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The Role of Innovation in Enforcement Cases – Note by the European Union

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More documents related to this discussion can be found at www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm.

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1. Introduction

1. The Commission fully shares the conclusions of the Background Note of the OECD Secretariat[1] on the importance of innovation, in its different forms, as a driver both for the economy as a whole and for the development of individual undertakings. Innovation is key for the economic development and one of the main drivers of growth and employment in the EU economy, that in turn generate clear benefits for consumers' welfare.

2. Similarly, there is consensus that the relationship between competition and innovation is bi-directional: competitive markets generally promote innovation and innovation can shape and redesign the competitive scenario. The interaction may be more relevant in certain specific innovation-driven markets, such as the pharmaceutical industry or highly technological sectors. Nevertheless, innovation, be it related to products or services, is relevant for the whole economy.

3. This note will provide an overview of the experience of the Commission in the field of competition and innovation. Section 2 will first describe the role of innovation in market definition, in particular in light of the ongoing review of the Commission's Market Definition Notice[2], which is applicable to the Commission's practice in both antitrust and merger assessments. Section 3 will focus on innovation in antitrust, describing (a) the legal framework and (b) examples from the Commission's enforcement practice. Section 4 will deal with the Commission's merger practice, again focusing first on the legal framework and then on the main cases where innovation played a key role in the competitive assessment of the transaction or in the design of suitable remedies. Finally, Section 5 offers a conclusion.

2. Innovation in market definition

4. The Commission's Market Definition Notice provides guidance on the principles and methodologies applied by the Commission when defining markets in competition enforcement. In the Union legal framework, market definition is an important first step in the assessment of cases under competition law. The Commission generally uses market definition where there is a need to assess the relative competitive strength of the undertakings as part of the competitive assessment and, most notably, to assess whether an undertaking holds market power. Market definition is used by the Commission to identify the immediate and effective competitive constraints faced by the undertaking(s) concerned.

5. The Commission is currently revising its Market Definition Notice.[3] The Commission's draft revised Market Definition Notice recognises the importance of

[1] OECD Secretariat, *Competition and Innovation, Part I: a theoretical perspective – Background Note*, 14 June 2023, DAF/COMP(2023)2.

[2] Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p.5 (the "Market Definition Notice").

[3] The draft revised Market Definition Notice was made available for public consultation on 8 November 2022, more information can be found at https://competition-policy.ec.europa.eu/public-

innovation as one of the parameters of competition relevant for market definition. The draft also acknowledges that market definitions can differ depending on the competition concerns in question. For instance, the competitive constraints may depend on whether the concern being explored is that a merger would lead to increases in prices of existing products, or that the same merger would reduce investments in product development.[4] As a result, the relevant market definition in relation to price competition may differ from the relevant market in relation to innovation competition.

6. Moreover, as highly innovative industries characterised by significant presence of R&D have certain specificities, the draft revised Market Definition Notice includes a section dedicated to markets with significant R&D activities. This section elaborates on how the Commission takes such specificities into account when defining markets, in particular with respect to pipeline products and innovation efforts.

7. As regards pipeline products, while these products are not yet available to customers, there may be sufficient visibility on their R&D process to establish the other product(s), with which the pipeline product is likely to be substitutable if the product is ultimately brought to market. Thus, the Commission may conclude that a pipeline product belongs to an existing relevant product market or to a new product market, which would be limited to the pipeline product and its substitutes. The Commission assesses the intended use of the pipeline product and its projected substitutability with other products play when defining the relevant market. Moreover, the geographic dimension of a relevant market containing pipeline products may need to reflect the geographic dimension of the underlying R&D effort. It could hence be broader than the relevant geographic market of commercialised products.

8. As regards innovation efforts, while early innovation efforts may not immediately translate into tradeable products, it may still be relevant to identify the boundaries within which undertakings compete in such earlier innovation efforts, in order to assess whether there could be a loss of innovation competition due to a concentration or behaviour. In this type of assessment, the Commission may take into account a number of relevant factors, such as the different lines of research, the specialisation of the different teams involved in the research or the results of the undertaking's past innovation efforts.

9. The guidance on innovation included in the draft revised Market Definition Notice, which builds on the Commission's case practice, illustrates the importance given to innovation as a parameter of competition when assessing cases, including as part of market definition, under Union competition law – both in antitrust and merger control enforcement.

consultations/2022-market-definition-notice_en. The revised Market Definition Notice has not yet been adopted at the time of drafting of this contribution.

[4] For example, in case M.7932 *Dow/DuPont*, the Commission first defined national markets for formulated crop protection products to assess product and price competition. In that assessment, the Commission relied on market shares computed at the level of crop/pest combinations at the national level, but also used market shares for crop/pest combination groupings at the EEA level as being informative of the strength of market players at the level of their portfolio of active ingredients, as well as global market shares of R&D suppliers, as being informative of the relative strength of suppliers bringing new active ingredients to the market. Second, the Commission analysed innovation competition in the whole industry and in innovation spaces consisting of groupings of crop/pest combinations at the global or at least EEA-wide level to assess how agrochemical companies compete to discover and develop new active ingredients.

3. Innovation in antitrust

3.1. Legal framework

10. This section describes the different Union competition law instruments – regulations and notices – related to antitrust, where the concept of competition in innovation has been translated into specific rules and indications.

11. The importance of innovation in the EU competitive analysis is already evident from the text of the fundamental competition rules in the Treaty on the Functioning of the European Union ("TFEU"). Article 101(1) TFEU expressly prohibits agreements restrictive of competition that, in particular, limit technical development.[5] Article 101(3) TFEU then provides that the prohibition of Article 101(1) can be declared inapplicable in case of agreements that, *inter alia*, contribute to the promotion of technical progress.[6] Similarly, Article 102 TFEU on abuse of dominant position expressly states that a conduct can be abusive if it consists in limiting, *inter alia*, technical development (lett. b).[7] The Commission has implemented and specified these principles in a series of specific competition instruments over the years.

