, the formal text of the European Parliament is not yet available at the time of writing this report.

Whilst some Member States have already put in place domestic legislation with a similar focus (but different scope), the adoption by the European Union of the CSDD proposal will mark a significant shift in how corporate social responsibility is regulated, also at the multilateral stage. It forms part of a visible evolution from soft law standards to hard law obligations. In turn, this development might also affect how corporate social responsibility is regulated at the international level.[332]

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[326] See, CSDD Proposal, Article 1.

[327] See, CSDD Proposal, Article 1(1) and recitals 14, 17 and 18 in the preamble.

[328] European Commission, Follow-up to the second opinion of the Regulatory Scrutiny Board, SWD(2022) 39 final at < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX: 52022SC0039&qid=1676398121012&from=EN >.

[329] Council of the European Union's General Approach on the Proposal for a Directive of the European Parliament and the Council on the Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022/0051(COD), ST 15024/1/22 REV 1, ("Council's General Approach").

[330] Council's General Approach, para. 4. However, see also European Parliament, Draft Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), Committee on Legal Affairs, 2022/0051(COD) (7 November 2022), at < https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.pdf >.

[331] European Parliament, Draft Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), Committee on Legal Affairs, 2022/0051(COD) (7 November 2022), at < https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.pdf >.

[332] See especially United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2011; OECD, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011).

A main implication of the proposed new directive is that the expansive due diligence obligations might discourage covered companies from establishing or maintaining business relationships in countries where there is even a potential that adverse human rights or environmental impacts could arise. Companies might fear the administrative burden resulting from this new instrument, the risk of remedies, and the task of assessing compliance with multilateral environmental agreements, international human rights agreements, and fundamental labour standards. In respect of the latter concern, the proposal, if adopted, in practice will mean that EU (and foreign) companies are being burdened indirectly with the enforcement of obligations under multilateral environmental agreements, international human rights agreements and fundamental labour standards, often in circumstances where the European Union or its Member States would not have jurisdiction for that enforcement. In particular, the agreements and standards identified in the Annex to the CSDD generally impose obligations on States who are party to the agreement or convention to respect and protect the rights identified therein. The establishment of due diligence obligations relating to violations of these rights at EU level means that companies are effectively required to contribute to the prevention, mitigation and termination of violations of those obligations where a State, within or outside the European Union, has failed to ensure due respect and protection of these rights.

3.4.2. Outline of main features of the European Commission's proposal

The CSDD Proposal introduces obligations applicable to companies that are established under the laws of an EU Member State as well as companies established outside the European Union that generate a certain amount of turnover within the European Union.

According to the European Commission, covered EU companies are companies with:

- more than 500 employees on average and which generated over EUR 150 million in net worldwide turnover in the last financial year for which annual financial statements have been prepared ("high-cap"); or
- more than 250 employees on average and which generated over EUR 40 million in net worldwide turnover in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of the high-impact sectors identified in the Proposal ("mid-cap").[333]

[333] CSDD Proposal, Article 2(1).

Under the European Commission proposal, covered non-EU companies are companies with:

- more than EUR 150 million of net turnover within the European Union in the financial year preceding the last financial year ("foreign high-cap"); or
- between EUR 40 and 150 million of net turnover within the European Union in the financial year preceding the last financial year, provided that at least 50% of their net worldwide turnover was generated in one or more of the high-impact sectors identified in the Proposal (please see below) ("foreign mid-cap").[334]

The high-impact sectors identified in the CSDD Proposal include:

- the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear;
- agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages;
- the extraction of mineral resources regardless of the place of extraction (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).[335]

The Proposal establishes six obligations, which mirror (to some extent) the due diligence process set out in the Due Diligence Guidance for Responsible Business Conduct adopted by the Organisation for Economic Co-operation and Development ("OECD Guidance").[336] These obligations require a covered company to:

- integrate due diligence into its policies;
- identify actual and potential adverse human rights and environmental impacts arising from their own operations, the operations of their subsidiaries, and

[334] CSDD Proposal, Article 2(2).

[335] CSDD Proposal, Article 2(1)(b).

[336] CSDD Proposal, recital 16 in the preamble. See, OECD Due Diligence Guidance for Responsible Business Conduct (2018), at < http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf > ("OECD Guidance").

the value chain operations carried out by entities with whom they have an established business relationship ("adverse impacts");[337]

- prevent and mitigate potential adverse impacts, bring actual adverse impacts to an end and minimise their extent;
- establish and maintain a complaints procedure;
- monitor the effectiveness of its due diligence policy and measures; and
- publicly communicate on due diligence.[338]

The CSDD Proposal also envisages placing a duty of care on the directors of covered companies.[339]

The term "value chain" is defined in the European Commission's Proposal as referring to "activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company".[340] In turn, the term "established business relationship" refers to "a business relationship[ ], whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain".[341] Those two concepts are used by the European Commission to define the CSDD's scope of application. They signal the European Commission's intention to establish the broad reach of the CSDD, as covering an entire supply chain (downstream and upstream), potentially including indirect and potentially short-term business relationships.

The CSDD Proposal also sets out the requirement for the Member States to lay down rules in their national laws governing the civil liability of a covered company for damages arising due to its failure to comply with the due diligence obligations. In particular, it envisages that the Member States must ensure that covered companies are held liable for damages if (i) they fail to comply with the due diligence obligations laid down in the CSDD; and (ii) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end (or its extent minimised), occurred and led to damage. The conditions

[337] Sections 1 and 2 of Part I of the Annex to the Proposal list violations of rights and prohibitions included in international human rights agreements and human rights and fundamental freedoms conventions, respectively. See CSDD Proposal, Article 3(c).

[338] CSDD Proposal, Article 4(1).

[339] CSDD Proposal, Article 25.

[340] CSDD Proposal, Article 3(g).

[341] See CSDD Proposal, Articles 3(f) and 1(1).

that must be met for civil liability to arise in those circumstances, however, are left to be specified in the Member States' national law.

Moreover, Article 9 of the CSDD Proposal requires companies to establish and maintain a complaints procedure. Complaints may be submitted under this procedure by certain persons and organisations that have legitimate concerns regarding actual or potential adverse impacts with respect to a company's operations, the operation of its subsidiaries and its value chains.[342] Complainants are entitled to request appropriate follow-up on their complaint from the company and to meet with its representatives at an appropriate level to discuss severe adverse impacts identified in their complaint.[343] Following the submission of a complaint, the company must determine whether it is well-founded and if so, it will be considered a potential or adverse impact that was identified under Article 6 of the CSDD Proposal.[344] Complaints may be submitted by (i) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact; (ii) trade unions and other workers' representatives representing individuals working in the value chain concerned; and (iii) civil society organisations active in the areas related to the value chain concerned.[345] Although the CSDD Proposal identifies the groups that may submit complaints, this may not prevent other groups who do not have the necessary standing from submitting complaints. A company is likely to spend time examining these complaints to determine that the respective complainants have standing. The current design of the complaints procedure does not prevent this occurrence. To submit a complaint, a complainant must have standing and "legitimate concerns" regarding actual or potential adverse impacts with respect to a company's operations, the operation of its subsidiaries and its value chains.[346] The concept of "legitimate concerns" creates a low standard that can be easily met. If the "legitimate concerns" standard is met, the company will need to consider the complaint and reach conclusions on the merits of legal and fact-intensive questions relating to whether a violation of one or more listed rights or prohibitions has occurred. If a company finds that a complaint is well-founded, the adverse impact set out in the complaint is considered to have been identified.[347] In those circumstances, the company will need to adopt measures either to prevent the potential adverse impact or to bring an actual adverse impact to an end.

[342] CSDD Proposal, Article 9(1).
[343] CSDD Proposal, Article 9(4).
[344] CSDD Proposal, Article 9(3).
[345] CSDD Proposal, Article 9(2).
[346] CSDD Proposal, Article 9(1).
[347] CSDD Proposal, Article 9(3).

In respect of damage occurring at the level of established indirect business relationships, the CSDD Proposal provides that a covered company should not be liable if it has carried out specific due diligence measures (including measures to verify compliance of its indirect partners, e.g., by contractual means), that could be reasonably expected to adequately prevent, mitigate, bring to an end or minimise the adverse impact. Moreover, the civil liability of a covered company for damage arising due to its failure to carry out adequate due diligence is not deemed to prejudice the civil liability of its subsidiaries or the respective civil liability of direct and indirect business partners in the value chain.

The Council has already signalled, in its General Approach, certain objections to the broad scope and significant effects of the European Commission's proposal. In particular, the Council considers that companies should be given more time to implement these new obligations, proposing a three-year phase in period,[348] and proposes that the thresholds are slightly amended (to the effect that they should be met by each company for two consecutive financial years in order for a company to become subject to the due diligence obligations).[349] Although the Council accepts that the turnover criterion creates a territorial connection between non-EU companies and the territory of the European Union (which might be disputed), it identifies a possible deficiency in the enforcement of the obligations under the proposals due to the possibly lack of information about the turnover of non-EU companies. Therefore, the Council proposes that the European Commission establishes a "secured system of exchange of information about the net turnover generated in the Union by non-EU companies without a branch in the EU or having branches in multiple Member States".[350] Moreover, according to the Council, Member States should be free to decide whether regulated financial undertakings are covered by these new due diligence obligations.[351] The Council also insists that the CSDD includes a review clause, requiring the European Commission to review, within seven years of the entry into force of the CSDD, the thresholds regarding the number of employees and the net turnover, the list of high-risk sectors and the criterion of the net turnover generated in the European Union in respect of non-EU companies.[352]

More significantly, the Council proposes that, to ensure covered companies' compliance and to align with the international framework, the concept of an "established business relationship" be replaced with that of a "business partner".

[348] Council's General Approach, paras. 12 to 16 and Article 2.
[349] Council's General Approach, Article(2)(3a).
[350] Council's General Approach, paras. 13 and Article 21(1a).
[351] See Council's General Approach, paras. 20 to 24 and Article 2(8).
[352] Council's General Approach, Article 29.

The Council's definition of the term "business partner" is that of a legal entity "(i) with whom the company has a commercial agreement related to the operations, products or services of the company or to whom the company provides services […] ('direct business partner'), or (ii) which is not a direct business partner but which performs business operations related to the operations, products or services of the company ('indirect business partner')".[353] It further proposes that the risk-based approach in relation to the mapping, assessment and prioritisation of adverse impacts be strengthened.[354]

The Council also suggests replacing the concept of "value chain operations" with the concept of a "chain of activities".[355] This new concept covers a company's upstream and, in a more limited manner, also downstream business partners. However, it leaves out the phase of the use of a company's products or the provision of services.[356] This new concept is defined as:

- activities of a company's upstream business partners related to the production of goods or the provision of services by the company, including the design, extraction, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service, and
- activities of a company's downstream business partners related to the distribution, transport, storage and disposal of the product, including the dismantling, recycling, composting or landfilling, where the business partners carry out those activities for the company or on behalf of the company, *excluding* the disposal of the product by consumers and distribution, transport, storage and disposal of the product being subject to export control under the Regulation (EU) 2021/821 of the European Parliament and of the Council or export control relating to weapons, munition or war materials, after authorisation of the export of the product.[357]

Finally, to achieve legal certainty for covered companies and to avoid unreasonable interference with Member States' tort law systems, the Council proposes to significantly amend the conditions for establishing the civil liability of covered companies for non-compliance with the CSDD. In particular, the Council suggests

[353] Council's General Approach, Article 3(e).

[354] Council's General Approach, para. 17 and Article 3(e) and(f).

[355] Council's General Approach, Article 3(g) and paras. 18 to 19.

[356] Council of the European Union, Council adopts position on due diligence rules for large companies, Press Release, 1 December 2022, at < https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/ >.

[357] See Council's General Approach, Article 3(g).

the introduction of four conditions that must be met in order for a covered company to be held liable, namely:[358]

- a damage caused to a natural or legal person;
- a breach of the duty;
- a causal link between the damage and the breach of the duty; and
- a fault (intention or negligence).

Unlike the CSDD Proposal, the text of the CSDD proposed by the Council expressly provides for the right of victims of human rights or environmental adverse impacts to full compensation. However, it specifies that this compensation should not extend to punitive damages.

Finally, the Council suggest clarifying the rules governing the joint and several liability of a covered company and its subsidiary or its business partner in order to avoid that covered companies unduly rely on contractual assurances received from their subsidiaries or business partners.[359] In particular, the Council envisages that covered companies cannot be held liable for damages caused only by its business partners. However, where the damage was caused jointly by the company and its subsidiary, direct or indirect business partner, they should be liable jointly and severally.

3.4.3. Conclusion: the transformative effects of the proposed new instrument on businesses and supply chains

In its design, the instrument envisaged by the CSDD proposal is very different from the other instruments discussed in this report. This is not a trade or competition instrument. However, if adopted, this directive's implementation will likely have far-reaching implications on Member States' corporate laws, companies' due diligence obligations, the competitiveness of EU businesses and overall supply chains inside and across the European Union's borders.

The challenge is to design these new corporate sustainability due diligence obligations in a manner that ensures their effectiveness, taking into account also the objectives pursued, whilst not undermining the competitiveness of the businesses that need to comply with them. For that reason, requiring covered companies to screen their entire supply chain, covering direct and indirect business relationships, might be impracticable and result in an efficient allocation of resources without taking into account the actual or potential risk of the covered

[358] See Council's General Approach, paras. 27 to 29 and Article 22.
[359] See Council's General Approach, paras. 28 to 29 and Article 22.

international environmental, human rights and labour standards being violated.

As the national reports show, with few exceptions (such as Germany and the Netherlands), most Member States do not currently impose a comprehensive mandatory and enforceable duty of care or due diligence obligation regarding respect for human rights and environmental law. Where such a duty does apply, the regulatory landscape may be fragmented (e.g., separate rules for sovereign wealth fundings) and indirectly have effects on businesses in other Member States (for example, Slovenian businesses being affected by the mandatory due diligence obligations applying already in Germany). Typically, so far, government intervention in most Member States is limited to encouraging voluntary social governance agendas and the use of voluntary codes of conduct. In some Member States, there are criminal penalties for corruption (including in respect of international trade) but that involves a higher threshold than the conduct covered by the CSDD. Likewise, due diligence obligations typically apply to listed companies[360] but those obligations are commonly less strictly defined and enforced as compared with the obligations envisaged under the CSDD.

A common theme throughout the national rapports is the concern about whether businesses are well-equipped to control the entirety of their supply chains and the indirect established business relationships forming part of it. For example, the Spanish report cites a survey of 1900 companies in Spain, showing that only 8% of those companies carry out human rights impact assessments. Likewise, various reports underscore the importance of clearly defining the new obligations. Transposing international standards, which might be intentionally open-ended and aspiring, to enforceable obligations is not sufficient. National law needs to be more precise. Moreover, certain national reports reflect on the risk that the implementation of the proposed directive, taking into account also the variety of corporate governance models at Member State level, will result in a fragmented landscape and might undermine the level playing field in the international market as well as the competitiveness of European businesses.

[360] See Directive (EU) 2017/828 of the European Parliament and of the Council of 17 may 2017 amending directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (text with EEA relevance), OJ 2017 L 132, at < http://data.europa.eu/eli/dir/2017/828/oj > and Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ 2022 L 184, at < http://data.europa.eu/eli/dir/2007/36/2022-08-12 >.

4. Concluding observations

The concept of open strategic autonomy is built on tensions: it has internal and external dimensions; it stands for open trade and justified protectionism; it promotes strengthening the multilateral framework whilst facilitating the option of resorting to unilateral actions; it aspires to ensure a level playing field across global value chains but outsources enforcement of sustainability standards to private parties; and it supports strong responses to unfair and discriminatory trade practices but without undermining the integrity of the internal market. At this stage, the European Union is seeking to resolve those tensions through the design of coherent trade and competition policies, against the background of a rapidly changing geopolitical context.

Undoubtedly, the industrial policy of the European Union is at a cross-roads. The transformation towards a net-zero green and digitalised economy in Europe and elsewhere is resulting in intense external and internal pressures on the internal market and a rebalancing of the European Union's trade and competition policies. Those pressures increasingly require a prompt response whilst the process for amending and concluding multilateral agreements (such as the reform of the WTO SCM Agreement) is slow.

A common concern related to that transformation is how to guarantee a level playing field for companies within the European Union and between EU and non-EU companies. The Foreign Subsidies Regulation seeks to address that issue in respect of foreign subsidies affecting economic activity in the European Union, with the implications of this new instrument for investments within the European Union remaining uncertain. The CCSD proposal aims to ensure a level playing field, in terms of sustainability standards, for EU (and groups of non-EU) companies, doing business at home and abroad, and places a considerable burden on those companies for enforcing these standards. At the same time, the European Union is seeking to respond to the threat that investments, especially in green sectors, are redirected to countries offering the highest and most readily available subsidies. In turn, that shift is seen as potentially undermining the EU Green Deal and EU Digital Strategy.

Many of these considerations cause the European Union's trade policy to become increasingly transactional and defensive. Although the European Union remains a strong supporter of the rules-based multilateral trading system (albeit in need of reform), the shift in the European Union's trade policy (and similar trends in its trading partners) nonetheless risks weakening that system. Overall, some rebalancing in that system is likely but in favour of what interests remains unclear.

In the meantime, the European Union and other trading partners are filling perceived gaps in the system by resorting to unilateral action.

Intersecting with these paramount shifts (and further complicating these developments) is the need to respond to threats to security. In that context, security cannot be disconnected from the interest of the European Union to rely on more resilient and diversified supply chains and avoid that foreign governments obtain a competitive advantage in the acquisition of critical assets (including technology) in the European Union.

Ultimately, investing and doing business in the European Union will become harder – at a time when the European Union's interest is in attracting more investment in digital and green sectors. Many of these new "geopolitical" instruments – even if adopted for protecting legitimate interests – risk reducing EU market access and investments and increasing the costs and efforts of doing business in the European Union. This is the case, for example, with increased FDI control, the Foreign Subsidies Regulation, and various other "level playing field" instruments. The collective economic effects of all of these instruments, combined, have yet to become visible and quantified. In practice, those effects could be widespread and profound. A key message for businesses, trying to benefit from a competitive advantage in accessing the EU market, is to invest in due diligence. This is important not only because of the various EU proposals directly concerning social corporate governance. Companies must also carry out due diligence in documenting the different ways in which a company interacts with a government or receives benefits, knowing your customer, understanding your supply chains.

Finally, trade and competition are increasingly inter-linked. Competition objectives are pursued via trade inspired instruments and new trade regulation seems to be inspired by levelling the playing field considerations. Internal market logics and external trade interests are increasingly inter-connected. A subsidies race is also starting, including to maintain the competitiveness of the European industry. Maybe it also means that the professional communities working on trade and competition need to collaborate more, as the work on this FIDE2023 topic has attempted to achieve.

INSTITUTIONAL REPORT

The New Geopolitical Dimension of The EU Competition and Trade Policies: Towards Greater Strategic Autonomy

Ben Smulders[1]

I. Introduction

In July 2019, Ursula von der Leyen, then still President *in spe* of the European Commission, published a document setting out the political guidelines for the European Commission 2019-2024.[2] In this, she stated: "*Europe must lead the transition to a healthy planet and a new digital world. But it can only do so by bringing people together and upgrading our unique social market economy to fit today's new ambitions*". Amongst the headline ambitions of the mandate, the Policy lists "*the European Green Deal*" and "*A Europe fit for the digital age*". Under the heading "*A stronger Europe in the world*", the President explains that '*We must be ambitious, strategic and assertive in the way that we act in the world … trade is not an end in itself. It is a means to deliver prosperity at home and to export our values across the world*".

The new Commission's policy priorities were further outlined in individual "mission letters" to the member of the Commission. In her mission letter, Margrethe Vestager, Executive Vice-President in charge of the portfolio "A Europe fit for the Digital Age"[3] (which includes competition) was tasked with the following: "*The digital transition will have an impact on every aspect of our economy and society. Your task will be to ensure that Europe fully grasps the potential of the digital age and strengthens its industry and innovation capacity. This will be a key part of strengthening our technological leadership and strategic autonomy (…). When it comes to competition, the mandate is clear: Your task over the next five years will be to ensure our competition policy and rules are fit for the modern economy, vigorously*

[1] The author is *inter alia* Deputy Director General for State aid control in DG Competition and former Director of the Legal Service Trade and WTO law team in the European Commission. Opinions expressed are strictly personal and do not, in any way, bind the institution the author works for. The author wishes to express his gratitude to Nicolo' Tucci and Salim Medghoul for their inspiring thoughts and contribution.

[2] https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf

[3] Mission letter to Executive Vice-President Margarethe Vestager: https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf

enforced and contribute to a strong European industry, both internally and on the global stage."

The messages of the Commission were clear: the "twin transitions" towards a more sustainable, digital and resilient EU are defining ambitions, but in an interconnected and troubled world they require both internal and external action, across multiple policy areas, ensuring that all tools, including trade and competition, work in support of EU values and policy objectives "*These transitions will take place in a time of moving geopolitical plates which affect the nature of competition. The need for Europe to affirm its voice, uphold its values and fight for a level playing field is more important than ever. This is about Europe's sovereignty.*"[4]

"Open strategic autonomy" (as defined by the Commission's Joint Research Center) "*is about equipping the EU to manage interdependence in line with its interests and values*".[5] This popular concept is shorthand for EU's objective to continue to build on (and benefit from) openness – consistent with its commitment to open and fair trade with diversified and sustainable global value chains – while assertively defending its interests, protecting the EU's economy from unfair trade practices and ensuring a level playing field both internally and globally.[6]

At the center of these policies are a strong and well-functioning Single Market, with fair competition and world-leading innovation, values that inform also the competition and trade policies. In this respect, the policies are not at odds with each other and, instead, operate together in a coherent manner and reinforce each other. Indeed, the EU needs companies that vigorously compete, grow and innovate, benefit from a level playing field both in the Single Market and globally, and give customers a choice of products and services, contributing to reliable and diverse supply chains.

Competition and trade tools, therefore, support the priorities of green and digital transitions and of resilience

[4] The quote is taken from the Commission's 2020 "Industrial Strategy", which elaborates further on the concept of open strategic autonomy: 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, 10 March 2020, COM(2020) 102 final. The industrial strategy was updated in 2021: 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 recovery, 5 May 2021, COM(2021) 350 final.

[5] Commission Joint Research Centre (JRC) Science for Policy Report, *Shaping § securing the EU's Opening Strategic Autonomy by 2040 and beyond*, 2021.

[6] 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, 18 February 2021, COM(2021) 66 final.

In particular, competition policy and enforcement are key to furthering "open strategic autonomy".[7] Especially in the current times of crisis, competition rules have an essential role to play and can contribute to the resilience of the Single Market, by ensuring that markets remain open and contestable.

Recent experience has shown that competition rules do not stand in the way of an efficient response to specific crisis measures and exceptional business needs.[8] Competition rules contribute to addressing issues related to "capacity-building", always aimed at avoiding undue market distortions.[9]

In this context, vigorous enforcement remains the rule to avoid anticompetitive conducts. In recent times, calls have been made for relaxation of merger control, antitrust or state aid rules. However, this would lead to inefficient markets. Instead, the Single market requires strong and effective competition policy and enforcement, to give the European economy the ability to recover without compromising the green and digital transitions.

At the same time, EU trade policy must continue to build on the importance of open and fair trade, strengthening the effectiveness of the multilateral framework for trade governance.

This report focusses on the contribution of the ongoing, far-reaching review of competition and trade policies, as well as their enforcement, to the EU's efforts to enable its industries to lead the twin transitions, and foster the resilience of the Single Market.

The report follows the sub-topics identified by FIDE. It will first address matters related to the way in which sustainability factors and benefits could be incorporated into competition law analysis by competition enforcers. The second part will address issues related to the ability of competition policy and enforcement to remain effective by reacting to new market developments and the changing policy

[7] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A competition policy fit for new challenges, 18 November 2021, COM(2021) 713 final

[8] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1–9, amended six times).

Communication from the Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (OJ C 116I, 8.4.2020, p. 7–10).

Communication from the Commission, Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 131I, 24.3.2022, p. 1–17).

[9] For instance, the Commission presented recently the new REPowerEU plan to speed up the green transition and resilience of our economy with more affordable, secure and sustainable energy. From a competition perspective, the funds under the Recovery and Resilience Facility will continue to be subject to State aid control and a new industrial alliance and potential IPCEI will be shaped in accordance with State aid and antitrust rules.

objectives of the Union. Finally, the report will examine the "level playing field" instruments available to protect EU from unfair trade practices and competitive distortions. This final section will also analyses how these instruments fit in EU's trade policy and how they coexist with the goals pursued by competition law – ensuring open markets, encouraging collaborative ventures, innovation and investment, and protecting consumers against limitations of supply that would result in higher prices.

II. Competition policy in support of the green transition: filling the green investment gap and enforcing competition rules

In September 2021, the European Commission published a Policy Brief explaining how EU competition rules can play their part in delivering the Green Deal objectives.[10] The Policy Brief summarized the outcome of a call for contributions and a conference (the "Greening Competition Conference') hosted by Executive Vice-President Margrethe Vestager, which took place on 4 February 2021 and provided a forum for a broad debate on the issue.[11]

Both the consultation and the conference confirmed that an effective interplay between competition policy and the regulatory framework is necessary to meet these objectives.

In this context, the Policy Brief highlights the importance of competition policy in supporting and complementing European solutions at various levels, by keeping markets open, competitive and innovative. At the same time, it provides examples of concrete policy reform across the competition instruments of antitrust, merger control and State aid.

The ongoing consultations regarding different competition instruments[12] with stakeholders and national competition authorities will provide further input to the Commission's policy work. The following sub-sections will provide examples of how competition policy and enforcement is contributing to the pursuit of sustainability objectives in the context of antitrust enforcement, merger control and State aid control.

In particular, the attempt will be to address issues related to the way in which

[10] European Commission, Competition Policy Brief, Competition Policy in Support of Europe's Green Ambition, September 2021.

[11] More information on the Conference and the contributions can be found on: https://competition-policy.ec.europa.eu/policy/green-gazette_en

[12] DG Competition is conducting specific public consultations for each of the competition rules under revision: Public Consultations (europa.eu)

sustainable benefits could be incorporated into the competition law analysis and, more precisely, to identify the tools available in order to balance competition concerns and benefits to sustainability.

1. *Green competition policy: the assessment of sustainability agreements*

Antitrust policy and enforcement can contribute specifically to meeting sustainability objectives, in particular by promoting and protecting competitive markets. It is crucial that markets respond to the Green Deal objectives without creating distortions to competition, by ensuring a strong and fair competition between companies.

As mentioned in the Policy Brief, "*EU antitrust rules allow companies to pursue genuinely green initiatives jointly, while preventing 'greenwashing' that would harm consumers*".[13] Indeed, competition rules allow companies to jointly invest, produce, and distribute sustainable products, provided that this is carried out in compliance with Article 101 TFEU.

In this context, sustainability agreements may benefit from the exemption under Article 101(3) TFEU, when the sustainability benefits deriving from them outweigh the restrictive effects on competition and compensate consumers for the harm suffered. As part of the assessment under Article 101(3) TFEU, sustainability benefits may lead to both, qualitative efficiencies and cost efficiencies that can be passed on to consumers.[14] However, even where no quality improvement or cost savings are achieved, consumer preferences for sustainable products and services may still lead to a favorable assessment under Article 101(3) TFEU, whenever appropriate.[15]

As pointed out in the FIDE questionnaire, it is important to stress that, as regards the assessment, sustainability benefits must at least partially be realized in the market where competitive concerns have been identified.[16]

In parallel, the Commission is currently looking into these issues and intends to provide guidance on the circumstances in which cooperation between competitors can contribute to more sustainable products or production processes in the

[13] See the Policy Brief, p. 1-2.

[14] In this regard, the Policy Brief provides further examples on types of agreements, which may lead to efficiencies.

[15] For instance, in circumstances where consumers are ready to pay a higher price for sustainable benefits.

[16] See the Policy Brief, p. 6: "*Benefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same. This ensures that consumers are fully compensated for the harm suffered. […] The Commission considers that these are sound principles that ensure that antitrust enforcement remains anchored to the consumer welfare standard and at the same time allows sustainability benefits that accrue for the benefit of society as a whole, to be taken into account.*"

ongoing review of the Horizontal Block Exemption Regulations and Guidelines. At the same time, the Commission stands also ready to address requests from companies on agreements that pursue sustainability objectives.[17]

Moreover, with regard to sustainability initiatives in the agriculture sector, the Commission has also reformed the Common Agriculture Policy in order to help European farmers to address pollution, climate change and other sustainability challenges. The reform of the Common Agriculture Policy provides for a new derogation from antitrust rules in relation to agricultural sustainability agreements.[18]

Finally, the Commission can further achieve European Green Deal objectives through vigorous enforcement of antitrust rules. In the last few years, the objective of delivering a low-carbon economy has already been at the core of antitrust enforcement practice[19] and the future individual cases will help to provide further guidance on the application of Article 101 TFEU to sustainability agreements.

2. *Green competition policy: sustainability considerations in merger control*

In addition to cooperation agreements, sustainability considerations have become relevant also to the area of merger control.

As confirmed by both the respondents to the call for contributions and the 2021 Greening Competition Conference, the European Merger Regulation (hereinafter the "EUMR") and its enforcement by the Commission generally support the Green Deal objectives.

At the same time, however, the 2021 Policy Brief highlights some of the issues still standing with regard to the enforcement of merger rules: firstly, the need to take into account consumer preferences for sustainable products and services; secondly, the pursuit of innovation theories of harm in merger cases to prevent the loss of "green" innovation; thirdly, the concerns about "killer" acquisitions of small undertakings active in "green" innovation.

In this respect, the Commission is taking concrete steps to implement changes and adopt tools to address sustainability issues in merger control in the near future.

A number of ongoing competition policy work streams already deal with some of

[17] See the Policy Brief, p. 6: "*…where the public interest so requires, pursuant to Article 10 of Regulation 1/2003, the Commission will also consider adopting decisions finding that the competition rules are not applicable to sustainability initiatives*".

[18] The new provision exempts from the application of Article 101 TFEU sustainability agreements concluded between producers and/or other actors from the food value chain aimed at achieving higher environmental and animal welfare standards than required by law. The Commission is working on guidelines on the application of this provision (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Sustainability-agreements-in-agriculture-guidelines-on-antitrust-derogation_en).

[19] See examples in the Commission's Report on Competition Policy 2021, COM (2022) 337 final.

the issues raised. In the context of the revision of its 1997 Market Definition Notice, the Commission is looking into the significant developments of the past twenty years, while aiming at understanding the competitive environment in which firms operate, both at a given time and more dynamically. In particular, the Commission is considering new ways of offering goods and services and further reflecting on issues related to consumer preferences for sustainable products. Furthermore, the Commission has recently revised its approach to referrals between Member States and the Commission, as set out in Article 22 of the EUMR.[20] The new approach aims at tackling "killer acquisitions" that may lead to a loss of innovation also with regard to sustainability.

In addition, in its enforcement practice, the Commission has developed tools to analyze out of market efficiencies and has proven its ability to enforce and pursue innovation theories of harm across different sectors (especially in the pharma and digital sectors[21]).

While, under the current legal framework, the Commission does not have a mandate to intervene in merger cases solely because they are likely to harm the environment, there is, nonetheless, space for sustainability considerations in the assessment of mergers.

Firstly, Article 2 of EUMR sets out the criteria for a substantive assessment of mergers, which includes the "*development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition*". The Commission already takes into account consumer preferences for sustainable products, either in market definition or in the competitive assessment as a parameter of differentiation, which affects closeness of competition.[22] This trend already results from recent practice, for instance, in waste recycling markets.[23] Sustainability factors played a key role also in other merger assessments,[24] where the Commission has pursued innovation theories of harm to protect innovation efforts benefitting the environment.

[20] Communication from the Commission. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113, 31.3.2021, p. 1–6.

[21] Some examples of cases where the Commission raised innovation theories of harm include M.8401 J&J/ Actelion, M.7278 General Electric/ Alstom, M.7932 Dow/ Dupont, M.8084 Bayern/ Monsanto.

[22] See for instance, M.7184 Marine Harvest/Morpol, M.9730 FCA/PSA, M.8829 Total Produce/Dole Food Company, M.7220 Chiquita Brands International/Fyffes and M.7510 Olam/ADM Cocoa Business, among others.

[23] See case M.10047 Schwarz/Suez, concerning Commission's approval of the merger between Schwarz Group and Suez Waste Management on condition that the parties would divest assets to ensure that customers would continue benefitting from less polluting lightweight packaging sorting services.

[24] Risk of a reduction of incentives and the ability to achieve the same level or type of innovation: see cases M.7932 Dow/Dupont and M.8084 Bayern/ Monsanto. Differently, in the *Aurubis/Metallo* case, the same level of innovation was not achieved.

Secondly, in the existing legal framework, factors of sustainability may arise in the assessment of merger efficiencies. The Commission might analyse environmental factors as efficiencies whenever they "*counteract the effects on competition and in particular the potential harm to consumers*".[25] As specified in paragraph 78 of the Horizontal Merger guidelines,[26] "*the efficiencies have to benefit consumers, be merger-specific and be verifiable*".

Lastly, sustainability considerations may arise in the context of remedies, which may be adopted to counter the negative effects on the environment identified during the substantive assessment of a merger.[27]

In sum, sustainability considerations and innovative green theories of harm relied upon by the Commission in the protection of green innovation and prevention of "killer" acquisitions are not out of the ordinary and in sync with the European Green Deal objectives.

3. *Role of State aid in enabling a green transition*

State aid rules play a key role in supporting the Green Deal objectives. In particular, the Climate, Energy and Environment Aid Guidelines[28] ("CEEAG") and the revision of the related sections of the General Block Exemption Regulation ("GBER") will facilitate the granting of State aid in those areas important for the green transition, while also aiming at crowding in private investment.

The CEEAG broadens the scope of the guidelines to new areas (industry, clean mobility, circularity and biodiversity) and to technologies that can deliver the de-carbonization goals. At the same time, the guidelines introduce new rules with regard to reductions on certain electricity levies for energy intensive users,[29] as well as safeguards to ensure that the aid is effectively directed where it is necessary to improve climate and environmental protection. In this context, the targeted revision of the GBER will complement the CEEAG by introducing State aid provisions to further facilitate public support for the EU's green transition.

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[25] See EUMR, recital 23.

[26] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2001, p. 5.

[27] See, in this respect, Policy Brief, p. 7: "*…where environmental aspects are considered an important parameter of competition to assess, for example, how closely two merging companies compete in the relevant market, or where the Commission has concerns about innovation competition, this may have to be reflected in the design of remedies. If environmentally friendly, products or innovation in this field are important for the competitiveness of the divestment business, specific purchaser criteria may also be necessary to ensure that the purchaser will continue to be able to successfully produce and market such products and continue to innovate in this field*".

[28] Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022 (OJ C 80, 18.2.2022, p. 1–89).

[29] Aid to energy intensive users is proposed to be partially aligned to the ETS Aid Guidelines: Communication from the Commission Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021 (OJ C 317, 25.9.2020, p. 5–19).

State aid rules also play an important role in enabling the innovation needed to deliver on the Green Deal objectives. In this respect, the State aid rules on Important Projects of Common European interest[30] ("IPCEI Communication") promote ambitious cross-border collaborations between Member States and industry. In particular, IPCEIs can contribute to the development of new technologies and production processes in all areas of the economy that can contribute to the Green Deal objectives, where the market alone would not deliver.

Finally, the new Regional State aid Guidelines[31] can contribute to granting public support to the least favored regions in order to adapt to the green transition, while ensuring a level playing field between Member States.[32]

On 13 January 2023 the Commission consulted Member States on a draft proposal for a new Temporary Crisis and Transition Framework (TCTF) as part of the Green Deal Industrial Plan (see section III.3 below).[33] The declared purpose of this proposal is to respond to the double challenges of the energy crisis and the Inflation Reduction Act of the USA. The temporary changes to State aid rules would, in addition to certain simplifications, allow aid to support new investments in production capacities for new green technologies that are at risk of relocation outside the EEA area. This would include, as an exceptional temporary feature, a possibility of "matching aid", allowing a Member State to offer support corresponding to the subsidies (not exceeding the funding gap) that a third state is offering in order to attract that investment. Under the draft proposal, the TCTF would apply to 31 December 2025.

III. Competition policy in the context of a European "open strategic autonomy"

The Commission's prohibition of the Siemens/Alstom transaction, in February 2019, triggered a new phase in Europe's ongoing debate concerning the interaction between competition law and EU industrial policy.[34] While this debate is not

[30] Communication from the Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ C 528, 30.12.2021, p. 10–18).

[31] Communication from the Commission, Guidelines on regional State aid (OJ C 153, 29.4.2021, p. 1–46).

[32] See also COM/2020/21 final, Sustainable Europe Investment Plan.

[33] https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_527

[34] See Commission Staff Working document on Evaluation of EUMR, footnote No 20: "… *On 18 December 2018, representatives of 18 EU governments called for a renewed EU industrial policy in a Joint Statement adopted at the 6th Ministerial Meeting of the Friends of Industry in Paris. On 19 February 2019, the German Federal Ministry for Economic Affairs and Energy and the French Ministry for Economy and Finances made public the Franco-German Manifesto for a European industrial policy fit for the 21st century. Several technical reports from*

novel[35], after the decision some stakeholders called for a relaxation of the EU competition rules and, more specifically, for wider geographic market definitions, including more global markets.

However, as stated by the European Political Strategy Center in its report "EU industrial policy after Siemens-Alstom", "*relaxing merger control, antitrust or state aid rules presents no panacea to alleged weaknesses and competitiveness challenges of European industry and carries significant risks – notably if this translates into authorising anti-competitive transactions*".[36] As European Commissioner for Competition, Margrethe Vestager, put it: "*…we can't build those champions by undermining competition. We can't build them with mergers that harm competition or by looking the other way when Europe's businesses break our rules*".

Indeed, open competition is a strategic choice. By keeping markets open and competitive and ensuring a level playing field, competition policy helps achieving the Union's wider priorities. Relaxing its enforcement, in the opposite, would lead towards creating inefficient markets.

At the same time, it is important to point out that competition enforcement does not itself prevent the creation of "European champions". If anything, rules-based competition law enforcement provides legal certainty and predictability to all businesses carrying out activities in the Single Market, *"and creates the conditions for better, more efficient and innovative industries to emerge*".[37]

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various public bodies followed suit, such as the note of 6 May 2019 Competition and Trade: which policies for the EU?, by the French Council of Economic Analysis and the joint report of 3 June 2019 Competition policy and EU strategic interests by the Inspectorate General of Finance and the General Council for the Economy. On 4 July 2019, the German and French ministries, together with Poland's Ministry of Entrepreneurship and Technology, published the paper Modernising EU Competition Policy. Furthermore, on 4 February 2020, the Ministries of Economic Development of France, Germany, Poland and Italy addressed a joint letter to Executive Vice-President Vestager. On 20 July 2020, the French Senate adopted a resolution on the modernisation of EU competition policy. On 26 November 2019, the Austrian Federal Competition Authority published a Position paper on national and European champions in merger control. Other contributions include a report by the European Political Strategy Centre (EPSC) EU Industrial Policy after Siemens-Alstom (18 March 2019), an article by the Nordic Competition Authorities (26 June 2019), papers by the business associations Business Europe Improving EU Competition and State Aid Policy (4 September 2019) and European Roundtable of Industrialists Competing at Scale (7 October 2019), a report of the EU Affairs Committee of the French Parliament on EU Competition Law Facing the Challenges of Globalization (November 2019), a report by Robert Schuman Foundation Competition Policy and Industrial Policy: for a Reform of European Law (January 2020), a letter by the Swedish Minister of Economic Affairs, on behalf of counterparts in eight Member States (March 2020). On 25 November 2020, the European Parliament adopted a Resolution on a New Industrial Strategy for Europe".

[35] Over the years, the Commission has consistently confirmed its attempt to resist political pressure to approve transactions that would raise competition concerns by creating national or European champions: see, for example, *Ryanair/AerLingusI* (2007) and *Deutsche Börse/London Stock Exchange Group* (2017).

[36] See European Commission, European Political Strategy Centre, *EU industrial policy after Siemens-Alstom: finding a new balance between openness and protection*, Publications Office, 2019.

[37] For a concrete example of competition enforcement not standing in the way of the creation of "champions", see *ibid.*, p. 4: "*the vast majority of merger transactions in the EU are cleared unconditionally. Over*

Therefore, it is clear that competition rules are not just a set of prohibitions, but have an in-built flexibility, always aimed at avoiding undue market distortions. Especially in the recent times of crisis, preserving competition contributes to boosting the resilience of the Single Market.

The following sub-sections will seek to highlight the in-built ability of competition policy to adapt to new market circumstances, policy priorities and customer needs, while not relaxing the enforcement of its core principles and standards.

1. Balancing industrial policy considerations with competitive concerns in merger control

As anticipated, among the debates, which have surfaced in recent years on issues related to the enforcement of EU merger control, one has concerned its interaction with EU industrial policy, in particular, on whether EU merger control takes sufficiently into account the increased globalisation of the economy and whether it impedes the emergence of European (industrial) champions and the development of an ambitious industrial strategy.

Indeed, global competitiveness cannot come at the expense of a fair and healthy competitive environment in the EU.

In that vein, the Commission Staff Working Document on the evaluation of procedural and jurisdictional aspects of EU merger control has refrained from specifically addressing these debates,[38] since they "*do not directly concern the procedural and jurisdictional aspects under review and, in some cases, go well beyond EU merger control*".

In part, on the one hand, these discussions concern the Commission's enforcement practice in interpreting and applying the existing rules in the EUMR to individual cases. In this context, the Commission has continued to develop its approach on substantive issues by assessing the effects of mergers on new parameters, such as innovation and quality, which has resulted in a number of interventions in sectors like digital, pharma, medical devices, agro-chemicals and basic industries.[39]

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the past ten years (2009-2019), the European Commission has approved over 3,000 mergers and blocked only nine. A number of significant merger transactions that helped to build strong 'European champions' while sustaining robust competition in European markets were cleared, such as Peugeot's takeover of Opel, or AB InBev's acquisition of SABMiller".

[38] European Commission, Commission Staff Working Document, *Evaluation of procedural and jurisdictional aspects of EU merger control*, 26 March 2021, SWD (2021) 66 final.

[39] See for example the Commission decisions in cases: M.8788 – Apple/Shazam, 2018; M.8124 – Microsoft/LinkedIn, 2016; M.8084 – Bayer/Monsanto, 2018; M.7932 – Dow/DuPont, 2017; or M.7275 – Novartis/GSK Oncology Business, 2015.

On the other hand, the Commission has launched specific work streams and initiatives addressing recent debates about EU merger control:

(i) Commission staff working document on evaluation of Market Definition Notice[40]: the evaluation of the Notice is part of a broader Commission effort to make sure that EU competition policy and rules are fit for the modern economy. The revised Notice, in particular, will take into consideration the significant developments of the past twenty years, such as digitalisation and new ways of offering goods and services.[41] In the context of the evaluation, the Commission addressed the issue concerning the assessment of geographic markets in conditions of globalisation and import competition. The evaluation results overall suggest that the Notice allows the Commission to reflect market developments, as shown in individual cases, although this is not set out explicitly in the Notice.[42] Indeed, the Commission did not provide conclusive statements on the need to introduce targeted changes to the Notice.

(ii) Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market ("Foreign Subsidies Regulation" or "FSR")[43]: the Regulation fills a regulatory gap by complementing the various existing Single Market and competition instruments, as well as the existing trade policy tools. It includes new tools to effectively tackle foreign subsidies that cause distortions and undermine the level playing field in the internal market.

[40] European Commission, Commission Staff Working Document, *Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997*, 12 July, 2021, SWD(2021) 66 final.

[41] In particular, the Commission's analysis needs to take account of "*changes in production processes, consumer preferences, and other market specificities, such as innovation cycles, supply chains, the specificities of digital markets and related business models, and ease of access to new suppliers*" (see above Competition policy report, p. 7).

[42] The results were the following:

(i) the Notice overall adequately describes the assessment of geographic markets in the context of globalization;

(ii) the Commission has gathered more and more experience in analyzing markets that are potentially global or otherwise broader than the EEA over the years and out-of-market competition can be assessed where the criteria of potential competition is fulfilled (some data: while in 1992–2004, the Commission assessed a global market as one of the plausible markets in approximately 20% of merger cases with affected markets, in 2005–2018 the share rose to approximately 30%);

(iii) Examples of case law regarding evolutions in assessing global markets in the same industry: see M.580 – ABB/Daimler-Benz and M.5754 – Alstom Holdings/Areva T&D (market of rail technology); M.2033 – Metso/Svedala and M.9585 – Outotec/Metso (Minerals business).

[43] European Commission, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223. The Regulation was adopted on 14 December 2022 and published in the Official Journal on 23 December 2022 (OJ L 330, 23.12.2022, p. 1).

(iii) Digital Markets Act ("DMA")[44]: the Regulation includes *ex ante* rules (both prohibitions and obligations) for digital platforms having a gatekeeper role and a market investigation framework to examine digital markets (see below sub-section III.2).

2. DMA and other relevant competition instruments towards a European digital economy

With the growing relevance of the digital economy, the EU should not lag behind in the digital transition. At the same time, ensuring competitive conditions and level playing field is key in the digital Single Market.

If anything, competition enforcement may need to adapt as the economy digitalizes. Indeed, competition tools need adapting to deal with the new digital landscape and to enable industries to lead the twin transition[45]. In this context, a central objective of competition policy remains keeping digital markets competitive. In particular, as regards online platforms, it is necessary to both continue enforcing competition rules and to complement the existing toolbox to make the most out of online platforms and the data economy.

Together with the Digital Services Act[46], the DMA is one of the centerpieces of the European digital strategy. The DMA is coherent with the Commission's digital strategy in its contribution to ensuring a fair and competitive digital economy, one of the three main pillars of the policy orientation and objectives announced in the Communication "Shaping Europe's digital future".[47] The aim is to create a level playing field to allow innovative digital businesses to grow within the Single Market and compete globally.

The DMA builds on the Commission's extensive experience in dealing with digital and online markets through competition law enforcement and complements existing EU (and national) competition rules.[48] In particular, it addresses economic

[44] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842. The DMA (Regulation (EU) 2022/1925) entered into force on 1 November 2022.

[45] See above also the *Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997.*

[46] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC, COM(2020) 825 (Digital Services Act or DSA).

[47] European Commission, Directorate-General for Communications Networks, Content and Technology, Shaping Europe's digital future, Publications Office, 2020

[48] The Commission is a global frontrunner in enforcing antitrust rules in the digital sector. See example of several cases (some still under investigation): *AT.40652 – Apple – App Store Practices (e-books/audiobooks); AT.40670 – Google – Adtech and Data-related practices; AT.40716 – Apple – App Store Practices; AT.40684 – Facebook leveraging; AT.40703 – Amazon – Buy Box; AT.40462 – Amazon Marketplace; AT.40437 – Apple – App Store Practices (music streaming).*

imbalances and unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules

The DMA minimises the detrimental structural effects of unfair practices *ex ante*, without limiting the ability to intervene *ex post* under EU and national competition rules. In particular, the DMA contains provisions that should allow the Commission to receive information from digital gatekeepers about acquisitions of companies providing digital services, thereby increasing its knowledge about these transactions and their business rationale.

To ensure that the new gatekeeper rules keep up with the fast pace of digital markets, the Commission will have significant powers in carrying out market investigations. These will allow the Commission to: (i) designate companies as gatekeepers, (ii) update dynamically and expand the obligations for gatekeepers when necessary, and (iii) design remedies to tackle systematic infringements of the DMA rules. In particular, the Commission will be the sole enforcer of the regulation in order to ensure effective implementation of the rules.

In addition to the DMA, further competition rules can contribute to reflecting the specificities of digital markets:

(i) Commission's recent Guidance on Article 22 EUMR[49]: encourages, where appropriate, MS to refer potentially problematic transactions to the Commission for its review, even if those do not meet national notification thresholds. (e.g. certain acquisitions of innovative digital companies having competitive potential beyond what their turnover would indicate),

(ii) Revision of the Horizontal Guidelines: updated guidance on data sharing, to ensure that companies can take the most out of data without undermining competition,

(iii) Revision of Vertical Block Exemption Regulation and Guidelines[50]: up-to-date guidance including on new supply and distribution models.

See also Commission's decision of 27 June 2017 in Case *AT.39740 – Google Search (Shopping)*. On 10 November 2021 the General Court upheld the Commission's decision, confirming the latter's approach was correct and legally sound.

Access to data or data accumulation played a role also in a number of recent merger cases (see, for example, Commission's decision of 6 September 2018 in Case *M.8788 – Apple/Shazam*; Commission's decision of 17 December 2020 in Case *M.9660 – Google/Fitbit*)

[49] Communication from the Commission. *Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases,* OJ C 113, 31.3.2021, p. 1–6.

[50] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ('VBER').

At the same time, State aid policy can contribute to addressing the needs for large-scale investments to support the development of the necessary infrastructure as the backbone to the digital economy, without crowding out private investment.[51]

3. State aid and EU industrial policy

EU State aid rules play an important role in the Commission's wider competition toolbox to support the EU's industrial policy goals and its "open strategic autonomy".

As State aid rules are a vital part of the twin transition, the Commission is currently reviewing and has reviewed a large number of State aid instruments in the context of its "fitness check", as part of a more general review of the EU competition framework.[52]

The updated Industrial Strategy[53] (May 2021) reaffirmed the priorities set out in the March 2020 Strategy. The purpose of the update was to respond to the lessons learned from the COVID-19 crisis to boost the recovery and enhance the EU's "open strategic autonomy". In this context, the updated strategy clearly highlights that "*enforcement of competition rules, in particular State aid rules, will ensure that public funds for the recovery do not replace but trigger additional private investments*". Both strategies clearly recognize fair and open competition as one of the fundamentals of industry, since it ensures a level playing field that provides opportunities for businesses of all sizes to grow.

In the context of the pandemic, the Commission has used the full flexibility of State aid rules to address very exceptional circumstances. The adoption of the COVID-19 Temporary Framework[54] has enabled necessary and proportionate support by Member States to businesses in need. At the same time, however, the Commission was very careful in ensuring equal treatment and limiting undue distortions to competition that would undermine the Single Market. In particular, the COVID-19 Temporary Framework introduced safeguards to ensure that public support did not distort the level playing field in the Single Market.

As also set out in the Industrial Strategy – as confirmation of the exceptional character of such instrument – crisis support measures need to be progressively

[51] In this context, see the Revision of Broadband State aid Guidelines, which aims to further facilitate the deployment and take-up of broadband network, thereby accelerating the digital transition and increasing connectivity; see also the Revision of the R&D&I-Framework and corresponding GBER-rules, which aim at updating these rules to reflect recent market and technological developments and thereby facilitate private-sector investments that accelerates the twin transitions.

[52] See above, Footnote No 4.

[53] See above, Footnote No 4.

[54] See above, Footnote No 8.

phased out when the economic situation allows it, while avoiding cliff-edge effects. Indeed, relaxing State aid rules cannot be the solution to addressing challenges EU is facing. Consequently, the COVID-19 Temporary Framework ceased to, apply on 30 June 2023 with the exception of some measures specifically intended to sustain the recovery, which apply until end 2024.

The same approach has been adopted in the context of the more recent Temporary Crisis Framework[55] ("TCF") to enable Member States to use the flexibility foreseen under State aid rules to support the economy in the context of Russia's invasion of Ukraine. The TCF seeks to address the energy-specific aspects of the situation and to speed up investments that support the green transitions whilst providing – as before it the Covid-19 Temporary Framework – fundamental safeguards to avoid excessive distortion of the Single Market.

The ongoing review of State aid instruments is intended to support EU industry in meeting the challenges of the twin transitions, and foster the resilience of the Single Market:

- The update of the State aid Framework on IPCEIs[56]: the update enables Member States and industry to jointly overcome market failures, by setting up ambitious cross-border projects in a transparent manner, while ensuring positive spill-over effects for the EU economy at large. In order to qualify for support under the revised IPCEI Communication, a project must: (i) provide an important contribution to EU objectives; (ii) demonstrably overcome important market failures; (iii) involve at least four Member States, unless a smaller number is exceptionally justified by the nature of the project; (iv) be designed in a transparent and inclusive manner, providing all Member States a genuine opportunity to participate in an emerging project; (v) deliver concrete positive spill-over effects benefiting the EU economy and society, beyond the participating Member States and companies; (vi) involve important co-financing by the companies that will receive State aid; and (vii) avoid negative environmental impacts due to failure to comply with the principle of 'do no significant harm' that are unlikely to be outweighed by sufficient positive effects.

Furthermore, the revised rules set specific criteria for the eligibility of breakthrough innovation projects (covering both R&D&I stage and the first industrial

[55] See above, Footnote No 8.

[56] Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest – OJ C 528, 30.12.2021

deployment stage) or of large infrastructure projects of great importance for the EU in different sectors.

With regard to necessity and proportionality of the aid, the revised rules also set a maximum permitted aid level.[57]

- The new CEEAG (discussed above in Section II.3) provides a comprehensive framework for the further de-carbonization and increased sustainability of the European economy.
- The Regional State aid Guidelines: enable Member States to support the least favored regions, as well as regions facing transition or structural challenges, while ensuring a level playing field between Member States. The Regional Aid Guidelines maintain strong safeguards to prevent Member States from using public money to trigger the relocation of jobs from one EU Member State to another, which is essential for fair competition in the Single Market.
- The revision of the Broadband Guidelines seeks to reflect recent technological and market developments.58
- The revision of R&D&I State aid rules will make sure that R&D&I are fit for purpose taking into account the market evolution, in particular the technological development, as well as the specific green and digital transition objectives, as well as the EU research and innovation policy, ensuring that public funding goes to projects that otherwise would not be realised due to market failures.

Finally, while awaiting the full impact that the ongoing updates will deliver in the context of the twin transition, there was, obviously, an urgency to respond to the hardships and global energy market disruption caused by Russia's invasion of Ukraine.

In May 2022, the Commission presented the REPowerEU Plan[59], which addresses a double urgency to transform Europe's energy system: phasing out of the EU's dependence on Russian fossil fuels, which are used as an economic and political weapon, whilst also addressing the transformations required by the climate crisis.

[57] See IPCEI Communication, para.33: *"The maximum permitted aid level will be determined with regard to the identified funding gap in relation to the eligible costs. If justified by the funding gap analysis, the aid intensity could cover all of the eligible costs. …]".*

[58] The proposed targeted revision of the Guidelines consists of, *inter alia*: (a) Introducing new speed thresholds for public support to Gigabit fixed networks and new guidance on support for the deployment of mobile networks, (b) Introducing a new category of possible aid in the form of demand-side measures supporting the take-up of fixed and mobile networks (vouchers).

[59] 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, REPowerEU Plan, 18 May 2022, COM(2022) 230.

In particular, the measures in the REPowerEU Plan respond to EU's ambition to reduce its energy dependency faster, through energy savings, diversification of energy supplies, and accelerated roll-out of renewable energy to replace fossil fuels in homes, industry and power generation. In this context, State aid will play a crucial role.[60]

While there was an initial fear that the war would slow down EU's industrial strategy and its efforts to achieve the green and digital objectives, it is now generally agreed that the new REPowerEU Plan and the Commission's efforts actually have helped in speeding up the green transition and resilience of our economy with more affordable, secure and sustainable energy. In this context, State aid rules have an in-built flexibility, always aimed at avoiding undue market distortions.

In February 2022, the Commission put forward a Green Deal Industrial Plan[61] to simplify, accelerate and align incentives to preserve the competitiveness and attractiveness of the EU as an investment location for the net-zero industry. It is based on four pillars: a predictable and simplified regulatory environment; faster access to sufficient funding; skills; and open trade for resilient supply chains. It announced the intention to allow further flexibility for the Member States to grant aid limited to carefully defined areas and on a temporary basis within the Temporary Crisis and Transition Framework (TCTF) for State aid mentioned above.

IV. "Open strategic autonomy": a new EU trade policy and relevant "level playing field" instruments

As correctly pointed out in the FIDE questionnaire, the EU's new trade policy seeks to promote its open strategic autonomy. According to the Commission's Trade Policy Review[62], open strategic autonomy "*builds on the importance of openness, recalling the EU's commitment to open and fair trade with well-functioning, diversified and sustainable global value chains*". This concept encompasses: a)

[60] The amendment of the Temporary Crisis Framework extends its scope by providing for the following additional types of aid measures in line with the REPowerEU Plan: (i) measures accelerating the rollout of renewable energy; (ii) measures facilitating the decarbonisation of industrial processes. Under both new sections, Member States need to ensure that the projects are implemented within a specific timeline, to ensure an effective acceleration effect in reaching the REPowerEU objectives

[61] Communication to 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 Green Deal Industrial Plan for the Net-Zero Age, 1 February 2023, COM(2023) 62.

[62] See above, Footnote 5.

resilience and competitiveness to strengthen the EU's economy; b) sustainability and fairness, reflecting the need for responsible and fair EU action; c) assertiveness and rules-based cooperation to showcase the EU's preference for international cooperation and dialogue, but also its readiness to combat unfair practices and use autonomous tools to pursue its interests where needed.

The Trade Policy Review also announces the three core objectives of trade policy for the medium term,[63] as well as the six areas that are critical to achieving the EU's objectives in the medium term.[64]

The Trade Policy Review, while supporting the need to strengthen and improve the effectiveness of the multilateral framework for trade governance, expresses the need to ensure that the rules respond to current economic realities and are well equipped to respond to competitive distortions and ensure a level playing field. It is in this context that the EU is moving to further develop its tools to confront new challenges and protect the Single Market from unfair trading practices, both internally and externally, and to enforce its sustainable development commitments.

This section will examine some relevant "level playing field" instruments – already adopted or still in the pipeline – which will contribute to ensuring that EU is well equipped to protect the EU's economy from unfair trade practices and to respond to competitive distortions in the Single Market.

1. Foreign Subsidies Regulation (FSR)

The FSR was adopted on 14 December 2022 and entered into force on 13 January 2023.[65] The adopted text maintains the three-tier structure of the Commission proposal consisting of notifications for large concentrations and public procurement procedures as well as an ex-officio tool to investigate suspected subsidies in other situations.

[63] See Trade Policy review, pp. 9-10: (i) Supporting the recovery and fundamental transformation of the EU economy in line with its green and digital objectives. This calls, in particular, for closer policy integration between trade policies and internal EU policies; (ii) Shaping global rules for a more sustainable and fairer globalization, including leading efforts to reform the WTO and improving the effectiveness of the multilateral framework for trade governance. At the same time, however, there is a need to ensure that the rules respond to current economic realities and are well equipped to respond to competitive distortions and ensure a level playing field; (iii) Increasing the EU's capacity to pursue its interests and enforce its rights, including autonomously where needed.

[64] See Trade Policy review, pp. 10-21: (i) Reform WTO; (ii) Support the green transition and promote responsible and sustainable value chains; (iii) Support the digital transition and trade in services; (iv) Strengthen the EU's regulatory impact; (v) Strengthen the EU's partnerships with neighboring and enlargement countries and Africa; (vi) Strengthen the EU's focus on implementation and enforcement of trade agreements, and ensure a level playing field.

[65] See footnote 43. The Regulation will become applicable 6 months after entry into force.

The Council called on Commission already in 2020 to work on tackling the effects of distortive foreign subsidies.[66] The issue of subsidies has also been brought forward by the co-legislators at several occasions.[67]

The FSR fills a regulatory gap. While the origin of the EU State aid policy goes back to the founding years of the Union in the 1950s and, over the decades, the EU has refined its State aid policy, for example, through a sophisticated set of guidelines and block-exemption rules, there are no rules comparable to EU State aid rules to tackle subsidies granted by third countries. Subsidy control under WTO rules is largely limited to trade in goods and does not cover services or investment. The FSR therefore complements existing rules:

It lays down rules and procedures for investigating foreign subsidies that favour companies in a way that negatively affects competition in the EU internal market and for addressing such distortions. There is a particular focus on large concentrations and large public procurement procedures for which notifications are required, but the Commission can launch investigations on its own initiative in any other economic activity for which a distortive foreign subsidy was granted. The Commission will be exclusively competent to enforce the instruments, while keeping Member States properly informed and involved in the decision making.

The FSR does not interfere in Member States' competences (e.g. MS are competent for national security and public order, and can continue to look into those aspects under their national FDI screening mechanisms). In contrast, the FSR addresses the effects of foreign subsidies on the internal market. It therefore aims to achieve a playing field in the economic sense like other competition instruments, by tackling foreign subsidies that undermine the Single Market's level playing field.

As regards its relationship with the objectives of EU competition law and trade defence rules, the FSR does not aim to transpose existing rules into the area of foreign subsidies, but rather to complement the existing legal framework with a

[66] See, for further details, Commission Staff Working Document, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5 May 2021, SWD(2021) 99 final: *"Recently, several suggestions for action have been brought forward aimed at addressing the possible distortions from foreign subsidies. The Netherlands have suggested targeting undertakings receiving foreign subsidies or having an unregulated dominant position in a third country market, in order to prevent potentially disruptive behaviour. France, Germany, Italy and Poland have called for an adaptation of the Union's competition rules, notably to take account of the possible distortions created by foreign State support and protected markets. The German Monopolies Commission has proposed a third-country State aid instrument to address the negative effects of non-EU subsidies on the internal market"*.

[67] In the Council conclusions of 11 September 2020, the EU Council stated that it "*looks forward, in that respect, to discussing the White Paper on levelling the playing field as regards foreign subsidies*". This Council position was later endorsed by the Special European Council in its conclusions of 1-2 October 2020, which called for, *inter alia,* "*further instruments to address the distortive effects of foreign subsidies in the Single Market*"."

new instrument for foreign subsidies. The FSR respects the boundaries of existing instruments, while drawing inspiration from them, for example through aligning concepts to the extent possible.[68]

The FSR will start to apply on 12 July 2023 (with the notification obligation applying as of 12 October). While this Regulation constitutes a unilateral approach to ensure a level playing field in the EU internal market, the EU remains firmly committed to developing a multilateral approach to address distortive subsidies globally.[69]

2. FDI Screening Regulation

EU grows thanks to an open investment environment, which allows others to invest in Europe's competitiveness. However, as set out in its New Industrial Strategy, the EU "*must also be more strategic in the way it looks at risk associated to foreign investment*". In this context, the FDI Screening regulation has been adopted to safeguard Europe's interests on the grounds of security and public order.

The framework sets up a FDI screening mechanism to address cases where a transaction would create a risk to security or public order in the EU.

As the FSR, this Regulation complements the existing legal framework with a new instrument for FDI screening. FDI and merger control are separate instruments: FDI control assesses security risks and risks for public order, whilst merger control at both the EU and Member State level is concerned about effects on competition. It is important, also, to bear in mind that FDI control is not an industrial policy tool, but it is exclusively designed to identify risks for public order and security. To the extent an FDI constitutes a concentration falling within the scope of the EUMR, Article 21 of the EUMR applies, which confers exclusive competence on the Commission to review concentrations with a Union dimension. EU Member States may only respond appropriately to protect their legitimate interests (e.g. public security).[70]

3. Anti-coercion and International Procurement Instrument

The EU has developed further tools to confront new challenges and protect European companies and citizens from unfair trading practices, both internally and externally.

The Commission has proposed a new legal instrument in the area of trade policy,

[68] More specifically on competition rules, the procedure for assessing notified concentrations under the FSR is aligned to the extent possible with the procedure for assessing notified concentrations under the EUMR.

[69] See the joint declaration of the European Parliament, the Council and the European Commission, to be issued when the Regulation on foreign subsidies distorting the internal market is adopted.

[70] See in this respect, the recent case of Hungary's breach of Article 21 EUMR on the limits of the "legitimate interests" concepts: Hungary's veto over the acquisition of AEGON's Hungarian sub (europa.eu).

to protect the EU from potential coercive actions of third countries[71]. The aim of the anti-coercion instrument is to deter countries from restricting or threatening to restrict trade or investment to bring about a change of policy in the EU in areas such as climate change, taxation or food safety. These range from countries using explicit coercion and trade defense tools against the EU, to selective border or food safety checks on goods from a given EU country, to boycotts of goods of certain origin. This tool will allow EU to react to unfair trade practices and respond to economic intimidation.

In the same spirit, the International Procurement Instrument[72] confronts unfair trade practices, aiming at tackling protectionism in access to procurement markets in third countries and enhancing reciprocal access for EU operators in public procurement.

In particular, the International Procurement Instrument will: (i) provide leverage for the EU while negotiating market opening with third countries; (ii) enforce the principle of balanced reciprocal market access for EU business to third countries' procurement markets; (iii) improve the level playing field.

4. Single Market Emergency Instrument

The Commission announced in its Industrial Strategy Update a Single Market Emergency Instrument ("SMEI") to help mitigate harmful impacts of crises on the Single Market and to provide a structural solution to safeguard the resilience, level playing field and well-functioning of the Single Market and its supply chains in the context of possible future crises. A proposal[73] was adopted by the European Commission on 19 September 2022.

Recent crises, such as the COVID-19 pandemic, have shown how such events can disrupt the Single Market and the extent to which businesses and the European economy rely on its normal functioning. The SMEI will focus on removing obstacles and preserving the free movement of goods, services and persons and on ensuring the availability of crisis-relevant goods in case it is activated. In normal times where no sudden event is likely to have severe disruptive effects

[71] 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.

[72] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI).

[73] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98, COM(2022) 459.

on the Single Market, market forces ensure the functioning of businesses and of the Single Market. As such, continued efforts to preserve and further deepen the Single Market are still needed.

The Instrument will provide a strong agile governance structure as well as a targeted toolbox to ensure the smooth functioning of the Single Market in any type of future crisis, in line with EU competition rules. A general contingency planning framework enables the Commission and Member States to set up a coordination and communication network to increase preparedness. In case of a threat of significant disruptions, the so-called vigilance mode would focus on monitoring supply chains of identified, strategically important goods and services as well as on building up strategic reserves in these areas. Finally, in case of a wide-ranging impact of a crisis on the Single Market that severely disrupts free movement on the Single Market or the functioning of the supply chains that are indispensable for societal and economic activities, the emergency mode of SMEI would enable tools to facilitate free movement, transparency, joint public procurement, and availability of crisis-relevant goods and services, including priority rated orders, mirroring provisions in other jurisdictions.

5. *A European Critical Raw Materials Act*

The REPowerEU Plan stated that the Commission "*will intensify work on the supply of critical raw materials and prepare a legislative proposal. The Commission will step up ongoing EU policies and actions (e.g. implementation and negotiation of Free Trade Agreements, cooperation with likeminded partners, etc.), reinforce the EU's monitoring capacity and help secure the supply of diverse critical raw materials. This initiative will aim to strengthen the European value chain through the identification of mineral resources and of critical raw materials projects in the European strategic interest, while ensuring a high level of environmental protection, including projects that promote a circular economy and resource efficiency*". In her State of the European Union[74] address on 14 September 2022, the Commission President confirmed that a European Critical Raw Materials Act[75] would be tabled.

This new framework could include: designating and prioritizing critical raw materials, identifying strategic projects all along the supply chain, from extraction to refining, from processing to recycling, serving to increase EU primary and secondary raw material industrial capacities, coordinating procurement and strategic reserves, and ensuring high social and environmental standards. The

[74] https://state-of-the-union.ec.europa.eu/index_en

[75] The proposal is tentatively scheduled for adoption in the first quarter of 2023. A public consultation ran from 30 September until 25 November 2022.

Act would also address international partnerships, innovation and financing (including provisions on State aid and avoiding distortions of competition where relevant).

6. Instruments to support the green transition and promote responsible and sustainable value chains

Trade policy will have an important supporting role in combatting climate change and environmental degradation in the context of the European Green Deal. As set out in the Trade Policy Review, "*making this vision a reality will require action at all levels – multilaterally, bilaterally and autonomously*".[76]

As regards autonomous EU measures, the Carbon Border Adjustment Mechanism[77] ("CBAM") supports *"the objective to ensure that trade is sustainable, responsible and coherent with our overall objectives and values*".[78] The main objective of this environmental measure is to avoid carbon leakage, while encouraging partner countries to establish carbon-pricing policies to fight climate change. This instrument targets imports of carbon-intensive products in compliance with international trade rules. The CBAM complements the EU's Emissions Trading System (EU ETS) and will gradually replace the existing EU mechanisms to address the risk of carbon leakage.

On 23 February 2022, the Commission adopted a proposal for a Directive on corporate sustainability due diligence,[79] seeking to foster sustainable and responsible corporate behavior and to introduce mandatory human rights and environmental due diligence requirements in companies' operations and corporate governance. The new rules will ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside Europe.

On 14 September 2022, the Commission furthermore adopted a proposal for a Regulation on prohibiting products made with forced labor,[80] as part of its efforts to promote decent work and freedom from forced labor through a variety of internal and external policies. The new rules will build on existing due diligence efforts and enable competent authorities to investigate products suspected of

[76] Trade Policy review, p. 12.

[77] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, 14 July 2021, COM(2021) 564 final.

[78] Trade Policy review, p. 13.

[79] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23.2.2022, COM(2022) 71 final.

[80] European Commission, Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, 14.09.2022, COM(2022) 453 final.

being made with forced labor.

At the same time, the EU intends to make full use of the opportunities provided by the implementation of trade agreements to reach its sustainable development commitments and to help developing countries support compliance with sustainable development rules and standards.

In this context, it is important to underline that, while adopting measures to achieve EU's sustainable development goals, EU must still build on openness and be open to fair trade with well-functioning, diversified and sustainable global value chains. As long as rules foster a level playing field and are applied equally, this will not lead to distortions of the Single Market.

V. Conclusions

There is little doubt that the current crises that the EU is facing call for urgent and unprecedented action. A wish for a more resilient EU in an increasingly more complex and unstable world transpired already from the objective to strive towards open strategic autonomy; since 2020 that has translated into a series of initiatives.

The war at its borders, which is currently devastating Ukraine, is also posing many threats to the EU and its Member States and shows how much their destinies are intertwined, and how a threat posed to one represents a threat to the other. Facing what has gradually become a serious menace to the values for which the EU and its Member States commonly stand, and which determine the very identity of the EU, requires not only solidarity between them but also the capacity of each of them to defend these values effectively and therefore in a coordinated way. This is an overriding public interest, both from an EU and an individual Member State perspective. It is from that perspective, that the EU's quest for open strategic autonomy needs to be understood and the impact it has on the EU's key policies, such as trade and competition but also more generally on its Common Foreign and Security Policy (CFSP) and industrial policy.

A conceptualization of that notion starts from the literal meaning of "autonomy" as "the ability of the self – autos – to live by its laws – nomos", and defines strategic autonomy as the ability of the EU "to live by its laws and norms both by protecting these internally and by partnering multilaterally in an international order based upon the rules it has contributed to shaping". "Autonomy" in that sense is evidently not the same as the autonomy of the EU legal order. To be sure, a connection can be drawn: strategic autonomy could be said to refer to factual underpinnings of

the autonomous legal order of the EU, guaranteeing essential prerequisites that have to be met so that EU citizens can live by the laws they regard as their own.

Yet, strategic autonomy is meant to include "economic resilience", making sure that the EU is not left behind in its economic and technological race with China and the U.S. Perhaps more fittingly, this concept can therefore be described as the ability of the EU to secure its citizens a life to the fundamental standards of prosperity, safety, health, and general well-being, while maintaining the importance of openness and the EU's commitment to open and fair trade with well-functioning, diversified and sustainable global value chains as mentioned already. This is part of the promise of the Union (Art. 2(1), 3(1) TEU). Open strategic autonomy unites a panoply of instruments with which the EU tries to cope with the shifting reliability of its connections and of its place in the world to its best advantage. As the Commission Joint Research Centre's "Science for policy" report on open strategic autonomy, referred to above, put it: "*Open strategic autonomy is about equipping the EU to manage interdependence in line with its interests and values.*"

We therefore need to look at the bundle of policies and measures assembled under the heading of open strategic autonomy, rather than search for an overarching concept, in order to understand potential challenges for the EU constitution. The sheer breadth of the task ahead for the EU is illustrated by the Commission's 2021 Strategic Foresight Report "The EU's capacity and freedom to act". Transcending the origin of strategic autonomy in the sphere of the CFSP, the Report identifies ten areas "*in which the EU could strengthen its open strategic autonomy and global leadership*". This includes a European Health Union; a sufficient supply of decarbonized and affordable energy; digital sovereignty; a guaranteed supply of critical raw materials; a first-mover global position in standard-setting; resilient and future-proof economic and financial systems; training and education policies in order to develop and to retain skills and talents matching EU ambitions; the strengthening of security and defence capacities and access to space; the promotion of peace, security, and prosperity for all; and the adaptation of democratic institutions to strengthen their resilience and capacity to anticipate change. This carefully worded Report indicates that the Commission envisages a future for the Union as a geopolitical player, asserting its interests on the world stage by leveraging its power if required.[81]

[81] See for further analysis Editorial comments: Keeping Europeanism at bay? Strategic autonomy as a constitutional problem, 2022 CMLRev, pp. 313-326. F. Hoffmeister, „Strategic autonomy in the European Union's External Relations law", forthcoming in the June 2023 issue of CMLRev.

NATIONAL REPORTS

BELGIUM

Jan Blockx[1], *Pierre Goffinet*[2]

Green competition policy

Question 1

a.

The Belgian Competition Authority (BCA) has stated that it considers that the antitrust legal framework allows it to take environmental considerations into account in order to assess both whether an agreement constitutes a restriction of competition in the sense of Article 101(1) TFEU (and its Belgian law equivalent in Article IV.1(1) Code of economic law (CEL)), as well as whether the agreement can benefit from an exemption by application of Article 101(3) TFEU (or Article IV.1(3) CEL).[3]

The BCA has also expressed its support for the initiatives taken by the Dutch and Greek competition authorities to better incorporate sustainability in the application of European competition law.[4] At the same time, the BCA has insisted that there is a need for EU guidance in this respect, presumably to avoid divergent national approaches in the EU.[5]

So far, the BCA has not adopted any decisions in which sustainability benefits were specifically considered when examining the competitive effects of agreements. The BCA has stated that it is particularly keen to provide (informal) guidance on sustainability initiatives.[6]

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[3] See the Environmental Considerations in Competition Enforcement – Note by Belgium for the OECD Competition Committee meeting on 1-3 December 2021 (DAF/COMP/WD(2021)47), available at https://one.oecd.org/document/DAF/COMP/WD(2021)47/en/pdf (hereafter "Belgian note for OECD roundtable"), p. 2 and 5. Accessed 27 September 2022.

[4] Belgian note for OECD roundtable, p. 6.

[5] Belgian note for OECD roundtable, p. 6.

[6] Belgian note for OECD roundtable, p. 6. See also BCA, Priority note 2022, available at https://www.bma-abc.be/sites/default/files/content/download/files/2022_prioriteitenbeleid_BMA.pdf and https://www.abc-bma.be/sites/default/files/content/download/files/2022_politique_priorites_ABC.pdf (hereafter "BCA priority note 2022"), p. 3. Accessed 27 September 2022.

b.

Whether national courts would be competent and willing to consider sustainability arguments in private actions depends on their interpretation of Article 101 and 102 TFEU. So far, the national courts have not expressed themselves on this matter. More generally, it is important to note that some Belgian courts tend to take a more passive attitude in competition law cases.

However, the Belgian courts are increasingly aware of sustainability concerns. For example, the Court of First Instance of Brussels has found that the various Belgian governments have been negligent in their climate policy.[7]

Question 2

a.

The BCA has stated that it considers that the Belgian legal framework allows it to take environmental considerations into account in order to assess whether a concentration can be authorized in view of the assessment criteria in Article IV.9 CEL.[8] However, so far, the BCA has not adopted any merger decisions in which sustainability benefits were specifically considered.

b.

The BCA has stated that it considers that the Belgian legal framework allows it to take environmental considerations into account in order to assess whether a concentration can be authorized in view of the assessment criteria in Article IV.9 CEL. [9] However, so far, the BCA has not adopted any merger decisions in which sustainability benefits were specifically considered. Moreover, the BCA has never vetoed a concentration.

Question 3

The BCA considers that the European Court of Justice never endorsed an exclusive focus on consumer welfare as interpreted in economic doctrine and that the legal framework therefore allows it to take into account total as well as consumer welfare (*i.e.* also out-of-market benefits).[10] This implies that out-of-market

[7] Judgment of the Brussels Court of First Instance of 17 June 2021, *Klimaatzaak*, available at https://prismic-io.s3.amazonaws.com/affaireclimat/18f9910f-cd55-4c3b-bc9b-9e0e393681a8_167-4-2021.pdf. Accessed 15 July 2022. The Court refrained from imposing specific obligations on the Belgian government to remedy this situation, which has led the NGOs that brought the case to appeal this judgment.

[8] Belgian note for OECD roundtable, p. 2 and 5.

[9] Belgian note for OECD roundtable, p. 2 and 5.

[10] Belgian note for OECD roundtable, p. 2 and 5.

benefits are balanced against possible harm to users in the market. However, the BCA considers that out-of-market benefits cannot completely outweigh harm to users in the market: it is necessary that any restriction of competition also provides benefits to those who may be negatively affected by the restriction of competition.[11]

European strategic autonomy, the promotion of "European champions" and competition law enforcement

Question 4

a.

On 20 December 2018, the BCA sent a joint open letter with the Dutch Authority for Consumers & Markets, the UK Competition & Markets Authority and the Spanish Comisión nacional de los mercados y la competencia to the European Commissioner for Competition stating that it shared the Commission's very significant competition concerns about the Siemens/Alstom transaction and that "*that the overall loss of competition brought about by the merger would be both widespread and very significant*."[12] The letter also expressed the view that "*the remedies ultimately offered by the Parties fall far short of what would be required to address all concerns to the required standard*." While not specifically addressed in the letter, it therefore seems that the BCA was not convinced by the industrial policy arguments put forward to approve the Siemens/Alstom transaction.

b.

As far as we know, the different Belgian market participants simply answered the requests for information received from the European Commission. However, in the Belgian press, the operator of the Belgian railway infrastructure, Infrabel, was critical about the proposed merger.[13]

c.

We are not aware of such cases.

[11] Belgian note for OECD roundtable, p. 2 and 5.

[12] The joint letter is available on the website of the Dutch authority: https://www.acm.nl/sites/default/files/documents/2018-12/siemens-alstom-open-letter-to-com.pdf. Accessed 27 September 2022.

[13] See "Infrabel vreest nieuwe monopolist Siemens-Alstom" (*De Tijd* 31 October 2018).

Question 5

Belgian competition law uses a very similar standard for the assessment of mergers as exists under EU law, namely whether the merger amounts to a significant impediment to effective competition on the Belgian market or a significant part thereof, in particular through the creation or strengthening of a dominant position (Article 9(3) and (4) CEL). The BCA's stance on the Siemens/Alstom transaction also suggests that it will not easily be swayed by industrial policy concerns to approve a merger.

On the other hand, in the context of sustainability, the BCA has indicated that it can take into account total as well as consumer welfare (*i.e.*, also out-of-market benefits).[14] Such a broader perspective could permit the inclusion of industrial policy concerns.

As indicated before, there is no decisional practice on this issue.

Question 6

The government cannot overrule a merger control decision of the BCA for reasons of (EU) industrial policy.

Until May 2013, the Minister of Economic Affairs had certain competences regarding merger control decisions of the BCA. The law of 2006 regulating Belgian competition law allowed the Federal Council of Ministers to overrule on grounds of public interest decisions of the BCA's Competition Council, in which a concentration was declared impermissible.[15] This could only be done if the reasons of public interest outweighed the risk of harm to competition as established by the Competition Council. Moreover, besides overruling a decision blocking a concentration the Council of Ministers could also waive in whole or in part the conditions of a decision conditionally allowing a concentration. In their assessment and motivation, the Council of Ministers could take into account amongst others, the public interest, the security of the country and the competitiveness of the sectors concerned in view of international competition, consumer interests and employment opportunities. It was not for the Council of Ministers to reassess the competition law aspects; this remained the exclusive

[14] Belgian note for OECD roundtable, p. 2 and 5.

[15] Art. 8(6) and Art. 60 of the Law on the Protection of Economic Competition coordinated on 15 September 2006, *Official Gazette* of 29 September 2006, p. 50613. This possibility was already included in the very first regulation of competition law in Belgium in 1991. See, Art. 10, §6 and Art. 34bis of the law of 5 August 1991 on the Protection of Economic Competition as coordinated by the Royal Decree of 1 July 1999, *Official Gazette* of 1 September 1999, p. 32315.

domain of the Competition Council. The Council of Ministers could take such a decision on its own initiative or on request of (one of) the notifying parties.

In addition, the law of 2006 also allowed the Minister of Economic Affairs to intervene during the hearing before the Competition Council on a concentration.[16] To support his intervention, he had to address a note to the Competition Council in which he indicated the elements of the case of concern to the general interest, as well as those that may influence the general policy on economic competition. The submission of such a note would not confer on the Minister the status of a party to the case and the note would be communicated to the notifying parties in order for them to react.

The competence to overrule decisions of the BCA was never used and in the review of Belgian competition law in 2013, this competence was removed (also based on a recommendation by the OECD[17]). However, the Minister still retains two means of intervention in merger control decisions. First, Article IV.65(4) of the Code of Economic Law ("***CEL***") allows the Minister to be heard by the Competition College during the hearing regarding a concentration. He is exempted from demonstrating any particular interest. The law no longer specifies the arguments he can bring forward, but in any case, the BCA's competences are limited to assessing whether the concentration leads to significant impediments to effective competition. Secondly, Article IV.90(4) CEL still grants the Minister of Economic Affairs the competence to file an appeal against a decision of the BCA blocking a concentration. The Minister does not need to show any particular interest and he does not need to have been (formally) heard by the Competition College in the case. However, his appeal needs to be grounded in competition law (procedure and/or substance), not purely based on industrial policy arguments. Moreover, it is the Court that decides, the Minister cannot simply overrule the BCA.

Question 7

a.

The BCA has not adopted any decisions against any of the large US digital platforms.

An investigation into a complaint brought by Belgian company Dialo, which ran a website for classified ads, against discriminatory practices by Google in the

[16] Art. 57(2) Law on the Protection of Economic Competition coordinated on 15 September 2006, *Official Gazette* of 29 September 2006, p. 50613.

[17] https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf, p. 12.

displaying of search results was closed because of priority setting in 2012.[18] The BCA pointed out that Google operates globally and that its search algorithm was not specifically designed for Belgium. It also mentioned that the European Commission had already opened a number of investigations into abuse practices by Google.

b.

Not applicable.

c.

The Digital Markets Act has a limited scope: it only concerns (i) certain conduct listed in the Articles 5-7 of the Digital Markets Act (ii) that is practiced by designated gatekeepers of (iii) core platform services.

The Digital Markets Act does not prohibit national competition authorities from applying their antitrust rules. However, Article 38(2)-(3) of the Digital Markets Act requires every national competition authority to inform the Commission if it "*intends to launch an investigation on gatekeepers*" or "*intends to impose obligations on gatekeepers*".

Article 38(7) of the Digital Markets Act also explicitly states that a national competition authority may "*conduct an investigation into a case of possible non-compliance with Articles 5, 6 and 7 of this Regulation on its territory*". However, the Commission may relieve the national competition authority of its powers in those circumstances.

Based on these rules, the BCA will continue to be able to bring its own, competition law-based cases against large digital platforms in all of the following instances:

(a) The case does not concern core platform services;

(b) The case concerns core platform services, but the platform in question has not been designated as a gatekeeper under the Digital Markets Act;

(c) The platform has been designated as a gatekeeper, but the conduct is not covered by the Articles 5-7 of the Digital Markets Act; and

(d) The conduct is covered by the Articles 5-7 of the Digital Markets Act, but the Commission does not relieve the BCA of its investigative powers.

d.

In the instances (a) and (b) above, the risk of inconsistency is limited. In the situations (c) and (d) above, there is indeed a risk of inconsistencies, but Article 38

[18] Decision 2012-P/K-07-AUD of 17 April 2012.

of the Digital Markets Act is specifically designed to avoid that inconsistencies arise in those cases.

Question 8

The European State aid rules were conceived to deal with Member State subsidies that distort competition between undertakings in different Member States. They are therefore not the ideal tool to pursue industrial policy goals that concern competition between undertakings in the EU and undertakings in the rest of the world.

However, in a context of trade liberalization, the European State aid rules clearly also affect competition between undertakings in the EU and undertakings in the rest of the world. To take this into account, the Commission has accepted that (increased) State aid may be allowed in the case of non-EU competitive pressure on European businesses.

The most obvious example of this are the Commission's maritime guidelines which allow various subsidies to encourage re-registration to EU Member States of vessels carrying flags of convenience (of tax havens and/or countries that do not observe similar social or safety rules).[19] The Commission has applied these guidelines to allow for such subsidies in numerous cases.

The Framework for State aid for research and development and innovation contains a narrower exception in its "matching clause" (point 92) which allows higher aid intensities if competitors located outside the Union have received subsidies for similar projects.[20] As far as we are aware, this provision has not been applied by the Commission.

In addition, Article 107(3)(b) TFEU specifically allows State aid for the promotion of the execution of so-called "important projects of common European interest" (IPCEI). While this provision was little used, the European Commission now considers that the development of certain industrial value chains in Europe may constitute such IPCEIs and therefore warrant the granting of State aid by EU Member States.[21] On this basis, the Commission has approved one IPCEI in relation micro-electronics, two in relation to batteries and two in relation to hydrogen technology (which aims at facilitating the energy transition).

[19] See Community Guidelines on State aid to maritime transport (2014) OJ C 13/3.

[20] Framework for State aid for research and development and innovation (2014) OJ C 198/1.

[21] See Commission Communication on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (2014) OJ C 188/4, now replaced by Commission Communication on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (2021) OJ C 528/10.

More generally, given the limited scope for European Union funding for industrial policies, the EU State aid policy allows the Commission to coordinate Member State funding for industrial policies.

The European Commission's supervisory role in the State aid regime allowed for some coordination of Member State spending during the COVID-19 pandemic. As indicated before, given the limited scope for European Union support for the long-term viability of strategic European industry sectors, the State aid regime allows the European Commission to at least coordinate Member State support for this purpose. Nevertheless, some critics expressed the view that big State-owned companies could easily by-pass the rules while private-owned companies had difficulties to obtain the approval of State support, especially if the Temporary Framework was not applicable.

Question 9

Belgian courts have sent preliminary references to the CJEU about State aid topics in multiple cases. These include references by first instance courts[22] as well as courts of appeal[23] and by the Belgian Constitutional Court.[24] We are not aware of requests for preliminary rulings in State aid matters originating from the Belgian Supreme Court or the Council of State (the highest administrative court in Belgium), but this may just be a question of chance, since these courts do regularly refer preliminary questions to the CJEU on other subject matters.

As far as we are aware, Belgian national courts have so far requested two opinions from the European Commission on the basis of Article 29 (1) of Regulation 2015/1589. One request, from the Commercial Court of Ghent, division Dendermonde, resulted in a Commission opinion on 2 October 2020.[25] The other request, from the Court of Appeal of Ghent, resulted in a Commission opinion on 30 June 2021.[26]

[22] For example, the reference leading to the judgment in case C-89/10 Q-Beef & Bosschaert ECLI:EU:C:2011:555.

[23] For example, the reference leading to the judgment in case C-393/04 Air Liquide Industries Belgium ECLI:EU:C:2006:403.

[24] For example, the reference leading to the judgment in case C-76/15 Vervloet ECLI:EU:C:2016:975.

[25] Available at https://competition-policy.ec.europa.eu/system/files/2021-09/RFO_31_opinion_nl.pdf. Accessed 27 September 2022.

[26] Available at https://competition-policy.ec.europa.eu/system/files/2021-11/COM_opinion_to_Court_of_Gent_RFO_32_en.pdf. Accessed 27 September 2022.

Question 10

The substantial analysis of the BCA in all its investigations is in principle limited to competition law concerns, even though it can take into account other considerations (see for example question 1 regarding environmental considerations). Therefore, the BCA could in theory also take into account considerations linked to trade defence, especially if trade instruments influence competitive parameters, such as market definition and market shares.

However, as explained above in question 4(a) the BCA was not convinced by the industrial policy concerns of the parties in the Siemens/Alstom case. Such industrial policy concerns are closely linked to the effects of trade defence policy. Therefore, there is no guarantee that the BCA would take into account such considerations in a specific case, and to our best knowledge, existing (external) trade instruments have never affected the analysis of the BCA in past cases.

We would like to point to Article IV.13 CEL which stipulates that it is in principle prohibited for any company having its registered office or establishment in Belgium to comply with measures or decisions taken by a foreign State, which concern regulations on competition dominant positions or trade-restricting practices in the field of international maritime and air transport. It is up to the government to specify the scope of the prohibition and determine conditions for exemptions in a Royal Decree. This did not happen yet and as far as we know this Article, which exists since 2006, has never been applied in practice.

Question 11

To this day, Belgium has a limited FDI-regulating system, which only applies to the Flemish public sector. However, a proposal regarding a more general Belgian FDI screening mechanism is currently being discussed.

The Flemish "*Bestuursdecreet*" of 7 December 2018 contains specific rules aimed at safeguarding the strategic interest of the Flemish Region and the Flemish Community.[27] The mechanism established by the decree is not a classic FDI screening mechanism as advanced by the EU Regulation 2019/452. It is an individual *ex-post* possibility for the Flemish government to annul, to suspend or to declare inapplicable certain acts by Flemish public institutions. The regime applies if all the following conditions are satisfied:

i. a legal action (*i.e.*, not only the sale of shares);

[27] (Flemish) Government Decree of 7 December 2018, *Official Gazette* of 19 December 2018, p. 100723, Art. III.59 and III.60.

ii. of (i) the Flemish Government, (ii) local governments, or (iii) institutions with legal personality established for the specific purpose of meeting general interest needs in which one of the governments falling within the scope of (i) or (ii) holds a majority of votes in the board of directors or of which the management is being overseen by one of the governments within the scope of (i) or (ii);

iii. which results in natural or legal persons not established in an EU Member State or in another State of the European Economic Area acquiring control or decision-making power in one of these institutions;

iv. as a result of which the strategic interests of the Flemish Region or Community are threatened, in particular if the continuity of vital processes is endangered, if certain strategic or sensitive knowledge risks falling into foreign hands, or if the strategic independence of the Flemish Community or the Flemish Region is jeopardised; and

v. where the Flemish Government has not succeeded in reaching an amicable settlement to safeguard these Flemish strategic interests.

Besides the Flemish system, a general Belgian screening mechanism is expected to be adopted soon. Following a broad consultation with relevant stakeholders, a preliminary draft law was adopted by the federal Council of Ministers in July 2020. Following the opinion of the Council of State in September 2020, it was decided in 2021 to draft a so-called 'cooperation agreement' between the federal government and the governments of the regions and communities in Belgium, with the aim of setting up a national screening mechanism. A draft cooperation agreement[28] of 1 June 2022 between the Federal State and the federated entities aimed at establishing a screening mechanism for foreign direct investments, through an Interfederal Screening Committee ("***ISC***") is currently pending. The legislative process is not yet complete as the proposal still needs to undergo a review by the Council of State, before a second reading for adoption will take place in the conciliation committee. It is expected that the proposal will be submitted to the various parliaments before 31 December 2022, so it could enter into force on 1 January 2023.[29]

[28] Draft cooperation agreement of 1 June 2022 establishing a foreign direct investment screening mechanism, see, https://www.ewi-vlaanderen.be/sites/default/files/ontwerp_van_samenwerkingsakkoord_van_1_juni_2022.pdf, accessed 14 October 2022.

[29] See, "Instemming met het samenwerkingsakkoord betreffende het mechanisme voor de screening van buitenlandse directe investeringen" (Press release of the Belgian federal government), https://news.belgium.be/nl/instemming-met-het-samenwerkingsakkoord-betreffende-het-mechanisme-voor-de-screening-van, accessed 14 October 2022.

The proposal envisages an ISC composed of three representatives of federal ministries (Finance, Internal Affairs and Foreign Affairs), three representatives of the regions and three representatives of the communities. The scope of the proposal concerns foreign (non-EU) direct investments that may have an impact on security or public order in Belgium or on the strategic interests of regions and communities. The regime will apply to direct or indirect acquisitions of voting rights in entities incorporated in Belgium and the proposal includes notification thresholds based on the size of the shareholding and/or the turnover achieved by the target. The proposal foresees a mandatory notification with a suspensory effect of transactions falling within the scope of the regime. Notifications will need to be submitted to the ISC, followed by a two or three stage review process: (i) a pre-notification phase during which the ISC's Secretariat conducts a preliminary review and can request additional information of the parties until it considers the notification to be complete; (ii) the phase I assessment which lasts maximum 40 days, during which the ISC conducts a high-level review of the transaction; (iii) if the phase I investigation reveals potential risks, an in-depth screening procedure, phase II, will start. This screening phase will result in advice to the respective ministers in relation to the investment and decision for the parties in which the transaction is (conditionally) approved or prohibited.

a.

Traditionally, Belgium is considered to be an open economy characterised by high foreign direct investment rates,[30] partly due to minimal restrictions on foreign investment, but also due to its central location. The main investing countries are the United States, the United Kingdom, France, the Netherlands, China, Germany, Japan, Luxembourg, Spain and Italy.[31] Consequently, it also includes several non-EU States regarding which the FDI system would apply.

The sole fact of achieving a legislative draft for a joint FDI screening mechanism after more than three years of negotiation is already a significant step. The fear of several cross-sectoral organisations was that a Belgian FDI system would be fragmented due to the complex division of competences for promoting and regulating foreign investments between the federal level, the regions and the communities. They feared such a fragmented FDI system could have a chilling effect on investments. Even though the fear for a fragmented system seems to be alleviated by the creation of the ISC, these cross-sectoral organisations continue

[30] Belgium ranks 44th in the ranking of the top FDI economies in 2020. See, UNCTAD, World Investment Report 2021, p.7, (https://unctad.org/system/files/official-document/wir2021_en.pdf).

[31] EY, Attractiveness Survey Belgium, May 2022, https://www.ey.com/en_be/attractiveness/22/6-main-trends-from-the-belgian-attractiveness-survey-2022.

to stress the importance of effectiveness and predictability of the system and the need for investigations to be carried out within reasonable time limits.[32]

Based on the current draft we consider that the following elements could prove challenging in practice:

- The large scope (range of sectors) in combination with the lack of investment thresholds in monetary terms (barring some exceptions) means that potentially also small investments in for example start-ups might be caught by the FDI mechanism;
- The possibilities to extend the time limits in the phase II screening procedure in combination with the standstill obligation during the review process might significantly delay M&A transactions and will impact deal certainty. Consequently, it is expected that ISC clearance will often be construed as a condition precedent to closing the deal, with the inclusion of long stop dates;
- Despite it being a coordinated FDI system, there is a built-in fragmentation due to the potential review by different government levels. This could negatively impact the predictability of the process.
- Finally, significant deal uncertainty may result from the possibility for the ISC to conduct *ex officio* investigations concerning already completed deals up to five years after closing, with the risk that the parties may be required to unwind implemented transactions.

b.

The draft Cooperation Agreement is globally inspired by the EU's FDI Screening Regulation and takes into account the coordination obligations imposed by this Regulation.[33] Nevertheless, the envisaged Belgian FDI system also caters for national particularities.[34]

One notable difference is that the EU Regulation refers to mechanisms to screen foreign direct investment on grounds of security and public order, while the envisaged Belgian draft agreement states in Article 1(2) that the objective is to safeguard national security, public order and the strategic interests of the federal state, the regions and/or the communities. The particular division of competences within Belgium also grants the regions and communities certain competences

[32] See, for example "Belgisch mechanism voor de screening van buitenlandse investeringen: habemus pactum!", VBO-FEB, 8 June 2022, https://www.vbo.be/actiedomeinen/europa/europa/belgisch-mechanisme-voor-de-screening-van-buitenlandse-investeringen--habemus-pactum_2022-06-08/, accessed 14 October 2022.

[33] EU Regulation 2019/452 of 19 March 2019 establishing a general framework for the screening of foreign direct investments into the Union, *OJ* L/791, p. 1.

[34] This is explicitly foreseen in the recital 8 of Regulation 2019/452.

regarding the screening of foreign direct investments. Their involvement is stressed by adding their specific strategic interests as one of the grounds to screen investments, besides the more general (and traditionally national) public security and public order.[35]

c.

In general, the Belgian draft agreement closely follows EU Regulation 2019/452.

First, Article 2, 3° which defines a foreign direct investment within the meaning of the draft agreement, almost literally transposes the definition included in Article 2(1) of Regulation 2019/452. The only difference is that it does not include the focus on the exercise of an economic activity. However, the text of the Regulation regarding economic activity is subsequently included in Article 4(1) of the draft agreement.

Article 4 of the draft agreement determines two conditions in order for investments to be caught by the screening mechanism. First, the investment needs to fall within the definition of a foreign direct investment, including the possibility that those investments may have an impact on national security, public order or the strategic interests of the federal state, the regions or the communities. Secondly, the investment needs to result in the acquisition of direct or indirect control[36] of at least 25% or 10% of the voting rights in a Belgian undertaking that is active in certain specific sectors. For certain sectors specific turnover thresholds are included (see below question 11(d)).

Secondly, Article 2(2) of Regulation 2019/452 defines a foreign investor as "*a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment*". Article 2, 4° of the draft agreement copies the scope of the regulation, but also adds a broader category of undertakings of which the ultimate beneficial owner ("***UBO***") has its main residence outside the EU, even if the undertaking itself might be situated in the EU.[37]

[35] Article 2, 7° of the draft agreement defines strategic interests as the interests of the regions and communities within the framework of their substantive competences to: (i) ensure the continuity of vital processes; (ii) prevent certain strategic or sensitive knowledge from falling into foreign hands; and (iii) ensure strategic independence.

[36] Article 2, 1° of the draft agreement which includes the definition of control is clearly inspired by the definition of control in competition law and explicitly refers to the Jurisdictional Notice of the European Commission in this regard (Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, *OJ* C/95, p. 1).

[37] This is arguably in line with recital 10 of Regulation 2019/452.

d.

The Belgian draft agreement includes all sectors as listed in Article 4(1) of Regulation 2019/452, but also includes additional requirements and sectors.

The first category of foreign direct investments caught by the Belgian screening mechanism are investments which result in the acquisition of at least 25% of the voting rights in undertakings active in the following sectors:

- Critical infrastructure, both physical and virtual, for energy, transport, water, health, electronic communications and digital infrastructure, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities, as well as the land and real estate crucial for the use of such infrastructure;
- Technologies and raw materials for: safety (including health safety), national defence or the maintenance of public order and whose disruption or failure, loss or destruction would have significant consequences for Belgium, an EU Member State or the EU, military equipment subject to export control, dual-use goods and technology of strategic importance and related intellectual property such as concerning artificial intelligence, semiconductors, robotics, cybersecurity, aerospace, defence, energy storage and quantum and nuclear technologies;
- Supply of critical inputs, including energy and food security;
- Access to sensitive information (*e.g.,* relating to Belgium's defence and strategic interests), as well as personal data, including the possibility to control such information;
- Private security;
- Freedom and pluralism of the media; and
- Strategic technology in the biotechnology sector provided that the turnover of the undertaking in the preceding financial year exceeded 25 million euro.

The second category of foreign direct investments caught by the Belgian screening mechanism are investments which result in the acquisition of at least 10% of the voting rights in undertakings that generated a turnover of more than 100 million euro in the preceding financial year and that are active in the following sectors:

- Defence, including products of dual use;
- Energy;
- Cybersecurity; and
- Electronic communications or digital infrastructures.

Consequently, there is a certain overlap in the sectors caught by both categories of investments. For certain sectors it was deemed necessary not only to capture shareholdings of 25% of the voting rights, but also smaller shareholdings of 10% of the voting rights in case a certain turnover threshold is exceeded. There is one notable exception, namely biotechnology. This sector requires a higher shareholding, 25% of the voting rights, but a lower turnover threshold, with the objective to capture investments in innovative (start-up) companies in this sector (see above).

e.

According to Article 11 of the draft agreement, when evaluating a foreign direct investment, the ISC members are required to assess the impact on national security, public order and the strategic interests of the federal state, the regions or the communities, on the basis of the following risks:

- Impairment of the continuity of critical processes that, in case of failure or disruption, lead to serious social disruption or threat to national security, strategic interests and the quality of life of the Belgian population;
- Impairment of integrity and/or exclusivity of knowledge and information connected to vital processes and their high-performance sensitive technology; or
- Creation of strategic dependencies.

f.

Article 11 of the draft agreement explicitly states that the ISC members will motivate their advice to their respective ministers solely on the basis of considerations concerning the safeguarding of national security, public order or their strategic interests. There is no mention of competition considerations. However, it cannot be excluded that such considerations might be taken into account for example as part of public order or strategic interests.

In addition, the draft agreement does not contain any provision comparable to recital 36 of Regulation 2019/452, which requires a certain consistency between the procedures in case the investment also is caught by the concentration control mechanism under competition law.

g.

The system has not entered into force, so it cannot yet be assessed whether the information-sharing mechanism works effectively and adequately.

However, the draft agreement foresees all elements of information-sharing and cooperation as required by Regulation 2019/452. First, the information that is

required when submitting the notification to the ISC according to Article 6(2) of the draft agreement, is the same information as listed in Article 9(2) of Regulation 2019/452. Moreover, Article 6(3) of the draft agreement provides that this information will be shared with the other EU Member States and the European Commission, as required by Article 6(1) of Regulation 2019/452. The other EU Member States and the European Commission will have 35 calendar days to submit observations, in line with Article 6(7) of Regulation 2019/452. Secondly, Article 18 of the draft agreement determines that the observations and opinions of other Member States and the European Commission will be taken into account when taking a decision in the assessment phase. Moreover, a request for additional information of a Member State and/or the European Commission will suspend the procedure until the information has been provided but with a maximum of five days. This should allow the ISC members to still consider any observations or opinions received through the information-sharing mechanism. Finally, Article 31 of the draft agreement designates the ISC as contact point within the meaning of Article 11 of Regulation 2019/452.

h.

Article 29 of the draft agreement determines that an appeal can be filed before the Market Court against a decision on the non-admissibility of a foreign direct investment within 30 days after notification of this decision. The Market Court, a specialised chamber of the Brussels' Court of Appeal, will be able to annul the decision of non-admissibility of the investment and will have the competence to fully review any decision that imposes a fine on the investor on the basis of the cooperation agreement. The appeal does not have a suspensory effect, but suspension of the decision can be requested on an *ad hoc* basis. The appeal can only be filed by the foreign investor of the Belgian beneficiary of the investment.

i.

The cooperation agreement setting up the FDI screening mechanism has not been adopted yet and has not been applied. Consequently, it has not been affected by the COVID-19 pandemic thus far.

Trade defence and public procurement – foreign subsidies

Question 12

In general, the idea of an EU initiative concerning foreign subsidies is supported in Belgium. For example, on 1 December 2020, the special advisory committee Competition of the Central Business Council, an organisation uniting employers and employees, adopted an opinion on competition law in the face of globalisation and digital platforms. In this Opinion, the Council supports the Commission's White paper on levelling the playing field as regards foreign subsidies of 17 June 2020.[38]

There is a risk of overlap with Member States' competences, in particular FDI screening, concentration control, and public procurement. However, it is expected that, if the risk of an overlap exists, this will be clarified in the future Regulation on foreign subsidies. For example, Article 40 of the provisional agreement between the European Parliament and the Council on that proposed Regulation includes a provision concerning the relationship with other instruments including the EU Merger Regulation and the FDI Regulation.[39]

It should be noted that Belgium has already foreseen that it will need to adapt certain Belgian instruments to the future Regulation on foreign subsidies. During a meeting of the European Ministers in charge of the Internal Market and Industry, Belgium argued in particular for an extension of the transition period so that Member States would have sufficient time to adapt their national regulations before the future Regulation on foreign subsidies comes into force. It also asked for precise criteria to frame the Commission's power with regard to the balancing test of the positive and negative effects of these subsidies. Finally, it called for the establishment of a system of national contact points to ensure a good flow of information between the Commission and the Member States.[40]

The proposed Regulation will have an impact on certain public procurement procedures falling within the scope of the Regulation. If the value of a public

[38] See, "Mededingingsrecht in het licht van de mondialisering en digitale platforms", *Bijzondere raadgevende commissie Mededinging van de Centrale Raad voor het Bedrijfsleven/La Commission consultative spéciale Concurrence du Conseil Central de l 'Economie*, 1 December 2020, https://www.ccecrb.fgov.be/p/nl/797/mededingingsrecht-in-het-licht-van-de-mondialisering-en-de-digitale-platforms/14, accessed 14 October 2022.

[39] Provisional agreement resulting from interinstitutional negotiations regarding the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 11 July 2022.

[40] See, Response of W. Borsus, Minister of Economic Affairs and Foreign Trade in the Walloon government, to parliamentary question, 14 March 2022, https://www.parlement-wallonie.be/pwpages?p=interp-questions-voir&type=28&iddoc=110199, accessed 14 October 2022.

procurement procedure exceeds a certain value, bidders will need to notify the contracting authority of foreign financial contributions and subsequently, the contracting authority will need to transfer this notification to the European Commission for review. It is inevitable that this might have an impact on the timing of the public procurement procedure because the result of the Commission's investigation will need to be taken into account.

To our best knowledge there are no concerns on Belgian level regarding the scope of the Commission's proposal. Overall, Belgium supports the EU initiative.

Question 13

In our view, the proposed Regulation on foreign subsidies has the objective of filling a regulatory gap that exists regarding foreign subsidies. While existing State aid and trade defence rules can provide helpful inspiration to develop a framework to strengthen and protect the internal market, the current proposal also raises a number of questions, including as to its compatibility with the EU's obligations under international trade agreements, and as to whether effective and efficient enforcement can be achieved.

Mandatory due diligence and regulating supply chains

Question 14

Currently there is no national legal instrument in Belgium that imposes a general mandatory due diligence requirement on undertakings to respect human rights and environmental law throughout the supply chain.

However, on 2 April 2021, a legislative proposal was submitted in federal Parliament establishing a duty of care and accountability for companies across the value chain.[41] This proposal has not been adopted yet and is still being discussed in the Economy, Consumer Protection and Digital Agenda Committee of the Belgian Federal Parliament.

The objective of the proposal is to impose on all undertaking established or active in Belgium and their subsidiaries a twofold obligation: (i) a duty of care and (ii) a duty to provide reparation and/or compensation. The duty of care includes that companies must provide mechanisms that allow them to continuously

[41] Proposal of law establishing a duty of care and accountability for companies across the value chain, *Parl. Doc.* 2020-21, nr. 55-1903/001.

detect, prevent, stop, mitigate and remedy any potential and/or actual violation of human rights, labour rights and environmental standards throughout their entire value chain. The duty to provide reparation includes an obligation to provide compensation for the damage suffered as a result of missing or inadequate precautions to prevent the violations that caused damage. In addition, large undertakings and undertakings active in high-risk sectors or regions will have to develop a "care plan", which includes a risk analysis, procedures to evaluate subsidiaries and subcontractors and an alert mechanism.

a.

The proposal envisages a broad scope of application. Article 5 of the amended proposal[42] states that it will apply to all undertakings established or active in Belgium.[43] However, the extent of an undertaking's obligations is meant to be proportional to both its size and the powers and means at its disposal. Therefore, not all obligations apply to all undertakings established or active in Belgium. A division is made between large companies[44] and SMEs[45], between companies active in high-risk sectors and regions[46] and other companies, and between undertakings of public interest[47] and other undertakings.

b.

Article 6 of the amended proposal determines the main obligations imposed on all undertakings established or active in Belgium:

– Obligation to identify all potential and actual adverse effects on human rights, international humanitarian law, labour rights and environmental rules resulting both from its own activities and from the activities of subsidiaries, associated companies and entities in the company's value chain;

[42] Amendment to the proposal of law establishing a duty of care and accountability for companies across the value chain, *Parl. Doc*. 2020-21, nr. 55-1903/003.

[43] Undertaking established in Belgium is defined in Article 2 of the amended proposal as: "*each undertaking whose registered office is located in Belgium*". Undertaking active in Belgium is defined in Article 2 of the amended proposal as: "*an undertaking other than an undertaking established in Belgium that supplies products to end-users residing in Belgium or which supplies products from Belgium*".

[44] Large undertaking is defined in Article 2 of the amended proposal as: "*an undertaking other than an SME*".

[45] SME is defined in Article 2 of the amended proposal as: "*an undertaking that fulfills all of the following conditions: (a) the undertaking does not, at the balance sheet date of the last completed financial year, exceed the threshold of an average workforce of 250 employees during the financial year; (b) the enterprise, at the balance sheet date of the last completed financial year does not exceed more than one of the following criteria:*

(i) annual turnover, excluding VAT: 50 000 000 euros; (ii) balance sheet total 43 000 000 euros".

[46] The high-risk sectors and regions are to be determined by Royal Decree.

[47] An undertaking of public interest is defined in Article 2 of the amended proposal as: "*an organisation of public interest within the meaning of Article 1:12 of the Companies and Associations Code*".

- Obligation to take all possible reasonable and appropriate measures to prevent those adverse effects;
- To the extent that these effects cannot be prevented, obligation to:

a) take alle possible reasonable and appropriate measures to mitigate and terminate those consequences; and

b) repair and/or compensate the damage caused.

Article 11 of the amended proposal lists the obligations imposed on large undertakings, undertakings of public interest and undertakings active in high-risk sectors or regions:

- Obligation to develop and implement a care plan. Such a care plan needs to include the mechanisms put in place and the measures taken to fulfill the obligations referred to in Article 6 and shall include in particular:

a) a policy statement;

b) a listing of the subsidiaries, associated companies and entities in the company's value chain and a description of the controlling, participating or trading relationship with that company or entity;

c) a listing of all potential and actual adverse effects;

d) procedures for the regular evaluation of its own activities and the activities of subsidiaries, associated companies and entities in the company's value chain with a view to possibly updating the listings referred to in b) and c);

e) reasonable and appropriate measures to prevent, limit and eliminate potential and actual adverse effects;

f) a mechanism for reporting on the existence or occurrence of adverse effects with safeguards to protect whistleblowers;

g) an effective mechanism within the company for dealing with notifications as referred to in f) and complaints relating to breaches of the duty of care and for remedying the damage caused thereby;

h) a mechanism to monitor, on a regular basis, the implementation and effectiveness of the procedures, measures and mechanism referred to in e) to g).

- Obligation to annually (i) evaluate and if necessary amend the care plan, (ii) provide a report on the implementation of the care plan, (iii) disclose the care plan and the annual report.

c.

The general duty of care and the related obligations (identify risks, take preventive measures and repair damage) apply to undertakings established or active in Belgium. Nevertheless, the damage covered includes the adverse effects resulting from their own activities, the activities of subsidiaries,[48] the activities of associated undertakings[49] and the activities of undertakings active in the value chain of the undertaking concerned.[50] Consequently, the liability can have a very broad scope.

However, according to Article 8 of the amended proposal, undertakings established or active in Belgium are subject to additional obligations allowing them to limit liability. First, they are obliged to discontinue activities in case their own activities or activities of their subsidiaries cause or contribute to adverse effects on human rights, international humanitarian law, labour rights or environmental rules to the extent that those adverse effects cannot be otherwise prevented or terminated. Secondly, if the activities of associated companies or entities in the value chain of the undertaking actually cause or contribute to adverse effects on human rights, international humanitarian law, labour rights or environmental rules, the undertaking is obliged to terminate the participation in an associated company or the trading relationship with an entity in the value chain, if attempts to prevent and mitigate serious adverse effects are unsuccessful, if the adverse effects cannot be remedied, if there is no reasonable prospect of change or if the undertaking or entity concerned does not take measures to prevent, mitigate and terminate the adverse effects. In case the undertaking respects those additional obligations and terminates the activities or the commercial ties with the other undertakings, it can limit the temporal scope of its liability.

Furthermore, the liability regime has been simplified for claimants in different ways. Articles 33 to 37 of the amended proposal determine: (i) that an undertaking which infringes the duty of care and the related obligations will be liable for all damages caused by this infringement and is obligated to make full reparations; (ii) that there is a reversal of the burden of proof because the undertaking should

[48] A subsidiary is defined in Article 2 of the amended proposal as: "*an undertaking in relation to which the undertaking has controlling powers within the meaning of Articles 1:14 to 1:16 of the Companies and Associations Code*".

[49] An associated undertaking is defined in Article 2 of the amended proposal as: "*any undertaking other than a subsidiary or a joint subsidiary in which the undertaking holds a participation within the meaning of Article 1:22 of the Companies and Associations Code associations*".

[50] The value chain is defined in Article 2 of the amended proposal as: "*The set of entities with which the undertaking has a commercial relationship because those entities:*

(a) directly or indirectly provide products, including financial services, that contribute to the creation of the undertaking's products, or

(b) receive from the undertaking products, including financial services".

prove that it respected the duty of care and because there is a presumption that an infringement of the duty of care causes damages; and (iii) that when the damage is due to non-compliance with the duty of care by several undertakings, those undertakings shall be jointly and severally liable for the damage caused.

d.

The duty of care and the related obligations do have extra-territorial effects in the sense that: (i) it is not only applicable to undertakings established in Belgium, but also undertakings merely active in Belgium; and (ii) undertakings established or active in Belgium could also be held liable for effects caused by their subsidiaries, associated undertakings or undertakings active in their value chain.

Moreover, Article 39 of the amended proposal foresees a modification of the Belgian Code of international private law, which states that Belgian courts will also have jurisdiction to adjudicate claims for compensation and reparation for infringement of the duty of care by companies active in Belgium.

e.

The amended proposal provides for different types of consequences in case of (suspected) breach of the duty of care:

- Criminal sanctions;
- Injunctions;
- Duty of reparation and liability for damages;
- Exclusion from public tenders.

First, Article 21 of the amended proposal determines that undertakings that infringe the general duty of care or the stricter obligations for large undertakings, undertakings of public interest and undertakings active in high-risk sectors or regions, can be sanctioned with a criminal fine between EUR 250 and EUR 100 000 or up to 6% of the total annual turnover in the last completed financial year preceding the imposition of the fine, whichever amount is higher.

Secondly, Article 24 of the amended proposal states that the president of the enterprise court will be competent to determine the existence of an infringement of the obligations related to the duty of care and the care plans and that he can issue an injunction concerning the infringement(s).

Thirdly, the amended proposal creates a liability system favourable to private claimants in case of an infringement of the duty of care and the associated obligations. Article 25 of the amended proposal creates the possibility of a collective redress action. The group of complainants can consist of all those who

have suffered damage in their personal capacity as a result of a common cause. Furthermore, as indicated in response to question (c), the Articles 33 to 37 of the amended proposal have simplified the liability regime to the benefit of both claims introduced by individual claimants and cases of collective redress.

Finally, Article 43 of the amended proposal modifies the law on public procurement by determining that (established) infringements of the duty of care and the associated obligations will be considered a compulsory ground for exclusion from public procurement procedures, except in situations where the candidate can demonstrate that it took measures to redress the infringement.

f.

For the scope of the liability regime see the response above to question (d) and (e).

Question 15

Currently, the duty of care/due diligence legislation is not yet in force. It is merely a proposal pending in federal parliament.

In our view, at this stage, the proposal is not fully clear and consistent with existing legislation. Therefore, we expect several amendments to follow after discussions in the competent committee. For example, it has not yet been determined how many years after the finding of an infringement a candidate will need to be excluded from public tenders. Consequently, enforcement challenges will only become fully clear when there is a fully-fledged proposal.

The opinion of the petitioners of the legislative proposal is that Belgium does not need to wait for European legislation as this would only prolong unfair competition at the expense of Belgium and other EU Member States and that Belgian legislation would encourage Belgian companies to adapt while waiting for European regulations and thus get ahead in a market where policymakers, consumers and investors are demonstrating stricter expectations of corporate social responsibility. However, it cannot be excluded that this proposal will not be adopted before the EU Directive will be adopted. If that were to be the case, it is most likely that the government will propose legislation in line with the Directive, while taking into account the work already done in light of the currently pending legislative proposal.

If we compare the currently pending Belgian proposal and the legislative proposal of the European Commission, certain challenges can be identified already. However, a complete analysis between both proposals will only be relevant when there is a complete Belgian proposal.

First, while the general obligations to be imposed in order to comply with corporate due diligence as foreseen in the European proposal are similar to the Belgian proposal, the scope clearly differs, meaning that Belgian legislation would go further than the proposed European Directive. As explained above, the Belgian proposal imposes certain minimum obligations on all undertakings established or active in Belgium, even if more stringent obligations are imposed on large undertakings, undertakings of public interest and high-risk undertakings. The proposed EU Directive would apply to two groups of undertakings: (i) undertakings of a substantial size and economic power; and (ii) undertakings active in high-impact sectors (already defined in the proposal). SMEs do not directly fall within the scope of the Directive, but they could be impacted as contractors or subcontractors of the companies within its scope. The proposal includes certain accompanying measures that would also be relevant for SMEs. This is in contrast to the Belgian proposal which foresees obligations for all undertakings, including SMEs.

Secondly, the EU proposal foresees the set-up of a European Network of Supervisory Authorities to ensure a coordinated approach. The main element missing in the Belgian proposal, as also criticised in the advice of the Council of State,[51] is an enforcement agency. The Belgian proposal foresees criminal sanctions in case of infringement but does not appoint an enforcement or supervisory authority. Consequently, at this moment it is not clear which national body would be appointed as Belgian representative in the European network.

Thirdly, the liability regime proposed in the EU Directive is less strict than the Belgian proposal. For example, in case a company took certain actions preventing adverse effects, it cannot be held liable for the damages caused by an indirect partner. Moreover, the EU proposal does not foresee any presumption of damage or joint and several liability.

[51] Advice of the Council of State regarding the proposal of law establishing a duty of care and accountability for companies across the value chain, *Parl. Doc.* 2020-21, nr. 55-1903/002.

BULGARIA

Oleg Temnikov

Question 1

The Bulgarian national competition authority – the Commission on Protection of Competition („CPC"), to our best knowledge, did not had the opportunity to express its views of assessment of sustainability agreements in decisions or rulings rendered under the Bulgarian Competition Protection Act („CPA") and/or Art. 101 and 102 of the TFEU. In this respect, the only indications for the CPC's position on this topic is its input to the EC's Call for contributions on „Competition Policy supporting the Green Deal" (available at the following link – https://ec.europa.eu/competition/information/green_deal/contributions.zip).

In its submission, the CPC showed a cautious approach. In particular, it stressed that it expects further clarification – „*general policy guidelines and case-by-case assessment*" from the EC. At the same time, the CPC called for „flexibility to be given to the evaluating authorities in admitting certain restrictive agreements in order to take into account „*the economic specifics of individual regions and national characteristics*".

In view of the above, we would expect the Bulgarian CPC to strictly follow the EC's more conservative approach in assessing sustainability arguments. This is not surprising and is in line with the practice of the CPC until now, which in general (i) follows strictly the EC's practice and (ii) does not engage in detailed examination of effects of agreements. This approach of the CPC is due to the lack of significant flow of relevant cases before it (due to the limited size of the Bulgarian market) and thus, the lack of practical experience for such assessment.

To the best of our knowledge, neither the CPC, nor competent state courts in Bulgaria had the opportunity to consider proper sustainability arguments or to assess such.

Similarly, as it concerns private enforcement cases, we would expect the relevant state courts to follow the CPC approach, if any, and respectively the EC's approach. In this respect too, we are not aware of any private enforcement cases where sustainability arguments have been raised or considered.

Question 2

The Bulgarian CPA is generally in line with EU Competition law and the Bulgarian CPC also strictly follows EC's and CJEU's practice. In this respect, all the tools under EU law are generally available (or potentially available, upon decision of the CPC), in the Bulgarian context.

Specifically, as it concerns merger control, the current CPA provides explicitly that

> *„The Commission may permit a concentration which, even if leading to a significant impediment to effective competition in the relevant market, especially as a result of establishing or reinforcing a dominant position, is aimed at modernising the relevant business activity, improving the market structures and promoting consumers' interests, and as a whole the positive effect outweighs the negative impact on competition in the relevant market."*

(Art. 26 (5) of the Bulgarian CPA)

In our view, this provision *per se* could constitute a reasonable ground for the CPC and/or courts to consider sustainability benefits. However, in view of the development of the matter and EU level, it would be recommendable the legislator to take appropriate steps to improve the language of this provision, in particular by introducing explicit reference to sustainability benefits and their potential role in merger control.

On another note, in the future the adoption by the EC of relevant guidelines and/or the rendering of relevant case law by the CJEU could also be used as arguments and grounds by the CPC and/or Bulgarian court to consider sustainability benefits.

Question 3

As noted above, to the best of our knowledge, neither the CPC nor competent state courts in Bulgaria had the opportunity to consider proper sustainability arguments or to assess such.

Should the CPC face such arguments, most likely it would use the same approach of the EC to assess the trade-off between harm to competition and befits to sustainability, subject, however, to the more limited availability and scope of economic analysis in proceedings before the CPC.

Question 4

To our best knowledge, neither the Bulgarian Government nor the CPC have expressed official positions on the propose Siemens/Alstom transaction and respective investigation.

Similarly, we are not aware of any submissions by local market participants.

The CPC has not considered yet similar cases, or cases implying similar arguments.

Question 5

In respect of merger control, the current CPA provides explicitly that

> *„The Commission may permit a concentration which, even if leading to a significant impediment to effective competition in the relevant market, especially as a result of establishing or reinforcing a dominant position, is aimed at modernising the relevant business activity, improving the market structures and promoting consumers' interests, and as a whole the positive effect outweighs the negative impact on competition in the relevant market."*

(Art. 26 (5) of the Bulgarian CPA)

In our understanding, this provision could be used as a ground for the CPC to include industrial policy concerns in its review of mergers. However, due to its competence being limited by the provision of EU law, we would not expect the CPC to be called to assess beneficial effects on European and world level, or strategic considerations as to EU's strategic autonomy. In any event, the CPC would most likely follow the EC's practice.

To our knowledge, the CPC has not considered yet similar cases, or cases implying similar arguments.

Question 6

No, the CPC is independent and autonomous in the process of merger review and it should not be influenced by decisions of the government, nor formal legal mechanisms exists in this respect in Bulgaria.

Yes, decisions in merger cases have been reversed by courts in the recent years, mainly on procedural grounds and/or substantial grounds – such as wrong assessment of the relevant market, wrong assessment of market conditions, lack of analysis etc.

Question 7

Question 7 (a.) and (b.)

No, the CPC has not considered proper competition law cases (i.e. prohibited agreement or abuse of dominance) against any of the large US digital platforms.

Question 7 (c.) and (d.)

Considering that the Bulgarian CPC has not been involved in such major cases, we would not expect the Digital Market Act to adversely affect its practice or enforcement activity.

Question 8

The practice of the EU and Member States in the past years in terms of policies to support particular sectors has proved to be an efficient tool to address different types of market failures, whether due to natural events (like the COVID pandemic) or human-made events (e.g. the war in Ukraine). In this respect, we consider that such further measure, if taken wisely, may contribute to cure market failures by increasing the competitiveness of particular sectors, or by saving particular sectors for short or midterm economic difficulties. The EU policy toward airlines during the COVID crisis has shown to be an efficient tool in this respect.

Question 9

Bulgarian courts have considered only very few cases implying EU State aid law. In this respect, we are not aware of cases where Bulgarian courts have used judicial remedies and other tools under EU law.

Question 10

So far, the CPC has not investigated cases where existing trade defence instruments affected its competition law analysis. Considering the geographical position of Bulgaria (close to the external borders of the EU) and the diversity of investors in Bulgaria (including large spectrum of non-EU investor from jurisdictions like US, Canada, Turkey, China, Japan, Russia etc.), we would expect the CPC to become much more active in developing such „geopolitical" consideration, once allowed to do so by EU rules or local law.

Question 11

a.

Bulgaria has not implemented so far an FDI Control regime in the meaning of 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. Although certain restrictions exists for some sectors (like energy, gambling etc.), they have not played a major role nor are relevant for competition law analysis.

b.

Bulgaria has not implemented so far an FDI Control regime in the meaning of 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.

c.

n/a

d.

n/a

e.

n/a

f.

n/a

g.

n/a

h.

n/a

i.

n/a

Question 12

No such concern in Bulgaria. Considering the limited market size, such major concerns have not occurred in the past year, to the exception of small doubts in relation to imports of certain food products from Turkey and north Macedonia. Nevertheless, such concerns have not led to any national law measures or competition law actions.

Question 13

In our understanding the EC should aim at implementing a coherent approach on foreign subsidies in order to avoid any potential contradictions, lack of coordination or unwanted effects on competition and state aid rules. The local implementation of these policies seem more problematic, as it could lead to excessive fragmentation, on one side, and on the other side, could require complex tools for analysis, which local authorities may not necessarily possess.

Question 14

No such legislation has been implemented so far in Bulgaria.

Question 15

n/a

CROATIA

Melita Carević[1], *Luka Petrović*[2]

Introduction

This report indicates that the Croatian legal framework is not yet fully prepared for all the contemporary challenges that European Union competition and trade policies are currently facing. Croatian competition law has not yet encountered cases in which sustainability arguments would have to be assessed and weighted against competitive harm, nor have there been any legislative amendments which would provide guidance for dealing with this type of cases. The experiences of other Member States and further legislative developments at the European Union level will therefore provide valuable input for the Croatian legislator, the Competition Agency and the judiciary. Similarly, when it comes to trade policy, Croatia has not yet developed a coherent body of legislation and practice fully in line with the European Union's current trade policy. Some aspects of trade policy discussed in this questionnaire are partially regulated through various legislative acts and individual legal rules, without and overarching legislative framework. This is partially due to the fact that binding rules at the European Union level have not yet been adopted and it is expected that as the European Union law evolves in this regard, so will the the Croatian legislation.

The report was written on the basis of desk research of the Croatian legal framework and case law, an interview conducted with the Competition Agency and information obtained from the Ministry of Finance and the Croatian National Bank.[3] The research of national case law was performed through the publicly available search engine of the Supreme Court, as well as through private databases IUS INFO and Informator. It should be noted that despite being the most comprehensive available online search engines, the aforementioned databases are limited in scope and only contain a selection of national case law. Our research results are therefore limited to publicly available jurisprudence of Croatian courts. The research of the case law of the Competition Agency was preformed through the search engine available at the Competition Agency's website.

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[3] The authors are grateful to the Competition Agency for providing help in conducting this research and acknowledge that all potential mistakes are the responsibility of the authors.

Competition

Green competition policy

Question 1

a.

So far no special legal developments took place in Croatia which would accommodate green initiatives and sustainability agreements in national competition law. The Croatian Competition Act[4] has not yet undergone any amendments in this regard, nor has the Croatian Competition Agency (hereinafter: the Competition Agency) decided any cases on the issue or adopted any soft law instruments serving as guidance. Our research also has not identified any judicial case law nor administrative practice on this topic.

Should a case involving sustainability agreements arise before the Competition Agency, it can be expected that the Croatian Competition Agency would be more likely to follow the European Commission's approach and that it would refrain from assuming the trailblazing role. Since the Competition Act does not expressly envisage a legal basis for taking into account sustainability benefits to the wider society in cartel cases,[5] and since no such basis currently exists in EU law, the Competition Agency is more likely to follow the developments on the EU level and in other Member States. Compered to, for example the Netherlands Authority for Consumers and Markets, which has taken the proactive role in greening competition law,[6] the Croatian Competition Agency is relatively young, smaller and has a lower budget at its disposal. Furthermore, unlike the Netherlands Authority for Consumers and Markets, the Croatian Competition Agency has not yet encountered cases which raised sustainability or environmental issues and attracted significant public interest in that regard, which would have led it to take a stance on the issue or nudged it into developing soft law instruments concerning the interaction of sustainability and competition law. Given the relatively under-developed competition law culture in Croatia,[7] the Competition Agency has so far directed its enforcement efforts towards cases in which the competitive harm

[4] Competition Act (*Zakon o zaštiti tržišnog natjecanja*), Official Gazette 79/09, 80/13, 41/21.

[5] For an example of legislative amendment in this regard, see V. H .S. E. Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law', *Journal of European Competition Law § Practice*, Vol. 13, No. 6, 2022, pp.426-434.

[6] P. Jansen, S. J. Beeston & L. Van Acker, 'The sustainability guidelines of the Netherlands Authority for Consumers and Markets: an impetus for a modern EU approach to sustainability and competition policy reflecting the principle that the polluter pays?', *European Competition Journal*, Vol. 18, No. 2, 2022, pp. 287-327.

[7] J.Pecotić Kaufman & R. Šimić Banović, 'The Role of (In)formal Governance and Culture in a National Competition System: A Case of a Post-Socialist Economy', *World Competition*, Vol. 44, No. 1, 2021, pp. 81-108, at 104-106.

occurred in a straightforward typical manner, and none of those cases have so far raised environmental concerns.

b.

At the outset, it should be noted that private litigation in competition cases is not well-developed in Croatia. In 2017 the Croatian Parliament adopted the Act on damages procedures resulting from violations of competition law,[8] which transposed Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union into Croatian law. The national legal framework remains silent on the use of sustainability criteria in private action and there have been no cases which would provide guidance on how open would the competent commercial courts be towards such interpretations.[9] Given the complexity of sustainability arguments, it is without doubt that their assessment would represent a challenge to the national courts. However, Croatian legislation does provide one option which might open the doors for addressing this issue. Article 17 of the Act on damages procedures resulting from violations of competition law prescribes that if it has been established that a claimant suffered harm, but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available, the competent court will freely estimate the amount of the harm suffered. While determining the level of the harm, the competent court may seek assistance from the Competition Agency. It can therefore be concluded that the national courts also have a certain degree of flexibility to consider sustainability arguments when determining the level of the harm suffered. Despite this, given the fact that private litigation in competition cases in Croatia is still in its roots, it is hardly likely that sustainability arguments would be put forward by the parties or taken into account by the Croatian courts.

Question 2

The Croatian Competition Act does not leave much room for considering a transaction's likely detrimental effects on the environment as competitive harm. Article 16 of the Competition Act prescribes that "a concentration of undertakings which would significantly impede competition in the market, in particular where such a concentration creates or strengthens a dominant position of the undertakings parties to the concentration shall be deemed incompatible

[8] Act on damages procedures resulting from violations of competition law (*Zakon o postupcima naknade* štete *zbog povreda prava tržišnog natjecanja*), Official Gazette 69/2017.

[9] Our research, conducted through databases IUS-INFO and Informator, has not identified any national case law applying the Act on damages procedures resulting from violations of competition law.

and therefore prohibited." Since the relevant criterion for prohibiting a concentration is the "significant impediment of the competition on the market" and the Competition Act does not allow for other reasons, such as environmental considerations, to be taken as the main reason for prohibiting a concentration. However, when assessing the concentration's effect on the competition on the market and possible barriers to entry, the Competition Agency takes into account, inter alia "the effects of the concentration on other undertakings or consumers, such as: shorter distribution channels, the lowering of transportation, distribution and other costs, specializing in production, technological innovation, lower prices of goods and/or services and other benefits that are directly linked with the implementation of the concentration".[10] The Competition Act therefore envisages a potential legal path for taking "other benefits that are directly linked with the implementation of the concentration", which can also encompass sustainability benefits. No guidance has so far been given regarding this option in the national case law, nor in the legislative framework.

Question 3

The Croatian legislative framework does not offer any guidance on how to determine the trade-off between harm to competition and benefits to sustainability. It is highly likely that quantifying and balancing these effects would represent a significant challenge to the Competition Agency and subsequently the national courts. The Competition Agency does not currently dispose with internal expertise required to perform an analysis of sustainability benefits or their assessment and comparison to the harm to competition. Therefore, despite the fact that the burden of proof lies on the party claiming sustainability benefits, the Competition Agency would most likely face challenges in assessing those benefits and balancing them against competitive harm. No special tools have been developed in this regard, neither by the applicable competition legislation, nor soft law instruments.

European strategic autonomy, the promotion of "European champions" and competition law enforcement

Question 4

a.

In the aftermath of the prohibition of the *Siemens-Alstom* merger, Croatia was, along with France, Austria, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania,

[10] Competition Act, Article 21(3)3.

Slovakia and Spain, one of the 19 Member States which signed a statement calling for quick industrial policy action at the European Union level in order to ensure the competitiveness of the Union industries on the global market.[11] However, Croatia did not take such a determinate stance on the issues as Germany and France, which fully opposed the European Commission's decision. There were no strong political reactions to this decision by any of the major political parties or in the public discourse. The Competition Agency has not taken a stance on the issue and has not decided any similar cases.

b.

Our research has not identified this type of intervention by market participants in Croatia.

c.

The Competition Authority has not yet been faced with similar industrial policy related arguments in merger cases. This can be explained by the size of the Croatian market and the lower thresholds for the application of the Competition Act in merger cases, when compared to the thresholds for the application of the Merger Regulation.[12] It is therefore highly unlikely that a case before the Competition Agency would involve this type of arguments.

Question 5

Under the current legislative framework, the Competition Agency has very limited authority to include some industrial policy benefits in its review of mergers. Due to the size of the Croatian market and thresholds for applying the Croatian Competition Act in cases concerning merger control, the scenario of Croatian Competition Agency having to decide on a merger that could create a more powerful European or world player or improve the EU's strategic autonomy is not very likely. In addition, there are currently no legal grounds in Croatian legislation which would expressly allow for the assessment of these factors during merger control.

On the other hand, supply chain uncertainties are a factor which might be taken into account during the assessment of a merger's effect on the competition on the relevant market. Pursuant to Article 21 paragraph 3 points 2 and 3 of the

[11] EURACTIV, *19 EU countries call for new antitrust rules to create 'European champions*, <https://www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions/>, visited 20 September 2022.

[12] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/2004, p. 1.

Competition Act, when assessing the merger's impact on the competition, the Competition Agency considers:
"2. the position in the market and the market share, economic and financial power of the undertakings in the relevant market, the level of competitiveness and possible changes in the business operations of the parties to the concentration and alternative sources of supply for the customers resulting from the implementation of the concentration;
3. the effects of the concentration on other undertakings or consumers, such as: shorter distribution channels, the lowering of transportation, distribution and other costs, specializing in production, technological innovation, lower prices of goods and/or services and other benefits that are directly linked with the implementation of the concentration."
Even though supply chain uncertainties are not a criterion expressly mentioned by the Competition Act, the Competition Agency can assess alternative sources of supply resulting from the merger and the length of the distribution channels, which are both relevant in the context of supply chain uncertainties. The criterion of alternative sources of supply, primarily aimed at ensuring that the merger does not close off main competitive supply channels, can also be relevant if the merger improves the functioning of a supply channel which faces uncertainties prior to the merger. Furthermore, a merger which leads to shortening of a supply channel might at the same time address supply chain uncertainty if a shorter supply channel in a particular situation reduces uncertainty. For example, if the uncertainties in the supply channel are caused by delays in maritime transport, and the merger would result in the production being organised closer to the relevant market and eliminate the need for maritime transport, the merger would successfully address the uncertainty by shortening the supply chain.

Despite the recent supply chain uncertainties on the Croatian market which were caused by the pandemic, the delays in the global traffic network and the war in Ukraine, there were no cases before the Competition Agency which raised the issue of a merger addressing supply chain uncertainties or similar industrial policy concerns. There is therefore no practice which would provide insight how would the Competition Agency deal with these issues and whether it would accommodate them in its analysis of competitive harm.

Question 6

The Croatian Competition Act does not envisage the possibility of the government's direct interference in the Competition Agency's decision on the approval of a merger. The decisions of the Competition Agency can only be challenged in

a judicial forum, more precisely, before the High Administrative Court, and subsequently before the Supreme Court.

The independence of the Competition Agency is enshrined in Article 26 of the Competition Act, which states that the Competition Agency "exercises its powers independently, impartially and in the common interest of the effective enforcement" of EU and Croatian competition law.[13] The independence of the Competition Agency was furthermore strengthened by the latest amendments to the Competition Act which took place in 2021 and served as an implementation instrument for the ECN+ Directive. The inclusion of EU industrial policy concerns in merger review cases under Croatian law would therefore have to be performed by the Competition Agency.

Question 7

The Competition Agency has not yet initiated any cases against any of the large digital platforms, including US platforms. However, the Competition Agency has been closely following the case law developments in other European Union Member States and at the European Union level and has been analysing best practices, especially within the European Competition Network.

The Republic of Croatia being a relatively small market, and the Competition Agency being a relatively young agency tasked with competition law enforcement, but also with developing competition law culture in Croatia (which is still lacking even on traditional markets), are factors which might have influenced the lack of national enforcement of competition law on the digital markets. Cases against digital platforms involve the application of competition law in an environment which significantly differs from the traditional markets, in which the existing tools for market definition and market power analysis were developed. The application of competition law in a digital context therefore requires specialised expertise and resources, and in lack of an adequate legislative framework, an innovative and a rule-defining role of the enforcer.

Further reasons most likely include the fact that cases against large digital platforms, such as Amazon and Google, were already initiated at the European Union level by the European Commission. Since no separate violation of competition rules seems to have occurred on the Croatian market, the Competition Agency did not have the need to initiate separate proceedings.

[13] Competition Act, Article 26(2).

The Digital Markets Act further reduces the likelihood of the Croatian Competition Agency pursuing large digital platforms for violations of competition law. Since within its power as the principal enforcer of the Digital Markets Act, the European Commission will be closely monitoring the activities of large digital platforms acting as gatekeepers, it is highly likely that the European Commission will have the best overview of potential breaches of competition law in that sector and that it will act accordingly. National competition authorities, especially those of smaller Member States, such as Croatia, are therefore less likely to duplicate enforcement activities in respect to large digital platforms and are more likely to focus their limited resources on pursuing violations which concern their domestic markets. Since large digital platforms acting as gatekeepers are present on the markets of all European Union Member States and since their activities on those markets will be monitored by the European Commission, the need for enforcement actions under national law or Articles 101 and 102 by the national competition authorities is likely to diminish.

Question 8

State aid policy and decisional practice of the European Commission can be one of the tools for the creation of European industrial champions – as targeted state aid can, using significant funds, create new industrial champions in industries which have not yet developed or strengthen existing companies into European champions. However, state aid policy must be a part of a larger industrial policy of the European Union, in which competition law policy also plays a significant role. Importantly, any such policies must be implemented without jeopardising the single market and free market competition. State aid policy may distort competition between Member States and create significant tensions, since funding European champions in one or a few Member States may significantly harm their competitors in other Member States, in industries in which such competitors exist.

Potentially the strongest instrument which can be used to create European industrial champions is the Commission's initiative promoting Important projects of common European interest (hereinafter: IPCEI), which creates a framework through which the Commission can support Member States' efforts in numerous sectors.[14] However, these policies are based on the initiative of Member States, and the Commission primarily has a coordinative role, which might lead to a lack of a

[14] For example, since 2019 there have been IPCEIs which have sought to support research and innovation in the battery value chain, the hydrogen technology chain and the microchip industry. For further information on the recent IPCEIs, see Commission, 'Important Projects of Common European Interest (IPCEI)' < https://competition-policy.ec.europa.eu/state-aid/legislation/modernisation/ipcei_en>, visited 20 October 2022.

coherent EU industrial policy, as individual Member States, or groups of Member States, initiate their own IPCEIs.

The Communication "Criteria for the compatibility with the internal market of State aid to promote the execution of important projects of common European interest" sets out clear criteria which the Commission will consider for state aid to be allowed under Art 107(3)(b) TFEU.[15] Any proposals from the Members States need to be designed "to overcome important market or systemic failures."[16] However, there is a lack of explanation as to which situations can be classified as market or systemic failures, other than these being failures which prevent "the project from being carried out to the same extent or in the same manner in the absence of the aid, or societal challenges, which would not otherwise be adequately addressed or remedied."[17] Therefore, a situation in which there is a lack of a strong industrial player in Europe, coupled with strong international competition which makes it very difficult for a European player to develop, can be considered as a failure of the European single market to create a secure and stable supply chain. This is especially the case in light of recent events such as the war in Ukraine and the COVID pandemic.

While the abovementioned reasoning provides a potential interpretation of what constitutes a market failure, to provide the full answer it is necessary to determine what the purpose of the market is and consequently what are its failures. If we were to look at the market solely from the perspective of consumers, in most circumstances there is no need for strong market intervention as consumers can be supplied even without strong European champions. However, if we take the broader view of market goals, specifically the goals of creating added value for the economy, jobs for individuals and new innovations for the European market – a European champion is much more likely to ensure those goals for the entire European market. These impacts are especially important in industries which benefit from economies of scale or industries which have high barriers to entry – for example, the aerospace industry or the microchip industries. In these industries, creating strong European champions benefits not only the security of supply chains, but also provides consumers with a significant benefit as they are likely to benefit from lower costs due to increased competition.

Nonetheless, this measure would need to be used sparingly, given that indiscriminate use of state aid could endanger the competition inside of the internal market.

[15] European Commission, 'Communication from the Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' [2021] OJ C 528/02.

[16] Ibid. Chapter III, Article 15.

[17] Ibid.

Providing such aid would also – under Article 103(3) TFEU – require showing it is done with the aim of mitigating a "market failure" in the broader sense and a necessity for it, while also not harming competition and trading conditions in the single market. Therefore, following the reasoning of the Commission's decision in the Siemens-Alstom merger case, any state aid granted to create strong European champions should be justified by proving strong international pressure which makes it difficult for European companies to function, as well as showing that any potential impact on the Single Market would be positive or that any negative effects would be proportional.

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?

In the current understanding of the Croatian Ministry of Finance, which has a primary role in Croatia in monitoring the application of State aid rules in the process of determining the application of state aid, it is necessary to take into consideration the interaction of various industrial policies relating to the current state of the market, with the aim of ensuring macroeconomic sustainability and diminishing market failures on a larger scale. This understanding seems to be in line with the current policy of the European Commission, as the largest state aid programmes by the Commission in recent years have been in response to the COVID pandemic and the war in Ukraine (as well as its impact on the European economy), namely the Temporary Framework for COVID aid[18] and the Temporary Crisis Framework.[19] However, as pointed out by the Commission, it is necessary to phase out these types of state aid policies as soon as possible to mitigate adverse impacts on the single market.[20] Consequently, we can conclude that the most far-reaching and significant state aid policies are seen within the context of mitigating adverse and significant market failures caused by external

[18] The Temporary Framework for COVID aid has went through 7 amendments, for the most recent version see European Commission, 'Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' [2022] OJ C423/04.

[19] The Temporary Crisis framework has gone through 4 amendments, for most recent version see Commission, 'Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia' [2022] OJ C426/01.

[20] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A competition policy fit for new challenges' ('Communication on a competition policy fit for new challenges') COM(2021) 713 final, s 2.

factors, and that these policies should be "progressively phased out when the economic situation allows it".[21] This is in line with Article 107(2)(b) TFEU which permits state aid in exceptional circumstances, such as the COVID crisis.

In contrast, when discussing other forms of permissible State aid stemming from Article 107(3) TFEU, it is necessary to recognise that the Commission in its Communication 'A Competition Policy For New Challenges' primarily focuses state aid policy in terms of supporting the Green and Digital transition, as opposed to creating strong European champions.[22] The Communication explicitly acknowledges the goal of the ongoing review of competition instruments (including State aid policy), which is to allow EU industries to lead the digital and green transition, and foster the resilience of the single market, while allowing customers and consumers a fair share of the benefits.

Due to the recent COVID crisis and the war in Ukraine, it seems that the self-sufficiency and long-term viability of the European industrial sector has become a much more important factor in all policies. Specifically, it has become apparent that in times of crises, it is necessary for states to have control over crucial resources – such as oil, gas, and vaccines – needed to combat the crisis or to allow their economies to function. Consequently, there is a wider understanding that in terms of ensuring the stability of the markets it is necessary to maintain a degree of self-sufficiency in critical industries in Europe. It seems that this has also been considered by the Commission in recent policy proposals. This can clearly be seen in the EU Chips Act proposal which aims to ensure the long-term security of the supply chain for semiconductors through creating strong European players.[23] As pointed out in the answer to the first part of the question, non-viability of a strategic industrial sector can be also potentially be seen as a "market failure", as it does not provide for supply chain stability in times of crises and therefore creates a significant risk to all individuals in the single market. However, when providing state aid to critical industrial sectors, its impact on consumers and the internal market should be weighed against any potential benefit in increasing supply chain security. Namely, creating a diversified market with numerous suppliers around the world – as well as having stockpiles of relevant resources, similar to natural gas and oil – might in certain circumstances be equally effective, while mitigating any distortions to the internal market.

[21] Ibid.

[22] Ibid. s 3.

[23] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Chips Act for Europe', COM (2022) 45 final.

Question 9

Our research has not identified any national case law in which national courts made use of any judicial remedies and other available tools – including Article 29(1) of Council Regulation (EU) 2015/1589 and the preliminary reference procedure under Article 267 TFEU – to seek clarification about the scope of EU State aid rules. Rather, in the publicly available cases, most of which have dealt with the Common Agricultural Policy and state aid granted under Commission Regulation (EU) 702/2014 and Regulation (EU) 1306/2013, national courts have applied national and EU law without resorting to collaboration with the Commission or the CJEU. While these cases have dealt with EU law, they have been relatively straightforward, and we were unable to identify any cases which required extensive or difficult interpretation of EU law.

Geopolitical instruments, trade defence instruments, and competition policy

Question 10

The Competition Agency has not investigated any cases in which international trade restrictions between the European Union and third countries were raised as a limiting factor in regard to supply from third countries which would influence the definition of the relevant market or the level of market power. However, should trade defence instruments continue to apply in the future, it is not unlikely that this type of arguments will be raised before the Competition Agency. Since the Competition Agency would be able to assess those arguments with the existing traditional tools for market definition and the determination of market power, it seems very likely that they would be taken into account without any difficulties.

TRADE
FDI control

Question 11

The main Croatian legal instrument introduced in the context of the FDI Screening Regulation is the Decree on the implementation of 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.[24] Interestingly, the Decree is eight Articles long and does not establish an FDI screening mechanism, rather it establishes the Interdepartmental

[24] Decree on the implementation of 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

Commission for Screening Foreign Direct Investments in the EU and the National Contact Point (hereinafter: the NCP) in charge of the implementation of the FDI Screening Regulation, which primarily serve as competent authorities for a coordination mechanism under the FDI Screening regulation.[25] The NCP may request information from a foreign investor or an undertaking in Croatia in which the investment is planned. Article 4 of the Decree on the implementation of Regulation (EU) 2019/452 also mandates that the investor or the undertaking need to submit this information to the NCP within seven days. However, there are no penalties or sanctions for failing to meet this obligation.

While there is still no public initiative or a clear legislative goal set by the Croatian government in terms of adopting a new national FDI screening mechanism, the Second Annual Report on the screening of foreign direct investments into the Union[26] shows that Croatia had entered into a consultative or legislative process expected to result in the adoption of a new mechanism, and the NCP has entered into bilateral exchanges with Member States to develop relevant screening regulations in Croatia.[27]

Nonetheless, there is a long-standing obligation – ever since 2006 – for all foreign investors to provide information regarding the value, type and source of the investment to the Croatian Central Bank.[28] Specifically, the investor needs to provide: a report on the initial foreign investments (its value and whether the investment changes the initial share capital in any way), a quarterly report on foreign direct investment, a quarterly report on real-estate investments, report on real-estate investments abroad and a report on dividends and other forms of profit.[29]

This information is unfortunately not gathered with the aim of FDI screening.[30] Rather, it is collected for statistical purposes and published by the Croatian National Bank on a quarterly basis, as statistical data for Croatia.[31]

Union (*Uredba o provedbi Uredbe (EU) 2019/452 Europskog parlamenta i Vijeća od 19. ožujka 2019. o uspostavi okvira za provjeru izravnih stranih ulaganja u Uniji)*, Official Gazette 105/2020).

[25] Article 3.

[26] European Commission, 'Report from the Commission to the European parliament and the Council, Second Annual Report on the screening of foreign direct investment into the Union' COM(2022) 433 final, p 9.

[27] Commission, 'Commission Staff Working Document, Screening of FDI into the Union and its Member States' SWD(2022) 219 final, p 22.

[28] Foreign Exchange Act (*Zakon o deviznom* poslovanju, Official Gazette No 96/03, 140/05, 132/06, 150/08, 92/09, 153/09, 133/09, 145/10, 76/13, 52/21), Art 49 and Decision on Collection of Data for the Purpose of Drawing Up the Balance of Payments, the Status of Foreign Debt and the Status of International Investments (*Odluka o prikupljanju podataka za potrebe sastavljanja platne bilance, stanja inozemnog duga i stanja međunarodnih ulaganja* Official Gazette No. 103/12, 10/14, 45/15, 13/20), Art 4.

[29] Ibid. Article 5.

[30] Ibid.

[31] For example, see the report from 30 September 2022 for the second quarter of 2022: Croatian National Bank, Commentary on the balance of payments, the state of gross foreign debt and the state of international

As far as we have managed to ascertain, there have not been challenges in the implementation of the FDI screening regulation in Croatia, given that the FDI Regulation is applied directly and does not require anything more than the acquisition of data on foreign investments.

