Strategic Foresight and EU Competition Law

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ABSTRACT

Competition law and policy want to ensure the long-term competitiveness of markets to the ultimate benefit of consumers. This requires thinking about and shaping the markets of tomorrow. Strategic foresight represents a powerful tool at the disposal of competition authorities that need to engage in prospective analyses, set priorities in line with their long-term strategic goals and devise pertinent soft law guidance for future enforcement. But what is strategic foresight? What are its limits, and how could it be incorporated into competition law and policy? In this primer on strategic foresight and EU competition law, we sketch areas of competition law that could benefit from incorporating strategic foresight, while also setting out the related challenges, including satisfying the standard of proof and limited resources.

Keywords: EU competition law, merger control, new tools, efficiencies, priority-setting, remedies, standard of proof, strategic foresight

1.Introduction

Competition law and policy aim to ensure the long-term competitiveness of markets to the ultimate benefit of consumers. This requires thinking about the markets of tomorrow, how competition might develop in a specific setting, and which impact competition law remedies will have on tomorrow's consumers. In its endeavour to shape future markets for the better, competition law regularly needs to make a host of predictions. While it often looks to the past performance of markets to predict the future, this modus operandi seems out of step with highly dynamic market realities and those that are affected by unforeseen transformations. What would be required is to take into account the future – a future that, as such, we cannot know.

There are multiple ways in which law and policy can learn to be more responsive and forwardlooking when it comes to economic and societal changes. And competition law is not alone in this. When confronted with the same challenge, other policy areas have recently looked to one specific tool: strategic foresight. Could this tool also be of use in competition law? In what ways, and with which limitations?

Strategic foresight allows for "elaborating forward-looking strategies and policies" that can be relied upon in various settings, including in companies, governments, research and law enforcement. The need to embed strategic foresight into European Union (EU) policy-making was acknowledged by the EU in 2019, with the appointment of European Commission VicePresident Šefčovič specifically tasked with leading the Commission's efforts in this regard – the first ever appointment with such a portfolio. This strategic foresight mandate aims at "strengthening [the EU's] culture of preparedness and evidence-based anticipatory policymaking" and is key to "support the transitions to a green, digital, and fairer Europe". And the Commission is not alone in this, for the OECD has also established a Strategic Foresight Unit that supports the OECD's work in this regard.

In its first Strategic Foresight Report of 2020, the European Commission noted that as a tool, "[s]trategic foresight can help build collective intelligence in a structured manner to better chart the way forward for the twin green and digital transitions and to recover from disruptions" – a message reiterated in subsequent Reports. Given that competition law is faced with exactly

these challenges, the question naturally arises to what extent it should add strategic foresight to its toolbox. The Commission's envisaged purpose in conducting strategic foresight exercises is to inform its priorities, work programmes and multi-annual programming, as well as to feed into the assessment of EU laws and policies (impact assessments, fitness checks, evaluations). It is high time to assess what role strategic foresight could play in competition policy as well as in the enforcement of competition law.

This is the issue at the heart of this contribution. As the first article of its kind, we set out the opportunities and challenges that await EU competition law, policy and enforcement if it embarks on making use of strategic foresight. We proceed as follows. Section 2 introduces strategic foresight as a valuable reference point for competition authorities faced with decisionmaking in uncertain and complex market settings. While it can only provide a rudimentary introduction to this multi-faceted field, it serves as necessary background to the remainder of the article. Section 3 turns to distinct opportunities for employing strategic foresight at various stages of competition legal analysis and policy-making, while section 4 sets out the challenges that competition law might face upon employing strategic foresight, including the standard of proof and legal certainty. We conclude with some reflections on the future of strategic foresight in EU competition law (section 5).

2 A short primer on strategic foresight

2.1 Definition and functions

Strategic foresight is part of the broader field of strategic intelligence that includes tools such as evaluation, impact assessments, innovation studies, policy analysis, strategic planning or technology assessment. As a methodological tool, strategic foresight looks to the future with the aim of preparing stakeholders for potential challenges. It is "the discipline of exploring, anticipating and shaping the future to help build and use collective intelligence in a structured, systematic and systemic way to anticipate developments". Largely triggered by the need to "navigate through the "fog" of uncertainty", strategic foresight has long been used in corporate settings to aid strategic decision-making and direct innovation efforts.14 In this contribution, we focus on a more recent dimension of foresight, namely its application in policymaking. We also explore the new dimension of how strategic foresight might be employed in legal analysis.

Since the 1990s, strategic foresight has been increasingly employed to help policy-making deal with complex, multi-dimensional and interdependent issues, especially in fields such as

research, innovation, and technology. As a tool, it can mitigate the risk of unintended consequences. With this in mind, it can easily be seen how foresight might also come to bear on competition policy – and perhaps also on certain aspects of competition legal analysis.

Strategic foresight can inform policy-making by providing "anticipatory knowledge" as regards, for example, the "dynamics of change, future challenges, risks and opportunities, strengths and weaknesses of the current system for addressing these, visions for change and possible options". Implementing the insights gathered through strategic foresight in a given setting is a crucial stage not only in corporations, but also in policy. Here, cooperation between policy-makers and the strategic foresight team can support "the translation of anticipatory intelligence into options for policy definition". Where strategic foresight reveals that a policy contradicts its own aims, it may be a driver for reconfiguring the policy system.

Strategic foresight does not pretend to provide hard facts about the future. Instead, it is a tool that helps "anticipate possible opportunities and challenges and better prepare for change". In this sense, foresight differs from forecasting, which endeavours to anticipate a single and accurate account of the future by leveraging evidence and probability based on past observations. From a legal and policy perspective, strategic foresight can therefore inform the elaboration of competition policy – but it may often not fulfil the evidentiary standard of proof when it comes to enforcing the competition rules (see section 4.1). Among other limitations of strategic foresight are the short-term thinking and risk aversion often present in policy-making culture, the capabilities and skills required to conduct strategic foresight, institutional shortcomings such as silos and coordination issues, as well as various challenges that prevent foresight to be integrated into policy-making, such as a lack of acceptability and accessibility of foresight studies.

2.2 Strategic foresight methods and their application

There are multiple ways of engaging in strategic foresight, and a full-scale foresight exercise typically consists of not one but a mix of various methods.23 Foresight methods typically rely on qualitative, quantitative and semi-quantitative techniques. For competition law and policy, five methods stand out as particularly relevant: horizon scanning, megatrends analysis, scenario planning, visioning and back-casting. Whereas horizon scanning helps to determine “possible futures”, megatrends analysis and scenario planning can be used to establish “plausible futures”, which are more likely to occur as compared to possible futures. “Normative futures” – desired futures that stakeholders strive to make a reality – can be modelled using the methods of visioning and back-casting, among others.28 We discuss these in turn and provide examples of their application.