12. The relevance of innovation is confirmed in the Guidelines on the application of Article 101(3) TFEU, published in 2004.[8] Those Guidelines clarify that agreements between undertakings are caught by the prohibition rule of Article 101(1) when they are likely to have an appreciable adverse impact on the parameters of competition on the market, including innovation. [9] The ability to maintain innovation below competitive levels for a significant period of time is also mentioned as an indication of market power.[10] The nexus between competition and innovation is then explicitly mentioned referring to the analysis under Article 101(3) TFEU, where it is stated that rivalry between undertakings is

[5] The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: […] (b) limit or control production, markets, technical development, or investment; […].

[6] The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[7] Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: […] (b) limiting production, markets or technical development to the prejudice of consumers; […]

[8] *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.4.2004, p. 97–118

[9] *Guidelines on the application of Article 81(3) of the Treaty*, para. 16.

[10] *Guidelines on the application of Article 81(3) of the Treaty*, para. 25.

an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. [11] The Guidelines confirm that innovation competition is one of the most important expressions of competition, together with price competition. [12]

13. In accordance with this general rule, the role of competition in innovation is then particularly relevant in two regulations adopted by the Commission for the implementation of Article 101(3) TFEU.

14. Regulation 316/2014 on technology transfer agreements ("TTBER").[13] Technology transfer agreements are agreements by which one party authorises another to use certain industrial property rights (e.g. patents, design rights, software copyrights and know-how) for the production of goods or services. The TTBER exempts from the prohibition of Article 101(1) TFEU certain categories of technology transfer agreements, considering in general that they can have substantial pro-competitive potential, as they may promote innovation by allowing innovators to earn returns to cover at least part of their research and development costs. To strike a balance between cooperation and competition, according to the TTBER technology transfer agreements can only benefit from an exemption under the TTBER if (i) the parties to the agreement have a market share below certain thresholds and (ii) the agreement does not include hardcore restrictions.[14] Moreover, a series of clauses are excluded from the benefit of the exemption.

15. It is noteworthy that in the TTBER the market share thresholds apply to both the relevant product market(s) and the relevant technology market(s). Technology markets consist of the licensed technology rights and their substitutes, namely other technologies which are regarded by the licensees as interchangeable for producing the contract products. The inclusion of both products and technology market thresholds is an attempt to capture all actual and potential competitive effects of licence agreements. Technology is an input, which is integrated either into a product or a production process. Technology right licensing can therefore affect competition both upstream in input markets and downstream in output markets.

16. The Guidelines accompanying the TTBER[15] provides further indications on the relevance of competition in innovation for the Commission. Notably, paragraph 26 expressly recognizes that some licence agreements may affect competition in innovation. The Commission would normally confine itself to examining the impact of the agreement on competition within existing product and technology markets, as competition on such markets may be affected by agreements that delay the introduction of improved products or new products that over time will replace existing products. In a limited number of cases, however, it may be useful and necessary to also analyse the effects on competition in

[11] *Guidelines on the application of Article 81(3) of the Treaty*, para. 105.

[12] *The last condition for exception under Article [101] (3) is not fulfilled, if the agreement eliminates competition in one of its most important expressions. This is particularly the case when an agreement eliminates price competition or competition in respect of innovation and development of new products* (*Guidelines on the application of Article 81(3) of the Treaty*, para. 110).

[13] Commission Regulation (EU) No 316/2014 of 21 March 2014 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements*, OJ L 93, 28.3.2014, p. 17–23.

[14] Hardcore restrictions are serious restrictions of competition that will in general cause harm to the market and consumers, such as price fixing or output restriction.

[15] Communication from the Commission — *Guidelines on the application of Article 101 TFEU to technology transfer agreements*, OJ C 89, 28.3.2014, p. 3–50

innovation separately, particularly where the agreement affects innovation aiming at creating new products and where it is possible at an early stage to identify research and development poles. In such cases it can be analysed whether after the agreement there will be enough competing research and development poles left for effective competition in innovation to be maintained. In this respect, the Guidelines provide a soft safe harbour for technology transfer agreements that fall outside the block exemption because the market shares thresholds are exceeded. For these agreements, the Guidelines state that, in the absence of hardcore restrictions, an infringement of Article 101 TFEU is unlikely if there are at least four other independently controlled technologies that are substitutable for the licensed technology.[16]

17. Finally, the TTBER excludes from the benefit of the exemption all clauses assigning the improvements of the licensed technology made by the licensee exclusively to the licensor (exclusive grant-backs), because this would reduce the licensee's incentive to innovate since it hinders the licensee in exploiting the improvements, including by way of licensing to third parties.

18. Regulation 2023/1066 on research and developments agreements ("R&D BER").[17] The R&D BER exempts from the prohibition of Article 101(1) TFEU certain types of R&D agreements and the joint exploitation of their results. The R&D BER clearly aims at facilitating innovation. The introduction of new processes and products on the market stimulates competition within the single market and helps to strengthen the ability of European industry to compete internationally. Research and development plays an essential role as it promotes and maintains dynamic competition, characterised by initiation and imitation and in doing so assures economic growth. Similarly to the TTBER, according to the R&D BER R&D agreements can only benefit from an exemption if (i) the parties to the agreement have a market share below certain thresholds applicable to both the product and the technology markets and (ii) the agreement does not include hardcore restrictions. Moreover, a series of clauses are excluded from the benefit of the exemption.

19. The R&D BER includes a specific reference to innovation competition, in its provision on the possibility for the Commission to withdraw the exemption in individual cases. According to lett. (e) of Article 10, the benefit of the exemption can be withdrawn where the existence of the research and development agreement would substantially restrict innovation competition in a particular field.

