Equivalent in effectiveness?

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Abstract

This research analyses the effectiveness of equivalence frames within the European Union. It asks itself the following question: In how far are certain frames by interest groups more effective in influencing the European Commission in drafting legislative proposals?
The analysis conducted in this research found that negative frames are more effective in influencing the European Commission in drafting legislative proposals. This confirms a bias towards negative frames.

However, it was also found that business interest groups don't make more use of negative frames than non-business interest groups. This finding doesn't confirm a double bias in which specific interest groups make more use of more effective frames. In addition it was found that differences exist per case. This suggests that every case is unique and that not every frame is as effective in another case.

Therefore it can be concluded that certain frames, more specifically negative frames, are more effective in influencing the European Commission in drafting legislative proposals but that differences exist per case and that the usage of frames is equally divided over business and non-business interest groups. The conclusions of this research thus raises questions about the argument of effectiveness of civil society participation systems while it didn't show that the legitimacy of the system is severely undermined as interest groups equally use this bias.

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1. Introduction

"… and that government of the people, by the people, for the people, shall not perish from the earth."

With these words Abraham Lincoln ended his Gettysburg address to commemorate those who had fallen in the Gettysburg battle. The final words of this speech have grown into a conception of democracy itself. A conception that states that government should be of the people, by the people and for the people. These three requirements have been used ever since to structure thoughts about the democratic value of political systems.

On the other side of the transatlantic ocean Lincoln his conception resonates strongly in the debates about the democratic deficit of the European Union (EU). Ever since the debate was started it has sparked vivid deliberations between those who argue that there is such a thing as a democratic deficit within the EU and those who the deny the very existence of it (e.g., Williams, 1991; Beetham and Lord, 1998; Majone, 1998; Scharpf, 1999; Moravcsik, 2002; Lord, 2004; Follesdal, 2006; Hix, 2006; Schmidt, 2006). Several debates can be considered part of the democratic deficit dispute of which one has been of particular importance (Bellamy, 2012). This debate has focussed on the issues of government 'by' and 'of' the people. Several authors have argued that government by the people is impossible for the EU as it lacks a common demos or people (Weiler, 1995, p. 225). On the other side of the argument we find authors that argue that the presence of the right democratic institutions will bring a demos into being, making a government by the people possible (Hix, 2008).

The academic debate about the democratic deficiencies of the EU has had consequences for the way the European Union works. Partly as a reaction to the debate the European Union, and especially the European Commission, has actively sought to increase the participation of civil society (Kohler-Koch, 2007). The way for the European Commission to address this issue was by opening up to interest groups to allow for a more participatory decision-making process. This approach culminated in the Commission's White Paper on Governance in 2001 (European Commission, 2001) which set out a new mode of European governance open to input from civil society. This new mode of governance was firmly rooted in the belief that interest groups, the representatives of civil society, can enhance the policy-making process.

According to Saurugger (2008) two main arguments can be made for allowing the participation of interest groups in the policy-making processes. The first argument is of a

fundamental nature. It states that including everybody in the political process is in line with the fundamental principles of democracy. Opening up to interest groups will enhance the legitimacy of the governance system as interest groups represent civil society and thus enable civil participation (Saurugger, 2008). The second argument is that opening up to interest groups will increase the effectiveness of the governance as interest groups have information that otherwise would not be available to the decision-makers (Saurugger, 2008). These two arguments form the theoretical backbone of the inclusion of interest groups in the European Union its policy making processes.

Although increased interest group participation can increase legitimacy and effectiveness it can also work the other way around. When there is a consistent bias towards specific interest groups in the decision-making process interest group participation doesn't decrease democratic deficiencies but instead increases them (Michalowitz, 2007). Within the discussion on interest group participation a returning fear is that business groups dominate the participation process and that there exist a consistent bias towards them. The arguments that are put forward to support this position often mention that business interest groups have more resources at their disposal and that they are able to gain more influence through these resources (Baroni et al, 2014). Therefore the question of how much influence specific interest groups have is of great relevance to our notion of European democracy and European governance. Especially the methods that interest groups employ to gain influence could contribute to our understanding of interest group influence and thus the legitimacy of the current European governance system.

1.1 Framing as a tool to increase influence

Recently, scholars of interest groups have focused on the concept of 'framing', or the idea that interest groups strategically communicate and promote arguments and issue-definitions in order to influence policy decisions in the desired direction, to explain how interest groups gain influence (De Bruycker, 2016, p. 775). Framing, in this context, means putting forward certain arguments and definitions in communications in order to influence policy. It's an important part of the methods of interest groups because framing importantly affects the legislative outcomes in the EU (Daviter, 2011). Given the impact framing can have on the outcome of decision-making processes it's essential to understand whether framing affects the influence that interest groups have.

Of particular importance in this regard is the question whether the usage of specific frames increases the influence of interest groups in the decision-making process. If this would be the case severe doubts can be raised about the notion of increased legitimacy of European governance by including interest groups. Just as with the constant bias towards specific interest groups an overall bias towards specific frames increases democratic deficiencies rather than decreasing them.

The input legitimacy in the EU it's governance system is built upon the assumption that there is no persistent bias towards particular interest groups. This assumption exists as a sustained bias would not increase legitimacy, as is the goal, but instead decrease it. This assumption however could be invalid if some frame are more effective than others. First of all, if some frames are more effective than others they could create a biased system. In such a system decision are not taken solely on basis of the input or characteristics of an interest group but also on the frames they use. In addition to this it would be even more problematic if only some interest groups use these more effective frames. This would not only created a system that is biased towards frames but also towards certain interest groups. The consequences of such a double bias would be that the input legitimacy of the EU is severely decreased.

In case that the usage of specific frames consistently gives interest groups more influence on the outcome of decision-making processes one could speak of frame capture. Whereas regulatory capture means that certain interest groups continuously dominate the outcome of a specific policy process (Stigler, 1971) frame capture would mean that specific frames offer domination of a policy process. The choice of a frame would allow an interest group to determine the outcome of a decision-making process and thereby capture the policy process.

With regard to this an especially valuable question would be who makes use of the more effective frames. If only some interest groups would make use of more effective frames they would be able to capture the policy process. More precisely, it would not be unthinkable that only business interest groups would make more use of effective frames. Given their substantial advantage in resources it could be that only they are aware of a bias towards specific frames. Not only would this invalidate the argument that interest groups increase the effectiveness of governance but it would also cast severe doubts on the legitimacy of the governance system of the European Union. Whereas this system of civil society participation

was created as a response to the democratic deficit debate a bias towards frames could, especially if used more by specific interest groups, instead increase the deficit. A government of the people, by the people and for the people should not mean a government that is systematically biased towards some interest groups and therefore some of its citizens.

1.2 Research question

Given the importance of interest groups their framing influence and the consequences of that for input legitimacy this research sets the objective to find out whether or not specific frames increase the influence of interest groups in the policy-making process of the EU. In doing so it possess the following research question:

In how far are certain frames by interest groups more effective in influencing the European Commission in drafting legislative proposals?

The choice has been made to focus on the European Commission as the Commission is one of the key players in the EU its institutional set up. The Commission has the sole right to initiate proposals for legislation in all policy areas except for the area of freedom, security and justice. This gives the Commission a crucial position in the policy-making process. Given it's legislative power it's able to decide whether or not the European legislative process will start.

In addition the choice has been made to focus on the policy draft stage or the agenda setting stage in the European policy cycle. The agenda-setting phase of the policy cycle, which in the EU is before a final legislative proposal is put forward by the European Commission, is perhaps the most important in the policy cycle. During the agenda-setting phase the actors that are involved set the tone of the debate and create the possible outcomes of the development of the policy (Howlett, Perl and Ramesh, 2009). By defining the parameters of the debate possible avenues for policy outcomes are created. This makes the agenda-setting phase crucial for the whole of the policy process as it has a direct influence on the other phases of the policy cycle. In the EU the Commission has the ability, through its sole legislative initiative, to determine the terms and conditions of any legislative debate as the other institutions will debate on the basis of the content of the Commission its legislative proposal (Klüver, 2013, p. 156).

The agenda-setting function of the Commission doesn't mean that the Commission is the only actor involved in this stage of the process. Other policy actors in the EU are more than aware of the importance of the agenda-setting phase and try to be involved as quick as

possible. It's common knowledge amongst lobbyist that as long as no formal written proposal has been made changes to the proposals can be made more easily and swifter (Bouwen, 2009, p. 25). Although in latter stages the European Parliament and the Council of the European Union can still modify the proposal to their own liking, completely overhauling a proposal is very unlikely (Thomson and Hosli, 2006). Therefore the decision has been made to focus on the agenda-setting phase and the Commission.

1.3 Sub-questions

In order to answer the research question three sub-questions have been drafted. These will structure the research into independent units of analysis. The first sub-question is whether negative frames are more effective than positive frames. This question builds upon prospect theory which will be explained in the theoretical framework. If negative frames are more effective than positive frames this would create a bias towards these frames. Such a bias would be even more harmful to input legitimacy if the more effective frames are used substantially more by specific interest groups. Therefore the second sub-question is whether business interest groups use more negative frames than positive frames.

The last sub-question is whether there is a difference in terms of the effectiveness of frames per case. In order to establish how effective certain frames are in influencing the European Commission it´s important to see how effective frames are in different cases. This helps to get a broader picture of the effectiveness of frames as each case represents a different setting. This settings consists of different frames and different people on the receiving end of the frame. If it would be established that certain frames are effective across several cases this helps to understand the overall effectiveness of frames and excludes the possibility that frames are only effective in a certain context. This adds to the validity of the research, helps to guide future research and narrows down the discussion on input legitimacy.

1.4 Academic relevance

The objective of this research is to find out whether or not specific frames increase the influence of interest groups in the policy-making process of the EU. By setting this objective it tries to fill a gap in the literature on framing. As will be explained in chapter 2 (literature review) research on framing has mainly focussed on one specific kind of framing called emphasis framing. Although this is a good way to assess what the different interests are within

a specific policy discussion it doesn't contribute to our understanding of interest group influence. Emphasis frames are case specific, can't be used by all different interest groups and therefore can't represent a strategic choice. Interest groups are bound by the interest they represent and pick their emphasis frames based on these interests.

Equivalence frames on the other hand are general frames, not bound by the case and can be used by every interest group. Therefore, they could represent a strategic choice which in turn could impact on the influence of interest groups. If there would be a bias towards specific frames and especially if only some interest groups make use of them this would also impact on the legitimacy of the civil society participation system of the European Union. Given this importance it's unfortunate that equivalence framing and their impact have not been researched yet within the European Union. Therefore this research aims to fill this gap by studying the effectiveness of equivalence framing in the European Union. This contributes to our understanding of equivalence frames and could potentially unlock a complete new and undiscovered area of research that has strong links to the governance system of the European Union.

1.5 Societal relevance

Since research on equivalence frames and their effectiveness has a strong link to the governance system of the European Union, researching this will help to improve our understanding of the effects of the newly created system of civil society participation of the EU. This system was created as a response to the democratic deficit debate but could potentially have some negative effects.

These negative effects are grounded in a possible double bias. In order to understand how a double bias would negatively impact the system it's helpful to turn back to the arguments in favour of input-legitimacy. It's has to be remembered that two arguments can be given in favour of such a system according to Saurugger (2008). These are effectiveness, as interest groups might have information that is unknown to policy makers, and legitimacy, as interest groups represent civil society. However, when a bias exist these arguments are less valid. First of all, when it's found that specific frames are more effective there would be a bias towards frames. This impact directly on the argument of effectiveness as not the information itself but also the way it's framed has a strong impact on the outcome of the system. This would be undermining for the system as European legislation would be based on framing

instead of purely on information.

Secondly, when only specific interest groups make use of these frames and thus gain more influence the legitimacy of the system is undermined. In that case the importance of interest groups as representatives of society who voice their interest is undermined, as not the characteristics of the interest group and the citizens they represent matter, but rather their framing. If only specific groups make use of more effective frames the system would be biased towards these groups which negatively impact the legitimacy as the system would favour specific interest groups.

The potential double bias and the negative effects it can have on the way we create policy in the European Union makes it important to further our understanding of what gives influence in this system. Is it the information and the characteristics of an interest group that are decisive or are there other aspects, such as the choice of frames, in play as well? By researching equivalence framing in the EU a new light can be shed on the workings of a system that was created a response to the democratic deficit debate. With more understanding of this system we can assess whether or not this has been a right response and whether or not it still needs to be improved. As the outcomes of the system in the form of legislation directly impact daily life of all European citizens this is an important area to expand our knowledge on.

1.6 Outline

This research starts out with a literature review of the academic literature on framing. Within this review criticism on the concept op emphasis framing is voiced as they don't represent a strategic choice by an interest group but rather the interest that are at stake. Therefore, this research focusses on equivalence framing as they can represent a strategic choice and there has not been any research on equivalence framing within the EU.

In the theoretical framework chapter prospect theory is used to formulate the hypotheses that negative frames are more effective than negative frames. In addition, the hypothesis is formulated that business interest groups use more negative frames in market shaping legislation. As market shaping legislation is by far the most used type of new legislation this potentially offers valuable insights.

Within the research design chapter the hand coding method for conducting the research is explained and operationalised. It starts off with the criteria that guided the case selection and some information on the selected cases. After that it's explained how the frames will be analysed and how effectiveness will be measured. In addition it's explained how the

division between business and non-business interest groups is made. At the end of the chapter limitations of the method that are related to validity and generalisability are discussed.

The chapter on results discusses the results of research. This follows the structure of the cases. Thus first the results of case one, two and three are given. Afterwards the results of all three cases combined are given. The following chapter, the analysis chapter, tests the formulated hypotheses based on the given results and tries to assess what the results mean for these theories. The structure of the chapter follows the structure of the three sub-questions. In the conclusion an answer to the overall research question will be given as well as an explanation of what the results mean.

2. Literature review

2.1 Emphasis framing

Recently, scholars of interest groups have focused on the concept of 'framing', or the idea that interest groups strategically communicate and promote arguments and issue-definitions in order to influence policy decisions in the desired direction, to explain how interest groups gain influence (De Bruycker, 2016, p. 775). The focus on framing can be explained as it has been shown that framing not only structures political conflict in the EU but also importantly affects the legislative outcome (Daviter, 2011). This makes framing an important component of a broader understanding of the legislative processes in the EU, its governance system and its legitimacy.

Framing can be understood in different ways. Most literature on framing has focussed on one way of understanding the so called *emphasis frames*. This means that certain aspects of an issue are emphasized over others (Druckman, 2004, p. 672). To give an example of this kind of framing: imagine a policy debate about a higher tax on fuel. An interest group consisting of fuel exploiters might emphasize the consequences of this tax for their industry while an interest group of environmentalists can emphasize the effects for the environment. In this case both groups emphasize different aspects of a certain issue. They both thus use different emphasis frames (Industrial frame versus environmental frame).

The perspective of emphasis framing has been extensively used in researching framing in the EU. Some examples of this research is that Boräng and Naurin (2015) showed that civil society groups are more likely than businesses to share emphasis frames with EU Commission officials, that interest groups employ different frames depending on which Directorate-General of the Commission they try to influence (Klüver, Mahoney, and Opper, 2015) and that frames differ per policy context (Eising, Rasch, and Rozbicka, 2015). Also great large-n analyses of frames have been done in European policy debates. Both analyses found that actors find it difficult to (re-)frame issues, because existing collective frames are hard to change (Baumgartner, 2009) & (Baumgartner and Mahoney, 2008).

Although this field of research has produced results that might help to understand some larger issues in the EU a lot can be said about their value for the concept of framing itself. The problem with such research is the definition of framing they employ. Research that focusses on emphasis frames converges around a 'loose' definition of framing. These definition come in many forms but centre around the idea that framing is defined as

information that conveys differing perspectives on some event or issue (Scheufele and Iyengar, 2015, p. 4 & 5). There are several problems with these kind of definitions.

First of all such a broad definition of framing creates problems with analysing the strategic purposes of interest groups. With loose definitions of framing actors will highlight different perspectives of an issue not because it's their strategy but because of the interests they represent. In the aforementioned example of a higher tax on fuels a group of fuel exploiters doesn't strategically pick to highlight the effect of the tax on their industry, it's simply their interest they voice. This has been shown by Candel, Breeman, Stiller, and Termeer (2014) who concluded that farmers will voice an 'agricultural frame' and environmental groups an 'environmental frame'. They don't do this for strategic purposes but simply because farmers will look to an issue from an agricultural perspective, as this is the interest they have, while environmental will put an environmental perspective against this. Thus analysing emphasis frames lack the ability to unravel strategic purposes. They can however be used analyse what is at stake in a policy debate. In the example of Candel et al (2014) this would show that there are agricultural and environmental issues in the given policy debate. However the strategic value of such analyses can be neglected as the chosen perspectives don't necessary represent a strategic choice.

Another issue with using loose definitions is that it's hard to determine the effectiveness of frames. As emphasis represent positions rather than strategic choices it's very difficult to untangle the actual framing effect from other factors (De Bruycker, 2016, p. 778). Emphasis frames represent different positions, not differences in presentation. This also means that the effectiveness of emphasis frames is connected to arguments rather than frame effectiveness. Thus deciding the effectiveness of frames, an essential part to our understanding of interest group influence and input legitimacy, is hard when using an emphasis frame perspective.

2.2 Equivalence framing

Given this critique on emphasis framing several scholars have argued for a new direction in framing research (De Brucker, 2016 & Cacciatore, Scheufele, and Iyengar, 2015). Instead of focussing on emphasis frames new research should look at equivalence frames. This change of perspective does allow scholars to analyse strategic decisions of interest groups and the effectiveness of frames. Equivalence frames can be defined as presenting more or less logically

equivalent information in either a positive or a negative light (Levin, Schneider, and Gaeth, 1998). Whereas emphasis frames thus focus on differences in arguments and information equivalence frames are about casting information in a different light. Although equivalence frames also emphasize certain aspects of an issue, the scope of emphasis is much narrower (De Bruycker, 2016, p. 778).

In total three different kind of equivalence frames are distinguished in the literature. These are:

1. opportunities versus risks;
2. gains (benefits) versus losses (costs);
3. positive consequences versus negative consequences (De Bruycker, 2016, p. 778 &779).

As can be seen equivalence frames are general frames. This means that they are applicable across different policy issues. Whereas emphasis frames are mostly tailored to a specific situation, equivalence frames can be used anywhere. In any policy debate it's possible to focus on risks, losses or negative consequences of certain information or instead to focus on the opportunities, gains and positive consequences. Because equivalence frames are generally applicable this opens up the possibility to analyse frames across policy areas. As was mentioned in the introduction this in an interesting aspect for the discussion on input legitimacy since it can help to define the parameters in which frames are effective. In turn this could guide possible future debates on legitimacy and input by interest groups.

Another important asset of equivalence frames is that as opposed to emphasis frames they can be used strategically. Whereas emphasis frames are tied to interests that interest groups represent equivalence frames represent strategic choices. Whilst the information is more or less the equivalent the presentation is a strategic choice for interest groups. This distinction can be clarified by using an analogy of the art world. Equivalence framing is equivalent to the choices that an art gallery owner makes about how to display a painting. Reactions among potential buyers to a painting can differ depending on the strategic choice of the frame of the painting, the light and the room being used to present the painting. However, many political communication researchers have focussed on emphasis frames and their effects which means presenting completely different paintings which will undoubtedly create different reactions amongst the potential buyers (Iyengar and Scheufele, 2014, p. 13).

This research agrees with the critique on emphasis frames. Therefore it focusses solely on equivalence frames. By doing this not only a contribution is made to a new direction in framing research but it also helps to fill a gap in the literature. Whereas equivalence framing has been used to research public opinion it has rarely been used in the context of policy making (De Bruycker, 2016). However, the effects of equivalence framing have been analysed more intensively within other disciplines like psychology, marketing or health communication. Studies in these fields of research found considerable effects of equivalence frames on perceptions, judgements, evaluations and behaviour (Schuck and De Vreese, 2006). The lack of research is unfortunate as there is promising potential in combining policy making and equivalence framing. The possibility to disentangle strategic choices makes it possible to see to what extent specific frames are effective. The applicability across policy areas reinforces this potential as equivalence frames can be used in any policy area. Thus by researching the effectiveness of (equivalence) frames and their usage in the context of the EU a first step in the right direction of framing research can be made whilst also making a contribution to the issue of input legitimacy.

3. Theoretical framework

3.1 Defining interest groups

As has been explained in the literature review equivalence frames can be based on a strategic decision. This strategic decision is made by the creator of the frame which in this research is an interest group. In order to understand their decision making process and the consequences for input legitimacy it´s first necessary to explain what interest groups are. This is important as any theoretical model of interest group influence must depart from a proper theoretical understanding of what interest groups are (Goldstein, 1999, p. 128). In addition to understanding what interest groups are, it´s important to understand what goals they pursue and what could drive their decision on what frames to use.

First of all, a definition of what exactly an interest group is should be given. Although the field of interest group study would significantly benefit from a commonly used single definition that is used this is at the moment not the case. A plethora of seemingly interchangeable concepts are being used to describe the matter at hand: interest groups. To give an example of this conceptual diffusion: interest groups, political interest groups, interest associations, interest organisations, organised interests, pressure groups, specific interests, special interest groups, citizen groups, public interest groups, non-governmental organisations, social movement organisations, and civil society organisations are all used by different authors to describe the same phenomenon (Beyers, Eising and Maloney, 2008). In order to avoid this conceptual blurriness it's prudent to explain how interest groups are defined in this research.

Broadly speaking two distinct definitions can be found in the interest group literature. The scholars who make use of a behavioural definition (e.g., Truman, 1951; Berry, 1977; Lindblom, 1980; Salisbury, 1984; Wilson, 1990; Baumgartner et al, 2009) define interest groups "on the basis of their observable policy-related activities, in particular, activities related to influencing policy outcomes" (Baroni, Carroll, William Chalmers, Marquez, & Rasmussen, 2014, p.2). This definition thus focusses on the activities that the interest groups undertake with the goal to influence policy outcomes. A different approach is taken by those that define interest groups as membership associations where the organizational characteristics of the group plays an important role (Baroni et al., 2014) . Examples of this approach are Thomas and Hrebenar, 1990; Jordan et al, 2004; Halpin, 2010; Jordan and Greenan, 2012; Binderkrantz et al, 2014. This approach focusses mainly on the organisational

part of interest groups and their internal dynamics. Given the fact that this research doesn't focus on the internal dynamics of interest groups but rather on their external influence this research uses a behavioural definition. A key question of critique that can be posed when using such a behavioural definition is how much activity is required before something can be regarded as an interest group (Wilson, 1990, p.7). For this research the answer to that question is fairly simple as participating in an EU consultation is deemed to be enough activity to be regarded as an interest group. Therefore the following definition will be used in this research. An interest group is 'any organization that seeks to influence the formulation and implementation of public policy' (Grant, 1989, p. 9).

As this definition of what an interest group constitutes is broad it's important to distinguish between different kind of interest groups. This distinction allows to see whether different kind of interest groups make use of different frames or not. In this research the interest group population is divided into two categories. These two categories are based on the European transparency register and will be further explained in the methodology part. Although also other categorisations are being used, amongst others the categorisation scheme by Klüver, Mahoney and Opper (2015), for this research it's most useful to stick to the categorisation of the European transparency register as most interest groups studied here are registered in the transparency register.

3.2 Interest groups and rational-choice theory

With the definition of an interest group set it's time to make clear what drives interest groups. In order to comprehend what drives interest groups it's assumed that interest group operate based on rational-choice theory. Rational-choice theory states that actors act in a rational way, are goal-oriented, purposeful and follow a fixed set of ordered goals (Downs, 1957). When this is translated to interest groups it follows that the main goal of interest groups is survival (Klüver, 2013). Only when an interest group survives it will be able to direct policies into a desired direction. Therefore all interest groups will try to ensure survival. An important way to ensure survival for an interest group is to maximise influence. For non-business interest groups maximising influence will attract more members to the cause which in turn may lead to more legitimacy and thus influence due to a bigger membership (Bernhagen, Dür, and Marshall, 2015, p. 3). For interest groups representing business it also follows that maximising influence will lead to survival as when influence is at its peak it will be the easiest to push a

policy in the desired direction. This will make it easier for a business to make profit and thus to survive (Bernhagen, Dür, and Marshall, 2015). Therefore, all interest groups try to maximise influence to ensure survival.

One of the ways in which an interest group can try to maximise its influence is to pick the most effective frames. As equivalence frames are picked strategically, as opposed to emphasis frames who merely represent an underlying interest, interest groups will thus try to pick the frames that are most effective. Therefore, following rational-choice theory, in this research it will be assumed that interest groups pick the frames that are most effective and who will in turn maximise their influence.