Horizon scanning is a foresight technique to generate knowledge of emerging issues (“possible futures”). Through an engagement with multiple sources, including news, academic outputs or conference proceedings, horizon scanning is used as an early warning “to flag issues at the margins of current thinking that may have a large future impact”. Among issues to detect are new, non-obvious and recent trends with potentially significant future repercussions, new drivers of change, “weak signals” that consist of minor events which, when combined with other elements, can have profound effects, as well as “discontinuities” that are abrupt changes that stop, modify or generate new phenomena. The rationale behind employing horizon scanning is thus to identify new ideas and patterns of change. The OECD’s Global Scenarios 2035 report is an example of the application of horizon scanning that was intended to identify what could drive change in international collaboration. This was combined with a scenario planning exercise (see below). In competition policy, horizon scanning and megatrends analysis could contribute to a better understanding of the trajectory of competition and innovation that competition authorities need to look out for. As with megatrends analysis, horizon scanning may be particularly useful in the identification of areas that should be of particular interest to a competition authority. It could also help an authority understand how a competition remedy should best be structured so as to remain relevant as markets develop.

The analysis of megatrends, i.e. of “long-term driving forces that are observable now and will most likely have significant influence on the future”, is a foresight method to determine plausible futures. It provides a “conceptual framework … to think about and prepare for inevitable pattern shifts that will occur”. It usually consists of multiple steps that involve analysis, discussion and creative thinking. The EU is currently monitoring 14 global

megatrends developed by the Competence Centre on Foresight of the Joint Research Centre (JRC), such as “accelerating technological change and hyperconnectivity”, “climate change and environmental degradation”, and the “changing nature of work”. When discussing how to protect competition in a changing world, OECD Deputy-Secretary General Ulrik Knudsen recently emphasised that “[c]ompetition … is shaped by the megatrends that define our time, including globalisation, … the digital transformation and the growing importance of intangible assets”. In the context of competition law, megatrends analysis may be particularly useful when a competition authority needs to decide on the focus of a sector inquiry. As authorities’ resources are limited, sector inquiries must target areas that will be particularly relevant for competition in the future. In addition, megatrends analysis may allow a competition authority to identify those areas that are most closely associated with policy-related objectives, such as greening or digitalisation. A better understanding of emerging trends can also help a competition authority in preparing relevant soft law instruments, as well as legislative proposals.

Scenario planning is “a disciplined method for imagining possible futures”. It is a process that consists in creating “stories” of the future and aligning strategic responses with these. The accounts of possible future scenarios are based on combining multiple parameters that are derived from data, facts and hypotheses in creative ways. This “requires insightful and intuitive thinking …, normally based on a systematic analysis of the present”. While stakeholder workshops are often organised in the course of scenario planning, desk research and computer modelling are also common. The scenarios can help to identify and better understand uncertainties and current trends that can be determinative of the future. Scenario planning is considered particularly effective and robust when it comes to coping with complexity. The OECD study cited above, which created scenarios based on horizon scanning, is an example of applying this method. In a further project, the OECD relied on scenario planning to devise alternative scenarios for digital transformation, focused on some common elements, so as to permeate the complexities and uncertainties in this area and help policy-makers in their choices.47 In the context of competition law, scenario planning could help provide a better understanding of the impact a certain merger or acquisition may have on

competition in the future. It may also help in envisioning plausible scenarios in case one antitrust remedy is given priority over another.

Visioning ("normative futures"), another method belonging to the foresight toolbox, can be relied upon for "identifying, developing and enriching a compelling, preferred future". Visioning conjures not only a normative vision for the future, but also sketches how to achieve this future. Visioning is thus a first step in the process of strategic planning towards policies commonly perceived as normatively desirable. Back-casting, a method tightly linked to visioning, implies working backwards from the desired future to trace the actions that need to be undertaken to achieve it. The policy goals at the heart of EU competition policy could thus be set as a preferred future, and back-casting could be relied upon to understand how competition policy can arrive at putting this vision into action. With the twin transition set as a policy goal for all EU policy areas, this could be set as a desired future to achieve.

Strategic foresight methods are typically used in various combinations. In addition to the OECD Global Scenarios 2035 report mentioned above, two case studies provide further instructive examples:

In 2021, the EU Competence Centre on Foresight published a foresight study exploring how the green transition will shape European labour markets in the medium- to long-term (ie, 2040s and beyond). It relied on a review of existing qualitative assessments to derive expected developments (forecast); a study of literature to identify drivers of change (foresight), subsequently validated with a Delphi study (i.e., developing a consensus of opinion); and outlining visions of futures.

The European Commission's 2023 Annual Strategic Foresight Report on "Sustainability and Peoples Wellbeing at the Heart of Europe's Open Strategic Autonomy" was based on a comprehensive foresight process. It involved developing scenarios that depicted different potential sustainable futures for the EU by 2050. It utilised the back-casting method to derive the sustainability transition trajectories for each scenario, alongside analysing various patterns of change.

Strategic foresight as a method is inherently multidisciplinary. To be successful in the policy realm, it requires a collaboration of strategic foresight experts as well as subject matter experts and stakeholders.

2.3 The use of strategic foresight in EU law and policy

Even though the EU has used strategic foresight as a method to inform policy and legislative initiatives since the mid-1980s,54 it resurfaced as a powerful policy tool much more recently.

Presently, the European Commission relies on strategic foresight methods for “strategic planning, policy-making and preparedness”, as well as for designing new policy initiatives and revisiting existing ones in line with the Better Regulation toolbox. Strategic and science-based foresight is seen as key in future-proofing EU policy-making, in particular to help realise the EU’s long-term commitments such as the United Nations’ sustainable development goals (SDGs). The Commission also envisages the integration of strategic foresight in creating legislation that “achieves its objectives while being targeted, effective, easy to comply with and with the least burden possible”.

To strengthen the EU’s foresight capacity, the Commission established the already mentioned Megatrends Hub in the JRC in 2016. Two years later, it created the Competence Centre for Foresight tasked with “developing an anticipatory culture inside the European Commission’ and “experimenting and developing different methods to make foresight practically useful for decision making processes”. Most recently, in February 2024, the Commission launched the Futures4europe platform that aims at gathering, hosting and sharing foresight activities related to Europe. In addition, the Strategic Foresight Network coordinates long-term policies between the Commission’s Directorates General and the European Strategy and Policy Analysis System (ESPAS), providing an inter-institutional initiative to foster foresight and anticipatory policymaking.