20. The relevance of the concept of innovation competition for the analysis of R&D agreements is confirmed in the chapter of the Horizontal Guidelines[18] dedicated to research and development agreements. The text refers for instance to early innovation efforts (cooperation on R&D that is not closely related to a specific product or technology) and explains that in those circumstance in order to assess the competitive position of the parties it may be necessary to take into account factors such as the nature and scope of the innovation efforts, the objectives of the various lines of research, the specialisation of the different teams involved or the results of the past innovation efforts of the undertakings

[16] *Guidelines on the application of Article 101 TFEU to technology transfer agreements*, paragraph 157.

[17] Commission Regulation (EU) 2023/1066 of 1 June 2023 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements*, OJ L 143, 2.6.2023, p. 9–19.

[18] Communication from the Commission – *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, OJ C 259, 21.7.2023, p. 1–125

concerned. This may require the use of specific metrics, for example, the level of R&D expenditure, or the number of patents or patent citations.[19] Similarly, the Horizontal Guidelines deal also with innovation relating to entirely new products, explaining that in that case the assessment will focus on possible restrictions of innovation competition concerning, for instance, the quality and variety of possible future products or technologies or the speed or level of innovation. The assessment must take into account that the outcome of R&D is by nature uncertain and that outcomes will, in general, be less certain for early innovation efforts than for R&D efforts that are close to the market launch of the products or technologies resulting from the R&D agreement. [20]

21. The Horizontal Guidelines also include several references to competition in innovation in the different chapters dealing with other categories of horizontal agreements. For example, the Guidelines indicate that mobile telecommunications infrastructure sharing agreements can reduce the parties' decision-making independence and limit their ability or incentives to engage in infrastructure competition with each other. This may in turn reduce the parties' flexibility in innovation and technology/product differentiation on the wholesale and retail mobile telecommunication markets and thereby limit competition between them. Therefore, mobile infrastructure sharing agreements can harm final consumers by leading to less choice, lower quality of services, as well as delays in innovation.[21] The Horizontal Guidelines also include references to competition in innovation in relation to the assessment of standardisation agreements, because of the risks of foreclosure of innovative technologies. Once a technology has been chosen to be included in a standard, competing technologies and undertakings may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring the exclusive use of a particular technology can have the effect of hindering the development and diffusion of other technologies. The risk of limitation of innovation is increased if one or more undertakings are unjustifiably excluded from the standard development process.[22]

22. In essence, the Horizontal Guidelines confirm that innovation competition is an important element in the assessment of conducts, in particular agreements, under the EU legal framework.

3.2. Decisional practice

23. The Union courts have indicated that innovation is a relevant parameter of competition.[23] In particular, in certain markets, innovation may even be the main parameter of competition.[24] Accordingly, in its enforcement practice of Articles 101 and 102 TFEU

[19] Horizontal Guidelines, paragraphs 133-134.

[20] Horizontal Guidelines, paragraph 150.

[21] Horizontal Guidelines, paragraph 263.

[22] Horizontal Guidelines, paragraph 443.

[23] Case C-377/20, SEN, paragraph 45; Case C-413/14 P Intel, paragraphs 133-134; Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, Case T-604/18, ECLI:EU:T:2022:541, paragraphs 177 and 281.

[24] Case T-168/01, GlaxoSmithKline Services Unlimited v Commission, EU:T:2006:265, paragraph 106 ; Case T-321/05, AstraZeneca AB and AstraZeneca plc v Commission, EU:T:2010:266, paragraph 254.

the Commission has investigated cases where innovation was an important part of the assessment.

24. In that regard, innovation plays a role in the analysis of anticompetitive conducts and their potential effects: an anticompetitive agreement or an abuse of dominance may harm innovation, to the detriment of consumers, who may be deprived of innovative products or services. Furthermore, the Commission takes into account innovation in the context of assessing possible objective justifications or efficiencies raised by the parties. This section provides some examples of these two scenarios from the Commission's enforcement experience.

25. As regards harm to innovation, the Commission has identified innovation concerns in several antitrust cases, in particular in sectors where innovation is a relevant parameter of competition. This includes in particular the digital sector.

26. For instance, already in the *Microsoft* case, the Commission found that Microsoft's tying of Window Media Player to the Windows OS harmed, among other things, innovation cycles.[25] More recently, in the *Android* case, the Commission found that Google had infringed Article 102 TFEU by putting in place a single and continuous infringement consisting of three separate unlawful conducts.[26] When assessing the potential effects of the first conduct, which amounted to tying (of each of the Google Search and browser apps to the Google Play Store), the Commission found that the ties reduced the incentives of competitors to invest in innovation.[27] Similarly, with regard to the anti-fragmentation agreements ("AFAs"), the Commission found that Google's prohibition of any alternative Android fork deterred innovation and limited the diversity of the offers available to consumers.[28] The General Court confirmed the Commission's findings on both conducts.[29]

[25] Commission decision of 21 April 2004 in case COMP/C-3/37.792 Microsoft, paragraphs 980-981 and 983, upheld by the General Court in judgment of 17 September 2007, *Microsoft* v *Commission*, Case T-201/04, EU:T:2007:289, paragraph 1088.

[26] In particular, Google (i) required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store); (ii) made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices; and (iii) prevented manufacturers wishing to pre-install Google apps from selling any smart mobile devices running on alternative versions of Android that were not approved by Google (so-called "Android forks"), through agreements called anti-fragmentation agreements ("AFAs"). See IP/18/4581 of 18 July 2018, "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine".

[27] In particular, as regards the tie of Google Search to the Play Store, the Commission found that "by making it harder for competing general search services to gain search queries including the respective revenues and data needed to improve their services, Google's conduct reduces the incentives of competing general search services to

invest in developing innovative features, such as innovation in algorithm and user experience design", Commission decision of 18 July 2018 in case AT.40099 – Google Android, paragraph 862. Similarly, as regards the tying of Google Chrome to Google Play, the Commission found that Google's conduct deterred innovation in relation to mobile web browsers because it prevented the development of non-OS specific mobile web browsers with innovative features, *Ibid*. paragraph 970.