3.3 Framing effects and Commission officials

In order to develop hypotheses the concept of framing effects is used. Broadly speaking, framing effects means that when frames are being used they make use of a cognitive bias in our brains. This results in a higher chance of preferring a specific action or performing an act due to the way information is presented. These framing effects constitute one of the most stunning and influential demonstrations of irrationality (Kahneman and Tversky, 1986). The underlying irrationality of framing effects challenges a lot of modern day rational assumptions in both social sciences, decision-making and policy formulation. Instead of a pure rationalised way of decision making frames can activate irrational cognitive biases in our brains and in doing so influence the way we act.

Framing effects have been studied mostly in psychology where a subject take a test in a secluded environment. Normally these test consist of hypothetical situations in which the subject has to pick a decision from a limited amount of available options. The outcome of these decisions or the lead-up to a decision is framed in a specific way in order to test the framing effect. Although there are similarities between such tests and actual decision-making there are also important differences. The main differences would be that in most cases policymakers will have in-depth knowledge of the matter at hand and that the policy is too complex to be caught into an A and B option. In addition to this the secluded environments take away the possibility of an extensive analysis of the problem and a discussion about it with peers. This would in reality often be a possibility for decision-makers. Based on this assumption it could be argued that policy makers will be less responsive to frames and their framing effects.

However Bartels (2003, p.63) states that there is "little basis [in research] for supposing that even well-informed, well-thought-out opinions are likely to be immune from framing effects". This statement is also confirmed by LeBoeuf and Shafir (2003) who found that giving more thought to a problem doesn't eliminate or reduce the framing effect. In addition to this, the research that focussed on framing effects and decision-makers such as politicians and government officials also found that framing effects were just as effective on them as with other citizens (Linde and Vis, 2017 & Haerem, Kuvaas, Bakken and Karlsen, 2010). Therefore there is no reason to believe that officials from the European Commission are not effected by framing effects.

3.4 Prospect theory & negativity bias

For equivalence frames two framing effects, the negativity bias and prospect theory, are of particular importance. Negativity bias means that "negative events are more salient, potent, dominant in combinations, and generally efficacious than positive events" (Rozin and Royzman, 2001, p. 297). This negativity bias doesn't only run true for negative events but also in processing and evaluating information. Information that is framed in a negative way is more salient and dominant than the same message framed in a positive way. This holds not only true with regards to media and news messages and the effect on citizens but also for decision-makers (Olsen, 2015). It has been confirmed that decision makers who were confronted with negative frames were better at recalling these messages and were less secure in making their decision than those who received positive frames (Kuvaas and Selart, 2003). The negativity bias thus makes decision-makers, and more specifically Commission officials, more sensitive to messages that are framed in a negative way.

One theory that builds on the negativity bias is prospect theory. This theory was developed by Kahneman and Tversky in 1979 as a reaction to the dominant theory of expected utility which in turn forms the basis of rational choice theory. The expected utility theory states that in situations in which the outcome is at least partly unsure actors act in a rational way to calculate what the best decision would be based on the utility value and its probability (Mongin, 1997). Prospect theory differs from this in that the starting point of the model is that choices are evaluated relative to a reference point (Kahneman & Tversky, 1979). The reference point, on which decisions are based, is often the status quo that is prevalent at the time of the decision. In the situation of a decision on new EU legislation this reference point would be the

situation before the new legislation comes into effect. Decisions on changing this reference point are thus dependent on the starting point and are not equal in every situation.

The second and most important difference between prospect and expected utility theory is that changes to the reference point are not perceived to be equally important. For people who are faced with a decision a loss is more salient than a gain. Thus the possibility of losing something as a result of taking a decision has a stronger effect on behaviour than gaining something (Kahneman & Tversky, 1979). This leads to a situation in which decision-makers have a cognitive bias that is geared towards preventing losses from happening rather than trying to gain something as a result of their decision. An example of this framing effect is the following test that Kahneman and Tversky (1979) conducted:

Case 1
Imagine that the U.S. is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people. Two alternative programs to combat the disease have been proposed. Assume that the exact scientific estimates of the consequences of the programs are as follows:

If Program A is adopted, 200 people will be saved.
If Program B is adopted, there is a 1/3 probability that 600 people will be saved, and a 2/3 probability that no people will be saved.
Which of the two programs would you favour?

Case 2
If Program A is adopted, 400 people will die.
If Program B is adopted, there is a 1/3 probability that nobody will die, and a 2/3 probability that 600 people will die.
Which of the two programs would you favour?

In case 1 72% of the participants chose program A and 28% chose program B. In case 2 78% of the participants chose program B and 22% chose program A (Kahneman and Tversky, 1979). The main difference is the wording in the cases. The programs in both case are equivalent but in case 1 they are framed in terms of people being saved (positive) whereas in case 2 they are

framed in people dying (negative). The results of this case, which has been repeated in many different ways, affirms that people are less apt to take risk to achieve gains and are willing to take more risk if they can prevent losses. This bias provides a strong basis for equivalence framing to build upon.

3.5 Negative frames

When the negativity bias, prospect theory and equivalence framing are combined it results in the prediction that frames that a focus on negative effects will generate a stronger reaction than those who focus on positive effects. Frames that focus on negative consequences as deriving from the decision will, according to the negativity bias, be more salient and stick better to the memory of the decision-makers. Not only does the message resonate better, according to prospect theory decision-makers will also have a cognitive bias towards trying to prevent losses rather than trying to solidify gains from their decisions. For equivalence frames, which focus either on losses or on benefits, this would theoretically result in a situation in which negative frames are more effective than positive frames. Decision-makers will, when faced with a decision between the two, prefer to reduces losses than to increase gains. Based on these theoretical assumptions three hypothesis have been formulated.

These are:

Hypothesis 1.1:

Frames emphasizing costs or losses are more effective than frames that emphasise gains or benefits.

Hypothesis 1.2:

Frames emphasizing risks are more effective than frames that emphasise opportunities

Hypothesis 1.3:

Frames emphasizing negative consequences are more effective than frames that emphasise positive consequences.

3.6 Frame usage per different interest group

As has been explained above this research distinguishes different kind of interest groups based on the categories of the European transparency register. The distinction between different kind of interest groups can be important as it might shed a light on differences in the usage of frames by interest groups. Especially when it turns out that certain frames are more

effective than others the usage of these frames by business and non-business interest groups would be particularly interesting in the light of democratic legitimacy.

Although equivalence framing in the EU has not been researched there are strong theoretical reasons to assume that different groups use different frames. Bernhagen, Dür and Marshall (2015) found that in the EU there is often a dividing line between business and non-business actors when it comes to lobbying positions. They differentiated between two distinct situations. The first situation is when the Commission adopts market creating policies. An example of such a policy would be the Single European Act with which the Commission tried to establish the internal market. In such a situation business interests will generally positive as this establishes new opportunities for them. These situations are now rare as the market within the EU is already created.

Therefore the Commission has now mainly turned to adopting other policies which are called market-shaping. On market-shaping policies Bernhagen, Dür and Marshall (2015) concluded that business actors are more likely to defend the status-quo and thus advocate more against proposed legislation. On the other hand non-business actors are more likely to be in favour of changing the status quo. This doesn't mean that business interests always align but does signal a general trend (Bernhagen, Dür and Marshall, 2015). When this information is combined with the idea of equivalence framing it seems more likely that business actors will emphasize the negative consequences of new market-shaping legislation whereas non-business actors will be more apt to emphasize the positive consequences. This is translated into the following two hypothesis.

Hypothesis 2.1 : Business interest groups make more use of negative equivalence frames on market-shaping policies.

Hypothesis 2.2: Non-business interest groups make more use of positive equivalence frames on market-shaping policies.

4. Research design

The effectiveness of frames in this research is defined as frame congruence. Therefore the research measures frame congruence in order to determine frame effectiveness. It does so by making use of the open stakeholder consultations by the European Commission. The open stakeholder consultations provide a sound basis for research for two reasons. First of all the open consultation is the easiest way of accessing the European Commission. Therefore most interest groups will participate in them as everyone else is doing it as well. This creates an environment in which a wide variety of actors is present which thus constitutes a good sample of the overall interest group population (Klüver, 2013).

A second benefit of using open online consultations is that it offers a database that can be used to measure frame congruence. Online open stakeholder consultations were introduced in 2000 and have become a regular instrument of consultation for major policy initiatives (Quittkat and Finke, 2008). Based on a draft proposal in which the Commission shows its position interest groups can send in their comment for an eight-week consultation period before the final policy proposal is decided upon (Klüver, 2013, p. 95). After this period all the send in comments will be made public.

4.1 Picking the cases

In order to pick the cases for analysis several steps had to be taken. The current consultation regime of the Commission was created in 2015 as part of the Better Regulation agenda. In order to broaden the possibilities for participation by society several changes were made by the Commission. Consultations are now also required for impact assessments, roadmaps and even for proposals that are already adopted (European Commission, 2017). For the later the consultation input is send to both the European Parliament and the Council of the European Union. This broadens the consultation regime and allows for more participation as for the above mentioned policy documents this was previously not always required. Consultations now however make more use of tailored surveys instead of relying solely on position papers. These surveys consist of a mix of closed and open questions. In addition to this it´s still possible to send in position papers (European Commission, 2017).

Although it would have been logically to focus on the new consultation regime given the increase of input and thus framing options this has not been done. By looking into the current consultation regime it was found that position papers are not published. In addition it

was found that there is often a linkage between the closed questions and the open survey questions. This could possibly blur the distinction between the effectiveness of framing and the effect of reactions to closed survey questions. Given the fact that equivalence framing has not been researched within the context of the European Union the decision was made to not take this risk.

Instead this research will make use of cases that were open to public consultation in 2013 and 2014. These public consultations either make use of surveys or are based on send in position papers. The cases that this research analyses are cases that are solely based on position papers. Therefore there is no risk of taking into account survey questions when determining the effectiveness of equivalence frames.

A problem that arose from focussing on 2013 and 2014 is that in 2015 the website ´your voice in Europe´ that archived the consultations was removed and changed into the new consultation website ´have your say´. Therefore, it was not possible to gain access to the consultations. However, by making use of the website ´Wayback Machine[1]´, which archives internet websites, it was possible to retrieve the lists of all consultations that were held in 2013 and 2014. The website creates a copy of websites on a regular basis. With the help of this website it was discovered that in total 190 consultations were held in these two years. Based on this list it was possible to search for each individual consultation on the internet as they still existed. These 190 consultation differ in form and size and first had to be filtered through four selection criteria in order to create a list of cases that are suitable for analysis for this research. These criteria are explained below.

First of all interest groups will have to react to a specific piece of information provided by the Commission. This is necessary as equivalence frames need to be based on the same information which can then be casted in a different light. This criterion is operationalised by only selecting consultations in which groups are asked to react to information that is provided by the Commission.

The second criterion is that there should have been a follow-up by the Commission. This means that the European Commission has officially used the input of the public consultation to go to the next step of the legislative procedure. For example this can be to put forward a new legislative proposal, an assessment of the effectiveness of the usage of funds

[1] See: https://archive.org/web/

or a proposal for the usage of a new definition. Without a follow-up no framing congruence can be analysed. The third criterion is in line with the second as it requires that the send in position papers by interest groups should be publically available as otherwise no framing congruence can be established.

The fourth criterion that will be used is that only proposals that make use of non-standardised consultations will be selected. As standardised consultations take the form of fixed questions and answers there is no textual source to be analysed. Therefore these cases will be excluded.

Out of 190 public consultations that were held in 2013 and 2014 sixteen cases fulfilled all four criteria. A point of interest is that there were several cases from the Department of Maritime Affairs and Fisheries that fulfilled all criteria except that the send in position papers were not published. Although it's possible to retrieve these by making use of the Regulation (EC) No 1049/2001 of the European Parliament and of the Council on public access to EU institution documents this was considered too time consuming for this research. The sixteen cases that are eligible for analysis focus mainly on state aid and competition rules and were organised by the DG Competition (13 cases) and DG Agriculture and Rural Development (3 cases). The focus on state aid can be explained by the fact that the European Commission started a project to completely revise all state aid rules at the end of 2012.

Out of these sixteen case three cases have been selected to analyse. In order to increase the general validity of this research cases have been selected where all or most responses were in English. By selecting these case it's possible to get a complete overview of all the frames used in a case. Some researches that employed a similar method (Klüver, Mahoney and Opper,2015), as the one in this research simply chose to omit all non-English papers. This creates the risk of creating data that is not complete and therefore less reliable for overall conclusions.

This first case that was selected had 12 English position papers. A second case was selected as it had only one German position paper that had to be excluded. This left 28 English position papers to analyse. The third case was selected as it had the highest rate of English responses. Although it would have been interesting to analyse a market-creating case and compare the usage of frames to market-shaping cases, this was not possible as none of the 16 cases could be considered a market-creating policy. However, by since market-shaping

policies are the default in the European Union this does contribute to the generalizability of the research (Bernhagen, Dür and Marshall, 2015)

4.2 The selected cases

Out of sixteen cases that fulfilled the criteria three cases have been chosen. As mentioned above all three cases can be considered as being market-shaping cases. The first case that will be analysed is a consultation by DG Competition on the 'Draft Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union'. This notice, that came into effect in 2014, is a Commission communication that serves as a guideline for companies to assess whether specific agreements they make restrict competition under Article 101 (1) of the TFEU. Important here is that some agreements don't restrict competition when they fall under a certain amount of market shares, the so called 'safe-harbour' (Aird and Frenz, 2015). This safe-harbour doesn't create a new market but instead shapes the existing market by setting out the rules that companies have to adhere to. Although the notice gives guidance to companies for assessing whether there actions are within the limits of law it's not legally binding on them (Aird and Frenz, 2015).

The second case that will be analysed has the broadest scope of the three cases. This consultation by DG competition focussed on updating the 'Notice on a simplified procedure for treatment of certain mergers'. Under this notice, which came into force in December 2013, companies can use a shorter notification form for certain categories of mergers that are generally unlikely to raise competition problems . The Commission can then clear such cases without an extensive market investigation. This doesn't however mean that the criteria contained in the notice are legally binding (Aird and Frenz, 2015). In addition to the Notice the consultation also included three annexes. These are the Form CO, the short Form CO and the Form RS. These forms can be used to ask the Commission for a shorter notification period if the merger would not raise competition issues. As with the first case this case can be considered to be market-shaping as the notice doesn't create a new market but rather sets out the rules for an existing market.

The third case is a consultation by DG competition on the 'Draft guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty'. These guidelines were adopted in 2014 and set out the Commission it's position on when state aid for rescuing and restructuring non-financial undertakings in difficulty is allowed under Article 107 (3) of

the TFEU. As with the other cases these guidelines are not legally binding but merely provide the view of the Commission on how state-aid should be used (Aird and Frenz, 2015). As these guidelines don't create a new market for businesses to compete on but rather shapes the context in which they will compete this is considered to be a market-shaping case.

4.3 Analysing the cases

The method of text analysing will be hand coding. Although large N-design are becoming more popular in analysing consultations and framing the method has severe downside. First of all as no studies have been previously undertaken to study the effectiveness of equivalence frames in the EU validity of analysing should be preferred over large generalisations. Although large N-designs that make use of automated software are able to analyse a lot of policy issues their validity is less high (Klüver, 2013). As automated software establishes positions based on specific pre-coded words they can miss subtle differences in meaning. These subtle differences are however of fundamental importance to equivalence frames as they emphasize negative or positive aspects of a proposal. Thus hand coding has been chosen as it offers more validity.

The method consists of two steps. First, based on a coding scheme and a unit of analysis the send in position papers from the open consultations will be analysed on frames. The coding scheme is based upon interest group type and a table for frame type. The frame table in this research is the following:

Type of frame	Positive	Negative
Emphasize costs/gains	P1=Gains or benefits	N1=Costs or losses
Emphasize risks/opportunities	P2=Opportunities	N2=Risks
Emphasize negative/positive	P3=Positive consequences	N3=Negative consequences

This table will be used to code the frames in the six different categories (N1, N2, N3, P1, P2, P3). Based on this table a combination can be made with the different kind of interest groups.

4.4 Classifying interest groups

There are several different classifying schemes in use in academia. As this research is based upon the consultation regime which in turn relies on the transparency register, the choice has been made to make use of the classification system of the European Transparency system. This system let's interest groups sign up and classify themselves. Because the main criticism on the European Transparency system is that self-classification is not always reliable (Baroni et al, 2014) the choice has been made to check for each interest group if they assigned themselves to the right category. This has also been done for interest groups that didn't sign up to the transparency register. The classification into the two different categories has been based upon the definitions of the transparency register in combination with information from the websites of the interest groups.

In order to make a clear distinction between business actors and non-business actors category 2 of the transparency register, being 'In-house lobbyists and trade/business/professional associations', has been divided into two parts. The first part consists of the subcategories 'Trade and business associations' and Companies and groups'. These type of interest groups will be counted as business groups. The other part of the category consists of 'Trade unions and professional associations'. These will be counted as non-business groups. Below the classification scheme has been written down. All categories and definitions are based upon the guidelines of the European Transparency register (Joint Transparency Register Secretariat, 2018, p. 8 & 9).

4.4.1 Business interest groups

Category 1: 'Professional consultancies, law firms or self-employed consultants'

-*Definition of professional consultancies:* "Firms carrying on, on behalf of clients, activities involving advocacy, lobbying, promotion, public affairs and relations with public authorities" Transparency Register Secretariat, 2018, p. 8) .

-*Definition of law firms: "*Law firms carrying on, on behalf of clients, activities involving advocacy, lobbying, promotion, public affairs and relations with public authorities" (Transparency Register Secretariat, 2018, p. 8).

-*Definition of self-employed consultants*: "self-employed consultants or lawyers carrying on, on behalf of clients, activities involving advocacy, lobbying, promotion, public affairs and relations with public authorities" (Transparency Register Secretariat, 2018, p. 8).

Category 2.1 'In-house lobbyists and trade/business/ professional associations'

More precisely: 'Trade and business associations' and 'Companies and groups'

-*Definition of companies and groups:* "Companies or groups of companies (with or without legal status) carrying on in-house, for their own account, activities involving advocacy, lobbying, promotion, public affairs and relations with public authorities: (Transparency Register Secretariat, 2018, p. 8).

-*Definition of trade and business associations:* "Organisations (either profit or non-profit making themselves) representing profit-making companies or mixed groups and platforms" (Transparency Register Secretariat, 2018, p. 8).

4.4.2 Non-business interest groups

Category 2.2: 'In-house lobbyists and trade/business/ professional associations'

More precisely: 'Trade unions and professional associations'

-*Definition of trade unions and professional associations:* "interest representation of workers, employees, trades or professions" (Transparency Register Secretariat, 2018, p. 8).

Category 3: 'Non-governmental organisations'

-*Definition of non-governmental organisations*: "Not-for-profit organisations (with or without legal status), which are independent from public authorities or commercial organisation. Includes foundations, charities, etc." (Transparency Register Secretariat, 2018, p. 9).

Category 4: 'Think tanks, research and academic institutions'

-*Definition of think tanks and research institutions*: "specialised think tanks and research institutions dealing with the activities and policies of the European Union" (Transparency Register Secretariat, 2018, p. 9).

-*Definition of academic institutions*: "institutions whose primary purpose is education but that deal with the activities and policies of the European Union" (Transparency Register Secretariat, 2018, p. 9).

Category 5: 'Organisations representing churches and religious communities'

-*Definition of organisations representing churches and religious communities:* "Legal entities, offices, networks or associations set up for representation activities" (Transparency Register Secretariat, 2018, p. 9).

Category 6: 'Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.'

-*Definition of regional structures:* "Regions, representative offices, associations or networks representing regions" (Transparency Register Secretariat, 2018, p. 9).

-*Definition of other sub-national public authorities:* "All other sub-national public authorities, such as cities, local and municipal authorities, or their representation offices, and national associations or networks" (Transparency Register Secretariat, 2018, p. 9).

-*Definition of other public or mixed entities:* "Other organisation created by law with public or mixed (public/private) status" (Transparency Register Secretariat, 2018, p. 9).

Based on these classification categories and definitions category 1 and category 2.1 will be counted as being business actors. All other categories are counted as non-business actors. The interest group classification into actor type categories will be based on information obtained mainly from the transparency register and on the information submitted by the interest groups in their consultation submissions. In addition information from their websites will be used when an organisation is not registered in the transparency register. Per case it will be coded which frames where being used and by what kind of interest group. In addition it will also be coded how many groups fall into each category. This will be done by using the following coding scheme for each case.

	Amount of interest groups	N1	N2	N3	P1	P2	P3
Business interest groups							
Non-business interest groups							

Thus for each case the type of frame used and by what type of interest group will be coded. This helps to answer the questions which frames are being used and by what kind of interest group. In addition to this coding scheme per frame it will be coded what the frame is about, to what issues it refers and what solution it proposes. This will be done by copying the frames into a separate Word document. In the end this will create an overview of what the frames are about and what they want to see changed or not.

A last important step of coding is defining the unit of analysis. In this research the unit of analysis is a quasi-sentence, defined as "an argument or phrase which is the verbal express of one idea or meaning" (Klingemann, Volkens, Bara, Budge, and McDonald, 2006, p. xxiii). Thus quasi-sentences will guide the research and will be used to assign codes to specific quasi-sentences. An example of a quasi-sentence is the following example from the second case.

> "The new concept of 'plausible markets' causes confusion and uncertainty and should thus be removed."

In the above sentence two frames can be discovered. First of all, the new concept of 'plausible markets' causes confusion. Therefore, this will be coded as a N3 frame (negative consequence). Because the unit of analysis is a quasi-sentence, the second part which states that the concept causes uncertainty will also be coded as a separate N3 frame.

4.5 Coding the effectiveness of frames

The second step of the research focuses on the initial proposal by the European Commission and its follow-up. In order to establish frame congruence the initial proposal and the follow-up will be compared. The comparison will be based on the issues that the frames put forward. More specifically for each frame a solution is formulated. Almost all frames proposed a solution for their frame. This has been put underneath the frame in the Word document. For the small number of frames that didn't clearly formulate a solution has been created based on the issues that the frame put forward.

The changes in the follow-up that match the solution are where the framing has been completely or partially successful as framing was able to guide the proposal in a different direction. Based on the solution data in the Word document it can be established which

frames were proponents or opponents of the new direction. This makes it possible to establish frame congruence and thus to analyse which frames were effective and which ones were not. However, it's not only important to analyse where frames changed the direction but also were frames were able to keep the status-quo as some frames had as their solution to keep the draft as it was. Thus based on the comparison between the initial proposal, the follow-up and the solutions it will also be established whether frames were proponents or opponents of the status quo and if the proposal stayed the same or changed.

The last step of the research is that the effectiveness will be coded into the Word document. This will be done per frame and per solution. Every frame will be coded as either being successful, partly successful or not successful. Frames will be coded green if the proposed solution is adopted or if it can be understood from the text that the main input of the frame is taken into account. Therefore the final text doesn't have to be precisely the same as the solution but it should be possible to derive from the context whether or not the input has been used and that the final version reflects the frame it's solution. Coding this way is a benefit of hand coding as an automated system would not be able to take into account the context of the final version. Frames will be coded as partially successful when only parts of the solution are taken into account. A frame will be coded as ineffective when this is not the case.

After the coding is done an overview is created of the effectiveness per individual frame, per frame type and per casus. By combining this data with the usage by interest groups it can be established whether business interest groups make more use of negative frames and whether non-business interest groups make more use of positive frames. In turn the overall overview makes it possible to answer the sub-questions and the overall research question.

4.6 Examples of coding

In order to give more clarity about the followed method consider the following examples from case 2. Below you find an extract of case 2, which can also be found in Annex 2. First the frame has been copied from the position paper. After that, based on the text the solution for the frame has been formulated. This looks like this:

“In general terms, so as to increase legal certainty, it is desirable for the wording to be identical in both the Commission Notice and the Short Form CO. This is the case, for example, for those situations where the simplified procedure and the Short Form CO may be used, or those situations where reversion to the normal procedure is required. “

Solution:

It is desirable for the wording to be identical in both the Commission Notice and the Short Form CO

This is an example of a P3 (positive consequence) frame that was not successful. As can be seen the frame is that legal certainty can be increased by making the wording identical in both the Commission Notice and the Short Form CO. Both were two documents that were under consultation in case 2. Based on the solution that was proposed both the Commission Notice and the Short Form CO have been compared to see whether the wording has been made identical in situations where the simplified procedure and the Short Form CO may be used or in situations where reversion to the normal procedure is required. However, based on the comparison it became clear that the wording didn’t change and was thus not identical. Therefore, the frame has been coded red as it was ineffective.

Another example is the following frame from case 2.

“In fact, in a number of instances, the revisions actually increase the burden on notifying parties to provide information which may be irrelevant to the Commission’s assessment of the merger.”

Solution

The information required by a notification should be set at the minimum possible level.