Trade defence and public procurement – foreign subsidies

Question 12

In Croatian mainstream politics, there is no serious concern about the impact of foreign subsidies. There have been a few cases in which foreign subsidies and their impact have been recognized. However, these have been in areas of public procurement in which Croatian authorities have the possibility of intervening and refusing any abnormally low tenders, which have not provided sufficient justification for their low costs.[32] Specifically, these cases were in relation to large scale infrastructure projects such as the Pelješac Bridge (recently fully finished and constructed by the China Road and Bridge Corporation) and the development of the railway between Karlovac and Hrvatski Leskovac. In both cases, Chinese corporations provided the lowest offer and there have been significant doubt as to whether their tenders were a result of Chinese subsidies. In the end, the offer from the China Bridge and Road Corporation for the construction of the Pelješac Bridge was accepted despite numerous appeals,[33] while the offer from China Railway Eryuan Engineering was refused as abnormally low.[34]

There is no risk of the Commission's control of foreign subsidies interfering with matters falling with the competence of the Croatian government, as outside the area of public procurement, there is no mechanism for the control of foreign subsidies.

The Croatian Public Procurement Act allows contracting authorities to refuse abnormally low tenders if the economic operators do not provide sufficient explanations to explain the price or costs proposed in the tender.[35] The contracting authority may also refuse tenders if they ascertain that the tender is abnormally low due to the influence of State aid, after which the contracting authority must notify

investments for the second quarter of 2022', <https://www.hnb.hr/-/komentar-platne-bilance-stanja-bruto-inozemnog-duga-i-stanja-medjunarodnih-ulaganja-za-drugo-tromjesecje-2022> visited 15 October 2022.

[32] Public Procurement Act (*Zakon o javnoj nabavi* Official Gazette 120/16, 114/22, Article 289.

[33] See State Commission for Supervision of Public Procurement Procedures, Decision UP/II-034-02/18-01/59 of 21 March 2018 and Decision UP/II-034-02/18-01/64 of 21 March 2018

[34] See State Commission for Supervision of Public Procurement Procedures, Decision UP/II-034-02/21-01/162 of 1 March 2021.

[35] Public Procurement Act, Article 289.

the Commission about its decision.[36] Given that the evidentiary standard – in the context of public procurement – is not clearly defined, the Commission proposal may serve to strengthen Croatian review procedures and provide inspiration for the Croatian legislator in seeking to further clarify national procedures. Outside the context of public procurement, there is no concern with regard to the Commission's proposal, given that it would not significantly impact any Croatian legislation.

Question 13

At the onset, it is important to define the objectives of EU competition law and trade defencerules. Afterwards, it is possible ascertain whether there are limitations to the Commission's foreign subsidies proposal.

As noted by the Commission in the Guidelines on Article 101(3) "the objective of Article [101] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[37] While this shows the Commission's priorities in enforcing EU competition law, this can also be seen as one of the most widely accepted goals of EU competition law.[38] However, the primary role of EU trade defence law – in coordination with EU's common commercial policy – can among others be viewed as ensuring "free and fair trade"[39] while at the same time protecting efficient domestic producers in order to protect efficient domestic industries thereby promoting long-term total welfare on the market.[40]

The Proposal for a Regulation on foreign subsidies distorting the internal market, and the three tools it provides to the Commission form a reasonable mechanism to ensure and prevent any distortion to the internal market and to prevent unfair international competition. Under this proposal, the Commission would have the capacity to investigate and prevent any foreign subsidies distorting the internal market. However, under the current proposal, a distortion on the internal market exists "where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market."[41] Therefore,

[36] Ibid, Articles 289(5) and 289(6).

[37] Guidelines on the application of Article 81(3) [now Article 101(3)] of the Treaty [2004] OJ C101/97, para 13.

[38] See for example Patricia Trapp, *The European Union's Trade Defence Modernisation Package: A Missed Opportunity at Reconciling Trade and Competition?*, 1st ed., Springer 2022, p 69-81 and Alison Jones, Brenda Sufrin, Niamh Dunne *EU Competition Law: Text, Cases, and Materials*, 7th ed., OUP 2019, p 40-54.

[39] Treaty on European Union, Article 3(5).

[40] For a more detailed analysis see Trapp (n 36), p 82-97.

[41] Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, COM (21) 223 final, Article 3.

the Commission would have the authority to act even if such a subsidy is beneficial for the development of the economic activity in question in the EU. Thankfully, Article 5 of the Proposal allows the Commission to balance between the positive and negative effects when deciding to implement any measures.

Therefore, the legislative framework creates the tools for the Commission in order to protect the internal market when necessary, while also not being overly protective of domestic industries and harming consumers. However, the proposed approach could also be used strictly in a protectionist manner, which could therefore lead to consumer harm.

Mandatory due diligence and regulating supply chains

Question 14

Currently, in Croatia there is no legislation regulating the duty of care of companies to respect human rights and environmental law throughout the supply chain. While legislation governing the due diligence of companies exists, it mostly refers to non-financial reporting and does not provide for a mechanism to enforce human rights and environmental law. Furthermore, this legislation has primarily been introduced to transpose EU directives or to implement EU regulations and was not introduced autonomously at the incentive of the Croatian legislator.

The most important piece of legislation governing due diligence of companies in Croatia is the Law on Accounting.[42] As required by Directive 2014/95/EU,[43] it has introduced the obligation for companies, which are public interest entities exceeding the average number of 500 employees during the financial year to include a non-financial statement containing information to the extent necessary for an understanding, among others, of the impact of their activity on human rights and the environment in their management report.[44] However, the Law does not provide for a mechanism for the enforcement of those rights. Rather, it simply requires the publication of non-financial reports, as required by Article 19(a) of Directive 2014/95/EU.

Article 22 of the Law on Accounting also requires undertakings of public interest, whose securities are traded on a market in any Member State, to publish a corporate governance statement. While this is a requirement introduced by

[42] Law on Accounting (*Zakon o računovodstvu*), Official Gazette 78/2015, 134/2015, 120/2016, 116/2018, 42/2020, 47/2020).

[43] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330, Article 19(a)

[44] Law on Accounting, Article 21(a).

Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings – which does not regulate supply chains and human rights throughout the supply chain – the Zagreb Stock Exchange Corporate Governance Code requires companies to publish policies on managing the social, environmental, and human rights impact of their undertaking.[45]

While these requirements do not constitute an enforceable due diligence requirement, as they only require publishing information, they nonetheless show a growing concern and understanding in Croatia that companies are required to manage their impact on human rights, society and the environment.

However, there is one exception to the aforementioned. In the market for timber products, there is an enforceable obligation for companies to respect environmental law throughout their supply chain. Specifically, as required by Articles 4,5 and 6 of the EU Timber Regulation,[46] all timber traders are required to be able to identify traders to who have supplied them with timber or timber products, or whom they have supplied. In Croatia, this is an obligation enforced by the Agricultural Ministry.[47] Furthermore, as required by Article 37 of the Law on Forests, transport of any timber which was felled outside of forestry designated land requires a valid bill of lading, issued by the Croatian Chamber of Forestry and Wood Technology Engineers.[48] The bill of lading serves as proof that the timber was not legally harvested and transporting timber without the bill of lading results in fines between 7.000 and 70.000 HRK, depending on the size and nature of the offending body, i.e. whether it is a large or small business, or even a public body.[49]

In conclusion, similar to the due diligence requirements discussed in the previous section, this legislation is heavily influenced by the legislative activities of the European Union and largely constitutes implementation of the *acquis communautaire*. Nonetheless, the Croatian legislator has in some areas further strengthened the due diligence requirements, in an effort to ensure their effectiveness.

[45] *Zagreb Stock Exchange Corporate Governance Code*, p 27, <https://zse.hr/UserDocsImages/docs/issuers/corp_governance/2019%20-%20ZSE%20Corporate%20Governance%20Code.pdf> (Zagreb Stock Exchange, Croatian Financial Services Supervisory Agency 2019), visited 20 October 2022.

[46] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance

[47] Law on the implementation of EU Timber Regulation (*Zakon o provedbi uredbi Europske unije o prometu drva i proizvoda od drva*), Official Gazette 16/20), Article 6.

[48] Law on Forests (*Zakon o šumama*), Official Gazette 14/20, Article 37.

[49] Ibid Articles 82, 85, 88, 90, 91 and 92.

Question 15

In Croatia there have been no significant challenges in enforcing and implementing the duty of care/due diligence obligation and legislation, given that there has been very little legislative activity in that regard.

However, the legislative proposal on "Sustainable Corporate Governance" (and its subsequent implementation) would create a completely new legislative framework. While the proposed Directive would not affect existing laws to a large extent – as it relates to matters which are currently not regulated – the primary challenge would be to set up an efficient system of enforcement. Similarly to the NCP in charge of implementing the FDI Screening Regulation,[50] Croatian authorities would likely create a completely new body in charge of implementing the Corporate Sustainability Due Diligence Directive. Based on the example of the NCP – which started considering additional measures to strengthen the implementation of the FDI Screening Regulation only after two years – the Supervisory Authority would also likely require some time to become fully functioning.

[50] 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 L 79I/2019.

CZECH REPUBLIC

Jiří Kindl[1] and Michal Petr[2]

Question 1

The Czech Competition Authority (also referred to as the "Czech NCA") has not made its position to sustainability agreements public, and to our knowledge, it has not yet been dealing with any such case. The Czech competition law[3] does not contain any provisions on sustainability agreements. No guidance material has been published on this issue and the competition authority does not mention it in its annual reports either.[4] The authority organizes a major antitrust conference every year, the said type of agreements has, however, never been discussed in detail as a selected topic. Even though the Czech Republic holds the Presidency of the EU in the second half of 2022, the competition-related priorities do not mention any topics connected particularly to sustainability agreements, or more broadly, the Green Deal, with the exception of a brief remark that in the course of the process of review of the Horizontal Block Exemption Regulation, the Commission "*consults conditions, under which the cooperation among competitors may contribute to more sustainable product or production processes*".[5] The Presidency programme of the Czech Government does not mention it at all.[6]

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[3] Act No 143/2001 Coll., on the Protection of Competition, as amended, hereinafter referred to as „Czech Competition Act". Current version of the Act is not available in English, the version from 2017 is available at: https://www.uohs.cz/en/legislation.html.

[4] The annual reports of the Czech Competition Authortiy are available at: https://www.uohs.cz/en/information-centre/annual-reports.html.

[5] Information Bulletin of the Czech Competition Authority *ÚOHS a české Předsednictví EU 2022* [*Czech Competition Authority and the Czech EU Presidency 2022*], p. 13, available (in Czech only) at: https://www.uohs.cz/cs/informacni-centrum/informacni-listy.html; hereinafter referred to as „Czech Competition Authority and the Presidency".

[6] *Programme of the Czech Presidency of the Council of the European Union*, available at: https://czech-presidency.consilium.europa.eu/media/ddjjq0zh/programme-cz-pres-english.pdf, hereinafter referred to as „Czech Presidency Programme".

Sustainability agreements are clearly not among the top priorities of the Czech Competition Authority. In its annual reports, it regularly outlines its priorities for the next year. In the last five years, this type of agreements has never been mentioned. In its enforcement practice, the competition authority focuses primarily on the so-called by-object agreements (esp. bid-rigging practices and resale price maintenance agreements). It is worth mentioning that, in the last five years, the authority has not found, at the end of the day, any agreement to be a by-effect infringement. In this period of time, no agreement has been exempted due to Article 101 (3) TFEU (or its national equivalent). The level of economic analysis, if any, was very low in the respective decisions. Similarly, the requirements for the Article 101 (3) TFEU exemption have only been outlined, but never discussed in depth.

No antitrust case investigated by the authority has been connected to "green" markets or to the issues of ecology in the last five years. Thus, it is difficult to speculate what would be the approach of the Czech Competition Authority to those arrangements. Given its overall conservative approach to the assessment of agreements, we nonetheless predict that it would follow the Commission's approach.

Given the fact that the all the decisions of the Czech Competition Authority over the last five years concerned only by-object agreements, with hardly any assessment of their effects, the courts have not had the opportunity to address these issues yet, and it is thus even more difficult to predict their position. This being said, it ought to be mentioned that the courts have generally been very conservative in the past; for example, in a case concerning RPM agreements, the Regional Court in Brno declared that such agreements can almost never bring benefits to consumers, because they prevent price competition.[7] Similarly, we do not believe that the courts would be impressed by sustainability arguments meant to defend otherwise competition-wise restrictive agreements.

Concerning the private enforcement of competition law, the practical experience is very limited in the Czech Republic. The antitrust-related arguments are occasionally employed in private litigation, even though frequently only at the secondary level, to support the arguments bases on the rules on unfair competition or sector regulation. There has been only a couple of private enforcement cases so far and there have been practically no cases finding an antitrust infringement.[8]

[7] Judgement of the Regional Court in Brno of 23 October 2009, Ref. No. 62 Ca 4/2007 (*Tupperware II*).

[8] For an overview of public antitrust enforcement in the Czech Republic, see, e.g., PETR, M., ZORKOVÁ, E. *Zkušenosti se soukromým prosazováním soutěžního práva v České republice* [*Experience with Private Enforcement of Competition Law in the Czech Republic*]. ANTITRUST, 2020, No. 3, p. 49 or MIKULÍKOVÁ, L. *Soukromoprávní vymáhání soutěžního práva v ČR. Teorie a praxe. [Private competition law litigation in the Czech Republic. Theory and practice.]* Prague: C.H. Beck, 2020.

In the few private enforcement decisions published so far, the level of understanding of competition law and corresponding sophistication does not seem to having been high. Occasionally, the courts have made clear errors in law that needed to be corrected by superior courts. Thus, we do not predict that the courts would go beyond the dictum of the Article 101 (3) TFEU (or its Czech equivalent) and that they would likely not accept any sustainability-based arguments to preponderate over narrowly viewed competition law arguments.

Question 2

Over the last five years, there have been 241 merger review decisions.[9] The overwhelming majority of these cases (230, i.e. more than 95%) have been cleared in the simplified procedure[10] or in the so-called Phase I review.[11] Those decisions do not contain any detailed assessment of the effects of the concentrations in question, only declarations that the concentration in question would not lead to a significant lessening of competition. Only a couple of decisions involved in-depth analysis, namely 7 Phase II decisions and 4 commitment decisions. It is thus very difficult to predict the approach of the Competition Authority in more complex cases.

In these last five years, we were able to identify 7 mergers connected with "green" markets, including production of components to solar and wind power plants,[12] production of electricity in solar plants,[13] energy supplies from renewable sources,[14] purchase of biomass for the purposes of production of heat and electricity[15] and the purification of waste waters.[16] All these concentrations were cleared in a simplified procedure, with no detailed assessment of their effects.

As has been said in relation to antitrust (Question 1), we do not predict that the Czech Competition Authority would consider any non-economic efficiencies (public interest) of the concentration should a more complex assessment be required. It is

[9] These statistics are based on the Annual Reports of the Czech Competition Authority 2021 – 2017.

[10] Section 16 (2) of the Czech Competition Act.

[11] *Ibid*, Sec. 16a.

[12] Decisions of the Czech Competition Authority Ref. No. S144/2021/KS (*BayWa / Solid Power Distribution*) and Ref. No. S228/2018/KS (*Windar Renovables / AO ROSNANO / PAO SEVERSTAL / WINDAR RUS*).

[13] Decisions of the Czech Competition Authority Ref. No. S178/2021/KS (*Enery Development / PV Čekanice, HEFRA solarpark development, PV Rosice, FVE Tuchlovice and ENERGY 21*) and ref. No. S124/2018/KS (*SPVA 1 / Litovelská obchodní a investiční* and *HAMA Litovel*).

[14] Decision of the Czech Competition Authority Ref. No. S36/2021/KS (*PETR NEMEC FAMILIENSTIFTUNG / Bluelight.li / Vitri / T. J. / Nano Energies*).

[15] Decision of the Czech Competition Authority Ref. No. S396/2021/KS (*CREDITAS ASSETS SICAV / EC Biowatt*).

[16] Decision of the Czech Competition Authority Ref. No. S220/2020/KS (*BETVAR / První pokratický holding / INSET / Národní centrum využití vod*).

generally recognized that, as a matter of principle, the Czech Competition Authority deals only with competition related arguments (whether the concentration would or would not significantly impede competition) when assessing mergers and acquisitions and does not take into account non-competition issues as those are not a part of the "substantive test" for assessing impacts of concentrations.[17]

Question 3

Given the answers to Questions 1 and 2, we do not think that the Czech Competition Authority would take any not competition-related sustainability benefits into consideration.

Question 4

a.

There are no publicly available/known views of the Czech Republic (the government and/or the national competition authority) concerning the respective merger case and the industrial policy arguments relating to it. The Czech NCA is not mentioned in the respective Commission's decision among those that submitted comments.[18]

b.

That information is not publicly available. It is mentioned in the public version of the Commission's decision that the notifying parties claimed that the Czech rolling stock manufacturer Skoda (being also a customer of the notifying parties in relation to ETCS On-Board Units) was sponsoring an entry in that market.[19] Concerning comments of the Czech entities in the course of the Commission's proceedings it is, however, likely that some Czech entities provided their views on various matters relating to that merger, esp. as regards the submitted commitments (as respondents in the market test). Those entities that might have (or might have not) participated could have been competitors and/or customers to the merging parties (esp. it could have been the following entities: Skoda Transportation, AZD, Czech Railways, RegioJet and LEO Express). It is also worth mentioning that ultimately the Czech Republic was not mentioned as an

[17] See e.g. KINDL, J. ET Al. *Soutěžní právo [Competition Law].* 3rd edn. Prague: C.H. Beck, 2021, chapter 27, or NEDELKA, M., KUBÁČ, R. *Czech Republic.* In JANSSENS, T. (ED) *Lexology Getting the Deal Through – Merger Control 2020.* Law Business Research 2019, at p. 143.

[18] See Commission's decision in Case M.8677 – *SIEMENS/ALSTOM*, Ref. C(2019) 921 final, of 6 February 2019 (public version), e.g. section 9.4.3.1.

[19] Ibid., para. 844.

adversely affected local market and was, hence, dealt with only as a part of the broader EEA market.[20]

c.

It can be hardly said that the Czech NCA dealt with a comparable transaction. Given the preponderance of the EU merger control regime when the transactions have the Community dimension and the fact that the Czech market is relatively small, it is unlikely that similar arguments (a potential clash between industrial policy arguments and "narrower" competition policy arguments) would appear before the Czech Competition Authority in a merger case. Also, as mentioned above, it is quite generally recognized that, as a matter of principle, the Czech Competition Authority deals only with competition related arguments (whether the concentration would or would not significantly impede competition) when assessing mergers and acquisitions and does not take into account non-competition issues as those are not a part of the "substantive test" for assessing impacts of concentrations.[21]

Question 5

As mentioned above, it is quite generally recognized among practitioners as well as in academia in the Czech Republic that the Czech competition law does not allow the Czech NCA to take into account non-competition issues when assessing concentrations.[22] That also means that industrial policy concerns shall not override competition law assessment.

Question 6

No. There are no provisions to that effect in the applicable Czech law. Accordingly, no decision of the Czech NCA was reversed in such a manner.

Question 7

a.

No. Based on publicly available information the Czech Competition Authority has not brought any case against the large US digital platforms (meaning GAFAM[23]).

[20] Ibid., para. 42.

[21] See e.g. KINDL, J. ET Al. *Soutěžní právo [Competition Law]*. 3rd edn. Prague: C.H. Beck, 2021, chapter 27, or NEDELKA, M., KUBÁČ, R. *Czech Republic*. In JANSSENS, T. (ED) *Lexology Getting the Deal Through – Merger Control 2020*. Law Business Research 2019, at p. 143.

[22] Ibid.

[23] Google, Apple, Facebook, Amazon, Microsoft.

On a related note, it may be, however, mentioned that the Czech NCA brought the case against the Dutch based company Booking.com B.V. which operates the well-known hotel and accommodation booking platform/portal. It was fined by the Czech NCA for the parity clauses included in its contracts with partners.[24] The complainant in the respective case was the operator of an on-line travel agency at www.skooch.com. The competition authority's decision was so far sustained in the judicial review but the appellate proceedings are still pending before the Czech Supreme Administrative Court.[25] Also, interestingly the Czech Competition Authority brought a case against the company CHAPS for a putative abuse of dominance by an internet platform enabling on-line search in public transportation timetables. In that case Google and the Czech search engine company Seznam.cz might have been seen as adversely affected by the alleged abuse as CHAPS was held to withhold machine readable data on public transportation timetables to those companies.[26] The decision of the Czech NCA was cancelled in the judicial review and the case was remanded back to the Czech NCA where it is pending.[27] Those two cases can be considered the only ones where the Czech Competition Authority substantively dealt with the application of competition law in digital platforms sphere.[28]

Even though the above question relates to the cases brought by the competition authority, it is worth mentioning that in the Czech Republic there are two significant privately brought cases for damages against Google in the wake of the Commission's decisions in *Google Shopping* and the *Google Android*. The first one has been brought by Heureka Group a.s. (a major Czech comparative shopping search website operator) and the second one by Seznam.cz, a.s. (a Czech general search engine operator). Both proceedings are pending before the Municipal Court in Prague.[29] In the Heureka damages claim, the Czech court lodged a preliminary reference to the Court of Justice which has not been decided yet.[30]

[24] Decisions of the Competition Authority Ref. No. ÚOHS-S0664/2015/KD-37030/2018/830/DKl of 12 December 2018 (*BOOKING.COM*) and Ref. No. ÚOHS-R0219/2018/HS-29914/2019/310/AŠi of 1 November 2019 (*BOOKING.COM*).

[25] Judgment of the Regional Court in Brno Ref. No. 30 Af 2/2020 – 135 of 31 January 2022. The appellate proceedings before the Supreme Administrative Court pending under Ref. No. 6 As 35/2022.

[26] The decision of the Chairman of the Czech NCA Ref.No. ÚOHS-R12/2016/HS of 16 January 2018 (*CHAPS*) and the previous first-instance decision of the Czech NCA Ref.No. ÚOHS-S669/2013/DP of 22 December 2015 (*CHAPS*), which has been partially changed. Please note that Jiří Kindl has been representing CHAPS in the said case.

[27] Judgment of the Regional Court in Brno Ref. No. 30 Af 28/2018 – 373 of 25 November 2020 and judgment of the Supreme Administrative Court Ref. No. 6 As 4/2021 of 18 May 2022.

[28] For the activity of the Czech NCA in the digital sector as well as a discussion over the above cases, see KINDL, J., PETR, M. *Czech Republic*. In MÂNDRESCU, D. (ED) *EU COMPETITION LAW AND THE DIGITAL ECONOMY: PROTECTING FREE AND FAIR COMPETITION IN AN AGE OF TECHNOLOGICAL (R)EVOLUTION*. THE XXIX FIDE CONGRESS IN THE HAGUE 2020 CONGRESS PUBLICATIONS. Vol. 3, at pp. 165-180.

[29] Ref. Nos. 1 Cm 22/2020 and 2 Cm 31/2021.

[30] Case C-605/21.

b.

N/A

c.

It would probably diminish it even further. As mentioned above, there were no such cases against the large US platforms in Czechia in the past and it is unlikely that there will be some in the future.

d.

It might be useful if it would deal with locally specific issues, e.g. some abuses by the large platforms towards smaller local companies. But there does not seem to be anything Czech-specific in this regard. It is also worth mentioning that there may be a role for follow-on private litigation on the local (incl. Czech) level against those platforms.

Question 8

There seem to be no Czech-specific answers on the above questions. There have been multiple state aid authorizing decisions meant to address adverse effects of Covid-19 pandemic which related to various sectors of the Czech economy as well as in respect of various entities. Obviously, in those cases industrial policies played some roles and it seems that such concerns and policy objectives are suitable for being taken into account in the context of EU State aid proceedings.

Question 9

Even though there are no precise data available, based on the experiences of the authors the Czech courts usually deal with State aid law issues on their own and do not resort to collaboration with the Commission or to preliminary references to the CJEU. However, it can be said that at least at the level of the Czech Supreme Court the judges seem to be quite well aware of the EU State aid rules, incl. related case law and soft law documents.[31] It can be also said that Czech courts can be seen progressively as less reluctant to pose questions to the CJEU, which can be documented by the number of the preliminary references so made and which deal with various issues relevant from the perspective of the EU law.[32] One may,

[31] See, e.g., judgment of the Czech Supreme Court Ref. No. 23 Cdo 1341/2012 of 25 June 2014 (*NH HOSPITAL*).

[32] Cf. lists of cases in which preliminary references were made available at https://www.nssoud.cz/rozhodovaci-cinnost/predbezne-otazky or https://www.nsoud.cz/Judikatura/ns_web.nsf/Edit/Zahranicnivztahy~Ceskepredbezneotazky (14 August 2022).

hence, postulate that if properly argued in the course of the case, the Czech courts might be willing to cooperate with the Commission and/or submit a request for preliminary reference to the CJEU should some EU State aid law issue be relevant for making their final decisions.

Question 10

As has been discussed in Questions 1 and 2 above, the level of the assessment of effects that undertakings' conduct actually has on competition was very low in the decisions issued by the Czech Competition Authority over the last 5 years. In the simplified merger procedures, the relevant markets are not discussed at all, in Phase I decisions they are only broadly outlined. Similarly, in by-object agreement cases the relevant markets are not dealt with in much detail.

In the last five years, there has not been any case where trade instruments would be relevant for the decision of the Czech Competition Authority. If, however, there were a case in which trade restrictions would have been relevant, we would predict that the competition authority would take them into account and if need be, narrow the relevant markets or "subtract" the competitive pressures exercised by third-country undertakings.

Question 11

In order to implement the FDI Screening Regulation in the Czech Republic, a specific Act on the Screening of Foreign Investments (hereinafter referred to as the "FDI Screening Act") was adopted and entered into force in May 2021.[33] In August 2022, the Ministry of Trade and Industry, which is entrusted with its implementation, issued its first Annual Report on Foreign Investment Screening in the Czech Republic in the Period 1 May 2021 – 30 April 2022.[34]

The FDI Screening Act targets foreign investors, i.e. natural persons with non-EU citizenship or companies with their seat outside of the EU; also entities directly or indirectly controlled by such natural persons or companies are covered.[35] The Act covers transactions whereby the foreign investor acquires at least 10% share of voting rights in the target company, becomes a member of an executive or controlling body of the target company, acquires ownership rights to assets used to perform the relevant economic activity or acquires other form of control, which would enable

[33] Act No. 24/2021 Coll., on the Screening of Foreign Investments.

[34] Annual Report of the Ministry of Trade and Industry on the Screening of Foreign Investment, available at: https://www.mpo.cz/assets/cz/zahranicni-obchod/proverovani-zahranicnich-investic/2022/8/FIRST-ANNUAL-REPORT-FDI-Screening-in-the-CZ-2021-2022.pdf.

[35] Section 2 (1) of the FDI Screening Act.

the foreign investor to access information, systems or technologies important for the security of the Czech Republic or for its internal or public security.[36]

The FDI Screening Act provides for obligatory *ex ante* screening of foreign investments into target companies that produce military material, dual-use products,[37] or are part of critical infrastructure or critical information infrastructure. Such foreign investments need to be notified to the Ministry of Industry and Trade and cannot be implemented before they are cleared by it.[38] At the same time, foreign investments in other sectors that are capable of threating security of the Czech Republic or its internal or public order may also by screened by the Ministry, either upon a request of the foreign investor (the so-called "consultation")[39] or *ex officio* by the Ministry, within 5 years after the investment has been implemented.[40] In case of a voluntary consultation, the Ministry only starts the process of screening if it or other public authorities find(s) it necessary.[41] Whereas the foreign investment may be cleared by the Ministry itself, it may only be blocked by a decision of the Government.[42]

The FDI Screening Act does not specify what is to be understood by transactions "*threating security of the Czech Republic or its internal or public order*". It cannot be deduced from the practice of the Ministry, as only basic details were published in the first Annual Report and no foreign investment has been blocked yet. In the first year, the Ministry of Trade and Industry reviewed 12 foreign investments. Out of these, 10 cases were reviewed in course of a voluntary consultation; the full screening process was opened with respect to 3 of them. In addition to that, one investment was screened upon an obligatory notification and one *ex officio* by the Ministry. No foreign investment has been blocked, but in 2 cases, the investors withdrew their applications and the investments were not implemented; two proceedings were ongoing as of August 2022.[43]

The decisions adopted according to the FDI Screening Act may be reviewed in a standard court judicial review procedure. The FDI Screening Act only provides for a specific regime concerning classified information.[44]

[36] *Ibid*, Sec. 5.

[37] Defined by reference to the Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

[38] Section 7 of the FDI Screening Act.

[39] Such a request is obligatory in case of investments in radio and TV broadcasters and periodic press, issuing more than 100 000 items a day (Section 10 (1) of the FDI Screening Act)

[40] Section 8 of the FDI Screening Act.

[41] *Ibid*, Sec. 10 (6).

[42] *Ibid*, Sec. 13.

[43] These statistics are based on the first Annual report of the Ministry of Trade and Industry.

[44] Sections 22 and 23 of the FDI Screening Act.

The screening mechanism is based solely on the criteria of security, competition-related issues are not considered. The Czech Competition Authority is not among the public authorities that have to be consulted by the Ministry of Industry and Trade in the course of the screening; even if it may still consult it, the Competition Authority was not mentioned in the first Annual report of the Ministry.

Question 12

Even though the Czech Republic holds presidency of the Council of the European Union in the second half of 2022, it has not stated its position towards the proposed Regulation on Foreign Subsidies Distorting the Internal Market. In The Presidency Programme, it is only mentioned that "*negotiations on the Regulation to address distortions caused by foreign subsidies in the Single Market can be expected to continue in the trialogues*" during the Presidency.[45] The Czech Chamber of Commerce, the largest representative of the Czech business, does not mention it in its Presidency priorities at all.[46] The proposed regulation is outlined in the information to Presidency published by the Czech Competition Authority; the authority summarizes the proposal, noting that "*the positive effect of the adoption of the proposal should be improved market conditions, in which the undertakings that had received subsidies from third countries would not have unfair advantages. At the same time, increased level of administration is to be expected*".[47]

We have not noticed any significant discussion concerning the proposal in the Czech Republic so far. The topic was briefly discussed at the Annual Conference on Public Procurement, organised by the Czech Competition Authority in May 2022;[48] however, the Authority's representatives only outlined the Commission's proposal and did not discuss in detail its implementation in the Czech Republic.

Question 13

We have not noticed any discussion on this topic in the Czech Republic so far.

[45] Czech Presidency Programme, p. 47.

[46] *Europe Friendly to Business. Priorities of the Czech Chambre of Commerce*, available (in Czech only) at: https://komora.cz/files/uploads/2022/06/BrozuraPriorityHK_cz_2B.pdf.

[47] Czech Competition Authority and the Presidency, p. 12.

[48] The Czech Competition Authority is also responsible for the review of public procurement in the Czech Republic. The presentations are available (in Czech only) at: https://www.uohs.cz/cs/informacni-centrum/konference-a-seminare/uskutecnene-akce/majova-konference-o-verejnych-zakazkach-2022/predstaveni-prednasejicich-a-jejich-prezentace.html.

Question 14

There is no specific obligation under the currently applicable rules in the Czech Republic to that effect. Activities in relation to corporate responsibility and socially responsible conduct in business relations are dealt with in the Czech Republic, at present, at the voluntary level. Usually that take place within the context of the applicable OECD documents which are dealt with by the Czech National Contact Point which was established pursuant to those OECD documents via a governmental resolution back in 2013 as a permanent working group under the auspices of the Ministry of Industry and Trade.[49] In this context, the National Contact Point deals with issues relating to the OECD Guidelines for Multinational Enterprises – Recommendations for responsible business conduct in a global context, incl. dealing with complaints on non-compliance with those principles by multinational enterprises[50] and related lecturing in which the National Contact Point also deals with the proposed EU measures.[51]

The Czech Presidency of the Council of the EU in 2022 lists the above issue among the points to be dealt with. Namely, the programme of the Czech Presidency mentions the following: "*In the area of company law, CZ PRES will try to achieve a common approach for the initiative on sustainable corporate governance, where the priority will be to strike a balance between achieving the intended objectives and the administrative burden on businesses. CZ PRES will also look into the proposal to revise the Non-Financial Reporting Directive with a view to reaching a political agreement.*"[52] Accordingly, it may be expected that some developments on this front will follow. It can be expected that the Czech legislature will wait with introducing any measures in this respect only until after the EU measures will have been definitely adopted.

Question 15

There is not yet any applicable legislative proposal at the Czech level.

[49] Governmental Resolution No. 779 of 16 October 2013. See its dedicated website: https://www.mpo.cz/cz/zahranicni-obchod/narodni-kontaktni-misto-pro-smernici-oecd/narodni-kontaktni-misto-pro-implementaci-smernice-oecd-pro-nadnarodni-podniky--223631/ (14 August 2022).

[50] See https://www.mpo.cz/cz/zahranicni-obchod/narodni-kontaktni-misto/projednavani-stiznosti/default.htm (14 August 2022). E.g., the National Contact Point has been so dealing with a complaint on violating human rights of workers in Myanmar lodged by the Czech NGO.

[51] See, e.g., https://www.mpo.cz/assets/cz/zahranicni-obchod/narodni-kontaktni-misto-pro-smernici-oecd/2022/6/Prezentace-z-webinare-Spolecenska-odpovednost-podniku-9--cervna-2022.pdf (14 August 2022).

[52] Programme of the Czech Presidency of the Council of the EU, p. 40; available at: https://czech-presidency.consilium.europa.eu/media/ddjjq0zh/programme-cz-pres-english.pdf (14 August 2022).

FINLAND

Petri Kuoppamäki, Maria Wasastjerna, Essi Ellman[1]

GREEN COMPETITION POLICY

Question 1

The Finnish Competition Act[2] (hereinafter the "FCA") prohibits agreements that prevent, restrict, or distort competition.[3] Sustainability agreements between undertakings may be incompatible with the FCA if cooperation is considered to restrict competition. The prohibition does not apply if the agreement generates benefits that outweigh the negative effects of the restriction on the competition.[4] Four cumulative conditions must be met: (i) the agreement improves production, (ii) consumers receive a fair share of the benefits, (iii) restrictions are indispensable, and (iv) some degree of competition remains.

While Finland was EU chair country in 2019 an initiative was made to amend the EU's horizontal guidelines to include environmental aspects. Sustainability agreements was one of the main topics during the Competition and Consumer Day that was organised in fall 2019 in Helsinki. The idea of amending the horizontal guidelines was brought into the discussion. In 2022, the European Commission

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[2] The unofficial and English translation of the Finnish Competition Act is available at *Finlex Data Bank*, <https://www.finlex.fi/en/laki/kaannokset/2011/en20110948.pdf>.

[3] For a treatise on Finnish competition law in English language see Competition Law in Finland, by Sari Hiltunen, Petri Kuoppamaki, Jussi Nieminen and Susanna Kärkelä: 3rd edition, Kluwer 2017.

[4] Section 5 of the Competition Act (948/2011) is a blueprint of Article 101 (1) TFEU with the obvious difference that no effect on trade between EU Member States is required. All agreements between undertakings, decisions by associations of undertakings, and concerted practices by undertakings which have as their object the significant prevention, restriction or distortion of competition or which result in a significant prevention, restriction or distortion of competition shall be prohibited. In particular, agreements, decisions or practices which: directly or indirectly fix purchase or selling prices or any other trading conditions. An exemption to the prohibition of section 5 is laid down in section 6 of the Competition Act. Similarly to Article 101(3) Section 6 of the Competition Act allows an exception, based on efficiency benefits, from the prohibition on restrictive agreements on the same grounds as Article 101 (TFEU). Four cumulative conditions must be met: (i) the agreement improves production, (ii) consumers receive a fair share of the benefits, (iii) restrictions are indispensable, and (iv) some degree of competition remains.

published its new draft horizontal guidelines[5], including a new chapter on the assessment of sustainability agreements.[6]

The Finnish Competition and Consumer Authority (hereinafter the "FCCA") has been actively promoting the inclusion of environmental aspects to the competition analysis. Based on the views of Kirsi Leivo, Director General of the FCCA, wider sustainability benefits, outside of only those consumers who are directly affected, should be considered in the EU guidelines. She has also emphasised that 'competition policy is important, but climate policy is even more important'.[7]

In December 2020, the Director General of the FCCA published an article concerning a greener competition policy.[8] She argues that it is relevant to assess the actual effects of sustainability agreements: how much does the agreement reduce environmental damage – and on the other hand, does the agreement increase emissions. Cooperation should be allowed at least if the sustainability benefits of the agreement are 'clearly more significant' than the harm caused by the restrictions on competition.

In the article, the European Commission's guidelines at the time were considered insufficient as they did not contain any specific criteria for the evaluation of sustainability agreements. The Director General stated then that the FCCA will not provide further guidance on how to assess sustainability agreements until the Commission has given its final views on the subject.[9] Certain European jurisdictions have been proactive in providing guidance on the assessment of sustainability cooperation[10].

The FCCA has tried to influence the content of chapter 9 in Commission's horizontal guidelines through the European Competition Network (ECN). The FCCA has currently no plans to publish itself any specific guidance on the

[5] Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final.

[6] Please note that all of the above-mentioned Director General's views are legally non-binding and only illustrate potential approaches that the authority might take to assessing sustainability cooperation.

[7] Interview by *Europe Forum*, 9 August 2019, <https://soundcloud.com/user-860545267/tunnin-junassa-kirsi-leivo> (only in Finnish).

[8] K. Leivo, 'Pääkirjoitus: Kohti vihreämpää kilpailupolitiikkaa', *Finnish Competition and Consumer Authority Newsletter 5/2020*, 8 December 2020, <https://www.kkv.fi/ajankohtaista/kkv-uutiskirje/paakirjoitus-kohti-vihreampaa-kilpailupolitiikkaa/> (only in Finnish).

[9] That statement was given in the FCCA's seminar, 17 November 2020. The presentation from the seminar is available at <https://docplayer.fi/217695385-Vaikuttaako-ilmastonmuutos-kilpailupolitiikkaan.html> (only in Finnish).

[10] For example, the Netherlands Competition Authority (hereinafter the "ACM") has taken a leading stance in Europe by publishing the first draft version of its sustainability guidelines already in July 2020. The ACM has, also, cleared several sustainability agreements between competitors, for example, a joint agreement between soft-drink suppliers about discontinuation of plastic handles. For further information, see <https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles>.

assessment of sustainability agreements. The FCCA is expected to carefully follow the European Union's approach.

1a.

On 1 March 2022, the European Commission published its new draft horizontal guidelines, including a new chapter on agreements pursuing sustainability objectives. The new chapter offers more detailed and, thus, more clarified rules on the evaluation of the legality of sustainability agreements between competitors.

Based on the practice of the FCCA in its previous cases, and the fact that the Finnish rules concerning restrictive practices (Sections 5 and 6) have been harmonised with Article 101 TFEU, it is reasonable to expect that the FCCA will follow the European Commission's approach.

1b.

In addition to public enforcement of competition rules by the FCCA, Market Court and Supreme Administrative Court, the Finnish legislation contains rules for private enforcement. The private action cases are handled by the civil courts (i.e. District Court, Court of Appeals and Supreme Court).

First, it is possible to file a private suit in the District Court for an infringement of competition law and to have it prohibited by a civil court. While such direct claims have been sparse, in principle there is no reason why such claims could not include sustainability arguments as well.

Second, under the Act on Competition Damages[11], an undertaking must compensate for the damage caused by the competition restriction. As a basic principle, there must be a link between the infringement and the harm suffered, which the claimant must prove.[12] Most Finnish damage cases have been so called *follow-on* cases i.e. they have been filed as a follow up to a binding court decision finding infringement of competition rules.

The aim of the damage claim is to put the injured party in a position in which they would have been if the infringement had not occurred. The injured party who has suffered damage from the infringement has the right to claim full compensation, including compensatory damages, lost profits, and interest.

Like discussed, private suits can be direct actions or follow-on cases. Considering sustainability arguments in a direct private enforcement case would be somewhat unprecedented, as such an approach has not been previously tried in Finland. Thus, a direct sustainability-based competition law claim would be a risky

[11] The act is available only in Finnish at *Finlex Data Bank*, <https://www.finlex.fi/fi/laki/alkup/2016/20161077>.
[12] However, the damage presumption applies to cartels unless proved otherwise by the infringer.

endeavour as it is quite possible that the national court would not be willing to consider sustainability arguments. However, if the sustainability arguments have already been established by a binding and legally enforceable (final) court decision finding the competition law infringement and the sustainability argument, a follow-on damage case could become a realistic option. The EU damages directive prevents nowadays the civil court from re-evaluating whether there has been a competition law infringement or not, as that has already been established in the public enforcement case. However, with the exception of cartel cases where the burden of proof has been shifted, the claimant has to prove the damage and the level of it. While there have been some notable successes, several of the past follow on-cases in Finland have failed on the burden of proof.[13]

Question 2

Under the Finnish Competition Act, mergers that meet certain turnover thresholds must be notified to the FCCA. The authority assesses whether a proposed merger significantly impedes effective competition in the Finnish markets or a substantial part thereof. The creation or strengthening of a dominant position is an indication of a significant impediment to effective competition. Accordingly, the FCCA may attach conditions to the implementation of a merger or propose that the Market Court prohibits the merger.

There are at least two prominent ways to consider sustainability aspects in merger proceedings. First, competition authorities may enforce theories of harm, as a mean of preventing the loss of green innovation.[14] Second, sustainability arguments may arise in the assessment of merger efficiencies.[15] Both aspects could, in principle, be taken into account not only by the European Commission but also in Finnish jurisdiction.

Sustainability factors may also be taken into account in market definition analysis[16] and remedies[17]. Moreover, so-called killer acquisitions raise competition concerns

[13] See Kuoppamäki, Petri: Private Enforcement and the Implications of the Damages Directive in Finland. Europarättslig Tidskrift nro 3/2016 p. 421-443. See also Kuoppamäki, Petri: Private Enforcement and Collective Redress in European Competition Law – Legal Status and Developments in Finland. FIDE report 2016.

[14] See, for example, Commission Decision of 4 May 2020, *Aurubis / Metallo Group Holding*, M.9409. The Commission was concerned that the merger might negatively impact incentives to engage in the collecting and sorting of copper scrap.

[15] Pierre Régibeau, Chief Competition Economist at the European Commission, has stated that his team is developing a framework for assessing broader green efficiencies in merger control.

[16] See, for example, Commission Decision of 5 May 2015, *DEMB / Mondalez / Charger OpCo*, M.7292. The Commission considered that organic and fair-trade coffee may constitute a separate market from "normal" coffee.

[17] See, for example, Commission Decision of 8 September 2015, *General Electric / Alstom (Thermal Power – Renewable Power § Grid Business)*, M.7278. The Commission approved the merger on the condition

when larger companies that do not pursue environmentally friendly strategies purchase smaller firms that are active in green innovation.[18] Partly in relation to this, the turnover thresholds are proposed to be lowered in a number of European countries, including in Finland.[19]

However, since the FCCA has not published any decisions or further guidance concerning sustainability benefits in merger control, the FCCA can be expected to follow the EU's approach to sustainability benefits.

2a.

In order to assess the effects of a merger on competition, the FCCA must take potential efficiency gains that may result from the merger into account.[20] The weight given to efficiency claims depends on how substantial the claimed efficiencies are, how likely they are to be achieved, and whether they promote competition for the benefit of customers and consumers. If the efficiencies for consumers would outweigh the merger's negative effects, the merger may be cleared.

According to the FCCA's Guidelines on the Application of the Competition Act on Merger Control (1/2011)[21], efficiency benefits can be production-related, such as improved product quality, more efficient production and distribution, the ability to offer a broader product portfolio with the same inputs, or other savings in production, supply, or distribution costs. Consumers can also benefit from dynamic efficiencies, such as new and improved products resulting from innovations in production or distribution.

The FCCA's potential approach to sustainability as a recognisable efficiency benefit that may outweigh competitive harm remains to be seen, although the FCCA is expected to be able to consider claims related to sustainability efficiencies. In principle, there is indeed no basis under the current legislation for excluding sustainability arguments from the efficiency defence. As for the antitrust analysis

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that that the parties divest Alstom's turbine technology to ensure continued innovation in energy efficient electricity generation.

[18] For further information, see European Commission, 'Competition Policy in Support of Europe's Green Ambition', *Competition Policy Brief*, Issue 1, 10 September 2021, <https://ec.europa.eu/competition-policy/publications/competition-policy-briefs_en>. See, also, M. Huimala, M. Wasastjerna & J. Heurlin, 'Vastuullisuus osana tehokkuuspuolustusta EU:n kilpailuoikeudessa', *Defensor Legis*, 4/2020, pp. 506-524 (only in Finnish).

[19] The combined turnover of the parties is proposed to be lowered from EUR 350 to EUR 100 million, and the turnover of at least two of the parties from EUR 20 to EUR 10 million. Further, the combined turnover threshold would no longer be based on the parties' global turnover, but instead on the turnover resulting solely from Finland.

[20] Government Proposal 88/2010, p. 71, <https://www.finlex.fi/fi/esitykset/he/2010/20100088> (only in Finnish).

[21] English version of the Guidelines on Merger Control is available at <https://www.kkv.fi/uploads/sites/2/2021/11/2011-guidelines-1-2011-mergers.pdf>.

under Sections 5 and 6 of the Finnish Competition Act, also in merger control the key issue seems to be *what kind of efficiencies* can be taken into account. in the merger analysis.

However, in practice the threshold to accept efficiency arguments is high and there are hardly any cases where an otherwise anti-competitive merger would have been cleared on efficiency grounds.[22]

2b.

Taking into account the previous answers, the FCCA is expected to be competent to consider a transaction's likely detrimental effects on the environment as competitive harm. Such a conclusion would seem reasonable since there are no legislative obstacles to assessing a transaction's negative effects on the environment. However, it must be underlined that so far there have been no national decisions concerning a merger's environmental effects.

Furthermore, it must be borne in mind that under the Finnish merger control rules a merger can be prohibited only if it *significantly impedes effective competition* in the Finnish markets or a substantial part thereof. This means that *a prohibition decision must always be based on competition grounds*. Neither the FCCA nor the Market Court (that decides on a possible prohibition of a merger based on a proposal made by the FCCA) are environmental protection agencies. Hence, the environmental arguments do not give the FCCA (or Market Court for that sake) any new competences. Rather the question here is, how far the sustainability arguments will enrich the competition law analysis in the coming years. This remains to be seen.

Question 3

According to Kirsi Leivo, Director General of the FCCA, it is relevant to assess the actual effects of sustainability agreements: how much does the agreement reduce environmental damage – and on the other hand, does the agreement increase emissions. The agreement's impact on emission trading must also be taken into account. Finally, cooperation should not reduce incentives to invest in 'green technology'.[23]

[22] This goes both to EU merger control as well to the Finnish rules. that have been inspired by the EU merger control. For a detailed analysis of efficiency defence under the EU merger rules see Kuoppamäki, Petri – Torstila, Sami: 'Is There a Future for an Efficiency Defence in EU Merger Control?' European Law Review. Issue 5, October 2016.

[23] K. Leivo, 'Pääkirjoitus: Kohti vihreämpää kilpailupolitiikkaa', *Finnish Competition and Consumer Authority Newsletter 5/2020*, 8 December 2020, <https://www.kkv.fi/ajankohtaista/kkv-uutiskirje/paakirjoitus-kohti-vihreampaa-kilpailupolitiikkaa/> (only in Finnish).

The Director General has argued that wider sustainability benefits for society as a whole should be considered. Accordingly, cooperation should be allowed at least if the sustainability benefits of the agreement are 'clearly more significant' than the harm caused by the restrictions on competition.

However, it must be again underlined that the FCCA has not published any further guidance on how to determine the possible trade-off between harm to competition and benefits to sustainability, and how to balance these interests. Thus, the FCCA's more detailed approach remains to be seen, although the FCCA is expected to follow the European Commission's approach.[24]

The main question in Finland, like on the EU level, seems to be in how far the efficiency analysis can incorporate environmental improvements. The current approach has been that companies engaging in a horizontal cooperation need to be able to prove inter alia that the cooperation produces clear, demonstrable and quantifiable efficiencies that overweigh the negative effects. Normally the compensation would need to take place in the same product and geographic market. This somewhat limited approach has been chosen because when competitors meet there is at least some risk of a cartel emerging. The problem in this particular context is that a narrow definition of efficiencies and/or relevant markets may limit the practical availability of efficiency defence for sustainability agreements. Quite often measures that improve sustainability increase the costs at least in the beginning. Often costs come down over time when scale effects start to play in, like we have seen with wind energy for instance, but there is no certainty for that. We may also face a tough challenge of comparing short/medium term consumer harm with long term benefits for the planet. What should be the time perspective? When analysing consumer benefits, should we look only at present consumers – meaning us – or also at the costs and benefits that will or may accrue to our children and grandchildren?

[24] For an overview of competition policy in relation to sustainability goals, see, M. Ristaniemi & M. Wasastjerna, 'Sustainability and competition: Unlocking the potential', *Concurrences*, 4/2020, pp. 53-65. See, also, M. Wasastjerna, T. Malminen & M. Dahlqvist, 'Kilpailuoikeus ja yritysvastuu', *in* A. Vanhala & M. Ristaniemi (Ed.), *Yritysvastuu § oikeus*, Kauppakamari, 2022, pp. 321–350.

EUROPEAN STRATEGIC AUTONOMY, THE PROMOTION OF "EUROPEAN CHAMPIONS" AND COMPETITION LAW ENFORCEMENT

Question 4

4a.

During the European Commission's investigation of the Siemens-Alstom merger, the Finnish government, along with 18 other EU governments, called for new competition rules to create European champions.[25] The group of 19 EU governments stated that Europe 'must act quickly to maintain its competitiveness' and face 'fierce competition' from other large economies with proactive industrial strategies.

However, the Finnish Government later shifted its opinion[26] in a joint article prepared by six EU countries, supporting strong EU competition and State aid rules. The group of six Member States argued that the Commission 'should preserve evidence-based and independent enforcement of the competition rules and maintain the strong competition framework on mergers and antitrust.'[27] A day after the joint article was published, the Ministry of Economic Affairs and Employment of Finland published its own statement defending a strong EU competition policy.[28]

In June 2019, the Nordic competition authorities published a joint article to support a strict merger control regime. The Nordic authorities spoke against the Franco-German proposal to allow the creation of European champions. Instead, they argued that the proposal 'would benefit but a few large European companies and be especially detrimental to Member States with smaller domestic markets.'

[25] J. Valero, '19 EU countries call for new antitrust rules to create 'European champions'', *Euractiv*, 19 December 2018, updated 9 January 2019, <https://www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions/>. The full statement is available in French at <https://www.entreprises.gouv.fr/files/files/directions_services/secteurs-professionnels/industrie/amis-industrie/declaration-finale-amis-industrie-2018.pdf>.

[26] Governmental changes in Finland may have caused the shift in the position concerning industrial policy. It can be argued that the current government has taken a stricter approach to competition policy.

[27] S. Kollerup, S. Blok, T. Haatainen, L. Varadak, B. Chiritoiu & I. Baylan, 'Why strong EU competition and State aid rules matter', *Politico*, 11 November 2021, <https://www.politico.eu/wp-content/uploads/2021/11/11/Article-Why-strong-EU-competition-and-state-aid-rules-matter_version-final.pdf?utm_source=POLITICO.EU&utm_campaign=8f11aa03cd-EMAIL_CAMPAIGN_2021_11_11_04_34&utm_medium=email&utm_term=0_10959edeb5-8f11aa03cd-190032705>. The statement was written by six ministers from Denmark, the Netherlands, Finland, Ireland, Romania, and Sweden.

[28] O. Hyvärinen, 'Finland defends strong EU competition policy', *Ministry of Economic Affairs and Employment of Finland*, 12 November 2021, <https://tem.fi/en/blog/-/blogs/finland-defends-strong-eu-competition-policy>.

Thus, they 'fully support strong and politically independent merger supervision at the EU level, as well as at the national level'.[29]

4b.

Market participants in Finland did not intervene in the Siemens-Alstom case, either in support of or in opposition to the proposed transaction.

4c.

The Finnish Competition and Consumer Authority has not been confronted with arguments similar to the Siemens-Alstom merger. However, Finnish companies have occasionally made the argument that they should be able to grow in Finland in order to be big enough to compete on international markets. The FCCA has held the position that effective competition on the national market is the best way to become and remain competitive. Also, small markets might be more vulnerable to concentration as they invite less entry due to the smaller growth potential for the newcomer as compared to larger countries. To illustrate the counter argument of the industry, a 40% market share allows much smaller scale of the business in Finland than say 40% market share for the same products in Germany. This difference might make it difficult to reach an efficient scale for companies coming from small Member States. Maybe this is one of the reasons why many Finnish companies are overtaken by bigger companies from other countries. This is sometimes called the "small markets dilemma". Theoretically, there are arguments in both directions. The discussion goes on and the jury is still out there.

Question 5

In recent years, particularly after the blocked Siemens/Alstom transaction, there has been a rising debate about the potential conflict between industrial policy and competition law. The former aims to ensure the sustainable competitiveness of European industry[30], while the latter is intended to protect consumer welfare. Therefore, the aims of competition law are sometimes seen contradicting industrial policy objectives.

The current debate focuses on industrial mergers that raise competition law concerns and the question of whether such mergers should be allowed on industrial policy grounds. However, the Finnish merger control regime is limited to the

[29] J. Hald, K. Leivo, R. Jermsten, P. G. Pálsson & L. Sørgard, 'The Nordic Competition Authorities support a strict merger control regime', *Konkurransetilsynet*, 26 June 2019, <https://konkurransetilsynet.no/the-nordic-competition-authorities-suppert-a-strict-merger-control-regime/?lang=en>. The article was written by the five Director Generals from Denmark, Finland, Sweden, Iceland, and Norway.

[30] The Ministry of Economic Affairs and Employment of Finland: EU industrial policy, <https://tem.fi/en/eu-industrial-policy>.

assessment of the competitive effects of mergers.[31] Under the current legislation, there is no basis for the FCCA to consider non-competition arguments, such as industrial policy benefits, in a merger assessment. Furthermore, the FCCA's views do not support such a wider assessment.[32]

However, it must be underlined that there are no national decisions or further guidance with regard to industrial policy benefits as part of a merger control assessment.

Question 6

There is no "Ministererlaubnis" available in Finland.

The Finnish Competition and Consumer Authority's remit is limited to the assessment of the likely effects of a merger on effective competition. If the FCCA finds that the merger is likely to have anti-competitive effects and the proposed remedies are not sufficient for eliminating the identified competition concerns, the FCCA may propose the Finnish Market Court to prohibit the merger. A decision of the Market Court can be appealed against to the Supreme Administrative Court of Finland.

Only the competent courts may overrule a decision made by the FCCA. Thus, under the relevant procedural rules regarding the Finnish merger control regime, the government, for example a ministry, cannot interfere in the merger control process on EU industrial policy grounds and overrule a prohibition decision.

Question 7

7a.

No cases have been brought against the large US digital platforms by the Finnish Competition and Consumer Authority.

7b.

No such cases have been reviewed by the Finnish Competition and Consumer Authority.

[31] Application of the Competition Act on Merger Control (1/2011), pp. 70-94.

[32] The FCCA has supported a strict merger control regime, as stated above in section 4a. Further, Rainer Lindberg, Director and Head of International Competition Affairs of the FCCA, has argued that the basis of an industrial policy strategy is on exposing the domestic industry to competition. In that sense, there is no conflict between industrial and competition policy. See, R. Lindberg, 'White Paper on Foreign Subsidies – Kauppa-, kilpailu- ja teollisuuspolitiikan risteyskohdassa', *the FCCA's blog*, 26 November 2020, <https://ajankohtaistakilpailusta.fi/2020/11/26/white-paper-on-foreign-subsidies-kauppa-kilpailu-ja-teollisuuspolitiikan-risteyskohdassa/> (only in Finnish).

7c.

The Digital Markets Act[33] (hereinafter the "DMA") will impose certain obligations and prohibitions on gatekeepers, which they have to comply with in their daily activities to ensure a fair and open digital market. The European Commission will be responsible for enforcing the regulation.

As the Finnish Competition and Consumer Authority has not previously brought cases against large digital platforms and considering the relatively small market size in Finland, such cases seem somewhat unlikely.

Should the FCCA bring forward such cases, one relevant aspect to consider is the coordination between the DMA and the FCA. Once in force, the DMA would apply in parallel with competition law, meaning that the FCCA's decisions cannot run against the Commission's decisions or the self-executing obligations under the DMA. However, it remains to be seen, how clear-cut this division of powers will be in practice.

7d.

Some Member States and national competition authorities called for powers to be able to enforce the Digital Markets Act in their own right. In the end, the EU legislators have agreed that the Commission would be the sole enforcer of the rules laid down in the Digital Markets Act.

According to the Commission, centralised enforcement would be the most effective way to monitor the cross-border activities of the gatekeepers and to ensure the objective of the DMA to establish a harmonised framework with maximum legal certainty for businesses across the entirety of the EU. [34] The role of national competition authorities would therefore be limited to carrying out ancillary activities. A clear division of powers between the Commission and national competition authorities is indeed important to minimise any risks of inconsistencies or over-enforcement.

Question 8

The Finnish Government, along with five other EU Member States, has published a joint article in which they support strong EU competition and State aid rules. The Member States argue that while it is crucial to adapt to enable structural changes such as digitalisation and fighting climate change, the effectiveness and

[33] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final. On 18 July 2922, the Digital Markets act received the final approval from the European Union's legislators.

[34] European Commission, 'Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets', *European Commission*, 23 April 2022, <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349>.

politically independent character of competition and State aid framework must not be jeopardised. Maintaining a robust competition and State aid framework matters as it ensures a level playing field in the Single Market.[35]

The Finnish Ministry of Economic Affairs and Employment has argued in its statement that when it comes to State aid policy, it is always a question of finding a balance between different objectives. While the EU State aid rules target Member States' business aid measures to actions that promote sustainable economic growth and address market failures, at the same time, the rules must ensure that the internal market remains as open and competitive as possible.[36]

Although the Finnish government supports 'strong State aid rules', according to the joint article, it recognises the potential of State aid policy to consider industrial policy goals. The countries consider that Important Projects of Common European Interest (hereinafter "IPCEI") enable Member States to provide State aid for projects of broad European importance.[37] The countries, however, underline that excessive and non-targeted use of the IPCEIs may lead to unfair competition. Thus, IPCEIs should be used proportionately, carried out in a fully open and transparent manner, target clear market failures, involve support for neither mass production nor commercial activities, and result from clear and balanced EU long-term strategies.

In a similar way, the Finnish Ministry of Economic Affairs and Employment has considered in its above-mentioned statement that the State aid rules with regard to IPCEIs already allow flexible support for breakthrough innovations essential for the competitiveness of the EU. Therefore, a significant easing of the rules to include, for example, production-related investments, would significantly increase the risk of distortion of competition and harmful subsidy race in the EU.

With regard to the COVID-19 pandemic, the Ministry considered temporary relaxed State aid rules to be justified for as long as the COVID-19 epidemic

[35] S. Kollerup, S. Blok, T. Haatainen, L. Varadak, B. Chiritoiu & I. Baylan, 'Why strong EU competition and State aid rules matter', *Politico*, 11 November 2021, <https://www.politico.eu/wp-content/uploads/2021/11/11/Article-Why-strong-EU-competition-and-state-aid-rules-matter_version-final.pdf?utm_source=POLITICO.EU&utm_campaign=8f11aa03cd-EMAIL_CAMPAIGN_2021_11_11_04_34&utm_medium=email&utm_term=0_10959edeb5-8f11aa03cd-190032705>. The statement was written by six ministers from Denmark, the Netherlands, Finland, Ireland, Romania, and Sweden.

[36] O. Hyvärinen, 'Finland defends strong EU competition policy', *Ministry of Economic Affairs and Employment of Finland*, 12 November 2021, <https://tem.fi/en/blog/-/blogs/finland-defends-strong-eu-competition-policy>.

[37] For example, in the past two years, the Commission has approved two IPCEIs on batteries. The aim of the projects is to support the development of an innovative and sustainable European battery industry. For more detailed information, see, European Commission, 'State aid: Commission approves €2.9 billion public support by twelve Member States for a second pan-European research and innovation project along the entire battery value chain', *European Commission*, 26 January 2021, <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_226>.

continued to affect the EU's economic situation. As the COVID-19 situation stabilised, there were no further grounds for continuing to apply the relaxed rules and the generous criteria adopted in the early stages of the crisis.

To summarise, the Finnish government does advocate strong State aid rules and competition policy in general. The joint statement referred to above was issued before the Russia's attack against Ukraine and the subsequent energy crisis in Europe. Indeed, Finland has recognised that State aid policy may be a suitable tool to consider industrial policy objectives, such as in the case of IPCEIs. However, such instruments must be used in a smart and selective manner.[38] The Finnish government has yet to take a stance whether the current situation would require a more strategic State aid policy.

Question 9

National courts may request for a preliminary ruling from the CJEU on matters concerning the interpretation or validity of EU law. When it comes to State aid questions, Finnish courts have requested for a preliminary ruling only in a handful of cases. During the previous ten years, the Supreme Administrative Court of Finland has requested for a preliminary ruling concerning the tax levied on confectionery, ice cream and soft drinks[39], as well as the deduction of losses in under the national corporate income tax legislation.[40]

In addition to preliminary rulings, the Commission can assist national courts in enforcing State aid rules. Under Article 29 of Council Regulation (EU) 2015/1589, a national court may request the Commission for information in its possession (typically related to a pending Commission procedure) and also request the Commission's opinion regarding the application of State aid rules. Furthermore, the Commission may submit its own observations to national courts amicus curiae. In Finland, the Commission has issued an opinion in several State aid cases during the previous ten years: to the Administrative Court of Kuopio in 2014 and 2013, and the Supreme Administrative Court of Finland in 2010.[41]

[38] See also, R. Lindberg, 'White Paper on Foreign Subsidies – Kauppa-, kilpailu- ja teollisuuspolitiikan risteyskohdassa', *the FCCA's blog*, 26 November 2020, <https://ajankohtaistakilpailusta.fi/2020/11/26/white-paper-on-foreign-subsidies-kauppa-kilpailu-ja-teollisuuspolitiikan-risteyskohdassa/> (only in Finnish). Rainer Lindberg, Director of the FCCA, reminds that every rationally operating country has industrial policy goals. In that sense, there is no conflict whatsoever between industrial and competition policy, as far as the State aid measures are non-discriminatory.

[39] Order of the Court of 19 November 2019, *Criminal proceedings against Syyttäjä and Tulli*, C-486/19, EU:C:2019:984.

[40] Judgment of the Court of 18 July 2013, *P Oy*, C-6/12, EU:C:2013:525.

[41] The issued opinions were related to the following national court judgements: Supreme Administrative Court, 16 May 2018, 2320/2018; Administrative Court of Kuopio, 18 February 2013, 13/0069/2; and Supreme Administrative Court, 6 April 2011, HFD 2011:33.

GEOPOLITICAL INSTRUMENTS, TRADE DEFENCE INSTRUMENTS, AND COMPETITION POLICY

Question 10

Generally speaking, trade defence instruments are likely to affect the competition law analysis, in particular the definition of the relevant product and geographic market. Definition of the relevant market is an empirical question. So, if it shown that the trade defence limit the supply from other countries, this will limit the scope of the relevant market. Likewise, products that are no longer delivered to the relevant geographic area will have to be discounted from the product market. What the effect will be in a particular case, can only be determined by analysing in detail what the effects of the trade defence measures are on a particular market. Sometimes the relevant market will become smaller and higher market shares will be shown for the domestic players.

Finland has ca. 1300 km border with Russia and the sanctions against Russia because of its illegal attack against Ukraine have basically stopped most of the trade with Russian companies. The examples are too many to be counted here. It can be envisaged that some interesting cases will be seen later but this is too early to tell yet.

The concept of relevant market plays a central role in the application of competition legislation. That is the case also in Finland. For instance, it is necessary to find out whether two undertakings operate in the same relevant market before concluding whether they are competitors from the perspective of cartel prohibition. Furthermore, it is necessary to recognize the relevant market in which a company operates before being able to conclude whether the undertaking is in a dominant position in that market.

To give a more technical exposition of the empirical question, in defining the relevant product and geographic markets, it is essential to consider the substitutability of demand and supply.

The demand side substitution is assessed from the consumers' point of view. All products that could, in the view of the consumers, substitute for the product in question, belong to the same product market as the product in question. The consumers are likely to consider that two products could substitute one another, if there are no technical impediments to switching products and if switching is neither costly nor time-consuming. Obviously, if certain products from a certain country are no longer available for the consumer, this is bound to affect the substitution analysis.

When it comes to the definition of the relevant markets, the Government proposal for the Competition Act refers to the Commission notice on the definition of relevant market.[42]

The supply side substitution is assessed from the point of view of the suppliers. In essence, it is considered whether other suppliers could easily and with reasonable cost adjust their production or distribution so that they could start producing competing products in order to offer customers these alternatives. In can be assumed that the supply substitution will play a key role in analysing the effect of the current sanctions against Russia or trade defence instruments.

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.[43] The definition of the relevant geographical market is affected for instance by the sellers' possibilities to transfer production or supply from one region to another and the consumers' corresponding possibility and willingness to transfer demand. Also, other factors such as transportation costs need to be taken into account.

The case Neste/SEO[44] concerned supply of gasoline on the gross market. According to the competition authority, Neste had abused its dominant position by worsening the conditions for SEO that had tried to challenge some of Neste's core businesses. Neste was a state-owned company that earlier had had an import monopoly for gasoline in Finland. Obviously that trade measure had affected trade flows as it prevented anyone else from importing fuels to Finland. However, Neste had lost its legal monopoly several years ago and also other companies could import gasoline to Finland. The Competition Council found that Neste still had a dominant position in Finland. For instance, most of the storage capacity available was still in Neste's hands. It could use its installed base to control the pricing in the market. The learning of the case is that substantial trade measures may still have an effect even years after they have lapsed.

[42] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9 Dec. 1997, pp. 5–13. Government proposal (88/2010), p. 70.

[43] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9 Dec. 1997, pp. 5–13, para. 8.

[44] Neste/SEO, dnro 16/359/93, decision of the Competition Council 16.6.1994.

FDI CONTROL[45]

Question 11

Finland has had legislation in this field since 1939. The current act (Act on the Screening of Foreign Corporate Acquisitions) is from the year 2012 and was amended in 2014 and 2020.[46] Only a minority of legislative changes introduced in 2020 are based on the EU FDI Screening Regulation. This is because the national FDI Screening legislation was generally in line with the requirements of the EU FDI Screening Regulation. However, some clarifications were done.

The purpose of the Act is to screen foreign corporate acquisitions and, if key national interests so require, to restrict transfer of influence to foreign ownership, while maintaining a positive attitude to foreign investments. The ministry of Economic Affairs and Employment as a competent authority must confirm the acquisition unless it could endanger a key national interest. Key national interest mainly refers to national military defence, functions vital to society (including safeguarding critical infrastructure and security of supply), foreign and security policy objectives, and security and public order as defined in the TFEU.

11a.

Recently, one of the greatest challenges has been the growing number of cases in the national screening mechanism as well as the number of transactions notified in the context of the EU Screening Regulation. At the same time, the cases under screening have become more complex. Ownership structures with various geographically dispersed intermediate holding companies and arrangements to exercise actual influence indirectly in the target company require detailed analysis.

11b.

The FDI Screening Regulation does not define the scope of national screening mechanism or the outcome of the screening process, which are in the competence of the Member States. Nor does the Screening Regulation force Member States to set up national screening mechanisms. However, the Screening Regulation sets certain (mostly procedural) requirements for those Member States that have a national screening mechanism. The Finnish legislation was mostly in line with

[45] The answers to this section are based on the premises and functioning of the. Act on the Screening of Foreign Corporate Acquisitions and excludes screening of real estate acquisitions.

[46] See https://tem.fi/documents/1410877/0/Ohjeita+hakemukselle+ja+ilmoitukselle_en.pdf/ce7e92f0-2f9d-0e2b-849c-0a4786db2763/Ohjeita+hakemukselle+ja+ilmoitukselle_en.pdf?t=1634815680174, See also e.g. https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3637/finland-amends-its-fdi-screening-regime

these requirements, but certain changes were done in 2020. For example, section 5a in national legislation regarding anti-circumvention and section 8a regarding disclosure of secret information to authorities were amended. The screening regulation is directly applicable in the context of the information sharing mechanism, which includes also the factors that Member States can take into account when assessing possible risk to public order and security.

11c.

The screening targets only foreign corporate acquisitions. Greenfield investments are not in the scope. Investors are defined as foreign owners if the investor is a foreign national or organisation not domiciled in an EU or EFTA Member State. The investor is defined as foreign owner also if the investor is an organisation which is domiciled within EU or EFTA Member State but in which a foreign (non-EU/EFTA) national or organisation controls at least one tenth of shares or has an equal actual influence. Regarding defence sector acquisitions, all investors domiciled outside Finland are defined as foreign owners. When defining the foreign owner, the whole ownership structure up to ultimate and beneficial owners is taken into account.

11d.

The Act is generally applicable with no sector-specific listing, but two categories: 1. Acquisitions in defence, dual-use and security sector. 2. Acquisitions where the target company is considered critical in terms of securing functions vital to society on the basis of their field, business or commitments. Government-level documents (in particular the Government Decision on the Objectives of Security of Supply and the Security Strategy for Society) guide the scope of the application. Both documents are updated regularly. The definition of a defence industry enterprise is broad, including companies that do not produce defence material or dual-use items, but supply other products or services that are important for military national defence.

11e.

The risk is assessed with a case-by-case approach and is bound to the prevailing security environment. Risk to public order and security (as well as risks to other key national interests) is assessed with an internal structured risk assessment procedure.

11f.

The assessment is strictly security based, but competition considerations may be taken into account indirectly with certain restrictions. For example, if the

target company is in a dominant position in a security of supply critical value chain. Alternatively, if the acquisition could potentially decrease the supply of critical products or services, or if the acquisition has negative market affects from continuity management point of view.

11g.

The purpose of the information sharing mechanism is to enable Member States to assess whether covered investment in one Member State could affect security or public order in other Member States. From this point of view based on the Finnish contact point's experiences, the information-sharing mechanism has generally worked effectively. Situational awareness of third country investments to security critical targets in the EU has increased. However, challenges related to for instance tight time frames and to certain procedural aspects due to differing scopes of Members States national screening mechanisms remain.

TRADE DEFENCE AND PUBLIC PROCUREMENT – FOREIGN SUBSIDIES

Question 12

There is little scientific evidence of concrete situations where foreign subsidies would have distorted competition in Finland. However, we find the proposal important in terms of closing the "legal gap" and equal operating conditions of the internal market. From a Finnish standpoint, the Government has wanted to ensure that this is not a protectionist instrument, and that the proposal works both for the companies and administrative organizations. The Finnish standpoint is that the reached agreement as a whole is quite well-balanced.

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)?'

In Finland this kind of risk has not been identified. The instrument complements other existing instruments that are applied in parallel. For example, the national Merger Control operates according to its own rules. Concentrations notified according to the Foreign Subsidies Regulation and the national merger control rules are probably not the same ones due to different aims of the rules and the national turnover thresholds for notifying the concentrations.

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 effect?

We have not identified problems considering the procedural autonomy. The Commission has wide powers under the proposal which corresponds to the Commission's current powers within competition law. In Finland there has been to some extent a concern about the effects of the Foreign subsidies procedure on the duration of the procurement procedure and the appeal process following the Commission's possible negative decision which can have negative effects on the fluency of the procurement process. However, it is positive that the Commission´s handling deadlines related to public procurement procedures were shortened during the negotiations.

Question 13

In general, we find that the new regulation will help to close the "legal gap" in an efficient way since the regulation is based on the principles similar to EU state aid law. In a big picture, a trade policy solution seeking to level the global playing field in the field of subsidies, would be more ideal, but that is not realistic on a fast schedule. The foreign subsidies regulation might help to speed up trade policy discussions and the progress of broader WTO state aid regulation. The European Parliament, Council and Commission will issue a short trilateral declaration where they refer to the EU's commitment to an open and rules-based multilateral trading system within the WTO and to modernised WTO rules for industrial subsidies. The trilateral declaration will be accompanied by a unilateral declaration of the Commission setting out in detail the EU priorities related to the modernisation and enforcement of the WTO rules.

A fundamental prerequisite for the functionality of the DFS regulation is that the procedure is well known and that the Commission provides instructions on how the regulation is applied in practice. It is also good to keep in mind that the purpose of different legislative instruments are different, although they have commonalities with each other.

MANDATORY DUE DILIGENCE AND REGULATING SUPPLY CHAINS

Question 14

Currently, there is no legislation in Finland regarding a due diligence obligation. The Finnish Government, however, aims to enact a law on corporate social responsibility.[47] The contemplated legislation would lay down provisions on companies' due diligence obligation with regard to human rights and the environment in their business operations.

In March 2022, the Finnish Ministry of Economic Affairs and Employment published a memorandum investigating the potential due diligence obligations in national legislation, which would apply to Finnish companies.[48] The memorandum assessed in more detail the legislative options for meeting the obligations, the effect of the obligations on human rights, the environment and companies, as well as the conditions for implementing the legislation.

Yet, the memorandum did not include concrete regulatory proposals, for example, on which companies would be subject to the possible legislation. Instead, it presented alternative legislative solutions, such as different options for the scope of the obligation.[49] At the moment, it seems rather unclear whether the national legislative initiative on corporate social responsibility will progress, as the EU Directive on corporate sustainability due diligence[50] is simultaneously being prepared. Thus, any national regulation would likely require amendments once the EU legislation has entered into force.

[47] M. Ristaniemi, 'Yritysvastuun oikeudellisia normeja ja normilähteitä', *in* A. Vanhala & M. Ristaniemi (Ed.), *Yritysvastuu § oikeus*, Kauppakamari, 2022, pp. 78–79.

[48] L. Piirto & S. Teräväinen, 'Memorandum on the due diligence obligation – Review of the national corporate social responsibility act', *Publication series of the Ministry of Economic Affairs and Employment of Finland 2022:24*, 18 March 2022 (English translation published on 12 April 2022), available in English at <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/164286/TEM_2022_52.pdf?sequence=1&isAllowed=y>.

[49] The memorandum introduced four options for the scope of the obligation: (i) applies to all companies, (ii) applies broadly to companies but would be limited to, e.g., a certain tier of the supply chain, (iii) applies only to companies of a certain size but would have a broad supply chain dimension, and (iv) applies only to companies of a certain size, in addition to which the supply chain dimension of the regulation would be limited. See, memorandum, 2022, pp. 87-89.

[50] The proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

Question 15

There are two main challenges in implementing due diligence legislation, according to Linda Piirto, Commercial Counsellor at the Ministry for Foreign Affairs of Finland and co-author of the above-mentioned memorandum investigating the potential due diligence obligations in national legislation.[51]

First, international social responsibility standards and voluntary guidance. These standards are products of international negotiation processes and formulated for ambition and ambiguity. Therefore, they do not contain any unequivocal rules that could be incorporated 'as is' into eventual legislation. National legislation is required to be precise and clearly defined. Thus, national legislation would need to be considerably less open to interpretation than international standards and guidance.

Second, liability for damages. Under international social responsibility guidance, companies are held liable if they have caused or contributed to adverse impacts for either humans or the environment. If guidance is to be interpreted strictly, a company may not act responsibility if it, for example, continues to order from a supplier that has excessively long hours without due rest breaks. The liability for damages in the Finnish jurisdiction requires, however, a causal link between the violation and the harm suffered. Accordingly, only an order relationship with an 'unethical' supplier is not considered to fulfil the requirement of a causal link.

[51] L. Piirto, 'Kansallinen yritysvastuulaki on mahdollinen, mutta olisiko EU-sääntely vaikuttavampaa?', *the Ministry of Economic Affairs and Employment of Finland*, 18 March 2022, <https://tem.fi/-/kansallinen-yritysvastuulaki-on-mahdollinen-mutta-olisiko-eu-saantely-vaikuttavampaa-> (only in Finnish).

FRANCE

Francesco Martucci[1]*, Stéphane de la Rosa*[2]

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Question 1[4]

1.1.

D'une manière générale, l'Autorité de la concurrence semble plutôt disposée à prendre en considération les gains environnementaux dans son analyse concurrentielle. Cette orientation est relativement récente et se traduit essentiellement par des déclarations officielles et par la participation de l'Autorité à des réflexions prospectives sur le sujet. On peut recenser aussi quelques rares décisions dans lesquelles les enjeux environnementaux ont joué un rôle. Ces décisions pourraient être annonciatrices d'une évolution de fond à laquelle l'Autorité semble attachée.

Déclarations de principes, réflexions et *advocacy*. L'Autorité énonce, par exemple, dans son rapport annuel pour l'année 2021 que:

„Les objectifs de développement durable (fixés par la loi climat au niveau national et par le Pacte vert au niveau européen) seront amenés à jouer un rôle de plus en plus important dans la pratique de l'Autorité, nécessitant l'adaptation de son analyse à ces nouveaux enjeux.“[5]

Dans son rapport annuel pour l'année 2020, l'Autorité avait déjà adopté une position comparable. Elle y rappelait aussi sa participation aux réflexions nationales et internationales sur la prise en compte des objectifs environnementaux dans la mise en œuvre du droit de la concurrence[6]. À ce titre, l'Autorité a notamment

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[4] Question traitée par M. Raphael **Amaro**, Professeur à l'Université de Caen.

[5] Aut. conc., *Rapport annuel 2021,* disp. en ligne sur le site de l'Autorité, p. 7.

[6] Aut. conc., "L'Autorité de la concurrence annonce ses priorités pour l'année 2020", communiqué de l'Autorité du 9 janv. 2020, disponible en ligne: https://www.autoritedelaconcurrence.fr/fr/communiques-de-

participé aux réflexions engagées par la Commission européenne à l'occasion du *Green Deal*, à celles de l'*International Competition Network* et à celles engagées avec sept autres régulateurs sectoriels[7]. Ces dernières réflexions ont d'ailleurs abouti à la publication d'un document commun en mai 2020 intitulé *"Accord de Paris et urgence climatique: enjeux de régulation"*[8].

Enfin, l'Autorité a aussi créé un groupe de travail au sein de ses services d'instruction fin 2019, consacré aux enjeux environnementaux. Dans son rapport annuel pour l'année 2020, elle décrit en ces termes la mission de ce groupe de travail:

„*(i) discuter avec les différents interlocuteurs pouvant éclairer l'Autorité sur les problématiques de développement durable et les difficultés rencontrées ;*

(ii) réfléchir en interne en explorant les sujets juridiques et économiques qui peuvent se présenter, afin de renforcer l'expertise et harmoniser les pratiques des services d'instruction ;

(iii) agir en accompagnant les acteurs et en cherchant des cas contentieux qui présentent des aspects de développement durable (…)"[9].

Exemptions et gains environnementaux. Pour répondre précisément à la question posée, on relèvera qu'à ce jour il n'y a pas encore eu d'affaires permettant à l'Autorité de tenir compte de gains environnementaux pour accorder une exemption.

Condamnation de pratiques anticoncurrentielles ayant un impact négatif sur l'environnement. En revanche, on recense déjà plusieurs décisions par lesquelles l'Autorité a pris des mesures pour empêcher certaines entreprises d'adopter des comportements anticoncurrentiels ayant un impact négatif sur l'environnement.

Par exemple, dans l'affaire des sols résilients[10], l'Autorité a jugé qu'un accord de non-concurrence sur la communication écologique pouvait être constitutif d'une entente prohibée. En l'occurrence, les trois principales entreprises productrices des sols en cause et le syndicat professionnel du secteur s'étaient engagés dans l'élaboration commune de fiches dites „de déclarations environnementales et sanitaires" portant sur les performances environnementales de leurs produits et avait ratifié une charte imposant de ne pas communiquer sur les performances

presse/lautorite-de-la-concurrence-annonce-ses-priorites-pour-lannee-2020 (dernière consultation le 17 oct. 2022)

[7] L'AMF, le CSA, l'ARCEP, la CNIL, l'Hadopi, l'ART, la CRE et l'ARJEL.

[8] *www.autoritedelaconcurrence.fr/sites/default/files/2020-05/publication_aai-api_accord_de_paris_052020_2.pdf* (dernière consultation le 17 oct. 2022)

[9] Aut. conc., *Rapport annuel 2020,* disp. en ligne sur le site de l'Autorité, p. 42.

[10] Aut. conc., déc. n° 17-D-20 du 18 oct. 2017 *relative à des pratiques mises en oeuvre dans le secteur des revêtements de sols résilients*.

environnementales de leurs produits autrement que sur la base de ces fiches. Un dirigeant auditionné par l'Autorité admettra que cet accord visait à „*éviter un dangereux "marketing vert" de la part de certains producteurs*". L'Autorité verra, en définitive, dans cet accord une violation des articles 101 du TFUE et L. 420-1 du code de commerce qu'elle caractérisera en ces termes:

„En s'imposant a une communication environnementale ne portant que sur les valeurs moyennes retenues dans le cadre du (syndicat) et en s'interdisant, par là-même, de communiquer sur la base de données environnementales individuelles et fondées sur les performances spécifiques de chaque entreprise, les participants à cet accord signé sous l'égide du (syndicat) ont renoncé à se faire librement concurrence sur la base des mérites de leurs produits respectifs au regard des critères environnementaux."[11]

En matière d'abus, l'Autorité a également accepté l'engagement d'Engie de supprimer l'obligation d'utiliser le gaz comme unique source d'énergie imposée aux nouvelles copropriétés afin de favoriser l'adoption de solutions énergétiques performantes couplant énergies renouvelables et gaz[12].

Avis de l'Autorité sur les marchés à fort enjeux environnementaux. Par ailleurs, l'Autorité a aussi été saisie pour avis par le gouvernement français à propos d'un projet d'arrêté relatif aux critères d'allotissement des marchés de collecte, de transport et de régénération des huiles usagées. Si le projet avait pour objectif de renforcer l'efficacité de la filière en cause à des fins environnementales, l'Autorité a toutefois considéré que les critères retenus n'étaient pas pertinents au regard de certaines particularités du marché et que l'objectif poursuivi par le gouvernement ne serait pas atteint. Pour cette raison, elle a émis un avis défavorable[13], qui sera suivi par le gouvernement. Cet avis ne traite pas de façon explicite la question

[11] *Ibid*., point 437 – L'Autorité ajoute: *"En outre, cet accord a été mis en œuvre par les fabricants adhérents au SFEC, qui représentent l'essentiel des acteurs de secteur, sur un marché oligopolistique stable caractérisé par des barrières à l'entrée liées, en particulier, au mécanisme de prescription de la norme française UPEC, puis UPEC A. Il est intervenu alors que les performances environnementales des revêtements de sols s'imposaient comme l'un des principaux critères de choix des entreprises générales et des distributeurs, et alors que la sensibilité des clients, intermédiaires et finaux, aux performances environnementales des produits de revêtements de sols – notamment en ce qui concernait les valeurs d'émission de COV – était de plus en plus importante. Témoigne de l'importance accrue de ces critères environnementaux le souhait exprimé par certains distributeurs – comme Leroy Merlin – de disposer d'informations détaillées sur les performances environnementales des différents produits. Dès lors, en interdisant aux participants à l'accord de communiquer sur des valeurs individuelles, l'accord a affecté l'un des paramètres essentiels de la concurrence*." (pt. 439).

[12] Aut. conc., déc. 17-D-16 du 7 sept. 2017 *relative à des pratiques mises en œuvre par la société Engie dans le secteur de l'énergie.*

[13] Aut. conc., avis 21-A-13 du 11 oct. 2021 *concernant les critères d'allotissement des marchés de collecte, de transport et de régénération des huiles usagées prévus par le projet d'arrêté portant cahier des charges d'agrément des éco-organismes de la filière à responsabilité élargie du producteur des huiles minérales ou synthétiques, lubrifiantes ou industrielles.*

du développement durable, mais la recherche des gains d'efficacité du marché en question par la préservation de sa structure concurrentielle s'y rattache indirectement dans la mesure où l'activité des opérateurs en cause est centrée sur le recyclage des huiles usagées.

1.2.

Il s'agit d'apprécier l'application par le juge des notions de droit substantiel de la concurrence (*stand alone*) et réparation du préjudice découlant d'une dégradation anticoncurrentielle des performances environnementales d'un bien ou d'un service (*stand alone et follow-on*).

Une juridiction saisie en *stand alone* d'une entente ou d'un abus de position dominante pourrait, d'une part, considérer que des gains environnementaux puissent constituer des éléments pertinents pour accorder une exemption, dans le cas d'une entente, ou constater l'existence de justifications objectives, dans le cas d'un abus. D'autre part, une juridiction saisie d'une action en réparation pourrait très bien juger, en *stand alone* comme en *follow-on*, qu'une entente ou un abus de position dominante ayant pour effet de dégrader les performances environnementales d'un bien ou d'un service puissent causer un préjudice réparable.

Question 2[14]

Oui. V. réponse à la question 3.

Question 3[15]

Mobilisation des outils habituels. À ce jour, l'Autorité ne dispose pas d'outils *ad hoc* mais peut mobiliser les outils habituels permettant de mettre en balance les avantages et les inconvénients d'un comportement que ce soit sur le fondement des règles relatives aux ententes et abus de position dominante ou que ce soit sur le fondement des règles relatives au contrôle des concentrations.

Lors d'une conférence, des représentants de l'Autorité ont résumé, en ces termes, la prise en compte du développement durable dans l'analyse concurrentielle:

„*le développement durable a plutôt tendance à affecter la qualité, d'une part, et à avoir un rôle dans une analyse concurrentielle à long terme, voire dans une analyse dynamique, d'autre part. Dès lors, l'intégrer au raisonnement amène à s'intéresser*

[14] Question traitée par Rafael **Amaro**, Professeur à l'Université de Caen.
[15] Question traitée par Rafael **Amaro**, Professeur à l'Université de Caen.

davantage au rôle des éléments non tarifaires et à dépasser plus fréquemment une vision statique et à court terme dans l'analyse concurrentielle. Rien de tout cela ne remet pour autant en cause la place du bien-être des consommateurs. "[16]

Comme l'Autorité l'indique dans ses lignes directrices relatives au contrôle des concentrations, elle peut procéder à une analyse de long terme évoquée ci-dessus[17].

Question 4[18]

Le gouvernement français a été fortement mobilisé par le projet Alstom / Siemens, présenté en septembre 2017. Cette position se comprend compte tenu de l'importance de l'entreprise Alstom dans l'industrie du transport ferroviaire et, avant le rachat contesté (et contestable) par General Electric, dans la production de turbine électrique. L'État français est lui-même indirectement actionnaire d'Alstom à travers les participations de la Caisse des Dépôts et des Consignations. Désormais, depuis l'acquisition en février 2020 de la branche ferroviaire de Bombardier, l'actionnaire principal est la Caisse des dépôts du Québec.

Il convient de rappeler que la Commission, dans sa décision publiée le 6 février 2019[19], a opposé un refus au projet d'acquisition d'Alstom par Siemens, en mettant en avant des risques de hausse des prix et de réduction des choix pour les opérateurs ferroviaires et pour les gestionnaires d'infrastructures sur les marchés de systèmes de signalisation, de même que sur ceux des trains à grande vitesse. Plus précisément, la décision a été motivée par le fait que les parties n'étaient pas disposées à remédier aux importants problèmes de concurrence relevés par l'autorité de contrôle et les propositions de remèdes n'ont pas été considérées comme étant suffisantes.

Alors même que ce projet de concentration, présenté sur le fondement du règlement 8§3 du règlement (CE) n° 139/2004, concernait une entreprise souvent présentée comme un „champion national", une analyse précise de la décision de la Commission ne fait pas ressortir des arguments spécifiquement présentés par le gouvernement français. Les arguments présentés par les parties – et significativement par Alstom – se font l'écho de la position gouvernementale. Ce point se retrouve notamment par rapport au risque d'entrée et d'expansion de fournisseurs et d'équipementiers asiatiques sur le marché ferroviaire (notamment

[16] S. Martin, U. Berkani, E. Provost, "Développement durable: Quel rôle pour la politique de concurrence?", in *Demain la concurrences,* colloque tenu le 3 nov. 2020), *Concurrences* n° 1-2021, art. n° 99283, spéc. n° 9.

[17] Aut. conc., *Lignes directrices relatives au contrôle des concentrations*, 2020, §774.

[18] Question traitée par Stéphane **de La Rosa**, Professeur de droit public à l'Université Paris-Est Créteil (UPEC).

[19] Case M. 8677 – *Siemens / Alstom*, 6.2.2019.

China Railway Signal § Communication – CRSC)[20]. Même si les parties n'ont pas directement fait référence à la nécessité d'une politique industrielle de l'Union, l'argument renvoie nécessairement à la capacité de l'Union à se protéger sur des marchés stratégiques et à consolider des opérateurs présentant une taille stratégique.

Cet argument fut toutefois écarté par la Commission au motif que l'entrée sur le marché de „Asian Players" était très incertaine compte tenu des enjeux de sécurité et de certification du matériel roulant. Par ailleurs, dans la mesure où une part minimale de gestionnaires d'infrastructures, avait un lien avec CRSC en Europe, l'arrivée de cet opérateur était très peu probable, de sorte que „*any potential entry of Chinese suppliers would not be enough to overcome the significant impediment to effective competition that would result from the Transaction*"[21].

La décision elle-même de la Commission fut en revanche très critiquée par le gouvernement français. Le ministre de l'économie français a publiquement qualifié décision „d'erreur économique" et de „faute politique". En réaction au refus de concentration, les ministres français et allemands ont adopté conjointement, dès le 19 février 2019, un „Manifeste franco-allemand" intitulé „Pour une politique industrielle européenne adaptée au 21ème siècle"[22]. Une partie de ce document programmatique envisage une modernisation du droit des concentrations, d'une part, avec une „ mise à jour des lignes directrices actuelles **en matière de concentrations pour mieux tenir compte de la concurrence au niveau mondial, de la concurrence potentielle future et du calendrier** de développement de la concurrence afin de donner à la Commission européenne plus de flexibilité dans son appréciation des marchés pertinents", d'autre part, (et surtout), en envisageant un droit de recours au profit du Conseil de l'Union, qui pourrait revenir sur des décisions de la Commission, dans des conditions strictes. Cette proposition de contrôle „politique" de la décision „économique" de concentration a également eu un relais par un rapport en France de l'Inspection générale des finances[23].

Cette proposition de rétablir un contrôle a elle-même soulevé une série de réserves dans la doctrine, qui a souligné le risque d'un contrôle d'opportunité économique sur une décision de contrôle qui doit faire prévaloir la rationalité économique de l'opération, le risque d'atteinte à la concurrence, et la limitation de l'offre pour

[20] *Ibid*., § 1015.
[21] Ibid. § 1018.
[22] Disponible notamment sur le lien suivant: https://ue.delegfrance.org/manifeste-franco-allemand-pour-une
[23] Rapport dans la foulée de l'IGF – Rapport établi sous la supervision d'Anne Perrot, par V. Blonde, A. Ropars, S. Catoire, H. Mariton, présenté en avr. 2019 (disponible, https:// www.ladocumentationfrancaise.fr/var/storage/rapports-publics/ 194000488.pdf).

les opérateurs d'infrastructure[24]. Elle mérite toutefois d'être débattue et posée, à l'instar du droit d'évocation reconnue en droit français[25].

Si certaines réactions au refus de fusion ont pu apparaître comme étant excessive ou uniquement guidées par des postures politiques, il n'en demeure pas moins que la décision de la Commission dans ce dossier soulève plusieurs questionnements. Tout d'abord sur la délimitation du marché pertinent: en constatant que les opérateurs européens n'avaient de fait jamais accès au marché chinois (mais également japonais et coréen), la Commission a délimité un marché pertinent en privilégiant la réalité des pratiques actuelles et passées des gestionnaires d'infrastructure ferroviaire (sur la signalisation) et en se focalisant sur les commandes des principaux opérateurs (SNCF, DB essentiellement). Cette délimitation n'est pas inexacte, mais elle tranche, par sa relative précision, avec une argumentation plus faible et peut-être moins étayée par rapport au risque d'entrée d'opérateurs asiatiques. Surtout, elle n'investit pas les risques de prise de contrôle sous formes de filiales dédiées. Par ailleurs, la Commission a été sensible aux arguments des États pour lesquels la fusion aurait conduit à un renchérissement des coûts: Espagne, Royaume-Uni, Croatie, Portugal essentiellement. L'argument de la politique industrielle a ainsi faiblement prospéré par rapport aux contraintes propres aux différents marchés nationaux.

Question 5[26]

Faut-il opposer la politique industrielle et la politique de concurrence? *A priori*, les deux politiques apparaissent comme antagonistes. La politique industrielle regroupe un ensemble d'interventions publiques visant à corriger les imperfections de marché[27]. Elle donne aux États la possibilité d'intervenir sur le marché pour orienter l'économie et privilégier tel ou tel secteur à des fins stratégiques et de compétitivité internationale. Elle est particulièrement sollicitée en période de crise. En pareil cas, les États cherchent à aider les entreprises nationales au moyen notamment de subventions et de crédits d'impôt, l'idée étant de relancer une industrie ou de soutenir le financement de l'innovation.

[24] V. en ce sens, W. Chaiehloudj, "Faut-il repenser le droit européen des concentrations après l'affaire Alstom / Siemens?", *Cahiers de droit européen*, 2020, pp. 549-611 ; D. Bosco, "La 'faute politique" serait de politiser le contrôle des concentrations", *Contrats Concurrence Consommation*, mai 2019, repère 5 ; L .Idot, "Mariage interdit, de raison ou forcé: quand la politique de concurrence peine à suivre les stratégies des grands groupes", Europe 2021, n° 3, repère 13.

[25] Ci-après la contribution de Walid **Chaiehloudj**, Professeur à l'Université de Perpignan, Membre du collège de l'Autorité de la concurrence de la Nouvelle-Calédonie.

[26] Question traitée par Walid **Chaiehloudj,** Professeur de droit privé à l'Université de Perpignan, Membre du collège de l'Autorité de la concurrence de la Nouvelle-Calédonie.

[27] DG Trésor, *Politique industrielle et politique de la concurrence*, 13 avr. 2012.

La politique de concurrence a quant à elle une autre fonction. Elle cherche à prévenir et sanctionner les restrictions de concurrence aux fins de protéger le bien-être des consommateurs. À l'échelle de l'Union européenne, l'opposition a été grande entre politique industrielle et politique de concurrence et s'est donnée à voir récemment avec la médiatique décision de prohibition de la Commission européenne dans l'affaire *Alstom/Siemens*[28]. L'institution bruxelloise fut accusée de mener une politique trop rigoriste en matière de concentration, laquelle ferait obstacle à la formation de „champions européens" capables de rivaliser avec les grosses entreprises américaines et chinoises[29]. Le courroux fut tel qu'il a suscité une réaction politique des ministres français et allemand de l'économie sous la forme d'un *Manifeste pour une politique industrielle adapté au XXIe siècle*. La décision révélait en creux une réalité. Au regard du règlement n° 139/2004, la politique industrielle européenne est subordonnée à la politique de concurrence. Autrement dit, la primauté du droit européen de la concurrence résulterait de la rédaction du règlement sur les concentrations. Cette primauté pourrait cependant être fragilisée. Car depuis quelques années, la Commission européenne a fixé des objectifs de politique industrielle précis notamment dans le Pacte vert[30] ou dans le secteur du numérique[31].

À l'échelle nationale, peut-on tirer le même constat? L'Autorité de la concurrence n'intègre-t-elle pas des objectifs de politique industrielle dans son contrôle des concentrations? Il faut dire d'abord que la politique de concurrence est „une forme minimaliste de politique industrielle"[32]. La politique de concurrence française en matière de concentration permet d'empêcher la création d'entreprises dominantes qui non seulement porterait atteinte au surplus du consommateur, en entraînant une augmentation des prix, une baisse de l'innovation ou une chute de la qualité des produits et des services, mais également pénaliserait la compétitivité d'autres entreprises. Cette protection de la compétitivité des autres entreprises n'est qu'une manifestation d'une politique industrielle qui va bien au-delà de la seule politique de concurrence.

[28] Pour plus de précisions, voy. *supra* la contribution du professeur de La Rosa.

[29] Il faut néanmoins nuancer cette position tendant à voir une hostilité de la Commission à l'égard des grandes consolidations industrielles. À titre d'exemple, la Commission ne s'est pas opposée à la concentration entre Alstom et Bombardier. Voy. Comm. eur., 31 juill. 2020, *Bombardier/Alstom*, aff. M.9779. Elle n'a pas prohibé non plus la concentration entre Altice et Covage. Voy. Comm. eur., 27 nov. 2020, *Altice/Covage*, aff. M. 9728.

[30] Comm. eur, *Le pacte vert pour l'Europe*, COM(2019) 640 final, 11 déc. 2019. Voy. ég. M. Vestager, *Competition Policy in support of the Green deal*, Speech, 10 sept. 2021.

[31] Voy. par ex. Règlement (UE) 2022/1925 du Parlement européen et du Conseil du 14 septembre 2022 relatif aux marchés contestables et équitables dans le secteur numérique et modifiant les directives (UE) 2019/1937 et (UE) 2020/1828 (règlement sur les marchés numériques), *JOUE* L 265/1 du 12 déc. 2022, cons. 7.

[32] Nous reprenons ici l'expression du vice-président de l'Autorité de la concurrence. Voy. E. Combe, "Politique industrielle: oui, mais avec de la concurrence", *L'Opinion,* 19 mai 2020.

Ensuite, la pratique décisionnelle de l'Autorité de la concurrence montre qu'elle n'est pas insensible aux objectifs de politique industrielle. Par exemple, elle a récemment appliqué pour la première fois l'exception de l'entreprise défaillante dans le secteur des produits d'ameublement[33]. Aux fins de sauvegarder des emplois et de maintenir une activité économique, elle a autorisé la concentration en dépit des risques d'atteinte à la concurrence de l'opération. En effet, l'Autorité a autorisé l'opération sans engagement alors même que les parties à l'opération n'étaient pas à même de démontrer que les effets anticoncurrentiels pourraient être contrebalancés par des gains d'efficience. Pourtant, les risques d'atteinte à la concurrence étaient importants. L'acquisition des actifs de l'entreprise en difficulté permettra notamment à l'entreprise acquéreuse de renforcer sa puissance d'achat de telle sorte que les fournisseurs seront placés en état de dépendance économique. Toujours est-il que l'Autorité a jugé que les trois conditions d'application de l'exception de l'entreprise défaillante étaient réunies. Premièrement, les difficultés de l'entreprise cible auraient entraîné sa disparation rapide en l'absence de reprise. Deuxièmement, il n'existait pas d'autre offre de reprise que celle de la partie notifiante moins dommageable pour la concurrence, portant sur la totalité ou une partie substantielle de l'entreprise. Troisièmement enfin, la disparition de l'entreprise en difficulté n'aurait pas été moins dommageable pour les consommateurs.

En outre, il convient de relever que la politique industrielle peut s'insérer au stade de l'évaluation des gains d'efficacité de l'opération de concentration. Dans ses récentes lignes directrices publiées en mars 2021, la *Competition and Market Authority* a indiqué qu'elle serait désormais sensible aux gains d'efficacité environnementaux[34]. L'autorité britannique a jugé que ces gains d'efficacité pourraient prendre la forme par exemple de bénéfices en termes de développement durable ou de soutien à la transition vers une économie à faible émission carbone, et ce, dans certaines circonstances. C'est dire que le contrôle des concentrations pourrait être mis au service d'une politique industrielle: celle de verdir l'économie. En France, l'Autorité de la concurrence n'a pas pour l'heure développer une telle doctrine alors même qu'elle devra assurément accompagner la réussite du Pacte vert[35]. La révision des lignes directrices sur les concentrations ne laisse aucune trace de ces gains d'efficacité environnementaux[36]. Cela ne signifie pas pour autant que l'Autorité de la concurrence est insensible à l'intégration de cet objectif de politique industrielle

[33] Aut. conc., déc. n° 22-DCC-78 du 28 avr. 2022 relative à l'acquisition du contrôle exclusif des actifs de Conforama par le groupe Mobilux.

[34] Competition & Markets Authority, *Merger Assessment Guidelines*, 18 mars 2021.

[35] Sur ce sujet: voy. *supra* la contribution du professeur Amaro. Voy. ég. pour une étude exhaustive: W. Chaiehloudj, "Le droit de la concurrence est-il un frein à la protection de l'environnement?", *Contrats, conc., consom.* 2022, n° 4, étude 6.

[36] Aut. conc., *Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations*, 2020.

qu'est la protection de l'environnement et du climat. Des membres de l'Autorité de la concurrence ont estimé récemment qu'il pourrait être „*intéressant de clarifier ou de réexaminer les motivations de la minoration de la valeur d'un gain futur au motif qu'il est éloigné dans le temps*“[37]. Qui plus est, l'Autorité s'est déjà émancipée d'un contrôle purement concurrentiel en intégrant d'autres objectifs qu'industriels. Par exemple, dans le secteur de la presse, elle a pris en compte le critère de la diversité éditoriale en tant qu'effet „non-prix“ d'une opération de concentration[38].

Enfin, même si l'Autorité de la concurrence s'avère rétive à l'intégration d'objectifs de politique industrielle, elle ne pourra parfois pas l'empêcher. Cette situation peut se présenter lorsque le ministre de l'Économie décide d'user de son pouvoir d' "évocation“ en vertu de l'article L. 430-7-1 du code de commerce[39].

Question 6[40]

Le ministre de l'Économie a un rôle important en France en matière de concurrence. Ce dernier a la possibilité d'agir tant en *ex ante* qu'en *ex post*. Le législateur l'a doté de différents pouvoirs tantôt pour défendre directement l'intérêt général tantôt pour protéger plus franchement l'ordre public économique. Pour ce faire, le ministre de l'Économie peut intervenir dans divers domaines tels que le contrôle des concentrations (I). Il peut également chercher à réprimer les pratiques anticoncurrentielles et les pratiques restrictives de concurrence (II).

6.1. Le pouvoir d'évocation du ministre de l'Économie en matière de concentration, un pouvoir au service de la défense de l'intérêt général

Depuis la loi n° 2008-776 du 4 août 2008 dite de modernisation de l'Économie (LME), le pouvoir décisionnel en matière de contrôle des concentrations du ministre de l'Économie a été transféré à l'Autorité de la concurrence. Aussi la LME a-t-elle mis un terme à la structure duale qui s'imposait jusqu'alors. Il faut se souvenir que sous l'empire de la loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques, le Conseil de la concurrence n'avait qu'un rôle consultatif. En pratique, lorsque l'opération dépassait les seuils de contrôle, elle devait être notifiée aux services du ministre de l'Économie, à savoir la Direction générale de la concurrence, de la consommation et de la répression des fraudes

[37] Voy. S. Martin, U. Berkani et E. Provost, "Droit de la concurrence et développement durable: Des opportunités à droit constant", *Concurrences* n° 1-2021, art. n° 99283.

[38] Voy. par ex.: Aut. conc., déc. n° 15-DCC-63 du 4 juin 2015 relative à la prise de contrôle exclusif de la Société du Journal Midi Libre par la société Groupe La Dépêche du Midi.

[39] Voy. notre contribution *infra*.

[40] Question traitée par Walid **Chaiehloudj**, Professeur à l'Université de Perpignan, Membre du collège de l'Autorité de la concurrence de la Nouvelle-Calédonie.

(DGCCRF). Cette dernière pouvait autoriser l'opération en phase I ou saisir le Conseil de la concurrence pour avis si elle estimait que l'opération pouvait porter atteinte à la concurrence. En phase II, l'avis du Conseil de la concurrence était également consultatif, si bien que l'appréciation du Conseil ne liait pas le ministre de l'Économie au moment d'adopter la décision finale[41]. Partant, ce n'est que depuis l'entrée en vigueur de la LME, et la création de l'Autorité de la concurrence, que celle-ci détient en quelque sorte le monopole du contrôle des concentrations à l'échelle nationale. Toujours est-il que le législateur n'a pas entièrement dépossédé le ministre de l'Économie de son pouvoir de contrôle. Conformément à l'article L. 430-7-1 du Code de commerce, le ministre de l'Économie peut intervenir à deux étapes de la procédure du contrôle des concentrations:

D'abord, à l'issue de la phase I, une fois que l'Autorité de la concurrence a décidé d'autoriser une opération de concentration, le ministre de l'Économie peut demander l'ouverture d'un examen approfondi dit de phase II de l'opération. Il doit alors formuler cette demande dans un délai de cinq jours ouvrés à compter de la date à laquelle il a reçu la décision. À ce stade, son rôle se limite à pousser l'Autorité de la concurrence à examiner plus avant l'opération, étant précisé que dans une telle hypothèse, le ministre de l'Économie révèle au grand jour son désaccord avec la position prise par l'Autorité. Les divergences peuvent être de plusieurs ordres entre les deux entités. Le ministre de l'Économie peut, par exemple, considérer que l'opération aurait mérité des engagements de la part des entreprises[42]. Il peut également juger que les engagements proposés ne sont pas suffisants ou pas nécessaires pour éliminer les préoccupations de concurrence soulevées au cours de l'instruction.

Ensuite, à l'issue de la phase II, le ministre de l'Économie peut „évoquer" l'affaire et statuer sur l'opération. Il détient ce que l'on nomme un pouvoir d'évocation. Autrement dit, il peut revenir sur une décision de l'Autorité de la concurrence pour des motifs d'intérêt général[43] qu'il s'agisse d'une décision d'autorisation avec

[41] À cet égard, il a pu arriver que le ministre de l'Économie accepte par exemple des engagements en dépit d'un avis négatif ou très réservé du Conseil de la concurrence. En outre, il a été rapporté que "*sur les 82 avis rendus par le Conseil, 18 affaires ont fait l'objet d'analyses divergentes, ce qui veut dire que le ministre a suivi le Conseil dans 80% des cas. Dans 6 affaires où le Conseil avait suggéré d'interdire la concentration, le ministre l'a autorisée avec ou sans engagements. En revanche, le ministre a été plus sévère dans 5 cas. Dans les autres affaires, les divergences étaient mineures*". Voy. L. Idot, "Les 20 ans de la loi NRE – Contrôle des concentrations", *RLC* 2022, n° 113, p. 23.

[42] Sur les engagements, voy. not. l'étude de l'Autorité de la concurrence dédiée aux engagements comportementaux: Aut. conc., *Les engagements comportementaux*, La documentation française, 2019, p. 53 et s.

[43] À l'échelle de l'Union européenne, on retrouve également la défense de l'intérêt général dans le règlement (CE) n° 139/2004. En effet, le contrôle européen des concentrations est ouvert à la prise en compte d'intérêts a-concurrentiels. L'article 21 § 4 du règlement dispose que "*les États membres peuvent prendre les mesures appropriées pour assurer la protection d'intérêts légitimes autres que ceux qui sont pris en considération par le présent règlement et compatibles avec les principes généraux et les autres dispositions du droit communautaire*"et

ou sans engagements ou d'une décision de prohibition. Pour ce faire, le ministre de l'Économie dispose d'un délai de 25 jours ouvrés à partir du moment où il a reçu la décision de l'Autorité. L'article L. 430-7-1 du code de commerce précise, d'une part, la nature de ce pouvoir en énonçant que le ministre „*peut évoquer et statuer sur l'opération en cause pour des motifs d'intérêt général autres que le maintien de la concurrence et, le cas échéant, compensant l'atteinte portée à cette dernière par l'opération*". C'est dire que le ministre de l'Économie peut réaliser une mise en balance entre les effets anticoncurrentiels d'une concentration et les effets vertueux de l'opération relativement à des motifs d'intérêt général. D'autre part, le texte délivre quelques exemples de motifs d'intérêt général. Il est indiqué que „*les motifs d'intérêt général autres que le maintien de la concurrence pouvant conduire le ministre chargé de l'économie à évoquer l'affaire sont, notamment, le développement industriel, la compétitivité des entreprises en cause au regard de la concurrence internationale ou la création ou le maintien de l'emploi*". L'adverbe „notamment" a ici une grande incidence Il faut en inférer que la liste d'exemples n'est pas exhaustive. Aussi un autre motif d'intérêt général tel que la protection de l'environnement ou la préservation du climat pourrait aisément intégrer cette liste et être opposé par le ministre de l'Économie. Quoi qu'il en soit, le rôle du ministre de l'Économie, lorsqu'il évoque une affaire, ne consiste pas simplement à défendre l'ordre public économique qui a notamment pour objet de veiller au bon fonctionnement du marché. Son pouvoir va bien au-delà puisqu'il s'agit de protéger des valeurs de nature économique ou sociale.

Depuis son introduction en 2008, le pouvoir d'évocation n'a été utilisé qu'une seule fois par le ministre de l'Économie en 2018 dans l'affaire *Cofigeo*[44]. En l'espèce, l'Autorité de la concurrence avait autorisé l'acquisition du groupe Agripole par Cofigeo sous réserve d'engagements[45]. Les remèdes étaient de type structurel puisqu'il était enjoint à Cofigeo de céder une marque notoire ainsi qu'un site de production permettant l'exploitation et la production de MDD. Le ministre de l'Économie ne fut pas convaincu de la décision et considéra que cette opération appelait „*une appréciation sous l'angle de motifs d'intérêt général tels que le maintien de l'emploi et le développement industriel*"[46]. Dans sa décision du 19 juillet 2018, le ministre de l'Économie a autorisé la concentration sans imposer de cession d'actifs jugeant que „*le démantèlement de l'un des pôles du groupe Cofigeo*

que "*sont considérés comme intérêts légitimes, au sens du premier alinéa, la sécurité publique, la pluralité des médias et les règles prudentielles*". Voy. pour plus de précisions: W. Chaiehloudj, "Faut-il repenser le droit européen des concentrations après l'affaire *Alstom/Siemens*?", *Cahiers de droit européen* 2019, n°2-3, p. 549, spéc. p. 565 et s.

[44] Cette affaire concernait le secteur des plats cuisinés appertisés.

[45] Aut. conc., déc. n° 18-DCC-95 du 14 juin 2018 relative à la prise de contrôle exclusif d'une partie du pôle plats cuisinés ambiants du groupe Agricole par la société Financière Cofigeo.

[46] Ministère de l'Économie et des Finances, communiqué de presse n° 543, 14 juin 2018.

affaiblierait considérablement son équilibre global, affectant ainsi directement l'emploi au sein de ce dernier"[47]. Le ministre de l'Économie a simplement imposé un engagement comportemental: celui de maintenir l'emploi pendant deux ans. L'enseignement de cette affaire est important. Elle a le mérite de traduire en pratique ce que l'on concevait sur un plan théorique. Il faut retenir que lorsque le ministre de l'Économie identifie un motif d'intérêt général, il peut revenir sur une décision pourtant parfaitement motivée d'un point de vue concurrentiel. Aussi ces motifs d'intérêt général permettent-ils au ministre de l'Économie de faire fi de l'analyse concurrentielle aux fins de privilégier une autre politique, exogène à la concurrence, telle qu'une politique industrielle ou une politique d'emploi comme le dévoile la présente décision. En somme, le pouvoir d'évocation n'est pas un pouvoir ordinaire ; il est un „superpouvoir" qui permet au ministre de l'Économie de privilégier une autre politique que celle de la politique de concurrence.

Le pouvoir de poursuite et de sanction du ministre de l'Économie en matière de pratiques anticoncurrentielles et de pratiques restrictives de concurrence, un pouvoir au service de la défense de l'ordre public économique

Le ministre de l'Économie peut intervenir en *ex post* pour poursuivre et sanctionner des pratiques violant le droit de la concurrence. Dans ces hypothèses, c'est son rôle de gardien de l'ordre public économique qui se donne à voir.

D'abord, depuis l'entrée en vigueur de l'ordonnance n° 2008-1161 du 13 novembre 2008 portant modernisation de la régulation de la concurrence, le ministre de l'Économie dispose d'un pouvoir d'injonction et de transaction pour le règlement des „micro-pratiques anticoncurrentielles". Ces pouvoirs d'injonction et de transaction sont prévus par l'article L. 464-9 du code de commerce[48]. S'agissant du pouvoir d'injonction, il consiste à enjoindre les entreprises de mettre un terme aux pratiques visées notamment aux articles L. 420-1 à L. 420-2-2 et L. 420-5 du code de commerce. S'agissant du pouvoir de transaction, il permet au ministre de l'Économie de proposer une transaction aux entreprises, étant précisé que le montant de la transaction ne peut excéder 150 000 euros ou 5% du chiffre d'affaires connu en France[49].

[47] Ministre de l'Économie et des Finances, déc. du 19 juillet 2018 statuant sur la prise de contrôle exclusif d'une partie du pôle plats cuisinés ambiants du groupe Agricole, § 86.

[48] Le ministre de l'Économie prend son rôle de gardien de l'ordre public économique très au sérieux. Depuis l'année 2019, on relève une quinzaine de décisions faisant application de l'article L. 464-9 du code de commerce. Le ministre de l'Économie a encore récemment usé de son pouvoir d'injonction dans une affaire d'abus de position dominante concernant le secteur funéraire. Voy. DGCCRF, Communication relative aux pratiques anticoncurrentielles relevées sur le marché des services funéraires d'Arès et de certaines communes du bassin d'Arcachon dans le département de la Gironde, 2022. *Adde* A. Marie, "La ''pratique" des PAC des PME/TPE par le ministre de l'Économie et l'Autorité de la concurrence" *in Liber Amicorum L. Idot – Concurrence et Europe,* vol. 1, Concurrences, 2022, p. 93.

[49] Lorsque les entreprises respectent l'injonction ou la transaction conclue, cela a pour effet d'éteindre toute action devant l'Autorité de la concurrence pour les mêmes faits.

Le domaine de l'article L. 464-9 du code de commerce est très singulier dans la mesure où il s'agit d'appréhender des pratiques anticoncurrentielles qui touchent des marchés de petites dimensions. Autrement dit, le ministre de l'Économie est le juge naturel des pratiques anticoncurrentielles dont les effets ne sont pas sensibles sur le marché. Avec l'entrée en vigueur de la loi DADDUE n° 2020-1508 du 3 décembre 2020, l'article L. 464-9 a été modifié. Cette loi a supprimé la condition d'affectation d'un „marché local". Ce n'est pas à dire que le ministre de l'Économie peut utiliser ses pouvoirs pour toutes les pratiques anticoncurrentielles, celles relevant des articles 101 et 102 TFUE et affectant le commerce entre États membres sont hors d'atteinte. En d'autres mots, seules les pratiques anticoncurrentielles prohibées par le code de commerce peuvent être sanctionnées par le ministre de l'Économie, ce dernier n'ayant pas de compétence pour appliquer le droit de l'Union européen. Quant à son champ d'application *ratione personae*, le texte prévoit que les entreprises mises en cause ne doivent pas avoir un chiffre d'affaires individuel supérieur à 50 millions d'euros et des chiffres d'affaires cumulés supérieurs à 200 millions d'euros. Au-delà, l'Autorité de la concurrence retrouve sa compétence. L'Autorité récupère également sa compétence lorsque les entreprises restent sourdes aux injonctions, qu'elles n'exécutent pas les transactions ou refusent de transiger. Dans ces hypothèses, le ministre de l'Économie doit saisir l'Autorité de la concurrence qui doit alors instruire l'affaire.

Ensuite, le ministre de l'Économie bénéficie de pouvoirs de poursuite en matière de pratiques restrictives de concurrence, qualifiées parfois également de pratiques commerciales déloyales. Aux termes de l'article L. 442-4 du code de commerce[50], le ministre de l'Économie peut introduire une action devant les juridictions civiles ou commerciales compétentes pour que les pratiques restrictives de concurrence identifiées par ses services soient réprimées. C'est dire que le ministre de l'Économie n'a pas un pouvoir de sanction direct contre les entreprises. En pratique, il doit convaincre un juge en apportant des preuves démontrant que les parties poursuivies ont enfreint le droit des pratiques restrictives. Le ministre de l'Économie a été très actif ces dernières années pour défendre l'ordre public économique et participer aux rééquilibrages des relations commerciales. De grands succès ont été obtenus notamment dans le secteur du numérique. Grâce à son action, des tribunaux de commerce ont condamné des entreprises pour déséquilibre significatif à plusieurs reprises. On peut mentionner les affaires les plus notoires telles que les décisions

[50] La cour européenne des droits de l'Homme a jugé ce pouvoir d'action en justice du ministre de l'Économie conforme à l'article 6 de la Convention au motif que ce pouvoir a notamment pour objectif la défense de l'ordre public économique. Voy. CEDH, 17 janv. 2012, *Galec c. France*, n° 51255/08.

Amazon[51] et *Google Play*[52]. Il faut néanmoins relever qu'un coup d'arrêt pourrait se faire sentir ces prochaines années, la Cour de cassation ayant aggravé la charge probatoire pesant sur le ministre de l'Économie. Dans un arrêt du 11 mai 2022, elle a jugé au visa de l'article 6 de la Convention européenne des droits de l'Homme qu' "*il résulte de ce texte, qu'au regard des exigences du procès équitable, le juge ne peut fonder sa décision uniquement ou de manière déterminante sur les déclarations anonymes*"[53]. Autrement dit, le ministre de l'Économie ne pourra plus emporter la conviction d'un juge en rapportant uniquement comme preuve des témoignages anonymes attestant de la mise en œuvre de pratiques restrictives de concurrence[54].

Question 7[55]

7.1. Positionnement de l'Autorité de la concurrence. L'Autorité de la concurrence française n'a jamais intenté d'actions en justice à l'encontre d'une plateforme numérique américaine. Cela s'explique parce que, dans le système français, l'application du droit des pratiques anticoncurrentielles se fait selon une stricte séparation entre *private enforcement* et *public enforcement*. D'un côté, l'Autorité de la concurrence se saisit ou est saisie de comportements d'entreprises afin de constater ou non l'existence de pratiques anticoncurrentielles, de les sanctionner ou de mettre en œuvre des procédures négociées. De l'autre côté, une action peut être introduite par un justiciable – par exemple un concurrent ou des consommateurs – devant le juge de droit commun qui est seul compétent pour connaître du contrat ou pour engager la responsabilité d'une entreprise.

Dans ce système dualiste, l'Autorité de la concurrence n'a pas vocation à saisir les juridictions d'une action à l'encontre d'une entreprise. Les seules hypothèses dans lesquelles l'Autorité de la concurrence est partie à une instance devant le juge national sont celles dans lesquelles ses décisions ont fait l'objet d'un recours devant la Cour d'appel de Paris, pour les pratiques anticoncurrentielles, et devant le Conseil d'État, pour les opérations de concentration. On notera que, dans la logique de la jurisprudence *VEBIC*[56], le président de l'Autorité de

[51] T. com. Paris, 2 sept. 2019, *Amazon,* n° 2017/050625. Dans cette affaire, le tribunal a prononcé une amende de plus de 9 millions d'euros et a enjoint à Amazon de modifier ou supprimer sept clauses litigieuses.

[52] T. com. Paris, 28 mars 2022, *Google Play*, n° 2018/017655. Dans cette affaire, le tribunal a prononcé une amende de 2 millions d'euros et a enjoint à Google de modifier les clauses litigieuses.

[53] Cass. com., 11 mai 2022, n° 19-22.242.

[54] Étant donné que le droit de la concurrence est considéré comme un droit quasi-répressif, l'arrêt étonne peu. On se souvient qu'en matière pénale, la Cour européenne des droits de l'Homme avait posé un tel principe. Voy. par ex. CEDH, 10 avr. 2012, *Ellis et Simms et Martin c/ Royaume-Uni* n° 46099/06 et n° 46699/06.

[55] Question traitée par Francesco **Martucci**, Professeur à l'Université Paris Panthéon Assas.

[56] CJUE, GC, 7 décembre 2010, *VEBIC*, C-439/08, ECLI:EU:C:2010:739.

la concurrence peut former un pourvoi en cassation contre l'arrêt de la cour d'appel[57].

En revanche, il appartient à l'Autorité de la concurrence, le cas échéant saisie d'une plainte, de se prononcer sur les comportements adoptés par les entreprises américaines du secteur numérique. Ainsi, elle a adopté des décisions à l'encontre d'Apple, de Google et de Meta. Ces trois décisions sont présentées ci-dessous.

7.2. Apple. L'Autorité de la concurrence a condamné Apple à une amende de 1,1 milliard d'euros au motif que l'entreprise américaine a violé les articles 101 TFUE, L. 420-1 et L. 420-2, alinéa 2, du code de commerce[58] du fait d'ententes au sein de son réseau de distribution et d'abus de dépendance économique vis-à-vis de ses revendeurs indépendants „premium"[59]. L'entente avait été pratiquée avec les deux grossistes, Tech Data et Ingram Micro, qui ont également été sanctionnés. L'Autorité avait été saisie en 2012 par eBizcuss, distributeur de produits Apple spécialisé haut de gamme. Trois pratiques ont été reprochées à Apple: 1) une répartition de produits et de clientèle entre ses deux grossistes Tech Data et Ingram Micro 2) des prix de vente imposés aux détaillants revendeurs premium (APR) afin qu'ils appliquent les mêmes prix que ceux pratiqués par Apple elle-même, dans les Apple Store et sur son site Internet et 3) un abus de dépendance économique vis-à-vis des revendeurs premium (pour la plupart des PME).

Le groupe Apple[60] a introduit un recours contre cette décision devant la Cour d'appel de Paris[61]. Le 6 octobre 2022, celle-ci a réformé la décision de l'Autorité de la concurrence en diminuant l'amende d'Apple à 371,6 millions d'euros. Elle a considéré que la pratique des prix de vente imposés aux détaillants revendeurs premium (APR) n'était pas caractérisée dès lors que l'Autorité de la concurrence n'a établi ni l'existence d'une recommandation de prix de la part d'Apple revêtant

[57] Cass. com., 17 janvier 2012, *Président de l'Autorité de la concurrence c/ SFR et France Télécom*, n° 11-13067. Article L. 464-8, alinéa 4, du code de commerce introduit par la loi ° 2008-776 du 4 août 2008 de modernisation de l'économie.

[58] Article L. 420-1 du code de commerce: "Sont prohibées même par l'intermédiaire direct ou indirect d'une société du groupe implantée hors de France, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, les actions concertées, conventions, ententes expresses ou tacites ou coalitions, notamment lorsqu'elles tendent à: 1° Limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises; 2° Faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse; 3° Limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique; 4° Répartir les marchés ou les sources d'approvisionnement".

[59] Décision n° 20-D-04 du 16 mars 2020 relative à des pratiques mises en œuvre dans le secteur de la distribution de produits de marque Apple.

[60] Les requérantes sont les sociétés APPLE FRANCE S.A.R.L. (France), SOCIÉTÉ APPLE DISTRIBUTION INTERNATIONAL LIMITED (Irlande), APPLE OPERATIONS EUROPE LIMITED (Irlande), APPLE EUROPE LIMITED (Royaume-Uni), APPLE OPERATIONS INTERNATIONAL LIMITED (Irlande), APPLE SALES INTERNATIONAL LIMITED (Irlande), SOCIÉTÉ APPLE INC. (États-Unis).

[61] Cour d'appel de Paris, 6 octobre 2022, 20/08582.

un caractère impératif pour l'ensemble de ses APR ni l'adhésion des APR à un système de prix imposés de sorte la pratique s'avère davantage correspondre à un parallélisme de comportements que l'adhésion à un système de prix imposés par Apple[62]. En revanche, la Cour d'appel a confirmé que la répartition de produits et de clientèle par Apple entre ses deux grossistes constitue une restriction de concurrence par objet, eu égard à son degré de nocivité, excluant toute possibilité d'exemption, la durée de l'entente ayant été cependant déterminée par l'Autorité de manière incorrecte puisque l'entente a débuté en 2009 et non en 2005 comme l'avait constaté la décision contestée. La Cour d'appel a également avalisé le raisonnement de l'Autorité quant à l'existence d'un abus de dépendance économique dans les relations entre les APR et Apple, l'exploitation abusive résultant des difficultés d'approvisionnement et de différences de traitement entre les différents canaux d'approvisionnement. Enfin, en ce qui concerne la fixation du montant de l'amende, on note que la Cour d'appel censure l'Autorité au motif que celle-ci a majoré de façon disproportionnée le montant de l'amende à hauteur de 90% au titre de la puissance économique d'Apple, estimant qu'un montant de 50% aurait été suffisant.

7.3. Google (droits voisins). L'Autorité de la concurrence a infligé à Google une sanction de 500 millions d'euros dans une affaire concernant la rémunération des droits voisins des éditeurs et agences de presse. Dans une première décision[63], elle avait adressé des injonctions à Google afin que celle-ci présente une offre de rémunération pour les utilisations de leurs contenus protégés par les éditeurs et agences de presse. Ainsi que la Présidente de l'Autorité l'avait déclaré:

„*Au terme d'une instruction approfondie, l'Autorité a constaté que Google n'avait pas respecté plusieurs injonctions formulées en avril 2020. Tout d'abord, la négociation de Google avec les éditeurs et agences de presse ne peut être regardée comme ayant été menée de bonne foi, alors que Google a imposé que les discussions se situent nécessairement dans le cadre d'un nouveau partenariat, dénommé Publisher Curated News, qui incluait un nouveau service dénommé Showcase. Ce faisant, Google a refusé, comme cela lui a été pourtant demandé à plusieurs reprises, d'avoir une discussion spécifique sur la rémunération due au titre des utilisations actuelles des contenus protégés par les droits voisins. En outre, Google a restreint sans justification le champ de la négociation, en refusant d'y intégrer les contenus des agences de presse repris par des publications (images par exemple) et en écartant l'ensemble de la presse*

[62] ADLC, décision 21-D-17 du 12 juillet 2021 relative au respect des injonctions prononcées à l'encontre de Google dans la décision n° 20-MC-01 du 9 avril 2020.

[63] ADLC, décision n° 20-MC-01 du 9 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse.

non IPG de la discussion, alors même qu'elle est incontestablement concernée par la loi nouvelle, et que ses contenus sont en outre associés à des revenus significatifs pour Google. Ces manquements ont été aggravés par la non transmission des informations qui auraient permis une négociation équitable, et par la violation des obligations visant à assurer la neutralité de la négociation vis-à-vis de l'affichage des contenus protégés et des relations économiques existant par ailleurs entre Google et les éditeurs et agences de presse"[64].

Le Syndicat des éditeurs de presse magazine (SEPM), l'Alliance de Presse d'information Générale (APIG) et l'Agence France Presse (AFP) avaient ainsi saisi à la fin de l'été 2020 l'Autorité de la concurrence du non-respect des injonctions prononcées dans la décision du 9 avril 2020. Les injonctions ont été décidées après que Google a décidé de ne pas afficher les extraits d'articles, les photographies et les vidéos au sein de ses différents services, sauf à ce que les éditeurs lui en donnent l'autorisation à titre gratuit. Or, en vue de transposer la directive n° 2019/790 du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique, la loi n° 2019-775 du 24 juillet 2019 a créé un droit voisin au profit des agences et des éditeurs de presse. Pour l'Autorité de la concurrence, le comportement de Google était constitutif d'un abus de position dominante dont la gravité a justifié le prononcé à titre provisoire de sept injonctions. L'Autorité a résumé ces injonctions: – „entrer en négociation de bonne foi avec les éditeurs et agences de presse qui le désirent (Injonction n° 1) pendant une période de trois mois à compter de la demande de l'éditeur ou de l'agence de presse (Injonction n° 4)" ; „communiquer les informations nécessaires à l'évaluation transparente de la rémunération prévues à l'article L. 218-4 du code de la propriété intellectuelle (le „CPI") (Injonction n° 2)" ; „veiller à respecter un principe de stricte neutralité au cours des négociations, afin de ne pas affecter l'indexation, le classement et la présentation des contenus protégés repris par Google sur ces services (injonction 5)" ; - „veiller à respecter un principe de stricte neutralité des négociations sur toute autre relation économique qui existerait entre Google et les éditeurs et agences de presse (injonction 6)" ; „envoyer à l'Autorité des rapports réguliers sur les modalités de mise en œuvre de la décision (Injonction n° 7)"[65]. Par un arrêt en date du 8 octobre 2020[66], à l'encontre duquel Google n'a pas introduit de pourvoi, la Cour d'appel de Paris a confirmé la décision de l'Autorité de la

[64] ADLC, Communiqué de presse, Rémunération des droits voisins: l'Autorité sanctionne Google à hauteur de 500 millions d'euros pour le non-respect de plusieurs injonctions, 13 juillet 2021.

[65] *Ibid*.

[66] CA Paris, 8 octobre 2020, n° 20/08071. Les requérantes étaient GOOGLE LLC (États-Unis), GOOGLE Ireland Limited (Irlande) et GOOGLE France SARL.

concurrence en apportant une précision sur l'injonction n°5, laquelle ne devait pas faire „obstacle aux améliorations et innovations des services offerts par les sociétés Google LLC, Google Ireland Ltd et Google France, sous réserve qu'elles n'entraînent, directement ou indirectement, aucune conséquence préjudiciable aux intérêts des titulaires de droits voisins concernés par les négociations prévues par les articles 1 et 2 de la présente décision"[67]. Le 12 juillet 2021, l'Autorité de la concurrence a sanctionné Google par une amende de 500 millions d'euros tout en prononçant une astreinte[68]. La décision de l'Autorité a fait l'objet d'un recours introduit devant la Cour d'appel de Paris. Finalement, le 21 juin 2021, l'Autorité a adopté une décision par laquelle elle a acceptés les engagements des sociétés Alphabet Inc, Google LLC, Google Ireland Ltd et Google France et clôt les procédures au fond ouvertes en novembre 2019 par le SEPM, l'APIG et l'AFP, qui dénonçaient des pratiques mises en œuvre par Google[69].

7.4. Google (Amadeus). En janvier 2018, Google a suspendu les comptes Google Ads de la société Amadeus. On rappelle que l'ouverture d'un compte Google Ads est nécessaire pour que des annonces publicitaires soient diffusées par Google dans les résultats des recherches par mots-clés. Google a reproché à Amadeus des „déclarations trompeuses" et „des cas graves ou récurrents de non-respect de nos règles en matière de publicité" alors que les campagnes menées par Amadeus avaient été réalisées en coopération avec les équipes commerciales de Google, dans le cadre d'un partenariat spécifique proposé par Google. Amadeus a créé de nouveaux comptes Google Ads que Google a suspendus en alléguant un „contournement des systèmes". En mars 2018, si les comptes ont été réactivés, la plupart des annonces d'Amadeus ont été refusées en raison de „vente d'articles gratuits". Amadeus a saisi l'Autorité de la concurrence[70].

Après avoir constaté la position dominante de Google puisque 90% des recherches effectuées en ligne passent par son moteur de recherche, l'Autorité de concurrence souligne l'existence de barrières à l'entrée sur le marché des recherches effectuées en ligne. En effet, des investissements conséquents sont requis pour développer un algorithme aussi performant que Google qui a accumulé de surcroît un nombre considérable de données. Pour l'Autorité, du fait de leur grand nombre et de l'absence d'alternatives, les annonceurs ne disposent pas d'un pouvoir de négociation qui pourrait contrebalancer le poids de Google. Il ressort des faits

[67] *Ibid.*

[68] ADLC, Décision 21-D-17 du 12 juillet 2021 relative au respect des injonctions prononcées à l'encontre de Google dans la décision n° 20-MC-01 du 9 avril 2020.

[69] ADLC, Droits voisins: l'Autorité accepte les engagements de Google, Communiqué de presse, 21 juin 2022.

[70] ADLC, L'Autorité de la concurrence ordonne des mesures d'urgence à l'encontre de Google, Communiqué de presse, 31 janvier 2019.

d'espèce que sans le moteur de recherche Google, l'activité d'Amadeus serait quasiment nulle.

En 2019, l'Autorité a adopté des mesures conservatoires en estimant que les pratiques de Google sont susceptibles de caractériser une rupture brutale des relations commerciales dans des conditions non objectives, non transparentes et discriminatoires[71]. En effet, Google a suspendu les comptes d'Amadeus sans avertissement et sans expliciter les manquements reprochés alors que les services commerciaux de Google avaient participé à l'élaboration des campagnes publicitaires, tandis que d'autres annonceurs ont pu continuer à pratiquer le même type d'annonces. Google a attaqué devant le Conseil d'État la décision de l'Autorité au motif que celle-ci avait publié sur son site internet la version „non confidentielle" de sa décision sans protéger les éléments couverts par le secret des affaires. Dans un arrêt en date du 20 mars 2020[72], le Conseil d'État a renvoyé l'affaire au Tribunal des conflits qui a estimé que la juridiction judiciaire était compétente, dans le conflit opposant Google et l'Autorité de la concurrence pour connaître du traitement des secrets d'affaires au stade de la décision et il a renvoyé l'affaire devant la Cour d'appel de Paris[73]. Celle-ci a fait droit à la demande de Google de retirer la décision publiée sur le site de l'Autorité et de republier une décision dans une version non confidentielle expurgée des éléments couverts par le secret des affaires[74].

Sur le fond, l'Autorité de la concurrence a prononcé une série de mesures d'urgence visant à remédier à la situation critique dans laquelle s'était retrouvée la société Amadeus en perdant 90% de son chiffre d'affaires, risquant ce faisant de se retirer du marché. Aussi le préjudice grave et immédiat a été caractérisé, venant s'ajouter au potentiellement anticoncurrentiel des pratiques de Google. Quatre mesures ont été enjointes à Google. L'Autorité les résume ainsi:

> *„- clarifier les Règles Google Ads applicables aux services payants de renseignements par voie électronique afin de les rendre plus précises et intelligibles;*
>
> *– revoir la procédure de suspension de compte des annonceurs actifs dans le secteur des services de renseignements par voie électronique, en prévoyant un avertissement formel et un préavis suffisant pour permettre aux annonceurs, sauf situation grave, de justifier le manquement reproché, d'y remédier, ou de demander des explications;*

[71] Décision 19-MC-01 du 31 janvier 2019 relative à une demande de mesures conservatoires de la société Amadeus.

[72] CE, 20 mars 2020, N° 429279.

[73] TC, 5 octobre 2020, N° 4193.

[74] CA Paris, 16 juin 2022, 20/14545.

– *réaliser une revue individuelle de la conformité des campagnes proposées par les comptes non suspendus d'Amadeus aux règles clarifiées et, si cette revue révèle que ces annonces sont effectivement conformes, autoriser Amadeus à diffuser ses annonces publicitaires dans des conditions non-discriminatoires;*
– *organiser une formation de son personnel commercial au contenu des Règles Google Ads clarifiées afin que celui-ci puisse alerter les annonceurs sur les cas de non-conformité*"[75].

L'Autorité souligne que si Google doit demeurer „libre de déterminer sa politique de contenus", celle-ci doit „être suffisamment intelligible pour les acteurs économiques et s'appliquer dans des conditions objectives, transparentes et non-discriminatoires, afin que tous les annonceurs d"un même secteur soient traités sur un pied d'égalité"[76]. La Cour d'appel de Paris doit se prononcer à présent sur l'affaire au fond.

7.5. Meta. L'Autorité de la concurrence a été saisie en 2019 par la société Criteo – société française de publicité en ligne – d'une plainte à l'encontre de Meta à propos de pratiques de la seconde société susceptibles d'affecter les conditions de la concurrence, d'une part entre les différents prestataires de service d'intermédiation publicitaires, et d'autre part, entre la plaignante et Meta[77]. Les sociétés du groupe Meta (Meta Platforms Inc., Meta Platforms Ireland Ltd., et Facebook France) ont proposé des engagements en juin 2021. L'Autorité de la concurrence les a soumis à un test de marché et, après avoir demandé des modifications substantielles, a accepté et rendu obligatoires les engagements proposés.

La plaignante – Criteo – propose un service d'intermédiation publicitaire par lequel elle permet aux annonceurs, grâce à la technique du reciblage, de placer leurs annonces sur des différents inventaires, y compris sur des plateformes comme Facebook ou Instagram. Meta tire quant à elle ses revenus en grande partie de la vente de son inventaire publicitaire propriétaire aux annonceurs et, de façon plus accessoire, de la vente des inventaires d'éditeurs tiers utilisant le réseau publicitaire pour les éditeurs (Ad Network) qui est le service Meta Audience Network (MAN). Comme l'Autorité de la concurrence le constate, „Meta met à disposition des annonceurs son propre inventaire publicitaire (Facebook, Instagram, Messenger) et celui d'éditeurs utilisant MAN, un système d'enchères, une plateforme d'achat et de pilotage des campagnes, et des capacités

[75] ADLC, L'Autorité de la concurrence ordonne des mesures d'urgence à l'encontre de Google, Communiqué de presse, 31 janvier 2019.
[76] *Ibid*.
[77] ADLC, Décision 22-D-12 DU 16 juin 2022 relative à des pratiques mises en œuvre dans le secteur de la publicité sur internet.

d'exploitation de données pour le ciblage et la mesure des performances de campagnes"[78]. De 2016 à 2018, la société Criteo a eu recours aux interfaces de programmation d'application spécifiques („application programming interface"). Meta a retiré à Criteo non seulement la mise à disposition de ces interfaces en 2018, mais aussi son statut de partenaire „Facebook Marketing Partners" qui est un gage de réputation pour les clients.

L'Autorité de la concurrence a constaté que Meta, avec 50% des parts de marché en 2019, était en position dominante sur le marché français de la publicité en ligne non liée aux recherches. L'abus a été caractérisé sur trois points. Premièrement, „les conditions dans lesquelles Criteo a été privée, en juillet 2018, de l'accès à l'ancien programme de partenariat de Meta, dénommé „Facebook Marketing Partner", se caractérisaient par un manque d'objectivité, de transparence, de prévisibilité et de stabilité des critères d'accès à ce programme, et par des différences de traitement dans leur mise en œuvre"[79]. Deuxièmement, des comportements de Meta s'apparentent selon l'Autorité à des pratiques de dénigrement au détriment de Criteo contribuant à empêcher celle-ci d'accéder au programme „Facebook Marketing Partner". Troisièmement, le retrait d'accès à une „application programming interface" („User Level Bidding") à Criteo a révélé un défaut de transparence et d'objectivité et un risque de discrimination dans les critères d'accès à ces „application programming interfaces" de la part de Meta dès lors que celles-ci sont mises à disposition d'un nombre restreint d'entreprises dans le cadre d'une version d'essai. Pour l'Autorité, ces comportements „étaient susceptibles, d'une part, de distordre la concurrence entre prestataires de services de publicité en ligne cherchant à placer des annonces sur l'inventaire de Meta, et, d'autre part, dans un contexte marqué par le renforcement de l'intégration verticale de Meta, d'avoir des effets d'éviction, en affaiblissant la pression concurrentielle exercée par des intermédiaires tels que Criteo, dont le service de reciblage est concurrent de celui développé par Meta"[80].

Les engagements de Meta sont de trois types. En premier lieu, Meta propose l'accès à son programme de partenariat MBP aux entreprises actives dans le domaine des services publicitaires (spécialité „Advertising Technology" dit „AdTech"). En deuxième lieu, elle s'engage à dispenser à ses équipes commerciales une formation de conformité portant sur le contenu des communications destinées aux clients annonceurs. En troisième lieu, elle entend à développer une nouvelle „application

[78] ADLC, Meta prend des engagements devant l'Autorité de la concurrence, Communiqué de presse, 16 juin 2022.
[79] *Ibid*.
[80] *Ibid*.

programming interface“ à destination des prestataires de services publicitaires („Fonctionnalité de Recommandation“).

La décision de l'Autorité n'a pas été contestée en justice.

7.6. Liens entre la pratique de l'Autorité et la souveraineté numérique. Il est difficile de conclure à la lecture de ces quelques décisions à la contribution „à une économie numérique européenne plus dynamique et à une plus grande souveraineté numérique européenne“ comme le demande le questionnaire (7 b).

L'Autorité de la concurrence utilise le droit des pratiques anticoncurrentielles essentiellement pour rétablir une égalité entre le géant numérique et les cocontractants français. Il ne se dessine pas à ce stade une volonté d'asseoir une quelconque souveraineté numérique européenne, même si l'Autorité permet de protéger les opérateurs nationaux en l'occurrence. En revanche, on peut considérer que les mesures adoptées contribuent à leur manière à favoriser une résistance numérique française. Les décisions de l'Autorité permettent en effet aux entreprises françaises de ne plus se soumettre totalement aux géants américains. Cependant, la question de l'efficacité des mesures adoptées par l'Autorité de la concurrence se pose. Certes, le montant des amendes reste d'une ampleur encore limitée, eu égard à la puissance des plateformes numériques d'autant que, par exemple dans le cas d'Apple, le juge peut en réduire le montant. Toutefois, on constate que les décisions de l'Autorité donnent lieu soit à une procédure négociée soit sont contestées devant le juge national ce qui montre une certaine méfiance des acteurs du numérique. On notera que le 13 juillet 2022, l'Autorité de la concurrence a lancé une consultation publique dans le cadre de son enquête sectorielle sur le cloud qui s'inscrit dans la stratégie nationale pour le Cloud que le gouvernement a lancé le 17 mai 2021 dans l'objectif de garantir la souveraineté numérique[81].

Question 8[82]

La question 8 s'avère particulièrement large et appelle de notre part une réflexion générale sur le droit des aides d'État. Si les règles relatives aux aides d'État sont déterminées par le cadre des articles 107 et 109 TFUE, il est désormais acquis que leur mise en œuvre relève d'une politique des aides d'État qu'il appartient à la Commission de mener. À cet effet, la Commission décide de la compatibilité des mesures d'aides en application des articles 107, paragraphes 2 et 3, TFUE, et 106, paragraphe 2, TFUE. La politique de la Commission se concrétise par sa pratique décisionnelle et par la *soft law* qu'elle édicte. Il est indéniable que la

[81] ADLC, L'Autorité de la concurrence a une consultation publique dans le cadre de son enquête sectorielle sur l'informatique en nuage (« cloud »), Communiqué de presse, 13 juillet 2022.

[82] Question traitée par Francesco **Martucci**, Professeur à l'Université Paris Panthéon Assas.

politique des aides d'État constitue un instrument au service de la réalisation des objectifs de l'Union. Cela explique par exemple que la Commission oriente les règles des aides d'État dans un sens favorable à la protection de l'environnement, ce qui s'explique non seulement parce que celle-ci est un objectif essentiel de l'Union, mais aussi parce que les exigences de la protection de l'environnement doivent être intégrées dans la définition et la mise en œuvre des politiques et actions de l'Union, conformément à la clause d'intégration de l'article 11 TFUE.

En revanche, pour la politique industrielle, la réponse n'est pas si aisée que cela. Pour certains auteurs, derrière les décisions en droit de la concurrence, il y aurait de la part de la Commission „la conduite secrète d'une politique industrielle sous le manteau"[83].

Une difficulté d'ordre constitutionnel existe en ce que l'industrie relève des compétences d'appui, de complément ou de coordination en vertu de l'article 6 b) TFUE. Le titre XVII de la troisième partie du traité, intitulé Industrie, contient l'article 173 TFUE qui dispose:

„*1. L'Union et les États membres veillent à ce que les conditions nécessaires à la compétitivité de l'industrie de l'Union soient assurées. À cette fin, conformément à un système de marchés ouverts et concurrentiels, leur action vise à: – accélérer l'adaptation de l'industrie aux changements structurels; – encourager un environnement favorable à l'initiative et au développement des entreprises de l'ensemble de l'Union, et notamment des petites et moyennes entreprises; – encourager un environnement favorable à la coopération entre entreprises; – favoriser une meilleure exploitation du potentiel industriel des politiques d'innovation, de recherche et de développement technologique*".

D'un côté, l'Union européenne est censée respecter le principe d'attribution des compétences, de sorte qu'un empiètement sur une compétence étatique n'est pas nécessairement opportun au moment où la théorie de l'*ultra vires* progresse dans les prétoires des cours constitutionnelles nationales. De l'autre côté, l'article 173, paragraphe 3, TFUE prévoit que „[l]'Union contribue à la réalisation des objectifs visés au paragraphe 1 au travers des politiques et actions qu'elle mène au titre d'autres dispositions des traités". Cela permet donc à la Commission de mettre en œuvre le droit des aides d'État pour atteindre un objectif, fondé sur un „système de marchés ouverts et concurrentiels" et visant à adapter l'industrie, ce qui peut passer par une politique des aides d'État orientée. Le problème est alors celui de l'équilibre institutionnel car il ne faudrait pas qu'à son tour, la Commission empiète sur les prérogatives du législateur de l'Union. Il serait peut-être judicieux que celui-

[83] V. D. Geradin, N. Petit, "La politique industrielle sous les tirs croisés de la mondialisation et du droit communautaire de la concurrence", *in* A. Mourre (dir.), *Mondialisation, politique industrielle et droit de la concurrence*, Bruxelles, Bruylant, 2006, p. 35.

ci fasse usage de son pouvoir législatif consacré par l'article 173, paragraphe 3, TFUE. On peut se demander dans quelle mesure l'article 114 TFUE pourrait être mobilisé. En tout état de cause, une impulsion donnée par le Conseil européen, à la manière de ce qu'il a fait pour la crise de la COVID-19, serait bienvenue.

En droit des aides d'État, l'article 107, paragraphe 3, c), TFUE semble constituer la base juridique naturelle d'une telle action de la Commission européenne. Cependant, désormais, l'article 107, paragraphe 3, b), TFUE retient l'attention avec les „aides destinées à promouvoir la réalisation d'un projet important d'intérêt européen commun". C'est à notre sens au moyen des PIIEC que la Commission peut agir de concert avec les États membres pour promouvoir une politique industrielle européenne.

La crise de la COVID-19 a entraîné un changement de paradigme en droit de l'Union. Le droit des aides d'État n'échappe pas à ce constat. La réactivité avec laquelle la Commission européenne a adapté les règles relatives aux aides d'État en fixant un cadre de flexibilité et a adopté les décisions en application de ce cadre n'a pas manqué d'impressionner. Les projets notifiés par la Commission ont été déclarés compatibles tandis que le système d'exemption a pleinement joué. Longtemps, la politique des aides d'État a eu une lecture néolibérale de l'économie dans lequel la vie et la mort des entreprises suivaient le cours naturel du libre jeu du marché. Aussi, depuis les premières lignes directrices de 1994, la politique des aides d'État était réfractaire à l'idée de soutenir une entreprise en difficultés. La crise financière a ouvert la voie avec une autonomisation du cadre relatif aux banques en difficultés. La communication bancaire assouplit en effet les exigences pour de claires raisons systémiques. Cependant, cela ne signifie pas que toute aide en difficulté doit être aidée.

Avec la crise de la COVID-19, le droit des aides d'État a été assoupli pour permettre de soutenir les entreprises. Il est donc devenu aussi un droit du soutien public à l'économie ce qui se comprend dans le contexte de l'UEM. En effet, les finances européennes sont d'un volume trop faible pour permettre une politique publique européenne de financement de l'économie. Limité par la décision „ressources propres", le budget de l'Union est d'un volume trop faible. C'est pourquoi la Commission a clairement considéré qu'il fallait „décentraliser" à l'échelle nationale le financement public de l'économie en faisant jouer la clause de suspension du Pacte de stabilité et de croissance et en flexibilisant le droit des aides d'État. Est-ce que cette orientation de la politique des aides d'État est conjoncturelle? Rien ne s'oppose dans le traité à ce que cette approche devienne structurelle. Le soutien à un secteur stratégique peut se comprendre pleinement. Là encore, l'article 107, paragraphe 3, b), TFUE et les PIIEC peuvent pleinement jouer un rôle.

Question 9[84]

Les juridictions françaises n'ont jamais demandé à la Commission de leur fournir des informations en sa possession ou un avis sur des questions relatives à l'application des règles en matière d'aides d'État, en application de l'article 29, paragraphe 1, du règlement (UE) 2015/1589. Cette disposition n'a pas été appliquée en France.

En revanche, les juridictions françaises assument pleinement leur fonction de juge de la légalité des aides d'État. De jurisprudence constante, elles respectent le monopole de la Commission européenne pour apprécier la compatibilité des aides d'État. Selon la formule consacrée par le Conseil d'État, „s'il ressortit à la compétence exclusive de la Commission européenne de décider, sous le contrôle de la Cour de justice [l'Union européenne], si une aide de la nature de celles mentionnées à l'article [107] du traité est ou non, compte tenu des dérogations prévues par ce traité, compatible avec le marché [intérieur], il incombe, en revanche, aux juridictions nationales de sanctionner, le cas échéant, l'invalidité de dispositions de droit national qui auraient institué ou modifié une telle aide en méconnaissance de l'obligation, qu'impose aux États membres le paragraphe 3 de l'article [108] du traité, d'en notifier à la Commission, préalablement à toute mise à exécution, le projet; que l'exercice de ce contrôle implique, notamment, de rechercher si les dispositions dont l'application est contestée instituent un régime d'aide"[85].