[28] Commission decision of 18 July 2018 in case AT.40099 – Google Android, paragraphs 1139 – 1145.

[29] Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, Case T-604/18, ECLI:EU:T:2022:541, paragraphs 564, 862-863 and 892.

27. The Commission made similar findings on harm to innovation in the Google Shopping case, where it noted that Google's conduct was "likely to reduce the incentives of competing comparison-shopping services to innovate. Competing comparison shopping services will have an incentive to invest in developing innovative services, improving the relevance of their existing services and creating new types of services, only if they can reasonably expect that their services will be able to attract a sufficient volume of user traffic to compete with Google's comparison-shopping service."[30]

28. The Commission has identified harm to innovation also outside the digital sphere, in industries and cases where innovation was identified as a relevant parameter of competition. For instance, in the Car Emissions case, the Commission found that automotive original equipment manufacturers ("OEMs") had coordinated their market conducts to limit technological development and competition on innovation as regards car emission cleaning technologies for passenger cars. More specifically, the automotive OEMs held regular technical meetings to discuss the development of the selective catalytic reduction (SCR)-technology, which eliminates harmful nitrogen oxide (NOx)-emissions from diesel passenger cars through the injection of urea (also called "AdBlue") into the exhaust gas stream. During these meetings, and for over five years, the car manufacturers colluded to avoid competition on cleaning better than what was required by the applicable EU emission standards, despite the relevant technology being available. The OEMs reached an agreement on AdBlue tank sizes and ranges and a common understanding on the average estimated AdBlue-consumption.[31] The Commission found that the OEMs thereby removed the uncertainty about their future market conduct concerning the product characteristics of new diesel passenger cars equipped with SCR-systems, and that this behaviour was, by its very nature, capable of hindering competition and limited technological development, contrary to Article 101(b) TFEU.[32]

29. Importantly, the Union courts have specified that for the finding of an infringement of the competition rules it is not necessary to show that harm to innovation has actually manifested itself: the weakening of competition is highly likely to have such consequences.[33]

30. The risk of harm to innovation is also a reason for prompt intervention, particularly in markets where innovation is a key driver of competition, and given that harm in terms of less innovation may be hard to redress. For instance, in its decision adopting interim measures against Broadcom, the Commission found that Broadcom's conduct (consisting of exclusive or quasi-exclusive purchasing obligations and commercial advantages conditional on exclusivity or quasi-exclusivity) would lead to serious and irreparable harm, including harm to innovation. In particular, the Commission found that "*due to their weakened state and the reduced possibility of being able to contract with the principal OEMs for the sale of new products and thereby generate the necessary return on investment, competitors are likely to be less willing to carry out significant investments in research and development. Damage to innovation is likely to occur for example in the form*

[30] Commission decision of 27 June 2017 in case AT.39470 - Google Shopping, paragraph 595, confirmed by the General Court in judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, ECLI:EU:T:2021:763, paragraph 566.

[31] See IP/21/3581 of 8 July 2021, "Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars".

[32] Commission decision of 8 July 2021 in case AT. AT.40178 – *Car Emissions*, paragraph 224.

[33] See judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, ECLI:EU:T:2021:763, paragraph 443.

of competitors abandoning pipeline products as well as OEMs and service providers becoming increasingly unable to offer new or improved services to their customers."[34] The Commission also noted that harm to innovation would likely be irreversible, as damage in the form of undue delays to innovation or abandoned development of pipeline products cannot be undone by a Commission final decision.[35]

31. In some instances, assessing whether a conduct affects innovation is part of the very legal test for establishing that it is anticompetitive. This is particularly the case when it comes to refusal to supply abuses under Article 102 TFEU. The Union courts have indicated that the conduct by a dominant undertaking of refusing to give access to an input to downstream competitors amounts to an abuse of dominance where: (i) the input is indispensable; (b) the refusal is capable of eliminating all competition; and (iii) the refusal is not objectively justified.[36] When the input at stake is protected by intellectual property rights ("IPRs"), it is in particular necessary to establish that the dominant undertaking's refusal to supply the IP-protected input prevents the emergence of new products or services,[37] or limits "technical developments".[38] Accordingly, in such cases, to establish the abuse, it is necessary to assess whether the conduct affects innovation in the market, in the form of limiting technical developments. The Commission carried out this analysis in the *Microsoft* case, where it found that Microsoft's refusal to give interoperability information to its competitors affected innovation, as those competitors would be able to "*offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important*."[39]

32. While the importance of intellectual property rights to reward innovation is fully acknowledged in the EU decisional practice, it should also be noted that competition law may set limits to the use of intellectual property rights. This is particularly relevant in those cases where the exclusive IP rights are used in a way that is contrary to their intended purpose and where the practice relies on the use of means other than those which come within the scope of competition on the merits. For example, the misuse of patent rights

[34] Commission decision for interim measures of 16 October 2019 in case AT.40608 - *Broadcom*, paragraphs 474 and 479.

[35] *Ibid*, paragraph 495.

[36] Judgement of 26 November 1998, *Oscar Bronner v Mediaprint*, Case C-7/97, EU:C:1998:569, paragraph 41.