In this case it was harder to measure the frame congruence. First of all, this is an example of a N3 frame as the revisions actually increase the burden. The solution that was formulated in the position paper was that the information required by a notification should be set at the minimum possible level. Although, the final draft did lower the amount of information

required for a notification it's hard to define what the minimum possible level is. Therefore, this frame was coded as being partially effective as it did lower the information required but it wasn't specified what exactly a minimum possible level is.

4.7 Operationalization

In order to make a clear distinction between the frames it´s necessary to define what the different frames entail. In total six frames will be used in the analysis. The frames all emphasize certain or possible outcomes of the draft proposal or of proposed changes. These six frames are based on the Bruycker (2016) and are the following:

1. gains (benefits)
2. losses (costs)
3. opportunities
4. risks
5. positive consequences
6. negative consequences

These six frame types are operationalised in the following way. The gains and losses frames are the most clear of these six types of frames. These focus on financial costs or benefits. An example of such a frame from case 2 is:

"A delay in the merger review can have a significant economic impact on the parties."

As this frame states that it will have an economic impact on the parties, which in this case were businesses, this frame has been coded as a N1 frame (costs). These frames thus emphasize specific costs or benefits that the proposal will create or possibly creates. Frames that state that the proposal could possibly create costs or benefits will also be counted as one of these two frame types.

The level of certainty is the main difference between the other four frames. The first two frames, opportunities or risk, focus on things that might happen as a consequence of the proposal. Opportunity frames can focus on two things. The first thing that opportunity frames can focus on are possible positive consequences that arise from the proposal. An example of this could from case 2 is:

"The parties can then work to provide a response to the tailored document request. This is likely to involve less company time."

The important word here is likely, as this suggest that it's not sure yet whether it will involve less company time. Therefore it has been coded as a P2 (opportunity) frame.

A second option is that a change in the proposal is proposed in order to possibly create new opportunities. This means that by changing the proposal new opportunities can be taken into account which could have a positive impact. An example of this could from case 2 is:

"Bearing this in mind, the Working Group encourages DG Comp to reassess whether the HHI Delta or a market share increment threshold in this 20 to 50% horizontal market share category can be further broadened to extend the benefit of the Simplified Procedure to transactions resulting in negligible market share increases."

In this case the frame suggest that it should be explored if the category can be further broadened to extend the benefits. This is thus not certain but rather an opportunity in the pure sense of the word. Therefore, this has been coded as a P2 frame. The same goes for frames that focus on risks. Either the risk are a possible outcome of the current proposal or a change is proposed in order to possibly counter certain risks. All non-financial possible outcomes are defined as either risk or opportunity frames. These can be related amongst others to the environment, employment or safety as long as no financial costs are mentioned.

The last two frames focus on the consequences of the proposal or of the proposed solution. These messages have been framed as certain consequences. These consequences can either be directly derived from the current proposal or can be achieved by making a change to the proposal. An example of a positive consequence frame from case 3 is:

"We welcome the fact that the compatibility criteria are now more detailed, as this will add to legal certainty."

An example of a negative consequence frame from case 3 is:

"Consequently, such a strict criterion would significantly increase the number of undertakings in difficulty, as defined here, even if they were actually viable."

As with opportunities or risk frames all non-financial consequences fall into this category.

4.8 Criteria for reliability

Given the fact that the method employed in this research has been used before but only in cases with a focus on emphasis frames, it's important to specify precisely what criteria guided the coding of the equivalence frames. This not only increases the reliability of the research but also allows future researchers to make changes to the method in order to improve it as this research should not be seen as an attempt to close a book but rather as a first step, an introduction, which other scholars can use to fill the remaining blank pages and chapters. Therefore, in addition to the definitions employed above the following three criteria have been used to guide the coding of the equivalence frames.

First of all, a frame has to focus on the draft paper of the consultation. Therefore frames that focus on general remarks or frames that consider aspects that are not in the scope of the consultation paper have not been considered in this research. Frames that put forward an addition to the paper, such as the addition of an extra paragraph are on the other hand included.

Secondly, solutions that are put forward in a position paper are not limited to one frame per solution. Sometimes several frames are used to put forward one solution. If this solution is adopted all frames will be counted as successful. The same goes if the solution is only partially successful or not successful at all.

Thirdly, some frames are accompanied by several solutions. This means that the current draft can be changed in a couple of ways to take improve it. If any of these solutions are implemented fully a frame will be regarded as being successful. If any of the solutions are partially implemented the frame will be counted as partially successful. If none of the solutions have been implemented the frame will be counted as being not successful

4.9 Limitations

As with every research there are downsides to the choices that have been made and this research is no exception to that rule. These downside are related to the validity and generalizability. The first downside is linked to validity. While the open stakeholders consultation can be an important tool to influence the European Commission there are other ways as well. These include amongst others private stakeholder consultations, private meetings and informal contacts. Although the message of interest groups there will probably be a repetition of their position paper repeating a message can help to make it stick. This is something to keep in mind as these external factors can't be singled out in this research design. It might seem as if there is a draft made by the Commission, there frames that put forward in the consultation regime which is followed by a changed final version due to the frames. It might however also be that external factors are overlooked. Future research that employs a similar method could make use of interviews with both Commission officials and interest groups to find out whether there were other occasions that might have influenced the final output of the Commission.

The second limitation to this research is related to the amount of cases being analysed and generalisability. In total three cases will be studied by making use of hand coding. Although hand coding increases validity it's also a very time consuming process. For these three cases alone more than 350 pages had to be analysed after which for all 282 frames the effectiveness has to be determined. Therefore it was not possible to analyse more cases. In turn this means that any generalisation about the effectiveness of frames with regards to a policy should be seen as a starting point of future research. The conclusions that are formulated after conducting this research should thus be thoroughly tested in future research and should not be taken as final conclusions.

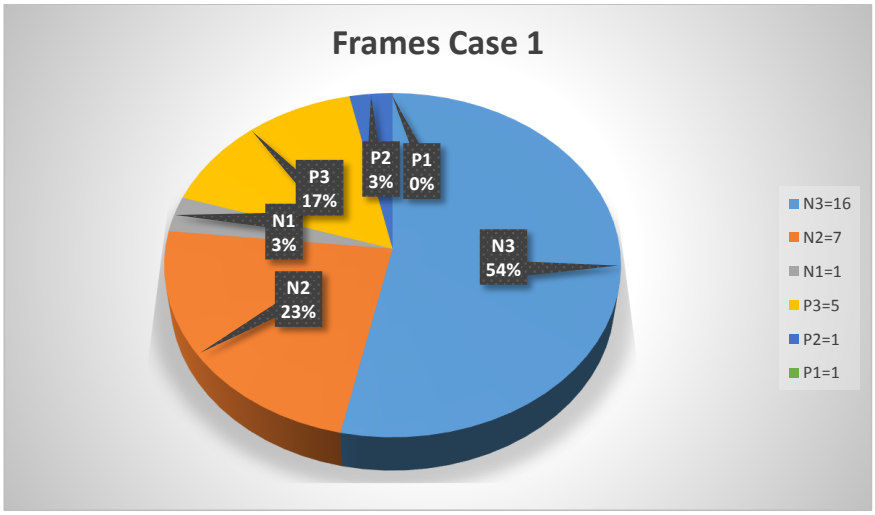
5. Results

In this part the findings of the analysis will be discussed. Each case will be first discussed separately after which a combined overview of all three cases and all frames used will be given. Each case will start with discussing the amount of frames used followed by the frame usage per type of interest group. After that the effectiveness per frame type will be unveiled.

5.1 Case 1

5.1.1 Total usage

In the first case, the consultation on the 'Draft Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union', 30 frames were used. Of these frames more than half (16) were N3 frames. This was followed by 7 N2 frames and 5 P3 frames. In addition there were 1 N1 and 1 P2 frames. Zero P1 frames were found. These numbers translate into the following graph:



Graph 1: Frame usage per frame type in percentages in case 1

As can be seen from Graph 1 from the 30 frames used 80 percent were negative frames whereas only 20 percent were positive frames. Also noteworthy is that 54 percent of the frames used focussed on negative consequences (N3).

5.1.2 Usage per actor

Of the 30 frames used 26 were put forward by business interest groups. Out of these 26 frames 21 were negative frames whereas 5 were positive frames. Non-business interest groups used 4 frames in total. 3 of those were negative frames and 1 was a positive frame. In the table below the frame usage per interest group is divided over the different categories of frames.

	Amount of interest groups	N1	N2	N3	P1	P2	P3
Business interest groups	6	1	5	15	0	1	4
Non-business interest groups	3	0	2	1	0	0	1

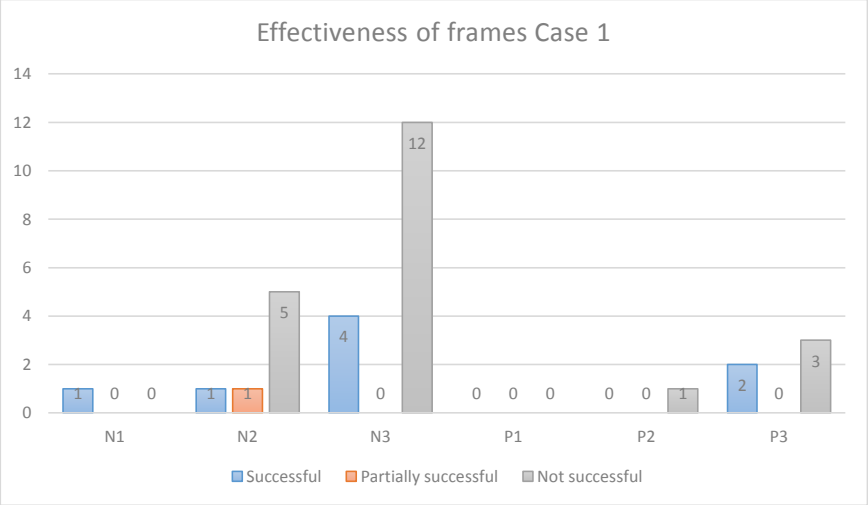
Table 1: frames per interest group category in case 1

*3 interest groups used no frames in their position papers

When this is put into percentages business interest groups used 19.23 percent positive frames and 80.76 negative frames. Non-business interest groups on the other hand used 75 percent negative frames and 25 percent positive frames.

5.1.3 Effectiveness of frames

Of the 30 frames used 8 were effective, 1 was partially effective and 21 were not effective. When this is put into percentages it follows that 26.66 percent of the frames used were effective, 3.33 of the frames used were partially effective and 70 percent of the frames used were not effective. Spread out over the six different categories of frames the following graph comes out.



Graph 2: Effectiveness of frames in case 1

When the above is translated into percentages the following table emerges.

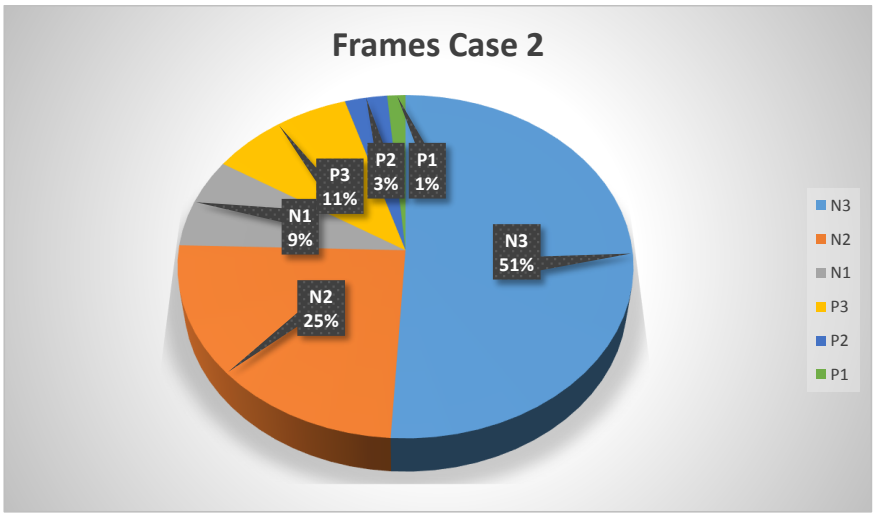
	Successful	Partially successful	Not successful
N1	100%	0%	0%
N2	14.29%	14.29%	71.42%
N3	25%	0%	75%
P1	0%	0%	0%
P2	0%	0%	100%
P3	40%	0%	60%

Table 2: Effectiveness per frame type in case 1

5.2 Case 2

5.2.1 Total usage

In the second case, the consultation on the 'Draft Notice on a simplified procedure for treatment of certain mergers', a total of 212 frames were used. This high amount of frames can be explained by the length of the submitted papers. Most of the 28 position papers were more than 10 pages long whereas in the other cases position papers usually were two pages. Of the 212 frames used 18 were N1 frames, 52 were N2 frames, 108 were N3 frames, 3 were P1 frames, 7 were P2 frames and 24 were P3 frames. These numbers translate into the following graph:



Graph 3: Frame usage per frame type in percentages in case 2

From this graph a similar picture emerges as in case 1. Again, the negative frames constitute the greatest part (85 percent) of the total amount of frames whereas positive frames form only a minor part (15 percent) of the total frame usage. As with the first case the majority of frames were N3 frames that focused on negative consequences.

5.2.2 Usage per actor

Of the 212 frames used 210 were put forward by business interest groups. Out of these 26 frames 177 were negative frames whereas 33 were positive frames. Non-business interest groups used 2 frames in total. 1 of those was a negative frames and 1 was a positive frame. In the table below the frame usage per interest group is divided over the different categories of frames.

	Amount of interest groups	N1	N2	N3	P1	P2	P3
Business interest groups	22	18	51	108	3	6	24
Non-business interest groups	2		1			1	

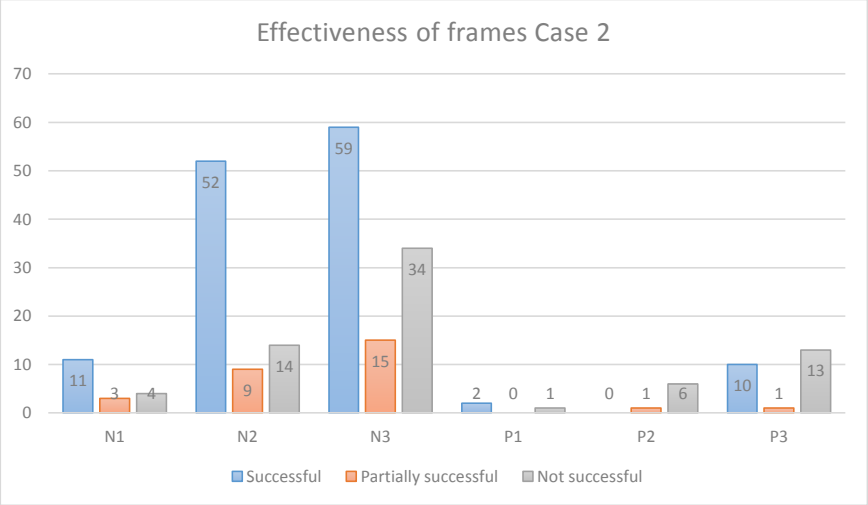
Table 3: frames per interest group category in case 2

*3 interest groups used no frames in their position papers

When this is put into percentages business interest groups used 15.71 percent positive frames and 84.29 percent negative frames. Non-business interest groups on the other hand used 50 percent negative frames and 50 percent positive frames.

5.2.3 Effectiveness of frames

Of the 212 frames used 111 were effective, 29 were partially effective and 72 were not effective. When this is put into percentages it follows that 52.36 percent of the frames used were effective, 13.68 of the frames used were partially effective and 33.96 percent of the frames used were not effective. Spread out over the six different categories of frames the following graph comes out.



Graph 4: Effectiveness of frames in case 2

When the above is translated into percentages the following table emerges.

	Successful	Partially successful	Not successful
N1	61.1%	16.67%	22%
N2	55.77%	17.3%	27%
N3	54.6%	13%	31.4%
P1	66.66%	0%	33.33
P2	0%	14%	86%
P3	40%	8%	52%

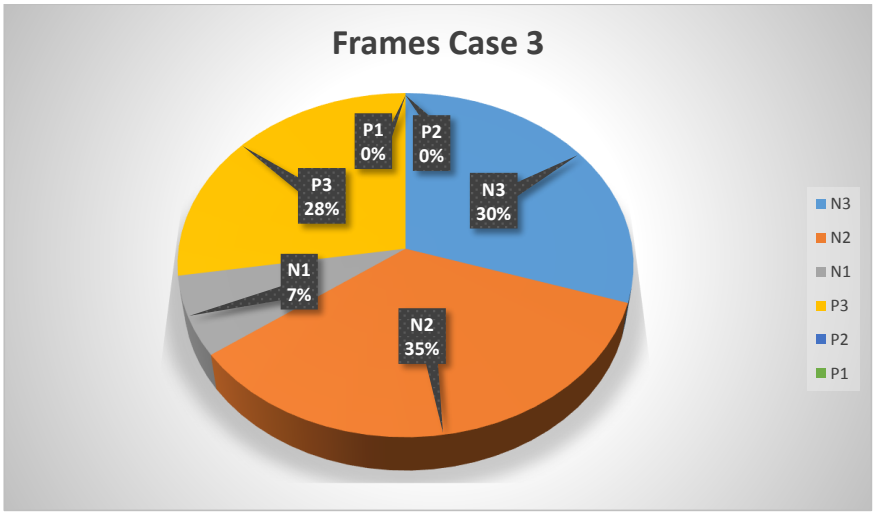
Table 4: Effectiveness per frame type in case 2

5.3 Case 3

5.3.1 Total usage

In the third case, the consultation on the 'Draft guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty', a total of 40 frames were used. This amount of frames is more similar to the amount of frames used in the first case. Of the 30

frames used 3 were N1 frames, 14 were N2 frames, 12 were N3 frames, 0 were P1 frames, 0 were P2 frames and 11 were P3 frames. These numbers translate into the following graph:



Graph 5: Frame usage per frame type in percentages in case 3

From this graph a slightly different picture emerges than in case 1 and 2. Although the negative frames still form a solid majority (72 percent) the total amount of positive frames (28 percent) is higher than in the other cases. In addition to that the share of N3 frames is lower compared to the other two cases and the share of N2 frames is increased.

5.3.2 Usage per actor

Of the 40 frames used 19 were put forward by business interest groups. Out of these 19 frames 11 were negative frames whereas 8 were positive frames. Non-business interest groups used 21 frames in total. 18 of those were negative frames and 3 were a positive frames. In the table below the frame usage per interest group is divided over the different categories of frames.

	Amount of interest groups	N1	N2	N3	P1	P2	P3
Business interest groups	6	0	5	6	0	0	8
Non-business interest groups	6	3	9	6	0	0	3

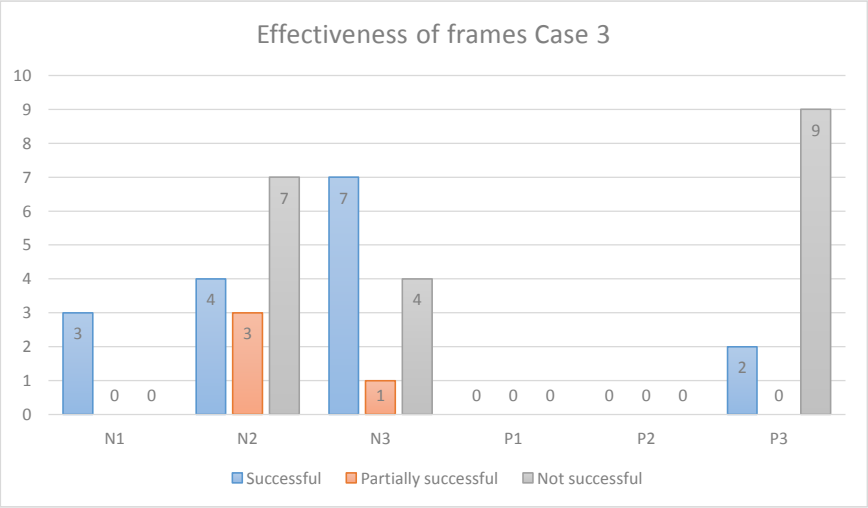
Table 5: frames per interest group category in case 3

*3 interest groups used no frames in their position papers

When this is put into percentages business interest groups used 42.11 percent positive frames and 57.89 percent negative frames. Non-business interest groups on the other hand used 85.71 percent negative frames and 14.29 percent positive frames.

5.3.3 Effectiveness of frames

Of the 40 frames used 16 were effective, 4 were partially effective and 20 were not effective. When this is put into percentages it follows that 40 percent of the frames used were effective, 10 percent of the frames used were partially effective and 50 percent of the frames used were not effective. Spread out over the six different categories of frames the following graph comes out.



Graph 4: Effectiveness of frames in case 3

When the above is translated into percentages the following table emerges.

	Successful	Partially successful	Not successful
N1	100%	0%	0%
N2	28.6%	21.4%	50%
N3	58.33%	8.33%	33.33%
P1	0%	0%	0%
P2	0%	0%	0%
P3	18%	0%	82%

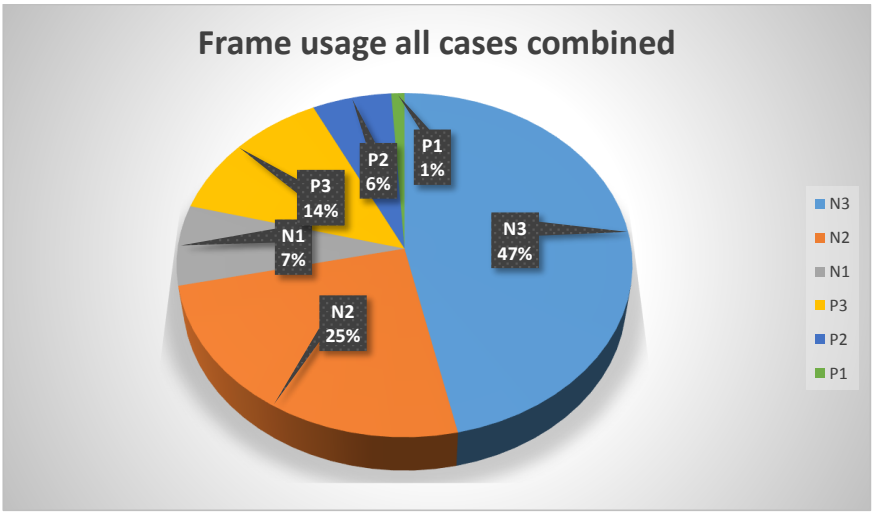
Table 6: Effectiveness per frame type in case 3

5.4 All cases combined

5.4.1 Total usage

In total 282 frames were used. Of the 282 frames used 22 were N1 frames, 73 were N2 frames, 136 were N3 frames, 3 were P1 frames, 8 were P2 frames and 40 were P3 frames.

These numbers translate into the following graph:



Graph 5: Frame usage per frame type in percentages all cases combined

From this graph it follows that in total 79 percent of all frames used were negative and 21 percent was positive. Of this almost 50 percent of all frames used is formed by N3 frames that emphasize negative consequences. After that N2 frames follow with a quarter of all the frames. Only then the P3 frames that emphasize positive consequences follow.

5.4.2 Usage per actor

Of the 282 frames used 255 were put forward by 34 business interest groups. Out of these 255 frames 209 were negative frames whereas 46 were positive frames. 11 non-business interest groups used 27 frames in total. 22 of those were negative frames and 5 were positive frames. In the table below the frame usage per interest group is divided over the different categories of frames.

	Amount of interest groups	N1	N2	N3	P1	P2	P3
Business interest groups	34	19	61	129	3	7	36
Non-business interest groups	11	3	12	7	1	1	4

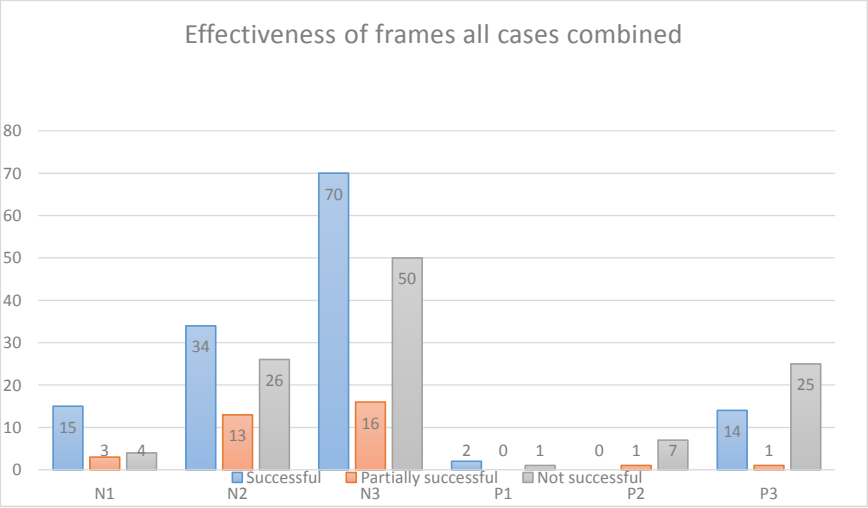
Table 7: frames per interest group category all cases combined

*3 interest groups used no frames in their position papers

When this is put into percentages business interest groups used 18.04 percent positive frames and 81.96 percent negative frames. Non-business interest groups on the other hand used 81.48 percent negative frames and 18.52 percent positive frames.