Impact assessments (IAs) are one area where the Commission is already testing foresight methods as a tool to aid decision-making. As the report by the European Parliamentary Research Service stressed, strategic foresight is “a key anticipatory tool for policymaking in general, and for IAs in particular”, especially given that the timeframe used for conducting foresight “measures in decades rather than years”. The Regulatory Scrutiny Board (RSB) ensures that the Commission relies on foresight analyses of high quality, and uses foresight instruments to their fullest potential .62 When providing advice on the Digital Services Act IA, the RSB suggested future-proofing options reflecting the likely future developments in this field. The RSB’s 2020 report also suggested “future proofness” of the rules related to 5G developments and machine-to-machine communications in the framework of the Roaming Regulation IA. In 2022, foresight elements were integrated into 18 IAs, e.g. when demonstrating the expected evolution of the problem at stake and future-proofing alternatives. 2023 has witnessed a notable increase in foresight being mentioned in IAs: almost half of IAs made a reference to foresight as compared to a quarter of IAs in 2021 and 2022.65 The five top

topics that integrated foresight included climate and environment, followed by internal market, transport, justice and fundamental rights, and digital and technology.

Against these insights into the nature of strategic foresight, its possible applications and the EU’s embracing of this tool, the following section considers what opportunities present themselves for utilising strategic foresight in EU competition law.

3 Opportunities for employing strategic foresight in EU competition law

Technological and environmental transformations are examples of complex developments that call for action in terms of boosting the resilience of the legal framework that regulates and shapes them. The rapidity of change presents legislators, policy-makers and enforcers with the challenge to act in the face of uncertainty – a demanding task that can be supported by novel methods. In the following, we provide insights on whether and how strategic foresight might be of use to develop a deeper understanding of future market developments relevant for competition assessments and policy choices. The European Commission is particularly interesting in this respect, as it is both a competition authority and tasked with preparing legislative proposals. We focus on five areas of competition law and policy for which we consider the possible application of strategic foresight: (1) agenda-setting, sector inquiries and case prioritisation; (2) legislative proposals and soft law guidance; (3) remedies and commitments; (4) merger control; and (5) market power assessments. The areas are discussed in the order of relevance and potential that strategic foresight might bring to them. As we show, assessments that are more normative in nature and have at their core the ambition to shape future markets (areas 1, 2 and 3) can greatly benefit from employing foresight methods. While foresight can also be leveraged in legal assessments (areas 4, 5 and 6), its potential is more limited on account of the uncertainty inherent in foresight exercises. Nevertheless, foresight can in many instances usefully complement methods currently applied for forward-looking assessments by generating additional insights about the future.

3.1 Agenda-setting, sector inquiries and case prioritisation

It has been argued that nothing is more crucial to the success of a competition authority than its decisions to prioritise certain cases. If strategic foresight can successfully be deployed to allow a competition authority to take prioritisation decisions that align with its strategic goals in the long-term, then this alone would mark a great success.

3.1.1 Agenda-setting, sector inquiries and strategic foresight

Typically, a competition authority’s individual prioritisation decisions will be preceded by a process of agenda-setting. Depending on the jurisdiction at issue, this is also known as annual/action/work plan, enforcement priorities or strategy statement, and constitutes a public statement by a competition authority that sets out the specific sectors or practices that it will focus on. Almost half of NCAs in the EU have a publicly available agenda. Agenda-setting does not only have a bearing on the work of competition authorities at a specific moment in

time, but also “on the future developments of markets and the general development of their competition regime”.70

When it comes to how competition authorities identify those overarching priorities that they want to pay attention to in their enforcement work, strategic foresight methods can help in identifying shifting patterns with an important impact. Of the methods discussed in section 2, megatrends analysis and horizon scanning could contribute to an authority’s agenda-setting. Within the strategic goals that a competition authority is pursuing, these tools allow the authority to pinpoint emerging issues that should rank high on its agenda, allowing it to act more quickly and, thus, with foresight.

Closely connected to agenda-setting, the identification of emerging pattern shifts and market changes also allows a competition authority to initiate sector inquiries or market studies that target those economic sectors in which the most impactful changes are expected to occur. In some jurisdictions, e.g. the UK and Germany, sector inquiries also allow the authority to adopt remedies in order to safeguard competition in a given sector. Strategic foresight, and in particular visioning and back-casting, can be useful tools for devising such remedies, as is further discussed below.

3.1.2 Case prioritisation

In the EU, both the European Commission and national competition authorities (NCAs) are endowed with powers to set their enforcement priorities in individual cases. The authorities can refuse to act on a complaint on the ground that another authority is addressing a specific case, as envisaged in Regulation 1/2003, and they can invoke policy grounds to justify not acting on a complaint. For NCAs, the power to prioritise when it comes to the application of Articles 101 and 102 TFEU is stipulated in the ECN+ Directive. At the level of the EU, the Court made it clear that the Commission "is entitled to give differing degrees of priority to the complaints brought before it". As Executive Vice-President Vestager pointed out, the

Commission's resources are limited, so "[t]here is no way we can police every possible breach

70 Jennings, "Prioritisation in Antitrust Enforcement – A Finger in Many Pies", 11 Competition Law International (2015), 29-38, 29.

of the rules". At the same time, the Commission's discretion is not unlimited and its rejection decisions are subject to judicial scrutiny.

When the International Competition Network (ICN) conducted a survey on case prioritisation and initiation among 35 competition authorities, the need to consider the future ranked high in the authorities' considerations when setting priorities. Almost all authorities referred to the "impact of conduct on market competition, consumer welfare and/or businesses" as a criterion in the process of setting priorities. With dynamic effects and long-term impacts of business practices at the forefront of authorities' minds, future-oriented considerations seem unavoidable to operationalise this criterion of priority-setting. The criteria of "key sectors" and "potential effects of the investigation and enforcement" cannot escape a reflection on future market developments. Almost half of the responding agencies agreed that "emerging trends and developments / current issues of importance" were a relevant filtering criterion, showing that the prospective nature of assessments was important to set sound priorities.

Future-oriented analysis could also assist in determining when a competition authority should exercise its negative powers of prioritisation, i.e. when not to intervene. Establishing whether markets are likely to self-correct in the future, and thus whether current distortions are only temporary and not deserving of intervention, is as important as the assessment of distortions that require intervening precisely because they can distort competitive conditions in a long run. That said, erring on the side of caution and favouring false negatives (i.e., non-intervention) in case the future-oriented assessment is inconclusive cannot be supported: non-intervention in digital markets, for example, may be one of the reasons for the high concentration in these markets.