[37] The European Court of Justice ("ECJ") specified that the refusal to licence IPRs can be found to be abusive "*only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand*". judgment of 29 April 2004, IMS Health v NDC Health [2004], C-418/01, ECLI:EU:C:2004:257, paragraph 49

[38] Judgment of 17 September 2007, *Microsoft* v *Commission*, Case T-201/04, EU:T:2007:289, paragraph 647: "*The circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health, paragraph 107 above, cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.*"

[39] Judgment of 17 September 2007, *Microsoft* v *Commission*, Case T-201/04, EU:T:2007:289, paragraph 656, upholding the Commission's decisions and referring to paragraph 699 therein.

could adversely affect innovation in terms of stifled incentives to innovate in addition to having a direct effect on the market (e.g. by delaying the entry of generic drugs). In this regard, in the AstraZeneca case the General Court, following the arguments of the Commission, noted that the *"misuse of the patent system potentially reduces the incentive to engage in innovation, since it enables the company in a dominant position to maintain its exclusivity beyond the period envisaged by the legislator"*.[40] Specifically, the misuse of the patent system consisted in misleading representations made by a dominant undertaking to patent offices for the purposes of obtaining intellectual property rights to which an undertaking was not entitled, or to which it was entitled for a shorter period, which was correctly qualified by the Commission as an abuse of dominance.[41]

33. As regards innovation as a possible objective justification or efficiency, undertakings seeking to make this argument must prove with a sufficient degree of probability that their conduct indeed brings forth innovation efficiencies.[42]

34. In particular, the Union courts have indicated that vague, general and theoretical claims are insufficient.[43] For instance, in the *Microsoft* case, Microsoft argued as an objective justification that disclosing interoperability information to competitors would have a significant negative impact on its incentives to innovate. However, the Commission and the General Court rejected the argument, as it was not sufficiently well founded.[44]

35. Another example of an objective justification based on innovation is offered by the parallel trade cases in the pharmaceutical sector. In particular, GlaxoSmithKline argued that its contractual restrictions to parallel trade of pharmaceutical products could be

[40] Judgment of 1 July 2010, AstraZeneca v Commission, Case T-321/05, EU:T:2010:266, paragraph 367; the impugned conduct concerned misleading representations made to patent offices for the purposes of obtaining intellectual property rights to which an undertaking was not entitled, or to which it was entitled for a shorter period.

[41] See the judgment of 6 December 2012, AstraZeneca v Commission, Case C-457/10P, EU:C:2012:770, upholding the General Court judgment in Case T-321/05, EU:T:2010:266. See also the Commission's press release of 10 October 2022 announcing the sending of Statement of Objections to Teva over misuse of the patent system and disparagement of rival multiple sclerosis medicine: https://ec.europa.eu/commission/presscorner/detail/es/ip_22_6062.

[42] Judgment of 27 September 2006, GlaxoSmithKline Services v Commission, Case T-168/01, EU:T:2006:265, paragraph 252. In abuse of dominance cases, to prove that their conduct is not an abuse, dominant undertakings must show four cumulative conditions: (i) the efficiency gains likely to result from the conduct counteract any likely negative effects on competition in the affected markets; (ii) the gains have been, or are likely to be, brought about as a result of the conduct; (iii) the conduct is necessary for the achievement of those efficiency gains; and (iv) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition; see judgment of 27 March 2012, Post Danmark, C-209/10, EU:C:2012:172, paragraph 42.

[43] Judgment of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraph 166.

[44] Judgment of 17 September 2007, Microsoft v Commission, Case T-201/04, EU:T:2007:289, paragraph 692 -712. In particular, the General Court noted that *"…Microsoft, which bore the initial burden of proof … did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate. Microsoft merely put forward vague, general and theoretical arguments on that point … It follows that it has not been demonstrated that the disclosure of the information to which that remedy relates will significantly reduce – still less eliminate – Microsoft's incentives to innovate*." (paragraphs 697, 698 and 701)

justified under Article 101(3) because, by limiting parallel trade between Member States and ensuring revenues that could be invested in R&D, they encouraged innovation and optimised the distribution of medicines. The General Court, noting the specific peculiarities of the pharmaceutical sector, did not exclude as a matter of fact that there could be a correlation between parallel trade and R&D efforts, acknowledging that the effect of parallel trade on competition is 'ambiguous'. However, to establish the degree of correlation would require a thorough examination: the General Court found that in that given case the Commission failed to carry out such examination, and therefore it could not be concluded whether the conditions for application of the exemption under Article 101(3) TFEU were met. The Commission's decision was therefore annulled.[45]

4. Innovation in mergers

4.1. Legal framework

36. The EU's merger control framework allows the Commission to assess the impact of mergers and acquisitions on innovation. The EU merger control rules put competitive harm caused by reduction of innovation on an equal footing with increased prices and reduced output.

37. The substantive test for assessing mergers in EU competition law is set out in the EU Merger Regulation[46]. Pursuant to Article 2(3) of the EU Merger Regulation, concentrations that would significantly impede effective competition (SIEC), in the common market or in a substantial part of it, shall be declared incompatible with the common market. The Commission's Horizontal Merger Guidelines[47] and Non-horizontal Merger Guidelines[48] further clarify and explain how the Commission appraises mergers and acquisitions and provide further guidance on the SIEC substantive test.

38. As regards assessment of transactions that may lead to horizontal effects, paragraph 8 of the Horizontal Merger Guidelines clarifies that a merger may result in a SIEC in various ways, including if it diminishes innovation. Specifically, it states: "*Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. By 'increased market power' is meant the ability of one or more firms to […] diminish innovation, or otherwise influence parameters of competition.*" (emphasis added) Thus, the EU Merger Regulation provides a flexible framework, which allows the Commission to assess competition between the

[45] Judgment of 27 September 2006, GlaxoSmithKline Services v Commission, Case T-168/01, EU:T:2006:265, paragraphs 251 – 308, upheld by the Court of Justice in judgment of 6 October 2009, GlaxoSmithKline Services v Commission, C-501/06 P, paragraph 95.

[46] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p.1 (the "EU Merger Regulation").

[47] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p.5 (the "Horizontal Merger Guidelines").

[48] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p.6 (the "Non-horizontal Merger Guidelines").

merging parties and their rivals across a spectrum of parameters that are relevant in a given market, including innovation.