5.4.3 Effectiveness of frames

Of the 282 frames used 135 were effective, 34 were partially effective and 113 were not effective. When this is put into percentages it follows that 47.87 percent of the frames used were effective, 12.06 percent of the frames used were partially effective and 40.07 percent of the frames used were not effective. Spread out over the six different categories of frames the following graph comes out.



Graph 6: Effectiveness of frames all cases combined

When the above is translated into percentages the following table emerges.

	Successful	Partially successful	Not successful
N1	68.18%	13.64%	18.18%
N2	46.57%	17.8%	35.6%
N3	51.47%	11.76%	36.76%
P1	66.66%	0%	33.33%
P2	0%	12.5%	87.5%
P3	35%	2.5%	62.5%

Table 8: Effectiveness per frame type all cases combined

6. Discussion

With the above results gathered this part of the research will answer the three sub-questions and in turn the overall research question. By doing so it will connect the findings of the cases to the theoretical framework and the hypotheses that followed from it. The structure of this chapter follows the order of the sub-questions. Therefore first an answer will be given to the question whether negative frames are more effective than positive frames. Building on that the second sub-question, whether business interest groups use more negative frames, will be answered. After that the last sub-question will be answered which is whether there is a difference in terms of the effectiveness of frames per case.

6.1 Effectiveness of negative and positive frames

As explained in the theoretical framework there are strong theoretical reasons to suspect that negative frames are more effective than positive frames. According to prospect theory, which builds upon the negativity bias, people who have to take a decision are more apt to try to avoid a negative outcome than to try to achieve a positive outcome. Given the fact that there is no reason to believe that this risk-avoidant behaviour would not persist in European Commission officials the following hypotheses have been formulated.

Hypothesis 1.1:

Frames emphasizing costs or losses are more effective than frames that emphasise gains or benefits.

Hypothesis 1.2:

Frames emphasizing risks are more effective than frames that emphasise opportunities

Hypothesis 1.3:

Frames emphasizing negative consequences are more effective than frames that emphasise positive consequences.

In all three cases combined 282 frames were used in total. Out of these 135 were effective, 34 were partially effective and 113 were not effective. Putting this into percentages gives the

following numbers. 47.87 percent of the frames used were effective, 12.06 percent of the frames were partially effective and 40.07 percent of the frames used were not effective. In total 231 negative frames were used of which 51.51 percent was effective, 13.86 percent was partially effective and 34.63 percent was not effective. This shows that on average negative frames were slightly more effective than the average as negative frames have both a higher success rate and a higher partially successful rate. Turning to the positive frames only 31.37 percent of the frames used was effective, 3.92 percent was partially successful and 64.71 percent of frames was not effective. By looking at the average effectiveness rate a wide gap between the negative and positive frames becomes visible. This gap is also visible when looking at the overall effectiveness of the frame types.

The smallest difference in effectiveness is visible between the N1 and P1 frames. Whereas N1 frames have an overall success rate of 68.18 percent P1 frames achieved a very similar rate of 66.66 percent. It has to be noted however that there were only 3 P1 frames, that were found in one cases, while there were 22 N1 frames spread out over three cases. This could possibly distort the picture of the effectiveness of P1 frames. Even though this could be the case it's striking that N1 frames also had a partially successful rate of 13.64. This leaves only 18.18 percent of N1 frames ineffective. As opposed to this P1 frames had an ineffective rate of 33.33 percent. It can thus be concluded that N1 frames are more effective than P1 frames. Therefore hypothesis 1.1 is confirmed.

The most striking difference can be witnessed when looking at the average rates of N2 and P2 frames. N2 frames had a success rate of 46.57 percent, a partially successful rate of 17.8 and an ineffective rate of 35.6 percent. This is in sharp contrast to P2 frames that have a 0 percent success rate, a 12.5 percent partially successful rate and an ineffective rate of 87.5 percent. However where 73 N2 were analysed there were only 8 P2 frames. This also makes the P2 sample less reliable as was the case with the P1 frames. Nevertheless it can be concluded that N2 frames are more effective than P2 frames. Therefore hypothesis 1.2 is confirmed.

The last two frames are the N3 and P3 frames which were used most frequently. In total 136 N3 frames and 40 P3 frames were used. Quite stunning differences exist in terms of the effectiveness per frame. N3 frames had a success rate of 51.47 percent which is the third highest of all frame types. In addition 11.76 percent of frames were partially successful which leaves a 36.76 percent ineffectiveness rate. This ineffectiveness rate is almost as high as the

success rate of the P3 frames which was 35 percent. Only 2.5 percent of the P3 frames were partially successful and thus 62.5 percent, the second highest of all types of frames, were ineffective. This is a substantial difference that supports the claim that N3 frames are more effective than P3 frames. Therefore hypothesis 1.3 is confirmed.

6.1.1 A bias based on prospect theory

With the three hypotheses confirmed it's time to consider what this means. As have been shown all three different types of negative frames were more effective than the positive frames. Therefore, it can be concluded that prospect theory seems to hold in an environment in which well-informed people, Commission officials, make a decision. This conclusion confirms earlier research that framing effects also influence policymakers who are well-informed on the subject. In addition it seems that prospect theory is right about the decision-making process. Whereas decision-makers are less apt to take risk to reap benefits they are willing to take more risk to avoid negative consequences.

In addition to this it can be concluded that it seems to be the case that a bias exists in the European governance system that was created as a response to the democratic deficit discussion. In turn this raises doubts about the argument of increased effectiveness of the civil society participation system. Instead of purely information that is given to the decision-makers, which potentially raises effectiveness of the decision-making process, the conclusion that negative frames are more effective than positive ones suggests that information is not the only factor that is taken into account. Instead the framing of the information seems to be important as the outcome of the legislative process can be affected by this. If this conclusions holds with an increased database of cases this invalidates the argument of effectiveness. With this information in mind it's all the more important to see who makes use of this frame bias as such a frame bias offers opportunities for interest groups to capture the system and gain more influence.

Furthermore it has to be noted that the difference in amount of usage between negative and positive frames is extraordinary. 79 percent of the 282 frames are negative frames as opposed to the total of 21 percent positive frames. A possible explanation for this could be that interest groups are aware that negative frames are more effective than positive frames and have adopted their framing strategies to this. This would be a logical step when it's assumed that interest groups behave rationally to maximise their influence. Although the evidence seems

to point to this conclusion more research would be needed to discover if interest groups indeed strategically frame their message in a negative way.

6.2 Frame usage per different category of interest group

With the above conclusion that negative frames are more effective than positive frames the question as to whether business interest groups make more use of negative frames becomes all the more pressing. As has been explained in the theoretical framework Bernhagen, Dür and Marshall (2015) concluded that business interest groups often appose changes to the status-quo with regards to market-shaping policies. Non-business interest groups on the other hand favour changes to the status-quo. Given that the drafts on which the consultations run represent a change to the status-quo it could be expected that business interest groups would be more likely to emphasize the negative effects of the draft whereas non-business interest groups would emphasize the positive effects of the draft. This translates into the following two hypothesis:

Hypothesis 2.1: Business interest groups make more use of negative equivalence frames on market-shaping policies.

Hypothesis 2.2: Non-business interest groups make more use of positive equivalence frames on market-shaping policies.

Turning to the results of the analysis these hypotheses don't seem to hold. First of all, when looking to the results of all three cases combined non-business interest groups used a fairly similar percentage of negative frames to the percentage of negative frames used by business interest groups. In total business interest groups used 18.04 percent positive frames and 81.96 percent negative frames. Non-business interest groups on the other hand used 81.48 percent negative frames and 18.52 percent positive frames. When looking at it this way there seems to be a negligible difference in frame usage per interest group.

If the results are split over the three cases a different picture emerges. In the first case business interest groups used 80.76 percent negative frames whereas non-business interest groups used 75 percent negative frames. In the second case there is a difference between the percentages of business and non-business interest groups as the former used 84.29 percent negative frames and the later 50 percent negative frames. This difference can however be explained by the amount of frames used. Two non-business interest groups put forward only two frames in total whereas business interest groups, a group of 22 interest groups, used 210

frames. Therefore, for non-business groups this case doesn't seem to be the most representative independent unit of analysis. In the third case, where there were six business interest groups and six non-business interest groups the reverse of the hypotheses is true. This case is also interesting because the amount of frames was almost perfectly split between business interest groups (19) and non-business interest groups (21). In this case 85.71 percent of non-business interest group frames was negative whereas for business interest groups that percentage was 57.89.

With these results it can be concluded that in two cases non-business interest groups used more negative than positive frames and in one case the usage of negative and positive frames was evenly split. As explained above the case in which the results were evenly split had only two frames and is therefore not the most representative of the three cases analysed. Business interest groups used more negative than positive frames in all three cases. In the first and second cases this difference was quite substantial with around 80 percent negative frames. In the third case the difference was less substantial as 57.89 percent of frames used were negative frames. Bearing this is mind the hypothesis that business interest groups use more negative frames doesn't hold as non-business interest groups made use of an equal percentage of negative frames. Therefore hypothesis 2.1 and hypothesis 2.2 are not confirmed.

6.2.1 No double bias

With this conclusion it seems likely that while there is a bias towards negative frames this bias is not exploited by a specific type of interest group. When all interest groups equally exploit such an advantage it could be argued that this evens it out. Although this would need more research to have this as a hard conclusion it doesn't invalidate the argument of legitimacy of the civil society participation system. However, with regard to the legitimacy argument it's interesting to see that while business and non-business interest groups in terms of percentages use the same amount of negative and positive frames there is a big discrepancy between the actual frames put forward by business and non-business interest groups. A potential explanation for this might be found in the fact that the cases concerned are from DG competition. It seems natural that in such a case there is more at stake for business interest groups than for non-business interest groups. In other cases such as environmental issues or with legislation that touches upon consumer protection issues this would not be the case. Therefore, by researching such policy issues it could be seen if business interest groups indeed

use more frames in general. Such a finding would point to a bias towards business interest groups.

An explanation for the finding that business and non-business interest groups use an equal amount of negative frames in terms of percentages might lie in the assumption that interest groups behave rationally to maximise their influence. Given the fact that negative frames are more effective than positive frames both business and non-business interest groups would logically adopt their framing strategies to including negative frames. This however does assumes that both business and non-business interest groups are aware of the fact that negative frames are more effective than positive ones. More research would be needed to see whether such information is common knowledge on the ground.

6.3 Frame effectiveness per case

When looking at the three different cases there are some differences in terms of the effectiveness of frames per case. This difference is important as every case depicts a different setting in which different frames were used. By looking at the three different cases and the effectiveness of frames in each it can be assessed whether certain frame types were more effective than others in specific cases and how the conclusions per case hold up when all three cases are combined.

In the first case the overall effectiveness of the frames was significantly lower than in the other cases. Of the 30 frames that were used 8 were effective, 1 was partially effective and 21 were not effective. This means that the overall success rate of the frames was only 26.66 percent. A possible explanation for this could be that many frames focussed on the same issue. This issue was the newly introduced 'restriction by object' which means that agreements between companies, that have as their objective the restriction of competition, are always prohibited regardless of their market share. Several position papers mentioned that this would 'cause serious legal consequences', that it could 'raise serious concerns about legal uncertainty' and that it would establish 'an unduly strict approach'. All these frames however did not convince the Commission to change its approach as the text stayed the same in the final notice.

Although the overall effectiveness of the frames was low compared to the other cases there were interesting differences between the different kind of frames in case 1. By far the

most successful type of frame in case 1 was the N1 frame with a success rate of hundred percent. Although on paper this looks quite astonishing it must be noted that there was only one N1 frame in this case. Therefore, this overall success rate is not based upon a solid sample. The same can be said of the one P2 frame that was not successful.

The other frame types however were used more often and their success rates are thus based on a more representative sample. Of these the most successful were the P3 frames. Out of the five P3 frames two were successful and three were not which gives it a 40 percent success rate. This is a considerably higher rate of success compared to the other two frames. Whereas out of the 16 N3 frames four were successful, which gives the N3 frames a success ratio of 25 percent, out of the seven N2 frames only one was successful and one was partially successful. This gives it a success rate of only 14.29 percent which is way below the average of the case.

The success rates of the first case are however not mirrored in the second case. The overall success rate of the second case was 52.36 percent. In addition to that 13.68 percent of the frames were partially effective and only 33.96 percent of the frames were not effective. This is in sharp contrast to the first case as the success rate in the second case was almost twice as high. This is an interesting difference as in case 2 seven times as much frames were used than in case 1. One could thus argue that the second case, with by far the highest amount of frames used, provides the most solid sample to base conclusions on.

In addition to the difference between the overall success rates of the first and second case also different success rates exist per frame type. Although the success rate of the P3 frames was also 40 percent in case 2, the same as in case 1, this falls well below the average success rate in case 2. For all the other frames significant differences exist. Starting with the highest rate, the P1 frames had a rate of 66.66 percent success. The sample on which this is built however only consists of three frames which makes it less reliable. After that the highest success rate, 61.1 percent, was achieved by the N1 frames. Where in the first case a 100 percent success rate was noted this was due to one frame only. In the second case however a total of 18 N1 frames was used. This provides a broader sample that also showcases a high success rate. Also above average, but only slightly, were the N2 and N3 frames. The former had an success rate of 55.77 whereas the later had a success rate of 54.60. In addition to the

success rates it's also noteworthy that both, respectively 17.3 percent for N2 and 13 percent for N3, have rather high partially successful rates.

The third case, in which 40 frames were found, had a success rate of 40 percent. This seems to strike a balance between the success rates of the first and second case. Only two frame types achieved a success rate that was above this average. The most striking one was the N1 frame with a success rate of a 100 percent. This is similar to the success rate in the first case but the sample in case 3 consisted of three frames that consequently were all successful. Given the high success rates in all three cases it can be concluded that N1 frames are generally very effective. The other frame that had a higher than average success rate was the N3 frame. It had a success rate of 58.33 percent and an partially successful rate of 8.33 percent. This more or less matches the success rate of case 2 but is distinctly higher than the success rate in case 1.

Of the two frames that had a success rate below average the N2, of which 14 were used, had a similar success rate as in case 1 with 28.6 percent successful frames. It must be noted however that 21.4 percent of the frames were partially successful. Therefore 50 percent of the frames was at least partially successful in changing the draft in the desired direction. This can't however be said of the last frame, the P3 frames, which had a success rate of only 18 percent while 11 frames were used in total. This is far below the other two cases where the P3 frames had a success rate of 40 percent. No P1 and P2 frames were found in case 3.

6.3.1 Silver bullets?

Overall, it can be concluded that quite a lot of differences exist in effectiveness per type of frame in each case. Only one frame type, N1, achieved a success rate that was consistently above average. The least consistent success rate was of the P1 as the frame type was only found in one case. The P2 frame was found in two cases and showed a low success rate in both of them. The frames that were found in all three cases, the N2, N3 and P3, had all similar success rate in two cases but also one outlier case. For all of these frame types a rather high amount of frames was found in each case which otherwise might have explained the outlier cases.

Given the fact that differences exist in terms of effectiveness per case for all frames it is difficult to say with certainty that all frames perform more or less equally in different settings. Except for N1 frames, that in term of effectiveness seems to be a silver bullet for

framers, every other frame had at least one outlier case. This leads to the conclusion that while some frame are generally more effective than others every case has its own unique features and results. A greater database with more cases could potentially single out if the one case was indeed an outlier case and if percentages of the other two cases are similar to other findings. Such a database would help to establish whether or not there is a bias towards all negative frame types or that the bias only exist in certain cases. This is important for our understanding of the workings of the civil society participation system and therefore helps to understand whether the efficiency argument is correct or invalid.

7. Conclusion

This research set out the objective to find out whether or not specific frames increase the influence of interest groups in the policy-making process of the EU. This objective not only filled a gap in the existing academic literature but also helps to further our understanding of the workings of the civil society participation system in the EU and therefore also our understanding of European democracy.

In order to fulfil this objective it's first necessary to assess the existing literature on framing. In this literature a focus on emphasis framing was discovered. This focus on emphasis framing helped to understand what issues are at stake in specific discussion between interest groups and helps to see what interest groups represent. However, there is also critique on the focus on emphasis framing as they don't represent a strategic choice and thus tell us little about the influence of framing but rather explain how interests are balanced by the European Commission. Given this critique the decision was made to focus solely on equivalence frames as they do represent a strategic choice and can thus contribute to our understanding of how much influence the usage of specific frames can give interest groups.

The importance of the question of influence is supported by prospect theory. This theory suggests that negative frames are more effective than positive frames as they build upon the negativity bias. Therefore, decision-makers are less willing to take more risk to achieve a benefit than they are willing to avoid a loss. In addition to this the research by Bernhagen, Dür and Marshall (2015) provided reasons to suspect that business interest groups make more use of negative frames in market-shaping legislation. This is important as most newly created legislation in the EU is market-shaping.

In order to research the effectiveness of frames the decision was made to focus on the consultation regime of the European Commission. This provided an opportunity to assess the effectiveness of frames. Therefore three cases were selected in order to analyse the framing by interest groups and to measure their effectiveness. These cases needed to have a draft proposal, position papers by interest groups and a follow-up. However, an interesting avenue for future research could also be to focus on cases where no follow-up was put forward by the European Commission. It could be argued that in extreme cases the Commission can also decide to not put forward a follow-up due to the framing of interest groups. In this case framing would be very effective as it was able to influence the usage of the Commission its initiative monopoly.

In order to code the frames and their effectiveness a method had to be created. This was a challenging task as no research before has researched equivalence framing in the European Union. Although some elements of other research designs could be used that focussed on equivalence framing such as elements of research done by Klüver, Mahoney and Opper (2015) the foundation had to be built from scratch. Because this foundation, amongst others the operationalization of equivalence frames and measuring frame effectiveness, are new they can be prone to mistakes or misconceptions. That said great care has been taken to explain what steps have been made and what the underlying rationale was. In addition examples have been given and three annexes have been added to show what work has been undertaken. This allows other scholars to strengthen the research method in order to build a stronger framework for future research on equivalence frames.

The discussion focussed on the results and what they mean. In order to provide a clear overview the findings have also been related to the theoretical framework. However before answering the sub-questions it's prudent to first restate the overall research question as this has guided the entire research.

The research question of this research was: 'In how far are certain frames by interest groups more effective in influencing the European Commission in drafting legislative proposals?' In order to answer this question three sub-questions have been formulated to guide the research. These will be answered first before turning to the answer on the overall research question.

7.1 Are negative frames more effective than positive frames?

In addition to finding that on average the negative frames were significantly more effective than positive frames it was also found that all three negative frame types were more effective than their positive counterparts. Therefore, this sub-question can be answered positively and the hypotheses that derived from it confirmed.

These findings not only support prospect theory but also showcases that even well-informed people are not immune to cognitive biases. This is an important finding as it also impacts on the efficiency argument in favour of civil society participation systems. Given the fact that a bias towards negative frames exists within this system doubts can be raised if it increases the efficiency. Whereas this argument states that by allowing more interest group participation the effectiveness of making legislation can be improved by the information that

interest groups have, the findings suggest that the information itself is not the only criteria that matters for the outcome. Instead framing seems to directly impact on the outcome of the legislative processes. This is something to take into account when evaluating the civil society participation system of the European Union.

7.2 Do business interest groups use more negative frames than non-business interest groups?

With the aforementioned bias towards negative frames it become even more pressing to see what kind of interest groups used this bias. An uneven usage of negative frames by specific interest groups suggests that there is not only a bias towards negative frames but because of their substantial usage also towards specific interest groups. These findings would also raise doubts about the validity of the argument of civil society participation that states that it increases legitimacy as the system would be tilled in favour of interest groups that are most capable in their framing.

This double bias however wasn't confirmed by the findings of this research as business and non-business interest groups used a similarly high percentage of negative frames. Therefore it doesn't look like specific types of interest groups are able to use this bias to their own advantage. These findings didn't support the hypotheses that were formulated based on the research by Bernhagen, Dür and Marshall (2015). Although it would have been logical for business interest groups to formulate more negative frames based on the fact that they often oppose new market-shaping legislation this wasn't the case. Although business interest groups used a very high percentage of negative frames non-business interest groups used a similar percentage.

What is an important outcome is that business interest groups used a significantly higher amount of frames in total. This can possibly be explained by the interests that are in stake in the three cases. Because the three cases analysed were part of DG competition it could be that for business interest groups there was simply more at stake. This also seems to be confirmed by the amount of business interest groups that reacted to the consultations. Therefore, a suggestion for future research would be to see whether business interest groups in different cases, such as environmental legislation or legislation that touches upon consumer protection, also make use more frames in general.

7.3 Is there a difference in terms of the effectiveness of frames per case?

The findings of the research suggest that there is indeed a difference in terms of the effectiveness of frame types per case. Only the N1 frame achieved a success rate that was above average in all cases. For the other frames types, the N2, N3 and the P3, that were found in three cases, the findings of two cases align and there is one outlier case. This seems to suggest that there is not one silver bullet for framers, except for the N1 frame.

This is an interesting finding as it also showcases that each case has an unique setting in which different frames can be more or less effective. Given this conclusion it makes it harder for interest groups to take advantage of the bias towards negative frames as not every type of negative frame is always as effective as thought. In order to solidify this research and to improve the generalizability future research on equivalence framing could apply a similar method to other cases. This would not only contribute to understanding whether the current outlier cases are indeed outlier cases but would also help to see in what type of cases the different kind of frame types are most effective.

7.4 Answering the main research question

With the above results in mind it's now time to turn to the main research question. The main research question reads as following. 'In how far are certain frames by interest groups more effective in influencing the European Commission in drafting legislative proposals?' The analysis conducted in this research found that negative frames are more effective in influencing the European Commission in drafting legislative proposals. Especially the N1 frame was found to be particularly effective. This confirms a bias towards negative frames.

However, it was also found that business interest groups don't make more use of negative frames than non-business interest groups. This finding doesn't confirm a double bias in which specific interest groups make more use of more effective frames. In addition it was found that differences exist per case. This suggests that every case is unique and that not every frame is as effective in another case.

Therefore it can be concluded that certain frames, more specifically negative frames, are more effective in influencing the European Commission in drafting legislative proposals but that differences exist per case and that the usage of frames is equally divided over business and non-business interest groups. The conclusion of this research thus raises questions about the argument of effectiveness of civil society participation systems while it didn't show that

the legitimacy of the system is severely undermined as interest groups equally use this bias.

7.5 Policy recommendation?

Given the fact that a bias towards negative frames exist it could be argued that a policy recommendation should be formulated. This could counterbalance the bias towards negative frames and improve the system of civil society participation. The first step of countering a bias is often making people aware that such a bias exist. Therefore a policy recommendation could take the form of a training for Commission officials to make them aware of their presumed bias. This training could be made mandatory for those officials who are dealing with input from interest groups and are thus prone to frames. The training could start out by explaining the workings of cognitive biases and more specifically the negativity bias. Following that prospect theory should be explained to also show how this impacts decision-makers. In addition it would be good to give examples from consultations in order to show how framing works in practise. Such a training could potentially be a first step towards countering a bias towards negative frames.

7.6 Suggestions for future research

However, delicate action is necessary as the system impacts on our democracy. Before jumping to too drastic conclusions about the input-legitimacy in the European Union more research is needed. The consultations analysed were only held by DG competition, there were only three cases and not all consultations make use of position papers. Therefore, following this research method the evidence should first be expanded before coming to these conclusions. In addition to the afore mentioned research an incredibly interesting, but also very challenging, research could focus on whether the conclusions of this research also hold when the surveys used in the consultation regime are analysed. This would capture all different consultation options and thus also improve on the generalizability of this research.

In addition to analysing more cases it would also be good to combine the academic knowledge with knowledge 'on the ground'. Such research could discover whether interest groups seem to be aware that there is to be a bias towards negative frames and whether they adjust their framing strategies accordingly. In order to do this interviews could be conducted with those responsible for consultations or communication within interest groups. Interview

questions could assess whether there is such a thing as common knowledge about the effectiveness of criticism in consultations.

To conclude, this research can only be seen as a starting point. It has taken up the gauntlet of being the first ever research to study equivalence framing in the European Union. This has been challenging and many improvements can be made to the used research method. It's important that this is done as the conclusions of this research point to a very minor crack in the wall that is called input-legitimacy in the European Union. Future research should see whether this is a standalone crack or that the foundation is rotten. As said before, this research is not a closing chapter, but should rather be seen as a first step into the fascinating world of equivalence frames.