The ICN report stressed that to predict the development of markets and emerging issues, access to various sources of information and an overview of existing trends are key. Both external sources of information (e.g., consultations with stakeholders, exchanges with other competition authorities) and internal ones (e.g., monitoring activities, prior investigations) are used to prioritise cases.82 Here, strategic foresight can be added to the sources of information that competition authorities can turn to when considering case prioritisation. Horizon scanning and megatrends may assist competition authorities in establishing the key areas and sectors to focus on, as well as the types of anti-competitive behaviour to look out for. As prioritisation and agenda-setting are tools to implement a certain vision for future markets, methods that help creating normative futures (i.e., visioning and back-casting) could also prove useful. For example, if the visioning exercise leads to the conclusion that the goal for the upcoming years

is to promote green competition with the end objective of achieving concrete climate targets, back-casting could be used to establish which sectors and industries competition intervention should target for maximum impact in that regard. One can expect the participatory nature of many foresight exercises, involving a number of various stakeholders, to also strengthen the validity and legitimacy of the selected priorities.

Long-term thinking in the course of prioritising their enforcement activity is key for competition authorities that want to take a proactive approach to enforcement. If the objective of prioritisation is to select cases that can set important enforcement precedents, the relative weight of cases can be influenced by the extent to which specific infringements are expected to materialise in the future. Foresight can be a tool to help establishing this: to illustrate, looking further into the future might be relevant to determine whether technological developments will make certain types of infringements more or less likely over the course of time. The proactive approach to enforcement could also be realised by relying on visioning and back-casting.

If one of the goals of a competition authority is to safeguard innovation, then priorities that are established based on a careful scrutiny of how markets might evolve and change over a longer time period can support carving out approaches that best accommodate innovation considerations.

Naturally, even with the adoption of strategic foresight methods, authorities will not be able to claim with confidence that what they foresee as possible or plausible futures will materialise with certainty. Therefore, prioritisation cannot be set in stone. It is and remains “a buffet or process or way of working” that requires constant re-appraisal, also if strategic foresight is added to the mix. That said, priority-setting is also a tool to shape future markets. Foresight methods that aim to create desired futures such as visioning and back-casting – as opposed to those that establish possible or plausible futures – might be of particular relevance in prioritysetting for authorities who want to realise longer term visions for the markets.

3.2 Legislative proposals and soft law guidance

A peculiar feature of EU competition law is that the European Commission both proposes legislation and, as a competition authority, adopts soft law instruments on the EU level, while national competition authorities only publish soft law instruments. The preparation of legislative proposals and soft law guidance may greatly benefit from strategic foresight.

Even though key antitrust rules are enshrined in Articles 101 and 102 TFEU and thus constitute primary law that is not typically open to change, the development of secondary EU law and EU antitrust soft law could benefit from foresight on an ongoing basis. In terms of secondary antitrust legislation, Regulation

1/2003 on implementing the antitrust rules is currently under review, while the Commission regularly re-issues its Block Exemption Regulations. Regarding soft law, the Market Definition Notice was updated in February 2024 and now places much greater emphasis on forward-looking analysis in market definition, while the Commission's multiple guidelines accompanying the Block Exemption Regulations are regularly updated.

The Commission can build on strategic foresight both in the development of new legislative proposals and soft law guidance, and in conducting evaluations and IAs. From the plurality of methods that strategic foresight can choose from, instruments that uncover areas in which antitrust will need to play a more prominent role in the future (e.g., horizon scanning, megatrends analysis) may be particularly useful. When it comes to proposing rules and guidance that lead business in Europe towards the goals that EU competition policy wants to achieve – including the digital and green transition –, tools such as visioning and back-casting may appear particularly useful. Also, scenario planning might help with identifying several possible futures and assessing to what extent the extant or proposed rules and guidelines adequately address these. As section 2.3 mentions, foresight methods are already relied upon in conducting IAs for EU policies and laws in a number of areas. As competition legislation has a strong market-shaping function, foresight could be leveraged more effectively to thoroughly reflect on the changing market dynamics and design future-proof regulatory tools.

The Digital Markets Act (DMA) is a good example of how strategic foresight could be relied upon. In view of multiple competition issues arising in digital platform markets, the Commission in 2020 proposed the DMA, a competition-related regulation aimed at ensuring contestability and fairness in the digital sector. As this is a highly dynamic market environment, the Commission has asserted that "[e]nsuring that the Digital Markets Act is and remains future proof has been a key objective of the Commission from the start". To realise this goal, the DMA as adopted in 2022 includes provisions that allow the Commission to specify certain obligations that digital gatekeepers need to fulfil through implementing acts. Furthermore, the Commission can carry out a market investigation in order to assess whether the scope of certain obligations should be extended; it then does so through a delegated act. The DMA also gives the Commission powers to conduct market investigations in order to establish whether further types of digital services should be added to the list of core platform services, and in order to analyse whether further practices should be included in the obligations for gatekeepers. To carry out these types of market investigations, the reliance on strategic foresight tools can be particularly useful to establish the types of developments that the Commission should consider when proposing changes to the current regime.

Despite its in-built flexibility, some consider the structure of the DMA too rigid in light of rapid market transformations and new business models. Arguably, if a full-fledged foresight exercise had been conducted in the context of the DMA, the final result might have been more satisfactory in terms of its future-proofness.

Block exemption regulations and accompanying guidelines are further candidates for benefiting from strategic foresight. Exemptions that relate to vertical agreements, for example, play a

crucial role in shaping distribution systems by exempting entire categories of agreements across key sectors, including in the dynamic online platform economy. The aim of attaining a single market has been an important parameter in shaping the Commission's guidance concerning online distribution rules and what to consider as active/passive sales. A clearer idea of how to achieve these goals could lead to a more sophisticated framework.

Strategic foresight methods could assist policymakers in drafting soft law instruments more generally, especially given the market impact of Commission soft law across the EU. For instance, the 2023 Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements aim to offer legal clarity for the future, helping businesses to selfevaluate the legality of their cooperation agreements. The new Guidelines include a chapter on “Sustainability Agreements” that is clearly driven by the EU’s Green Deal. The chapter outlines which types of sustainability agreements among companies might attract legal scrutiny under competition law and which would be seen as unproblematic. Foresight methods such as scenario planning could have, in this instance and in future iterations of the Guidelines, provided more precise insights into expected (or necessary) horizontal cooperation initiatives, thereby increasing the reliability and practical relevance of the Guidelines. Given their importance and their focus on future-oriented issues, soft law instruments could benefit from the inclusion of foresight techniques.

Overall, it would seem that strategic foresight is a good companion for competition policy- and law-making. In this environment, it is also faced with less constraints from the point of view of the standard of proof, as we will see below.

While foresight has received significant attention in EU policy- and law-making in recent years, there remains lack of clarity related to its implementation that must be tackled to ensure its efficiency. The European Parliament’s 2022 Resolution drew attention to the fact that “implementing strategic foresight remains unclear”, urging the Commission to demonstrate its methodology of conducting foresight in the context of IAs. The 2024 study subsequently revealed remaining problems with adopting a consistent methodological approach for incorporating foresight into IAs: only 15 out of 44 analysed IAs prepared in 2022 and 2023 demonstrated such a consistent approach. As foresight in the area of IAs is still in its infancy, this criticism should not be interpreted as an inherent failure of the foresight method. Rather, greater emphasis should be placed on developing the most suitable foresight methods and implementing them consistently to fully unlock the potential of this tool moving forward.