En conséquence, pour exercer leur office de juge de la légalité, les juridictions administratives apprécient si la mesure en cause est constitutive d'une aide d'État. Elles appliquent dès lors l'article 107, paragraphe 1, TFUE en vue de déterminer l'existence d'une aide d'État. À ce titre, ont été posées des questions préjudicielles à la Cour de justice. Le Conseil d'État a ainsi opéré quelques renvois dont l'objet a été d'interpréter la notion d'aide d'État[86]. Dans une majorité d'affaires, il applique l'article 107, paragraphe 1, TFUE sans recourir à l'article 267 TFUE que ce soit pour écarter la qualification d'aide d'État ou, au contraire, pour la retenir. De façon résiduelle, la Cour de cassation a également posé une question préjudicielle dans une affaire concernant un contentieux fiscal[87]. On relève de rares questions préjudicielles posées par les juridictions du

[84] Question traitée par Francesco **Martucci**, Professeur à l'Université Paris Panthéon Assas.

[85] CE, 27 juillet 2009, *Société Boucherie du marché*, n° 312098, Publié au recueil Lebon.

[86] Sur la notion de "ressources d'État", CJUE, 21 octobre 2020, *Eco TLC*, C-556/19, ECLI:EU:C:2020:844 ; CJUE, 19 décembre 2013, *Association Vent De Colère! Fédération nationale*, C-262/12, ECLI:EU:C:2013:851 ; CJUE, 30 mai 2013, *Doux Élevage SNC*, C-677/11, ECLI:EU:C:2013:348. Sur la notion d'avantage, CJUE, 17 septembre 2020, *Ministre de l'Agriculture et de l'Alimentation*, C-212/19, ECLI:EU:C:2020:726.

[87] CJCE, 7 septembre 2006, *Laboratoires Boiron SA*, C-526/04, ECLI:EU:C:2006:528.

fond[88]. Le Conseil d'État a également renvoyé à la Cour de justice des questions portant sur l'interprétation des dispositions du droit de l'Union en matière de récupération des aides illégales concernant tant l'article 108, paragraphe 3, TFUE et le règlement de procédure[89] que les décisions de la Commission[90].

Question 10[91]

Nous avons effectué une recherche détaillée, sur la période 2014-2022, couvrant l'ensemble des décisions et avis publiés par l'Autorité de la concurrence française, intéressant les questions d'entente, d'abus de position dominante et de concentration. Il apparaît que les instruments de défense commerciale de l'Union, et plus largement les mesures de politique commerciale, ne sont jamais en cause ou pris en considération, y compris dans plusieurs cas où étaient questionnée les systèmes de distribution de produits importés sur le marché français.

Cette analyse est par ailleurs confirmée par Damien Raymond dans sa thèse[92] pour toute la période antérieure. En d'autres termes, à notre connaissance, les autorités françaises (autorité administrative indépendance comme l'autorité de la concurrence ou juridictions), n'ont en l'état jamais eu à connaitre d'affaires ou de contentieux où étaient en cause, de façon directe ou indirecte, les rapports entre le droit de la concurrence et les instruments antidumping comme cela a par exemple été le cas dans le cadre du contentieux *Extramet* porté devant la CJCE[93].

Ce constat a par ailleurs été confirmé à l'occasion d'échanges et d'entretiens menés avec des spécialistes français du droit de la concurrence, qu'ils soient praticiens ou universitaires. Il est au demeurant logique. En premier lieu, les mécanismes de défense commerciale existant ne couvrent que les échanges de marchandises et n'intéressent en conséquence qu'une portion limitée des affaires de concurrence. En second lieu, les autorités françaises s'intéressent essentiellement à la structuration du marché national et, de façon très accessoire, à l'origine des produits importés ou distribués sur les marchés français.

Il est du reste peu évident que la mise en place de nouveaux instruments géopolitiques puisse avoir des effets sur la pratique de l'autorité de la concurrence

[88] Pour une cour administrative d'appel, CJUE, 20 mai 2010, *Scott SA*, C-210/09, ECLI:EU:C:2010:294 ; CJCE, Gde ch.22 décembre 2008, *Société Régie Networks*, C-333/07, ECLI:EU:C:2008:764. Pour le tribunal de commerce de Paris, CJCE, 11 juillet 1996, *SFEI e. a.*, C-39/94, ECLI:EU:C:1996:285.

[89] CJUE, 11 mars 2010, *Centre d'exportation du livre français (CELF)*, C-1/09, ECLI:EU:C:2010:136 ; CJUE, Gde ch., 12 février 2008, *Centre d'exportation du livre français (CELF)*, C-199/06, ECLI:EU:C:2008:79.

[90] CJUE, 13 juin 2019, *Copebi SCA*, C-505/18, ECLI:EU:C:2019:500.

[91] Question traitée par Alan **Hervé**, Professeur à l'Université Rennes I.

[92] D. Raymond, *Action antidumping et droit de la concurrence dans l'Union européenne*, Bruxelles, Larcier, Collection: "Droit de l'Union", 2015.

[93] CJCE, 16 mai 1991, *Extramet*, C-358/89, ECLI:EU:C:1991:214.

ou le contentieux national. Rappelons que la possibilité pour les autorités françaises de restreindre ou interdire des investissements étrangers a largement précédé l'adoption du règlement de filtrage[94]. Jusqu'à présent, ce cadre réglementaire n'a pas eu d'effet sur l'application nationale des règles de concurrence. Il devrait en aller de même du nouvel instrument de l'Union sur la réciprocité dans l'accès à la commande publique[95], les règles en matière de commande publique obéissant à une logique spécifique et excluant l'intervention du droit de la concurrence.

Il pourrait en aller différemment d'une éventuelle adoption de la proposition de règlement sur les subventions étrangères génératrices de distorsions actuellement en discussion[96], en ce qu'elle envisage la possibilité d'adopter à l'encontre des entreprises concernées des mesures correctrices et réparatrices (cession de certains actifs ou l'interdiction d'un certain comportement sur le marché) susceptibles d'affecter leurs comportement sur le marché unique, et par extension au sein des marchés nationaux.

Les effets précis de cette législation pour les autorités nationales, et notamment françaises, restent cependant suspendus aux pouvoirs qui leur seront éventuellement reconnus au stade de sa mise en œuvre. Pour l'heure, tel n'est pas le cas dans le texte de la proposition initiale de la Commission, qui prévoit qu'elle sera la seule autorité en charge de l'application du règlement. Les États membres – et en conséquence leurs autorités de concurrence – sont simplement invités par cette proposition à fournir les renseignements nécessaires à la Commission dans le cadre de son pouvoir d'enquête, sans même que soit mentionné le rôle qu'il pourrait jouer en matière de saisine de la Commission. Le règlement pourrait ainsi mettre davantage en avant le rôle des autorités nationales et en particulier des autorités chargées d'assurer la mise en œuvre du droit de la concurrence dans sa future application, en particulier au stade de la procédure d'enquête et dans la prise en considération des effets nationaux ou locaux de certaines subventions étrangères.

Question 11[97]

En France, le contrôle des investissements étrangers préexiste très largement à l'introduction, au niveau européen, d'un mécanisme de coopération entre États membre sur le filtrage des investissements directs étrangers („IDE") qui a été introduit par le règlement (UE) 2019/452 du 19 mars 2019, directement

[94] V. notamment le décret n° 2014-479 du 14 mai 2014 relatif aux investissements étrangers soumis à autorisation préalable, qui modifiait lui-même un cadre réglementaire déjà ancien.

[95] Règlement (UE) 2022/1031 du Parlement européen et du Conseil du 23 juin 2022, *JOUE* L 173 du 30 juin 2022, p. 1.

[96] COM(2021) 223 final, 5 mai 2021.

[97] Question traitée par Claire **Vanini**, avocate associée, Cabinet CMS Francis Lefebvre.

applicable depuis le 11 octobre 2020[98]. Le dispositif français présente un champ d'application et un cadre procédural qui ont été substantiellement étendus et enrichis ces dernières années, incorporant directement le mécanisme de coopération prévu par le Règlement, sans qu'il n'ait été nécessaire de prévoir de mesures de transposition substantielles. Néanmoins, le dispositif français, dont le renforcement avait démarré avant la crise de la COVID mais que celle-ci a conduit à élargir de nouveau doit aujourd'hui relever un certain nombre de défis dont les principaux restent la prévisibilité et la proportionnalité.

11.1. Champ d'application et procédure de contrôle dans le dispositif de filtrage des investissements

En France, le contrôle des investissements étrangers qui existait de longue date avait plutôt eu tendance depuis les années 1990, et ce afin de ne pas mettre la France en situation de manquement aux libertés d'établissement et de circulation des capitaux consacrées par le TFUE, à être de plus en plus restreint. C'est la loi du 9 décembre 2004 qui avait réformé le régime et l'avait été codifié aux articles L. 151-3 et suivants du code monétaire et financier („CMF"). Initialement limité aux activités régaliennes mettant directement en cause l'ordre public ou la sécurité publique, son champ d'application n'a cessé d'être étendu, d'abord en 2014 avec le décret dit „Montebourg"[99], puis en 2019 dans la foulée de la loi PACTE[100] et enfin, en 2020-2021, pour répondre aux risques de prise de contrôle d'actifs stratégiques dans un contexte économique fragilisé par la crise de la COVID[101].

Aujourd'hui, l'état du dispositif est le suivant: sont soumises à autorisation préalable du Ministre en charge de l'Économie, toute opération qualifiée d'investissement (i) ; réalisée par un investisseur étranger (ii) ; dans une activité dite „sensible" (iii).

La notion d'investissement s'applique à toute opération visant tant la prise de contrôle[102] d'une entité juridique que l'acquisition de tout ou partie d'une branche d'activité située en France. Sur ce point, il convient d'être particulièrement vigilant car le transfert de propriété d'actifs immatériels tels une autorisation de mise sur le marché de médicaments suffit à entrer dans le champ d'application du contrôle. Par ailleurs, pour les investisseurs non ressortissants de l'Union européenne,

[98] Règlement (UE) 2019/452 du Parlement européen et du Conseil du 19 mars 2019, établissant un cadre pour le filtrage des investissements directs étrangers dans l'Union, *JOUE* L 79, du 21 mars 2019, p. 1.

[99] Décret n° 2014-479 du 14 mai 2014 relatif aux investissements étrangers soumis à autorisation préalable

[100] Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises

[101] Décret n° 2020-892 du 22 juillet 2020 relatif à l›abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé.

[102] Au sens de l'article L.223-3 du Code de Commerce, cette notion étant plus restreinte que celle ce "contrôle" applicable en matière de concentrations

l'autorisation préalable du Ministre est requise non pas seulement en cas de prise de contrôle d'une société mais dès le franchissement, direct ou indirect, du seuil de détention de 25% des actions ou des droits de vote (ce seuil ayant temporairement été ramené à 10% pour les sociétés cotées en 2020 du fait de la crise du COVID mais depuis la mesure a été prorogée et les pouvoirs publics envisagent de le maintenir durablement à ce niveau).

La notion d'investisseur étranger est très large puisqu'elle vise tous les ressortissants étrangers qu'ils soient établis ou non dans l'Union européenne et dépasse donc très largement le champ du règlement qui ne s'applique qu'aux investisseurs de pays tiers. Par ailleurs, le régime s'applique également aux personnes physiques françaises dès lors qu'elles n'ont pas leur résidence fiscale en France. Enfin, pour les groupes de société, il suffit qu'une seule entité de la chaîne de contrôle de la société acquéreuse soit établie hors de France pour faire tomber l'investisseur dans la qualification d'investisseur étranger.

Enfin, la notion d'activité sensible n'a cessé de s'entendre: initialement limitée aux activités mettant directement en jeu la défense, ou la sécurité et l'ordre public, elle est aujourd'hui très large et relève en grande partie d'une appréciation au cas par cas. On distingue deux grandes catégories d'activités dites „sensibles": les activités sensibles par nature (telles par exemple, la production d'armes, les biens à double-usage, la cryptologie, la sécurité des systèmes d'information, les jeux, le domaine de la cybersécurité, de la robotique, des semi-conducteurs, du stockage d'énergie, etc.) et les activités qui nécessitent une analyse au cas par cas en tant qu'elles seraient susceptibles de mettre en cause le fonctionnement des services de transport, d'eau, d'énergie ou la santé publique ou encore la sécurité alimentaire. Les critères appliqués par la Direction Générale du Trésor („DG Trésor") pour déterminer les activités sensibles sont aujourd'hui en phase avec ceux proposés par le règlement. Toutefois, dans la mesure où le champ d'application du contrôle français vise aussi les investissements de ressortissants de l'Union, on peut s'interroger sur la pertinence d'un traitement identique pour les deux catégories d'investisseurs au regard notamment de la liberté d'établissement garantie par le TFUE.

S'agissant de la procédure de contrôle, celle-ci s'organise autour de deux phases: une revue dite de phase 1, dans un délai de 30 jours ouvrés, dans le cadre de laquelle les opérations les plus simples et ne nécessitant pas d'engagements peuvent être autorisées (le défaut de réponse dans ce délai valant refus implicite) ; une revue dite de phase 2, qui ouvre un délai supplémentaire de 45 jours ouvrés pour procéder à un examen approfondi et, le cas échéant, imposer des engagements à l'acquéreur tels que le maintien des actifs et du savoir-faire ou de la propriété intellectuelle en

France, la poursuite des contrats en cours, des engagements de stabilité tarifaire ou encore des engagements plus structurels portant sur la gouvernance.

11.2. La prise en compte du règlement

C'est dans le cadre de ces délais que s'intègre le mécanisme de coopération mis en place au niveau de l'Union par le règlement. Rappelons que le Règlement prévoit que, dès qu'une opération est notifiée dans un État membre, celui-ci doit automatiquement en informer la Commission et les autres États qui ont un premier délai de 15 jours calendaires pour émettre des observations, ce délai pouvant être étendu à 35 jours calendaires dans l'hypothèse où la Commission et/ou un ou plusieurs États membres considèrent que l'investissement concerné pourrait porter atteinte à l'ordre public ou la sécurité publique.

En France, aucune mesure de réception spécifique au règlement n'a été jugée nécessaire. Il a seulement été imposé, par l'arrêté du 10 septembre 2021 qui a modifié la liste des pièces à fournir au dossier de demande d'autorisation[103], que l'acquéreur qui notifie son opération remplisse lui-même le formulaire d'information standardisé au niveau de l'Union comportant les informations qui seront transmises par la France dans le cadre du mécanisme de coopération.

En pratique, ce formulaire étant joint au dossier de demande d'autorisation, les services de la DG Trésor le notifient généralement dans la foulée à la Commission et aux États membres ce qui permet d'obtenir leurs commentaires dans le délai d'examen national de 30 jours ouvrés ou, en cas de difficultés dans le délai supplémentaire de 45 jours ouvrés.

Dans le cadre d'opérations mondiales concernant des filiales présentes dans plusieurs États membres ayant un dispositif de filtrage, ce mécanisme est une source d'information pour les différents États membres et leur permet également de détecter des opérations, notifiées dans un État membre, qui ne l'auraient pas été dans un autre alors qu'elles auraient dû l'être. Le mécanisme de coopération impose donc aux acquéreurs de procéder à une revue de la nécessité de notifier leurs opérations de manière cohérente et systématique dans tous les États membres disposant de mécanismes de filtrage au risque de déclencher, au niveau national des procédures de sanctions et des injonctions de régularisation.

En France, l'entrée en application du règlement qui impose une certaine transparence des procédures ainsi que des délais et voies de recours a eu pour effet de mieux encadrer les procédures en prévoyant de manière détaillée le contenu des demandes d'autorisation et d'élever le niveau d'exigences s'imposant aux

[103] Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France, NOR: ECOT2122313A

services du Ministre dans la préparation des décisions qui sont mieux motivées et font dorénavant expressément mention des délais et voies de recours, même si le contentieux reste extrêmement rare.

11.3. Les principaux défis à relever

L'un des principaux défis à relever est celui d'assurer au régime une certaine prévisibilité surtout dans le cadre d'opérations souvent de dimension mondiale et impliquant plusieurs autres mécanismes de filtrage. La DG Trésor a récemment publié des lignes directrices qui marquent indéniablement un grand progrès dans la transparence du régime. Toutefois, la marge de manœuvre laissée dans l'appréciation du caractère „sensible" de telle ou telle activité peut parfois créer une certaine insécurité juridique comparé à des États comme l'Allemagne où la liste des activités sensibles est beaucoup plus détaillée et la marge de manœuvre des autorités compétentes beaucoup plus limitée.

De la même manière, la proportionnalité des mesures restrictives imposées à une décision d'autorisation peut également parfois être questionnée surtout lorsqu'elles ont vocation à s'appliquer à des investisseurs de l'Union, de surcroît dans des secteurs d'activité qui font déjà l'objet d'une harmonisation au niveau de l'Union. Par exemple en matière de produits pharmaceutiques, l'on peut s'interroger sur la possibilité pour une autorité nationale d'imposer des conditions supplémentaires à un transfert d'AMM à un opérateur de l'Union alors que ces mêmes conditions ne sont pas prévues par les directives sectorielles qui réalisent une harmonisation exhaustive en la matière.

Enfin, même si les refus pure et simple d'autorisation sont extrêmement rares, l'effectivité des voies de recours peut parfois poser question dès lors que les opérateurs, pour ne pas retarder les transactions, sont parfois conduits à accepter des conditions sans les contester. En pratique, il n'est pas rare qu'un opérateur qui après avoir mené sa propre analyse renonce purement et simplement à une opération de peur d'avoir à prendre des engagements qui diminueraient alors la valeur de l'opération. D'ailleurs, la meilleure façon pour les pouvoirs publics de ne pas avoir à prendre une décision négative est de faire savoir à l'avance qu'elles ne voient pas d'un bon œil telle ou telle opération, comme cela a été le cas avec le projet de prise de contrôle de Carrefour par la chaîne de supermarchés canadienne Couche-tard. L'on peut d'ailleurs se demander si cette prise de position du Ministre de l'Économie lui-même, de par les effets qu'elle a produits, n'aurait pas pu faire l'objet d'un recours, au titre des actes de droits souples, tel qu'ouvert par la jurisprudence du Conseil d'État dite *Fairvesta*[104].

[104] CE, Ass., 21 mars 2016, *Fairvesta*, n°368082

Question 12[105]

12.1. Préoccupations internes s'agissant des subventions étrangères et appui étatique à la proposition de l'Union européenne

Impulsée par le livre blanc relatif à l'établissement de conditions de concurrence égales pour tous en ce qui concerne les subventions étrangères[106], puis annoncée dans la communication de la Commission relative au réexamen de la politique commerciale commune[107], la proposition formelle de règlement relatif aux subventions étrangères faussant le marché intérieur a été présentée et justifiée pour combler un vide juridique, du fait de l'inexistence d'instruments permettant le respect du droit des aides d'État par entreprises établies dans les États tiers[108]. En octobre 2022, cette proposition, qui a obtenu un accord au niveau du COREPER et qui a fait l'objet d'amendements par le Parlement européen[109], a été adoptée[110].

À l'échelle de la France, cette proposition a toujours été très activement soutenue et n'a pas soulevé de réserves. Le principe même d'une initiative visant à rétablir une loyauté concurrentielle est défendu depuis plusieurs années. À titre d'exemple, le Sénat français, par une résolution européenne du 8 septembre 2017[111] avait déjà souligné la nécessité de modifier le règlement (CE) n° 1/2003 pour permettre à la Commission, à l'instar de ce que prévoit en droit interne l'article L. 464-1 du Code de commerce[112], de prendre des mesures conservatoires et provisoires vis à vis d'entreprises dont le comportement anticoncurrentiel porte une atteinte

[105] Question traitée par Stéphane **de La Rosa**, Professeur à l'Université Paris-Est Créteil, responsable de la branche française de la FIDE.

[106] COM (2020) 253 final, 17 juin 2020.

[107] COM (2021) 66 final, *Réexamen de la politique commerciale*, 18 février 2021.

[108] COM (2021) 223 final du 5 mai 2021.

[109] Amendements du Parlement européen, adoptés le 4 mai 2022, à la proposition de règlement du Parlement européen et du Conseil relatif aux subventions étrangères faussant le marché intérieur (COM(2021)0223 – C9-0167/2021 – 2021/0114(COD)).

[110] Règlement (UE) 2022/2560 du Parlement européen et du Conseil du 14 décembre 2022 relatif aux subventions étrangères faussant le marché intérieur, *JOUE* L 330 du 23 décembre 2022, p. 1

[111] Sénat, Résolution européenne pour une réforme des conditions d›utilisation des mesures conservatoires prévues par le règlement (CE) n° 1/2003 du Conseil relatif à la mise en œuvre des règles de concurrence, 8 septembre 2017, n° 131.

[112] Au terme de l'article L. 464-1 C. Comm: "L›Autorité de la concurrence peut, à la demande du ministre chargé de l›économie, des personnes mentionnées au dernier alinéa de l›article L. 462-1 ou des entreprises ou de sa propre initiative et après avoir entendu les parties en cause et le commissaire du Gouvernement, prendre les mesures conservatoires qui lui sont demandées ou celles qui lui apparaissent nécessaires. Ces mesures ne peuvent intervenir que si la pratique en cause porte une atteinte grave et immédiate à l›économie générale, à celle du secteur intéressé, à l›intérêt des consommateurs ou le cas échéant, à l›entreprise plaignante. Elles peuvent comporter la suspension de la pratique concernée ainsi qu›une injonction aux parties de revenir à l›état antérieur. Elles doivent rester strictement limitées à ce qui est nécessaire pour faire face à l›urgence dans l›attente d›une décision au fond".

grave et immédiate à l'économie en général, à celle d'un secteur concerné ou à des infrastructures critiques.

À la suite du dépôt de la proposition formelle du règlement, le gouvernement français a activement appuyé son adoption, dans le cadre de la présidence française de l'Union (1er semestre 2022). Cet appui politique a été de pair avec la mise en avant de la souveraineté économique comme axe fort de cette séquence politique. L'accord sur le règlement au niveau du Conseil a pu être obtenu durant cette présidence.

Dans le cadre du contrôle de subsidiarité qui repose sur les Parlements nationaux, le Sénat français a adopté un avis politique[113] en décembre 2021, par lequel il appuie fortement la proposition. Le même avis souligne qu'une approche plus extensive de la lutte contre les subventions pourrait être suivie, en faisant évoluer à la marge le contenu du règlement. Parmi celles-ci, il est souligné la possibilité de mandater des autorités nationales pour repérer, conjointement avec la Commission, l'existence de subventions étrangères, la nécessité d'intégrer dans le bilan concurrentiel les objectifs climatiques et la protection des infrastructures essentielles (examiner la réalité de l'effet distorsif de la subvention en pesant les effets négatifs et positifs et en incluant des considérations non strictement concurrentielles), ou encore le fait de réduire les seuils d'engagement de la procédure de notification en présence d'une subvention étrangère attribuée dans le cadre d'un marché public (le seuil de 250 millions – réduit à 200 millions dans les amendements parlementaires – permettant de déclencher l'obligation de notification étant considéré comme trop élevé et beaucoup trop important par rapport aux seuils de procédures formalisées contenues dans les directives 2014/23, 2014/24 et 2014/25)[114].

12.2. Interférence entre le contrôle des subventions étrangères par la Commission et questions relevant de la compétence des États (notamment filtrage IDE)

Le règlement (UE) n° 2019/452 du 19 mars 2019 établissant un cadre pour le filtrage des investissements directs étrangers et le règlement relatif aux subventions étrangères reposent sur des degrés d'harmonisation différents.

[113] Avis d'autant plus notable que seules deux autres chambres parlementaires ont adopté une position en Europe: le Sénat tchèque et le Parlement portugais.

[114] Cette réserve s'explique d'autant plus que la proposition introduit une forme de clause *de minimis* en introduisant un seuil très éloigné du seuil usuel du règlement *de minimis*. En effet, suivant l'article 3 de la proposition sur les subventions étrangères une subvention étrangère est peu susceptible de fausser le marché intérieur si son montant total est inférieur à 5 000 000 € sur une période de trois exercice – il s'agit d'un seuil incomparablement plus élevé que le seuil usuel «*de minimis*» (200 000 € sur une période de trois ans, selon le règlement (UE) n° 1407/2013).

D'un côté, en matière d'investissement, le législateur européen a veillé à préserver la compétence interne en se bornant à instituer un cadre général de filtrage, par les États membres, „des investissements directs étrangers dans l'Union pour des motifs de sécurité ou d'ordre public" et „un dispositif de coopération entre les États membres et entre les États membres et la Commission concernant les investissements directs étrangers susceptibles de porter atteinte à la sécurité ou à l'ordre public"[115]. Il en résulte que les États, au nom de la protection de la sécurité nationale et des intérêts essentiels de la sécurité, conservent une „compétence exclusive"[116] dans l'exercice du filtrage. L'importance du renvoi aux États conduit plusieurs auteurs à considérer que, en dépit de la base juridique que constitue l'article 207 TFUE, le règlement sur le filtrage se limite à coordonner une compétence nationale[117]. En France, le cadre normatif régissant le filtrage des investissements a été sensiblement amplifié par la loi PACTE puis par le décret n° 2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France[118]. Il se caractérise, ainsi que souligné à la question 11, par une importante marge de manœuvre au profit du ministère de l'économie (pouvoir d'injonction, mesures conservatoires, possibilité d'autoriser sous conditions une opération, sanctions).

D'un autre côté, le règlement sur les subventions se caractérise par d'importantes prérogatives conférées à la Commission, qu'il s'agisse de l'évaluation des effets de la subvention, de la décision d'exclure certaines offres dans les marchés publics ou encore du dialogue avec les États tiers concernés. Le règlement penche ainsi plus dans le sens d'une véritable compétence exclusive, cohérente avec la base juridique de l'article 207 TFUE.

L'articulation entre ces deux encadrements normatifs, qui se caractérisent par un renvoi distinct au droit interne, reste à préciser. Par exemple, dans l'hypothèse où une entreprise implantée d'un État tiers aurait reçu des subventions au sens du règlement „subvention" (à savoir une contribution financière qui confère un avantage) et réaliserait une opération d'investissement soumise à autorisation au titre du filtrage. Dans ce cas de figure, deux examens concomitants pourraient

[115] Règlement (UE) 2019/452, précité, art. 1.

[116] *Ibid*.

[117] R. Bismuth, "Reading Between The Lines of the EU Regulation Establishing a Framework for Screening FDI into the Union", *in* J.H.J. Bourgeois, *EU Framework of Foreign Direct Investment Control*, Kluwer Law International, 2020, p. 103; P. Callol, "Protectionist trends in cross-border mergers and acquisitions in Europe: national interest, FDI and other ingredients of the growing regulatory maze", European Competition Law Review, 2021, p. 117; M. Merola, C. Favaretto, "Le contrôle des investissements étrangers en Europe", *Journal de Droit européen*, 2021, p. 162.

[118] Sur le contenu et l'ampleur des dispositifs de filtrage, v. la contribution ci-dessus de Claire Vannini. V. aussi F. Martucci, « Le cadre de filtrage des investissements directs étrangers: la quête d'un équilibre entre marché et intérêts stratégiques dans le système constitutionnellement intégré », *Europe*, 2020, mars n° 3, Étude n°2, pp. 7-12.

avoir lieu: celui de la Commission au titre de l'examen d'office et celui de l'État dans le cadre du filtrage. Or, il n'est pas exclu que les considérations qui sous-tendent le contrôle soient distinctes: d'un côté l'existence d'une distorsion dans le marché intérieur, d'un autre côté le risque d'atteinte à des activités jugées comme étant stratégiques. Pour éviter ces distorsions, il pourrait être utile de revenir aux motifs de justification qui permettent de justifier des entraves dans le cadre de la libre circulation des capitaux, notamment l'ordre public et la sécurité publique (article 65, paragraphe 1, b) TFUE – on peut également penser à d'autres raisons impérieuses d'intérêt général dégagées dans le cadre de la libre circulation des capitaux). Sous l'angle des investissements, ces motifs permettent de justifier les dispositifs de filtrage par rapport à la liberté de circulation des capitaux. Sous l'angle des subventions, ces mêmes motifs pourraient s'ajouter à l'examen des effets de la subvention étrangère sous le seul prisme de ses effets de distorsion dans le marché intérieur.

12.3. Conséquences de la proposition relatives aux subventions étrangères (sous le volet marché public) par rapport à l'autonomie procédurale des États membres (par rapport aux procédures de recours sur les marchés publics et sur l'admission des modes de preuve)

Le règlement relatif aux subventions étrangères se caractérise par une forte centralisation des pouvoirs au profit de la Commission. En matière de marchés publics, il reviendra au pouvoir adjudicateur de recevoir les notifications de subventions étrangères par les soumissionnaires issus d'États tiers, puis de transférer „sans délai" la notification à la Commission. L'examen de la distorsion relèvera de la compétence exclusive de la Commission, qui évaluera le caractère indûment avantageux de l'offre. À l'issue de l'examen, d'une durée de 120 jours [durée retenue à la suite des amendements parlementaires], la Commission pourra soit constater l'absence de distorsion, soit exiger des engagements, soit prendre une décision interdisant l'attribution du marché au soumissionnaire. L'ampleur de ces pouvoirs interroge nécessairement par rapport à l'autonomie des États et des pouvoirs adjudicateurs.

En premier lieu, il conviendra de clarifier l'articulation entre la décision de refus d'attribution prise par la Commission (en raison d'une subvention étrangère) et le rejet de l'offre prise par le pouvoir adjudicateur lui-même. Des décalages temporels ne sont pas à exclure: le pouvoir adjudicateur devra-t-il attendre 120 jours avant de pouvoir se prononcer sur les autres offres? Comment cette contrainte temporelle pourrait-elle se concilier avec le déroulement de procédures de passation négociées, qui nécessitent d'organiser plusieurs étapes de négociation?

En second lieu, la jonction des contentieux devra être précisée. *A priori*, une contestation de la décision de la Commission relèverait nécessairement de la compétence du Tribunal de l'Union, par la voie d'un recours en annulation. De son côté, le contentieux de l'attribution du contrat relève du droit interne, partiellement harmonisé par les directives 89/665 et 2007/66[119] relatives aux recours en matière de commande publique. La finalité générale de ces directives est de permettre aux opérateurs économiques de contester les violations des obligations de publicité et de mise en concurrence lorsqu'ils sont soumissionnaires à l'attribution de contrats de la commande publique, marchés publics ou concessions. Or, le cadre procédural introduit par ces directives privilégie l'autonomie institutionnelle et procédurale des États: elles imposent la mise en œuvre de remèdes mais renvoient aux États le soin de définir le contenu des procédures applicables (administratives, judiciaires, devant un juge administratif)[120].

L'articulation entre ces deux contentieux devra être précisée. Par exemple, un candidat à un marché public dont l'offre serait refusée par le pouvoir adjudicateur pourrait contester l'attribution du contrat en invoquant l'existence d'une subvention étrangère au profit de l'opérateur sélectionné, et, à ce titre, invoquer soit un manquement du pouvoir adjudicateur pour ne pas avoir notifié la subvention, soit une erreur de droit de la Commission pour avoir conclu à l'absence de distorsion. Dans un tel schéma, il conviendra de clarifier si de tels manquements relève des directives „recours" et de l'autonomie procédurale des États ou si le juge interne, à l'instar du droit des aides, serait habilité pour constater l'illégalité de la subvention (le défaut de notification). Cette clarification risque d'être d'autant plus complexe que le cadre contentieux est très variable suivant les États (régime des référés administratifs en France, compétences d'autorités spécialisées dans d'autres États ou encore compétence du juge judiciaire).

[119] Directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux, *JOCE* L 395/33 du 30 décembre 1989; Directive 2007/66/CE du 11 décembre 2007 modifiant les directives 89/665/CEE et 92/13/CEE du Conseil en ce qui concerne l'amélioration de l'efficacité des procédures de recours en matière de passation des marchés publics, *JOUE* L 335/31 du 20 décembre 2007.

[120] En ce sens, la jurisprudence souligne que "même si les directives 'recours' imposent l'existence de voies de recours à la disposition d'entreprises ayant ou ayant eu un intérêt à obtenir un marché déterminé et ayant été ou risquant d'être lésées par une violation alléguée, elles ne sauraient être considérées comme procédant à une harmonisation complète et, partant, comme envisageant l'ensemble des voies de recours possibles en matière de marchés publics" (CJUE, 14 mai 2020, *T-Systems Magyarország Zrt., BKK Budapesti Közlekedési Központ Zrt*, C-263/19, *Rec. num*. pt. 53).

Question 13[121]

Le règlement relatif aux subventions étrangères est un dispositif hybride, qui combine politique commerciale, marché intérieur et politique de concurrence. En se fondant sur l'article 207 TFUE, qui concerne la politique commerciale, la Commission rattache le règlement à un champ de compétence exclusive de l'Union, même si l'objectif est celui que vise l'article 114 TFUE en matière de bon fonctionnement du marché intérieur. Cette dimension justifie la double base juridique de la proposition. Le volet „concurrence" se caractérise par un contrôle spécifique des concentrations, dans le cas où une entreprise située dans un États tiers a reçu une subvention au sens du règlement. Il se retrouve également par la possibilité d'exiger des mesures réparatrices. Le volet „marché intérieur" renvoie plus spécifiquement aux dispositifs spécifiques de notification en matière de marchés publics et au dispositif de l'examen d'office des subventions. Enfin, la politique commerciale apparaît comme le bloc de compétence qui structure l'ensemble du règlement, notamment car il s'agit d'introduire un dispositif qui complète les instruments existants de défense commerciale, essentiellement applicables aux marchandises (mesures de dumping, mesures de sauvegarde).

Des interrogations peuvent être soulevées s'agissant de l'articulation de ces modules entre eux et de leur articulation avec d'autres instruments.

Tout d'abord, il ne faut pas exclure un risque de dispersion entre le règlement subventions étrangères et d'autres instruments, notamment en matière de marchés publics. À cet égard, l'adoption récente de l'instrument dit IPI[122] soulève des enjeux de cohérence. D'un côté, le règlement subventions étrangères permettra d'aller jusqu'à refuser l'attribution d'un marché public (ou d'une concession) en présence d'une subvention étrangère, d'un autre côté, le règlement IPI conduit, en présence d'une pratique ou mesure d'un pays tiers restreignant de manière récurrente l'accès des opérateurs économiques européens aux marchés dudit pays tiers, à envisager des mesures tels qu'un ajustement de l'offre (réajustement du prix de l'offre par le soumissionnaire) voire une exclusion de l'offre (donc avant l'examen en tant que tel du contenu de l'offre par le pouvoir adjudicateur). Le règlement IPI est conçu comme une mesure de défense commerciale, mais dont le champ est différent du règlement „subventions": les seuils ne sont pas les mêmes

[121] Question traitée par Stéphane **de La Rosa**, Professeur à l'Université Paris-Est Créteil, responsable de la branche française de la FIDE.

[122] Règlement 2022/1031 du 23 juin 2022 concernant l›accès des opérateurs économiques, des biens et des services des pays tiers aux marchés publics et aux concessions de l›Union et établissant des procédures visant à faciliter les négociations relatives à l›accès des opérateurs économiques, des biens et des services originaires de l›Union aux marchés publics et aux concessions des pays tiers, *JOUE* L 173 du 30 juin 2022, p.1. V. également *infra*, la contribution d'Alan Hervé.

(marchés présentant une valeur de 1,5 millions d'euros déclencher le dispositif IPI) et le champ d'application diffère (le dispositif IPI ne s'applique pas aux États tiers partis à l'Accord sur les marchés publics de l'OMC ou à ceux pour lesquels un accord bilatéral a été conclu – ce qui peut soulever des doutes sérieux quant à son efficacité, tandis que le règlement „subventions" s'applique indistinctement à tous les États tiers).

Eu égard à l'hétérogénéité des instruments, il faudrait envisager, à terme, un instrument unique en matière de marchés publics, afin d'avoir une approche commune des instruments de défense commerciale dans ce secteur, une identification plus claire des marchés et des concessions par rapport aux infrastructures sensibles et essentielles de l'Union et un positionnement plus audacieux par rapport aux États tiers parties à l'AMP de l'OMC, qui ont eux-mêmes des réserves par rapport à l'accord multilatéral.

Il apparaît, également, que l'approche „en silo" (à travers les modules) que retient le règlement „subventions" permet de préserver la cohérence d'ensemble des instruments existants (règlement (UE) n° 1/2003, règlement (CE) n° 139/2004 sur les concentrations, directives marchés publics, régime général des aides d'État, règlement (UE) n° 2016/1037 relatif aux importations subventionnées dans les États tiers)[123] sans toutefois envisager une refonte plus substantielle de ceux-ci.

À terme, une approche commune des subventions (marchandises, services) sera peut-être souhaitable et plus cohérente. De même, en matière de concentration, des enjeux d'articulation se poseront entre l'examen *ex ante* des subventions reçues par une entreprise située dans un État tiers (par exemple pour favoriser la prise de contrôle) et l'examen en tant que tel de la concentration sur le fondement du règlement (CE) n° 139/2004, avec les enjeux inhérents à l'examen du bilan concurrentiel et à la protection du bien-être du consommateur. Soulignons à cet égard que des institutions françaises invitent à mieux préciser la notion de bien-être du consommateur pour y intégrer, dans l'examen du bilan concurrentiel, des paramètres tenant à la protection de l'environnement, à la préservation de l'emploi en Europe ou encore à la préservation de la souveraineté numérique[124]. Si, à l'avenir, de telles évolutions devaient se faire jour, l'examen de la distorsion du marché consécutif à une subvention étrangère devra nécessairement intégrer ces paramètres. Il en résultera la nécessité d'adopter un texte plus général et transversal.

[123] Il faut souligner que le règlement "subventions étrangères" s'applique "sans préjudice" de ces autres instruments (art. 40 de la proposition).

[124] V. par exemple, Sénat, Rapport d'information sur la modernisation de la politique européenne de concurrence, 8 juillet 2020, n° 603.

Question 14[125]

14.1. Quelles sont les entreprises soumises à cette obligation/législation?

En droit français, la loi n° 2017-399 du 27 mars 2017 a introduit un devoir de vigilance à la charge de certaines sociétés mères et donneuses d'ordre[126] établies en France et qui développent des activités économiques internationales. Ces dernières doivent mettre en place un plan de gestion des risques, afin de prévenir les atteintes transnationales les plus graves aux droits fondamentaux et à l'environnement. La loi française s'inscrit dans la continuité des principaux internationaux de diligence raisonnable (*due diligence*) développés en particulier par les Nations Unies et l'OCDE[127], tout en leur insufflant une force contraignante. Si les sanctions de ce devoir de vigilance sont, pour l'heure, encore fragiles, la consécration d'exigences impératives dans l'ordre juridique français marque une avancée notable en vue de la mise en place future d'un cadre juridique contraignant à l'échelle européenne et internationale[128].

Bases juridiques. Le régime juridique français du devoir de vigilance est codifié à l'article L. 225-102-4 du Code de commerce et sa sanction, sur le fondement de la responsabilité civile, est prévue à l'article L. 225-102-5 du même code[129].

Entreprises soumises au devoir de vigilance. Applicabilité *ratione personae*. Seules les grandes entreprises, sous forme de sociétés anonymes[130], sont visées par ce régime juridique, par référence à des données chiffrées. Il s'agit, d'une part, des sociétés „qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés"[131], y compris dans leurs filiales, et „dont le siège social est fixé

[125] Question traitée par Mme **Marion Ho-Dac**, Professeure de droit privé à l'Université d'Artois,

[126] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°74 du 28 mars 2017. ELI: https://www.legifrance.gouv.fr/eli/loi/2017/3/27/ECFX1509096L/jo/texte

[127] Voir les principes directeurs de l'OCDE à l'intention des multinationales de 2011 et les principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme de 2014, ainsi que dans des normes de conformité, comme la norme ISO 26000 relative à la responsabilité sociale des entreprises.

[128] En ce sens, v. S. Cossart, J. Chaplier & T. Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", *Business and Human Rights Journal*, 2017, 2(2), 317-323. Voir également B. Parance (e. a.), "Regards croisés sur le devoir de vigilance et le duty of care", *Journal de droit international* (*Clunet*), Janvier-Février-Mars 2018.

[129] https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA 000006161273/?anchor=LEGIARTI000035181820#LEGIARTI000035181820

[130] La codification de la loi sur le devoir de vigilance a été opérée dans le Chapitre V (du Titre II, Livre II du Code du commerce) relatif aux sociétés anonymes (articles L. 225-96 à L. 225-125 du même code). Ce régime juridique s'applique en outre, par le jeu de renvois, aux sociétés en commandite par actions (article L. 226-1, al. 2 du même code), aux sociétés par actions simplifiées (article L. 227-1, al. 3 du même code) et aux sociétés européennes (article L. 229-1 al. 2 du même code).

[131] Article L 225-102-4, I aliéna 1er, du Code de commerce (FR).

sur le territoire français"[132] et, d'autre part, des sociétés employant „au moins dix mille salariés"[133] y compris dans leurs filiales et „dont le siège social est fixé sur le territoire français ou à l'étranger"[134]. Il existe en revanche une exemption, par un jeu de présomption, pour les „filiales ou sociétés contrôlées"[135] dépassant ces seuils, lorsque la société qui les contrôle[136] est elle-même soumise au devoir de vigilance.

On déduit des données normatives précitées que les sociétés mères établies en France sont soumises au devoir de vigilance avec un seuil minimal de salariés plus élevé – 10 000 au lieu de 5 000 – lorsque la nature internationale du groupement sociétaire est prise en compte. L'appréhension transnationale de la taille de l'entreprise est en parfaite cohérence avec la portée internationale du régime de vigilance raisonnable qui, par nature, a pour objectif de réguler les activités économiques de l'opérateur tout au long de sa chaîne d'approvisionnement.

Applicabilité *ratione loci*. La portée géographique du régime français de vigilance n'est pas parfaitement claire dans la mesure où aucune règle d'applicabilité n'a été explicitement formulée par le législateur. De même, aucune articulation avec le droit des conflits de lois n'est opérée[137]. Une double lecture est donc possible. D'un côté, si l'on prend appui sur le critère du siège social en France, ce dernier fait écho au facteur de rattachement de la loi applicable aux sociétés (*lex societatis*) en droit international privé français, en application de l'article L. 210-3 du Code du commerce. On peut alors soutenir que le devoir de vigilance s'impose aux sociétés dont la *lex societatis* est la loi française. Reste que la notion de siège social est morcelée entre les théories du siège statutaire et du siège réel. La doctrine française, sous influence européenne, tend à admettre que le siège statutaire prime le siège réel[138] ; les tiers peuvent néanmoins se prévaloir du siège réel en cas de

[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] Article L 225-102-4, I aliéna 2, du Code de commerce (FR).
[136] Le critère du contrôle [une société en contrôlant une autre] est défini à l'article L. 233-3 du Code du commerce. Sont principalement visées les hypothèses suivantes: "[Alinéa I] 1° Lorsqu'elle [la société] détient directement ou indirectement une fraction du capital lui conférant la majorité des droits de vote dans les assemblées générales de cette société; 2° Lorsqu'elle dispose seule de la majorité des droits de vote dans cette société en vertu d'un accord conclu avec d'autres associés ou actionnaires et qui n'est pas contraire à l'intérêt de la société; 3° Lorsqu'elle détermine en fait, par les droits de vote dont elle dispose, les décisions dans les assemblées générales de cette société". En outre, il existe une présomption d'un tel contrôle, lorsque la société [Alinéa II] "dispose directement ou indirectement, d'une fraction des droits de vote supérieure à 40% et qu'aucun autre associé ou actionnaire ne détient directement ou indirectement une fraction supérieure à la sienne".
[137] Voir en ce sens, E. Pataut, "Le devoir de vigilance – Aspects de droit international privé", *Droit social,* 2017, p. 883 et s.
[138] Sur cette question, voir M. Menjucq, *Droit international des sociétés*, *Rép. Sociétés Dalloz*, Janvier 2019, spéc. n°94 et s.

fraude[139]. Partant, le devoir de vigilance serait applicable, en principe, aux sociétés ayant leur siège statutaire en France.

De l'autre côté, il paraît possible de soutenir que le devoir de vigilance du droit français s'impose aux sociétés établies en France, sans considération de leur *lex societatis*. Tel est le cas si l'on considère que le régime de vigilance relève de la catégorie dérogatoire des lois de police[140]. Rappelons que ces dernières doivent être mises en œuvre sans considération de la loi applicable au titre du raisonnement de conflit de lois ; elles visent à assurer la protection économique, politique et sociale de l'État concerné[141].

Quelle que soit l'interprétation retenue, l'enjeu d'applicabilité géographique du devoir de vigilance est crucial puisqu'il conditionne la mise en œuvre et, *in fine*, la sanction de ce cadre juridique dans un contexte, par nature, transfrontière ; la question resurgira par conséquent au stade de la loi du délit, quand il s'agira de déterminer la loi applicable à l'action en responsabilité civile[142] engagée contre une société mère mise en cause sur le fondement du droit français[143].

Applicabilité *ratione temporis*. Les articles L. 225-102-4 et L. 225-102-5 précités sont applicables à compter du rapport de gestion[144] présenté par le conseil d'administration ou le directoire de la société concernée, lors de l'assemblée générale. Ce rapport porte sur le premier exercice ouvert après la publication de la loi n° 2017-399 précitée instaurant un devoir de vigilance. Par dérogation, pour l'exercice au cours duquel ladite loi a été publiée, le I de l'article L. 225-102-4 – alinéas 1 à 8 – s'applique, à l'exception du compte rendu prévu à son alinéa 7.

14.2. Quelles obligations les entreprises doivent-elles respecter?

La mise en œuvre opérationnelle du devoir de vigilance implique, pour les sociétés qui y sont soumis, l'établissement et la mise en œuvre contraignante et „de manière effective" d'un „plan de vigilance", selon les termes de l'article L. 225-102-4, I alinéa 1er, du Code du commerce[145]. Ce plan prend appui sur la gestion des risques puisqu'il doit comporter „les mesures de vigilance raisonnable propres à identifier les risques"[146] qui découlent de l'activité sociétaire appréhendée globalement,

[139] Article L. 210-3, alinéa 2, du Code du commerce (FR).

[140] Voir en particulier, V. Pironon, "Le devoir de vigilance et le droit international privé. Influences croisées", *Travaux du Comité français de Droit international privé (2018-2020),* Paris, Pedone, 2021, p. 223-244.

[141] Comp. Article 9 du règlement 593/2008 "Rome I".

[142] En application du règlement 864/2007 "Rome II".

[143] Voir *infra*, § relatif à la responsabilité civile.

[144] Mentionné à l'art. L. 225-102 du Code du commerce (FR) qui lui-même renvoie à au deuxième alinéa de l'article L. 225-100 du même code.

[145] Voir B. Teyssié, "Le plan de vigilance – trois années d'application", *Rec. Dalloz*. 2021, p. 1823.

[146] Article L 225-102-4, I alinéa 3, du Code du commerce (FR).

incluant les activités des sociétés sous contrôle de la société mère ainsi que des opérateurs intervenant dans la chaîne de valeurs de celle-ci[147]. L'analyse des risques porte précisément sur les (potentielles) „atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement"[148] que l'activité sociétaire globale pourraient entraîner.

Pour ce faire, la loi fixe les cinq grandes catégories de données à recueillir et d'actions à réaliser afin de structurer le plan de vigilance, étant entendu que cette liste pourra être précisée et complétée par décret en Conseil d'Etat[149]. Il s'agit des catégories suivantes:

„*1° Une cartographie des risques destinée à leur identification, leur analyse et leur hiérarchisation; 2° Des procédures d'évaluation régulière de la situation des filiales, des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, au regard de la cartographie des risques 3° Des actions adaptées d'atténuation des risques ou de prévention des atteintes graves; 4° Un mécanisme d'alerte et de recueil des signalements relatifs à l'existence ou à la réalisation des risques, établi en concertation avec les organisations syndicales représentatives dans ladite société; 5° Un dispositif de suivi des mesures mises en œuvre et d'évaluation de leur efficacité*".

Dialogue et transparence. Suivant la logique de la RSE[150], il est également précisé, d'une part, que le plan de vigilance ne doit pas être conduit uniquement par les organes sociétaires mais „en association avec les parties prenantes de la société, le cas échéant dans le cadre d'initiatives pluripartites au sein de filières ou à l'échelle territoriale"[151]. On retrouve le lexique théorique de la gouvernance globale (*global governance*) qui met en dialogue les actionnaires, d'un côté, et les parties prenantes, de l'autre. Cette dernière notion est très large, incluant notamment des ONG – de plus en plus active – représentant la société civile dans la défense des droits humains et la protection de la planète[152], au-delà de la seule action des syndicats[153].

[147] L'alinéa 3 de l'article L 225-102-4 I, du Code du commerce vise, en ce sens, "les activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation".

[148] Article L 225-102-4, alinéa 3, du Code du commerce (FR).

[149] Voir l'alinéa 8 de l'article L 225-102-4 I du Code du commerce (FR): "Un décret en Conseil d'État peut compléter les mesures de vigilance prévues aux 1° à 5° du présent article. Il peut préciser les modalités d'élaboration et de mise en œuvre du plan de vigilance, le cas échéant dans le cadre d'initiatives pluripartites au sein de filières ou à l'échelle territoriale".

[150] Responsabilité sociale des entreprises.

[151] Article L 225-102-4, I alinéa 6, du Code du commerce (FR).

[152] En France, voir notamment l'ONG Sherpa.

[153] En ce sens, M-A. Moreau, "L'originalité de la loi française du 27 mars 2017 relative au devoir de vigilance dans les chaînes d'approvisionnement mondiales", *Droit Social,* 2017, p. 792 et s.

D'autre part, l'exigence de transparence donne lieu à une obligation de publication du plan de vigilance et du compte rendu de sa mise en œuvre effective[154], au sein du rapport de gestion présenté à l'assemblée générale ordinaire des actionnaires[155].

Obligations sectorielles supplémentaires. La loi n°2021-1104 du 22 août 2021[156] a ajouté de nouvelles exigences à la charge des entreprises du secteur agricole ou forestier, aux fins de prévenir la déforestation, et ce dans le contexte plus global de lutte contre le dérèglement climatique. Les opérateurs concernés, définis par un arrêté au Conseil d'État[157], doivent inclure dans le plan de vigilance „des mesures […] propres à identifier les risques et à prévenir la déforestation associée à la production et au transport vers la France de biens et de services importés"[158].

14.3. Les entreprises peuvent-elles être tenues responsables des actions d'autres entreprises/personnes sous leur contrôle et/ou tout au long de la chaîne d'approvisionnement?

Si le devoir de vigilance pèse sur les sociétés mères établies en France, il ne se limite pas aux frontières économiques françaises. Ce sont les activités mondiales des sociétés concernées qui doivent être soumises à l'analyse des risques et aux mesures de prévention prévues par la loi française. Si l'article L 225-102-4 du Code du commerce ne recourt pas littéralement au concept de chaîne de valeurs ou d'approvisionnement afin d'étendre la portée géographique du devoir de vigilance, il dispose que doivent être prises en compte par chaque société concernée „[les] activités [de leurs] sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation"[159]. Il s'agit bien, de la sorte, d'une extension transfrontière de la portée du régime de vigilance.

A contrario, et afin de ne pas rendre la tâche impossible, toutes les activités de la chaîne de valeurs de la société mère ne doivent pas, de manière systématique et exhaustive, entrer dans l'analyse des risques fondée sur la vigilance „raisonnable"[160]. Seules les activités „régulières et d'ampleur significative"[161] développées avec des

[154] Article L 225-102-4, I alinéa 7, du Code du commerce (FR).

[155] Le rapport de gestion est présenté par le conseil d'administration ou le directoire, au moins une fois par an, dans les six mois de la clôture de l'exercice sociétaire, selon l'article L. 225-100 du Code du commerce (FR).

[156] Loi n°2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, JORF n°0196 du 24 août 2021, v. ELI: https://www.legifrance.gouv.fr/eli/loi/2021/8/22/TREX2100379L/jo/texte

[157] Article L 225-102-4, I alinéa 5, du Code du commerce (FR).

[158] Article L 225-102-4, I alinéa 4, du Code du commerce (FR).

[159] Article L 225-102-4, I alinéa 3, du Code du commerce (FR).

[160] L'article L. 225-104-4 I alinéa 3 se réfère aux "mesures de vigilance raisonnable" devant figurer dans le plan de vigilance.

[161] B. Teyssié, *op. cit*.

opérateurs intégrés dans la sphère d'influence économique et commerciale de la société mère sont à analyser. Les nouveaux sous-traitants ou fournisseurs en sont donc exclus. Pour autant, il peut paraître bienvenu de s'assurer qu'un futur partenaire commercial d'importance fasse l'objet de contrôles préventifs en lien avec le respect des droits fondamentaux humains et de l'environnement, et soit ainsi, par anticipation, intégré dans le plan de vigilance. La pratique pourrait aller en ce sens, sans que de telles orientations puissent être généralisées vis-à-vis de tous les sous-traitants et fournisseurs économiquement non significatifs[162].

14.4. Effets extraterritoriaux de l'obligation de vigilance?

La portée extraterritoriale du régime français de vigilance est limitée au stade de l'applicabilité du dispositif juridique mis en place, dans la mesure où il concerne au premier chef les sociétés établies en France. Ce double rattachement territorial et personnel – si l'on considère que la nationalité de la société est définie par la loi de son siège social – permet de soutenir que la loi française n'est pas conçue, *per se*, dans une optique d'extraterritorialité. Il en irait probablement autrement si les sociétés étrangères développant une activité économique significative sur le territoire français étaient également soumises au devoir de vigilance dans les conditions exposées plus haut, ce qui n'est pas le cas.

Pour autant, trois éléments permettent d'atténuer le rejet apparent de toute vocation extraterritoriale de la loi française. Premièrement, au stade de l'applicabilité du régime de vigilance, la taille de l'entreprise inclut certaines de ses composantes sises à l'étranger. Deuxièmement, au stade de la mise en œuvre du plan de vigilance, c'est l'activité mondiale de l'entreprise qui est prise en compte en y incluant, de manière englobante, les activités qui se réalisent dans la chaîne de valeurs de la société (sous-traitants et fournisseurs liés à celle-ci par une relation établie, *supra*). Troisièmement, sous l'angle contentieux, la loi française devrait pouvoir, en théorie au moins[163], être sanctionnée devant le juge français. Même s'il ne s'agit pas, à proprement parler, d'extraterritorialité mais d'internationalité, la compétence (internationale) du juge français sera en principe aisément fondée sur le chef de compétence de droit commun du règlement 1215/2012 „Bruxelles I *bis*" en faveur du domicile du défendeur, à savoir le siège social (en France) de l'entreprise débitrice du devoir de vigilance[164]. De la sorte, les risques de *forum shopping* sont cantonnés.

[162] *Ibid.*

[163] Il faut, à cette fin, que la loi française soit désignée comme loi applicable (au sens du droit des conflits de lois) sur le fondement du règlement 864/2007 "Rome II" (en matière délictuelle). Voir *infra* (§ responsabilité civile et § défis).

[164] Article 4 du règlement 1215/2012 "Bruxelles I bis".

14.5. Identification des recours et accessibilité

Le respect du régime de vigilance par les sociétés qui y sont soumises est d'abord garanti par la possibilité, offerte à toute personne, de mettre en demeure la société mère (ou donneuse d'ordre) qui n'aurait pas élaboré de plan de vigilance dans les conditions présentées plus haut[165]. Il s'agit donc d'une action préventive.

Si la mise en demeure reste infructueuse dans un délai de trois mois, le juge judiciaire[166] peut ensuite être saisi par toute personne justifiant d'un intérêt à agir[167]. Il pourra alors enjoindre (*i.e.* par le prononcé d'une injonction) la société concernée de respecter le régime de vigilance, le cas échéant sous astreinte[168]. Le président du tribunal, statuant en référé, peut être saisi aux mêmes fins[169]. Aucune amende civile n'est, en revanche, prévue en cas de manquement aux obligations de vigilance[170].

C'est ensuite sur le terrain du droit civil qu'une demande d'indemnisation peut être conduite par les victimes alléguées de préjudices subis du fait de l'inaction sociétaire sur le fondement du devoir de vigilance[171]. Il s'agit cette fois d'un recours curatif.

14.6. Champ d'application du régime de responsabilité

Le régime français de vigilance peut être sanctionné, selon l'article L 225-102-5 du Code du commerce, au titre de l'engagement de la responsabilité civile de droit commun – par renvoi aux articles 1240 et 1241 du Code civil – en cas de manquement aux obligations définies à l'article L. 225-102-4 du Code du commerce (exposées *supra*) par la société concernée. Si le manquement est reconnu, cette dernière devra réparer le préjudice. Toute personne justifiant d'un intérêt à agir peut introduire une telle action.

En outre, il est prévu que la juridiction saisie puisse „ordonner la publication, la

[165] Article L 225-102-4, II alinéa 1, du Code du commerce (FR).

[166] Le Code d'organisation judiciaire (en son article L 211-21) prévoit à présent que le tribunal judiciaire de Paris (TJ) est compétent pour connaître des actions relatives au devoir de vigilance fondées sur les articles L. 225-102-4 et L. 225-102-5 du Code du Commerce. Sur le débat de la compétence d'attribution avant intervention du législateur, voir Cour de cassation, civile, Chambre commerciale, 15 décembre 2021, 21-11.882 21-11.957, Publié au bulletin. Le fait que le régime de vigilance soit codifié dans la section relative aux assemblées d'actionnaires pouvait laisser penser que le tribunal du commerce serait compétent pour connaître d'une question relative au fonctionnement sociétaire. Voir sur ce point, R. Dumont, note sous l'arrêt préc., *Rec. Dalloz* 2022, p. 826.

[167] *Ibid.*

[168] *Ibid.*

[169] Article L 225-102-4, II alinéa 2, du Code du commerce (FR).

[170] Un tel mécanisme était prévu dans le projet de loi (« condamner la société au paiement d'une amende civile d'un montant qui ne peut être supérieur à 10 M € ») mais il a été censuré par le Conseil constitutionnel français, v. Cons. const., décis. n° 2017-750 DC du 23 mars 2017.

[171] Voir infra.

diffusion ou l'affichage de sa décision ou d'un extrait de celle-ci, selon les modalités qu'elle précise"[172] au frais de la personne condamnée. Le juge pourra également „ordonner l'exécution de sa décision sous astreinte"[173].

Dans une optique civiliste, il n'est pas certain que la loi française ait réussi à faciliter l'imputation des dommages causés par les filiales ou les fournisseurs étrangers à la société mère française. En effet, c'est uniquement si le manquement à l'obligation de vigilance – telle qu'elle est formalisée par l'établissement du plan de vigilance – est la cause du dommage que la responsabilité civile de la société peut être engagée. Il sera particulièrement difficile pour les victimes de prouver que le préjudice qu'elles invoquent aurait pu être évité par l'exécution des „mesures de vigilance raisonnable" au sens de la loi. En ce sens, la doctrine qualifie le dispositif français d'obligation de moyens (et non de résultats)[174].

Enfin, dans une perspective contentieuse, le législateur français n'a (malheureusement) pas pensé le dispositif de vigilance dans sa dimension privée transfrontière (i.e. droit international privé)[175]. Si la compétence internationale du juge français devrait pouvoir être fondée en application du règlement 1215/2012 „Bruxelles I" comme exposé plus haut, il n'est en revanche pas évident que la loi française soit applicable au titre du droit des conflits de lois – en l'occurrence, en matière de responsabilité délictuelle, le règlement 864/2007 „Rome II"[176] –, à moins que sa qualification de loi de police[177] soit admise par le juge français.

Question 15[178]

Défis au niveau national (français) dans l'application du devoir de vigilance. Si la loi française sur le devoir de vigilance peut être considérée comme à l'avant-garde du droit contraignant en matière de *corporate due diligence*, incluant un volet réparation, elle présente certaines fragilités qui sont autant de défis à relever à l'avenir, tant pour les opérateurs économiques concernés par le texte,

[172] Article L 225-102-5, alinéa 3, du Code du commerce (FR).

[173] Article L 225-102-5, alinéa 4, du Code du commerce (FR).

[174] Voir A. Danis-Fatôme & G. Viney, "Responsabilité civile dans la loi du 27 mars 2017", *Rec. Dalloz* 2017 Chron. 1610 ; C. Hannoun, "Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017", *Droit Social*, 2017, n°10, p. 806 et s.

[175] Sur cet aspect essentiel, v. H. Cantú Rivera H., & C. Kessedjian (eds.), *Private International Law Aspects of Corporate Social Responsibility*., Springer Nature, Ius Comparatum – Global Studies in Comparative Law, 1 ed. 2020, Vol. 42.

[176] En effet, ce texte prévoit en principe l'application de la loi du lieu de réalisation du dommage (article 4) qui sera généralement situé dans un État étranger au sein duquel l'entreprise française déploie ses activités internationales soumises au devoir de vigilance.

[177] Article 16 du règlement 864/2007 "Rome II". En ce sens, voir V. Pironon, "Le devoir de vigilance et le droit international privé. Influences croisées", *op. cit.*

[178] Question traitée par Mme **Marion Ho-Dac**, Professeure de droit privé à l'Université d'Artois.

les parties prenantes associées au plan de vigilance ou engagées dans le respect et la sanction du régime de vigilance, que pour les magistrats qui auront la tâche difficile de „faire vivre" le texte dans des contextes contentieux particuliers.

S'agissant des sociétés débitrices du devoir de vigilance, une difficulté essentielle réside dans la complexité qui peut exister dans la réalisation du plan de vigilance et la mise en œuvre des mesures raisonnables y relatives. L'élaboration du plan est un exercice difficile pour plusieurs raisons, parmi lesquelles: l'obligation de conduire un processus de concertation avec les parties prenantes associées à la réalisation du plan ; la nécessité d'avoir une bonne connaissance de la chaîne de valeurs et des entités sociétaires étrangères qui en font parties ; avoir accès aux données opérationnelles sur les marchés étrangers en lien avec les risques à identifier ; identifier concrètement les risques d'atteintes graves aux droits humains, sociaux et environnements pour pouvoir les prévenir ou les atténuer.

Dans ce contexte, la pratique a mis en avant l'accompagnement insuffisant des sociétés, du fait notamment du manque de définitions des notions-clés et des référentiels de la loi ou encore l'absence d'autorités administratives en charge de la régulation de ce régime. De son côté, la doctrine relève que l'expérience des grands groupes sociétaires en matière de RSE et des outils qui y sont associés (adoption de codes de conduites et de charte éthique, mise en place de dialogues intersectoriels et transnationaux etc.) devrait aider les opérateurs et progressivement renforcer les procédures d'élaboration des plans de vigilance[179]. Il en va de même des référentiels qui se développent mondialement sur la base des principes internationaux non contraignants de *due diligence*, qu'il s'agisse de leur mise en œuvre volontaire par certains acteurs, de leur promotion institutionnelle ou encore de leur mention/interprétation dans des contentieux judiciaires souvent largement médiatisés. Cette internormativité en construction pourrait favoriser la mise en œuvre effective du cadre juridique français (et, au-delà, d'un futur cadre juridique de l'Union européenne, *infra*).

Enfin, l'effectivité du devoir vigilance tient également, au-delà de l'engagement des sociétés qui y sont tenues et aux parties prenantes qui y sont associées, à sa mise en œuvre contentieuse. En cas d'échec du volet préventif de l'analyse des risques, l'action en responsabilité civile pourrait conduire à la réparation de dommages que la réalisation efficiente d'un plan de vigilance aurait pu éviter. Le juge français et l'ensemble des collaborateurs de la sphère judiciaire auront un rôle certain dans la lecture (plus ou moins littérale, sévère, protectrice, englobante, etc.) qui sera faite du dispositif juridique de vigilance. Des signaux

[179] En ce sens notamment M-A. Moreau, L'originalité de la loi française du 27 mars 2017 relative au devoir de vigilance dans les chaînes d'approvisionnement mondiales, *op. cit.*

seront ainsi envoyés – dans un sens ou dans un autre – aux sociétés investies du devoir de vigilance.

Défis de la proposition européenne de directive sur le devoir de vigilance. Dans l'ordre juridique de l'Union européenne, la Commission a publié une proposition de directive sur le devoir de vigilance des entreprises en matière de durabilité et modifiant la directive (UE) 2019/1937, le 23 février 2022[180]. Ce texte a pour ambition d'importer le devoir de vigilance mis en œuvre au niveau national par certains États membres, comme la France, au niveau européen. Le champ d'action du texte est assez ambitieux sous l'angle de sa portée géographique car, même s'il ne vise que les très grands opérateurs sociétaires, d'un point de vue économique, il contraint non seulement les sociétés établies dans l'Union mais également les sociétés étrangères (les plus) actives sur le marché intérieur (contrairement au droit français, *supra*). Dans ce contexte, un des défis majeurs du futur cadre juridique européen sera celui de l'effectivité de cette ambition normative extraterritoriale[181]. À cette fin, il est crucial de s'assurer que les conditions d'applicabilité du texte, en particulier *ratione loci*, sont clairement précisées. S'agissant d'une directive européenne, elle devra être transposée en droit national. Son application effective dépendra donc de la désignation de la loi nationale d'un État membre comme loi applicable[182].

La proposition de directive prévoit notamment que les victimes de dommages causés par les entreprises multinationales soumises au régime européen de vigilance devraient pouvoir obtenir réparation auprès des juridictions nationales des États membres de l'Union. Ce régime de *private enforcement* est donc tributaire de la compétence d'un „for européen" et, ensuite, de l'application de la „loi européenne"[183]. Ces questions se posent de manière analogique dans le cadre du régime français (comme exposé *supra*). Une différence existe toutefois s'agissant de la compétence internationale d'une juridiction nationale dans l'Union pour connaître d'un dommage imputé à une société non européenne active sur le

[180] COM(2022) 71 final.

[181] V. M. Ho-Dac, "The Extraterritorial Scope of European Corporate Due Diligence", *in* A. Hervé & C. Rapoport (dir.), *L'Union européenne et l'extraterritorialité*, Presses Universitaires de Rennes, 2022 (à paraître).

[182] Sur cet enjeu d'applicabilité dans les rapports privées, v. les principaux travaux de droit international privé: Groupe Européen de DIP, Recommendation on the PIL Aspects of the Future EU Instrument on Corporate Due Diligence and Accountability, 8 October 2021 https://gedip-egpil.eu/wp-content/uploads/2021/02/Recommandation-GEDIP-Recommendation-EGPIL-final.pdf; Report of the European Law Institute (ELI), Business and Human Rights: Access to Justice and Effective Remedies, 2022 https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/business-and-human-rights/.

[183] V. G. Van Calster, *European Private International Law – Commercial Litigation in the EU*, Hart Publishing, 3 ed., 2021, chapter 7; M. Ho-Dac, Brief Overview of the Directive Proposal on Corporate Due Diligence and Private International Law, 27 April 2022, Blog EAPIL https://eapil.org/2022/04/27/brief-overview-of-the-directive-proposal-on-corporate-due-diligence-and-pil/.

marché intérieur et donc soumise au régime de vigilance de l'Union (ce cas n'étant pas prévu en droit français). Le règlement 1215/2012 „Bruxelles I *bis*" ne sera pas applicable ici et cette compétence dépendra donc des droits nationaux des conflits de juridictions, ce qui pourrait créer des incertitudes ou des lacunes et, partant des traitements inéquitables pour les justiciables dans l'espace judiciaire européen[184].

Incidence des mesures européennes sur le régime français du devoir de vigilance. S'il est encore trop tôt pour pouvoir apprécier, en détails, l'impact d'un futur régime européen de vigilance sur le cadre juridique français décrit plus haut, quelques tendances se dessinent[185].

Sur le terrain de l'applicabilité des textes, la donnée la plus notable est probablement l'élargissement du champ géographique du devoir de vigilance dans la proposition européenne, puisque certaines sociétés étrangères, non européennes, sont également incluses dans le texte, alors que le droit français vise uniquement les sociétés mères ayant leur siège est en France.

Sur le fond du régime, on peut relever que la proposition européenne apparaît plus ambitieuse dans mise en œuvre effective du futur régime de vigilance grâce à la mise en place d'un cadre contraignant de *public enforcement* qui n'existe pas en droit français. La proposition de directive prévoit notamment l'instauration de sanctions financières importantes pour les sociétés qui ne se conformeraient pas à leurs obligations ainsi qu'un mécanisme de contrôle administratif de ces dernières, afin de les inciter, le cas échéant, à renforcer leur plan de vigilance. Elle prévoit, en outre, l'engagement de la responsabilité des administrateurs de l'entreprise assujettie au devoir de vigilance. Par ailleurs, le texte européen permettrait de combler certaines lacunes légistiques de la loi française en renforçant le travail de définitions des termes-clés et des référentiels tels que les „incidences potentielles ou réelles sur les droits de l'homme et sur l'environnement" ou les „relations commerciales établies" dans la chaîne de valeurs de la société mère.

Enfin, sur le terrain de la sanction privée curative, le régime européen de responsabilité civile prévoit, contrairement au droit français, un cas d'exonération des sociétés mères pour les dommages causés par les acteurs de la chaîne de valeurs de ces dernières.

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[184] En ce sens, v. M. Ho-Dac, Brief Overview of the Directive Proposal on Corporate Due Diligence and Private International Law, *op. cit.*

[185] Pour analyse comparée, v/ B. Cazeneuve & P. Sellal, "Projet de directive concernant un devoir de vigilance européen: quels défis pour les entreprises assujetties?", *Dalloz Actualité*, 2 juin 2022. https://www.dalloz-actualite.fr/node/projet-de-directive-concernant-un-devoir-de-vigilance-europeen-quels-defis-pour-entreprises-ass.

GERMANY

Marc Bungenberg, Philipp Reinhold, Stefan Schelhaas

Extended Executive Summary

Question 1

1. Since the turn of the millennium, the Federal Cartel Office has been considering the possibility of including environmental concerns in antitrust law. Often, "voluntary" forms of cooperation – controlled by a central body – are established.
2. However, there is no significant body of case practice regarding the consideration of sustainability aspects within the context of Sections 1 and 2 of the Competition Act (GWB). Therefore, there are no general guidelines that can be derived from these provisions. Nevertheless, it can be concluded from the decisions taken so far that the Federal Cartel Office generally takes a positive view on sustainability initiatives.

Question 2

3. Merger control is currently not a suitable instrument for considering reasons of public interest, as the Federal Cartel Office is exclusively responsible for the competition policy assessment of a merger project. Thus, it is not possible for the Federal Cartel Office to prohibit a merger on the basis of sustainability aspects. Due to the high procedural requirements, the Federal Cartel Office has been unable to take into account sustainability aspects raised by "efficiency objections" in its decisions. However, public interest reasons can be considered within the context of ministerial authorisation.

Question 3

4. In principle, the Federal Cartel Office accepts "sustainable efficiency objections", although it has not yet been required to handle such on a substantive level. For this purpose, however, it could have recourse to the balancing clause of Section 36 (1) sentence 2 GWB, according to which the "sustainable efficiencies" raised must outweigh the competitive restrictions of the proposed merger.

Question 4

a.

5. According to media reports, the Federal Cartel Office has spoken out against a merger of the train divisions of Siemens and Alstom. In a confidential letter to the EU Commission, it outlined considerable antitrust concerns regarding this project. In doing so, the Federal Cartel Office opposed the former Federal Minister of Economics, Peter Altmaier (CDU), who had supported the merger, arguing it was necessary to create a "European champion" in the market of high-speed trains, to stand a chance against Chinese manufacturers.

b.

6. Regarding China, the BDI had called for EU merger control to be amended in order to promote the market-driven formation of European industrial champions. The VDMA, on the other hand, criticised a reform of European competition law in favour of industrial policy considerations. In particular, it clearly rejected the creation of a Ministerial or Council authorisation at the Union level, as it would entail the politicisation of competition law.

c.

7. Statements by the Federal Cartel Office in the Siemens/Alstom merger control proceedings suggest that the Federal Cartel Office is rather opposed to the creation of "European champions", unless the competition concerns against such a merger can be eliminated.

Question 5

8. According to German merger control law, only competition policy aspects are to play a role in the context of merger control by the Federal Cartel Office. Nevertheless, the examination of mergers requires consideration as to whether competitors from outside the EU are active in the relevant market, or will be active in the foreseeable future, and will therefore limit the market power of the merging parties.
9. The consideration of the international competitiveness of German companies, possibly also to the detriment of competition, is the task of the Federal Minister of Economics under the ministerial authorisation procedure.

Question 6

10. In German merger control law, public interest considerations are taken into account within the context of the ministerial authorisation, in contrast to the purely competitive examination undertaken by the Federal Cartel

Office. According to this, a merger project prohibited by the Federal Cartel Office under Section 36 (1) GWB, can be approved by the Federal Minister of Economic Affairs and Climate Action. On application, ministerial authorisation will be issued provided that the public interest associated with the merger project – including environmental protection – at least outweigh its anti-competitive effects, and that other competition-compliant measures taken by the state to remedy the situation are not possible.

11. Since the introduction of ministerial authorisation in 1973, 23 procedures have been initiated, of which ministerial authorisation has been granted in 10 cases – partly subject to conditions and ancillary provisions. In the most recent proceedings, the safeguarding of 16,000 jobs as well as "know-how and innovation potential for energy transition and sustainability" were considered to be reasons of public interest.

Question 7

a.

12. With the 10th GWB revision, which came into force at the beginning of 2021, the GWB provisions on abuse control were comprehensively revised and "digitalised". Section 19a GWB is a new provision that establishes preventive abuse control in the area of digital ecosystems. It enables the Federal Cartel Office to intervene earlier and more effectively against any anti-competitive behaviour of large digital companies.
13. Thus, the Federal Cartel Office can now, as a second step, prohibit practices that threaten competition from companies whose overriding importance for the competition has been established in the first step. Since the entry into force of Section 19a of the GWB, the Federal Cartel Office has initiated several proceedings against the GAFA companies.

b.

14. Proceedings initiated against Amazon have shown that the Federal Cartel Office can exert influence on large digital corporations within the scope of its abuse control. In these proceedings, it was possible to achieve improved customer access for European retailers in online trade, thus increased competition for Amazon's own sales. This can certainly be seen as a contribution to greater digital sovereignty for Europe and a more dynamic digital economy.
15. With the finding of the outstanding cross-market importance of the GAFA-companies, the Federal Cartel Office has also laid the foundation for a further strengthening of Europe's digital sovereignty.

c.

16. The question of whether the Federal Cartel Office can initiate its own competition law proceedings against large digital platforms, alongside the European Commission, depends primarily on whether Section 19a of the GWB can be applied alongside the provisions of the Digital Markets Act (Regulation (EU) 2022/1925).
17. In this context, the application of Section 19a GWB crucially depends on its classification as a norm under antitrust law or regulatory law. The Federal Cartel Office supports a classification under antitrust law. In the remaining discourse, such clear positioning has not yet evolved. Rather, both views are held. Only a decision by the CJEU can provide comprehensive clarification.

d.

18. Only the Commission's exclusive competence in enforcing the DMA can ensure the proper functioning of the internal market and undisturbed cross-border trade between Member States. Otherwise, the internal market would be fragmented, which may have a negative impact on both European consumers and commercial users of the gatekeeper platforms. The support of the European Commission from national competition authorities is not necessary, due to the small number of potential gatekeepers.

Question 8

Creation of European champions

19. As part of its new industrial strategy, the EU Commission intends to establish a world-leading industry in Europe and is using provisions of state aid law for this purpose. However, a "protectionist revolution" of the state aid regime is not envisaged.
20. Rather, the Commission remains loyal to its competitive line and focuses on ecological and digital innovation through competition. Nevertheless, the Commission has revised a large number of its instruments under state aid law in concretisation of Article 107 (3) TFEU, to support and promote green and digital transformation by facilitating and increasing the granting of state aid. Accordingly, industrial policy aspects are likely to be taken into account in future decision-making practice, whereby the creation of European champions is only expected to play an indirect role.

Consideration of the long-term viability of strategic industries

21. At the beginning of the Coronavirus pandemic, the Commission explicitly wanted to prevent the loss of critical facilities and technologies by granting state aid. Nevertheless, it did not give a "carte blanche", but referred to state aid instruments modified by the temporary framework. The same applies to the strengthening of the autonomy of the internal market envisaged in the updated industrial strategy, through the expansion of strategic sectors to be promoted.
22. Thus, both the Chips Act and the approved IPCEI projects show that the Commission is adhering to its competitive line here as well, and is applying state aid instruments in their entirety – albeit with some reasonable modifications. The long-term viability of strategic industries is therefore likely to be taken into account, at best as a secondary argument, when examining a state aid measure.

Question 9

23. The German courts are very reluctant to use the instruments at their disposal to cooperate with the European Commission and the CJEU. Since 2009, the Commission has only been asked for an opinion in eight cases. The number of requests for information is even lower. However, the Commission also makes only very limited use of the possibilities available to it to cooperate with the German courts. Thereto, only one amicus curiae opinion was sent to a German court in the period 2014-2017.
24. Further, preliminary ruling proceedings in the area of state aid were initiated by German courts only in individual cases.
25. However, these statistics, which may seem sobering at first glance, do not indicate an unwillingness of the German courts to cooperate with the European institutions. Rather, any reluctance could be due to the fact that the German courts have already used case law or Commission decisions to clarify open questions, meaning the instruments for cooperation did not require to be used.

Question 10

26. As far as can be seen, the Federal Cartel Office's decision-making practice has, so far, not included a comprehensive competitive analysis of the effects of trade defence instruments. However, it can be assumed that in similar cases the Federal Cartel Office would carry out a comparable examination. Trade

defence instruments fall under the overall scope of legal barriers to market entry, which can be a significant factor in the examination of a dominant position.

27. In the CRRC/Vossloh case, with regard to Chinese acquirers, the Federal Cartel Office used the Commission's Anti-Dumping Country Report as evidence that state-owned enterprises benefit significantly from subsidies, and are therefore able to use targeted low-price strategies to gain market share. The large number of existing trade policy measures was also viewed as an indication that such strategies are actively implemented with the acceptance of anti-dumping or countervailing duties

Question 11

28. Germany has both cross-sectoral and sector-specific investment controls. Initially, a sector-specific notification and approval requirement was introduced in 2004 for defence companies and manufacturers of cryptosystems. Today, this check is based on Section 4 (1) No. 1 of the Foreign Trade and Payments Act (AWG), in conjunction with Sections 60 to 62 of the Foreign Trade and Payments Ordinance (AWV). In 2009, it was supplemented by a cross-sectoral check (Sections 4 (1) Nos. 4 and 4a, 5 (2) of the Foreign Trade and Payments Act, in conjunction with Sections 55 to 59 of the Foreign Trade and Payments Ordinance).

a.

29. In substantive terms, the requirement of a foreseeable impairment of public order or security leads to considerable legal uncertainty. The use of these terms perpetuates the case law of the CJEU, according to which a causal link between the planned investment and the fundamental interests of society must be proven.

30. In the active practice of the BMWK, the substantive test criterion has recently become politically charged to a considerable extent. As a result, a prohibition ultimately becomes a political decision. This was particularly demonstrated by the COSCO case. The dispute over the approval of the investment in the port of Hamburg not only led to a political compromise, but, subsequently, impacted other investment decisions by the BMWK in the Elmos and ERS Electronic cases.

31. In addition to the political control of the approval and prohibition practice, there is a lack of transparency concerning the decisions made. Unlike the Federal Cartel Office, the BMWK does not publish any case reports. This makes

it even more difficult for investors to address possible concerns. Incidentally, this also applies to the Commission's influence on national proceedings, as the contents and background of such are also not accessible.

32. Finally, although investors have the possibility of legal protection in principle, legal action is rarely taken in transaction practice due to the tight time frame. Further, court decisions to date in the Siltronic/GlobalWafers case convey a trend in favour of a very generous scope for decision-making on the part of the BMWK, which ultimately rules out effective control. This is at odds with the CJEU's particular emphasis on procedural rights.

b.

33. Cross-sector investment control has been comprehensively adapted to the content of the EU Screening Regulation. Sector-specific investment control is in addition to the scope of application of the EU Screening Regulation. In addition, special statutory review mechanisms exist for individual special sectors, e.g. under the Satellite Data Security Act (SatDSiG), the Aviation Security Act (LuftNaSiG) or the Act on the Transfer of Shareholdings in Volkswagenwerk Gesellschaft mit beschränkter Haftung to Private Owners (limited liability company) (VWGmbHÜG). However, these play a rather minor role and have already been partially superseded by control under the AWG and AWV.

c.

34. The cross-sectoral review procedure generally covers any direct or indirect acquisition of a domestic company by non-EU/non-EFTA foreigners, insofar as the respective share of voting rights reaches one of the thresholds listed in Section 56 AWV. In turn, this is significantly related to an allocation of the target company based on Section 55a (1) AWV.

35. For companies within the meaning of Section 55a (1) nos. 1 to 7 AWV, a threshold of 10% of the voting rights applies, which must be, at least, reached or exceeded. For companies within the meaning of Section 55a (1) nos. 8 to 27 AWV, a threshold of 20% of the voting rights applies. For all other companies, a threshold of 25% of the voting rights applies. For all companies in nos. 1 to 27, a reporting obligation applies in principle (Section 55a (4) AWV). For the individual thresholds, Section 56 (2) AWV provides for an adjustment in cases where additional voting rights are acquired which already build upon the values specified in (1).

36. Sector-specific investment control applies to any complete acquisition of companies, or the acquisition of a direct or indirect voting share of 10%

by a foreigner, if these companies operate in particularly security-sensitive areas (Sections 60 (1) and (1a), 60a AWV). Deviating from the cross-sectoral investment control, EU foreigners are also subject to sector-specific investment control pursuant to Section 60 (1) AWV, in addition to non-EU acquirers (Section 2 (5) AWG).

d.

37. The cross-sector investment control is applicable to all sectors, in principle. The case groups mentioned in Section 55a (1) No. 1 to 27 AWV only have an effect on the applicable inspection threshold pursuant to Section 56 (1) AWV. At the same time, the wording of Section 55a (1) AWV suggests that special consideration be given to the question of whether there is a probable impairment of public order or security.
38. Defence companies and manufacturers of crypto systems, as defined in Section 60 (1) AWV are subject to sector-specific control as *lex specialis*. However, a change of procedure is possible according to Section 62a AWV. While cross-sectoral control regularly focuses on the development or production of certain goods, Section 60 (1), sentence 1 AWV, additionally covers the modification and the actual power over the goods mentioned.

e.

39. With regard to cross-sectoral investment control, Germany has adopted the standard of review prescribed by Article 4 of the EU Screening Regulation. Pursuant to Section 55 (1) AWV, the BMWK may examine whether an acquisition transaction is likely to impair the public order or security of the Federal Republic of Germany, of another Member State of the European Union, or in relation to projects or programs of Union interest. In this context, the case groups named in Section 55a (1) AWV may be taken into account as factors in accordance with Section 55a (1) AWV.
40. A different standard of review applies in the context of sector-specific investment control. At this point, the BMWK examines whether the acquisition is likely to "impair essential security interests of the Federal Republic of Germany" (Section 60 (1) AWV).
41. The previous decisions of the VG Berlin and the OVG Berlin-Brandenburg in the Siltronic/GlobalWafers case suggest that a risk situation is examined by considering the overall indications determined within the individual case, which may point to an impairment.

f.

42. In discussions, the BMWK emphasises that investment control does not constitute competitive control, but rather serves security policy purposes. However, this clear distinction from competitive considerations can, at least, be called into question in view of the cases that have come to light so far. Time and again, the BMWK seems to highlight the risk of technology transfer to China and that sufficient supplies to the German economy must be ensured. These are motives that can, in any case, also be assigned to the area of competition and industrial policy.

g.

43. According to the BMWK, the exchange of information between the BMWK and the Commission functions without problem. According to the latest OECD study on the effectiveness and efficiency of the EU investment control regime, however, there appear to be some overall inefficiencies within the cooperation mechanism that are also likely to affect Germany. This applies, for example, to the lack of capacity to deal with, and forward, cases that are not subject to their own review.

h.

44. In Germany, investment control decisions of the BMWK are subject to judicial review, just like any other administrative decision. In principle, a constitutional complaint or an action for official liability may also be considered. The Berlin Administrative Court is responsible for actions to challenge a prohibition, or actions for the issuance of a clearance certificate pursuant to Section 58 AWV. The extent to which decisions accompanying proceedings can also be challenged is generally disputed. The courts have so far been very restrictive in this respect.

i.

45. As a result of the Coronavirus crisis, and the discussions on access to medical goods, Germany has now included a number of health-related sectors in Section 55a (1) AWV (Nos. 8 to 11). Apart from this, cross-sectoral, but also sector-specific investment control has been repeatedly adapted since the outbreak of the Coronavirus crisis and generally tightened in the process. Acquisitions in the healthcare sector have also been prohibited on this basis.

Question 12

46. The German government, as well as the leading business associations in Germany, are fundamentally positive about the introduction of a new instrument on third-country subsidies. From the business community's point of view, however, further clarification is required with regard to its application. In its statement on the Commission's proposal, the German government highlighted that overlaps, and the resulting inefficiencies, must be avoided.
47. With regard to the new adjustments to the awarding of public contracts, the question has been raised as to whether the new sub-instrument 3 actually promises added value, compared to the existing regulations. However, this criticism has not been explored further. One reason for this is that the high thresholds for intervention are unlikely to affect the procurement practices of municipalities, for example. In addition, in view of the fact that third-country-related procurement rules have so far remained largely insignificant, it may be assumed that they will only have a minor influence on procurement practice.

Question 13

48. The broad approach taken by the Commission proposal accounts for the fundamental importance of state aid control within the competitive order of the internal market. However, the question arises as to whether the concrete design does not go beyond closing the regulatory gap identified. To close this gap, it would have been preferable to create a uniform instrument, as proposed by the German Monopolies Commission, for example.
49. In contrast, the chosen division into three different types of procedure entails not only insignificant additional burden for companies, but also for public administrative bodies. The creation of a genuine "level playing field" also appears questionable. This would have required a strict focus on the concept of state aid. In addition, the formulation adopted (in particular, the possible remedial measures) creates a certain potential for political abuse.

Question 14

50. On Jan. 11, 2021, the German Bundestag (Federal Parliament) passed the so-called Supply Chain Sourcing Obligations Act (LkSG), which will come into force on Jan. 1, 2023. Further amendments in this context relate to; Section 124 (2) GWB for the exclusion of public contracts, Section 2 (1) Wettbewerbsregistergesetz (Competition Registrations Act) (WRegG) for

registration in the event of a fine of at least €175,000.00, and Section 106 (1) Betriebsverfassungsgesetz (BetrVG – Works Constitution Act), which established a corresponding duty to inform with regard to the works council.

a.

51. Pursuant to Sec. 1 (1) Sentence 1 and 3 LkSG, the Act initially applies directly only to companies – regardless of their legal form – with at least 3,000 employees. From 2024, it will also apply to companies with at least 1,000 employees. In addition, however, it can be assumed that smaller companies will also be affected by the Act, by making due diligence obligations of the LkSG an object of mutual agreements (trickle-down effect).
52. The companies covered must have their head office, principal place of business, administrative headquarters or registered office in Germany (Sec. 1 (1) Sentence 1 No. 1 LkSG). However, foreign companies may also be included if they operate a branch in Germany and employ 3,000 or 1,000 employees there (Sec. 1 (1) Sentence 2 LkSG). In the case of affiliated companies, the employees of all companies belonging to the group are included in the calculation, insofar as the calculation concerns the employees of the parent company (Sec. 1 (3) LkSG). There is no provision for reciprocal attribution between the parent company and the subsidiary.

b.

53. Companies within the scope of the LkSG are subject to a wide range of obligations in terms of internal corporate structuring, general governance and the conduct of their business activities. In this context, Section 3 of the LkSG forms the starting point for the application of comprehensive duties of care, which are detailed in Sections 4 to 10 of the LkSG. § Section 3 (1) sentence 2 LkSG lists these duties of care in an exhaustive manner.
54. Essentially, these are obligations of effort, not obligations of success nor warranty liability. A distinction must be made between the "own business area", a "direct supplier" and an "indirect supplier". An appropriateness standard applies to the specific type of implementation (Section 3 (2) LkSG).
55. All obligations are linked to the so-called "protected legal positions" on the basis of the international conventions listed in the annex to the LkSG (§ 2 para. 1 LkSG), as well as to the prohibited acts named in § 2 para. 2, 3 and 4 LkSG.

c.

56. According to Section 2 (5) LkSG, the supply chain in the context of the LkSG stands for the overall area of a company's products and services. It includes all steps in Germany, and abroad, that are required to manufacture products and provide services, starting with the extraction of raw materials through to delivery to the end customer. In the case of affiliated companies, the law includes companies belonging to the group as part of the company's own business operations, insofar as a determining influence is exercised (Section 2 (6) sentence 3 LkSG). This creates an extension to further suppliers.

57. The due diligence requirements of the LkSG apply along these spheres of influence. Their scope varies depending on whether it is the company's own business unit, a direct supplier or an indirect supplier.

d.

58. At first glance, the LkSG has a territorially limited scope of application. Section 1 of the LkSG presupposes a domestic connection. However, it is currently still disputed whether a determining influence of a company on a subsidiary abroad is sufficient to include it within the scope of application of the LkSG. In addition, the extension of the LkSG to direct and indirect suppliers can also be interpreted as an extraterritorial effect of the law.

e.

59. The LkSG does not create any independent new legal remedies, but ties in with the existing legal process. Accordingly, any civil law claim can be brought before the civil courts, even if the place of performance is abroad. By contrast, public law measures based on Sections 12 to 21 of the LkSG are subject to administrative appeal.

f.

60. Civil liability is not established by the LkSG (Section 3 (3) LkSG). However, this does not affect any liability established independently (Section 3 (3) sentence 2 LkSG). Apart from this, Section 11 of the LkSG contains a procedural facilitation in the form of procedural autonomy, according to which trade unions or non-governmental organizations can be authorized to enforce a violation of the rights addressed in Section 2 (1) of the LkSG. To do so, the legal position must be "of paramount importance", however the law fails to define in more detail, which of the positions mentioned in Sec.2 (1) LkSG this should apply to.

Question 15

61. Apart from the economic implications, the greatest challenges of the LkSG at present are the enormous scope and extent of the due diligence obligations, and legal uncertainty for companies caused by numerous terms that are open to interpretation. In view of the expansion of duty positions and the introduction of civil liability by the EU proposal, it is feared that small and medium-sized companies, in particular, will have difficulties in complying with such comprehensive supply chain legislation.

Erweiterte Zusammenfassung

Frage 1

1. Das Bundeskartellamt beschäftigt sich bereits seit der Jahrtausendwende mit der Berücksichtigungsfähigkeit von Umweltbelangen im Kartellrecht. Oftmals werden hier „freiwillige" – aber von einer zentralen Stelle gesteuerten – Kooperationsformen aufgesetzt.
2. Eine große Fallpraxis bezgl. der Berücksichtigung von Nachhaltigkeitsaspekten im Rahmen von §§ 1, 2 des Gesetzes gegen Wettbewerbsbeschränkungen (GWB) existiert jedoch nicht, so dass sich hieraus keine allgemeinen Leitlinien ableiten lassen können. Gleichwohl kann aus den bisherigen Entscheidungen herausgelesen werden, dass das Bundeskartellamt Nachhaltigkeitsinitiativen grundsätzlich positiv gegenübersteht.

Frage 2

3. Die dem Bundeskartellamt obliegende Fusionskontrolle ist aktuell kein geeignetes Instrument zur Berücksichtigung von Gemeinwohlgründen, da das Bundeskartellamt ausschließlich für die wettbewerbspolitische Bewertung eines Zusammenschlussvorhabens zuständig ist. So ist ihm die Untersagung einer Fusion aufgrund von Nachhaltigkeitsaspekten nicht möglich. Auch die mittels eines Effizienzeinwands vorgetragenen Nachhaltigkeitsaspekte konnte das Bundeskartellamt aufgrund der hohen prozessualen Anforderungen bisher nicht in seinen Entscheidungen berücksichtigen. Gemeinwohlgründe können jedoch im Rahmen der Ministererlaubnis Berücksichtigung finden.

Frage 3

4. Grundsätzlich akzeptiert das Bundeskartellamt „nachhaltige Effizienzeinwände", wenngleich es sich mit diesen bislang noch nicht auf materieller Ebene auseinandersetzen musste. Hierzu könnte es jedoch auf die Abwägungsklausel des § 36 Abs. 1 S. 2 GWB zurückgreifen, nach der die vorgebrachten „nachhaltigen Effizienzen" die wettbewerblichen Einschränkungen des Zusammenschlussvorhabens überwiegen müssen.

Frage 4

a.

5. Nach Medienberichten hat sich das Bundeskartellamt gegen eine Fusion der Zugsparten von Siemens und Alstom ausgesprochen und in einem vertraulichen Schreiben an die EU-Kommission erhebliche kartellrechtliche Bedenken gegen das Vorhaben dargelegt. Das Bundeskartellamt hat sich damit gegen den damaligen Bundeswirtschaftsminister Peter Altmaier (CDU) gestellt, der die Fusion wiederum mit dem Argument, es sei notwendig, auf dem Markt für Hochgeschwindigkeitszüge einen „europäischen Champion" zu schaffen, der gegen chinesische Hersteller eine Chance habe, unterstützt hatte.

b.

6. Der BDI hatte mit Blick auf China gefordert, die EU-Fusionskontrolle anzupassen, um so das marktgetriebene Bilden europäischer Industriechampions fördern zu können. Der VDMA hingegen hatte sich kritisch gegenüber einer Reform des europäischen Wettbewerbsrechts zugunsten industriepolitischer Erwägungen geäußert. Insbesondere wurde die Schaffung einer unionalen Minister- bzw. Ratserlaubnis aufgrund der damit einhergehenden Politisierung des Wettbewerbsrechts klar abgelehnt.

c.

7. Äußerungen des Bundeskartellamts im Rahmen des Fusionskontrollverfahrens Siemens/Alstom lassen darauf schließen, dass das Bundeskartellamt der Schaffung „europäischer Champions" eher ablehnend gegenübersteht, sofern die Wettbewerbsbedenken gegen einen solchen Zusammenschluss nicht vollständig ausgeräumt werden können.

Frage 5

8. Im Rahmen der Fusionskontrolle durch das Bundeskartellamt sollen nach deutschem Fusionskontrollrecht lediglich wettbewerbspolitische Gesichtspunkte eine Rolle spielen. Gleichwohl wird bei der Prüfung von Fusionen berücksichtigt, ob Wettbewerber von außerhalb der EU im betroffenen Markt tätig sind oder in absehbarer Zeit tätig sein und die Marktmacht der Fusionsparteien begrenzen werden.
9. Die Berücksichtigung der internationalen Wettbewerbsfähigkeit deutscher Unternehmen möglicherweise auch zu Lasten des Wettbewerbs ist Aufgabe des Bundeswirtschaftsministers im Rahmen des Ministererlaubnisverfahrens.

Frage 6

10. Die Berücksichtigung von Allgemeinwohlbelangen erfolgt im deutschen Fusionskontrollrecht – in Abgrenzung zur rein wettbewerblichen Prüfung des Bundeskartellamts – im Rahmen der Ministererlaubnis. Hiernach kann ein durch das Bundeskartellamt nach § 36 Abs. 1 GWB untersagtes Zusammenschlussvorhaben durch den Bundesminister für Wirtschaft und Klimaschutz auf Antrag durch den Erlass einer Ministererlaubnis genehmigt werden, sofern die mit dem Zusammenschlussvorhaben einhergehenden Gemeinwohlgründe – hierzu zählt auch der Umweltschutz – dessen wettbewerbsschädliche Auswirkungen zumindest aufwiegen und andere wettbewerbskonforme Abhilfemaßnahmen des Staates nicht möglich sind.
11. Seit der Einführung der Ministererlaubnis im Jahr 1973 wurden 23 Verfahren eingeleitet, von denen in 10 Fällen eine Ministererlaubnis – teils unter Auflagen und Nebenbestimmungen – erteilt worden ist. In den jüngsten Verfahren wurde die Sicherung von 16.000 Arbeitsplätzen sowie „Know-how und Innovationspotential für Energiewende und Nachhaltigkeit" als Gemeinwohlgrund angesehen.

Frage 7

a.

12. Mit der Anfang 2021 in Kraft getretenen 10. GWB-Novelle wurden die GWB-Bestimmungen zur Missbrauchsaufsicht umfassend überarbeitet und „digitalisiert". Dabei wurde mit § 19a GWB eine neue Vorschrift geschaffen, die eine präventiv ausgerichtete Missbrauchsaufsicht im Bereich der digitalen Ökosysteme etabliert und dem Bundeskartellamt ein früheres und effektiveres Eingreifen gegen etwaig wettbewerbsschädliche Verhaltensweisen großer Digitalkonzerne ermöglicht.
13. Das Bundeskartellamt kann nunmehr Unternehmen, deren überragende marktübergreifende Bedeutung für den Wettbewerb es in einem ersten Schritt festgestellt hat, in einen zweiten Schritt wettbewerbsgefährdende Praktiken untersagen. Das Bundeskartellamt hat seit dem Inkrafttreten des § 19a GWB mehrere Verfahren gegen die GAFA-Unternehmen eingeleitet.

b.

14. Ein gegen Amazon eingeleitetes Verfahren hat aufgezeigt, dass das Bundeskartellamt im Rahmen seiner Missbrauchskontrolle Einfluss auf die großen Digitalkonzerne nehmen kann. In diesem Verfahren konnte für die europäischen Händler ein verbesserter Kundenzugang im Onlinehandel und

damit auch eine erhöhte Konkurrenz für den Eigenverkauf von Amazon selbst erreicht werden, was durchaus als Beitrag zu einer größeren digitalen Souveränität Europas und einer dynamischeren digitalen Wirtschaft gewertet werden kann.

15. Mit der Feststellung der überragend marktübergreifenden Bedeutung der GAFA-Unternehmen für den Wettbewerb hat das Bundeskartellamt zudem den Grundstein für eine weitere Stärkung der digitalen Souveränität Europas gelegt.

c.

16. Inwieweit das Bundeskartellamt neben der Europäischen Kommission eigene wettbewerbsrechtliche Verfahren gegen große digitale Plattformen einleiten kann, hängt in erster Linie davon ab, ob § 19a GWB neben den Vorschriften des Digital Markets Act (VO (EU) 2022/1925) zur Anwendung kommen kann.

17. Die Anwendung des § 19a GWB hängt entscheidend von dessen Einordnung als kartell- oder regulierungsrechtliche Norm ab. Das Bundeskartellamt vertritt eine kartellrechtliche Einordnung. Im übrigen Diskurs hat sich eine solch klare Positionierung noch nicht herauskristallisiert. Vielmehr werden beide Ansichten vertreten. Umfassende Klärung wird hier nur eine Entscheidung des EuGH bringen können.

d.

18. Nur die alleinige Zuständigkeit der Kommission bei der Durchsetzung des DMA kann einen reibungslos funktionierenden Binnenmarkt sowie einen ungestörten grenzüberschreitenden Handel zwischen den Mitgliedstaaten gewährleisten. Anderenfalls käme es zu einer Fragmentierung des Binnenmarktes, die sich sowohl auf die europäischen Verbraucher als auch die kommerziellen Nutzer der Gatekeeper-Plattformen negativ auswirken kann. Auch ist eine Unterstützung der Europäischen Kommission durch die nationalen Wettbewerbsbehörden aufgrund der geringen Anzahl an potentiellen Gatekeepern nicht erforderlich.

Frage 8

19. Im Rahmen ihrer neuen Industriestrategie beabsichtigt die Kommission, eine weltweit führende Industrie in Europa zu etablieren und zieht hierzu auch die Vorschriften des Beihilfenrechts heran. Eine „protektionistische Revolution" des Beihilfenregimes ist jedoch nicht angedacht.

20. Die Kommission bleibt vielmehr ihrer wettbewerblichen Linie treu und setzt auf ökologische und digitale Innovation durch Wettbewerb. Gleichwohl hat die Kommission eine Vielzahl ihrer beihilfenrechtlichen Instrumente in Konkretisierung des Art. 107 Abs. 3 AEUV überabeitet, um so den grünen und digitalen Wandel durch eine erleichterte wie erhöhte Beihilfenvergabe zu unterstützen und zu fördern. Demgemäß dürften in der zukünftigen Entscheidungspraxis auch industriepolitische Aspekte herangezogen werden, wobei dem Aspekt der Schaffung europäischer Champions lediglich eine indirekte Rolle zukommen dürfte.
21. Bereits zu Beginn der Corona-Pandemie hat die Kommission den Verlust kritischer Anlagen und Technologien auch durch die Gewährung staatlicher Beihilfen explizit verhindern wollen. Gleichwohl hat sie hier keinen „Freibrief" erteilt, sondern auf das durch den befristeten Rahmen modifizierte Beihilfeninstrumentarium verwiesen. Gleiches gilt für die in der aktualisierten Industriestrategie vorgesehene Stärkung der Autonomie des Binnenmarktes durch den zu fördernden Ausbau strategischer Sektoren.
22. Sowohl das Chips-Gesetz wie auch die genehmigten IPCEI-Vorhaben zeigen auf, dass die Kommission auch hier an ihrer wettbewerblichen Linie festhält und das Beihilfeninstrumentarium – wenn auch mit einigen sinnvollen Modifikationen – vollständig anwendet. Die langfristige Lebensfähigkeit strategischer Industriezweige dürfte daher allenfalls als Nebenargument im Rahmen der Prüfung einer beihilfenrechtlichen Maßnahme berücksichtigt werden.

Frage 9

23. Die deutschen Gerichte nutzen die ihnen zur Verfügung stehenden Instrumente zur Zusammenarbeit mit der Europäischen Kommission und dem EuGH nur sehr zurückhaltend. So wurde die Kommission seit 2009 lediglich in acht Fällen um die Abgabe einer Stellungnahme gebeten. Die Zahl der Auskunftsersuchen lag sogar noch darunter. Aber auch die Kommission nutzt die ihr zur Verfügung stehenden Möglichkeiten zur Zusammenarbeit mit den deutschen Gerichten nur sehr begrenzt. So wurde im Zeitraum von 2014-2017 lediglich eine Amicus-Curiae-Stellungnahme an ein deutsches Gericht übermittelt.
24. Vorabentscheidungsverfahren wurden im Bereich der staatlichen Beihilfen nur in Einzelfällen durch deutsche Gerichte eingeleitet.
25. Diese auf den ersten Blick ernüchternden Zahlen zeigen jedoch nicht den Unwillen deutscher Gerichte, mit den europäischen Institutionen

zusammenzuarbeiten. Vielmehr könnte die zurückhaltende Zusammenarbeit auch darin begründet liegen, dass die deutschen Gerichte bereits ergangene Rechtsprechung oder bereits erlassene Kommissionsbeschlüsse zur Klärung offener Fragen herangezogen haben, so dass auf die Instrumente der Zusammenarbeit nicht mehr zurückgegriffen werden musste.

Frage 10

26. Eine umfängliche wettbewerbliche Auseinandersetzung mit den Auswirkungen handelspolitischer Schutzinstrumente findet sich in der Entscheidungspraxis des Bundeskartellamts – soweit ersichtlich – bislang nicht. Es ist jedoch davon auszugehen, dass bei gleich gelagerten Fällen eine vergleichbare Auseinandersetzung durch das Kartellamt erfolgen würde. Handelsschutzinstrumente unterfallen dem Gesamtbereich rechtlicher Marktzutrittsschranken, die als Faktor bei der Prüfung einer marktbeherrschenden Stellung bedeutsam sein können.
27. In dem Fall CRRC/Vossloh hat das Bundeskartellamt im Hinblick auf chinesische Erwerber den Anti-Dumping-Länderbericht der Kommission als Beleg dafür herangezogen, dass Staatsunternehmen in erheblicher Weise von Subventionen profitieren und daher gezielt Niedrigpreisstrategien zur Erlangung von Marktanteilen einsetzen können. Die Vielzahl von bestehenden handelspolitischen Maßnahmen wurde zudem als Indiz dafür angesehen, dass derartige Strategien unter Inkaufnahme von Antidumping- bzw. Ausgleichszöllen aktiv umgesetzt werden.

Frage 11

28. Deutschland verfügt über eine sektorübergreifende und eine sektorspezifische Investitionskontrolle. Zunächst wurde 2004 eine sektorspezifische Melde- und Genehmigungspflicht für Rüstungsunternehmen und Hersteller von Kryptosystemen eingeführt. Diese Prüfung basiert heute auf § 4 Abs. 1 Nr. 1 des Außenwirtschaftsgesetzes (AWG) i.V.m. den §§ 60 bis 62 der Außenwirtschaftsverordnung (AWV). Im Jahr 2009 wurde sie um eine sektorübergreifende Kontrolle ergänzt (§§ 4 Abs. 1 Nr. 4 und 4a, 5 Abs. 2 AWG i.V.m. §§ 55 bis 59 AWV).

a.

29. In materieller Hinsicht führt die Voraussetzung einer voraussichtlichen Beeinträchtigung der öffentlichen Ordnung oder Sicherheit zu erheblicher Rechtsunsicherheit. Der Rückgriff auf diese Begrifflichkeiten schreibt

die Rechtsprechung des EuGH fort, nach der eine kausale Verknüpfung zwischen der geplanten Investition und den Grundinteressen der Gesellschaft nachzuweisen ist.

30. In der aktiven Praxis des BMWK wird das materielle Prüfkriterium zuletzt in erheblicher Weise politisch aufgeladen und dadurch eine Untersagung letztlich zu einer politischen Entscheidung. Dies hat der Fall COSCO eindrucksvoll belegt. Der Streit um die Zulassung der Beteiligung am Hamburger Hafen hat nicht nur zu einem politischen Kompromiss geführt, sondern anschließend auch auf andere Investitionsentscheidungen des BMWK in den Fällen Elmos und ERS Electronic ausgestrahlt.

31. Zu der politischen Steuerung der Genehmigungs- bzw. Untersagungspraxis tritt eine Intransparenz hinsichtlich der getroffenen Entscheidungen. Anders als das Bundeskartellamt veröffentlicht das BMWK keinerlei Fallberichte. Die Auseinandersetzung mit möglichen Bedenken durch die Investoren wird dadurch im Ergebnis weiter erschwert. Dies betrifft im Übrigen auch die Einflussnahmen der Kommission auf die nationalen Verfahren, deren Inhalte und Hintergründe ebenfalls nicht zugänglich sind.

32. Schließlich besteht für Investoren zwar grundsätzlich eine Rechtsschutzmöglichkeit, jedoch wird der Rechtsweg aufgrund des engen zeitlichen Rahmens in der Transaktionspraxis selten beschritten. Auch zeigen die bisherigen Gerichtsentscheidungen im Fall Siltronic/GlobalWafers eher in Richtung eines sehr großzügig bemessenen Entscheidungsspielraums des BMWK, wodurch eine effektive Kontrolle letztlich ausgeschlossen wird. Dies steht in einem Widerspruch zu der besonderen Betonung von Verfahrensrechten durch den EuGH.

b.

33. Die sektorübergreifende Investitionskontrolle ist umfassend an den Gehalt der EU-Screening-Verordnung angepasst worden. Die sektorspezifische Investitionskontrolle tritt neben den Anwendungsbereich der EU-Screening-VO. Darüber hinaus existieren für einzelne Sonderbereiche spezialgesetzliche Überprüfungsmechanismen, z.B. nach dem Satellitendatensicherheitsgesetz (SatDSiG), dem Luftverkehrsnachweissicherheitsgesetz (LuftNaSiG) oder dem Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand (VWGmbHÜG). Allerdings spielen diese eine eher geringe Rolle und sind teilweise bereits durch die Kontrolle nach dem AWG und der AWV verdrängt worden.

c.

34. Das sektorübergreifende Prüfverfahren erfasst grundsätzlich jeden unmittelbaren oder mittelbaren Erwerb eines inländischen Unternehmens durch Nicht-EU-/Nicht-EFTA-Ausländer, insoweit der jeweilige Stimmrechtsanteil einen der in § 56 AWV aufgeführten Schwellenwerte erreicht, der wiederum maßgeblich mit einer Zuordnung des Zielunternehmens auf Grundlage von § 55a Abs. 1 AWV zusammenhängt.
35. Für Unternehmen i.S.v. § 55a Abs. 1 Nr. 1 bis 7 AWV gilt ein Schwellenwert von 10 % der Stimmrechte, die zumindest erreicht oder überschritten werden müssen. Für Unternehmen i.S.v. § 55a Abs. 1 Nr. 8 bis 27 AWV gilt ein Schwellenwert von 20 % der Stimmrechte. Für alle übrigen Unternehmen gilt ein Wert von 25 % der Stimmrechte. Für alle Unternehmen der Nr. 1 bis 27 gilt grundsätzlich eine Meldepflicht (§ 55a Abs. 4 AWV). Für die einzelnen Schwellenwerte ergibt sich aus § 56 Abs. 2 AWV eine Anpassung in Fällen, in denen ein Zuerwerb weiterer Stimmrechte erfolgt, der auf den in Abs. 1 genannten Werten bereits aufbaut.
36. Die sektorspezifische Investitionskontrolle findet bei jedem vollständigen Erwerb von Unternehmen oder dem Erwerb eines unmittelbaren oder mittelbaren Stimmrechtsanteils von 10 % durch einen Ausländer Anwendung, wenn diese Unternehmen in besonders sicherheitssensiblen Bereichen tätig sind (§§ 60 Abs. 1 und 1a, 60a AWV). In Abweichung zur sektorübergreifenden Investitionskontrolle unterfallen der sektorspezifischen Investitionskontrolle nach § 60 Abs. 1 AWV neben unionsfremden Erwerbern auch EU-Ausländer (§ 2 Abs. 5 AWG).

d.

37. Die sektorübergreifende Investitionskontrolle ist grundsätzlich auf alle Sektoren anwendbar. Die in § 55a Abs. 1 Nr. 1 bis 27 AWV genannten Fallgruppen haben lediglich Auswirkung auf die anwendbare Prüfschwelle gemäß § 56 Abs. 1 AWV. Zugleich legt die Formulierung des § 55a Abs. 1 AWV eine besondere Berücksichtigung bei der Frage nahe, ob eine voraussichtliche Beeinträchtigung der öffentlichen Ordnung oder Sicherheit gegeben ist.
38. Rüstungsunternehmen und Hersteller von Kryptosystemen i.S.v. § 60 Abs. 1 AWV unterfallen der sektorspezifischen Kontrolle als *lex specialis*. Ein Verfahrenswechsel ist gemäß § 62a AWV jedoch möglich. Während im Rahmen der sektorübergreifenden Kontrolle regelmäßig auf die Entwicklung oder Herstellung bestimmter Güter abgestellt wird, umfasst § 60 Abs. 1 S. 1 AWV zusätzlich auch die Modifikation sowie die tatsächliche Gewalt über die genannten Güter.

e.

39. Bei der sektorübergreifenden Investitionskontrolle hat Deutschland den durch Art. 4 EU-Screening-VO vorgegebenen Prüfungsmaßstab übernommen. Gemäß § 55 Abs. 1 AWV kann das BMWK prüfen, ob durch einen Erwerbsvorgang die öffentliche Ordnung oder Sicherheit der Bundesrepublik Deutschland, eines anderen Mitgliedstaates der Europäischen Union oder in Bezug auf Projekte oder Programme von Unionsinteresse voraussichtlich beeinträchtigt wird. Dabei können die in § 55a Abs. 1 AWV benannten Fallgruppen gemäß § 55a Abs. 1 AWV als Faktoren berücksichtigt werden.
40. Ein anderer Prüfungsmaßstab gilt im Rahmen der sektorspezifischen Investitionskontrolle. An dieser Stelle prüft das BMWK, ob durch den Erwerb „wesentliche Sicherheitsinteressen der Bundesrepublik Deutschland voraussichtlich beeinträchtigt" werden (§ 60 Abs. 1 AWV).
41. Den bisherigen Entscheidungen des VG Berlin und des OVG Berlin-Brandenburg in dem Fall Siltronic/GlobalWafers kann entnommen werden, dass die Prüfung einer Gefährdungslage im Rahmen einer Gesamtbetrachtung verschiedener im Einzelfall ermittelter Indizien erfolgt, die auf eine Beeinträchtigung hindeuten können.

f.

42. In Gesprächen betont das BMWK, dass die Investitionskontrolle keine wettbewerbliche Kontrolle darstellt, sondern sicherheitspolitischen Zwecken dient. Diese klare Abgrenzung von wettbewerblichen Erwägungen kann allerdings angesichts der bisher bekannt gewordenen Fälle zumindest in Frage gestellt werden. Denn immer wieder scheint das BMWK darauf abzustellen, dass die Gefahr eines Technologietransfers nach China vorliege und dass die hinreichende Belieferung der deutschen Wirtschaft gesichert werden müsse. Hierbei handelt es sich um Beweggründe, die jedenfalls auch dem Bereich der Wettbewerbs- bzw. Industriepolitik zuzuordnen sind.

g.

43. Laut Angaben des BMWK funktioniert der Informationsaustausch zwischen BMWK und Kommission problemlos. Laut der neuesten Studie der OECD zur Effektivität und Effizienz der EU-Investitionskontrollregimes scheinen insgesamt allerdings einige Ineffizienzen innerhalb des Kooperationsmechanismus zu bestehen, die auch Deutschland betreffen dürften. Dies gilt etwa für die fehlende Kapazität zur Auseinandersetzung mit und Weiterleitung von Fällen, die einer eigenen Prüfung nicht zugeführt werden.

h.

44. In Deutschland sind investitionskontrollrechtliche Entscheidungen des BMWK, wie jede andere Verwaltungsentscheidung auch, gerichtlich überprüfbar. Auch eine Verfassungsbeschwerde oder eine Amtshaftungsklage kommt grundsätzlich in Betracht. Zuständig ist für Anfechtungsklagen gegenüber einer Untersagung oder Verpflichtungsklagen auf Erteilung einer Unbedenklichkeitsbescheinigung gemäß § 58 AWV das Verwaltungsgericht Berlin. Inwieweit verfahrensbegleitende Entscheidungen ebenfalls angegriffen werden können, ist allgemein umstritten. Die Gerichte sind hier bislang sehr restriktiv.

i.

45. In Folge der Corona-Krise und den Diskussionen über den Zugang zu medizinischen Gütern hat Deutschland nun auch eine Reihe gesundheitsrelevanter Bereiche in § 55a Abs. 1 AWV aufgenommen (Nr. 8 bis 11). Abgesehen davon wurde die sektorübergreifende, aber auch die sektorspezifische Investitionskontrolle seit Ausbruch der Corona-Krise immer wieder angepasst und dabei allgemein verschärft. Auf dieser Grundlage sind auch bereits Übernahmen im Gesundheitsbereich untersagt worden.

Frage 12

46. Die Bundesregierung, aber auch die führenden Wirtschaftsverbände in Deutschland stehen der Einführung eines neuen Instruments zu Drittlandssubventionen grundsätzlich positiv gegenüber. Aus Sicht der Wirtschaft sind allerdings weitere Klarstellungen hinsichtlich dessen Anwendung erforderlich. Die Bundesregierung hat in ihrer Stellungnahme zum Vorschlag der Kommission darauf hingewiesen, dass Überschneidungen und daraus folgende Ineffizienzen vermieden werden müssen.
47. Hinsichtlich der neuen Anpassungen bei der Vergabe öffentlicher Aufträge ist die Frage aufgeworfen worden, ob das neue Teilinstrument 3 tatsächlich einen Mehrwert gegenüber den bestehenden Regelungen verspricht. Diese Kritik wurde jedoch nicht weiter vertieft. Als Ursache kann angeführt werden, dass aufgrund der hohen Eingreifschwellen die Vergabepraxis etwa von Kommunen nicht berührt sein dürfte. Zudem wird womöglich angesichts der bislang weitgehend unbedeutend gebliebenen drittstaatsbezogenen Vergaberegeln von einer nur geringen Beeinflussung der Vergabepraxis ausgegangen.

Frage 13

48. Durch den breiten Ansatz, der mit dem Kommissionsvorschlag verbunden ist, wird der fundamentalen Bedeutung der Beihilfenkontrolle innerhalb der wettbewerblichen Ordnung des Binnenmarkts Rechnung getragen. Es stellt sich allerdings die Frage, ob die konkrete Ausgestaltung nicht über die Schließung der verorteten Regelungslücke hinausgeht. Zur Schließung wäre die Schaffung eines einheitlichen Instruments vorzugswürdig gewesen, wie dies etwa die deutsche Monopolkommission vorgeschlagen hatte.
49. Die gewählte Aufteilung in drei unterschiedliche Verfahrensarten geht dagegen mit einer nicht nur unerheblichen Mehrbelastung von Unternehmen, aber auch der öffentlichen Verwaltungsstellen einher. Auch erscheint die Herstellung eines echten „level playing field" fraglich. Hierfür wäre eine strenge Orientierung am Beihilfenbegriff erforderlich gewesen. Durch die beschlossene Ausgestaltung (insbesondere die möglichen Abhilfemaßnahmen) besteht zudem ein gewisses politisches Missbrauchspotenzial.

Frage 14

50. Am 11.1.2021 hat der Deutsche Bundestag das sog. Lieferkettensorgfaltspflichtengesetz (LkSG) beschlossen, das am 1.1.2023 in Kraft tritt. Weitere Änderungen in diesem Zusammenhang betreffen § 124 Abs. 2 GWB für den Ausschluss von öffentlichen Aufträgen, § 2 Abs. 1 Wettbewerbsregistergesetz (WRegG) für eine Eintragung bei einem Bußgeld von mindestens 175.000,00 € sowie § 106 Abs. 1 Betriebsverfassungsgesetz (BetrVG), wodurch im Hinblick auf den Betriebsrat eine entsprechende Unterrichtungspflicht begründet wurde.

a.

51. Gemäß § 1 Abs. 1 S. 1 u. 3 LkSG gilt das Gesetz zunächst direkt nur für Unternehmen – unabhängig von ihrer Rechtsform – mit mindestens 3.000 Mitarbeitern, ab 2024 auch für Unternehmen mit mindestens 1.000 Mitarbeitern. Darüber hinaus ist jedoch davon auszugehen, dass auch kleinere Unternehmen von dem Gesetz betroffen sein werden, indem Sorgfaltspflichten des LkSG zu einem Gegenstand gegenseitiger Verträge gemacht werden (trickle-down-Effekt).
52. Die erfassten Unternehmen müssen ihre Hauptverwaltung, Hauptniederlassung, ihren Verwaltungssitz oder ihren satzungsmäßigen Sitz im Inland haben (§ 1 Abs. 1 S. 1 Nr. 1 LkSG). Es können aber auch ausländische Unternehmen einbezogen werden, wenn sie eine Zweigniederlassung in

Deutschland betreiben und dort 3.000 bzw. 1.000 Mitarbeiter beschäftigen (§ 1 Abs. 1 S. 2 LkSG). Bei verbundenen Unternehmen werden die Mitarbeiter aller konzernangehörigen Gesellschaften bei der Berechnung berücksichtigt, sofern es um die Berechnung der Arbeitnehmer der Obergesellschaft geht (§ 1 Abs. 3 LkSG). Eine wechselseitige Zurechnung zwischen Ober- und Tochtergesellschaft ist nicht vorgesehen.

b.

53. Für die Unternehmen im Anwendungsbereich des LkSG ergeben sich eine Vielzahl von Verpflichtungen bei der internen Unternehmensstrukturierung, allgemeinen Governance sowie der Abwicklung ihrer geschäftlichen Tätigkeit. In diesem Zusammenhang bildet § 3 LkSG den Ausgangspunkt einer Geltung von umfassenden Sorgfaltspflichten, die wiederum in den §§ 4 bis 10 LkSG näher ausgestaltet sind. § 3 Abs. 1 S. 2 LkSG zählt diese Sorgfaltspflichten in abschließender Weise auf.
54. Hierbei handelt es sich im Wesentlichen um Bemühenspflichten, keine Erfolgspflichten oder Garantiehaftung. Auch ist zu unterscheiden zwischen dem „eigenen Geschäftsbereich", einem „unmittelbaren Zulieferer" und einem „mittelbaren Zulieferer". Für die konkrete Art der Umsetzung gilt ein Angemessenheitsmaßstab (§ 3 Abs. 2 LkSG).
55. Sämtliche Verpflichtungen knüpfen an sog. „geschützten Rechtspositionen" auf Grundlage der in der Anlage zum LkSG aufgeführten internationalen Übereinkommen (§ 2 Abs. 1 LkSG) sowie an die in § 2 Abs. 2, 3 und 4 LkSG benannten Verbotstatbestände an.

c.

56. Die Lieferkette im Rahmen des LkSG steht gemäß § 2 Abs. 5 LkSG für den Gesamtbereich der Produkte und Dienstleistungen eines Unternehmens und umfasst alle Schritte im In- und Ausland, die zur Herstellung der Produkte und zur Erbringung der Dienstleistungen erforderlich sind, angefangen von der Gewinnung der Rohstoffe bis zur Lieferung an den Endkunden. Zum eigenen Geschäftsbereich zählt das Gesetz bei verbundenen Unternehmen auch die konzernangehörigen Gesellschaften, soweit ein bestimmender Einfluss ausgeübt wird (§ 2 Abs. 6 S. 3 LkSG), was dann auch zu einer Erstreckung auf weitere Zulieferer führt.
57. Entlang dieser Einflusssphären finden die Sorgfaltspflichten des LkSG Anwendung. Ihr Umfang ist unterschiedlich, je nachdem, ob es sich um den eigenen Geschäftsbereich, einen unmittelbaren oder einen mittelbaren Zulieferer handelt.

d.

58. Auf den ersten Blick verfügt das LkSG über einen territorial begrenzten Anwendungsbereich. In § 1 LkSG wird ein Inlandsbezug vorausgesetzt. Allerdings ist derzeit noch streitig, ob ein bestimmender Einfluss eines Unternehmens auf eine Tochtergesellschaft im Ausland ausreichend ist, um dieses in den Anwendungsbereich des LkSG einzubeziehen. Daneben kann auch die Erstreckung des LkSG auf unmittelbare und mittelbare Zulieferer in Form einer extraterritorialen Wirkung des Gesetzes gedeutet werden.

e.

59. Das LkSG schafft keine eigenständigen neuen Rechtsbehelfe, sondern knüpft an den bestehenden Rechtsweg an. Danach ist wegen etwaigen zivilrechtlichen Ansprüchen der Weg zu den Zivilgerichten eröffnet, ggf. auch dann, wenn der Erfolgsort im Ausland liegt. Für öffentlich-rechtliche Maßnahmen auf Grundlage der §§ 12 bis 21 LkSG steht dagegen der Verwaltungsrechtsweg offen.

f.

60. Eine zivilrechtliche Haftung wird durch das LkSG grds. nicht begründet (§ 3 Abs. 3 LkSG). Eine unabhängig hiervon begründete Haftung bleibt hiervon jedoch unberührt (§ 3 Abs. 3 S. 2 LkSG). Abgesehen davon enthält das LkSG in § 11 eine prozessuale Erleichterung in Form einer Prozessstandschaft, wonach bei einer Verletzung der in § 2 Abs. 1 LkSG angesprochenen Rechte Gewerkschaften oder Nichtregierungsorganisationen zu einer Durchsetzung ermächtigt werden können. Die Rechtsposition muss dabei allerdings auch „überragend wichtig" sein, ohne dass das Gesetz näher definiert, auf welche der in § 2 Abs. 1 LkSG genannten Positionen dies zutreffen soll.

Frage 15

61. Abgesehen von den ökonomischen Implikationen lassen sich zum jetzigen Zeitpunkt als die größten Herausforderungen des LkSG die enorme Reichweite und der Umfang der Sorgfaltspflichten sowie die durch zahlreiche auslegungsbedürftige Begriffe hervorgerufene Rechtsunsicherheit auf Unternehmensseite benennen. Angesichts der Ausweitung von Pflichtenpositionen und der Einführung einer zivilrechtlichen Haftung durch den EU-Vorschlag steht zu befürchten, dass gerade kleinere und mittlere Unternehmen Schwierigkeiten haben werden, einer derart umfassenden Lieferkettengesetzgebung gerecht zu werden.

Bericht

Frage 1

Das Bundeskartellamt kann im deutschen Recht Nachhaltigkeitsgesichtspunkte im Rahmen von §§ 1[i] und 2[ii] des Gesetzes gegen Wettbewerbsbeschränkungen (GWB) sowie im Fusionskontrollverfahren (hierzu Frage 2) berücksichtigen. Dies ist keine neue Erkenntnis, vielmehr weist das Bundeskartellamt selbst darauf hin, dass es sich mit der Berücksichtigungsfähigkeit von Umweltbelangen im Kartellrecht bereits seit der Jahrtausendwende befasst.[1]

Bereits der Entwurf eines Umweltgesetzbuches (UGB) aus dem Jahr 1997 hatte vorgesehen, wettbewerbsbeschränkende Vereinbarungen aus Umweltschutzgründen vom Kartellverbot des § 1 GWB auszunehmen. Ein spezifischer kartellrechtlicher Ausnahmetatbestand für den Umweltsektor wurde letztlich im deutschen Kartellrecht jedoch nicht eingeführt. Im Rahmen der 6. GWB-Novelle 1999[2] wurde aber ein neuer – mittlerweile wieder abgeschaffter[3] – Freistellungstatbestand in § 7 GWB aufgenommen, der sich ausdrücklich auf Kooperationen zur Verwirklichung umweltrechtlicher Rücknahme- und Verwertungspflichten bezog.[4] Eine Berücksichtigung des Umweltschutzes kann jedoch weiterhin über die Legalausnahme des § 2 Abs. 1 GWB erfolgen.[5] So hatte das Bundeskartellamt bereits 2007 entschieden, dass die Schonung natürlicher Primärressourcen und die damit verbundene Energieeinsparung sowie der verminderte Schadstoffausstoß

[1] BKartA, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Virtuelle Tagung des Arbeitskreises Kartellrecht, Hintergrundpapier v. 1.10.2020, S. 29, unter Verweis auf „Der Grüne Punkt – Duales System Deutschland AG" (DSD), <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=7866CBDDA436B763EBC53998480300B6.2_cid387?__blob=publicationFile&v=2>, zuletzt abgerufen am 6.12.2022; hierzu BKartA, Bundekartellamt prüft Vereinbarkeit des DSD mit dem Kartellgesetz, Pressemitteilung vom 23.8.2002, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2002/23_08_2002_DSD.html>, zuletzt abgerufen am 6.12.2022.

[2] Sechstes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen v. 26.8.1998, BGBl. 1998, I-2521.

[3] Die Abschaffung dieser Vorschrift erfolgte mit der 7. GWB-Novelle am 30.6.2005, s. BKartA, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Virtuelle Tagung des Arbeitskreises Kartellrecht, Hintergrundpapier v. 1.10.2020, S. 29, <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=7866CBDDA436B763EBC53998480300B6.2_cid387?__blob=publicationFile&v=2>, zuletzt abgerufen am 6.12.2022.

[4] BKartA, Ausnahmebereiche des Kartellrechts – Stand und Perspektiven der 7. GWB-Novelle, Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 29.9.2003, S. 5 f., <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Bundeskartellamt%20-%20Ausnahmebereiche%20des%20Kartellrechts.pdf?__blob=publicationFile&v=4>, zuletzt abgerufen am 6.12.2022; s.a. T. Lübbig, *in* Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 9, Rn. 256.

[5] T. Lübbig, *in* G. Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 9, Rn. 256.

einen Effizienzgewinn i.S.d. heutigen Art. 101 Abs. 3 AEUV, § 2 GWB darstellen kann.[6]

Vielfach werden „freiwillige" – aber von einer zentralen Stelle gesteuerten – Kooperationsformen aufgesetzt, die in den „Graubereich" der kartellrechtlichen Verbotszone fallen.[7] Zuletzt hatte sich das Bundeskartellamt zur Vereinbarkeit mehrerer Nachhaltigkeitsinitiativen mit dem Kartellverbot nach § 1 GWB (bzw. Art. 101 AEUV) befasst.[8] Bislang ist vornehmlich die 2. Beschlussabteilung mit Fallkonstellationen an der Schnittstelle zwischen Nachhaltigkeit und Kartellrecht befasst gewesen.[9] Das Bundeskartellamt sieht hier insbesondere die wachsende Erwartungshaltung von Politik und Öffentlichkeit, „wünschenswerte Maßnahmen" nicht durch das Kartellrecht zu blockieren, auch wenn außerwettbewerbsrechtliche Gemeinwohlziele im Rahmen von wettbewerbsrechtlichen Normen nur bedingt zu berücksichtigen seien.[10] Demgemäß hatte das Bundeskartellamt sich zu den bisher diesbezüglich eingegangenen Rückfragen regelmäßig zurückhaltend geäußert.[11] Gleichwohl war und ist ihm die stetig steigende Bedeutung dieser Thematik – auch über Ländergrenzen hinweg – bewusst.[12] In der jüngeren Praxis hat das Bundeskartellamt die folgenden Nachhaltigkeitsinitiativen überprüft:

- Gemeinsame Standards zu Löhnen im Bananensektor,[13]
- Initiative Tierwohl,[14]
- Agrardialog Milch,[15]
- Fairer Handel mit landwirtschaftlichen Erzeugnissen aus Drittstaaten (Fairtrade).

Die entsprechenden Prüfverfahren werden im Folgenden näher dargestellt.

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[6] BKartA 31.5.2007 – B4-1006-06, Rn. 187 – Gesellschaft für Glasrecycling und Abfallvermeidung mbH (GGA) u.a. – Gemeinsame Beschaffung von unaufbereitetem oder aufbereitetem Altglas.

[7] F. Engelsing/M. Jakobs, Nachhaltigkeit und Wettbewerb, *WuW* 2019, 16 (16 f.).

[8] Hierzu u.a. F. Engelsing/M. Jakobs, Nachhaltigkeit und Wettbewerb, *WuW* 2019, 16 (16 ff.).

[9] F. Engelsing/M. Jakobs, Nachhaltigkeit und Wettbewerb, *WuW* 2019, 16 (17).

[10] J. J. Dreyer/E. Ahlenstiel, Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen, *WuW* 2021, 76 (79), unter Verweis auf BKartA, Tätigkeitsbericht 2015/16, BT-Drs. 18/12760, 54.

[11] BKartA, Tätigkeitsbericht 2015/16, BT-Drs. 18/12760, 54.

[12] BKartA, Tätigkeitsbericht 2015/16, BT-Drs. 18/12760, 54.

[13] BKartA 8.3.2022 – B2-90/21 – Fallbericht „Arbeitsgruppe des deutschen Einzelhandels – Nachhaltigkeitsinitiative zur Förderung existenzsichernder Löhne im Bananensektor (Living Wages) (Entscheidung v. 25.11.2021)".

[14] BKartA 8.3.2022 – B2-72/14 – Fallbericht „Fortentwicklung und Einführung des Kompensationsmodells der Initiative Tierwohl (ITW) im Bereich Rindfleisch (Entscheidung v. 14.12.2021)".

[15] BKartA 8.3.2022 – B2-87/21 – Fallbericht „Finanzierungskonzept für eine marktkonforme und faire Risiken- und Lastenverteilung der landwirtschaftlichen Transformationsprozesse für Milcherzeuger (Entscheidungen v. 6.10.2021 u. 10.1.2022)".

Die Initiative des deutschen Einzelhandels und der Deutschen Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH ist eine Selbstverpflichtung zu „gemeinsamen Standards zu Löhnen im Bananensektor".[16] Angestrebt ist eine Kooperation zur Gewährleistung existenzsichernder Löhne entlang der Lieferkette im Bananenhandel. Wettbewerbsrechtliche Bedenken wurden seitens des Bundeskartellamtes nicht geäußert,[17] da kein Austausch zu Einkaufspreisen, weiteren Kosten, Produktionsmengen oder Margen stattfand. Zudem wurden auch keine verpflichtenden Mindestpreise bzw. Preisaufschläge eingeführt. Demgemäß hat das Bundeskartellamt bereits einen Verstoß gegen das Kartellverbot des § 1 GWB bzw. Art. 101 Abs. 1 AEUV verneint.[18]

Die „Initiative Tierwohl"[19] ist ein Branchenbündnis aus Landwirtschaft, Fleischwirtschaft und Lebensmitteleinzelhandel, das Tierhalter für die Verbesserung von Haltungsbedingungen honoriert.[20] Vorgesehen ist die Zahlung eines einheitlichen Aufschlags an die teilnehmenden Tierhalter – das sogenannte „Tierwohlentgelt" – über die teilnehmenden Schlachtbetriebe. Bislang wurde durch diese Initiative lediglich die Erzeugung von Schweine- und Geflügelfleisch erfasst, sollte aber ab 2022 auch im Bereich der Rindermast eingeführt werden. Das Bundeskartellamt war hier einerseits skeptisch, ließ diesen Preisaufschlag andererseits aber aufgrund des Pioniercharakters der Initiative im Rahmen seines Aufgreifermessens für eine Übergangsphase zu.[21] Gleichzeitig hat das Bundeskartellamt mögliche Wege einer kartellrechtskonformen Fortentwicklung der „Initiative Tierwohl" dargelegt: So hat das Bundeskartellamt die Einführung wettbewerblicher Elemente verlangt. Eine spezifische Höhe des Tierwohlentgelts soll lediglich empfohlen werden, zudem müssten, so das Bundeskartellamt, Verbraucher eindeutig darauf hingewiesen werden, dass die Produkte nach

[16] BKartA, Nachhaltigkeit im Wettbewerb erreichen – Bundeskartellamt schließt Prüfung von Brancheninitiativen ab, Pressemitteilung vom 18.1.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html>, zuletzt abgerufen am 6.12.2022.

[17] BKartA 8.3.2022 – B2-90/21, S. 1 – Fallbericht „Arbeitsgruppe des deutschen Einzelhandels – Nachhaltigkeitsinitiative zur Förderung existenzsichernder Löhne im Bananensektor (Living Wages) (Entscheidung v. 25.11.2021)".

[18] BKartA 8.3.2022 – B2-90/21, S. 1 – Fallbericht „Arbeitsgruppe des deutschen Einzelhandels – Nachhaltigkeitsinitiative zur Förderung existenzsichernder Löhne im Bananensektor (Living Wages) (Entscheidung v. 25.11.2021)".

[19] Zu den einzelnen Kriterien s. Initiative Tierwohl, Kriterien, <initiative-tierwohl.de/tierhalter/kriterien/>, zuletzt abgerufen am 6.12.2022.

[20] Dies geschieht durch Zahlung eines einheitlichen Aufschlages an die teilnehmenden Tierhalter. Finanziert wird die Initiative von den vier größten Lebensmitteleinzelhandelsunternehmen, EDEKA, REWE, Aldi und der Schwarz-Gruppe, s. BKartA, Nachhaltigkeit im Wettbewerb erreichen – Bundeskartellamt schließt Prüfung von Brancheninitiativen ab, Pressemitteilung vom 18.1.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html>, zuletzt abgerufen am 6.12.2022.

[21] BKartA 8.3.2022 – B2-72/14, S. 3 – Fallbericht „Fortentwicklung und Einführung des Kompensationsmodells der Initiative Tierwohl (ITW) im Bereich Rindfleisch (Entscheidung v. 14.12.2021)".

Tierwohlstandards produziert wurden. Darüber hinaus müsse die Teilnahme an der „Initiative Tierwohl" für Tierhalter, Schlachtbetriebe und den Lebensmitteleinzelhandel tatsächlich freiwillig sein.[22]

Im Rahmen des „Agrardialog Milch" haben Milcherzeuger ein abgestimmtes Finanzierungskonzept zu Gunsten der Rohmilcherzeuger vorgestellt.[23] Diese Abstimmung bzw. dieses Finanzierungskonzept hat das Bundeskartellamt allerdings als unzulässig angesehen; es beinhalte eine unzulässige Preisabsprache. Entlang der Lieferkette sollten einheitliche Preisaufschläge erfolgen, die bis zum Endverbraucher weitergegeben werden sollten. Letztlich hätte dieses Finanzierungkonzept eine flächendeckende Erhöhung der Milchpreise ausgelöst. Konkrete Produktionskriterien für die Rohmilchproduktion mit Blick auf Nachhaltigkeitsaspekte waren nicht vorgesehen bzw. haben aus Sicht des Bundeskartellamtes keine Rolle bei der Preisabsprache gespielt.[24] Ein lediglich höherer Absatzpreis für die Erzeuger leiste nach Ansicht des Bundeskartellamts jedoch keinen unmittelbaren Beitrag zum Umweltschutz oder dem Tierwohl.[25] Gleichzeitig wurde jedoch betont, dass Nachhaltigkeitsaspekte im Kartellrecht anerkannt sind. Dabei hat das Bundeskartellamt ebenfalls die Möglichkeit aufgezeigt, dass der Agrardialog jederzeit ein Nachhaltigkeitskonzept ohne Rückgriff auf eine Preisabsprache zu Lasten der Verbraucher vorlegen kann.

Die „Fairtrade Labelling Organizations International e.V." (Fairtrade International) ist eine Dachorganisation für fairen Handel mit Sitz in Bonn. Die Organisation setzt sich für nachhaltige landwirtschaftliche Bewirtschaftung und fairen Handel zwischen landwirtschaftlichen Erzeugern in Schwellen- und Entwicklungsländern sowie deren Abnehmern im Rahmen eines Lizensierungs- und Zertifizierungssystems ein. Die Initiative ist auf die Festlegung von Mindestpreisen bzw. Preisaufschlägen ausgelegt. Im Gegensatz zu den vorgenannten Initiativen entschloss sich das Bundeskartellamt in diesem Fall im Rahmen seines Aufgreifermessens dazu, kein Ermittlungsverfahren durchzuführen.[26] Die Behörde begründete ihre Entscheidung zum einen mit dem

[22] BKartA 8.3.2022 – B2-72/14, S. 4 – Fallbericht „Fortentwicklung und Einführung des Kompensationsmodells der Initiative Tierwohl (ITW) im Bereich Rindfleisch (Entscheidung v. 14.12.2021)".

[23] BKartA, Preisaufschläge ohne mehr Nachhaltigkeit in der Milchwirtschaft: Bundeskartellamt zeigt kartellrechtliche Grenzen auf, Pressemitteilung vom 25.1.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/25_01_2022_Agrardialog.html>, zuletzt abgerufen am 6.12.2022.

[24] BKartA 8.3.2022 – B2-87/21, S. 1 – Fallbericht „Finanzierungskonzept für eine marktkonforme und faire Risiken- und Lastenverteilung der landwirtschaftlichen Transformationsprozesse für Milcherzeuger (Entscheidungen v. 6.10.2021 u. 10.1.2022)".

[25] BKartA 8.3.2022 – B2-87/21, S. 3 – Fallbericht „Finanzierungskonzept für eine marktkonforme und faire Risiken- und Lastenverteilung der landwirtschaftlichen Transformationsprozesse für Milcherzeuger (Entscheidungen v. 6.10.2021 u. 10.1.2022)".

[26] BKartA, Tätigkeitsbericht 2017/18, BT-Drs. 19/10900, 52.

Freiwilligkeitscharakter der Teilnahme an der Initiative und zum anderen mit der zum Entscheidungszeitpunkt geringen Marktabdeckung, der bestehenden Konkurrenz in Form anderer Nachhaltigkeitsinitiativen sowie der Transparenz der Preiselemente und Sozialstandards.[27]

Weiterhin hat sich das Bundeskartellamt mit dem Siegel „Grüner Knopf – Bündnis für nachhaltige Textilien" sowie der Initiative zur Reduzierung von Fett, Zucker und Salz in Fertigprodukten und Getränken befasst.[28] Beide Initiativen wurden im Rahmen des Aufgreifermessens toleriert.[29]

Wenngleich noch keine große Fallpraxis bzgl. der Berücksichtigung von Nachhaltigkeitsaspekten seitens des Bundeskartellamts vorliegt, so kann dennoch festgestellt werden, dass es Nachhaltigkeitsinitiativen grundsätzlich positiv gegenübersteht und auch Hinweise zur kartellrechtskonformen Ausgestaltung dieser Initiativen gibt. Gleichwohl sieht das Bundeskartellamt bislang grds. davon ab, Nachhaltigkeitsinitiativen aufgrund abstrakter Gemeinwohlvorteile durch Einzelfreistellungen vom Kartellverbot auszunehmen. Eine Einzelfreistellung sei vielmehr nur möglich, wenn die Vorteile für den Verbraucher quantifizierbar sind – was aber bei Einhaltung von Gemeinwohlaspekten praktisch jedoch schwer umsetzbar sei.[30] Kooperationen müssten konkrete Nachhaltigkeitsziele verfolgen. Allgemeine Leitlinien können hieraus nicht abgeleitet werden; auch hat das Kartellamt solche bislang nicht erlassen. In der Literatur werden entsprechende Leitlinien aber immer wieder gefordert.

Frage 2

Das Bundeskartellamt weist ausdrücklich darauf hin, dass bei der Fusionskontrolle in Deutschland eine klare Trennung zwischen den Aufgabenbereichen des

[27] BKartA, Tätigkeitsbericht 2017/18, BT-Drs. 19/10900, 52.

[28] BKartA, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Virtuelle Tagung des Arbeitskreises Kartellrecht, Hintergrundpapier v. 1.10.2020, S. 32, <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=7866CBDDA436B763EBC53998480300B6.2_cid387?__blob=publicationFile&v=2>, zuletzt abgerufen am 6.12.2022.

[29] BKartA, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Virtuelle Tagung des Arbeitskreises Kartellrecht, Hintergrundpapier v. 1.10.2020, S. 32, Fn. 100, <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=7866CBDDA436B763EBC53998480300B6.2_cid387?__blob=publicationFile&v=2>, zuletzt abgerufen am 6.12.2022.

[30] BKartA, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Virtuelle Tagung des Arbeitskreises Kartellrecht, Hintergrundpapier v. 1.10.2020, S. 42 u. 44 f., <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=7866CBDDA436B763EBC53998480300B6.2_cid387?__blob=publicationFile&v=2>, zuletzt abgerufen am 6.12.2022.

Kartellamtes und der Politik besteht.[31] Überragende Interessen des Gemeinwohls könnten im Rahmen der Ministererlaubnis berücksichtigt werden (hierzu Frage 6), das Bundeskartellamt ist ausschließlich dem Wettbewerbsschutz verpflichtet, kann also Umweltschutz- und Nachhaltigkeitsgesichtspunkte ausschließlich in die wettbewerbspolitische Bewertung eines angemeldeten Zusammenschlusses einfließen lassen. Eine Berücksichtigung des Umweltschutzes auf der Tatbestandsseite des § 36 GWB der gebundenen Entscheidung ist nicht möglich – Umweltschutz ist hier schlichtweg nicht vorgesehen.[32]

Ob eine Fusion aus Nachhaltigkeitsgründen Effizienzen bringen kann, ist als Prüfungskriterium in der GWB-Fusionskontrolle nicht explizit vorgesehen. Allerdings setzt sich das Bundeskartellamt bereits regelmäßig mit Effizienzeinwänden der Beteiligten in Zusammenschlussvorhaben im Rahmen der Abwägung auseinander.[33] Dabei handhabt das Bundeskartellamt die Effizienzeinrede bislang sehr restriktiv.[34] Insbesondere werden Mindestanforderungen an den Vortrag der Beteiligten gestellt.[35] Im Fall *Miba/Zollern* bewertete das Bundeskartellamt Effizienzen und Synergien nach Erwägungsgrund 29[36] der FKVO;[37] ebenso hat es die einschlägigen Leitlinien[38] der Kommission herangezogen.[39] Das Bundeskartellamt ließ aber letztendlich offen, ob es Effizienzen im Rahmen der wettbewerblichen Würdigung berücksichtigen darf,

[31] BKartA, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Virtuelle Tagung des Arbeitskreises Kartellrecht, Hintergrundpapier v. 1.10.2020, S. 42 u. 44 f., <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=7866CBDDA436B763EBC53998480300B6.2_cid387?__blob=publicationFile&v=2>, zuletzt abgerufen am 6.12.2022.

[32] J. J. Dreyer/E. Ahlenstiel, Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen, *WuW* 2021, 76 (77).

[33] Monopolkommission, Hauptgutachten XXIV: Wettbewerb 2022, Rn. 463.

[34] So etwa auch J. J. Dreyer/E. Ahlenstiel, Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen, *WuW* 2021, 76 (77).

[35] Unter Verweis auf Miba/Zollern (BKartA 17.1.2019 – B5-29/18 – Miba AG/Zollern GmbH & Co. KG (GU-Gründung)); hier genügte der Vortrag der Beteiligten nicht den Verfahrensanforderungen.

[36] „Um die Auswirkungen eines Zusammenschlusses auf den Wettbewerb im Gemeinsamen Markt bestimmen zu können, sollte begründeten und wahrscheinlichen Effizienzvorteilen Rechnung getragen werden, die von den beteiligten Unternehmen dargelegt werden. Es ist möglich, dass die durch einen Zusammenschluss bewirkten Effizienzvorteile die Auswirkungen des Zusammenschlusses auf den Wettbewerb, insbesondere den möglichen Schaden für die Verbraucher, ausgleichen, so dass durch den Zusammenschluss wirksamer Wettbewerb im Gemeinsamen Markt oder in einem wesentlichen Teil desselben, insbesondere durch Begründung oder Stärkung einer beherrschenden Stellung, nicht erheblich behindert würde. Die Kommission sollte Leitlinien veröffentlichen, in denen sie die Bedingungen darlegt, unter denen sie Effizienzvorteile bei der Prüfung eines Zusammenschlusses berücksichtigen kann."

[37] S. BKartA 17.1.2019 – B5-29/18, Rn. 368 – Miba AG/Zollern GmbH & Co. KG (GU-Gründung).

[38] Kommission, Leitlinien zur Bewertung horizontaler Zusammenschlüsse gemäß der Ratsverordnung über die Kontrolle von Unternehmenszusammenschlüssen, ABl. 2004 C 31, 5, insb. Rn. 76 ff.

[39] BKartA 17.1.2019 – B5-29/18, Rn. 369 ff. – Miba AG/Zollern GmbH & Co. KG (GU-Gründung).

da der Vortrag der Beteiligten nicht den Anforderungen genügte.[40] Auch in den weiteren Verfahren, in denen sich das Bundeskartellamt mit Effizienzeinwänden auseinandergesetzt hatte, waren diese mangels eines den Anforderungen entsprechenden Vortrags der Beteiligten stets nicht entscheidungsrelevant.[41]

In ihrem 24. Hauptgutachten[42] diskutiert die Monopolkommission unter anderem die Möglichkeit, ob ein Effizienzeinwand für Klima- und Umweltschutzaspekte in die deutsche Fusionskontrolle explizit aufgenommen werden könnte.[43] Die Aufnahme des Effizienzeinwandes für Klima- und Umweltverbesserungen in das GWB könnte dazu führen, dass die Zusammenschlussbeteiligten solche Effizienzen bereits im Fusionskontrollverfahren ausführlich vortragen könnten. Zudem würde eine einheitliche und systematische Prüfung dieser Effizienzeinwände durch das Bundeskartellamt sichergestellt.[44] Im Koalitionsvertrag wurde angekündigt, das GWB zu evaluieren und Aspekte wie Nachhaltigkeit, Innovation, Verbraucherschutz und soziale Gerechtigkeit zu beachten.[45] Wie dies allerdings geschehen soll, ist bislang offen. Würde das Bundeskartellamt in Zukunft Nachhaltigkeitsgesichtspunkte innerhalb eines gesetzlich verankerten Effizienzeinwandes prüfen, würde vom Bundeskartellamt ermittelt, ob Effizienzen durch ein Zusammenschlussvorhaben entstehen. Dabei wäre besonders zu differenzieren zwischen solchen Effizienzvorteilen, die nur den fusionierenden Unternehmen zugutekommen, und solchen, die der Allgemeinheit von Nutzen sind. Zudem müssten die Effizienzen im Bereich Nachhaltigkeit umso gewichtiger sein, je stärker die von der geplanten Fusion ausgehenden Wettbewerbsbeschränkungen sind.[46]

Derzeit jedenfalls ist die Fusionskontrolle kein geeignetes Instrument, um umweltpolitischen Gesichtspunkten und Belangen umfassend Rechnung zu tragen.[47] Auch die Untersagung einer Fusion wegen negativer Konsequenzen für die Umwelt ist *de lege lata* in Deutschland nicht möglich.[48]

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[40] BKartA 17.1.2019 – B5-29/18, Rn. 372 – Miba AG/Zollern GmbH & Co. KG (GU-Gründung).

[41] Monopolkommission, Hauptgutachten XXIV: Wettbewerb 2022, Rn. 463; so etwa auch J. J. Dreyer/E. Ahlenstiel, Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen, *WuW* 2021, 76 (77).

[42] Monopolkommission, Hauptgutachten XXIV: Wettbewerb 2022.

[43] Monopolkommission, Hauptgutachten XXIV: Wettbewerb 2022, Rn. 452 ff.

[44] Monopolkommission, Hauptgutachten XXIV: Wettbewerb 2022, Rn. 462.

[45] SPD, Bündnis 90/Die Grünen und FDP, Koalitionsvertrag „Mehr Fortschritt wagen", S. 31, <www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1>, zuletzt abgerufen am 6.12.2022.

[46] Monopolkommission, Hauptgutachten XXIV: Wettbewerb 2022, Rn. 462.

[47] J. J. Dreyer/E. Ahlenstiel, Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen, *WuW* 2021, 76 (78).