39. Furthermore, the Horizontal Merger Guidelines specifically address markets where innovation is a key parameter of competition. In paragraph 38, the Horizontal Merger Guidelines specify that if a merger combines two important innovators, or eliminates a firm with promising pipeline products, the transaction can eliminate an important competitive force and thus lead to a significant impediment of effective competition against which the Commission should intervene. Paragraphs 20(b) and 38 of the Horizontal Merger Guidelines explain that the innovation potential of the merging companies is taken into account regardless of the current market position of the companies. Moreover, according to paragraph 38 of the Horizontal Merger Guidelines, assessing pipelines and pipeline products is only one example of how to assess the effects of a merger on innovation.

40. As regards non-horizontal mergers, paragraph 10 of the Non-horizontal Merger Guidelines specifies that mergers may result in a significant impediment to effective competition, or otherwise in competitive harm, in various ways, including if it diminishes innovation – mirroring the language used in paragraph 8 of the Horizontal Merger Guidelines. Furthermore, paragraph 26 of the Non-horizontal Merger Guidelines clarifies that when a merger involves a company that is likely to expand significantly in the near future, for instance because of a recent innovation, the Commission will extensively investigate such transactions regardless of the current market position of the merging companies.

41. In addition, on 1 September 2023, the Commission's Merger Simplification Package entered into force[49] and introduced several changes related to innovation. First, the new Notice on Simplified Procedure[50] expands the categories of simplified cases, but at the same time introduces safeguards, i.e. circumstances in which a concentration that technically qualifies for simplified treatment nevertheless could be investigated under the normal procedure. The safeguards include circumstances when the proposed concentration would combine two important innovators or when involves a firm that has promising pipeline products, when one of the parties is a recent entrant or when the concentration would eliminate potential competition. Moreover, the parties have to disclose all pipeline products giving raise to horizontal overlaps or vertical relationships in the Short Form CO (the Commission's notification form for simplified cases). Second, the new Merger Implementing Regulation[51] introduces a number of changes to the Form CO (the Commission's notification form). As regards innovation, under the new Form CO, the notifying parties are required to provide information on pipeline products, including the specifics about the parties' and their competitors' pipeline products and their stage of development. This is particularly relevant in sectors where innovation is a key parameter of competition.

[49] For more information on the changes introduced in the 2023 Merger Simplification Package, see for instance the Competition policy brief entitled '*The 2023 Merger Simplification Package: cutting red tape and refocussing resources*', available here: https://competition-policy.ec.europa.eu/system/files/2023-09/kdak23002enn_competition_policy_brief_2_2023_merger_simplification_package.pdf.

[50] Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 160, 5.5.2023, p.1.

[51] Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Countil Regulation (EC) NO 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004, OJ L 119, 5.5.2023, p. 22.

42. The legal framework for the assessment of innovation in EU merger control has been applied by the Commission in its decisional practice in both horizontal as well as non-horizontal cases. As illustrated by the examples in Section 4 B, the Commission has intervened in numerous cases where the proposed merger would have led to harm to innovation through various means.

4.2. Decisional practice

43. In its merger control practice, the Commission has found innovation to be an important competitive parameter in a number of industries, for example the pharmaceutical, medical devices, agrochemical, manufacturing, financial services and digital sector. When assessing the importance of innovation in a certain industry, the Commission conducts an analysis of the features and structure of the industry in question.

44. In its decisional practice, the Commission has assessed harm to innovation in several cases, including both horizontal and non-horizontal transactions. Based on this practice, innovation-related harm to consumers resulting from concentrations manifests itself in three main ways: (i) a discontinuation of existing pipeline products, (ii) a reduction in future R&D efforts, and (iii) a reduction in future product market competition. The following paragraphs provide a non-comprehensive overview of the Commission's recent merger control practice where it assessed innovation theories of harm.

4.2.1. Horizontal mergers

45. Innovation rivalry is a particularly important competitive factor, for example, in the pharmaceutical and medical devices sectors. The Commission has intervened in several cases where it assessed the merger's impact on innovation and pipeline products.

46. ***Novartis/GSK's Oncology Business***[52] - In *Novartis/GSK's Oncology Business*, the Commission found that both companies had R&D programmes for innovative drugs aimed at treating skin and ovarian cancer with the same mechanism of action. The Commission's concerns related to both late-stage (so-called Phase III) and earlier stages (Phases I and II) pipelines in connection with the same drugs. The Commission's concerns were two-fold: (i) the transaction would have reduced from 3 to 2 the number of companies developing and marketing specific treatments for skin cancer and (ii) the transaction would have reduced innovation, with the likely abandonment of Novartis' broad clinical trial program for specific cancer treatments. These treatments were at the time being trialled for a number of other cancers. In its investigation, the Commission also assessed the transaction's specific impact on innovation, by taking into account the expected role of both products in the treatment of a number of other cancers such as ovarian, colorectal or lung cancer. The Commission's assessment revealed that the merger would not only have led to the abandonment of Novartis' current efforts to launch its specific combination treatment for skin cancer, but also to the abandonment of the broader clinical trial program. The merger was conditionally approved subject to structural remedies that addressed the innovation concerns.

47. ***Pfizer/Hospira***[53] - In *Pfizer/Hospira*, the Commission found that Pfizer was developing a competing medicine to Hospira's biosimilar for the treatment of chronic inflammatory diseases. The Commission had concerns that post-transaction, Pfizer would be likely to either (i) delay or discontinue development of its biosimilar drug in order to

[52] Case M.7275 *Novartis/GSK's Oncology Business*, Commission decision of 28 January 2015.

[53] Case M.7559 Pfizer/Hospira, Commission decision of 4 August 2015.

focus on Hospira's marketed product, leading to the net loss of future competition by one of only three differentiated biosimilars in advanced stages of development or (ii) hand back Hospira's product to its developer Celltrion, leading to the loss of current price competition between Hospira and Celltrion. The transaction was conditionally approved subject to structural remedies that preserved future innovation in biosimilars.