3.3 Remedies and commitments

The effectiveness of antitrust decisions is largely contingent on the effectiveness of their accompanying remedies. Regulation 1/2003 envisages that the Commission can impose remedies following the finding of an infringement in antitrust cases or that undertakings might

offer voluntary commitments where the Commission intends to adopt an infringement decision. Remedies are also a common tool in merger control. A merger posing a competition concern may be declared compatible with competition law if companies implement modifications that eliminate the identified concern. Such behavioural or structural modifications are expressly envisaged in the EUMR. Under the DMA, the European Commission can also impose remedies to ensure compliance with the regulation.95

Remedies can broadly be divided into structural and behavioural. In antitrust, they need to be “proportionate to the infringement committed and necessary to bring the infringement effectively to an end”. Behavioural remedies require a company to act or to refrain from certain behaviours for a set duration (e.g., relying on certain terms and conditions, licensing IPRs). Conversely, structural remedies are one-off measures that mandate specific changes to the firm's structure and do not require any long-term monitoring.

3.3.1 Effective remedies in the digital sector

In dynamic markets that are prone to significant change, it is important to tailor remedies to the specific market context, also ensuring that the remedies do not quickly become obsolete. This challenge is hard to overcome and has prompted criticism that competition law as is might not be the most adequate legal instrument to restore effective competition and contestability in digital markets. When designing remedies, competition authorities face the difficulty of assessing their future effects – a difficulty that is exacerbated by the fast development of digital markets. In Google Shopping, for instance, the effectiveness of the remedies that Google proposed to bring its abuse of dominance to an end were generally not regarded as sufficient. And in Internet Explorer, Microsoft was required to provide users with a choice screen on which browser they wanted as their default setting, a remedy that was largely seen as unsuccessful – because Microsoft had already won over the market (perhaps also due to its anticompetitive behaviour), but also because the market was already dethroning that browser in favour of Google's Chrome. Arguably, the exercise of scenario-planning might have envisaged market developments that rendered this remedy superfluous – and could have instead taught us how to deal with such situations when they arise again.

To design effective remedies in the digital sector, a competition authority must accurately anticipate the likely evolution of the affected markets in the near and more distant future. Envisioning plausible or possible futures with the use of foresight methods could enable competition authorities to more effectively serve competition and consumers.

One option that presents itself in digital markets is to "make greater use of flexible, targeted remedies". This could include "remedies that are contingent on market evolution, lack of entry, the development of new technologies etc." A downside of contingent remedies lies in their complexity, while structural ones, such as the divestiture of capabilities or of technologies, are much more clear-cut. Both of these solutions come with some weaknesses, however. Contingent remedies entail legal uncertainty for the affected undertakings, while structural remedies are quite interventionist and therefore often only relied upon as a last resort. In both cases, insights on the future market development gathered through strategic foresight exercises can support a competition authority in designing effective remedies and accepting voluntary commitments that adequately address the issues that will arise in the future. These insights can be useful both in devising contingent remedies and when planning structural remedies in a way that gives priority to the type of possible future that would benefit competition and consumer welfare. This would seem like a manageable area for the implementation of strategic foresight.

3.3.2 The market-shaping function of remedies and commitments

In addition to mitigating harm resulting from an anti-competitive conduct and restoring competitive conditions and market contestability, remedies are a powerful instrument to steer the future market development. Similarly, commitments accepted by the competition authority can be used "as a forward-looking tool to shape market structures and affect business conduct". The market-shaping function of remedies and commitments thus enables competition enforcers to use these remedial tools to steer markets in a desired direction. To determine a preferred direction of market development in an informed manner, an overall understanding of future structural and behavioural features is an important precondition. Here, envisioning plausible or possible futures through strategic foresight could provide competition authorities with a basis for their analysis.

The advantage is clear: where remedial decisions are based on solid predictions, there is a decreased risk of such decisions losing relevance. At the same time, an agile remedial process allows competition authorities to review and adapt imposed remedies in response to changing market conditions. In fact, such adaptation of remedies may necessarily follow on from "a learning process that enables the reduction [of] over- and under-enforcement errors in remedy

design and implementation over time". And yet, as an elevated legal uncertainty for undertakings might be a repercussion of such an agile remedial regime, a thorough foresight analysis could be a welcome method to limit the risk of remedial obsolescence.

3.4 Merger control

The substantive analytical framework underpinning merger control is inherently futureoriented: "[m]erger analysis is an exercise in prediction". In a merger assessment, the competition authority is required to establish how a transaction would affect competition in the market and, if it decides to block a merger, it needs to base its predictive assessment on evidence that meets the standard of proof. To assess whether the merger significantly impedes effective competition (SIEC test) and is hence incompatible with the EU Merger Regulation (EUMR), a combination of methods, including economic theory, empirical evidence and experience, is usually applied.

The assessment tools currently relied upon in merger analysis may no longer be fit for purpose, however. Even though such tools "are meant to assess the future effects of the merger, [they] tend to focus on the current structure of markets, instead of forwardly looking at how markets might evolve post-merger". Dynamic markets in particular require an update to the methodological toolbox to envisage how potentially affected markets develop in the future and what the repercussions of the merger decision might be on the relevant market, on related markets, on competitors and on consumers. The strategy of Big Tech companies to swallow their (potential) competition is well-known, but has not yet been sufficiently addressed. This may also be due to a lack of adequate tools for pinpointing the competition issues that may arise post-merger. For instance, some of the ex-ante forecasting methods used in predicting the competitive outcomes of complex horizontal mergers – e.g., merger simulations – do not render equally reliable results when used in the assessments of future effects of non-horizontal mergers, which are often at issue in digital markets. Using new and diverse tools of foresight could make merger control more suitable to tackle the problem of concentration in digital markets.

3.4.1 Methodological plurality in merger control

In merger control, a methodological flexibility for conducting the prospective analysis can be observed, in the EU and beyond. The US Horizontal Merger Guidelines (2023) note that "merger analysis does not consist of uniform application of a single methodology". Instead, it is "a fact-specific exercise" in the course of which the "Agencies assess any relevant and meaningful evidence". This methodological diversity bodes well for strategic foresight and

other future-looking methodologies to be accepted as additional instruments in a merger review, supporting not only the understanding of the affected markets, but also assisting in formulating theories of harm and assessing future likely impacts.