[48] J. J. Dreyer/E. Ahlenstiel, Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen, *WuW* 2021, 76 (78).

Anders kann sich dies im Rahmen der in § 42 GWB vorgesehenen Ministererlaubnis darstellen. Die Kompensation der Wettbewerbsbeeinträchtigung muss dabei nicht unmittelbar erfolgen, sondern kann auch abstrakt der Allgemeinheit zugutekommen.[49]

Frage 3

Wie bereits unter Frage 2 ausgeführt, ist das Bundeskartellamt ausschließlich für die wettbewerbspolitische Beurteilung eines Zusammenschlussvorhabens gem. § 36 GWB zuständig. Eine Berücksichtigung nachhaltiger Kriterien ist dabei auf der Tatbestandsebene nicht möglich. Gleichwohl akzeptiert das Bundeskartellamt grundsätzlich „nachhaltige Effizienzeinwände", wenngleich in der bisherigen Praxis solche Einwände an den prozessualen Voraussetzungen gescheitert sind, so dass das Bundeskartellamt sich auf der materiellen Ebene nicht mit diesen auseinandersetzen musste. Hierfür stünde jedoch die Abwägungsklausel des § 36 Abs. 1 S. 2 Nr. 1 GWB zur Verfügung, nach der die „nachhaltigen Effizienzen" die wettbewerblichen Nachteile des Zusammenschlussvorhabens überwiegen müssen.[50]

Frage 4

a.

Nach Medienberichten hat sich das Bundeskartellamt gegen eine Fusion der Zugsparten von Siemens und Alstom ausgesprochen[51] und in einem vertraulichen Schreiben an die EU-Kommission erhebliche kartellrechtliche Bedenken gegen das Vorhaben dargelegt, wie von der „Frankfurter Allgemeine Zeitung" berichtet wird.[52] Hiernach teile das Bundeskartellamt die Brüsseler Vorbehalte voll und ganz, die Wettbewerbsbedenken blieben für beide Märkte bestehen, die von der Fusion betroffen wären (Hochgeschwindigkeitszüge und Signalanlagen).

[49] J. J. Dreyer/E. Ahlenstiel, Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen, *WuW* 2021, 76 (78), unter Verweis auch auf die Ministererlaubnis Bundesminister für Wirtschaft und Technologie 5.7.2002 – I B 1 – 22 08 40/129, *WuW* 2002, 751, Rn. 136 ff. – E.ON/Ruhrgas, wo grundsätzlich anerkannt wurde, dass die Erreichung umweltpolitischer Ziele ein Gemeinwohlvorteil i.S.v. § 42 GWB darstellt.

[50] S. H. Kahlenberg, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 36 GWB, Rn. 196.

[51] o.V., Bundeskartellamt ist gegen Siemens-Alstom-Fusion, *NTV-online* v. 13.1.2019, <www.n-tv.de/wirtschaft/Bundeskartellamt-ist-gegen-Siemens-Alstom-Fusion-article20809409.html>, zuletzt abgerufen am 6.12.2022.

[52] W. Mussler, Bundeskartellamt offen gegen Zug-Fusion von Siemens und Alstom, *FAZ.Net* v. 13.1.2019, <www.faz.net/aktuell/wirtschaft/unternehmen/bundeskartellamt-offen-gegen-zug-fusion-von-siemens-und-alstom-15986495.html>, zuletzt abgerufen am 6.12.2022.

Zusagen der beiden Unternehmen, so glaube man, könnten die grundlegenden Wettbewerbsbedenken nicht lösen. Das Bundeskartellamt hat sich damit gegen den damaligen Bundeswirtschaftsminister Peter Altmaier von der CDU gestellt, der die Fusion wiederum mit dem Argument, es sei notwendig, auf dem Markt für Hochgeschwindigkeitszüge einen „europäischen Champion" zu schaffen, der etwa gegen chinesische Hersteller eine Chance habe, unterstützt hat.[53] Altmaier führte gegenüber der DPA aus: „Ich darf mich nicht in laufende Verfahren einmischen. Aber wenn Europa im internationalen Wettbewerb bestehen will, braucht es europäische Champions, die den Wettbewerb mit Anbietern aus den USA oder aus China aufnehmen und gewinnen können."[54]

b.

Der Spitzenverband der deutschen Industrie und der industrienahen Dienstleister BDI hatte mit Blick auf China gefordert, die EU-Fusionskontrolle anzupassen.[55] Während in China durch Eingriffe der Regierung im weltweiten Maßstab Großkonzerne geschmiedet würden, berücksichtigten die EU-Wettbewerbshüter als relevanten Markt bei europäischen Fusionen häufig zu sehr den hiesigen Binnenmarkt, hieß es in einem im Januar 2019 vorgelegten BDI-Grundsatzpapier.[56] Das vom Markt getriebene Bilden europäischer Champions solle zugelassen werden.[57]

Dagegen nahm der „Verband Deutscher Maschinen- und Anlagenbau" (VDMA) die untersagte Fusion im Fall Siemens/Alstom zum Anlass, sich kritisch

[53] o.V., Deutschland und Frankreich wollen Siemens/Alstom-Fusion retten, *Reuters* v. 21.1.2019, <www.reuters.com/article/eu-siemens-alstom-altmaier-lemaire-idDEKCN1PF11O> zuletzt abgerufen am 6.12.2022.

[54] o.V., Altmaier warnt vor Scheitern der Siemens-Alstom-Zugfusion, Handelsblatt online v. 18.1.2019, <www.handelsblatt.com/unternehmen/industrie/konkurrenz-aus-china-altmaier-warnt-vor-scheitern-der-siemens-alstom-zugfusion/23883390.html>, zuletzt abgerufen am 6.12.2022.

[55] „Während in China durch Eingriffe der Regierung im weltweiten Maßstab Großkonzerne geschmiedet werden (etwa im Bereich Eisenbahn mit der Bildung des Großkonzerns CRRC im Jahr 2015), berücksichtigen die Wettbewerbshüter in der EU als relevanten Markt bei europäischen Fusionen allein den europäischen Binnenmarkt. Hier sollte gegengesteuert und das vom Markt getriebene Bilden europäischer Champions zugelassen werden." S. BDI, Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, Grundsatzpapier China, Januar 2019, S. 9, <www.bundestag.de/resource/blob/908170/02447d9bd668e912d44190c451c5a573/Stellungnahme-Iris-Ploeger-BDI-data.pdf>, zuletzt abgerufen am 6.12.2022.

[56] BDI, Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, Grundsatzpapier China, Januar 2019, S. 9, <www.bundestag.de/resource/blob/908170/02447d9bd668e912d44190c451c5a573/Stellungnahme-Iris-Ploeger-BDI-data.pdf>, zuletzt abgerufen am 6.12.2022.

[57] BDI, Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, Grundsatzpapier China, Januar 2019, S. 9, <www.bundestag.de/resource/blob/908170/02447d9bd668e912d44190c451c5a573/Stellungnahme-Iris-Ploeger-BDI-data.pdf>, zuletzt abgerufen am 6.12.2022.

gegenüber einer Reform des europäischen Wettbewerbsrechts zu Gunsten industriepolitischer Erwägungen zu positionieren. Nach Auffassung des Verbandes sprechen einerseits die politische Unabhängigkeit der europäischen Kommission als Kartellbehörde und andererseits die Möglichkeiten der Unternehmen, zunächst die Skalierungseffekte des Binnenmarktes zu nutzen und sich dann erfolgreich auf dem Weltmarkt zu bewähren, gegen ein Instrument zur Schaffung „europäischer Champions", welches in erster Linie die Größe der betreffenden Unternehmen und (industrie-)politische Beweggründe in den Mittelpunkt stellt. Gleichwohl forderte der VDMA die Kommission zu einer flexibleren Nutzung der bestehenden Sicherungskontrollregelungen für die Marktabgrenzung insbesondere im Hinblick auf große Unternehmen in Drittstaaten und deren Einfluss auf den Wettbewerb im europäischen und globalen Markt auf. Die Schaffung einer unionalen Minister- bzw. Ratserlaubnis wird seitens des VDMA jedoch aufgrund der damit einhergehenden Politisierung des Wettbewerbsrechts klar abgelehnt.[58] Die Position des VDMA begründet sich vor allem mit der mittelständisch geprägten Struktur des von ihm repräsentierten Industriezweiges.[59]

c.

Gem. § 18 Abs. 2 GWB ist der im Rahmen der Zusammenschlusskontrolle zu bestimmende räumliche Markt nicht auf das Gebiet der Bundesrepublik Deutschland begrenzt.[60] Es ist allein von einem ökonomischen Marktbegriff auszugehen.[61] Demnach ist das Bedarfsmarktkonzept anzuwenden.[62] Die rechtliche Grundlage, entsprechende Argumente in die Bestimmung des relevanten Marktes seitens des Bundeskartellamts aufzunehmen, ist demnach vorhanden, so dass ein Zusammenschlussvorhaben auch – wie von den Beteiligten im Fall Siemens/Alstom gefordert – im Kontext des Weltmarktes beurteilt werden könnte. Bisher hatte das Bundeskartellamt aber über keinen entsprechenden Sachverhalt zu entscheiden. Die unter Punkt a. dargestellten Äußerungen des Bundeskartellamts im Rahmen des Fusionskontrollverfahrens Siemens/Alstom lassen aber darauf schließen, dass das Bundeskartellamt der Schaffung „europäischer Champions"

[58] VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, VDMA-Position, Januar 2020, S. 2, <www.vdma.org/documents/34570/0/VDMA%20Position_China_Handelspolitische_Instrumente.pdf/39dd2f1c-44c5-fc81-f381-404cefa93506>, zuletzt abgerufen am 6.12.2022.

[59] U. Marx, Altmaiers Champions-Strategie fällt im Maschinenbau durch, *FAZ* v. 18.2.2019, S. 22.

[60] T. Steinvorth, *in* Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 20, Rn. 43.

[61] BT-Drs. 15/3640, 45.

[62] BKartA 27.4.2020 – B4-115/19, S. 34 – Fallbericht „Bundeskartellamt gibt den Erwerb der Vossloh Locomotives GmbH durch die die chinesische CRRC Zhuzhou Locomotives Co. nach umfangreichen Ermittlungen frei".

eher ablehnend gegenübersteht, sofern die Wettbewerbsbedenken gegen einen solchen Zusammenschluss nicht vollständig ausgeräumt werden können.

Frage 5

Im Rahmen der Fusionskontrolle durch das Bundeskartellamt sollen nach deutschem Fusionskontrollrecht – wie bereits zu Frage 2 erläutert – lediglich wettbewerbspolitische Gesichtspunkte eine Rolle spielen. So soll zum einen die unabhängige Rechtsanwendung durch das Bundeskartellamt sichergestellt werden.[63] Zum anderen soll dies auch politischen Druck vom Bundeskartellamt fernhalten.[64] Allerdings wird bei der Prüfung von Fusionen berücksichtigt, ob Wettbewerber von außerhalb der EU im betroffenen Markt tätig sind oder in absehbarer Zeit tätig sein werden und die Marktmacht der Fusionsparteien begrenzen werden.[65] Generell wird nur ein marginaler Anteil der angemeldeten Zusammenschlussvorhaben überhaupt durch das Bundeskartellamt untersagt.

Die Berücksichtigung der internationalen Wettbewerbsfähigkeit deutscher Unternehmen möglicherweise auch zu Lasten des Wettbewerbs ist Aufgabe des Bundeswirtschaftsministers im Rahmen des Ministererlaubnisverfahrens (s. hierzu Frage 6). Hier soll bei der Prüfung der gesamtwirtschaftlichen Vorteile eines Zusammenschlusses und der überragenden Interessen der Allgemeinheit gemäß § 42 Abs. 1 Satz 2 GWB „auch die Wettbewerbsfähigkeit der beteiligten Unternehmen auf Märkten außerhalb des Geltungsbereichs dieses Gesetzes" Berücksichtigung finden.

Frage 6

Das deutsche Fusionskontrollrecht sieht das Instrument der Ministererlaubnis vor (vgl. § 42 GWB[iii]). Der deutsche Bundesminister für Wirtschaft und Energie (heute: Wirtschaft und Klimaschutz) kann seit der 2. GWB-Novelle 1973 einen vom Bundeskartellamt nach § 36 Abs. 1 GWB untersagten Zusammenschluss im Einzelfall genehmigen. Die Ministererlaubnis wurde parallel mit der Fusionskontrolle eingeführt und sollte faktisch Kritiker der Fusionskontrolle „besänftigen". Der deutsche Gesetzgeber hat die Ministererlaubnis trotz Forderungen nach ihrer Abschaffung[66] bis heute aufrechterhalten, wenn auch mit

[63] BT-Drs. 17/9852, 20.

[64] BT-Drs. 17/9852, 20.

[65] A. Mundt, Je größer, desto besser? Europäische Champions werden nicht durch wettbewerbsbeschränkende Fusionen geschaffen, *ifo Schnelldienst* 8/2019, 24 (24 f.).

[66] S. bspw. BT-Drs. 16/365, 3.

einigen Modifikationen.[67] Im Jahr 2017 hat das damalige Bundesministerium für Wirtschaft und Energie Leitlinien zum Verfahren erlassen.[68]

Mit der Ministererlaubnis erfolgt eine transparente Trennung zwischen der rein wettbewerblichen Prüfung des Bundeskartellamts und der Berücksichtigung von Allgemeinwohlbelangen durch den heutigen Bundesminister für Wirtschaft und Klimaschutz.[69] Die Ministererlaubnis kann auf Antrag der Beteiligten erlassen werden – nachdem ein Zusammenschluss durch das Bundeskartellamt untersagt worden ist –,[70] wenn dafür überwiegende Gemeinwohlgründe – gesamtwirtschaftliche Vorteile oder ein überwiegendes Interesse der Allgemeinheit – sprechen. Diese Gründe sind nach allgemeiner Ansicht als abschließend zu verstehen. Gleichwohl steht dem Minister bei der Auslegung der entsprechenden Begriffe ein weiter Beurteilungsspielraum zu.[71] So sind unter dem Begriff der gesamtwirtschaftlichen Vorteile zwar nur wirtschaftliche Umstände zu berücksichtigen.[72] Der Begriff der überragenden Interessen der Allgemeinheit umfasst hingegen grundsätzlich sämtliche nichtwirtschaftliche Gemeinwohlerwägungen wie beispielsweise den Umwelt- oder Gesundheitsschutz oder auch sozial-, staats- und gesellschaftspolitische Interessen,[73] sofern diese nicht lediglich geringfügig sind.[74] In beiden Fällen müssen die Gründe für den Erlass einer Ministererlaubnis jedoch konkret nachgewiesen sein. Zudem dürfen andere – wettbewerbskonforme – Abhilfemaßnahmen des Staates nicht möglich sein.[75] Die Interessen der am Zusammenschluss beteiligten Unternehmen sind nachrangig bzw. nur von Bedeutung im Zusammenhang mit den gesamtwirtschaftlichen Vorteilen des Zusammenschlusses, „wenn und soweit sie mit dem öffentlichen Interesse an

[67] S. Thomas, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 3, Fusionskontrolle, 6. Aufl., München 2020, § 42 GWB, Rn. 5.

[68] S. Bundesministerium für Wirtschaft und Energie, Bekanntmachung der Leitlinien für das Verwaltungsverfahren zur Entscheidung über die Erteilung einer Ministererlaubnis nach § 42 des Gesetzes gegen Wettbewerbsbeschränkungen v. 27.10.2017, <www.bmwk.de/Redaktion/DE/Downloads/B/bekanntmachung-der-leitlinien-fuer-das-verwaltungsverfahren-zur-entscheidung-ueber-die-erteilung-einer-ministererlaubnis.html>, zuletzt abgerufen am 6.12.2022.

[69] BT-Drs. 17/9852, 20; s.a. A. Riesenkampff/S. Steinbarth, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 42 GWB, Rn. 2.

[70] A. Riesenkampff/S. Steinbarth, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 42 GWB, Rn. 2.

[71] OLG Düsseldorf 16.12.2002 – Kart 25/02 (V), NJOZ 2003, 546 (551) – E.ON/Ruhrgas.

[72] A. Riesenkampff/S. Steinbarth, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 42 GWB, Rn. 25.

[73] A. Riesenkampff/S. Steinbarth, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 42 GWB, Rn. 7; T. Steinvorth, *in* Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 42, Rn. 177.

[74] S. Thomas, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 3, Fusionskontrolle, 6. Aufl., München 2020, § 42 GWB, Rn. 63.

[75] S. Thomas, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 3, Fusionskontrolle, 6. Aufl., München 2020, § 42 GWB, Rn. 56.

der ausnahmsweisen Zulassung von Marktbeherrschung durch Zusammenschluss übereinstimmen."[76]

Im Rahmen der ministerlichen Abwägung müssen die Gemeinwohlgründe die von dem geplanten Zusammenschluss ausgehenden Wettbewerbsbeschränkungen zumindest aufwiegen,[77] wobei sich das notwendige Gewicht der Gemeinwohlbelange durch die Schwere der Wettbewerbsbeschränkung bestimmt.[78] Hierbei ist gem. § 42 Abs. 1 S. 2 GWB auch die internationale Wettbewerbsfähigkeit der beteiligen Unternehmen zu berücksichtigen.[79] Zuletzt darf das Ausmaß der Wettbewerbsbeschränkung gem. § 42 Abs. 1 S. 3 GWB die marktwirtschaftliche Gesamtordnung nicht gefährden.[80] Nur bei Vorliegen der genannten Voraussetzungen darf eine Ministererlaubnis erteilt werden. Diese greift dann als Ausnahmevorschrift in die dem Bundeskartellamt obliegende wettbewerbspolitische Entscheidung ein und hebt die Entscheidung der Kartellbehörde auf.

Vor Erlass der Ministererlaubnis ist gem. § 42 Abs. 5 S. 1 GWB ein Gutachten der Monopolkommission einzuholen, an dessen Feststellungen der Minister jedoch nicht gebunden ist.[81] Eine Abweichung von dem durch die Monopolkommission erstellten Gutachten ist gem. § 42 Abs. 1 S. 4 GWB gesondert zu begründen. Die (Minister-)Erlaubnis kann nach § 42 Abs. 2 S. 1 GWB mit Bedingungen und Auflagen verbunden werden, sofern der betreffende Antrag nur in Teilen erlaubnisfähig ist.[82] Eine laufende Verhaltenskontrolle darf hiermit jedoch gem. § 42 Abs. 2 S. 2 i.V.m. § 40 Abs. 3 S. 2 GWB nicht etabliert werden.

Über den Antrag auf Ministererlaubnis ist gem. § 42 Abs. 4 S. 1 GWB grundsätzlich innerhalb von vier Monaten zu entscheiden. Erteilt der Minister eine Erlaubnis, so stellt diese einen Verwaltungsakt dar.[83] Das deutsche Recht sieht Möglichkeiten des Verwaltungsrechtsschutzes in Form der Beschwerde nach den §§ 73 ff. GWB gegen solche Entscheidungen vor.[84] Darüber hinaus kann im Rahmen des Eilrechtsschutzes nach § 67 Abs. 3 GWB die Anordnung der aufschiebenden Wirkung der Beschwerde beim zuständigen Gericht beantragt

[76] OLG Düsseldorf 11.7.2002 – VI-Kart 25/02 (V), Rn. 37.

[77] T. Steinvorth, *in* Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 21, Rn. 179.

[78] A. Riesenkampff/S. Steinbarth, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 42 GWB, Rn. 9.

[79] A. Riesenkampff/S. Steinbarth, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 42 GWB, Rn. 8.

[80] T. Steinvorth, *in* Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 21, Rn. 179.

[81] T. Steinvorth, *in* Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 21, Rn. 170.

[82] T. Steinvorth, *in* Wiedemann (Hrsg.), Handbuch des Kartellrechts, 4. Aufl., München 2020, § 21, Rn. 181.

[83] E. Bremer/F. Scheffczyk in: Säcker/Meyer-Beck (Hrsg.), Münchener Kommentar zum Wettbewerbsrecht, Bd. 2, Gesetz gegen Wettbewerbsbeschränkungen, 4. Aufl., München 2022, § 42 GWB, Rn. 33.

[84] Bechtold/Bosch, GWB, 10. Aufl., München 2021, § 73 GWB, Rn. 2.

werden.[85] Es gilt zwischen dem Rechtsschutz des Antragsstellers einerseits und den Rechtsschutzmöglichkeiten Dritter andererseits zu differenzieren. Zuständig ist mit Blick auf § 73 Abs. 4 GWB das OLG Düsseldorf. Die Würdigung der gesamtwirtschaftlichen Lage und Entwicklung ist der gerichtlichen Nachprüfung gem. § 76 Abs. 5 Satz 2 GWB entzogen. Gegen die Entscheidungen des OLG Düsseldorf kann eine Beschwerde beim Bundesgerichtshof eingereicht werden.

Nach nahezu jedem Ministererlaubnisverfahren ist es zu Änderungen an den einschlägigen Vorschriften gekommen.[86] Zuletzt gab es Vorschläge im Rahmen der 10. GWB-Novelle.[87] Allerdings ist die im Regierungsentwurf noch geplante Änderung in dem letztendlich beschlossenen Gesetz wieder ersatzlos gestrichen worden.

Obgleich die Ministererlaubnis bereits mit der 2. GWB-Novelle 1973[88] eingeführt worden ist, wurden bislang erst 23 solcher Erlaubnisverfahren eingeleitet.[89] Hiervon sind 10 Verfahren zumindest teilweise – aus Sicht der Antragsteller – erfolgreich gewesen.[90] In vier Fällen wurde die Erlaubnis mit Auflagen erteilt, in einem Fall wurde eine Teilerlaubnis mit Auflage erteilt, zwei Fälle wurden mit positiver Stellungnahme der Monopolkommission genehmigt, drei weitere Fälle wurde entgegen der Stellungnahme der Monopolkommission – zwei davon mit Nebenbestimmungen – genehmigt, sechs Fälle wurden untersagt und sieben Fälle wurden zurückgenommen.[91]

Wie bereits zuvor ausgeführt, sind immer wieder Stimmen aufgekommen, die Ministererlaubnis aus dem Gesetz und damit aus dem deutschen Kartellrecht

[85] E. Bremer/F. Scheffczyk, *in* Säcker/Meyer-Beck (Hrsg.), Münchener Kommentar zum Wettbewerbsrecht, Bd. 2, Gesetz gegen Wettbewerbsbeschränkungen, 4. Aufl., München 2022, § 42 GWB, Rn. 99.

[86] Zuletzt durch die 9. GWB-Novelle, BGBl. 2017, I-1416.

[87] S. den Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz) v. 24.1.2020, S. 13 f., <www.bmwk.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?__blob=publicationFile&v=10>, zuletzt abgerufen am 6.12.2022.

[88] Zweites Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen v. 3.8.1973, BGBl. 1973, I-917 (921).

[89] S. Bundesministerium für Wirtschaft und Energie, Übersicht über die bisherigen Anträge auf Ministererlaubnis nach § 24 Abs. 3/§ 42 GWB, <www.bmwk.de/Redaktion/DE/Downloads/Wettbewerbspolitik/antraege-auf-ministererlaubnis.pdf?__blob=publicationFile&v=9> zuletzt abgerufen am 6.12.2022.

[90] S. hierzu F. Mattes, *Die Ministererlaubnis in der Fusionskontrolle*, München 2004; M. Konrad, Die Ministererlaubnis Miba/Zollern und die Reform der Ministererlaubnis mit der 10. GWB-Novelle, *WuW* 2020, 244 (244 ff.); P. Pichler, Gemeinschaftsunternehmen Miba/Zollern – Kurzbericht zur Untersagung durch das BKartA und zur Ministererlaubnis des BMWi, *NZKart* 2019, 549 (549 ff.); R. Podszun, Die Ministererlaubnis – Einbruch der Politik ins Recht der Wirtschaft, *NJW* 2016, 617 (617 ff.); A. Stöhr/O. Budzinski, Gemeinwohl durch Marktmacht?, *WuW* 2019, 508 (508 ff.), mit einer Ex-post Analyse; G. von Wangenheim/M. Dose, Die Ministererlaubnis im GWB als strategisches Instrument, *WuW* 2017, 182 (182 ff.).

[91] Bundesministerium für Wirtschaft und Energie, Übersicht über die bisherigen Anträge auf Ministererlaubnis nach § 24 Abs. 3/§ 42 GWB, <www.bmwk.de/Redaktion/DE/Downloads/Wettbewerbspolitik/antraege-auf-ministererlaubnis.pdf?__blob=publicationFile&v=9>, zuletzt abgerufen am 6.12.2022.

ersatzlos zu streichen.[92] Dabei wurden und werden u.a. europarechtliche Bedenken gegen eine Beibehaltung der Ministererlaubnis angeführt.[93]

Reformforderungen umfassen u.a. einen Parlamentsvorbehalt, eine Erhöhung der Verfahrenstransparenz, eine Bindung an das Votum der Monopolkommission, eine Verfahrensbeschleunigung, die Einführung eines öffentlichen Konsultationsverfahrens sowie Dokumentationspflichten des Ministers.

Die letzten Verfahren haben die Zusammenschlüsse *Edeka/Kaiser`s Tengelmann*[94] sowie *Miba/Zollern*[95] betroffen.

Im Ministererlaubnisverfahren *Edeka/Kaiser`s Tengelmann* wurde die Sicherung von 16.000 Arbeitsplätzen als Gemeinwohlgrund angesehen, der die erheblichen Wettbewerbsbeschränkungen im Ergebnis aufwiegen soll.

Die Ministererlaubnis im Fall *Miba/Zollern* argumentiert mit dem Gemeinwohlgrund „Know-how und Innovationspotential für Energiewende und Nachhaltigkeit". Es liege ein „überragendes Interesse der Allgemeinheit vor". Der damalige Bundeswirtschaftsminister Altmaier hatte den Zusammenschluss der zwei Unternehmen im August 2019 erlaubt und mit dieser Genehmigung Nebenbestimmungen in Form von aufschiebenden und auflösenden Bedingungen sowie einer Investitionsauflage verbunden.

Auch wenn der Umwelt- und Klimaschutz grundsätzlich als überragendes Interesse der Allgemeinheit anerkannt ist,[96] wird zukünftig somit noch

[92] R. Podszun, Die Ministererlaubnis – Einbruch der Politik ins Recht der Wirtschaft, *NJW* 2016, 617 (617 ff.); R. Podszun/S. Kreifels/G. Schmieder, Streitpunkte der 9. GWB-Novelle, *WuW* 2017, 114 (119); M. Konrad, Time to Say Goodbye, Warum die Ministererlaubnis abgeschafft werden sollte, Verfassungsblog v. 29.11.2021, <verfassungsblog.de/time-to-say-goodbye/>, zuletzt abgerufen am 6.12.2022.

[93] U.a. Monopolkommission, Sondergutachten 34: Zusammenschlussvorhaben der E.ON AG mit der Gelsenberg AG und der E.ON AG mit der Bergemann GmbH, 2002, S. 120 ff.; J. Basedow, Gemeinschaftsrechtliche Grenzen der Ministererlaubnis in der Fusionskontrolle, Zum Verhältnis des § 42 GWB zu den Art. 81 und 82 EG, *EuZW* 2003, 44 (44 ff.); W. Möschel, Neue Rechtsfragen bei der Ministererlaubnis in der Fusionskontrolle, *BB* 2002, 2077 (2084 f.); a.A. allerdings J. Kühling/A. Wambach, Ministererlaubnisverfahren – Kein Anlass zu grundlegenden Reformen, *WuW* 2017, 1 (1 ff.).

[94] Bundesminister für Wirtschaft und Energie 17.3.2016 – I B 2 – 22 08 50/01; hierzu OLG Düsseldorf, 12.7.2016, VII-Kart 3/16 (V), *WuW* 2016, 372 – Ministererlaubnis EDEKA/Kaiser`s Tengelmannn; hierzu A. Martin-Ehlers, Die Schaffung neuer Verfahrensrechte – Eine kritische Kommentierung des Beschlusses des OLG Düsseldorf v. 12.7.2016, *WuW* 2017, 9 (9 ff.); s.a. das ablehnende Sondergutachten der Monopolkommission, Sondergutachten 70: Zusammenschlussvorhaben der Edeka Zentrale AG & Co. KG mit der Kaiser's Tengelmann GmbH, 2015.

[95] Bundesminister für Wirtschaft und Energie 19.8.2019 – I B 2 – 20302/14-02; vgl. auch das ablehnende Sondergutachten 81 der Monopolkommission, Sondergutachten 81: Zusammenschlussvorhaben der Miba AG mit der Zollern GmbH & Co. KG, 2019, sowie die Entscheidung des Bundeskartellamtes BKartA 17.1.2019 – B5-29/18, Rn. 372 – Miba AG/Zollern GmbH & Co. KG (GU-Gründung); zu der Ministererlaubnis M. Konrad, Die Ministererlaubnis Miba/Zollern und die Reform der Ministererlaubnis mit der 10. GWB-Novelle, *WuW* 2020, 244 (244 ff.).

[96] Bundesminister für Wirtschaft und Technologie 5.7.2002 – I B 1 – 22 08 40/129, *WuW* 2002, 751, Rn. 136 – E.ON/Ruhrgas: „Die Erreichung umweltpolitischer Ziele ist, wenngleich sie in der bisherigen

stärker zu diskutieren sein, ob bzw. inwieweit konkrete Maßnahmen zur Klimaschutzverbesserung infolge eines Unternehmenszusammenschlusses ein überragendes Interesse der Allgemeinheit bzw. einen Gemeinwohlvorteil darstellen, welche die Ministererlaubnis rechtfertigen. So wurde in der Sache *E.ON/Ruhrgas* die Ministererlaubnis aufgrund des Umwelt- und Klimaschutzes mit dem Argument verwehrt, dass der betreffende Zusammenschluss keinen Beitrag zur Umwelt- und Klimapolitik leiste, der über das hinausgehe, was auch von den beteiligten Unternehmen jeweils einzeln zu leisten wäre.[97]

Im Fall *Miba/Zollern* argumentierten die beteiligten Unternehmen, dass das Zusammenschlussvorhaben u.a.[98] dem Erhalt von technologischem Know-how, Innovationspotenzial und technologischem Vorsprung diene. Der Bundeswirtschaftsminister begründete seine Erteilung der Ministererlaubnis damit, dass die Beteiligten den Gemeinwohlgrund „Know-how und Innovationspotential für Energiewende und Nachhaltigkeit" erfüllen,[99] was als überragendes Interesse der Allgemeinheit anzuerkennen sei. Weiterhin führte er aus, dass das Innovationspotential des entstehenden Gemeinschaftsunternehmens erheblich größer als bei einer parallelen Forschung und Entwicklung durch die beteiligten Unternehmen sei.[100] Insbesondere seien durch die Zusammenlegung des technologischen Know-hows Effizienzverbesserungen im Bereich der umweltschutzbezogenen Zukunftsanwendungen möglich.

An diesen Fällen zeigt sich der dem Minister bei der Auslegung des Begriffs des überragenden Interesses der Allgemeinheit zustehende Beurteilungsspielraum. Dieser könnte jedoch durch die zumindest angedachte Kodifizierung eines klima- und umweltbezogenen Effizienzeinwandes (s. hierzu Frage 2) eingeengt werden. Denn in einem solchen Szenario würden etwaig durch die Fusion entstehende Effizienzen bereits seitens des Bundeskartellamts ermittelt, wobei zwischen nur den beteiligten Unternehmen zukommenden und dem Gemeinwohl dienenden Effizienzen zu unterscheiden wäre.[101] Käme das Bundeskartellamt bei den

Entscheidungspraxis bisher keine Rolle gespielt hat, grds. als Gemeinwohlvorteil i. S. v. § 42 GWB anzuerkennen." S.a. Monopolkommission, Sondergutachten 34: Zusammenschlussvorhaben der E.ON AG mit der Gelsenberg AG und der E.ON AG mit der Bergemann GmbH, 2002, Rn. 207.

[97] Bundesminister für Wirtschaft und Technologie 5.7.2002 – IB 1 – 22 08 40/129, *WuW* 2002, 751, Rn. 136 – E.ON/Ruhrgas; s.a. Monopolkommission, Sondergutachten 34: Zusammenschlussvorhaben der E.ON AG mit der Gelsenberg AG und der E.ON AG mit der Bergemann GmbH, 2002, Rn. 208 ff.

[98] Neben der Stärkung der internationalen Wettbewerbsfähigkeit, dem Erhalt von militärischer Schlüsseltechnologie, und der Sicherung von Arbeitsplätzen.

[99] Bundesminister für Wirtschaft und Energie 19.8.2019 – I B 2 – 20302/14-02, Rn. 149, 167-201 u. 247-261.

[100] Bundesminister für Wirtschaft und Energie 19.8.2019 – I B 2 – 20302/14-02, Rn. 181.

[101] J. Welsch, Agenda 2025: Mehr Nachhaltigkeit in der Fusionskontrolle?, D'Kart Antitrust-Blog v. 8.8.2022, <www.d-kart.de/blog/2022/08/08/agenda-2025-mehr-nachhaltigkeit-in-der-fusionskontrolle/>, zuletzt abgerufen am 6.12.2022.

letztgenannten Effizienzen im Rahmen seiner rein wettbewerblich orientierten Prüfung zu dem Schluss, dass die im Rahmen des Effizienzeinwandes seitens der Beteiligten vorgebrachten umwelt- oder klimabezogenen Effizienzen nicht zu überprüfen bzw. fusionsspezifisch wären, so wäre der Minister mit dem Ergebnis an die Entscheidung des Bundeskartellamts gebunden, dass er die darin nicht anerkannten Effizienzen nicht mehr im Rahmen einer Ministererlaubnis berücksichtigen darf,[102] da er an die tatsächlichen und rechtlichen Feststellungen des Bundeskartellamts gebunden ist.[103]

Eine Einbeziehung von Nachhaltigkeitsgesichtspunkten bzw. -effizienzen im Rahmen der Erteilung einer Ministererlaubnis wäre aber dann sinnvoll, wenn die durch das Bundeskartellamt festgestellten Effizienzen mangels ausreichender Verbrauchervorteile die mit dem Zusammenschluss einhergehende Wettbewerbsbeeinträchtigung nicht aufwiegen können.[104]

Gleichwohl sollte eine umwelt- und klimapolitisch motivierte Ministererlaubnis weiterhin eine Ausnahme darstellen, da es ansonsten zu einem „Greenwashing" von Fusionskontrollvorhaben kommen könnte, die letztlich nicht nur dem Wettbewerb, sondern auch den Klima- und Umweltzielen schaden.[105]

Frage 7

a.

Mit der Anfang 2021 in Kraft getretenen 10. GWB-Novelle wurde die GWB-Bestimmungen zur Missbrauchsaufsicht umfassend überarbeitet und „digitalisiert".[106] Dabei wurde mit § 19a GWB eine neue Vorschrift geschaffen, die eine präventiv ausgerichtete Missbrauchsaufsicht im Bereich der digitalen Ökosysteme etabliert.[107] Diese ermöglicht dem Bundeskartellamt gegenüber der vorigen Rechtslage ein früheres und effektiveres Eingreifen gegen etwaig

[102] J. Welsch, Agenda 2025: Mehr Nachhaltigkeit in der Fusionskontrolle?, D'Kart Antitrust-Blog v. 8.8.2022, <www.d-kart.de/blog/2022/08/08/agenda-2025-mehr-nachhaltigkeit-in-der-fusionskontrolle/>, zuletzt abgerufen am 6.12.2022.

[103] A. Riesenkampff/S. Steinbarth, *in* Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (Hrsg.), Kartellrecht, 4. Aufl., München 2020, § 42 GWB, Rn. 3.

[104] J. Welsch, Agenda 2025: Mehr Nachhaltigkeit in der Fusionskontrolle?, D'Kart Antitrust-Blog v. 8.8.2022, <www.d-kart.de/blog/2022/08/08/agenda-2025-mehr-nachhaltigkeit-in-der-fusionskontrolle/>, zuletzt abgerufen am 6.12.2022.

[105] So J. Welsch, Agenda 2025: Mehr Nachhaltigkeit in der Fusionskontrolle?, D'Kart Antitrust-Blog v. 8.8.2022, <www.d-kart.de/blog/2022/08/08/agenda-2025-mehr-nachhaltigkeit-in-der-fusionskontrolle/>, zuletzt abgerufen am 6.12.2022.

[106] Noch zum Referentenentwurf s. R. Polley/R. Kaup, Paradigmenwechsel in der deutschen Missbrauchsaufsicht – Der Referentenentwurf zur 10. GWB-Novelle, *NZKart* 2020, 113 (114).

[107] T. Körber, „Digitalisierung" der Missbrauchsaufsicht durch die 10. GWB-Novelle, Macht im Netz IV: Maßvolle Antwort oder übertriebene Regulierung der Digitalwirtschaft?, *MMR* 2020, 290 (293).

wettbewerbsschädliche Verhaltensweisen großer Digitalkonzerne mittels eines zweistufigen Verfahrens[108].[109] So kann das Bundeskartellamt nunmehr Unternehmen, deren überragende marktübergreifende Bedeutung für den Wettbewerb es in einem ersten Schritt mittels Entscheidung gem. § 19a Abs. 1 GWB festgestellt hat, in einen zweiten Schritt wettbewerbsgefährdende Praktiken i.S.d. § 19a Abs. 2 GWB untersagen.[110]

Das Bundeskartellamt hat seit dem Inkrafttreten des § 19a GWB mehrere Verfahren gegen Meta, Google, Amazon und Apple (sog. GAFA-Unternehmen[111]) eingeleitet.[112] Ein entsprechendes Verfahren gegen Microsoft, vom Präsidenten des Bundeskartellamts Mundt als „alter Kunde der Wettbewerbsbehörden" bezeichnet, wurde hingegen noch nicht angestrengt, wenngleich eine durch das deutsche Softwareunternehmen Nextcloud eingereichte Beschwerde geprüft wird.[113] Auch nach der vorherigen Rechtslage ist das Bundeskartellamt gegen die genannten Unternehmen vorgegangen. Die entsprechenden Verfahren werden im Folgenden kurz erläutert, wobei eine Einschränkung auf die in jüngster Zeit eingeleiteten Verfahren erfolgt.

Facebook: Das Bundeskartellamt hat am 2.5.2022 entschieden, dass die Meta Platforms, Inc., Menlo Park, USA mitsamt seinen verbundenen Unternehmen (im Folgenden: Meta) von überragender marktübergreifender Bedeutung für den Wettbewerb ist,[114] da Meta eine solche Machtposition innehat, die dem Unternehmen marktübergreifende Verhaltensspielräume eröffnet, die durch den Wettbewerb nicht hinreichend kontrolliert werden können.[115] Der Beschluss des Bundeskartellamts ist aufgrund des Verzichts auf Rechtsmittel seitens Meta[116]

[108] R. Polley/R. Kaup, Paradigmenwechsel in der deutschen Missbrauchsaufsicht – Der Referentenentwurf zur 10. GWB-Novelle, *NZKart* 2020, 113 (115).

[109] BKartA 30.6.2022 – B6-27/21, S. 1 – Fallbericht „Meta (vormals Facebook), Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 2. Mai 2022)".

[110] S. BKartA 30.6.2022 – B6-27/21, S. 2 – Fallbericht „Meta (vormals Facebook), Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 2. Mai 2022)".

[111] S. A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (496).

[112] BKartA, Für Meta (vormals Facebook) gelten neue Regeln – Bundeskartellamt stellt „überragende marktübergreifende Bedeutung für den Wettbewerb" fest, Pressemitteilung v. 4.5.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/04_05_2022_Facebook_19a.html>, zuletzt abgerufen am 6.12.2022.

[113] J. Olk/H.J. Jakobs, Kartellamtschef Mundt: „Mir soll keiner erzählen, ein Monopol sei gut für Innovation", Handelsblatt.com v. 9.2.2022, <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Interviews/2022/220209_Handelsblatt.pdf?__blob=publicationFile&v=4> zuletzt abgerufen am 6.12.2022.

[114] BKartA 30.6.2022 – B6-27/21, S. 1 – Fallbericht „Meta (vormals Facebook), Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 2. Mai 2022)".

[115] BKartA 30.6.2022 – B6-27/21, S. 2 – Fallbericht „Meta (vormals Facebook), Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 2. Mai 2022)".

[116] BKartA, Für Meta (vormals Facebook) gelten neue Regeln – Bundeskartellamt stellt „überragende

bestandskräftig.[117] Damit sind die Instrumente der erweiterten Missbrauchsaufsicht auf Meta anwendbar, die der deutsche Gesetzgeber mittels § 19a Abs. 2 GWB Anfang 2021 eingeführt hat. Eine Untersagung von wettbewerbsgefährdenden Praktiken ist jedoch noch nicht erfolgt.

Bereits Ende 2020 hat das Bundeskartellamt ein noch laufendes Missbrauchsverfahren gegen Meta wegen der Verknüpfung von Virtual-Reality-Produkten von Oculus (nun: Meta Quest) mit Facebook eingeleitet.[118] In diesem Zusammenhang wurde auch das zuvor beschriebene Verfahren nach § 19a GWB eingeleitet, welches dann von diesem Verfahren abgetrennt worden ist.[119]

Zudem hatte das Bundeskartellamt Meta bereits Anfang 2019 die Zusammenführung von Nutzerdaten aus verschiedenen Quellen untersagt.[120] Das Verfahren wurde 2016 durch das Bundeskartellamt eingeleitet.[121] Der Rechtsstreit mit Meta zu dieser Entscheidung ist jedoch bis heute vor den Gerichten anhängig.

Google: Am 30.12.2021 hat das Bundeskartellamt gem. § 19a Abs. 1 GWB entschieden, dass auch die Alphabet Inc., Mountain View, USA mitsamt den verbundenen Unternehmen (im Folgenden: Google) über eine überragend marktübergreifende Bedeutung für den Wettbewerb verfügt.[122] Hierauf aufbauend hat das Bundeskartellamt sodann am 21.6.2022 ein Verfahren gegen Google wegen möglicher Wettbewerbsbeschränkungen bei der Google Maps Plattform zulasten

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marktübergreifende Bedeutung für den Wettbewerb" fest, Pressemitteilung v. 4.5.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/04_05_2022_Facebook_19a.html>, zuletzt abgerufen am 6.12.2022.

[117] BKartA, Meta (vormals Facebook) – Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb, *NZKart* 2022, 465 (465).

[118] BKartA, Bundeskartellamt überprüft die Verknüpfung von Oculus mit dem Facebook-Netzwerk, Pressemitteilung v. 10.12.2020, <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/2020/09_12_2020_Facebook_Oculus.pdf?__blob=publicationFile&v=5>, zuletzt abgerufen am 6.12.2022.

[119] BKartA 30.6.2022 – B6-27/21, S. 9 – Fallbericht „Meta (vormals Facebook), Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 2. Mai 2022)".

[120] S. BKartA 15.2.2019 – B6-22/16 – Fallbericht „Facebook; Konditionenmissbrauch gemäß § 19 Abs. 1 GWB wegen unangemessener Datenverarbeitung (Entscheidung vom 6.2.2019)"; s.a. BKartA, Bundeskartellamt untersagt Facebook die Zusammenführung von Nutzerdaten aus verschiedenen Quellen, Pressemitteilung v. 7.2.2019, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2019/07_02_2019_Facebook.html> zuletzt abgerufen am 6.12.2022.

[121] BKartA 15.2.2019 – B6-22/16, S. 1 – Fallbericht „Facebook; Konditionenmissbrauch gemäß § 19 Abs. 1 GWB wegen unangemessener Datenverarbeitung (Entscheidung vom 6.2.2019)".

[122] S. BKartA 5.1.2022 – B7-61/21 – Fallbericht „Google – Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 30.12.2021)"; s.a. BKartA, Alphabet/Google ist ein Anwendungsfall für neue Aufsicht über große Digitalkonzerne – Bundeskartellamt stellt „überragende marktübergreifende Bedeutung" fest, Pressemitteilung v. 5.1.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/05_01_2022_Google_19a.html>, zuletzt abgerufen am 6.12.2022.

alternativer Kartendienste eingeleitet.[123] Zudem werden in parallelen Verfahren Googles Konditionen zur Datenverarbeitung[124] sowie das Nachrichtenangebot Google News Showcase[125] überprüft.

Amazon: Auch für die Amazon.com Inc., Seattle, USA einschließlich der mit ihr verbundenen Unternehmen (im Folgenden: Amazon) hat das Bundeskartellamt die überragend marktübergreifende Bedeutung für den Wettbewerb gem. § 19a Abs. 1 GWB am 5.7.2022 festgestellt.[126] Das Verfahren wurde am 18.5.2021 durch das Bundeskartellamt eingeleitet.[127]

Neben diesem Verfahren führt das Bundeskartellamt aktuell auch zwei Verfahren nach den Regelungen der klassischen Missbrauchsaufsicht gegen Amazon. Dabei wird in einem Verfahren die Einflussnahme von Amazon auf die auf dem Amazon-Marktplatz tätigen Händler mittels Preiskontrollmechanismen bzw. Algorithmen untersucht.[128] In einem zweiten Verfahren prüft das Bundeskartellamt, inwieweit Vereinbarungen zwischen Amazon und Markenherstellern, die auf dem Amazon-Marktplatz Dritthändler vom Verkauf von Markenprodukten ausschließen, einen Verstoß gegen Wettbewerbsregeln darstellen.[129]

Bereits 2018 hatte das Bundeskartellamt ein Verfahren zur Überprüfung der Geschäftsbedingungen und Verhaltensweisen von Amazon gegenüber

[123] BKartA, Verfahren gegen Google wegen möglicher Wettbewerbsbeschränkungen bei Kartendiensten (Google Maps Plattform), Pressemitteilung v. 21.6.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/21_06_2022_Google_Maps.html?nn=3591568>, zuletzt angerufen am 6.12.2022.

[124] BKartA, Verfahren gegen Google nach neuen Digitalvorschriften (§ 19a GWB) – Bundeskartellamt prüft marktübergreifende Bedeutung für den Wettbewerb und Konditionen zur Datenverarbeitung, Pressemitteilung v. 25.5.2021, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/25_05_2021_Google_19a.html?nn=3591568>, zuletzt abgerufen am 6.12.2022.

[125] BKartA, Bundeskartellamt prüft Google News Showcase, Pressemitteilung v. 4.6.2021, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html?nn=3591568>, zuletzt abgerufen am 6.12.2022; BKartA, Google News Showcase – Bundeskartellamt konsultiert Vorschläge Googles zum Ausräumen wettbewerblicher Bedenken, Pressemitteilung v. 12.1.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/12_01_2022_Google_News_Showcase.html>, zuletzt abgerufen am 6.12.2022.

[126] S. BKartA 6.7.2022 – B2–55/21 – Fallbericht „Überragende marktübergreifende Bedeutung von Amazon für den Wettbewerb (Entscheidung vom 5. Juli 2022)"; s.a. BKartA, Für Amazon gelten verschärfte Regeln – Bundeskartellamt stellt überragende marktübergreifende Bedeutung fest (§ 19a GWB), Pressemitteilung v. 6.7.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/06_07_2022_Amazon.html>, zuletzt abgerufen am 6.12.2022.

[127] BKartA, Verfahren gegen Amazon nach neuen Vorschriften für Digitalkonzerne (§ 19a GWB), Pressemitteilung v. 18.5.2021, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html?nn=3591568>, zuletzt abgerufen am 6.12.2022.

[128] BKartA, Für Amazon gelten verschärfte Regeln – Bundeskartellamt stellt überragende marktübergreifende Bedeutung fest (§ 19a GWB), Pressemitteilung v. 6.7.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/06_07_2022_Amazon.html>, zuletzt abgerufen am 6.12.2022.

[129] BKartA, Für Amazon gelten verschärfte Regeln – Bundeskartellamt stellt überragende marktübergreifende Bedeutung fest (§ 19a GWB), Pressemitteilung v. 6.7.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/06_07_2022_Amazon.html>, zuletzt abgerufen am 6.12.2022.

Dritthändlern eröffnet.[130] Das Verfahren wurde am 17.7.2019 eingestellt,[131] da Amazon seine Geschäftsbedingungen für Dritthändler auf dem Amazon-Marktplatz aufgrund der Bedenken des Bundeskartellamts weltweit entsprechend überarbeitet hatte.[132]

Apple: Das Bundeskartellamt prüft aktuell auch die überragend marktübergreifende Bedeutung für den Wettbewerb des Technologiekonzerns Apple. Ein entsprechendes Verfahren wurde am 21.6.2021 eingeleitet,[133] ist jedoch noch nicht abgeschlossen.[134]

Des Weiteren hat das Bundeskartellamt am 14.6.2022 ein sich dem obigen Verfahren anschließendes Verfahren gegen Apple zur Untersuchung seiner Tracking-Regelungen sowie des App Tracking Transparency Framework initiiert.[135] Hierbei wird insbesondere untersucht, ob diese Regelungen Apples eigene Angebote bevorzugt behandeln und/oder andere Unternehmen behindern könnten.[136]

b.

Die unter Punkt a. dargestellten Verfahren sind – mit Ausnahme der Feststellung einer überragend marktübergreifenden Bedeutung für den Wettbewerb für die Unternehmen Meta, Google und Amazon – größtenteils noch nicht abgeschlossen. Auch das gegen Amazon eingeleitete Verfahren zur Überprüfung der Geschäftsbedingungen und Verhaltensweisen gegenüber Dritthändlern endete nicht mit der Verhängung von Abhilfemaßnahmen, sondern wurde

[130] BKartA, Einleitung eines Missbrauchsverfahrens gegen Amazon, Pressemitteilung v. 29.11.2018, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html?nn=3591568>, zuletzt abgerufen am 6.12.2022.

[131] BKartA 17.7.2019 – B2 – 88/18 – Fallbericht „Amazon ändert weltweit seine Geschäftsbedingungen für Händler auf seinen Marktplätzen – Bundeskartellamt stellt Missbrauchsverfahren ein".

[132] BKartA, Bundeskartellamt erwirkt für Händler auf den Amazon Online-Marktplätzen weitreichende Verbesserungen der Geschäftsbedingungen, Pressemitteilung v. 17.7.2019, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2019/17_07_2019_Amazon.html>, zuletzt abgerufen am 6.12.2022.

[133] BKartA, Verfahren gegen Apple nach neuen Digitalvorschriften (§ 19a Abs. 1 GWB) – Bundeskartellamt prüft Apples marktübergreifende Bedeutung für den Wettbewerb, Pressemitteilung v. 21.6.2021, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/21_06_2021_Apple.html>, zuletzt abgerufen am 6.12.2022.

[134] BKartA, Bundeskartellamt prüft Apples Tracking-Regelungen für Dritt-Apps, Pressemitteilung v. 14.6.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/14_06_2022_Apple.html>, zuletzt abgerufen am 6.12.2022.

[135] BKartA, Bundeskartellamt prüft Apples Tracking-Regelungen für Dritt-Apps, Pressemitteilung v. 14.6.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/14_06_2022_Apple.html>, zuletzt abgerufen am 6.12.2022.

[136] BKartA, Bundeskartellamt prüft Apples Tracking-Regelungen für Dritt-Apps, Pressemitteilung v. 14.6.2022, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/14_06_2022_Apple.html>, zuletzt abgerufen am 6.12.2022.

seitens des Bundeskartellamtes eingestellt.[137] Allerdings hat Amazon seine Geschäftsbedingungen für seine gesamten Online-Marktplätze aufgrund der Bedenken des Bundeskartellamts zu Gunsten der Drittanbieter überarbeitet.[138] Das Bundeskartellamt konnte durch dieses Verfahren somit weltweite Verbesserungen für ebendiese Dritthändler erzielen.[139] Gleichzeitig wurde durch dieses Verfahren deutlich, dass das Bundeskartellamt im Rahmen seiner Missbrauchskontrolle Einfluss auf die großen Digitalkonzerne nehmen kann. Zudem konnte so für die europäischen Händler ein verbesserter Kundenzugang im Onlinehandel und damit auch eine erhöhte Konkurrenz für den Eigenverkauf von Amazon selbst erreicht werden, was durchaus als Beitrag für eine größere digitale Souveränität Europas und einer dynamischeren digitalen Wirtschaft gewertet werden kann. Gleichwohl handelt es sich hierbei um ein einzelnes Verfahren. Für eine endgültige Bewertung sollte daher der Ausgang der weiteren Verfahren abgewartet werden. Dennoch hat das Bundeskartellamt mit der Feststellung der überragend marktübergreifenden Bedeutung für den Wettbewerb für die Unternehmen Meta, Google und Amazon sowie der Einleitung eines entsprechenden Verfahrens gegen Apple den Grundstein gelegt, auch durch diese Verfahren die digitale Souveränität Europas zu stärken.

c.

Inwieweit das Bundeskartellamt neben der Europäischen Kommission eigene wettbewerbsrechtliche Verfahren gegen große digitale Plattformen einleiten kann, hängt in erster Linie davon ab, ob § 19a GWB neben den Vorschriften des Digital Markets Act (VO (EU) 2022/1925)[140] zur Anwendung kommen kann. § 19a fand mit der 10. GWB-Novelle Einzug in das Gesetz gegen Wettbewerbsbeschränkungen.[141] Das „GWB-Digitalisierungsgesetz"

[137] S. BKartA 17.7.2019 – B2 – 88/18 – Fallbericht „Amazon ändert weltweit seine Geschäftsbedingungen für Händler auf seinen Marktplätzen – Bundeskartellamt stellt Missbrauchsverfahren ein".

[138] BKartA, Bundeskartellamt erwirkt für Händler auf den Amazon Online-Marktplätzen weitreichende Verbesserungen der Geschäftsbedingungen, Pressemitteilung v. 17.7.2019, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2019/17_07_2019_Amazon.html>, zuletzt abgerufen am 6.12.2022.

[139] BKartA, Bundeskartellamt erwirkt für Händler auf den Amazon Online-Marktplätzen weitreichende Verbesserungen der Geschäftsbedingungen, Pressemitteilung v. 17.7.2019, <www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2019/17_07_2019_Amazon.html>, zuletzt abgerufen am 6.12.2022.

[140] Verordnung (EU) 2022/1925 des Europäischen Parlaments und des Rates vom 14. September 2022 über bestreitbare und faire Märkte im digitalen Sektor und zur Änderung der Richtlinien (EU) 2019/1937 und (EU) 2020/1828 (Gesetz über digitale Märkte), ABl. 2022 L 265, 1.

[141] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz) v. 18.1.2021, BGBl. 2021, I-2.

verfolgt mitunter das Ziel, dem Bundeskartellamt zu ermöglichen, besser den Herausforderungen von Plattformökonomie und digitalen Ökosystemen gegenübertreten zu können (s.a. Punkt a.).[142] Daneben ist aber auch der europäische Gesetzgeber darauf aus, die Macht großer Digitalkonzerne einzuhegen. Am 14.9.2022 wurde daher vom Europäischen Parlament und vom Rat das Gesetz über digitale Märkte (Digital Markets Act (DMA)) angenommen.[143] Die Verordnung gilt ab dem 2.5.2023 und sieht ebenfalls vor, unter bestimmten Voraussetzungen Unternehmen Verhaltenspflichten auferlegen zu können.

Grundsätzlich gehen unionale Verordnungen den nationalen Regelungen zwar im Wege des Anwendungsvorrangs vor,[144] die Absätze 5 und 6 des Art. 1 DMA treffen jedoch Regelungen über die parallele Anwendbarkeit nationaler Vorschriften. Während gemäß Art. 1 Abs. 5 DMA, der das Verhältnis zum mitgliedstaatlichen Regulierungsrecht bestimmt, die Mitgliedsstaaten betroffenen Unternehmen keine weiteren Verpflichtungen im Wege von Rechts- und Verwaltungsvorschriften auferlegen dürfen, bleiben hingegen gemäß Art. 1 Abs. 6 DMA, der das Verhältnis des DMA gegenüber dem Kartellrecht betrifft, nationale Wettbewerbsvorschriften unberührt.[145] Somit sind die Möglichkeiten des Bundeskartellamts neben der Kommission tätig werden zu können, im Wesentlichen von der Einordnung des §19a GWB entweder als regulierungs- oder kartellrechtliche Norm abhängig.[146] In der Literatur werden beide Ansichten vertreten; eine klar herrschende Meinung hat sich noch nicht herausgebildet.[147]

Folgt man der Auffassung, bei § 19a GWB handele es sich um eine kartellrechtliche Norm, so greift Art. 1 Abs. 6 DMA, womit eine parallele Anwendbarkeit grundsätzlich möglich wäre. Allerdings ist zu differenzieren, ob die Kommission ein entsprechendes Unternehmen als „Torwächter" (Gatekeeper) benannt hat oder nicht.[148] Ist letzteres der Fall, kann das Bundeskartellamt frei verfahren. Fand jedoch eine Benennung als Gatekeeper statt, so verengen sich die Möglichkeiten der Behörde. Sofern bestimmte Verhaltensweisen bereits von Vorschriften

[142] BT-Drucks. 19/23492, 73.

[143] Einen Überblick über die Regelungen des DMA geben R. Podszun/P. Bongartz/A. Kirk, Digital Markets Act – Neue Regeln für Fairness in der Plattformökonomie, *NJW* 2022, 3249 (3249 ff.).

[144] M. Schroeder, *in* Streinz (Hrsg.), EUV/AEUV, 3. Aufl., München 2018, Art. 288 AEUV, Rn. 44; M. Ruffert, *in* Calliess/Ruffert (Hrsg.), EUV/AEUV, 6. Aufl., München 2022, Art. 288 AEUV, Rn. 21.

145 A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (496).

[146] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (496).

[147] Wissenschaftlicher Dienst des Bundestages, Die Anwendbarkeit von § 19a GWB im Lichte des europäischen Gesetzgebungsverfahrens zum „Digital Market Act", WD 7 – 300 – 114/21; PE6 – 3000 – 067/21, S. 9 f. m.w.N.

[148] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (498).

des DMA erfasst sind, so ist eine Untersagung unter Rückgriff auf § 19a GWB nicht mehr möglich.[149] Möglicherweise sind die Feststellung der überragenden marktübergreifenden Stellung i.S.d. § 19a Abs. 1 GWB sowie der Gatekeeper-Eigenschaft i.S.d. Art. 3 DMA nebeneinander denkbar und die Auferlegung von Verhaltenspflichten nach § 19a Abs. 2 GWB solange zulässig, wie sie keine Entsprechung[150] im DMA haben.[151] Aufgrund des großen Gleichlaufs zwischen § 19a GWB und DMA dürfte es jedoch auch in diesem Fall zu einer weitgehenden Einschränkung des Bundeskartellamts kommen.[152]

Konsequenz einer regulierungsrechtlichen Einordnung wäre die Ausschlusswirkung von Art. 1 Abs. 5 DMA,[153] die allerdings erst ab dem Zeitpunkt der Gatekeeper-Benennung eines Unternehmens durch die Kommission und nur gegen ebendieses greift.[154] Bis zu diesem Zeitpunkt könnte das Bundeskartellamt weiterhin auf der Grundlage des § 19a GWB gegen das betreffende Unternehmen vorgehen.[155] Denn gemäß Art. 5 Abs. 1 DMA „erlegen die Mitgliedstaaten [nur] Torwächtern keine weiteren Verpflichtungen […] auf." Hat die Kommission jedoch ein Unternehmen bereits förmlich als Gatekeeper bezeichnet, so kann das Bundeskartellamt nicht mehr auf § 19a GWB zurückgreifen.[156] Vielmehr verbleiben ihm in diesem Fall nur die Möglichkeiten der „klassischen" nationalen Missbrauchsaufsicht, die als kartellrechtliche Vorschriften Art. 1 Abs. 6 DMA unterfallen und demgemäß weiterhin angewendet werden können.[157] Auch dies würde jedoch den Handlungsspielraum des Bundeskartellamtes erheblich einschränken.

Der Präsident des Bundeskartellamts Mundt schien sich hinsichtlich der kartell- oder regulierungsrechtlichen Einordnung von § 19a GWB nicht festlegen zu

[149] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (498).

[150] S. hierzu den Vergleich der Verhaltenskatalogposition von § 19a Abs. 2 GWB und Art. 5, 6 DMA-Entwurf von T. J. Gerpott, Neue Pflichten für große Betreiber digitaler Plattformen – Vergleich von 19a GWB und DMA-Kommissionsvorschlag, *NZKart* 2021, 273 (276).

[151] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, NZKart 2021, 496 (498).

[152] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, NZKart 2021, 496 (498).

[153] Wissenschaftlicher Dienst des Bundestages, Die Anwendbarkeit von § 19a GWB im Lichte des europäischen Gesetzgebungsverfahrens zum „Digital Market Act", WD 7 – 300 – 114/21; PE6 – 3000 – 067/21, S. 12; s. ebenfalls B. P. Paal/L. K. Kumkar, Wettbewerbsschutz in der Digitalwirtschaft, Die wichtigsten Neuerungen der 10. GWB-Novelle im Überblick, *NJW* 2021, 809 (815).

[154] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (497).

[155] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (497).

[156] A. Grünwald, Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs, *NZKart* 2021, 496 (497).

[157] Vgl. N. Gielen/S. Uphues, Digital Markets Act und Digital Services Act, *EuZW* 2021, 627 (631).

wollen. Er bezeichnete § 19a GWB als „kartellrechtsnahe Regulierung“[158]. Im Zusammenhang mit dem Jahresbericht 2021/22 des Bundeskartellamts[159] scheint die Auffassung der Behörde jedoch klar. Sie vertritt eine kartellrechtliche Einordnung.[160] Im übrigen Diskurs hat sich eine solch klare Positionierung allerdings noch nicht herauskristallisiert (s.o.).[161] Befürworter einer regulierungsrechtlichen Einordnung stützen ihre Auffassung vor allem darauf, dass § 19a GWB trotz seiner Stellung in der Missbrauchsaufsicht mit einer ex-ante Regulierung auf das Verhalten von Marktteilnehmern einwirken möchte.[162] Umfassende Klärung wird nur eine Entscheidung des EuGH bringen können.[163]

d.

Die relevanten digitalen Großkonzerne, die für eine Einstufung als Gatekeeper in Frage kommen, agieren innerhalb der gesamten Europäischen Union.[164] Gleichwohl wenden diese teilweise unterschiedliche Konditionen und Geschäftspraktiken in den einzelnen Mitgliedstaaten an, was zu ungleichen Wettbewerbsbedingungen der (End-)Nutzer dieser digitalen Plattformen und damit einer Beeinträchtigung des Binnenmarktes führt.[165] Im Sinne eines gut funktionierenden Binnenmarkts ist jedoch die Herstellung einheitlicher Wettbewerbsbedingungen von wesentlicher Bedeutung.[166] Dies kann von den nationalen Wettbewerbsbehörden aber nicht geleistet werden. Vielmehr sind hier regulatorische Maßnahmen auf europäischer Ebene notwendig. Die ausschließliche Zuständigkeit der Kommission im Bereich des DMA ist aus dieser Sicht zu begrüßen.

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[158] F. Bien, Conference Briefing (16): Die 10. GWB-Novelle beim 6. Berliner Kolloquium des FIW, D'Kart Antitrust-Blog v. 29.11.2019, <www.d-kart.de/blog/2019/11/29/conference-debriefing-16-10-gwb-novelle-fiw/>, zuletzt abgerufen am 6.12.2022.

[159] BKartA, Jahresbericht 2021/22, S. 38, <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Jahresbericht/Jahresbericht_2021_22.pdf;jsessionid=30E67F55332FE414EF1CE33C27F896BC.1_cid390?__blob=publicationFile&v=8>, zuletzt abgerufen am 6.12.2022.

[160] BKartA, Jahresbericht 2021/22, S. 38, <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Jahresbericht/Jahresbericht_2021_22.pdf;jsessionid=30E67F55332FE414EF1CE33C27F896BC.1_cid390?__blob=publicationFile&v=8>, zuletzt abgerufen am 6.12.2022.

[161] Einen Überblick über den Streitstand gibt Wissenschaftlicher Dienst des Bundestages, Die Anwendbarkeit von § 19a GWB im Lichte des europäischen Gesetzgebungsverfahrens zum „Digital Market Act“, WD 7 – 300 – 114/21; PE6 – 3000 – 067/21, S. 9 f. m.w.N.

[162] R. Polley/F. A. Konrad, Der Digital Markets Act, *WuW* 2021, 198 (199).

[163] A. Grünwald, *in* Jaeger/Kokott/Pohlmann/Schroeder/Seeliger (Hrsg.), Frankfurter Kommentar zum Kartellrecht, 100. EL, Köln 2021, § 19a GWB, Rn. 27.

[164] G. Monti, The Digital Markes Act – Institutional Design and Suggestions for Improvement, TILEC Discussion Paper v. 22.2.2021, S. 17, <ssrn.com/abstract=3797730>, zuletzt abgerufen am 6.12.2022.

[165] Erwg. 7 DMA.

[166] Erwg. 7 DMA.

Wenngleich die (potentiellen) Gatekeeper in Teilen unterschiedliche Konditionen und Geschäftsbedingungen in den einzelnen Mitgliedstaaten vorsehen, so ist die grundsätzlich angebotene Plattform doch in allen Mitgliedstaaten weitgehend gleich.[167] Bei einer Verfolgung etwaig unfairer Praktiken dieser Plattformen durch die nationalen Wettbewerbsbehörden besteht jedoch die Gefahr divergierender Verfahren, Entscheidungen und verhängten Abhilfemaßnahmen in den einzelnen Mitgliedstaaten,[168] was wiederrum ungleiche Wettbewerbsbedingungen für die Nutzer dieser Plattformen aus den unterschiedlichen Mitgliedstaaten hervorrufen würde.[169] Es bestünde somit auch hier die Gefahr einer Fragmentierung des Binnenmarkts.[170] Zwar besteht hier die Möglichkeit, eine einheitliche Vorgehensweise der nationalen Wettbewerbsbehörden über den Auf- oder Ausbau von Kooperationsnetzwerken sicherzustellen.[171] Dies könnte jedoch mit erheblichen Kosten – insbesondere im Bereich der Überwachung der auferlegten Verhaltenspflichten[172] – einhergehen.[173] Daher erscheint es auch aus diesem Blickwinkel sinnvoller, die ausschließliche Zuständigkeit zur Durchsetzung des DMA der Kommission zu übertragen.

Zudem ist die Einhaltung der Verhaltenspflichten durch die großen Digitalkonzerne auch wahrscheinlicher, wenn Sie einer großen und gut ausgestatteten europäischen Behörde gegenüberstehen als vielen kleinen nationalen Behörden, deren Vorgehensweise sich hinsichtlich des betreffenden Unternehmens auch noch unterscheiden kann.[174]

Im Ergebnis ist somit feststellen, dass nur die alleinige Zuständigkeit der Kommission bei der Durchsetzung des DMA einen reibungslos funktionierenden

[167] G. Monti, The Digital Markes Act – Institutional Design and Suggestions for Improvement, TILEC Discussion Paper v. 22.2.2021, S. 5, <ssrn.com/abstract=3797730>, zuletzt abgerufen am 6.12.2022.

[168] A. de Streel/R. Feasey/J. Kraemer/G. Monti, Making the Digital Markets act more resilient and effective, CERRE Recommendations Paper, Mai 2021, S. 75, <ssrn.com/abstract=3853991>, zuletzt abgerufen am 6.12.2022.

[169] Vgl. Erwg. 7 DMA.

[170] S. Erwg. 6 DMA.

[171] S. H. Schweitzer, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, *ZEuP* 2021, 503 (540); s.a. BKartA, Digital Markets Act: Perspektiven des (inter)nationalen Wettbewerbsrechts, Tagung des Arbeitskreises Kartellrecht, 7. Oktober 2021, Hintergrundpapier, S. 38 f., <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2021_Hintergrundpapier.pdf;jsessionid=E1856BB5C623885DD9F35A8DC53EF530.1_cid387?__blob=publicationFile&v=3>, zuletzt abgerufen am 6.12.2022.

[172] G. Monti, The Digital Markes Act – Institutional Design and Suggestions for Improvement, TILEC Discussion Paper v. 22.2.2021, S. 5, <ssrn.com/abstract=3797730>, zuletzt abgerufen am 6.12.2022.

[173] A. de Streel/R. Feasey/J. Kraemer/G. Monti, Making the Digital Markets act more resilient and effective, CERRE Recommendations Paper, Mai 2021, S. 75, <ssrn.com/abstract=3853991>, zuletzt abgerufen am 6.12.2022.

[174] G. Monti, The Digital Markes Act – Institutional Design and Suggestions for Improvement, TILEC Discussion Paper v. 22.2.2021, S. 5, <ssrn.com/abstract=3797730>, zuletzt abgerufen am 6.12.2022.

Binnenmarkt sowie einen ungestörten grenzüberschreitenden Handel zwischen den Mitgliedstaaten gewährleisten kann. Anderenfalls käme es zu einer Fragmentierung des Binnenmarktes, die sich sowohl auf die europäischen Verbraucher als auch die kommerziellen Nutzer der Gatekeeper-Plattformen negativ auswirken kann.[175] Hinzu kommt, dass es sich bei den Unternehmen, die als Gatekeeper bezeichnet werden könnten, um eine relativ geringe Anzahl handelt, die eine Unterstützung der Kommission durch die nationalen Behörden nicht erforderlich macht.[176]

Frage 8

Das unionale Beihilfenrecht dient dem Schutz des Binnenmarktes vor von mitgliedstaatlicher Seite ausgehenden Wettbewerbsverzerrungen. Demgemäß etabliert Art. 107 Abs. 1 AEUV ein grundsätzliches Verbot mitgliedstaatlicher Beihilfen. Dieses Beihilfenverbot gilt jedoch nicht absolut. Vielmehr sehen Art. 107 Abs. 2 und 3 AEUV[177] sowie die Allgemeine Gruppenfreistellungsverordnung[178] mehrere Ausnahmetatbestände vor, in dem eine Beihilfe mit dem Binnenmarkt vereinbar ist.

Nach dem Aktionsplan Beihilfen aus dem Jahr 2004[179] sollen Beihilfen mit einer wirtschaftspolitischen Zielsetzung zur Verfolgung von im gemeinschaftlichen Interesse liegenden Zielen und zur Kompensation von Marktversagen dienen.[180] Letzteres liegt dann vor, wenn der Markt kein wirtschaftlich effizientes, m.a.W. ein in ausreichenden Maßen den Wohlstand des Marktes oder einer Volkswirtschaft steigerndes Ergebnis hervorbringt.[181] Fraglich erscheint jedoch, ob die Abwesenheit von europäischen Industrie-Champions als Marktversagen in diesem Sinne zu qualifizieren ist. Dies erscheint jedoch zweifelhaft. So soll zum einen ein Marktversagen auf dem Binnenmarkt kompensiert werden. Dessen wirtschaftliche Effizienz ist jedoch unabhängig von der Anwesenheit

[175] Vgl. Erwg. 6 f. DMA.

[176] G. Monti, The Digital Markes Act – Institutional Design and Suggestions for Improvement, TILEC Discussion Paper v. 22.2.2021, S. 5, <ssrn.com/abstract=3797730>, zuletzt abgerufen am 6.12.2022.

[177] Die Legalausnahmen des Art. 107 Abs. 2 AEUV haben für die Beantwortung der vorliegenden Frage keine Relevanz und werden daher auch nicht weiter thematisiert.

[178] Verordnung (EU) Nr. 651/2014 der Kommission vom 17. Juni 2014 zur Feststellung der Vereinbarkeit bestimmter Gruppen von Beihilfen mit dem Binnenmarkt in Anwendung der Artikel 107 und 108 des Vertrags über die Arbeitsweise der Europäischen Union, ABl. 2014 L 187, 1.

[179] Kommission, Aktionsplan Staatliche Beihilfen, Weniger und besser ausgerichtete staatliche Beihilfen – Roadmap zur Reform des Beihilferechts 2005-2009, KOM(2005) 107 endg. v. 7.6.2005.

[180] H. Schweitzer/E.-J. Mestmäcker, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 5, Beihilfenrecht, 6. Aufl., München 2022, I. Abschnitt, A., Rn. 22.

[181] Kommission, Aktionsplan Staatliche Beihilfen, Weniger und besser ausgerichtete staatliche Beihilfen – Roadmap zur Reform des Beihilferechts 2005-2009, KOM(2005) 107 endg. v. 7.6.2005, Rn. 23.

eines Industrieunternehmens von Weltgeltung. Vielmehr kann die notwendige Effizienz auch durch einen regionalen Marktführer oder mehrere kleinere Industrieunternehmen erwirtschaftet werden. Zum anderen würde dies zu einem massiven Anstieg von „politisierten Beihilfen" an die zu schaffenden europäischen Champions führen, da diese sich dann der Konkurrenz US-amerikanischer und chinesischer Unternehmen auf dem Weltmarkt stellen müssten. So stellt die Volksrepublik China im Rahmen ihrer Strategie „Made in China 2025" nämlich fast unbegrenzte Finanzmittel zur Verfügung, um chinesische Unternehmen als Weltmarktführer in bestimmten Schlüsselsektoren zu etablieren.[182] Ebenso werden Subventionen in einer neuen amerikanischen Industriepolitik eine wesentliche Rolle spielen.[183] Zudem wäre zu beachten, dass mitgliedstaatliche Beihilfen die Schaffung von europäischen Industriechampions nur bedingt fördern würden, da die Mitgliedstaaten bei der Beihilfenvergabe zumeist nationale und keine unionalen Interessen verfolgen. Demgemäß müsste eine solche Förderung mittels Unionsbeihilfen durchgeführt werden, deren Finanzierung jedoch zunächst festgelegt werden müsste. Es käme sodann zu einem politisierten[184] Subventionswettlauf mit den genannten Staaten.

Einer solchen Abkehr von der wettbewerblichen Ausrichtung des Beihilfenrechts steht die Kommission jedoch ablehnend gegenüber, wie auch die fusionskontrollrechtliche Entscheidung in Sachen Siemens/Alstom gezeigt haben dürfte. Vielmehr ist sie der Auffassung, dass gerade der Wettbewerb auf einem starken und widerstandsfähigen Binnenmarkt Impulse für Innovationen und Investitionen der Unternehmen aller Größenordnungen setzt, wodurch diese im internationalen Markt wettbewerbsfähiger werden.[185] Die Kommission sieht folglich insbesondere den innovationsfördernden Wettbewerb sowie einen resilienten Binnenmarkt als Schlüssel für die internationale Wettbewerbsfähigkeit der auf dem Binnenmarkt tätigen Unternehmen und damit auch der Schaffung von

[182] M. Böheim/T. Jaeger/M. Kopetzki/B. Meyer, Vorschläge für einen zukunftsorientieren EU-Beihilferahmen, Österreichisches Institut für Wirtschaftsforschung, März 2022, S. 29 ff., <www.wifo.ac.at/jart/prj3/wifo/resources/person_dokument/person_dokument.jart?publikationsid=67417&mime_type=application/pdf>, zuletzt abgerufen am 6.12.2022.

[183] S. bspw. den Inflation Reduction Act of 2022 (H.R.537), <www.congress.gov/bill/117th-congress/house-bill/5376>, zuletzt abgerufen am 6.12.2022, sowie den Supreme Court Security Founding Act of 2022 (H.R.4346), <www.congress.gov/bill/117th-congress/house-bill/4346>, zuletzt abgerufen am 6.12.2022; Letzterer wird auch als CHIPS and Science Act bezeichnet; zu den Inhalten s. Maywald, Präsident Biden unterzeichnet den „CHIPS and science Act" und den Inflation Reduction Act 2022, *IStR-LB* 2022, 67 (67 f.).

[184] M. Böheim/T. Jaeger/M. Kopetzki/B. Meyer, Vorschläge für einen zukunftsorientieren EU-Beihilferahmen, Österreichisches Institut für Wirtschaftsforschung, März 2022, S. 37, <www.wifo.ac.at/jart/prj3/wifo/resources/person_dokument/person_dokument.jart?publikationsid=67417&mime_type=application/pdf>, zuletzt abgerufen am 6.12.2022.

[185] Kommission, Eine Wettbewerbspolitik für neue Herausforderungen, COM(2021) 713 final v. 18.11.2021, S. 2; s.a. Soltész, Wichtige Entwicklungen im Europäischen Beihilferecht im Jahre 2021, *EuZW* 2022, 5 (11).

europäischen Champions. Hierzu sollen auch die bisherigen Beihilfen im Bereich der Innovation aufgestockt werden,[186] um so entsprechende Innovationsanreize zu setzen. Denn eine global wettbewerbsfähige und weltführende Industrie ist eines der Ziele der neuen Industriestrategie der EU.[187]

Um dieses Ziel zu erreichen und die Unternehmen bei der digitalen und ökologischen Innovation und Transformation in einem veränderten geopolitischen Umfeld zu unterstützen,[188] hat die Kommission ihre wettbewerblichen Instrumente einer Prüfung unterzogen und an die neuen Gegebenheiten angepasst.[189] So wurde bspw. der Anwendungsbereich der AGVO im Jahr 2021 erweitert und eröffnet den Mitgliedstaaten weitere Möglichkeiten, den digitalen und ökologischen Wandel zu fördern.[190] Eine weitere Reform ist für das erste Quartal 2023 geplant, die eine weitere Erweiterung des Anwendungsbereichs, bspw. im Bereich der Förderung von Wasserstoff sowie weiteren grünen Investitionen, mit sich bringen wird.[191] Zudem hat die Kommission neue Leitlinien für Klima-, Umweltschutz- und Energiebeihilfen[192] erlassen, die Investitionen der Mitgliedstaaten u.a. auch in erneuerbare Energien erleichtern, um die Ziele des europäischen Green Deals schneller und auch kosteneffizienter zu erreichen.[193] Mit beiden überarbeiteten Instrumenten soll es den Mitgliedstaaten ermöglicht werden, die erforderliche Unterstützung zur Verwirklichung des Green Deals bereitzustellen.[194] Zudem wurden auch die Kriterien für eine Freistellung nach Art. 107 Abs. 3 lit. b) AEUV („wichtige Vorhaben von gemeinsamem europäischem Interesse") an den Green

[186] Kommission, Eine neue Industriestrategie für Europa, COM(2020) 102 final v. 10.3.2020, S. 12.

[187] Kommission, Eine neue Industriestrategie für Europa, COM(2020) 102 final v. 10.3.2020, S. 3.

[188] M. Böheim/T. Jaeger/M. Kopetzki/B. Meyer, Vorschläge für einen zukunftsorientieren EU-Beihilferahmen, Österreichisches Institut für Wirtschaftsforschung, März 2022, S. 38, <www.wifo.ac.at/jart/prj3/wifo/resources/person_dokument/person_dokument.jart?publikationsid=67417&mime_type=application/pdf>, zuletzt abgerufen am 6.12.2022.

[189] Kommission, Eine Wettbewerbspolitik für neue Herausforderungen, COM(2021) 713 final v. 18.11.2021, S. 3.

[190] S. zur AGVO-Reform bspw. Soltész, Wichtige Entwicklungen im Europäischen Beihilferecht im Jahre 2021, *EuZW* 2022, 5 (10); G. Quardt, Neue Freistellungstatbestände in der AGVO, Beihilfenblog v. 30.7.2021, <beihilfen-blog.eu/neue-freistellungstatbestaende-in-der-agvo/>, zuletzt abgerufen am 6.12.2022.

[191] S. Kommission, Genehmigung des Inhalts des Entwurfs einer Verordnung der Kommission zur Änderung der Verordnung (EU) Nr. 651/2014 zur Feststellung der Vereinbarkeit bestimmter Gruppen von Beihilfen mit dem Binnenmarkt in Anwendung der Artikel 107 und 108 des Vertrags über die Arbeitsweise der Europäischen Union, ABl. 2021 C 433, 1; s.a. A. Lazarova, Konsultation des AGVO-Entwurfs, Beihilfenblog v. 25.10.2021, <beihilfen-blog.eu/konsultation-des-agvo-entwurfs/>, zuletzt abgerufen am 6.12.2022.

[192] Kommission, Leitlinien für staatliche Klima-, Umweltschutz- und Energiebeihilfen 2022, ABl. 2022 C 80, 1.

[193] Kommission, Staatliche Beihilfen: Kommission billigt neue Leitlinien für staatliche Klima-, Umweltschutz- und Energiebeihilfen, Pressemitteilung v. 21.12.2021, <ec.europa.eu/commission/presscorner/detail/de/ip_21_6982>, zuletzt abgerufen am 6.12.2022.

[194] Kommission, Eine Wettbewerbspolitik für neue Herausforderungen, COM(2021) 713 final v. 18.11.2021, S. 11.

Deal und die neue Industrie- und Digitalstrategie angepasst.[195] Bereits vor Erlass dieser Mitteilung wurden zwei IPCEI-Vorhaben mit einem Gesamtvolumen von EUR 3,65 Mrd. Euro in den Bereichen Batterien und Mikroelektronik seitens der Kommission genehmigt.[196] Auch hier war jedoch der mit diesen Projekten einhergehende Innovationssprung und nicht die Schaffung europäischer Champions der Kerngedanke der Kommission bei der Genehmigung der Vorhaben.

Im Ergebnis lässt sich festhalten, dass die Kommission im Rahmen ihrer neuen Industriestrategie eine weltweit führende Industrie in Europa etablieren will und hierzu auch die Vorschriften des Beihilfenrechts heranzieht. Hingegen soll dies nicht durch eine „protektionistische Revolution" des unionalen Beihilfenregimes erreicht werden. Vielmehr bleibt die Kommission ihrer wettbewerblichen Linie treu und setzt auf ökologische und digitale Innovation durch Wettbewerb. Die Kommission hat eine Vielzahl ihrer beihilfenrechtlichen Instrumente in Konkretisierung des Art. 107 Abs. 3 AEUV überabeitet, um so den grünen und digitalen Wandel durch eine erleichterte wie erhöhte Beihilfenvergabe zu unterstützen und zu fördern. Demgemäß dürften in der zukünftigen Entscheidungspraxis auch industriepolitische Aspekte herangezogen werden, wobei dem Aspekt der Schaffung europäischer Champions lediglich eine indirekte Rolle zukommen dürfte. Vielmehr dürfte hier der Innovationsaspekt im Vordergrund stehen, der jedoch mittelbar zu einer marktgetriebenen Entstehung europäischer Champions führen kann.

Am 11.3.2020, einen Tag nach der Veröffentlichung der neuen Industriestrategie der Kommission,[197] hatte die WHO COVID-19 zu einer weltweiten Pandemie erklärt.[198] Die daraufhin von den Mitgliedstaaten ergriffenen Maßnahmen zur Eindämmung des Virus fuhren Wirtschaft und soziales Leben mit gravierenden Folgen für die auf dem Binnenmarkt tätigen Unternehmen weitgehend bis gänzlich herunter.[199] Die Kommission selbst sprach bereits in einer am 13.3.2022 erlassenen Mitteilung von einer gesundheitlichen Notlage, die eine großen wirtschaftlichen

[195] S. Kommission, Kriterien für die Würdigung der Vereinbarkeit von staatlichen Beihilfen zur Förderung wichtiger Vorhaben von gemeinsamem europäischem Interesse mit dem Binnenmarkt, ABl. 2021 C 528, 2.

[196] S. Kommission, Staatliche Beihilfen: Kommission genehmigt das Vorhaben Frankreichs, Deutschlands, Italiens und des Vereinigten Königreichs, staatliche Beihilfen in Höhe von 1,75 Mrd. EUR für ein gemeinsames im Bereich Mikroelektronik zu gewähren, Pressemitteilung v. 18.12.2018, <ec.europa.eu/commission/presscorner/detail/de/ip_18_6862>, zuletzt abgerufen am 6.12.2022; Kommission, Staatliche Beihilfen: Kommission genehmigt öffentliche Förderung von 2,9 Mrd. EUR für ein zweites, die gesamte Batterie-Wertschöpfungskette betreffendes paneuropäisches Forschungs- und Innovationsvorhaben on zwölf Mitgliedstaaten, Pressemitteilung v. 26.1.2021, <ec.europa.eu/commission/presscorner/detail/de/IP_21_226>, zuletzt abgerufen am 6.12.2022.

[197] S. Kommission, Eine neue Industriestrategie für Europa, COM(2020) 102 final v. 10.3.2020.

[198] Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 1.

[199] C. Seitz/A. S. Berne, Das Panazee gegen COVID-19: Das EU-Beihilfenrecht, Staatliche Unterstützungsmaßnahmen und der befristete Beihilferahmen der EU-Kommission, *EuZW* 2020, 591 (591).

Schock für die Europäische Union bedeute.[200] Gleichzeitig hatte die Kommission umfangreiche Unterstützungsmaßnahmen auch über die Gewährung staatlicher Beihilfen angekündigt, um die wirtschaftlichen Auswirkungen der Pandemie abzufedern,[201] wobei die Kommission aufgrund des begrenzten EU-Haushalts die Mitgliedstaaten aufgefordert hatte, die entsprechenden Beihilfen aus ihrem Haushalt zur Verfügung zu stellen.[202] Die Kommission kündigte zudem an, alle erforderlichen Verfahrenserleichterungen für eine rasche Genehmigung dieser Beihilfenmaßnahmen vorzunehmen.[203] Zudem hatte sie die Mitgliedstaaten dazu aufgerufen, einem krisenbedingten Verlust kritischer Anlagen und Technologien mit allen zur Verfügung stehenden Instrumenten entgegenzutreten.[204]

Bereits am 19.3.2020 wurde sodann ein mittlerweile mehrfach erweiterter befristeter Beihilfenrahmen[205] zur Beschleunigung und Vereinfachung der betreffenden Beihilfenverfahren durch die Kommission erlassen.[206] Mit diesem Rahmen legte die Kommission fest, welche Beihilfenmaßnahmen auf der Grundlage von Art. 107 Abs. 3 lit. b) u. c) AEUV kurzfristig genehmigt werden können.[207]

Die einzelnen Mitgliedstaaten haben seit dem Beginn der Pandemie umfangreiche Beihilfenmaßnahmen durchgeführt, wobei insbesondere die ersten Maßnahmen auf der Grundlage des Art. 107 Abs. 2 lit. b) AEUV (Katastrophenbeihilfen) oder auf Art. 107 Abs. 3 lit. b) u. c) basierten.[208] Die weit überwiegende Mehrzahl der Maßnahmen wurde jedoch seitens der Kommission auf der Grundlage des befristeten Rahmens genehmigt.[209] Im Jahr 2020 wurden durch die EU-

[200] Kommission, Die koordinierte wirtschaftliche Reaktion auf die COVID-19-Pandemie, COM(2020) 112 final v. 13.3.2020, S. 1.

[201] Kommission, Die koordinierte wirtschaftliche Reaktion auf die COVID-19-Pandemie, COM(2020) 112 final v. 13.3.2020, S. 3 u. 10.

[202] Kommission, Die koordinierte wirtschaftliche Reaktion auf die COVID-19-Pandemie, COM(2020) 112 final v. 13.3.2020, S. 10.

[203] Kommission, Die koordinierte wirtschaftliche Reaktion auf die COVID-19-Pandemie, COM(2020) 112 final v. 13.3.2020, S. 10.

[204] Kommission, Die koordinierte wirtschaftliche Reaktion auf die COVID-19-Pandemie, COM(2020) 112 final v. 13.3.2020, S. 2.

[205] Kommission, Befristeter Rahmen für staatliche Beihilfen zur Stützung der Wirtschaft angesichts des derzeitigen Ausbruchs von COVID-19, ABl. 2020 C 91 I, 1, zuletzt geändert durch Kommission, Änderung des Befristeten Rahmens für staatliche Beihilfen zur Stützung der Wirtschaft angesichts des derzeitigen Ausbruchs von COVID-19, ABl. 2022 C 423, 9.

[206] Frenz, Handbuch Europarecht, Bd. 3, Beihilferecht, 2. Aufl., Berlin 2021, Rn. 2320.

[207] Bundesministerium der Finanzen, 28. Subventionsbericht des Bundes (2019 – 2022), Rn. 206 f.

[208] S. Kommission, Coronavirus Outbreak – List of Member State Mesures approved under Articles 107(2) b, 107(3)b and 107(c) TFEU and under the State Aid Temporary Framework, <competition-policy.ec.europa.eu/state-aid/coronavirus_en>; zuletzt abgerufen am 6.12.2022; s.a. C. Seitz/A. S. Berne, Das Panazee gegen COVID-19: Das EU-Beihilfenrecht, Staatliche Unterstützungsmaßnahmen und der befristete Beihilferahmen der EU-Kommission, *EuZW* 2020, 591 (597).

[209] S. Kommission, Coronavirus Outbreak – List of Member State Mesures approved under Articles 107(2)b,

Mitgliedstaaten Beihilfen in Höhe von nominal EUR 636,46 Mrd. vergeben.[210] Hiervon fielen allein auf Deutschland EUR 111,46 Mrd.[211] Bis zum Mai 2022 hat die Kommission im Zusammenhang mit der Corona-Pandemie ca. 950 nationale Maßnahmen in Höhe von nominal fast EUR 3,2 Bio. durch über 1300 Beschlüsse genehmigt.[212] Von diesen Beihilfenmitteln wurden ca. EUR 730 Mrd. ausgezahlt.[213] Aufgrund der mit der Verbesserung der Gesundheitslage einhergehenden Erholung der Wirtschaft hat die Kommission jüngst beschlossen, den Befristeten Rahmen schrittweise auslaufen zu lassen.[214]

Wenngleich die wirtschaftlichen (Nach-)Wirkungen der Corona-Pandemie noch zu spüren sind bzw. durch den Ukraine-Krieg wieder verschärft wurden, hat die Kommission bereits erste wichtige Lehren aus dieser Krise gezogen:[215] Diese habe deutlich aufgezeigt, dass internationale Wertschöpfungsketten voneinander abhängig seien und ein global integrierter und gut funktionierender Binnenmarkt von wesentlicher Bedeutung sei.[216] Dabei wurden als Probleme die Einschränkung der Grundfreiheiten durch Grenzen, unterbrochene globale Lieferketten sowie die Nachfragestörung als zentrale Probleme identifiziert, die im Rahmen der aktualisierten Industriestrategie mittels mehrerer Maßnahmen angegangen werden sollen.[217]

Die für die vorliegende Frage wesentlichen Maßnahmen betreffen die Verbesserung der Resilienz des Binnenmarktes[218] sowie Stärkung der industriellen und strategischen Autonomie Europas.[219] So will die Kommission die Abhängigkeit

107(3)b and 107(c) TFEU and under the State Aid Temporary Framework, <competition-policy.ec.europa.eu/state-aid/coronavirus_en>, zuletzt abgerufen am 6.12.2022.

[210] Kommission, State Aid Scoreboard 2021, S. 34.

[211] Kommission, State Aid Scoreboard 2021, S. 34.

[212] Kommission, Staatliche Beihilfen: Kommission wird Befristeten COVID-19-Rahmen auslaufen lassen, Erklärung v. 12.5.2022, <ec.europa.eu/commission/presscorner/detail/de/STATEMENT_22_2980>, zuletzt abgerufen am 6.12.2022.

[213] Kommission, Staatliche Beihilfen: Kommission wird Befristeten COVID-19-Rahmen auslaufen lassen, Erklärung v. 12.5.2022, <ec.europa.eu/commission/presscorner/detail/de/STATEMENT_22_2980>, zuletzt abgerufen am 6.12.2022.

[214] Kommission, Staatliche Beihilfen: Kommission wird Befristeten COVID-19-Rahmen auslaufen lassen, Erklärung v. 12.5.2022, <ec.europa.eu/commission/presscorner/detail/de/STATEMENT_22_2980>, zuletzt abgerufen am 6.12.2022.

[215] Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 4 f.

[216] Kommission, Europäische Industriestrategie, <ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy_de>, zuletzt abgerufen am 6.12.2022.

[217] Kommission, Europäische Industriestrategie, <ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy_de>, zuletzt abgerufen am 6.12.2022.

[218] Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 6 ff.

[219] Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 11 ff.

der EU von anderen Staaten u.a. auch in strategischen Sektoren verringern.[220] Dies soll zum einen durch die Diversifikation der Handelspartner, Bevorratung, eine stärker kreislauforientierte Wirtschaft sowie eine erhöhte Ressourceneffizienz geschehen.[221] Zudem sollen Industrieallianzen in strategischen Bereichen zur Förderung von Innovationen und der Schaffung hochwertiger Arbeitsplätze in wettbewerbskonformer Weise unterstützt werden.[222] Im Bereich der Beihilfen ist hier insbesondere an die Förderung von wichtigen Vorhaben von gemeinsamen europäischen Interesse zu denken,[223] die ggf. durch bereits bestehende Industrieallianzen initiiert werden können.[224] So wurde bereits ein gemeinsames Projekt von Frankreich, Deutschland, Italien und dem Vereinigten Königreich zur Forschung und Entwicklung innovativer Technologien und Komponenten im Schlüsselbereich der Mikroelektronik durch die Kommission mit einem Fördervolumen von EUR 1,75 Mrd. durch die Kommission im Jahr 2018 als IPCEI genehmigt.[225] 2021 wurde die sog. „European Battery Innovation" als zweites paneuropäisches Vorhaben mit einem Fördervolumen von EUR 2,9 Mrd. von der Europäischen Kommission als zweites IPCEI-Vorhaben genehmigt.[226]

2021 hat die Kommission zudem eine Industrieallianz für Industriedaten, Edge und Cloud sowie eine Industrieallianz für Prozessoren und Halbleitertechnik initiiert, die im Ergebnis die kritischen digitalen Infrastrukturen, Dienste und Produkte ausbauen sollen.[227] Die letztgenannte Allianz soll nun durch den Erlass eines Chip-Gesetzes,[228] welches sich aktuell im Gesetzgebungsverfahren

[220] Kommission, Eine neue Industriestrategie für Europa, COM(2020) 102 final v. 10.3.2020, S. 16.

[221] Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 13.

[222] Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 13.

[223] Vgl. Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 14; Kommission, Eine Wettbewerbspolitik für neue Herausforderungen, COM(2021) 713 final v. 18.11.2021, S. 22.

[224] Kommission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final v. 5.5.2021, S. 14.

[225] Kommission, Staatliche Beihilfen: Kommission genehmigt das Vorhaben Frankreichs, Deutschlands, Italiens und des Vereinigten Königreichs, staatliche Beihilfen in Höhe von 1,75 Mrd. EUR für ein gemeinsames im Bereich Mikroelektronik zu gewähren, Pressemitteilung v. 18.12.2018, <ec.europa.eu/commission/presscorner/detail/de/ip_18_6862>, zuletzt abgerufen am 6.12.2022.

[226] Kommission, Staatliche Beihilfen: Kommission genehmigt öffentliche Förderung von 2,9 Mrd. EUR für ein zweites, die gesamte Batterie-Wertschöpfungskette betreffendes paneuropäisches Forschungs- und Innovationsvorhaben von zwölf Mitgliedstaaten, Pressemitteilung v. 26.1.2021, <ec.europa.eu/commission/presscorner/detail/de/IP_21_226>, zuletzt abgerufen am 6.12.2022.

[227] Kommission, Digitale Souveränität: Kommission startet Allianzen für Halbleiter und industrielle Cloud-Technik, Pressemitteilung vom 19.7.2021, <ec.europa.eu/commission/presscorner/detail/de/ip_21_3733>, zuletzt abgerufen am 6.12.2022.

[228] S. hierzu auch Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022.

befindet,[229] verstärkt und erweitert werden,[230] um so dem aktuellen Mangel an Halbleitern in der EU entgegenzutreten, der die globale Abhängigkeit Europas in diesem Bereich, aber auch die Bedeutung von Halbleitern für die Unionsindustrie deutlich aufgezeigt hat.[231]

Mit dem Chips-Gesetz soll die Produktionskapazität von Halbleitern in der EU erheblich ausgeweitet werden.[232] So soll von der Forschung bis hin zur Produktion ein Halbleiter Ökosystem in Europa sowie eine resiliente Lieferkette geschaffen werden.[233] Dieses soll kurz- bis mittelfristig für eine größere Versorgungssicherheit Europas im Bereich der Halbleiter sorgen und damit die Autonomie der EU innerhalb dieses strategischen Bereichs stärken.[234] Langfristig soll Europa als Technologieführer in diesem Bereich etabliert werden.[235] Hierzu sind bis zu EUR 43 Mrd. an öffentlichen und privaten Investitionen vorgesehen, wovon die öffentlichen Investitionen ca. EUR 11 Mrd. umfassen.[236] Diese sind aufgrund der in diesem kapitalintensiven Sektor bestehenden hohen Markteintrittsbarrieren erforderlich.[237] Die betreffenden Beihilfemaßnahmen zur Schließung von Investitionslücken im Bereich der Halbleiter[238] sind von der Kommission, sofern sie nicht einer der geltenden Leitlinien unterfallen, einer Einzelfallprüfung nach Art. 107 Abs. 3 lit. c) AEUV zu unterziehen.[239] Bei der anzustellenden Abwägung hat die Kommission zu berücksichtigen, dass die zu fördernden Produktionsanlagen neuartig im Sinne des Chip-Gesetzes sind, so dass sich die Unterstützungsleistungen auf solche Bereiche beschränken, die über den aktuellen technischen Stand in der EU hinausgehen und in denen eine hinreichend zuverlässige Versorgung nicht sichergestellt ist.[240] Zudem dürfen durch die Beihilfengewährung keine privaten Initiativen unterbunden werden, unabhängig davon, ob diese bereits bestehen oder sich erst im Planungsstadium befinden.[241]

[229] Kommission, Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates zur Schaffung eines Rahmens für Maßnahmen zur Stärkung des europäischen Halbleiter-Ökosystems (Chip-Gesetz), COM(2022) 46 final v. 8.2.2022.

[230] Kommission, Europäisches Chip-Gesetz – Fragen und Antworten, 8.2.2022, <ec.europa.eu/commission/presscorner/detail/de/QANDA_22_730>, zuletzt abgerufen am 6.12.2022.

[231] Kommission, Digitale Souveränität: Kommission startet Allianzen für Halbleiter und industrielle Cloud-Technik, Pressemitteilung vom 19.7.2021, <ec.europa.eu/commission/presscorner/detail/de/ip_21_3733>, zuletzt abgerufen am 6.12.2022.

[232] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 3.

[233] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 4..

[234] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 4.

[235] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 4.

[236] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 13.

[237] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 19.

[238] Kommission, Eine neue Industriestrategie für Europa, COM(2020) 102 final v. 10.3.2020, S. 22.

[239] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 19.

[240] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 19 f.

[241] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 20.

Denn aus der Förderung entstehende übermäßige Wettbewerbsverzerrungen sollen auf ein Minimum begrenzt werden.[242]

Das Chip-Gesetz wie auch die genehmigten IPCEI-Vorhaben zeigen das Bestreben der Kommission, strategische Sektoren innerhalb der EU zur Stärkung der Autonomie des Binnenmarktes bis hin zu einer langfristigen Weltmarktführerschaft auszubauen. Hierzu sieht die Kommission auch eine massive Förderung dieses Ausbaus mittels staatlicher Beihilfen vor. Gleichwohl erfolgt diese Förderung nicht „um jeden Preis". Vielmehr bleibt die Kommission auch diesbezüglich ihrer wettbewerblichen Linie treu und wendet das beihilfenrechtliche Instrumentarium vollständig an – wenn auch mit einigen sinnvollen Modifikationen und Konkretisierungen des Art. 107 Abs. 3 AEUV. Weiterhin muss eine sorgfältige Prüfung der betreffenden Fördermaßnahme erfolgen, um so die damit einhergehenden Wettbewerbsbeschränkungen auf dem Binnenmarkt auf einem minimalen Niveau zu halten.

Eine Förderung von strategischen Sektoren im Hinblick auf deren langfristige Überlebensfähigkeit wird von der Kommission auch in ihrer überarbeiteten Industriestrategie wie auch den überarbeiteten Beihilfeninstrumenten nicht angesprochen. Gleichwohl hat die Kommission im Rahmen der Corona-Pandemie den Verlust kritischer Anlagen und Technologien explizit verhindern wollen.[243] Dies zeigt auf, dass der Kommission Überlegungen zur Sicherung der Lebensfähigkeit strategischer Schlüsselsektoren nicht fremd sind. Gleichwohl hat sie in diesem Zusammenhang keinen Freibrief erteilt, sondern u.a. auf das durch den Befristeten COVID-19-Rahmen modifizierte Beihilfeninstrumentarium verwiesen.

Es ist daher davon auszugehen, dass die Kommission im Rahmen ihrer Beihilfenaufsicht zwar entsprechende Argumente berücksichtigt. Sie wird die betreffende Maßnahme weiterhin sorgfältig prüfen und diese im Rahmen des bestehenden Beihilfenregimes gegen die negativen Auswirkungen der Beihilfe abwägen. Zu denken wäre hier insbesondere an eine Einzelfreistellung gem. Art. 107 Abs. 3 lit. c) AEUV.

Die langfristige Lebensfähigkeit strategischer Schlüsselsektoren dürfte daher allenfalls als Nebenargument für eine Einzelfreistellung in Frage kommen. Dabei hat gerade die Corona-Pandemie aufgezeigt, dass die Abhängigkeit der EU in strategischen Sektoren gravierende wirtschaftliche Auswirkungen haben kann. Zur Stärkung der Autonomie der EU wäre es daher sinnvoll, das

[242] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022, S. 20

[243] Kommission, Die koordinierte wirtschaftliche Reaktion auf die COVID-19-Pandemie, COM(2020) 112 final v. 13.3.2020, S. 2

Beihilfenrecht bspw. über Leitlinien entsprechend zu modifizieren. Hierbei sollte jedoch weiterhin die Zielsetzung des Beihilfenrechts berücksichtigt werden, so dass eine entsprechende Beihilfe mit gewissen Anforderungen im Bereich Innovation verknüpft werden sollte. Nur so kann mittel- bis langfristig eine Wettbewerbsfähigkeit der betreffenden Sektoren sowie ein zusätzlicher Nutzen für die gesamte EU-Wirtschaft erzielt werden. Anderenfalls würden die betreffenden Subventionen lediglich Wettbewerbsverzerrungen hervorrufen, die mit dem Binnenmarkt jedoch nicht vereinbar sind.

Frage 9

Die nationalen Gerichte sind gem. Art. 4 Abs. 3 EUV bei der Durchsetzung der Beihilfenvorschriften durch die Kommission zu unterstützen.[244] Durch eine enge Zusammenarbeit von nationalen Gerichten und Kommission soll so unionsweit eine kohärentere und wirksamere Anwendung der Beihilfenvorschriften gewährleistet werden.[245] Art. 29 VO (EU) 2015/1589 sieht insgesamt drei Instrumente der Zusammenarbeit vor.[246]

Zunächst können die nationalen Gerichte die Kommission gem. Art. 29 Abs. 1 1. Alt. VO (EU) 2015/1589 um die Übermittlung von Informationen und Unterlagen zu bei ihnen anhängigen Beihilfeverfahren bitten, die sich im Besitz der Kommission befinden.[247] Die Kommission ist sodann ungeachtet des Wortlauts der Vorschrift („bitten") aufgrund der Verpflichtung zur loyalen Zusammenarbeit nach Art. 4 Abs. 3 EUV verpflichtet, dem betreffenden nationalen Gericht die gewünschten Informationen und Unterlagen innerhalb einer grundsätzlich einmonatigen Frist[248] zu übermitteln.[249] Strukturierte und belastbare Statistiken

[244] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 100; s.a. A. Bartosch, EU-Beihilfenrecht, 3. Aufl., München 2020, Art. 29 VO 2015/1589, Rn. 1.

[245] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 100.

[246] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 103; Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 109.

[247] Ausf. zu dieser Form der Zusammenarbeit s. Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 104 ff.

[248] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 111.

[249] Vgl. EuGH 13.7.990 – Rs. C-288 Imm, ECLI:EU:C:1990:315, Rn. 16 ff. – Zwartveld; EuG 18.9.1996 – Rs. T-353/94, ECLI:EU:T:1996:119, Rn. 64 – Postbank/Kommission; s.a. Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 107.

über die Nutzung dieses Informationsinstruments existieren jedoch nicht.[250] Die Kommission gibt in ihrer 2019 veröffentlichten „Studie über die Durchsetzung von Beihilfevorschriften und -beschlüssen durch nationale Gerichte" an, dass im Zeitraum von 2014-2017 mindestens sieben Auskunftsersuchen durch nationale Gerichte an die Kommission gerichtet worden sind, wobei diese Anfragen ihren Ursprung in Deutschland, Italien, den Niederlanden und Spanien hatten.[251] Wenngleich diese Zahlen nicht uneingeschränkt belastbar sind, so zeigen diese dennoch, dass das Informationsinstrument des Art. 29 Abs. 1 1. Alt. VO (EU) 2015/1589 in der Europäischen Union nur sehr vereinzelt in Anspruch genommen wird. Dies gilt auch für die deutschen Gerichte, die zwar in einem vierjährigen Zeitraum zumindest eine entsprechende Anfrage bei der Kommission eingereicht haben. Gerade vor dem Hintergrund eines stetigen Anstiegs von Beihilfenverfahren vor deutschen Gerichten in diesem Zeitraum[252] ist dies jedoch eine verschwindend geringe Anzahl. Im Ergebnis muss daher konstatiert werden, dass das Informationsinstrument des Art. 29 Abs. 1 Alt. 1 VO (EU) 2015/1589 von einer weit überwiegenden Anzahl deutscher Gerichte nicht genutzt wird.

Mit dem zweiten Instrument des Art. 29 Abs. 1 2. Alt. VO (EU) 2015/1589 können die nationalen Gerichte die Kommission um eine Stellungnahme betreffend die Anwendung der Vorschriften über staatliche Beihilfen in einem anhängigen Verfahren ersuchen.[253] Auch hier ist die Kommission gem. Art. 4 Abs. 3 AEUV verpflichtet, dem Bitten um eine Stellungnahme innerhalb von grundsätzlich vier Monaten[254] nachzukommen.[255] Seit 2009 hat die Kommission unionsweit mindestens[256] 25 solcher Stellungnahmen abgegeben.[257] Dabei wurden von

[250] Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 109.

[251] Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 109.

[252] S. Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 31 u. 61.

[253] Ausf. zu dieser Form der Zusammenarbeit s. Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 112 ff.

[254] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 118.

[255] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 117

[256] Auch hinsichtlich dieses Instruments sind die Statistiken nicht uneingeschränkt belastbar. Vielmehr besteht hinsichtlich Gesamtzahl der Fälle auch hier Unsicherheit. Die Statistiken geben daher nur die tatsächlich ermittelten Fälle wieder, s. Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 109.

[257] S. Kommission, Opinions issued, <competition-policy.ec.europa.eu/state-aid/national-courts/application-state-aid-law/requests-opinions/opinions-issued_en>, zuletzt abgerufen am 6.12.2022; s.a. Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 109 f.

deutschen Gerichten mindestens 7 und von der Staatsanwaltschaft mindestens eine solcher Anfragen eingereicht.[258] Auch hier zeigt sich in Deutschland eine starke Zurückhaltung bei dem Einsatz dieses Instruments. Dies könnte jedoch darin begründet liegen, dass das betreffende Gericht frühere Beschlüsse, Stellungnahmen, Bekanntmachungen oder Leitlinien der Kommission herangezogen hat und die Einholung einer zusätzlichen Stellungnahme bei der Kommission nicht mehr erforderlich war.[259]

Als letztes Instrument stehen der Kommission die sog. Amicus-Curiae-Stellungnahmen zur Verfügung.[260] Hiernach kann die Kommission zur Gewährleistung der kohärenten Anwendung der Art. 107 Abs. 1, 108 Abs. 3 AEUV gem. Art. 29 Abs. 2 VO (EU) 2015/1589 den mitgliedstaatlichen Gerichten aus eigener Initiative schriftliche oder ggf. mündliche Stellungnahmen übermitteln.[261] Im Rahmen eines anhängigen Verfahrens kann ein nationales Gericht jedoch auch die Kommission um die Abgabe einer Amicus-Curiae-Stellungnahme bitten, was jedoch – anders als bei den vorgenannten Instrumenten – vollumfänglich im Kommissionsermessen steht.[262] Im Zeitraum von 2014-2017 wurden von der Kommission mindestens 20 Amicus-Curiae-Stellungnahmen abgegeben,[263] von denen mindestens eine an ein deutsches Gericht – das Oberverwaltungsgericht Berlin[264] – adressiert worden ist. Seit 2018 wurden unionsweit lediglich zwei weitere Amicus-Curiae-Stellungnahmen durch die Kommission dokumentiert, die jedoch an Gerichte in Luxemburg und Polen gerichtet waren.[265] Hieran zeigt sich, dass nicht nur die deutschen Gerichte sehr zurückhaltend hinsichtlich der Instrumente des Art. 29 Abs. 1 VO (EU) 2015/1589 agieren, sondern auch,

[258] S. Kommission, Opinions issued, <competition-policy.ec.europa.eu/state-aid/national-courts/application-state-aid-law/requests-opinions/opinions-issued_en>, zuletzt abgerufen am 6.12.2022; s.a. Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 109 f.

[259] Vgl. Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 113 f.

[260] Ausf. zu dieser Form der Zusammenarbeit s. Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 120 ff.

[261] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 120.

[262] Kommission, Bekanntmachung der Kommission über die Durchsetzung der Vorschriften über staatliche Beihilfen durch die nationalen Gerichte, ABl. 2021 C 305, 1, Rn. 121.

[263] Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 110 f.

[264] S. Kommission, Schriftliche Stellungnahme der Europäischen Kommission nach Art. 29 Abs. 1 und 2 der Verordnung (EU) Nr. 2015/1589 in der Verwaltungsstreitsache OVG 6 B 3.17 (Magic Mountain Kletterhallen GmbH gegen Land Berlin) v. 5.12.2017, <competition-policy.ec.europa.eu/system/files/2021-12/magic_mountain_kletterhallen_amicus_curiae_2017_observation_de.pdf>, zuletzt abgerufen am 6.12.2022.

[265] S. Kommission, Amicus curiae observations – State Aid, <competition-policy.ec.europa.eu/state-aid/national-courts/amicus-curiae-observations_en>, zuletzt abgerufen am 6.12.2022.

dass die Kommission die Zusammenarbeit mit den deutschen Gerichten in Beihilfensachen nur sehr sporadisch vorantreibt.

Im Rahmen der o.g. Studie hat die Kommission zudem die Gründe für den zurückhaltenden Gebrauch der vorgestellten Instrumente ausführlich analysiert und Verbesserungsmöglichkeiten aufgezeigt.[266] Da die Studie jedoch auf der unionalen Ebene verbleibt und keine weiteren Differenzierungen hinsichtlich der einzelnen Mitgliedstaaten vornimmt, können die Ergebnisse der Studie nicht 1:1 auf Deutschland übertragen werden. Daher ist anzuraten, eine solche Studie auch im Hinblick auf die deutschen Gerichte durchzuführen, um die Hintergründe und Problematiken hinsichtlich dieser Formen der Zusammenarbeit in Erfahrung zu bringen. Diese könnten dann gezielt auf nationaler Ebene angegangen werden, um so die Zusammenarbeit zwischen den deutschen Gerichten und der Kommission zu intensivieren.

Die Zusammenarbeit der nationalen Gerichte mit dem EuGH findet seinen Ausdruck im Vorabentscheidungsverfahren gem. Art. 267 AEUV.[267] Hiernach können mitgliedstaatliche Gerichte dem EuGH entscheidungserhebliche anhängige Fragen vorlegen, die die Auslegung primären Unionsrechts oder die Gültigkeit und Auslegung sekundären Unionsrechts betreffen.[268] Letztinstanzliche nationale Gerichte sind gem. Art. 267 Abs. 3 AEUV sogar zur Vorlage an den EuGH verpflichtet.[269] Das Vorabentscheidungsverfahren gewährleistet somit die einheitliche Interpretation des Unionsrechts in nationalen Gerichtsverfahren auch im Bereich der staatlichen Beihilfen.[270]

Aus den Jahresberichten über die Rechtsprechungstätigkeit des EuGH geht jedoch hervor, dass ein Vorabentscheidungsverfahren im Bereich der staatlichen Beihilfen europaweit nur vereinzelt eingeleitet wird. So betrafen im Zeitraum von 2015-2021 nur 55 von insgesamt 3771 eingeleiteten Vorabentscheidungsverfahren den beihilfenrechtlichen Bereich, die sich auf die einzelnen Jahre wie folgt aufteilen:

- 2015: 4 (von 436),[271]

[266] Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 111 ff.

[267] M. Bungenberg, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 5, Beihilfenrecht, 6. Aufl., München 2022, VI. Abschnitt, Rechtsschutz, Rn. 248.

[268] M. Bungenberg, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 5, Beihilfenrecht, 6. Aufl., München 2022, VI. Abschnitt, Rechtsschutz, Rn. 248.

[269] M. Bungenberg, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Beihilfenrecht, Bd. 5, 6. Aufl., München 2022, VI. Abschnitt, Rechtsschutz, Rn. 249.

[270] M. Bungenberg, *in* Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 5, Beihilfenrecht, 6. Aufl., München 2022, VI. Abschnitt, Rechtsschutz, Rn. 249.

[271] Gerichtshof der Europäischen Union, Jahresbericht 2015, Rechtsprechungstätigkeit, 2016, S. 81.

- 2016: 10 (von 470),[272]
- 2017: 10 (von 533),[273]
- 2018: 4 (von 568),[274]
- 2019: 17 (von 641),[275]
- 2020: 4 (von 556),[276]
- 2021: 6 (von 567).[277]

Diese Zahlen zeigen auf, dass das Vorabentscheidungsverfahren in Beihilfensachen unionsweit nur eine untergeordnete Rolle spielt. Dies gilt auch für Deutschland. So wurden im Zeitraum von 2017-2021 insgesamt 587 Vorabentscheidungsverfahren durch deutsche Gerichte angestrengt.[278] Zwar wurde seitens des EuGH keine spezifische Statistik darüber aufgestellt, welche Rechtsbereiche von diesen Verfahren betroffen waren. Aus einer Zusammenschau mit dem o.g. Zahlen geht hervor, dass nur ein kleiner Bruchteil der Verfahren in Beihilfensachen eingeleitet worden sind. Gleichwohl lässt sich hieraus kein Unwillen der deutschen Gerichte ableiten, mit dem EuGH zusammenzuarbeiten. Vielmehr erscheint es durchaus möglich, dass die nationalen Gerichte die Antwort auf eine etwaige Vorlagefrage bereits eindeutig aus der bisherigen EuGH-Rechtsprechung entnehmen konnten bzw. kein Raum für vernünftige Zweifel an dieser Antwort bestand, so dass es keines Vorlageverfahrens bedurfte.[279]

Zusammenfassend lässt sich festalten, dass die deutschen Gerichte die Möglichkeiten der Zusammenarbeit mit Kommission und EuGH aktuell nur sehr vereinzelt nutzen. Dies könnte jedoch daran liegen, dass die deutschen Gerichte auf die bereits vorhandenen Kommissiondokumente bzw. die bereits ergangene EuGH-Rechtsprechung zur Klärung offener Fragen zurückgreifen, so dass eine Zusammenarbeit nach Art. 29 VO (EU) 2015/1589 bzw. Art. 267 AEUV nicht mehr erforderlich ist. In diesem Fall würden die deutschen Gerichte sogar ressourcenschonend agieren, da sie die Kommission bzw. den EuGH nicht mit weiteren nicht notwendigen Arbeiten belasten. Dies kann jedoch nicht mit Sicherheit festgestellt werden. So geht auch aus der o.g. Studie der Kommission hervor, dass das Verfahren nach Art. 29 VO (EU) 2015/1589 einer Gruppe von in

[272] Gerichtshof der Europäischen Union, Jahresbericht 2016, Rechtsprechungstätigkeit, 2017, S. 93.
[273] Gerichtshof der Europäischen Union, Jahresbericht 2017, Rechtsprechungstätigkeit, 2018, S. 111.
[274] Gerichtshof der Europäischen Union, Jahresbericht 2018, Rechtsprechungstätigkeit, 2019, S. 132.
[275] Gerichtshof der Europäischen Union, Jahresbericht 2019, Rechtsprechungstätigkeit, 2020, S. 172.
[276] Gerichtshof der Europäischen Union, Jahresbericht 2020, Rechtsprechungstätigkeit, 2021, S. 227.
[277] Gerichtshof der Europäischen Union, Jahresbericht 2021, Rechtsprechungstätigkeit, 2022, S. 245.
[278] Gerichtshof der Europäischen Union, Jahresbericht 2021, Rechtsprechungstätigkeit, 2022, S. 246.
[279] Vgl. EuGH 11.8.2008 – verb. Rs. C-428/06 – C-434/06, ECLI:EU:C:2008:488, Rn. 42 – UGT-Rioja u.a.

diesem Rahmen befragten Richtern unklar war oder diese Schwierigkeiten hatten, einen Ansprechpartner bei der Kommission zu finden.[280] Andererseits hat auch ein Viertel der befragen Richter angegeben, dass die Kooperationsinstrumente des Art. 29 VO (EU) 2015/1589 für ihre Fälle nicht relevant waren.[281] Daher sollte speziell für die deutschen Gerichte – bspw. im Rahmen einer repräsentativen Befragung – untersucht werden, welche Gründe für die lediglich vereinzelte Zusammenarbeit mit Kommission und EuGH angeführt werden. Auf dieser Basis könnten die Kooperationsinstrumente sodann ggf. verbessert werden, um eine verstärkte Zusammenarbeit zwischen den deutschen Gerichten und der unionalen Ebene zu erreichen.

Frage 10

Handelsschutzinstrumente haben in der Entscheidungspraxis des Bundeskartellamts – soweit ersichtlich – bislang nur eine sehr eingeschränkte Rolle gespielt. Eine umfassende Berücksichtigung der wettbewerblichen Auswirkungen von Handelsschutzinstrumenten, wie dies die Europäische Kommission bspw. in den Fällen *ArcelorMittal/Ilva*[282] und *Tata Steel/Thyssenkrupp /JV*[283] vorgenommen hat, findet sich in den Entscheidungen des Kartellamts nicht. Dies könnte mit der Art von Produktkategorien zusammenhängen, die durch das Kartellamt bislang geprüft wurden. Es ist jedoch davon auszugehen, dass das Bundeskartellamt in ähnlich gelagerten Fällen eine vergleichbare wettbewerbliche Analyse vornehmen würde. Abgesehen davon, dass das Kartellamt in seiner Prüfung regelmäßig auf die Entscheidungspraxis der Kommission Bezug nimmt, spielen Handelsschranken im Allgemeinen in der fusionskontrollrechtlichen Praxis durchaus eine Rolle. So erklärt das Bundeskartellamt in seinem „Leitfaden zur Marktbeherrschung in der Fusionskontrolle" im Kontext von „Wettbewerbsfaktoren außerhalb des relevanten Marktes":

„Ein Marktzutritt ist selten unmöglich, aber eventuell aufgrund hoher Kosten oder geringer Ertragserwartungen nicht zu erwarten. Die Wahrscheinlichkeit bemisst sich allgemein nach den Möglichkeiten und Anreizen zum Markteintritt. Ausschlaggebend ist damit das Verhältnis zwischen den mit dem Marktzutritt verbundenen Kosten und den erwarteten Erlösen, sowie den jeweils damit verbundenen Risiken. Grundsätzlich nicht erforderlich ist es, alle Kosten und Erlöse

[280] Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 121.

[281] Kommission, Study on the enforcement of State aid rules and decisions by national courts, Final Study, 2019, S. 120.

[282] Kommission 7.5.2018, M.8444 – ArcelorMittal/Ilva

[283] Kommission 11.6.2019, M.8713 – TATA STEEL/THYSSENKRUPP/JV; bestätigt durch EuG 22.6.2022 – Rs. T-584/19, ECLI:EU:T:2022:386 – thyssenkrupp/Kommission.

im Einzelnen zu quantifizieren. Die Möglichkeit und die Anreize zum Marktzutritt werden insbesondere von verschiedenen Arten von Marktzutrittsschranken beeinflusst. Je nach Ursache des Hindernisses lassen sich rechtliche, strukturelle und strategische Marktzutrittsschranken unterscheiden.

Rechtliche Marktzutrittsschranken liegen vor, wenn staatliche Vorschriften den Marktzutritt erschweren oder ausschließen. Dazu gehören staatlich geschützte Monopole oder durch den Staat vergebene (zahlenmäßig beschränkte) Lizenzen. Des Weiteren können tarifäre und nicht-tarifäre Handelshemmnisse für ausländische Anbieter ein Marktzutrittshindernis darstellen."[284]

Des Weiteren ist hinsichtlich chinesischer Erwerber auf die Freigabeentscheidung des Bundeskartellamts in dem Fall *CRRC/Vossloh* hinzuweisen.[285] Darin hat das Kartellamt zum einen ausdrücklich festgestellt, dass sich das Wettbewerbsrecht allein auf die Frage konzentriere, „wie sich wirtschaftliche Macht auf die Funktionsfähigkeit des Wettbewerbs auswirkt", während es sich „[b]ei verschiedenen Wettbewerbsverzerrungen, die europäische Hersteller benennen, […] vielmehr um Fragen der Handelspolitik oder des Vergaberechts [handele], die mit den Instrumenten des Wettbewerbsrechts nicht gelöst werden können".[286] Zum anderen wurde in der Entscheidung – unter ausdrücklicher Bezugnahme auf den Anti-Dumping-Länderbericht der Kommission zu China – darauf hingewiesen, dass CRRC in Folge umfassender staatlicher Subventionen über weitreichende Möglichkeiten zur Umsetzung von Niedrigpreisstrategien verfüge, um Marktanteile zu gewinnen.[287] Dabei wurden weiterhin die Vielzahl von Handelsschutzmaßnahmen gegenüber chinesischen Unternehmen als ein Indiz für die Bereitschaft angesehen, „zur Steigerung des Absatzes zu so niedrigen Preisen anzubieten, dass ein Verstoß gegen Anti-Dumping-Vorschriften in Kauf genommen wird".[288] Dennoch sah das Kartellamt insgesamt keine Tendenz für die Erlangung einer marktbeherrschenden Stellung in den nächsten Jahren.

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[284] BKartA, Leitfaden zur Marktbeherrschung in der Fusionskontrolle, 29.3.2012, Rn. 61 f., <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden%20-%20Marktbeherrschung%20in%20der%20Fusionskontrolle.pdf?__blob=publicationFile&v=12>, zuletzt abgerufen am 6.12.2022.

[285] BKartA 27. April 2020 – B4-115/19 – Fallbericht „Bundeskartellamt gibt den Erwerb der Vossloh Locomotives GmbH durch die die chinesische CRRC Zhuzhou Locomotives Co. nach umfangreichen Ermittlungen frei".

[286] BKartA 27. April 2020 – B4-115/19, S. 4 – Fallbericht „Bundeskartellamt gibt den Erwerb der Vossloh Locomotives GmbH durch die die chinesische CRRC Zhuzhou Locomotives Co. nach umfangreichen Ermittlungen frei".

[287] BKartA 27. April 2020 – B4-115/19, S. 5 f. – Fallbericht „Bundeskartellamt gibt den Erwerb der Vossloh Locomotives GmbH durch die die chinesische CRRC Zhuzhou Locomotives Co. nach umfangreichen Ermittlungen frei".

[288] BKartA 27. April 2020 – B4-115/19, S. 6 f. – Fallbericht „Bundeskartellamt gibt den Erwerb der Vossloh Locomotives GmbH durch die die chinesische CRRC Zhuzhou Locomotives Co. nach umfangreichen Ermittlungen frei".

Frage 11

Eine außenwirtschaftsrechtliche Kontrolle von Investitionen wurde in Deutschland erstmals mit dem 11. Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung[289] eingeführt, das am 29. Juli 2004 in Kraft trat und sich auf Rüstungsunternehmen und Hersteller von Kryptosystemen bezog.[290] Hintergrund war, dass vermehrt ausländische Unternehmen Anteile an deutschen Rüstungsunternehmen erworben hatten und deshalb befürchtet wurde, dass Deutschland seiner Verpflichtung zur Sicherheitsvorsorge nicht mehr nachkommen könne, wenn durch solche Veräußerungen die Verfügungsmöglichkeit über Kernfähigkeiten der deutschen Rüstungswirtschaft gefährdet würde.[291] Heute finden die Vorgaben der sektorspezifischen Investitionskontrolle für den Erwerb von Unternehmen, die in besonders sicherheitssensiblen Bereichen tätig sind, Anwendung (§ 4 Abs. 1 Nr. 1 AWG; §§ 60 bis 62 AWV).

Diese sektorspezifische Melde- und Genehmigungspflicht wurde – nach ersten Plänen gegen Ende 2007[292] – durch Inkrafttreten des 13. Gesetzes zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung[293] am 24. April 2009 um eine sektorübergreifende Kontrolle ergänzt.[294] Die Erweiterung des Kontrollregimes erging vor dem Hintergrund nationaler sowie auch internationaler Diskussionen über die Notwendigkeit und Möglichkeit einer nationalen Überprüfung von ausländischen Direktinvestitionen sowie angesichts einiger intransparenter Aktivitäten ausländischer Staatsfonds.[295] Gleichzeitig

[289] Elftes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung v. 23.7.2004, BGBl. 2004, I-1859 (Nr. 39).

[290] T. Roth, Der Erwerb von Rüstungs-und Kryptounternehmen durch Gebietsfremde, *AW-Prax* 2004, 431 (431 ff.); M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 60 AWV, Rn. 1.

[291] T. Roth, Der Erwerb von Rüstungs- und Kryptounternehmen durch Gebietsfremde, *AW-Prax* 2004, 431 (431); s.a. Bundesregierung, Entwurf eines Elften Gesetzes zur Änderung des Außenwirtschaftsgesetzes (AWG) und der Außenwirtschaftsverordnung (AWV) v. 18.2.2004, BT-Drs. 15/2537, 7.

[292] Dazu C. Tietje, Beschränkungen ausländischer Unternehmensbeteiligungen zum Schutz vor „Staatsfonds" – Rechtliche Grenzen eines neuen Investitionsprotektionismus, Policy Papers on Transnational Economic Law, No. 26/2007, <opendata.uni-halle.de/bitstream/1981185920/73751/1/iwr_101_322.pdf>, zuletzt abgerufen am 6.12.2022.

[293] Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung v.18.4.2009, BGBl. 2009, I-770.

[294] H. Willems, Braucht Deutschland ein Kontrollrecht gegenüber ausländischen Investoren?, *AW-Prax* 2008, 369 (369 ff.); K. Kollman, Prüfung ausländischer Investoren in Deutschland, *AW-Prax* 2009, 205 (205 ff.); M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 55 AWV, Rn. 2.

[295] H. Willems, Braucht Deutschland ein Kontrollrecht gegenüber ausländischen Investoren?, *AW-Prax* 2008, 369 (369 ff.); K. Kollman, Prüfung ausländischer Investoren in Deutschland, *AW-Prax* 2009, 205 (205 f.); M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 55 AWV, Rn. 2.

sollte das gegenüber anderen Industrieländern – wie dem Vereinigten Königreich, Frankreich oder den U.S.A. –bestehende Regelungsdefizit behoben werden.[296]

In Folge einer Reihe von öffentlich kontrovers diskutierten Transaktionen, wie z.B. dem Erwerb des deutschen Robotikherstellers KUKA durch das chinesische Unternehmen Midea[297] – wurde die sektorübergreifende Investitionskontrolle seit dem Jahr 2017 mehrfach angepasst und dabei verschärft, zuletzt durch die 17. Novelle der AWV vom 27. April 2021.[298] Ein wichtiger Treiber der Reformen war dabei die Herausbildung eines europäischen Investitionskontrollsystems durch die EU-Screening-Verordnung[299] sowie zuletzt die wirtschaftlichen Auswirkungen der Corona-Pandemie. Die sektorübergreifende Investitionskontrolle basiert heute auf §§ 4 Abs. 1 Nr. 4 und 4a, 5 Abs. 2 AWG sowie den §§ 55 bis 59 AWV.

a.

In materieller Hinsicht erzeugt der Prüfungsmaßstab einer „voraussichtlichen Beeinträchtigung der öffentlichen Ordnung oder Sicherheit" innerhalb der deutschen sektorübergreifenden Prüfung eine nicht unerhebliche Rechtsunsicherheit. Nach Rechtsprechung des EuGH lassen sich hierunter die „wesentlichen Grundinteressen der Gesellschaft" fassen, nicht aber rein wirtschaftliche Ziele.[300] Zugleich hat der EuGH eine dynamische Anpassung grundsätzlich anerkannt.[301] Trotz Einbeziehung dieser Begrifflichkeit in Art. 4 EU-Screening-VO, von wo aus sie nunmehr auch Eingang in die deutsche Investitionskontrolle gefunden hat, geht der deutsche Gesetzgeber unzutreffend

[296] S. dazu mit einer Darstellung der bereits bestehenden Regelungsregime C. Tietje, Beschränkungen ausländischer Unternehmensbeteiligungen zum Schutz vor „Staatsfonds" – Rechtliche Grenzen eines neuen Investitionsprotektionismus, Policy Papers on Transnational Economic Law, No. 26/2007, <opendata.uni-halle.de/bitstream/1981185920/73751/1/iwr_101_322.pdf>, zuletzt abgerufen am 6.12.2022. Auf diese Orientierung verweist auch K. Kollman, Prüfung ausländischer Investoren in Deutschland, *AW-Prax* 2009, 205 (205 f.).

[297] o.V., Chinesen können Kuka übernehmen, *Spiegel Online* v. 17.8.2016, <www.spiegel.de/wirtschaft/unternehmen/sigmar-gabriel-macht-weg-fuer-kuka-uebernahme-frei-a-1108130.html>, zuletzt abgerufen am 6.12.2022.

[298] Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, BAnz AT 30.04.2021 V1; dazu C. Barth/A.-C. Käser, Erneute Novellierung der deutschen Investitionskontrolle, *NZG* 2021, 813 (813 ff.).

[299] Verordnung (EU) 2019/452 des Europäischen Parlaments und des Rates vom 19. März 2019 zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen in der Union, ABl. 2019 L 79 I, 1.

[300] St. Rspr. EuGH 16.9.2020 – Rs. C-339/19, ECLI:EU:C:2020:709, Rn. 40 – Romenergo und Aris Capital; EuGH 7.6.2012 – Rs. C-39/11, ECLI:EU:C:2012:327, Rn. 29 – VBV – Vorsorgekasse; EuGH 14.3.2000 – Rs. C-54/99, ECLI:EU:C:2000:124, Rn. 17 – Association Église de scientologie de Paris; EuGH 27.10.1977 – Rs. C-30/77, ECLI:EU:C:1977:172, Rn. 35 – Regina/Bouchereau; EuGH 28.10.1975 – Rs. C-36/75, ECLI:EU:C:1975:137, Rn. 28 – Rutili/Ministre de l'intérieur.

[301] Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, BT-Drucks. 19/29216, 19; s. dazu S. Hindelang/T. M. Hagemeyer, Enemy at the Gates?, *EuZW* 2017, 882 (888); V. Jungkind/C. Bormann, Verschärfung des Außenwirtschaftsrechts vor dem Hintergrund der COVID-19 Pandemie, *NZG* 2020, 619 (620).

davon aus, dass durch die Übertragung des unionalen Prüfprogramms bei kritischen Technologien kein „zwingend […] ausgeprägter Bezug zu den" Grundinteressen der Gesellschaft vorliegen muss.[302] Er hat zugleich Fallgruppen des Art. 4 EU-Screening-VO übernommen, deren Betroffenheit nunmehr bei der materiellen Prüfung besonders berücksichtigt werden soll (§ 55a Abs. 1 AWV), deren Einschlägigkeit jedoch teils nur auf Grundlage einer komplexen Verweisungstechnik ermittelt werden kann. Hinzu tritt eine zuletzt wohl auch politisch beeinflusste Entscheidungspraxis, etwa im Fall der geplanten Beteiligung von *COSCO* sowie der kurz danach untersagten Transaktionen im Fall *Elmos* sowie *ERS Electronic*.[303] Im Fall *COSCO* wollte der Bundeskanzler den Beteiligungserwerb zulassen, obwohl das BMWK als zuständige Prüfstelle eine voraussichtliche Beeinträchtigung der öffentlichen Ordnung oder Sicherheit angenommen hatte und sich auch die Europäische Kommission gegen eine Genehmigung aussprach. Der hierbei gefundene Kompromiss hat wiederum nach medialen Angaben zu einer Untersagung in darauffolgenden Fällen geführt, in denen sich das BMWK im Vorfeld positiv positioniert hatte.[304] Insgesamt bleibt dadurch für die Investoren letztlich schwer absehbar, unter welchen Bedingungen eine Transaktion untersagt wird. Insbesondere im Fall chinesischer Investoren bzw. Investoren, die eine nur geografische Nähe zu China aufweisen, fehlt es bislang an einer klaren Linie. Bei dem gescheiterten Erwerb von *Siltronic* durch

[302] Bundesregierung, Entwurf eines ersten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze, BT-Drs. 181/20, 17; so auch S. Hindelang/A. Moberg, The art of casting political dissent in law: The EU'S framework for the screening of foreign direct investment, *CMLR* 2020, 1427 (1454); T. M. Hagemeyer-Witzleb/S. Hindelang, Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation, *CEJoCL* 2021, 39 (47 u. 49).

[303] S. dazu J. Löhr, Hamburger Hafen in Chinas Händen, FAZ Online v. 24.10.2022, <www.faz.net/aktuell/wirtschaft/cosco-beteiligung-im-krisenfall-fuer-hamburgs-hafen-problematisch-18410969.html?premium>, zuletzt abgerufen am 6.12.2022; S. C. Schulz, Chinas Pläne am Hamburger Hafen: Wie groß ist die Gefahr?, RND Online v. 26.10.2022, <www.rnd.de/wirtschaft/hamburger-hafen-was-der-deal-mit-chinas-staatsunternehmen-cosco-bedeutet-XJWVRXNVK5HWJDJ3FJ2E4XG3O4.html>, zuletzt abgerufen am 6.12.2022. Zu einer rechtlichen Einordnung C. Herrmann, Hamburger Hafenrundfahrt im Regierungsviertel: Investitionskontrollrechtliche Überlegungen zur Übernahme eines Hamburger Terminals durch die chinesische Reederei COSCO, Verfassungsblog v. 25.10.2022, <verfassungsblog.de/hamburger-hafenrundfahrt-im-regierungsviertel/>, zuletzt abgerufen am 6.12.2022. Zu den Folgeuntersagungen o.V., „Eine offene Marktwirtschaft ist keine naive Marktwirtschaft", Spiegel Online v. 9.11.2022, <www.spiegel.de/wirtschaft/unternehmen/robert-habeck-zu-verbot-von-elmos-und-ers-electronic-uebernahme-durch-china-keine-naive-marktwirtschaft-a-f336bb4e-7416-4c40-93b5-ded3e2f81378>, zuletzt abgerufen am 6.12.2022.

[304] S. diesbezüglich bspw. die Pressemitteilung von Elmos, Ad hoc: Verkauf der Elmos Wartefertigung an Silex wird wahrscheinlich untersagt werden, Pressemitteilung v. 7.11.2022, <www.elmos.com/ueber-elmos/newsroom/pressemitteilungen/aktuelles/ad-hoc-verkauf-der-elmos-waferfertigung-an-silex-wird-wahrscheinlich-untersagt-werden.html>, zuletzt abgerufen am 6.12.2022: „Das Bundesministerium für Wirtschaft und Klimaschutz (BMWK) hat den beteiligten Parteien heute mitgeteilt, dass in der kommenden Kabinettssitzung am 9. November 2022 der Verkauf der Elmos Waferfertigung an Silex Microsystems AB voraussichtlich untersagt werden wird. Das ist eine neue Entwicklung, da bis zum heutigen Tage das BMWK den beteiligten Parteien mitgeteilt hatte, dass die Transaktion wahrscheinlich genehmigt werden wird."

das taiwanesische Unternehmen *GlobalWafers* hat sich dies etwa darin gezeigt, dass das BMWK die Gefahr einer Einverleibung Taiwans durch China als ein Indiz für die voraussichtliche Beeinträchtigung der öffentlichen Ordnung oder Sicherheit gewertet hat.

Diese Rechtsunsicherheit wird durch die intransparente Entscheidungspraxis zusätzlich verstärkt. Anders als das Bundeskartellamt, veröffentlicht das BMWK keine Prüfberichte, die es den Investoren ermöglichen würden, die voraussichtlichen Bedenken des BMWK zu antizipieren und ihre Investitionsentscheidungen hieran auszurichten.[305] Dies gilt unabhängig davon, dass sich eine Reihe der Bedenken im Hinblick auf chinesische Investoren in den Fällen wiederholen dürften.

Die allgemeine Unsicherheit im Umgang mit der Investitionskontrolle scheint maßgeblich auf eine politische Uneinigkeit über ihren eigentlichen Ansatz zurückzugehen. Trotz allgemeiner Bekenntnisse dahingehend, dass mit dieser keine Industrie- und Wettbewerbspolitik verfolgt werden soll, werden in der öffentlichen Debatte derartige Gesichtspunkte gegenüber ausländischen Investitionstätigkeiten wiederholt vorgebracht.

Dies äußert sich nicht zuletzt auch im Kontext des verfahrensrechtlichen Problems eines nur unvollständigen Rechtsschutzes. Einerseits hat das BMWK auf Grundlage von § 14a AWG die Möglichkeit einer Verlängerung des Verfahrens, die mit insbesondere kapitalmarktrechtlichen Fristen kollidieren und den Erwerb dadurch zum Scheitern bringen kann. Dies hat zuletzt der Fall *Siltronic/GlobalWafers* deutlich gezeigt.[306] Andererseits führt die zeitgebundene Transaktionspraxis dazu, dass nur in seltenen Fällen ein gerichtlicher Rechtsschutz überhaupt ersucht wird. Die Erfolgsaussichten im einstweiligen Rechtsschutz müssen nach den ersten Entscheidungen des VG Berlin[307] und OVG-Berlin-Brandenburg[308] im *Siltronic*-Fall als sehr gering bewertet werden.[309] Darin haben die Gerichte allgemein einen sehr weiten Spielraum des BMWK angedeutet, der nach Ansicht der Gerichte sowohl in materieller als auch in formeller Hinsicht zu bestehen scheint, darin jedoch von der Rechtsprechung des EuGH

[305] In Einzelfällen werden lediglich Pressemitteilungen veröffentlicht, die jedoch keine vertieften Einblicke zulassen, s. Bundesministerium für Wirtschaft und Klimaschutz, Chipfabrik Elmos darf nicht an chinesischen Investor verkauft werden – Bundeskabinett untersagt Verkauf, Pressemitteilung v. 9.1.2022, <www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/11/20221109-chipfabrik-elmos-darf-nicht-an-chinesischen-investor-verkauft-werden.html>, zuletzt abgerufen am 6.12.2022.

[306] S. dazu OVG Berlin-Brandenburg 21.1.12022 – OVG 1 S 10/22, *NZG* 2022, 421; VG Berlin 27.1.2022 – 4 L 111/22, juris.

[307] VG Berlin 27.1.2022 – 4 L 111/22, juris.

[308] OVG Berlin-Brandenburg 21.1.2022 – OVG 1 S 10/22, *NZG* 2022, 421.

[309] S. dazu auch die Kritik bei M. Helleberg/J. Schäffer, OVG Berlin-Brandenburg: Außenwirtschaftliche Freigabe für die Übernahme eines Herstellers von Wafern, *NZG* 2022, 421 (423 f.).

abweicht. Dieser hebt gerade im Rahmen einer zurückhaltenden Kontrolle von Ermessenentscheidungen die Bedeutung der Verfahrensrechte explizit hervor.[310]

b.

Die sektorübergreifende Investitionskontrolle auf Basis der §§ 4 Abs. 1 Nr. 4 und 4a, 5 Abs. 2 AWG i.V.m. §§ 55 ff. AWV ist umfassend an den Gehalt der EU-Screening-Verordnung angepasst worden. Der deutsche Gesetzgeber sieht dabei allerdings einen erweiterten Spielraum bei der Feststellung einer voraussichtlichen Beeinträchtigung der öffentlichen Ordnung oder Sicherheit.[311] Die genaue Anwendungspraxis des BMWK ist allerdings schwer nachzuvollziehen, denn die tatsächliche Fallpraxis ist in Deutschland intransparent. Anders als bei der wettbewerblichen Fusionskontrolle werden zu den Investitionskontrollverfahren keinerlei Informationen veröffentlicht.[312] Den bisher einzigen Urteilen des VG Berlin und OVG Berlin-Brandenburg lässt sich allerdings entnehmen, dass das BMWK zumindest auch industriepolitische Erwägungen in seine Gesamtanalyse einfließen lässt.[313] Die Gerichte scheinen diese Argumentationsweise grundsätzlich zu billigen.

Die sektorspezifische Investitionskontrolle gemäß §§ 4 Abs. 1 Nr. 1, 5 Abs. 3 AWG i.V.m. §§ 60 ff. AWV tritt neben den Anwendungsbereich der EU-Screening-VO und führt zu einer spezifischen Kontrolle gegenüber Rüstungsunternehmen und Herstellern von Kryptosystemen am Maßstab wesentlicher Sicherheitsinteressen der Bundesrepublik Deutschland. Darüber hinaus existieren für einzelne Sonderbereiche spezialgesetzliche Überprüfungsmechanismen, z.B. nach dem Satellitendatensicherheitsgesetz (SatDSiG), dem Luftverkehrsnachweissicherheitsgesetz (LuftNaSiG) oder dem Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand (VWGmbHÜG).[314] Allerdings spielen diese eine eher geringe Rolle und sind teilweise bereits durch die Kontrolle nach dem AWG und der AWV verdrängt worden.[315]

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[310] Dervisopoulos, *in* Rengeling/Middeke/Gellermann (Hrsg.), Handbuch des Rechtsschutzes in der Europäischen Union, 3. Aufl., München 2014, § 7, Rn. 119 f.

[311] Bundesregierung, Entwurf eines ersten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze, BT-Drs. 181/20, 17.

[312] S. die Entscheidungsdatenbank des Bundeskartellamtes, <www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html?nn=3591512&docId=3589936>, zuletzt abgerufen am 6.12.2022.

[313] VG Berlin 27.1.2022 – 4 L 111/22, juris, Rn. 48; implizit auch OVG Berlin-Brandenburg 31.1.2022 – OVG 1 S 10/22, juris, Rn. 23.

[314] S. dazu den Überblick bei B. Dehne, *Investitionskontrolle in Deutschland*, Baden-Baden 2022, S. 184 ff.

[315] So etwa das SatDSiG; s. Bundesregierung, Entwurf eines Ersten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze, BT-Drucks. 19/18895, 1.

c.

Das sektorübergreifende Prüfverfahren erfasst grundsätzlich jeden unmittelbaren oder mittelbaren Erwerb eines inländischen Unternehmens durch Nicht-EU-/Nicht-EFTA-Ausländer, insoweit der jeweilige Stimmrechtsanteil einen der in § 56 AWV aufgeführten Schwellenwerte erreicht, der wiederum maßgeblich mit einer Zuordnung des Zielunternehmens auf Grundlage von § 55a Abs. 1 AWV zusammenhängt. Unionsfremde sind dabei nach der Negativdefinition des § 2 Abs. 19 AWG alle Personen und Personengesellschaften, die nicht als Unionsansässige i.S.v. § 2 Abs. 18 AWG anzusehen sind.[316] Für Unternehmen i.S.v. § 55a Abs. 1 Nr. 1 bis 7 AWV gilt ein Schwellenwert von 10 % der Stimmrechte, die zumindest erreicht oder überschritten werden müssen. Für Unternehmen i.S.v. § 55a Abs. 1 Nr. 8 bis 27 AWV gilt ein Schwellenwert von 20 % der Stimmrechte. Für alle übrigen Unternehmen gilt ein Wert von 25 % der Stimmrechte. Für alle Unternehmen der Nr. 1 bis 27 gilt grundsätzlich eine Meldepflicht (§ 55a Abs. 4 AWV). Für die einzelnen Schwellenwerte ergibt sich aus § 56 Abs. 2 AWV eine Anpassung in Fällen, in denen ein Zuerwerb weiterer Stimmrechte erfolgt, der auf den in Abs. 1 genannten Werten bereits aufbaut.

Die sektorspezifische Investitionskontrolle findet bei jedem vollständigen Erwerb von Unternehmen oder dem Erwerb eines unmittelbaren oder mittelbaren Stimmrechtsanteils von 10 % durch einen Ausländer Anwendung, wenn diese Unternehmen in besonders sicherheitssensiblen Bereichen tätig sind (§§ 60 Abs. 1 und 1a, 60a AWV). In Abweichung zur sektorübergreifenden Investitionskontrolle unterfallen der sektorspezifischen Investitionskontrolle nach § 60 Abs. 1 AWV neben unionsfremden Erwerbern auch EU-Ausländer (§ 2 Abs. 5 AWG).

d.

Die sektorübergreifende Investitionskontrolle ist grundsätzlich auf alle Sektoren anwendbar. Die in § 55a Abs. 1 Nr. 1 bis 27 AWV genannten Fallgruppen

[316] Unionsansässige sind danach „1. natürliche Personen mit Wohnsitz oder gewöhnlichem Aufenthalt in der Europäischen Union, 2. juristische Personen oder Personengesellschaften mit Sitz oder Ort der Leitung in der Europäischen Union, 3. Zweigniederlassungen juristischer Personen, deren Sitz oder Ort der Leitung in einem Drittland liegt, wenn die Zweigniederlassungen ihre Leitung in der Europäischen Union haben und es für sie eine gesonderte Buchführung gibt, und 4. Betriebsstätten juristischer Personen aus Drittländern, wenn die Betriebsstätten ihre Verwaltung in der Europäischen Union haben." Näher zum Erwerbsbegriff C. H. Seibt/B. Wollenschläger, Unternehmenstransaktionen mit Auslandsbezug nach der Reform des Außenwirtschaftsrechts, *ZIP* 2009, 833 (836); H. Hasselbrink, Beteiligungserwerbe an GmbH durch ausländische Investoren – Auswirkungen des Außenwirtschaftsgesetzes auf GmbH-Transaktionen – *GmbHR* 2010, 512 (514 f); M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 55 AWV, Rn. 77 ff.; B. Dehne, *Investitionskontrolle in Deutschland*, Baden-Baden 2022, 250 ff.

haben lediglich Auswirkung auf die anwendbare Prüfschwelle gemäß § 56 Abs. 1 AWV. Zugleich legt die Formulierung des § 55a Abs. 1 AWV eine besondere Berücksichtigung bei der Frage nahe, ob eine voraussichtliche Beeinträchtigung der öffentlichen Ordnung oder Sicherheit gegeben ist. Von besonderer Bedeutung ist in diesem Zusammenhang u.a. der Betrieb einer „kritischen Infrastruktur" nach Maßgabe des Gesetzes über das Bundesamt für Sicherheit in der Informationstechnik (BSIG) (Nr. 1). Gemäß § 2 Abs. 10 BSI-Gesetz sind dies „Einrichtungen, Anlagen oder Teile davon, die 1. den Sektoren Energie, Informationstechnik und Telekommunikation, Transport und Verkehr, Gesundheit, Wasser, Ernährung, Finanz- und Versicherungswesen sowie Siedlungsabfallentsorgung angehören und 2. von hoher Bedeutung für das Funktionieren des Gemeinwesens sind, weil durch ihren Ausfall oder ihre Beeinträchtigung erhebliche Versorgungsengpässe oder Gefährdungen für die öffentliche Sicherheit eintreten würden". Eine genaue Zuordnung im Einzelfall ist allerdings nur in Verbindung mit der Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz (BSI-KritisV) möglich, worin die Kritikalität des Erwerbsziels je nach Sektor und anhand verschiedenster Schwellenwerte genauer aufgeschlüsselt wird. So war etwa die Beteiligung von *COSCO* an einem Hafenterminal des Hamburger Hafens als Erwerb einer kritischen Infrastruktur i.S.v. § 2 Abs. 10 BSIG i.V.m. § 8 Abs. 3 und Anlage 7, Teil 1 Ziff. 1. 1.25), Teil 3 Ziff. 1.3.5 BSI-KritisV zu werten.[317]

Rüstungsunternehmen und Hersteller von Kryptosystemen i.S.v. § 60 Abs. 1 AWV unterfallen allerdings der sektorspezifischen Kontrolle. Rüstungsgüter basieren dabei maßgeblich auf der gemäß Art. 346 Abs. 2 AEUV vom Rat festgelegten Warenliste.[318] Während im Rahmen der sektorübergreifenden Kontrolle regelmäßig auf die Entwicklung oder Herstellung bestimmter Güter abgestellt wird, umfasst § 60 Abs. 1 S. 1 AWV zusätzlich auch die Modifikation sowie die tatsächliche Gewalt über die genannten Güter. Für Güter i.S.d. Teils I Abschnitt A der Ausfuhrliste (Nr. 1) und aus dem Bereich der Wehrtechnik (Nr. 2) erstreckt sich der Anwendungsbereich der sektorspezifischen Kontrolle auch auf Unternehmen, die diese Güter in der Vergangenheit entwickelt, hergestellt, modifiziert oder die tatsächliche Gewalt innegehabt haben und noch über Kenntnisse oder sonstigen

[317] S. dazu auch C. Herrmann, Hamburger Hafenrundfahrt im Regierungsviertel: Investitionskontrollrechtliche Überlegungen zur Übernahme eines Hamburger Terminals durch die chinesische Reederei COSCO, Verfassungsblog v. 25.10.2022, <verfassungsblog.de/hamburger-hafenrundfahrt-im-regierungsviertel/>, zuletzt abgerufen am 6.12.2022. Das Erreichen eines geforderten Frachtumschlags von mindestens 3,27 Mio. Tonnen/Jahr ließ sich zwar nicht endgültig feststellen, durfte jedoch unterstellt werden. Damit galt für den Erwerb insgesamt eine Schwellenwertgrenze von 10 %.