48. ***Johnson & Johnson/Actelion***[54] - In *J&J/Actelion*, the Commission found that both companies were developing promising treatments to treat insomnia. The two treatments under development were based on a novel mechanism of action. No other treatments of this kind were marketed in the EEA at the time of the transaction and only a very limited number of medicines with this new mechanism of action were being developed. Both treatments were at an early stage of clinical trials (so-called Phase II), but close in their expected efficacy and safety profiles. The Commission concluded that there would not be a sufficient level of competition if one of the two R&D programmes were discontinued after the merger. The merger was conditionally approved subject to remedies.

49. In addition to pharma, the Commission has intervened based on innovation theories of harm in other industries, such as manufacturing of gas turbines and agrochemicals.

50. ***GE/Alstom***[55] - In *GE/Alstom*, a transaction that concerned gas turbines used to generate electricity, the Commission found that Alstom's innovation 'input' was understated by its market shares. Its R&D spent, headcount and testing infrastructure were proportionately greater than its market share. Alstom's large installed based also helped it to develop and introduce a range of improvements and modifications to its products. Alstom was considered an important competitive force from an innovation and technology point of view. The Commission found that post-transaction, Alstom's removal would have reduced the competitive pressure on the parties' competitors to invest significantly in innovation. Moreover, GE would have likely discontinued some of Alstom's products – including the existing turbine GT26 and Alstom's pipeline product GT36. This would have resulted in innovation harm in two respects. First, customers would have been deprived of new and innovative products. Second, discontinuation would have affected future technology upgrades of the existing turbines that were already installed. The Commission conditionally approved the transaction, subject to a comprehensive divestiture remedy package.

51. ***Dow/DuPont***[56] - In *Dow/DuPont*, a transaction that mainly concerned pesticides, the Commission's investigation showed that innovation in pesticides was of particular importance. The Commission assessed the parties' innovation efforts and early pipeline products and concluded that the merger would have reduced innovation competition by (i) removing the parties' incentives to continue to pursue ongoing parallel innovation efforts and (ii) removing the parties' incentives to develop and bring new pesticides to the market. During the investigation, the Commission carried out a comprehensive assessment of the parties' R&D 'output'.

52. As regards the first theory of harm, whereby the transaction would have removed the parties' incentives to continue to pursue ongoing parallel innovation efforts, the Commission's investigation of Dow's and DuPont's innovation pipelines demonstrated that the two are competing head-to-head in a number of important herbicide, insecticide

[54] Case M.8401 Johnson & Johonson/Actelion, Commission decision of 9 June 2017.

[55] Case M.7278 *General Electric/Alstom (Thermal Power-Renewable Power & Grid Business)*, Commission decision of 8 September 2015.

[56] Case M.7932 *Dow/DuPont*, Commission decision of 27 March 2017.

and fungicide innovation areas. After the merger, they would have an incentive to discontinue some of these costly development efforts.

53. As regards the second theory of harm, whereby the transaction would have removed the parties' incentives to develop and bring new pesticides to the market, the Commission found specific evidence that the merged entity would have lower incentives and a lower ability to innovate than Dow and DuPont separately. In its investigation it also found specific evidence that the merged entity would have cut back on the amount they spent on developing innovative products. Only five companies are globally active throughout the entire R&D process, from discovery of new active ingredients, their development, testing and regulatory registration, to the manufacture and sale of final formulated products through national distribution channels. Other competitors have no or more limited R&D capabilities. After the merger, only three global integrated players would remain to compete with the merged company, in an industry with very high barriers to entry. The number of players active in specific innovation areas would be even lower than at the overall industry level.

54. The *Dow/DuPont* case was conditionally approved by the Commission. The divestiture remedy included, among other assets, a divestiture of a large part of DuPont's global R&D organisation, which addressed the Commission's innovation concerns.

4.2.2. Non-horizontal cases

55. The Commission's enforcement track record also includes interventions in non-horizontal mergers across different industries, where the Commission had concerns that the merged entity's foreclosure strategies would negatively affect the merged entity's rivals' ability to innovate.

56. ***Broadcom/Brocade***[57] - In *Broadcom/Brocade*, the Commission assessed the innovation impact of a potential interoperability degradation between networking products for communications and datacentre infrastructures and applications. The Commission concluded that the merged entity could have the ability and incentive to degrade interoperability between Brocade's Fibre Channel switches and Host Bus Adaptor (HBA) cards of suppliers competing with Broadcom. While such foreclosure strategy would not have been necessarily sufficient to prevent competitors from supplying current generations of fibre channel HBAs, it could have eventually deprived competitors from having sufficient resources to invest in the development of future generations of HBAs. The Commission concluded that this would have not only diminished the competitor's innovation efforts, but ultimately also those of the merged entity. The transaction was conditionally approved subject to remedies.

57. ***Illumina/GRAIL***[58] - In *Illumina/GRAIL*, a transaction that would have led to the vertical integration of Illumina with GRAIL, the Commission was concerned that foreclosure strategies by Illumina would have stifled innovation on the emerging downstream markets for Next Generation Sequencing (NGS)-based cancer detection tests. Illumina is the unrivalled supplier of NGS systems for genetic and genomic analysis, which companies like GRAIL require to develop cancer detection tests.

58. According to the Commission's in-depth investigation, following the acquisition of GRAIL, Illumina would have had the ability and incentive to foreclose GRAIL's competitors from its high-throughput NGS systems. It could for instance refuse to supply

[57] Case M.8314 Broadcom/Brocade, Commission decision of 12 May 2017.