8. References

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Annex 1: frames case 1

<u>Assonime</u> (THE ASSOCIATION OF ITALIAN JOINT STOCK COMPANIES

II - In-house lobbyists and trade/business/professional associations

and more precisely: Trade and business association

1. Fining policy (§5)
   As for the first change, we understand that, since there may be significant uncertainty on both market shares and on whether an agreement is or is not a restriction by object, the Commission prefers to eliminate the express commitment not to impose fines where "an undertaking assumes in good faith" that the agreement is covered by the Notice.

Solution:

In our view, this change should be accompanied by clear assurance that in these cases the general criteria for imposing fines will be applied by the Commission (and by the competition authorities in Member States) in a reasonable and predictable way, taking into account inter alia whether there was significant uncertainty on the unlawfulness of the agreement or practice at issue.

2. In the light of this evolution, **it would be highly undesirable to treat restrictions by object as a homogeneous group of agreements** which, by their very nature, are as injurious as cartels, and therefore should presumptively be considered to have an appreciable effect on competition irrespective of the size of market shares and of the turnover of the parties.

Solution:

If the Commission intends to exclude all restrictions by object from the de minimis Notice, we respectfully suggest that it should either give a more complete overview of the relevant criteria which should guide the application of article 101(1) in the light of the entire case-law of the Court of Justice, without putting an excessive emphasis on paragraph 37 of Expedia, or simply make a general reference to the criteria established by the case-law of the Court of Justice.

3. (§§ 8 and 12

Met opmerkingen [DP1]: N2.

Met opmerkingen [DP2]: N3

The partnership agreement in the main proceedings in the Expedia case provides a good example: if there are diverging views on whether an agreement is or is not a restriction by object, there will also be uncertainty on whether the de minimis thresholds can or cannot be applied.

Solution:

an approach based on exceptions which are clearly defined ex ante, and regularly updated on the basis of a reasoned assessment of the evolution of the case-law, would be preferable to an approach depending on the legal assessment of an agreement in each case.

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4. The assessment of restrictions by object under article 101(1)

However, for restrictions other than "obvious restrictions of competition such as price fixing, market sharing or the control of outlets", there are risks in truncating the assessment of the actual or potential competitive harm under paragraph 1. Indeed, an assessment under paragraph 3 is significantly more rigid than an assessment of the actual or potential impact on competition under paragraph 1.

5. A system centered only on paragraph 3 would lead to systematically prohibit agreements of this kind, with a straight-jacket effect.

6. to make it a fair and efficient way to prohibit anticompetitive restraints

7. while excluding from the prohibition clearly innocuous practices

Solution

In the light of the above, the best efforts should be devoted to gradually refine the use of presumptions in the application of paragraph 1 of article 101 to make it a fair and efficient way to prohibit anticompetitive restraints, while excluding from the prohibition clearly innocuous practices.

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8. We respectfully submit that the way the case-law of the Court of Justice is summarized in points 1 and 2 of the revised Notice gives the misleading impression that paragraph 37 of the Expedia judgment overcomes the previous case-law by setting the principle that for restrictions by object the assessment of economic context, and in particular of the market position of the parties, is irrelevant in the application of article 101(1) because a restriction by object constitutes by its nature an appreciable restriction of competition.

Met opmerkingen [DP3]: N3

Met opmerkingen [DP4]: N2

Met opmerkingen [DP5]: N3

Met opmerkingen [DP6]: P3

Met opmerkingen [DP7]: P3

Met opmerkingen [DP8]: N3

9. On the contrary, it would establish an unduly strict approach for the assessment under 101(1) of other restrictions, notably vertical restrictions.

Met opmerkingen [DP9]: N3

Solution 1:

We respectfully suggest that it [Commission] should either give a more complete overview of the relevant criteria which should guide the application of article 101(1) in the light of the entire case-law of the Court of Justice, without putting an excessive emphasis on paragraph 37 of Expedia, or simply make a general reference to the criteria established by the case-law of the Court of Justice.

2:

-Or to cancel point 2 of the draft revised Notice, which puts an excessive emphasis on paragraph 37 of the Expedia judgement;
-to eliminate, from point 12 of the draft Notice, the words "In view of the clarification of the Court of Justice referred to in point 2 of this Notice";
-to add a new point 12 a), stating that "The agreements referred to in point 12 may be prohibited under article 101(1) even below the market share thresholds set out in points 8, 9 and 10, according to the criteria established by the case-law of the Court of Justice".

Bundesverband der Deutschen Industrie e.V (BDI)

No frames.

Borenius
I - Professional consultancies/law firms/self-employed consultants and more precisely: Law firm

Frames:

10. There is also no legal certainty if the EU courts will support and follow Expedia case judgment in the future.

Met opmerkingen [DP10]: N3

Solution 1:

Leave the current regulation presented in the De Minimis Notice unamended, allowing the agreements having a restrictive object "to be proved as not having an appreciable effect on competition";

Solution 2:

Reconsider the presentation of the list of agreements having a restrictive object and create a more detailed list containing all current agreements having a restrictive object and/or at least more precise criteria for the establishment of agreements having "as their object" the restriction of competition so that everyone could finalise the list in accordance with such criteria

11. In the opinion of the European Commission such wording should ensure that no agreements containing "by object restrictions" can benefit from the safe harbour of the De Minimis Notice. However in our opinion, such a wording, for several reasons, does not provide legal certainty related to the notion of "by object restrictions'.

Met opmerkingen [DP11]: N3

Solution 1:

Leave the current regulation presented in the De Minimis Notice unamended, allowing the agreements having a restrictive object "to be proved as not having an appreciable effect on competition";

Solution 2:

Reconsider the presentation of the list of agreements having a restrictive object and create a more detailed list containing all current agreements having a restrictive object and/or at least more precise criteria for the establishment of agreements having "as their object" the restriction of competition so that everyone could finalise the list in accordance with such criteria.

12. Third, the Draft Notice is silent on the legal consequences for undertakings which may arise if the list of agreements having a restrictive

object is corrected either by the Commission or the courts. What will happen if undertakings enter into agreements, which later on (possibly even after several years after its existence) are considered by the Commission or the court as agreements having as "their object" the restriction of competition? Will such revision have immediate effect on the legality of such agreements, if yes, ex nunc or ab initio?

Met opmerkingen [DP12]: N2

Solution 1:

Leave the current regulation presented in the De Minimis Notice unamended, allowing the agreements having a restrictive object "to be proved as not having an appreciable effect on competition";

Solution 2:

Reconsider the presentation of the list of agreements having a restrictive object and create a more detailed list containing all current agreements having a restrictive object and/or at least more precise criteria for the establishment of agreements having "as their object" the restriction of competition so that everyone could finalise the list in accordance with such criteria.

13. the Draft Notice's approach to declare all agreements having a restrictive object as having an appreciable restrictive effect on competition does not seem to be well supported by economic arguments or case law nor, therefore, timely and well-founded, especially taking into consideration that it may be followed also by national competition authorities and cause serious legal consequences for undertakings, specifically small and medium-sized enterprises, in the case of an infringement of Article 101(1)

Met opmerkingen [DP13]: N2 (may)

Solution 1:

Leave the current regulation presented in the De Minimis Notice unamended, allowing the agreements having a restrictive object "to be proved as not having an appreciable effect on competition";

Solution 2:

Reconsider the presentation of the list of agreements having a restrictive object and create a more detailed list containing all current agreements having a restrictive object and/or at least more precise criteria for the establishment of

agreements having “as their object” the restriction of competition so that everyone could finalise the list in accordance with such criteria.

14. Second, the proposed Draft Notice could raise serious concerns about legal certainty for undertakings, legal advisers, competition law authorities, and the courts as regards the notion of agreements containing restrictions “by object”

Met opmerkingen [DP14]: N2

Solution 1: Leave the current regulation presented in the De Minimis Notice unamended, allowing the agreements having a restrictive object “to be proved as not having an appreciable effect on competition”;

Solution 2:
Reconsider the presentation of the list of agreements having a restrictive object and create a more detailed list containing all current agreements having a restrictive object and/or at least more precise criteria for the establishment of agreements having “as their object” the restriction of competition so that everyone could finalise the list in accordance with such criteria.

COMPER Fornalczyk & Partners General Partnership

I - Professional consultancies/law firms/self-employed consultants

And more precisely: Professional consultancies

15. The proposed change will instead disrupt the previous legal certainty, as applying an economic analysis, particularly in the field of descriptive economics, leaves scope for interpretation of the results obtained.

Met opmerkingen [DP15]: N3

Solution:

Accordingly, it might be useful to consider retaining the rule preventing fines from being imposed on undertakings that assumed, in good faith, that the agreement concluded between them fulfilled the exemption criteria (point 4 of the Notice).

Danish Competition Authority

No frames

Gesamtverband der Deutschen Versicherungswirtschaft e. V.

II - In-house lobbyists and trade/business/professional associations

and more precisely: Trade and business associations

Frames:

16. Against the backdrop of this stricter approach by the ECJ, the German insurance industry takes a critical view of the European Commission's plans to remove the provisions regarding companies' good faith which were in point 4 of the previous notice. This would result in the erosion of the principle of fault.

17. In future, fines could also be imposed on companies which had believed in good faith that an agreement fell under the scope of the de minimis notice.

18. Companies' evaluation of what conduct is covered by the de minimis notice will be hampered by serious legal uncertainty. This is because, unlike the criterion of hard-core restrictions (price-fixing and market-sharing agreements), there is no conclusive legal definition of what constitutes intention to restrict competition.

19. If, in addition, the provisions on good faith were removed, the standard of care required - involving as it would an element of self-assessment - would be even more difficult to ascertain for companies concerned, and would need to be further defined.

20. For these reasons, the German insurance industry considers that it would be best to retain the provisions on good faith contained in point 4 of the current notice and to incorporate them into the new notice. This would help to maintain legal certainty and

21. ensure that companies genuinely acting in good faith are not sanctioned under antitrust legislation.

Solution for all five:

For these reasons, the German insurance industry considers that it would be best to retain the provisions on good faith contained in point 4 of the current notice and to incorporate them into the new notice. This would help to maintain legal

Met opmerkingen [DP16]: N3

Met opmerkingen [DP17]: N1

Met opmerkingen [DP18]: N3

Met opmerkingen [DP19]: N3

Met opmerkingen [DP20]: P3

Met opmerkingen [DP21]: P3

certainty and ensure that companies genuinely acting in good faith are not sanctioned under antitrust legislation

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Giorgio Monti, Professor of Competition Law

VI Individual/Citizen

Frames:

22. This suggestion is a bit like the Guidance on enforcement priorities for exclusionary abuses: rather than restating the law, one may be better off stating one's prosecutorial discretion. The result is the same: parties know that the Commission is bound by its statements, but its advantage is that it does not always constrain one from taking action below the thresholds.

Met opmerkingen [DP22]: P3

Solution:

It strikes me that the ECJ here should be followed, but in a different way. Paragraph 3 of the Notice should be rephrased in the following way: 'With this Notice the Commission explains how it will exercise its prosecutorial discretion. By providing a set of market-share based safeharbours, it provides legal certainty to undertakings with small market shares. This safe harbour is justified by the extremely low probability that the agreements in question have an anticompetitive object or effect.'

Herbert Smith Freehills

I - Professional consultancies/law firms/self-employed consultants and more precisely: Law firm

Frames (object restriction)

23. To take the interpretation adopted by the Commission to its logical conclusion, this would mean that the unilateral disclosure on a single occasion of a future pricing intention by A, a supplier of product X, to B, a potential supplier of product X, would constitute an appreciable restriction of competition for the purposes of Article 101 TFEU, even if A and B were the smallest of tens of thousands of suppliers of product X, with a market share of less than 0.1%, and were only active in one area in one Member State.

Met opmerkingen [DP23]: N3

24. Similarly, under this interpretation, the supply of product Y by supplier C to distributor D, on terms that D's volume rebate is limited by reference to sales within its Member State of establishment, would constitute an appreciable restriction of competition for the purposes of Article 101 TFEU, even if again C was the smallest of tens of thousands of suppliers of product Y, and D the smallest of tens of thousands of distributors of product Y, and even if the (indirect) restriction could have no impact in practice, for example if due to transport costs D would never have delivered the product outside its local area.

25. Finally, we note that this approach would result in any non-full function joint venture which contains restrictions which could conceivably be regarded as restrictions by object, for example as the joint venture involves agreeing on production, and therefore output, levels, as amounting to an appreciable restriction on competition, regardless of the nature of the joint venture or the parties position on the market, or indeed its likely impact. This is clearly inappropriate.

Solution for all three:

Accordingly, we would urge the Commission to reconsider its approach, at least unless and until the CJEU clarifies the meaning of its comments in Expedia.

Saskia King

VI Individual/Citizen

26. This could mean that particular agreements that should benefit from the Draft Notice do not and vice versa. This is not conducive to legal certainty.

Solution

If the Commission is intent on excluding restrictions by object from the scope of the Draft Notice, then it would be preferable if the Commission made clear that those agreements still benefit from the application of an Article 101(1) TFEU analysis. What is apparent from the case law is that it is not always immediately evident or indeed obvious from the outset whether an agreement is restrictive by object or effect.

Union of Groups of Independent Retailers of Europe

II - In-house lobbyists and trade/business/professional associations

and more precisely: Trade and business associations

Met opmerkingen [DP24]: N3

Met opmerkingen [DP25]: N3

Met opmerkingen [DP26]: N3

27. warns that the finalised notice may need to be revised in the light of experiences gained from fast developing means of distribution, e.g. e-commerce where independent retailers, working in groups, require a certain measure of uniformity and quality standardization;

Met opmerkingen [DP27]: N2

Solution

Specify that the new rules do not create "per se" infringements and will in any case not prevent the possibility of benefitting from an individual exemption provided for in Article 101 (3) TFEU.

28. Therefore, it might be tempting for national competition authorities (NCAs) to identify more systematically an agreement as an agreement creating a restriction by object since the latter now offers a certain procedural flexibility for NCAs. As such, it regrettably will no longer be necessary for NCAs to assess the actual effects of such practices.

Met opmerkingen [DP28]: N3

Solution

Clearly state in the Notice that it will always need to be determined on a case-by case basis whether the nature of an agreement that has the objective to restrict competition, would exclude it from the Notice.

Osservatorio Permanente sull'Applicazione delle Regole di Concorrenza ("Osservatorio Antitrust"), an independent research centre established at Faculty of Law, University of Trento (Italy)

IV - Think tanks, research and academic institutions

and more precisely: Think tanks and research institutions

Frames

29. However, with the Draft Notice 2013, an unreasonable focus is, in our opinion, put on how a restriction on competition is achieved, rather than the restriction on competition itself. Singling out restrictions by object may lead to the incongruous conclusion that there is a preferable form of anticompetitive behaviour for small undertakings (restrictions by effect), instead of establishing a threshold below which enforcement is not desirable.

Met opmerkingen [DP29]: N2

Solution

Focus should be on the threshold(s) under which anticompetitive agreements do not warrant enforcement, rather than making a principled stance against a certain type of anticompetitive agreement.

30. A verbatim application of the Expedia ruling, with complete disregard for the significance of an agreement, runs a high risk of being contrary to the general principle of proportionality;

Met opmerkingen [DP30]: N2

No clear solution proposed. But focus stayed on Expedia in the final version as the frame refers to paragraph 2, which remained unchanged.

Annex 2: frames case 2

American Bar Associations

II - In-house lobbyists and trade/business/professional associations

and more precisely: professional association

1. The Sections support these changes. The Sections believe, however, that the SP's scope of application could be extended in certain additional **respects in order to increase the reach of simplified treatment** without risk of including transactions that potentially raise serious competition issues.

Met opmerkingen [DP31]: P2

Solution

Therefore, the Sections suggest that the Commission consider extending the application of the SP to horizontal mergers where the parties have an aggregate market share below 30%, or at least below 25.

AFEP

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Short Form CO

2. In general terms, so as to increase legal certainty, it is desirable for the wording to be identical in both the Commission Notice and the Short Form CO. This is the case, for example, for those situations where the simplified procedure and the Short Form CO may be used, or those situations where reversion to the normal procedure is required.

Met opmerkingen [DP32]: P3

3. Given that the wording is not harmonised at this stage, interpretation issues might arise which could easily be dispelled by the wording of the two texts being identical or by one referring to the other.

Met opmerkingen [DP33]: N2

Solution for both:

It is desirable for the wording to be identical in both the **Commission Notice and the Short Form CO.**

4. In point 1.5: besides the comments supra (cf. Summary) regarding the room for discretion given to the Commission concerning the application of new simplified procedure cases, it appears that the last paragraph of point 1.5, which gives the Commission the right to extend information which should be notified and go back on its "waiver" decisions, should be better justified, otherwise the security of the parties concerned will be significantly undermined.

Met opmerkingen [DP34]: N3

Solution

it appears that the last paragraph of point 1.5, which gives the Commission the right to extend information which should be notified and go back on its "waiver" decisions, should be better justified or deleted.

Short Form CO

5. In point 1.4: - instances of missing or incomplete contact details are explicitly considered to be “incomplete information”, which seems excessive insofar as the scope of the contact details required is particularly wide (parties, competitors, suppliers, customers, etc.) (§ 8.15). This requires resources and an unrealistic knowledge of the contact details of actors on a market (particularly its competitors).

Met opmerkingen [DP35]: N3

Solution:

Don’t apply the rule of missing/incomplete contact details to be considered to be incomplete information.

6. Furthermore, the notifying parties might, in this framework, have to disclose the existence of an operation in order to satisfy the Commission’s information requirements, which is difficult to reconcile with the requirements of business confidentiality. - in the last paragraph, the numbers of the “footnotes” enabling to determine the information which the Commission may or not need are incorrect. This makes it impossible to apply this provision correctly.

Met opmerkingen [DP36]: N2

Solution:

Specify that it's not necessary to disclose the existence of an operation.

7. In Section 6: the notion of "plausible alternative product and geographic market definitions" risks seriously bloating the definition of relevant markets (also see the comments on point 6 of the Commission Notice).

Met opmerkingen [DP37]: N2

Solution:

This provision should be deleted.

Allen & Overy

8. In fact, in a number of instances, the revisions actually increase the burden on notifying parties to provide information which may be irrelevant to the Commission's assessment of the merger.

Met opmerkingen [DP38]: N3

Solution

The information required by a notification should be set at the minimum possible level.

The Revised Notice The "market share" threshold

9. In a new footnote 15 to the Revised Notice the Commission states that when applying the "market share" threshold for determining whether the simplified procedure will apply, "all plausible alternative product and geographic market definitions" must be considered and mentioned by notifying parties. We acknowledge that the current Notice does contain a reference to this concept, but are concerned about its extended use in the Revised Notice. We believe that this condition imposes a significant burden on parties.

Met opmerkingen [DP39]: N3

Solution

Delete this

The "joint venture" threshold

10. Paragraph 11 of the Revised Notice notes that in relation to certain joint ventures with a turnover of less than the threshold specified in paragraph 5(a) the Commission may nevertheless consider it appropriate to carry out a full assessment under the formal first-phase merger

procedure, giving some examples of when it may do so. While we appreciate that the Commission will not want to tie its hands by giving exhaustive guidance in this regard, we do think that the examples given would benefit from greater clarity. This would in turn reduce uncertainty for notifying parties as to whether their merger will qualify for simplified treatment.

Met opmerkingen [DP40]: P3

Solution

We do think that the examples given would benefit from greater clarity. One way to clarify this would be to include hypothetical examples.

The "small increment" threshold

11. In many cases involving market share (and increments) above these levels it will be readily apparent that no competition concerns arise and we would prefer this to be acknowledged by allowing mergers involving a larger delta (say, 200) to be eligible for simplified treatment. This would ensure that the threshold captures morecases that are unlikely to give rise to competition concerns.

Met opmerkingen [DP41]: P3

Solution

Higher delta (200)

Revised Form CO

Section 5.4 documents

12. The scope of documents required to be submitted under section 5.4 has been greatly expanded to an extent which, in our view, will significantly increase the burden on notifying parties.

Met opmerkingen [DP42]: N3

Solution

Copies of all documents prepared by or for or received by the "board of management. We recommend that the Commission removes this reference from the Revised Form CO altogether.

13. If section 5.4 were to cover documents prepared by the General Counsel, this would give rise to serious concerns relating to loss of privilege.

Met opmerkingen [DP43]: N3

Solution

Delete this or specify that this is not the case.

Analyses, reports, studies, surveys etc. for the purpose of assessing any of the affected markets

14. We note that this requirement is limited to the last three years. However, following the comments made in (b) above, we are concerned that the vast majority of these documents will not be relevant to the Commission's assessment of the notified merger.2 In fast-moving (e.g. technology) markets, for example, information which is three years old is unlikely to be representative of current market conditions. In addition, because this request would encompass documents produced in the ordinary course of business, the potential burden in collecting and producing these materials would be significant and is unwarranted. We recognise that the Commission identifies this category of documents as one in relation to which a waiver may be appropriate, but as noted at 2.2 we are concerned that this would not routinely be granted.

Met opmerkingen [DP44]: N2

Solution Form CO

Therefore we strongly urge the Commission to scale back the documents it requires under the revised section. One option would be for the Commission to retain section 5.4 in its current form and provide an indication of when, exceptionally, it would consider it necessary to request internal documents from notifying parties in addition to those submitted under section 5.4.

Market definition and affected markets

In section **6 of the Revised Form CO** the Commission clarifies that notifying parties must submit "all plausible alternative product and geographic market definitions (including but not limited to alternative product and geographic markets that were considered in previous Commission decisions)".

15. “Plausible” is an extremely low threshold, entailing an element of subjective judgement, and may result in parties being required to identify numerous markets which, in economic terms, are unlikely to be used in the merger assessment. It is also important to link section 6 to section 7 (Information on affected markets) of the Revised Form CO: given that the information required under section 7 must be submitted for all affected markets identified under plausible alternative market definitions, this may result in multiple sets of information being submitted, adding substantially to the burden, not only on notifying parties but also the Commission.

Met opmerkingen [DP45]: N3

16. The Commission states that it will require parties to submit all plausible alternative market definitions despite its previous precedents. A strict requirement of this type is unnecessary. There may well be circumstances in which this information is not needed and often data will not be available on all of the permutations. For example, where the merger relates to an industry where the Commission has a very established way of defining the market (such as pharmaceuticals, where markets are usually defined on the basis of the Anatomical Therapeutic Chemical (ATC) classification) – will the parties still be required to submit alternative market definitions? And similarly where all the precedents point to an EEA-wide market – will the parties be required to also submit information for each national market? If so, this would significantly increase, not decrease, the burden on notifying parties.

Met opmerkingen [DP46]: N3

Solution for both

To ensure that the administrative burden on notifying parties and the Commission is kept to a minimum, and that the Commission is requesting and receiving only information that will be meaningfully relevant for its assessment of a merger, we suggest that this requirement is removed

Revised Short Form CO

17. Our main comment on the Revised Short Form CO relates to the new paragraph 5.3 which requires notifying parties, in a situation where a merger qualifies for the simplified procedure under the “market share”

or “small increment” thresholds, to provide copies of presentations analysing different options for acquisitions, including but not limited to the notified concentration. We reiterate the concerns expressed at 2.6(b) above, and add that we do not believe it is either appropriate, reasonable or necessary, to bring section 5.4 document requests within the scope of the simplified procedure given the substantial additional time and

18. resource burden it adds for notifying parties.

Met opmerkingen [DP47]: N3

Met opmerkingen [DP48]: N1

Solution

Don’t bring the section 5.4 document (See Form CO and check with Short) request within the scope of the simplified procedure.

AmCham

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Revised Notice on simplified procedures

AmCham EU is concerned that the proposed revisions to point 5 of the Notice appear to delete – potentially inadvertently - the option for using simplified procedure in cases without overlaps. The text as it would appear to read after revisions refers immediately to the market share thresholds and different from the original version now omits a reference to the absence of overlaps.

19. This would create a significant gap that would lead to significant additional work for notifying parties.

Met opmerkingen [DP49]: N3

Solution

The draft should clarify that the absence of overlaps remains a sufficient reason for the simplified procedure.

20. As the proposed new text deletes the reference to the absence of overlaps, a conservative reader may raise a doubt as to whether simplified procedure continues to be applicable to cases without an overlap. This would be highly impractical, burdensome and in some cases outright impossible.

21. In order to avoid even the appearance of uncertainty and the related risk that parties may be asked to provide such information,

Met opmerkingen [DP50]: N3

Met opmerkingen [DP51]: P3

Solution for both

AmCham EU would call on the Commission to clarify that transactions without overlaps will continue to qualify for simplified procedure.