[318] S. dazu etwa B. W. Wegener, *in* Calliess/Ruffert (Hrsg.), EUV/AEUV, 6. Aufl., München 2022, Art. 346 AEUV, Rn. 8.

Zugang zu der solchen Gütern zugrunde liegenden Technologie verfügen (§ 60 Abs. 1 S. 2 AWV).

e.

Bei der sektorübergreifenden Investitionskontrolle hat Deutschland den durch Art. 4 EU-Screening-VO vorgegebenen Prüfungsmaßstab übernommen. Gemäß § 55 Abs. 1 AWV kann das BMWK „prüfen, ob es die öffentliche Ordnung oder Sicherheit der Bundesrepublik Deutschland, eines anderen Mitgliedstaates der Europäischen Union oder in Bezug auf Projekte oder Programme von Unionsinteresse im Sinne des Artikels 8 der Verordnung (EU) 2019/452 des Europäischen Parlaments und des Rates vom 19. März 2019 zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen in der Union (ABl. L 79 I vom 21.3.2019, S. 1) voraussichtlich beeinträchtigt, wenn ein Unionsfremder unmittelbar oder mittelbar ein inländisches Unternehmen oder unmittelbar oder mittelbar eine Beteiligung im Sinne des § 56 an einem inländischen Unternehmen erwirbt". Dabei können die in § 55a Abs. 1 AWV benannten Fallgruppen gemäß § 55a Abs. 1 AWV als Faktoren bei einer entsprechen Prüfung „berücksichtigt werden". Auch an dieser Stelle übernimmt das deutsche Recht damit das europäische Prüfkonzept.

Ein anderer Prüfungsmaßstab gilt im Rahmen der sektorspezifischen Investitionskontrolle. An dieser Stelle prüft das BMWK, „ob der Erwerb eines inländischen Unternehmens oder einer unmittelbaren oder mittelbaren Beteiligung im Sinne des § 60a an einem inländischen Unternehmen durch einen Ausländer wesentliche Sicherheitsinteressen der Bundesrepublik Deutschland voraussichtlich beeinträchtigt" (§ 60 Abs. 1 AWV).

Auch wenn die Entscheidungspraxis des BMWK intransparent ist und Prüfungsentscheidungen nicht veröffentlicht werden, so kann den Entscheidungen des VG Berlin und des OVG Berlin-Brandenburg in dem Fall *Siltronic/GlobalWafer* entnommen werden, dass die Prüfung einer Gefährdungslage im Rahmen einer Gesamtbetrachtung verschiedener im Einzelfall ermittelter Indizien erfolgt, die auf eine voraussichtliche Beeinträchtigung hindeuten können.[319]

[319] S. dazu OVG Berlin-Brandenburg 21.1.2022 – OVG 1 S 10/22, NZG 2022, 421; VG Berlin 27.1.2022 – 4 L 111/22, juris.

f.

In Gesprächen betont das BMWK immer wieder, dass die Investitionskontrolle keine wettbewerbliche Kontrolle darstellt, sondern sicherheitspolitischen Zwecken dient. Dies entspricht auch der Forderung, die von Seiten der Monopolkommission in ihrem XXIII. Hauptgutachten formuliert wurde.[320] Diese klare Abgrenzung von wettbewerblichen Erwägungen kann allerdings angesichts der bisher bekannt gewordenen Fälle zumindest in Frage gestellt werden.

In dem Fall *Siltronic/GlobalWafers* gab etwa das Bundeskartellamt den Erwerb frei und erklärte: „Die weltweiten Ermittlungen hatten ergeben, dass der Zusammenschluss keine erhebliche Behinderung wirksamen Wettbewerbs erwarten lässt".[321] Die Marktanteile der Zusammenschlussbeteiligten lagen nach der Analyse des Bundeskartellamts unterhalb der Vermutungsschwelle von § 18 Abs. 4 des Gesetzes gegen Wettbewerbsbeschränkungen (GWB). Im Bereich der gängigen, relativ standardisierten Wafer seien die Produkte der Zusammenschlussbeteiligten grundsätzlich untereinander, aber auch mit den Wafern ihrer großen und kleineren Wettbewerber substituierbar. Bei Wafern mit sehr spezifischen Eigenschaften, die jedoch nur einen geringen Anteil des Wafer-Marktes ausmachten, könnten die aktuellen Bezugsalternativen der Abnehmer zwar beschränkter sein, jedoch bestehe in diesen Konstellationen eine wechselseitige Abhängigkeit zwischen Wafer-Lieferant und Abnehmer.[322] Dennoch hatte das BMWK erhebliche Bedenken gegenüber dem Erwerbsvorgang, wie den entsprechenden Gerichtsentscheidungen entnommen werden kann. Dabei verwies das BMWK seinerseits auf die Gefahr eines Technologietransfers nach China sowie auf die Absicherung einer hinreichenden Belieferung der deutschen Wirtschaft.[323] Dabei handelt es sich um Beweggründe, die jedenfalls auch dem Bereich der Industriepolitik zuzuordnen sind. So stehen die technologische Souveränität und Belieferung mit Chips etwa auch im Zentrum der europäischen Pläne für ein „Chip-Gesetz", das ganz maßgeblich auf die Stärkung der Wettbewerbsfähigkeit Europas gerichtet ist.[324]

[320] Monopolkommission, XXIII. Hauptgutachten: Wettbewerb 2020, Rn. 592 u. 817 ff.

[321] BKArtA 11.3.2021 – B8-25/21 – Fallbericht „Freigabe des Erwerbs des Siliziumwafer-Herstellers Siltronic durch GlobalWafers (Entscheidung vom 8. Februar 2021)".

[322] BKArtA 11.3.2021 – B8-25/21, S. 3 – Fallbericht „Freigabe des Erwerbs des Siliziumwafer-Herstellers Siltronic durch GlobalWafers (Entscheidung vom 8. Februar 2021)".

[323] VG Berlin 27.1.2022 – 4 L 111/22, juris, Rn. 9, 22, 24 u. 26.

[324] Kommission, Ein Chip-Gesetz für Europa, COM(2022) 45 final v. 8.2.2022; Kommission, Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates zur Schaffung eines Rahmens für Maßnahmen zur Stärkung des europäischen Halbleiter-Ökosystems (Chip-Gesetz), COM(2022)46 final v. 8.2.2022, S. 3: „Mit dem Vorschlag soll das strategische Ziel erreicht werden, die Resilienz des europäischen Halbleiter-Ökosystems und seinen weltweiten Marktanteil zu erhöhen. Der Vorschlag zielt überdies darauf ab, die frühzeitige Einführung neuer Chips durch die europäische Industrie zu erleichtern und ihre Wettbewerbsfähigkeit zu steigern."

g.

Laut Angaben des BMWK funktioniert der Informationsaustausch zwischen BMWK und Kommission problemlos. Zuletzt konnte beobachtet werden, dass sich die Europäische Kommission in den *COSCO*-Fall eingeschaltet und ihre Bedenken geäußert hatte, die von der deutschen Politik auch ernst genommen wurden. Dies Stellungnahmen der Kommission werden allerdings ebenfalls an keiner Stelle veröffentlicht. Laut der neuesten Studie der OECD zur Effektivität und Effizienz der EU-Investitionskontrollregimes scheinen insgesamt allerdings einige Ineffizienzen innerhalb des Kooperationsmechanismus zu bestehen, die auch Deutschland betreffen dürften.[325] Dies gilt etwa für die fehlende Kapazität zur Auseinandersetzung mit und Weiterleitung von Fällen, die einer eigenen Prüfung nicht zugeführt werden.[326]

h.

In Deutschland bestehen (zumindest hypothetisch) eine Reihe von möglichen Rechtsmitteln nach Maßgabe der Verwaltungsgerichtsordnung (VwGO) und sogar dem Grundgesetz (GG) i.V.m. dem Bundesverfassungsgerichtsgesetz (BVerfGG):

Abschließende Entscheidungen des BMWK sind als Verwaltungsakte grundsätzlich mit der Anfechtungsklage gem. § 42 Abs. 1 Alt. 1 VwGO angreifbar.[327] Wurde ein Antrag auf Erteilung einer Unbedenklichkeitsbescheinigung gestellt (§ 58 AWV) und weigert sich das BMWK diese auszustellen, so kann hiergegen Verpflichtungsklage (§ 42 Abs. 1 Alt. 2 VwGO) erhoben werden.[328] Auch für

[325] OECD, Framework for Screening Foreign Direct Investment into the EU, Assessing effectiveness and efficiency, 2022.

[326] OECD, Framework for Screening Foreign Direct Investment into the EU, Assessing effectiveness and efficiency, 2022, S. 23 u. 31.

[327] S. zum Rechtsschutz auch C. H. Seibt/B. Wollenschläger, Unternehmenstransaktionen mit Auslandsbezug nach der Reform des Außenwirtschaftsrechts, *ZIP* 2009, 833 (844 f.); T. Voland, Rechtsschutz gegen Maßnahmen der Investitionskontrolle im Außenwirtschaftsrecht – Fiat iustitia?!, *EuZW* 2010, 132 (132 ff.); C. Flaßhoff/S. Glasmacher, Wankende Verwaltungsakte im Außenwirtschaftsrecht bei Unternehmenskäufen, *NZG* 2017, 489 (491 ff.); M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 58 AWV, Rn. 24 f., § 59 AWV, Rn. 35 ff., sowie § 62 AWV, Rn. 29 ff.; T. M. Hagemeyer, Access to Legal Redress in an EU Investment Screening Mechanism, *in* Hindelang/Moberg (Hrsg.), Yearbook of Socio-Economic Constitutions 2020, Cham 2021, S. 795 (804 ff.); B. Dehne, *Investitionskontrolle in Deutschland*, Baden-Baden 2022, S. 301 ff.

[328] Richtigerweise weist B. Dehne, *Investitionskontrolle in Deutschland*, Baden-Baden 2022, S. 309 f., darauf hin, dass eine Versagungsgegenklage im Rahmen der sektorübergreifenden Investitionskontrolle nicht in Betracht kommt, da das BMWK entweder dem Antrag entspricht, keine Prüfung vornimmt oder das Prüfverfahren eröffnet. Im letzten Fall trifft das BMWK eine abschließende Entscheidung. Handelt es sich dabei um eine Untersagung, so muss diese als belastender Verwaltungsakt mit der Anfechtungsklage angegriffen werden.

die Geltendmachung eines Akteneinsichtsrechts gegenüber dem BMWK ist grundsätzlich die Erhebung einer Verpflichtungsklage statthaft, jedoch verlangt die Rechtsprechung aufgrund von § 44a VwGO, dass die Gewährung der Akteneinsicht aus Gründen effektiven Rechtsschutzes unabweisbar geboten ist, sodass eine gerichtliche Geltendmachung nur unter engen Voraussetzungen möglich ist.[329] Im Zusammenhang mit einem öffentlich-rechtlichen Vertrag kommt ggf. eine allgemeine Leistungsklage oder eine Feststellungsklage (§ 43 VwGO) auf Feststellung der Nichtigkeit des Vertrages in Betracht.[330]

Neben den abschließenden Entscheidungen ist nach wohl h.M. etwa auch die Mitteilung über die Einleitung eines Prüfverfahrens selbstständig mit der Anfechtungsklage angreifbar.[331] Im Vorfeld einer Einleitung ist auch die Erhebung einer Feststellungsklage denkbar, mit dem Ziel festzustellen, dass eine Transaktion nicht in den Anwendungsbereich der §§ 55 ff., 60 ff. AWV fällt.[332] Dabei steht jedoch die Möglichkeit zur Beantragung einer Unbedenklichkeitsbescheinigung womöglich einem Rechtsschutzinteresse entgegen.[333] Dies ist gerichtlich noch nicht erörtert worden. Ebenfalls noch nicht abschließend geklärt ist bislang die Möglichkeit gegen Verlängerungs- und Nachforderungsentscheidungen vorzugehen. Das VG Berlin sowie das OVG Berlin-Brandenburg scheinen eine isolierte Anfechtung an § 44a VwGO scheitern lassen zu wollen.[334] Nicht selbstständig angreifbar sind dagegen die Zustimmung der Bundesregierung oder andere verwaltungsinterne (Mitwirkungs-)Handlungen.[335]

Anfechtungsklagen gegen eine Untersagung oder Anordnung entfalten gemäß § 14 Abs. 2 AWG keine aufschiebende Wirkung.[336] Insoweit kommt ein Antrag auf

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[329] S. dazu J.-P. Schneider, in: Schoch/Schneider (Hrsg.), Verwaltungsrecht, 2. EL, München 2022, § 29 VwVfG, Rn. 90 f.

[330] Zu dieser Möglichkeit M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 59 AWV, Rn. 38, sowie § 62 AWV, Rn. 32.

[331] T. Voland, Rechtsschutz gegen Maßnahmen der Investitionskontrolle im Außenwirtschaftsrecht – Fiat iustitia?!, *EuZW* 2010, 132 (133); M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 58 AWV, Rn. 25; B. Dehne, *Investitionskontrolle in Deutschland*, Baden-Baden 2022, S. 306 ff.; a.A. C. H. Seibt/B. Wollenschläger, Unternehmenstransaktionen mit Auslandsbezug nach der Reform des Außenwirtschaftsrechts, *ZIP* 2009, 833 (844).

[332] Dazu auch T. M. Hagemeyer, Access to Legal Redress in an EU Investment Screening Mechanism, *in* Hindelang/Moberg (Hrsg.), Yearbook of Socio-Economic Constitutions 2020, Cham 2021, S. 795 (808).

[333] T. M. Hagemeyer, Access to Legal Redress in an EU Investment Screening Mechanism, *in* Hinde-lang/Moberg (Hrsg.), Yearbook of Socio-Economic Constitutions 2020, Cham 2021, S. 795 (808).

[334] OVG Berlin-Brandenburg 21.1.2022 – OVG 1 S 10/22, juris, Rn. 10; VG Berlin 27.1.2022 – 4 L 111/22, juris, Rn. 34.

[335] Ganz h.M. C. H. Seibt/B. Wollenschläger, Unternehmenstransaktionen mit Auslandsbezug nach der Reform des Außenwirtschaftsrechts, *ZIP* 2009, 833 (844); M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 59 AWV, Rn. 35, sowie § 62 AWV, Rn. 29.

[336] M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 59 AWV, Rn. 36, sowie § 62 AWV, Rn. 30.

vorläufigen Rechtsschutz gemäß § 80 Abs. 5 S. 1 Alt. 1 VwGO in Betracht. Ein Antrag gemäß § 123 Abs. 1 S. 2 VwGO auf die vorläufige Erteilung einer Freigabe oder auch auf die vorläufige Bescheinigung einer Genehmigungsfiktion gemäß § 58a Abs. 2 bzw. § 61 AWV i.V.m. § 42a Abs. 3 VwVfG ist zwar grundsätzlich denkbar, wird jedoch in der Regel nicht erfolgreich sein.[337] So haben das VG Berlin und OVG Berlin-Brandenburg in dem Fall *Siltronic* angenommen, dass es sich hierbei um eine „echte Vorwegnahme in der Hauptsache" handele.[338]

Sofern eine Untersagung oder Anordnung rechtswidrig und schuldhaft ausgesprochen oder ein nichtiger öffentlich-rechtlicher Vertrag geschlossen wurde, können schließlich auch Amtshaftungsansprüche gegen die Bunderepublik Deutschland bestehen, deren Geltendmachung allerdings das erfolglose Beschreiten des Verwaltungsrechtswegs voraussetzt.[339] Grundsätzlich wäre im Anschluss an eine Rechtswegerschöpfung zudem eine Verfassungsbeschwerde (Art. 93 I Nr. 4a GG, §§ 13 Nr. 8a, 23, 90 ff. BVerfGG) denkbar.

i.

In Folge der Corona-Krise und den Diskussionen über den Zugang zu medizinischen Gütern, die auch durch die Leitlinien der Kommission entsprechend kanalisiert worden ist, hat Deutschland nun auch eine Reihe gesundheitsrelevanter Bereiche in § 55a Abs. 1 AWV aufgenommen (Nr. 8 bis 11).[340] Abgesehen davon wurde die sektorübergreifende, aber auch die sektorspezifische Investitionskontrolle seit Ausbruch der Corona-Krise immer wieder angepasst und dabei allgemein verschärft.[341] In praktischer Hinsicht wurde außerdem die Übernahme der Heyer Medical AG, einem deutschen Beatmungsgerätehersteller, durch den chinesischen Aeonmed-Konzern untersagt.[342]

[337] So auch M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, § 62 AWV, Rn. 30.

[338] OVG Berlin-Brandenburg 21.1.2022 – OVG 1 S 10/22, juris, Rn. 9; VG Berlin 27.1.2022 – 4 L 111/22, juris, Rn. 40.

[339] M. Mausch-Liotta/S. Sattler, *in* Hocke/Sachs/Pelz (Hrsg.), Außenwirtschaftsrecht, 2. Aufl., Heidelberg 2020, Heidelberg, § 59 AWV, Rn. 39, sowie § 62 AWV, Rn. 33; T. M. Hagemeyer, Access to Legal Redress in an EU Investment Screening Mechanism, *in* Hindelang/Moberg (Hrsg.), Yearbook of Socio-Economic Constitutions 2020, Cham 2021, S. 795 (810 ff.).

[340] Dazu P. Bendlin Spür, Die Außenwirtschaftsrechtsnovelle 2020: Effektiverer Schutz von Sicherheitsinteressen zulasten ausländischer Investoren und deutscher Zielunternehmen?, *COVuR* 2020, 516 (520 f.); B. Dehne, *Investitionskontrolle in Deutschland*, Baden-Baden 2022, S. 597.

[341] Dazu V. Jungkind/C. Bormann, Verschärfung des Außenwirtschaftsrechts vor dem Hintergrund der COVID-19 Pandemie, *NZG* 2020, 619 (619 ff.); C. Barth/A.-C. Käser, Erneute Novellierung der deutschen Investitionskontrolle, Die 17. Verordnung zur Änderung der Außenwirtschaftsverordnung, *NZG* 2021, 813 (813 ff.).

[342] o.V., Bund verhindert Übernahme von Beatmungsgerätehersteller, Spiegel Online v. 27.4.2022, <www.spiegel.de/wirtschaft/beatmungsgeraete-bund-stoppt-uebernahme-durch-chinesisches-unternehmen-a-6c0396e9-2773-4f2b-aa41-85917dfe104d>, zuletzt abgerufen am 6.12.2022.

Frage 12

Die Bundesregierung hat den Vorschlag der Kommission von Anfang an begrüßt.[343] Parallel dazu hatte auch die Monopolkommission als wettbewerbspolitisches Beratungsorgan der Bundesregierung ein derartiges Instrument vorgeschlagen,[344] welches sich indes in Einzelpunkten von dem Ansatz der Kommission unterscheidet.[345] Führende Industrieverbände sehen ebenfalls die Notwendigkeit für die Einführung eines neuen Instruments zum Umgang mit ausländischen Subventionen, wobei angesichts der vorgeschlagenen EU-Verordnung weitere Klarstellungen als erforderlich angesehen werden.[346]

Die Bundesregierung hat sich ursprünglich grundsätzlich offen gegenüber der teils ein-, teils zweistufigen Ausgestaltung innerhalb des Weißbuches der Kommission gezeigt, soweit es nicht zu Überschneidungen und dadurch zu Ineffizienzen komme.[347] Insbesondere im Hinblick auf mögliche Überschneidungen mit der Fusionskontrolle sollte jedoch auf eine klare Abgrenzung geachtet werden.[348] Zusätzlich wurde ein Informationsaustausch bspw. mit dem für die Fusionskontrolle zuständigen Bundeskartellamt vorgeschlagen.[349] Weitergehende Sorgen wurden nicht – jedenfalls nicht öffentlich – kommuniziert. Das BMWK betont etwa, dass die Investitionskontrolle in Deutschland nicht zu wettbewerblichen Zwecken eingesetzt werde, weshalb auch keine Überschneidung mit dem neuen Instrument

[343] S. dazu Bundesregierung, Stellungnahme der Bundesregierung zum Weißbuch der Europäischen Kommission zur Gewährleistung fairer Wettbewerbsbedingungen bei Subventionen aus Drittstaaten v. 6.12.2020, <www.bmwk.de/Redaktion/DE/Downloads/S-T/stellungnahme-bundesregierung-weißbuch-wettberwerbsbedingungen.pdf?__blob=publicationFile&v=6>, zuletzt abgerufen am 6.12.2022.

[344] Monopolkommission, XXIII. Hauptgutachten: Wettbewerb 2020, Rn. 885 ff. u. 924 ff. Ein eigenständiger Regelungsentwurf findet sich bei Rn. 960.

[345] S. zu dem Vorschlag auch J. Kühling/P. Reinhold/T. Weck, State Capitalism and Level Playing Field: The Need for a 'Third-Country State Aid Instrument' to Restore a Level Playing Field in the EU's Internal Market, *EStAL* 2020, 403 (403 ff.).

[346] Bundesverband der Deutschen Industrie (BDI), Bessere Kontrolle von Drittstaatssubventionen im Binnenmarkt, <bdi.eu/artikel/news/bessere-kontrolle-von-drittstaatssubventionen-im-binnenmarkt/>, zuletzt abgerufen am 6.12.2022.

[347] Bundesregierung, Stellungnahme der Bundesregierung zum Weißbuch der Europäischen Kommission zur Gewährleistung fairer Wettbewerbsbedingungen bei Subventionen aus Drittstaaten v. 6.12.2020, S. 2 f., 7, 14 ff., 17 u. 24 ff., <www.bmwk.de/Redaktion/DE/Downloads/S-T/stellungnahme-bundesregierung-weißbuch-wettberwerbsbedingungen.pdf?__blob=publicationFile&v=6>, zuletzt abgerufen am 6.12.2022.

[348] Bundesregierung, Stellungnahme der Bundesregierung zum Weißbuch der Europäischen Kommission zur Gewährleistung fairer Wettbewerbsbedingungen bei Subventionen aus Drittstaaten v. 6.12.2020, S. 18, <www.bmwk.de/Redaktion/DE/Downloads/S-T/stellungnahme-bundesregierung-weißbuch-wettberwerbsbedingungen.pdf?__blob=publicationFile&v=6>, zuletzt abgerufen am 6.12.2022.

[349] Bundesregierung, Stellungnahme der Bundesregierung zum Weißbuch der Europäischen Kommission zur Gewährleistung fairer Wettbewerbsbedingungen bei Subventionen aus Drittstaaten v. 6.12.2020, S. 17, <www.bmwk.de/Redaktion/DE/Downloads/S-T/stellungnahme-bundesregierung-weißbuch-wettberwerbsbedingungen.pdf?__blob=publicationFile&v=6>, zuletzt abgerufen am 6.12.2022.

zu befürchten sei. In der Stellungnahme der Bundesregierung zum Weißbuch wurde dies freilich noch anders bewertet und eine Nähe betont.[350]

Die Bundesregierung hat ursprünglich eine nochmalige Prüfung dahingehend vorgeschlagen, ob nicht bereits mit den bestehenden Vergaberegelungen das Ziel des vorgeschlagenen Teilinstruments 3 (vergaberechtliches Instrument) erreicht werden könne.[351] Im Nachgang zum finalen Vorschlag ist diese grundsätzliche Kritik jedoch bislang nicht wiederholt geworden. Dies lässt sich in zweierlei Hinsicht erklären: Zum einen sind die finalen Eingreifschwellen des geplanten Vergabeinstruments nunmehr sehr hoch, so dass zumindest die Vergabepraxis etwa von Kommunen in der Regel nicht berührt sein dürfte. Zum anderen wird womöglich angesichts der bislang weitgehend unbedeutend gebliebenen drittstaatsbezogenen Vergaberegeln von einer nur geringen Beeinflussung der Vergabepraxis ausgegangen. So besteht innerhalb des Sektorenvergaberechts bereits die im freien Ermessen des Auftraggebers stehende Möglichkeit,[352] Angebote im Rahmen von ausgeschriebenen Lieferaufträgen[353] gem. § 55 Abs. 1 SektVO auszuschließen, deren Warenanteil zu mehr als 50 % aus Staaten stammt, die nicht dem EWR angehören oder mit denen kein Abkommen über gegenseitige Marktöffnung existiert, das die ausgeschriebene Ware umfasst.[354] Hiervon sind die wichtigsten Fälle wie China, Russland oder Indien abgedeckt, und zwar auch dann, wenn die betreffenden Waren von einem in der EU ansässigen Unternehmen angeboten werden.[355] Neben dieser Zurückweisungsmöglichkeit sieht § 55 Abs. 2 SektVO zudem einen Privilegierungszwang vor.[356] Hiernach ist gem. § 55 Abs. 2

[350] Bundesregierung, Stellungnahme der Bundesregierung zum Weißbuch der Europäischen Kommission zur Gewährleistung fairer Wettbewerbsbedingungen bei Subventionen aus Drittstaaten v. 6.12.2020, S. 16, <www.bmwk.de/Redaktion/DE/Downloads/S-T/stellungnahme-bundesregierung-weißbuch-wettberwerbsbedingungen.pdf?__blob=publicationFile&v=6>, zuletzt abgerufen am 6.12.2022.

[351] Bundesregierung, Stellungnahme der Bundesregierung zum Weißbuch der Europäischen Kommission zur Gewährleistung fairer Wettbewerbsbedingungen bei Subventionen aus Drittstaaten v. 6.12.2020, S. 21 f., <www.bmwk.de/Redaktion/DE/Downloads/S-T/stellungnahme-bundesregierung-weißbuch-wettberwerbsbedingungen.pdf?__blob=publicationFile&v=6>, zuletzt abgerufen am 6.12.2022.

[352] H. Röwekamp, *in* Eschenbruch/Opitz/Röwekamp (Hrsg.), SektVO, 2. Aufl., München 2019, § 55 SektVO, Rn. 6.

[353] S. I. Langenbach, *in* Burgi/Dreher (Hrsg.), Beck'scher Vergaberechtskommentar, Bd. 2, 3. Aufl., München 2019, § 55 SektVO, Rn. 4; D.-H. Sturhahn, *in* Pünder/Schellenberg (Hrsg.), Vergaberecht, 3. Aufl., Baden-Baden 2019, § 55 SektVO, Rn. 3.

[354] D.H. Sturhahn, *in* Pünder/Schellenberg (Hrsg.), Vergaberecht, 3. Aufl., Baden-Baden 2019, § 55 SektVO, Rn. 3.

[355] S. I. Langenbach, *in* Burgi/Dreher (Hrsg.), Beck'scher Vergaberechtskommentar, Bd. 2, 3. Aufl., München 2019, § 55 SektVO, Rn. 8; H. Summa, *in* Heiermann/Zeiss/Summa (Hrsg.), jurisPK Vergaberecht, 6. Aufl., Saarbrücken 2022, § 55 SektVO, Rn. 7.

[356] S. D.-H. Sturhahn, *in* Pünder/Schellenberg (Hrsg.), Vergaberecht, 3. Aufl., Baden-Baden 2019, § 55 SektVO, Rn. 5.

S. 1 SektVO bei mehreren gleichwertigen Angeboten dasjenige zu bevorzugen, welches nicht nach § 55 Abs. 1 SektVO zurückgewiesen kann. Letzteres ist gem. § 55 Abs. 2 S. 2 SektVO auch dann zu bevorzugen, wenn dessen Preis um bis zu 3% höher ist als der des zurückweisbaren Angebots.[357]

Die Drittlandsklausel des § 55 SektVO hat keinen vergaberechtlichen, sondern einen rein handelspolitischen Hintergrund.[358] So soll mit dieser der Grundsatz der Reziprozität im Sektorenvergaberecht mit dem Ziel forciert werden, dass Drittstaaten ihre Vergabemärkte ebenfalls für EU-Unternehmen weitgehend öffnen.[359] Bislang ist der Bestimmung jedoch keine praktische Bedeutung zugekommen.[360] Teilweise wird in der Literatur sogar von deren Anwendung abgeraten.[361]Allerdings könnte die Drittlandsklausel in Folge einer neueren Entscheidung des OLG Brandenburg neuen Aufwind erhalten, in der ein grundsätzlich weiter Entscheidungsspielraum anerkannt worden ist.[362] Gleichwohl bleibt deren Anwendbarkeit auf das Sektorenvergaberecht begrenzt.

In der Literatur wird daher auch ein umfassenderer Ansatz gefordert,[363] der mit dem Erlass des „Instruments betreffend das öffentliche Beschaffungswesen"[364] (IPI) seitens der Kommission geschaffen worden ist. Das IPI soll ebenfalls den Grundsatz der Reziprozität bei der Öffnung drittstaatlicher Vergabemärkte einfordern,[365] umfasst jedoch neben dem Sektorenvergaberecht auch die klassische Auftrags- sowie die Konzessionsvergabe. Zudem verfolgt das IPI einen bieterbezogenen Ansatz.[366]

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[357] I. Langenbach, *in* Burgi/Dreher (Hrsg.), Beck'scher Vergaberechtskommentar, Bd. 2, 3. Aufl., München 2019, § 55 SektVO, Rn. 10.

[358] G. Zillmann, Waren und Dienstleistungen aus Drittstaaten im Vergabeverfahren – Die Bekanntmachung des Bundesministeriums für Wirtschaft und Arbeit zur Drittlandsklausel nach § 12 VgV, *NZBau* 2003, 480 (481).

[359] G. Zillmann, Waren und Dienstleistungen aus Drittstaaten im Vergabeverfahren – Die Bekanntmachung des Bundesministeriums für Wirtschaft und Arbeit zur Drittlandsklausel nach § 12 VgV, *NZBau* 2003, 480 (481)

[360] O. Dörr, *in* Burgi/Dreher/Opitz (Hrsg.), Beck'scher Vergaberechtskommentar, Bd. 1, 4. Aufl., München 2022, Einl., Rn. 219; D.-H. Sturhahn, *in* Pünder/Schellenberg (Hrsg.), Vergaberecht, 3. Aufl., Baden-Baden 2019, § 55 SektVO, Rn. 1;

[361] So H. Summa, *in* Heiermann/Zeiss/Summa (Hrsg.), jurisPK Vergaberecht, 6. Aufl., Saarbrücken 2022, § 55 SektVO, Rn. 2.

[362] OLG Brandenburg 2.6.2020 – 19 Verg 1/20, NZBau 2021, 60; dazu H. Röwekamp/S. Blätgen, Die „Drittlandsklausel" der Sektorenverordnung, *NZBau* 2021, 16 (16 ff.).

[363] S. O. Dörr, *in* Burgi/Dreher/Opitz (Hrsg.), Beck'scher Vergaberechtskommentar, Bd. 1, 4. Aufl., München 2022, Einl., Rn. 219.

[364] Verordnung (EU) 2022/1031 des Europäischen Parlaments und des Rates vom 23. Juni 2022 über den Zugang von Wirtschaftsteilnehmern, Waren und Dienstleistungen aus Drittländern zum Unionsmarkt für öffentliche Aufträge und Konzessionen und über die Verfahren zur Unterstützung von Verhandlungen über den Zugang von Wirtschaftsteilnehmern, Waren und Dienstleistungen aus der Union zu den Märkten für öffentliche Aufträge und Konzessionen von Drittländern (Instrument betreffend das internationale Beschaffungswesen — IPI), ABl. 2022 L 173, 1.

[365] A. Neun/O. Otting, Die Entwicklung des europäischen Vergaberechts in den Jahren 2021/2022, EuZW 2022, 837 (837).

[366] Vgl. A. Neun/O. Otting, Die Entwicklung des europäischen Vergaberechts in den Jahren 2021/2022, EuZW 2022, 837 (837).

So kann die Kommission Auftraggeber im Rahmen einer sog. IPI-Maßnahme gem. Art. 6 Abs. 6 IPI dazu verpflichten, bei Angeboten von drittstaatlichen Bietern eine Bewertungsanpassung vorzunehmen oder das Angebot gänzlich von Vergabeverfahren auszuschließen. Voraussetzung ist jedoch u.a., dass mit dem betreffenden Drittstaat keine Vereinbarungen bezüglich des Marktzugangs im Bereich der öffentlichen Aufträge und Konzessionen bestehen.[367]

Sowohl die Drittlandsklausel als auch das IPI zielen auf die Öffnung drittstaatlicher Vergabemärkte ab, nicht jedoch auf die Beseitigung von durch drittstaatliche Subventionen verursachte Binnenmarktverzerrungen. Demgemäß enthält das IPI auch keine gegen drittstaatliche Subventionen gerichteten Instrumente bereit. Auch im nationalen Vergaberecht findet sich keine entsprechende Bestimmung. So sind zwar „ungewöhnlich niedrige Angebote" auf Grundlage von § 54 Abs. 4 SektVO bzw. § 60 Abs. 4 der Vergabeverordnung (VgV), aber auch § 33 Abs. 3 der Vergabeverordnung Verteidigung und Sicherheit (VSVgV) grundsätzlich von einem Vergabeverfahren auszuschließen, wenn diese auf einer rechtswidrigen Beihilfe beruhen.[368] Die genannten Regelungen stellen jedoch auf den Beihilfenbegriff des Art. 107 Abs. 1 AEUV ab,[369] so dass ein Vorgehen gegen drittstaatliche Subventionen auf dieser Grundlage ebenfalls nicht möglich ist. Da jedoch auch drittstaatliche Bieter, die im Rahmen ihrer Angebotslegung Subventionen erhalten haben, den Binnenmarkt verfälschen können, ist ein solches Instrument zum Schutz des Binnenmarktes erforderlich. Demgemäß ist die Einführung eines solchen vergaberechtlichen Instruments durch die Drittstaatensubventionsverordnung[370] aus wettbewerblicher Sicht zu begrüßen. Die Kommission kann in diesem Rahmen unter bestimmten Voraussetzungen Positiv- oder Verpflichtungsbeschlüsse gegenüber den drittstaatlichen Bietern sowie Beschlüsse zur Untersagung der Zuschlagserteilung an den betreffenden drittstaatlichen Bieter gegenüber den Auftraggebern erlassen.

Auf etwaige Nachprüfungsverfahren dürfte das vergaberechtliche Instrument allenfalls geringfügige Auswirkungen zeitigen, da das Instrument insbesondere den Auftraggebern und Bietern bestimmte Verhaltenspflichten auferlegt.

[367] S. Erwg. 10 IPI.

[368] Zu § 60 VgV U.-D. Pape, *in* Pünder/Schellenberg (Hrsg.), 3. Aufl., Baden-Baden 2019, § 60 VgV, Rn. 21.

[369] Zu § 60 Abs. 4 VgV I. Lausen, *in* Burgi/Dreher (Hrsg.), Beck'scher Vergaberechtskommentar, 3. Aufl., München 2019, § 60 VgV, Rn. 33; zu § 54 Abs. 4 SektVO M. Steck, *in* Eschenbruch/Opitz/Röwekamp (Hrsg.), SektVO, 2. Aufl., München 2019, § 54 SektVO, Rn. 37; § 33 Abs. 3 VSVgV verweist bereits in seinem Wortlaut ausdrücklich auf Art. 107 AEUV.

[370] Verordnung des Europäischen Parlaments und des Rates über den Binnenmarkt verzerrende drittstaatliche Subventionen, 2021/0114 (COD) v. 16.11.2022, <data.consilium.europa.eu/doc/document/PE-46-2022-INIT/de/pdf>, zuletzt abgerufen am 6.12.2022.

Gleichwohl dürften die Bestimmungen der Drittstaatensubventionsverordnung zum vergaberechtlichen Instrument aufgrund ihrer wettbewerblichen Relevanz auch drittschützende Wirkung entfalten, so dass deren Einhaltung sowohl durch den betroffenen Bieter als auch durch dessen Konkurrenten vor den Vergabekammern und -senaten eingefordert werden kann, sofern vorab eine entsprechende Rüge an den Auftraggeber ergangen ist.

Frage 13

Durch den breiten Ansatz, der mit dem Kommissionsvorschlag verbunden ist, wird der fundamentalen Bedeutung der Beihilfenkontrolle innerhalb der wettbewerblichen Ordnung des Binnenmarkts Rechnung getragen.[371] Zur Schließung der auf Ebene des Beihilfenrechts verorteten Regelungslücke wäre allerdings die Schaffung eines einheitlichen Instruments vorzugswürdig gewesen.[372] Dies liefe letztlich auf eine Reduzierung des gewählten Ansatzes sowie auf eine *ex officio*-Prüfung hinaus, bei der die Kommission in Fällen ausländischer Subventionen ein Interventionsrecht erhält. In Analogie zum Beihilfenrecht wäre dieses um eine Anzeigepflicht zu ergänzen. Im Übrigen bliebe das bestehende Instrumentarium unverändert. Das Bundeskartellamt hat seinerseits in dem Fall *Vossloh* deutlich gemacht, dass es bereits jetzt eine Berücksichtigung von Subventionen in der fusionskontrollrechtlichen Praxis für möglich erachtet.[373]

Die Aufteilung in drei unterschiedliche Verfahrensarten geht mit einer nicht nur unerheblichen Mehrbelastung von Unternehmen, aber auch der öffentlichen Verwaltungsstellen einher. Ausgehend von dem Subventionstatbestand und den Rechtsfolgen innerhalb des europäischen Beihilfenrechts, erscheint die Herstellung eines echten „level playing field" zudem fraglich. Hierfür wäre eine strenge Orientierung am Beihilfenbegriff und der dort geltenden Rückzahlungspflicht erforderlich gewesen. Stattdessen wurde mit der Voraussetzung einer binnenmarktverzerrenden Subvention eine neue Schadenstheorie begründet.[374] Auch bergen die möglichen Abhilfemaßnahme ein nicht nur unerhebliches

[371] Dies herausstellend J. Kühling/T. Weck/P. Reinhold, Third-Country State Aid Regulation: The European Debate on Foreign Subsidies, *in* Chi/Bungenberg/Bjorklund (Hrsg.), Asian Yearbook of International Economic Law 2022, Cham 2022, S. 149 (149 ff.).

[372] So der Vorschlag der Monopolkommission; dazu J. Kühling/P. Reinhold/T. Weck, State Capitalism and Level Playing Field: The Need for a 'Third-Country State Aid Instrument' to Restore a Level Playing Field in the EU's Internal Market, *EStAL* 2020, 403 (414 ff.).

[373] BKartA 27.4.2020 – B4-115/19 – Fallbericht „Bundeskartellamt gibt den Erwerb der Vossloh Locomotives GmbH durch die die chinesische CRRC Zhuzhou Locomotives Co. nach umfangreichen Ermittlungen frei (Entscheidung v. 27.4.2020)".

[374] Monopolkommission, XXIII. Hauptgutachten: Wettbewerb 2020, Rn. 888; J. Kühling/P. Reinhold/T. Weck, State Capitalism and Level Playing Field: The Need for a 'Third-Country State Aid Instrument' to Restore a Level Playing Field in the EU's Internal Market, *EStAL* 2020, 403 (414).

Missbrauchspotenzial.[375] Es wird hier in der Zukunft entscheidend darauf ankommen, wie die Europäische Kommission und die Mitgliedstaaten von ihren neuen Kompetenzen Gebrauch machen werden.

Frage 14

Am 11.1.2021 hat der Deutsche Bundestag das sog. Lieferkettensorgfaltspflichtengesetz (LkSG)[376] beschlossen, das am 16.7.2021 verkündet wurde und am 1.1.2023 in Kraft tritt. Weitere Änderungen in diesem Zusammenhang betreffen § 124 Abs. 2 GWB für den Ausschluss von öffentlichen Aufträgen, § 2 Abs. 1 Wettbewerbsregistergesetz (WRegG) für eine Eintragung bei einem Bußgeld von mindestens 175.000,00 € sowie § 106 Abs. 1 Betriebsverfassungsgesetz (BetrVG), wodurch im Hinblick auf den Betriebsrat eine entsprechende Unterrichtungspflicht begründet wurde.[377]

a.

Der personelle Anwendungsbereich des deutschen Gesetzes ergibt sich aus § 1 LkSG.[378] Danach gilt das Gesetz zunächst direkt nur für Unternehmen[379] – unabhängig von ihrer Rechtsform – mit mindestens 3.000 Mitarbeitern, ab 2024 auch für Unternehmen mit mindestens 1.000 Mitarbeitern (§ 1 Abs. 1 S. 1 u. 3 LkSG). Darüber hinaus ist jedoch davon auszugehen, dass auch kleinere Unternehmen von dem Gesetz betroffen sein werden, indem Sorgfaltspflichten des LkSG zu einem Gegenstand gegenseitiger Verträge gemacht werden (trickle-down-Effekt).[380]

Die erfassten Unternehmen müssen ihre Hauptverwaltung, Hauptniederlassung, ihren Verwaltungssitz oder ihren satzungsmäßigen Sitz im Inland haben (§ 1 Abs. 1 S. 1 Nr. 1 LkSG). Ausländische Unternehmen werden allerdings dann einbezogen, wenn sie eine Zweigniederlassung in Deutschland betreiben und dort

[375] Monopolkommission, XXIII. Hauptgutachten: Wettbewerb 2020, Rn. 889 ff.; J. Kühling/P. Reinhold/T. Weck, State Capitalism and Level Playing Field: The Need for a 'Third-Country State Aid Instrument' to Restore a Level Playing Field in the EU's Internal Market, *EStAL* 2020, 403 (414).

[376] Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz – LkSG), BGBl. 2021, I-2959.

[377] Dazu L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 25 ff.

[378] Zur Entstehung und der dabei u.a. vom Bundesrat gegenüber der Reichweite vorgebrachten Kritik C. Johann/S. Wildfeuer, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 1 LkSG, Rn. 1 ff.

[379] Einen Unternehmensbegriff enthält das Gesetz nicht, vgl. dazu C. Johann/S. Wildfeuer, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 1 LkSG, Rn. 6 ff.

[380] E. Wagner/M. Ruttloff, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, *NJW* 2021, 2145 (2145); L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 29.

3.000 bzw. 1.000 Mitarbeiter beschäftigen (§ 1 Abs. 1 S. 2 LkSG). Bei verbundenen Unternehmen werden die Mitarbeiter aller konzernangehörigen Gesellschaften bei der Berechnung berücksichtigt, sofern es um die Berechnung der Arbeitnehmer der Obergesellschaft geht (§ 1 Abs. 3 LkSG). Eine wechselseitige Zurechnung zwischen Ober- und Tochtergesellschaft ist nicht vorgesehen.[381]

b.

Für die Unternehmen im Anwendungsbereich des LkSG ergeben sich eine Vielzahl von Verpflichtungen bei der internen Unternehmensstrukturierung, allgemeinen Governance sowie der Abwicklung ihrer geschäftlichen Tätigkeit. In diesem Zusammenhang bildet § 3 LkSG den Ausgangspunkt einer Geltung von umfassenden Sorgfaltspflichten, die wiederum in den §§ 4 bis 10 LkSG näher ausgestaltet sind.[382] § 3 Abs. 1 S. 2 LkSG zählt diese Sorgfaltspflichten in abschließender Weise auf.[383] Dies sind:

- die Einrichtung eines Risikomanagements (§§ 3 Abs. 1 Nr. 1, 4 Abs. 1 LkSG),
- die Festlegung einer betriebsinternen Zuständigkeit (§ 3 Abs. 1 Nr. 2, 4 Abs. 3 LkSG),
- die Durchführung regelmäßiger Risikoanalysen (§§ 3 Abs. 1 Nr. 3, 5 LkSG),
- die Abgabe einer Grundsatzerklärung (§§ 3 Abs. 1 Nr. 4, 6 Abs. 2 LkSG),
- die Verankerung von Präventivmaßnahmen im eigenen Geschäftsbereich (§§ 3 Abs. 1 Nr. 5, 6 Abs. 1 u. 3 LkSG) und gegenüber unmittelbaren Zulieferern (§ 6 Abs. 4 LkSG),
- das Ergreifen von Abhilfemaßnahmen (§§ 3 Abs. 1 Nr. 6, 7 Abs. 1 bis 3 LkSG)
- die Einrichtung eines Beschwerdeverfahrens (§§ 3 Abs. 1 Nr. 7, 8 LkSG),
- die Umsetzung von Sorgfaltspflichten in Bezug auf Risiken mittelbarer Zulieferer (§§ 3 Abs. 1 Nr. 8, 9 LkSG), und
- die Dokumentation und die Berichterstattung (§§ 3 Abs. 1 Nr. 9, 10 Abs. 1 u. 2 LkSG).

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[381] M. Passarge, Zum Anwendungsbereich des Lieferkettensorgfaltspflichtengesetzes auf Konzerngesellschaften, *CB* 2021, 332 (335).

[382] Zusammen bilden diese Vorschriften das „Herzstück" des LkSG, vgl. R. Sangi, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, 2022, Baden-Baden, § 3 LkSG, Rn. 1.

[383] R. Sangi, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 3 LkSG, Rn. 10.

Durch § 3 LkSG werden letztlich Bemühenspflichten, also keine Erfolgspflicht oder Garantiehaftung begründet.[384] Zudem ist für Geltung danach zu unterscheiden, ob es sich um Risiken innerhalb des „eigenen Geschäftsbereichs", eines „unmittelbaren Zulieferers" oder eines „mittelbaren Zulieferers" handelt.[385] Für die konkrete Art der Erfüllung gilt der Maßstab der „Angemessenheit" („in angemessener Weise"). Hierzu listet Art. 3 Abs. 2 LkSG einzelne Kriterien, nach denen sich die Angemessenheit der Umsetzung einer Sorgfaltspflicht bestimmen soll und die auch für die Art der Risikoanalyse bestimmend sind.[386] Dazu gehört die Art und der Umfang der Geschäftstätigkeit (Nr. 1 und Nr. 2) sowie die zur erwartende Schwere (Nr. 3) und der eigene Verursachungsbeitrag (Nr. 4). Das Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA) hat eine Handreichung zur Risikoanalyse im Kontext des LkSG herausgegeben, die eine Umsetzung dieser Vielzahl von auch strukturellen Anpassungen erleichtern soll.[387]

Sämtliche Verpflichtungen knüpfen an sog. „geschützten Rechtspositionen" auf Grundlage der in der Anlage zum LkSG aufgeführten internationalen Übereinkommen (§ 2 Abs. 1 LkSG) sowie an die in § 2 Abs. 2, 3 und 4 LkSG benannten Verbotstatbestände.[388] Hierbei ergibt sich vor allem im Hinblick auf die über Abs. 1 einbezogenen völkerrechtlichen Rechtspositionen eine enorme Unsicherheit, da weder eindeutig ist, auf welche Normen hierbei genau Bezug genommen wird, noch, welche genaue Reichweite der völkerrechtlichen Bestimmung konkret anhaftet.[389]

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384 D. Leuering/D. Rubner, Lieferkettensorgfaltspflichtengesetz, *NJW-Spezial* 2021, 399 (399); E. Wagner/M. Ruttloff, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, *NJW 2021*, 2145 (2145 f.); L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 86. Letztere weisen allerdings darauf hin, dass innerhalb des eigenen Geschäftsbereichs Abhilfemaßnahmen zur Beendigung von Verstößen führen müssen, sodass diesbezüglich letztlich doch von einer Erfolgspflicht auszugehen ist.

385 D. Leuering/D. Rubner, Lieferkettensorgfaltspflichtengesetz, *NJW-Spezial* 2021, 399 (399); L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 79.

386 L. Harings/M. Jürgens, Das Lieferkettensorgfaltspflichtengesetz, Köln 2022, S. 74 ff.; R. Sangi, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 3 LkSG, Rn. 12 ff.

387 Bundesamt für Wirtschaft und Ausfuhrkontrolle, Risiken ermitteln, gewichten und priorisieren, Handreichung zur Umsetzung einer Risikoanalyse nach den Vorgaben des Lieferkettensorgfaltspflichtengesetzes, 2022, <www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_risikoanalyse.pdf;jsessionid=CD439D278345DA90506A87EF04495666.1_cid381?__blob=publicationFile&v=6>, zuletzt abgerufen am 6.12.2022.

388 Umfassend zu den einzelnen Rechtspositionen sowie ihrer Reichweite L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 39 ff., sowie die Kommentierungen zu § 2 LkSG *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022; s.a. den Überblick bei E. Wagner/M. Ruttloff, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, *NJW 2021*, 2145 (2146 f.).

389 L. Harings/C. Keim, Menschenrechtliche Sorgfaltspflichten in internationalen Lieferketten, *AW-Prax* 2021, 21 (21 f.); E. Wagner/M. Ruttloff, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, *NJW* 2021, 2145 (2146 f.); C. Johann, in: Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 2 LkSG, Rn. 2.

c.

Die Lieferkette im Rahmen des LkSG steht gemäß § 2 Abs. 5 LkSG für den Gesamtbereich der Produkte und Dienstleistungen eines Unternehmens und umfasst alle Schritte im In- und Ausland, die zur Herstellung der Produkte und zur Erbringung der Dienstleistungen erforderlich sind, angefangen von der Gewinnung der Rohstoffe bis zur Lieferung an den Endkunden. Danach ließe sich zwar sowohl ein Einbezug von vor- als auch nachgelagerten Wertschöpfungsstufen ableiten. Durch die weitergehende Konkretisierung in § 2 Abs. 5 LkSG wird deutlich, dass sich das LkSG nicht nur auf den eigenen Geschäftsbereich eines Unternehmens (Nr. 1 u. Abs. 6), sondern auch auf seine unmittelbaren (Nr. 2 u. Abs. 7) wie mittelbaren (Nr. 3 u. Abs. 8) Zulieferer bezieht. Umstritten ist in diesem Zusammenhang, ob reine Hilfslieferungen aus der Lieferkette auszuschließen sind.[390] Zum eigenen Geschäftsbereich zählt das Gesetz bei verbundenen Unternehmen auch die konzernangehörigen Gesellschaften, soweit ein bestimmender Einfluss ausgeübt wird (§ 2 Abs. 6 S. 3 LkSG), was dann auch zu einer Erstreckung auf weitere Zulieferer führt.[391]

Entlang dieser Einflusssphären finden die Sorgfaltspflichten des LkSG Anwendung. So besteht das Erfordernis einer Risikoanalyse bspw. gemäß § 5 Abs. 1 LkSG auch im Hinblick auf unmittelbare Zulieferer, ebenso die Pflicht zur Ergreifung von Präventiv- und Abhilfemaßnahmen (§§ 6 Abs. 4, 7 Abs. 1 u. 2 LKSG). Für mittelbare Zulieferer bedarf es jedenfalls eines Zugangs zum Beschwerdeverfahren (§ 9 Abs. 1 i.V.m. § 8 LkSG). Im Übrigen bestehen Sorgfaltspflichten erst in Folge von tatsächlichen Anhaltspunkten, die eine Verletzung einer menschenrechtsbezogenen oder einer umweltbezogenen Pflicht möglich erscheinen lassen (sog. „substantiierte Kenntnis") gemäß § 9 Abs. 2 und 3 LkSG.[392]

d.

Grundsätzlich scheint das LkSG allgemein über einen territorial begrenzten Anwendungsbereich zu verfügen. Die genaue Reichweite des LkSG ist jedoch

[390] Dies sind solche, die für die Produktion bzw. das Dienstleistungsangebot nicht notwendig sind. Dazu L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 58 ff.; K. Gehne/M. Gabriel, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 2 LkSG, Rn. 159 f.

[391] Zum bestimmenden Einfluss etwa L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 63 ff.; K. Gehne/M. Gabriel, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 2 LkSG, Rn. 172 f.

[392] Näher zur erforderlichen Kenntnis bzw. Kenntnisnahme L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 68 ff.; K. Gehne/F. Humbert/T. Philippi, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 9 LkSG, Rn. 9 ff.

derzeit noch nicht abschließend geklärt. So wird zwar in § 1 LkSG einerseits ein Inlandsbezug vorausgesetzt. Andererseits ist bspw. streitig, ob ein bestimmender Einfluss eines Unternehmens auf eine Tochtergesellschaft im Ausland ausreichend ist, um dieses in den Anwendungsbereich des LkSG einzubeziehen.[393] Hierdurch wäre dann letztlich doch eine gewisse Extraterritorialität gegeben. Daneben kann auch die Erstreckung des LkSG auf unmittelbare und mittelbare Zulieferer in Form einer extraterritorialen Wirkung des Gesetzes gedeutet werden.[394]

e.

Das LkSG schafft keine eigenständigen neuen Rechtsbehelfe, sondern knüpft an den bestehenden Rechtsweg an. Danach ist wegen etwaigen zivilrechtlichen Ansprüchen der Weg zu den Zivilgerichten eröffnet, ggf. auch dann, wenn der Erfolgsort im Ausland liegt.[395] Für öffentlich-rechtliche Maßnahmen auf Grundlage der §§ 12 bis 21 LkSG steht dagegen der Verwaltungsrechtsweg offen.

f.

Eine zivilrechtliche Haftung wird durch das LkSG grds. nicht begründet (§ 3 Abs. 3 LkSG). Eine „unabhängig von diesem Gesetz begründete Haftung" bleibt hiervon jedoch unberührt (§ 3 Abs. 3 S. 2 LkSG). Insgesamt ist noch streitig, wie weit die hierdurch in Bezug genommene sonstige zivilrechtliche Haftung reichen soll.[396] Eine Haftung nach dem Recht des Ortes, an dem ein Schaden eingetreten ist, ist hiervon jedoch unabhängig.[397] Zudem enthält das LkSG in § 11 eine prozessuale Erleichterung in Form einer Prozessstandschaft, wonach bei einer Verletzung der in § 2 Abs. 1 LkSG angesprochenen Rechte Gewerkschaften oder Nichtregierungsorganisationen zu einer Durchsetzung ermächtigt werden können. Die Rechtsposition muss dabei allerdings auch „überragend wichtig" sein, ohne dass das Gesetz näher definiert, auf welche der in § 2 Abs. 1 LkSG genannten Positionen dies zutreffen soll.[398]

[393] L. Harings/M. Jürgens, Das Lieferkettensorgfaltspflichtengesetz, Köln 2022, S. 64 f.

[394] So etwa v. Thalhammer, Das umstrittene Lieferkettensorgfaltspflichtengesetz – Ein juristischer Blick auf Kritik aus Zivilgesellschaft, Wirtschaft und Politik, *DÖV* 2021, 825 (827 f.).

[395] L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 160.

[396] Dazu etwa R. Sangi, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 3 LkSG, Rn. 33 ff.

[397] Dazu L. Harings/M. Jürgens, *Das Lieferkettensorgfaltspflichtengesetz*, Köln 2022, S. 160.

[398] S. Wildfeuer, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 11 LkSG, Rn. 5 f.

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Abgesehen von den ökonomischen Implikationen[399] lassen sich zum jetzigen Zeitpunkt als die größten Herausforderungen des LkSG – gleiches gilt auch im Hinblick auf den derzeitigen Richtlinienvorschlag auf EU-Ebene[400] – die enorme Reichweite und der Umfang der Sorgfaltspflichten sowie die durch zahlreiche auslegungsbedürftige Begriffe hervorgerufene Rechtsunsicherheit auf Unternehmensseite benennen. So ist bspw. die Festlegung des konkreten Ausmaßes der Sorgfaltspflichten durch den in § 3 Abs. 2 LkSG enthaltenen Angemessenheitstest kaum mit dem verfassungsrechtlichen Bestimmtheitsgrundsatz in Einklang zu bringen.[401] § 20 LkSG formuliert allgemein gegenüber dem BAFA einen Konkretisierungsauftrag. Auch die Gerichte sind zu einer weiteren Konkretisierung berufen. Angesichts der Ausweitung von Pflichtenpositionen und der Einführung einer zivilrechtlichen Haftung durch den EU-Vorschlag steht zu befürchten, dass gerade kleinere und mittlere Unternehmen Schwierigkeiten haben werden, einer derart umfassenden Lieferkettengesetzgebung gerecht zu werden.[402] Um hier keinen im Widerspruch zu Art. 101 ff. AEUV stehenden Vermachtungstendenzen Vorschub zu leisten, sollte darauf geachtet werden, dass der persönliche Anwendungsbereich sich an den Einfluss- und Handlungsmöglichkeiten der Unternehmen orientiert.

[399] Dazu etwa G. Felbermayr/C. Herrmann/R. J. Langhammer/A. Sandkamp/P. Trapp, Ökonomische Bewertung eines Lieferkettengesetzes, Kieler Beiträge zur Wirtschaftspolitik Nr. 42, Juli 2022.

[400] Kommission, Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über die Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit und zur Änderung der Richtlinie (EU), COM(2022)71 final v. 23.2.2022; dazu bspw. M. Nietsch/M. Wiedmann, Der Vorschlag zu einer europäischen Sorgfaltspflichten-Richtlinie im Unternehmensbereich (Corporate Sustainability Due Diligence Directive), *CCZ* 2022, 125 (125 ff.).

[401] E. Wagner/M. Ruttloff, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, *NJW 2021*, 2145 (2146).

[402] M. Nietsch/M. Wiedmann, Der Vorschlag zu einer europäischen Sorgfaltspflichten-Richtlinie im Unternehmensbereich (Corporate Sustainability Due Diligence Directive), *CCZ* 2022, 125 (136 f.). M.w.N. zur Frage der zivilrechtlichen Haftung auch R. Sangi, *in* Johann/Sangi (Hrsg.), Lieferkettensorgfaltspflichtengesetz, Baden-Baden 2022, § 3 LkSG, Rn. 40 ff.

Endnotes

i § 1 GWB
Verbot wettbewerbsbeschränkender Vereinbarungen

Vereinbarungen zwischen Unternehmen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen, die eine Verhinderung, Einschränkung oder Verfälschung des Wettbewerbs bezwecken oder bewirken, sind verboten.

ii § 2 GWB
Freigestellte Vereinbarungen

(1) Vom Verbot des § 1 freigestellt sind Vereinbarungen zwischen Unternehmen, Beschlüsse von Unternehmensvereinigungen oder aufeinander abgestimmte Verhaltensweisen, die unter angemessener Beteiligung der Verbraucher an dem entstehenden Gewinn zur Verbesserung der Warenerzeugung oder -verteilung oder zur Förderung des technischen oder wirtschaftlichen Fortschritts beitragen, ohne dass den beteiligten Unternehmen

1. Beschränkungen auferlegt werden, die für die Verwirklichung dieser Ziele nicht unerlässlich sind, oder
2. Möglichkeiten eröffnet werden, für einen wesentlichen Teil der betreffenden Waren den Wettbewerb auszuschalten.

(2) Bei der Anwendung von Absatz 1 gelten die Verordnungen des Rates oder der Europäischen Kommission über die Anwendung von Artikel 101 Absatz 3 des Vertrages über die Arbeitsweise der Europäischen Union auf bestimmte Gruppen von Vereinbarungen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen (Gruppenfreistellungsverordnungen) entsprechend. Dies gilt auch, soweit die dort genannten Vereinbarungen, Beschlüsse und Verhaltensweisen nicht geeignet sind, den Handel zwischen den Mitgliedstaaten der Europäischen Union zu beeinträchtigen.

iii § 42 GWB
Ministererlaubnis

(1) Die Bundesministerin oder der Bundesminister für Wirtschaft und Energie erteilt auf Antrag die Erlaubnis zu einem vom Bundeskartellamt untersagten Zusammenschluss, wenn im Einzelfall die Wettbewerbsbeschränkung von gesamtwirtschaftlichen Vorteilen des Zusammenschlusses aufgewogen wird oder der Zusammenschluss durch ein überragendes Interesse der Allgemeinheit gerechtfertigt ist. Hierbei ist auch die Wettbewerbsfähigkeit der beteiligten Unternehmen auf Märkten außerhalb

des Geltungsbereichs dieses Gesetzes zu berücksichtigen. Die Erlaubnis darf nur erteilt werden, wenn durch das Ausmaß der Wettbewerbsbeschränkung die marktwirtschaftliche Ordnung nicht gefährdet wird. Weicht die Entscheidung vom Votum der Stellungnahme ab, die die Monopolkommission nach Absatz 5 Satz 1 erstellt hat, ist dies in der Verfügung gesondert zu begründen.

(2) Die Erlaubnis kann mit Bedingungen und Auflagen verbunden werden. § 40 Absatz 3 Satz 2 und Absatz 3a gilt entsprechend.

(3) Der Antrag ist innerhalb einer Frist von einem Monat seit Zustellung der Untersagung oder einer Auflösungsanordnung nach § 41 Absatz 3 Satz 1 ohne vorherige Untersagung beim Bundesministerium für Wirtschaft und Energie schriftlich zu stellen. Wird die Untersagung angefochten, beginnt die Frist in dem Zeitpunkt, in dem die Untersagung unanfechtbar wird. Wird die Auflösungsanordnung nach § 41 Absatz 3 Satz 1 angefochten, beginnt die Frist zu dem Zeitpunkt, zu dem die Auflösungsanordnung unanfechtbar wird.

(4) Die Bundesministerin oder der Bundesminister für Wirtschaft und Energie soll über den Antrag innerhalb von vier Monaten entscheiden. Wird die Entscheidung nicht innerhalb dieser Frist getroffen, teilt das Bundesministerium für Wirtschaft und Energie die Gründe hierfür dem Deutschen Bundestag unverzüglich schriftlich mit. Wird die Verfügung den antragstellenden Unternehmen nicht innerhalb von sechs Monaten nach Eingang des vollständigen Antrags zugestellt, gilt der Antrag auf die Ministererlaubnis als abgelehnt. Das Bundesministerium für Wirtschaft und Energie kann die Frist nach Satz 3 auf Antrag der antragstellenden Unternehmen um bis zu zwei Monate verlängern. In diesem Fall ist Satz 3 nicht anzuwenden und die Verfügung ist den antragstellenden Unternehmen innerhalb der Frist nach Satz 4 zuzustellen.

(5) Vor der Entscheidung nach Absatz 4 Satz 1 ist eine Stellungnahme der Monopolkommission einzuholen und den obersten Landesbehörden, in deren Gebiet die beteiligten Unternehmen ihren Sitz haben, Gelegenheit zur Stellungnahme zu geben. Im Fall eines Antrags auf Erlaubnis eines untersagten Zusammenschlusses im Bereich der bundesweiten Verbreitung von Fernsehprogrammen durch private Veranstalter ist zusätzlich eine Stellungnahme der Kommission zur Ermittlung der Konzentration im Medienbereich einzuholen. Die Monopolkommission soll ihre Stellungnahme innerhalb von zwei Monaten nach Aufforderung durch das Bundesministerium für Wirtschaft und Energie abgeben.

(6) Das Bundesministerium für Wirtschaft und Energie erlässt Leitlinien über die Durchführung des Verfahrens.

GREECE

George Karydis, Maria Meng-Papantoni[1]

Part I: COMPETITION

Introduction

EU competition policy faces new challenges. On the one hand, competition rules should be applied by taking into account other EU policies, such as environmental, industrial or commercial policy. On the other hand, the new digital environment imposes "ex ante" regulation on digital markets that will complement the "ex post" control of specific anti-competitive practices.

In this context, the first part of the present report is structured in six chapters which correspond to the questions posed by the general rapporteurs. The first two chapters attempt to highlight the position of the Hellenic Competition Commission (HCC) on these new challenges, by answering the first six (6) related questions. The third chapter answers the seventh question, by presenting the position of the Hellenic authorities regarding the final text of the DMA. The fourth and fifth chapters present the importance of Industrial Policy objectives when applying the State Aid rules and the contribution of the Hellenic courts to the uniform and effective application of these rules (questions 8 and 9). Finally, chapter 6 records the effect that the new trade policy measures of the Union may have on the application of competition rules by the HCC (question 10).

Chapter 1: The Hellenic Competition Commission's perception of "Green Competition"

The HCC recognizes that, in the face of 'climate emergency', an accelerated transition to sustainable development becomes vital, not only as a matter of sustainability,

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but also as means of acquiring a competitive advantage for undertakings.[2]

1.1. Assessment of sustainability objectives in the review of anti-competitive agreements (Question 1)

In reviewing anticompetitive agreements, the HCC is willing to consider sustainability benefits to the wider society under Art 101(3) TFEU and the relevant provision of Art 1(3) of Hellenic Law 3959/2011. This is evident by its Technical Report on Sustainability and Competition[3] which focuses on concepts and tools drawn from environmental economics to quantify the broader social benefits, as well as benefits for future generations brought by environmental sustainability, in the context of competitive assessments. Also, it is evident by the Sandbox for Sustainability and Competition which provides a forum where firms can experiment with new/innovative business models and proposals that contribute significantly to sustainable development goals, whilst the effects of business proposals on both competition and sustainability are assessed by the HCC in line with the broader public interest goals for sustainable development. The HCC's note on Environmental Considerations in Competition Enforcement and its Staff Discussion Paper provides further evidence of the HCC's willingness to consider sustainability benefits to the wider society, while a recent legislative provision/amendment[4] explicitly states that reasons of public interest, such as environmental protection, could exclude the application of EU and national competition rules.

On the matter of environmental considerations in competition enforcement, within the ECN, the HCC supports a broad definition of the concept of 'consumer' (user) so that gains for some individuals can be balanced against losses for other individuals in the specific category of "consumers" and it also emphasizes the need for a dynamic understanding of consumers. Specifically, the HCC supports the view that a static understanding of consumers which focuses on the effects of an agreement on current consumers of the relevant market, without considering long-term effects, risks missing the environmental damage that may adversely affect such consumers in the future. In the same vein, a static approach underestimates the long-term collective benefits of sustainability agreements, which may be partly apportioned to the users of the relevant product but may also benefit the public overall.

[2] HCC, Staff Discussion Paper On Sustainability Issues and Competition Law, <https/www.epant.gr/files/2020/Staff_Discussion_paper.pdf>, par. 109.

[3] HCC and AMC, Technical Report on Sustainability and Competition, <https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf>.

[4] Art 39 of Hellenic Law 4886/2022.

Furthermore, the HCC's Staff Discussion Paper has analysed each one of the cumulative conditions under Art 101(3) TFEU in the context of sustainability agreements. In considering the concept of "fair share" for users, it has suggested that current, future, direct or indirect users can be taken into account. 'Fair share' does not necessarily mean full compensation of the loss that results from the agreement, since if the benefits of the sustainability agreement for the entire society outweigh the loss for direct and indirect consumers, then these consumers can be assumed to receive a fair share of the benefits. Also, the concept of consumers should not be understood as referring only to present customers of the firms in question in the specific relevant market, but also to 'subsequent purchasers', i.e., future consumers.

The administrative practice of the HCC indicates that, even though there are no relevant decisions which refer to sustainability concerns in granting an exemption, past case law implies that it may consider broader public policy concerns. Specifically, in *Decision 457/V/2009* the HCC granted an exemption to the Public Company of Electricity (DEI) for a 15-year exclusive supply agreement with a lignite mine for the generation of electricity, among others, on the grounds that security of energy supply would benefit direct consumers. Also, in *Decision 627/2016* the HCC cleared with commitments the acquisition of Piraeus Port Authority SA by COSCO, among others, on the grounds that the net economic benefit would benefit the 'users' of the Hellenic port.

Overall, the HCC favours a wider approach than the Commission on the interpretation of Art 101(3) TFEU[5], stating that the advantages of sustainable development should not necessarily be located on the specific relevant market where the anti-competitive effects are found.

This expansive approach is consistent with the letter of a recent legislative provision[6], which expressly confers to the HCC's President the power to issue a no-enforcement action letter regarding the non-application of competition rules if there is a reason of public interest such as the achievement of sustainable development goals. This disposition allows the exemption (on a temporary basis) of anti-competitive practices that contribute to the protection of the environment,

[5] The Commission's approach is presented at A. Badea et al., 'Competition Policy in Support of Europe's Green Ambition', *Concurrences Competition Policy Brief*, 2021-01,September 2021,<https://awards.concurrences.com/IMG/pdf/kdak21001enn.en_1_.pdf?73625/9ca97e9ef4992ce50098e0e5134604780f40db87d765e13a0f8d09f67cc5780>: « … the assessment of the anticompetitive effects and benefits of a practice are made within the confines of each relevant market. Benefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same. This ensures that consumers are fully compensated for the harm suffered».

[6] Art 39 of Hellenic Law 4886/2022.

without explicitly requiring the fulfilment of all conditions relevant to the exemption. Nevertheless, this legislative provision cannot ensure legal certainty to the companies involved[7], and may also affect the uniform and effective application of EU law, especially if the expansive interpretation of Art 101(3) TFEU will not prevail.

Finally, the Hellenic courts have not yet considered sustainability arguments in competition law cases, but they would be competent to do so in the future, as environmental protection is a constitutional obligation of the State under Art 24 of the Hellenic Constitution.

1.2. Sustainability benefits in merger assessment (Question 2)

The HCC Staff Discussion Paper states that under the broad umbrella of 'economic progress', sustainability issues may be considered in the evaluation of mergers.[8] With regard to Hellenic merger control, the HCC has engaged with sustainability-related arguments in past merger cases, i.e. *WasteSyclo/TERNA Energy/PUBLIC POWER CORPORATION*[9], *INTERMPETON BUILDING METERIALS/ POLYECO*[10], *EP.AL.ME/MYTILINAIOS*[11] *and PPC RENEWABLE VOLTERRA*[12], but sustainability issues played only a minor role in the final decision.[13] The Staff Discussion Paper recommended though "that CAs should enforce competition law so as to (i) contribute to the attainment of sustainability aims, (ii) take into account possible externalities and their inter-generation effects, (iii) synchronize competition law and (iv) develop a "sustainability sandbox".[14] Nevertheless, the HCC has stated that, even though negative environmental externalities of a notified merger will seldom lead to the prohibition of a merger, they could potentially set an argument in favour of the provision of remedies.[15]

1.3. Tools to trade-off harm to competition and benefits to sustainability

[7] Art 39(4) of Hellenic Law 4886/2022 which stipulates that "the no-action letter is not binding on the HCC and the courts".

[8] HCC Staff Discussion Paper, pp. 39-40.

[9] Decision 577/VII/2013.

[10] Case n. 615/2015.

[11] Case n. 682/2019.

[12] Case n. 694/2019.

[13] HCC Staff Discussion Paper, pp. 41-45.

[14] HCC Staff Discussion paper, pp. 45-47.

[15] HCC Staff Discussion Paper, p. 40.

(Question 3)

Two important documents mention the tools that can be used to trade-off harm to competition and benefits to sustainability, i.e. the Technical Report on Sustainability and Competition and the Sustainability Sandbox. The Technical Report: (i) introduces the main concepts of welfare economics in the presence of externalities and presents the basic welfare economic analysis incorporating individuals' choice for environmental quality, (ii) discusses various methods to measure changes associated with reduced environmental sustainability under the concept of total economic value, which encompasses the overall welfare gains attributed to improvements in environmental quality.[16] In the Sandbox, the evaluation process takes into account the existing competition law framework together with a number of criteria and Key Performance Indicators[17], whilst it is indicated that in hard cases the balance will lead towards an outcome that benefits the wider public interest.[18]

Chapter 2: Review of Mergers and Industrial Policy Concerns – Approach of the HCC and other Hellenic Authorities

2.1. Position of the HCC and the Hellenic Government concerning the industrial policy dimension of the Siemens/Alstom case (Question 4)

In response to the Commission's prohibition of the *Siemens/Alstom* merger, the undertakings claimed that the merger would create a European champion of sufficient scale to counter China's State-owned CRRC and to assume a global leadership role to the benefit of EU industry.[19]

In the aftermath of the case, France and Germany issued a joint manifesto calling for the development of an EU industrial policy that would offer increased protectionism to key EU industrial players so as to ensure the continued competitiveness of the European industries and enable EU companies to better compete on the world stage.[20] However, the Commission is traditionally wary of

[16] *HCC Newsletter*, Issue 4, May 2021, <https://www.epant.gr/en/enimerosi/publications/newsletters/item/1412-issue-4.html>, p.7, and HCC and ACM, Technical Report, op. cit, p. 5

[17] Public Consultation: Proposal for The Creation Of A Sandbox For Sustainability And Competition In The Greek Market, <https://www.epant.gr/en/enimerosi/sandbox.html>, pp. 3-4 and 7.

[18] Ibid. p. 5

[19] D. Garrod, S. Casselbrant-Multala and L. Garritsen, "Foreign Investment: An Overview of EU And National Case Law", *Concurrences e-Competitions*, 2021, <https://www.akingump.com/a/web/113312/e-Competitions-Special-Issue-Foreign-Investment-4835-7933-3554.pdf>, p. 2.

[20] See 'A Franco-German Manifesto for A European Industrial Policy Fit For The 21st Century', 2019, <www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.

such initiatives (that would forge European champions), as it fears that they could squeeze competition in the single market.[21]

The HCC and the Hellenic Government have not directly expressed a position concerning the industrial policy dimension of the *Siemens/Alstom* case, whilst the HCC has not been confronted with similar (industrial policy) arguments in comparable transactions. Also, the participants in the Hellenic market did not intervene in the *Siemens/Alstom* case. Nevertheless, the HCC has acknowledged that the implementation of a broader competition policy is essential to increase Greece's competitiveness, to improve economic efficiency and the social and environmental sustainability of economic development as well as to promote innovation. Accordingly, the HCC has recognised that an enhanced competition policy in national markets is necessary and has a complementary role by also involving broader industrial policy strategies.[22]

It is notable that 19 EU governments (including the Hellenic Government) proposed updating the EU's antitrust rules in order to facilitate the emergence of EU industrial giants that would have the ability to face fierce competition from other large economies with proactive industrial strategies that implement protectionist trade measures (e.g. the US and China).[23] Specifically, they urged the EU to adopt a comprehensive and assertive industrial strategy that takes into account the specific needs of industries and regions so as to improve the competitiveness of the entire Union and facilitate the development of EU industrial leadership among the global value chains.[24]

2.2. HCC's reliance on competition-related considerations in merger assessment and a potential diversion towards the consideration of non-competition (industrial policy) issues (Question 5)

The Hellenic rules concerning the control of concentrations are laid down in Arts 5-10 of Hellenic Law 3959/2011 and mirror the provisions of the EUMR 139/2004, e.g. the assessment of notified mergers is based on the SIEC test (the substantive standard used in the EUMR) and therefore align Hellenic law with

pdf%3F__blob%3DpublicationFile%26v%3D2>.

[21] J. Valero, '19 EU Countries Call For New Antitrust Rules To Create 'European Champions', December 2018, <www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions/>, p. 1.

[22] HCC Newsletter, Issue 3, October 2020, <https://www.epant.gr/en/enimerosi/publications/newsletters/item/1164-issue-3.html>, p. 52.

[23] Joint Statement by 19 Governments, <https://www.bmwk.de/Redaktion/DE/Downloads/F/friends-of-industry-6th-ministerial-meeting-declaration.pdf?__blob=publicationFile&v=6<, p. 1.

[24] Joint Statement by 19 Governments, p. 1 and 2.

EU competition rules, whilst the HCC applies the provisions of Law 3959/2011 by taking into account all relevant EU principles, Commission's Notices and Guidelines as well as relevant EU case law.[25]

It is notable that there are no sectors of the economy excluded from merger notification and review requirements, except for transactions in the markets for electronic communications and postal services where the Hellenic Telecommunications and Post Commission (EETT) is the competent authority to apply the Hellenic Competition Act.[26]

The HCC conducts merger assessment on the basis of the SIEC test[27] and applies an economics-based analysis in the assessment of merger effects[28]. Conversely, non-competition considerations do not form part of merger assessment according to HCC's standard practice.[29]

Nevertheless, in exceptional cases the HCC has taken into account non-competition considerations in the assessment of concentrations. Specifically, in *Cosco* the HCC took into account *industrial policy factors in the broadest sense of the term,* as it mentioned that (i) the COSCO/PAA merger constituted a strategically important investment for the Hellenic economy as a whole, (ii) the specific investments are expected to affect other branches of economic activity.[30] Moreover, the HCC has recently expressed its position that sustainability and environmental considerations may be taken into account when assessing a concentration. Specifically, the HCC's Staff Discussion Paper on Competition Law and Sustainability[31] addresses the extent to which environmental and sustainability concerns may be taken into account in its assessment of a concentration, whilst the HCC's Technical Report on Sustainability and Competition[32] addresses forms of quantitative assessment in order to take into account broader social benefits in the green circular economy. Despite these developments, the HCC has not relied

[25] T. Patsalia and V. Kalogiannis, The Merger Control Review: Greece, 2021, <https://thelawreviews.co.uk/title/the-merger-control-review/greece#footnote-029>, p. 1; OECD Peer Reviews of Competition Law and Policy – Greece, 2018, <https://www.epant.gr/en/enimerosi/publications/other-publications/item/609-oecd-peer-review-2018.html>, p. 46; Information Guide, 'Competition Law Procedures at the HCC: A Primer', <https://www.epant.gr/en/enimerosi/publications/guides/item/540-competition-law-procedures-at-the-hellenic-competition-commission-a-primer.html>, p. 1,

[26] Art 113(2) of Hellenic Law 4727/2020 and Art 5(1) and (2) of Hellenic Law 4053/2012. See also the similar provision of Art 12 of Hellenic Laws 4070/2012 and 3431/2006.

[27] OECD Peer Reviews of Competition Law and Policy – Greece, 2018, <https://www.epant.gr/en/enimerosi/publications/other-publications/item/609-oecd-peer-review-2018.html>, p. 59-60 and Art 7(1) and (2) of Hellenic Law 3959/11.

[28] Ibid, p. 57.

[29] Ibid, p. 23.

[30] HCC Decision 627/2016, paras 254, 256, 257.

[31] HDP, op. cit.

[32] HCC and AMC, Technical Report, op. cit.

upon such sustainability arguments in any merger case to date, i.e. in *Mitilineos/EPALME*[33] and *PPC Renewables/Volterra*[34] the HCC did not take into account the parties' sustainability arguments. Lastly, a diversion from the standard practice to focus on competition-related considerations occurred in *Masoutis/Promitheutiki*[35] where the HCC took into account non-competition considerations, i.e., the unprecedented financial and social circumstances as a result of the coronavirus pandemic, in reaching a decision to accept the proposed revision of commitments.

2.3. The Government/Ministry Can no longer Overrule a Decision Blocking a Merger (Question 6)

Under the old merger control regime[36], an otherwise prohibited merger could have been allowed by the Minister of Development if it was "indispensable for the public interest".[37] Accordingly, the HCC's prohibition decision in *Kamari/Vossinakis*[38] was overruled by a ministerial decision that approved the transaction, due to the attraction of investments and the strengthening of competitiveness of the merger entity in the EU and International markets.[39]

However, under the new legal regime (Hellenic Law 3959/2011) this is no longer possible since HCC's decisions can only be reversed by the Athens Administrative Court of Appeal.[40]

Chapter 3: Effect of the DMA on HCC's Competence (Question 7)

3.1. The DMA and HCC's Competence to enforce competition rules against large digital platforms

According to the final text of the DMA adopted by the European Parliament legislative resolution on July 2022[41], the Commission would be in charge of enforcing the DMA (exclusive/centralized enforcement), to a few large online platforms (Gatekeepers) e.g., Google, Apple, Facebook and Amazon.[42]

[33] HCC Decision 682/2019.
[34] HCC Decision 694/2019.
[35] HCC Decision 713/2020.
[36] Art 4 of Hellenic Law 703/77.
[37] OECD Peer Reviews of Competition Law and Policy – Greece, 2018, op. cit, p. 59-60.
[38] HCC Decision 40/1996.
[39] Ministerial decision 17/2/1997, OJ 107/18/2/1997.
[40] Art 30 of Hellenic Law 3959/11.
[41] See final text of the DMA, <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html#title2>
[42] C. Carugati, The role of national authorities in the Digital Markets Act, *Concurrences*, 2022, p. 5.

The HCC has not brought a case against any of these large online platforms and therefore it has not imposed any relevant remedies. Nevertheless, the HCC would have the competence to investigate practices of local platforms which are not within the DMA's scope (e.g. Expedia, Booking and Airbnb) and impact the local economy.[43] In this context, the HCC Law Reform Committee has proposed an Amendment Act that would play a complementary role to the DMA and would give to the HCC the competence to regulate platforms and ecosystems which do not fall within the DMA's jurisdictional thresholds but are extremely important to the Hellenic economy.[44]

Furthermore, since this Regulation aims to complement the enforcement of competition law, it should apply without prejudice to the EU and national Competition rules. However, the application of those rules should not affect the uniform and effective application of the DMA in the internal market.[45] To that end, the HCC should closely cooperate with the Commission when enforcing the EU and national competition rules against gatekeepers, as it is important that the HCC's decisions do not run counter to a decision adopted by the Commission under the DMA.[46]

3.2. Centralized vs Decentralized enforcement of the DMA

The centralized enforcement of the DMA will provide a common rule which will reduce compliance costs and legal uncertainty to firms that implement the same practice globally, whilst avoiding inconsistencies arising from the NCAs' adoption of conflicting approaches.[47]

But, in order to achieve the effective implementation of the DMA, a mechanism of cooperation between the NCA'S and the Commission is already stipulated in the final text of DMA.[48]

Specifically, the NCAs should be empowered to conduct in their territory a market investigation on their own initiative regarding cases of possible non-compliance with Articles 5, 6 and 7 of the Regulation. In this situation, they should inform the Commission in writing before taking the first formal investigative measure and the Commission, as the sole enforcer of the DMA, has full discretion to decide

[43] C. Carugati, op. cit, p. 4-5.

[44] I. Lianos and M. Iakovidis, 'Digital Platforms and State Rules', <https://www.kathimerini.gr/economy/561357049/psifiakes-platformes-kai-thesmikoi-kanones/>.

[45] Preamble of the final text of DMA, op. cit, points 10-11.

[46] Articles 1 par.7, 37, 38 and point 92 of the Preamble of the final text of DMA.

[47] C. Carugati, op.cit, pp. 2 and 7.

[48] Art. 38 of the final text of the DMA.

whether to open investigatory proceedings.[49] NCAs have also the duty to support, after the Commission's request, any of its market investigations pursuant to this Regulation.[50]

At the same time, the NCAs should closely cooperate and coordinate with the Commission when enforcing national competition rules against gatekeepers in order to ensure the effective and uniform application of the regulation.[51] This mode of cooperation is equivalent to that provided for in Art 11(2) and (3) of Regulation 1/2003regarding cooperation between the Commission and the NCAs for the application of EU Competition rules.

In our opinion, the mechanism of cooperation established by the DMA may ensure both the Commission's exclusive competence to enforce the DMA and uniform and coherent application of this Regulation. In that way the NCAs could achieve the effective control of anti-competitive practices of large digital platforms, without the risk of inconsistencies or overenforcement.

Chapter 4: State Aid policy and EU industrial policy objectives (Question 8)

4.1. Is State Aid policy a suitable tool to consider EU industrial policy goals?

In specific circumstances, State Aid measures may be approved by the Commission under Art 107(2) and (3) TFEU. The State Aid exception which coincides best with the objectives of EU industrial policy, in particular the preservation and/or promotion of the competitiveness of the Union's industry,[52] concerns the "support of an important project of common European interest" (IPCEI), set out at the first limb of Art 107(3)(b) TFEU. Furthermore, the IPCEI Communication enables the Commission to increasingly use State Aid as an instrument to create positive EU industrial policy[53], while the 'Matching Clause' mechanism stipulated at par. 38 of the Communication[54] directs the Commission to consider, in the assessment of

[49] Ibid. Art.38 par. 7 and point 91 of the Preamble.

[50] Ibid. Art.38 par. 6.

[51] Ibid. Art.38 par. 2 and 3.

[52] Art 173 (1) TFEU.

[53] Communication from the Commission, 'Criteria for the analysis of the compatibility with the internal market of State Aid to promote the execution of important projects of common European interest', 2021/C 528/02, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014XC0620%2801%29>, par. 3.2.1, point 14.

[54] See the same provision in the Framework for State Aid for research and development and innovation, (2014/C 198/01), OJ 27/6/2014, C-198/1, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52014XC0627(01)>, par. 92.

necessity and proportionality of the aid, whether a competitor outside the EU has received, or is going to receive, aid of an equivalent intensity for similar projects.

This specific State Aid scheme could preserve the competitiveness of EU undertakings with strategic character and could form the basis for a future European industrial policy by being adapted to industrial reality. It could also lead to the improvement of the international competitiveness of these undertakings on global markets although the IPCEI Communication does not explicitly address this issue. [55]

Overall, a reflection on the current status indicates that there is need to turn the exceptions to the State Aid prohibition into a coherent EU industrial policy, which will be more adapted to geopolitical changes of the world and will aim to increase the external competitiveness of EU industries.[56] In fact, "there are strong arguments in favour of an active industrial policy at European and national level. Both State Aid control and competition policy need to take account of the international dimension of markets, and a dynamic assessment of competitive pressures in markets is essential…".[57] Thus, State Aid measures should be justified by the industrial policy objectives of innovation, research, technological development, etc., while the attainment of such objectives would also ensure the preservation and promotion of the international competitiveness of the relevant EU Industrial sectors.[58] Besides, the exception provisions of State Aid do not expressly include a condition relating to the existence of market failure, but merely require that the Aid should relate to a public interest objective, and that it should be appropriate, necessary and proportionate.[59] In any case, market failures could also be assessed in a global perspective.[60]

4.2. Have such industrial policy concerns played a role in the Commission's

[55] See however the critical position of the German Monopolies Commission in Biennial Report XXIII of the Monopolies Commission ('Competition 2020'), <https://www.monopolkommission.de/images/HG23/Main_Report_XXIII_Chinese_state_capitalism.pdf>, points 774 and 775. The Commission considers that the active creation and promotion of national or European Champions by means of State aid could not be justified under Art. 107(3)(b) TFEU as a project of common European interest.

[56] J. Hettne, 'EU Industrial Policy and State Aid – A Competence Mismatch?', Swedish Institute of European Policy Studies 2020, https://www.sieps.se/globalassets/publikationer/2020/2020_1epa.pdf?>, op.cit, pp. 6, 8 and 9.

[57] P. Lowe, "Competition and Industrial Policy in Europe: How Can They Work Together?", Oxera, October 2019, <https://www.oxera.com/insights/agenda/articles/competition-and-industrial-policy-in-europe-how-can-they-work-together/>.

[58] Joint Statement by 19 Governments, op. cit., p. 2; Cf Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, C/2022/481, points 399 and 400 dealing with energy intensive users.

[59] Cf Judgment of the Court of 22 September 2020, C-594/18 P, Republic of Austria v. Commission, ECLI:EU:C:2020:742, par. 66 and 67.

[60] J. Hettne, op.cit, p. 9.

decisional practice?

Many national aid measures have been classified as being compatible with the internal market and in that context the analysis of the Commission has focused on market failures.[61] Nevertheless, in some cases the Commission has used its State Aid powers to shape or recompose certain sectors of the economy. Specifically, nearly 60% of all aid granted in the EU has been directed to environmental protection, energy efficiency and the production of renewable energy. Based on a wide interpretation of Art 107(3)(c) TFEU, environmentally friendly industrial objectives are considered compatible with the internal market, provided that they contribute to the EU environmental or energy objectives without adversely affecting trading conditions contrary to the common interest.[62] Also, the Commission has expressed the willingness to use its powers to grant aid for IPCEI, so as to pursue industrial policy objectives, in high-technology and other sectors mentioned in the IPCEI Communication .[63]

4.3. Lessons drawn from the Covid-19 experience on how State Aid policy can be used to support the EU economy

The Commission recognized that the Covid-19 outbreak qualified as an 'exceptional occurrence' under Art 107(2)(b) TFEU, i.e., an extraordinary, unforeseeable event having a significant economic impact.[64] Moreover, Art 107(3)(b) TFEU enabled the Commission to approve national support measures that aimed to remedy a serious disturbance to the economy of a Member State. In this context, the Commission approved several national schemes that provided support to sectors hard hit by the outbreak (e.g., aviation).[65]

One lesson to be learned is that State Aid can be effectively used in times of crisis. Nevertheless, a broad interpretation of the concept of 'crisis' could extend the grant of State Aid not only in times of (financial) crisis around the globe, but also in case of economic difficulties (e.g. due to the energy crisis) affecting EU economic sectors which are vital for the European economy. In this context, the relevant factors to be considered in the assessment of State Aid measures should

[61] J. Hettne, op.cit., p. 5-6.

[62] J. Hettne, op.cit, p. 6.

[63] B. Deffains, O. d' Ormesson and T. Perroud, 'Competition Policy and Industrial Policy: For A Reform Of EU Law', 2020, https://www.robert-schuman.eu/en/doc/divers/FRS_For_a_reform_of_the_European_Competition_law-RB.pdf, pp. 20 and 35. See notably the projects covered by the IPCEI Communication, op. cit, point 15.

[64] Ashurst LLP, 'The Impact of Covid-19: Navigating EU State Aid', 2020, <https://www.ashurst.com/en/news-and-insights/legal-updates/the-impact-of-covid-19-navigating-eu-state-aid/>, p. 2.

[65] Ibid., p. 3.

be (a) the strategic importance of the beneficiaries of the Aid facing financial/ economic difficulties and (b) the durable link, in the medium and long term, between the beneficiaries of the Aid and the European economy.[66]

Chapter 5: Hellenic Jurisdictions and EU State Aid rules (Question 9)

The Hellenic courts have rarely used judicial remedies and other tools to seek clarification and certainty about the scope of EU State Aid law. However, in applying these rules, they conform, in principle, with relevant EU jurisprudence.

5.1. Questions for preliminary ruling to CJEU

The Hellenic courts have not submitted a significant number of questions to the CJEU for a preliminary ruling under Art 267 TFEU.[67]

Most importantly, in *Asteris v. Greece*[68] the Athens Court of First Instance referred to the CJEU a question for a preliminary ruling regarding State Aid.[69] The Court delimited the scope of State Aid, as it held that State Aid is fundamentally different in nature from damages which the competent national authorities may be ordered to pay to undertakings in compensation for damage caused to those undertakings.[70]

Furthermore, in *Trapeza Eurobank Ergasias*[71], the CJEU ruled that Art 107(1) TFEU must be interpreted as meaning that its scope of application may cover various privileges, e.g., where a bank has the unilateral right to register a mortgage over immovable property. It is, however, for the referring court to determine whether that is the case in the main proceedings[72] and whether those privileges constitute compensation for services provided by that bank in order to discharge public service obligations, and that they thus escape being classified as State Aid.[73]

5.2 Cooperation with the Commission

[66] Cf. Judgment of the General Court of 19 May 2021, Ryanair DAC v European Commission, Case T-628/20, ECLI:EU:T:2021:285, par.38, 39 and 40.

[67] Judgment of the Court of 27 September 1988, Asteris SA and others v. Greece, C-106/87, ECLI:EU:C:1988:457, Judgment of the Court, 11 July 2019, RM and SN v. Agrotiki Trapeza Ellados, C-262/19, ECLI:EU:C:2019:614, Judgment of the Court of 12 November 1992, Kerafina-Keramische und Finanz Holding v. Greece, C-134/91, ECLI:EU:C:1992:434 and Judgment of the Court of 16 April 2015, Trapeza Eurobank Ergasias AE v. Agrotiki Trapeza tis Ellados AE (ATE), C-690/13, ECLI:EU:C:2015:235.

[68] Case C-106/87, op.cit.

[69] Case C-107/87, op.cit, para 21.

[70] Ibid, par. 23 and 24.

[71] Case C-690/13, op.cit.

[72] C-690/13, op, cit, par. 29.

[73] Ibid, par. 33, 35.

Following a request from the Athens Court of First Instance[74], the Commission**,** *in its Opinion*, gave detailed Guidance on how a national court should interpret and apply the test used to establish State Aid according to the principles developed in EU precedent.

In the case of *Hellenic Shipyards SA*[75], the Commission intervened ex officio, *as amicus curiae***,** by submitting a Memorandum to the Administrative Court of Athens that focused on the ECJ's ruling in case C-93/17 and referred to the obligation of Hellenic State to recover incompatible aid, whilst it emphasized that such an obligation continues to exist as long as there are assets of the Hellenic Shipyards which can lead to even partial recovery of the amount of incompatible aid.

5.3 Compliance of the national jurisprudence with the EU constant Case Law

In principle, national courts are following the EU case law when they are applying Art 107(1) TFEU without using the tools available to seek clarification about the scope of State Aid.

Indicatively a StE's (Hellenic Council of State) decision[76] upheld the principle that the judgment on whether State Aid measures conform with the Common Market falls within the exclusive jurisdiction of the Commission, whilst national Courts have no competence to make such decision.[77] Also in full compliance with the EU Case Law, STE's decision came to the conclusion that a tax measure did not qualify as State Aid as the different treatment it introduced was justified by the logic of the system itself and so it did not entail an advantage.[78]

Lastly, another StE's decision[79] referred and fully complied with the EU precedent on State Aid and the relevant legal principles of supremacy, uniform application, and effectiveness of EU law regarding the enforcement of Commission decisions in relation to both the recovery of incompatible State Aid and the legal consequences of lack of notification according to Art 108(3) TFEU.

Chapter 6: Effect of new instruments to ensure fair competition to the HCC's application of competition rules (Question 10)

In its decisional practice, the HCC consistently applies the Commission's Notice

[74] Decision 3388/2009, Polymeles Protodikeio Athinon.

[75] Decision 4636/2020, Dioikitiko Protodikeio Athinon.

[76] StE Decision 2406/2014.

[77] StE Decision 2406/2014, op. cit., par. 22 and 24. See also, StE Decision 333/2022 STE, which held that national authorities and courts have an obligation to prevent the granting of unlawful aid, i.e. aid which has been introduced without prior notification and the Commission's approval.

[78] StE Decision 2406/2014, op.cit, par. 23.

[79] StE Decision 281/2022.

on the definition of the relevant market.[80] According to the HCC, factors enabling the determination of the relevant geographic market include legal or regulatory restrictions of entry, e.g. the necessity to comply with certain specifications or technical standards, restrictions arising from certification processes, etc.[81] These legal or regulatory provisions constitute indirect trade defence measures, since they are often applied as a tool of regional or national policy and can limit the geographical flow of goods or services.

Indirect trade defence measures can be identified in the Hellenic Milk Market where the HCC has consistently held that the relevant geographic market for the supply and collection of raw milk has national dimension due to the high costs of distribution, the short life spun of fresh milk and the preferences of consumers. In *DELTA/MEVGAL* the HCC held that the importance of the origin of the milk was a factor that limited the geographical scope of the market.[82] In *VIVARTIA/MEVGAL* the HCC recognized as an entry barrier the legislation concerning the conditions of use of the indication "fresh" at the milk packaging.[83] Overall, the technical rules concerning the indication at the packaging may be characterised as an indirect trade defence measure which in combination with the Hellenic consumers' preference for milk of Hellenic origin may lead non-Hellenic milk products to exert limited presence in Greece.

Also, the use of other instruments to protect fair competition in the internal market or other interests could lead to a narrow delimitation of the relevant geographic market. This will be the case for rules and procedures related to screening mechanisms of foreign direct investments[84] or other instruments that control foreign subsidies. Such rules impede access in the relevant market for undertakings that are recipients of subsidies by non-European states and affect competition in the internal market.[85] Accordingly, these rules constitute an entry barrier in the relevant market of the subsidized activity or of the activity linked to the impeded foreign investment.

[80] See Commission's Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (97/C 372 /03), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29>.

[81] Determination according to Art 6(5) and (6) of Hellenic Law 3959/2011 in the specific content of merger notification, pp.20 and 26.

[82] Case 650/2017, par. 69-73.

[83] Case 515/VI/2011, par. 56-59.

[84] Art 3(2) Regulation 2019/452 of the European Parliament and of the Council.

[85] See the redressive measures mentioned in Art 6 of the proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM (2021), 223 final.

Concluding Remarks of Part I

The HCC is willing to consider sustainability benefits to the wider society under Art 101(3) TFEU and the relevant provision of Art 1(3) of Hellenic Law 3959/2011. This expansive approach is consistent with the recent legislative provision of Art 39 of Hellenic Law 4886/2022, regarding the non-application of competition rules when there is a reason of public interest such as the achievement of sustainable development goals.

Mergers are assessed by the HCC on the basis of the SIEC test. However, sustainability issues may also be considered. Additionally, there are exceptional cases that signal the tendency of the Commission to take into account industrial policy factors in the broadest sense of the term, such as the contribution of a concentration to the Hellenic economy as a whole.

This report underlined the necessity to turn the exceptions to the State Aid prohibition into a more coherent EU industrial policy, which will be adapted to geopolitical changes in the world and will aim to increase the competitiveness of EU industries.

Furthermore, it has been highlighted that the Hellenic courts are following the EU case law when they are applying Art 107(1) TFEU without using the tools available to seek clarification about the scope of State Aid.

Finally, this report argued that indirect trade defence measures could affect the application of competition rules, and specifically they could lead to a narrow delimitation of the relevant geographic market and to the impairment of the competitive pressure exercised by third country firms.

Part II: TRADE

A. FDI control

Question 11

Greece was behind its Western European peers regarding the attraction of FDI. However, data from the United Nations Conference on Trade and Development (UNCTAD) and the World Bank shows that the country has experienced a steady increase in inward FDI since 2015[86]. Investment opportunities arising from both its geo-strategic position and the financial crisis that the country experienced[87]. More specifically, the country marked a powerful increase of 74.3 percent in FDI in 2021, in line with the Hellenic Investment and Foreign Trade Company, also called Enterprise Greece. Enterprise Greece recently released data issued by the Bank of Greece showing that net inflows of foreign direct investment exceeded 5 billion euros ($5,055.9 million)[88]. Compared to 2.9 billion euros in 2020, last year saw the biggest net foreign direct investment inflow in Greece since 2002.

In relation to sectors of investment, tourism has arguably been the foremost active sector and, till the outbreak of the COVID-19 pandemic, had been growing markedly. Although the decrease in energy demand and therefore the reduction of feed-in tariffs has impacted greenfield energy projects, the energy sector and its infrastructure projects remain attractive (Microsoft is to invest 1 billion euros in data-centers in Greece). The banking and finance sectors have also attracted the eye of a substantial number of international hedge funds primarily thanks to the Greek non-performing loan (NPL) market, the biggest in Europe by an oversized margin[89]. Moreover, a level of investment in property and logistics has also been observed during the previous few years. Other sectors, like retail and the food industry, are involved in investment and restructuring activities[90].

Over the last 10 years, Switzerland, Cyprus, and Germany were the main sources of investment activity in Greece, followed by France and the Netherlands. In

[86] World Bank, 'Foreign Direct Investment, net inflows (% of GDP) Greece' <https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=GR>.

[87] See Hellenic Bank Association, "Documentation on the operation of the Greek banking system", 2017, <https://www.hba.gr/UplDocs/HBA_GreekBankingSystem_January2017F2n.pdf> (in Greek).

[88] Ph. Chrysopoulos, 'Dramatic Rise of Foreign Investments in Greece' *Greek Reporter,* 24 February 2022, <https://greekreporter.com/2022/02/24/foreign-investments-greece/>.

[89] Bank of Greece, 'Evolution of loans and non-performing loans' <https://www.bankofgreece.gr/en/statistics/evolution-of-loans-and-non-performing-loans>.

[90] Y. Kelemenis, 'Investing in Greece' *Thomson Reuters*, 1 August 2020) <https://uk.practicallaw.thomsonreuters.com/0-626-2533?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

recent years FDI inflows from China (including Hong Kong) have increased significantly, while Luxembourg, Canada, USA, and therefore the UK also are among the highest 10 countries of origin[91].

All investments made in Greece are subject to checks on their compatibility with the applicable European/national legislation. Regulation 2019/452 is directly applicable within the country. A national contact point for the purposes of the cooperation mechanism under the FDI Screening Regulation was nominated (Art. 169 Law 4781/2021) and the cooperation with the Commission and the other Member States is proven adequate. Until the submission of this, Greece is working on the draft legislation for the national FDI screening mechanism on the grounds of security and public order[92].

The laws in Greece generally encourage and facilitate FDI. Greece does, however, limit foreign ownership of property located in certain regions designated as border areas (Art. 24 Law 1892/1990 modified by Art. 114 (2) Law 3978/2011). Law 4278/2014 Article 43 (1) provides the areas that are deemed "border areas" for the purpose of the law. Thus, real estate acquisition or tenancy in the border regions is prohibited to natural or juridical persons whose nationality or seat is outside the Member States and the European Free Trade Association, as well as the transfer of company shares or the change of shareholders/partners of companies of any form that own real estate in these areas. The ban may be lifted with a discretionary decision taken by a committee of the appropriate Decentralized Administration (or the Minister of National Defence in case the properties to be exploited belong to the Fund for the Exploitation of Private Public Property) according to Articles 26 and 27 Law 1892/1990, as in force.

In addition, permission from the Minister of National Defence is required for lifetime legal transactions for the acquisition of rights in rem or under obligation on private Greek islands or islets, on real estate on private islands or islets as well as the leasing of public islands from natural or legal persons (Art. 28 Law 1890/1990 and Ministerial Decision F.110/3/330340/S.120/2014).

A permit of the prefect with the approval of the competent military service of the area is also required for life legal transactions for the acquisition of real estate or property rights, or for mining or quarrying operations on real estate in certain areas in northern Greece and in Crete mentioned in Article 32 Law 1892/1990 (Art. 29 Law 1892/1990). In particular, it is noted that the administrative approval

[91] Enterprise Greece, 'Foreign Direct Investments' <https://www.enterprisegreece.gov.gr/en/greece-today/why-greece/foreign-direct-investment>.

[92] Cf. Commission Staff Working Document, Screening of FDI into the Union and its Member States, First Annual Report on the screening of foreign direct investment into the Union, p. 31, SWD(2021) 334 final.

required for the establishment or alteration or transfer of mining rights or the granting of the use and quarrying of such rights resulting from a mining permit or a mining concession is subject to control for reasons of public order and safety (Articles 74-76 of Law 210/1973).

The legislator feels the need to protect the territorial integrity of the country and the protection of national security. The protection of the above principles being initially broader with the passage of time is partially bent, on the one hand because of the need to comply with the European Union law[93], to which Greece belongs, and on the other hand because of the need to attract FDI.

B. Trade defence and public procurement – foreign subsidies

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?

Greece is giving great interest to the proposal for the Regulation on foreign subsidies. This is because, in the context of the country's restructuring after the painful fiscal crisis that hit it during the last decade, Greece has embarked on an extensive program to attract investors to exploit its wealth-producing resources. In particular, the Public Private Property Development Fund (established by Law 3986/2011) has included in its program a wide range of infrastructure (ports, airports, highways, etc.), real estate and businesses through public tenders[94]. The preservation and protection of the internal market from any distortions from foreign subsidies, especially in the case of the above procedures, is of direct interest to Greece.

More specifically, as the data shows[95], every year there is a significant number of awarded tenders in Greece that meet both the criterion set by the regulation to be considered significant, i.e., over the €250,000 (Table 1) and do also constitute a major component of the Greek economy, amounting in a year even more than 3 billion euros (Table 2). Therefore, Greece has a genuine concern about both the existence and the impact of foreign subsidies.

[93] ECJ, 305/87, *Commission v. Hellenic Republic*, ECLI:EU:C:1989:218.
[94] See https://hradf.com/en/asset-development/.
[95] The charts were constructed by processing official data from https://opentender.eu/gr/download.

Table 1

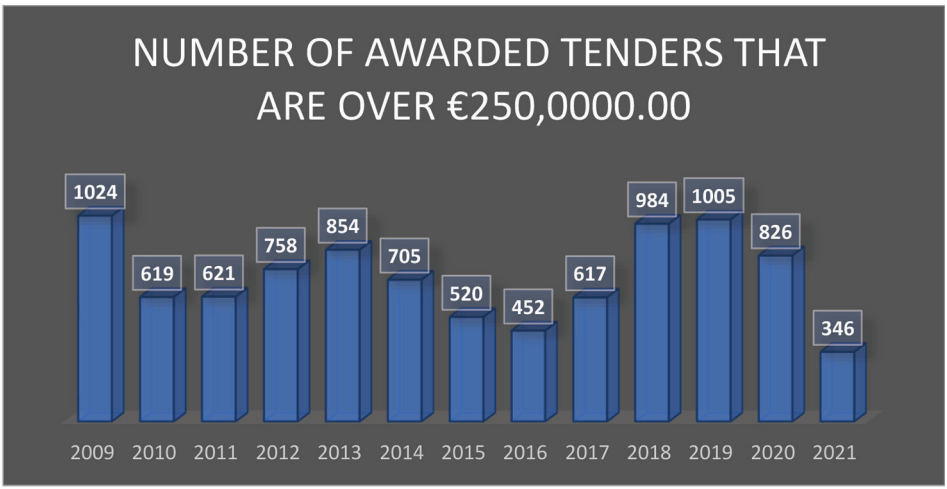
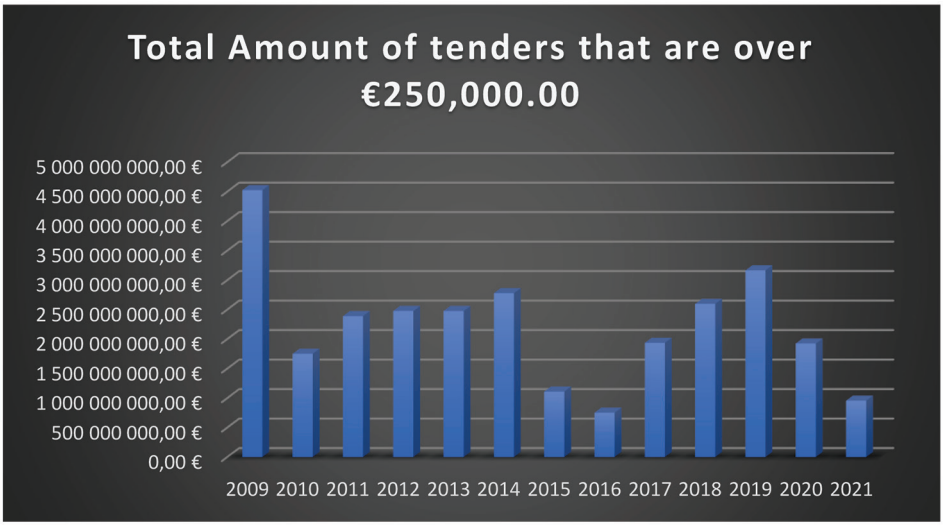


Table 2



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 competence of the Commission for the control of foreign investments under the proposed Regulation may coincide with the control of foreign investments

as carried out by Greece[96]. Since the Commission's control under the proposed Regulation may be broader than the national control, which, due to its scope, may also concern matters of a confidential nature, provision should be made for a coordination of the two procedures so that the conduct of the control by the Commission does not impinge on the confidentiality of the information available to the Member State in the context of its competence to control foreign investment (Article 3(4) of Regulation 2019/452).

What is the impact of the proposal on the procedural autonomy of Member States in organizing public procurement review procedures?

Article 31 of this proposal for a Regulation sets out the consequences of the Commission's evaluation during the procurement procedure. According to the Greek Public Procurement Law, any person who has a legitimate interest in being awarded a public contract and who has suffered or is likely to suffer damage as a result of an enforceable act or omission by the contracting authority may first bring a preliminary appeal (Articles 360-371 of Law No. 4412/2016) before the Single Public Procurement Authority and then apply for suspension of execution and annulment of the decisions of the Single Public Procurement Authority before the competent Administrative Court of Appeal or the Council of State (Article 372 Law No. 4412/2016).

The question arises if an undertaking wishes to bring an action before the European Court of Justice against a decision of the Commission taken on the basis of Article 30 (2) of the said proposed Regulation, and on the other hand against the enforceable act of the Greek contracting authority in case it was taken in accordance with Article 31 (3, 4) of the said proposed Regulation.

Those appeals could be brought by the undertaking itself which was audited by the Commission or by another undertaking which participated in the same public procurement procedure against the decision of the Single Public Procurement Authority, while also submitting a question for a preliminary ruling on the Commission's assessment of the foreign subsidies to the undertaking audited[97].

It must be accepted that the above competent Greek Single Public Procurement Authority will not be able to deal with the case before it until the final resolution of the above issue by the European Court of Justice. This fact will also have the consequence of extending the time for the signature of the public contract,

[96] Currently on the basis of Law 1892/1990 (see above our report on FDI control) and after the adoption of the prepared bill, in accordance with the provisions of the above Regulation.

[97] Cf. G. Karydis, *Illegal state aid and legal protection of interested third parties*, Nomiki Vivliothiki, 2013, pp. 136, s. (in Greek).

because according to Article 364 of Law No. 4412/2016, the time limit for the exercise of the aforementioned preliminary appeal and its exercise will prevent the conclusion of the contract under penalty of nullity.

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?

To ensure the principles of legal certainty and predictability, the procedures of this proposed Regulation (Articles 9, 15, 24(3c), 25, 30(2), 32, 38) should include and clarify certain formal elements relating to time references, time limits, procedural safeguards or the involvement of Member States or interested third parties[98], in order to make the text in question more prescriptive and ensure the principles of evidentiary and due process guarantees.

Question 13

The three modules introduced in the Commission's foreign subsidies proposal seek to transpose existing competition, public procurement and trade defense framework 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 competition law and trade defense rules?

Since one of the basic principles underlying the Common Commercial Policy is uniformity and that trade policy measures should not distort competition[99], the use of trade defines instruments is to offset the distortions of competition in the internal market that may be caused in particular by foreign subsidies. We therefore consider that the main challenge and at the same time the constraints that should be placed on the possibilities opened up to the Commission through the 3 modules of the proposed Regulation is to avoid creating protectionism by respecting, in particular, the principles of non-discrimination, transparency and, especially in relation to State aid law, the principles of necessity and proportionality of the aid.

[98] Cf. G. Karydis, *EU Competition and Internal Market Law*, Nomiki Vivliothiki, 2020, pp.292, s.
[99] *Local cost standard*, Opinion 1/75, European Court of Justice, ECLI:EU:C:1975:145.

C. Mandatory due diligence and regulating supply chains

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?

Article 24 of the Hellenic Constitution (HC) is the fundamental provision of environmental protection under which the Greek State is obliged to take specific preventive or repressive measures in the context of the principle of sustainability. Moreover, the protection of human rights is achieved through the enshrinement of the fundamental rights of the individual in the HC[100] and the incorporation of international conventions and agreements on human rights and fundamental freedoms in the Greek legal order.

In Greece, there is no general horizontal legal obligation for companies to conduct due diligence to respect human rights and the environment in supply chains arising from a specific legislation.

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

Due diligence obligations in particular in relation to environmental, social and labour issues, and respect of human rights are imposed to companies in the context of corporate social responsibility by provision 151 of Law No. 4548/2018[101].

Also, a special corporate due diligence obligation was introduced in the Greek legal order by:

A. the Joint Ministerial Decision No 134627/5835/29-12-2015 (Government Gazette 2872/B/29.12.2015) on the determination of the competent authorities, measures, and procedures for the implementation of Regulation (EU) 995/2010 laying down the obligations of operators placing timber and timber products on the market, and

B. the Decision of the Ministry of Environment and Natural Resources YPEN/DDED/24248/598/27-3-2019 on the measures for the implementation of Regulation (EU) 511/2014 on compliance measures for users of genetic resources and the sharing of benefits arising from their utilization.

[100] See generally Articles 4, 13, 16 and 22 HC.
[101] In the context of the harmonization with Directive 2014/95/EU.

Liability of companies under a duty of due diligence (Art. 71 Hellenic Civil Code) may arise in the context of their liability in tort (Art. 914 Hellenic Civil Code)[102] in relation to organizational obligations, the object of which is to develop and maintain such a business organization as to prevent, as far as possible, damage to third parties[103].

Based on the above legislative provisions, the following apply to the below questions:

a. Which companies are subject to this obligation/legislation?

The scope of application of provision 151 of Law No. 4548/2018 includes large public limited companies, i.e., listed companies, insurance and reinsurance companies, credit institutions and entities defined as such by law based on the nature of their business activity, size, or number of employees (Annex A of Law 4308/2014), which, on the date of closing their balance sheet, exceed the average number of five hundred employees during the financial year.

The scope of application of the Joint Ministerial Decision No 134627/5835/29-12-2015 (Government Gazette 2872/B/29.12.2015) includes all natural or legal persons who either place timber or timber products on the market or, in the context of commercial activity in the internal market, carry out sales and purchases of timber or timber products already placed on the internal market and which fall within the scope of Regulation (EU) 995/2010 and the Commission's delegated and implementing Regulations adopted for its implementation.

All Natural or legal persons who are users of genetic resources shall fall within the scope of the Decision of the Ministry of Environment and Natural Resources ΥΠΕΝ/DDED/24248/598/27-3-2019.

b. Which obligations must companies respect?

In provision 151 (1) of Law No. 4548/2018, companies are required[104] to submit a management report to the company's annual general meeting, which includes a non-financial statement containing information on environmental, social and labour issues, respect for human rights, as well as a description and the effectiveness of the company's policies on these issues.

[102] See *Psaroudakis*, *in DAE* 2020, art. 107 numb. 7 (in Greek).

[103] See Hellenic Supreme Court 252/2013; G. Ladogiannis, «Liability of the company and its managers towards third parties due to breach of the duty of care and protection», in *Liability issues in the limited company* 3ο Congress of the CFRC, Nomiki Vivliothiki, 2019, pp. 139 (148-151), (in Greek).

[104] According to paragraph 3 of the same article, subsidiaries of limited liability companies are exempted from the above obligations if they are included in the consolidated management report or in the separate report of another company. It is also noted that the members of the Board of Directors are not subject to the criminal sanctions provided for in Article 179 of the above law in the event that the non-financial statement referred to in Article 151 is not submitted (See generally Livad*a*, *in DAE* 2020, art. 151, in Greek)

In case of the Joint Ministerial Decision No 134627/5835/29-12-2015, companies should respect the due diligence obligations set out in Articles 4 and 5 of Regulation (EU) 995/2010.

In case of the Decision of the Ministry of Environment and Natural Resources ΥΠΕΝ/DDED/24248/598/27-3-2019 companies should respect the due diligence obligations set out in Article 4 of Regulation (EU) 511/2014.

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?

According to the Greek law (Art. 71 Hellenic Civil Code) the legal person is liable for the acts or omissions of its organs in the performance of their duties. In case of illegality, the liability of each is judged independently[105]. The obligations of the legal person are not self-evidently obligations of its organs. It is noted that due to the legal autonomy of affiliated companies in Greek law, in the absence of a specific rule of protective law, it is difficult, according to the prevailing view, to impute tort liability of the company to third parties, such as their subsidiaries[106].

d. Does the duty of care/due diligence obligation have extra-territorial effects?

No such legal features have the above mentioned Greek laws.

e. What are the available remedies and to whom are those remedies available?

In case of provision 151 of Law No. 4548/2018, the administrative courts are competent to hear the dispute between the company and the Hellenic Commission of Capital Markets, which controls compliance with the provisions for company reporting. Also, the civil courts are competent to adjudicate the dispute between the company and the members of its board of directors for failure to exercise due diligence under Article 151 of Law No. 4548/2018.

Pursuant to Article 12 of the Joint Ministerial Decision No 134627/5835/29-12-2015, the decision to impose an administrative fine may initially be challenged by the offending operator or timber trader by way of an appeal, within a certain time limit, to the Secretary General of the Decentralized Administration, against whose decision a further appeal may be lodged with the Administrative Court of First Instance.

According to Article 7 par. 2 of the Ministerial Decision ΥΠΕΝ/DDED/24248/598/27-3-2019, the Administrative Courts and the Council of State

[105] See Ladogiannis, op.cit.

[106] See M. Varela, *The formation of internal responsibility in groups of companies – The management of the consolidated company*, Nomiki Vivliothiki, 2007, pp. 263, s (in Greek).

have jurisdiction over administrative sanctions. The criminal courts also have jurisdiction over criminal sanctions. Violators of Articles 4 and 7(2) of Regulation (EU) 511/2014 have a right of appeal to the courts above.

f. What is the scope of the liability regime?

In case of provision 151 of Law No. 4548/2018, the companies which fail to fulfil their reporting requirements are subject to administrative sanctions (Art. 26 of Law No 3556/2007 and Art. 24 of Law No 4706/2020). Also, the members of the board of directors of the company have civil liability (art. 102 Law No 4548/2018) due to failure to observe the due diligence of article 151 of Law No. 4548/2018.

According to Article 9 (9) of the Joint Ministerial Decision of the No 134627/5835/29-12-2015, any Timber Operator or Timber Dealer who violates or fails to comply with its provisions is subject to criminal and administrative sanctions.

According to Article 7 (1 and 2) of the Ministerial Decision ΥΠΕΝ/DDED/24248/598/27-3-2019, the sanctions are administrative and criminal in nature.

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

The main challenges that Greek company law will face in implementing the due diligence obligation for "Sustainable Corporate Governance" of the proposed directive are basically focused on the concept of corporate interest and the introduction of liability at the level of a group of companies.

As Greek Law 4548/2018 on limited liability companies does not define the objectives pursued by the Board of Directors of the company and further the concept of corporate interest[107] and due to the fact that there are no (corporate law) rules in the Greek law on group of companies[108] -the individual view of the

[107] See Vervesos, *in DAE* 2020, art. 77 numb. 9 (in Greek); Perakis, *in DAE* 2020, Introduction numb. 45-61 (in Greek)

[108] See Perakis, *in DAE* 2020, Introduction numb. 63 (in Greek).

corporate interest of each company in the group prevails-, it can be reasonably argued that the creation of a legal ground of (civil) liability for the legal person and its directors for the protection of human rights and the environment throughout the supply chain will open the discussion for the adoption of more general relevant legislative amendments to Greek corporate law on the above issues, which have been extensively discussed in Greek theory[109].

Another challenge that both the Greek law and the Greek judicial system will face is the implementation of Article 15 (3) of the proposed directive. More specifically, further guidelines should be given on how and which metrics the companies should use when setting the variable remuneration in order the directors to foster the business strategy and the long-term interests and sustainability of the company. One question that often arises is the credibility of CSR disclosures and how to enhance it. Another issue is that companies may choose those ESG factors that are easily measurable but may not capture the most important ESG issues for a company. This could result in other important ESG issues being ignored. ESG metrics may also be used to boost executive pay or shield executives from poor performance.

[109] See Perakis, op.cit,; Vervesos, op.cit.; K. Pampoukis, "The "general corporate interest" as a central idea in the institution of corporate governance", *ComLawOv* 2003, pp. 955 (in Greek); G. Triantafyllakis, *The corporate interest as a rule of conduct of the limited liability company's organs*, 1998 (in Greek); G. Sotiropoulos, "Social Corporate liability – Content, applicable law and prospects", *RevComLaw* 2019, pp. 32

HUNGARY

Gábor Hajdu, Bálint Kovács, Csongor István Nagy[1]

COMPETITION

Green competition policy

Question 1

Hungarian competition law, especially substantive law, has been harmonized with EU competition law. In *Allianz*,[2] the Hungarian Supreme Court submitted preliminary questions in a purely Hungarian competition matter (one which was based on facts arising before Hungary's accession to the EU), considering that "the concepts referred to in Paragraph 11(1) of the (…) [Hungarian Competition Act] must in fact be interpreted in the same way as the equivalent concepts in Article 101(1) TFEU and that it is bound in that regard by the interpretation of those concepts provided by the Court."[3] Accordingly, the CJEU held that Section 11(1)-(2) CA, as the national equivalent of Article 101 TFEU, "faithfully reproduces Article 101(1) TFEU. It is clearly apparent, moreover, from the preamble to and the explanatory memorandum for the CA that the Hungarian legislature sought to harmonise domestic competition law with that of the European Union"[4]. Although the statement related specifically to Section 11 CA, in principle, it may be extrapolated to the substantive rules of Hungarian competition law at large, provided certainly that such rules do not contain an express deviation from the EU rules.

It has to be noted that the Hungarian Competition Act (hereafter: HCA),[5] in the provision on individual exemption, does refer to environment protection as one of the legitimate benefits that may justify the exemption of an agreement that otherwise restricts competition.

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[2] Case C-32/11.

[3] Para 22.

[4] Para 21.

[5] Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

Article 17 An agreement is exempted from the prohibition pursuant to Article 11 provided that

(a) it contributes to a more reasonable organisation of production or distribution, the promotion of technical or economic progress, or the improvement of competitiveness or of the protection of the environment;

(b) it allows trading parties not participating in the agreement a fair share of the resulting benefit;

(c) the concomitant restriction or exclusion of competition does not exceed the extent necessary to attain economically justified common goals; and

(d) it does not enable the exclusion of competition in respect of a substantial proportion of the goods concerned.

The reference to environment protection of Article 17 of the HCA has never been used in the decisional and judicial practice.

The Hungarian Competition Office (hereafter: HCO) usually follows the European Commission's approach in competition matters, including its guidelines and notices. The question of sustainability is no exception to this and the HCO is expected to follow the European Commission's (more conservative) approach and not to be willing to consider relevant sustainability benefits to the wider society under Article 101(3) TFEU when examining the effects of agreements between competitors.

The same holds true for courts, who are not expected to follow a different approach in a private action.

Question 2

The HCO has a very wide discretion for assessing mergers and, in theory, sustainability benefits may be taken into consideration along other effects in the market. The lack of decisional practice in this regard makes it difficult to predict what the reaction of the HCO would be in a case where the assessment of a merger hinges on the consideration of sustainability benefits.

Question 3

Article 17 of the HCA would be an adequate entry point to consider sustainability benefits, as it contains a specific statutory reference to the protection of the environment as a benefit that may justify otherwise restrictive agreements. As a matter of practice, however, the real question is not if environment protection

or sustainability more generally are relevant benefits that may be taken into a consideration under Article 17 of the HCA, but if these benefits need to accrue to the affected consumers in the relevant market. Under EU competition law, the Commission does not take into consideration under Article 101(3) TFEU all the benefits accruing from the arrangement, only those which accrue to the direct or indirect consumers of the product (or service). The HCO is expected to follow this more restrictive approach when assessing benefits under Article 17 of the HCA.

Merger control, the same as the rules on the abuse of dominant position allow a wider playing field for the HCO.

The rules on the assessment of mergers do not specify sustainability among the legitimate benefits to be considered, however, the wide discretion enjoyed by the HCO and the extrapolation of the reference to environment protection in Article 17 of the HCA may authorize the HCO to consider sustainability benefits.

Article 30 (1) The Hungarian Competition Authority shall prohibit a concentration where, with a view to the provisions of paragraph (2), the concentration would significantly reduce competition on the relevant market, in particular as a result of the creation or strengthening of a dominant position.

(2) When assessing a concentration, both concomitant advantages and disadvantages shall be considered. In the course of such consideration, the following factors shall be examined in particular:

(a) the structure of the relevant markets, existing or potential competition on the relevant markets, procurement and marketing possibilities, the costs, risks and technical, economic and legal conditions of market entry and exit, the prospective effects of the concentration on competition on the relevant markets;

(b) the market position and strategy, economic and financial capacity, business conduct, internal and external competitiveness of the undertakings concerned and likely changes to them;

(c) the effect of the concentration on suppliers and trading parties.

The same holds true for the assessment of abuse of dominant position under Article 21 of the HCA.

European strategic autonomy, the promotion of "European champions" and competition law enforcement

Question 4

There is no publicly available data in this matter about the Hungarian implications of the *Siemens/Alstom* transaction.

To the best of our knowledge, the HCO has not been confronted with similar arguments in comparable transactions.

Question 5

The HCO has a wide discretion when assessing mergers. Although, as noted above, Article 30 of the HCA refers solely to competition goals to be taken into account, the discretionary powers of the HCO allow it to consider the circumstances and aspects listed in the question but may not allow to side with the non-competition benefits when there is a clear conflict between competition and geopolitical considerations.

Question 6

Article 24/A of the HCA authorizes the government to directly exempt a concentration from the notification duty if this is justified by the public interest, especially the preservation of the workplaces for the sake of the security of supply. In this case the concentration may be announced as having a national strategic significance; such concentrations do not have to be notified to the HCO at all. This provision was inserted into the HCA by Act CXCI of 2013.

Article 24/A of the HCA does not specify the aspects the government should take into account when making use of this possibility and affords a very wide discretion.

It has to be noted that when making use of Article 24/A of the HCA the government does not overrule the HCO's decision but removes the case from the competence of the HCO and makes the decision itself.

The government has made use of this possibility in several cases, among others, in the energy, telecommunications and media sectors.[6]

Question 7

The HCO has brought no antitrust or merger control procedures against US digital platforms. According to the rules on the division of work between the

[6] Csongor István Nagy, Competition Law in Hungary, Kluwer, 2006, 44.

European Commission and national competition authorities, competition cases of a European dimension are handled by the European Commission, hence, it is not expected that the HCO would open an investigation in such a case.

Nonetheless, it has to be noted that the HCO fined Facebook (Meta) on the basis of the Hungarian Unfair Commercial Practices Act.[7] The HCO found that Facebook's allegation that its services were "free" was misleading, as the use of personal data may be conceived as the performance of the users, the consideration they provide for the services received from the social media platform. Nonetheless, in Case *Kfv. II.37.243/2021/11*, the Supreme Court quashed the HCO's decision and held that the services of Facebook are free, even if the social media platform uses of personal data of the users. The Supreme Court found that the use of data and provision of personalized services, including advertising, constitute no meaningful burden for the users and, hence, the services of Facebook can be regarded as "free" in the sense that they do not involve any financial or financially relevant detriment.

Question 8

Hungarian law contains no general regime on state aid comparable to the EU rules and, hence, we cannot report on any local aspects or experiences in this regard.

Question 9

We are not aware of any Hungarian judicial practice concerning EU state aid rules, which implies that the use of Regulation 2015/1589 does not emerge before national courts.

Geopolitical instruments, trade defence instruments, and competition policy

Question 10

We cannot report on any such case and we do not expect that similar considerations would be relevant when the new "geopolitical" instrument will be applied more regularly.

[7] Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers.

TRADE

FDI control

Question 11

Investment control has been part of the Hungarian legal system even before the EU-wide regulation entered into force. These rules were to be found in a number of laws pertaining to different industries. For the purposes of the present research, these will not be addressed. Instead, we focus on the unified investment screening regime adopted in 2018, in addition to the regime adopted in 2020. The purpose of these two mechanisms is to protect Hungarian economic interests pursuant to the state of emergency in the country.

Act LVII of 2018 on controlling foreign investments violating Hungary's security interests ("2018 Act") constitutes the main national legal instrument on investment screening. This was adopted by the Hungarian Parliament in October 2018 and entered into force on January 1, 2019. This Act constitutes the main framework of the FDI screening system in Hungary, and it is complemented by Government Decree no. 246/2018 (December 17) on the implementation of Act LVII of 2018 on controlling foreign investments violating Hungary's security interests ("2018 GD"). The 2018 GD contains the detailed rules which supplement the screening framework established by the 2018 Act.

During the SARS-COV2 pandemic, the Hungarian government adopted Government Decree no. 227/2020 (May 25) concerning the measures necessary for the protection of the economic interests of companies established in Hungary in order to prevent a human pandemic threatening the safety of life and property and to avert the consequences thereof. Soon after its entry into force, it was replaced by a new law, which entered into force on June 18, 2020. The legislature adopted Act LVIII of 2020 concerning the transitional rules and epidemiological preparedness related to the ending of the state of emergency ("2020 Act"). This is a massive piece of legislation which regulates in a large number of different areas. Chapter 85 of the 2020 Act – namely articles 276-292, under the title "Measures necessary for the economic protection of companies incorporated in Hungary" – lays down additional rules for investment control. These rules were adopted during the state of emergency decreed in the wake of the pandemic, and contain a temporary regime for investment screening, parallel to the system laid down by the 2018 Act.

The 2020 Act was complemented by Government Decree no. 289/2020 (June 17) on the definition of the scope of activities necessary for the economic protection of companies established in Hungary, which contains a table of economic activities that fall under the screening obligations established within this piece of legislation.

The 2018 Act initially gave competence to the Minister of Interior for conducting the review of foreign investments in accordance with its rules. This was recently modified by government decree, which passed this competence to the Cabinet Office of the Prime Minister. Under the 2020 Act, notifications must be submitted to the Ministry of Innovation and Technology, which – in the Government established in 2022 – is now named the Ministry of Technology and Industry.[8]

The simultaneous existence of the two investment screening regimes means that in case foreign investors' activities will fall under the application of both regimes, two separate applications will have to be submitted in accordance with the rules laid down by the two legislative acts.

For the purposes of making the two regimes more readily identifiable, the year of their adoption is used, naming them accordingly: the 2018 Act and the 2020 Act. These denominations also include all additional regulatory modifications and supplementations, which form part of the respective legislative acts. The two regimes have also been dubbed by some practitioners as "permanent" and "temporary", respectively.[9] The "temporary" screening regime was enacted for the duration of the state of emergency introduced pursuant to the SARS-COV2 pandemic. The state of emergency was subsequently extended due to the Russian aggression against neighboring Ukraine.[10]

The most important difference between the two regimes concerns the underlying considerations for their adoption. The 2018 Act establishes a regime focusing mainly on national security and public order matters, with the aim of protecting sensitive economic sectors from investors whose activities might constitute a threat to the national interest and security. The 2020 Act establishes a regime which focuses on the protection of Hungarian economic interests in strategic sectors, which may be affected during the state of emergency. As shown, the state

[8] In accordance with Government Decree No. 182/2022 (May 24) on the competences and powers of the members of Government.

[9] See e. g. https://www.engage.hoganlovells.com/knowledgeservices/news/hungarian-fdi-veto-lifted-after-pressure-from-eu-commission-alls-well-that-ends-well-or-dangerous-precedent. The two systems have also been dubbed as *lasting* and *temporary*, see e. g. https://www.wolftheiss.com/insights/status-report-on-newly-implemented-fdi-regimes/ – Accessed August 28, 2022.

[10] Government Decree 180/2022 (24 May) on the declaration of a state of emergency and on certain emergency rules in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary.

of emergency was first justified by the SARS-COV2 pandemic, and then extended because of the Russian aggression against neighboring Ukraine.

Originally the screening regimes were meant to cover foreign investors from outside the EU, EEA and Switzerland, or investors from within such countries, as well as from Hungary, but controlled by foreign entities. During the state of emergency, the personal scope of the 2018 Act has been extended to all investors coming also from the EU, EEA and Switzerland. The screening regimes also extend to indirect acquisitions, acquisitions of shares and deals related to assets.

The threshold for triggering the screening obligation is set at HUF 350 million, just under EUR 1 million, in the case of the screening regime established by the 2020 Act. The 2018 Act does not contain such a financial threshold, with only a corporate threshold applying to cases where there is an acquisition of 25% of ownership in a private company, or 10% in a publicly traded company. Additionally, the 2018 Act is also triggered in case the investment results in the acquisition of a dominant influence as defined by the Hungarian Civil Code (art. 8:2). Similar corporate threshold exists in the case of the 2020 Act, where an investment aimed at acquiring a 10% shareholding triggers the obligation to notify the transaction. Furthermore, in the 2020 Act, the acquisition of convertibles, rights in usufruct, corporate transformations, asset acquisitions, capital injections and in-kind contributions also trigger the obligation of notification, even in cases where this is free of charge.

In accordance with the screening regimes, investors must submit their request within ten days after a transaction is negotiated and the contract is signed. The transaction will go through, or conclude, pending approval. Pending approval, the parties to the transaction must suspend their activities, with a standstill obligation being mandated under both screening regimes. Approval or prohibition of the transaction shall be notified in the case of the 2018 Act in a maximum of 60 days after receipt of notification, which may be extended with up to 60 days. In the case of the 2020 Act the Ministry shall reply in no later than 30 days, which may be extended with up to 15 days.

In cases of non-compliance with the legal obligation to report a transaction in accordance with these laws, the transaction will be nullified and voided *ex lege*, and the party breaching its legal obligations will face an administrative fine. In the case of the 2018 Act the administrative fine is up to HUF 10 million (or approx. EUR 25.000). In the case of the 2020 Act the administrative fine is measured at up to 1% of the annual turnover of the Hungarian business targeted by the foreign investor.

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.

Due to the novelty of a unified investment screening regime, the experience with its application is quite limited, with just a small number of cases which have become public as a consequence of investors manifesting their dissatisfaction in front of the judiciary with the way their cases have been handled. The challenges in applying the FDI screening regimes stem from the fact that there are two regimes, and both underwent several amendments in a short period of time, which might have made it more difficult for interested persons to follow through with their obligations.

In addition to the regime established by the 2018 Act, the screening regime established by the 2020 Act brought a whole different set of complications. The number of legislative interventions which have in the past couple of years amended the investment screening regimes make things a little more complicated. An example of this is Government Decree no. 532/2020, which was in force for approximately one year, and added a number of new features to the regime established by the 2018 Act. It extended the material scope of the 2018 Act by adding activities from the insurance sector, and it also extended the personal scope of the 2018 Act to investors from the EU, EEA and Switzerland. After GD 532/2020 was abrogated, Act XCIX of 2021 on the transitional rules related to the state of emergency entered into force which maintained both the extension on the personal scope (art. 114) of the screening regime, as well as the extension on the material scope.[11] It takes quite some effort to follow all the amendments and abrogations made during this period of time.

As a matter of principle, the continuous evolution of the screening regimes, as also shown above, especially of the regime established pursuant to the state of emergency, might have made it difficult for some economic actors to follow the rules. Nonetheless, there have not been any resounding cases where investors' complaints regarding the amendments to the screening regimes have become public, which is most probably due to the fact that foreign investors are usually assisted by professionals who are able to follow the legislative evolution within the

[11] There were provisions related to the 2020 Act in Government Decree no. 189/2021 (April 21) *on the different application in emergency situations of the measures necessary for the protection of the economic interests of companies established in Hungary in order to prevent a pandemic which threatens the safety of life and property and to avert the consequences thereof* (currently not in force). Some of the provisions of this government decree were then transposed into Act no. XCIX of 2021 on transitional arrangements in the event of an emergency, Chapter 72: Measures necessary for the economic protection of companies established in Hungary in order to prevent a human pandemic threatening the safety of life and property and to avert the consequences thereof.

country. The existence of two parallel regimes for investment screening might also, in theory, make it a bit more difficult and more expensive for investors, but **once again** no signs of complaints in this regard could be identified.

One issue that more realistically poses a challenge to foreign investors is the definition of terms such as national security and economic interest, which constitute the evaluation criteria for FDI. While the industry sectors where the 2018 and 2020 screening regimes apply are quite well defined in the government decrees accompanying them, it must also be noted that these regimes cover a significant part of Hungarian industry (as is also shown in detail below). Combining a wide domain of application of these regimes with evaluation criteria that are open-ended to say the very least, leaves authorities' decisions up for debate, and easily leads to an abundance of accusations of arbitrariness in the decision-making process. This also stems from the fact that national security[12] is an evaluation criterion (contained in the 2018 Act), which implies a certain degree of secrecy, being tied to the inherent sovereign rights of a state. Making such evaluations public would beat the purpose of national security considerations. It is also an issue that is recognized by the EU, this being the reason why the FDI Screening Regulation allows for much leeway for Member States to create the mechanism which best suits their needs.

While having such a wide degree of appreciation due to the special place held by national security in the workings of a sovereign, it seems more difficult to accept a similar argument in the case of national or public (or indeed, economic) interest as an evaluation criterion. It is for this reason that a definition for the term was included in art. 276 point 1 of the 2020 Law, that provides the following as a definition of national interest: "the public interest in the safety and security of networks and equipment and continuity of supply not covered by sectoral EU and national law." However, art. 160 of Act XCIX expands this definition by also adding after continuity of supply "a public interest relating to an essential strategic economic interest from the point of view of the national economy" as also constituting national (or public) interest.

The expansion of the material scope of the investment screening regimes might have also made it difficult to observe the law, which was the case, for example, with the inclusion of higher education institutions into the sphere of strategic entities, as per art. 1(3) of Government Decree 189/2021, and then art. 160(2) of Act XCIX/2021. Or that of insurance activities, as shown below, regarding a case which came out of such an investment.

[12] This term is defined extensively in art. 74 of Act no. CXXV of 1995 regarding the national security services.

The following section will present two cases which have thus far sprung up in relation to Hungary's investment screening system, and are considered pioneering in their own right:

VIG case[13]

AEGON Group of the Netherlands, an insurance company, was preparing a sale of its subsidiaries in a number of CEE countries in September 2020. VIG (Vienna Insurance Group) expressed an interest in acquiring its businesses in Hungary, Poland, Romania and Turkey. This acquisition would have made VIG a market leader in Hungary. The parties agreed to sign an agreement in this regard in November 2020.

Before the transaction was signed, the aforementioned Government Decree no. 532/2020 entered into force, and widened the applicability of the investment screening regime established by the 2018 Act.[14] Thus, the parties had to seek the approval of the Minister of Interior for the transaction to go through. Subsequent to submitting the notification for approval, the Minister vetoed the transaction in April 2021. The European Commission, in turn, applying the EU Merger Regulation, cleared the transaction in August 2021. The parties sought judicial review over the decision of the Minister, but their claims were rejected by the Budapest-Capital Regional Court in September 2021. In the meantime, the parties also sought the intervention of the Commission, alleging that Hungary essentially violated EU law with its decision to veto the transaction.

In addition to the legal battles, VIG was also discussing alternative solutions with the Hungarian Ministry of Finance, reaching an agreement and signing a memorandum of understanding ("MoU") in December 2021. Pursuant to this MoU, the Hungarian State would gain a 45% participation in the Hungarian subsidiaries of AEGON and in UNION Vienna Insurance Group Biztosító Zrt. The transaction then took place in February 2022 between VIG and Corvinus Nemzetközi Befektetési Zrt. a state-owned investment fund.

[13] Information provided regarding this case is based on the following sources: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258 https://ec.europa.eu/competition/mergers/cases1/202209/M_10102_8196601_401_3.pdf https://www.vig.com/en/investor-relations/ir-newsinside-information/detail/vienna-insurance-group-and-hungary-reach-an-agreement-on-the-outlines-of-a-cooperation-and-the-further-procedure-regarding-the-hungarian-insurance-companies-aegon-and-union.html

https://www.jdsupra.com/legalnews/hungarian-fdi-veto-lifted-after-3725622/ – Accessed 30 August 2022.

[14] Extending its applicability to all EU, EEA and Swiss investors, and also over the insurance industry. For this reason, some have called it 'Lex AEGON', see: https://www.engage.hoganlovells.com/knowledgeservices/news/hungarian-fdi-veto-lifted-after-pressure-from-eu-commission-alls-well-that-ends-well-or-dangerous-precedent – Accessed 30 August 2022.

The investigation of the Commission went on regardless of this agreement between the Government and VIG. The scope of the investigation was to find out whether the veto of the Ministry of Interior was compliant with EU law and did in fact aim to protect national security. The Commission found that the Hungarian veto infringed EU law, because it failed to communicate the intended veto to the Commission prior to its implementation, with which it basically infringed art. 21 of the EU Merger Regulation. In addition, the Commission observed that Hungary failed to demonstrate that the measure was justified, suitable and proportionate, which made it incompatible with the EU rule on freedom of establishment, and infringed art. 21 of the EU Merger Regulation. The decision contained an order for Hungary to withdraw its veto by 18 March 2022, threatening the launching of an infringement procedure before the Court of Justice of the European Union for failure to do so.[15]

This case is an illustration of the ways in which a screening procedure can ultimately force investors into negotiations. Any judicial review and petitioning of the EU institutions will take time and ultimately hold many risks. In this case, judicial review did not produce positive results, while the order by the Commission to withdraw the veto under the threat of infringement proceedings would have only prolonged the case, without producing immediate results itself. The eventual result of the infringement proceedings, despite the Commission's decision, would have still carried a degree of uncertainty, prolonging the finalization of the transaction. It is obvious why prolonging a transaction in this way may be considered bad for business. The amendment to the 2018 Act via GD 532/2020 provided the Hungarian Government with sufficient tools to pressure the investor into a deal which allowed for a state-owned entity to enter the insurance market.

The finance minister in charge of the negotiations with VIG declared in a Facebook post on 21 February 2022 that this acquisition aimed to increase public wealth and return strategic assets into the ownership of the state.

Xella case[16]

The case of *Xella* (C-106/22) is one in which the Budapest-Capital Regional Court (Budapest High Court, as named in the Case) made a request for a preliminary ruling in February 2022. The Hungarian court asked the CJEU to interpret whether or not the Hungarian FDI screening regime established by the 2020 Act is compatible with EU law, namely the FDI Screening Regulation.

[15] The decision was not public as of the closing of herein manuscript.

[16] Information regarding this case is based on the following sources: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=257222&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8901808 – Accessed 30 August 2022.

The case was brought by Xella Magyarország **Építőanyagipari** Kft, which is owned by a German company, which in turn is partially indirectly owned by a Bermudan company, which sought authorization for acquiring Janes **és** Társa Szállítmányozó, Kereskedelmi **és** Vendéglátó Kft, an extractor of raw materials. The Minister, due to Janes being considered a strategic company, refused the approval of the transaction arguing that the influence bought by Xella as a foreign-owned entity in such a company "would represent a long-term risk in terms of ensuring the security of building materials." In essence, the Minister further argued that the issues currently faced by Hungary due to the disruptions in global supply chains, the increase in the price of construction materials and the already existing situation of foreign entities controlling similar strategic undertakings in the market, the acquisition of Janes by Xella would further reduce Hungarian ownership of strategic enterprises, damaging the national interest, potentially harming the national economy and jeopardizing particular investments in Hungary.[17]

In its response, Xella argues that its ultimate beneficiary is a citizen of an EU Member State, and that the restriction is arbitrary. Xella also notes that the concept of "national interest" is unclear, thus infringing the principle of rule of law. It is also stated that the European Commission already approved the foreign ownership structure of Xella in 2017 in case M.8604. The second question addressed to the CJEU relates to this last argument, enquiring whether in case a merger is approved by the Commission under its merger control procedure, will its future examination under a Member State's legislation be precluded.[18]

The above two cases, pertaining to both the 2018 and the 2020 regime actually demonstrate how difficult it is to find a place in an open economy for investment screening regimes, especially when the use of such open-ended terms as national security and national interest constitute the backbones of these regimes. A proper mixture of EU and national law will likely bring about a better understanding of the limits as to what these open-ended terms actually allow Member States to decide in the course of applying their investment screening regimes.

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)?

[17] See para. 6 and subsequent – Case C-106/22, Summary of the request for a preliminary ruling made under Article 98(1) of the Rules of Procedure of the Court of Justice https://curia.europa.eu/juris/showPdf.jsf?text=&docid=257222&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8901808 – Accessed 30 August 2022.

[18] See also: https://curia.europa.eu/juris/document/document.jsf?text=&docid=259779&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=246944

The dual regime in Hungary extends to much more than what is covered by the EU FDI Screening Regulation, with some estimating that the screening mechanism established via the 2020 Act extends to approximately 80% of Hungarian industry sectors.[19]

One of the more important differences is the fact that the preamble of the Regulation, in para. (9), provides that it does not cover portfolio investments. The Hungarian screening regimes do not make such a difference between investments, which means that the screening regime may also apply to portfolio investments, not just FDI.

The screening mechanism established by the 2020 Act shall not apply if an entity established abroad enters into a transaction relevant under the Act with its Hungarian subsidiary, which qualifies as a strategic company.

c. What investments and investors are subject to FDI control?

The 2018 Act

The regime established by the 2018 Act applies to foreign investors, defined as follows:

a) a national of a state outside the European Union, the European Economic Area and the Swiss Confederation or a legal entity or other organization registered in such a state,

b) a legal entity registered domestically, in another Member State of the European Union, another member state of the European Economic Area or the Swiss Confederation acquiring ownership or interest as specified under art. 2 (1) in an economic entity registered in Hungary, with activities laid down under art. 2 (4), if the person with controlling interest in the legal entity as specified in the Act on the Civil Code (hereinafter: HCC) is a national of a state outside the European Union, the European Economic Area or the Swiss Confederation, or a legal entity or other organization registered in such a state.

The foreign investor, as defined above, must obtain the prior approval of the minister of interior in case it plans to establish an economic entity (meaning that the screening regime also applies to greenfield investments) or acquire ownership within an entity registered in Hungary. Regarding the acquisition of ownership, this must be notified in case it meets the conditions set out below:

[19] See: https://www.engage.hoganlovells.com/knowledgeservices/news/hungarian-fdi-veto-lifted-after-pressure-from-eu-commission-alls-well-that-ends-well-or-dangerous-precedent – accessed 24.08.2022

a) direct or indirect acquisition of more than a 25% ownership (in the case of a publicly listed company, more than a 10% ownership) in an existing or yet to be established company with its registered seat in Hungary, provided that this company pursues activities that are deemed sensitive from a national security point of view;

b) acquisition of controlling interest (or decisive control) in such a company, pursuant to the definition of the Hungarian Civil Code (HCC) of controlling interest.

The notification obligation is also applicable in case the acquisition by the foreign investor extends to less than 25% of the company, but as a result of the acquisition, more than 25% of the company will be owned by foreign investors. Publicly traded companies are exempted from this rule.

The notification obligation is also applicable in case a foreign investor wishes to establish a branch office in Hungary, or in case it wishes to acquire a right to operate or use infrastructure and equipment related to activities in the field of utilities services (electricity, natural gas, water).

The 2020 Act

The above definition of the 2018 Act is maintained within the 2020 Act, with a small adjustment regarding the specific activities of the foreign investor. Thus, an entity shall be considered a foreign investor, similarly to what was shown above at point b), whenever it acquires a determined share, or influence, in a Hungarian economic entity, and it is a legal person or another entity registered domestically (in Hungary), in another Member State of the European Union, a member state of the European Economic Area, or the Swiss Confederation, in case the majority influence (or control) over said legal person or other entity belongs to a citizen of, or legal person or other entity registered in a state outside the European Union, the EEA or the Swiss Confederation. What has been added is the specific nature of the economic activity of the Hungarian entity in which such influence is acquired, as defined by art. 277 section (2) of the 2020 Act: the Hungarian entity must be a company (limited liability company, private joint stock company or publicly traded joint stock company) the main or additional activity of which falls within a sector of strategic importance within the meaning of art. 4(1)(a)-(e) of Regulation (EU) 2019/452 (except for financial infrastructure). These are the economic activities of the strategic company.

In the case of the 2020 Act, a foreign investor must obtain the prior approval of the minister of economy, in case it intends to acquire directly or indirectly an interest

in a company registered in Hungary and active in a specific industrial sector (called a 'strategic company') by way of acquisition (including *in kind* contributions, or other types of acquisitions, whether free or not), capital increase, merger, division of a company, or other transformation, issuance of bonds or establishing of usufructuary rights over the shares or quotas of a strategic company, provided that the transaction results in the acquisition of:

a) a direct or indirect majority control over, or 10% interest in a Strategic Company, and also reaches or exceeds the threshold of HUF 350 million (approx. EUR 1 million);

b) 15%, 20% or 50% interest in a Strategic Company, irrespective of its value;

c) more than 25% interest in a Strategic Company, if this is the result of an acquisition carried out by more than a single Foreign Investor; or

d) ownership or establishment of operation rights over an infrastructure or asset necessary for pursuing activities in strategic sectors (including the establishment as a security over any "strategic infrastructure or asset").

d. What sectors are subject to FDI control?

The 2018 Act

The activities affected by the obligation to notify are the following:

a) manufacture of weapons and ammunition as well as of military equipment and devices subject to license,

b) manufacture of dual use products,

c) the production of secret service equipment as defined in the government decree on the detailed rules for the licensing of military technology activities and the certification of such undertakings,

d) provision of financial services as specified in the law on credit institutions and financial undertakings and the operation of payment systems as ancillary financial services,

e) services governed by the law on electricity,

f) services governed by the law on natural gas supply,

g) services governed by the law on water public utility services,

h) services governed by the law on electronic communications,

i) the set-up, development and operation of electronic information systems governed by the law on the electronic information security of central and local government agencies,

j) insurance and reinsurance activities under Law LXXXVIII of 2014 on insurance activities and activities directly related to insurance activities subject to mandatory reporting.

The above activities have been included in a more concrete manner in Annex 1 and Annex 2 of GD 246/2018, as follows:

Annex 1 to Government Decree 246/2018 (December 17) – Activities subject to notification within the scope of activity laid down in the law

1. Activities subject to notification in the scope of manufacture of weapons and ammunition as well as of military equipment and devices subject to license

1. The manufacture of firearms, pieces of firearms, ammunition – with the exception of museal ammunition – and Flobert ammunition laid down in Law XXIV of 2004 on Firearms and Ammunition (hereinafter Arms Act) according to Section 2 (20) of the Arms Act.
2. The manufacture of devices specified in Annex 1 of Government Decree 156/2017 (VI.16.) on the detailed regulations of the licensing of defense industry and trade activity and the certification of enterprises (hereinafter: DI Decree) – not governed by (1) or by Chapter 3 (1) of DI Decree – in compliance with Section 1 (d) of Act CIX of 2005 on the authorization of the manufacturing of military equipment and the provision of military services (hereinafter: ME Act), not including the manufacture of the devices listed under Chapter XXV (1) "Coercive devices".