[58] Case M.10188 Illumina/GRAIL, Commission decision of 6 September 2022.

its NGS systems to GRAIL's rivals, increase the prices, or degrade quality and delay supplies. This could have had significant negative effects on the innovative capabilities of early cancer detection test developers (i.e. GRAIL's competitors) and of this emerging industry in the EEA as a whole – at a very critical stage of development.

59. As regards Illumina's ability to foreclose GRAIL's rivals, GRAIL and its rivals rely on Illumina's NGS systems to develop and run their tests. Early cancer detection test developers need high-throughput NGS systems, with a reliable support network and a solid track record. Today, only Illumina's equipment meets these requirements and the investigation showed that there are no credible alternatives to Illumina in the short to medium term. In addition, barriers to entry are significant. Moreover, switching NGS providers would be a long and costly process for GRAIL's rivals, without a guarantee of success.

60. As regards Illumina's incentive to foreclose GRAIL's rivals, while Illumina's sales of NGS technology to GRAIL's rivals represent a small proportion of its sales and profits, NGS-based early cancer detection testing is expected to expand rapidly and to become highly lucrative. Given the enormous market potential and the ongoing close innovation competition in the development of early cancer detection test, the Commission considered that Illumina would have an incentive to foreclose GRAIL's rivals already today, despite benefitting from this action only at a later stage. The Commission's investigation showed that GRAIL's flagship test "Galleri", while enjoying a first mover advantage, is not unique, and several players are currently developing cancer detection tests that would closely compete with Galleri in the near future absent the transaction.

61. The remedies offered by Illumina did not adequately address the Commission's competition concerns. Therefore, the Commission prohibited the transaction.

4.2.3. Importance of innovation as a consideration when assessing suitable remedies

62. In cases where the Commission identifies competition concerns due to harm to innovation or where innovation is an important parameter of competition between the parties (and their rivals), the Commission takes innovation into account when assessing the suitability of remedies proposed by the parties.

63. For instance, in *GE/Alstom*, the Commission cleared the transaction subject to a comprehensive remedies package that ensured that competition, and in particular, innovation, would continue in this sector. The package comprised the divestment of the technology for the GT26 and GT36 turbines, of existing upgrades and of pipeline technology for future upgrades of turbines. To strengthen the purchaser's ability and incentive to further improve the divested technology, a significant share of Alstom's long-term servicing agreements for GT26 turbines was also part of the package. Finally, it included the divestment of two test facilities for the above turbines as well as a large number of Alstom R&D engineers. This enabled the remedy purchaser, Ansaldo Energia, to become a full-technology provider, and thereby ensuring that innovation would continue in this sector post-transaction.

64. In *Dow/Dupont*, the remedy package proposed by the parties included, among other assets, the sale of a large part of DuPont's global R&D organisation. The sale of the underpinning R&D organisation and pipeline was crucial to ensure the viability and competitiveness of the divested business on a lasting basis and to enable the buyer to become a global integrated R&D competitor, thus preserving the continued R&D competition in the market. Divesting the R&D organisation was necessary to address the Commission's concerns as regards innovation competition in pesticides.

65. In *Novartis/GSK*, the Commission accepted the remedies proposed by the parties, whereby Novartis committed to fully return one of the treatments where the Commission raised competition concerns to its owner and licensor Array BioPharma Inc. (Array) and to divest the other treatment of concern to Array. These commitments ensured that the development of these two treatments worldwide was preserved and continued.

66. In *Illumina/GRAIL*, the remedies offered by the parties included (i) a licence open to NGS suppliers to some of Illumina's NGS patents, and a commitment to stop patent lawsuits in the US and Europe against a Chinese NGS supplier for three years and (ii) a commitment to conclude agreements with GRAIL's rivals under the conditions set out in a standard contract. After an extensive analysis of the proposed commitments, including testing their efficacy with market participants, the Commission concluded that these remedies were insufficient to address the Commission's concerns and to prevent the harm to innovation in the area of NGS-based cancer detection tests resulting from the transaction.

67. Finally, innovation capabilities are also considered in the design of remedies in transactions where innovation is an important parameter of competition in the given market and where the parties' innovation capabilities are a factor contributing to their competitive strength or closeness of competition. For instance, in *Sika/MBCC*[59], the parties' innovation capabilities at global scale and vertical integration were a key part of their competitive strength. Therefore, while markets were national, the divestment of MBCC's chemical admixtures business included all global R&D assets, sites, personnel, IP and other relevant assets to fully address the Commission's concerns.

5. Conclusion

68. This contribution's overview of the Commission's legal framework and decisional practice in antitrust and mergers confirms that the Commission has always taken into account competition in innovation in its competitive analysis.

69. The concept of protection of innovation competition is already included in the fundamental rules on competition in the TFEU and is then implemented and specified in secondary legislation.

70. The Commission's decisional practice, both in antitrust and mergers, is consistent with this legislative framework:

- In antitrust cases, the relevant analysis has focused either on the possible harm to innovation to the detriment of consumers brought about by anticompetitive agreements or abuses of dominance, or on the relevance of innovation in the context of assessing possible objective justifications or efficiencies of specific conducts;
- In merger cases, the Commission has assessed harm to innovation in both horizontal and non-horizontal transactions, focusing on three main concerns: (i) discontinuation of existing pipeline products, (ii) reduction in future R&D efforts, and (iii) reduction in future product market competition. Moreover, in specific cases, innovation has been taken into account also when assessing the remedies proposed by the parties, in particular when innovation was a key parameter of competition between the parties.

71. The Commission considers that the relevance of innovation as a parameter of competition will continue to play an important and even increasing role in the assessment

[59] Case M.10560 Sika/MBCC, Commission decision of 8 February 2023.

of cases under Union competition law, in particular in dynamic and fast-moving markets, such as the ones in the present digital world, where success is often determined by the capacity to innovate and to market as soon as possible new products and services. It is therefore essential that competition authorities are prepared to include the assessment of competition in innovation in their toolbox and their day-to-day activities, where relevant.