22. However, AmCham EU is concerned that those thresholds are still too low and that they will continue to capture transactions that do not raise an issue. Thus even following the proposed rules, business will continue to be required to develop and provide significant amounts of information simply to satisfy the requirements of the form.

Met opmerkingen [DP52]: N3

Solution:

A further increase of the thresholds for applying the rules on the simplified procedure.

23. The revisions introduced in paragraph 11 of the Notice, and more specifically in the new Section 8.2.2 of the Short Form CO relating to extra-EEA joint ventures highlight a recurring and significant practical problem in EU merger control. Under the current EU Merger Regulation, two parties that form a joint venture may technically meet the EU merger thresholds even where the joint venture has no current or planned sales in the EU. This can lead to unnecessary notifications where a transaction has no real or potential effect in the European Union.

Met opmerkingen [DP53]: N2

Solution

The Commission should clarify that transactions relating to joint ventures without any activity in the European Union do not have any effect in the European Union and do not require notification.

24. AmCham EU considers that this problem creates significant burden on the parties both in terms of delay to closing and in terms of work required to complete the Short Form CO and the review process with the Commission

Solution

As a result, AmCham EU would call on the Commission to clarify that in line with international legal principles a merger notification is not required in situations where the joint venture does not have a material presence or sales in the European Union, because such a transaction cannot possibly have any potential effect on competition in any discernible market in the European Union.

Met opmerkingen [DP54]: N3

25. Furthermore, the reference to inputs to products sold in the EU is an entirely new concept and unclear. In particular, it is not clear what level of production would be captured. In the extreme, this could lead to significant uncertainty where it is not clear which input is relevant, a product sold, a direct input or any input, however far removed from the product sold in the EU. For example, assume the joint venture is a mining operation in Australia that does not sell to the EU. The ore is further processed into a metal by a third party in Brazil. A fourth party in Mexico further processes the metal into a car part, and this car part is shipped to Spain for incorporation in a car. Surely the activities of the mining joint venture in Australia do not have any relevance in the EU.

Met opmerkingen [DP55]: N2

Solution (notice)

Delete the reference or make clear what is meant by it.

26. It is important to recall that the waiting period places significant burdens on the parties.

Met opmerkingen [DP56]: N3

27. For instance, during this time, a buyer must stand by and watch unable to take action to respond to new developments, customers may not appreciate the impending uncertainty and may choose to contract with the competition, and acquisition funds need to be kept available sometimes at significant cost.

Met opmerkingen [DP57]: N1

Solution

AmCham EU would thus urge the Commission to clarify, e.g. in **paragraph 20 of the Notice**, that pre-notification is not required, and considered the exception rather than the rule, in cases that qualify for simplified procedure.

Make a true Short Form CO available

28. The notification forms are very cumbersome, especially in simple cases and the proposed changes do not appear to change this. In fact, in some cases it can be more difficult and burdensome to complete a Short Form CO than to complete the full Form CO. A shorter notification form will also allow the case team to focus on the essence of a case and avoid wasting time analysing large amounts of irrelevant information.

Met opmerkingen [DP58]: P3

Solution

AmCham EU proposes significantly simplifying at least the Short Form CO and only request elements that are strictly required for the assessment of a simple merger matter are the following:

- Description of the parties; - Transaction description; - Identification of revenues relevant for the assessment of applicable thresholds; - Potential market definition; and - Discussion of horizontal or vertical overlaps of the parties. Any additional information or clarification requirements should be addressed in the course of the phase 1 review

29. The new concept of 'plausible markets' does not add clarity, causes confusion

Met opmerkingen [DP59]: N3

30. and uncertainty and should thus be removed

Met opmerkingen [DP60]: N3

Solution for both

Delete plausible markets

31. Many companies monitor acquisition opportunities systematically and boards may frequently consider potential targets as a matter of course. This could potentially produce a large amount of documents.

Met opmerkingen [DP61]: N2

Solution

Section 5 (3) documents should not be required in Short Form CO; and the proposed request for documents discussing unrelated transactions in Sections 5 (3) of Short Form CO and Section 5 (4) of Form CO should be deleted.

32. In addition, where contact details are required, AmCham EU would urge the Commission to use the opportunity to adapting required contact details to modern business practices.

Met opmerkingen [PD62]: P2

Solution

For this reason, the contact request should be modernised and allow the parties to dispense with identifying a physical address and focus on one of the three faster methods (telephone, fax or email) as an alternative.

33. AmCham EU wishes to recall that a declaration of incompleteness is issued typically well into phase 1, when the parties have already spent significant time waiting for the appointment of the case team; (normally) in pre-notification; and in phase 1. new notification will start the process from zero and will thus add significant additional time to the review schedule of the parties. A delay in the merger review can have a significant economic impact on the parties, especially in simple cases where, absent competition issues, the parties did not anticipate a delay in the competition review.

Met opmerkingen [DP63]: N1

Solution

AmCham EU would suggest including a clarification that a declaration of incompleteness will only be made after the parties have been given an opportunity to rectify the allegedly incomplete or incorrect information. In particular, the new references in the various forms that missing or incomplete contact details will lead to a declaration of incompleteness should be deleted.

APDC

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Possible declaration of incompleteness when reverting to full procedure (**Draft notice para 22**)

34. Considering the serious consequences attached to a declaration of incompleteness (which means that the whole review has to start afresh, giving rise to several weeks/months of delay for the notifying parties), this new provision is likely to act as a strong deterrent to the use of the Short Form CO (and in turn to the parties asking for a simplified procedure).

Met opmerkingen [DP64]: N2

Solution

The APDC thus urges the Commission to remove this provision or to explicitly clarify that a declaration of incompleteness may only be issued when it is established that a material piece of information was not contained in the initial notification.

THE REVISION OF THE **FORM CO**

35. First of all, the APDC welcomes the increase by 5% in the level of market shares triggering affected markets as defined in Section 6 of the Amended Form CO. Such increase is consistent with the one concerning the thresholds of the proposed amended Short Form CO (see above para. 8) and aims at reducing the level of information to be provided by the notifying parties in the framework of a merger control procedure.

Met opmerkingen [DP65]: P3

Solution

Keep it this way

"All plausible alternative" relevant market definitions

36. Since the structure of the **Form CO** is such that for each market identified as affected under Section 6, the detailed information requested under Sections 7 and 8 will have to be provided for the Form to be complete,

the introduction of the notion of “plausible alternative market definition” is likely to be very burdensome.

Met opmerkingen [DP66]: N2

Solution Form CO

Delete plausible

The APDC respectfully draws the attention of the Commission on the significant risk generated by such proposal that runs counter to the Commission’s objectives of streamlining the procedures, since it is likely to:

37. increase the number of (formally) affected markets;

Met opmerkingen [DP67]: N2

38. increase the workload for the notifying parties and their external counsels in gathering the additional information and drafting the relevant sections of the Form CO;

Met opmerkingen [DP68]: N2

39. increase, as a consequence of the above, the duration of the pre-notification period.

Met opmerkingen [DP69]: N2

Solution (Form CO)

The APDC therefore respectfully proposes to **remove** such proposed amendment in its entirety, **or**, at least, to limit its scope to the alternative product and geographic market definitions that have been envisaged in the most recent decisions of the Commission that have addressed the activity at stake.

Extension of the scope of Section 5.4 of the Form CO

40. The new requirement is undoubtedly more burdensome and its proposed scope is even wider than that the one provided for under US law: indeed, under article 4(c) of the so-called “Hart-Scott Rodino” Form, parties are required to attach to the notification a number of documents prepared by or for any officer or director of the companies involved in the transaction, but only as far as their purpose is for the evaluation or analysis of the transaction in question.

Met opmerkingen [DP70]: N3

41. In addition, and although the Amended Form CO expressly provides that the notifying parties have the possibility to request a waiver for such

requirement (see above, para. 47 for the general comment of the APDC on the issue of waivers), making the provision of such documents a condition for completeness of the Form CO would, again, increase the workload imposed on the notifying parties.

42. Finally, the APDC fears that such requirement could potentially lead to a reversal of the burden of the proof.

Solution for all three (From CO)

The APDC considers that the provision of all of these documents up-front should not be a requirement for completeness. Should the Commission consider that 5.4 (iv) is useful for its assessment, in complex cases, it could still request information in the course of the notification (as is proposed to be the case under Section 1.8 of the Amended Form CO for economic data).

Contact Details

43. The APDC notes that Section 1.4 c) of the Amended **Form CO** contains a proposal that increases the threshold for completeness with regards to contact details. While the existing Form CO mentions that "multiple instances of incorrect contact details" could form a grounds for declaring a notification incomplete, the Amended Form CO proposes to mention only) "instances of incorrect contact details". Such a change is likely to create an additional and unnecessary burden for the companies that, although they already spend a considerable amount of time gathering such information, are not always able to provide perfectly accurate contact details.

Solution

The provision of limited instances of contact details which are not correct should not be, from the APDC's standpoint, a ground for incompleteness.

Ashurst

I - Professional consultancies/law firms/self-employed consultants

And more precisely:

Law firm

Met opmerkingen [DP71]: N3

Met opmerkingen [DP72]: N2

Met opmerkingen [DP73]: N2

There are a number of amendments which are likely to result in a net increase in the burden faced by notifying parties. For example:

44. requirements to provide even more internal documents under Section 5 of the proposed revised Form CO and Short Form CO;
45. requirement to identify "all plausible" market definitions;
46. potential requirement to summarise data stored by notifying parties which may be useful for quantitative economic analysis; and
47. new questions in the **Form CO** on, for example, market exit, barriers to access to customers, research and planning and launch of new products.

Solution (See per frame)

Met opmerkingen [DP74]: N2

Met opmerkingen [DP75]: N2

Met opmerkingen [DP76]: N2

Met opmerkingen [DP77]: N2

48. The Draft Revised Simplified Procedure **Notice** states that the Commission will now "in principle" apply the simplified procedure to each of identified categories (i.e. under the Proposal, the words "in principle" will be added). This appears to place greater emphasis on the Commission's discretion in applying the simplified procedure and, accordingly, suggests that there is less certainty for businesses as to the circumstances in which the simplified procedure will apply.

Met opmerkingen [DP78]: N3

Solution

We consider that this increased uncertainty is undesirable, and unless it is the Commission's intention to change its approach in this context (which is not clear from the Proposal), we would recommend that the Commission does not proceed with the proposed amendment.

We support the proposal to extend the scope of application of the simplified procedure by revising the thresholds, so that the procedure is available provided the combined market share of all of the parties does not exceed 20 per cent for horizontal relationships (increased from 15 per cent) or 30 per cent for vertical relationships (increased from 25 per cent).

49. As well as enabling more mergers to benefit from the simplified procedure,
50. this change also brings welcome consistency as between the Draft Revised Simplified Procedure Notice and the Commission's guidelines on

Met opmerkingen [DP79]: P3

the assessment of non-horizontal mergers,4 which state that the Commission is unlikely to find concern in non-horizontal mergers where the market share post-merger of the new entity in each of the markets concerned is below 30%.5.

Solution:

Keep it this way.

New high market share/small increment criterion

51. We note that the Commission will decide whether to apply the simplified procedure to this category of mergers on a case-by-case basis. Accordingly, there will be no certainty for parties as to whether, even if they are able to ascertain that their transaction falls within the high market share/small increment criterion, the Commission will allow the merger to be reviewed under the simplified procedure
52. Notifying parties are required to fulfil the conditions of this criterion "under all the plausible alternative market definitions". This is a very high burden for businesses, especially for products that may not have previously been subject to competition analysis by the Commission or other competition authorities and for which the relevant market definition may not be clear.
53. The margin of error for such small market shares can be very high, yet extremely small changes to market share figures are likely to have a significant impact on the application of the proposed new high market share/small increment criterion. Such uncertainties will inevitably increase the amount of time spent in pre-notification discussions with the Commission – see further section 4 of this response which discusses in more detail the implications of the Proposal for premerger discussions.
54. Under the proposed new criterion, there is no "clear line" which can be identified due to the number of different possible permutations of combined market shares and HHI deltas, which again increases the uncertainty for the undertakings concerned.

Solution for all four:

In light of the above, we consider that it would be preferable to replace the proposed HHI delta threshold with a simpler market share threshold, such that the simplified procedure would be available where the combined market share

Met opmerkingen [DP80]: P3

Met opmerkingen [DP81]: N3

Met opmerkingen [DP82]: N3

Met opmerkingen [DP83]: N3

Met opmerkingen [DP84]: N3

of all parties to the concentration that are in a horizontal relationship is less than 50 per cent and the increment is less than X per cent.

STREAMLINING, REDUCING, STANDARDISING AND UPDATING THE INFORMATION REQUIREMENTS

Requirement to submit "all plausible" market definitions

55. We are concerned that the amendments to Form CO and Form RS to include a requirement for notifying parties to identify "all plausible alternative product and geographic market definitions" will significantly increase the burden on notifying parties, particularly given that such definitions are expressly stated not to be limited to alternative product and geographic market definitions that have been considered in previous Commission decisions, and a notification may be deemed incomplete on the basis that a largely theoretical but still plausible market has not been listed and explored.
56. We note in this regard that the definition of "affected markets" (in respect of which a considerable amount of information must be provided) is to be based on this list of "all plausible relevant product and geographic markets", which is likely to result in a disproportionate amount of information being required about markets which, although "plausible", are not genuinely likely to be relevant to the Commission's assessment of the transaction.
57. In practice, these amendments are likely to increase the amount of time
58. and resources required to prepare a notification,
59. and to increase the uncertainty for notifying parties as to whether the Commission will accept a notification as "complete", without increasing the effectiveness or efficiency of the Commission's review
60. Similar concerns also arise in respect of the amendments to the definition of "reportable markets" in the revised Short Form CO. In our experience, the existing requirement in the current Short Form CO to provide information on "all relevant product and geographic markets, as well as plausible alternative relevant product and geographic market definitions" already gives rise to considerable difficulties for the parties and is often the subject of lengthy discussions with the case team during the pre-notification stage. Yet under the proposed revised wording this requirement will, far from being streamlined and reduced in scope, be

Met opmerkingen [DP85]: N3

Met opmerkingen [DP86]: N2

Met opmerkingen [DP87]: N2

Met opmerkingen [DP88]: N1

Met opmerkingen [DP89]: N2

extended by referring to "all plausible relevant product and geographic markets" (emphasis added). This may appear to be a small change, but we are concerned that it introduces a requirement to set out an exhaustive list of all potentially plausible alternative market definitions, and thereby broadens the scope of "reportable markets" in respect of which information must be provided. This is likely to unnecessarily increase the burden on notifying parties.

Met opmerkingen [DP90]: N2

Solution

We would therefore suggest that the existing wording should be retained. In addition, we would welcome further clarification from the Commission as to what is meant by the use of the term "plausible" in this context. We would also suggest that it should be made expressly clear that if additional "plausible" market definitions arise as a result of the Commission's investigations, after the notification has been otherwise accepted as complete, this should not lead to the conclusion that the notification was in fact incomplete.

Supporting documentation – section 5.4 Form CO and 5.3 Short Form CO

61.3.7 The amendments to the supporting documentation required to be submitted under section 5.4 of the Form CO will significantly increase the burden on notifying parties by expanding the scope of documentation required.

Met opmerkingen [DP91]: N3

Solution

We would therefore suggest that the wording of section 5.4 of the final version of the revised **Form CO** should therefore be amended as follows:

the first line of section 5.4 should refer to "copies of the following documents as prepared by or for or received…" (additional text underlined; the word "all" has been deleted); and "in particular" at the end of paragraph 5.4 (immediately before sub-paragraph 5.4(i)) should be deleted.

With regard to the specific categories of documents listed in sub-paragraphs (i)-(iv) of revised section 5.4, we wish also to make the following comments:

-Requirement to provide analyses, reports, studies surveys etc.

-Internal presentations

-Board meeting

62. Requiring such information as a matter of course for all transactions considered under the simplified procedure would effectively negate a substantial part of the benefits of the simplified procedure,

Solution

and we therefore recommend that section 5.3 of the draft revised Short Form CO should be deleted.

Requirement to provide a description of data collected and stored which may be useful for quantitative economic analysis.

63. In any event, we do not consider that it is appropriate to include such a requirement in the Form CO given that businesses generally collect a wide range of data and this data is not necessarily centrally located (indeed, certain data may be independently collated and stored by a single employee). It could, therefore, be a very time-consuming and difficult task to summarise the complete range of potentially useful data collected by undertakings concerned at the pre-notification stage.

Solution

In light of these concerns, we do not consider that it is an appropriate use of the resources of notifying parties to attempt to summarise potentially useful data in **the Form CO**.

Contact details

64. In our experience, notifying parties often encounter difficulties in completing the Commission's template for contact details with all the requested data, due to some information not being publicly available, or not having been updated on company websites. We are therefore concerned by the proposed amendment to recital 1.4(c) of the draft revised Form CO, which provides that "instances of missing or incomplete contact details" will be considered as incorrect or misleading information rendering the notification incomplete. We consider that it is disproportionate to place a notifying party at risk of a notification being deemed incomplete and a fine potentially being imposed under Article 14(1)(a) of the EU Merger Regulation in circumstances in which the

Met opmerkingen [DP92]: N3

Met opmerkingen [DP93]: N2

Met opmerkingen [DP94]: N3

relevant contact details cannot be obtained even having taken reasonable steps.

Solution: (Form Co)

Delete this

Additional information requirements

3.19 Despite the fact that the Commission claims that the purpose of the Proposal is to reduce the burden on notifying parties, we note that the draft revised **Form CO** includes a number of other new questions asking for additional data that has not previously been required, for example in relation to:

(a) market exit over the previous 5 years;

(b) barriers to access to customers, such as those resulting from product certification procedures or the importance of reputation;

(c) research and planning and priorities over the next 3 years; and

(d) frequency of introduction of new products and/or services.

65. Given that Commission's stated purpose of reducing the burden on notifying parties, we suggest that the Commission should reconsider whether it is necessary to increase the burden on notifying parties by requiring such additional information to be provided in the Form CO as a matter of course

Solution: (Form Co)

Delete these requirements.

Met opmerkingen [DP95]: N3

Baker McKenzie

I - Professional consultancies/law firms/self-employed consultants

And more precisely:

Law firm

66. Recital 1.6: The text should refer to Article 339 of the Treaty on the Functioning of the European Union to ensure that rights and obligations arising there from are incorporated by reference into the text of the Form CO.

Met opmerkingen [DP96]: P3

Solution:

Refer to article 339 TFEU

67. Accordingly, we would recommend that this new Section 1.8 be deleted to avoid generating further work for notifying parties less familiar with the procedure.

Met opmerkingen [DP97]: P3

Solution:

Delete section 1.8. A simple reference to the Commission's Best Practices for the Submission of Economic Evidence and Data Collection may suffice in Section 1.2

68. Recital 1.9: We welcome the Commission's efforts to engage in increased international cooperation with other competition agencies around the world, particularly in the areas of substantive appraisal and the formulation of remedy proposals in cases with effects in worldwide markets. We recognise that waivers are indeed necessary to facilitate joint discussion and analysis. However, we caution against the need for such waivers and contacts in cases involving purely local or regional markets. In such cases, international cooperation may lead to an increase in data and documentation requests, as well as an impact on procedural timing, where it is not justified.

Met opmerkingen [DP98]: N2

Solution

We would recommend the insertion of the following words at the end of the first sentence of this new Section 1.9: "and the same geographic markets".

Extended scope of Section 5.4 documents

Section 5.4 substantially extends the scope of internal documents that must be provided by the parties, for all notified concentrations. This would extend to various documents that are entirely unrelated to the transaction (including those containing information on all plausible affected markets and those relating to other, unrealised transactions) and board minutes.

In our view, it would be disproportionate to require these documents to be disclosed for all mergers. These sorts of documents are useful only for assessing the competitive effects of transactions raising relatively complex issues, and even for those transactions, the vast majority of information contained in them will be irrelevant.

69. The proposals would therefore result in wasted time and
70. costs for the notifying parties in gathering the relevant documents, and for the Commission in reviewing them.

Solution (Form CO)

We consider that the existing disclosure requirements are retained on the basis that these are most likely to be relevant to the assessment of the concentration. The Commission could use information requests for additional documents in those cases raising complex issues.

Alternatively, we recommend that the proposed categories of documentation are narrowed in to ensure that they focus on the most relevant documents and are understood by the parties.

Preamble of Section 5.4

71. As currently drafted, Section 5.4 would include any document (electronic or otherwise), such as email and is not subject to any cut-off date. We are concerned that companies would not know how to comply with this requirement, with a significant impact on the timing of the pre-notification procedure and the Commission finding itself overwhelmed with irrelevant documentation.

Solution (Form Co)

The words "in particular" should be deleted. The word "following" should be inserted before "…documents" to make it clear that the sections 5.4 (i)-(iv) are exhaustive

72. The words "or received by" should be deleted. This additional breadth to the requirement would result in notifying parties having to identify and submit irrelevant information - e.g. unsolicited documents from third parties. The existing "received by" wording is a logical means of filtering out less probative data since documents prepared for or by the specified

Met opmerkingen [DP99]: N3

Met opmerkingen [DP100]: N1

Met opmerkingen [DP101]: N3

Met opmerkingen [DP102]: N3

recipients can in broad terms be expected to have a greater probative value than say, unsolicited documents.

Solution (Form Co)

The words "or received by" should be deleted

73. The reference to "the board of management" should be deleted. This is imprecise and could cover a large number of individuals within a company (particularly a large multinational company) which may have a "board of management" for each business unit, division or subsidiary.

Met opmerkingen [DP103]: N2

Solution

The reference to "the board of management" should be deleted. We consider that the current reference to the board of directors or the supervisory board is sufficient.

74. Section 5.4(i) requests minutes of various meetings where the "transaction" was discussed. This should be amended so that the parties need only disclose "sections of minutes which relate to consideration of the competitive impact of the transaction in any of the affected markets". As it stands, the proposal would require detailed and full minutes relating to nonantitrust issues such as tax aspects and employment issues, without any cut-off date. Only minutes relating to relevant meetings held in the last two years should be covered.

Met opmerkingen [DP104]: N3

Solution (Form Co)

This should be amended so that the parties need only disclose "sections of minutes which relate to consideration of the competitive impact of the transaction in any of the affected markets".

75. Section 5.4(ii) asks for presentations analysing different options for acquisitions including but not limited to the notified concentration. If this requirement is to retained, we recommend that it only relates to "presentations prepared in the last two years analysing different options for the notified concentration". We query why the Commission would

find it useful to review other documents. For example, if the notified transaction relates to a widget plant in England for the buyer's EU business unit then does a document discussing the acquisition of a bookstore chain in Sydney for the buyer's Australian business unit four years ago have to be provided? We have concerns that considerable time

76. and effort will be wasted considering compliance with this obligation.

Met opmerkingen [DP105]: N3

Met opmerkingen [DP106]: N3

Solution (Form Co)

If this requirement is to retained, we recommend that it only relates to "presentations prepared in the last two years analysing different options for the notified concentration". (Or delete).

77. Section 5.4(iii) refers to documents which assess "general market conditions" in respect of the concentration. This is unnecessarily broad (and vague) as well as unlimited in time. In our view, the reference to "general market conditions" should be deleted. We consider it more appropriate for the Commission to identify specific market documents or reports that it may consider necessary for its assessment. The parties can then work to provide a response to the tailored document request. This is likely to involve less company time

78. and effort than a response to the broad disclosure requirement.

Met opmerkingen [DP107]: P2

Met opmerkingen [DP108]: P2

Solution (Form CO)

In our view, the reference to "general market conditions" should be deleted. We consider it more appropriate for the Commission to identify specific market documents or reports that it may consider necessary for its assessment.

Notion of plausible markets

Section 6.1: stipulates that the parties must submit "in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions)". Section 6.3 also refers to "plausible" relevant product and geographic markets. The adjective "plausible"

appears in the Commission's existing Notice on simplified procedure but we note that this term has now been elevated to main text of the From CO.

79. In our experience and practice, we draft Form CO notifications to cover genuine alternative product and geographic market definitions that are 'economically realistic' (i.e. they make sense from the industry's perspective). Whilst splitting data to take account of geographic market definitions is typically relatively manageable (e.g. local, national, regional, global), problems can arise with respect to product market considerations.
80. So without greater clarity as to what is specifically meant by the term "plausible" there is a material risk of an expansion of the data required to be submitted to the Commission in the Form CO under this approach.

Met opmerkingen [DP109]: N2

Met opmerkingen [DP110]: N2

Solution

Accordingly, we recommend that the Commission ensures that the term "plausible" has the following footnote: "...'plausible' means all reasonable market definitions but does not mean all conceivable market definitions". This footnote should be added to both the Form CO and the Short Form CO.