2. Activities subject to notification obligation within the scope of the manufacture of dual use products

1. The manufacture of products specified in ANNEX 1 of Regulation 428/2009/EC setting up a Community regime for the control of exports, transfer, brokering and transit of dual use products.

3. Activities subject to notification obligation in the scope of the manufacture of intelligence devices specified in the government decree on the detailed regulations of the licensing of defense industry, trade activity and the certification of enterprises

1. The manufacture of devices specified in CHAPTER XXVI of Annex 1 of the DI Decree in compliance with Section 1 (d) of Act CIX of 2005 on the authorization of the manufacturing of military equipment and the provision of military services.

4. Activities subject to notification obligation within the scope of the operation of the payment system from the industry of financial services and auxiliary financial services specified in the Act on Credit Institutions and Financial Enterprises

1. The credit reference services specified under Section 3 (1) (k) of Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises (hereinafter CI Act), data processing by the financial enterprise operating the central credit information system defined by the Act on the Central Credit Information System as laid down under Section 6 (1) (42) (b) of the CI Act.
2. The operation of payment systems laid down under Section 3 (2) (b) of the CI Act, not including operation by cash-substitute payment instruments exclusively.

5. Activities subject to notification obligation within the scope of services governed by the Act on Electric Energy

The activity specified in this subsection shall be subject to notification only if it is carried out through the direct use of a critical system element as defined in Article 1(f) of Act CLXVI of 2012 on the Identification, Designation and Protection of Critical Systems and Installations (hereinafter: CI Act).

1. The transmission of electric energy as laid down under Section 3 (1) of Act LXXXVI of 2007 on Electric Energy (hereafter EE Act).
2. The distribution of electric energy as laid down under Section 3 (8) of the EE Act.
3. System control as laid down under Section 3 (51) of the EE Act.
4. The production of electric energy by a production license holder with a production license for a power plant with a nominal performance capacity of at least 50 MW as laid down in Section 3 (57) of the EE Act.

6. Activities subject to notification obligation within the scope of the Act on Natural Gas Supply

The activity specified in this subchapter is subject to notification only if it is carried out through the direct use of a vital system element within the meaning of Section 1(f) of the CI Act.

1. The distribution of natural gas in compliance with Section 3 (24) of Act XL of 2008 (hereinafter GET Act).
2. The storage of natural gas in compliance with Section 3 (31) of the GET Act.

3. The delivery of natural gas in compliance with Section 3 (34) of the GET Act.
4. System supervision in compliance with Section 3 (52) of the GET Act.

7. Activities subject to notification obligation with the scope of the act on water public utility services

The activity specified in this subchapter is subject to notification only if it is carried out through the direct use of a vital system element within the meaning of Section 1(f) of the CI Act.

1. Outsourcing as laid down under Section 2 (13) of Act CCIX of 2011 on Water Utility Supply (hereinafter: WUS Act).
2. The development of water utilities as specified under Section 2 (21) of the WUS Act.

8. Activities subject to notification obligation within the scope of services governed by the Act on Electronic Communications

1. The provision of electronic communication services – defined under Section 188 (13) of Act C of 2003 on Electronic Communications – for the provision of which services the electronic communication network operated includes system elements of vital national or European importance designated by virtue of Government Decree 249/2017 (IX.5.) on the Identification and Protection of Critical Assets and Infrastructure in the Infocommunications Sector.

9. Activities subject to notification obligation within the scope of the establishment, development or operation of electronic information systems governed by the Act on the Electronic Security of State and Local Government Organizations

1. Cooperation in the establishment, operation, auditing, maintenance or repair of electronic information systems specified in Section 1 (1) (14 b) of Act L of 2013 on the Electronic Security of State and Local Government Organizations (hereinafter: IS Act), as laid down under Section 11 (1) (k) of the IS Act.
2. Participation in an investigation into a security event specified under Section 1 (1)(9) of the IS Act as laid down under Section 11 (6) of the IS Act.
3. The performance of a fragility test specified under Section 1 (1) (41) of the IS Act as laid down under Section 18 (3) of the IS Act.

10. Activities subject to notification under Act LXXXVIII of 2014 on insurance and reinsurance activities and activities directly related to insurance activities

1. Insurance and reinsurance activities within the meaning of Act LXXXVIII of 2014 on Insurance Activities (hereinafter: "IR Act").
2. Activities directly related to insurance pursuant to Section 40 (3) a) and e) of the IR Act.

The 2020 Act

Government Decree 289/2020 contains a much more straightforward, which actually relies on the classification of economic activities in Hungary (TEÁOR), which is identical to the one established in Regulation 1893/2006/EC establishing the statistical classification of economic activities (NACE):

Chemical sector:

19 – Manufacture of coke and refined petroleum products

20 – Manufacture of chemicals and chemical products

21 – Manufacture of basic pharmaceutical products and pharmaceutical preparations

Commercial facilities:

45 – Wholesale and retail trade and repair of motor vehicles and motorcycles

46 – Wholesale trade, except of motor vehicles and motorcycles

47 – Retail trade, except of motor vehicles and motorcycles

Communications sector

58 – Publishing activities

59 – Motion picture, video and television program production, sound recording and music publishing activities

60 – Programming and broadcasting activities

61 – Telecommunications

Critical industrial sectors (including electronics, mechanical engineering, steel production and production of means of transport)

26 – Manufacture of computer, electronic and optical products

27 – Manufacture of electrical equipment

28 – Manufacture of machinery and equipment n.e.c.

29 – Manufacture of motor vehicles, trailers and semi-trailers

30 – Manufacture of other transport equipment

24 – Manufacture of basic metals

25 – Manufacture of fabricated metal products, except machinery and equipment

Defense industry

254 – Manufacture of weapons and ammunition

304 – Manufacture of military fighting vehicles

Dams

4291 – Construction of water projects

Energy sector

35 – Electricity, gas, steam and air conditioning supply

Services related to emergency situations

8422 – Defense activities

8424 – Public order and safety activities

8425 – Fire service activities

Food and agricultural sector

10 – Manufacture of food products

11 – Manufacture of beverages

12 – Manufacture of tobacco products

1 – Crop and animal production, hunting and related service activities

2 – Forestry and logging

3 – Fishing and aquaculture

6820 – Renting and operating of own or leased real estate – only if it is also carried out in relation to land used for agriculture and forestry pursuant to Section 5(17) of Act CXXII of 2013 on the Turnover of Agricultural and Forestry Land

Governmental facilities

84 – Public administration and defense; compulsory social security

Healthcare

86 – Human health activities

87 – Residential care activities

88 – Social work activities without accommodation

Information technology

62 – Computer programming, consultancy and related activities

63 – Information service activities

Nuclear sector

2446 – Processing of nuclear fuel

Construction industry

41 – Construction of buildings

42 – Civil engineering

43 – Specialized construction activities

Water and wastewater services

36 – Water collection, treatment and supply

37 – Sewerage

Waste management

38 – Waste collection, treatment and disposal activities; materials recovery

39 – Remediation activities and other waste management services

Building materials industry

23 – Manufacture of other non-metallic mineral products

Traffic, transport and logistics

49 – Land transport and transport via pipelines

50 – Water transport

51 – Air transport

52 – Warehousing and support activities for transportation

53 – Postal and courier activities

Manufacture of medical devices

325 – Manufacture of medical and dental instruments and supplies

Tourism

55 – Accommodation

56 – Food and beverage service activities

Administrative and support service activities

782 – Temporary employment agency activities

Raw material of critical importance

5 – Mining of coal and lignite

6 – Extraction of crude petroleum and natural gas

7 – Mining of metal ores

8 – Other mining and quarrying

9 – Mining support service activities

Teaching

8542 – Tertiary education

8560 – Educational support activities

e. How is a risk to public order or security assessed at Member State level?

The assessment of public order or security is made at the level of the competent ministries, in a non-public manner, maintaining the classified nature of confidential information.

In accordance with the 2018 GD, art. 11, pursuant to the decision of the competent minister, the public body concerned in accordance with its statutory tasks may be involved in the screening procedure. For such purposes, the state security services may be involved, which have competences in matters of security.

The national security services in Hungary are divided into two categories. The so-called civil national security services include the following: the Information Bureau (Információs Hivatal), the Bureau for the Protection of the Constitution (Alkotmányvédelmi Hivatal), the Specialised National Security Service (Nemzetbiztonsági Szakszolgálat), the National Information Center (Nemzeti Információs Központ). The military national security service is made up of the Military National Security Service (Katonai Nemzetbiztonsági Szolgálat). Theoretically all these security services may be involved in during

the screening procedure. Of these, the Bureau for the Protection of the Constitution is named in art. 14 of the 2018 GD as the one which checks for investors' compliance with the notification obligation under the screening regime. The Bureau for the Protection of the Constitution may itself involve other public bodies the statutory tasks of which may make this necessary. The Bureau for the Protection of the Constitution will inform the competent minister of any facts which it might encounter that are relevant in this regard, and may also suggest what action shall be taken. However, such suggestion is not binding on the minister, meaning that the latter will not have an obligation to act in the way suggested by the Bureau.

In case the investment is approved, there is no need to reveal any further information with the occasion of the approval. However, when the competent ministry chooses to oppose the approval of the investment, it must include in its decision some explanations.

Reasons for refusal, in accordance with art. 6(6) of the 2018 Act, which provides that in case the investor falling under the provisions of the 2018 Act attempted to hide the fact that it would present a risk to Hungary's national security interests, attempts to impede control or circumvent the screening procedure. This is especially so in case the foreign investor does not carry out actual economic activity in its country of registration, or where there is no evidence of the existence of lasting economic activity (especially establishments, facilities, or employees). In such a case the refusal will contain the reasons for which the investor was nominated as a risk in accordance with art. 6(6) (shown above), as well as the circumstances which underly the probability of the abuse shown there (in accordance with art. 13(1)(e)). In addition, the refusal must contain the security interest, or sphere of interest that is violated by the investment (in accordance with art. 13(1)(c)), but shall not contain any classified information.

In accordance with the art. 284 or the 2020 Act, the decision for refusing the investment will show whether there is a risk of prejudice to or threat to the interests of the State, public security or public order of Hungary, or the possibility of such prejudice or threat, in particular with regard to the security of supply of basic social needs. The refusal shall also contain information on which of the following risks (in addition to the above mentioned one) exists in the case of the investor: the lack of any formal elements in the notification as shown in art. 279 of the Act; whether the notifier is controlled in any form by an administrative body (public body, military) of a state outside the EU, whether via its ownership structure or via substantial financing; whether the investor has been involved in

activities affecting security or public order in another EU Member State; whether there is a serious risk that the notifier will engage in illegal or criminal activities.[20]

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?

In accordance with the provisions of the 2018 and 2020 Acts, there is no room for competition considerations in the process of FDI control.

g. Do the information-sharing mechanisms between the Commission and the Member States operate effectively and adequately?

While it is one of the principal aims of the FDI Screening Regulation to enhance information-sharing between the European Commission and Member States, there is no publicly available information on how this has evolved between Hungary and the Commission.

The Ministry of Foreign Affairs and Trade has been designated as the national contact point for the purposes of information-sharing under the screening mechanism.

h. What legal remedies are available to contest national authorities' FDI decisions?

There is limited judicial review that is made available. Under both screening regimes the investor may only seek judicial review in case of severe violations of the procedural rules pertaining to the screening process. In such cases, the investor may turn to the Budapest-Capital Regional Court (Fővárosi Törvényszék)[21] which may only order that the procedure be repeated, thus no immediate judicial remedy is made available through the courts. This is also a consequence of the fact that the courts will not have access to all information that is available to the competent authority to decide on a matter of national security.

i. Has the COVID-19 pandemic affected the application of FDI control?

It was the pandemic which has prompted the creation of the regime under the 2020 Act, and as it has been shown in the above, there have been many legislative interventions at the level of both the 2018 Act and the 2020 Act, that were justified by the state of emergency introduced due to the pandemic.

Trade defence and public procurement – foreign subsidies

[20] In accordance with art. 284 of the 2020 Act.

[21] https://birosag.hu/sites/default/files/2019-02/birosagok_angolul.pdf

Question 12

Our research identified no specific concerns voiced at the level of the Member State. While we are aware that Hungary made a submission during the public consultation, this has been kept confidential and is not publicly available.[22]

We have also consulted with the government body responsible for the monitoring of state aid (State Aid Monitoring Office, in Hungarian: Támogatásokat Vizsgáló Iroda), where it was confirmed that at this point there is no publicly available government standpoint to report about.

Question 13

In Hungary, there is no public position we could report on in this matter.

The scholarship has considered the extension of the EU state aid rules to foreign subsidies as a reasonable and consistent regulatory step, which is in conformity with the objectives of EU competition law and commercial policy.[23]

Mandatory due diligence and regulating supply chains

Question 14

For the purposes of this question, we use the elements of corporate due diligence in relation to human rights and environmental protection as presented in Article 4 of the Corporate Sustainability Directive's draft proposal (hereafter: "Corporate Sustainability Directive" or "Directive"). Therefore, we present the Hungarian rules on the basis of these elements.[24]

In general, Hungary's legal system provides for extensive protection regarding environment protection and various human rights (especially in relation to labour rights), which also obligate companies active within the country. However, there is no single law mandating corporate due diligence as presented by the Corporate Sustainability Directive in the context of human rights and environmental protection and the Hungarian regulation is heavily fragmented.

[22] See Summary of the responses to the public consultation on the White Paper on levelling the playing field as regards foreign subsidies –
https://ec.europa.eu/competition/international/overview/WP_foreign_subsidies2020_summary_public_consultation.pdf

[23] Cs.I. Nagy, 'Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?', *Central European Journal of Comparative Law*, Vol. 2, No. 1, 2021, pp. 147-162.

[24] Corporate Sustainability Directive, Article 4, para 1, (a)-(f).

The first aspect of mandatory due diligence as per Article 4 of the Directive, is integrating due diligence into the company's policies. Specifically, as detailed by Article 5, this includes a description of the company's approach to due diligence, a code of conduct, and a description of the processes put into place to implement due diligence. Based on our research findings, it appears that Hungary's legal system has thus far not specifically mandated the incorporation of a description of the company's approach to due diligence within its policies in a general human rights / environmental protection context. In a similar fashion, the third element appears absent as a requirement from the regulations processed for this research. Hungary, however, does deal with the presentation of a code of conduct by companies within certain contexts. These are primarily in relation to consumer protection, and the prevention of unfair commercial practices. For instance, Act XLVIII of 2018 establishes the legal basis for corporate codes of conduct with relation to unfair commercial practices.[25] This is further expounded by Act CCXXXVII of 2013, which mandates that financial entities must inform their clients if the activity covered by the contract between them falls under the scope of the company's code of conduct and make this code freely accessible to the client. Likewise, if the said entity operates a website, they must make their code of conduct freely accessible in all language version that are available.[26]

The other aspect of mandatory due diligence is identifying actual or potential adverse impacts, preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent. For this aspect, our research has found one concrete example in Hungarian regulations that seems to be applicable within the context of the Directive. According to Act XXXVII of 2009, all economic actors participating in a timber trade chain must establish information gathering procedures based on due diligence and maintain a ready system of documentations in relation. Most importantly of this obligation, the economic actors are obligated to retain their data for five years, prove that they have mitigated risk, and remove legally problematic timber from the market. This particular provision largely stems from the Hungarian legislative's adherence to Regulation 995/2010.[27]

With regards to the complaints procedures mandated by the Directive, while the Hungarian legal system does deal with corporate complaints procedures, these are chiefly related to consumer concerns and were not strictly created in a human rights or environmental protection context. An example of this is Gov. Decree

[25] Act XLVIII (2018), §. 2 (i).
[26] Act CCXXXVII (2013), §. 117 (6-7).
[27] Act XXXXVII (2009), §. 90(6)-(7), 115(c)

435/2016 (XII. 16.), which deals with the complaints procedures employed by financial institutions towards financial consumers.

The remaining aspects of due diligence as laid down by the Directive (monitoring of due diligence policy effectiveness and public communication of due diligence policy) are consequently not applicable.

Question 15

As shown by the previous question, Hungary's internal regulation on corporate due diligence with regards to environmental protection and human rights are largely absent (in the context presented by the Directive). The sole exception to this is the existing legislation on timber production and trade.

In general, Hungary's regulatory approach thus far has been to encourage the voluntary participation of companies in corporate social responsibility, as well as voluntarily adopting codes of conduct that are relevant to the Directive's goals. Therefore, the adoption of mandatory measures raises a question of implementation in Hungary. The primary challenge would be to ascertain the ideal approach to implementing due diligence on a regulatory level. The current environmental protection and human rights legislation is highly fragmented. One approach would be to implement the due diligence rules into these individual pieces of legislation. Another would be to create an entirely new law specifically for the implementation of the Directive. In the researchers' opinion, this latter approach would be most beneficial as it would make due diligence related rules easily accessible by both companies and professionals. Furthermore, the fragmented implementation approach would risk diffusing the importance of these rules. The singular law approach would likely ensure a stronger enforcement by judges.

From a practical perspective, the relatively wide-ranging obligations imposed by the Directive might pose challenges for companies operating within Hungary. The adoption process of the new obligations would likely be lengthy, and successful enforcement would require significant investment into organizational infrastructure from the member state.

IRELAND

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Chapter 1

Green competition policy

Question 1

a.

Notification and clearance of individual agreements is not possible under the Competition Act 2002 (as amended) (the „**Competition Act**"). However, pursuant to section 4(3) of the Competition Act, the Competition and Consumer Protection Commission („**CCPC**") retains the power to issue Declarations in respect of specified categories of agreements, which in its opinion comply with the „efficiency criteria" set out in section 4(5) of the Competition Act. This is equivalent to the power of the European Commission to issue block exemptions, and the „efficiency criteria" in Section 4(5) are similar to the criteria in Article 101(3) TFEU i.e., promotion of technical or economic progress while allowing consumers a fair share of the resulting benefits.

For example, in December 2010, the Competition Authority adopted a revised Declaration[3] and a Notice[4] in respect of vertical agreements and concerted practices. In October 2020, the CCPC extended its declaration in respect of vertical agreements and concerted practices until 1 December 2022.

While, in principle, the CCPC has the power to issue Declarations recognising sustainability benefits as „efficiency criteria", we expect that the CCPC will follow the practice of the European Commission as Irish and European competition law is closely aligned. In particular, we expect the CCPC not to issue its own declarations on sustainability benefits, but rather consider any relevant sustainability benefits

[1] Matheson LLP;

[2] DLA Piper Ireland LLP

[3] CCPC, Declaration dealing with Vertical Agreements and Concerted Practices; https://www.ccpc.ie/business/wp-content/uploads/sites/3/2020/10/Amended-Declaration-In-Respect-of-Vertical-Agreements-and-Concerted-Prac....pdf

[4] CCPC, Notice in respect of Vertical Agreements and Concerted Practices; https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/Guidance-Notice-Vertical-Agreements-2010.pdf

in line with relevant EU guidance / block exemptions if and when published by the European Commission.

b.

While sustainability arguments have generally not formed part of the Irish courts' jurisprudence in relation to competition law actions, arguments frequently arise in relation to wider environmental concerns such as environmental degradation, biodiversity loss and deterioration of water and air quality.

In particular, in relation the environment as a constitutional right, a number of cases were brought before the Irish Courts. For example, in the case *Friends of the Irish Environment v Government of Ireland*,[5] Friends of the Irish Environment („**FIE**"), an environmental non-governmental organisation, filed suit in the High Court, arguing that the decision of the Irish government to approve the National Mitigation Plan (the „**Plan**") in 2017 violated Ireland's Climate Action and Low Carbon Development Act 2015[6] (the „**Climate Act**"), the Constitution of Ireland, and the rights to life and to private and family life (Articles 2 and 8 of the European Convention on Human Rights („**ECHR**")). FIE alleges that the National Mitigation Plan, which seeks to cut emissions by 80 percent by 2050 compared to 1990 levels, is not „fit for purpose" because it is not designed to achieve substantial emissions reductions within the next few decades. The Irish High Court accepted the scientific evidence of the urgency of the climate crisis, and the need for emissions reductions by individual countries in the short-term. The Court further accepted the existence of the implied or unenumerated constitutional right to an environment consistent with human dignity, and that the Plan engaged the constitutional rights alleged. Ultimately, however, the Court dismissed the challenge on the basis that the government had broad discretion regarding the contents of the Plan, and further that there was no independent cause of action to challenge the validity of the Plan with respect to rights protected under the ECHR or the Constitution. On November 22, 2019, FIE appealed the ruling and the Irish Supreme Court quashed the government's National Mitigation Plan because it failed to address how a transition to a low carbon, climate resilient and environmentally sustainable economy could be achieved by 2050.

More recently, there are calls by the Climate Bar Association for a dedicated environmental dispute resolution court and a model environmental code to unify and simplify environmental legislation.[7]

[5] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49.

[6] Climate Action and Low Carbon Development Act 2015.

[7] Irish Legal News; Lawyers call for dedicated Irish environmental court; (21 January 2022); Lawyers call for dedicated Irish environmental court | Irish Legal News.

Question 2

a.

The CCPC in its Guidelines on Merger Analysis states that it will consider efficiencies that are merger-specific, verifiable and benefit consumers. The Guidelines go on to state that the onus of proof rests on the parties to „ demonstrate that efficiencies will be of sufficient size and/or scope and will occur in a sufficiently timely." The CCPC may be able to consider claims to sustainability under efficiencies e.g., as part of a quality element[8] or fostering sustainability via competition as part of research & development and innovation.[9]

While the CCPC has not yet considered sustainability claims in merger control cases, it may be able to use its „classic" merger control tools to foster sustainability. In addition, as the European Commission increasingly considers sustainability in its decisions, the CCPC is likely to follow suit.

b.

The CCPC has not yet considered a transaction's likely detrimental effects on the environment as competitive harm.

On a European level, In *Schwarz Group/Suez Waste Management*,[10] while clearing the merger subject to commitments, the European Commission considered the effects of a merger in the lightweight waste sector and found that environmental impacts such as increased environmental costs due to longer distances travelled by waste trucks as well as customers' preference for waste to be sorted in-land were factors in assessing the merger's impacts on the environment. It is likely that the CCPC would consider a transaction's detrimental environmental effects as competitive harm following the European Commission's increased consideration for sustainability and the environment.

However, in its *Pandagreen/Exomex* merger determination,[11] the CCPC has not considered environmental impacts and cleared the waste merger subject to a binding commitment to divest part of the Pandagreen business. This may be due to the fact that the merger was already notified on 9 April 2021, i.e., before the

[8] See for example Cristina A. Volpin; Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves); 28 July 2020; who argues that the impact on sustainability of certain types of conduct or transactions can be considered in the analysis of their price or non-price effects on quality, choice and innovation.

[9] See for example the antitrust investigation of the European Commission into BMW, Daimler and VW (Volkswagen, Audi, Porsche) in which the European Commission found that they have breached EU antitrust rules from 2006 to 2014 by colluding to restrict competition on the development of technology to clean the emissions of petrol and diesel passenger cars.

[10] M.10047 – *Schwarz Group / Suez Wate Management Companies* (14 April 2021).

[11] M/21/016 – *Pandagreen/Exomex* (30 September 2021).

European Commission's decision in the *Schwarz Group/Suez Waste Management* merger. However, only recently on 3 August 2022, a new proposed waste merger was notified to the CCPC and it may be likely that the CCPC will take inspiration from the European Commission's consideration of sustainability goals in competition policy.[12]

Question 3

From an Irish perspective, it is currently not possible to give a definite answer to this question as sustainability benefits have to date not formed part of the CCPC's competition law analysis.

The best analogy for this, however, might be the application of the efficiency criteria pursuant to Article 101(3) TFEU and the Irish equivalent power under section 4(5) of the Competition Act (as set out at question 1 above). However, there are few CCPC precedent cases that outline a detailed methodology for the application of efficiency gains.

Chapter 2

European strategic autonomy, the promotion of „European champions" and competition law enforcement

Question 4

a.

Other than acknowledging that the Siemens/Alstom transaction was „closely followed" by the CCPC in its Mergers & Acquisitions Report (2019)[13], it is not clear the precise position Ireland maintained during the Commission's merger investigation. For many years, however, it is notable that Irish policymakers have been highly sceptical of broad arguments favouring the creation of „European champions". Rather, Ireland tends to associate itself with EU Member States that oppose protectionist policies and seeks to positively develop EU exports and imports.[14]

[12] M/22/037 – *Thorntons Recycling/Carducci Holdings (The City Bin Co.)*.

[13] CCPC Mergers and & Acquisitions Report 2019; see https://www.ccpc.ie/business/wp-content/uploads/sites/3/2020/01/2020-01-03-CCPC-2019-Merger-Review-Report-FINAL.pdf

[14] Alexander Conway, A Spectrum of Choices for the EU and Ireland; March 2021; see https://www.iiea.com/images/uploads/resources/Strategic-Autonomy-Alexander-Conway-IIEA.pdf

b.

The Irish company, Smurfit Kappa Group Ireland, is part of the European Round Table for Industry („**ERT**"), which includes CEOs and Chairs from around 60 of Europe's largest companies in the industrial and technological sector. Reacting to proposed changed in merger control post Siemens / Alstrom, on 7 October 2019, the ERT published a position paper stating that „ERT does not believe there should be greater political involvement in merger control decisions."[15]

c.

We are not aware of similar arguments in comparable transactions in Ireland and there is no Irish merger control rule regarding any exceptions to promote „national champions" to ensure long-term competitiveness on the international level. However, the Competition Authority in 2003, as the CCPC then was, issued a submission paper in which it advocates that competition through normal market behaviour than a centrally planned industrial policy is at the heart of how competition policy works, in the medium- and long-term, to the benefit of consumers and efficient and innovative products. The CCPC acknowledged the arguments in favour of creating industrial champions but considered that competition in the domestic market is the best stimulus to international success as companies that compete nationally know how to cut costs, operate efficiently and gain market share. The CCPC gave Ryanair as an example which developed a successful business model in Ireland and the UK and then expanded into other European markets.[16]

In general, the CCPC is expected to align its assessment of industrial policy goals with those of the European Commission. For example, the repeated prohibition of the Ryanair / Aer Lingus merger[17] by the European Commission would likely be blocked by the CCPC on similar grounds, namely that it would create a monopolistic market in the commercial flight industry sector.

[15] ERT, 7 October 2019, Competing at Scale: EU Competition Policy fit for the Global Stage; https://ert.eu/documents/competing-at-scale-eu-competition-policy-fit-for-the-global-stage/.

[16] Competition Authority – Submission to the Enterprise Strategy Group, https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/s_03_006-Enterprise.pdf.

[17] Eg, RTE – EU blocks Ryanair takeover deal for Aer Lingus, https://www.rte.ie/news/business/2013/0227/369828-eu-blocks-ryanair-takeover-deal-for-aer-lingus/; European Commission, Mergers: Commission prohibits Ryanair's proposed takeover of Aer Lingus, https://ec.europa.eu/commission/presscorner/detail/en/IP_13_167.

Question 5

The most recently enacted Competition (Amendment) Act 2022, strengthened the CCPC's powers, allowing it to require notification of 'below threshold' transactions that are not subject to the mandatory notification requirement but which „ may, in the opinion of the Commission, have an effect on competition in markets for goods or services in the State." While the new CCPC powers do not specify that the CCPC can make decisions other than on competition grounds, a potential rationale for this enhanced power may be concerns about harm to innovation and „killer acquisitions" in certain sectors.[18]

For completeness, the CCPC has a dual competition and consumer mandate and can therefore address certain issues through its broader work e.g., conducting market studies.

As set out above in at question 4, the CCPC is expected to align its assessment of industrial policy goals with those of the European Commission. As such, the CCPC would only consider industrial policy goals and balance these against competitive concerns if the European Commission indicated that it would take such approach. As of today, while the European Commission has acknowledged the need for the EU market to remain competitive on the international level, it fell short of putting this assessment into practice by, for example, highlighting industrial policy goals through the creation of EU champions. As such, the CCPC will await, and likely adopt, the European Commission's stance once it considers to put more emphasis on EU industrial policy.

Question 6

The Irish government generally has no jurisdiction to overrule mergers that were blocked by the CCPC on competition law grounds. Section 24(3) of the Competition Act, however, provides for an appeal mechanism to the High Court for a merger that has been prohibited or cleared conditionally. It can be further appealed on a point of law to the Supreme Court.

However, under part 3A of the Competition Act 2002, the Minister for Communications, Energy and Natural Resources (the „**Minister**") has the power to block a media merger that the CCPC has previously cleared on competition grounds. The Minister can do so if the media merger is likely to be contrary to the public interest in protecting plurality of the media in the State.

[18] OECD (2020), Start-ups, Killer Acquisitions and Merger Control, www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf.

In general, the CCPC's decisions on mergers may be appealed to the High Court. The only merger determination that was overturned to date was a decision by the CCPC's predecessor, the Competition Authority, in which it was found that the acquisition of Breeo Foods Limited and Breeo Brands Limited by Rye Investments Limited, an indirect, wholly owned subsidiary of Kerry Group plc was likely to result in a substantial lessening of competition in a number of product markets (i.e. the product markets for rashers, non-poultry cooked meats and processed cheese).[19] Rye Investments Limited appealed to the High Court and in March 2009 the Competition Authority's prohibition decision was annulled by the High Court. The High Court found that the Competition Authority made material errors in how it reached its conclusions finding that the Competition Authority (i) made fundamental errors in the market definition of the cheese product market, and (i) failed to assess the post-merger existence of sufficient countervailing buyer power in the product markets for rashers and non-poultry cooked meats.[20] This decision was subsequently appealed by the Competition Authority to the Supreme Court against the High Court judgment. However, the CCPC decided not to proceed with the appeal to the Supreme Court.

In relation to media mergers, the Minister has not yet blocked a media merger / reversed a decision by the CCPC.

Question 7

a.

Ireland has considered a very limited number of cases against large digital platforms. In the two main cases, the CCPC's investigation was not prompted by complaints, but rather informed by investigations in other Member States and Irish political direction. The two investigations involved Booking.com and Ticketmaster:

- The Booking.com investigation followed a number of investigations across Europe by other authorities with Ireland joining France, Sweden and Italy in securing commitments from Booking.com. In 2015, the CCPC concluded its investigation of alleged anti-competitive practices by Booking.com and found that use of wide 'most-favoured nation' clauses („MFNs") risks dampening competition. The CCPC ultimately required Booking.com to remove wide MFNs from their contracts with hotels, whilst permitting narrow MFNs to remain. In September 2020, the CCPC and Booking.com

[19] M/08/009 – *Kerry / Breeo*; Update 21 April 2016; M/08/009 – Kerry/ Breeo Update – CCPC Business
[20] *Rye Investments Ltd v Competition Authority* [2009] IEHC 140.

mutually agreed to extend the duration of the commitments until 1 July 2023.21

- The Ticketmaster investigation followed an investigation carried out by the CCPC's predecessor, the Competition Authority, and took account of material developments and trends in the ticketing services sector in Ireland. In 2021, the CCPC completed its investigation into suspected abuse of dominance practices by Ticketmaster Ireland. The CCPC suspected that Ticketmaster Ireland had abused its dominant position in the provision of ticketing services by entering into long-term contracts which hindered the ability of venues and live event organisers to work with other ticketing services providers. Ticketmaster Ireland entered into a legally binding agreement with the CCPC where it committed to a number of actions (see below at b. for further details).

b.

In relation to online travel agencies („**OTA**s"), such as booking.com concern of the CCPC (and other competition authorities such as those in France, Italy and Sweden), centre largely on the fact that such websites usually offer a best-price guarantee to consumers which effectively means other hotels and accommodation providers cannot offer lower prices to potential guests who approach them by phone, email and cannot offer lower prices to other OTAs. The CCPC stated that „hotels in Ireland are now free to enter into alternative pricing arrangements with different OTAs, thereby facilitating price competition. Hotels will also be able to offer cheaper prices through other marketing channels, for example loyalty clubs and through direct contact with consumers who call, email or drop in."[22]

In relation to its ticket investigation, the CCPC, in its agreement committed Ticketmaster Ireland to remove exclusivity clauses with venues in relation to the supply of outsourced primary ticketing services. Exclusivity clauses must now be limited to three years in contracts with live event organisers and the overall contract duration will be capped at five years, with no automatic contract renewals. The CCPC held that this would the „agreement with Ticketmaster would allow for improved competition in the market, and provide more choice for Irish live event businesses. Improved competition in this market can ultimately deliver consumers significant benefits in terms of price, service and innovation."[23]

[21] CCPC, Booking.com investigation: Booking.com Investigation | Competition and Consumer Protection Commission (ccpc.ie).

[22] CCPC, Commission secures 5-year commitments from Booking.com | Competition and Consumer Protection Commission (ccpc.ie).

[23] CCPC, CCPC publishes 2020 Annual Report – CCPC Business.

As such, remedies imposed by the CCPC in relation to Booking,com and Ticketmaster strengthening digital sovereignty by deciding the rules applied in these digital spheres.

c.

The CCPC noted in it submission to the consultation on the Digital Markets Act („**DMA**") proposal that it may „have potential implications for the CCPC's mandate of enforcing competition and consumer protection law and how these statutory functions are carried out."

d.

Digital data sovereignty seems more effective and feasible at the EU level, which can be evidenced by the success of the General Data Protection Regulation.

With that in mind, the increasing use of Article 22, allows national competition authorities in the EU to refer merger transactions to the European Commission for determination. This is a key development ensuring greater European cooperation in cases against large digital platform. As mentioned above, the CCPC made one referral under Article 22 in the Facebook / Kustomer case.

Question 8

From an Irish perspective, industrial policy issues have not factored in the CCPC's decision-making to any discernible extent, but CCPC cases have nevertheless attracted public and political discussions regarding the interplay of industrial policy goals and competition law creating European champions. We appreciate, however, that there is the wider EU context that necessarily incorporates any Irish considerations and would like to highlight the following.

We appreciate that there is a wider EU context, whereby state aid can play a crucial role in defining EU industrial policy by fostering the establishment of strong industrial players. Large EU companies often no longer compete with other EU competitors, but rather with global players that are often heavily subsidised by foreign governments. For example, the Siemens/Alstom merger would have created a European industrial champion on the backdrop of the rise of CRRC, a Chinese state-owned rolling stock manufacturer and the largest of its kind in the world.[24] As such, for the EU to stay competitive in markets for globally crucial

[24] Konstantinos Efstathiou; 'The Alstom-Siemens merger and the need for European champions' (11 March 2019); https://www.bruegel.org/blog-post/alstom-siemens-merger-and-need-european-champions.

resources and products, state aid should be considered as an important tool to ensure the EU's industrial and economic competitiveness in the next decades.

Industrial policy goals have been part of the European Commission's decision making as regards the creation of industrial champions, most recently in the proposed Siemens/Alstom merger. As set out above, the Swedish letter sent, inter alia, on behalf of Ireland, emphasised the need to consider the global market when making industrial policy decisions while acknowledging that EU competition policy should not be politicised.

In Ireland alone, state aid was granted in over 20 cases since the start of the COVID-19 pandemic to shield Irish businesses and the economy, totalling several billions of euros in financial support.[25] These state aid measures have ensured that Ireland was able to recover from the severe financial, economic and social effects the COVID-19 pandemic has caused. In particular, as the largest island in the European Union with a significant reliance on the commercial flights industry sector and its strong economic ties to its European and overseas neighbours, state aid was crucial to ensure the survival of the State's commercial airports. The importance of the commercial flight sector was an important factor for the sector being selected as a target of COVID-19 financial supports, and this trend is likely to continue.

Only recently in April 2022, following Russia's invasion of Ukraine, state aid was granted by the Irish government and approved by the European Commission to ensure the long-term viability of the Irish road haulage sector affected by the fuel prices increase caused by the geopolitical crisis.[26]

As the large number of state aid measures have proven to be effective in ensuring the survival of key industry sectors across the EU, it is expected that considerations of long-term viability will form part of future State aid decisions.

Question 9

While it is possible for Irish courts to refer questions regarding the interpretation of state aid rules to the Court of Justice, we are not aware of any such references specific to the state aid rules in the TFEU or secondary legislation.

There is no reason why a reference to the Court of Justice on the state aid rules would not be made by an Irish court if required. The dearth of references to the Court of Justice may indicate that the state aid issues raised before Irish courts to

[25] European Commission, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases/ireland_en#:~:text=on%2014%20August%202020%2C%20an,with%20up%20to%20499%20employees.

[26] European Commission, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2669.

date did not require the assistance of the Court of Justice and could be adequately dealt with at national court level.

Chapter 3

Geopolitical instruments, trade defence instruments, and competition policy

Question 10

We are not aware of any cases to date where the CCPC conducted investigations where trade defence instruments affected its competition law analysis.

Our expectation is that the new „geopolitical" instruments will not produce major effects for Irish competition law practice. Ireland is an open economy which attracts and has attracted large sums of foreign direct investment, and the number of restrictive trade measures under national law is hence rather limited.

Chapter 3

Trade: FDI control

Question 11

a.

Ireland does not currently have an existing FDI screening regime in place – but this is soon to change. On 2 August 2022, the Irish Government published the draft Screening of Third Countries Transaction Bill 2022 (Screening Bill). This is the first FDI screening regime to be introduced in Ireland. The Screening Bill is expected to be enacted later in 2022 but may well undergo further legislative amendment.[27]

In essence, the Screening Bill provides for a mandatory and suspensory prior notification regime for investments in „Sensitive Sectors" – i.e., those sectors covered by the EU FDI Screening Regulation. A notification obligation will arise where (a) the 'value of the transaction' (not yet defined) is €2 million or higher, (b) involves a 'third country' firm or person or connected person (i.e., any country outside of the EU, EEA and Switzerland), and (c) involves shares or voting rights in a firm in Ireland moving from: (i) 25% or less to more than 25% of shares or

[27] The Screening Bill is available at: https://www.oireachtas.ie/en/bills/bill/2022/77/?tab=bill-text

voting rights in that firm; or (ii) from 50% or less to more than 50% of shares or voting rights in that firm.

Under the Screening Bill, the Minister for Enterprise, Trade and Employment („**Minister for Enterprise**") will have wide-ranging abilities to review and block investments from third countries. In addition, the Minister for Enterprise may review non-notifiable transactions where there are reasonable grounds for believing that the transaction may affect security or public order in Ireland. A unit within the Irish Department for Enterprise, Trade and Employment („**DETE**") will be responsible for the operation of the screening regime.

b.

The Screening Bill implements a somewhat maximalist version of the EU FDI Regulation. Although the sectors are no wider than those outlined in the EU FDI Regulation, the current scope of the Screening Bill appears expansive and broadly scoped as it extends to transactions above a EUR 2 million value threshold and potentially includes internal group re-organizations. Further, the review period for the Minister for Enterprise can take up to 135 days, irrespective of the third country of origin of the investment. As such, the Screening Bill extends to countries such as the UK and the US, both of which are well-established, important strategic sources of FDI into Ireland and, thus, unlikely to raise potential public order or security issues.

c.

The Screening Bill proposes to require mandatory notification of transactions where:

a) A third country undertaking (or connected person) is a party to the transaction,

b) The transaction value is above EUR 2 million,

c) The transaction relates to or impacts upon one of the Sensitive Sectors in the EU FDI Regulation,

d) The transaction relates to an asset or firm in Ireland.

A 'third country undertaking' refers to a natural person or firm from outside the EU/EEA.

d.

The „Sensitive Sectors" are those contained in the EU FDI Regulation – and include „critical" infrastructure, technology and inputs across a wide range of sectors such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure.

e.

Under section 13(2) of the Screening Bill, the Minister will have regard to the following considerations when assessing whether a transaction affects security or public order in Ireland:

a) whether a party to the transaction is controlled by a foreign government,

b) whether a party to the transaction is already involved in activities relevant to Irish security or public order,

c) whether a party to the transaction has previously taken actions affecting Irish security or public order,

d) whether a party is at risk of engaging in illegal or criminal activities,

e) whether the transaction provides a person with an opportunity to:
   i. undertake action disruptive or destructive to persons in Ireland
   ii. improve access to sensitive undertakings, assets, people or data in Ireland,
   iii. undertake espionage affecting or relevant to Irish interests.

f) whether the transaction will have a negative impact on the stability, reliability continuity or safety of (a-e, article 4(1)

g) whether the transaction would result in persons acquiring access to information, data, systems, technologies or assets that are of general importance to the security or public order of Ireland

h) where applicable, comments of Member States and the opinion of the European Commission

i) whether the transaction affects, or would be likely to affect, the security or public order of a Member State other than Ireland.

f.

No. These are not expressly referred to as considerations which the Minister must have regard to when reaching a determination whether a transaction will affect public security or order in Ireland.

g.

As far as we are aware, the Investment Screening Unit („**ISU**“) within DETE is already reviewing and sharing information in relation to existing FDI notifications within the EU. We are not aware of any public comments by DETE as to potential issues in relation to the existing information-sharing mechanism.

h.

The Screening Bill provides for the introduction of a bespoke appeals process, including arrangements around time limits for appeal, the appointment of an adjudicator, a right to an oral hearing, provisions regarding the sharing of sensitive information, and provisions for holding an appeal in non-public sittings (i.e., behind closed doors). Notably, the Screening Bill purports to include provisions whereby the Minister will have the power to „designate" certain lawyers with the right to represent clients subject of a Screening decision.

i.

N/A.

Chapter 4

Trade defence and public procurement – foreign subsidies

Question 12

Given Ireland's heavily services-based economy, there is perhaps less voluble concern among the Irish business community in relation to the impact of foreign subsidies. However, it is clear that Ireland supports the implementation of the Foreign Subsidies Regulation, and this will be particularly relevant for key Irish export sectors such as food & beverage, life sciences, and agriculture. Indeed, Ireland previously was a signatory to a letter submitted by the Swedish Government to the European Commission on 10 March 2020, stating that „the EU must not be naïve when facing a rapidly changing global landscape, where unfair foreign

subsidies or state control of firms have a detrimental effect on the functioning of the internal market." However, the letter also states that „it is important that any review of Europe's competition rules […] is based on proven principles, evidence and economic research, in order to avoid inflicting harm on consumers, SMEs and the Single Market. Any moves to soften and politicize EU competition rules would be detrimental for the whole European Union."[28]

In the case of the Foreign Subsidies Regulation, Irish policymakers are generally well disposed to allocate an exclusive competence to the European Commission, in line with the EU Treaties, in complex areas where the European Commission is better placed with the technical and administrative expertise required to efficiently operate a foreign subsidy notification regime (i.e., staff, resourcing, knowledge, legal support etc.). Indeed, DG Trade has established over many decades the expertise needed to investigate and sanction trade issues at a global level. That said, Irish policymakers tend to keep under review efforts by the European Commission to allocate to itself further centralised powers. By analogy, in the past, Ireland has vigorously defended its independence on taxation issues at a European level, and sought to seek common ground under the guidance of the OECD. Most recently, in October 2022, the Irish President criticised the „lack of legitimacy and competence" in economic matters which has fuelled a „democratic crisis" and „loss of trust" across the EU – indicating that this is a sensitive subject for Irish policymakers.

From an Irish perspective, this aspect of the Foreign Subsidies Regulation has the potential to introduce further complexity and uncertainty to an already cumbersome procurement process for public contracts.[29] That said, the threshold is set quite high (i.e., the estimated value of the public procurement project must be equal to or greater than EUR 250 million, and the foreign firm must have received at least EUR 4 million in financial aid/grant/contributions in the three years preceding the notification). Accordingly, it appears this may only apply in high-value cases in an Irish context.

[28] Letter from Ibrahim Baylan, Minister for Business, Industry and Innovation (Sweden) to Margarethe Vestager dated 10 March 2020; https://www.regeringen.se/493e14/globalassets/regeringen/dokument/naringsdepartementet/letter-to-executive-vice-president-margrethe-vestager---10-march-2020.pdf.

[29] 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.

Question 13

Yes. We envisage that various complex jurisdiction and enforcement issues are likely to arise with this new and sophisticated framework, including potential errors of over / under enforcement. In relation to concentrations, the prior notification obligation in Chapter 3 of the Foreign Subsidies Regulation will raise significant transaction complexity, particularly where merging parties will need to gather detailed financial information over a prior three-year period, in a format that is outside of current reporting structures or information systems. At the same time, it may assist with legal certainty that the proposed regime draws heavily on existing legal concepts under the EU Merger Regulation (e.g., the notions of 'turnover', 'control', 'joint venture', are largely similar). However, it remains to be seen whether an *ex ante* notification regime is the best measure to tackle the perceived risk to EU internal market distortions, particularly where the measures may well introduce barriers to access the internal market.

Chapter 5

Mandatory due diligence and regulating supply chains

Question 14

No. At present, there are no directly applicable Irish laws to compel firms to respect human rights and environmental law throughout the supply chain. Accordingly, this response sets out some of the relevant issues from an Irish perspective.

Ireland is committed to implementing the 2011 United Nations Guiding Principles on Business and Human Rights („**UNGPs**").[30] Generally, these policies are implemented by companies on a voluntary basis. At the same time, it is evident that many Irish firms are at the forefront of efforts to proactively partner with non-governmental organisations to encourage equality throughout the supply chain. For example, FairTrade International is an alternative approach to conventional trade and is based on a partnership between some of the most disadvantaged farmers and workers in the developing world selling their products to companies based in Ireland and across the EU.

Within Ireland, Irish law provides for a highly progressive and well-developed equality and human rights environment. For example, Irish firms must comply with the Employment Equality Acts 1998-2015. This legislation goes beyond

30 See https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

existing EU obligations and prohibits discrimination in employment (including vocational training and work experience). In 2014, Ireland introduced a positive obligation on public sector bodies to eliminate discrimination and to protect the rights of staff and services users.[31] All public bodies in Ireland have responsibility to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans. This requirement relates to public bodies only.

From a liability perspective, traditional Irish corporate law principles provide for separate legal personality and liability. Given an increasing global trend for human rights-based litigation against corporations for harms within the supply chain. At present, some Irish commentators have discussed whether the Irish courts would be likely to the UK in a historic judgment against the oil giant Shell. In that case, a UK court found in favor of a group of Nigerian farmers along with environmental activists in an oil spill case.[32] The decision provides guidance on the circumstances in which a parent company might owe a duty of care in respect of the negligence of its subsidiaries in another country. It is evident that where subsidiaries operate in poorer, less-developed countries, the risk of a claim being brought against the parent company in respect of the acts or omissions of its foreign subsidiary is substantial and duty of care/due diligence obligations ought to be taken seriously.

Question 15

There are no current Irish laws applicable to enforce diligence requirements with respect to human rights or environmental law issues relating to the supply chain in Ireland. However, the Irish Government has welcomed agreement on the Corporate Sustainability Reporting Directive (**CSDD**). In particular, the Minister for Trade Promotion, Digital and Company Regulation commented on the EU proposal on 30 June 2022:

„This agreement is excellent news for consumers, investors and other stakeholders with an interest in how the businesses they engage with are addressing sustainability matters. The Directive will ensure that the largest businesses across operating in Europe and listed SMEs provide reliable and comparable information annually in relation to their impacts on environment, social and governance matters as well as human rights. I believe it strikes the correct balance between requiring reporting

[31] Section 42 of the *Irish Human Rights and Equality Commission Act 2014*. Section 42(1) requires public bodies, in the performance of their functions, to have regard to the need to eliminate discrimination, promote equality and protect human rights of staff and people availing of their services.

[32] Okpabi v Royal Dutch Shell plc [2021] UKSC 3 on 12 February 2021.

which gives maximum relevant information while also avoiding unnecessary burdens on companies."[33]

We anticipate that the Irish Supervisory Authority (tbc) would face a number of challenges exercising its new powers under the CSDD, such as conducting extra-territorial inspections into possible breaches by a company of their obligations in the CSDD. Further, the language used within the CSDD includes general requirements for a Member State „to take appropriate measures", leaving open to further interpretation the precise measures needed. Further, given the area of expertise covers such a multitude of issues ranging from human rights and environmental concerns, the Irish Government will face organization and technical difficulties in implementing the CSDD across all sectors. Further, the CSDD will impose significant challenges for private sector firms to ensure adequate resourcing is devoted to meeting the CSDD requirements.

One point to note is that there is a concern in Ireland that if the CSDD is implemented in a maximalist approach, many firms may consider deploying or re-directing supply chains (even outside of the EU) to potential locations where there is weaker governance and enforcement provisions. Therefore, there is a challenge to ensure that all EU countries adopt a similar approach when implementing the CSDD.

As mentioned above, given the lack of existing laws within Ireland directly relating to duty of care/due diligence obligations, the proposed EU measures will be welcomed to improve standards along the supply chain. It is noteworthy, that the Proposal will set a combination of binding requirements for companies as well as company directors, moving beyond voluntary measures. These provisions will be significant and will require amendments to the current fiduciary responsibilities of a director set out in Part 5 of the Companies Act 2014. Directors will be required to take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.

The CSDD seeks to impose an obligation on directors, for the first time in statute in Ireland, to set up and oversee the implementation of corporate sustainability due diligence processes and to take into account the actual and potential adverse impacts identified and the relevant measures to be taken under the CSDD with respect to such impacts.

[33] See Minister Troy welcomes agreement on the Corporate Sustainability Reporting Directive – DETE (enterprise.gov.ie)

ITALY

Ginevra Bruzzone, Enrico Adriano Raffaelli[1]

Question 1

In line with a general trend in the EU, the Italian Competition Authority ("ICA", or "Authority"), which has competence in the enforcement of competition law and consumer protection law, is becoming more and more sensitive with regard to sustainability issues and has set up an ad hoc internal working group on these matters.

For the time being, the ICA has not adopted any decision directly dealing with sustainability agreements and the positions expressed by the Authority in the framework of the consultations carried out within the European Competition Network are still confidential.

However, on a more general level, the ICA has already taken a clear stance on the relevance of sustainability in the framework of competition law assessments. Indeed, in its Annual Report on the activities carried out in 2020, issued in 2021, the ICA stated that the protection of competition can be seen as complementary to the public interest in environmental safeguard and sustainability insofar as antitrust and consumer protection rules are instrumental in enhancing the sustainability of economic activities. In this vein, competition, while not having the primary purpose of promoting sustainable development, can contribute, by complementing existing instruments such as regulation and taxation, to facilitate the process of transition to an environmentally sustainable growth model. More generally, the Authority confirmed that it is ready to apply competition law in evolutionary terms and to assess, in coordination with the European Commission and other Authorities of the Member States, the possible expansion of the currently available instruments to accompany a development that is both sustainable and competitive.[2]

In concrete terms, it is true that the ICA has examined cases related to environmental issues (such as, for instance, an in-depth investigation in the infrastructure sector for electric mobility and several cases dealing with urban waste management chains and, in particular, recovery and recycling services[3]). It is

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[2] ICA Annual Report of 31 March 2021, pp. 15 ff.

[3] See, for instance: Case A476 – CONAI PLASTIC WASTE MANAGEMENT, decision no. 25609, 3

also true that, so far, the Authority under Article 101(3) TFEU has not considered possible sustainability benefits. The same applies to the available judicial practice, with reference to both administrative and civil courts, given that no case law exists on the specific issue of the relationship between sustainability and agreements restricting competition.

On the other hand, considering the ICA's competence on consumer protection law, it should be noted that the Authority dealt with sustainability issues with particular regard to misleading advertising claims containing green references (i.e. the practice of so-called 'greenwashing'). As is well known, the necessary basis for enabling consumers to make virtuous environmental choices is ensuring that they are provided with clear and reliable information to identify the features of each product. In this scenario, the so-called 'environmental claims' or 'green claims' are defined as the practice of suggesting, or otherwise creating the impression, in the context of a commercial, marketing or advertising communication, that a product or service is environmentally sustainable. When such claims are untrue or cannot be verified due to their vagueness, the conduct at issue is defined as greenwashing.

The ICA's decisions on greenwashing show that such practice has a 'transversal' nature, in the sense that it is put in place by undertakings operating in the most diverse economic sectors, such as food and beverage,[4] transport and mobility,[5] or even personal hygiene.[6]

As per the second part of the question *(b)*, in general terms, national courts would be competent, and may well be willing, to consider sustainability arguments in a private action.

In this regard, it is particularly worth mentioning that, following the approval of Constitutional Law No. 1 of 11 February 2022, the protection of the environment has been expressly included among the fundamental principles of the Italian Constitution. Indeed, the said Law added a new paragraph to Article

September 2015; Case A531 – RECYCLING PRIMARY PACKAGING/ABUSIVE COREPLA WRAPPING, decision no. 28430, 27 October 2020; Case I838 – RESTRICTIONS IN THE PURCHASE OF EXHAUSTED LEAD ACCUMULATORS, decision no. 29718, 15 June 2021; Case C12404 – ENEL X-VOLKSWAGEN FINANCE LUXEMBOURG/JVC, decision no. 29945, 9 December 2021; Case A544 – ERION WEEE, decision no. 30130, 27 April 2022. All the ICA's decisions are available at *www.agcm.it*.

[4] Case PS6302 – ACQUA SANT'ANNA BIO BOTTLE, decision no. 24046, 14 November 2012.

[5] Case PS10211 – VOLKSWAGEN POLLUTANT EMISSIONS OF DIESEL VEHICLES, decision no. 26137, 4 August 2016.

[6] Case PS10389 OLIVE ITALIA-PANNOLINI NAPPYNAT, decision no. 26298, 15 December 2016. On this issue, see also Case PS4026 – ACQUA SAN BENEDETTO-LA SCELTA NATURALE, decision no. 20559, 10 December 2019; Case PS7235 – FERRARELLE-IMPATTO ZERO, decision no. 23278, 8 February 2012; Case PS8438 – WELLNESS INNOVATION PROJECT-PANNOLINI NATURAÈ, decision no. 24438, 3 July 2013; Case PS11400 – ENI DIESEL+-PUBBLICITÀ INGANNEVOLE, decision no. 28060, 20 December 2019; PS11848 – DOLOMITI ENERGIA/OFFERTE COMMERCIALI, decision no. 29774, 13 July 2021.

9 of the Constitution, enshrining the principle of protection of the environment, biodiversity, and ecosystems in the interest of future generations. At the same time, also Article 41 of the Constitution on the exercise of the economic initiative was amended. In this regard, it should be noted that Article 41 is the only provision of the Constitution to which the Italian Antitrust Law (Law No. 287/90) expressly refers, stating that such provision is the constitutional foundation that the same Antitrust Law implements.

The amendment of Article 41 consisted, first, of adding a reference to the environment among the limits to private economic initiative. As a result, the provision now states that private economic initiative cannot be carried out to the detriment of, inter alia, health and the environment, adding these two limits to those already in force, namely security, freedom, and human dignity. Secondly, the third paragraph of Article 41 of the Constitution was also integrated, by making mention to environmental purposes in addition to the already existing reference to social objectives that are considered by the law in determining the proper programmes aimed at orienting and coordinating both public and private sector economic activity.

Obviously, the environment was already protected at constitutional level even before the said amendments, by means of a systematic interpretation of several norms of the Italian Constitution; however, the explicit inclusion of the abovementioned provisions in the fundamental law proves the increasing importance of the environment and its protection among the values underlying the Italian legal order.

In light of the recent developments outlined above, it can be assumed that national courts, given the importance of constitutional principles, will be increasingly willing to consider sustainability as a fundamental (and fully binding) principle to be balanced with other, more traditional and well-established, principles. Moreover, national courts will have the possibility to draw new general principles from the values laid down in the Italian Constitution, as well as at European level, with environmental protection as the central pivot.

Question 2

As stated in Article 10 of Law no. 287/90, the ICA operates autonomously and with independence of judgement and assessment: this provision grants the possibility for the Authority to interpret and apply the law according to the evolution of the applicable principles. Furthermore, since it very origins, the Italian Antitrust Law contains (in its Article 1, para. 4) an important reference to EU law, stating that

the same Law no. 287/90 shall be interpreted in compliance with the principles of the EU legal order in the field of competition.

In such a framework, the assessments carried out by the ICA can require, in some cases, an evolutionary approach, considering the change in perspective that may occur with regard to the main principles and values in light of which cases are decided. In this respect, the integration of sustainability into EU and national policies and actions calls for a rethinking of the relations between economic, social and environmental considerations. This entails that, in general terms, socio-economic, competitive, and environmental concerns should not be seen as opposing interests.

Furthermore, flagship initiatives of the EU such as Next Generation EU and the Green Deal shall be implemented in accordance with competition policy considerations. At the same time, the values underlying such horizontal policy initiatives may be considered in the framework of merger control, antitrust and state aid rules: in this vein, competition policy may not be aimed only at ensuring competition, pursuing consumer welfare and mitigating negative externalities, but also at actively contributing to social and environmental objectives.

In merger control cases, for the moment, the ICA has not yet been confronted with claims related to sustainability as recognisable efficiency benefits, nor with the issue of detrimental effects on the environment as competitive harm. However, the general framework outlined above suggests that, with particular regard to the Italian legal order, the ICA may assess merger operations also in the light of sustainability objectives. Indeed, although it is rather difficult to make predictions about the stance the ICA will take in the future, it can be assumed that sustainability will probably be included among the elements to be assessed in merger control cases by the Authority; in this respect, some authors have already proposed possible tools that could be applied to this aim. Of course, in such perspective, having regard to the difficulty of measuring environmental benefits in 'quantitative' terms, the assessment of mergers in light of environmental compatibility considerations could have an inevitably political relevance, as it involves several public interests, even beyond the environment itself. Also for this reason, it can be expected that the ICA will be particularly careful in carrying out its assessments on sustainability in the context of mergers, given that the balance of interests and economic assessments will often be extremely delicate and complex.

In light of the political sensitivity of the abovementioned issues, some authors proposed the introduction of a procedure enabling the ICA, without prejudice to its competence for any final assessment on mergers, to request non-binding opinions

to the Ministry for the Environment or to the Ministry of Ecological Transition. These opinions could address specifically the soundness of arguments according to which the merger at issue (as well as, in a different context, a sustainability agreement) may contribute to the achievement of environmental objectives. Such a pre-emptive involvement of the political level would allow to carry out a more solid and accurate assessment of all the interests at stake and strengthen the political legitimacy of the final decision with reference of sustainability aspects, while leaving the overall competition assessment firmly in the hands of the ICA. In any event, the said proposal has remained, at least for the time being, only at the level of scholarly debate.

Question 3

As observed above (see the answer to Question 1), the ICA has expressly stated its willingness to incorporate sustainability benefits in the assessment of economic initiatives undertaken by companies from a competition point of view. In particular, in the context of the Annual Report presented by the ICA in 2021, the Authority noted, first, the existence of a virtuous circle in which competition and sustainability goals fit together. In this regard, if competitive pressure exerts a powerful incentive to use the planet's limited resources efficiently, environmental policies, for their part, provide a competitive lever for companies to the extent that the eco-sustainable impact of a product can rise to a qualitative dimension of the competitive comparison between operators.[7] In a second step, the ICA, having taken note of the circumstance that sometimes the pursuit of sustainability goals cannot disregard the implementation by companies of conducts likely to produce anticompetitive effects (e.g. sustainability agreements), and that such a situation imposes a trade-off between market efficiency and environmental efficiency, spelled out its readiness to apply competition law according to an evolutionary perspective, taking into account the need to pursue the aforementioned goals.

With this in mind, the statement made by the Authority would find its mode of implementation, first, in changing the approach traditionally employed in the interpretation of Article 101(3) TFEU, which, as is well known, lays the ground for the balancing activity between the prohibition of agreements restricting competition and the different types of efficiencies that identify the sphere of inapplicability of such prohibition.

In this regard, it should be noted that the adoption, since the early 2000s, of a 'more economic approach' for balancing the various interests at stake in the EU

[7] ICA, Annual Report 2020, available at *www.agcm.it*.

framework, has significantly limited the room for maneuver granted to antitrust authorities in assessing the range of benefits that can be considered under Article 101(3) TFEU. This does not imply that the decisions taken by the ICA over the years have always been entirely devoid of assessments regarding the possible environmental benefits that the conducts at issue would have produced. However, so far environmental efficiencies have not been considered as a factor that could have its own specific weight for the purposes of the assessments made under Article 101(3) TFEU and, therefore, for the purposes of granting the exemptions laid down in that provision.

That being said, it can be observed that the proposals made by legal scholars and practitioners to incorporate sustainability benefits into competition law analysis are mainly based on an expansive reading of the four conditions identified in Article 101(3) TFEU – and, in particular, of what constitutes an "improvement in the production or distribution of products" and "technical and economic progress" – as well as of the perimeter of the entities that can benefit from the advantages produced by the agreement.

Secondly, the ICA may consider sustainability benefits in the exercise of its competence on merger control: on this point, reference is made to the observations made above (see the answer to Question 2).

In any event, given the lack of practice on these matters in the Italian legal order and the consequent legal uncertainty surrounding the assessment of sustainability benefits on the part of the ICA, it would be useful if the Authority issued specific guidelines aimed at clarifying its approach to the assessment of sustainability issues and benefits in carrying out competition analyses, following the example, inter alia, of the Dutch Competition Authority.

Question 4

a) Both during and following the conclusion of the Commission's investigation in the Siemens/Alstom case, the Italian government expressed its position with regard to the industrial policy issues raised by the planned merger between the two railway giants.

In particular, on 18 December 2018, Italy, together with eighteen other Member States of the European Union, drafted a joint statement[8] aimed at proposing to

[8] Friends of Industry, Joint Statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain, 18 December 2018. The document can be found at the following address: *bmwk.de/Redaktion/DE/Downloads/F/friends-of-industry-6th-ministerial-meeting-declaration.pdf?__blob=publicationFile&v=6*.

update EU competition law in order to facilitate the emergence of European industrial giants capable of facing "fierce competition" from other large economic blocs, such as the United States and China. Subsequently, following the European Commission's refusal to authorize the merger between Siemens and Alstom,[9] on 4 February 2020, the Italian Minister for Economic Development, together with a few representatives from France, Poland and Germany, addressed a letter[10] to Margrethe Vestager, Vice President of the Commission and EU Commissioner for Competition. The letter gave voice to the same concerns expressed in the previous joint statement. In particular, due to the presence in European markets of foreign players benefitting from significant government subsidies, the need to modernize the current guidelines on the assessment of horizontal mergers and to adopt a new definition of relevant market that takes into account this changed context is strongly emphasised. Indeed, the letter points out that the actions of such players, subsidized or otherwise supported by the respective States, can cause alarming distortions to competition, producing negative effects for European consumers and companies.

The aforementioned issues have also been addressed by the ICA. Indeed, recalling the Siemens/Alstom decision and the opposing positions expressed in that regard, in its 2019 Annual Report[11] the ICA stated two points. On the one hand, it reaffirmed that the promotion of competition in the EU internal market remains an indispensable condition for promoting the innovative potential of undertakings; on the other hand, it recognised that the development and promotion of European industry, as well as the rapid evolution of markets, require constant updating of competition rules. It then noted that balancing these different needs does not necessarily entail the amendment of existing legislation, since some adjustments of antitrust enforcement can be pursued through interpretation and codified in soft law instruments.

b) With reference to the procedure of the Siemens/Alstom case before the European Commission, there is no record of the intervention of specific Italian market players in support of or in opposition to the proposed transaction. However, Commissioner Vestager stated that the Commission, during its investigation, received several complaints from customers, competitors, industry and trade union associations, all of whom pointed out that the merger could be significantly damaging to competition.[12] From the documentation published on

[9] European Commission, 6 February 2019, case no. M.8677.

[10] The document can be consulted at the following location: *www.politico.eu/wp-content/uploads/2020/02/Letter-to-Vestager.pdf*.

[11] ICA, Annual report 2019, pp. 13-15, available at *www.agcm.it*.

[12] See what reported in XVIII legislatura, Dossier n. 12, *Audizione della Commissaria europea per la Concorrenza, Margrethe Vestager*, 2019, p. 23.

the website of the DG Competition of the European Commission, it also emerges that twenty-four interested third parties were heard during the proceedings, including – unspecified – competitors of the parties. Fourteen of them also submitted comments to the Commission's statement of objections.[13]

c) There is no evidence of comparable transactions assessed by the ICA, in which similar arguments were put forward.

That being stated, it can be added that the ICA examined merger operations having a considerable economic impact also at European and international level: in these contexts, the Authority sometimes noted the importance of the transaction from an industrial point of view, albeit in a general manner and without specifically including this issue in its competition assessment. An example is the Nexi/SIA case,[14] in the framework of which the ICA, as a preliminary remark, observed – quoting the Bank of Italy – that the operation represented an important step for the Italian and European payment industry, giving rise to an entity capable of covering various segments of the payment industry in different countries, and thus aligning the Italian market to the situation of other European markets.[15] The ICA eventually authorized the transaction, subject to the application of some remedies.[16] It is worth noting that Nexi and SIA, in their joint press release issued after the ICA's Decision, stated that the transaction would "*create a European champion in digital payments*", although the expression was used most probably in a non-technical sense, i.e. without specific implications from a competition point of view.

In a more general way, it can be noted that significant industrial policy issues emerged, at European level, also in relation to the Fincantieri/Chantiers de l'Atlantique (former STX) operation, which was later halted for a series of reasons partly related to the advent of the pandemic emergency. Indeed, in that context, the Italian and French governments had expressed their ambition to create a European leader of global dimensions in the civil and military shipbuilding market. Since the transaction affected trade between Member States, the European Commission was competent to give its preliminary assessment. Actually, the proposed transaction did not meet the turnover thresholds set at the European level, yet

[13] See Final Report of the Hearing Officer Siemens/Alstom, 1 February 2019, p. 2; European Commission, 6 February 2019, case no. M.8677, para. 4, pt. 26; Official Journal C 300 of the European Union, 5 September 2019, p. 12.

[14] Case C12373 – NEXI/SIA.

[15] *Ivi*, § 169.

[16] See *Agreement for the creation of the European digital payments paytech leader*, 5 October 2020, available at *www.nexi.it/content/dam/nexi/download/investror-relations/2020.10.05%20-%20Press%20Release%20Nexi-SIA%20ENG.pdf,* p. 2.

France made a referral request under Article 22(1) of the Merger Regulation, later joined by Germany. As a result of the investigation, the Commission found that the transaction could significantly harm competition in the shipbuilding industry, particularly in the global cruise ship market. However, the Commission did not reach a final position, since the parties decided to abandon the operation.

Question 5

a) Until August 2022, the ICA was in a position to include some industrial policy concerns in its examination of mergers, at least from a theoretical point of view. In fact, according to the former version of Article 6 of Law no. 287/90, the *competitive situation of the national industry* was one of the factors that could be taken into account by the ICA in the assessment of a merger. However, in practice the said factor had been systematically ignored by the ICA, which had traditionally considered industrial or social policy issues extraneous to its tasks, focusing its merger analysis specifically on competition law matters. With the entry into force of the Annual Market and Competition Law 2021, on 27 August 2022, the said ICA's practice was 'codified': the wording of Article 6 was amended, inter alia, by removing the *competitive situation of tha national industry* from the list of factors included in that provision.

The provisions of Article 20 (paragraphs 5-*bis* and 5-*ter*) and Article 25 of Law no. 287/90 are also relevant in this regard. The former provides that the Authority may authorize a concentration between banks or banking groups, which determines or strengthens a dominant position, *in the interest of stability of one or more of the parties involved*, if the Bank of Italy has submitted a request to that effect. Such authorizations cannot include restrictions that are not strictly necessary for pursuing the goal.

On the other hand, as we will explain in more detail in the answer to Question 6, Article 25 provides that the ICA may exceptionally authorize prohibited transactions for the protection of important general interests of the national economy and on the basis of the criteria determined, in general and in advance, by the Council of Ministers. However, these forms of authorization have never been enforced.

Currently, it is the Government that may give relevance to industrial policy concerns in relation to merger operations. Indeed, in the presence of highly adverse circumstances, the Government has the power to limit or exclude antitrust scrutiny of mergers with a national dimension by adopting a special decree-law. These are the antitrust exemptions that are allowed to rescue firms in a state of

crisis and safeguard the national economic base. Such rescue operations are worth mentioning because they can also conceal the political will to create, preserve or strengthen so-called national champions, especially when firms with significant market shares are involved. Some practical examples are given hereafter.

In 2008, the so-called 'Salva Alitalia' Decree[17] introduced a transitional and derogatory regime of Law no. 287/1990 for mergers concerning undertakings, active in essential public services that have been the subject of extraordinary administration (insolvency procedure). Specifically, the legislation exempted such transactions from the need for authorization, merely providing for an obligation of prior notification and proposal of behavioral measures. Within 30 days of notification, the ICA was to validate, by resolution, the measures proposed by the parties, amending and/or supplementing them when deemed necessary. Moreover, it could not have intervened to remove any monopolies created before at least three years had already passed since the resolution.

More recently, with the so-called 'Save Banks' Decrees of 2017[18] and 2020[19], ICA's competence on certain mergers having a national dimension was completely excluded. However, it is interesting to note that in the case of the 2017 'Save Banks' Decree, despite the said legislative prohibition, the ICA declared its competence to assess the merger between Intesa Sanpaolo and some business branches of Banca Popolare Vicenza and Veneto Banca, which was eventually authorized by the Authority on the merits.[20] Specifically, the ICA based this decision on the principle of primacy of European Union law, in relation to Article 22 of Regulation (EU) no. 139/2004, according to which any administration is required to disapply national legislation that conflicts with EU law.

Question 6

Pursuant to the Italian competition law, the assessment of whether a concentration should be prohibited, or authorized subject to corrective measures, falls within the exclusive competence of the ICA. The status of independent administrative authority held by the ICA aims at preserving its decisions from external influences, either from undertakings or from the government. Even after the adoption of the ICA decision, the government is not empowered to overturn it, either on competition or on other policy grounds.

[17] Article 1, para. 10, Decree-law no. 134/2008.

[18] Article 3, para. 4, Decree-law no. 99/2017. In particular, the measure was aimed at rescuing two failing financial institutions (Banca Popolare di Vicenza and Veneto Banca).

[19] Article 171, para. 4, Decree-law no. 34/2020.

[20] Case C12103 – INTESA SANPAOLO/RAMI DI AZIENDA DI BANCA POPOLARE VICENZA-VENETO BANCA.

As anticipated in the previous paragraph, since its adoption in 1990, the Italian competition law has contained a provision (Article 25) which gives the government some powers on merger control, but this provision is carefully designed so as to avoid direct interference by the government in individual cases. Pursuant to Article 25, the Council of Minister, on the proposal of the Minister for Economic Development, may establish ex ante, in general terms, the criteria whereby the ICA can exceptionally authorize, for relevant general interests of the national economy within the European integration, mergers which would otherwise be prohibited pursuant to Article 6 of Law 287/1990, provided that this does not entail the elimination of competition from the market or anticompetitive restrictions which are not strictly justified by the above mentioned general interests. In such cases, anyway, the Authority should prescribe the measures needed to re-establish fully competitive conditions within a deadline.

The reference to general criteria instead of a general power to overturn decisions on public policy grounds, the expressly exceptional nature of the authorization process contemplated by Article 25, the reference to the framework of European integration, as well as the need to prescribe corrective measures and restore effective competition within a clear time-framework are all meant to preserve the effectiveness of merger control as a tool of competition law from excessive external interferences.

So far, Article 25 has never been implemented: since 1990, no government has adopted the general criteria whereby the ICA should exceptionally authorize anticompetitive mergers, subject to subsequent remedies aimed at restoring effective competition.

On the other hand, there have been a few cases, in 2008, 2017 and 2020, in which by means of ad hoc legislative measures the powers of the ICA to impede anticompetitive mergers have been temporarily limited, for public policy reasons.

a) The rules of 2008

In 2008, Article 1 §10 of decree law 134 (*Disposizioni urgenti in materia di ristrutturazione di grandi imprese in crisi*), which introduced a new § 4-quinquies in Article 4 of decree-law 347/2003, removed the power of the ICA to prohibit acquisitions involving large undertakings providing essential public services subject to an extraordinary administration procedure, when such acquisitions were contemplated in the restructuring programme, since they were considered *ex lege* as justified by prominent reasons of general interest. The acquisition had still to be notified ex ante to the ICA, together with behavioural measures capable to prevent the application of unfair prices and conditions as a consequence of

the merger. The ICA maintained the power to impose, within 30 days from the notification, such corrective measures, including, if needed, amendments and integrations. Moreover, it had to establish a deadline of at least three years for the elimination of any monopoly position resulting from the concentration. This exceptional framework, which derogated to the standard rules on merger control contained in Law 287/1990, was applicable for a limited period, until June 2009.

On the basis of these rules, in 2008 the ICA authorized, subject to behavioural remedies, the acquisition by CAI of some business units of Alitalia and of a controlling stake in Air One, which would have led to a monopoly situation on some internal routes, including the Linate – Fiumicino route. In 2011, the ICA opened proceedings aimed at restoring competition on such routes, which ended with the imposition of structural remedies in 2012 (granting of slots to other companies).

The issue of whether such legislative measure temporarily weakening national merger control was compatible with the Italian Constitution was raised before the Italian Constitutional Court. In its judgment n. 270 of 2010, the Court considered it legitimate since the Constitution allows a balancing between the protection of competition and other public policy goals that it considers relevant (point 8.2). In this case, the legislation was meant to preserve the continuity of public service as well as the assets and employment of a large strategic company. However, the Court also stressed that consistency with EU law and in particular with Protocol no. 27 to the Treaties, whereby the internal market includes a system of undistorted competition, requires that legislative measures restricting competition for the protection of other public policy goals should be considered as an exception. Thus, they should not go beyond what is necessary and proportionate to reach these goals.

b)The 2017 Decree-Law

In 2017, as illustrated in the answer to Question 5, a decree-law concerning a specific rescue operation in the banking sector (decree-law no. 99/2017 concerning the compulsory administrative liquidation of Banca Popolare di Vicenza and Veneto Banca) established that any concentration resulting from the rescue strategy, provided it did not fall within the scope of application of the EU merger regulation, was authorized ex lege for relevant general interests of the national economy, thus excluding the standard application of Law no. 287/1990.

c) The legislative measures of 2020

More recently, in 2020 two further legislative measures were adopted which limited, in specific circumstances identified in the relevant provisions, the power

of the ICA to prohibit mergers following the standard criteria of Article 6 of the Italian Competition Law.

The first provision (Article 171 of decree-law 34/2020) concerns acquisitions of small banks different from cooperative credit banks, with total assets not exceeding € 5 mln. If such banks are subject to the national administrative resolution procedure, their acquisition is ex lege compatible with the national competition law, since they are of relevant general interest for the national economy. The ICA complained that, at least, the provision should have maintained the possibility to impose corrective measures.

The second legislative provision (Article 75 of decree-law 104/2020) was a temporary one, which is no longer applicable. It removed, from its entry into force until the end of 2020, for reasons of general interest of the national economy, the power of the ICA to block concentrations involving undertakings in labour intensive sectors or providing services of general economic interest, provided that they had suffered losses in the last three years and might cease their activity. This provision provided the legal basis for derogating from the standard merger control rules for the acquisition by Poste Italiane of Nexive, its main competitor for some services. Under this temporary framework, the ICA could neither prohibit mergers falling within the scope of the provision nor impose structural remedies, although it kept the power to impose behavioural remedies. In its decision concerning the acquisition of Nexive, the ICA imposed behavioural remedies but also stated, in an obiter dictum, that in the absence of this legislative exception the merger would have been prohibited.

Some remarks

Thus, ad hoc legislative measures adopted in 2008, 2017 and 2020 may have constrained the power of the ICA to review mergers, notwithstanding the complaints raised by the Authority, more than what would have been allowed by Article 25 of Law 287/1990, which provides a number of safeguards aimed at ensuring that derogations to the protection of competition do not go beyond what is necessary and proportionate. A matter for debate is whether, instead of adopting ad hoc legislative measures, it would not be better to implement Article 25 as originally drafted in Law 287/1990 in order to take into account other policy goals in the area of mergers.

Question 7

a) Over the last years, the ICA initiated several investigations against the so-called GAFAMs for conducts violating competition law provisions. Such investigations

generally concluded with the imposition of sanctions that, considering the turnover of the companies involved and the seriousness of the damage caused to the market, were particularly high.

One of the most relevant decisions of the ICA against large digital platforms was adopted against Google at the outcome of an investigation concerning a case of exclusionary abuse of dominant position, in violation of Article 102 TFEU. The conduct at issue was reported to the Authority by a complainant, Enel X Italia, with reference to Google's refusal, motivated by the objective of protecting the business model of Google Maps, to allow the search and navigation app developed by the complainant, JuicePass (an innovative service presented to the market at a critical time for the development of electric mobility), to have access to Google's Android Auto platform.[21]

Another case started in July 2020, when the Authority, following a complaint lodged by a company called "Digitech", opened an investigation on an alleged violation of Article 101 TFEU by Apple and Amazon, which agreed to reserve the marketplace of Apple and Beats branded products to a number of operators, which were not selected on the basis of qualitative characteristics.[22]

Finally, mention must be made of the most striking case, by reason of the size of the sanction imposed by the ICA (the highest fine in the history of Italian antitrust), amounting to more than one billion euros: the Amazon case, closed by the Authority in November 2021. The ICA found that Amazon had abused its dominant position, in breach of Article 102 TFEU, by granting several benefits (in terms of visibility of its offer and improvement of its sales on the website *amazon.com*) only to third-party sellers adhering to the logistics service it offered.[23] It should be noted that, in the latter case, the ICA initiated the investigation *ex officio*, thus in the absence of a specific complaint on the part of one or more entities.

b) As for the outcomes of the proceedings summarised above, the Authority deemed necessary to impose not only sanctions, but also corrective measures, which generally consist of obligations having as their object the reconfiguration of the platform, and/or its conducts on the market, so as to guarantee competitors access free of discriminatory conditions. Such measures should undoubtedly be perceived as contributing to a more vibrant European digital economy, given that they are aimed at ensuring the contestability of the affected markets and, more

[21] Case A529/2021 – GOOGLE/COMPATIBILITÀ APP ENEL X ITALIA CON SISTEMA ANDROID AUTO.

[22] Case I842/2021 – VENDITA PRODOTTI APPLE E BEATS SU AMAZON MARKETPLACE.

[23] Case A528/2021 – FBA AMAZON.

importantly, protecting and facilitating the implementation of innovative market initiatives (as happened, for example, in the Google/Enel case).

c) With regard to the relationship between the Digital Markets Act, entered into force on 1st November 2022 and applicable (with some exceptions) from 2 May 2023, and the ICA's activities, it has been observed in general terms that the proposal, giving an absolutely prominent role to the European Commission, risks entailing delays or lack of intervention with reference to conducts that, albeit restricting competition, affect only some Member States and/or do not fall within the European Commission's priorities.

In this sense, it is worth mentioning the remarks expressed with regard to the DMA proposal in June 2021, during a hearing before one commission of the Italian Parliament, by the (then) Secretary-General of the ICA.[24] On that occasion, the Secretary-General noted that National Competition Authorities ("NCAs") are, in some cases, the best-placed entities to deal with the competition issues raised by digital platforms. Also for that reason, he stressed the need to guarantee an effective application of the principle of subsidiarity and adequately involve NCAs in the enforcement of the DMA, suggesting the adoption of a cooperation model similar to the one designed by Regulation (EC) no. 1/2003. In this regard, it should be noted that the final version of the DMA, following the amendments made by the European Parliament, contains provisions (Articles 37 and 38) on cooperation and coordination between the European Commission and national authorities, including NCAs.

Moreover, the President of the ICA, in his presentation of the Annual Report on the activities carried out by the Authority in 2021, highlighted the importance of the fact that the DMA – as clarified also by Commissioner Vestager – aims to be complementary to antitrust provisions, given that it expressly states that its application is without prejudice to the enforcement of EU and national competition law.[25]

In this vein, it can be assumed that, in principle, the DMA will not affect the ICA's ability to bring its own, competition law-based cases against large digital platforms. However, in practice, the centralisation of powers in the hands of the Commission and the *ex ante* application of the new set of rules may reduce the relevance, or at least the promptness, of the ICA's actions against such platforms.

[24] Hearing of the (then) Secretary-General of the ICA, Avv. Filippo Arena, before the IX Commission of the Chamber of Deputies of the Italian Parliament, 16 June 2021, available at *www.camera.it*.

[25] President of the ICA, Presentation of the ICA's Annual Report 2021, available at *www.agcm.it*, pp. 7-9.

d) In the scenario outlined above, it does not seem possible to underestimate the risks, on the one hand, of a proliferation of parallel national legislations that would lead to regulatory fragmentation and, on the other hand, of an enforcement of competition law on the part of the NCAs that, following the application of relevant *ex ante* obligations on gatekeepers, could result in a sort of overreaction or potential duplication of investigations and sanctions, which may also call into question the full respect of the fundamental *ne bis in idem* principle.

At the same time, it is not desirable that NCAs, including the ICA, give up prosecuting cases against large platforms. Indeed, as already pointed out, in certain circumstances NCAs are in the best position to deal with the competitive issues posed by the digital economy, applying the traditional instruments for the protection of competition at national level.

All this considered, it would have been reasonable to involve NCAs in the enforcement of the rules laid down by the DMA, through a model of cooperation between the European Commission and national authorities, which may have relied on the positive experience gained in the framework of the European Competition Network. Alternatively, a provision regulating more carefully the relations between the DMA and competition law could have been introduced, in order to clarify the 'precedence' between the two sets of rules and avoid the risk of breaching the *ne bis in idem* principle. This is also having regard to the fact that many of the obligations laid down in Articles 5 and 6 of the DMA have their background in EU antitrust enforcement.

For the sake of completeness, it can be added that the Italian legislator has recently approved – in the framework of Law No. 118/2022 (Annual Market and Competition Law 2021), entered into force on 27 August 2022 – an amendment to the provision on the abuse of economic dependence (Article 9 of Law No. 182/1998), relating specifically to digital platforms. In particular, the legislator introduced a legal presumption of 'economic dependence' in the event that a company uses intermediation services provided by a digital platform whose role is decisive to reach end-users or suppliers. The rationale underpinning the amendment, which incorporates to a large extent the remarks expressed by the ICA in its Report to the Government containing proposals for the Competition Law 2021[26], is to make the legal framework of the abuse of economic dependence more appropriate with respect to the features of the intermediation activities carried out by large digital platforms.

[26] ICA, Report S4143 of March 2021 pursuant to Articles 21 and 22 of Law 287/90, available at *www.agcm.it*.

Question 8

State aid control and industrial policy

In the control of State aid, compared to the application of EU antitrust rules and of the Merger Regulation, there is a closer and more systematic relationship between the protection of competition and the pursuit of other public policy goals. The reason is that Article 107 enables the European Commission to declare State aid measures compatible with the Treaty provided that they are necessary and proportionate to pursue other public policy objectives falling within one of the broad categories listed in Article 107 itself.

At the same time, State aid control ensures that competition is not unduly distorted by selective support of specific undertakings by means of public resources. Thus, it prevents an unbounded subsidy race in the Member States and the disruption it would cause to the competitive level playing in the EU. Indeed, State aid control has some specific features, which make it a potentially virtuous tool for deciding how other public policy goals, including industrial policy goals, should be pursued.

Starting with the State Aid Action Plan in 2005, the idea to steer public resources towards good', 'better targeted' aid has guided the Commission's initiatives aimed at streamlining the analytical and legal framework governing this area.

The policy principles for the application of Article 107 which have been gradually spelled out by the Commission in the last fifteen years, initially in the framework of the State Aid Modernization initiative and more recently looking at the challenges of Next Generation EU, indicate the following: the aid measure must be aimed at a clearly defined public policy objective; it must bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern; it must be an appropriate policy instrument to address the public policy objective; it should be capable of changing the behavior of the beneficiary (incentive effect); it should not go beyond what is needed to induce the additional investment or activity; negative effects on competition and trade must remain limited; information about aid awards must be transparent.

Such principles are consistent with a modern approach to industrial policy, viewed as 'any type of intervention or government policy that attempts to improve the business environment or to alter the structure of economic activity towards sectors, technologies or tasks that are expected to offer better prospects for economic growth or societal welfare that would occur in the absence of such intervention.'[27]

[27] See K. Warwick, *Beyond Industrial Policy: emerging issues and new trends*, OECD Science, Technology and Industry Policy Papers n. 2/2013, OECD Publishing (http://dx.doi.org/10.1787/5k4869clw0xp-en). On the principles of a modern approach to industrial policy, see, for instance, J. Tirole, *Économie du bien commun*, 2017, Chapter 13.

In this perspective, State aid control can be seen as a tool for a pro-competitive industrial policy aimed at pursuing public goals while at the same time minimising market distortions and ensuring an efficient use of scarce public resources. Moreover, it is an important part of the broader commitment to competitive neutrality, which has also recently been advocated by the OECD Council as crucial to maintain proper bounds for public and private power in a competitive environment.[28]

EU versus national goals

The Court of Justice made it clear that the public policy objectives, which can be relevant for the application of Article 107 do not include only common EU policy objectives, but also legitimate public goals pursued by the public authorities of the Member States (*Austria v. Commission –Hinkley Point*, C-594/18 P). Therefore, in principle properly designed State aid can be considered compatible not only if aimed at supporting the EU strategy for sustainable growth, but also the objectives of complementary national industrial policies.

Role of the Commission

The exclusive competence of the European Commission to assess whether State aid is compatible pursuant to Article 107, § 2 or 3, subject to the control of EU courts, strongly supports the consistency of the system.

The case law, the Commission's regulations and the various guidelines contribute to promote common approaches by Member States to the design of public support. For instance, in the economic and financial crisis of 2008-09, the application of State aid rules ledto convergent approaches by the Member States to the emerging challenges in areas in which, later on, the issues were more properly addressed by a sectoral regulatory framework (e.g. before the adoption of the EU legislative framework on the resolution of banks).

As to the role of the Commission's Guidelines, the Court of Justice has stressed that Member States can notify aid measures also outside their framework and, in such cases, the Commission must assess the measure in the light of the provisions of the Treaty. However, in practice, for Member States following the indications of the Guidelines, whenever possible, entails clear benefits, since it increases the likelihood that the measure is approved and makes the approval process faster. In practice, many Member States, including Italy, usually adopt State aid schemes or measures either within the scope of the de minimis or GBER frameworks or following the Guidelines.

[28] OECD, Recommendation of the Council on Competitive Neutrality, OECD/LEGAL/0462, May 2021. The main objective of the recommendation is to ensure a level-playing field between state-owned and privately-owned enterprises, as well as between privately owned enterprises.

The appeal exerted on Member States, from the point of view of legal certainty, by regulations and guidelines makes such legal instruments crucial tools of EU policy. Both the GBER and the Guidelines reflect goals of common EU interest and are updated regularly to better align them to the evolution of the EU's objectives and strategies, including the EU commitment to the green and digital transformation and the new industrial strategy for Europe. Examples are provided by the Guidelines on IPCEI, which were updated in December 2021 (2021/C 528/02), by the new Guidelines on State aid for Climate, Environmental Protection and Energy (2022/C 80/01), as well as by the revisions of the GBER in July 2021 and March 2023.

In light of the above, in the application of State aid rules, including by means of block exemption regulations and guidelines, the European Commission can certainly take into account the policy objectives of its strategy for sustainable growth, including industrial policy objectives.

On the other hand, however, the underlying principles of State aid control ensure that the Commission has no limitless discretion in the assessment of whether aid to support a national or European champion or aid to an ailing firm or industry is compatible with the Treaty.

Supporting champions versus correcting market failures

As to initiatives aimed at strengthening specific undertakings (EU or national champions), the application of the basic principles of state aid control requires to identify a market or systemic failure or societal challenge that could not otherwise be addressed. It is doubtful that the lack, in a geographic area, of a highly competitive company for the production of certain goods or services can be considered, as such, a 'market failure'. In principle, what matters is whether in the absence of the measure the market is capable of providing the relevant products or services. In cases of services of general economic interest, for instance, the goal is ensuring the provision of the service at the price and quality conditions that are considered desirable by public authorities in the interest of final users.

Thus, within the State aid framework, in order to justify support to a specific company the notifying parties should show that, in the absence of the aid i.e. in the counterfactual scenario the provision of the good, service, infrastructure etc. would be suboptimal. In the Covid framework, this was the approach used to justify support to R&D and investment in Covid-19 relevant products, based on the alleged lack of sufficient production capacity. A similar approach can be perceived behind the proposal for a Chips Act, which is based on the presumption that in the absence of *ad hoc* initiatives the productive capacity would be

insufficient to ensure the viability of the European economy in a number of not unlikely political-economic scenarios.

More generally, the same approach will have to be followed in any initiative aimed at creating European and national champions. It should be on the authorities proposing the adoption of the aid measure to show that the measure pursues a well-defined policy objective and does not merely crowd out private investment. They should also show that the aid tool is appropriate and does not go beyond what is necessary and proportionate, without undue distortions of competition or intra EU trade.

The requirements for IPCEI, which are the state aid area closer to an industrial policy approach, are strict enough (concrete and clear important contribution to EU objectives, important market or systemic failure or social challenges, important co-financing, balance of positive and negative effects, focus on R&D and first industrial deployment, ex post evaluation). The requirement that more than one Member State participate (Italian companies have taken part in several IPCEI) is meant to favour non merely national industrial policy initiatives.

A notable development, in an industrial policy perspective, is the inclusion in the most recent Temporary frameworks of measures which go beyond the emergency challenges and aim at supporting investment for a stable economic recovery. For instance, in section 3.13 of the last version of the Covid temporary Framework, the Commission declared its willingness to consider compatible, pursuant to Article 107, §3, letter c, investment support measures to help Member States address the investment gap left behind by the crisis and accelerate the green and digital transitions. In order to avoid undue distortions to competition, such measures should have targeted a wide group of beneficiaries and the aid amounts should have been limited in size. An increasing emphasis on similar measures can be found in the Temporary Framework relating to the consequences of the war in Ukraine, which since March 2023 has become a 'Temporary Crisis and Transition Framework'. The current Framework includes new measures to accelerate investments in key sectors for the transition towards a net-zero economy, enabling investment support for production of strategic equipment and key components. Under strict conditions, also individual aid aimed at matching foreign subsidies may be considered compatible. Whenever, as in the recent crises, an extensive public support is called for, and, a fortiori, when the industrial policy goals which are considered relevant for the EU strategy for sustainable growth are being broadened, there are increasing risks for the level playing field within the internal market, because of varying levels of national resources available in the different Member States. Therefore, as indicated by the Commission in its

Green Deal Industrial Plan for the Net-Zero Age[29], to avoid fragmentation and exacerbating regional disparities and pursue the EU strategy across the Union as a whole, it becomes essential to also step up EU funding. This goal can be pursued by means of existing tools but also, as suggested by the Commission, by exploring new avenues to achieve common financing at the EU level to support investments.

Support to ailing companies

As to aid to ensure the survival of ailing companies or industry sectors, the approach during the Covid pandemic has been to consider compatible with Article 107 support to companies or sectors which would not have been ailing in the absence of the exogenous and unpredictable disturbance to the economy. This kind of support, while preserving assets and employment, has no negative impact on incentives.

Things would be different for support to distressed companies or sectors whose difficulties depend on their performance on the market. In such cases, State aid can be highly distortive and therefore a stricter approach, like the one followed in the Guidelines for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01), is justified. The experience developed in the application of such Guidelines as well as in the application of the 2009 Guidelines on aid to banks may provide insights on how to frame the assessment of aid aimed at ensuring the survival of ailing companies or industry sectors in the future. The need to avoid moral hazard and an adverse impact on incentives should be preserved, as well as the search for less distortive tools, which may be used to encourage the development of a certain activity in an area, especially if such activity is deemed essential for the economy and there is a significant likelihood that there may be a shortage of supply of the relevant product or service in the future.

Question 9

Preliminary rulings

Traditionally, Italy has always made an intensive use of referrals to the Court of Justice on issues concerning the interpretation of EU law, in all areas, including the rules on State aid.

Looking at general statistics on preliminary rulings, requests from Italian courts reached a share of more than 13% in the period 1961-2021 and, the enlargement of the EU notwithstanding, in the period 2017-2021 still represented approximately 10% of the total (Annual Report of the Court of Justice). Focusing on issues in

[29] COM(2023) 62 final.

the area of State aid, in the last ten years 23 preliminary rulings were issued upon request of an Italian court.[30]

In recent years, several requests came from the Council of State. The Supreme Court of Cassation also played a significant role, whereas some requests also came from regional administrative courts and civil courts (e.g. Cuneo, Aosta, Roma).

Cooperation tools provided by Article 29 of the Procedural Regulation

As to the cooperation tools provided by Article 29 of the Procedural Regulation (Council Regulation EU 2015/1589), Italian courts have used each of these instruments, i.e. requests of information to the European Commission, requests of opinion and amicus curiae).

From the available data, since 2014 requests of information pursuant to Article 29(1) have been submitted at least in five cases, whereas requests for the Commission's opinion pursuant to Article 29(2) have been submitted in three cases.

In two cases in 2018, the Commission intervened in national proceedings as amicus curiae; in one of such cases before the Council of State (RG 2018/2512, *Axpo c. Gestore Servizi energetici*) the Commission was authorized to submit oral observations before the court.

Expected use of cooperation tools

Two main developments may affect the need for national courts to use such information tools. On the one hand, following the introduction of Article 49(2) of Law 234/2012, administrative courts have been given the exclusive competence to hear cases concerning the public enforcement of State aid rules. This development, which increases the role of Regional Administrative Courts and of the Council of State, may contribute to the specialization of the judges hearing the cases. On the other hand, there have been several training programs for both administrative and civil judges in the area of State aid, and this can also contribute to enhance the know-how of the competent courts, increase the ability to deal with cases with no need of cooperation from the Commission.

However, better trained and specialized judges may also be more familiar with the judicial and administrative tools of EU law which may support their decisions when a preliminary ruling of the Court of Justice or some information or opinion by the Commission may be useful to decide a case.

[30] Cases C-102/21; C-332/20; C-915/19; C-705/19; C-609/19; C-415/19; C-338/19; C-128/19; C-92/19; C-26/19; C-686/18; C-385/18; C-284/18; C-659/17; C-387/17; C-245/16; C-307/14; C-105/14; C-89/14; C-68/14; C-181/13; C-69/13; C-51/12.

Thus, we can expect that the use of cooperation tools will remain relevant in the forthcoming years, but the content of requests for cooperation will evolve in parallel with the increase in the specialization of administrative and civil judges.

Question 10

In principle, impediments to the entry or expansion of third country firms resulting from the application of trade instruments may affect either the scope of relevant markets or the strength of potential competition in cases before the Italian Competition Authority. However, so far in the experience of the Authority these factors have not played a significant role in the assessment of cases.

In a broader perspective, the assessment of the relevance of competitive pressures resulting from imports is often a relevant factor in the analysis mergers, agreements and unilateral conduct. A prominent, although not recent, case was a concentration in the sugar sector, which in 2002 was authorized subject to remedies: after some time, the Authority revised the remedies because of the increasing competitive pressure resulting from imports (C5151- SECI- COPROB-FINBIETICOLA/ERIDANIA).

Question 11

a. The national legislative framework on golden powers and its relationship with Regulation (EU) 2019/452

In Italy the legal framework for FDI screening is mainly based on Decree Law n. 21/2012 establishing special powers ('*golden powers*') of the government on companies in the areas of defence and national security and with respect to assets of strategic relevance in some sectors including energy, transport and communications.

The previous legislation on 'golden shares' (decree-law no. 332/2004), which established special powers of the government on specific privatized companies, was set aside since it entailed an excessively discretionary assessment of the conditions in which the government was entitled to intervene, that the Court of Justice considered incompatible with the rules on the freedom of establishment (C-326/07).

The aim of the new legislative framework adopted in 2012, which was later amended several times (recently, by decree-law no. 21/2022), was to more clearly identify the conditions, the criteria and the procedures which allow the government to intervene by means of prohibitions or prescriptions when a corporate action or transaction may threaten the essential interests of the State.

Thus, a national legislative framework, which includes the power to screen FDI, already existed before the adoption of the 2019 EU Regulation and was broadly in line with the principles indicated in the Regulation. In order to fully align the national framework to the prescriptions of the Regulation, the rules were further amended and integrated, so as to extend the scope of application of Decree-Law no. 21/2012 consistently with the new Regulation and to include the new cooperation mechanisms (decree-law no. 105/2019; decree-law no. 23/2020).

Focusing on FDI, the system contemplates a prior notification obligation of certain corporate acts/transactions in specific sectors to the government, an assessment procedure which, in the cases covered by the EU regulation, involves the cooperation mechanisms, and the adoption of a final decision by the government, which may entail a prohibition or the imposition of specific prescriptions on the companies involved. The decision is subject to judicial review.

The identification of strategic assets in the different sectors, as well as the details of the procedures, are established by implementing decrees available on the website of the Presidency of the Council of Ministers – Dipartimento per il coordinamento amministrativo (DICA).

Sectors and actions/transactions subject to FDI control

First of all, pursuant to Article 1 of decree-law 21/2012, the rules on golden powers apply to assets of strategic relevance for the system of defence and national security (identified in implementing decrees). In this area, the notification obligation covers also acquisitions of minority shareholdings (above some thresholds) and applies both to third-country and EU investors. The substantive criterion for the assessment is 'the threat of a serious harm for the essential interests of defence and national security', taking into account a number of objective elements and criteria listed in Article 1, paragraphs 2 and 3, of Decree- Law 21/2012, which also recall the need for reasonable and proportionate decisions.

Article 1-bis of decree-law 21/2012, which was added in 2019, establishes golden powers for services of broadband electronic communication based on the 5G technology as well as further services, goods, relations, assets and technologies relevant to cybersecurity, including those related to cloud, identified by implementing decrees. The notification obligation in this area does not relate to corporate acquisitions, but to contracts and corporate initiatives concerning the acquisition of goods, assets and components. Companies are required to notify their annual plans (not each individual initiative). The final objective remains the protection of the essential interests of defence and national security and, to this aim, the assessment concern also whether the integrity and security of networks

and data may be compromised. Paragraph 4 of Article 1-bis indicates criteria and principles for the assessment and makes reference to the international and EU principles and guidelines on cybersecurity. Since the focus is on corporate acts, not on acquisitions of assets, this provision may have only an indirect effect on foreign investment.

Article 2 of Decree-Law no. 21/2012 originally covered only the energy, transport and communication sectors. Its scope of application was gradually expanded, after the adoption of the EU Regulation, and currently covers further sectors of strategic relevance for the national interest pursuant to Article 4, § 1, of the EU Regulation (Article 2, § 1-ter). Strategic assets in these sectors are identified by implementing decrees.

The notification obligation covers both the acts and decisions of companies holding strategic assets and acquisitions entailing a lasting establishment by means of the investment in such target companies. Originally, the notification obligation covered only third-country investors but, recently, taking into account the challenges resulting from the consequences of the Covid pandemic and more recently, of the war, for some sectors (communications, energy, transport, health, agrifood and finance) it has been extended to cover also EU investors.

The substantive criteria for the use of golden powers include the need to preserve networks and plants necessary to ensure the operation of essential public services and minimum supplies, as well as goods and relations of strategic relevance for the national interest, even if in the presence of concessions, independently of whether the concession was awarded by means of a public tender. The precondition for the use of veto powers is 'an exceptional situation, which is not covered by national and EU sectoral rules, entailing the threat of a serious harm for the public interests relating to the security and operation of networks and plants and to the continuity of supplies' (Article 2, paragraph 3).

Room for competition considerations

The system does not contemplate the possibility to justify an acquisition or an act, which would otherwise require the exercise of golden powers, because of competition considerations, e.g. the enhanced competitiveness of the acquired company. What matters is the impact on the public interests relating to defence and security.

On the other hand, since the application of golden powers restricts the freedom of enterprise, in the application of the rules the government has to carefully balance the risk of a negative impact on defence and public security with the

need to preserve fundamental freedoms, on the basis of objective criteria and the proportionality principle.

Operation of the information sharing mechanisms provided by the EU FDI Screening Regulation

Italy has actively participated to the new system of cooperation established by (EU) Regulation (EU) 2019/452. From October 2020 to 31 December 2021, the Italian Government sent 96 notifications of FDI in the Italian territory to the EU network and in 37 of such cases a phase 2 procedure was opened. In 29 cases, the Commission and other Member States made use of the possibility to request additional information.

In the same period, Italy received from other Member States 375 notifications of FDI in their territories. Hopefully, the continuous operation of the cooperation procedures will facilitate further substantive convergence in the national frameworks and in the criteria applied when screening FDI, so as to ensure a proper balancing between the need to protect national security and public order and the need to preserve fundamental freedoms.

Available legal remedies

The decisions on the use of golden powers on FDI are adopted by a decree by the President of the Council of Minister, following a decision by the Council of Ministers, and is an administrative act subject to judicial review. In a recent judgment (no. 289 of 9 January 2023, *Verizem*), the Council of State stressed that the government enjoys a wide discretion in assessing how to balance the relevant interests. Nonetheless, the decision, in order to resist judicial scrutiny, must be non-discriminatory, reasonable and proportionate.

Impact of the COVID-19 Pandemic

Both the challenges resulting from the Covid pandemic and the more recent challenges following the Ukrainian war, clearly outlined by the European Commission in its Communications of March 13th and 26th 2020 and of April 6th 2022, led to amendments in the national rules entailing a broader scope of application. Thus, the number of notifications from companies to the government pursuant to the national rules on golden powers increased significantly in recent years (8 notifications in 2014, 18 in 2015, 14 in 2016, 30 in 2017, 48 in 2018, 83 in 2019, 342 in 2020, 496 in 2021). Veto powers on notified acquisitions have been used in 8 cases (of which, 3 cases in 2021 and 3 cases in 2022).

Main challenges in applying FDI control

Also in light of the expansion of the scope of application of the rules on golden powers to FDI in recent years, there are two main challenges that must be met.

The first one concerns procedural aspects, i.e. the need to avoid unnecessary administrative burdens on companies and to ensure rapid decisions. In Italy, the expansion of the scope application of the rules has been accompanied by an effort to streamline and simplify procedures, also by means of pre-notifications (Arts. 26 and 27 of decree-law no. 21/2022). Strengthening transparency of the content of the decisions would be helpful to ensure the consistency and predictability of enforcement. Moreover, from a substantive viewpoint, in order to ensure a proper balancing between the protection of security and public order, on the one hand, and of fundamental freedoms on the other, it remains crucial that national courts ensure a proper judicial review of the decisions, so as to support well-reasoned decision-making, based on objective criteria and fully compliant with the proportionality principle.

Question 12

Awareness of the problem

In Italy, there was awareness of the existence of a gap, in the EU and international legislation, whereby foreign subsidies may distort the competitive level playing field in the internal market, in particular with respect of major acquisitions of EU companies and of the award of important contracts in public procurement. In some circumstances, the application of existing tools, e.g. on foreign direct investment for safety and security reasons, or on abnormally low bids in public procurement, may be sufficient to address the problem. However, the existing legislation did not provide a general tool, which could be used more generally to avoid competitive distortions generated by foreign subsidies supporting economic activity of some companies in the internal market.

As to the perceived existence of subsidies, companies have complained of distortions of competition for the building and management of infrastructures in other Member States resulting from public support from third countries.

The challenges for the new regulatory framework

Thus, there is a wide support for the attempt to find effective solutions to this problem, in order to ensure, at least for economic activities in the internal EU market, compliance with the principle of competitive neutrality advocated by the OECD in its Council Recommendation of 31 May 2021.

At the same time, it is also clear that designing an effective EU tool for the control of foreign subsidies is a very complex task. In particular, in a cost/benefit perspective, the new legislative framework should avoid unduly increasing administrative burdens on EU and non-EU companies. Moreover, it should not unduly delay the award of public procurement contracts or encourage tactical unmeritorious use of litigation by competitors in these markets.

These were the main concerns with respect to the proposal for a Regulation on foreign subsidies, that was finally adopted in December 2022. Of course, there is some overlap between the new rules and areas of Member States competence (public procurement, FDI), but this is not entirely new: Member States are used to comply with EU legislation in other areas falling within their competence.

From a procedural viewpoint, it seems easier to coordinate the application of the new rules with merger control procedures that with public procurement procedures. Unless the company is willing to propose rapidly commitments, it is likely that the procedure will significantly delay the award of the contract. For this reason, a widespread application of the tool to public procurement would have been highly undesirable. The high threshold for ex ante notification of subsidies in the area of public procurement and the design of the framework, whereby the Commission may intervene only if the subsidized company is the winner and there is a distortion of competition non compensated by positive effects, may represent a balanced solution.

Notions, presumptions and need for guidance

From a more substantive viewpoint, the new legislative framework is based on three main elements:

- a broad notion of foreign subsidy, not limited to financial grants – which makes it quite difficult for companies to list all the subsidies they have received in third countries in the relevant period;
- a quite broad notion of distortion of the competitive level playing field with respect to the merger or award of public contract at stake (the beneficiary receives an advantage which may distort competition, e.g. by allowing it to bid at conditions different from the ones which would have prevailed in the absence of the subsidy);
- the possibility for the Commission to balance the negative impact on competition with the positive impact on the involved economic activity in the EU or on the pursuit of other EU policy objectives.

Although apparently straightforward, this analytical framework raises a number of significant problems when one comes to its implementation.

For this reason, it is of the utmost importance that the regulation already contains some presumptions aimed at simplifying the application (e.g. not only reference to the de minimis thresholds but also to distinct thresholds for the subsidy which, if not reached, make the distortion of competition unlikely). On the other hand, the Regulation also indicates categories of subsidies for which it is presumed that they may distort competition, with a reversal of the burden of proof. In the transitional guidance and in the future Guidelines on the application of the Regulation, hopefully the Commission will further clarify how the rules will be applied, to enhance predictability and deter the potentially most dangerous distortions.

Ideally, the framework should prevent ad hoc foreign subsidies aimed at strengthening the competitive position of companies in the internal market. When such subsidies have already been granted or cannot be avoided and, moreover, may distort competition in the EU and cannot be justified, the companies wishing to take part in acquisitions or public procurement should be ready to submit commitments to rapidly remove competition concerns.

Question 13

For State aid, Member States agreed to restrain their freedom to selectively support undertakings by including in the Treaty a prohibition rule (Article 107, § 1, TFEU), accompanied by the possibility for the Commission to declare aid measure compatible when they are necessary and proportionate to pursue one of the aims listed in Article 107, § 2 and 3.

EU law clearly cannot contain a prohibition rule for foreign subsidies; however, as in the new Regulation, it can prohibit some use of such subsidies, i.e. foreign subsidies that distort competition in the internal market. Not surprisingly, the legal basis of the draft Regulation is not only Article 114, but also Article 207 TFEU.

Indeed, the Regulation is a hybrid instrument, whose nature depend of its purpose and probably should not be evaluated only within a static, but also from a dynamic perspective.

Basically, the Regulation is trying to apply the principles of competitive neutrality, advocated by the OECD, by means of a unilateral measure, within the boundaries set by the EU jurisdiction and its international commitments.

Since the initiative involves third countries, its effectiveness will also depend on the ability to promote international comity principles with respect to its application (e.g. with respect to the collection of information).

The Regulation contains some indications that this new legislative framework should be seen as a first step, which may be accompanied by bilateral dialogue with specific third countries. It can also represent a benchmark for wider multilateral initiatives on State aid supporting investment activities and public procurement.

Question 14

At the time of writing, it is not possible to detect, in the Italian legal system, binding provisions specifically aimed, in a general and systematic way, at imposing duty of care/due diligence obligations on companies to respect human rights and environmental law throughout the supply chain.

However, mention can be made of, first, pieces of legislation laying down general due diligence obligations that may (indirectly) concern, inter alia, the respect of human rights and environmental law, and, secondly, soft law instruments covering precisely the abovementioned issues.

– With reference to binding provisions, the compliance system provided for by Legislative Decree no. 231/2001 deserves a mention. In particular, the said Decree requires companies to undertake an internal self-regulatory process aimed at identifying, preventing, mitigating and remedying 'predicate crimes' potentially or actually committed by the subjects specified in Article 5 of the Decree[31]. The adoption and effective implementation of such organisational and management models generally exclude the entity's liability.
  However, while it is true that the relevant predicate crimes include some serious human rights violations (such as, for example, enslavement, human trafficking, forced labour, prostitution and child pornography, female genital mutilation) and environmental crimes, other relevant offenses remain uncovered by the Decree.
  Among the legislative provisions having a more circumscribed scope of application, an important role is played by Legislative Decree No. 254/2016, transposing Directive 2014/95/EU, which establishes the obligation for some large public interest entities[32] to disclose at the end of the financial year some

[31] Persons who hold positions of representation, administration or management of the entity or one of its organizational units with financial and functional autonomy as well as persons who exercise, even *de facto*, the management and control of the entity; persons subject to the management or supervision of one of the above-mentioned persons.

[32] Article 2 of the decree defines the scope of the obligation: public interest entities that had an average number of employees during the fiscal year of more than five hundred and, as of the balance sheet date, exceeded at least one of the two following size limits: (a) balance sheet total: 20,000,000; (b) total net sales and service revenues: 40,000,000 euros.

information concerning inter alia the environment and respect of human rights, as well as, with specific regard to such issues, the policies practiced by the company, including those of due diligence, as well as the results achieved through them.[33]

– As regards soft law instruments, in 2016 the Italian government entrusted the Interministerial Committee on Human Rights of the Italian Parliament with the task of preparing an Action Plan[34] aimed at inducing companies to: define their own human rights policy; create and operationalise corporate due diligence mechanisms to identify, measure and prevent any potential risk of human rights violations throughout the production chain; and provide grievance mechanisms that allow for reparations in favour of victims. The first National Action Plan, drafted in 2016, was then replaced by a second National Action Plan, covering the period between 2021 and 2026. Therefore, in the form of a non-binding "expectation", the Italian authorities outlined a behavioural standard of due diligence for companies on human rights and environmental law, thereby incorporating the UN Guiding Principles on Business and Human Rights.[35]

Question 15

One of the main problems in implementing due diligence requirements – as also noted by Thierry Breton[36], EU Commissioner for Internal Market – certainly relates to the complexity of global value chains, which makes it particularly difficult for companies to obtain reliable information on the operations of their suppliers. In addition, the fragmentation of national rules further slows progress in adopting best practices. Nonetheless, this latter aspect will be affected by the proposed Directive, according to which Member States shall adopt the necessary regulatory and administrative provisions to comply with it within two years after the Directive enters into force.

On the other hand, as pointed out for instance by the European confederation of directors' associations (Eco-Da), the proposed Directive on sustainable corporate governance fails to provide realistic, clear and enforceable rules for businesses,

[33] Article 3, Legislative decree no. 254/2016.

[34] National Action Plan on Business and Human Rights 2016-2021, p. 9. The commitment was reiterated in the Second National Action Plan on Business and Human Rights 2021-2026, pp. 15-16. The said plans are available at *www.cidu.esteri.it/comitatodirittiumani/it/ambasciata/*.

[35] OHCHR, *Guiding Principles on Business and Human Rights*, 2011, *www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf*.

[36] European Commission – Press release, *Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains*, 23 February 2022, *ec.europa.eu/growth/news/just-and-sustainable-economy-commission-lays-down-rules-companies-respect-human-rights-and-2022-02-23_en*.

and would probably lead to bureaucratization as well as overlapping of all the different initiatives related to corporate governance.[37] Some of the most critical remarks focus on the current wording of Articles 25 and 26 of the proposal, dealing with directors' liability. In particular, it is pointed out that the unclear and unlimited extension of such liability risks creating a punitive framework that would undermine the competitiveness and efforts of European companies, which, faced with the procedural burdens required by the implementation of the proposed Directive, might decide to disengage from some markets and/or terminate important business relationships. At the same time, the approach adopted by the proposal, according to which directors should consider general interests other than the ones of the company – potentially, on the same footing – cannot be fully shared, at least if interpreted in a strict sense. Indeed, such idea raises the very serious risk of placing eminently political choices and assessments on subjects whose role should not be political at all, namely directors (and possibly judges, subsequently called to decide if directors' choices were compliant or not to such provisions of the Directive).

From a different perspective, it has been noted that the proposed provisions would not be able to change the conducts of companies in the exercise of their business activities. More specifically, the proposed Directive does not appear to mark a real shift from traditional "*shareholder-centered*" governance to "*multi-stakeholder*" governance, *i.e.* a form of governance that takes more account of the interests of other stakeholders. In this regard, the proposal does not effectively address one of the main problems of the current governance model, namely the focus of corporate decision-makers on maximizing short-term shareholder value rather than the long-term interests of the company, which are generally closer to the interests of the society at large.[38]

In any event, it should be borne in mind that the legislative procedure concerning the proposed Directive is still ongoing. In this regard, on 1st December 2022 the Council of the EU adopted its negotiating position ('General Approach') on the proposal,[39] including some significant changes to the draft Directive, for instance: a replacement of the concept of 'value chains' with the narrower concept of

[37] Eco-Da – Position, *The proposed EU Corporate Sustainability Due Diligence Directive: more clarity needed to avoid excessive legal disputes*, May 2022, *ecoda.eu/wp-content/uploads/2019/08/20220520-ecoDa-Position-Paper-on-CSDD-3.pdf*.

[38] On these matters, see European Commission, *Sustainable corporate governance – Inception impact assessment*, 30 July 2020; European Commission, *Executive summary of the impact assessment report accompanying the document proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, 23 February 2022. See also European Commission, *Study on directors' duties and sustainable corporate governance*, July 2020, which assessed the root causes of "*short termism*" in corporate governance and identified possible EU-level solutions.

[39] See General Approach of the Council on the Corporate Sustainability Due Diligence Directive, 1st December 2022, *data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf.*

'chain of activities' thus reducing the scope of the draft Directive; the alignment of the proposal with the recently adopted Corporate Sustainability Reporting Directive,[40] so as to mitigate inconsistencies in legal interpretation between the two Directives and avoid broadening the duties of companies; some amendments to the provisions on civil liability of the companies (Article 22), directors' duties (Articles 25 and 26) and their remuneration (Article 15), in order to provide more clarity and avoid interference with Member Stats' national legislation. In particular, the General Approach removed the provisions of the proposal that imposed due diligence obligations on directors, due to the strong concerns expressed by Member States that considered those articles to be an inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company. The proposal to link directors' variable remuneration to setting climate plans was also removed. Therefore, the amendments at issue, if confirmed by the European Parliament and eventually included in the final version of the Directive, would address a large part of the critical issues pointed out by Eco-Da (and referred to above) with respect to the previous version of the proposal.

[40] See *eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464&from=EN*.

LUXEMBOURG

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1. COMPETITION

1.1. Green Competition Policy

1.1.1. Question 1

(a)

The Luxembourg Competition Council (LCC) has not yet adopted a position[2] as to whether sustainability-related arguments should be factored into the assessment of (potentially anti-competitive) agreements. The LCC did also not participate in the Commission's public consultation on sustainable agreements in the agricultural field.[3] Similarly, the LCC abstained from participating in the public consultation process on the Horizontal Block Exemption Regulation and Horizontal Guidelines of 2021.[4]

Having said that, the country's green policy focus may move the authorities to adopt a policy-stance in the years to come. The country has seen a steady rise of green innovation and cooperation projects, as well as voluntary agreements and energy-efficiency-standard-setting in the industrial sector (represented by FEDIL, a multi sectoral business federation).[5] Additionally, Luxembourg invests

[1] Philippe-Emmanuel Partsch is Partner, Arendt & Medernach, Paschalis Paschalidis is Counsel, Arendt & Medernach and Fynn Dewald, Associate, Cleary Gottlieb Steen & Hamilton.

[2] Even though the decision did not relate to a sustainability agreement strictly speaking, the LCC took into account environmental justifications in the assessment of a horizontal cooperation. On this point, see the Decision 2018-FO-01 of 7 June 2018, *Webtaxi*.

[3] Directorate-General for Competition of the European Commission, *Factual Summary Report on a Public Consultation for the Guidelines on the antitrust derogation for sustainability agreements in agriculture* (European Commission 2022), <www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Accords-de-durabilite-dans-l%E2%80%99agriculture-Lignes-directrices-sur-les-derogations-aux-regles-en-matiere-d%E2%80%99ententes-et-d%E2%80%99abus-de-position-dominante/public-consultation_en>, accessed on 19 July 2022.

[4] Directorate-General for Competition of the European Commission, *Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulations* (European Commission 2021), <www.ec.europa.eu/competition-policy/public-consultations/2019-hbers_en>, accessed on 20 July 2022.

[5] Ministry of Energy and Territory Development and Ministry of the Environment, Climate and Sustainable Development, *Luxembourg's Integrated National Energy and Climate Plan for 2021-2030*, (Gouvernement du

heavily in the green finance sector leading to the creation of a Climate Finance Task Force as well as a series of partnerships with the European Investment Bank to push investments in climate projects.

Especially (green) horizontal cooperation among industrial and financial (potential) competitors may give rise for a need of guidance from the LCC, including as to the measurability and importance of sustainability benefits. The LCC, as increasingly active and vigilant competition law watchdog in Luxembourg, is closely scrutinising these developments.

(b)

To the best of our knowledge, there is no precedent in the LCC's practice. It is likely that Luxembourg will follow the European Commission's approach that is to say to require full compensation of consumer harm by means of (sustainability-related) benefits for the same consumer group (as pointed out in the European Commission's 2021 Policy Brief).[6] Against this background, the assessment of (pro-competitive) benefits of a restrictive agreement will likely be conducted within the market concerned by the agreement, instead of a larger approach allowing for the consideration of societal benefits.

(c)

To the best of our knowledge, there is no relevant case law to date. It is likely that the Luxembourg courts will adopt the same approach as the European Commission, that is to say a strict assessment of environmental benefits against consumer harm arising out of the agreement in the (same) relevant market.

1.1.2. Question 2

To date, Luxembourg remains the only Member State of the European Union without a merger control regime. The LCC did however investigate in two instances transactions under Art. 5 of the Luxembourg Competition Law and Art. 102 TFEU, building on the Continental Can judgment and a potential abuse of a dominant position by the acquisition of a competitor – sustainability benefits were however not considered in either of these decisions.[7] Additionally, and further to the guidance of the European Commission on Art. 22 of the EU Merger

Grand-Duché de Luxembourg 2021) <www.ec.europa.eu/energy/sites/ener/files/documents/lu_final_necp_main_en.pdf>, accessed on 5 August 2022, p. 58 and 101, section "Accord volontaire".

[6] Directorate-General for Competition of the European Commission, *Competition policy brief* (European Commission 2021), <www.data.europa.eu/doi/10.2763/962262>, accessed on 19 July 2022, p. 6.

[7] See Luxembourg Competition Council, Decision 2016-FO-04 of 17 June 2016, *Utopia* as well as Luxembourg Competition Council, Decision F n° 2019-R-01 *Fédération des Artisans* of 15 March 2019.

Regulation, the LCC stressed that it would make use of the referral mechanism laid down in that article, where it would see that a transaction that would otherwise not be scrutinised in Luxembourg (due to the absence of a merger control regime) would threaten to affect competition in Luxembourg and trade between Member States.[8] In such a case, potential sustainability effects would however be analysed by the European Commission, provided it sided with the assessment of the LCC and accepted the referral for review.

As most recent development, the Ministry of Economy initiated in January 2021 a public consultation process to introduce legislation for a new (and first) national merger control regime. On 13 July 2022, a first interim report on the results of the consultation process has been released, where the Ministry of the Economy specifies that the national regime will (likely) draw "on pre-existing rules and concepts used both by the European Commission and by the national competition authorities of other Member States".[9]

Against this background, it is likely that Luxembourg will follow the European Commission's policy lead to give greater importance to environmental benefits in merger control, as demonstrated by the call for contributions in November 2020.[10]

In the same vein, the new merger control regime will probably draw inspiration from the practice of neighbouring countries, such as Germany, where the Minister of Economy – which disposes of an executive veto power over decisions by the *Bundeskartellamt* – authorized for example the *Miba/Zollern* merger, given its positive effects on energy transition and environmental protection.[11] The interim report of the Ministry of Economy of Luxembourg explicitly considers the possibility of such executive veto over merger control decisions in Luxembourg.[12]

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[8] *Contrôle des concentrations : changement d'approche de la Commission européenne – Nouvelles orientations relatives à l'article 22 du Règlement concentrations, aux termes de la Communication de la Commission du 31 mars 2021*, (Luxembourg Competition Council 2021), <www.//concurrence.public.lu/fr/actualites/2020/controle-concentrations-article-22.html>, accessed on 1 September 2022.

[9] Ministry of the Economy, *Introduction au Luxembourg d'un contrôle national des concentrations d'entreprises : bilan des travaux préparatoires menés par le ministère de l'Économie,* (Gouvernement du Grand-Duché de Luxembourg 2022) <www.meco.gouvernement.lu/dam-assets/publications/rapport-etude-analyse/snmc/rapport-intermediaire-controle-des-concentrations.pdf>, accessed on 28 July 2022, p.4.

[10] European Commission, *Competition Policy supporting the Green Deal – Call for contributions*, (European Commission 2020), <www.ec.europa.eu/competition-policy/policy/green-gazette_en>, accessed on 26 July 2022.

[11] Directorate for Financial and Enterprise Affairs of the Organization for Economic Cooperation and Development, *Environmental considerations in competition enforcement*, (OECD 2021) <www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement-2021.pdf>, accessed on 27 July 2022, p. 43.

[12] Ministry of the Economy, 2022, p. 33 (see footnote n°8).

1.1.3. Question 3

(a)

For the time being, there is no legal basis to include sustainability benefits in the LCC's competition law analysis – the LCC did also not take a position on this point to date. However, it is likely that the LCC will follow European Commission's practice and policy lead, which already confirmed that it would take into account sustainability-related efficiencies, but only when these accrue "substantially" to the same group of consumers that is harmed by the anticompetitive conduct or transaction.[13]

(b)

The tool that the LCC would likely use to evaluate (sustainability-related) efficiencies flowing from an agreement with anti-competitive effect or object, would lie in Art. 4 of the Luxembourg law on competition, mirroring the "efficiency defence" laid down in Art. 101(3) TFEU. The LCC has already done so in 2018 and took into account environmental and sustainability-related benefits in a decision relating to a taxi reservation centre, which acted as price setter for several taxi companies. The LCC identified *presumed anti-competitive effects* due to the by-object restriction of price fixing, but considered that efficiency gains, to the benefit of consumers, exempted the agreement under Art. 4 of the Luxembourg law on competition and Art. 101 (3) TFEU. Among these, the LCC took into consideration efficiency gains related to a decrease in carbon emissions and therefore environmental sustainability benefits.[14] However, the LCC did not proceed to quantify such sustainability benefits.

1.2. European Strategic Autonomy, the Promotion of "European Champions" and Competition Law Enforcement

1.2.1. Question 4

(a)

To the best of our knowledge, neither the Luxembourg government nor the LCC have commented on the case.

[13] OECD, 2021, p. 17, last paragraph (see footnote n°10).

[14] Luxembourg Competition Council, Decision 2018-FO-01 of 7 June 2018, *Webtaxi*, paragraphs 83 and 87. For a comment on this decision, see: L-H. De Ouderaen, P-E. Partsch and T. Evans, 'The Luxembourg Competition Authority allows a price-fixing agreement between competitors as it provides efficiency gains in the taxi market (Webtaxi)', *Concurrences*, 7 June 2018, <www.concurrences.com/en/bulletin/news-issues/june-2018/the-luxembourg-competition-authority-allows-a-price-fixing-agreement-between>, accessed on 1 September 2022.

(b)

To the best of our knowledge, there has been no public statement by Luxembourg-based market participants.

(c)

Since Luxembourg does not feature a national merger control regime (yet), the LCC has not been confronted with similar arguments for merger control questions.

1.2.2. Question 5

To the best of our knowledge – and due to the fact that there is currently no merger control regime in Luxembourg – the LCC has not yet had the chance to develop a policy approach in this respect.

Having said that in the *Utopia decision*, the LCC considered an industrial policy benefit of preserving employment, by means of the acquisition of a competitor by a dominant company.[15]

1.2.3. Question 6

There is no such precedent in Luxembourg due to the absence of a national merger control regime. As mentioned previously, the Luxembourg Ministry of Economy has however not excluded to integrate an executive veto power in the draft bill for the new merger control regime.

In addition, although it does not constitute a veto right over decisions of the LCC, the Administrative Tribunal of Luxembourg has confirmed that the Ministry of Economy has the right to intervene in investigations by the LCC, which is enshrined in Article 26(5) of the Luxembourg Competition Law, as amended.[16]

1.2.4. Question 7

(a)

On the 21 June 2017, the LCC dismissed a complaint by an independent seller against Amazon. The complainant, a seller on Amazon's marketplace, complained that the termination of its contract by Amazon and the subsequent refusal to re-establish a relationship constituted an abuse of a dominant position.[17]

[15] See Luxembourg Competition Council, Decision 2016-FO-04 of 17 June 2016, *Utopia*.

[16] Administrative Court of Luxembourg, first chamber, decision of 20 May 2009, n°24306 and 24408, p.25-26.

[17] *Loi du 23 octobre 2011 relative à la concurrence*, (Journal Officiel du Grand-Duché de Luxembourg) <www.legilux.public.lu/>, accessed on 28 July 2022.

The LCC dismissed the arguments of the claimants, considering that the refusal was justified given that the complainant failed to comply with Amazon requirements and policies. The LCC also rejected the argument of the complainant according to which Amazon's platform service constitutes an essential facility, considering that the complainant still had the possibility to continue its economic activity, either by selling products on its own website or by using other platform services similar to those offered by Amazon.[18]

Following this decision, the President of the LCC rejected a request for interim measures against Amazon on the 3 July 2019. This decision has been confirmed by the Administrative Tribunal on the grounds that the request for interim measures did not meet the four cumulative conditions necessary for the granting of such measures.[19]

For the time being, however, there has been no *ex officio* investigation by the LCC against large US digital platforms.

(b)

There has not been a prohibition decision against any large digital platform, yet.

(c)

With regard to policy making in the digital economy, and in addition to the above-mentioned proceedings against Amazon, the LCC issued a joint memorandum in collaboration with the Belgian and Dutch authorities in 2019, in which the authorities discuss challenges that digital economy raises for competition authorities.[20] The issuance of such a report and the fact that the LCC is one of the few national competition authorities that have a unit dedicated to the digital economy show that Luxembourg is committed to the effective adaptation of competition law to digital challenges.[21]

With regard to the enforcement of the DMA, the European Commission is expected to be the exclusive enforcement authority on EU level, while national competition authorities – such as the LCC – will play a cooperation role on national

[18] Luxembourg Competition Council, Decision 2017-C-02 of 21 June 2017, *Amazon Services Europe Sàrl*.

[19] In this regard, see: Luxembourg Competition Council, Decision 2019-MC-01 of 3 July 2019 *regarding a request for interim measures against Amazon Services Europe Sàrl*, and Administrative Court of Luxembourg, first chamber, decision of 24 March 2021, n°43612.

[20] J. Steenbergen, M. Snoep and P. Barthelmé, *Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities*, (Luxembourg Competition Council 2019), <www.concurrence.public.lu/fr/actualites/2019/joint-memorandum.html>, accessed on 1 August 2022.

[21] C. Carugati, 'The role of national Authorities in the Digital Markets Act', *Concurrences*, February 2022 <www.concurrences.com/fr/review/issues/no-1-2022/articles/the-role-of-national-authorities-in-the-digital-markets-act-105174>, accessed on 1 September 2022, points 14 and 26.

level. Given the fairly limited enforcement activity on national level to date, we do not expect the DMA to impact the overall activity level by the LCC. Having said that, it cannot be ruled out that a series of Luxembourg fintech operators, which may at times function as gatekeepers for niche financial industries, fall outside the scope of the DMA, rendering the LCC competent for complaints and potential enforcement.

(d)

The DMA does not prejudice the application of Art. 101 and Art. 102 TFEU, and a wide range of conduct continues not to fall within the DMA and remains an enforcement competence for national competition authorities under the existing regulatory framework. With respect to Luxembourg and digital platforms, it is however likely that enforcement activity of the LCC will continue to align with decisional practice by the EU Commission or that of the French and / or German authorities. There should consequently not be a significant Luxembourg-specific risk of over-enforcement or inconsistent application of applicable law and precedent.

1.2.5. Question 8

The European Commission already took into consideration such industrial policy goals through the approval of Important Projects of Common European interest (IPCEI) that aim at fostering economic growth, jobs and competitiveness for the Union industry and economy. The Commission approved for example €2,9 billion public support by 12 Member States for the project "European Battery Innovation" in order to support research and innovation in the battery value chain.[22] Such public support might be necessary for certain industry fields, which are either affected by market failures or industry-specific risks deter private investment.

However, to the best of our knowledge, the European Commission has not yet adopted a State aid decision to support a company headquartered in Luxembourg, solely for the purpose of creating or strengthening an industrial (European) champion. The Commission has neither endorsed State aid measures to address the absence of strong industrial players to remedy an EU-wide or national market failure. Having said that, it cannot be excluded that Luxembourg-based companies with a significant industrial global footprint – such as for example ArcelorMittal, or SES as a worldwide leading satellite owner and operator – may benefit from a

[22] European Commission, *Commission approves €2.9 billion public support by twelve Member States for a second pan-European research and innovation project along the entire battery value chain*, (European Commission 2021), <www.ec.europa.eu/commission/presscorner/detail/en/IP_21_226>, accessed on 1 August 2022.

certain degree of EU Commission-controlled State-aid support to protect EU-critical industry assets against rising geopolitical market pressures.

1.2.6. Question 9

To the best of our knowledge, Luxembourg courts have not used the tools available to collaborate with the Commission. In the Spark study on the "Enforcement of State Aid Rules and Decisions by National Courts" published in 2019 covering the period between 1 January 2007 and 31 December 2017, Luxembourg courts received two amicus curiae observations pursuant to Art. 29(2) of Council Regulation (EU) 2015/1589. Nevertheless, it appears that the national courts did not use the tools provided for under Art. 29(1).[23] Generally, the study did not report any relevant ruling on state aid matters in Luxembourg since 2007.[24] For the period of 2018 to 2021, the Commission Staff Working documents accompanying the Annual Competition Reports did also not record any Art. 29(1) request from Luxembourg.

Regarding judicial remedies, a selection of State aid cases involving Luxembourg's tax rulings have been brought, without Luxembourg courts referring however, any preliminary questions on this matter to the European Court of Justice.

Luxembourg courts are therefore interpreting the scope of EU State aid rules without resorting to the collaboration tools with the European Commission or the European Court of Justice.

1.3. Geopolitical Instruments, Trade Defence Instruments, and Competition Policy

1.3.1. Question 10

To the best of our knowledge, the LCC has not investigated cases where existing trade defence instruments may have impacted its competition law analysis.

[23] Spark Legal Network, European University Institute, Ecorys and Caselex, *Study on the enforcement of State aid rules and decisions by national courts* (Publications Office of the European Union 2019), <www.op.europa.eu/en/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1> accessed on 2 August 2022.

[24] Ibid, p. 23.

2. TRADE

2.1. FDI Control

2.1.1. Question 11

(a)

Luxembourg does not yet feature a FDI screening or control mechanism.

However, in recent years there has been a rise in legislative activity,[25] culminating in a draft bill introduced by the Government to Parliament, for the screening and ex ante control of certain FDI into nationally critical infrastructure and sectors.[26] The draft bill underlines that the introduction of such a tool has become necessary due to the emergence of (state owned or controlled) investors, which do not acquire an entity or asset for purely economic reasons, but for access to technology, information, goods or services of national strategic importance.[27]

(b)

As stated above, Luxembourg does not yet feature a FDI screening or control mechanism. The main challenge for the implementation of the new bill will be the co-existence of investment screening and control with the transactional financial sector. This issue has been raised by the Chamber of Commerce of Luxembourg in its opinion on the bill,[28] where it emphasized that the screening mechanism should not become a hurdle for foreign investments and foreign-to-foreign transactions. The Chamber of Commerce proposed to amend the bill and to provide more detailed explanations on its exact implementation to reassure investors about the scope, speed, and security of the process.

Taking into account the particularities of the financial sector, the bill explicitly excludes portfolio investments, which do not lead to a change of control in a

[25] The opposition party had initially tabled a draft bill in March 2020 (Bill 7578) which will however in all likelihood be replaced by the government proposal (Bill 7885), tabled on 15 September 2021.

[26] Luxembourg Parliament, *Projet de loi n° 7885 portant mise en place d'un mécanisme de filtrage national des investissements directs étrangers susceptibles de porter atteinte à la sécurité ou à l'ordre public aux fins de la mise en œuvre du règlement (UE) 2019/452 du Parlement européen et du Conseil du 19 mars 2019 établissant un cadre pour le filtrage des investissements directs étrangers dans l'Union, tel que modifié déposé le 15 Septembre 2021* (Chambre des Députés du Grand-Duché de Luxembourg 2021) <www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&id=7885>, accessed on 2 August 2022.

[27] Ibid, p.9.

[28] Luxembourg Parliament, *Projet de loi n°7885²* (Chambre des Députés du Grand-Duché de Luxembourg 2021) <www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&backto=/wps/portal/public/Accueil/TravailALaChambre/Recherche/PlusDeRecherches&id=7885>, accessed on 3 August 2022, see « Avis de la Chambre de Commerce ».

Luxembourg-law governed entity.[29] The bill does not foresee a suspensory effect for (notifiable) transactions but provides for the possibility of Luxembourg authorities to intercept and suspend transactions where the authorities identified concerns justifying a so-called "screening decision".[30] This would then lead to an investigation and the possibility to prohibit the transaction for national security concerns set out in the bill.[31]

(c)

The new bill incorporates the provisions of the FDI Screening Regulation. Art. 9 of the new bill refers to the same screening factors as Art. 4 of the FDI Screening Regulation. However, in terms of scope, the bill is slightly wider than the FDI Screening Regulation as it considers related activities ("*activités connexes*") as critical activities as well. Such "*activités connexes*" include activities that are likely to give access to sensitive information related to critical sectors pursuant to Art. 2(2) of the bill and activities likely to give access to places related to these same critical sectors.[32]

(d)

Any person not originating from a Member State of the European Economic Area will be considered a Foreign Investor and falls within the scope of the bill.[33]

In terms of investments, the bill targets an investment of any kind made by a Foreign Investor, acting alone, in concert or through an intermediary, and which serves to create or maintain direct and "lasting relationships" between the investor and the target entity, allowing the foreign investor to exercise control over this entity and activities in Luxembourg.[34]

(e)

Pursuant to Arts 2 and 9 of the bill, investments that produce effects in the following sectors fall within the scope of the new FDI tool: the development, operating, and trade of dual-use goods, energy, transportation, water, healthcare, telecommunications, data processing/storage, military and defence, finance and media.

Additionally, any activities linked to critical technologies and dual-use goods pursuant to Art. 2(1) of Regulation (CE) 428/2009, the supply of essential inputs

[29] Projet de loi n° 7885, 2021, p.2-3, Art. 2(1) and Art. 3(4) (see footnote n°25).
[30] Ibid, p. 14, Ad Art. 5, Alinea 2.
[31] Ibid, p. 15, Ad Art. 8.
[32] Ibid, p.3, Article 2(3).
[33] Ibid, p.3, Art. 3(1).
[34] Ibid, p.3, Art. 3(2).

such as food and raw materials, freedom of the media and access to sensitive information such as personal data are also covered by the bill.

All these activities are considered strategic for security and public order.

(f)

According to the bill, foreign investors must notify the Minister of the Economy before carrying out the investment. The Interministerial Committee for the screening of investments is entrusted with the assessment of these notifications and has to provide an opinion on whether it would recommend triggering a screening procedure.[35] After the issuance of this opinion, the Government will decide whether or not the investment needs to be subject to a screening procedure.[36] The procedure lasts for a maximum of 60 days, during which the Government may request additional information from the investor.[37]

(g)

There are no competition considerations reflected in the bill. Given the absence of both, a merger control and a FDI control regime, the authorities have also not yet adopted a practice to that effect.

(h)

There is no practice yet in Luxembourg with regard to these information-sharing mechanisms.

(i)

Judicial remedies ("*recours en réformation*") before the Administrative courts of Luxembourg are possible against decisions adopted under Art. 11(7) of the bill. It concerns the imposition of fines by ministers in case the foreign investor fails to comply with injunctions issued under Art. 11(1)-(2).

(j)

In light of the early stage of the national FDI control regime, there is no practice in Luxembourg in this regard.

[35] Ibid, p.4, Art. 4(1).
[36] Ibid, p.5, Art. 7(1).
[37] Ibid, p.5, Art. 8.

2.2. Trade Defence and Public Procurement – Foreign Subsidies

2.2.1. Question 12

(a)

To the best of our knowledge, Luxembourg did not respond to the public consultation procedure on the Commission's proposal for a Regulation and also abstained from commenting on the (potentially) distortive effect of foreign subsidies in the country. Foreign subsidy concerns have also not been addressed in the bill for the new FDI screening mechanism.

(b)

We do not see such risk for the time being. The (Draft) Foreign Subsidy Regulation ("**FSR**") focuses primarily on closing the regulatory gap, by which FDI may be cross-subsidised by third-country subsidies, which in turn escapes (until today) regulatory oversight by the EU Commission. While State Aid control has been and continues to be within the exclusive competence of the EU Commission, FDI screening and control has until today not featured among the regulatory control tools (or competences) of the Luxembourg Government. The current bill on the new FDI screening mechanism does not mention or take into account the FSR. Nonetheless, we would expect the Luxembourg legislator to design its new FDI tool to complement rather than interfere with the FSR.

With respect to the FDI Screening Regulation, we would expect the Commission to use the information gathered to continuously develop and adjust the FSR and to understand if the instrument is sufficient to address the concerns, which the Regulation is supposed to address.

(c)

We expect the impact of the draft FSR on Luxembourg's procedural autonomy to organise public procurement review procedures to be minimal. The FSR sets out clearly that it is within the European Commission's remit to evaluate notified transactions and to take clearance, commitment or prohibition decisions.[38] The EU Courts will be hearing the appeals of such decisions.[39] While national contracting

[38] Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, COM (2021) 223 final, Arts. 6, 7,8, 15.

[39] Committee on International Trade of the European Parliament, *Provisional Agreement Resulting from Interinstitutional Negotiations,* (European Parliament 2022) <www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf >, accessed on 18 August 2022, recital 45a, Art. 12(3)(d) and Art. 40a.

authorities will have to abide by the standstill obligation in such cases,[40] they are not concerned with the substantive foreign subsidy review. The Luxembourg courts will therefore likely be able to detach the foreign subsidy (Commission) decision from the national public procurement law questions that it will have to rule upon.

No particular concern has been expressed by the Luxembourg government regarding the scope of the Commission's powers under the proposal.

2.2.2. Question 13

We see three key limitations and tensions in the EU Commission approach under the FSR.

The first limitation relates to the fact that the FSR has been designed to control distortive foreign subsidies, but ultimately leads to significant (i) compliance burdens and (ii) transaction complexity for a series of EU-native multinationals and financial investors. Due to the fact that the Commission determines notification requirements of transactions on basis of received financial contributions as opposed to actual subsidies, a series of multinationals as well as financial investors will have to track closely which contributions they received from which government over a period of three years. For certain sectors and industry players, such as, for example, the construction sector or the basic industry sector (which participate frequently in state-financed projects), this will create hardship, complexify transactions and may lead to abstention in tenders in the EEA due to the notification requirements. This, in turn, carries the risk of reducing competition, but also hampering innovation and growth within the European Union. Competition law policy strives to achieve these objectives.

The second limitation relates to the potential conflict of (global) policy objectives of State aid granted inside and outside the EU, which risk to be treated differently under the FSR. Foreign State aid pursuing, for example, environmental and/or sustainability goals, may be treated as foreign subsidy capable of distorting the internal market, whereas the same aid, granted for the same policy objectives and approved under EU law, will fall out of scope of the FSR. The current draft of the FSR is vague on the evaluation of foreign subsidies and their purpose, risking to compromise *global* – and therefore European – policy objectives such as environmental or social goals.

[40] Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market, 2021, p. 40, Art. 31 (footnote n°37).

The third limitation relates to significant legal uncertainty coming with the FSR. Whereas competition law, State aid control, and trade defence instruments can rely on established CJEU precedent as well as a series of Commission block exemption regulations, notices and guidelines, the new FSR will necessarily add a layer of legal uncertainty for transaction planning and participations in public tenders. The current draft FSR refrains (for the most part) from sourcing from established notions in the three *established* legal fields, but will introduce new concepts, which will have to be developed. This risks creating tensions and parallel enforcement frameworks.

2.3. Mandatory Due Diligence and Regulating Supply Chains.

2.3.1. Question 14

There is currently no general binding obligation on companies in Luxembourg to adopt environmental and human rights due diligence measures in relation to their activities and their supply chain.[41] There are however non-binding guidelines, which are typically adhered to by the industry.

The "X Principles" of Corporate Governance of the Luxembourg Stock Exchange for example, provide general principles and guidelines on best corporate governance practices for listed companies. While no specific reference is made to human rights or supply chain due diligence, the principles reflect social and environmental responsibility objectives (Principle 9).[42]

Regarding statutory law, the Law on Commercial Companies of 10 August 1915 implemented the obligation for public interest entities, as per Directive 2013/34/EU as amended by Directive 2014/95/EU (the Non-Financial Reporting Directive), to disclose in their consolidated accounts non-financial statements information on "*the impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters*".[43] However, these are disclosure requirements without binding obligations on (due diligence) policies in these matters.[44]

[41] B. Baglayan, *A study on potential human rights due diligence legislation in Luxembourg*, (Commission consultative des Droits de l'Homme 2021), <www.maee.gouvernement.lu/dam-assets/directions/d1/pan-entreprises-et-droits-de-l-homme/study-potential-hr/A-study-on-potential-human-rights-due-diligence-legislation-in-Luxembourg.pdf >, accessed on 5 August 2022, p. 65.

[42] Luxembourg Stock Exchange, *Gouvernance d'entreprise : les X Principes de gouvernance d'entreprise de la Bourse de Luxembourg*, (Luxembourg Stock Exchange 2017) <www.bourse.lu/documents/legislation-GOVERNANCE-ten_principles-FR.pdf>, accessed on 5 August 2022, p. 29.

[43] *Loi du 10 août 1915 concernant les sociétés commerciales*, (Journal officiel du Grand-Duché de Luxembourg), <www.legilux.public.lu/eli/etat/leg/loi/1915/08/10/n1/jo>, accessed on 5 August 2022, Art. 1730-1.

[44] B. Baglayan, 2021, p. 72.

Luxembourg's environmental laws also provide for various industry-specific obligations that provide for *de facto* due diligence obligations. This includes, for example, an obligation to conduct an environmental impact assessment before carrying out a road project pursuant to the law of 15 May 2018.[45]

In terms of human rights, the Labour Code requires the employer to take all necessary preventive measures to ensure the protection of the dignity of every person in labour relations, but does not extend this to the supply chain/third parties.[46]

2.3.2. Question 15

(a)

There are no such challenges since such a general due diligence obligation for the supply chain has not been implemented in Luxembourg yet.

(b)

While the Luxembourg industry welcomes the approach to safeguard human rights and environmental compliance by means of EU-wide legislation, there are a series of concerns that have been raised.

In a joint position paper on the proposal, the Chamber of Commerce of Luxembourg underlines its openness to such legislation, but criticizes that:

First, the conditions under which the above regime will be triggered have not been drafted in a sufficiently precise manner and therefore it is not clear whether they are aligned with civil law principles on extra-contractual liability.[47] In this light, the Chamber of commerce considers that criteria such as the company's power to influence its direct and indirect business relationships, as well as the sector or geographical area in which the value chain partner is operating should be taken into consideration when it comes to assessing whether the company took appropriate measures or not. The European Parliament also underlined this ambiguity.[48]

[45] *Loi du 15 mai 2018 relative à l'évaluation des incidences sur l'environnement*, (Journal Officiel du Grand-Duché de Luxembourg), <www.legilux.public.lu/eli/etat/leg/loi/2018/05/15/a398/jo>, accessed on 5 August 2022.

[46] Code du Travail Luxembourgeois, Article L.245-4(3) (Journal Officiel du Grand-Duché de Luxembourg), <www.legilux.public.lu/eli/etat/leg/code/travail/20210423>, accessed on 5 August 2022.

[47] Chamber of Commerce Luxembourg and FEDIL, *Joint position paper on the Proposal for a Directive on Corporate Sustainability Due Diligence*, (Chamber of Commerce Luxembourg 2022) <www.cc.lu/toute-linformation/actualites/detail/joint-position-paper-on-the-proposal-for-a-directive-on-corporate-sustainability-due-diligence>, accessed on 4 August 2022, p. 16.

[48] European Parliament, *Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, <www.business-humanrights.org/en/latest-news/eu-human-rights-analysis-of-the-

Second, it is challenging for companies to control their whole value chain. In this light, due diligence obligations should only cover the first-tier direct supplier(s) of in-scope companies.[49]

Third, the proposal leaves wide discretion to Member States when it comes to transposing the Directive, notably regarding the imposed obligations.[50] To ensure a certain degree of harmonisation, key due diligence duties should be clearly explained and narrowed down.

Fourth, the proposal also raises concerns about competition, as it implements environmental and human rights standards for EU activities, while not excluding operations outside of the EU from its scope. It also creates inequality between EU companies that are operating in third countries and non-EU competitors that are not subject to such standards, risking compromising the market position of EU companies.[51]

While these points reflect in most part corporate and employer-related concerns, it is clear that the Commission's proposal will engage in a balancing act to avoid potential conflicts with national (civil) law rules and at the same time ensure a sufficient degree of legal certainty and harmonisation across the EU.

draft-due-diligence-directive-highlights-areas-of-concern/>, accessed on 4 August 2022, p. 26: "the relationship between Art 8(3) and Art 22's provisions on civil liability for damages linked to due diligence failures appears unclear".

[49] Chamber of Commerce Luxembourg and FEDIL, 2022, p. 3, first paragraph (see footnote n°46).

[50] Ibid, p.4, paragraph (B).

[51] Ibid, p.3.

THE NETHERLANDS

Mariska van de Sanden, Edmon Oude Elferink[1]

COMPETITION

GREEN COMPETITION POLICY

On 1 March 2022, the European Commission (EC) published draft Horizontal Guidelines including a chapter on sustainability in which it sets out its approach towards sustainability agreements.[2] As this draft reflects the latest position of the EC, it is taken as a starting point for the purpose of answering the questions on green competition policy.

Question 1

Question 1a

The Dutch Authority for Consumers and Markets (ACM, *Autoriteit Consument & Markt*) currently takes a more liberal approach than the EC as to whether or not sustainability benefits to wider society should be considered when examining agreements between competitors under Article 101(3) Treaty on the Functioning of the European Union (TFEU) and/or the equivalent Article 6(3) of the Dutch Competition Act (DCA, *Mededingingswet*).

ACM's approach is set out in its draft Guidelines on sustainability agreements (draft Sustainability Guidelines, *Leidraad duurzaamheidsafspraken*).[3] The main differences between ACM's and the EC's proposed methods to assess sustainability agreements are:

(i) ACM defines a distinct category of environmental damage agreements (*milieuschadeafspraken*). It concerns agreements, which aim to reduce

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[2] EC, 'Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines', 1 March 2022, <www.ec.europa.eu/competition-policy/public-consultations/2022-hbers_en>, visited 13 September 2022.

[3] ACM, 'Guidelines on Sustainability Agreements (Second draft version)', 26 January 2021, <www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf>, visited 13 September 2022.

negative externalities, i.e. damage to society that is not included in the price for a product or services, and that thus contribute to more efficient usage of natural resources.[4] The EC does not introduce such a notion in its draft Horizonal Guidelines;

(ii) ACM considers that if an environmental damage agreement contributes to compliance with an international or national standard or if it helps realizing a concrete policy goal (to prevent such damage), then benefits for others than merely the users can be taken into account and users do not need to be compensated in full for Article 101(3) TFEU and/or Article 6(3) DCA to apply.[5] The EC, on the other hand, still requires that the pros for the users outweigh the cons for that very same group of users; and

(iii) ACM contends that in situations where the benefits are global, like in case of a reduction in CO_2-emissions, all benefits can be taken into account to calculate the benefits of the agreement, while the EC seems to suggest that only a proportionate amount of those benefits can be used and taken into consideration.

ACM's approach can be best illustrated with a reference to the informal guidance that ACM gave to Shell and TotalEnergies with regard to a joint marketing initiative to store CO_2 in empty North Sea gas fields.[6] In that case, ACM stated that even if the initiative were not to fully compensate the users, the benefits for society in the form of cleaner air and less CO_2 pollution would still outweigh the negative effects under Article 6(3) DCA.

This particular CO_2-project is only one of many sustainability initiatives that ACM has recently assessed under its draft Sustainability Guidelines.[7] By providing this essential guidance to the market, and by being particularly vocal on the topic,[8]

[4] Ibid, p. 6.

[5] See also ACM, 'Fair share for consumers in a sustainability context', 27 September 2021, <www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf>, visited 13 September 2022.

[6] ACM, 'Informal guidance on collaboration between Shell and TotalEnergies in the storage of CO_2 in empty North Sea gas fields', 27 June 2022, <www.acm.nl/nl/publicaties/informele-zienswijze-samenwerking-shell-totalenergies-co2-opslag-noordzee>, visited 13 September 2022.