A number of factors determine the kind of tools that a merger review will rely on, as well as the level of detail that the authority can look into. These include the available data, market specifics, what economic issues are being investigated, as well as limited time and resources. In straightforward cases, the competition authority may conduct qualitative analysis based on evidence such as publicly accessible industry insights and internal documents of the parties, combined with simple assessments of market shares, for example, to make predictions about the future repercussions of the merger. For more complex mergers, competition authorities can combine quantitative with qualitative methods.

The European Commission uses two main categories of quantitative tools: merger simulation techniques and direct estimation methods.118 Merger simulation techniques aim to "approximate the effects of a merger on the main competitive variable of interest (typically price) through an internally coherent assumed model of competition in the industry which takes account of important observed or measured market features". As merger simulation techniques do not account for all relevant factors, it is essential to complement them with qualitative evidence obtained by reviewing internal documents or from other market actors in order to comprehensively understand the merger's likely effects. Many foresight methods indicated in section 2 could be relied upon alongside the simulation techniques – or instead of them, in combination with other qualitative methods – to support merger assessments. This is particularly true for sectors where effects on prices are less relevant than other repercussions, including the merger's impact on quality and innovation.

As the second category of tools used by the European Commission, direct estimation methods "seek to study the impact of past events in the markets at hand, using historical data".121 In INEOS/Solvay, for instance, the Commission relied on an ex-post assessment of previous mergers in the same industry to predict the likely effects of the merger in question.123 Despite the data and techniques that are available to the Commission, it remains difficult to reliably interpret the results.124 Foresight methods can be used to remedy this weakness of direct estimation methods: the results from past data might not indeed be accurately translated into predictions of future industry and market changes, in particular in dynamic markets.

Ex-post evaluations of merger decisions could verify the effectiveness of forecasting prediction methods used in merger review. This would render future decision-making more accurate.

3.4.2 The timeframe for merger assessments

The timeframe within which a merger's competitive effects are assessed is often determinative of the assessment's outcome. How far into the future a competition authority should look in order to avoid type I and type II errors – i.e., over- or underenforcement – in merger decisions is to a significant extent contingent upon the types of effects deemed relevant to a merger assessment. A more traditional view is that welfare effects of mergers should be established by assessing their static effects: short-term implications of the merger on prices and output. More recently, partially prompted by the development of the digital economy, the field of merger control has undergone a transformation, shifting its methodological focus from static to dynamic effects in order to yield more relevant results. A scrutiny of dynamic effects verifies how the merger might influence the future competitive landscape, e.g., incentives to innovate, barriers to entry and expansion, or the development of new technologies. The purpose is to preserve long-term competition and foster innovation. To do so, the timeframe that a merger assessment uses as its basic unit of analysis may need to be adapted. For example, the Lear Report found that the default period of two years in merger investigations "may be somewhat limiting" and could be extended, particularly in digital cases.

Focusing on a merger's dynamic implications can "help improving the precision of merger enforcement and protecting the long-term interests of consumers". The same is true for environmental goals, which typically require a long-term realisation – even extending to future generations. But how long should that timeframe be? There is no rule of thumb that would apply to all cases. Instead, every case needs to be assessed based on its facts. In this respect, strategic foresight can make two contributions. As foresight is a method to anticipate long-term developments, it can help in pinpointing the timeframe within which significant changes can be expected to occur in affected markets. Importantly, it can also help competition authorities envisage these changes and their impact on significant parameters of competition beyond price.

3.4.3 Potential competition

Strategic foresight tools can also assist competition authorities in the analysis of potential competition. In merger assessments, the notion of potential competition presupposes a forwardlooking analysis. Transactions can significantly impede effective competition if they involve an undertaking already active on a relevant market and a potential competitor. Such mergers might result in the incumbent discontinuing the acquired product or service altogether, reducing quality or slowing down innovation. They might also be part of a broader exclusionary

strategy. Even in scenarios not directly involving a potential competitor, a merger may be problematic if it results in rendering the expansion of small firms and potential competitors more cumbersome. In digital markets, the Commission investigated whether potential competitors might be harmed as a result of the combination of datasets enabled by the merger on a number of occasions. The notion of potential competition can also be used to assess whether a potential competitor might in the future impose a constraint on the merged entity.

There are important evidentiary challenges when a competition authority relies on theories of potential competition, however, for it is uncertain whether the potential constraint will materialise in the future. The notion of potential competition thus triggers "the need to push the forward-looking nature of merger control into greater uncertainty by assessing future entry" – a challenge that foresight methods can help address. The recent US proceedings concerning Meta's acquisition of Within illustrated the consequences of a failure to properly assess potential competition. The Federal Trade Commission (FTC) challenged the digital platform Meta's acquisition of Within, the owner of Supernatural, a subscription virtual reality (VR) fitness service, based on potential competition theories of harm, among others, and sought a preliminary injunction to block the transaction. The agency's arguments, holding that Meta did not have the characteristics of a potential entrant in the market for VR dedicated fitness apps, were dismissed. The judge disagreed with the FTC that it was "reasonably probable" that Meta – already active in the area of VR – had the incentive and capability to enter the market of VR dedicated fitness apps (actual potential competition). The FTC had not sufficiently proven that Meta had the means for entering that market absent the acquisition of Within, and that those means would have likely led to a de-concentration of that market. The judge found that while "Meta has an abundance of VR personnel on hand, it lacks the capability to create fitness and workout content" as well as studio production capabilities. This analysis is out of step with market realities, where large platforms such as Meta regularly overcome such "obstacles" through hiring staff and renting suitable venues and equipment. Under the perceived potential competition doctrine, the FTC argued that Meta's acquisition of Within would also be problematic as it would eliminate the competitive constraint Meta had by its presence on the fringes of the market. The judge denied this based on the same findings as for actual potential

competition. Despite this, the judge underlined the doctrinal validity of the potential competition theory.141

This case shows that even where a concept is sound and clearly applicable to a case, courts may not be able to apply it properly without the pertinent evidence. A strategic foresight exercise, for example scenario planning, could, in this particular case, have charted out the possible future development of VR dedicated fitness apps in the presence and absence of the acquisition.

In the EU, several cases touched upon the possibility of potential competition. In Visa, for instance, the General Court asserted that in order to determine whether a company is a potential competitor, "real concrete possibilities for it to enter the [relevant] market and to compete with established undertakings" needed to be assessed. This entry had to "take place with sufficient speed". A foresight exercise could support the authority's analysis both on likely scenarios for entry and on the time horizon for said entry.

The European Commission recently stressed that because of digitalisation and the need to protect dynamic competition, it "continuously assesses and seeks to improve its analytical framework and investigative tools". In this respect, it is important for "competition authorities [to] explain how the industry will behave over the next several years". Strategic foresight can provide much-needed answers by modelling likely alternative futures, complementing more traditional methods.