Comments on the Revised Implementing Regulation - Annex II (Short Form CO)

81. We consider that greater simplicity
82. and clarity for companies would arise with a clear market share threshold than an HHI threshold - even though footnote 4 states that the change in HHI can be calculated independently of the overall market concentration on the basis of the market shares of the parties. More importantly, with an HHI delta, the threshold in market share terms will vary according to the combination - which is inconsistent with a "bright line" test.

Met opmerkingen [DP111]: P3

Met opmerkingen [DP112]: P3

Solution for both

Therefore, we would recommend that the threshold be replaced with a clear market share threshold (as with the other thresholds in the application of a simplified procedure). We consider that a significant impediment to effective competition is highly unlikely to arise in any concentration where the combined market share is 50% or less and the increment is 3% or less.

83. Section 5.3: we have serious concerns about the insertion of this new section. We consider that it will effectively negate a large part of the benefits of the simplified procedure because it requires the submission of documents (previously allowing the avoidance of considerable time, resources and effort spent searching for, identifying, reviewing, checking, cataloguing and submitting such documents).

Solution

We would recommend that Section 5.3 be deleted in its entirety.

84. In addition, Section 5.3 asks for presentations analysing different options for acquisitions including but not limited to the notified concentration. Again, we note that the Commission only enjoys jurisdiction under the Merger Regulation over the notified concentration. It has no jurisdiction over other contemplated but as yet unimplemented or un-notifiable transactions - these are out of scope. This is particularly the case as the language in Section 5.3 is so broad it could encompass any option for acquisition. In addition, this category does not have a cutoff date. We query why the Commission would find it useful to review such documents particularly during a simplified procedure. We have concerns that much important client time and

85. effort will be wasted considering compliance with this obligation.

Solution

Therefore, this Section 5.3 should be deleted from the Short Form CO.

Met opmerkingen [DP113]: N3

Met opmerkingen [DP114]: N3

Met opmerkingen [DP115]: N3

CEFIC

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Sec. 5.4 of the draft new **Form CO**:

86. To start with, the extension of the documents covered to such only "received" by one of the relevant persons makes the provision unpredictable
87. and unfair since it would even cover any unsolicited – and potentially overlooked – information. The current wording "prepared by or for" covers all documents which can reasonably be expected to be produced.

Solution:

Keep prepare by or for.

88. As regards other "plausible" alternative market definitions their presentation cannot reasonably be a precondition for the completeness of the notification: economists tend to have different opinions on what is plausible. The term "plausible" is too fuzzy and diffuse to base the verdict of uncompleteness of a notification on it. Being required to rely on the Commission's perception of plausibility would expose the notifying party to a too high degree of discretion of an authority, contrary to the rule of law.
89. Furthermore, the kind invitation at the end of Sec. 7 to present all information also in regard of all plausible alternative market definitions might become the gateway to a significant administrative burden for the industry.

Solution

Cefic, therefore, urges the Commission to stick to the narrower scope of Sec. 6 as they are in force today.

Cleary Gottlieb Steen & Hamilton

I - Professional consultancies/law firms/self-employed consultants

And more precisely

Law firms

90. There is no sound rationale for applying the EU Merger Regulation in a manner that imposes costs
91. and delays on such transactions. Even with the use of Short Form, our experience is that such transactions may face delays of up to two months

Met opmerkingen [DP116]: N3

Met opmerkingen [DP117]: N3

Met opmerkingen [DP118]: N3

Met opmerkingen [DP119]: N2

Met opmerkingen [DP120]: N1

or more because of the need to obtain approval under the EU Merger Regulation

Met opmerkingen [DP121]: N3

Solution

However, there is nothing to stop the Commission making clear in the **revised Notice** and revised Implementing Regulation that

(1) in accordance with its obligations under public international law, it does not intend to assert jurisdiction over non-EEA JVs (at the very least, on a transitional basis i.e., pending a change in legislation),

(2) it does not intend to use its fining powers with regard to the execution of these transactions prior to Commission authorisations,

or (3) it will systematically grant a derogation from the suspensory effect imposed by Article 7 of the EU Merger Regulation.

92. First, the Commission's new proposed template for Simplified Procedure and non-Simplified Procedure cases requires notifying parties to provide data and information on all "plausible" market definitions,9 rather than on all likely market definitions pursuant to the principles expounded in the Commission's Notice on the Definition of Relevant Market.10 Besides simply requiring more data and explanations, the plausibility criterion is subjective and therefore seems likely to complicate pre-notification discussions and potentially the substantive analysis.

Met opmerkingen [DP122]: N2

Solution (Simplified, Form Co)

The Commission should therefore either withdraw this amendment or make clear that the duty to propose "plausible" alternative market definitions is limited to those that are not only realistic in the view of the notifying parties (who are well placed to assess market dynamics), but also those that are grounded in precedent, and/or based on the principles expounded in the Commission's Notice on the Definition of Relevant Market.

93. Second, in non-Simplified Procedure cases and certain Simplified Procedure cases, the Commission proposes to broaden the scope of the documents that must be submitted alongside a notification to now require the submission of documents that do not concern the notified concentration. In the majority of cases, the Commission will not need to

review documents that do not concern the notified transaction in order to make a decision on whether the notified transaction is compatible with the Internal Market. It is unnecessary and arguably disproportionate to require parties to submit such documents in every case.12

Solution

The Commission should therefore make clear that the internal documents to be submitted automatically alongside a notification are those which concern the notified concentration only. (Section 5.3 of the Revised Short Form notification template and Section 5.4 of the revised Form CO template.)

94. Third, the Commission's proposal for notifying parties to describe up-front the quantitative economic data available to them14 imposes a potentially significant burden on notifying parties, in particular if the requirement to describe amounts in practice to a requirement to submit.
95. Notifying parties do not always store data formally or in a centralised manner and describing what data is available in a complete and not misleading fashion may itself require considerable work. However, this would lead to a more significant burden still if the duty to describe available data amounts in practice to a duty upon the Commission to consider that data.15

Solution

We consider that the Commission should withdraw this proposal and only request a description of the quantitative economic data or the underlying data itself where it has decided that an examination of these is necessary, following discussions with the notifying parties. (Section 1.7 of the revised **Form CO** template for non-Simplified Cases.)

Clifford Chance

I - Professional consultancies/law firms/self-employed consultants

And more precisely

Law firms

Met opmerkingen [DP123]: N3

Met opmerkingen [DP124]: N3

Met opmerkingen [DP125]: N2

96. the requirement for all plausible market definitions in **Forms CO and RS** is likely to increase substantially the amount of irrelevant information provided by the parties.

Solution

While we have made certain suggestions for clarification of what will be considered plausible, we favour a reversion to the wording of the current forms.

Extended scope of section 5.4 (Form CO) documents

97. We do not consider there to be sufficient justification for the proposed extension of the scope of internal documents that must be provided by the parties, for all notified concentrations. While we recognise that requiring disclosure of some (but not all) of these categories of documents may be productive in some cases, making their disclosure a blanket requirement for all mergers is disproportionate, and will result in wasted time

98. and costs both for the notifying parties in gathering the relevant documents, and for the Commission in reviewing them.

99. Moreover, many of the additional documents that would now be required will be highly commercially sensitive. Notifying parties may suffer considerable commercial harm if there is a leak of such documents discussing financial matters, alternative transactions, employment and issues of commercial strategy unrelated to the concentration.

100. There is also a risk that sensitive issues are disclosed by case team members to company employees with whom they are engaged in the filing and review process, who are not authorised by the company to be aware of them.

101. 2.8.1 "Board of management": The disclosure requirements would extent not only to the board of directors, but also to the "board of managers[…](as applicable in light of the corporate governance structure)" and persons exercising similar functions, or to whom such functions have been entrusted or delegated. Given the absence of any globally-recognised (or even EU wide) concept of a board of managers, this will create substantial uncertainty for companies seeking to gather

Met opmerkingen [DP126]: N2

Met opmerkingen [DP127]: N3

Met opmerkingen [DP128]: N1

Met opmerkingen [DP129]: N1

Met opmerkingen [DP130]: N2

Met opmerkingen [DP131]: N3

these documents. In practice, they will be unable to do so until they have engaged with the Commission in pre-notification discussions to confirm which individuals are to be treated as forming part of the management board.

102. Given the time that it will take to gather the relevant documents, this will delay filing.

Met opmerkingen [DP132]: N3

Solution

If the Commission does opt to retain (Delete) the new categories of 5.4 documents, we submit that the wording of the categories needs to be substantially amended to address various openended and imprecise requirements. In particular:

-Board of management

-Docs received by the relevant board

-Use of words 'in particular' (Section 5.4 I-IV)

-Requirement to provide all minutes of board/shareholder meetings during which the transaction has been discussed.

-Presentations

-Document unrelated to the transaction in question for last three years

All "plausible" relevant market definitions

The revised **Forms CO** and RS include a new requirement for information on "all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions)".

103. Given that each new affected market will trigger a requirement to complete Sections 7 and 8 of Form CO (and that the draft amendments would extend this burden also to "other markets" described in Section 6.4), this places a costly administrative burden on the parties.

Met opmerkingen [DP133]: N1

104. Requiring all plausible market definitions will remove even that limited constraint, such that the only arbiter of what is plausible will be the Commission case team, despite the parties invariably having a better

understanding of the relevant markets. This, in turn, will exacerbate the problem of delayed notifications due to the already-excessive discretion enjoyed by case teams in deciding when a transaction can be notified (see our comments in paragraph 2.2 above).

Met opmerkingen [DP134]: N3

Solution

If the Commission decides to proceed with this amendment of **Forms CO** and RS, we submit that it **should clarify the meaning of plausibility**, in a way that can be relied on by notifying parties.

Definition of affected markets (Form CO)

The Commission proposes to adjust the relevant market shares for affected markets as follows:

2.17.1 from 15% to 20% for horizontally affected markets;

2.17.2 from 25% to 30% for vertically affected markets, neighbouring markets and markets in which a party holds IP that is important to another's market;

2.17.3 from 25% to 20% for markets in which the parties are potential competitors

105. The current definitions give rise to extended information requirements if only one party meets the relevant threshold, even if the other party's activities are entirely insignificant, so requiring a cumbersome waiver application in these circumstances.

Met opmerkingen [DP135]: N3

Solutions

We suggest that there should be a simple exclusion for markets where there is a share of less than 50% in one market, and a share of less than 5% in the other. Alternatively, the Commission might consider a sliding scale, such that the higher the share is in one market, the lower the threshold is in the other.

Contact details

106. Recitals 1.4 and 1.5 of **Form CO** now indicate that any instances of missing or incorrect contact details may be grounds for declaring a notification incomplete. The current form refers instead to "multiple instances". We are concerned that this change imposes unacceptable and unavoidable risks on the parties. Where large volumes of contact details are required, gathering them is costly and time-consuming. To penalise the parties – whether by rejecting a filing as incomplete, or imposing fines for incorrect information - for a typographical error in a fax number (which is unlikely to be used by the Commission in any event) would be disproportionate, and would not reflect a failure of due care by the parties.

Met opmerkingen [DP136]: N3

Solution

We consider that the previous reference to "multiple instances" strikes a more appropriate balance.

PROPOSED CHANGES TO SHORT FORM CO AND THE SIMPLIFIED PROCEDURE NOTICE

The requirement to provide Section 5.3 documents

107. We consider that the proposal to require documents to be submitted with the Short Form - including for concentrations in which the parties have no horizontal overlaps or vertical relationships whatsoever, and extending to documents relating to other, hypothetical transactions - will fundamentally undermine the attractiveness of this notification route for notifying parties

Met opmerkingen [DP137]: N3

Solution

Delete it or exclude concentrations in which the parties have no horizontal overlaps.

Extra-territorial joint ventures

108. …a farcical situation that exasperates clients and wastes large amounts of money.

Met opmerkingen [DP138]: N1

Solution

We therefore consider that the only requirement (if any) for the parties should be a short letter providing the information currently requested **in Section 8.2.2 of the revised** Short Form, i.e. explaining the products or services provided by the JV currently and in the future and why the JV would have no direct or indirect effect within the EEA. **Should** the Commission maintain its insistence on asserting jurisdiction over such transactions**, the only material sections of Form CO are Sections 1, 2, 8.2.2 and 9**, as well as Section 4 to the extent necessary to demonstrate that the parents meet the relevant EU and worldwide thresholds (only).

Competition Law Committee of the City of London Law Society

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Short Form CO

Joint Ventures

109. The proposed revisions do not go far enough to reduce the burden on notifying parties. In particular, more information than is necessary will still be required in situations when the transaction will manifestly have no competitive impact in the EEA.It is unfortunate that the revised Short Form CO has preserved the notification requirement for joint ventures primarily operating outside the EEA with no carve-out or reduction in burden for joint ventures triggering notification purely on the basis of the activities of the parent joint venture partners.

Met opmerkingen [DP139]: N3

Solution

Delete the notification requirement for joint ventures.

110. In particular, paragraph 11 creates uncertainty for parties notifying a joint venture principally operating outside of the EEA – the precise situation in which a significant reduction in burden for the notifying parties is warranted and justified.

Met opmerkingen [DP140]: N3

Solution:

Delete paragraph 11

Plausible candidate markets

The **Form CO** and Form RS have each been revised to include reference to a requirement for parties to provide information relating to "all plausible alternative product and geographic market definitions", and this requirement will be grounds for a finding of incompleteness.

111. Our belief is that the revision will in fact have the opposite effect and will increase the burden on parties.

Met opmerkingen [DP141]: N3

112. The revised wording is also sufficiently vague and open-ended such that parties will no longer have certainty as to the completeness of the notification.

Met opmerkingen [DP142]: N3

Solution

While clearly some analysis of the relevant markets currently takes place in pre-notification, we see no reason for provision of data on all plausible candidate markets to be a barrier to completeness of the notification. (Delete it, or make it less)

Information requirements

Other markets

113. Information on both affected markets and any other markets in which the notified operation may have a significant impact must be provided on the basis of all plausible alternative market definitions, which has scope to add significantly to the burden,

Met opmerkingen [DP143]: N3

114. cost

Met opmerkingen [DP144]: N1

115. and timing for notifying parties for the reasons stated above.

Met opmerkingen [DP145]: N3

Solution

Delete the notion of all plausible alternative market definitions. (Short form CO, Form CO)

Contact details

116. The change from “multiple instances” of incorrect contact details being grounds for declaring a notification incomplete to just “instances” of incorrect contact details effectively increases the threshold for completeness and has scope to materially increase the burden on notifying parties.

Met opmerkingen [DP146]: N3

Solution:

Change this back to multiple instances.

CMS

No frames

Danish Competition Authority

VI - Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.

117. The Danish Government must, however, point out that the proposed expansion of the market definitions in section 6 of both Form CO and Short Form CO ranks very far and may lead to undesired legal uncertainty for the enterprises.

Met opmerkingen [DP147]: N2

Solution:

Change definition of the market in section 6 of both Form CO and Short Form Co to a less broad definition.

Dickson Minto W.S.

I - Professional consultancies/law firms/self-employed consultants

And more precisely:

Law firms

118. We note also that, under **point 16 of the Notice**, the Commission has full discretion as to whether to allow concentrations meeting the requirements of point 6 to be examined under the simplified procedure. We are concerned that this does not provide enough certainty for businesses, particularly where they need to know for timing and transaction structuring purposes whether they will be able to make use of the simplified procedure2.

Met opmerkingen [DP148]: N3

Solution

Our suggestion would be to change the approach so that the starting point is that concentrations meeting the requirements of point 6 will automatically qualify for the simplified procedure, unless there are overriding (exceptional) reasons why the simplified procedure would not be appropriate.

Waivers

119. In particular, we welcome the Commission's indication of which categories of information may not be necessary for its assessment of a case (**see section 1.4 (g) of the Form CO**). We consider that specifically inviting merging parties to consider whether such information is necessary will assist parties in tailoring their notification to the requirements of the Commission and will therefore help to reduce the burden on both the parties and the Commission.

Met opmerkingen [DP149]: P3

Solution

Keep this.

120. Required documents now include those "received by" the board of management or directors instead of just those documents "prepared by" the board. We expect that this change will result in a large number of documents falling within the scope of section 5.4.

Met opmerkingen [DP150]: N3

Solution

Change “received by" the board of management or directors to documents "prepared by" the board.

121. We welcome the new structure of sections 7 and 8 of the **Form CO** as we consider that this structure is more logical and easier to follow. It should also make it easier for notifying parties to identify sections where waivers may be appropriate.

Met opmerkingen [DP151]: P3

Solution

Keep it this way

Short Form CO

122. Under the penultimate paragraph of section 1.1 of the Short Form CO, it is stated that "The Commission may always require a Form CO where it appears either that the conditions for using the Short Form CO are not met…". We are concerned about the use of the words "it appears that" as these afford the Commission wide discretion as to whether the conditions are met (and they establish a low threshold).

Met opmerkingen [DP152]: N3

Solution

We therefore propose the following amendment: "The Commission may always require a Form CO where it appears either that the conditions for using the Short Form CO are not met…".

ECLF

No frames

Freshfields Bruckhaus Deringer

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

Amendments to the notice on simplified procedure

123. The amendments introduce uncertainty concerning the availability of the simplified procedure (in particular as regards concentrations involving small horizontal increments (paragraph 6 and 16 of the draft Notice) and joint ventures (paragraph 5 and 11)).

124. We are concerned that the resolution of these uncertainties in specific cases will lead to protracted pre-notification discussions

125. We are concerned that these proposals will mean that notifying parties (who "in principle" should benefit from the simplified procedure under paragraph 6 of the Notice) will need to furnish case teams with information to enable the case team to exclude the existence of any of the "special circumstances" at paragraph 20 of the horizontal merger notice at pre-notification stage.3 This is an illogical outcome which is at odds with the stated objectives of the Commission's review.

Solution

We would therefore suggest that the proposals are amended to enable cases involving small increments to benefit from the simplified procedure as a matter of course.

Met opmerkingen [DP153]: N3

Met opmerkingen [DP154]: N3

Met opmerkingen [DP155]: N3

126. We consider that two aspects of the revised Notice concerning vertical mergers may give rise to confusion. First, vertical mergers are not expressly excluded from paragraph 6 (which we assume is designed to exempt only horizontal mergers with a limited increment). Paragraph 6 could be read to mean that a larger category of vertical mergers will benefit from the simplified procedure than is permitted in paragraph 5(b)(ii). We assume this is not the Commission's intention.

Met opmerkingen [DP156]: N3

Solution

Specify that vertical mergers are expressly excluded from paragraph six.

127. Second, we note that footnote 14 could be read to imply that vertical relationships exist only if an input is an "important input." This is misleading as the notion of an "important input" is relevant to the assessment of input foreclosure rather than the existence of a vertical link.

Met opmerkingen [DP157]: N3

Solution

We would propose that the text is clarified in both this respect

Amendments to notification forms

128. We recognise that the proposal for notifying parties to provide data and information (in sections 6-8) on all "plausible alternative product and geographic markets" appears to be designed to relieve the burden on notifying parties to provide, as a matter of completeness, data at each of Member State, EU and EEA level. We are aware that the concept is not entirely new, having been included in the definition of "reportable markets" in the Short Form CO. However, we consider that the addition of this concept into the Form CO has the potential to cause confusion

Met opmerkingen [DP158]: N2

129. and uncertainty including, in a worst case, divergent practices as between Commission case teams.

Met opmerkingen [DP159]: N2

Solution for both:

To avoid any misunderstanding about the scope of information to be provided, we propose that the meaning of "plausible" in this context should be expressly

linked to the definition of the relevant market (product and geographic) in light of the criteria in section 6.1 and the Commission's notice on the definition of the relevant market.

Herbert Smith Freehills

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

Paragraphs 5(b)(i) and (ii) and footnote 15 of the Draft Revised Simplified Notice (and section 1.1 of the Draft Revised Short Form CO)(market share thresholds

130. The result is that parties seeking to benefit from the simplified procedure may be required to provide significant additional amounts of market data to address "any plausible" markets which may serve to extend the pre-notification process and therefore undermine the purpose of the Commission's overall objective of streamlining the information requirements.

Met opmerkingen [DP160]: N2

Solution

We would suggest that provision of market information in this context should be limited to all "reasonable alternative market definitions" rather than "plausible" alternative market definitions.

131. We also note that, as currently envisaged by paragraph 16, to the extent that such matters would require substantive submissions by the notifying parties and consideration by the Commission within the pre-notification process, the benefit of the additional gateway is likely to be outweighed by the costs in terms of time and resources by the parties obtaining the Commission's consent for the parties to proceed with a simplified filing and therefore would not contribute toward the stated objective of a reduction of time and costs in respect of the simplified procedure process.

Met opmerkingen [DP161]: N1

Solution:

In addition, we would also note that for certain markets, such as bidding markets, HHI deltas would not be a useful or appropriate test. The Commission should consider whether an alternative de minimis threshold, for example as discussed above, would be appropriate.

Section 5.4 Draft Revised **Form CO**(internal documents)

132. The draft revised section 5.4 introduces significant new document disclosure requirements. We have significant concerns about this proposal, which in our view goes significantly beyond what is needed by the Commission for the purposes of the assessment of a concentration, and in particular for an assessment at Phase I. We note that this proposal is not consistent with, and is in fact contrary to, the Commission's stated aims of cutting the burden on business and streamlining the EUMR process. If implemented this would place significant additional burdens on the notifying parties, which we do not consider are off set in any way by the recognition that waivers may be sought from the requirement to provide information in specific cases(which in any event only appears started to apply to sections 5.4(iii) and (iv)). In practice the notifying party will need to undertake significant work to determine whether or not it would be possible to provide the requested information prior to any such request and acceptance of such a request would remain at the discretion of the individual case team

Met opmerkingen [DP162]: N3

Solution

Delete the new requirements.

Hogan Lovells

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

THE SIMPLIFIED NOTICE

Discretion to withdraw the simplified procedure

133. We welcome the Commission's proposal to extend the application of the simplified procedure by increasing the market share levels by 5% and adding a new criterion (horizontal cases where HHI delta smaller than 150 and combined market share below 50%). We consider that this will significantly increase the number of cases which can be treated under the simplified procedure.

Met opmerkingen [DP163]: P3

Solution

Keep it this way

Joint ventures with less than EUR 100 million in EEA

134. The Commission has proposed a new paragraph 11 of the **Simplified Notice** which sets out the circumstances when a proposed joint venture, even when it has sales of less than EUR 100 million in the EEA, may require a full assessment under the normal first-phase procedure. It includes the circumstance where the proposed joint venture "is likely to achieve significant sales, including in the EEA, in the foreseeable future". We consider that this sentence is too vague and creates legal uncertainty.

Met opmerkingen [DP164]: N3

Solution

We suggest that the sentence is amended to clarify that the exception applies only where the joint venture is likely to achieve annual sales of at least EUR 25 million in the EEA within the next two year period.

Form CO

Section 5.4 – Supporting documentation

135. We note that the Commission has proposed to expand the scope of supporting documents that should be submitted as part of Section 5. As currently drafted, we believe that this imposes a disproportionate burden on notifying parties,

Met opmerkingen [DP165]: N3

136. uncertainty regarding whether relevant information waivers can be secured,

Met opmerkingen [DP166]: N3

137. as well as a risk that pre-notification discussions will be unduly protracted and for the Commission to be burdened with irrelevant information.

Met opmerkingen [DP167]: N2

Solution

The new proposed Section 5.4 requires the submission of "all the documents prepared by or for or received by …" As currently drafted, any document, including an email, would require submission. We consider that the category of documents requested should be defined more precisely, to include only relevant extracts of minutes of meetings, presentations, analyses, reports, studies, and surveys. We consider that it is disproportionate to request entire copies of minutes in view of the fact that these may largely contain irrelevant and highly confidential material.Furthermore, the requirement is not time limited. We believe that a cut-off date of two years should be applied for all Section 5.4 documents.

Section 6 – All plausible alternative market definition

138. We note that the Commission has introduced a requirement in the Form CO (and likewise in the Short Form CO and Form RS) for the notifying party or parties to submit information regarding "in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions)." We consider that this requirement is overly extensive and now creates uncertainty for notifying parties as to whether a notification is complete.

Met opmerkingen [DP168]: N3

Solution

We encourage the Commission to take a pragmatic approach, and not require unnecessarily the parties to submit information based on alternative definitions in view of the high burden that such a request could impose on a notifying party.

Section 8.15 – Fax numbers

139. We note that the Form still requires fax numbers in addition to email addresses. Including fax numbers in addition to email addresses is a significant burden, and is in our view unnecessary as email has now become a preferred method of communication over fax.

Met opmerkingen [DP169]: N3

Solution

We consider that the Commission should only require the name, address, telephone number, and email addresses of appropriate contact persons.

SHORT FORM CO

Section 5.3

We note that the Commission is proposing to add a new requirement for supporting documentation in the Short Form CO. The new proposed Section 5.3. requests "copies of all presentations prepared by or for any members of the board of management, and the board of directors, and the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analysing different options for acquisitions, including but not limited to the notified concentration".