[7] ACM, 'System Operators can collaborate in order to reduce CO2 emissions', 28 February 2022, <www.acm.nl/en/publications/system-operators-can-collaborate-order-reduce-co2-emissions>, ACM, 'ACM favors collaborations between businesses promoting sustainability in the energy sector', 28 February 2022, <www.acm.nl/en/publications/acm-favors-collaborations-between-businesses-promoting-sustainability-energy-sector>, ACM, 'ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles', 26 July 2022, <www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles>, ACM, 'ACM agrees to arrangements of garden centers to curtail use of illegal pesticides', 2 September 2022, <www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides>, all visited 13 September 2022.

[8] E.g. ACM, 'Speech Martijn Snoep: Climate change requires a fresh look on fair and efficient in

ACM has clearly taken up to the role of frontrunner in the European Union (EU) where it concerns the interface between competition rules and sustainability.

Question 1b

We are unaware of any judgments in private actions in the Netherlands based on competition law where sustainability arguments have been raised and considered by the courts.

However, Dutch courts do show an inclination to take sustainability arguments into account in private actions in general, notably in two major tort cases of recent years against the Dutch government and the oil major Shell.[9] It is therefore our expectation that the courts would also be willing to consider sustainability arguments if they were brought forward in a private action based on competition law.

Question 2

Question 2a

To the best of our knowledge, there are no merger control decisions in which ACM has considered claims related to sustainability as recognisable efficiency benefits. It should be noted though that in Dutch literature, it has been argued that ACM could take positive sustainability effects into account.[10]

Question 2b

ACM considered a transaction's likely detrimental effects on the environment as competitive harm in at least two merger cases.[11] In the first case, ACM identified the risk that the transaction could lead to a less powerful incentive to invest in sustainability because of the reduction in competition.[12] In the second case, ACM

competition law', 21 June 2022, <www.acm.nl/en/publications/speech-martijn-snoep-climate-change-requires-fresh-look-fair-and-efficient-competition-law>, visited 13 September 2022.

[9] Dutch Supreme Court, 21 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda*) and District Court of The Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Royal Dutch Shell*).

[10] E. Raedts and I. Lulof, 'De opwarming van concentratiecontrole: mogelijkheden een groen licht te geven aan concentraties beschouwd', *Markt en Mededinging*, No. 4/5, 2020, pp. 195-202.

[11] See also ACM, *Sanoma/DPG Media*, 10 April 2020, <www.acm.nl/en/publications/acm-clears-acquisition-publishing-company-sanoma-media-rival-publisher-dpg-media>, visited 13 September 2022, as sustainability generally also includes labour conditions. In this case, ACM investigated the effects of the transaction on the labour conditions of journalists, such as the fees paid to them by the companies.

[12] ACM, *Harbour B.V./AEB Holding N.V.,* 11 April 2022, <www.acm.nl/en/publications/further-investigation-needed-acquisition-waste-management-company-aeb-avr>, visited 13 September 2022. On 27 May 2022, parties filed a request for a license at ACM, <www.acm.nl/nl/publicaties/avr-en-aeb-vragen-een-vergunning-aan-voor-overname-concentratiemelding>, visited 13 September 2022.

assessed whether lowered purchase prices due to the increased purchasing power of the two merging companies would withhold parties upstream from investing in sustainability.[13]

Question 3

The draft Sustainability Guidelines provide an insight into how ACM intends to determine the trade-off between harm to competition and benefits to sustainability when it is to assess sustainability agreements under the cartel prohibition. For example, quantification of the pros and cons of a sustainability agreement is only required if (i) the undertakings concerned have a combined market share of more than 30% or if (ii) the harm to competition is not evidently smaller than the benefits of the agreement.[14]

In those instances, the trade-off should be identified as accurately as possible and needs to be expressed in monetary terms:

- With regard to environmental damage agreements (see question 1a), ACM refers to environmental prices or shadow prices as tools to quantify the benefits. The guidelines that apply to governmental agencies when making social cost-benefit analyses (SCBAs) can be used as a starting point.[15] Together with the Greek competition authority, ACM has commissioned a report that describes the concepts of negative externalities and environmental damage and gives an extensive overview of the empirical instruments available to measure sustainability gains.[16]
- In the case of other sustainability agreements, for instance those regarding animal welfare and human rights, ACM requires full compensation and advocates a "willingness to pay" analysis as a tool to determine benefits.[17]

[13] ACM, *Van Drie Group/Van Dam*, 19 August 2021, <www.acm.nl/sites/default/files/documents/concentratiebesluit-van-drie-krijgt-vergunning-voor-overname-van-dam.pdf>, visited 13 September 2022.

[14] Ibid, p. 15.

[15] E.g. G. Romijn & G. Renes, 'General Guidance for Cost-Benefit Analysis', *CPB Netherlands Bureau of Economic Policy Analysis and PBL Netherlands Environmental Assessment Agency*, 23 June 2015, <www.pbl.nl/en/publications/general-guidance-for-cost-benefit-analysis>, visited 13 September 2022. See also S. Tey, 'Anticipating future public policy changes in environmental cost benefit analysis', *Oxera*, 30 March 2022, <www.oxera.com/insights/agenda/articles/anticipating-future-public-policy-changes-in-environmental-cost-benefit-analysis/>, visited 13 September 2022.

[16] R. Inderst et al., 'Technical Report on Sustainability and Competition', January 2021, <www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf>, visited 13 September 2022.

[17] "Willingness to pay" is the maximum price that a customer is willing to pay for a product or service. See for examples ACM, 'Chicken of Tomorrow', 26 January 2015, <www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf> and ACM, 'Coal power plants', 26 September 2013, <www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf>, visited 13 September 2022.

As regards abuse of dominance, ACM has yet to take a decision on the basis of Article 102 TFEU and/or Article 24 DCA where sustainability arguments are considered. In our view, benefits to sustainability can certainly be invoked as an objective justification for potentially abusive behaviour since Article 3 Treaty on the European Union (TEU) mentions sustainable development as one of the EU's objectives.[18] In order to establish whether those arguments hold ACM may well apply the analytical framework laid down in its draft Sustainability Guidelines.

In future merger cases, ACM is, in our view, also likely to apply its draft Sustainability Guidelines to assess efficiencies, in particular for the purpose of the valuation of the sustainability gains at a monetary amount.

EUROPEAN STRATEGIC AUTONOMY, THE PROMOTION OF "EUROPEAN CHAMPIONS" AND COMPETITION LAW ENFORCEMENT

Question 4

Question 4a

In the context of the investigation into the proposed merger between Siemens and Alstom, ACM shared the EC's concerns raised in the statement of objections.[19] In its intervention, ACM underlined that the remedies offered by the parties to the transaction fell far short of what would be required to address all concerns to the required standard. ACM did not allude to the industrial policy dimension but seemed not to be inclined to accept the argument that the parties' high combined market shares should be discounted in light of ever evolving and emerging markets.

The Dutch government did not make an official statement at the time but several papers issued between 2019 and 2021 indicate that the Netherlands supported the EC's position.[20]

[18] E.g., S. Holmes, 'Climate Change, sustainability, and competition law', *Journal of Antitrust Enforcement*, Vol. 8, No. 2, July 2020, pp. 354-405.

[19] ACM (together with the NCAs from Belgium, the UK and Spain), 'Letter from national competition authorities on the Siemens – Alstom merger', 21 December 2018, <www.acm.nl/sites/default/files/documents/2018-12/siemens-alstom-open-letter-to-com.pdf>, visited 13 September 2022.

[20] Paper by the Netherlands, Denmark, Finland, Ireland, Romania and Sweden, 'Why strong EU competition and state aid rules matter', 11 November 2021, <www.permanentrepresentations.nl/documents/publications/2021/11/11/competition-and-state-aid>, and Position paper by the Netherlands, *Strengthening European Competitiveness,* 15 May 2019, see: <www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness>, both visited 13 September 2022.

Question 4b

According to our knowledge, there were no market players from the Netherlands that intervened in the Siemens/Alstom matter.

Question 4c

ACM is currently conducting a phase II investigation into the proposed merger between two major media companies, RTL and Talpa. According to news reports, the parties involved argue that they need to join forces in order to better compete with American and Chinese players in the media sector.[21] The ACM's phase I decision does , not include however any reference to such an industrial policy argument.[22]

Question 5

When reviewing mergers, ACM applies the Guidelines on the assessment of horizontal mergers (*Beleidsregel beoordeling horizontale concentraties*).[23] These guidelines do not mention the possibility to take industrial policy concerns into account when assessing concentrations but there is nothing that prevent ACM from doing so either. As far as we are aware, ACM has never actually considered industrial policy in any of its merger decisions.

Question 6

In case ACM blocks a proposed merger on competition law grounds, Article 47 DCA provides for the possibility to request the Minister of Economic Affairs & Climate Policy (Minister, *Minister van Economische Zaken en Klimaat*) to "overrule" ACM's decision by granting a license for the merger in question. The Minister can only do so on the basis of public interest grounds, which have to outweigh the negative effects on competition.[24]

The DCA does not define public interest grounds but provides that the decision of the Minister should reflect the sentiment of the Dutch cabinet.[25] The grounds

[21] NLTimes, 'RTL Nederland and Talpa to merge in major Dutch media fusion', 23 June 2021, <www.nltimes.nl/2021/06/23/rtl-nederland-talpa-merge-major-dutch-media-fusion>, visited 13 September 2022.

[22] ACM, 'Extensive investigation needed into merger between RTL and Talpa', 28 January 2022, <www.acm.nl/en/publications/extensive-investigation-needed-merger-between-rtl-and-talpa>, visited 13 September 2022.

[23] ACM, 'Beleidsregel beoordeling horizontale concentraties', April 2013, <wetten.overheid.nl/BWBR0033395/2013-04-01>, visited 13 September 2022.

[24] Article 47(1) DCA and *Kamerstukken* II 1995/96, nr. A, p. 19.

[25] Article 49 DCA.

can be of an economic or non-economic nature.[26] Examples are state security, substantial employment opportunities with long- term effects[27] or the interest of efficiency that comes with economies of scale to be able to compete with markets beyond the Netherlands.[28]

The most recent case in which the Minister applied Article 47 DCA goes to show that there are limits to the Minister's discretion. In 2019, the Minister overruled ACM's decision to prohibit the acquisition of postal service company Sandd by Dutch incumbent PostNL on four grounds: (i) protection of customers of postal services, (ii) continuity of the national postal service, (iii) protection of employees and (iv) protection of financial interests of the State.

The Trade and Industry Appeals Tribunal (CBb, *College van Beroep voor het bedrijfsleven*), the highest appeal court for competition cases in the Netherlands, ruled that the Minister does not have the power to "redo" ACM's assessment when applying Article 47 DCA.[29] Considerations of competition fall within ACM's remit, and the Minister has to respect and adhere to ACM's assessment, including the latter's analysis as to whether prohibiting the merger would obstruct the performance of a service of general interests.

The Minister can thus only grant a license for a blocked merger on the basis of public interest grounds that do not contravene ACM's decision and that outweigh the negative effects on competition resulting from the merger. Although the CBb accepted the protection of employment mentioned under (iii) as a valid public interest ground, this was insufficient to grant the license in this case.

Note that the merger in question has been completed in the meantime and that it is unlikely that Sandd will ever revive as an independent market player, regardless the outcome of PostNL's pending appeal against the ACM's prohibition decision.

Question 7

Question 7a

When it comes to cases against US digital platforms it is worth mentioning that ACM, amongst other things, conducted a market study into app stores in 2019 and called for tip-offs regarding possible abuse of the position that Apple had attained

[26] *Kamerstukken* II 1995/96, 24 707, nr. 3, p. 40-41.
[27] *Nota n.a.v. verslag II voorstel-Mededingingswet, Kamerstukken* II 1996/97, 24 707, nr. 6, p. 69.
[28] *Kamerstukken* II 1995/96, 24 707, nr. A, p. 18-19.
[29] CBb, 6 June 2022, ECLI:NL:CBB:2022:289 (*PostNL/Sandd*).

with its App Store.[30] During ACM's investigation, Match Group, the owner and operator of the popular dating service Tinder and other dating apps, filed a complaint with ACM. According to the complaint, Apple violated competition laws by forcing Match Group to use Apple's in-app payment systems and pay an excessive commission to Apple.[31]

ACM has effectively brought a case against Apple on the basis of Article 102 TFEU and Article 24 DCA for abuse of its dominant position.[32] ACM ordered Apple to allow alternative payment methods in Dutch dating apps and made this order subject to penalty payments (*last onder dwangsom*). Initially, Apple's proposals to remedy the situation did not suffice according to ACM, as a result of which it had to pay a total of EUR 50 million in penalty payments.[33]

In the meantime, Apple has, be it under protest, changed its conditions in line with the ACM's order while appeals are pending. [34]

In May 2022, ACM launched a preliminary investigation into Google's Play Store dating-apps payment systems upon another complaint from Match Group.[35] Meanwhile, Brussels' media are suggesting that the EC will take over this investigation.[36]

[30] ACM, 'ACM launches investigation into abuse of dominance by Apple in its App Store', 11 April 2019, <www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store>, visited 13 September 2022.

[31] Reuters, 'Match Group asks Dutch regulators to reveal possible Apple antitrust decision', 3 September 2021,<www.reuters.com/business/match-group-asks-dutch-regulators-reveal-possible-apple-antitrust-decision-2021-09-03/>, visited 13 September 2022.

[32] ACM, 'Summary of decision: abuse of dominant position Apple', 24 December 2021, <www.acm.nl/en/publications/summary-decision-abuse-dominant-position-apple>, visited 13 September 2022. This publication followed upon a ruling of the president of the District Court of Rotterdam largely rejecting Apple's requests for injunctive relief. See District Court of Rotterdam, 24 December 2021, ECLI:NL:RBROT:2021:12851 (*Apple*).

[33] ACM, 'ACM to assess adjusted proposal of Apple regarding its conditions for dating apps', 28 March 2022, <www.acm.nl/en/publications/acm-assess-adjusted-proposal-apple-regarding-its-conditions-dating-apps>, visited 13 September 2022.

[34] ACM, 'Apple changes unfair conditions, allows alternative payment methods in dating apps', 11 June 2022, <www.acm.nl/en/publications/acm-apple-changes-unfair-conditions-allows-alternative-payments-methods-dating-apps>, visited 13 September 2022. Apple filed an objection against ACM's order. ACM will take a decision (on this objection) in 2023. Afterwards, an appeal at the District Court of Rotterdam and subsequently at the CBb may follow.

[35] Reuters, 'With Apple fight ongoing, Dutch watchdog ACM to investigate Google Play store practices', 4 May 2022, <www.reuters.com/technology/dutch-watchdog-acm-investigate-google-play-store-practices-2022-05-04/>, visited 13 September 2022.

[36] Politco, 'EU antitrust enforcers investigating Google Play Store', 4 August 2022, <www.politico.eu/article/eu-antitrust-enforcers-investigate-google-play-store/>, visited 13 September 2022.

Question 7b

The case of ACM against Apple (see question 7a) could be seen as contributing to a more vibrant digital economy and greater digital sovereignty.[37] The case provides a basis, be it a fragile one, for other parties to offer payment services and can potentially decrease dependence on Apple's payment method. In the same vein, the investigation into Google's Play Store, whether it is taken over by the EC or not, may potentially lead to benefits for the European digital economy.

Question 7c

At this point in time, it is difficult to assess if and to what extent the Digital Markets Act (DMA) will affect ACM's ability to bring its own competition law-based cases against digital platforms.

It is clear that some market conduct can violate both the DMA and competition law. As the main objective of the DMA is to prevent so-called gatekeepers (*poortwachters*) from abusing their strong market position in the first place, it may potentially impact the number of competition cases to be pursued by ACM. The more platforms and practices are subject to ex-ante scrutiny in accordance with the DMA, the less conduct should namely require the ex-post application of competition law.

Under the DMA national competition authorities (NCAs) can still bring competition cases against large digital platforms for breaches of competition law without approval from the EC.[38]As a matter of fact, ACM believes that it is useful for NCAs to pursue and to keep pursuing their own competition law-based cases against digital platforms. Not only with a view to the distribution of workload but also because it contributes to the development of thinking on competition law both on the part of NCAs themselves and of the EC.[39]

Question 7d

According to ACM, a good cooperation and coordination mechanism should be put in place to ensure that the DMA, on the one hand, and EU and national

[37] ACM, 'Big Tech and the Dutch payment market: tightening of rules needed to maintain a level playing field', 1 December 2020, <www.acm.nl/en/publications/big-tech-and-dutch-payment-market-tightening-rules-needed-maintain-level-playing-field>, visited 13 September 2022.

[38] Article 38 (3) DMA.

[39] ACM, 'New European competition rules for Big Tech companies can be even more effective', 23 June 2021, <www.acm.nl/en/publications/new-european-competition-rules-big-tech-companies-can-be-even-more-effective>, visited 13 September 2022. See also ECN, 'Joint paper of the heads of the national competition authorities of the European Union: How national competition agencies can strengthen the DMA', 22 June 2021, <www.acm.nl/sites/default/files/documents/verklaring-voorstel-digital-markets-act.pdf>, visited 13 September 2022.

competition law, on the other, can be applied in a coherent manner.[40] The Dutch government takes a similar position.[41] Cases brought by either the EC or NCA's should not lead to undesirable inconsistencies or over-enforcement.

Question 8

From a national perspective, the EC approval of a Dutch scheme to compensate energy-intensive companies for indirect emission costs to prevent those industries from relocating their production outside the EU should be mentioned here. Although not related to the creation of a European industrial champion, this decision demonstrates that industrial policy concerns can play a role in relation to State aid measures.[42]

Question 9

According to a study commissioned by the EC on the national enforcement of State aid rules that came out in 2019,[43] Dutch courts tend to apply State aid rules relatively often. In the period from 2007 to 2018, the Netherlands had the second largest number of cases of private enforcement of State aid rules before national courts in the EU, namely 89, as well as a number of cases of public enforcement.

Be that as it may, Dutch courts seem to make little use of judicial remedies and other tools available to seek clarification in the context of State aid. According to the said study, Dutch civil courts have been reluctant to involve the Court of Justice of the European Union (CJEU) when applying State aid rules. Only a "few" preliminary rulings were reported. Another recent publication shows that not one Dutch administrative court has actually referred a matter to the CJEU between 2016 and 2022.[44]

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[40] Ibid.

[41] See Dutch Ministry of Economic Affairs and Climate Policy, German Federal Ministry for Economic Affairs and Energy and French Ministry of Economics and Finance, 'Strengthening the Digital Markets Act and its Enforcement', September 2021 <www.bmwk.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4>, p.2 and Dutch Ministry of Economic Affairs and Climate Policy, German Federal Ministry for Economic Affairs and Energy and French Ministry of Economics and Finance, 'Non-paper France, Germany & The Netherlands', May 2021, <www.bmwk.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4>, point 5.

[42] EC, 'State aid: Commission approves EUR 835 million Dutch scheme to compensate energy-intensive companies for indirect emission costs', 19 August 2022, <ec.europa.eu/commission/presscorner/detail/en/ip_22_4928>, visited 13 September 2022.

[43] EC, Monti, G., Bas, P., Meindert, L., et al., *Study on the enforcement of state aid rules and decisions by national courts : final study*, COMP/2018/001, PO 2019, <https://data.europa.eu/doi/10.2763/793599> and <https://op.europa.eu/nl/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1>.

[44] J. Langer et al., 'Kroniek toezicht Nederlandse bestuursrechters op de naleving en handhaving van de Europese staatssteunregels 2016-2021', *Tijdschrift voor Bouwrecht*, Vol. 138, 2021.

From time to time, Dutch courts do involve the EC either in light of the previous and current Commission notice on the enforcement of State aid rules by national courts[45] or on the basis of Article 29(1) Regulation 2015/159.[46] According to the study commissioned by the EC, there were at least four opinions requested from the EC on the latter basis.

GEOPOLITICAL INSTRUMENTS, TRADE INSTRUMENTS, AND COMPETITION POLICY

Question 10

We are not aware of cases decided on by ACM where existing trade instruments have affected a competition law analysis.

That said, we do expect this to happen if and once existing FDI screening instruments (see question 11), will be applied more regularly in the Netherlands. Regulatory restrictions have namely played a role in previous competition law analyses of ACM.[47]

Trade

FDI CONTROL

Question 11

With a view to answering question 11, it seems useful first to give an overview of existing FDI screening mechanisms in the Netherlands.

General FDI-mechanism

On 19 April 2022, the Act on safety screening of investments, mergers and takeovers (Act VIFO, *Wet veiligheidstoets investeringen, fusies en overnames*) was adopted.[48] This act is the legal basis for a general FDI screening mechanism in the Netherlands.

[45] Commission Notice on Enforcement of State aid rules by national courts, OJ 2021 C305/1. See CBb, 29 December 2017, ECLI:NL:CBB:2017 (*Rare sheep breeds*) and Court of Appeal of 's-Hertogenbosch, 16 May 2017, ECLI:NL:GHSHE:2017:2127 (*Waste processing*).

[46] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty of the Functioning of the European Union, OJ 2015, L248/9.

[47] E.g. Summary ACM decision, 1 July 2021, <www.acm.nl/sites/default/files/documents/samenvatting-besluit-misbruik-van-economische-machtspositie-door-leadiant.pdf>, visited 13 September 2022 and the merger case concerning the waste processing market referred to in the answer to question 2b.

[48] *Regels tot invoering van een toets betreffende verwervingsactiviteiten die ene risico kunnen vormen voor de nationale veiligheid gezien het effect hiervan op vitale aanbieders of ondernemingen die actief zijn op het gebied van sensitieve technologie (Wet veiligheidstoets investeringen, fusies en overnames), Stb. 2022, 215*.

The Act VIFO establishes a general system to assess changes in control and influence, in addition to the sectoral rules identified below. The Act VIFO applies to acquisition activities when they involve a target undertaking that is active as a critical service provider, an administrator of a high-tech campus, or an undertaking whose activities relate to a sensitive technology.

After entry into force,[49] the Act VIFO will have retroactive effect from 8 September 2020 onwards. On this date, the draft legislative proposal and explanatory memorandum became publicly accessible for everyone. The geographical scope of the Act VIFO is not limited, which means that the investment screening is introduced for investments from all countries (including purely domestic transactions).

The Act VIFO determines that an acquisition activity cannot take place until the Minister has informed the party obliged to report, either the target undertaking or the acquirer, that (i) no review decision is required or (ii) a review decision has been taken.

If the Minister is of the opinion that the acquisition activity leads to a risk for national security (see also question 11e), he can decide in the review decision that the acquisition activity will be allowed if certain criteria or further rules are met. If the risk for the national security cannot be sufficiently averted by these criteria or rules, the Minister will prohibit the acquisition activity. Prohibited acquisition activities can be void (*nietig*) or voidable (*vernietigbaar*).

Sector-specific FDI-mechanisms

In addition to the Act VIFO, the Netherlands already has sectoral regulation in place that includes FDI control. It concerns:

- Electricity Act (*Elektriciteitswet*):[50] investments, that have a change of control[51] as a consequence, in a production plant with a rated electrical output exceeding 250 megawatts or in an undertaking that manages a production plant with the aforementioned output are notifiable and subject to control by the Minister;
- Gas Act (*Gaswet*):[52] investments, that have a change of control as a consequence, in an LNG-installation or LNG-company are notifiable and subject to control by the Minister; and

[49] The date of entering into force has not been set. However, the Act VIFO is expected to enter into force late 2022 or early 2023.

[50] Article 86f Electricity Act.

[51] In Article 26 DCA defines a "change of control" as the possibility to exercise decisive influence on the activities of an undertaking based on factual or legal circumstances.

[52] Article 66e Gas Act.

– Telecommunications Act (*Telecommunicatiewet*)[53]: this act was expanded by the Act on undesirable control of telecommunications (*Wet ongewenste zeggenschap telecommunicatie*), which entered into force on 1 October 2020.[54] This act applies to investors who wish to obtain a controlling interest in a telecommunications party where this would result in influence in the telecommunications sector.[55] The Minister needs to be notified and can, also ex officio, prohibit a transaction or impose conditions for clearance in case of a threat to the public interest.

As far as we know, one notification was made under both the Electricity and Gas Act. A total number of six notifications were made under the Telecommunications Act, two of which fell outside the scope of the law. In addition, seven investigations have been completed under the Telecommunications Act. None of these notifications or investigations has led to the conclusion that the activity should be prohibited or that measures need to be imposed.

Question 11a

As far as the application of FDI-rules is concerned, the main challenge for undertakings is to determine whether an envisaged investment or transaction falls within the scope of the Act VIFO or of any of the sector-specific regulations. It tends to be difficult to both identify relevant products and sensitive technology and to assess whether these products and technologies are caught by any of the FDI-regimes.

Once an undertaking has come to that conclusion, it is often difficult to assess if an investment runs an actual risk of being prohibited or only being cleared subject to conditions. In the absence of decisional practice and (national) case law, the notions used for the actual and substantive assessment, such as the risk for national security (Act VIFO) and the threat to the public interest (Act on undesirable control of telecommunications), still leave room for interpretation. We also refer question 11e.

[53] Article 14a.2 Telecommunications Act.

[54] *Wet van 20 mei 2022 tot wijziging van de Telecommunicatiewet met betrekking tot ongewenste zeggenschap in telecommunicatiepartijen (Wet ongewenste zeggenschap telecommunicatie), Stb. 2020, 165, Besluit van 22 september 2022, houdende regels ter uitwerking van hoofdstuk 14a van de Telecommunicatiewet (Besluit ongewenste zeggenschap telecommunicatie), Stb. 2020, 352 en Regeling van de Staatssecretaris van Economische Zaken en Klimaat van 17 september 2020 houdende voorschriften met betrekking tot de melding van het voornemen overwegende zeggenschap in een telecommunicatiepartij te verkrijgen (Regeling melding Wet ongewenste zeggenschap telecommunicatie), Stcrt, 2020, 48965.*

[55] See T.M. Stevens, 'Investeringstoets telecommunicatie', *Ondernemingsrecht*, 2019; K. Berg, 'Wet ongewenste zeggenschap telecommunicatie – een analyse', *Computerrecht*, 2019; and E. Breukink, 'Het wetsvoorstel ongewenste zeggenschap telecommunicatie', *Maandblad voor Ondernemingrecht*, No. 5-6, 2019.

Question 11b

On 18 November 2020, the Netherlands adopted the Implementation Act FDI Screening Regulation (Implementation Act, *Uitvoeringswet screeningsverordening buitenlandse directe investeringen*)[56] in order to implement the FDI Screening Regulation.[57]

In Article 2 Implementation Act, a contact point is established, i.e. the Minister. According to the Implementation Act, the Minister must ensure that the cooperation mechanism and information exchange with the EC and the other Member States takes place in accordance with Articles 6 to 9 FDI Screening Regulation.

In turn, the Minister has mandated the tasks emanating from the FDI Regulation to the Investment Review Agency (BTI, *Bureau Toetsing Investeringen*).[58]

In our view, the Act VIFO, which lays down the substantive Dutch rules on FDI, is in line with the standards set out in the FDI Screening Regulation and takes account of the criteria set out therein. Over all, the Netherlands does not seem to have gone beyond the harmonisation achieved in the FDI Screening Regulation.

For more information on the Netherlands' reporting on the basis of Article 5 FDI Screening Regulation, we refer to the first and second Annual Reports on the screening of foreign direct investments into the Union.[59]

Question 11c

See question 11a.

Question 11d

The Act VIFO applies to a critical service provider, administrator of a high-tech campus, or an undertaking whose activities relate to a sensitive technology. Critical service providers are undertakings active in the field of transportation of heat, nuclear energy, air transportation, harbour services, banking, infrastructure and the financial market. Other categories can be appointed by governmental decree.

[56] *Uitvoeringswet screeningsverordening buitenlandse directe investeringen, Stb. 2020, nr. 491.*

[57] 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 79/1.

[58] Website BTI, <www.bureautoetsinginvesteringen.nl>, visited 13 September 2022.

[59] EC, 'First Annual Report on the screening of foreign direct investments into the Union', 23 November 2021, <trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf>, and EC, 'Second Annual Report on the screening of foreign direct investments into the Union', 1 September 2022, <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0433>, both visited 13 September 2022.

According to the Act VIFO, sensitive technology includes:

– Dual-use items for the export of which an authorization is required based on Article 3(1) Regulation 428/2009;

– Military goods as meant in Article 2 Strategic Goods Implementation Regulation 2012 (*Uitvoeringsregeling strategische goederen 2012*). This provision refers to the Common Military List of the EU;[60] and

– All technologies relating to semiconductors, photonics, quantum mechanics and High Assurance identification techniques.

By governmental decree it is possible to appoint other technologies as sensitive technologies. Conversely, certain dual-use items or military goods can be excluded from being qualified as sensitive technologies by governmental decree.

As mentioned, there are also several specific assessments that are embedded in sectoral frameworks. Additionally, draft legislation is being prepared for a sectoral test for companies that are part of the Dutch defence industry.[61]

Question 11e

Under the Act VIFO, BTI assesses whether an investment poses a risk to national security. BTI has been founded only recently. Although it got off to a flying start, its experience and decisional practice have to be built up.

National security is defined in Article 1 Act VIFO with reference to the concept of national security under the TEU and the concept of public security and essential interest of its security under the TFEU.[62] In particular, it is concerned with the continuity of critical processes, maintaining the integrity and information of critical or strategic importance for the Netherlands and preventing unwanted strategic dependence on other countries.

The following criteria will be considered when evaluating whether an investment, and/or investor, poses a risk to national security (Article 19 to 21 Act VIFO):

– the degree of transparency regarding the investor's ownership structure;

– restrictions under national and international law;

[60] Article 8 Act VIFO.

[61] Dutch government, 'Kabinet: open markt, maar bescherming nationale veiligheid', 8 July 2022, <www.rijksoverheid.nl/actueel/nieuws/2022/07/08/kabinet-open-markt-maar-bescherming-nationale-veiligheid>, visited 13 September 2022. For the current rules applicable to contractors of the Dutch Ministry of Defence, see Dutch Ministry of Defense, 'Algemene beveiligingseisen Defensie Opdrachten 2019 (ABDO)', <www.defensie.nl/binaries/defensie/documenten/beleidsnota-s/2020/02/04/abdo-2019/ABDO2019_Definitief_V1.1_web.pdf>, visited 13 September 2022. This includes a change of control notification requirement.

[62] *Kamerstukken* II 2020-21, 35880-3, Explanatory Memorandum, p. 130.

– the security situation in the investor's country or region of residence;
– whether the investor has committed crimes;
– the level of cooperation during the assessment;
– connection of the investor to regimes that have a different geo-political agenda than the Netherlands;[63] and
– financing of the investment and resources used for the investment.

Other assessment criteria are specific to the investment, such as the exploitation track record in the case of the acquisition of vital infrastructure, and the track record of the investor on information security in case of an investment in sensitive technology. BTI has considerable leeway to assess national security risks.

The sector specific investment screening regulations contain limited guidance on the definition of public order or security.

Question 11f

In principle, there is no room for competition considerations in Dutch FDI control.[64]

Question 11g

The Minister is obliged to share information regarding FDI with the Member States and the EC as long as they fit within the definition provided in Article 2(1) FDI Screening Regulation.

Our understanding from contacts with BTI is that this information exchange works well. It allows the Member States to gather information about investments that are of interest to them, even if they are not notifiable in their own jurisdiction. Member States are known to use the exchange mechanism to gather information on investments where they could potentially have effect in their own Member State. For private parties, the downside to this is that may experience delays due to such exchanges.

Question 11h

Under the Act VIFO, BTI performs the review and the Minister issues the formal decisions in accordance with that act. A decision under the Act VIFO is a decision in the meaning of the Dutch General Administrative Act (*Algemene wet bestuursrecht*) and is open to reconsideration by the Minister (*bezwaar*), followed

[63] Ibid, pp. 4 and 5.
[64] Ibid, pp. 38-41 (FDI evaluation criteria) and pp. 72-73 (relationship FDI control and competition law).

by appeal proceedings at the Rotterdam court of first instance and the CBb.[65] This process is also open to third parties who are individually and directly concerned by a decision under the Act VIFO.

The initiation of injunction procedures could also be a possibility, for instance in the case of an unlawful act by the Dutch State. There are no facts or cases regarding such cases in the public domain yet since BTI has only recently started its operations.

Question 11i

The COVID-19 pandemic was used by the Minister to speed up the introduction of the first draft of the Act VIFO, which had been in the making for years.[66]

The Minister announced that the Act VIFO would apply retroactively from the date of his letter to Parliament in order to prevent investors from snatching up vulnerable companies, especially in the health care sector. Ironically, the health care sector has never been designated a vital sector but the retroactive application of the Act VIFO remained.[67]

TRADE DEFENCE AND PUBLIC PROCUREMENT – FOREIGN SUBSIDIES

Question 12

In the Netherlands, there has been a genuine concern about the existence and impact of foreign subsidies.[68] Companies in third countries that could benefit from subsidies or financial relationships that are not structured at arm's length with the governments of these third countries have been considered as distorting the competition on the EU internal market for some time already. The concerns on the part of the Dutch government led to the publication of a Dutch non-paper on a Level Playing Field Instrument (LPFI) in 2019.[69]

[65] Both courts are appointed by law as specialised courts for appeals under the Act VIFO, derogating from the regular process for appeals under Dutch administrative law.

[66] Ibid, p. 2. See also *Kamerstukken* II 2019-20, 30821, 113.

[67] *Kamerstukken* II 2020-21, 35880-3, Explanatory Memorandum, p. 125.

[68] Dutch government, 'Kabinetsappreciatie witboek buitenlandse subsidies op de interne markt', 21 August 2020, <www.rijksoverheid.nl/documenten/kamerstukken/2020/08/21/kabinetsappreciatie-witboek-buitenlandse-subsidies-op-de-interne-markt>, visited 13 September 2022; and *fiche* (memo) of the working group Review New Commission Proposals (BNC), 'Verordening buitenlandse subsidies', 11 June 2021, <www.rijksoverheid.nl/documenten/publicaties/2021/05/05/fiche-2-verordening-buitenlandse-subsidies>, visited 13 September 2022.

[69] Dutch government, 'Non-paper strengthening the level playing field on the internal market', 9 December 2019, <www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2019/12/09/non-paper-on-level-playing-field/Dutch+nonpaper+on+Level+playing+field.pdf> visited 13 September 2022.

Against this backdrop, it comes as no surprise that the Netherlands has fully supported the EC's proposal for the Foreign Subsidies Regulation (FSR), which was published in May 2021.[70] This support is reflected in the memo on new EU proposals (BNC fiche, *Beoordeling nieuwe commissievoorstellen*).[71] In that memo, the Netherlands mentions that, amongst other things, attention should be paid to the relationship with possible screening of foreign investments for the effects on national security and public order (including the FDI Screening Regulation) and the International Procurement Instrument (IPI).[72] Moreover, the Netherlands draws attention to the fact that investigations carried out by the EC on the basis of the FSR can cause delays in national public procurement procedures.[73] This potential impact needs to be considered and monitored once the FSR has entered into force.

On 30 June 2022, the European Parliament and the Member States reached a provisional political agreement on the FSR.[74] We have informal knowledge that the Netherlands considers the outcome of the legislative process satisfactory, taking into account the way the negotiations have gone and the short period of time a provisional agreement was reached.

Question 13

Whether or not there are limitations to the EU's approach to seek to transpose existing competition, public procurement and trade defence frameworks is difficult to say.

It is clear though that the EU is not only bound by EU law but also by international law. Free trade agreements between the EU and third countries as well as rules adopted by the Organization for Economic Cooperation and Development (OECD) will in any event have to be adhered to going forward.

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[70] Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5 May 2021, COM/2021/223 final.

[71] *BNC fiche*, 2021 (see footnote 67).

[72] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI), OJ 2020, L 173/1.

[73] N.A. Meershoek, 'Nationale veiligheid als natuurlijke begrenzing van EU aanbestedingsliberalisering', *Tijdschrift Aanbestedingsrecht en Staatssteun*, No. 4, 2021; M.J.A. Verseveld &. S.P.A. Boomkamp, 'De verwachte impact van de Europese regulering van buitenlandse Staatssteun op de aanbestedingspraktijk', *Tijdschrift Aanbestedingsrecht*, No. 5, 2021; C. Dekker, 'Proliferatie van het staatssteunrecht', *Markt & Mededinging*, No. 3, 2021.

[74] Council of the EU, 'Foreign subsidies distorting the internal market: provisional political agreement between the Council and the European Parliament', 30 June 2022, <www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/ Provisional agreement resulting from interinstitutional negotiations> visited 13 September 2022.

MANDATORY DUE DILIGENCE AND REGULATING SUPPLY CHAINS

Question 14

On 11 March 2021, a proposal for the Act on Due Diligence (*Wet verantwoord en duurzaam internationaal ondernemen*)[75] was introduced in the Netherlands.[76] The Act on Due Diligence's aim is to identify, prevent and reduce adverse effects of business activities on human rights, employment rights and the environment. It is modelled on the OECD Guidelines for Multinational Enterprises (OECD Guidelines).[77]

On 14 May 2019, the Act Duty of Care Child Labour (*Wet zorgplicht kinderarbeid*)[78] had already been adopted. This law is applicable to all undertakings, including foreign undertakings and undertakings that are only active online, that sell or supply goods or services to Dutch end users. If and once the proposed Act on Due Diligence is adopted, the Act Duty of Care Child Labour will be withdrawn.

In turn, the proposal for the Act on Due Diligence is likely to be amended in order to be brought in line with the proposal for a directive on Corporate Sustainability Due Diligence (Directive on CSDD) which the Commission published on 23 March 2022.[79] We also refer to question 15.

Question 14a

The Act on Due Diligence provides for a general duty of care that applies to all undertakings. However, the act also introduces a number of specific responsibilities with respect to the process of due diligence that only apply to large undertakings that carry out activities outside the Netherlands and that meet two out of three of the following criteria:

– balance sheet total EUR 20 million;

[75] *Voorstel van wet van de leden Voordewind Alkaya, Van den Hul en Van den Nieuwenhuizen houdende regels voor gepast zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), Kamerstukken* II 2020/21, 35 761, nr. 2.

[76] H. Koster, 'De voorgestelde Wet verantwoord en duurzaam internationaal ondernemen', *Bedrijfsjuridische Berichten*, Vol. 4, 2021.

[77] See OECD, 'OECD Guidelines' <www.oecdguidelines.nl/oecd-guidelines/all-about-the-oecd-general-information>, and Dutch Ministry of Foreign Affairs, 'NCP', <www.oecdguidelines.nl/ncp>, both visited 13 September 2022.

[78] *Stb.* 2019, nr. 401.

[79] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM(2022) 71 final.

– net turnover EUR 40 million; and
– average number of employees during the fiscal year is more than 250.

Question 14b

As mentioned, the Act on Due Diligence provides for a general duty of care. Undertakings that know or can reasonably expect that their activities have adverse effects on human rights, employment rights or the environment outside of the Netherlands, are obliged to take all precautionary measures that can reasonably be asked for to prevent these effects. The effects should be minimized and remedied as much as possible. Adverse effects on human rights, employment rights or the environment are in any event deemed to exist in case of a restriction of the freedom of association and collective bargaining, child labour, slavery and environmental damage.

Those undertakings that meet the requirements mentioned under question 14a need to ensure that they implement a due diligence process to identify, prevent and reduce the actual and potential adverse effects of their actions.

In accordance with the OECD Guidelines, this process consists of six steps: (i) include corporate social responsibility in the companies' policy and management systems, (ii) identify actual or potential adverse effects on corporate social responsibility related themes, (iii) stop, prevent or minimize these adverse effects, (iv) monitor the practical application and results, (v) communicate about how the effects are being handled and, if applicable, (vi) facilitate or take part in recovery.

Question 14c

The Act on Due Diligence creates clarity on the responsibilities of undertakings where it concerns adverse effects of business activities on human rights, employment rights and the environment. As a consequence, it may be easier for undertakings that act at each level of the supply chain to hold liable other undertakings that operate at a higher or a lower level in that same supply chain. Although technically the Act on Due Diligence does not provide for contractual cascades, it follows from the Explanatory Memorandum that non-compliance should ultimately lead to termination of contracts.[80]

The act addresses undertakings in the meaning of the Act on Trade Register (*Handelsregisterwet 2007*), or any entities that carry out an economic activity, including their subsidiaries. On this basis, a mother company can be held liable

[80] *Kamerstukken* II 2020/21, 35 761, nr. 3, Explanatory Memorandum, pp. 19 and 60.

for any violations of the law in question committed by their subsidiaries, and possibly vice versa.[81]

Question 14d

As regards extra-territorial effects, it is important to note that the Act on Due Diligence focusses on international corporate social responsibility and introduces obligations that apply to the foreign part of the supply chain. Once in force, the legislation will be applicable to undertakings if and to the extent that they are active in countries outside the Netherlands.

This includes both undertakings based in the Netherlands and foreign undertakings that meet the requirements mentioned in our answer to question 14a and that carry out an activity in the Netherlands or sell a product on the Dutch market.

Question 14e

According to the Act on Due Diligence, a regulator will have to be appointed or established for the purpose of enforcing the law. This regulator will have the power to impose orders subject penalty payments and administrative fines.

The obligations laid down in the Act on Due Diligence can serve as a legal basis for civil liability of undertakings, e.g. on the basis of a wrongful act (*onrechtmatige daad*).

An infringement of the Act on Due Diligence can also constitute under the circumstances an economic (criminal) offence.[82] In that event, it is possible that natural persons on the part of the undertaking are prosecuted in their capacity of managers (*feitelijk leidinggevers*).

Any person concerned (*betrokkene*) can invoke and rely on the Act on Due Diligence. This also includes persons or groups of persons of whom rights or interests are directly affected by a lack of due diligence or an organization with the protection of human rights, employment rights or the environment as its statutory objective.[83]

[81] Ibid, p. 28.
[82] *Kamerstukken* II 2020/21, 35 761, nr. 3, Explanatory Memorandum, p. 25.
[83] Article 1 Proposal.

Question 14f

The Act on Due Diligence does not create a liability regime in its own right. The general civil liability rules in the Netherlands apply. On that basis, a civil liability claim for a wrongful act (*onrechtmatige daad*) can be lodged in a Dutch court, if there is no contractual basis for it.

Question 15

The Directive on CSDD and the Act on Due Diligence are similar in terms of scope and objectives. Both legislative initiatives are modelled on the OECD Guidelines. If the adoption of the Directive on CSDD will not take too long, the Act on Due Diligence may still be amended in order to implement the Directive on CSDD.[84] Alternatively, the Dutch government lets the Act on Due Diligence enter into force and subsequently amends it to transpose the directive.

There do not seem to be any major challenges where it concerns the implementation in the Netherlands of the Directive on CSDD if and once adopted. The Netherlands have been advocating the adoption of this type of legislation at EU-level.[85] The questions raised in the BNC fiche concerning the Directive on CSDD only pertain to the scope of application.[86] With a view to ensuring as much legal certainty for undertakings, the Netherlands proposes to bring the scope in line with the proposal for Corporate Sustainability Reporting Directive.[87]

[84] *Kamerstukken* II, 2021/22, 35 761, nr. 6.

[85] Dutch government, 'Non-paper mandatory due diligence: building blocks for effective and ambitious European due diligence legislation', <open.overheid.nl/repository/ronl-42974c33-2ef5-42ed-ab61-2e41c0fdd988/1/pdf/mandatory-due-diligence.pdf>, visited 13 September 2022.

[86] *BNC fiche 'Richtlijn gepaste zorgvuldigheidsverplichting voor ondernemingen'*, 7 April 2022, <www.eerstekamer.nl/eu/behandeling/20220407/brief_regering_fiche_richtlijn/document3/f=/vlsojbc95dzx.pdf>, visited 13 September 2022.

[87] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 21 April 2021, COM(2021) 189 final.

NORWAY

Ronny Gjendemsjø[1], Kjell Jostein Sunnevåg[2] and Charlotte Hafstad Widerberg[3]

COMPETITION

Green competition policy

Question 1

The Norwegian Competition Authority has not had any cases dealing with the assessment of sustainability agreements, at least not any cases known to the public. In general there has not been many infringement decisions by the Norwegian Competition Authority where the application of the Norwegian equivalent of Article 101 (3) TFEU has been important for the outcome of the case.

a.

The provision on anti-competitive agreements in the Norwegian Competition Act (section 10) is fully harmonized with article 101 TFEU and article 53 EEA. Consequently, EU case law and guidelines from the European Commission play a significant role in the application of the provision on anti-competitive agreements. Hence, the Norwegian Competition Authority (NCA hereafter) will look to the European Commission's approach in its assessment of sustainability agreements. Relating to guidance on the assessment of sustainability agreements, the NCA consider the (draft) horizontal guidelines sufficient. The authority, however, will consider measures to make the sustainability chapter more accessible, for instance using flowcharts illuminating the assessment process. Moreover, the NCA will also introduce a dedicated sustainability page on its webpage in addition to targeted outreach to businesses and business associations.

[1] Professor Ronny Gjendemsjø, Faculty of Law, University of Bergen, co-author of answers to question 1 to 10, author of answer to question 14.

[2] Kjell Jostein Sunnevåg, Director External Relations, Norwegian Competition Authority, co-author of answers to questions 1 to 10. All views and opinions expressed are those of the authors, and not the opinion or position of the Norwegian Competition Authority.

[3] Charlotte Hafstad Widerberg, Doctoral Research Fellow, Scandinavian Institute of Maritime Law, University of Oslo, author of answers to question 10.

b.

In private actions, courts will have full competence to apply section 10 of the Norwegian competition act and article 53 EEA (The equivalent of article 101 TEFU). Since section 10 of the Norwegian Competition Act is harmonized with Article 101 TFEU, the courts' competence and willingness to consider sustainability effects in the assessment of an agreement, will depend on to what extent article 101 TFEU allows for considering such effects in the assessment of the agreement. Since the guidelines are not binding on national courts, the courts are expected to orient themselves more towards the case law of the EU Courts, which does not provide any clear guidance on whether sustainability effects are relevant under article 101 (3), at least for 'out of market' effects (externalities). There are judgments which indicate that other effects than efficiencies and so called 'out of market' effects are relevant under article 101 (3).[4] Still, there is no precedence from the ECJ on the matter. Furthermore, there is an uncertainty related to whether the judgments indicating that public policies or 'out of market' effects are relevant under Article 101 (3), actually express the correct state of law after the modernization of EU competition law.[5] Even if this case law do express the correct state of law, there is uncertainty about to what extent public policy goals and 'out of market' effects, including sustainability, may justify a restriction of competition under Article 101 third paragraph, and hence also under section 10 in the Norwegian Competition act. Based on this lack of clarity, the outcome of a court's case must be considered to be uncertain both in a private claim, and when the courts review a decision from the NCA.

Question 2

a.

In its merger review, the NCA will assess if the mergers, acquisitions and other forms of concentrations significantly restrict competition (SIEC-test). Generally, a consumer welfare standard applies. The Norwegian merger control rules was harmonized with EU merger control in 2017. The amendment of the act introduced the SIEC-test and the consumer welfare standard as the relevant welfare standard.

[4] See case T-528/93, *Métropole Télévision*, ECLI:EU:T:1996:99, paragraph 118 and case T-451/08, *STIM*, ECLI:EU:T:2013:189, paragraph 49.

[5] For the discussion in the literature on this topic see e.g., Okeoghene Odudu, 'The Wider Concerns of Competition Law', *Oxford Journal of Legal Studies,* 30, No. 3 (2010), pp. 599-613; Okeoghene Odudu, *The Boundaries of EC Competition Law,* Oxford, 2006, pp. 159-173; Christopher Townley, *Article 81 EC and Public Policy,* Hart Publishing, 2009, Anne C. Witt, 'Public Policy Goals Under EU Competition Law – Now is the Time to Set the House in Order', *European Competition Journal,* 8, No. 3 (2012), pp. 443-471; Martin Gassler, 'Sustainability, the Green Deal and Article 101 TFEU: Where We Are and Where We Could Go' *Journal of European Competition Law & Practice,* 12, No. 6 (2021), pp. 430-442.

This implies that a merger that satisfies the criteria for intervention in merger control, nevertheless, can be approved if the concentration leads to efficiency gains to the benefit of consumers in the relevant market.

The tools the NCA's have at its disposal to consider sustainability benefits in merger control will to some degree build on the principles envisaged in the EU (draft) horizontal guidelines relating to assessment of principles for antitrust assessment of sustainability agreements under 101 TFEU.

Thus, in a merger review, the NCA would consider claims related to sustainability benefits with a view to the principles envisaged in the (draft) guidelines. Nevertheless, the sustainability benefits will need to be substantiated and can not simply be assumed. Factors such as "Individual use value benefits", "Individual non-use value benefits", and "Collective benefits" can be considered with the appropriate methodology, with the companies involved bearing burden of proof.

However, in merger control the flexibility to consider sustainability benefits, for instance related to future customers and consumer benefits realized in other markets are wider than what is envisaged by the EU (draft guidelines) relating to agreements.

b.

Relating to detrimental effects on the environment as a consequence of a concentration, this will be considered on a case-by-case basis, and form part of one or more theories of harm. Here, environmental considerations could for instance be given relevance as a non-price dimension of competition, e.g. as a dimension of product quality or innovation, in the same way as the assessment relating to reduction in quality of privacy or data protection. Thus, the NCA might consider *pari passu* that a concentration satisfies the criterion for intervention if it reduces the environmental quality of the products or degrade innovation for green products.

Question 3

As alluded to above, sustainability benefits can be incorporated into the NCA's competition law analysis. The NCA can weigh relevant consumer benefits against competition concerns, both in merger review as well as in the assessment of environmental agreements potentially restricting competition by effect or object. The trade-off between harm to competition and benefits to sustainability will be determined according to the EU (draft) horizontal guidelines and the criteria for assessing benefits under Article 101(3) TFEU.

European strategic autonomy, the promotion of "European champions" and competition law enforcement

Question 4

a.

The NCA did follow the debate relating to the Siemens/Alstom transaction closely and expressed its view in general terms in the form of an op ed written by the former Director general Lars Sørgard on June 26, 2019, warning against a more lax merger control based on arguments supporting the creation national champions.[6]

c.

Information on to what extent the NCA has been confronted with similar arguments in comparable transactions is not available. Regardless, the transaction would be assessed based on the criteria in the competition law, where public interest or industrial policy aspects are not part of the assessment. The harmonization of the Norwegian merger control with EU merger control implies that the European Commission's decisional practice and guidelines is relevant for the application of the Norwegian merger control. The Norwegian Competition Authority often refers to and base their analysis on the guidelines and the decisional practice from the European Commission. Consequently, the *Siemens/Alstom* case may possibly influence how industrial policy arguments will be dealt with by the Norwegian Competition authority.

Question 5

In merger review, the NCA will assess the transaction only according to the effects on competition and consumers. As mentioned above, the harmonization of national merger control with the EU merger control rules, implies that the NCA is expected to follow the approach of the EU in *Siemens/Alstom* regarding industrial policy issues.

Question 6

Up until the amendment of the merger control rules which entered into force on 1st January 2017 the Government could assess the merger according to public interest considerations. The former Section 21 of the competition act provided that: "*In cases involving questions of principle or interests of major significance to*

[6] see https://konkurransetilsynet.no/kronikk-konkurranse-hjemme-gir-konkurransekraft-ute/ in Norwegian

society, the King in Council [the Government] may approve a concentration or an acquisition of shares that the Competition Authority has intervened against under Section 16 and Section 16 a. Such approval may be conditional." The main purpose of the amendment of the act was to achieve a more independent enforcement of the competition act, and in particular the merger control. This amendment occurred together with the establishment of an independent appeals tribunal in competition cases. For merger cases this involved that the competence to review the NCAs merger decisions was moved from the Ministry of Trade to the Competition Appeals Tribunal.

As a consequence of this amendment there are no recent cases where a decision by the competition authorities has been reversed based on industrial policy grounds or other public policy grounds. Furthermore, the merger decision review of the Ministry in the latest years before the amendment was based on effects on competition and consumers.

Question 7

The Norwegian competition authority has not brought any cases against any of the large US digital platforms.

In theory the Digital Markets Act should not affect the Norwegian Competition Authority's ability to bring its own cases against large digital platforms, since it "should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct".[7] There are particularly two reasons why the Norwegian Competition Authority is not expected to bring cases against large digital platforms. Firstly, as mentioned above, the Norwegian Competition Authority has not previously been active in enforcing national competition rules against the large international digital platforms. Secondly the Norwegian Competition Authority does not have any competence to enforce Article 101 or 102 TFEU, its cases would only regard a violation of EEA law or national competition law, while any competition law violation by these platforms are expected to be a violation of EU competition law. Thirdly, the Norwegian Competition Authority has previously considered the European Commission to be the most suited body to take actions against the large digital platforms, such as in the case regarding the online hotel booking platforms and the practice of price parity clauses.

On the question of whether it is useful for NCAs to pursue their own cases against large digital platforms, the answer will depend on the effect that the DMA has

[7] Draft Digital Markets Act, preamble paragraph 10.

both on the large undertakings in the digital markets, and how the enforcement of the DMA will affect the European Commissions future enforcement of the competition rules, in particular article 102 TFEU.

Question 8

In our opinion, there does not appear to be any support in economic theory that the creation of national champions based on aid and not on the merits of the company, will improve economic efficiency in the EU and EEA.

Question 9

Regulation 2015/1589 has not been incorporated to the EEA agreement. The rules on enforcement of State Aid rules within the EFTA pillar of the EEA agreement does not contain a provision similar to that of article 29(1) of regulation 2015/1589.

Geopolitical instruments, trade defence instruments, and competition policy

Question 10

There have not been any decisions where the Competition Authority's analysis of competition has been affected by trade defense measures towards non-EU-countries.

TRADE
FDI control

Question 11

As the EU`s trade policy is not covered by the EEA agreement, Norway is not subject to the EU FDI Screening Regulation (2019/452). Norwegian authorities have nevertheless referred to the FDI Screening Regulations on several occasions and have expressed an intent to cooperate closely with the EU in such matters.[8]

Norway established screening regulations for foreign direct investments in 2019, in the revised Security Act, chapter 10. The screening regulations in chapter 10 consist of three relatively short sections, respectively §§ 10-1 (Notification

[8] The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc),* page 6: https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf

obligation for acquisition of businesses subject to the Security Act), 10-2 (Processing of notification of acquisitions) and 10-3 (Decision on suspension of acquisition of businesses). The two latter provisions are primarily procedural provisions. § 10-3 states that the King can issue further regulations regarding the notification obligation. The only regulatory provision that has so far been issued on this matter, is § 93 of the Security of Undertakings Regulations which entered into force in 2019.[9] It states what information the acquirer must provide in its notification to the responsible Ministry, alternatively to the Norwegian National Security Authority (NSM). The information requested is among others, ownership structure and annual turnover etc.

The FDI screening regulations in the Security Act chapter 10 only applies to acquisitions of companies, which are subject to the Security Act. There is no publicly available information about which companies are subject to this act. However, the companies must fulfill at least one of the following criteria stated in the Security Act § 3-1 in order to be subjected to the Act:

(a) process security-graded information,

(b) possess information, information systems, objects or infrastructure that are of decisive importance for fundamental national functions or

(c) conduct activities that are decisive for fundamental national functions.

The responsible ministries are responsible for identifying companies, which constitute or conduct activities that are decisive for fundamental national functions.[10]

As of today, the only regulation which can be applied to stop or restrict foreign investments in businesses that are not subject to the Security Act, is § 2-5 in the Security Act.[11] However, this is a narrow exception provision, which can be used when there is no other legal basis for stopping an activity that entails a risk to national security interests being threatened. The provision gives the King in Council the powers to make necessary decisions to prevent activities that present a threat to security or other planned or ongoing activities that may present a not insignificant risk of a threat to national security interests. The scope of the provision

[9] The Security of Undertakings Regulations, 20.12.2018: https://lovdata.no/dokument/SFE/forskrift/2018-12-20-2053

[10] Proposition to the Storting (153L – 2016/2017), page 111: https://www.regjeringen.no/contentassets/0fcee45affd24280896b88b5413a00aa/no/pdfs/prp201620170153000dddpdfs.pdf

[11] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*, page 15: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/ Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf.

is wide and covers a broad spectrum of activities and situations. However, these are not specified in relation to which transactions or which sectors are covered.

Norwegian authorities have also emphasized the use of the Security Act § 9-4, for example in cases where ownership changes occur in a company´s supply chain that comprises a risk to national security. Regardless of whether the procurement is classified or not (the former is a procurement where the supplier of the good or service may gain access to or produces classified information or may gain access to a critical national object or infrastructure), the provision in the Security Act § 9-4 can be applied. The provision gives the government the opportunity to stop or set conditions for the procurement.

In October 2021 the Norwegian Justice Ministry in cooperation with the Defense Ministry, presented a consultation paper where several changes to the screening regulations of the Security Act were suggested.[12] The Ministries are still working on the matter, and have so far not presented any conclusions.

a.

Even though Norway introduced screening regulations in 2019, there is little known practice related to the provisions of the Security Act. As such, cases involve both confidential business information and national security issues, it is understandable that detailed practices are not made available to the public. The NSM has published a short guide, referred to as "*Guide in the use of the Security Act to counter security-threatening investments and acquisitions*".[13] However, this information is of limited nature and does not provide clarifications regarding specific transactions or sectors, which are covered by the FDI screening regulations.

The only publicly known case related to a foreign direct investment of a Norwegian company, which was considered to pose a threat to national security, is the Russian attempt to acquire Bergen Engines in 2021. The Russian TMH International Group attempted to buy the company, which amongst other produce engines to the Norwegian Navy.[14] The acquisition was considered a threat to national security and was eventually stopped by Norwegian authorities based on § 2-5 (the provision considered to be a security valve in cases where no other provisions are

[12] The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc)*: https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf

[13] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf

[14] Rolls Royce: https://www.rolls-royce.com/media/press-releases/2021/04-02-2021-rr-signs-agreement-to-sell-bergen-engines-to-tmh-group.aspx

applicable) of the Security Act. The ordinary screening regulations in chapter 10 did not apply to the case, as Bergen Engines was not subject to the Security Act.[15]

One of the main challenges in the Norwegian screening system today, is the fact that chapter 10 of the Security Act only applies to Norwegian companies which are subject to this act. This represents two challenges: First, it is not publicly known which companies these are. This makes it more challenging for foreign investors to know whether the transaction they are about to undertake is subject to national screening regulations or not. Furthermore, there is ambiguity pertaining to which acquisitions and transactions are covered by the screening regulations. Two, acquisitions and transactions related to companies, which are not subject to the Security Act, are not subject to any regular notification or reporting procedures. Consequently, these activities are not systematically reported to Norwegian authorities.

A further challenge relates to which Norwegian authorities receive notifications from investors and assess them. A fixed point of contact for notifications has not been established due to the sector principle of the Security act. The foreign investor must therefore contact the ministry responsible for the "business sector" in which the target company is located. If no ministry is responsible for the target company in question, the investor must contact and notify the NSM. NSM is one of Norway's three secret services. As a result, Norwegian authorities have not established a separate institution with high competence and experience in screening, instead the competence is distributed among several ministries and NSM.

b.

As mentioned, the FDI Screening Regulations do not pertain to Norway as an EEA member. The Norwegian national screening regulations in the Security Act are applied in cases where investors acquire Norwegian companies subject to this Act. As it is not publicly known how many companies are subject to the act in Norway, it is challenging to estimate the exact scope of the screening regulations in chapter 10 of the Security Act. Acquisitions and transactions by foreign investors related to Norwegian companies which are not subject to the Security act, are currently not subject to reporting obligations to Norwegian authorities.

c.

According to the Security Act § 10-1, all acquisitions of a qualified ownership interest in a company which is subject to the act, are covered by FDI control.

[15] Royal decree of 26. March 2021, " *Prohibition of the sale of Bergen Engines AS*": https://www.regjeringen.no/contentassets/e775dc91a33e4713a090da7398e6f3f5/endelig-godkjent-kgl.res.-stans-av-salget-av-bergen-engines-as.pdf

The acquirer shall notify the responsible ministry about the acquisition. Which ministry must be notified by the acquirer depends on which company is to be acquired. Different ministries are responsible for different "business" sectors. If the target company is not covered by any ministry, the acquirer shall notify the NSM.

Section 10-1 states that a qualified ownership interest exists if the acquirer will, overall, give the acquirer either directly or indirectly;

- At least one-third of the share capital, participating interests or votes in the undertaking,
- the right to own at least one-third of the share capital or participating interests, or
- significant influence over the management of the company otherwise.

This does not include the obligation to report, for example, in the case of sale of assets or the transfer of rights and obligations. If the ministry is made aware of such cases, they may be stopped due to national security if the conditions of section 2-5 in the Security act are met.[16]

According to the screening regulations in chapter 10 of the Security Act, tthe investor (acquirer) can be foreign, including a EU member, or Norwegian. The broad scope was justified by the fact that ownership structures can be complicated, and by imposing a notification obligation on all acquirers, you also cover cases where a foreign investor seek to circumvent the national screening provisions. [17]

d.

The Norwegian screening regulations of the National Security Act do not stipulate or identify any specific sectors that are covered by the regulations. However, the regulations of chapter 10 apply to all companies that are subject to the act. In § 1-3 the criteria for being covered by the act is defined as follows:

Businesses that:

(a) process security-graded information,

(b) possess information, information systems, objects or infrastructure that are of decisive importance for fundamental national functions or

(c) conduct activities that are decisive for fundamental national functions.

[16] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions, page 11*: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf

[17] Proposition to the Storting (153L – 2016/2017), page 150: https://www.regjeringen.no/contentassets/0fcee45affd24280896b88b5413a00aa/no/pdfs/prp201620170153000dddpdfs.pdf

The responsible ministries are responsible for identifying companies which constitute or conduct activities that are decisive for fundamental national functions.

e.

The authorities' processing of notices of acquisition is regulated in the Security Act § 10-2. The ministry, which receives the notification, alternatively the NSM, will seek advice from relevant Norwegian authorities. This includes advisory opinions from relevant ministries and Norwegian intelligence- and secret services on the acquisition´s and the investor´s risk potential. A risk assessment will be carried out, and if they conclude that the acquisition poses a not inconsiderable risk based on the target company`s importance for safeguarding national security interests, a decision to stop or impose conditions on the acquisition can be made by the King in Council.[18]

Hence, the King in Council has the option to stop or set conditions for the purchase of a qualified share in a company that is subject to the Security Act if there is a not insignificant risk that national security interests are threatened, cf. Security Act section 10-3. This also applies if an agreement has already been entered into regarding the acquisition, and even if the ministry has not received notification of the acquisition as expected.

f.

There is nothing in the preparatory work of the Security Act or in NSM's guide that indicates that Norwegian authorities can or will take competition considerations into account when conducting FDI control according to the Security Act.

g.

h.

The preparatory work of the Security Act and the Security Act do not mention what legal remedies are available to contest Norwegian authorities FDI decisions. Hence, it is assumed that such decisions, made by the King in Council, can be appealed to a Norwegian court.

i.

Mandatory due diligence and regulating supply chains

[18] The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*, page 14: https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20å%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjøp%200621.pdf

Question 14

In January 2022 the 'Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions' entered into force. This act establishes some due diligence obligations on businesses related to fundamental human rights and decent working conditions, but not related to environmental law. In the proposal of the act, it is suggested to await the legislative work in the EU regarding sustainable corporate governance, and potentially revise the act when that procedure is finalized.

a.

According to section 3 of the act, the companies that are subject to the obligations are 'larger enterprises', meaning either companies subject to some specific thresholds in the accounting act, or companies that exceeds two or more of the following conditions: sales revenues above 70 MNOK; a balance sheet total above 35 MNOK; average number of employees in the financial year above 50 full time positions.

b.

According to section 4 of the act, the companies have to carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises, which includes to identify and assess actual and potential adverse impacts in fundamental human rights and decent working conditions that the enterprise has either caused or contributed toward, or that are directly linked with the enterprise's operations, products or services via the supply chain or business partners. Furthermore, the companies have to implement suitable measures to cease, prevent, or mitigate adverse impacts on fundamental human rights and decent working conditions.

Pursuant to section 5 of the act, the companies or enterprises shall publish an account of due diligence pursuant to section 4, and anyone who requests it in writing has the right to information from the enterprise regarding how the enterprise address actual and potential adverse impacts on fundamental human rights or decent working conditions.

c.

Pursuant to section 3 of the act, parent companies will be responsible for the activity of their subsidiaries. This is not clear from reading the actual wording of the provision, but it follows from the preparatory works.

The obligations described under (b) above, includes identifying and assessing impacts on fundamental rights and decent working conditions in the supply chain

or with business partners. The duty is limited to what information the company or enterprise are allowed to request from its suppliers and business partners.

d.

The due diligence obligation applies to all large enterprises (see answer to letter a. for the definition of large enterprises) which are resident in Norway and foreign enterprises that offer goods and services in Norway and that are liable to tax in Norway.

e.

Pursuant to section 11 of the act the Norwegian Consumer Authority may issue individual decisions to order companies to comply with the due diligence duty, impose enforcement penalties either as a running charge or as a lump sum, and impose infringement penalties in case of repeated infringements.

POLAND

Artur Nowak-Far[1]

1. Introduction

The European Commission's update of the industrial strategy for Europe announced in May 2021 is about European business value chains that nowadays extend significantly beyond EU borders.[2] Under this strategy, these value chains are meant to achieve climate neutrality by 2050 and become digitalised to the extent where it is economically and technically viable.

The EU trade policy would also have to be tailored to the needs of the EU global challenges. They would pursue the goal of „open strategic autonomy". According to the European Commission's communication of 18 February 2021[3], this implies that the EU would be able to implement sustainable and assertive trade policy, pronouncing the Union's viability to pursue its strategic interests and values as well as to gain adequate competitive advantage.

The EU Green Deal and EU Digital Strategy are examples of focused public policy concepts, which require that other areas of EU intervention and regulation, such as e.g. State aid or merger control, are in line with them. 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", i.e. business entities apt to compete with powerful non-European companies in international markets.

2. Green competition policy at the national level (questions 1 – 3)

The European Commission's 2021 Policy Brief insisted that efficiencies related to sustainability had to be "in-market", meaning that sustainability benefits had to be realised at least partially in the market where competitive concerns have been identified. Certain Member State competition authorities have signalled a greater willingness to consider a wider range of sustainability claims in their reviews.

[1] SGH – Warsaw School of Economics, Collegium of Global Economy, Chair of European Integration and European Law

[2] 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 Recovery, document COM(2021) 350, final.

[3] 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, document COM(2021) 66, final.

In Poland, subsequent governments lacked great enthusiasm for the adoption of such ambitious economic policy goals, which would work detrimentally to her coal mining industry as well as to any other industries using coal in their value chains. It seems that significant modifications in Poland's industrial structure have been brought about mostly by external pressures of legislative and non-legislative character. The legislative pressure originated mostly from the emerging EU international commitments and the consequential EU legislation; the non-legislative pressure emerged from the change of global value chains, which have become increasingly sensitive to environmental concerns. This phenomenon has been increasingly re-enforced by the internal pressure resulting from the serious concerns about the quality of Poland's natural environment, especially about the quality of air.

It is quite important to highlight the fact that, in recent years, neither governmental nor Presidential administrations in Poland had had an „environmental knack". They both seemed to believe that pursuing ambitious environmental (and, to some extent, even digitalisation) goals reflected the „more affluent" EU Member States' long-term competitiveness strategy which could be detrimental to Polish economy as it had a different cost-benefit structure than the economies of these „leading" more economically advanced States enjoyed.

In fact, setting aside any misinformed or ideologically motivated argumentation, this point can be conceptualised as an argument that the EU industrial policy is likely to produce asymmetric effects in different jurisdictions, depending on the level of their economic development. To make it even more strictly conceptualised, this stance has held that Polish (coal based) economy was located at different place in the (environmental) Kuznetz's curve than the economies of the more economically advanced EU Member States.

The Kuznets's curve conceptualises an increasing environmental cost of economic development measured in any kind of polluting factor (being a measure of intensiveness of economic exploitation/burden of the natural environment) which is associated with any (hard) measure of the ever increasing economic development (such as e. g. GDP). Based on scientific observation, the curve indicates that the increase in the level of economic development is associated with quite significant increases in the environmental burden (most significantly, measured in level of pollution); however, at some high enough GDP level, the curve bends and becomes downward sloping. The problem is that, at a given moment, different countries having different industrial bases and being at different levels of economic development are located at different place on the Kuznets' curve – some

on the upward sloping leg of the EKC, some on the downward leg of it.[4] If these countries were meant to pursue a uniform environmental goal or even policy, the countries located on the latter slope would be much better off than the former ones. Thus, ideally, the better off countries would have to subsidize the former ones in order to make competition conditions equalised.

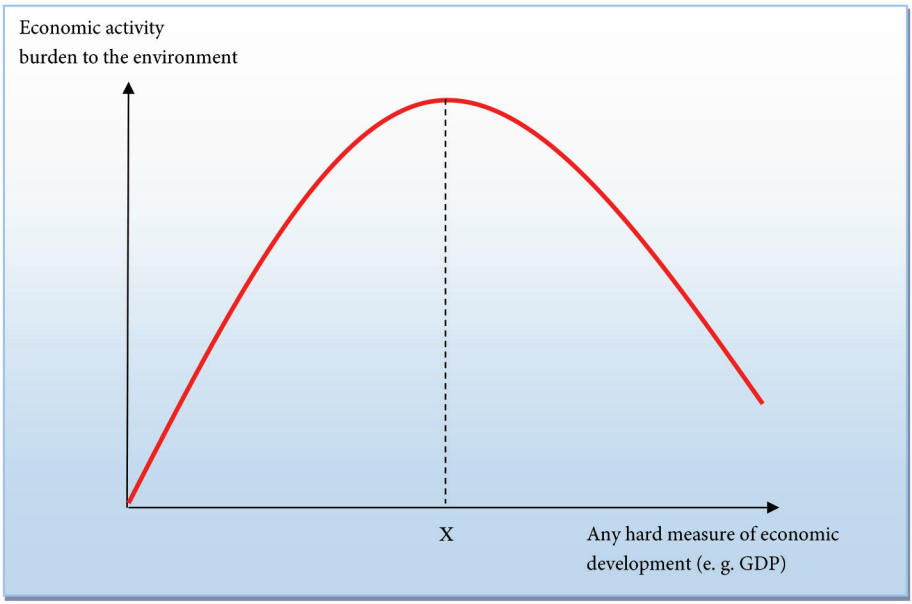

Figure 1: Environmental Kuznets curve (EKC)

Source: S. Kuznets, *Economic growth and income inequality*, "The American Economic Review" 1955, Vol. 45, p. 1-28.

Nevertheless, the EKC-concerned argumentation is considerably implausible with regards to pollutions arising from burning coal as a source of energy, since, in all countries, the emission of CO_2 has only been rising (which indicates that the "bending point" is achievable at higher level of economic development than that achieved so far). For Poland, it also appeared that the coal-based industries had consumed less expensive imported from non-EU countries coal which grossly undermined the argument that by protecting the coal-based, obsolete and environmentally harmful part of its economic base, Poland also protected its mining industry. Moreover, putting the coal-based industries at a favour (at

[4] S. Kuznets, *Economic growth and income inequality*, "The American Economic Review" 1955, Vol. 45, p. 1-28.

a detriment of the development of non-carbon emission industries), resulted in global vulnerability of the Polish economy to exogenous supply shocks (as these resulting from the sanctions imposed after Russia's attack on Ukraine). That required a significant policy shift (favoring renewable fuels) which is occurring just now.

Notwithstanding, any significant results of this recent policy shift still remain to be seen. So far, digitalisation, close-cycle economies, and climate neutrality have been considered challenges (if not even threats) to the competitiveness of Polish economy, as it has been quite openly stated e. g. in *The Productivity Strategy 2030* adopted in June 2022 by the Polish Ministry of Development and Technology.[5] This is not to say that Polish government is not willing to address these significant economic issues; it is, however, to highlight the fact that it wants to do it with utmost care for the interests these industries of Poland's economy which are responsible for most of carbon emissions.

Polish national competition authority (i. e. *the Office for the Protection of Competition and Consumers, Urząd Ochrony Konkurencji i Konsumentów, UOKiK*) is expected to follow the national competition strategy adopted by the Council of Ministers. It is also reporting to the Council of Ministers on the implementation of this strategy. Thus, it is not very likely to depart from the relatively environmentally insensitive (albeit not totally negligent) governmental stance pertaining to sustainability. It is so despite of the fact that, there are many ways in which sustainability issues can be accounted for in the decisions of various bodies concerned with competition. These are as follows:

(a) firstly, courts (especially competition courts and – less so – administrative courts) can do it in their judgments;

(b) secondly, UOKiK (or more strictly, its President acting as the very State authority) can take account of sustainability in its various decisions; some of the escape clauses (allowing this authority to depart from the general rules on competition), are indeed quite broad; most importantly, art. 20 of the Law on the Protection of competition and consumers (*Ustawa o ochronie konkurencji i konsumentów,* further referred to as 2007 Competition Law)[6] opens up many venues to consider sustainability as a basis for making such a departure in M&A cases, allowing sustainability to be counterbalanced against restrictions of competition which may emerge; the core issue is how the two conditions (which can be accounted for alternatively), i. e. the condition that transaction

[5] Ministerstwo Rozwoju i Technologii, *Strategia produktywności 2030*, Warszawa 1922, p. 7.

[6] Law of 16 February 2007 on the protection of competition and consumers, uniform text in Dz. U. (Journal of Laws) 2021, item 275.

concerned would „contribute to the development and technological progress" and/or that it would bring about „beneficial effects to the national economy") would be interpreted;

(c) thirdly, the Council of Ministers is empowered – under art. 8(3) of the 2007 Competition Law to grant a general exemption to any class of agreements (conceivably, also to individual agreements) restricting competition, if only this authority deems that these agreements meet the criteria equivalent to these set forth in Article 101(3) TFEU – which all should be supported by relevant evidence.

For years UOKiK has taken rather conservative (i.e. environmentally insensitive) stance with respect to sustainability. Such an approach has corroborated with (or perhaps, even has resulted from) the „market-oriented" stance this authority has relatively consistently applied in its scrutiny of competition-concerned cases. This, indeed, has been quite reflexive of the interpretation and application of Article 101(3) TFEU practiced by UOKiK. Lest we forget, this Treaty provision makes it possible for actions (business agreements, decisions, or concerted practices) to escape the general prohibition set forth in it whenever they contribute to improving the production or distribution of goods or to promoting technical or economic progress; this relief could only be granted where the resulting benefits would be fairly shared with consumers. Notwithstanding, the relief should not be grated where the restrictions of competition are not indispensable for the attainment of these objectives, or the resulting restriction of competition (products-wise) is significant. Thus, the question about whether „sustainability agreements" fall within the ambit of Article 101(3) TFEU and is indeed the one about whether sustainability itself could be considered an economically viable consideration fetching a market value. Secondarily, it is about the recognized concept of that value realisation and sharing its excess over a (hypothetical) non-sustainable solution benchmark value with relevant customers.

Thus, in theory, the regulatory venues are wide open for UOKiK to consider sustainability benefits in its merger control. In fact, arguments based on sustainability considerations are apparently legible for UOKiK. Yet, UOKiK does not seem to attribute much weight to these considerations, if they are confronted with what it interprets as a case involving significant competition or consumers' interests issue. UOKiK decision of 9 May 2022 concerning *Vinted* apparel re-selling platform[7] can be used to illustrate exactly this stance. In this decision (in paragraph 126 of it), UOKiK – in my opinion correctly – acknowledged the

[7] Decision DOZIK-8/2022 of 9 May 2022.

general importance of Vinted value chain (and – in fact – other similar re-selling undertakings) in protecting the environment (by increasing the likelihood that non-used-any-more apparel would not be disposed as waste but rather re-sold to fulfil its original function). On the other hand, however, UOKiK found this consideration much less important (and, thus, indecisive to, or even not regarded as mitigating the undertaking's liability in the case) than the consideration of transparency in dealing with customers and that of security of transactions.

In cases involving the assessment of undertakings' market positions, structure of their value chains would obviously have to be investigated more thoroughly and with due regard to how each element of the value chain contributes to the market/consumer value creation. *Prima facie*, this would bring UOKiK (like any other national market supervision authority or the European Commission) to taking into account sustainability effect (i.e. positive externalities, which transactions considered are likely to bring about). There is, however, no evidence that, so far, UOKiK has ever been confronted with a case in which sustainability would be so seriously exposed that it would make UOKiK prone to give a more elaborative response of how it construes the whole concept and exactly what weight it attaches to it. Until now, UOKiK has represented the position that collective economic interests in having undistorted competition are just paramount so that other (well-acknowledged) individual or collective interests (such as the interest in assuring sustainable economic growth) can somewhat be kept inferior and subordinated.

Thus, UOKiK is not prone to consider claim related to sustainability as recognisable efficiency benefits that can outweight foreseeable (in a given situation) competitive harm. However, under some circumstances UOKiK may consider a transaction's likely detrimental effects on the environment as a competitive harm – but only indirectly, by founding these detrimental effects as something highly likely to be reflected in the economic accounts submitted to support the arguments for the transaction considered. This implies that if e.g. a point was raised that a merger could reduce e.g. recycling rates and lead to a greater use of raw materials, it would only be accounted for as a hard figure – e.g. an assessment of penalties likely to be avoided by the emerging undertaking; that is to say that UOKiK would likely abstain from any outright assessment of the value of environmental detriment (i.e. the loss of efficiencies).

3. European strategic autonomy, the promotion of "European champions" and competition law enforcement (questions 4-6)

It is quite conceivable that competition law enforcement under Articles 101 and 102 TFEU and merger control procedures are apt to (and even should be able to) incorporate the EU industrial policy goals. This issue (having not only economic or legal, but also political magnitude) can be addressed – with respect to any existing distribution of powers – in the EU and in each EU Member State's industrial policy through:

(a) the adoption of definition of the relevant market – possibly accounting for the global reach of products or services concerned and thus for the global scale of competition considerations;

(b) the time-perspective (short-run *versus* medium or even long-run) adopted for the assessment of competition considerations arising from any merger;

(c) the outright inclusion of industrial policy concerns in the assessment of mergers.

The proceedings before the European Commission concerning Siemens-Alstom merger highlighted the point that, in fact, these policy choices were of utmost importance. Most significantly, the European Commission was confronted with the argumentation that long- or medium-run perspective should prevail in its assessment of the contemplated merger and, as a result, it had to adequately account likely entries of non-EU companies on the not yet fully-feathered EU internal market of hi-tech goods or services (i.e. the goods or services emerging as a result of quite intensive capital investment and subject to significant – in both qualitative and quantitative terms – technological changes). The European Commission's stance in this case has been definitely conservative as the decisive points in its (negative) decision consistently were based on the assessment of the contemplated transaction from the EU market perspective. This implied that other, wider perspective, considerations were considered redundant.

Polish competition supervision authority, UOKiK, was asked by the Commission about its stance in Siemens-Alstom merger. UOKiK's position presented to the Commission reflected a more general government attitude towards the policy of creating „European champions", understood to be companies of significant economic weight potentially able to compete successfully in the global arena.

The Polish, somewhat parochial, position can be outlined in the following points:

(a) Poland is interested in creating its own „national champions" able to compete in the EU and internationally – this interest had been well exposed in the

national *Strategy for Sustainable Economic Development* adopted by the Polish government in 2017[8];

(b) the European Commission's idea of creating „European champions", conceived as undertakings of significant global power, and thus, of extraordinarily strong market power in the EU internal market, poses a substantial threat to EU-wide competition which is not balanced by the very European champions' potential expansion globally;

(c) thus, in the short or medium run, the European champions pose more threat (on respective relevant markets) to Polish undertakings than benefits which (if at all) may most likely be expected in a longer run.[9]

None of the Polish market participants had formally expressed their opinion about Siemens-Alstrom case pending before the European Commission, although this case was observed carefully and commented in the media. Even though, the comments made in public discussion were generally neutral and no firm, unambiguous stance on the impact of the transaction on the Polish market was expressed in strong terms. This implies that the Polish market participants' reactions fell significantly short in their reach. Thus, they have not produced any remarkable intervention, support or opposition to the Siemens-Alstrom transaction deliberated by the European Commission.

It should be noted that the Polish Government joint the Franco-German Monifesto "Modernising EU Competition Policy" published in mid 2019.[10] Yet, this decision was motivated by the interest in urging the Commission to take a more proactive stance with regard to distortive effects of state-controlled and subsidised undertakings' presence in the EU internal market than cushioning the way for any EU global champions. Vagueness of the Manifesto on the latter issue (as well as on the issue of digital platforms) made it evidently easier for the Polish government to support the whole document.

UOKiK, however, was confronted with similar (but not at all the same) arguments as the ones expressed in Siemens-Alstom case in its widely discussed *PJSC Gazprom et al.* decision of 6 October 2020.[11] In its decision, UOKiK acknowledged that what it called „*quasi*-joint venture" had been established by a group of Russian, Dutch and Swiss companies – all interested in providing funds for North Stream 2 natural

[8] *Strategia na rzecz odpowiedzialnego rozwoju do roku 2020 r. (z perspektywą do 2030 r.)*, KPRM, Warszawa 2017.

[9] Szymon Zaręba, *Perspektywy unijnej kontroli koncentracji przedsiębiorstw po decyzji Komisji Europejskiej w sprawie Siemens-Alstom*, „Biuletym PISM" 2019, Nr 33(1781), March.

[10] https://www.bmwk.de/Redaktion/EN/Downloads/M-O/modernising-eu-competition-policy.pdf?blob=publicationFile&v=1(access, 31 August 2022).

[11] Decision DKK-1.422.2018.ES of 6 October 2020.

gas pipeline construction project directly connecting Russian sources with gas hubs located in Germany. The funds were to be provided in exchange for control over North Stream 2 future assets (i.e. the assets to be developed as a result of the funding granted) promised to the members of the said „*quasi*-joint venture".

In its decision, later repealed by the relevant anty-monopoly court, UOKiK found the transaction to be a disguised form of a (financial) merger intended to produce effects equivalent to setting up a controlling network of the (real economy) facility thus subject to mandatory notification and scrutiny of the Polish competition supervision authority despite of the fact, that – formally – the transaction did not involve companies established in Poland. UOKiK took into its consideration that the leading company (i.e. Gazprom group) had had extensive interests in the Polish market of natural gas and that of natural gas distribution and that the financial transaction concerned had likely been to produce significant effects on the Polish natural gas market (by making the existing Jamal gas pipeline and some German reverse distribution facilities potentially redundant). As a result of failing to notify the transaction (considered to have been subject to notification and competition scrutiny), UOKiK imposed significant fines on the companies concerned (referred to as „*quasi*-shareholders" of the North Stream 2 – financing joint venture).

Another case of relevance assessed by UOKiK was that pertaining to the notification by Allegro Group (operating the national trading platform Allegro.pl) of its acquisition of the Czech undertakings Mall Group and WE/DO CZ s. r. o.[12] where UOKiK agreed with the incumbent counterparties' argumentation that a highly internationally competitive market participant would emerge as a result of this transaction; moreover, the Polish competition authority acknowledged that that the forthcoming entry on the regional (Central-European) market of the US trading platform Amazon.com would have to be taken into account when assessing the relevant competitive situation. Nevertheless, UOKiK avoided any such statement, which would suggest other than competition-based rationale of its decision consenting the notified takeovers had been decisive.

4. Industrial policy concerns in the review of mergers (questions 5 – 6)

UOKiK decision in the *PJSC Gazprom et al.* case is quite instructive as to whether Poland's competition authority was in a position to include industrial policy concerns in its review of mergers and how (if at all) it tended to approach such concerns in practice. The straightforward answer to this question is that, at least

[12] Decision DKK-69-2022 of 2 March 2022.

at the time where that decision was deliberated and finally made, UOKiK did not enjoy adequate powers to address straightforwardly industrial policy issues. At that time, articles 18-19 of the 2007 Competition Law invested UOKiK (or strictly speaking, its President) with the power to scrutinise significant value M&A with well pronounced criteria referring to structures of competition on the relevant market. These criteria pertained to the assessment of whether the controlled transaction could distort competition, especially by giving rise to any incumbents' dominant position or to re-enforcement of the already existing dominant position of at least one of them, and whether any mitigating effects could be achieved by imposing on the counterparties (countervailing) obligation(s) to:

(a) sell specific assets;

(b) grant controlling rights (in a share/stock deal or a change in relevant undertakings' Management Board or Supervisory Board);

(c) grant exclusive licence to specific competitors.

Any significant power to control M&A transactions on the national industrial policy grounds was possible only with regard to specific undertakings controlled by the State and specifically indicated in a set of legislation including the Law of 16 December 2016 on the principles of management of the State property (*Ustawa o zasadach zarządzania mieniem państwowym*)[13] and the Ordonance of the Council of Ministers of 26 January 2021 concerning the list of companies, in which State Treasury stockholding rights are to be executed by the President of the Council of Ministers or a member of the Council of Ministers, governmental plenipotentiaries or State legal persons, including State-owned one-stockholder companies (*Rozporządzenie Rady Ministrów w sprawie wykazu spółek, w których prawo z akcji Skarbu Państwa wykonuje prezes Rady Ministrów lub inny członek Rady Ministrów, pełnomocnicy Rządu lub państwowe osoby prawne, w tym jednoosobowe spółki Skarbu Państwa*).[14] The core controlling mechanism set forth in this legislation was meant to prevent uncontrollable/not complying with the national interests share/stock and asset deals pertaining to the State-controlled companies. This regulation setting corroborated with the regulation of the 2007 Competition Law which invested with the Council of Ministers some prerogatives to adopt secondary competition-concerned regulations based on the broadly construed „national interests" grounds.

In its *PJSC Gazprom et al.* decision, UOKiK made an assessment of the effects the contemplated „*quasi*-joint (financial) venture" created to finance a major

[13] Dz. U. 2016, item 2259.
[14] Dz. U. 2021, item 168.

infrastructure project located abroad might likely have not only on the competition on the Polish market, but also on the EU market (yet, significantly, UOKiK abstained from assessing any broader than EU geographical market considerations). UOKiK found that the transaction should have been notified to the Polish authorities as it had been intended to produce significant, strategic importance competition-restriction effects in Poland and in some other EU Member States. Thus, UOKiK's (disapproving) decision was based on competition-related considerations rather than on any other grounds.

Since 2020, the legal position of UOKiK has changed as this authority was invested with the competence to take into account „national interests" (which is a concept definitely encompassing „national industrial interests") by virtue of the COVID-19-related amendments of the Law of 24 July 2015 on the control of certain investments (*Ustawa o kontroli niektórych inwestycji*, further referred to as „2015 Investment Control Law").[15] The change entered into force on 24 July 2020. Its intent was to extend onto UOKiK the powers so far invested with the Minister of Defence, the Minister for state assets, the Minister for maritime economy to participate in the mechanism of monitoring and, if needed on *ordre publique* grounds, to abort any transaction which pertains to any specifically listed undertakings and which is to result in transfer of controlling rights (regardless of the legal nature of the specific transaction employed). The entities subject to this regulation included, especially, these undertakings which deal with oil and natural gas extraction, processing and distribution, with telecommunication, with rhenium extraction and processing, or with (relevant for military purposes) metal ore extraction and processing. Transactions, which in contravention to the 2015 Investment Control Law would not have been notified to UOKiK or would have been concluded regardless of its objection, were to be considered by virtue of that Law. However, UOKiK's decisions with regard to these issues can be controlled by courts.

The relevant ministerial or UOKiK's objection to any proposed merger or acquisition subject to control under the 2015 Investment Control Law should not be arbitrary. According to Art. 11(1) of that Law, an objection (intended to abort any effects the transaction might have under Poland's jurisdiction) could be issued only in specific cases. Most significantly, such an abortive objection could be prompted by the considerations resulting from the protection of fundamental rights, or environmental protection, or specific Poland's obligations arising from her membership in NATO and EU (art. 1(1)(2) of the 2015 Investment Control Law). It is important to mention, that despite of the fact that these considerations

[15] Dz. U. 2015, item 1272.

should be taken into account, undertakings subject to control are not required to make any systemic due diligence with regard to them.

All this indicates that Poland's national competition authority is in a position to include at least the most significant industrial policy concerns in its review of mergers. However, since UOKiK's exposure to this type of mergers has been rather scarce and that this authority consented to the proposed transactions[16], it is rather difficult to deliberate on whether it could consistently approve any merger that raises competition law concerns on the ground that, regardless of these concerns, a merger assessed by this authority 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. Definitely however, it is highly foreseeable that such concerns would always be balanced against pure competition concerns if they have emerged (as, at least indirectly, indicated by UOKiK explanations pertaining to the decisions on *Orlen-PGNiG* merger[17] and on the creation of joint venture by *Orlen and Aramco* (using assets of Lotos Asfalt[18], and in the decision on the already discussed Allegro Group's acquisition of Mall Group and WE/DO CZ Czech assets). In all these decisions, the competitive benefits (in addition to an argument that national championship) were brought to the attention of the public as the most pronounced motives of UOKiK's positive decisions.

5. Digital soverignty issues (question 7)

Digital sovereignty is one of Poland's key industrial policy goals. It is declared to be achieved by promoting innovativeness and robustness of the domestic digital industry as well as of the products and services developed by this industry – all rightly conceived to be essential for the development of value chains of other industries, the existing ones as well as the ones foreseeable in the future. As such, digital sovereignty is also regarded as an important prerequisite for the development and maintenance of sustainable national competitiveness. In this context, the EU digital policy is perceived to be contributing to the national industrial policy goals and objectives. .

Sizeable domestic digital trading platforms or digital platforms of regional importance (such as Polish Allegro.pl or Lithuanian Vinted.com) sometimes find

[16] UOKiK practice is that its consenting decisions do not have extensive in-merit justifications attached to them; see e. g. decision in the case H&F Fund of 8 of October 2020, DKK-179/2020 (concerning the acquisition of the Electronic Payments Settlement System „Polskie ePłatności").

[17] Decision of 16 March 2022, DKK-82/2022.

[18] Decision of 6 July 2022, DKK/1.422.25.2022.

themselves in the scope of the national competition authority's (i. e. UOKiK) attention. UOKiK scrutinizes their activities with regard to their practices concerning relationships with other economic operators (Allegro.pl was found to illicitly favour its own virtual store over other offers present on that platform[19]) or consumer rights (Vinted.com was found to adopt illicit practices abusing rights of customers using that platform[20]).

No case of significantly international dimension, especially a case against a US digital platform, has ever been scrutinized by UOKiK.[21] Yet, this is not to say that Polish Internet platform users do not have any problems with them. Rather, that the domestic perception of these problems is rather benign for the sizeable international platforms.

Thus, the legislative initiative of the EU Digital Markets Act[22] (DMA) is welcome in Poland as it is to address the possible issues with big platforms in a very much welcome manner in line with the principles of proportionality and subsidiarity (as DMA clearly distinguishes EU market dimension). Most importantly, DMA makes it possible to avoid the acute problem of legislative and institutional fragmentation of the EU digital market supervisory system where there is significant risk of different reaction of national supervisory authorities to the same market behaviour of global platforms (most importantly being „gatekeepers" of the functionalities offered through them). The value, which can be attached to the solution of the said fragmentation is definitely prevailing over any possible risk of inconsistencies or over-enforcement associated with DMA. Moreover, it is quite reasonable to expect that, with the accumulation of DMA enforcement practices, this risk would steadily be reduced. Thus, at the end of the day, it is quite reasonable to expect that DMA would effectively enforce the protection of EU consumers and businesses.

6. Inclusion of European industrial policy goals in the state aid policy (questions 8 – 9)

It is unreasonable or even opaque to consider the lack of a strong industrial player in Europe to be a result of market failure, which would have to be remedied by allowing State aid measures. There is no sound economic model, which would support such a statement. Most importantly, market failure involves a situation

[19] Decision of 9 February 2016, DK-1/2016 *Grupa Allegro*.

[20] Decision of 9 May 2022, DOZIK-8/2022 *Vinted VAB*.

[21] UOKiK issued decisions of minor domestic asset deals (therefore having minor importance) with regard to e. g. Google Polish subsidiary (decision of 4 February DKK/32/2022 *Google Poland* sp. z o. o.).

[22] Proposal for a Regulation of the European Parliament and to the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

where, with respect to any relevant market, there is not effective market for goods or services, where its participants do not behave competitively, and – as a result – where Pareto optimum cannot be achieved.[23] In typical market situation, State aid is basically about everything but correcting these deficiencies. Most economic models concerning the sources of competitiveness and competitive advantage consider regulatory environment to be just one of many, and even not the most important, factors which would have to be taken into account.

Thus, State aid policy cannot, in isolation from other factors being under control of business undertakings, be regarded a suitable tool to effectively contribute to the fulfilment of European industrial policy goals, in particular to the creation of European industrial champions, unless they operate in a totally new industry which has to be protected from foreign entrants. Under regular circumstances, State aid cannot substitute for business undertakings' failures in creating (and/or sizing) sources of sustainable competitive advantage. Moreover, widely recognised studies indicate that long-term viability of any European industry would be achieved by adequate management practices and that quality improvements (also resulting from generally binding mandatory rules) exert adequate pressures to trigger these improvements.[24]

Yet, it should be acknowledged that state aid proved to be an effective remedy for the COVID-19 pandemic, where temporary liquidity provided from the EU and national budgetary resources had helped undertakings to survive an abrupt and dramatic fall in demand as well as broken supply chains. It is quite essential to note, however, that the goals and objectives of state aid offered in the aftermath of the COVID-19 pandemic include especially the protection of labour market; in different EU states, different proportion of loan and grant measures was adopted.[25]

Generally speaking, Poland's state aid policy has been rather cautious, This statement implies that significant state aid programmes, such as these produced to combat negative economic and social consequences of COVID-19 epidemic, are usually pre-notified or based (within the application of Article 108 TFEU) on an extensive setting provided for in Regulation 2015/1589.[26] So far, no preliminary questions were posed by the national courts with regard to the said exemptions.

[23] E. g. Richard Musgrave, Peggy Musgrave, *Public Finance in Theory and Practice, New York*: McGraw-Hill 1989, p. 7-8.

[24] Alfred D. Chandler, Scale and Scope: The Dynamics of Industrial Capitalism, Cambridge: Harvard University Press 1990, p. 593-630; M. E. Porter, C. Van der Linde, Green and Competitive: Ending the Stalemate, "Harvard Business Review" 1995, Vol. 73, p. 120-134.

[25] See e. g. Artur Nowak-Far, Sars-Cov-2 Pandemic: An Economic Analysis of Regulatory Intervention, in: Jolanta Itrych-Drabarek (eds), Contemporary States and the Pandemic, London: Routledge 2023, p. 350-365.

[26] Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ 2015, L 248/9.

Yet, it is quite foreseeable that such questions would be posed to the CJEU as a result of the now ongoing extensive review of state aid by the Supreme Chamber of Auditors (*Najwyższa Izba Kontroli, NIK*). As of today (31 August 2022), the review has not yet been completed. Consequently, no state aid reimbursement procedures have commenced which would likely produce decisions to be challenger before the courts.

7. Trade instruments (questions 10 – 13)

7.1. FDI controls

Increased FDI control, countervailing foreign subsidies, and various other "level playing field" instruments theoretically could allow the European Union to limit market access for foreign players who, in countries of their origin, might be subject to less stringent rules. The said measures are conceived to produce effect equivalent to that of antidumping measures, but they are expected to bring more flexibility and less negative WTO law-related ramifications.

UOKiK had to take into account the existing trade instruments in its competition law analysis at least in cases involving contemplated mergers and acquisitions potentially having a significant and long-lasting (and therefore, strategic) impact on the Polish market of goods or services considered strategically important. All the cases concerned involved analyses of narrowly defined markets from the competition structure perspective. This approach was understandable because of an alternative solution, (i.e. for example, discounting competitive pressure exercised by third country firms due to the fact that trade defence instruments were already there to be applied) was relatively new at both the domestic level and the EU level. As it has already been raised, Polish authorities have had monitoring and controlling competences since August 2015 where the (already discussed) 2015 Law on control of certain investments (*Ustawa o kontroli niektórych inwestycji*)[27] entered into force; even stricter rules have applied since 2017 to State-owned companies by virtue of the (also discussed in this report) 2016 Law on the principles of management of State property[28] (*Ustawa o zasadach zarządzania mieniem państwowym*).

It is significant to note that the 2015 Investment Control Law was declared to fulfil *ordre publique* considerations as defined in Articles 52(1) and Article 65(1) TFEU in connection with Article 4(2) TEU. The 2015 Law requires that every

[27] Law of 24 July 2015 on control of certain investments, Dz. U. 2015, item 1272.
[28] Law of 16 December 2016 on the principles of management of State property, Dz. U. 2016, item 2259.

merger or acquisition transaction giving a foreign entity a dominant or significant influence over undertakings indicated by the Council of Ministers be subject to the official scrutiny – either on the basis of the required notification, or *ex officio*, if the notification obligation has not been fulfilled. The detailed rules as to how „domination" or „significant influence" be established with regard to a transaction differs depending on the business vehicle concerned. For example, for publicly listed joint stock companies, achieving any 20%, 33%, and 50% threshold in the companies' capital is subject to mandatory notification (and, therefore, official scrutiny of its merits and consequences to the national interests). The 2015 Investment Control Law provides that the Council of Ministers is entitled to subject only specific undertakings to the official scrutiny. According to its art. 4, undertakings subject to the control are those operating in the following areas:

(a) production of electricity;
(b) production of engine fuels;
(c) transportation of oil or engine fuels;
(d) storage of engine fuels;
(e) underground storage of oil or natural gas;
(f) production of chemical substances, artificial fertilisers or chemical products;
(g) production and marketing of explosives, arms and ammunition or any material for military or law enforcement purposes;
(h) re-gasification and liquefaction of natural gas;
(i) re-loading of oil and oil-originating products in Maritime ports;
(j) distribution of natural gas or electricity;
(k) re-loading in ports deemed to be of strategic importance of the national economy under the 1996 Law on sea ports and marinas;
(l) telecommunication;
(m) transportation of gas fuels;
(n) production of rhenium;
(o) extraction and processing of metal ores used for manufacturing of explosives, arms and ammunition or products and technologies for military or law enforcement purposes.

At the EU level, FDI Screening Regulation[29] invested with national market surveillance authorities (as well as – with regard to transactions of an EU

[29] 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.

dimension – with the European Commission) the powers to monitor and even effectively abort FDI transactions on public policy grounds. Poland, however, has never invoked FDI Screening Regulation provisions with regard to transactions of a more significant dimension, which have been contemplated on the Polish market.

The clear preference of the Polish authorities has been to apply its domestic 2015 Investment Control Law, and on the basis of it – to invoke competition-concerning rules. Thus, it is possible to conclude that in Poland, a three-tier procedure would be involved in any assessment of a risk to public order or security:

(a) firstly, the importance of an undertaking subject to acquisition or a merger in the „sensitive" industry would be assessed;

(b) secondly, the scale of foreign influence in the undertaking concerned be analysed;

(c) thirdly, the competitive situation before and after the transaction would be assessed – which would, as well, include whether any sensitive technology capture would take place as a result of the transaction.

The result of the assessment could be either a straightforward consenting decision, or a decision on conditional consent (specifying the competition-concerned conditions on which it is granted) or an (abortive) objection – all contestable before the administrative courts.

This implies that in this assessment, there is room for competition considerations in the FDI control and that it could 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 make significant investment in the target undertaking.

COVID-19 pandemic affected the application of the domestic model of FDI control. As already indicated in this report, UOKiK's powers within the procedure increased; more flexibility was granted to exempt certain transactions from the official scrutiny, if such an exemption was justified on the public health protection grounds.

7. 2. Addressing the issue of foreign subsidies on competition

The European Commission proposal of 5 May 2021 for a regulation addressing foreign subsidies' effects on competition in the internal market[30] would, if adopted, introduce a handful of potentially effective tools to correct distortive ramifications

[30] 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)

of foreign subsidies and the risk of those subsidies upsetting the level playing field in the EU internal market. These tools would not only be applicable to M&A transactions, but also to all other areas where competition concerns are of utmost importance (such as e.g. public procurement).

Polish government is generally in favour of the proposed regulation. Such a stance became evident when it jointed the German-French manifesto "Modernising EU Competition Policy"[31] in mid-2019. Yet, later on, it expressed concerns about the fact that the European Commission would also have what can be interpreted as „unrestricted" powers to investigate individual cases of distortion of competition resulting from foreign subsidies. Therefore, Polish government proposed that the Regulation be amended so that the Commission's blank powers be limited: the Commission's interventions would then have to be based on specific „triggering criteria" to be agreed by the Member States. With regard to provisions regarding suspension of public procurement proceedings, Polish government proposed that its duration be as short as reasonably possible.

Hence, it is possible to sum the Polish position up in the following points:

(a) in Poland, there is a genuine concern about the existence and impact of foreign subsidies; therefore, Poland generally supports the European Commission's proposal which is deemed to adequately address that concern;
(b) Poland does not perceive a risk of „power bargaining" with the European Commission in the area of FDI control to be significant;
(c) Poland is not very willing to adjust its procurement procedures to the requirements of the proposed Regulation with regard to any arrangement, which would result in significant procrastination of these procedures.

8. Mandatory fundamental rights due diligence of supply chains (questions 14 – 15)

On 23 February 2022, the European Commission adopted its proposal on Sustainable Corporate Governance Directive.[32] The proposal pursues to introduce mandatory human rights and environmental due diligence requirements, and corporate governance standards at least with regard to larger companies. Polish Government has not presented any objection to the proposed provisions.

If adopted, the proposal would have a major impact of the companies concerned, as at present, these companies do not have to perform any type of mandatory due

[31] See footnote 9. See also: Maciej Bernatt, Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System, Cambridge: Cambridge University Press 2022.
[32] Doc COM/2022/71 final.

diligence with respect to human rights and environmental law throughout the supply chain. Some rudimental obligation to reflect on fundamental rights and especially environmental obligations are imposed on business operators under the domestic regulation on public procurement.

The proposal is not expected to give rise to significant concerns about its enforceability and implementability in Poland. This conclusion is even reinforced by the fact that the proposed provisions concern larger companies, which now are exposed to other extensive reporting obligations.

There are many possible legislative choices for the implementation of the proposed Directive in Poland. The primary legislative choice would be the implementation through a relevant self-standing Law. Such a choice is natural as the proposed provisions impose significant obligations onto business operators and concern fundamental rights of international dimension. Nevertheless, another viable possibility would be to sparse the Directive provisions over the already existing pieces of legislation (. e. g. the legislation concerning public procurement, annual reporting of publicly listed companies or corporate governance rules included in the Commercial Code – *Kodeks Spółek Handlowych*).

9. Conclusions

Generally speaking, Poland's stance towards more advanced EU regulatory initiatives (intended to encompass Europe-wide green policy goals, industrial policy and digital sovereignty concerns, as well as industrial policy and trade instruments considerations) is rather cautious and, as a result, considerably conservative. This means that:

(a) at the law enforcement level, all these additional ("extra-competition") issues are given less weight than competition-related arguments;

(b) at the EU law-making level, Polish authorities usually adopt "lukewarm water", reserved position to the emerging proposals assessing them in the light of rather narrowly defined concerns of national interests and the existing domestic solutions developed to address the issues to be addressed by the EU legislation;

(c) whenever it is possible to make a choice between the EU and national procedural model for deciding upon a competition-related case, Polish authorities favor the latter.

Hence, the Polish competition authority (UOKiK) is not prone to consider argument concerning sustainability as recognisable claim on efficiency benefits

that can outweigh foreseeable (in a given situation) competitive harm. Only under some circumstances, UOKiK may consider a transaction's likely detrimental effects on the environment as a competitive harm – but only indirectly, by founding these detrimental effects as something highly likely to be reflected in the economic accounts submitted by the counterparties to the intended transaction to support the arguments for it.

Poland's state aid policy has also been rather cautious, In this particular area, this means that significant state aid programmes, such as these produced to combat negative economic and social consequences of COVID-19 epidemic, are usually pre-notified or based (within the ambit of Article 108 TFEU) on an extensive setting provided for in Regulation 2015/1589.[33] So far, however, information about the details of the COVID-19 pandemic-related state aid in Poland has been rather scarce. Much more insights would be available after an extensive review of COVID-19 pandemic-related State aid would have been completed by the Supreme Chamber of Auditors (*Najwyższa Izba Kontroli, NIK*). This is expected by the end of 2022.

[33] Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ 2015, L 248/9.

PORTUGAL

Miguel França, Margarida Rosado da Fonseca

INTRODUCTION

Preliminary remarks: EU law, domestic order and institutional national framework

From the outset, it is important to recall some important issues regarding the relationship between the Portuguese legal framework and EU law.

First, the principle of the primacy of EU law is expressly recognised in the Portuguese Constitution (CRP)[1] and accepted by the Portuguese Constitutional Court (PCC). Article 8 (4) of the CRP provides that "The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law".

In 2017[2], the PCC submitted it its first question for preliminary review to the Court of Justice of the European Union (CJEU). On 15 July 2020, the PCC delivered its judgment 422/2020, expressly dealing for the first time with the relationship between European Union law and the CRP. More precisely, the PCC considered itself incompetent to rule on the validity of an EU rule in the light of the CRP.

The primacy of secondary EU law is also provided for by the CRP: Article 8(3) determines that "The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties". This means that, for example, block exemption regulations issued by the European Commission (Commission), implementing Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) and specifying the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) TFEU have primacy over national law.

[1] The CRP was adopted by Decree of 10 April 1976 and was last amended by Law n.º 1/2005, of 12 August, its 8th amendment. The text has 296 provisions.

[2] In case n.º 528/2017, before the plenary court.

Second, pursuant to the CRP[3], "the fundamental tasks of the State" include the following: "a) to guarantee the national independence and create the political, economic […] conditions that promote it; b) to guarantee the fundamental rights and freedoms and respect for the principles of a democratic state based on the rule of law; […] d) to promote the people's well-being and quality of life […]". The CRP contains an "economic Constitution" given that it draws up objective limits to the freedom of competition, stemming from: (i) the powers of the State to frame the private economic activity and (ii) the balance of conflicting rights regarding freedom of competition in the market (such as the workers and the consumers' rights).

Third, in line with the provisions of the CRP enabling the discipline of the "economic activity and investment by foreign natural and legal persons, with the aim of ensuring that they contribute to the country's development and defending national independence and workers' interests" to be undertaken by secondary legislation[4], the Parliament has passed a Law regulating the access to certain economic activities[5].

Fourth, in the economic and social fields, the State has the obligation to "*to ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between enterprises, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest*". In the context of the designing of the institutional architecture of the Public Administration, the CRP grants the State the faculty to set independent administrative entities by law[6].

The Competition Act (or CA)[7] entrusts the Portuguese Competition Authority (Autoridade da Concorrência, AdC) with the task of promoting competition and guaranteeing both the functioning of the market economy and consumer protection. The Competition Act and the AdC's bylaws were latest amended by Law n.º 17/2022, of 17 August[8]. While the first aim of that amendment was to transpose the ECN+ Directive[9] into the national legal order, the amendments went far beyond that and provide in particular for the exercise of the new powers of the AdC in purely domestic situations (in addition to restating the primacy of EU law).

[3] Article 81 – Priority duties of the state, indent f) CRP.

[4] Article 87 (Foreign economic activity and investment) CRP.

[5] Law n.º 88-A/97, of 25 July as amended.

[6] Article 267 (3) CRP.

[7] Law 19/2012, of 8 May as amended.

[8] The AdC's bylaws adopted by Decree-Law 125/2014, of 18 August.

[9] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Directive ECN+).

Articles 9 and 10 of the Competition Act concern respectively "Agreements, concerted practices and decisions by associations of undertakings" and their justification and are equivalent respectively to Article 101(1) and (2) and Article 101(3) TFEU[10]. As for Article 11 of the CA ("Abuse of a dominant position"), the underlying substantive test is equivalent to the one of Article 102 TFEU (despite of the fact that the non-exhaustive list of conducts is not identical).

Furthermore, it should be noted that the Competition Act provides that restrictions to competition prohibited under a provision equivalent to Article 101(1) and (2) TFEU may be considered justified "where, although they do not affect trade between Member States, they do fulfill all the other requirements for application of a regulation adopted in accordance with the provisions of Article 101(3) of the TFEU"[11].

The AdC is an independent administrative entity with administrative and financial autonomy, management autonomy and organic, functional and technical independence, disposing also of its own assets[12]. Its primary statutory mission is to ensure the application of rules to promote and defend competition in public and private, cooperative and social sectors, "in the respect for the principle of free market economy and freedom of competition, having the aim of the efficient functioning of the markets, the optimal allocation of resources and the interests of consumers"[13]. Decisions by the AdC are subject to judicial review.

The AdC is thus a single purpose entity that might need to interact with other public entities when it exercises its competences. In this context, the AdC is legally bound to interact with sectoral regulators, which are also independent administrative entities (without prejudice to its exclusive competence to enforce competition rules[14]). This is particularly relevant for merger control and investigation proceedings.

In 2011[15], the legislature set up a lower court dealing specifically with competition related cases (*Tribunal da Concorrência, Regulação e Supervisão*, the *Competition,*

[10] This is without prejudice to one of the examples of conducts in the non-exhaustive list contained in the same provision concerning specifically the intermediary platforms in the tourism sector, which does not exist in 101 TFEU.

[11] Article 10(3) of the Competition Act.

[12] Article 1 of the AdC's bylaws.

[13] Article 1 of the AdC's bylaws.

[14] The main rules for this interplay are set in Law n.º 67/2013, of 18 August, the Framework Law on independent administrative entities with competences to regulate the economic activity in the private, public and social sectors. The bylaws of the sectoral regulators under the scope of this Framework Law are bound to comply with its contents.

[15] Law n.º 46/2011, of 24 June as amended.

Regulation and Supervision Court)[16], which started working the following year[17]. That jurisdiction is competent to rule on the appeals lodged against the AdC administrative and sanctioning decisions, as well as to rule on private enforcement actions for damages[18]. The rulings of that court can be appealed to the High Court (*Tribunal da Relação*) in Lisbon, which already has a specific section for competition related appeals.

In line with EU law, any Portuguese court (whether lower court or appeal court) is competent to rule on competition matters in the context of a judicial action which also concerns that matter and may ultimately request the AdC or the Commission to act as *amicus curiae*[19].

As regards specifically prohibition, decisions adopted by the AdC in merger control proceedings, the notifying parties may submit an "extraordinary appeal" to the Minister in charge of the sector of economy in question[20]. The grounds for the appeal consist in the benefits of the projected merger for the promotion of fundamental strategic interests of the national economy that supersede, in concrete terms, the disadvantages for competition inherent to its implementation. On the basis of a proposal from the Minister, the Council of Ministers may authorize the projected merger by adopting a reasoned decision and can impose conditions and obligations "aiming at minimizing the negative impact on competition".

COMPETITION

Green competition policy

Question 1

a)

There is currently neither available decisional practice nor any published guidance from the AdC regarding how it will assess sustainability aspects of agreements containing restrictions to competition.

[16] Article 112 of Law n.º 62/2013, on the Organization of the Judiciary System, as amended.

[17] Decree n.º 84/2012, of 29 March.

[18] Law n.º 23/2018, of 5 June has transposed Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[19] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

[20] Article 41 of the AdC's bylaws, as amended.

Notwithstanding, recent speeches and declarations from the President of the AdC, Margarida Matos Rosa, can already provide some insight.

For example, on 4 February 2021 and when addressing the question whether competition policy should seek to achieve even more, the President of the AdC admitted that "more results are expected to come from State aid policy". That is seen to be "the preferred vector for a strong contribution to the Green Deal objectives"[21].

Also on 30 May 2022 and when discussing the relationship between competition and sustainability, the President of the AdC underlined that "competition authorities must take a closer look at claims of indispensability[22]. She further detailed that these claims must be supported by tangible evidence showing that: 1) Under the existing competitive set up (i.e., with unilateral action), it is not feasible for firms to achieve sustainability benefits; 2) The proposed agreement does achieve the alleged benefits; and 3) There are no alternative less restrictive agreements that could achieve those benefits". In addition, the President of the AdC highlighted that "there is a risk of negatively affecting the so-called "administrability" and the legal certainty of competition law enforcement. What we expect is that, in assessments of sustainability effects, economic analysis will be put at the front and centre, whether quantitative or qualitative. Decisions by competition authorities and by courts will rely on sound economic analysis".

Finally, in June 2022, when discussing the role that competition policy can play to achieve the society's important goals, such as sustainability, the AdC President's speech briefly mentions that enforcers should preserve the incentives for firms to compete and innovate "by preventing incumbent entrenchment and by fostering contestability". And "Competition is thus a strong catalyser for the green transition"[23].

Overall, it would seem that the AdC would favour a more conservative approach and would prefer not to "go beyond the current competition policy mandate and practice".

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[21] Speech about "What the current antitrust and merger rules deliver and what they don't", of 4 February 2021. Text available at https://www.concorrencia.pt/en/articles/what-current-antitrust-and-merger-rules-deliver-and-what-they-dont-margarida-matos-rosa.

[22] Speech about "Pros and Cons of Sustainability Considerations". Text available at https://www.concorrencia.pt/sites/default/files/documentos/intervencoes/Margarida%20Matos%20Rosa%20-%20Pros%20Cons%20of%20Sustainability%20Agreements.pdf.

[23] Speech about "Competition as an enhancer of fundamental values" in the Congress on Economic Governance, Regulation and Administration of Justice. Text available at:

https://www.concorrencia.pt/sites/default/files/documentos/intervencoes/Margarida%20Matos%20Rosa%20-%20Competition%20as%20an%20Enhancer%20of%20Fundamental%20Values.pdf.

b)

As referred above, the CA includes legal provisions that are equivalent to Articles 101 and 102 TFEU (see above Preliminary remarks).

In the context of its judiciary powers or review, national courts can provide an independent scrutiny in respect of the administrative approach adopted by the AdC. This is without prejudice to the boundaries set by Article 3 of Council Regulation n.º 1/2003 as regards the relationship between national competition laws and Articles 101 and 102 TFEU.

Therefore, they can consider sustainability arguments. However, there are currently no solid elements to predict whether Portuguese judges would be willing to take up those arguments.

Question 2

The substantive test to be applied in merger control proceedings concerns the likelihood of "creation of significant impediments to effective competition in the domestic market or a substantial part of it"[24].

Moreover, the CA provides that the "concentration is assessed so as to determine its effects on the structure of competition, taking into account the need to preserve and develop, in the interests of intermediate and final consumers, effective competition in the domestic market or in a substantial part of it"[25]. Amongst the illustrative list of factors to be considered by the AdC in this assessment of the "evolution of the technical and economic progress as long as the concentration results directly in efficiency gains which benefit consumers"[26].

The economic analysis concerning horizontal concentrations was the subject of a Guidance published in 2013 but that does not address this topic. Though there is no further guidance by the AdC, in its decisional practice it has been applying the Commission's guidance concerning the assessment of the horizontal and non-horizontal concentrations.

a)

The assessment of any sustainability benefits is part of the overall competition assessment.

[24] Article 41(3) CA.
[25] Article 41(1) CA.
[26] Article 41(2)(k) CA.

As referred above, in her speech of 30 May 2022, the President of the AdC weighed the pros and cons of sustainability considerations[27]. She submitted that, when assessing the sustainability effects, "economic analysis will be put at the front and center, whether quantitative or qualitative. Decisions by competition authorities and by courts will rely on sound economic analysis".

b)

As pointed out above in the Preliminary Remarks, the AdC is a single purpose entity, part of the independent public administration. Merger control proceedings must follow what is provided primarily in the CA, notably as regards the substantive test to assess the lawfulness of concentrations. More precisely, concentrations that are not likely to create significant impediments to effective competition in the domestic market or a substantial part of it shall be authorised.

During merger control proceedings, the AdC is bound to interact with public entities pursuing other policy goals and in particular with several sectoral regulators. Article 55 of the CA provides that when there is a concentration in a market that is subject to sectoral regulation, the Competition Authority, prior to taking a final decision, shall request the opinion of the sectoral regulatory authority, setting up a reasonable time limit for such purpose (no less than 15 days).

Only if the opinion requested is binding will the time limit for the AdC to adopt a final decision be suspended. Until the present moment, no public entity regulating has been requested to issue such an opinion. Nevertheless, it should be pointed out that this is without prejudice to the fact that the regulator on waters and waste, ERSAR – *Entidade Reguladora dos Serviços de Águas e Resíduos*, might be requested to provide non-binding opinions on projected concentrations in that field.

In any event, detrimental effects to the environment, if they are likely to result into competitive harm, as established by the CA, can be considered as impediments to effective competition.

Question 3

Again, any assessment of sustainability benefits should be substantiated on the basis of sound economic analysis.

The President of the AdC has already pointed out that the solution for the trade-off would require a case-by-case analysis. In the same speech of 30 May 2022, she

[27] See above note 22.

addressed the risk that firms cut costs at the expense of the environment. It was stated that if competition authorities were to adopt a total welfare rather than a consumer welfare approach, they could go "beyond the current competition policy mandate and practice", usurping the role of the legislature[28].

European strategic autonomy, the promotion of "European champions" and competition law enforcement

Question 4

a)

There is no information available in the context of the referred merger proceedings[29].

Nonetheless, in a speech made a week later[30], the President of the AdC specifically addressed the reactions of the French and German governments and the call for the creation for European champions (as well as the echo of national champions).

While defending that the relevance of industrial policy should not be disregarded, she affirmed that such industrial policy "is highly distortionary of competition and may bring harm to the functioning of markets in the vectors of price, quantity, quality, choice and innovation […] at the expense of consumers or the competitiveness of other firms supplied by the "national" or "European champion"".

The President of the AdC sustained that "industrial policy must remain horizontal and, as such, economies must be attractive because of their stable macroeconomic environment, their competitive and stable fiscal policy, the availability, quality and competitiveness of their infrastructure, of utilities provision and of their workforce, because of their effective framework of economic regulation and their effective judicial system. All of this is what makes a country attractive. It is on these grounds that each economy may spawn firms capable of competing on equal terms in international markets while bringing significant benefits to consumers. Those are the real Champions".

Later, on 25 September 2019[31], the President of the AdC again mentioned the *Siemens/Alstom* transaction when sharing her views on initiatives aimed at

[28] See above note 22.

[29] The Commission's decision to prohibit the projected concentration was adopted on 6 February 2019.

[30] Conference Economia Viva 2019 – Nova SBE, 15 February 2019. Available at: https://www.concorrencia.pt/sites/default/files/imported-media/The%2520Impact%2520of%2520Trade%2520Agreements%2520on%2520Competition.pdf

[31] Speech available at https://www.concorrencia.pt/sites/default/files/imported-media/Concorr%C3%AAncia%2520e%2520Atratividade%2520do%2520Investimento%2520-%2520Margarida%2520Matos%2520Rosa.pdf

promoting European industries ("European Champions") in defiance of the principles of competition, under the alleged need to respond to the challenges of the global economy. "The solution cannot be obtained at the expense of specific rules for some companies and at the end of the line at the expense of consumers", said Margarida Matos Rosa. This is because "there is no guarantee that it will necessarily result in benefits for consumers, the economy and the society. The same reasoning applies to the creation of "national champions"". And further stated that "competition, without recourse to subsidies and State aid, is the best way to boost the creation of true champions of the economy" at domestic or European level. Understandably, Margarida Matos Rosa acknowledged that "naturally there may be exceptions, market failures which need regulation from the State" but "it should be strictly limited to what is necessary".

In the same line, during a speech on 20-21 January 2020[32], another board member of the AdC stated that "bringing other public policy considerations or non-competition goals into the competition assessment carried out by enforcers may raise other types of risks, inter alia, unpredictability in the decision making". It was also noted that "a competition enforcer may not be in the best position to provide the optimal answer to a problem involving other public policy concerns", besides lacking democratic legitimacy and there is also a risk of jeopardizing its independence.

Already during the COVID 19 economic crisis, in a speech on 10 March 2021[33], the President of the AdC stated that it "seems like an ill-choice to ask competition policy, in some instances, to relax merger control". And reiterated that "Competition authorities must remain focused on their institutional purpose", which is to promote competition and consumer welfare. Thus, she further claimed that "the process must be based on the accumulated experience of competition authorities, on evidence and on the economic literature. Enforcers have built, over the years, robust best practices based on these principles. So a merger should not be allowed if there are anti-competitive concerns with no countervailing efficiencies accruing to consumers. Allowing other considerations to be factored in competition authorities' decisions may compromise the technical quality of competition analysis, and the objectives of competition policy".

[32] Speech of Board Member Maria João Melícias "In the line of fire: the interplay between consumer welfare and other public interest considerations in competition policy" for the Asian Competition Forum 15th Conference "Europe – Asia Trade, Investment and Antitrust: Challenges and Opportunities". Available at: https://www.concorrencia.pt/sites/default/files/imported-media/In%2520the%2520line%2520of%2520fire%2520-%2520Maria%2520Jo%C3%A3o%2520Mel%C3%ADcias.pdf

[33] What's new in merger control: theory and policy Panel discussion – "Whither merger control? Recent debates on digital and foreign acquisitions" Toulouse School of Economics. Available at: https://www.concorrencia.pt/sites/default/files/imported-media/Whats%2520New%2520in%2520Merger%2520Control%2520-%2520Theory%2520and%2520Policy%2520%2520Margarida%2520Matos%2520Rosa.pdf

b)

There is no public information on this matter.

c)

There is no public information on this matter.

Question 5

As referred above, the AdC is a single purpose entity in charge of enforcing competition rules and currently the set of factors provided for in the CA for the competition assessment do not include non-competition factors. More precisely, the CA no longer provides expressly for the international competitiveness factor (detailed explanation hereunder in answer to question 6 on the historical background). Consequently, industrial policy considerations as such are not aimed by the legislature to be applied by the AdC.

There are no guidance notes on the inclusion of industrial considerations in merger control assessment in general and, to the best of our knowledge, no administrative or judicial decisions to consider.

In addition to what has been mentioned above in answer to question 4. a), the President of the AdC again addressed this topic from the perspective of antitrust enforcers in her speech of 26 September 2019[34].

While acknowledging that the EU and its companies – including Portuguese companies – face challenges of competitiveness at a global level, for the President of the AdC the solution cannot be obtained through special rules for some companies an ultimately at the expense of consumers. By promoting "European champions" and protecting only certain companies depending on its size or sector, there is no guarantee that the outcome will benefit consumers, the economy and the society. Thus, the AdC applies the same reasoning to the creation of "nationals champions".

This rebuttal of industrial policy concerns in the assessment of mergers is reinforced by the following statements made in the same speech: "empirical studies show that using competition as a tool of industrial policy, allowing the creation of European or national giants, harms companies that buy products and services from these giants, as well as citizens, reducing choice and raising prices.

There may of course be exceptions, market failures that require regulation by the State.

[34] See above note 31.

In any case, as a rule, to allow political interference in the activities of competition authorities would jeopardize the independence and technical quality in the application of competition rules".

Without prejudice to what has been mentioned above, the extent of the CA and the AdC's powers under merger control coexists with the "extraordinary appeal to the Minister". As referred to in the Preliminary Remarks, this exceptional mechanism grants the Government the faculty to authorize a concentration prohibited by the AdC. Because that concentration might bring about fundamental strategic interests to the national economy. Such Government's decision is subject to judicial appeal to the Competition, Regulation and Supervision Court (which is also competent to assess the appeals against AdC's decisions). In practice, such appeal has not been used (since 2006) and it remains to be seen how the judiciary would in practice ascertain whether the Government's decision (and notably the remedies and conditions imposed) would be lawful.

In line with has been mentioned above, the AdC's priorities for 2022 include to "Embed competition considerations in current efforts by policymakers, so as to contribute to a resilient and innovative economic recovery: one that is structurally beneficial to consumers and firms"[35].

Question 6

Under the current CA (in force since 8 May 2012) and the current AdC's bylaws, no overruling of any prohibition decision adopted by the AdC under the "extraordinary appeal" to the Minister has yet taken place.

Historically, the Government's possibility to intervene in concentrations has been decreasing over time in the last three decades. This is in line with the evolution towards a stricter competition-based test to assess concentrations and the growing independence of the agencies in charge of enforcing competition rules.

In order to provide the full picture, it is important to underline that the "extraordinary appeal" to the Minister replaced an even more interventionist instrument, which existed until the initial Competition Act was adopted[36] and the AdC was created.

In that period, the Directorate-General for Competition and Prices (Ministry in charge of Economy) was in charge of merger control proceedings and of submitting

[35] Available at: https://www.concorrencia.pt/sites/default/files/Priorities%202022_0.pdf
[36] Law 18/2003, of 11 June.

the competition assessment of concentrations to the Minister[37]. The Portuguese competition rules at that time were enshrined in Decree-Law n.º 371/93, of 29 October[38]. The latter provided for a substantive test based on the "creation or reinforcement of a dominant position in the national territory or in a substantial part of it which are susceptible of impeding, distorting or restricting competition", as the trigger to prohibit concentrations. Nonetheless, if (i) the economic balance test [equivalent to the one currently in Article 101(3) TFEU] was positive or (ii) the projected concentration reinforced significantly the international competitiveness of the participating undertakings, the concentration could be authorized[39].

If the Minister considered that the concentration was susceptible of affecting competition in a negative manner, then he/she could request an opinion from the Competition Council (the other agency in charge of competition enforcement) before adopting a final decision[40].

However, in 2003, with the adoption of the 2003 CA and the creation of the AdC, that new independent agency became the sole entity competent for merger control proceedings. The dominance test remained in the 2003 CA and the consideration for the industrial policy within the competition assessment evolved towards the "contribution of the concentration for the international competitiveness of the Portuguese economy"[41]. Nevertheless, the AdC's 2003 bylaws still provided for the possibility of the Minister in charge of economy to "overrule" a prohibition decision by AdC and authorize the projected concentration "when the benefits resulting from the concentration to the promotion of fundamental interests of the national economy supersede the disadvantages for competition arising from its implementation"[42].

Historically, there is one case registered in this respect. On 7 April 2006, the AdC prohibited a concentration consisting of the acquisition of joint control of the Portuguese highways' operator Auto-Estradas do Atlântico by its competitors Brisa and Auto-Estradas do Oeste[43]. The AdC concluded that the concentration was susceptible of creating or reinforcing a dominant position which might

[37] Article 12[indent l)] of Law n.º 18/2003, of 11 June (2003 Competition Act).

[38] Decree-Law 371/93, of 29 October established the legal framework for the defense and promotion of competition and provided for the competencies of the agencies in charge of enforcing such aims.

[39] Article 10(2) of Decree-Law n.º 371/93 mentioned above in 38.

[40] In case the final decision consisted of a prohibition of the concentration or a non-opposition with conditions and obligations, the same was jointly adopted with the Minister in charge of the sector of activity in question, as provided in article 34(2) of Decree-Law n.º 371/1993, of 29 October. Such decision could be appealed to the Supreme Administrative Court.

[41] Article 12 of Law n.º 18/2003, of 11 June.

[42] Under article 34(1) of Decree-Law n.º 10/2003, of 18 January which approved the bylaws of the PCA.

[43] Case 22/2005 Brisa/AEO/AEA.

result in significant impediments to effective competition in two markets for the exploitation of motorways.

But the parties filed and extraordinary appeal to the Minister of Economy, which was upheld[44]. The Minister authorized the concentration, although imposing "complementary measures". The justification for the authorization was that the concentration "corresponds to fundamental interests of the national economy, not only due to the development of the sector in question, which is a national strategic sector, but also due to the upscaling of the undertakings involved, which will allow them an increased innovation capacity and increased international competitiveness, with inherent benefits to the national economy".

Finally, it should also be pointed out that most recent measures made that "extraordinary appeal" even more extraordinary. In 2012, amongst the structural measures adopted by the Portuguese Government to increase competition in the context of the implementation of the Economic and Financial Assistance Programme to Portugal was the revision of the CA and the AdC's bylaws (in 2014). One of the aims pursued consisted in reinforcing their alignment with EU law and EU merger control proceedings. In this way, the "extraordinary appeal" to the Minister was amended so as to become even more exceptional and arguably raise the standard for the Government to intervene in prohibited concentrations. Until the present day, no more "extraordinary appeal" has been made.

Question 7

a)

In the most recent years, the AdC has shown increased attention towards this sector of activity. For example, in 2019, the AdC submitted to public consultation a draft Issues Paper on Digital Ecosystems, Big Data, and Algorithms and subsequently adopted the final version[45]. Already in 2020, the AdC set up a "digital task force" with the aim of "detecting and investigating such behaviours, as well as to monitor digital competition policy initiatives". And on its Priorities of Competition Policy for 2022, the AdC states that, given the "increased digitization of various traditional sectors", there is a risk of abusive or collusive behaviour in the digital environment.

[44] Information available at https://web3.cmvm.pt/english/sdi/emitentes/docs/FR9670.pdf.

[45] Available at https://www.concorrencia.pt/en/articles/call-information-digital-ecosystems-big-data-and-algorithms

According to the AdC's public information[46], following a complaint and subsequent analysis of the concerned markets and questioning of its main economic agents, on 17 May 2022, the AdC decided to open administrative proceedings against Google for abuse of dominance. The proceedings are not public.

In the context of that investigation, "the AdC has collected indicia of self-preferencing behaviours by Google at various stages of the digital advertising value chain". The AdC considered that there were "indicia that Google has used information not accessible by competitors on online advertisement auctions in order to change the outcome of those auctions in Google's favour and has possibly limited the development of competing auction technologies, among other competition restricting behaviours in the context of negotiations with publishers".

On 27 July 2022, the Commission informed the AdC that, "in view of the scope and impact of the matter in question, it intended to extend the scope of its own investigation on Google to also include the practices and markets under investigation by AdC". Consequently, the AdC was relieved of that investigation[47] and closed it on 6 September 2022. The same is thus conducted by the Commission. Interestingly, the AdC made clear to the Commission importance of investigating the Portuguese markets "in view of the serious concerns identified in its investigation" and "has also made available to the Commission all the information collected during its investigation", notably "the information given by the Portuguese market stakeholders".

Already in a speech of 5 May 2022[48], a member of the Board of the AdC explained that in the context of the investigation it was found that "the agreement meant that each competitor refrained from targeting specific customers of rival companies, thus restricting competition both in the national telecom markets in which they are active and the national market for paid search advertising, by reducing the number, variety and quality of ads viewed by users of Google search. Therefore, it reduced the quality of this service as well". Although by then no final decision had yet been taken, that case was said to illustrate "the significance of search advertising for businesses today as a vital instrument for competition and differentiation, since it targets consumers when they are more willing to buy and perhaps change provider (the so-called performance phase)".

[46] Available at: https://www.concorrencia.pt/en/articles/portuguese-competition-authoritys-google-investigation-moves-european-commission

[47] Council Regulation n.º 1/2003.

[48] During the International Competition Network Annual Conference – at the Breakout session on "Theories of harm in digital markets" in Berlin. Available at https://www.concorrencia.pt/sites/default/files/MJM%20Theories%20of%20harm%20in%20digital%20markets%20ICN%20Berlin%20May%202022.pdf

b)

Given the above answer, it is likely that the outcome of current cases against the large US digital platforms will be well received by the AdC.

c)

The abovementioned speech of 5 May 2022[49] provides some insight on the way the AdC understands the Digital Markets Act (DMA). As referred to an AdC's member of the Board, in 2021, the AdC was directly involved in the negotiations of that legislation during the Portuguese Presidency of the Council.

The AdC is expected to see the DMA as "an ex-ante complementary tool to the case-by-case antitrust enforcement work of competition agencies in the future. Therefore, it will not replace competition enforcement in digital, which will continue, and perhaps may even intensify, given the acceleration of the digital transition and the burst in e-commerce. The interplay between the DMA, which will be enforced by the Commission, and competition rules, which will continue to be enforced by national agencies, will require an even closer cooperation between these institutions, to avoid, for example, conflicting decisions or remedies imposed on gatekeepers. Therefore, the DMA includes provisions whose purpose is to coordinate DMA proceedings with antitrust proceedings and on exchanging information between enforcers within the framework of the European Competition Network (ECN)".

d)

Both extremes, either the risk of inconsistencies or over-enforcement, can be avoided if there is a good cooperation between national enforcement agencies and the Commission. The ECN appears indeed to be the ideal tool for such cooperation[50].

Question 8

State aid is acknowledged to be able to distort competition in the internal market. The EU has had an approach towards this type of aid that is more demanding than that adopted in other regions of the globe. The growing protectionism in other areas of the globe and especially the scale of direct foreign investment in the EU during the last decade have brought much criticism on the uneven level playing field of EU companies when compared to companies from third countries.

[49] See above footnote 48.

[50] In 2021 the national competition authorities of the European Union at the ECN Directors General's meeting of 22 June 2021 endorsed a Joint paper on "How national competition agencies can strengthen the DMA".

As such, the recent industrial policy of the EU is to be implemented through a complex toolbox. That comprises notably the EU Regulation on the screening of foreign direct investment[51] and the soon to be adopted EU Regulation on foreign subsidies distorting the internal market[52].

In parallel, the approach towards State aid is evolving and we assist at a reflection on the challenges arising from exceptional circumstances such as the 2020 COVID 19 pandemics and economic crisis and this year's war in Ukraine.

Nevertheless, a "strong industrial player" should be able to grow in a competitive environment without prejudice to developing its activity on the basis of its merits.

In Portugal, the role of the AdC in respect of State aid is rather limited. Pursuant to Article 65(2) of the CA, the AdC may examine any aid or aid project and formulate to the Government or any other public entity the recommendations it deems necessary to eliminate the negative effects on competition. However, aid schemes are not required to be notified to the AdC for previous approval. The role of AdC is therefore only of issuing recommendations. Public authorities decide on the public policy objectives of eventual aid schemes.

The crisis triggered by the COVID-19 pandemic forced governments and public authorities to reassess many premises and review long-term practices. One example of such challenges was the swiftly adoption by the Commission of a Temporary Framework for assessing collaboration agreements in response to situations of urgency stemming from the COVID-19 outbreak, in parallel with the national competition authorities' willingness to act in the same line[53].

On 19 March 2020, the Commission adopted the State Aid Temporary Framework, which was amended six times. Its aim was "to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the coronavirus outbreak". In parallel, the remaining State aid legal framework, such as the one on rescue and restructuring aid, continued to be applicable by the Commission.

Even though there is an increasing awareness of the impact of State aid that has been authorized, it is still premature to draw lessons on the Commission's practice during

[51] 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.

[52] On 30 June 2022, the interinstitutional negotiations of the legislative proposal have led to a provisional agreement between the European Parliament and of the Council.

[53] Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

such exceptional times. Moreover, before a full economic recovery post-COVID 19, the EU economy is also being highly impacted by the ongoing war in Ukraine.

In times of uncertainty and rapid evolution of sectors which impact the whole economy, such as the digital one, the assessment of whether "the long-term viability" of a strategic European industry sector is to be considered as relevant factor in future State aid decisions may bring increased legal uncertainty as such. This is without prejudice to the fact that the main sustainable development goals may prove to be useful to reduce the degree of uncertainty concerning the future.

During the COVID-19 pandemic, in Portugal, the political debate turned around the question whether the main national air carrier, TAP, should be regarded as a "strategic national company" that would justify to be rescued.

Question 9

Portuguese courts do not make an intensive use of the remedies and tools available: for example, in the first 20 years following the accession of Portugal to the EU, only 60 preliminary requests pursuant to Article 267 TFEU wee formulated to the Court of Justice. Likewise, the Portuguese courts have not made themselves available of the possibility to ask the Commission for information on questions concerning the application of State aid rules.

Geopolitical instruments, trade defence instruments, and competition policy

Question 10

There is no publicly available information on any investigation where existing trade instruments affected the AdC's competition law analysis.

TRADE

FDI control

Question 11

a)

In Portugal, Decree-Law 138/2014, of 15 September establishes a regime for the safeguarding of strategic assets essential to guaranteeing public security.

That decree-law grants the Council of Ministers, on the basis of a proposal by the member of the Government responsible for the sector in which the strategic asset

in question is integrated, in exceptional circumstances and through a reasoned decision, the power to oppose the conclusion of legal transactions that result, directly or indirectly, in the acquisition of control, directly or indirectly, over infrastructures or strategic assets by natural or legal persons from third countries to the European Union (EU) and the European Economic Area (EEA).

Any possible opposition decision is subject to judicial control by the administrative courts, which control is effective, insofar as the provision in that decree-law of objective and transparent decision criteria allows the competent courts to review, taking into account in particular the reasoning of the decision, compliance with the provisions of the law.

b)

The FDI Screening Regulation is directly applied in Portugal. However, the national regime is far less intrusive. There is currently no publicly available information on any scrutiny of third party direct investments falling within the scope of the national decree law.

c)

Third country investors (natural or legal persons from third countries to the EU or EE) and only in respect of investments, which are structural and long-lasting, thus constituting concentrations from a competition law viewpoint.

d)

Energy, communications and transports.

e)

The member of the Government responsible for the sector may, by means of a reasoned decision, initiate a procedure for evaluating the operations that result, directly or indirectly, in the acquisition of control, direct or indirect, of infrastructure or strategic assets, within 30 days after the conclusion of the legal transactions relating to such operations or after the date from which such transactions become generally known.

The investors must send the information and documents related to the operation to the Government member responsible for the area, after which the Council of Ministers, on the basis of a proposal from that Government member, has a period of 60 days to exercise its power of opposition.

In this way, the public interest of national defence and security and the security and continuity at all times of essential services are safeguarded, without the opposition

regime representing State interference in the management and exploitation of the assets in question.

The concepts of de facto or de jure control adopted are those defined by national law and European Union law on competition matters, as well as by the case law of the CJEU.

f)

No. Merger control and FDI control are completely separate mechanisms, applied by different entities.

g)

No national rules in this respect have been adopted so far.

h)

Any eventual opposition decision by the government is subject to judicial review by the administrative courts.

i)

Not in Portugal. No amendment of the 2014 regime so far[54].

Trade defence and public procurement – foreign subsidies

Question 12

There has been no public debate so far in this respect.

[54] In its First Annual Report on the screening of foreign direct investments into the Union delivered on November 2021, the Commission mentioned that Portugal was one of two Member States "having initiated a consultative or legislative process expected to result in the amendments to an existing one". Moreover, in the Staff Working Document on the same Report it was expressly mentioned that there were efforts "ongoing to update the existing screening legislation". Amongst them were included the following ones:

The establishment in 2020 of an inter-ministerial Working Group at technical level; The discussion of a set of possible changes to the existing law – acknowledgment of "initial agreement on adjustments proposed, including on: the alignment of deadlines between national and EU mechanisms, the establishment of the contact point and the introduction of the possibility of imposing mitigation measures

It was further referred that "A number of important issues remain to be decided. It is therefore not yet possible to conclude the review and begin the legislative process".

Notwithstanding, in page 9 of the Commission's Second Annual Report on the screening of foreign direct investments into the Union, dated 1 September 2022, Portugal is solely included in the list of Member States with "National FDI screening mechanism in place" and not on the one mentioned above. Moreover, in page 35 of the Commission's Staff Working Document on the same Report, it is stated that "Portugal currently has no ongoing initiatives that may result in amendments to its existing screening mechanism".

Question 13

Transposing the existing competition, public procurement and trade defence frameworks to the assessment of foreign subsidies runs the risk of raising similar concerns to the ones highlighted above in respect of the introduction of "sustainability" elements in competition analysis.

Indeed, screening foreign investments requires a case-by-case analysis. In the context of that analysis, there are public policy choices to be made, as well as relevant considerations of international policy to be taken into account. Public authorities, composed by political elected representatives, are best placed to make those choices.

In the context of competition assessments, verification of the respect of public procurement rules or the implementation of existing trade defence instruments, the final decisions should be adopted on the basis of a sound economic analysis and a strict respect of the legislative framework. This is the best way to ensure that such decisions will be able to meet the scrutiny of courts, both at EU level as well as at international level.

Mandatory due diligence and regulating supply chains

Question 14

In Portugal, the criminal regime for corruption in international trade and in the private sector was established by Law no. 20/2008 of 21 April, as amended.

The law applies to foreign officials, officials of international organizations, holders of foreign political office, workers in the private sector and entities of the private sector.

The law is applicable, in cases of active corruption with prejudice to international trade, to acts committed by Portuguese nationals or by foreigners who can be found in Portuguese territory, regardless of where the practice of these facts has taken place.

Regarding crimes of active or passive corruption in the private sector, the law is applicable, also irrespective of the place where the facts were committed, when the agent is a national official or holder of a national political office or, if it is a Portuguese national, an official of an international organization.

The Portuguese Securities Code ("Código dos Valores Mobiliários")[55] contains the most relevant provisions regarding the duty of care/due diligence obligations that

[55] Decree-Law n.º 486/99, of 13 November, as amended.

apply to listed companies. For example, Article 26(I)(1) of the Securities Code concerns the "Involvement Policy". It provides that:

"Institutional investors who invest, directly or through a financial intermediary that provides portfolio management services in shares traded on the regulated market, and financial intermediaries that provide portfolio management services, to the extent that they invest in shares traded on the regulated market on behalf of investors, shall prepare and disclose to the public a policy of shareholder involvement in their investment strategy, describing how:

a) to monitor the subsidiaries with regard to relevant issues, including strategy, financial and non-financial performance, risk, capital structure, social and environmental impact and corporate governance"

See also Law No. 99-A/2021, of 31 December.

The following legal instruments are also relevant:

- Decree-Law No. 89/2017, of 28 July (as amended), which transposes Directive 2014/95/EU of the European Parliament and of the Council, of 22 October 2014, into Portuguese law, amending Directive 2013/34 /EU, with regard to the disclosure of non-financial information and information on diversity by certain large companies and groups.
- Law nº 50/2020, of 7 August, which transposes into the Portuguese legal system Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017, concerning the rights of shareholders of companies listed on the regarding their long-term involvement.
- The General Regime for Collective Investment Undertakings, Law no. 16/2015, of 24 February, as amended.

There are also other instruments that impose a duty of care to companies, in the context of climate law: Law no. 98/2021 of December 31. For example, Article 38(1) provides that "companies shall consider climate change in their respective corporate governance and incorporate, in their decision-making processes, an analysis of climate risk"; and moreover (2) "the duties of care, loyalty and of reporting the management and presenting accounts, in charge of the managers or administrators and the holders of governing bodies with supervisory functions, shall include prudent consideration and transparent information sharing about the risk that the climate change poses to the business model, capital structure and assets of companies".

Finally, (3) "Companies shall assess, in relation to each annual financial year, the economic, environmental and social dimensions and exposure to climate change

of the carbon impact of their activity and operation, integrating this assessment in the respective management reports, and may define a budget of carbon, establishing a total maximum limit for greenhouse gas emissions that consider the targets set out in this law. 4 — Companies and entities in the State business sector shall include, within the scope of informational obligations, namely those provided for in the Securities Code, a chapter that reports the climatic risks faced by those companies, following the recommendations and good practices of disclosing the climate information".

There are also provisions regarding the exposure to climate issues and the review of corporate governance rules: Article 78 (1) of the Securities Code states that "the regulatory and supervisory entities shall identify, within one year after the publication of this law, the legislative and regulatory changes necessary for companies to integrate into corporate governance the exposure to climate scenarios and the potential financial impacts resulting therefrom…".

a)

Listed companies are concerned by the above-mentioned laws.

b)

Listed companies should comply with the obligations provided for in the Securities Code as well as in specific legislation (please see above).

c)

d)

The obligations contained in the Securities Code apply to listed companies. However, the criminal regime for corruption in international trade and in the private sector established by Law no. 20/2008, of 21 April (as amended) can have extra-territorial effects, given that it applies in cases of active corruption with prejudice to international trade, to acts committed by Portuguese nationals or by foreigners who can be found in Portuguese territory, regardless of where the practice of these facts has taken place.

f)

Liability for offenses provided for in the Securities Code are punishable by the Securities Commission. Natural and legal persons, irrespective of the regularity of their constitution, can be made liable. Holders of governing bodies, their representatives and workers can be made liable. The liability of legal persons and similar entities does not exclude the individual liability of the respective agents.

Auditors can also be responsible for damages caused to issuers or third parties due to a deficiency in the report or opinion prepared by the auditor.

Question 15

The Portuguese government is currently considering the revision of the Commercial Companies Code as well as the adoption of further legislation.

The purpose is to ensure greater involvement of shareholders in corporate governance. Asset managers should also further inform the institutional investors regarding their approach to asset management and social, environmental and governance matters.

ROMANIA

Raluca Dinu[1], Eduard Calinoiu[2], Dana – Andreea Brailoiu[3]

COMPETITION

Green competition policy

Question 1

The Romanian Competition Council (RCC) welcomes the European Commission's approach towards a smooth transition to a green economy, to insure that competitive markets send the right signals to the business environment, while allowing customers and consumers a fair share of the resulting benefits. By keeping markets open and competitive and ensuring a level playing field, competition policy helps achieving the Union's wider priorities as set in its regulatory policies. The EU antitrust rules are applied in parallel by the European Commission and the national competition authorities and/or the national courts, contributing to the objectives of the European Green Deal, by sanctioning anticompetitive conduct which imposes restrictions on the development or launch of clean technologies or that forecloses markets or blocks access to the essential infrastructure.

Considering the ongoing review of the Horizontal Block Exemption Regulations, RCC embraces the general view with regard to consistency with the principles of the European Green Deal, while preserving the level playing field on the markets, to avoid hard-core restrictions of competition. By way of exemption, cooperation agreements aiming at pursuing genuinely green initiatives might potentially be excluded from the prohibition under Article 101(1) TFEU, only if the benefits that they create for customers offset the harm that they cause to them and all the criteria provided for in Art. 101 (3) TFEU are cumulatively met.

Against this framework, RCC observes the difficulty, in practice, to quantify the efficiency gains for environment alleged by the parties, taking part in the

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sustainability agreements. However, the parties have to explain in detail how exactly the agreement contributes to the sustainable objectives, certified expertise being relevant in this regard.

Moreover, RCC shares concerns on agreements imposing restrictions on output (disruption of or even agreements to stop manufacturing certain products), based on environmental criteria, which could remove competition or foreclose the market and suggest to limit the scope to precisely identify those cases in which competition can be removed based on objective criteria for a limited period of time, to avoid information exchange between parties with potential to foreclose the market. In addition, the parties should provide guarantees that competition will take place after that limited period elapses and the development of competition could be clearly perceived.

When a private action in which the parties plead sustainability arguments is brought to justice, the national courts have the power to analyze if the parties' allegations regarding the fulfilling of the conditions of exemption set by national and European legislation are met.

RCC has no information on the experience of the national courts in analyzing the arguments of a party regarding conditions in which a sustainability agreement is concluded.

Question 2

At least with regard to the efficiency gains related to sustainability and /or, conversely, regarding the risk of reduction of the green technologies used, at the moment, we consider that not all the necessary aspects are fully clarified in order to conduct an evaluation, in concrete cases, to show to what extent consumers are harmed, due to the reduction of the ecological technologies used.

In principle, to the extent that consumers are harmed by the proposed transaction, for example by reducing the range of friendly environmentally products or technologies, as well as a result of significant obstacles to competition on the Romanian market or on a part of it, in particular as a result of the creation or consolidation of a dominant position, the respective transaction could (in principle) be prohibited, by the decision of the Competition Council, following the specific provisions of the national regime for the evaluation of mergers (art. 11 of the Competition Law no. 21/1996, republished, and amended).

Question 3

Granting of State aid by each Member State in compliance with the common rules applicable at EU level allows targeting according to industrial policy goals while keeping a fair level playing field for all the market players.

Certainly, financing projects from the perspective of the State aid legislative framework, which involve sustainable development criteria, should be encouraged in order to have a positive impact on the environment and on the society. Thus, through sustainable development, an entrepreneur will be able to grow without adversely affecting the environment, the community or the society in which it is located.

Such projects, which may involve sustainability, could also be framed as a result of the adoption of the Regulation (EU) no. 241/2021 of the European Parliament and of the Council of 12 February 2021 establishing the instrument for recovery and resilience, within the national resilience and recovery plans of all Member States.

Question 4

Competition policy should not disregard the importance of preserving functional, undistorted and competitive markets, therefore RCC shared the approach of DG Competition at that time. The Siemens/Alstom transaction would have created the undisputed market leader in some signalling markets and a dominant player in high-speed trains industry. It would have significantly reduced competition in both these areas, depriving customers, including train operators and rail infrastructure managers of a choice of suppliers and products.

The merged entity would have held very high market shares both within the EEA and on a wider market also comprising the rest of the world except South Korea, Japan and China (which are not open to competition). The merged entity would have reduced competition significantly and harmed all the European customers. The parties did not bring forward any substantiated arguments to explain why the transaction would create merger specific efficiencies. In all of the above markets, the competitive pressure from remaining competitors would not have been sufficient to ensure effective competition.

With regard to similar cases, the economic concentration by which CELANESE CORPORATION (USA) acquired sole direct control over the assets of ACETATE PRODUCTS LIMITED (UK) may be mentioned[4].

However, taking into consideration that Romania's accession to the European Union took place on the 1st of January 2007, it must be underlined that the case was opened before the accession date, i.e. on the 19th of September 2006.