3.4.4 Counterfactuals

Another area where forward-looking methods can prove useful is the assessment of counterfactuals. Such hypothetical scenarios as to the market's development in the absence of a particular transactions can provide useful benchmarks to judge the impact of a proposed concentration. While counterfactuals are usually developed with reference to the state in which competition finds itself at the time of the assessment, in digital markets they could be interpreted in a more forward-looking manner to better consider the dynamic nature of digital markets. Counterfactuals are particularly challenging where a target company is a promising start-up with uncertain future success, or where horizontal overlaps occur in areas where an acquiring company is not yet powerful. In horizontal mergers, the European Commission wants to

consider future changes "that can reasonably be predicted", e.g. the likely entry or exit of undertakings in the absence of the transaction. In order to rely on foresight methods for merger counterfactuals, it will be key to assess to what degree a prediction based is "reasonable" or, in the words of the Meta/Within judge, "reasonably probable". We will further discuss these notions below.

3.5 Market power assessments

In abuse of dominance cases (Art 102 TFEU),150 EU competition authorities and courts must assess the company's market power ("dominance"). This assessment usually follows the delineation of the relevant market. In its recent Market Definition Notice, the European Commission stressed that it will pay greater attention to future developments also when delineating the relevant market.

An analysis of dominance aims to establish whether a company is unaffected by the usual disciplining market forces. There are multiple factors that competition authorities traditionally consider to establish dominance. While market shares "provide a useful first indication" of a company's economic strength, other relevant factors include the existing market conditions and market structure, the position of other competitors, barriers to expansion and entry, or countervailing buyer power.

Commonly, an assessment of a dominant position is focused on the present and past market position of an undertaking. However, establishing dominance may also require a competition authority to consider expected future changes. For example, when determining dominance in dynamic digital markets, the likelihood of market power to be fleeting needs to be addressed.154 In the Microsoft/Skype merger, the General Court asserted that "the consumer communications sector is a recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral", adding that in dynamic sectors, "high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition". The Commission had held that despite Skype's high market shares of beyond 80% in consumer communication services, the market was dynamic enough not to draw any quick conclusions based on that market share.156 The General Court agreed.157 Thus,

<https://www.gov.uk/government/speeches/competition-in-the-digital-age-reflecting-on-digital-mergerinvestigations>.

authorities should not discard a scenario which shows that a digital player's market power may be ephemeral or unstable – just like it should not assume that the dynamic nature of digital markets means that market power does not exist. Instead, the threat of potential market entry should be thoroughly evaluated. This entails a challenging assessment of "whether there truly is a risk of innovative entry within a reasonable time frame". Such assessments can be conducted by analysing existing barriers to entry and expansion, for example economies of scale, proprietary product differences, brand identity, switching costs, capital requirements, access to necessary inputs and know-how or government policy. While several of these indicators are already future-oriented, the analysis can be complemented with insights from strategic foresight. This could demonstrate that, for example, certain existing barriers to entry will become surmountable in the near future – or reversely, that some new barriers are likely to arise –, thereby contributing to an understanding of how ephemeral or lasting a dominant position is. There might be cases where an entrant-specific inquiry is requisite to establish how it might develop in the future. As data about past entries or current market entry barriers cannot always reliably forecast future competitive pressures, foresight methods could be employed to conduct such assessments of temporary market power.

4 Challenges of employing strategic foresight in EU competition law

Applying foresight methods in the scenarios sketched in section 3 has at its core the idea of looking into the future in more reliable ways, ensuring that competition enforcement and policy are future-proof. In adding strategic foresight to the toolbox, however, competition authorities and legislators may be constrained by the legal standard of proof, efficiency requirements, legal certainty as well as limited resources. These constraints are particularly relevant when strategic foresight is used to conduct legal assessments exemplified in sections 3.4 and 3.5 above. The application of foresight methods to more policy-oriented areas such as agenda-setting and prioritisation, legislation and soft-law, as well as remedies, arguably triggers fewer challenges – with the exception of limited resources.

4.1 The standard of proof and the quality of evidence

Any competition law assessment that relates to future developments encounters one primary challenge: the standard of proof. What standard of proof does a competition authority need to satisfy in order to be able to rely on a strategic foresight exercise?

4.1.1 Case law developments on the standard of proof in merger control

In Airtours, the General Court ruled that “where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof”. Ultimately, it decided that the Commission’s decision should be annulled as it was “far from basing its prospective analysis on cogent evidence”. A few years later, in Tetra Laval, the CJEU reminded the Commission

that a prospective analysis in merger control “must be carried out with great care since it does not entail the examination of past events … or of current events, but rather a prediction of events which are more or less likely to occur in future”. An analysis of this type, the Court noted, “makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely”.

The CJEU added in Cisco Systems that an “assessment of probabilities” is required when considering the most likely economic outcome, rather than an obligation for the Commission to “show beyond any reasonable doubt” that a proposed transaction is (in-)compatible with competition law. This is an important clarification when enforcers consider relying on strategic foresight. For instance, different scenarios can be assigned respective probabilities based on market insights, and this can allow the Commission to weigh these probabilities for its antitrust assessment. The most probable of the post-merger scenarios (“more likely than not”) should, for instance, lead the Commission to decide whether to allow or block a merger.

A dilemma can be encountered in relation to “balancing” predictions of harm and of efficiency. Factors that complicate such weighing include uncertainty as to how robust the methodological tools employed are, limitations of the available data and questions regarding timing. By relying on foresight methods, some of these uncertainties could be replaced with the most likely predictions available. This would then enable the enforcer to carry out this weighing exercise with all necessary information at hand.

4.1.2 CK Telecoms, the standard of proof and its implications for foresight analysis In its much-awaited case on the standard of proof that the Commission must satisfy in order to block a merger, the Grand Chamber of the CJEU held in CK Telecoms that the Commission must demonstrate that "it is more likely than not" that a merger would result in a significant impediment of effective competition. The standard of proof remains the same, irrespective of the Commission's intention to approve or block a transaction, the type of merger or the complexity of the theory of harm.171 Importantly, the Court acknowledged that the ex-ante review required of the Commission in merger control afforded it "a margin of discretion with regard to economic matters for the purpose of the application of the substantive rules [of merger control] since it carries out prospective economic analyses seeking to determine the likelihood

of certain developments in the relevant market within a foreseeable time frame." The Court not only acknowledged that such prospective analyses were often more complex than ex-post assessments, but also pointed to the fact that to engage in such analyses, several scenarios had to be considered. The Court's task is to ascertain that in carrying out its assessments, the Commission accurately stated the facts and committed no manifest error of assessment.175 Recalling Tetra Laval, the Court reiterated that prospective analyses require particular diligence. Nevertheless, and with importance also for strategic foresight, "the prospective nature of the economic analysis which the Commission must carry out precludes a requirement for that institution to meet a particularly high standard of proof".177

The CK Telecoms judgment set out the framework that possible and plausible futures arrived at through strategic foresight need to satisfy. While the judgment pertains to merger control, the Court's insistence on the Commission's margin of discretion in prospective analyses will carry much weight in any prospective antitrust assessment.

4.1.3 The quality of evidence in prospective merger analyses

The Commission needs to produce "convincing" and "cogent evidence" where it intends to block a merger. Particularly for conglomerate mergers, the quality of the evidence is "particularly important" because the prospective analysis frequently goes fairly far into the future, and "the chains of cause and effect [that need to be proven for a significant impediment to effective competition] are dimly discernible, uncertain and difficult to establish". For strategic foresight, this implies that predictions based on a certain scenario will be scrutinised in detail. For the Commission to rely on foresight in its competition assessment, the scenario it relies on needs to be considered as convincing and cogent evidence, and the plausible future it is envisaging must be the one that is most likely. To be in a position to select the most convincing scenario, enforcers need to gain a thorough understanding of the bases on which these scenarios were arrived at and the robustness of the method employed.

4.1.4 Prospective analyses, standard of proof and soft law guidance

In horizontal mergers, the European Commission "may take into account future changes to the market that can reasonably be predicted", in particular the likely entry or exit of companies in the future. The question then shifts to what types of market developments the Commission can reasonably foresee. Here, foresight analysis can help predict the most likely developments with a focus on the parameters that are most closely related to healthy competition, including price, quality and innovation.

The CMA's Merger Assessment Guidelines explain that the prospective nature of a merger analysis implies that "an element of judgement is necessary in deciding whether any loss of competition is substantial rather than any exact quantitative measurement". Judging on the prospective analysis conducted by the CMA in Intercontinental Exchange, the Competition Appeal Tribunal acknowledged the CMA's discretion and noted that "[t]he assessment of facts and forecasts of what may happen in the future is a matter primarily for the CMA's judgement". It further recognised that when the CMA looks to the future, "any assessment is likely to be imprecise and unpredictable"; what is of relevance is that such an assessment not be "unreasonable".

The Lear Report, which conducted an ex-post assessment of merger control decisions in digital markets, suggested improvements especially in information gathering, for instance by conducting dawn raids to obtain evidence of companies' future plans or developing a better understanding of key digital markets. As assessments of mergers in digital markets are inherently speculative, the Report suggested that competition authorities should be more "imaginative" and test the boundaries of the legal framework in digital markets.188 The field of strategic foresight could certainly be leveraged in pursuit of a more imaginative use of the available methodological instruments.

4.2 Legal certainty

Integrating foresight into competition assessments – particularly at the enforcement stage – poses the risk of reduced predictability of competition decisions. Predictability, also referred to as legal certainty, is an essential quality of enforcement outcomes as it allows companies to foresee whether their actions are allowed under the competition laws. As one of the key functions of antitrust is general deterrence – an expectation that undertakings change their course of conduct for fear of being sanctioned –, the absence of legal certainty is undesirable as it might result in over- or under-deterrence.190 In this respect, it needs to be acknowledged that strategic foresight might deliver outcomes that are not entirely obvious. Despite the longstanding use of foresight in the business world, affected companies may not necessarily employ the same methods when contemplating their market conduct. Therefore, legal uncertainty might undermine the positive impact of strategic foresight on antitrust enforcement. Therefore, a balance needs to be found where foresight is relied upon in competition enforcement, including an open communication of the methods employed by competition authorities. A further possibility lies in the authority refraining from the imposition of a fine where its decision significantly relies on predictions of future market developments that are not immediately obvious, but well-grounded in strategic foresight.

An important counter-argument to proposals to look further into the future in merger assessments is uncertainty in forecasting the effects of mergers. Whereas the precision of merger enforcement might as such be improved as a result, considering dynamic effects of mergers based on parameters such as innovation or investment may "raise legal uncertainty if the analysis of future effects is speculative and not supported by sound economic evidence". The unprecedented pace of technological progress and distinctive characteristics of digital markets, like network effects, multi-sidedness, data-based business models and disruptive innovation, put additional pressure on enforcers to conduct reliable assessments that account for change. While all merger assessments are characterised by a degree of uncertainty, such uncertainty is naturally higher in markets in which noteworthy transformations are taking place. Theories of harm based on a loss of potential competition, as described above, render a prospective analysis even more unsure and invite challenges based on the standard of proof.

4.3 Resource limitations

While the standard of proof and legal certainty are challenges that competition authorities will encounter when applying strategic foresight in competition law enforcement, these challenges play a lesser role when it comes to employing foresight for priority-setting and as the basis for legislative proposals or soft law guidance. A challenge that all possible applications of strategic foresight encounter, however, is limited resources – both in terms of time and expertise. Any serious deployment of strategic foresight exercises requires significant resources.

Given the procedural time constraints contained in the EU Merger Regulation, it might simply be too resource- and time-intensive to conduct fully fledged strategic foresight assessments catered to individual transactions. Here, a balance must be struck between "error costs, the limits of an administrative investigation with tight time constrictions and the inevitable uncertainty regarding the evolution of digital markets". This means that a "light version" of strategic foresight could be more adapted to merger assessments, while certain antitrust investigations – especially as regards the formulation of remedies – and priority-setting could "indulge" in more elaborate strategic foresight exercises. It is certainly not feasible – nor advisable – to conduct a foresight analysis in each and every single case. Particularly in the course of sector inquiries, however, where competition authorities invest significant resources to understand competition in a particular sector and its possible future development, strategic foresight tools could be the tool of choice.

5.Conclusions

The far-reaching and transversal transformation of our economies and societies, as a result of digitalisation and climate change, are phenomena that continuously challenge our ways of

designing and approaching laws and policies. Like any public policy, competition policy frequently suffers from "presentism" and "democratic myopia", i.e. an asymmetrical focus on current issues and functional short-sightedness. By relying on strategic foresight, competition enforcers can counter this pitfall and include future-oriented analyses into their case prioritisation, their agenda-setting and their competition assessments. As competition law strives to become more innovation-friendly,200 strategic foresight with its "natural affinities" to innovation can contribute to achieving this goal.

Strategic foresight responds to competition law's need to become more future-proof: in its assessments, in designing remedies, and in selecting the right cases at the right time. When included in the toolbox of competition authorities, strategic foresight can contribute to sound policy-making and enforcement. As competition authorities begin experimenting with this tool, they will also be able to fine-tune its application to individual settings, such as assessing mergers, devising remedies and adjusting soft law guidance. At the same time, the requisite standard of proof that strategic foresight exercises need to fulfil will need to be given some thought.

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