[4] Case RS – 95/19.09.2006.

The relevant market was defined as being the market for the sale of cellulose acetate fibers in the form of tow on the Romanian territory.

The economic concentration resulted in a market share for the parties to the concentration of around 80%. However, the analysis took into consideration that future likely entrants on the market included XIAN HUI'DA CHEMICALS INDUSTRIES COMPANY (China), DAICEL CHEMICAL INDUSTRIES (Japan) and NCF (China), as well as future increased production from RHODIA ACETOW GmbH (Germany) and EASTMAN CHEMICAL ENGLAND (UK), the final decision being to approve the economic concentration.

Question 5

Please note the reply provided at Q 4.

Question 6

In accordance with the national competition law, the Competition Council is an autonomous administrative authority. As a consequence, its decisions approving or blocking mergers on competition law grounds cannot be overruled on industrial policy grounds or other similar grounds by the Government of Romania, a ministry or by other central administrative authority.

However, until the 13th of April 2022, the Supreme Council of National Defense (Romania) had the power to block mergers in certain strategic areas on national security grounds.

Starting with the 14th of April 2022, a new body was established, the Commission for the Examination of Foreign Direct Investment, under the Government of Romania, replacing the previous legal regime. The new legislation was enacted in line with 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.

Question 7

a.

No, RCC has not conducted antitrust cases against gatekeepers.

b., c. and d.

The enforcement of DMA is complementary to the enforcement of competition rules and this could be noted from the cooperation between the competition authorities and the European Commission – DG Competition – to set up a functional mechanism to effectively enforce both DMA and competition rules across EU.

Question 8

The term "market failure" refers to situations in which markets, left to operate on their own, are unlikely to produce effective results. As it is generally accepted that competitive markets tend to lead to cost-effective and resource-efficient results in market failure situations, state intervention may improve the functioning of markets and therefore contributes to smart, sustainable and inclusive growth.

State aid is an important pillar in the development of high-performing companies, by supporting the development of new production units, in order to optimize logistics costs, increase the independence of non-European markets and rebalance the trade balance.

In accordance with the State aid legislative framework, in order to be able to assess the anti-competitive effects, the Commission assesses the financing project *prima facie* on the basis of the following considerations: the procedure followed by the Member State for selecting the beneficiaries; the market features and the beneficiaries targeted; the amount and the type of aid.

At the same time, some provisions of the European legislative framework also refer to the obligation to justify the real incentive effect. In order to demonstrate such an effect, the Member State may provide evidence that the aid has led to an increase in the size or scope of a project.

Market failures cannot be solved by entrepreneurs acting on their own initiative or mobilizing their own resources as they have no economic interest in investing in their solution and, on the other hand, they are aware that any investment in reducing market failures will affect their competitiveness and reduce their profits or produce even losses. Therefore, the role of solving or reducing market failures belongs to the state.

The state has two main options, as follows: a) legislative regulation of certain sectors/areas/activities/categories of problems in which market failures occur, namely by the establishment of mandatory legal norms for all economic actors; b) granting financially quantifiable advantages to enterprises, aiming at the financial compensation of certain market failures. The granting of such facilities for the

benefit of enterprises may take the form of State aid. Importantly, there must always be a causal link between the granting of State aid and the market failures to which it is addressed. The granting of State aid is justifiable only in the areas where the various market failures occur, and the amount/level of aid granted must be proportionate to the level of failure to be compensated.

The opportunity and necessity of granting aid, the method or instrument for granting it must be determined by studies and analyses of opportunity carried out before the actual establishment of such measures. The prevalence of positive over negative effects of aid is one of the main criteria taken into account by the European Commission when assessing the compatibility of different categories of aid.

Here are some examples of possible market failures and State aid that could be used to reduce them, as follows:

a. Less developed areas attract less investment can be supported through regional State aid for investment.

b. Underfunded economic sectors or facing overproduction crises can be supported through sectoral State aid.

c. Small and medium-sized enterprises that have difficult access to finance can be supported through State aid for SMEs.

d. Firms in difficulty face the impossibility of continuing their activity can be supported through State aid for rescue and restructuring.

e. Utilities / certain services are not provided to the population or their market price is too high, can be supported by compensations granted to companies for the provision of a public service obligation / service of general economic interest.

f. Disadvantaged workers are not employed by entrepreneurs; they can be supported through State aid for the recruitment and employment of disadvantaged and disabled workers.

g. Vocational training is not a priority for companies, a situation that can be remedied through State aid for vocational training.

h. Research is not encouraged, and in this case, the state can intervene by providing State aid for research, development and innovation.

i. The environment is not protected - facilities can take the form of State aid for environmental protection and energy efficiency.

In particular, in order for the Member States to cope with the global economic crisis (the coronavirus pandemic, the war in Ukraine etc.), for markets to function properly, the European Commission has adopted new legislation to allow much more flexible financing and to cover the shortcomings of the economic crisis. Thus, Member States have implemented support measures for citizens or businesses, some of which have involved State aid within the meaning of Article 107 (1) TFEU.

The new legislative framework adopted by the European bodies, which aimed at introducing State aid rules, to support the Member States for a good economic recovery, can be noted below, as following:

a. Communication from the Commission Temporary framework for State aid measures to support the economy in the current Covid-19 outbreak C (2021) 8442;

b. Communication from the Commission Temporary crisis framework for State aid measures to support the economy following the aggression against Ukraine by Russia (2022 / C 131 I / 01);

c. Regulation (EU) no. 241/2021 of the European Parliament and of the Council of 12 February 2021 establishing the instrument for recovery and resilience;

d. Draft revision of Commission Regulation (EC) no. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market pursuant to Articles 107 and 108 of the Treaty.

The European Commission, in its decision-making practice, could take into account considerations on the competitiveness of the EU economy as a whole. In this regard, projects of common European interest (such as Important Projects of Common European Interest - IPCEI, energy infrastructure, Research-development-innovation, microelectronics, etc.) are an example and should be encouraged.

Therefore, with regard to the State aid and de minimis funding, we consider that there are benefits at European level for good economic development, through the adoption of the new financial instruments, to provide flexibility in the conditions of eligibility for a simplified access to funding, as well as simplified and more targeted procedures.

Question 9

RCC is not a party of the State aid proceedings pending before national courts in the matter, therefore the information we have is limited.

However, in known cases before national courts regarding State aid (in particular, State aid recovery cases) the procedural means of cooperation between the European Commission and the national courts were used. Thus, in such cases, the European Commission made written observations before the national courts, pursuant to the Council Regulation (EU) no. 2015/1589 and the Commission Notices on the enforcement of State aid rules by national courts.

Question 10

The RCC has no such experience where existing trade instruments affected its competition law analysis.

TRADE
FDI control

Question 11

On April 14, 2022, the Romanian Government adopted the Emergency Ordinance no. 46/2022 regarding the implementing measures of the 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, as well as for the amendment of the Competition Law no. 21/1996 (hereinafter referred to as "GEO no. 46/2022").

GEO no. 46/2022 provides for the cases, which fall under the scope of the normative act, the conditions to be met by interested parties when filing requests for the authorization of foreign direct investments and sets up the FDI Screening Commission (CEISD) in charge with the evaluation of the screening procedure of investments under national security and public defense criteria, which fall under the scope of application of GEO no. 46/2022.

a.

Given that, the GEO no. 46/2022 entered into force on April 18, 2022, there is limited practice based on the enforcement of the national legal instrument.

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

b.

The national legal provisions may go beyond the harmonisation achieved by the Regulation. First of all, new investments also fall within the scope of application of GEO no. 46/2022. New investments are defined as initial investment in tangible

and intangible assets within the same scope related to starting the activity of a new undertaking, expanding the capacity of an existing undertaking, diversifying production of an undertaking with products, which have not been previously manufactured or a fundamental change of the general production process of an existing undertaking.

Secondly, shall the respective transaction also represent a notifiable concentration, according to the Competition Law no. 21/1996 as amended, the RCC shall inform the CEISD (the Commission in charge of examining foreign direct investments) about the notified mergers which are likely to be examined from the perspective of the national security or public order. In other words, the screening procedure shall equally apply to investments made by EU investors, which can be notified under the merger regime, if they might have an impact on the national security or public order or they present the aforesaid risks.

c.

The screening procedure applies to the following investments of foreign investors:

a. Foreign direct investments;

b. New investments (as defined in the answer to the previous question).

These investments will be examined by the Commission for Examining Foreign Direct Investments if the following cumulative conditions are fulfilled:

c. The investment refers to the domains enlisted in the Decision no. 73/2012 issued by the CSAT, namely:
    1. Security of citizens and communities;
    2. Border security;
    3. Energy security;
    4. Transport security;
    5. Security of vital supplies systems;
    6. Security of critical infrastructure;
    7. Security of information and communication systems;
    8. Security of financial, fiscal, banking and insurance activity;
    9. Security of production and circulation of weapons, ammunition, explosives and toxic substances;
    10. Industrial security;
    11. Disaster protection;

12. Protection of agriculture and environment;
13. Protection of privatization in case of state-owned enterprises.

The value of the investment exceeds the threshold of €2,000,000 determined at the exchange rate communicated by the National Bank of Romania valid for the last day of the financial year preceding the investment. By way of exemption, investments which do not exceed the threshold of €2,000,000 can be subject to screening procedure if, by their nature or potential effects, according to the criteria set for the art. 4 of the FDI Regulation, the respective investments can have an impact on security or public order or they present such risks.

As far as the notion of foreign investor is concerned, GEO no. 46/2022 provides for the following definition: (i) the natural person, who is not a citizen of a Member State of the European Union, or an undertaking, which is not headquartered in a Member State of the European Union having made or intending to make a foreign direct investment in Romania, (ii) the undertaking which is headquartered in the EU, having made or intending to make a foreign direct investment in Romania, controlled directly or indirectly by a natural person, who is not a citizen of a Member State of the European Union, or an undertaking, which is not headquartered in a Member State of the European Union or by any other entity without legal personality, organized based on the legislation of a third country; (iii) the trustee of an entity without legal personality having made or intending to make a foreign direct investment in Romania or a person in a similar position, if he/she is not a citizen of the European Union, in the case of a natural person, or if the undertaking does not have its headquarters in a Member State of the European Union, in the case of a legal person, or if that undertaking was incorporated under the law of a State which is not a Member State of the European Union.

By way of exemption, if the investment also represents a merger, which must be notified to the RCC, the latter shall inform the CEISD about the notified merger, which is likely to be examined from the perspective of national security. Consequently, EU investors may also be subject to the FDI control.

d.

As previously mentioned, the sectors/domains subject to FDI control are those provided in the Decision no. 73/2012 issued by the CSAT, namely:

1. Security of citizens and communities;
2. Border security;
3. Energy security;
4. Transport security;

5. Security of vital supplies systems;
6. Security of critical infrastructure;
7. Security of information and communication systems;
8. Security of financial, fiscal, banking and insurance activity;
9. Security of production and circulation of weapons, ammunition, explosives and toxic substances;
10. Industrial security;
11. Disaster protection;
12. Protection of agriculture and environment;
13. Protection of privatization in case of state-owned enterprises.

e.

The main purpose of the Commission established by GEO no. 46/2022 is to evaluate the risk to public order and/or national security. According to the provisions of art. 7 of GEO no. 46/2022, CEISD is formed by representatives of several ministries and authorities, whereas the Competition Council ensures the administrative mechanism so that the Commission can conduct its activity. The secondary legislation establishing the screening procedure and the mechanism for evaluating potential risks of foreign direct investments is not yet in force.

f.

Although the approval of the investment is based on national security criteria, according to the GEO no. 46/2022, the economic and social security issues are to be considered when assessing the benefits of such investment for the sectoral or overall development of Romania.

g.

Yes, work is in progress.

h.

According to GEO no. 46/2022, the CEISD will adopt an opinion related to the examined investments, deciding on either the authorization, the conditional authorization or the rejection of the investments. In the first case, the final decision is issued by the Competition Council, whereas in the latter cases, the Romanian Government will issue a Government Decision.

The Decision issued by the Competition Council can be contested within 30 days from its communication, following the procedure of administrative litigations,

before the Bucharest Court of Appeal. The Government Decisions can be contested based on the national legal procedure for the annulment of administrative acts, as prescribed by the Law no. 554/2004 on administrative litigation.

i.

The COVID-19 pandemic did not affect the application of FDI mechanism, since GEO no. 46/2022 entered into force on April 18, 2022.

Trade defence and public procurement – foreign subsidies

Question 12

RCC has been in favour of a cooperation mechanism between the European Commission and the relevant national public authorities, to provide for an efficient exchange of information and coordination, in particular in those instances in which the subsidized undertakings have an EU wide presence.

The Romanian delegation supported the legal proposal aimed at tackling foreign subsidies distorting the internal market. This consolidates the European toolbox aimed at achieving a level playing field but also offers to both investors and member states a degree of standardization of the assessment.

The procedural autonomy should be in line with the overall priorities and obligations inherent to membership. The EU has to act for securing the level playing field between EU and non-EU enterprises; the public procurement sector should be compliant to both competition rules and security expectations. The EC has to act as an integrator in legal affairs of such strategic scope and therefore the Member States should get along without too much exemptions and delays.

Question 13

The new intervention tools in regard to public procurement or economic concentrations, respectively the more general instrument that would allow to tackle all other economic situations are meant to cover a wide range of market-distortion contexts.

In terms of substance, we consider that the policy should benefit of a wide level of ambition, in order to cover under its scope as many harmful situations as possible.

Furthermore, equipping this level of ambition with adequate procedures and enforcement action is of paramount importance for the actual effectiveness of the policy. Here, rules should mirror the same level of control as prescribed by State aid rules for EU companies.

Without guaranteeing an appropriate level of enforcement, the proposed Regulation will come short of its objectives.

In order to remain attractive for foreign direct investors, the frameworks for merger review, foreign direct investment screening and foreign subsidies control should be articulated in a coherent and integrated manner, as to make sure that the different procedural frameworks allow for legal certainty and timely decisions. That is why we consider the national and EU bodies in charge of competition to be well placed to act as institutional facilitators for achieving the common ground of tangible results.

Mandatory due diligence and regulating supply chains

Question 14 – N/A

Presently, there is no legal framework in force establishing a duty of care/due diligence obligation applicable to companies to respect human rights and environmental law throughout the supply chain.

However, in practice, corporate responsibility programmes, voluntarily adopted by the companies, sometimes provide for measures that the companies and their respective subsidiaries implement with respect to human rights and environmental concerns. Such measures include screening of the vendors as regards to their production facilities, imposing certain contractual clauses on the commitment of the parties regarding forced labour, exploitation or children being used as workers etc.

Question 15 – N/A

As the directive in not yet available, it is difficult to assess what main challenges we will face in enforcing and implementing the duty of care/due diligence obligation/legislation.

SLOVAKIA

Ondrej Blažo, Hana Kováčiková[1]

COMPETITION

Question 1

a.

In several recent years, the Slovak National Competition Authority (Protimonopolný *úrad* Slovenskej republiky/Antimonopoly Office of the Slovak Republic [AMO]) focuses on bid rigging cases in the field of agreements restriction of competition [2] Thus, in this narrow-focused activity of the NCA there is no space for any sustainability assessment and the AMO deals with quasi-per se prohibited agreements. Sustainability considerations are not mentioned in strategic document as the "Prioritization Policy", i.e. protection of sustainability goals is not included into priorities and they are not referred as the reason for the more relaxed approach, as well. Similarly, sustainability goals are not in any form mentioned in the guidelines on fine setting.[3]

The Slovak competition law (Act No 187/2021 Coll. on the protection of competition [APC]) fully copies system of statutory exemptions from the prohibition of agreements restricting competition [§4(4) APC copies the wording of Art. 101(3) TFEU and *§4(5)* APC incorporates the European Commission's Block Exemptions Regulations directly into Slovak legal order expanding their application to cases having non-appreciable effect on trade). Hence, it its highly probable that in the case of necessity of application of any rule on exemption form prohibition of anti-competition agreement, the AMO will the practice of the European Commission without any contest, even in the purely national cases, and it will not develop any autonomous approaches.

[1] Comenius University in Bratislava. This report is an output within the projects VEGA No 2/0167/19 (2019-2022) and 620758-EPP-1-2020-1-SK-EPPJMO-CoE: „Rule of Law in the European Union"

[2] Blažo, O.: „Proper, transparent and just prioritization policy as a challenge for national competition authorities and prioritization of the Slovak NCA" (DOI: 10.7172/1689-9024.YARS.2020.13.22.5) and data and sources referred therein.

[3] https://www.antimon.gov.sk/data/files/1784_metodicky-pokyn-o-postupe-pri-urcovani-pokut-v-pripadoch-zneuzivania-dominantneho-postavenia-a-dohod-obmedzujucich-sutaz_1582022.pdf

b.

In Slovakia, there is no relevant practice in enforcement of competition law via private actions, thus it is not possible to draw any conclusion on willingness of the court to involve sustainability arguments in private actions. The statutory law does not provide any explicit provision in this issue, as well.

Question 2

Provision of §11 of the Slovak Act on protection of economic protection almost literally follows SIEC test under the EU Merger regulation and thus does not include any possible criteria for merger evaluation other than the SIEC test provides.

Question 3

Although the Slovak competition law does not include any provisions allowing to include other considerations than purely competition context, it must be noted that the Constitution of the Slovak republic (1992) defines country's economy as "based on the principles of socially and ecologically oriented market economy" [Article 55(1)]. The Constitution requires the protection of economic competition as another constitutional principle of national economy [Article 55(1)], nevertheless, these principles of socially and ecologically orientation of national economy were not reflected in the Slovak competition law.

Question 4

a.

Information of exact position of Slovakia in Siemens-Alstom merger is not accessible. However, Slovakia was a party to Joint statement[4] of Friends of Industry of 18 October 2018, which was adopted at 6th Ministerial Meeting in Paris. In this document, it recognised Industry as a key driver for growth as well as threats coming from protective industrial strategies of other major economic blocks. On the other side, from the Opinion[5] of the Advisory Committee on Mergers of 31 January 2019 as well as Commission's decision[6] of 6 February 2019 it can be assumed that Slovakia did not oppose the Commission's decision.

[4] Available at. https://www.bmwk.de/Redaktion/DE/Downloads/F/friends-of-industry-6th-ministerial-meeting-declaration.pdf?__blob=publicationFile&v=6 (accessed on 22 October 2022)

[5] Available at: https://ec.europa.eu/competition/mergers/cases/additional_data/m8677_9375_3.pdf (accessed on 22 October 2022)

[6] Case M.8677 – SIEMENS/ALSTOM

This might be supported also by the fact that Slovak AMO usually strictly follows the position of the Commission in competition cases.

b.

This information is not available.

Yet, it should be pointed out that initially the Commission raised objection in the Statement of objections in respect of Slovakia only as regards to ETCS ATP wayside overlay projects and ETCS ATP wayside re-signalling projects (see para 24). After submitting the observation of the Parties, Commission did not maintain its objection in Slovak market, as it had concluded that the market is EEA-wide only (para. 42). This suggests that in Slovakia did not exist any economically strong market participant to intervene relevantly to this case, nor to the support, nor to the opposition to the proposed transaction

c.

Slovak AMO has not been confronted with similar arguments yet, as it has not assessed the comparable transaction.

Since 2011 it decided 306 merger cases, out of which it approved 269, 3 cases were approved with additional commitments, and only in 1 case[7] it decided on the incompatibility with the market. However, as during the appeal Parties withdraw from the merger, AMO changed its decision from prohibition of merger towards withdrawal of the procedure and stopped the case. In 23 cases, the AMO stopped the procedure without deciding on mergers in merits and in 11 cases it imposed fines due to the realisation of merger without the prior notice or due to the early implementation of it.

In all approving decisions the AMO decided that the assessed transaction did not significantly impede the competition in the relevant market, nor led to the creation or strengthening of a dominant position. The assessment of the need to support of the merger with the aim to support the European Champion was therefore not necessary, as any of the merging subject did not submit them.

Question 5

Slovak AMO is not in the position to include industrial policy concern in its assessment of merger. According to the § 11(1) APC the merger can be approved only if it does not significantly impede effective competition in the relevant

[7] Decision of the Protimonopolný úrad SR of 25 January 2013 in merger AGROFERT HOLDING, .a.s and EURO BAKERIES HOLDING, a.s., Case No. 2013/2K/R/2/002)

market, particularly if the consequence leads to the creation or strengthening of a dominant position.

The text of applicable law gives no space to any discretion of PMU in regard as to lower the strictness of competition rules in favour of "higher goods" in the form of creating the European Champion.

Furthermore, the AMO preserves in its decision-making practise rather technical approach than the discoverable one reflecting to the dynamics of global competition.

Finally, the only fact that AMO is deciding on mergers only on local (i. e. Slovak) level itself is depriving the AMO of right to decide on European Champions just by itself.

As stated above, in last 10 years all assessed mergers were approved, as they neither significantly impeded the competition in the relevant market, nor led to the creation or strengthening of a dominant position. As all of them were decided in the 1st instance (administrative) procedure, no case law of the national courts is available to this regard.

Question 6

The AMO is an independent central state administration body of the Slovak Republic for the protection of competition and state aid coordination[8]. It (exclusively) controls mergers that meet notification criteria.[9] The 1st instanced decisions of the AMO can be reviewed by the 2nd instanced Council of the AMO. The decision of the AMO then can be subject to the judicial review only.

[8] To independency of the AMO see Blažo, O.: „Proper, transparent and just prioritization policy as a challenge for national competition authorities and prioritization of the Slovak NCA" (DOI: 10.7172/1689-9024.YARS.2020.13.22.5) or Patakyová, M. T.: „Independence of National Competition Authorities – Problem Solved by Directive 2019/1? Example of the Antimonopoly Office of the Slovak Republic". (https://doi.org./10.7172/1689-9024)

[9] Pursuant to the art. 8 (1) APC the merger is subject to control by the AMO if (a) the combined aggregate turnover of all the undertakings concerned in the accounting period preceding the merger in the Slovak Republic is more than EUR 46 million and at least two of the undertakings concerned have each achieved a total turnover in the Slovak Republic of at least EUR 14 million in the accounting period preceding the concentration; or (b) the combined aggregate turnover in the accounting period preceding the merger in the Slovak Republic (i) in form of fusion achieved by at least one of the parties to the merger is at least EUR 14 million and at the same time the worldwide total turnover achieved for the accounting period preceding the concentration by the other party to the concentration is at least EUR 46 million; or (ii) in form of acquiring of control achieved by at least one of the parties to the merger over which control is being acquired is at least EUR 14 million and, at the same time, the worldwide total turnover achieved in the accounting period preceding the concentration by any other party to the concentration is at least EUR 46 million.

The government or any other executive body has no competence to overrule a decision of the AMO blocking the merger. Answer to the question therefore must be negative.

Question 7

Due to extent of the Slovak national economy, it is not probable that Slovak authorities will engage any relevant steps towards large US digital platforms. Slovakia is not currently seat of any relevant "player" on digital market. Short-term, change of enforcement activities of the Slovak NCA due to the DMA is not to be reasonably expected.

Question 8

The question of creation of the European industrial champion through the means of competition law is not new. However, as already pointed out by Maincent and Navarro[10] in 2006 'EU does not suffer from the absence of large world-class companies, but rather from the absence of growing companies in new high-technology industries. Moreover, creation of European industrial champion is not just the question of isolated [competition] policy but rather it should be the outcome of synergies of different policies – competition, trade and research.

Economist Efstathiou[11] later stressed that there exists a need to support investment in innovation and favour the screening of foreign investment and the reciprocal access to procurement. Other economists Motta and Peitz[12] then suggest nurturing a culture of innovation, provide a framework leading to world-class infrastructure, an effective education and training system, and well-functioning financial markets.

The European Commission is rather careful when it comes to the state aid: 'An industrial policy that relies too heavily on public sector R&D is unlikely to yield the desired results because of its distance to manufacturing processes and market

[10] Maincent, E., Navarro, L (2006) „A policy for Industrial Champions: From picking winners to fostering excellence and the growth of firms". Industrial and Economic Reforms Papers No. 2, Enterprise and Industry Direcotriate-General, European Commission. European Communities, Office for the Official Publications of the European Communities, ISBN: 92-79-02214-8

[11] Efstathiou, K. (2019) "The Alstom-Siemens merger and the need for European champions", Available at: https://www.bruegel.org/blog-post/alstom-siemens-merger-and-need-european-champions (accessed on 23 October 2022)

[12] Motta, M., Peitz, M. (2019): „Competition policy and European firms'competitiveness", Available at: https://cepr.org/voxeu/blogs-and-reviews/competition-policy-and-european-firms-competitiveness (accessed on 23 October 2022)

conditions.'[13] That does not mean that the Commission rejects to fund R&D projects, but it will focus on support of 'breakthrough innovation' (Commission, 2019, p. 14). To this regard, the Commission clarified that various tools (same as defined above) will be used to meet the industrial goals and therefore state aid is only one of them. As regards to the absence of strong industrial player in Europe, the Commission stressed, that 'there is nothing that requires a European champion to be a single company, as it could very well be a temporary collaboration, or a consortium of companies that complement each other's services and can therefore provide a more complete offer.' The Commission identified various and flexible tools which in their complexity lead to the creation of the European Champion. As the Commission stresses the necessity of increase of private investments to R&D, it seems that it does not consider the state aid as the remedy to the market failure.

The most important lesson to be drawn from this experience is that the Commission by its quick adoption of the State Aid Temporary Framework throwed the safety wheel to various sectors. It enabled Member State to use the full flexibility foreseen under State aid rules to support the economy in the context of the coronavirus outbreak. This flexibility brought mainly the acceleration of the procedure, as tools and reasons for justification, which can be assessed in fastened procedure were identified. On the other side, in compliance with the proportionality principle, cases, where the circumstances did not fall under natural disaster of exceptional occurrences still fell under regular assessment.

The swift reaction of the Commission and acceptance of accelerated procedure indeed might be a good example to be re-used also in other areas. As regards to the support of European industry sector, Commission in its 2019 EU Industrial Policy Paper stressed, that it intends to support the R&D&I, which is the crucial prerequisite for the growth in industry sector. Also in its 2020 paper,[14] it pointed out to the crucial role of research and innovation in support of Europe's recovery from pandemic crisis. A long-term viability of a strategic European industry sector therefore should be considered a relevant factor in future State aid decisions and perhaps some flexibility could be used even in this sector.

[13] European Commission (2019): „EU Industrial Policy After Siemens-Alstom. Finding a New Balance Between Openess and Protection". Available at: https://www.politico.eu/wp-content/uploads/2019/03/EPSC_Industrial-Policy.pdf?utm_source=POLITICO.EU&utm_campaign=3bf9274f14-EMAIL_CAMPAIGN_2019_03_18_05_49&utm_medium=email&utm_term=0_10959edeb5-3bf9274f14-190406385 (accessed on 23 October 2022)

[14] European Commission (2020): „The role of research and innovation in support of Europe's recovery from the Covid-19 crisis". Luxembourg: Publication Office of the European Union. DOI:10.27777/028280

Question 9

The information whether Slovak courts used the possibility of 'amicus curiae' in state aid cases is not accessible. As regards to the judicial remedies, Slovak courts have not used the possibility to submit the preliminary ruling to the CJEU pursuant to the article 267 TFEU in the area of state aid yet.

Question 10

Currently, the Slovak Republic does not have a comprehensive legal regulation in the field of screening of foreign investments due to the protection of security and public order in the Slovak Republic and security and public order in the European Union. Slovak AMO therefore did not investigate cases where existing trade instruments affected its competition law analysis.

TRADE

FDI control

Question 11

Currently, there is no comprehensive measure for FDI control in Slovakia. This area is partially covered by Act No 45/2011 on critical infrastructure as it was amended in 2021.

The Act covers (in FDI control context) energy sector (mining, electricity, gas oil and oil products) and "industry" sector (pharmaceutical, metallurgy chemical), however regarding "elements" that are parts of the "critical infrastructure".

Any investor acquiring more that 10 % of shares of the provider of a critical infrastructure is subject to screening in terms if the investment does not endanger public order and security of the Slovak Republic, other Member state of the EU or the EU itself. The application is evaluated by the Ministry of Economy. If the investment threatens, in the opinion of the Ministry of Economy, public order and security of the Slovak Republic, other Member state of the EU or the EU, the case is referred to the Government of the Slovak Republic that can either reject consent with investment or approve the investment with conditions. The decision of the Government can be reviewed by the Supreme Court of the Slovak Republic. This revision procedure, however, is neither part of legal framework civil procedure (i.e. competence of the Supreme Court of the Slovak Republic) nor rules on judicial review of administrative decisions (possible competence of the Supreme

Administrative Court of the Slovak Republic) and this unsystematic (and probably unenforceable) review procedure is an outcome of adoption of the amendment during the COVID-19 pandemic using speed-up legislative procedure without "standard" features of legislative procedure (such as proper legal assessment).

Owing to lax of existence of Slovak legislation on cooperation in FDI matters and comprehensive legal framework on protection of national public order and security interest, in September 2022, the Government proposed new bill on the review of foreign investments that is currently under the consideration by the Slovak parliament (the National Council of the Slovak Republic).[15]

Trade defence and public procurement – foreign subsidies

Question 12

In its preliminary position to the proposal, the Slovak governmental bodies support the proposal of the regulation and considers it effective measure for protection of the internal market.[16] The concerns of the governmental bodies stipulated in their position paper to the proposal of regulation are mainly of technical nature. The substantive concerns are linked to the possibility of expropriation effects of suggested measures and possible violation of Fair and Equitable Treatment rule in the context of retrospective application of the regulation to the existing investments. Thus, no concerns regarding procedural autonomy or interference with other national competences were stipulated by the Slovak governmental authorities.

Question 13

Regarding the public-procurement module, following conclusions were published by the author in his recent paper: "The Draft RSDIM was created as a robust measure for defence of the EU's internal market against aggressive trade policies of third countries, in particular China. In fact, it is also "exporting" the EU standards of state subsidies to the third countries, i.e., recipients of state subsidies provided 022by third-country governments must be aware, that they will not be under scrutiny of domestic laws and the WTO rules but also "extraterritorialized"67 EU law. However, due to its shortcomings, it can become "a statue with feet of clay". Its effectiveness can be crippled by claims of violation

[15] https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=8&ID=1215

[16] LPEU/2021/258 COM(2021)223 Návrh NARIADENIE EURÓPSKEHO PARLAMENTU A RADY o zahraničných subvenciách narúšajúcich vnútorný trh. https://www.slov-lex.sk/legislativne-procesy/SK/LPEU/2021/258

of the WTO rules or violation of other bilateral free trade agreements concluded by the EU. Moreover, the link with the PPD and its concept of "abnormally low tender" are unclear. This legal uncertainty can raise tensions regarding the EU's commitment to rule of law as a principle of the EU integration. Apart from systematic solutions, e.g., creation of the WTO, at least plurilateral, system of the protection against foreign subsidies, or employment of the WTO dispute resolution system, the solution can be seen in more careful drafting of the trade defence in order to fit into exemptions under Art. XX(d) GATT and XIV(c) GATS. One of the options is to directly include the proposed regime into the framework of the competition law and the public procurement rules and not to design it as a protective measure against subsidies but as one of the elements for enforcement of the existing rules applied on the internal market that are not contrary to the WTO legal regime."[17] Similarly to this suggestion, more coherence with merger rules is, in our opinion, more desirable and the review of the foreign subsidies can be included as a part of substantive test of compatibility of the merger with the internal market, rather than separate test. Indeed, the review of the EU Merger Regulation requires the unanimity of in the Council of the European Union, however, the proposed regulation on foreign subsidies can be seen as partial circumvention of such unanimity. This ambiguous character of the proposed regimes stems also form introducing the existing elements of competition law and public procurement rules to the screening of undertaking and the conditions for the screening are mixed with the concepts of competition rules and public procurement rules.

Mandatory due diligence and regulating supply chains

Question 14

There is no comprehensive legislation on corporate social responsibility or due diligence in supply chains except general accounting rules based on EU accounting directive.[18]

[17] Blažo, Ondrej. "A New Regime on Protection of Public Procurement Against Foreign Subsidies Distorting the Internal Market: Mighty Paladin or Giant on the Feet of Clay?" International and Comparative Law Review, vol.21, no.2, 2021, pp.138-161. https://doi.org/10.2478/iclr-2021-0016

[18] Pakšiová, Renáta and Kornélia Lovciová. Food Companies Reporting of Corporate Social Responsibility in the Slovak Republic Source: European Food and Feed Law Review , 2019, Vol. 14, No. 3 (2019), pp. 281-287 https://www.jstor.org/stable/10.2307/26775786

Question 15

Currently, the main challenge of functioning of the AMO is the fact that over a year it is without a President. Former president's function expired in 2021 and the Government was not interested enough to choose a new one. The absence of institutional leader is not a stimulating factor for the work of the rest of office. Other weakness could be seen in the prioritization policy of the AMO, which misses all factors that are subjects of the assessment in this country report. Those are missing in the AMO's application practice either as approach of the AMO to the cases is rather conservative than bravely challenging the new phenomena of modern markets.

In the area of competition law, FDI screening and CSR, Slovakia is rather passive and introduces the legislation only when it is required to do so by the EU law. Thus, it is probable that any initiative of the EU in the area of sustainability or CSR will be transposed by simple copying the text of the directive into the Slovak law by minimalistic approach.

SLOVENIA

Anja Strojin Štampar, Janja Zaplotnik, Aljaž Cankar[1]

1. Introduction

The purpose of this report is to provide an insight into Slovenian legislation and the decisions of different authorities regarding the rather novel directions of European competition and trade policies. The roots of those policies stem from the time before the COVID-19 pandemic and were already challenged to a degree by the impact of the pandemic. However, the more recent global events, such as the inflation, which is proving to be difficult to tame, the Russian invasion of Ukraine, which created many supplies chain issues, and the looming energy crisis bound to hit Europe in the wintertime will likely provide additional challenges to the direction of those trade policies. Especially, the latter in particular may prove to be problematic for the new European trade policies, since more and more countries are currently (at least temporarily) relying on non-green, relatively more polluting energy sources to overcome the impeding energy crisis.

In general, it is difficult to say that Slovenia is at the forefront in terms of sustainability and digitalization. The Slovenian market is relatively small and any such EU-wide policies are implemented and enforced rather late, after they are already common in some larger EU Member States (developments at the European Commission and in Germany or Austria often serve as examples to be followed by the Slovenian competition protection authority). These are some of the reasons there are currently scarce legal acts and regulators' precedents with respect to these topics, as described in more detail below.

2. General information about Slovenian regulations on the topic

The answers below are covered by Slovenian and EU legislation on competition, state aid, FDI screenings, public procurement and company law. That is why we will give a brief overview of each piece of legislation as an introduction before we address the questions in the questionnaire.

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2.1. Competition legislation

The main piece of legislation in Slovenia in the field of competition law is the *Prevention of Restriction of Competition Act*[2]. It largely mirrors the provisions of the TFEU on the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices (Article 6 of the ZPOmK-1), on the abuse of dominance (Article 9 of the ZPOmK-1) and on merger control (Article 10 of the ZPOmK-1). It is anticipated that the ZPOmK-1 will be subject to changes and the draft amendment is already in the legislative process, but based on publicly available information at the time of the writing of this report, no changes related specifically to sustainability or digitalization are envisaged.

3. Answers to questions from Topic 2 of the Questionnaire

3.1. Competition

3.1.1. Green competition policy

Ad 1) As mentioned in the introduction, the Slovenian legislative body has thus far not adopted any specific legislation that would address sustainability agreements or their assessment. Nor did the Ministry of Economic Development and Technology and the Slovenian Competition Protection Agency ("**CPA**") issue any guidelines or publish its positions regarding those topics. In our opinion, the Slovenian CPA would therefore assess any sustainability agreements through existing legislation, most notably through Article 6 of the ZPOmK-1 on the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices.

However, the draft of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (the "**Draft Horizontal Cooperation Agreements Guidelines**") does address sustainability agreements in detail, including Section 9, which specifically addresses sustainability agreements. If the Draft Horizontal Cooperation Agreements Guidelines are passed in a form that also addresses sustainability agreements, it can be expected that the Slovenian CPA will follow these guidelines regarding sustainability agreements. In its past practice and case law the CPA followed the guidelines published by the European Commission (for example in cases no. 3061-28/2020-19 dated 3 December 2020, no. 3061-5/2020-50 dated 9

[2] Prevention of Restriction of Competition Act (in Slovenian: Zakon o preprečevanju omejevanja konkurence; Official Gazette of the Republic of Slovenia, no. 36/08 as amended, "ZPOmK-1").

July 2020 etc.) and we are of the opinion they would similarly follow the guidelines regarding sustainability agreements

Nevertheless, we do not expect the Slovenian CPA to expand on the European Commission's conservative approach. This is due to the fact that there is no legislation or government guidance available to the CPA that would provide a legal basis for the them to expand its approach beyond Article 6 of the ZPOmK-1 and guidelines by the European Commission (applied mutatis mutandis also with respect to Article 6 of the ZPOmK-1). Also, in general, the Slovenian CPA is inclined to take a more conservative approach and to pursue more "traditional" goals of competition law. Moreover, the Slovenian CPA is usually reluctant to be creative with its interpretation of legislation due to the close scrutiny of the legality of its decision by Slovenian courts. There is currently no case law available from the CPA that would address sustainability agreements and, since it is a new topic, we do not expect any case law in the very near future. On the other hand, if the practice and case law expand across the EU, we expect the Slovenian CPA to follow the same approach, albeit with several years of delay.

Private actions in Slovenia are very rare, so we are of the opinion it would be unlikely that the Slovenian courts would be willing to consider sustainability arguments in such case at this stage.

Ad 2) The Slovenian CPA has no subject specific legislation available regarding merger control and it will render its decision on the basis of Article 10 of the ZPOmK-1 and Articles 42 to 53 of the ZPOmK-1. Those articles of the ZPOmK-1 do not specifically address how to consider sustainability benefit in merger control. Efficiency benefits arguments have not yet been tested before the Slovenian CPA in merger control proceedings so it is difficult to assess if sustainability would be recognized as efficiency benefits outweighing competitive harm. It is more likely that this would not be the case, in particular in the absence of any European Commission precedents.

With regard to theories of competitive harm, the Slovenian CPA in practice normally follows the *European Commission Horizontal and Non-Horizontal Merger Guidelines*.[3] Without any specific guidance on how to assess detrimental effects on the environment as competitive harm at least in this regard, it is unlikely that this would be considered relevant in the substantive assessment of a merger.

[3] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *Official Journal C 031, 5 February 2004;* Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *OJ C 265, 18 October 2008.*

Ad 3) As previously mentioned, it is unlikely that the Slovenian CPA would incorporate sustainability benefits in its analysis. We are thus of the opinion that the CPA would not give much weight to sustainability arguments if potential harm to competition was detected.

3.1.2. European strategic autonomy, the promotion of "European champions" and competition law enforcement

Ad 4) and 5) Questions Ad 4) and Ad 5) are connected, so we provide a single answer to both questions.

To the best of our knowledge and, also, based on unofficial conversations with representatives of the CPA, the Slovenian CPA did not take or present any position during the European Commission's investigation of the proposed *Siemens/Alstom* transaction. Nor are we aware that any Slovenian market participants intervened in the proposed *Siemens/Alstom* transaction.

There was one merger clearance decision back in 2005 that could potentially be similar to the Siemens/Alstom transaction as regards the arguments that the parties prepared and that were ultimately accepted by the Slovenian CPA.[4] Namely, after 2000, the two main players on the Slovenian brewery market[5] (Pivovarna Laško d.d. and Pivovarna Union d.d) expressed their intent to merge. A third foreign company was also interested in the acquisition of Pivovarna Union d.d. thus competing with Pivovarna Laško d.d. for the acquisition of Pivovarna Union d.d. Arguably, Pivovarna Laško d.d. and Pivovarna Union d.d. were the only two mayor Slovenian breweries on the Slovenian beer market with some estimates that their combined share of the beer market would exceed 80% or even 90%. Due to the involvement of a third foreign company, there were public calls to protect "Slovenian national interest", so there are some similarities with regard to creating a "Slovenian champion" on the Slovenian beverages market, especially on the beer market, and not allowing the entry of a foreign investor on that market.[6] After years of legal battles, the CPA ultimately cleared the merger unconditionally[7] in 2005, even though it recognized that certain competition concerns exist. The decision is an older one and given the newer development of case law of the CPA and the European Commission, it might no longer stand with the same reasoning it did in 2005. The parties put forth different arguments regarding the definition of market shares (both in terms of geographic and product market definitions), potential for

[4] In 2003, the CPA was named Urad RS za varstvo konkurence.

[5] Both companies were also involved on the markets of other beverages, including non-alcoholic beverages.

[6] At the time the legal proceedings started, Slovenia was not yet part of the EU.

[7] Decision of the CPA no. 3071-1/02 dated 9 May 2005.

the market entry of foreign players etc., but the deciding factor that mitigated the competition concerns of the CPA was not clear from the CPA's decision. However, the decision could serve as evidence that the Slovenian CPA might consider the benefits of creating a "champion" against potential competition concerns that would arise in connection with the creation of such a champion (although the decision was criticized at the time of its adoption).

More recently, there were talks in the media of creating a Slovenian touristic holding that would join the Republic of Slovenia's shareholdings in tourist/hospitality sector companies under one-state owned umbrella. It could be expected that there would be competition concerns related to the creation of such a state touristic holding. It appears, however, that the project did not develop further to the point where the CPA would have to make a decision.

Ad 6) Under the legislation currently in force, the government (or any other Slovenian authority) has no powers to overrule the decision of the CPA.

Ad 7) The Slovenian CPA has thus far brought no cases against any of the large US digital platforms. Consequently, the contribution of the outcomes of such cases, particularly of the remedies imposed, to a more vibrant European digital economy and greater European digital sovereignty cannot be assessed.

After the entry into force of the Digital Markets Act, it is likely that the CPA would be even more reluctant to pursue its own, competition law-based cases against large digital platforms. The risk of inconsistencies in enforcement in particular could be the reason for the CPA's reluctance to pursue such an approach.

Ad 8) To the best of our knowledge, Slovenia has not proposed any state aid measures that would promote the creation of national or European champions.

Except in exceptional circumstances, in our opinion it would be difficult to argue that the lack of a strong industrial player may be characterized as a market failure as such, without changing the concept of state aid that is currently in place. According to some authors[8], no market failure exists when the market delivers efficient, albeit not politically desired results. If the market delivers efficient results by itself, there should be no failure present on the market. In our opinion it would be difficult to argue that the market fails to deliver efficient results because it fails to create European champions. Moreover, state aid should be in theory a means to create competition and not to further distort it by favoring a European champion over other potential competitors.

[8] Bartosz Bartniczak; Market Failures as Premises of Granting State Aid; Economic and Environmental Studies (E&ES); ISSN 2081-8319; Opole University; Faculty of Economics, Opole; Vol 17, Issue 3, (2017); pp 480.

In theory, the creation and maintenance of Airbus may be seen as the first example where state aid was deemed justifiable to create a European champion and to turn a monopolistic market into a duopolistic one, ultimately benefiting consumers. However, the aviation market is very specific and it is difficult to draw any parallels to other markets. Some authors now see the role of state aid to promote the execution of important projects of common European interest ("**IPCEI**") as means to create European champions, where it does not need to be a single company, but can also be a group, like IPCEI.[9] However, based on the *Communication on Important Projects of Common European Interest (IPCEI)* it can be understood that the lack of a strong industrial player in itself does not entail a market failure and a separate market (or systemic) failure should in any case be demonstrated.

Ad 9) Thus far, there are only a few Slovenian court decisions about statute of limitation rules with respect to receivables for the return of unlawful state aid. In those cases, it seems that the courts have been able to identify the relevant EU state aid rules on their own, without resorting to collaboration with the European Commission or to the remedies before the CJEU.

3.1.3. Geopolitical instruments, trade defense instruments, and competition policy

Ad 10) As mentioned in the beginning, the markets in Slovenia are rather small, which means that there are not a lot of decisions by the CPA. For example, the CPA issued 24 decisions in merger control in 2021, and all were clearances issued in phase I. Additionally, the CPA issued two decisions in the area of restrictive agreements. To the best of our understanding, none of those decisions dealt with the issues of trade defense measures limiting supply from non-EU countries and thus impacting the definitions of markets etc. However, we do expect that if the new "geopolitical" instruments will be applied even more regularly, a case involving those issues will eventually be brought in front of the CPA and the CPA will likely have to make those considerations.

[9] Marcin Szczepański - Graphics: Nadejda Kresnichka-Nikolchova; Important projects of common European interest Boosting EU strategic value chains; Members' Research Service; PE 659.341 (November 2020).

3.2. Trade

3.2.1. FDI control

Ad 11) The main national legal instrument in Slovenia that has been introduced in the context of Regulation 2019/452[10] is the Slovenian *Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic*,[11] which was adopted on 29 May 2020 and entered into force on 31 May 2020.

Foreign Direct Investment ("**FDI**") control is regulated in Chapter 11 of the ZIUOOPE, entitled "*Screening of Foreign Direct Investments*", in particular in Articles 69 to 75 of the ZIUOOPE and additionally in Article 81 of the ZIUOOPE, which presents a penalty provision. Article 85 of the ZIUOOPE states that the provisions of Chapter 11 will apply until 30 June 2023. The Slovenian Ministry of Economic Development and Technology ("**Ministry**"), under which FDI control is carried out, is currently starting to prepare amendments to the provisions in Chapter 11 of the ZIUOOPE, which could be regulated in the Slovenian *Investment Promotion Act*[12] or in an entirely new, separate act. The date of the expected adoption of the new legislation is not yet known.

a) Main challenges in applying FDI control in Slovenia

There are several challenges in applying FDI control in Slovenia, mainly due to the lack of legislative clarity and guidance from the practice by the Ministry. Parties to transactions are currently notifying the Ministry out of prudence, even if they do not necessarily consider their transaction to fall under the screening regime. The Ministry analyzes the notification obligation on a *case-by-case* basis, as they have not adopted specific recommendations and clarifications in order to ensure better legislative clarity. The lack of legislative clarity also effects specific terms such as "critical infrastructure", "critical technology", "security or public order" and "in close vicinity", which are not clearly defined and are assessed on a *case-by-case* basis by the Ministry. Additionally, there is little reasoning in the opinions by the Ministry based on which the meaning of the key terms of the FDI screening regime could be inferred. Such opinions are also not published.

[10] 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 ("**FDI Screening Regulation**").

[11] In Slovenian *Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19 ("**ZIUOOPE**")*, Official Gazette of the Republic of Slovenia, No. 80/20 as amended.

[12] In Slovenian: *Zakon o spodbujanju investicij ("**ZSInv**")*, Official Gazette of the Republic of Slovenia, No. 13/18 as amended.

b) Rules in Slovenia go beyond the harmonization achieved by the FDI Screening Regulation

Main challenges based on available practice are the result of rules in Slovenia going beyond the harmonization achieved by the FDI Screening Regulation. FDI control in Slovenia formally entails two separate procedures, one before a commission at the Ministry, comprising three to 10 members (three of whom are employees at the Ministry) and one led by the Minister himself. Only the latter ends with a binding decision issued in an administrative procedure by the Minister, as the commission at the Ministry may only issue a non-binding opinion.

The commission at the Ministry may issue an opinion that approves the FDI, prohibits the FDI, subjects the FDI to conditions or even unwinds the FDI.[13] Even though the commission at the Ministry should submit its opinion to the Minister,[14] who would then issue a decision on the basis of the aforementioned opinion, this has yet to occur in practice. Thus far, the opinions of the Ministry's commission state that there are currently no grounds to initiate a screening procedure (which would be then carried out by the Minister).

The ZIUOOPE also empowers the Minister[15] to carry out a retroactive screening procedure. He/she has the discretion to carry out such procedure even after the investment has been notified and the commission at the Ministry has already rendered a (positive) opinion. Such authority is possible in the five years following the date on which the notification was made. Nevertheless, the Ministry sees this option as *ultima ratio* and that procedure has never been carried out in practice.

Certain provisions of the ZIUOOPE not only go beyond the harmonization achieved by the FDI Screening Regulation, but are not regulated in accordance with the provisions of that regulation. In particular, it is important to highlight that foreign investors subject to FDI control are not only third-country nationals and legal persons, but – as a rule – also EU/EEA/Swiss nationals and legal persons,[16] which is contrary to the definition in Regulation 2019/452.[17] Additionally, ordinary share purchase agreements ("**SPAs**") are not expressly mentioned in the ZIUOOPE as the legal basis for acquiring a shareholding and thus the investment. However, the Ministry has confirmed that SPAs should also be notified. Additionally, foreign investors or target companies are under the

[13] See Article 73(7) of the ZUIOOPE.
[14] See Article 73(7) of the ZIUOOPE.
[15] See Article 72(2) of the ZIUOOPE.
[16] See Article 69 of the ZIUOOPE. Thus far, the Ministry has interpreted the provision as excluding Slovenian individuals or legal entities established in Slovenia.
[17] See Article 2(2) of the FDI Screening Regulation.

obligation to notify FDI.[18] In practice, notifications are made by foreign investors.

The ZIUOOPE also regulates sanctions[19] for non-notification or late notification of FDI. Failure to notify a foreign direct investment may result in a fine from EUR 100,000 up to EUR 250,000 for small companies. A fine between EUR 200,000 and EUR 500,000 may be imposed on medium and large companies. Sole entrepreneurs are exposed to a fine of between EUR 50,000 and EUR 150,000. The responsible person within a legal entity may be fined up to EUR 10,000. Regardless of the provisions of the ZIUOOPE, no sanctions have been imposed to date.

c) Investments and investors subject to FDI control

Investments subject to FDI control[20] comprise investments made by a foreign investor with the purpose of establishing or maintaining permanent and direct links between the foreign investor and an economic entity established in Slovenia, through the acquisition of at least a 10% participation in the capital or voting rights.

Although the law only mentions "direct links", according to the practice of the Ministry, FDI in which the foreign investor acquires a participation of more than 10% on *a look through basis* must also be notified. Indirect acquisitions of the shareholdings or voting rights of more than 10% in an entity in Slovenia also form investments requiring notification. One form of participation is sufficient, meaning a participation in the capital (even without voting rights) or the acquisition of voting rights.

Even though this is not provided for in the ZIUOOPE provision about a foreign direct investment, establishment of a new corporate entity in Slovenia or diversification of operations of a pre-existing corporate entity in Slovenia as well as an acquisition of right to make use of real estate essential for the use for critical infrastructure or located in the vicinity of such critical infrastructure[21] also constitute investments that could fall under FDI control and could be subject to mandatory notification.

As already discussed under point b), foreign investors subject to FDI control are third-country nationals and legal persons, as well as EU/EEA/Swiss nationals and legal persons.[22]

[18] See Article 71(1) of the ZIUOOPE.
[19] See Article 81 of the ZIUOOPE.
[20] See Article 70 of the ZIUOOPE.
[21] See Article 71(2) and 71(3) of the ZIUOOPE.
[22] See Article 69 of the ZIUOOPE.

If the investment qualifies as an FDI, the FDI must be notified to the Ministry in 15 days[23] i) after the conclusion of the merger agreement or the publication of the takeover bid (ordinary share purchase agreements shall also be notified in practice by the Ministry);[24] ii) after the incorporation of a corporate entity in Slovenia (if the foreign investor wishes to make an investment in tangible and intangible assets, relating to establishing of a new business unit, expansion of an existing one, diversification of production, or material changes in production process of an existing business unit)[25] or iii) after the conclusion of an agreement under which the foreign investor or its subsidiary acquired the right to make use of the real estate/land that is crucial to critical infrastructure or real estate/land that is in the close vicinity of such material infrastructure.[26]

d) Sectors subject to FDI control

FDI control under the ZIUOOPE affects strategic and critical sectors, such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate located in the vicinity of such infrastructure or crucial for such critical infrastructure.[27]

The ZUIOOPE fails to determine unambiguously the sectors in which the FDI must be notified, but it may be inferred from the practice of the Ministry that the FDI in the following sectors shall be subject to FDI control:

- critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or data storage, air transport and aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure or located in the vicinity of such infrastructure;
- critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, air transport and aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies and health care, medicine and pharmaceutical technologies;
- supply of critical inputs, including energy or raw materials, as well as food security, medicine and protective equipment;

[23] See Article 71(1) of the ZIUOOPE.
[24] See Article 71(1) of the ZIUOOPE.
[25] See Article 71(2) of the ZIUOOPE.
[26] See Article 71(3) of the ZIUOOPE.
[27] See Article 72(2) of the ZIUOOPE.

– access to sensitive information, including personal data, or the ability to control such information;
– the freedom and pluralism of the media;
– projects or programs in the interest of the EU, set forth in Annex I of the Regulation 2019/452/EU.[28]

e) Assessment of risk to public order or security in Slovenia

The ZIUOOPE[29] regulates the assessment of risks to public order or security similarly as the FDI Screening Regulation,[30] meaning the FDI is considered a risk to public order or security when it effects at least one of the sectors set out in point d) above.

The Ministry may also take into account,[31] in particular:
– whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;
– whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or
– whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

f) Competition considerations of the FDI control

Based on the current FDI control regime under the ZIUOOPE, the commission at the Ministry and/or the Minister in our view have no legal basis to consider competition arguments in the FDI control regime.

g) Information-sharing mechanisms in Slovenia operate effectively and adequately

Information-sharing mechanisms in Slovenia are established through a contact point within the Ministry to carry out tasks related to the implementation of the FDI Screening Regulation in Slovenia.[32] The contact point is responsible for annual reporting to the European Commission, the exchange of information, opinions and comments with the European Commission and Member States. In

[28] See Article 72(3) of the ZIUOOPE. These sectors mirror Article 4 of the FDI Screening Regulation but also add additional ones.
[29] See Article 72(1) of the ZIUOOPE.
[30] See Article 4(1) of the FDI Screening Regulation.
[31] See Article 72(4) of the ZIUOOPE.
[32] See Articles 71(6) and 71(7) of the ZIUOOPE.

the context of the implementation of the FDI Screening Regulation, the contact point may request that the foreign investor provide written or oral clarification or further explanation in relation to foreign direct investment in the assessment of risks to public order or security,[33] and to provide relevant evidence to that effect.

Thus far, there is no available information based on which it can be assessed if such information-sharing mechanisms operate effectively and adequately.

h) Legal remedies available to contest national authorities' FDI decisions

The Minister may prohibit or unwind a decision, transaction or legal act that was the basis for the FDI, thus making it null and void. An appeal against the Ministry's decision may be made to the Government of the Republic of Slovenia.[34] As previously mentioned under point b), this has never occurred in practice.

An appeal is envisaged as an ordinary legal remedy,[35] while possible extraordinary legal remedies are i) reopening of procedure,[36] ii) amendment or setting aside of decisions concerning administrative disputes,[37] iii) setting aside and annulment of decisions through supervisory right,[38] iv) extraordinary annulment[39] and v) reversal of decisions.[40] The applicable legal remedies are regulated in the Slovenian *General Administrative Procedure Act*.[41] These legal remedies are in our view available since the ZIUOOPE refers to the *mutatis mutandis* application of the General Administrative Procedure Act for the entire FDI notification procedure, while the screening and the legal remedies cited are set forth in the General Administrative Procedure Act as remedies against the final administrative decisions.[42]

Lawsuits in administrative disputes before the administrative court would also be available under the general rules of the *Administrative Dispute Act*[43] after an appeal before the Government of the Republic of Slovenia has been exhausted.

Thus far, there is no case law under any of the cited legal remedies with respect to FDI control.

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[33] See Article 72(3) of the ZIUOOPE.
[34] See Article 74(3) of the ZIUOOPE.
[35] See Article 229 of the ZUP.
[36] See Articles 260 - 272 of the ZUP.
[37] See Article 273 of the ZUP.
[38] See Article 274 - 277 of the ZUP.
[39] See Article 278 of the ZUP.
[40] See Article 279 – 280 of the ZUP.
[41] In Slovenian: *Zakon o splošnem upravnem postopku ("**ZUP**"),* Official Gazette of the Republic of Slovenia, No. 24/06 as amended..
[42] See Article 74(4) of the ZIUOOPE.
[43] In Slovenian: *Zakon o upravnem sporu* ("**ZUS-1**"), Official Gazette of the Republic of Slovenia, No. 105/06 as amended.

i) Effects of the COVID-19 pandemic on the application of FDI control

Slovenia was one of the EU Member States without a specific mechanism in place for monitoring and screening FDIs at the time when the FDI Screening Regulation was adopted. The ZIUOOPE's FDI control regime was thus adopted in 2020 during the COVID-19 pandemic.

Taking into account statistics regarding notifications by the Ministry,[44] FDI notification has increased in the last year as the COVID-19 pandemic situation in Slovenia has significantly improved. According to the Ministry, there were 29 notifications made in total from 31 May 2020 until 31 December 2020, 116 notifications in total from 31 December 2020 until 31 December 2021 and 103 notifications in total from 31 December 2021 until 8 August 2022. Based on the statistics presented, it is possible to infer that FDI surged and, in turn, the number FDI notifications increased after the COVID-19 pandemic in Slovenia eased (in particular in terms of hospitalizations due to or with COVID-19 patient ratio).

According to a substantive review, there is no information available as to whether the COVID-19 pandemic in Slovenia drove the commission at the ministry to closer scrutiny of FDI notifications in the health care sector.

3.2.2. Trade defense and public procurement – foreign subsidies

Ad 12) and Ad 13) Questions Ad 12) and Ad 13) are connected, so we provide a single answer to both questions.

In the Republic of Slovenia, the debate on the proposal for *Regulation on foreign subsidies distorting foreign markets*[45] has not yet developed. To the best of our knowledge, the Public Procurement Directorate at the Ministry of Public Administration has not published any special recommendation on this topic; however, the Ministry monitors regulatory developments in the field of public procurement on an ongoing basis and informs the public and the obliged parties about them. [46] Our general assessment would be that the planned measures are in principle appropriate and adequate.

However, we believe that the examination of foreign subsidies should be carried out in such a way that it does not disproportionately burden the European Commission and cause bottlenecks in public procurement procedures, and thus

[44] In which the amendments to the notifications are excluded.

[45] Proposal published at https://www.gibsondunn.com/ec-regulation-on-foreign-subsidies-distorting-the-internal-market/

[46] Mag. Urška Skok Klima, Public Procurement Directorate, Ministry of Public Administration: *Uredba o dostopu gospodarskih subjektov, blaga in storitev iz tretjih držav do trga javnih naročil Unije in Uredba o tujih subvencijah, ki izkrivljajo tuje trge; Kongres javnega naročanja*, Uradni list, Portorož, 9 September 2022.

delay the procurement of goods and services. In particular, it is important to determine on the basis of which information and documentation the Commission will initiate *ad hoc* reviews, i.e. for public tenders with an estimated value of less than EUR 300 million. It would also be worth considering the value threshold of tenders above which notification to the Commission is mandatory, as the figure of EUR 300 million appears to be rather too low.

Public procurement procedures are often criticized in the press and by experts for being inefficient. The European Commission should therefore be restrictive when adopting such a regulation, so as not to interfere too much with Member States' competences and the conduct of public procurement procedures. The content of the new regulation should be such that it complies with the fundamental principles of public procurement, i.e. the principles of economy, efficiency and effectiveness, ensuring competition between tenderers, transparency of public procurement, equal treatment of tenderers and proportionality.

3.2.3. Mandatory due diligence and regulating supply chains

Ad 14) The Republic of Slovenia has committed itself to respect human rights in business through the *National Action Plan of the Republic of Slovenia on Business and Human Rights (*"**NAP"***)*,[47] adopted in 2018, which implements the *UN Guiding Principles on Business and Human Rights.*[48] Under the influence of previously adopted and planned European regulations, the Republic of Slovenia is also transposing more specific corporate commitments aimed at these objectives into the national legal order.

Nevertheless, the Slovenian national legislation does not yet provide for a mandatory due diligence obligation applicable to companies to respect human rights and environmental law. No legislative activities based on the *Proposal for a Directive of the European parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* ("**Due Diligence Directive**") have been started or formally announced yet. However, Slovenian companies may be indirectly obliged to perform such due diligence as members of international supply chains, in particular German manufacturers, as Germany is one of the most important economic partners of the Republic of Slovenia[49] and has already

[47] In Slovenian*: Nacionalni akcijski načrt Republike Slovenije za spoštovanje človekovih pravic v gospodarstvu*, 2018; available at https://www.gov.si/en/topics/business-and-human-rights/

[48] *UN Guiding Principles on Business and Human Rights*, 2011; available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[49] In 2021, Slovenia exported the most goods to Germany (17.3% of total exports), Switzerland (13.4%), Italy (10.7%), Croatia (7.9%) and Austria (6.6%). However, the largest imports of goods came from Germany (14.9% of total imports of goods), Italy (11.3%), Switzerland (10.1%), China (10.0%) and Austria (8.8%). Source: Statistical Office of the Republic of Slovenia.

adopted national legislation introducing mandatory corporate sustainability due diligence.[50] In cases where German companies/multinationals are also obliged to introduce due diligence in relation to their suppliers or subcontractors, the Slovenian companies that are part of such supply (value) chains are also effected by the respective requirement of German legislation. The respective legislative requirement has a legislative influence on other EU Member States and builds a culture of respect for human rights in a non-coercive way. We believe that this is an effective and appropriate way of implementing such obligations, as respect for human rights is no longer merely motivated by penalty (under the threat of fines and criminal prosecution), but business-interest motivated, which is considerably more effective from the point of view of economic enterprises.

Currently, there are several legal mechanisms in the Slovenian national legislation through which business enterprises are obliged or invited to monitor and comply with environmental, social and governance ("**ESG**") requirements. Examples include the risk management system of business enterprises, and remuneration and cooperation policies. However, none of these mechanisms explicitly requires the performance of mandatory corporate sustainability due diligence.

The general duty of care to comply with ESG requirements is implicitly imposed through the duty to establish a comprehensive system for managing the risks to which a business enterprise is exposed. The formation of the risk management system and its implementation are the responsibility of both the supervisory and the management bodies of an economic entity, and the obligations in this respect are laid down in the *Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act* (the "ZFPPIPP").[51] The respective provisions of the ZFPPIPP are binding for the following economic entities: companies (Slo. *gospodarska družba*), entrepreneurs (Slo. *samostojni podjetnik*), institutions (Slo. *zavod*), public institutions (Slo. *javni zavod*), cooperatives (Slo. *zadruga*) and public funds (Slo. *javni sklad*).[52] Under the respective legislation, a

[50] *Sorgfaltspflichtengesetz, 2021*. On this issue Letnar Černič, J. (2021). *Regulacija dobavnih verig gospodarskih družb,* IUS-INFO, https://www.iusinfo.si/medijsko-sredisce/kolumne/287172, 8. 5. 2022.

[51] See Article 29 of ZFPPIPP (Official Journal of the Republic of Slovenia, No.176/2021 – consolidated text, as amended; in Slovenian: *Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju*).

[52] See Article 27 of the ZFPPIPP. The Slovenian Companies Act (ZGD-1) defines two general groups of companies: partnerships (Slo. *osebne družbe*) and limited liability companies (Slo. *kapitalske družbe*). Partnerships are those in which the partners (Slo. *družbeniki*) are liable for the company's obligations with all their assets (unlimited liability company (Slo. *družba z neomejeno odgovornostjo*) and limited partnership (Slo. *komanditna družba*)). In limited liability companies, the company itself is liable for its obligations with its capital, and the shareholders do not personally assume the company's obligations but are only obligated to pay in their capital contributions (stock company (Slo. *delniška družba*), limited liability company (Slo. *družba z omejeno odgovornostjo*), limited partnership (Slo. *komanditna delniška družba*) and European public limited company (SE)).

management board, as the operational and decision-making body of a company, has the obligation to establish a comprehensive risk management system that includes the identification and assessment of risks, the monitoring of incidents (breaches) and the implementation of measures to eliminate and mitigate risks.[53] The management board is required to report to the supervisory board on the performance of the risk management system. In a single-tier governance system, the duty to establish an integrated risk management system at a company lies with the board of directors, which is also responsible for supervision of the implementation of the risk management system.[54] It is therefore the legal duty of the supervisory board or the board of directors to verify and, if necessary, to order the management to include risks related to human rights and environment protectional violations in the risk management system, and to report to the supervisory body on any violations and measures taken.[55] The corporate supervisory body is thus also (co-)responsible for the establishment and administration of an adequate risk management system through the exercise of its supervisory function.

Due diligence on human rights and environmental protection could be available as one of the company's risk management measures under current Slovenian legislation, as violations of human rights and environmental protection rules are not only legal risks, but also strategic risks. These kinds of violations not only result in claims for damages and criminal penalties, but also have long-term negative consequences for a company, such as the loss of key employees, a deterioration of employer's reputation in the labor market, a lower positioning in the eyes of customers (weakening of market position) and other business partners (suppliers, subcontractors, credit institutions), which usually results in a loss of orders and a decrease in revenues. Slovenian companies should, therefore, integrate human rights and environmental violations into their risk management system and regularly monitor the realization and impact of these risks, and take appropriate action in due time, although a mandatory due diligence obligation to respect human rights and environmental law has not yet been enacted. Should the management neglect its duty to establish and maintain a suitable risk management system at a company, the management (directors) may be dismissed due to breach of law infringement and be held liable for damages.

[53] See Article 30 of the ZFPPIPP.

[54] According to the Companies Act, the supervisory body of a company is either a supervisory board in a two-tier system of corporate governance or a board of directors in a one-tier system of corporate governance.

[55] The basis for this allocation of powers is already laid down in the *Commission Recommendation of 15 February 2005 on the role of non-executive directors or members of the supervisory board of listed companies and on the committees of the management board or supervisory board* (2005/162/EC), Official Journal of the European Union, No L 52/51.

In addition to the duty of integrated risk management, additional measures in the area of monitoring and implementation of ESG requirements were introduced in 2021 by the amendment to the Slovenian Companies Act ("**ZGD-1**").[56] On 27 January 2021, the National Assembly of the Republic of Slovenia adopted the ZGD-1K[57] by which it implemented the provisions of the *Shareholders' Directive II*[58] and *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies* ("**Directive 2007/36/EC**").[59]

The Shareholders' Directive II and Directive 2007/36/EC are important for the protection of human rights and environment in two respects:

- The Shareholders' Directive II requires certain companies to adopt a remuneration policy that is designed to contribute to the sustainability of a company and to include, among the non-financial performance criteria, social responsibility criteria (where applicable); and
- Directive 2007/36/EC requires institutional investors and asset managers to develop an engagement policy that includes disclosures on how they monitor their investments in terms of their environmental and social impact.

The ZGD-1 stipulates that the remuneration policy must be clear and comprehensible, with a detailed description of all the components of fixed and variable remuneration, including all allowances and benefits. This obligation is complemented by the legal requirement that the remuneration policy must be designed to contribute to the achievement of the company's business strategy, long-term interests and *sustainability*, which must also be explained in the remuneration policy itself.[60] This is a key innovation in the regulation of the remuneration policy compared to the previous regulation. The criteria for financial and non-financial performance (including social responsibility criteria) and the methods for determining compliance with the criteria must be specified in detail, and the latter may also include a more detailed definition of criteria relating to respect for human rights as at the company and within its supply chain, which is not yet explicitly provided for in the law. A company must prepare a remuneration report for each financial year on the implementation of the remuneration policy, which

[56] Official Gazette of the Republic of Slovenia, No. 65/09 – consolidated text, as amended; in Slovenian: *Zakon o gospodarskih družbah*.

[57] Official Gazette of the Republic of Slovenia, No 18/21. The amendment to the ZGD-1K entered into force on 24 February 2021.

[58] *Directive (EU) 2017/828 of the European parliament and of the Council of 17 may 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement,* Official Journal of the European Union, No L 132/1.

[59] Official Journal of the European Union, L 184/17.

[60] See Article 294a of the ZGD-1.

must also be reviewed by the auditor.[61] The report must state how the remuneration received by the individual members of the management and supervisory bodies has contributed to the long-term performance of the company.[62] On this basis, it can be concluded that the Slovenian legislative body wishes to encourage the remuneration of members of management and supervisory bodies that leads to the long-term success of a company, which must include the promotion of the sustainable aspects of business.

The adoption of a remuneration policy and the reporting on remuneration is only mandatory for listed stock companies, while non-listed limited liability companies may voluntarily adopt this commitment via their articles of association or by an ordinary resolution of the general meeting.[63] Of course, limited liability companies or other companies may also voluntarily make such commitments.

Institutional investors, which include life insurance companies and occupational pension providers[64] and asset managers (investment firms, management companies and alternative investment fund managers)[65] are also required to prepare and publish an engagement policy and a report on the implementation of the engagement policy. In the engagement policy, they must, *inter alia*, describe how they involve shareholders in their investment strategies, how they monitor their investments, how they exchange views with the company's corporate bodies and with other stakeholders of the company. From a human rights perspective, an important provision is that the engagement policy must include a description of the monitoring of the companies, in which institutional investors and asset managers invest investors' funds, including their environmental and social impact.[66] This provision also opens up the possibility for the scrutiny of business partners and companies in which managers invest investors' funds from the perspective of respect for human rights and other aspects of sustainability.[67] The engagement policy must be drawn up by a company's management. This does not apply to stock companies with a single-tier governance system where it is the management board that adopts the engagement policy (as well as a report on its implementation), while shareholders may, either by resolution or the articles

[61] See Article 294b(6) of the ZGD-1.

[62] See Article 294b(2) of the ZGD-1.

[63] See Articles 294a(6) and 294b(10) of the ZGD-1.

[64] Article 317a(2)(1) of the ZGD-1 defines institutional investors as: i) a company carrying on the business of life insurance and reinsurance covering a life insurance obligation, as defined in the law governing the insurance industry, and ii) a company carrying on the business of occupational pension insurance, as defined in the law governing pensions and disability insurance.

[65] See Article 317(2) of the ZGD-1.

[66] See Article 317b(2)(2) of the ZGD-1.

[67] On this issue Letnar Černič, J., Strojin Štampar, A. and Rozman, T. (2021), Gospodarstvo in varstvo človekovih pravic (Business and human rights protection), Založba Nova univerza, Nova Gorica.

of association, require that the engagement policy be approved by the general meeting. In this way, all bodies of a stock company can be involved in verifying compliance with sustainability principles.

Another non-binding (lat. *ius dispositivum*) provision is in the Slovenian *Pension and Disability Insurance Act* ("**ZPIZ-2**"),[68] which recommends that pension fund managers may, but are not obliged to, incorporate the principles of responsible investment into the investment policies of pension funds. If they do not make use of this option, they are obliged to disclose on the basis of the "*comply or explain*" principle[69] that they are not following such principles. If such principles are taken into account, the manager must indicate how environmental, social and corporate governance factors are taken into account in the management of the fund's assets.

It should also be noted that the *Whistleblower Protection Directive* (Directive (EU) 2019/1937),[70] which should be applied to protect whistleblowers under the Due Diligence Directive and national law, has not yet been implemented in the national law of the Republic of Slovenia.

The obligation to respect human rights and protect the environment is also imposed by the general standard of care that the members of corporate bodies must exercise in the performance of their duties. In the performance of their duties, they must act in the best interests of a company with the care of a conscientious and honest businessman, and must protect a company's business secrets.[71] Violations of human rights and environmental legislation, whether committed intentionally or through gross negligence, clearly constitute a breach of due diligence that gives rise to liability for damages for members of the supervisory and management bodies, and also provides legal grounds for early termination of office. In the assessment of a breach of due diligence, the principle of the *business judgment rule*, which is not expressly provided for in Slovenian legislation, is also applied in the case law of the Republic of Slovenia.[72] Breaches may also be sanctioned under criminal law.

In terms of more socially responsible corporate governance and respect for human rights and other aspects of sustainability, Slovenian Sovereign Holding ("**SSH**") plays an important role as the central manager of state capital investments.[73] In

[68] Official Gazette of the Republic of Slovenia, No. 48/22 – consolidated text; in Slovenian: *Zakon o pokojninskem in invalidskem zavarovanju* ("**ZPIZ-2**").

[69] See Article 285 of the ZPIZ-2.

[70] *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report infringements of Union law*; Official Journal of the EU, No L 305/17.

[71] In Slovenian: *vesten in pošten gospodarstvenik*; see Article 263(1) of the ZGD-1.

[72] E.g. decisions of the Supreme Court of the Republic of Slovenia, with ref. no. III Ips 75/2008 and with ref. no. III Ips 80/2010.

[73] In Slovenian: Slovenski državni holding, d. d., Ljubljana.

August 2020, SSH published two new recommendations for the companies under its management: SSH expects all companies to commit to respecting human rights in their business operations and to implement the relevant NAP principles in their operations, which should be confirmed by the companies signing a commitment on respect for human rights in business with the Ministry of Foreign Affairs of the Republic of Slovenia. Under the second recommendation, SSH expects companies to prepare their action plans for the implementation of the NAP and also to define the timetable for the implementation of individual commitments, which should not exceed three years. SSH therefore expects companies with state capital investment to make an active commitment to respect human rights in their business operations and to implement all the principles of the National Action Plan of the Republic of Slovenia on Respect for Human Rights in Business that are relevant to them.

The recommendations and expectations of SSH are adopted in good faith that their implementation will contribute to improving the quality of corporate governance and the successful performance of companies with state capital investments,[74] but they are not mandatory instructions. It is the discretion of companies to decide whether and to what extent they will comply with these recommendations, and SSH expects companies to address their compliance with the recommendations in their annual report on a «comply or explain" basis. Companies are thus expected to disclose which recommendations they have not followed and the reasons for not following them. Therefore, while the *Act on the Slovenian Sovereign Holding* ("**ZSDH-1**")[75] does not prescribe any sanctions for breaches or non-compliance with the recommendations and expectations of SSH, SSH may take into account the passivity and non-responsiveness of a company's bodies for reasons that are not justified when deciding on the re-election of members of the management and supervisory bodies and, last but not least, when conferring official approval for the previous financial year (Slo. *razrešnica*, Ger. *Entlastung*).[76]

It should also be noted that in January 2020, SSH adopted an updated *Code of Ethics of Slovenian Sovereign Holding*, which also emphasizes the duty to respect human rights as prescribed by the Constitution and the legislation of the Republic of Slovenia.[77] The duty to respect human rights should be the fundamental guiding principle of SSH in the performance of its tasks, while the employees of SSH should pay particular attention to the promotion of human rights in business in

[74] SSH: Recommendations and Expectations of the Slovenian State Holding, August 2020, https://www.sdh.si/Data/Documents/asset-management/SSH%20RecommendationsExpectations_August_2020.pdf.

[75] Official Gazette of the Republic of Slovenia, No 25/14; In Slovenian: Zakon o slovenskem državnem holdingu; «ZSDH-1«).

[76] See Article 294 of the ZGD-1.

[77] See item 11 of the SSH Code of Ethics, January 2020; available at https://www.sdh.si/Data/Documents/pravni-akti/Kodeks%20etike%20SDH_januar%202020.pdf.

accordance with the NAP, in particular with regard to precarious work, mobbing, equal opportunities for women and men, the work and employment of disabled persons, health and safety in the workplace, consumer rights and trafficking in human beings for the purpose of exploiting forced labor.

In March 2021, SSH published an update of the *Corporate Governance Code for State Owned Enterprises* ("**SSH CG Code**").[78] Prior to its amendment in 2021, the SSH CG Code already contained some general recommendations on respect for human rights, but new recommendations were added in 2021 (for example, in Chapter 8, it obliges SOEs to report on a company's sustainability in its annual report, which also includes a description of a company's policies on environmental, social and human resources matters). As the SSH CG Code is one of the legally defined corporate governance documents,[79] such an amendment constitutes a more significant step by SSH in promoting its efforts to improve the sustainability aspects of business.

Recent legislative changes therefore show a trend towards legislative support for socially responsible asset management. It is a matter of concern that none of these legislative changes also apply to SSH as the central manager of the state's capital investments, and it would therefore be necessary to supplement the Act on the Slovenian Sovereign Holding (ZSDH-1) with such recommendations, as well. Since the legislative body has chosen such an approach in the area of private asset management, it is all the more justified to legislate the duty of the socially responsible management of the state's capital investments.

On the basis of the above, it can be concluded that the Slovenian legal system currently contains only dispositive norms (lat. *ius dispositivum*) and autonomous law recommendations regarding sustainability aspects.

Ad 15) Although the adoption of a single European regulatory framework and safeguards is intended to level the playing field for companies on the internal market and thus prevent distortions of competition, there is a concern that only imposing such obligations on certain companies would put these companies at a competitive disadvantage, in particular in terms of additional costs and public disclosure that could influence customers' decisions.

In the draft Due Diligence Directive, it is suggested that the obligations of the members of corporate bodies be better specified: in fulfilling their duty to act in the best interests of a company, they must take into account the short-, medium- and long-term implications of their decisions on sustainability aspects, including the

[78] SSH: Kodeks korporativnega upravljanja družb s kapitalsko naložbo države, 2021; https://www.sdh.si/Data/Documents/pravni-akti/Kodeks%20korporativnega%20upravljanja_marec%202021%20(1).pdf.

[79] See Article 32 of the ZGD-1.

implications for human rights, climate change and the environment.[80] We believe that a clearer definition and description of requested due diligence for members of management and supervisory bodies regarding the corporate sustainability due diligence obligation would be appropriate and useful, as it would place clearer obligations on the members of management and supervisory bodies, which in turn would facilitate the more effective sanctioning of breaches.

It is also important to note that the Slovenian system of tort law does not provide for so-called punitive damages. The imposition of such punitive damages could therefore change the legal nature of the tort liability, which could constitute disproportionate interference in the national legal system. Under Slovenian legislation, liability for damages (civil liability) is subjective and aims to recover the actual damage incurred in order to restore the property status as it was before the harmful event. It has no punitive function. We believe these general principles of Slovenian tort law should also be respected in the implementation of the Due Diligence Directive.

4. Conclusion

Based on the above analysis almost none of the researched topics, namely amendments to national legislation on competition, state aid, public procurement and corporate sustainability due diligence obligation (except for the FDI screening) have been specifically and additionally addressed and regulated in the Republic of Slovenia. In the field of competition law, no changes related specifically to sustainability or digitalization are envisaged. The Republic of Slovenia has not yet prescribed a mandatory corporate sustainability due diligence but the Slovenian companies may be impacted by the spill-over effect of the German regulation as many Slovenian companies are a part of the German multinationals' supply (value) chains. On the other hand, in the field of FDI screening the Republic of Slovenia is facing additional challenges due to national rules that go beyond the harmonization achieved by the FDI Screening Regulation. There are several challenges in applying FDI control in Slovenia, mainly due to the lack of legislative clarity and guidance from the practice by the Ministry Slovenian Ministry of Economic Development and Technology as the competent governmental authority. We do not believe that the competent authorities will be ahead of the schedule in adopting new legislation in the areas concerned, but will take the appropriate measures and regulations when European regulation is adopted. Slovenia usually follows the legal framework of Austria and Germany, which can be expected in these cases as well.

[80] See Article 25 of the draft Due Diligence Directive.

SPAIN

Nuria Bermejo[1]*, Enrique Feás*[2]

1. COMPETITION

1.1. Green Competition Policy

Question 1

a.

The Spanish competition authority (CNMC) would probably follow the European Commission's approach to the assessment of sustainability agreements. At the moment, there is no practice available to support this conclusion. Nevertheless, the CNMC contribution to the European Commission's public consultation on competition policy and environmental sustainability targets reveals a certain trend in this direction.[3] On the one hand, the CNMC stressed the need to redefine or reinterpret the concepts of "consumer" or "equitable sharing of profits" in a unified manner at EU, but it did not take any particular position in this regard. It only stated that this activity involves deciding

> "[…] whether, in order to determine that equitable distribution of profits, it is possible to take into account the global society –and not only consumers in the market concerned, as it has been done until now– when the benefits of such agreements have an impact on society as a whole. Whether the concept of consumer encompasses current consumers or also future consumers who are going to benefit from these environmental improvements, or if consumers in other countries shall be included, as the environment knows no borders".[4]

On the other hand, the CNMC pointed out that "[…] sustainability objectives can never be an excuse for cartels' greenwashing or for authorising mergers solely on

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[3] CNMC, *Call for Contributions. Competition policy supporting the Green Deal*, 2020, p. 17, https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/SPANISH%20COMPETITION%20AUTHORITYs%20COMMENTS%20EU%20CALL%20FOR%20CONTRIBUTION%20ON%20HOW%20COMPETITION%20RULES%20AND%20SUSTAINABILITY%20POLICIES%20WORK%20TOGETHER_0.pdf, visited 31 August 2022.

[4] CNMC, 2020, p. 17.

the basis of environmental efficiencies, if they do not compensate for the effects of the operation. Operators claiming the application of the exemption provided for in the legislation should do so on the basis of clear evidence and legitimacy".[5]

Thus, the CNMC does not show any particular willingness to go beyond a unified approach that would be defined by the European Commission and consider a wider range of sustainability claims in its assessments.

b.

According to the Spanish Competition Act (Ley 15/2007, de Defensa de la Competencia), three situations must be distinguished: (i) a final decision was previously adopted by national authorities or courts; (ii) a final decision was previously adopted by authorities or courts of other Member States, (iii) and no final decision was previously adopted.

(i) Spanish Civil Courts would not be competent to examine sustainability arguments in a private action brought before them when a final administrative or judicial decision was previously adopted by the national authorities or courts. Article 75(1) of the Spanish Competition Act provides that Spanish Civil Courts are bound by final administrative or judicial decisions finding an infringement of Articles 101 and 102 TFEU and Articles 1 and 2 of the Spanish Competition Act. Thus, they cannot proceed to a new examination of the agreement. According to Article 16(1) of the Regulation (EC) 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the same rule applies to final decisions of the European Commission.[6]

(ii) As provided for by Article 75(2) of the Spanish Competition Act, administrative and judicial decisions of other Member States finding an infringement are not binding for Spanish Civil Courts in a private action brought before them but establish a rebuttable presumption of the infringement. Hence, defendants can adduce new evidence and arguments to challenge the findings of the earlier decisions.[7] Spanish Civil Courts would then be competent to examine the sustainability arguments which parties may raise. At the moment, there is no available practice showing whether these courts would be willing to consider sustainability arguments in their decisions.

[5] CNMC, 2020, p. 18.

[6] P. Vidal & A. Capilla, "Comentario del artículo 75 LDC", *in* J. Massaguer *et al*, *Comentario de la Ley de Defensa de la Competencia*, 6th edition, Cizur Menor, 2020, Thomson-Civitas, section II (Proview version).

[7] Vidal & Capilla, 2020, section III (Proview version).

(iii) When no final decision was previously adopted, Spanish Civil courts would have to enter into the examination of the agreement in order to establish the infringement of Articles 101 and 102 TFEU and Articles 1 and 2 of the Spanish Competition Act.[8] Thus, they would be competent to examine sustainability arguments in a private action brought before them. At the moment, there is no available practice showing whether those courts would be willing to consider sustainability arguments in their decisions.

Question 2

The CNMC would be willing to consider claims related to sustainability as recognisable efficiency benefits, which can outweigh competitive harm –and, conversely, transaction's likely detrimental effects on environment as competitive harm– in merger control. As the CNMC stated in its contribution to the European Commission's public consultation on competition policy and environmental sustainability:

> "In the same way that competition authorities take into account criteria relating to intellectual property rights when analysing the concentrations and the potential effects of such operations on innovation, the effects of these mergers on sustainability could also be analysed with the same logic in order to be able to assess them jointly in the analysis of the operation. A precedent in this regard would be the Commission's Decision in the Dow/Dupont M.7932 case (2017) in which environmental and public health aspects were taken into account. This would allow, on the one hand, to assess the efficiencies implied by the concentration in terms of sustainability, but also, for those situations where the concentration was harmful to the environment, to impose conditions which mitigate such negative effects".[9]

In addition, Articles 10(4) and 60 of the Spanish Competition Act provides for the possibility of taking into account factors relating to sustainability in the analysis of economic concentrations. Under these provisions, the Council of Ministers is allowed to assess economic concentrations, which in phase II were not authorised by the CNMC or were authorised subject to conditions on the basis of general interest criteria other than competition. The list of these criteria –which is not exhaustive– includes among others the protection of public security or health (Article 10(4)(b)), and the protection of the environment (Article 10(4)(d)).[10]

[8] Vidal & Capilla, 2020, section I (Proview version).

[9] CNMC, 2020, p. 21.

[10] CNMC, 2020, p. 21. For a general overview of Article 10(4) of the Spanish Competition Act, see J. Folguera & P. Vidal, "Comentario del artículo 10 LDC", *in* J. Massaguer *et al*, *Comentario de la Ley de Defensa de la Competencia*, 6th edition, Cizur Menor, 2020, Thomson-Civitas, section IX (Proview version).

Question 3

This question has not yet a concrete answer. The CNMC acknowledged the interest of including sustainability considerations in the substantive analysis of mergers in its contribution to the European Commission's public consultation on competition policy and environmental sustainability. However, in its view, this "[…] would also require a review of the instruments for evaluating them (concepts, tools and profiles, as noted for the evaluation of cooperation agreements)".[11]

1.2. European Strategic Autonomy, the Promotion of "European Champions" and Competition Law Enforcement

Question 4

a.

The CNMC sent together with the Belgian Competition Authority, the Netherlands Authority for Consumers and Markets and the British Competition and Markets Authority a letter to the European Commission where they expressed very serious concerns with regard to the Siemens-Alstom merger. These authorities claimed that the merger involved "two particularly large and well-established players within the European railways supply chain, and the markets in which the Parties compete are critical to the supply of transportation services provided to consumers and businesses across the EEA". They shared then the Commission's competition concerns about it.[12] They argued that the merger was likely to lead to increased prices or lower quality products and services for consumers across the EEA and would result in a "widespread and very significant loss of competition".[13] Moreover, they pointed out that the remedies offered by the parties failed to address all competition concerns that arose from the merger in the different markets affected by it, specifically, in the markets of supply of very high-speed rolling stock and signalling products and services.[14]

When the Commission published its final decision, the CNMC issued a statement in support of it. The CNMC claimed that the merger between Siemens and Alstom would have been very detrimental for the competition in the market of signalling systems for high-speed lines in Spain. It would have

[11] CNMC, 2020, p. 22.

[12] CNMC *et al*, *Open Letter to the European Commission*, 2018, p. 1, https://www.acm.nl/en/publications/letter-national-competition-authorities-siemens-alstom-merger, visited 31 August 2022.

[13] CNMC *et al*, 2018, p. 1.

[14] CNMC *et al*, 2018, pp. 2-3.

created a significant dominant position in this market, which would have led to a substantial increase in the costs of installation and maintenance of the Spanish high-speed network. Furthermore, the merger would have foreclosed access to this market to potential competitors –such as the Spanish market operator CAF– and increased the transport costs in high-speed lines for the Spanish consumers.[15]

b.

To our knowledge, there is no public available information in this respect. In any case, CAF and Talgo are two Spanish market operators that would have been affected by the merger and, at least, they may have taken part in the procedure answering the questionnaires and the requests of information sent by the Commission.[16]

c.

The CNMC has not yet been confronted with similar arguments in comparable transactions.

Question 5

The CNMC is not in the position to include industrial policy concerns in its review of mergers, because it is limited to competition concerns in its assessment (Article 10(1) of the Spanish Competition Act). It must carry out a prospective analysis of the concentration and determine whether it could undermine the effective competition in the affected market.[17] As it will be explained in the answer to question 6, it is for the Council of Ministers to assess economic concentrations on the basis of general interest criteria other than competition (Articles 10(4) and 60 of the Spanish Competition Act).

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

Not applicable.

[15] CNMC, *La CNMC respalda la decisión técnica de la Comisión Europea de prohibir la adquisición de la entidad francesa ALSTOM, S.A. por parte de la alemana SIEMENS*, AG, 2019, pp. 1-2, https://www.cnmc.es/node/373389, visited 31 August 2022.

[16] Commission Decision of 6 February 2019, case M.8677 Siemens/Alstom, declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement, para 14 and 21.

[17] Folguera & Vidal, 2020, section I (Proview version).

Question 6

The Council of Ministers is allowed to assess economic concentrations, which in phase II were not authorised by the CNMC or were authorised subject to conditions on the basis of general interest criteria other than competition (Articles 10(4) and 60 of the Spanish Competition Act). This is a discretionary power which permits the government to take into consideration certain industrial policy interests and balance them against competitive concerns.[18] Thus, the Council of Ministers can overrule the CNMC decision and authorise a concentration or impose less stringent conditions when industrial policy interests outweigh competitive concerns. However, this power is considered to be exceptional.[19] Actually, the Council of Ministers has made use of it only in one single case since the Spanish Competition Act of 2007 came into force.

Article 10(4) of the Spanish Competition Act provides an open list of general interest criteria which can be considered in the assessment of an economic concentration. It includes (a) national defence and security; (b) the protection of public security or health, (c) the free movement of goods and services within the national territory; (d) the protection of the environment; (e) the promotion of research and technological development, and (f) the appropriate maintaining of the objectives of sector-specific rules. Although other grounds can be taken into consideration, criteria such as the protection of national undertakings from foreign acquisitions or the promotion of "national champions" are considered to be excluded.[20]

The Council of Ministers must state reasons to overrule a CNMC decision in every particular case and show that the grounds taken into consideration are sufficiently relevant to be balanced against competition concerns.[21] Where EU industrial policy objectives –such as the creation of a more powerful European or world player, the improvement of the European Union's strategic autonomy, or the addressing of supply chain uncertainties –would be at stake, the Council of Minister would have to determine whether they correspond to a general interest criterion within the meaning of Article 10(4) of the Spanish Competition Act. Hence, it would have to justify that the ground at issue reflects a general interest criterion which is recognised within the Spanish national legal order and is then sufficiently relevant to be weighed up in the decision.[22]

[18] Folguera & Vidal, 2020, section IX (Proview version).

[19] J. Maillo, "Control de concentraciones y política industrial: análisis del sistema español", 2014, pp. 11-12, https://www.aehe.es/wp-content/uploads/2014/09/Comunicación_Pol%C3%ADtica-industrial-y-control-de-concentraciones.pdf, visited 31 August 2022.

[20] Maillo, 2014, pp. 9-10.

[21] Folguera & Vidal, 2020, section IX (Proview version); Maillo, 2014, pp. 10-11.

[22] Folguera & Vidal, 2020, section IX (Proview version).

In any event, it does not seem likely that the Council of Ministers would be willing to overrule on EU industrial policy grounds a CNMC decision blocking a merger on competition law grounds inasmuch as this decision would benefit certain major market operators –mainly, German and French– to the detriment of smaller competitors from other Member States.[23]

Has a decision of your national competition authority been reversed in recent years, and, if so, on what grounds?

The Council of Ministers did not follow the decision of the Spanish National Authority in the merger between "Antena 3" and "La Sexta" (2012). The Council of Ministers softened the conditions imposed by the former CNC –now, CNMC– to the merger which brought together the media group "Antena 3" and the television broadcasting company "La Sexta". Although the merger had a Community dimension as defined by Regulation (EC) 139/2004, of 20 January 2004, on the control of concentrations between undertakings (the EC Merger Regulation), it affected the audiovisual market in Spain within the meaning of Article 4(4) of this Regulation and was therefore examined by the CNC.[24] The CNC authorised the merger, but impose strict conditions to maintain the effective competition in the affected markets, in particular the television advertising market.[25] "Antena 3" claimed then that the merger could not be carried out under these conditions.[26] Then, the Council of Ministers amended the CNC decision and authorised the merger subject to equivalent conditions to those imposed two years before to the merger between two television broadcasting companies, namely "Telecinco" and "Cuatro".[27]

The Council of Ministers based its decision in two grounds: the appropriate maintaining of the objectives of sector-specific rules –in particular, the liberalisation of the digital dividend and the pluralism of information– (Article 10(4)(f) of the Spanish Competition Act), and the promotion of research and technological development (Article 10(4)(e)) of the Spanish Competition Act). It considered that the merger allowed to release the radio spectrum in order to

[23] In this respect, see the statements of the Spanish Ministry of Economy, Ms. Nadia Calviño, after the Siemens-Alstom decision. "Calviño se opone a cambiar las normas de la UE para facilitar megafusiones empresariales", *El Confidencial*, 11 March 2019, https://www.elconfidencial.com/economia/2019-03-11/calvino-se-opone-a-cambiar-las-normas-europeas-de-competencia-para-facilitar-campeones-europeos_1874706/, visited 31 August 2022

[24] CNC Decision of 13 July 2012, C/0432/12 Antena 3/La Sexta, points of fact no. 8-11, https://www.cnmc.es/sites/default/files/200987_9.pdf, visited 31 August 2022. An executive summary of the decision is available in English, https://www.cnmc.es/sites/default/files/203934_9.pdf, visited 31 August 2022.

[25] CNC Decision, point of law No 2.

[26] Council of Ministers Decision of 27 August 2012, pp. 9-10, https://www.cnmc.es/expedientes/c043212, visited 31 August 2022.

[27] Council of Ministers Decision, p. 21; Maillo, 2014, p. 14.

permit a better and swifter deployment of 4G mobile networks and ensured the continuation of "La Sexta" in the market.[28] In addition, the Council of Ministers found that the operation promoted innovation in the field of HD television.[29]

The decision was contested before the Supreme Court (Administrative Chamber) and was examined *prima facie* by the interim order of 11 April 2013.[30] The Supreme Court considered that the arguments put forward to justify the government intervention were very weak. It detected at first sight inconsistencies and shortcoming in the grounds invoked by the Council of Ministers which could put in question the validity of the decision.[31] As the applicants withdrew their actions, no final judgement against the decision was adopted.

Question 7

a.

Yes. The case was brought against "Google, Inc" and "La Fourchette, SAS".[32] The applicant was the owner of a restaurant which hired the online restaurant reservation services offered by "La Fourchette, SAS" –known in Spain as "El Tenedor"– but excluded the functionality "Book with Google". The restaurant had also its own reservation system on its website.

The complainant claimed that, on the one hand, "Google Maps" gave priority to "El Tenedor" reservation system over his reservation system, and on the other hand, the functionality "Book with Google" remained active during several months although it had not been hired. He argued that all that was the result of an anticompetitive agreement existing between "Google, Inc" and "La Fourchette, SAS" or of an abusive conduct.

b.

No, because the complaint was dismissed.

c.

In accordance with the Proposal for Digital Markets Act, the Commission is the sole authority empowered to enforce it (Article 38(7) of the Proposal).[33] This

[28] Council of Ministers Decision, pp. 9-15 and 16-19.

[29] Council of Ministers Decision, pp. 12 and 15.

[30] ATS 3206/2013. ECLI:ES:TS:2013:3206A.

[31] Point of law No 3.

[32] CNMC Decision of 12 January 2021, S/004/19 Google-El Tenedor, https://www.cnmc.es/sites/default/files/3350672.pdf, visited 31 August 2022.

[33] Proposal for Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

power would limit the CNMC ability to bring its own competition law-based cases in situations where "it cannot be determined from the outset whether a gatekeeper's behaviour is capable of infringing this Regulation, the competition rules which the national competent authority is empowered to enforce, or both".[34]

The CNMC considers that this may be problematic "[…] in domestic markets that have specific characteristics and may require particular remedies" and claimed that "[i]n that case, the national authority may be best positioned to act".[35]

d.

It would be useful that national competition authorities pursue their own competition cases against large digital platforms in situations where they would be the best placed to investigate and enforce competition rules (principle of best positioned authority).[36] This solution would lead to a more effective treatment of certain cases –*i.e.*, those affecting a particular market with specific characteristics– and reduce the workload for the Commission. Risks of inconsistencies or over-enforcement could be addressed in a relatively easy manner through the provision of cooperation and coordination tools with the Commission.

Question 8

The correction of market failures can justify exceptions to the general prohibition of State aid set out in Article 107(1) TFEU. In accordance with Article 107(3) TFEU the Commission is allowed to consider compatible with the internal market a "good aid", i.e. an aid "which is well-designed, targeted at identified market failures and objectives of common interest, and least distortive".[37] A measure of aid, which have a beneficial impact in overall Union terms and not merely in the national interest of a Member State will not distort competition in the internal market.[38]

Amendments by the European Parliament to the Commission Proposal, 29 July 2022, recital 91, https://www.europarl.europa.eu/doceo/document/A-9-2021-0332-AM-256-256_EN.pdf, visited 31 August 2022.

[34] Recital 91.

[35] CNMC, *Position Paper for the Public Consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT)*, 2020, p. 9, https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/CNMC%20position%20paper%20on%20DSA%20and%20NCT.pdf, visited 31 August 2022.

[36] CNMC *Position Paper on DSA*, 2020, p. 9.

[37] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU State Aid Modernisation (SAM)*, 8 May 2012, COM(2012) 209 final, para 12.

[38] Consultation paper from the Commission, *State aid action plan. Less and better targeted state aid: a roadmap for state aid reform 2005–2009*, 7 June 2005, COM(2005) 107 final, para 10. See also, P. Jansen, "The Interplay Between Industrial Policy and State Aid: Natural Combination or Strange Bedfellows?", *EStAL*, nº 4, 2016, pp. 575-602, pp. 577-578.

However, as the Commission pointed out, "[…] State aid should only be used when it is an appropriate instrument for meeting a well-defined objective, when it creates the right incentives, is proportionate and when it distorts competition to the least possible extent".[39] It is far from clear whether the lack of a strong industrial player in Europe can be characterized as a genuine "market failure", i.e. a situation where an economic activity would not be undertaken by private initiative and should therefore be remedied by allowing State aid measures in order to contribute to a well-defined objective of public interest.[40] Moreover, the Commission and the Court of Justice considered that a measure of aid adopted with the purpose of strengthening the position of certain undertakings compared with others competing in the internal market would affect trade between Member States and threaten to distort competition between undertakings. It must be then considered incompatible with the internal market (Article 107(1) TFUE).[41] Thus, the alleged existence of a market failure would not be sufficient to consider a public measure aiming to promote European industrial champions to be a "good aid" inasmuch as they could favour some actors to the detriment of others and distort competition within the internal market. The relevance of limiting competition distortions to the least possible extent was stressed by the Commission in the following terms:

> "*Such aid* [a 'good-aid'] *will best contribute to growth when it targets a market failure and thereby complements, not replaces, private spending*. State aid will be effective in achieving the desired public policy objective only when it has an incentive effect, i.e. it induces the aid beneficiary to undertake activities it would not have done without the aid. And *State aid will have the greatest impact on growth only when it is designed in a way which limits competition distortions and keeps the internal market competitive and open*. Therefore State aid control is crucial in order to improve the efficiency and effectiveness of public spending taking the form of

[39] Consultation paper, 2005, para 11.

[40] See, for instance, Commission Decision of 19 June 2017, cases SA.45183 (2017/N) and SA.45185 (2017/N), Repayable advances for the research and development programme of the Airbus X6 helicopter, C(2017) 4113 final, para 63, 71-102. In this case, the market failure was linked to "[…] imperfect and asymmetric information between the company and the financial markets which impided Airbus Helicopters to finance the X6 project on the market" (para 102).

[41] Judgment of 17 September 1980, *Phillip Morris v Commission*, case 730/79, ECLI:EU:C:1980:209. The aim of the aid proposed by the Dutch government was to help the Netherlands subsidiary of the major tobacco manufacturer to concentrate and develop its production of cigarettes by closing one of the two factories which it owned in the country and by raising the annual production capacity of the second, thereby increasing the manufacturing capacity of the subsidiary by 40% and total production in the Netherlands by about 13% (para 3). As a result, the undertaking would account for nearly 50% of cigarette production in the Netherlands and expected to export over 80% of its production to other Member States (para 10). In the light of these facts, the Court considered that it was an "undertaking organized for international trade" (para 11) and concluded that "the measure of aid affected trade between Member States and would threaten to distort competition between undertakings established in different Member States" (para 12). See also A. Ezrachi, *EU Competition Law. An Analytical Guide to the Leading Cases*, 2021, p. 757.

> State aid, with the overarching objective of spurring more growth in internal market, *for which a necessary condition is developing competition*".[42]

Industrial policy concerns play a relevant role in the Commission's decisional practice.[43] In accordance with Article 107(3)(b) and (c) TFEU, public measures adopted to promote the execution of an important project of common European interest or to facilitate the development of certain economic activities or of certain economic areas, which do not adversely affect trading conditions to an extent contrary to the common interest, may be considered compatible with the internal market. As stated by the Commission "[s]tronger and better targeted State aid control can encourage the design of more effective growth-enhancing policies and it can ensure that the competition distortions remain limited so the internal market remains open and contestable".[44] Thus, in assessing the compatibility of a measure of aid with the internal market, the Commission must balance the maintenance of undistorted competition, on the one hand, and the achievement of industrial objectives covered by the abovementioned provisions, on the other hand. As the Commission puts it "[…] appreciating the compatibility of state aid is fundamentally about balancing the negative effects of aid on competition with its positive effects in terms of common interest".[45]

One of the seven Europe 2020 flagships was "An industrial policy for the globalisation era", which aimed "to improve the business environment, notably for SMEs, and to support the development of a strong and sustainable industrial base able to compete globally".[46] With regard to this objective, the Commission undertook to work "[t]o develop a horizontal approach to industrial policy combining different policy instruments (e.g. 'smart' regulation, modernised public procurement, competition rules and standard setting)"[47]. Later, the Commission considered that fostering sustainable, smart and inclusive growth in a competitive internal market was one of three objectives of the modernisation of State aid control.[48] However, in connection with this objective, the Commission did not mention the creation of European industrial champions as a particular aim to be considered in State aid control. In contrast, the Commission stated that

[42] Communication, 2012, para 12 (emphasis added).

[43] Jansen, 2016, pp. 576-577.

[44] Communication, 2012, para 5.

[45] Consultation paper, 2005, para 11.

[46] Communication from the Commission, *EUROPE 2020. A strategy for smart, sustainable and inclusive growth*, 3 March 2010, (COM(2010) 2020), pp. 3-4.

[47] Communication, 2010, p. 15.

[48] Communication, 2012, para 8. The other two objectives are "to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement, and to streamline the rules and provide for faster decisions"

> "State aid control already underpins the Europe 2020 flagships. For example, the broadband guidelines provide conditions for efficient State support to broadband rollout, supporting the achievement of the objectives of 'Digital agenda for Europe'. Public support to develop infrastructure is also instrumental to the achievement of smart, upgraded and fully interconnected transport and energy networks as foreseen by 'Resource efficient Europe'. *The framework for State aid to research, development and innovation facilitates the achievement of 'Innovation Union' as well as 'An industrial policy for the globalisation era' objectives*. The enforcement of 'polluter pays' principle as well as a possibility to provide aid in order to encourage companies to go beyond mandatory EU environmental standards or to promote energy efficiency provided for in the Environmental aid guidelines are one of the tools to implement 'Resource efficient Europe' flagship. The possibility to support training with State funds contributes to the goals of 'An agenda for new skills and jobs'. *Rescue and restructuring aid guidelines allow State aid to ailing companies only under strict conditions* and if it results in their return to long-term viability, encouraging thereby exit of inefficient firms and bracing the companies for global competition, *contributing to 'An industrial policy for a globalised era'. The link between the Europe 2020 objectives and flagship initiatives on the one hand, and State aid rules on the other, should be further developed to streamline the Commission's instruments and to encourage Member States to direct scarce public resources to common priorities.*"[49]

Thus, the creation of European industrial champions does seem to play a role in the Commission's decisional practice.[50]

Long-term viability of a strategic European industry sector is a relevant factor that should be considered in future State aid decisions. Supporting inefficient economic activities distorts competition between undertakings and results in a waste of scarce public resources which destroys value.

In order to prevent undue distortions of competition it would be of interest to require the redemption of the aids consisting of the provision of capital or hybrid instruments after a reasonable time to ensure the exit of the State.[51] This would show the ability of the undertaking to remain in the market without "artificial

[49] Communication, 2012, para 13 (emphasis added).

[50] As an example, see SA.45183 (2017/N) and SA.45185 (2017/N).

[51] Communication from the Commission, *Temporary framework for state aid measures to support the economy in the current Covid-19 outbreak* (consolidated version), as adopted on 19 March 2020 (C(2020) 1863) and its amendments C(2020) 2215 of 3 April 2020, C(2020) 3156 of 8 May 2020, C(2020) 4509 of 29 June 2020, C(2020) 7127 of 13 October 2020, C(2021) 564 of 28 January 2021, and C(2021) 8442 of 18 November 2021 C(2021) 8442, para 56 and 79.

support". If after the end of this period of time the State's intervention would not be reduced below to a minimum threshold, a restructuring plan approval in accordance with the Rescue and Restructuring Guidelines would have to be notified to the Commission which would assess whether it would be appropriate to restore the long-term viability of the undertaking.[52]

Question 9

Spanish judges are well aware of the tools available to seek clarification and certainty about the scope of State aid law, but they usually interpret and apply EU State aid rules without resort to collaboration with the Commission. They base their judgments in the case-law of the CJEU and the Supreme Court and take also into consideration the Communications on State aid rules.[53]

In contrast, Spanish courts are willing to refer questions to the Court of Justice for a preliminary ruling on the interpretation of EU State aid rules.[54] In recent dates,

[52] *Temporay framework*, 2021, para 85. See also Communication from the Commission, *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*, 2014/C 249/01 (OJ 31.7.2014), para 27-28 and 47.

[53] Among others, see the judgments of the Supreme Court (Administrative Chambers) of 29 January 2020, STS 221/2020, ECLI:ES:TS:2020:221, points of law No 2-3; of 11 October 2018, STS 3628/2018, ECLI:ES:TS:2018:3628, point of law No 6; of 23 September 2009, STS 5854/2009, ECLI:ES:TS:2009:5854, point of law No 8; judgment of the High Court of País Vasco (Administrative Chambers) of 11 November 2011, point of law No 3. See also the judgment of the High Court of Justice of Madrid (Criminal & Civil Chambers) of 14 March 2016, STSJ M 2240/2016, ECLI:ES:TSJM:2016:2240, points of law No 3-4.

[54] So far these questions for preliminary ruling gave rise to the following decisions of the Court of Justice: judgment of 7 November 2019, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*, joined cases C-105/18 to C-113/18, ECLI:EU:C:2019:935 (referred by the Supreme Court); judgment of 26 April 2018, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón*, joined cases C-236/16 to C-237/16, ECLI:EU:C:2018:291 (referred by the Supreme Court); judgment of 26 April 2018, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias*, joined cases C-234/16 to C-235/16, ECLI:EU:C:2018:281 (referred by the Supreme Court); judgment of 26 April 2018, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya*, case C-233/16, ECLI:EU:C:2018:280 (referred by the Supreme Court); judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, case C-74/16, ECLI:EU:C:2017:496 (referred by the Administrative Court of Madrid No 4); judgment of 15 October 2015, *Juan Miguel Iglesias Gutiérrez and Elisabet Rion Bea contra Bankia, S.A., and Others*, joined cases C-352/14 to 353/14, ECLI:EU:C:2015:691 (referred by the Labour Court of Terrasa No. 2); judgment of 9 October 2014, *Ministerio de Defensa y Navantia, S.A. v Concello de Ferrol*, case C-522/13, ECLI:EU:C:2014:2262 (referred by the Administrative Court of Ferrol No 1); Order of 22 October 2014, *Elcogás SA v Administración del Estado and Iberdrola SA*, case C-275/13, ECLI:EU:C:2014:2314 (referred by the Supreme Court); judgment of 5 March 2009, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado,* case C-222/07, ECLI:EU:C:2009:124 (referred by the Supreme Court); judgment of 11 September 2008, *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others*, joined cases C-428/06 to C-434/06, ECLI:EU:C:2008:488 (referred by High Court of Justice of País Vasco); judgment of 21 July 2005, *Administración del Estado v Xunta de Galicia*, case C-71/04, ECLI:EU:C:2005:493 (referred by the Supreme Court); judgment of 15 March 1994, *Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia*, case C-387/92, ECLI:EU:C:1994:100 (referred by the High Court of Valencia).

the Supreme Court referred a question where it asked the Court of Justice whether the limitation of administrative licenses for private hire vehicles (PHV) to a ratio 1/30 existing under Spanish law is compatible with Article 107 TFEU.[55] The High Court of Justice of Cataluña had previously referred a similar question about the compatibility of the mentioned ratio with Articles 49 and 107 TFEU and asked also the Court whether the requirement of a double authorisation for PVC and the imposition of additional constraints is compatible with Articles 49 and 107 TFEU.[56] As this procedure was still pending, the Supreme Court asked the Court of Justice to join both cases.

1.3. Geopolitical instruments, trade defence instruments, and competition policy

Question 10

No.

> *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?*

Not applicable.

2. TRADE

2.1. FDI Control

Question 11

FDI screening in Spain is based on the Law 19/2003, of 4 July, on the legal regime of capital movements and economic transactions abroad and on certain measures to prevent money laundering, which incorporates several articles of the EU treaties. Since the new EU regulation of 2019 this Law has been amended through the following regulations:

- Royal Decree-Law 8/2020, of 17 March, on extraordinary urgent measures to deal with the economic and social impact of COVID-19 (Fourth final provision). This regulation included an article 7bis ("Suspension of the

[55] Order of the Supreme Court of 20 May 2022, ATS 8264/2022, ECLI:ES:TS:2022:8264A. Case C-475/22, *Maxi Mobility Spain*.

[56] Order of High Court of Cataluña of 19 January 2021. Case C-50/21, *Prestige and Limousine, SL*.

liberalization regime for certain foreign direct investments in Spain") directly related to the EU screening regulation.

- Royal Decree-Law 11/2020, of 31 March, adopting complementary urgent measures in the social and economic field to deal with COVID-19 (Second Transitional Provision and Third Final Provision).
- Royal Decree-Law 34/2020, of 17 November, on urgent measures to support business solvency and the energy sector, and in tax matters (Fourth Final Provision and Single Transitional Provision).
- Royal Decree-Law 12/2021, of 24 June, adopting urgent measures in the field of energy taxation and energy generation, and on the management of the regulation fee and the water use tariff (Second final provision).
- Royal Decree-Law 27/2021, of 23 November, extending certain economic measures to support recovery (Article 4).

All these legal reforms, added to the long time elapsed since the Royal Decree 664/1999, of April 23 on Foreign Investment (the previous detailed regulation on foreign investment), recommended the approval of a new royal decree with two objectives: to develop the aspects of Law 19/2003 modified by the afore-mentioned Royal Decree-Laws (especially 8, 11 and 34/2020, regarding the introduction of article 7 bis related to the suspension of the liberalization regime) and to update the procedure for declaring foreign investments (both foreign investments in Spain and Spanish investments abroad) to the Investment Registry.

A project of Royal Decree on Foreign Investment[57] was therefore proposed in 2021, but by the end of August 2022 it is still pending approval by the Council of Ministers (the public consultation period ended on 25 November 2021).

a) What are the main challenges in applying FDI control at Member State level?

Under the currently applicable laws, the main challenge for the application of FDI screening is the lack of resources of the responsible ministerial department for FDI screening (the Deputy Directorate for Foreign Investment of the Ministry of Industry, Trade and Tourism of Spain), given the number and complexity of FDI operations. No horizontal or vertical coordination problems have been detected.

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)?

[57] See https://comercio.gob.es/es-es/participacion-publica/Paginas/DetalleParticipacionPublica.aspx?k=465.

The FDI screening has been transposed to national legislation but does not differ much from the European Union (EU) regulation. The afore-mentioned Article 7 bis introduced by Royal Decree-Law 8/2020 is practically a translation of Article 4 of the EU Regulation.

c) What investments and investors are subject to FDI control?

Controlled investments are, according to Article 7 bis, section 1, all those investments, as a result of which, the investor becomes a shareholder with 10% or more of the share capital of the Spanish company, or when, as a result of a corporate operation, it results in the control of the company (in accordance with article 7.2 of Law 15/2007, of July 3 (Spanish Competition Act), provided that one of these circumstances concurs:

(a) That they are carried out by residents of countries outside the EU and the European Free Trade Association (EFTA).

(b) That are made by residents of EU or EFTA countries but whose real ownership corresponds to residents of countries outside the EU and EFTA. Such beneficial ownership shall be presumed when the latter ultimately own or control, directly or indirectly, a percentage greater than 25% of the capital or voting rights, or when by other means they directly or indirectly exercise control of the investor.

As for investors, the following are subject to control:

(a) Investors directly or indirectly controlled by the government, including public bodies or the armed forces, of a third country (the criteria of Article 7.2 of the Spanish Competition Act is applied for the purposes of determining the existence of such control).

(b) Foreign investors that have made investments or participated in activities in sectors affecting security, public policy, and public health in another Member State, and in particular those mentioned in the list of controlled sectors.

(c) Foreign investors who have a serious risk of carrying out criminal or illegal activities, which affect public security, public order or public health in Spain.

d) What sectors are subject to FDI control?

The new Article 7bis, section 2 of Law 19/2003 mentions the following sectors, when they "affect public order, public safety and public health":

a) Critical infrastructures, whether physical or virtual (including energy, transport, water, health, communications, media, data processing or storage,

aerospace, defence, electoral or financial infrastructures, and sensitive facilities), as well as land and real estate that are key to the use of such infrastructures (described in Law 8/2011, of 28 April, establishing measures for the protection of critical infrastructures).

b) Critical and dual-use technologies, key technologies for industrial leadership and training, and technologies developed under programs and projects of particular interest to Spain, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies, biotechnologies, advanced materials and advanced manufacturing systems.

c) Supply of fundamental inputs, in particular energy, understood as those that are subject to regulation in Law 24/2013, of December 26, on the Electricity Sector, and in Law 34/1998, of October 7, on the Hydrocarbon Sector or those referring to strategic connectivity services or raw materials, as well as food security.

d) Sectors with access to sensitive information, in particular personal data, or with the ability to control such information, in accordance with Organic Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights.

e) Media, although audiovisual media services defined in Law 7/2010, of March 31, on General Audiovisual Communication, will be specifically regulated by that Law.

e) How is a risk to public order or security assessed at Member State level?

A risk to public order is assessed by the existence of a threat to public order. Security concerns are related to potential vulnerability. The truth is that Article 7 bis is quite imprecise, and legal firms interpret it just as a general guideline. In practice, the existence of international agreements on security is carefully considered for the assessment of potential risks, as well as participations in companies for reasons other than financial return. The lack of clarity might also derive of the typical EU legislation procedure: sometimes the initial proposal of the Commission is relatively clear, but changes during discussions in the Council and in Parliament result more complex or less clear legislation.

Article 7 bis includes 6 sections: a definition of FDI in Spain (section 1), a list of controlled sectors (section 2), a list of controlled investors (section 3), a catch-all rule (section 4), the nullity of investment operations without authorization (section 5) and the possibility of further legislation of the Ministry of Industry, Trade and Tourism clarifying exemptions or controlled sectors (section 6).

Article 7 bis, section 3, is a copy of Article 4.2 of the EU regulation and has 3 subsections: investments implying foreign government control (subsection a), previous investments of the same investor in matters affecting security, public order, and public health (subsection b) or serious risk that the foreign investor will engage in criminal or illegal activities (subsection c). In practice, most notifications in Spain are related with subsection a, almost none with subsection b and very few with subsection c. In any case, this is not an easy article to apply, as the definition of companies involved in "illegal" activities (e.g., bribery or insider information) is not clear. The list of the US Securities and Exchange Commission is not an option, given that a strict exclusion of all those companies would imply that in practice none could invest. The result is that the process is somehow schizophrenic. Article 7bis is, in reality, a complement of 7: only operations with potential specific problems should be analysed, not all of them.

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?

The Spanish ministerial department responsible for FDI screening is very respectful of the reports of the Spanish National Competition Commission, as well as with those of the National Data Protection Agency, although maybe be a little bit less strict that the US, whose Committee on Foreign Investment in the United States (CFIUS) is particularly hard on those issues. In Spain a few operations have been cancelled because of competition problems. Anyway, the FDI screening department cannot get into the details of competition or data protection issues, and it is quite logical that it relies on other authorities to evaluate specific risks.

g) Do the information-sharing mechanisms between the Commission and the Member States operate effectively and adequately?

The reporting mechanism established by Article 6 of the EU Regulation 2019/452 is considered to be quite good, as it warns whether the operation affects the Commission, the Member States in general or any Member State in particular, which facilitates the identification of problems. The Commission's opinion must be respected or, if not, it must be justified. This, in any case, is valid for formal notifications, not for consultations (which, on the other hand, are much more frequent).

h) What legal remedies are available to contest national authorities' FDI decisions?

Article 7 bis for FDI screening was very quickly transposed, practically translated. This explains why the suspension of the liberalization regime has no specific procedure attached. The development is the responsibility of the Ministry of Industry, Trade

and Tourism, but it is non-existent to date. The Spanish general Administrative Procedure[58] forces the government to justify (interpret) their decisions, but the Law of 1999 does not include a specific procedure or the need for justification. There have been a few complaints, but before general administrative courts.

i) Has the COVID-19 pandemic affected the application of FDI control?

Absolutely. The Explanatory Memorandum of Royal Decree-Law 8/2020, of 17 March, on extraordinary urgent measures to deal with the economic and social impact of COVID-19 highlights that "the recent impact of the global crisis triggered by COVID-19 on the world stock markets, poses a certain threat to listed Spanish companies, but also to unlisted companies that are seeing their equity value reduced, many of them from the strategic sectors of our economy, that operations are launched to acquire them by foreign investors".

2.2. Trade defence and public procurement – foreign subsidies

Question 12

There is no particular concern on that issue that we know of.

> *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)?*

Not particularly.

> *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?*

Not applicable for the time being.

[58] Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations.

Question 13

Not particularly.

2.3. Mandatory due diligence and regulating supply chains

Question 14

The election manifesto for the 2019 elections of the two parties that today share the coalition government included a promise to pass a national law on corporate due diligence on human rights. Spain's External Action Strategy 2021-2024 is committed to "the active involvement of the private sector in the defence and promotion of human rights and compliance with the principle of due diligence", and the Sustainable Development Strategy 2030, incorporates the development of a Due Diligence Law as a priority for action.

Despite these commitments publicly assumed both by the parties in government, and by the government of Spain itself, to date there is no proposal for a law in due diligence. Nor are we aware that there is an inter-ministerial group that is discussing the Spanish position on the draft due diligence directive.

In Spain, unlike in countries such as France, Germany or Norway, there are no legislative tools or national laws that impose mandatory due diligence in human and environmental rights, nor are there legislative processes underway.

According to a survey carried out by the Global Compact in Spain of 1,900 companies, only 8% of Spanish companies carry out human rights impact assessments in their activities.

According to the study of the Observatory of the CSR of Memories of Companies IBEX 35 of the year 2019, only 39% of the largest Spanish companies carry out an identification of risks of their impact on human rights.

Not applicable for the other sub questions.

Question 15

Not applicable.

SWEDEN

Erik Lagerlöf[1]

Question 1

The Swedish Competition Authority ("SCA") considered competition law developments in the context of the European Green Deal and EU climate targets in a paper published on 4 November 2020 ("the Paper").[2] Although it was published prior to both the Commission's publication of its draft revised Horizontal Guidelines on 1 March 2022 and the Commission's 2021 Competition Policy Brief of 1 September 2021, the views put forward by the SCA are relevant in relation to both these documents as well as the questions in the questionnaire.

In general, the SCA's position on sustainability agreements is limited. The authority underlines that sustainability issues have only very rarely become relevant to the authority in its governing role and that there is no directly relevant practice available. However, it does recognise that environment related matters are increasingly relevant within the context of competition law. Moreover, referring generally to the jurisprudence of the European Court of Justice ("CJEU") and the Commission's existing guidelines on horizontal agreements of 2010,[3] the SCA stresses that conditions already exist to consider different types of sustainability agreements as unproblematic under Article 101(1) TFEU.[4] In particular, the SCA mentions that participation in standard-setting for environmental or sustainability reasons is not problematic, provided the criteria set out in the Commission's existing guidelines are met.[5]

In its Paper, the SCA also underlines the possibility existing under present circumstances to justify sustainability agreements that are considered to restrict competition, provided they give rise to efficiency gains.[6] In this context, the

[1] Adjunct Professor at the Stockholm School of Economics and co-founder of The Swedish Institute for International Trade and Law

[2] Konkurrensverket, *Konkurrensverket och den gröna given (N2020/02495)*, 4 November 2020.

[3] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 11, 14.1.2011, p. 1–72).

[4] The Paper, pp. 4 and 8.

[5] The Paper, p. 8. See also Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 11, 14.1.2011, p. 1–72), at para. 280. In its Paper, the SCA also refers to the Commission's previous guidelines on horizontal cooperation and emphasises that these guidelines contained provisions specifically covering environmental agreements that were not considered to be in breach of (then) Article 81(1) EC. See further the Paper, p. 8.

[6] The paper pp. 4-5 It may also be noted that that the SCA refers specifically to the Commission's cases JAMA (Case IV/F-2/37.634) and KAMA (Case IV/F-2/37.611) as well as CEMEP (COMP/37773) as examples of where sustainability agreements have been considered by the Commission to fall outside of Article 101(1) TFEU.

SCA considers if consumers affected by any negative impact caused to them by a restriction of competition must be fully compensated or if the efficiency gained may be generated out of market. The SCA points out that the view of the Commission, as set out in the Guidelines on the application of Article 81(3) of the Treaty of 2004, is that the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement.[7] However, the SCA also underlines that that there is older CJEU case law and Commission decisions that indicate that there has been scope to consider benefits and efficiency gains, including environmental advantages,[8] on other markets than where the competitive concerns have been identified.[9] The SCA concludes that the issue is open for consideration.[10]

The SCA has not adopted any firm position of its own whether efficiencies related to environment and sustainability must be "in-market" or if out of market benefits could also be considered. However, in its Paper, the authority points to CJEU case law, starting with the judgment in *Wouters*,[11] which indicates that, in certain cases, it is possible to balance non-competition objectives against a restriction of competition, and to conclude that the former outweigh the latter.[12] The SCA recognises that this "rule of reason" doctrine has been applied very restrictively by the CJEU, but the authority also suggests that the doctrine could be applied to allow certain types of cooperation focused on sustainability where a restriction of competition is necessary to achieve the objective of the cooperation. However, the SCA underlines that such a development must be considered and sanctioned by the CJEU to ensure that such a practice would be lawful.[13]

In addition to the comments made in its Paper, the Director General of the SCA, Rickard Jermsten, has publically expressed that environmental benefits that occur outside the relevant market can be considered, as long as there is an overlap between the consumers in the relevant market and the beneficiaries in adjacent markets. He has also stated that the difficult task of measuring and balancing environmental harms and benefits should not make it prohibitively hard for parties to prove the existence of effects. Seemingly willing to consider out of

[7] The Paper, p. 10.

[8] The Paper, p. 10. The SCA refers to the Commission's decision CECED (IV.F.1/36.718), paras. 55-57, where the collective benefits of the agreement were considered.

[9] The Paper, p. 10. The SCA refers to judgment of 28 February 2002, *Compagnie générale maritime and Others v Commission*, T-86/95, ECLI:EU:T:2002:50 and judgment of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, ECLI:EU:C:2009:610.

[10] The Paper, p. 10.

[11] Judgment of 19 February 2002, *Wouters and Others*, C-309/99, ECLI:EU:C:2002:98.

[12] The Paper, pp. 10-11.

[13] The Paper, p. 11.

market benefits, he also clarified that he would welcome further clarification from the Commission in this regard.[14] Thus, the SCA does not appear to want to go beyond any guidelines adopted by the Commission.

In conclusion, the SCA recognises that environment related matters are increasingly relevant within the context of competition law. The authority has emphasised how conditions already exist to consider different types of sustainability as unproblematic under Article 101(1) TFEU. The authority has also underlined the possibility existing under present circumstances to justify sustainability agreements under Article 101(3) TFEU that are considered to restrict competition, provided they give rise to efficiency gains. Accordingly, within currently existing competition law constraints, the SCA is clearly willing to consider sustainability arguments. Moreover, although it has not adopted a firm position on the issue, the SCA seems to suggest that it would welcome a development, which would allow for out of market environmental benefits to be considered in competition law assessments. However, the SCA is not ready to move forward on this issue without further clarification from the Commission.

Question 2

As set out in its Paper, the SCA considers that the current legal framework for merger control assessment contributes to ensuring that competition is not restricted, which in turn provides opportunities for development and innovation focused on the environment and sustainability. The authority is also of the view that environment and sustainability aspects may have a direct effect on market definitions and, in turn, the market power of merging companies. The SCA underlines that environmental or sustainability aspects are not subject to particular consideration, though their impact on the function of the market and consumer behaviour constitute a part of the assessment of market competition.[15]

Moreover, the SCA also states in its Paper that sustainability aspects could be considered as part of an analysis of efficiency benefits, provided they generate consumer benefits, are merger specific and verifiable. Thus, to the extent sustainability aspects would generate such efficiency gains, there is nothing in principle that would prevent competition authorities from considering such aspects as part of their merger control assessments.[16] However, the SCA would not consider claims related to sustainability and the environment as efficiency

[14] Address of the Director General of the SCA, Rickard Jermsten, on 2 June 2022 at the 16th Annual IBA Competition Mid-Year Conference in Stockholm, Sweden.
[15] The Paper, p. 13.
[16] The Paper, p. 13.

benefits on their own that could outweigh competitive harm. Similarly, it would not consider a transaction's likely detrimental effects on the environment to constitute competitive harm on their own.

Question 3

As set out above, the SCA does not weigh benefits related to sustainability and the environment against a transaction's effect on competition. Rather, sustainability and environmental aspects would be considered as part of the authority's assessment of market competition in view of their impact on the function of the market and consumer behaviour.

Question 4

The SCA has on different occasions commented on the intended Siemens/Alstom transaction and the discussion related to "European champions" and the EU's future industry policy ambitions, in particular after the Commission's decision in this case on 6 February 2019.[17]

The authority has consistently voiced its opposition to a relaxation of EU merger control rules in favour of mergers among large European companies to allow for the creation of so-called "European Champions". The authority has underlined that the European merger control regime is based on hard-won principles of consumer welfare, transparency and legal certainty. According to the authority, this practice provides European consumers with lower prices and better products. The SCA considers that to relax EU merger controls in favour of "European champions" could damage the credibility of competition enforcement in Europe and undermine the cornerstones of a well-functioning single market where companies of all sizes can develop and thrive.[18]

The SCA has also emphasised that to change European merger control rules would benefit but a few large European companies and be especially detrimental to Member States with smaller domestic markets. The SCA has stated that this would be the case for the Nordic countries, where many markets are already concentrated.[19] Moreover, the SCA does not consider that the present regime is

[17] Siemens/Alstom (Case M.8677).

[18] Konkurrensverket, *The Nordic Competition Authorities support a strict merger control regime*, 26 June 2019, www.konkurrensverket.se/en/news/the-nordic-competition-authorities-support-a-strict-merger-control-without-political-interference/the-nordic-competition-authorities-support-a-strict-merger-control-regime/, visited 1 October 2022.

[19] Konkurrensverket, *The Nordic Competition Authorities support a strict merger control regime*, 26 June 2019.

excessively intrusive and believes that current merger rules do not stand in the way of creating European Champions through mergers. Such mergers will be allowed if they also give rise to synergies – including economies of scale and scope – that will offset the negative impact of increased concentration on consumer welfare.[20]

The author is not aware of any interventions by market participants in Sweden in Siemens/Alstom (Case M.8677).

The author is not aware of any case where the SCA would have been presented with arguments similar to those put forward in case M.8677 (Siemens/Alstom).

Question 5

As stated above, the SCA has consistently voiced its opposition to a relaxation of EU merger control rules to cater for EU industrial policy concerns and thus in favour of "European Champions". The SCA has emphasised that competition, not politics, should identify the winners among European firms. [21]

Question 6

The intervention by a ministry in relation to a decision adopted by the SCA, or any other authority, is contrary to Swedish law. Thus, a ministry cannot overrule a decision adopted by the SCA on industrial policy grounds.

Question 7

The SCA has not brought any case against any of the large US digital platforms.

Concerning the role of NCAs and its ability to bring competition law-based cases, the DMA raises concerns. One particular issue is the potential overlap between the DMA and competition law rules. Article 1(5) of the DMA requires Member States to "*not impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets*". Article 1(5) of the DMA further clarifies that the DMA does not preclude Member States "*from imposing obligations on undertakings […] for matters falling outside the scope of this Regulation*". Accordingly, if a matter falls *within* the DMA, the Member States are not permitted to impose additional obligations on gatekeepers for the purpose of ensuring contestable and fair markets.

[20] Konkurrensverket, *The Nordic Competition Authorities support a strict merger control regime*, 26 June 2019.

[21] Konkurrensverket, *The Nordic Competition Authorities support a strict merger control regime*, 26 June 2019.

The exclusion clause provided for in Article 1(5) of the DMA must be read in the context of Article 1(6) of the DMA. The latter provision provides that the DMA, including its Article 1(5), is without prejudice to the application of Articles 101 and 102 TFEU and national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions. Moreover, it also follows from Article 1(6) that the DMA is without prejudice to national competition rules prohibiting "*other forms of unilateral conduct*", if they are applied to undertakings other than gatekeepers or provides for obligations beyond the DMA. Consequently, Article 1(6) of the DMA is meant to ensure that the DMA will not affect EU and national competition law or national competition rules on unilateral conduct that oblige other undertakings than gatekeepers or provide for obligations beyond the DMA.

However, the distinction between the DMA and competition law is not straightforward. Conduct could well be seen to fall under both competition rules and the DMA, alternatively it may be difficult to determine which of the two frameworks that would apply. In such circumstances, it may be difficult for the SCA to decide if it is possible to move forward with a competition law-based case against a large digital platform.

The difficulties connected to the overlap between the DMA on the one hand and EU and nation competition rules on the other should not be overemphasised. The connection between the two regimes must be considered in the context of the role of NCAs in relation to large digital platforms. Large digital platforms operate in general on a cross-border basis. Without coordination at EU level, large digital platforms risk being subject to competition law-based claims in different Member States, in addition to actions based on the DMA adopted by the Commission at EU level. Such a development could lead to an increase in unnecessary administrative costs and legal uncertainties for companies. This does not mean that NCAs should not play an important role in the context of large digital platforms. A robust dialogue and coordination between NCAs and the Commission should underpin the relationship between them with a view to effective enforcement of both competition rules and the DMA.

Question 8

Strong EU competition rules are, and have been, a prerequisite for creating the effective competition that currently exists in the EU Single Market. Competition drives efficiency, innovation and rewards companies based on merit. The EU State aid rules play an important role in this framework. As recognised by the Commission, State aid should only be used when it is an appropriate instrument

for meeting a well-defined objective, when it creates the right incentives, is proportionate and when it distorts competition to the least possible extent. For that reason, appreciating the compatibility of State aid is fundamentally about balancing the negative effects of aid on competition with its positive effects in terms of common interest.[22] In this context, it is difficult to find a strong enough reason in favour of allowing State aid to be used in favour of industrial champions.

Some argue that there is a compelling link between an undertaking's size and its capacity to compete. In the presence of economies of scale – increasing returns associated with high fixed costs and low marginal costs – large companies produce more efficiently than smaller competitors do. In high-technology sectors, a minimum scale is also required to allow for a critical mass of investments in research and innovation. Moreover, large companies can also benefit from economies of scope, associated with the possibility to combine the production, research or distribution of similar products and services.

However, the presence of economies of scale does not justify intervention. As in the infant industry case, if entry or capacity expansions are profitable, that is, if future returns compensate for the upfront investments, a rational firm will invest and grow to the efficient size, with or without government support. Ensuring access to large markets and tackling potential obstacles to firm growth, like limited access to finance or regulatory hurdles, would be more efficient ways of promoting enterprise growth than direct support. In markets with significant economies of scale, companies will have a natural incentive to invest and grow to the efficient size. Conversely, protection of national champions, e.g. by preventing entry and limiting competitive pressure, can aggravate the problems associated with market power in terms of dead-weight loss, productive inefficiencies and lack of incentives to innovate.[23]

Regarding lessons that could be drawn from the Covid-19 pandemic in a State aid perspective, it is helpful to briefly consider the justification for the temporary state aid measures implemented during the Covid-19 outbreak. Where these measures were not aimed at sectors directly engaged in Covid-19-relevant products or research and developments, they were considered needed to remedy liquidity shortage caused by the pandemic and to ensure access to finance for businesses that faced a sudden shortage.[24] For state guarantees and

[22] The Commission, *State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005–2009 (COM(205) 107)*, paras. 10-11.

[23] E. Maincent and L. Navarro, *A Policy for Industrial Champions: from picking winners to fostering excellence and the growth of firms*, Industrial Policy and Economic Reforms Papers No 2., April 2006, p. 16.

[24] Commission Press Release of 6 April 2020, *State aid: Commission extends Temporary Framework to enable Member States to accelerate research, testing and production of coronavirus relevant products, to protect jobs and to further support the economy in the coronavirus outbreak*, at para. 11.

loan interest subsidies, the aim was repeated and clarified as ensuring access to liquidity.[25]

Accordingly, the temporary state aid measures during the Covid-19 pandemic were meant to remedy liquidity shortage caused by the pandemic and to ensure access to finance. The Commission did not devise a free-for-all for Member States to channel fiscal support into their potential national champions where those businesses already had access to liquidity and/or finance. The aid measures put in place were not directly designed to support the long-term viability of a strategic European industry sector. This must be correct. As considered above, the long-term viability of a strategic European industry sector must not be dependent on State aid measures.

Question 9

In general, Swedish courts have not been seeking clarification regarding State aid law issues. There are no examples available of where Swedish courts have used Article 29(1) of Regulation 2015/1589. To the extent of Swedish courts have dealt with State aid issues, they have set to deal with these without the collaboration with the Commission.

The Commission has on one occasion submitted written observations in national proceedings in accordance with Article 29(2) of Regulation 2015/1589. This occurred in the case Micula m.fl. mot Rumänien (Micula and others v Romania).[26]

Swedish courts have never made a request for a preliminary ruling in a matter concerning State aid.[27]

Question 10

To the author's knowledge, the SCA has not engaged in any competition law analysis which have involved trade instruments. This observation has been confirmed by the SCA in conversations with the authority. Moreover, new geopolitical instruments are unlikely to play any significant role to the SCA's analysis going forward, if at all. The SCA has stated that the Swedish market is too small to involve existing and future trade instruments in competition law analysis.

[25] Commission Press Release of 6 April 2020, *State aid: Commission extends Temporary Framework to enable Member States to accelerate research, testing and production of coronavirus relevant products, to protect jobs and to further support the economy in the coronavirus outbreak*, at paras. 24 and 26.

[26] Decision of the Nacka District Court (Nacka tingsrätt) of 5 July 2019.

[27] U. Bernitz, *Förhandsavgöranden av EU-domstolen 1995-2020 – Genomslag och betydelse i Sverige, Svenska institutet för europapolitiska studier*, Rapport nr. 2, September 2021, p. 72.

Question 11

There are currently only limited possibilities to control foreign direct investments in Sweden. Amendments to the Protective Security Act (Sw. *Säkerhetsskyddslagen (2018:585)*) entered into force on 1 January 2021 and these changes established a screening system concerning the transfer (sale) of certain security-sensitive activities. There is only limited information available regarding the application of this screening system.

The key challenge is to know when the screening system applies. The mechanism specifically targets transfers (sales) of activities that are sensitive to Swedish security interests, so called security-sensitive activities. If a transfer involves a security-sensitive activity, it falls within the scope of the screening system set out in the Protective Security Act and must be considered in accordance with this mechanism. However, there is (deliberately) no definition of what constitutes a "security-sensitive activity" and there is no detailed guidance available on when the screening mechanism in the Protective Security Act becomes applicable. The starting point for the assessment of if an activity is security-sensitive is if it affects Swedish security, including external and internal security interests as well as nationally important societal functions. There is no room for competition considerations under the mechanism provided for in the Protective Security Act.

It has been very difficult for companies and their legal advisors to appreciate if and when an activity actually affects Swedish security interests. The legislative preparatory works to the Protective Security Act have identified activities that could be characterised as security-sensitive. However, these examples have rarely been of much practical value.

Moreover, the investment screening system provided for in the Protective Security Act does not only target FDI from third countries, but also intra-EU transfers. There are no thresholds or other qualifying conditions to determine when the screening system becomes applicable. If a transfer involves a security-sensitive activity, it falls within the scope of the screening mechanism provided for in the Protective Security Act.

It is the operator of an activity – i.e. the seller – that is responsible for determining if an activity subject to a transfer is to be considered as security-sensitive and thus within the scope of the Protective Security Act. Essentially, if the seller, following a specifically regulated security analysis, considers that the transfer is not unsuitable from a security perspective, it has an obligation to consult with the relevant authority regarding the transfer. The relevant authority differs depending on the nature/area of the activity. A transfer may not be carried out until the

consultation process is completed. It is ultimately up to the relevant authority to decide when the seller can proceed with the planned transfer (sale). The authority can also refuse to approve the transfer. The authority may also decide on penalty fees in the event certain obligations set out in the Protective Security Act have been breached. The decisions adopted by the authority may be appealed to the Administrative Court of First Instance in Stockholm.

Regarding the application of the FDI Screening Regulation,[28] the screening mechanism provided for in the Protective Security Act falls within the definition of a foreign direct investment screening mechanism as set out in Article 2 of this regulation. However, in contrast to the FDI Screening Regulation, the screening mechanism provided for in the Protective Security Act is not limited to third country investments. It also targets intra-EU transfers. On the other hand, the mechanism is restricted to "security-sensitive" activities. As also stated above, the starting point for the assessment if an activity is security-sensitive, is if it affects Swedish security, including external and internal security interests as well as nationally important societal functions. It is likely that the scope of "security-sensitive" activities that may trigger a screening is narrower than the factors, set out in Article 4 of the FDI Screening Regulation that may be taken into consideration by Member States or the Commission in determining whether a foreign direct investment should generate a screening according to Regulation 2019/452.

It is uncertain if the Swedish government considers the screening mechanism in the Protective Security Act to fall within the scope of the FDI Screening Regulation at all. The Swedish government has not notified the screening mechanism to the Commission in accordance with Article 3(7) of the FDI Screening Regulation. Moreover, the author is not aware of any occasion where the cooperation mechanism provided for in either Article 6 or 7 of the FDI Screening Regulation has been used by the Swedish government.

Further, the amendments to the Protective Security Act that established a screening system concerning the transfer (sale) of certain security-sensitive activities were brought in as a direct response to effects on investments linked to the Covid-19 pandemic. The Swedish government considered it a matter of urgency to rapidly provide for an investment screening system and did not consider that the forthcoming FDI-act would be ready soon enough. Thus, a screening mechanism was provided for in the then already existing Protective Security Act.

[28] 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 L 079I 21.3.2019, p. 1).

Finally, in addition to the screening mechanism provided for in the Protective, it should be noted that a proposal for a new FDI-act is currently under consideration by the Swedish legislature. The proposed legislation is meant to introduce extensive requirements concerning the screening of investments and will be much broader than the mechanism provided for in the Protective Security Act. At the time of writing, it is uncertain when the new Act is meant to enter into force. However, in view of its importance, some of its likely key features are listed below.

- Anyone planning to make an investment covered by the new act should be required to notify the screening authority. A notification must be made before the investment is carried out.
- The suggested scope of the act is very wide. Not only investments made by investors from third countries, but *also those made by investors from other EU Member States* should be subject to a notification requirement. In addition, investments made by investors from Sweden should in general also be notified.
- The range of activities to be covered by the new screening mechanism is substantial. It is suggested that it should cover, for example, companies that carry on essential services (services or infrastructure necessary to the maintenance of important societal functions), activities related to the processing of raw materials considered critical to the EU, activities whose principal purpose concerns the processing of sensitive personal data or location data, activities related to emerging technologies and activities that manufacture, develop, conduct research into or supply dual-use products, or supply technical assistance for such products.
- The Inspectorate of Strategic Products (Sw. *Inspektionen* för *strategiska produkter*, "ISP") will be the authority responsible for screening foreign direct investments.
- The screening mechanism should be applicable to all investments in Swedish undertakings that carry out protected activities, regardless of their legal form. In other words, the act should apply to all investments in limited companies, partnerships, unincorporated partnerships, sole trader undertakings, economic associations, and foundations and trusts domiciled in Sweden.
- A threshold requirement related to investments in limited companies and economic associations is proposed. It is suggested that an investment where the investor after the investment will command 10 per cent or more of the total number of votes in the undertaking, through their shareholding, other participations, or membership, must be notified.

- The screening authority's screening analysis should involve an overall assessment in each individual case, based on the relevant activity's actual protection value. In particular, circumstances related to the potential investor will be significant for how the risks of the investment should be assessed.
- The screening will consist of a two-stage procedure. At the first stage, the screening authority must decide whether to take no further action or to initiate stage two, the screening process, within 25 working days of the notification. If the process moves into stage two, the authority should be required to adopt a final decision within three months of the decision to initiate the screening process. This deadline may be extended up to six months under certain circumstances.
- The screening authority shall have the right to order the investor and the investee undertaking to provide information or documentation requested by the authority. The authority should also have the power to issue injunctions in order to gain access to sites, premises and other locations.
- The screening authority may decide that the transaction cannot be carried out. It is suggested that it should also be able to approve the investment subject to conditions.
- A breach of the suggested legal requirements should be subject to a penalty fee, ranging from SEK 25,000 to SEK 50 million.

Question 12

In general, the proposal for a foreign subsidies regulation has generated relatively little discussion in Sweden. However, the Confederation of Swedish Enterprise ("the Confederation"), representing 60,000 companies and 49 industry and employer organisations, has commented on the proposal.[29] The Confederation has expressed its overall support for the new instrument. In particular, the Confederation has underlined that the new regulation will contribute to a level playing field within the single market and, in the longer term, generate greater transparency and insight into the prevalence of foreign subsidies.

Although at large positive towards the proposed regulation, the Confederation has also stressed that the new instrument must be proportionate, non-discriminatory and promote legal certainty. It has also stated that the new regulation should not unduly hinder foreign investments and should not generate greater administrative

[29] The Confederation of Swedish Enterprise, *Swedish Enterprise on the proposed EU regulation on foreign subsidies*, 14 May 2021.

costs than necessary. In addition, in order not to distort competition, the Confederation has underlined that the new instrument should not be more restrictive than the EU's existing State Aid rules.

The Confederation has not put forward any specific concerns regarding the procedural autonomy of Member States in organising public procurement review procedures or the scope of the Commission's proposed powers. On the contrary, the Confederation has welcomed the proposal to give the Commission sole supervisory responsibility. According to the Confederation, the Commission is the only actor capable of pooling the necessary resources and expertise over time to take on this role effectively.[30]

As a final comment, it may be added that the Confederation does not seem to have considered constitutionally fundamental issues such as subsidiarity, evidentiary standards and due process.

Question 13

The proposed foreign subsidies regulation, combining existing competition, public procurement and trade defence frameworks, has its limitations. The general objective of the new regulation – to deal with distortions in the internal market – is broadly the same as the objectives of EU competition law and trade defence rules. However, by combining the different frameworks into one single instrument, the proposed foreign subsidies regulation becomes a blunt instrument that may not be able to deal with distortions of the market effectively and, under certain circumstances, it may even have the opposite effect to its stated aim.

For example, the proposed foreign subsidies regulation draws on familiar EU competition law tools, but combines and re-purposes them in an unprecedent fashion. Notably, the definition of a financial contribution that may be considered to distort the internal market is very broad. However, in contrast to existing EU State aid rules, there are no immediate exceptions to subsidies that shall or may be considered compatible with the internal market similar to the exceptions provided for in Articles 107(2) and 107(3) TFEU. Nor is there a framework similar to the General Block Exemption Regulation (GBER)[31], which would clarify when a financial contribution would not be open to scrutiny by the Commission. As a result, financial contributions under the foreign subsidies regulation may be considered more problematic than comparable subsidies under EU State aid rules. Moreover,

[30] The Confederation of Swedish Enterprise, *Swedish Enterprise on the proposed EU regulation on foreign subsidies*, 14 May 2021, p.3.

[31] Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1–78).

the administrative burden on companies to identify financial contributions under the regulation, even in circumstances where the financial contribution would subsequently be considered as non-distorting, may prove to be, because of the general approach adopted towards financial contributions, significant.

Another issue is the nature of the required causal link between a foreign subsidy and distortion on the internal market. To prove a causal link between subsidies granted outside the EU and distortions in the EU will present new challenges.

A third difficulty that must be considered is the nature of remedies that the Commission may impose to address the distortion caused by a foreign subsidy. Possibly with the exception of a foreign subsidy directly facilitating a proposed acquisition (which the Commission could require a proposed acquirer to reject or reimburse), the appropriate remedy for a distortion may well be unclear. For example, what would the remedy be if the Commission concludes that long-standing subsidies under public-sector contracts raise a bidder's general profitability, enabling it to pay more for a target than EU bidders? What if the subsidised acquirer is the only bidder, or all potential acquirers are subsidised?

A concluding comment may be that the combined use of existing competition, public procurement and trade defence frameworks to address the distortive effects of foreign subsidies is not straightforward. As exemplified above, the resulting instrument is a blunt one, not necessarily at all times fit for purpose.

Question 14

There is currently no legal requirement of a mandatory duty of care or due diligence obligation in Sweden applicable to companies with regard to human rights and environmental law throughout the supply chain that can be judicially enforced.

Question 15

There are several issues regarding the enforcement and implementation of the duty of care/due diligence obligation/legislation set out in the proposed directive. This criticism includes the following three issues.

First, several of the provisions in the proposed directive rest on the assumption that a company is able to effectively map the entirety of their value chain, including identifying indirect "established business relationships" through multiple tiers.[32]

[32] Article 6(1) of the draft Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

While companies in some areas have managed to identify supply areas for key raw materials, this does not seem to generally have been done on a larger scale across all of the company's value chain as required by the proposed directive. It may well prove difficult for many companies to ensure that "established business relationships" with indirect suppliers are disclosed to them.

Second, a chief reason for the proposed directive is that it is meant to establish a level playing field between companies across the EU and thus to prevent implementation of varying standards.[33] However, to require the Member States to implement far-reaching, often unprecedented and controversial obligations through a directive also means that there is a significant risk that the implementation, under different national substantive and procedural regimes, may lead to an uneven implementation and subsequently application of the new obligations.

Third, the proposed directive requires the Member States to designate one or more supervisory authorities to supervise compliance with key obligations and carry out investigations into possible breaches by companies of these obligations.[34] Much of the language used in the proposed directive is very general and principles based. For example, Article 6(1) of the proposed directive requires companies to "take appropriate measures" to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships. It will require significant expertise, within both companies and the supervisory authorities, to analyse what "reasonable" or "appropriate" would constitute in different contexts across industries and multiple underlying jurisdictions. There are a limited number of individuals who hold this expertise. Accordingly, there is therefore a risk that the relevant expertise will not be available in all Member States and/or that companies will face a skills gap when recruiting individuals to assist in the implementation of the required analysis, policies and processes.

The issues related to the implementation of the sustainable corporate governance aspects of the proposed directive are considerable and would introduce unprecedented corporate governance obligations into Swedish law. For example, as provided for in Article 15(3) of the proposed directive, companies are required to take into account sustainability metrics in their plans for variable remuneration.

[33] Explanatory memorandum to the draft Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

[34] Article 17 of the draft Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

This obligation is problematic. As stated by Lidman and Hansen, one of the central issues that stock market regulation needs to deal with to make equity financing attractive is the agency problem. A core part of corporate governance aimed at this problem is that shareholders are given the right to "hire, fire and set the compensation of top-level managers". Variable remuneration is a key tool to align management and shareholder interests. Accordingly, the obligation in Article 15(3) of the proposed directive meddles with at least the compensation-part of the shareholder control rights. Consequently, this obligation makes it harder for shareholders to oversee and control management. Moreover, Article 25 of the proposed directive effectively requires management to take into account the consequences of their decisions for sustainability matters. By doing so, the directive further widens the gap between shareholders and management by decreasing the latter's accountability towards shareholders.[35]

In general, the models of corporate governance differ widely between the Member States. This reflects important national differences in factors such as legal frameworks, business practices and ownership structures across Member States. This diversity in corporate governance models has previously been recognised and respected by the EU. For example, the Shareolder Rights Directive II[36] expresses the following:

"It is therefore important to respect the diversity of corporate governance systems within the Union, which reflect different Member States' views about the roles of companies […]."[37]

In view of the principle of subsidiarity, to respect the diversity of corporate governance systems within the EU, which reflect different Member States' views about inter alia the roles of companies should not be taken lightly. The harmonisation attempted by the proposed directive severely risks overstepping this mark.

[35] E. Lidman and J Lau Hansen, *Response to the Proposed Corporate Sustainability Due Diligence Directive by Nordic and Baltic Company Law Scholars*, Oxford Business Law Blog, 14 July 2022 blogs.law.ox.ac.uk/business-law-blog/blog/2022/07/response-proposed-corporate-sustainability-due-diligence-directive, visited 1 October 2022.

[36] Directive 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (OJ L 132, 20.5.2017, p. 1–25).

[37] Recital 28 of Directive 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (OJ L 132, 20.5.2017, p. 1–25).