140. We consider that this requirement adds unnecessary additional burden on parties notifying under the simplified procedure, and that this requirement should be deleted.

Met opmerkingen [DP170]: N3

Solution

Delete or –

If this requirement does remain, we consider that a specific footnote should be added, as with the Form CO, indicating that this is a requirement where the notifying party or parties may want to discuss with the Commission a waiver. The requirement should also include a cut-off date of two years, and reference to the "board of management" should be deleted (for the reasons stated above).

JOINT VENTURES WITH NO ACTUAL OR FORESEEABLE EFFECTS WITHIN THE EEA

141. Under the current EU Merger Regulation, the jurisdictional thresholds can be met in the case of a joint venture solely on the basis of the EU turnover of two parents even if the joint venture itself has no turnover or assets in the EU. Whilst the Commission allows these transactions to be reviewed under the simplified procedure, we still consider that this leads to companies having to bear unnecessary burden

142. and costs,

143. and equally for the European Commission having to dedicate unnecessary resources.

Met opmerkingen [DP171]: N3

Met opmerkingen [DP172]: N1

Met opmerkingen [DP173]: N3

Solution:

We would welcome the reform of the EU Merger Regulation to introduce a requirement that a joint venture would only be notifiable if it creates actual or potential effects within the EEA. For example, a new EU turnover threshold for joint ventures could be introduced. In the interim, we welcome the fact that the proposed Short Form in Section 6.2. restricts reportable markets to those in the EEA. (keep this the way it's).

IBA

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

144. The main change proposed by the **revised Notice** is to increase the market share thresholds for qualification for the Simplified Procedure from 15% to 20% for horizontal relationships and from 25% to 30% for vertical ones. This increase by itself should ensure that more cases which do not raise any significant competition concerns will fall within the scope of the Simplified Procedure. The Working Group welcomes this proposed change as a positive development that has the potential to reduce the burden of time

145. and resources that is currently placed on firms and DG Comp with respect to transactions which raise no competition concerns and which must nevertheless be notified by way of a standard Form CO, with all of the information requirements this entails.

Met opmerkingen [DP174]: P3

Met opmerkingen [DP175]: P1

Solution

Keep this way

146. Bearing this in mind, the Working Group encourages DG Comp to reassess whether the HHI Delta or a market share increment threshold in this 20 to 50% horizontal market share category can be further broadened to extend the benefit of the Simplified Procedure to transactions resulting in negligible market share increases.

Met opmerkingen [DP176]: P2

Solution:

Broaden the HHI Delta or market share increment threshold.

147. The Working Group notes that DG Comp has missed an opportunity to use the introduction of a revised Simplified Procedure to provide for a shorter timeline for decisions in such cases. The 25 working day limit set down in Article 10(1) of Council Regulation 139/2004 ("Merger Regulation") is a deadline rather than a requirement that the review process last a certain duration.

Met opmerkingen [DP177]: P2

Met opmerkingen [DP178]: Heel mooi voorbeeld van hoe iets positief gebracht kan worden maar ook negatief!

Solution:

The Working Group encourages DG Comp to consider amending its **revised Notice** to state that decisions on cases under the Simplified Procedure may be issued, for instance, within 20 working days. Including a **target** of 20 working days for Simplified Procedure decisions in the revised Notice would not require any legislative change in terms of the Merger Regulation and could be viewed as a "best practice" aim.

PROPOSED CHANGES TO 5.4 DOCUMENTS

2.1. **Form CO**

2.1.1 Current Section 5.4

148. Notifying parties will have to submit the minutes from any meetings of the board of directors, board of management, supervisory board and shareholder meetings at which the transaction has been

discussed. This proposed change would potentially result in a significant increase in the amount of documentation that needs to be supplied by the parties to the Commission.

149. Notifying parties will need to submit any analysis, report, study or survey which could be relevant in assessing any affected markets. This would place an unduly onerous burden on the notifying parties

150. Notifying parties will be required to submit all presentations analyzing any alternative acquisition options, including but not limited to the notified concentration. The introduction of this change would represent a major and controversial modification which gives rise to serious concerns and does not have a parallel in other major jurisdictions, such as the U.S. or Canada.

151. First, the Working Group questions how this proposed change can be justified substantively, as a presentation analyzing a potential, alternative acquisition (in practice unrelated to the notified transaction) should in principle not be of relevance to the Commission in its assessment of the notified transaction's impact on competition.7 The existing requirements under Section 5.4 are more than adequate in providing the Commission with the documents it needs for the purposes of the competitive assessment. Second, this requirement could result in a significant and unwarranted increase in the amount of documentation submitted to the Commission.

Even if these 'alternative' transactions are abandoned, it could be very damaging to the notifying party and the potential target of the alternative transaction if there was any leak. For these reasons, contemplated transactions which are still under consideration or which have been abandoned are normally kept within a small closed group within the relevant company. If this information had to be provided to the Commission, there would be a number of negative repercussions, including:

152. This information could restrict the open nature of the discussion between DG Comp and the notifying parties (for example, during meetings with DG Comp) depending on who is present from the notifying companies, the discussion and review of documents could not extend to a discussion of alternative transactions.

Met opmerkingen [DP179]: N2

Met opmerkingen [DP180]: N3

Met opmerkingen [DP181]: N3

Met opmerkingen [DP182]: N2

Met opmerkingen [DP183]: N2

153. The parties would be very reluctant to allow the Commission to share confidential information with other agencies reviewing the transaction. Again, the Working Group is aware of the confidentiality assurances which typically exist or are provided when confidential information is shared pursuant to waivers. However, depending on the agency with which the information is shared, companies may be concerned that the formal confidentiality protections are not sufficient to protect highly sensitive commercial data. If the data were to include information on potential alternative transactions, this may further deter parties from providing waivers.

154. Other agencies around the world which look to the Commission's lead in designing and implementing their filing systems and information requirements may seek to expand their information requirements to cover documents assessing alternative transactions. Because of the highly-sensitive nature of this type of information, this would further increase the risk

155. and burden on parties involved in merger filings for the reasons set out above.

156. The draft **Form CO** would have to be redacted for the purposes of a company's own internal review of the draft and clearly would have to be redacted for the purposes of sharing the draft with other parties to the transaction, further adding to the procedural burden of preparing an EU merger filing.

Solution

The Working Group believes that DG Comp should reconsider the additional requirement related to meeting minutes and reduce the requirement to produce analyses/reports/studies/surveys from a three-year to a two-year period. Most importantly, the suggested inclusion within Section 5.4 of presentations which are clearly unrelated to the contemplated transaction (especially documents which relate specifically to other proposed acquisitions) should be re-examined.

Short Form CO; new Section 5.3

Met opmerkingen [DP184]: N3

Met opmerkingen [DP185]: N3

Met opmerkingen [DP186]: N3

Met opmerkingen [DP187]: N3

Notably, however, DG Comp's proposals include a new Section 5.3 in the proposed revised version of the Short Form CO, requesting the parties to submit copies of "all presentations prepared by or for any members of the board of management, and the board of directors, and the supervisory board, as applicable in the light of the corporate governance structure, or the other per son(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analyzing different options for acquisitions, including but not limited to the notified concentration ".

157. On the one hand, DG Comp is suggesting a welcome broadening of the scope of the Simplified Procedure in terms of the number of transactions which would fall to be considered under such procedures. On the other hand, DG Comp is proposing to impose additional and significant burdens on all transactions under the Simplified Procedure (including for those transactions that would have met the Simplified Procedure criteria prior to the proposed changes).

158. The new Section 5.3 therefore appears unwarranted and will, in effect, be an across-the-board increase in the burden on notifying parties as all parties notifying a Simplified Procedure transaction will have to comply with these requirements

Solution

On this basis, the Working Group suggests that the proposed new Section 5.3 runs contrary to the overall stated purpose of DG Comp's initiative — simplification — and therefore proposes that the Commission consider eliminating Section 5.3 from its proposal.

Expanded information waiver

3.1.1 Section 1.4(g) of the **draft Form CO**

159. The Working Group therefore recommends that the Commission also clarify in section 1.4(g) that the identified categories of information are illustrative - not exhaustive. In other words, section 1.4(g) should expressly invite the parties to assess, and seek waivers for, additional types of requested information that are not necessary for the resolution of their case. This can reduce burdens

Met opmerkingen [DP188]: N3

Met opmerkingen [DP189]: N3

Met opmerkingen [DP190]: P2

160. and conserve resources for both the notifying parties and DG Comp in appropriate situations

Met opmerkingen [DP191]: P1

Solution:

The Working Group therefore recommends that the Commission also clarify in section 1.4(g) that the identified categories of information are illustrative - not exhaustive. In other words, section 1.4(g) should expressly invite the parties to assess, and seek waivers for, additional types of requested information that are not necessary for the resolution of their case.

161. The Working Group welcomes the amendment to Sections 1.3 and 1.5 of the draft Short Form CO, as this will significantly streamline the preparation and assessment of nonproblematic transactions.

Met opmerkingen [DP192]: P3

Solution:

Keep sections 1.3 and 1.5 of the draft Short Form CO as it's.

162. The Working Group also encourages DG Comp to consider a further amendment, identifying types of information that may not be relevant and invite discussions to streamline information requirements. This could be achieved by revising the last paragraph of Section 1.6(g). In this way, DG Comp will further advance its objective of streamlining the burden on providing and assessing unnecessary information on notifying parties and the Commission in non-problematic cases.

Met opmerkingen [DP193]: P3

Solution

The Working Group also encourages DG Comp to consider a further amendment, identifying types of information that may not be relevant and invite discussions to streamline information requirements. Revising last paragraph of section 1.6 G

163. The Working Group is concerned that DG Comp's efforts to dispense with unnecessary information in particular cases (discussed

above) may be undermined by further proposed revisions to the draft Form CO (Section 1.2) and draft Short Form CO (Section 1.5).

Met opmerkingen [DP194]: N2

164. The Working Group does not question the Commission's power to request information under the Merger Regulation. However, the potential threat of withdrawal of a waiver, without any criteria as to when such a withdrawal will occur, will likely chill parties' willingness to seek a waiver in the first place.

Met opmerkingen [DP195]: N2

Solution

The Working Group therefore submits that DG Comp should further revise Section 1.2 of the draft **Form CO** and Section 1.5 of the draft Short Form CO to include the specific criteria that will lead to the withdrawal of a waiver for information.

DG Comp's draft proposal for the revision of the Simplified Procedure adds a requirement for the notifying parties to identify all plausible market definitions in the notifications and to provide data under all such alternative market definitions. The proposed amended notification forms also state that the concept "all plausible product and geographic market definitions" is not limited to definitions considered in previous Commission decisions. See: Form CO, Section 6 Market definitions and Section 7 Information on affected markets; Short Form CO, Section 6.1 Market definitions and Section 7 Information on markets; and Form RS, Section 3 Market definitions and Section 4 Information on affected markets.

165. The thorough assessment of all plausible market definitions would significantly increase the workload of the parties to the concentration in terms of data collection, who already frequently struggle to provide market data for hypothetical narrowly defined markets.

Met opmerkingen [DP196]: N3

Solution:

The Working Group thus proposes the relaxation of the revised market definition requirement, or indeed the retention of the language used in the current version of the filing documents.

Section 8

5.5. Upstream/downstream and neighbouring markets

166. In keeping with the comments above, the Working Group considers that the requirement to provide information about upstream/downstream or neighbouring markets from the markets on which the joint venture is active should be limited to upstream/downstream or neighbouring markets in the EEA. This again will avoid wasting resources of the parties and DG Comp on matters that could not result in competition concerns in the EEA.

Met opmerkingen [DP197]: P3

Solution

In keeping with the comments above, the Working Group considers that the requirement to provide information about upstream/downstream or neighbouring markets from the markets on which the joint venture is active should be limited to upstream/downstream or neighbouring markets in the EEA

ICC

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

CHANGES TO FORM CO AND FORM RS

Extended scope of Section 5.4 documents

The **draft Form CO** substantially extends the scope of internal documents that must be provided by the parties, for all notified concentrations. They would include various documents unrelated to the transaction in question (including those containing information on all plausible affected markets and those relating to other, unrealised transactions) and board minutes. They would also include documents received by (and not just prepared for or by) board members, as well as documents prepared by or for, or received by, members of the "board of management", or other persons exercising similar functions.

167. For the reasons set out below, we consider that making disclosure of these documents a requirement for all mergers is disproportionate, and will result in wasted time

168. and costs both for the notifying parties in gathering the relevant documents, and for the Commission in reviewing them

169. Moreover, given that the Commission's EUMR procedures are highly regarded by many less mature merger control regimes, it is likely that if the Commission decides to gather such a wide range of sensitive and confidential documents, a number of other regimes will follow suit, including ones with less rigorous protections against inappropriate disclosure to third parties and other government institutions

Solution

Accordingly, the Task Force submits that a more proportionate approach would be to limit the disclosure requirements to those most likely to be relevant to the assessment of the concentration – i.e. those required under the **current Form CO** – and to rely on information requests for additional documents in those cases raising complex issues.

170. Many of the additional documents that would now be required will be highly commercially sensitive, such as board minutes discussing financial matters, employment and issues of commercial strategy unrelated to the concentration. An inadvertent leak of such documents may cause notifying parties to suffer considerable commercial harm.

171. While we recognise that the Commission has a good track record in this respect, gathering large volumes of documents that are irrelevant to the Commission's assessment will nevertheless increase the risk that such documents are accidentally misplaced, disclosed, or stolen.

172. "Board of management": The disclosure requirements would extent not only to the board of directors, but also to the "board of managers […] (as applicable in light of the corporate governance structure)" and persons exercising similar functions, or to whom such functions have been entrusted or delegated. In the absence of any globally-recognised (or even EU wide) concept of a board of managers, this will create substantial uncertainty for companies seeking to gather these documents, and will make it impossible to do so until the

Met opmerkingen [DP198]: N3

Met opmerkingen [DP199]: N1

Met opmerkingen [DP200]: N2

Met opmerkingen [DP201]: N1

Met opmerkingen [DP202]: N2

Met opmerkingen [DP203]: N3

Commission has confirmed in pre-notification discussions which individuals are to be treated as forming part of the management board.

Solution

Accordingly, the Task Force submits that a more proportionate approach would be to limit the disclosure requirements to those most likely to be relevant to the assessment of the concentration – i.e. those required under the current **Form CO** – and to rely on information requests for additional documents in those cases raising complex issues.

173. There is a risk that the extended scope (including documents received by board members/members of the boards of management) will lead to more documents being disclosed that are covered by legal professional privilege in the US, or other countries. If companies were to disclose documents protected by US legal privilege, there is a material risk that the company will waive attorney-client privilege. Even if the documents have been requested by the Commission with sanctions for non-compliance, this may be viewed by a US court as insufficient. If a company operates in a technology industry in which very strict confidentiality and security protocols are required, such an outcome would be devastating.

Met opmerkingen [DP204]: N2

Solution (Form CO):

We therefore request that the wording revised Section 5(4) expressly states that the disclosure obligation does not extend to documents covered by legal professional privilege under the law of any country in respect of which the relevant legal advice was given.

All “plausible” relevant market definitions

The revised Forms CO and RS include a new requirement – as a condition of completeness of the Forms

174. It is undesirable, because it will shift the onus of determining what it plausible from the parties to the case team, with no practical possibility for parties to challenge this determination (even if a transaction timetable did permit a challenge before the Union Courts, the threshold of "plausibility" is too low to offer a sufficiently predictable chance of success). The resulting multiplication of "affected markets" (and requirements to complete Sections 7 and 8 of Form CO for each) will have an adverse impact on the timing,

175. Predictability

176. and burden of EUMR pre-notification

Solution:

If the Commission decides to proceed with this amendment of Forms CO and RS, we submit that it should clarify that "plausible" is not intended to mean "conceivable" but rather refers to realistic alternative markets that are economically justifiable in light of the information available to the case team.

Met opmerkingen [DP205]: N3

Met opmerkingen [DP206]: N3

Met opmerkingen [DP207]: N3

Icla

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Simplified Procedure / Short Form CO

"All plausible alternative" market definitions

We are also concerned at the proposed requirement that parties must submit, in addition to those market definitions considered relevant by the parties, "all plausible alternative product and geographic market definitions". This requirement is expressed to include, but is not limited to, alternative product and geographic market definitions that were considered in previous Commission decisions.

177. In our experience, significant time is already spent in pre-notification discussions considering potential market definitions. We consider that this proposed amendment again imposes a more stringent requirement for notifying parties.

178. It also has the potential to create uncertainty for businesses, as "plausible" is a term which imports a considerable degree of subjectivity.

179. Depending on its interpretation by the relevant case team, this requirement could in practice result in a substantial undertaking for notifying parties rather than simplifying the merger notification process.

Met opmerkingen [DP208]: N3

Met opmerkingen [DP209]: N3

Met opmerkingen [DP210]: N2

Solution:

Use a stricter definition than plausible.

180. We are concerned that the proposed amendment to Point 5(a)(i) of the **Draft Revised Simplified Procedure Notice** may result in confusion for notifying parties undertaking jurisdictional analysis.

Met opmerkingen [DP211]: N2

Solution:

The introduction of the wording "at the time of the notification" appears to be at variance with the usual position of using the most recent audited accounts for this purpose which continues to be set out in footnote 6 to Point 5(a)(i). Amend this.

Declaration of incompleteness

181. We have concerns about the Commission's proposed amendment to Point 22 of the **Draft Revised Simplified Procedure Notice**. Currently, where the Commission considers it appropriate in a particular case, it has the option of reverting from the short form procedure to a normal first phase merger procedure and launching an investigation and / or adopting a full decision. Under the proposed amendment, the

Commission would now also be permitted to consider the notification as "incomplete in a material respect"7 if it has not received a full form notification. We consider that this provision could result in significant delays in practice to the merger notification timetable

Met opmerkingen [DP212]: N2

Solution:

Delete this amendment

Changes to Form CO

Supporting documentation

182. We consider these additional requirements disproportionate and extremely burdensome, in contrast with the principle of simplifying the merger process.

Met opmerkingen [DP213]: N3

183. The imposition of these requirements in their current form as standard in all cases would place a very significant administrative burden on notifying parties.

Met opmerkingen [DP214]: N3

Solution:

We therefore suggest that these requirements should not apply as a matter of course in all cases. Rather, such information (copies of all the documents prepared by or for or received by any member(s) of the board of management, presentations analysing different options for acquisitions, minutes of the meetings of the board of management, should only be requested by the Commission case team where it is strictly deemed necessary in the circumstances of a particular case and parties should be provided with adequate opportunity to redact commercially sensitive information which is not of relevance to the case.

JBCE

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Extension of the Scope of the simplified procedure

- Increase in market share thresholds

The Commission proposes to increase the market shares that serve as the thresholds below which a transaction may qualify for simplified treatment from 15% to 20% for horizontal relationships and from 25% to 30% for vertical integration. The increase of these thresholds will most certainly lead to an increased number of cases falling within the scope of the simplified procedure.

184. JBCE can only support this change as it brings the present thresholds in line with thresholds relied upon in other areas of competition law (e.g. rules concerning vertical restraints and horizontal cooperation) below which there are generally speaking no major competition concerns detected. It therefore has the benefit of increased consistency and may bring within the scope of the simplified procedure certain transactions that currently are the subject of notification by means of a **regular Form CO**

Met opmerkingen [DP215]: P3

Solution:

Keep this way

Procedural timing (Form CO)

185. JBCE notes that the Commission does not fix a set short deadline for the handling of a simplified procedure. JBCE realizes that the Commission may be bound by the timing of the consultation with third parties and certain internal requirements, but it would have welcomed a firm short timeframe for the clearance of simplified Phase I cases. Given the ground that is usually already covered during pre-notification

discussions, it should be possible to come to an early conclusion. This is generally felt to be of great benefit to business. Sometimes the gain of only a few days for implementation of a transaction may bring significant advantages to business.

Met opmerkingen [DP216]: P3

Solution

Commission practice in some cases has demonstrated that the implementation of such shortened timeframe can be achieved. JBCE therefore requests the Commission to make an additional effort in setting itself a more ambitious target for the timing of a case decision in simplified case .

a) Form CO

186. Internal documents The Commission is proposing to extend the scope of Section 5.4 of **Form CO** to include information that is currently not requested. In the view of JBCE, the proposed extension of this information requirement of Section 5.4 is likely to bring about an additional burden on notifying parties that is not justified in the context of a simplification exercise aimed at making administrative procedures less burdensome for business.

Met opmerkingen [DP217]: N2

Solution

JBCE therefore urges the Commission to re-consider its proposed modification on this point.

ii) Quantitative economic data

The introductory remarks of the current draft of the revised Form CO contain the introduction of a requirement to provide information on quantitative economic data (see heading 1.8 of draft revised Form CO). The Commission has in the past always been able to request such quantitative economic data on a case by case basis where relevant to a particular case.

187. JBCE requests the Commission to remove this additional requirement from the text of the revised Form CO to avoid that the

administrative burden on companies is unnecessarily increased.

Met opmerkingen [DP218]: P3

Solution

JBCE requests the Commission to remove this additional requirement from the text of the revised **Form CO**

Contact details

The current draft of the **revised Form CO** contains a number of changes with regard to the requirement to provide contact details. More specifically: (i) the requirement to provide contact details for suppliers has been taken out; (ii) the Commission may request any additional contact details it may like to receive (footnote 43 of the draft revised Form CO); and (iii) "instances" of incorrect contact details may render a notification incomplete (see page 4 of the introduction to the draft revised Form CO). In addition, the categories of requested contact details remain the same.

188. JBCE, on the other hand, is concerned that giving case teams the opportunity to ask for any other contact details they may see fit and making the provision of these contact details a requirement for the completeness of the Form CO in practice could result in severe delays of submissions.

Met opmerkingen [DP219]: N3

Solution:

JBCE thus urges the Commission to delete footnote 43 from the draft revised **Form CO**.

Alternative market definitions and data on such markets

In Section 6 of both forms (**CO and simplified CO**), the Commission requires that the notifying party or parties submit, in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions). In practice, controversy on market definitions

is usually dealt with at the pre-notification stages in concert between the parties and the Commission. In fact, it is precisely controversy on relevant markets that is often the cause for significant delays in the actual filing of transactions.

189. If the parties will now have to provide their assessment of all plausible market definitions, regardless of the understanding reached during pre-notification also in the notification itself, this will significantly increase the burden on the notifying parties, particularly in markets in respect of which data is scarce and for market definitions that are hypothetical only.

Met opmerkingen [DP220]: N3

Solution

JBCE therefore invites the Commission to reconsider its proposals on this point (plausible).

Local effects of JVs.

JBCE would like to attract the Commission's attention to the fact that its members have had to notify transactions that in fact had no effect in the EU whatsoever, as there was no link to the EU Market or activity foreseen that could possibly affect trade within the EU. Currently, the jurisdictional thresholds clearly bring such transactions within the scope of the Commission's review. Given the significant burden this places on the parties to such transactions, the present review of the simplified procedure may be the ideal opportunity for the Commission to dispense of this category of transactions for review, e.g. by providing for a set of nominal review criteria. The Commission could introduce such criteria in line with the Gencor case, and only require simplified or full notification for those "extraterritorial" cases that have a foreseeable and substantial effect on competition within the EU.

190. If the Commission wishes to avoid legislative change on this point, it could for joint ventures that would fall within the scope of the above proposed criteria require a nominal notification, made on a **Nominal Form CO** that requires only a minimum of information for the Commission to assess whether the criteria are indeed met. Many off-

shore joint ventures would thus no longer require notification beyond a nominal one. This would have the potential of seriously reducing the burden on the parties involved, as well as on the Commission.

Met opmerkingen [DP221]: P3

Solution:

JBCE invites the Commission to allow for a nominal notification and assessment route available for those joint ventures that are created outside the EU that will not have a foreseeable and substantial effect on competition within the EU.

Jones Day

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

REVISED SECTION 6 FORM CO ON MARKET DEFINITIONS

191. The draft revised Section 6 on Market definitions in **Form CO** provides that affected markets shall be defined not only in accordance with what the parties deem to be the relevant product and geographic markets, but also as concerns "all plausible relevant market definitions". As a result, the provision of detailed market information on affected markets (Sections 7 and 8) would be required for each of the affected markets under all such plausible market definitions. As further discussed below, in some instances, the outcome may be similar to the Commission's current practice; however, in many other cases, this new approach would lead to a very significant increase in information to be provided, all subject to a finding of completeness of the Form CO. 6.

Met opmerkingen [DP222]: N3

192. The proposed requirement is vague and of potentially very broad reach. It would therefore create considerable legal uncertainty and scope for arbitrariness. A "plausible" relevant market could be interpreted as encompassing any variant of the relevant market set forth by the parties, to the exception of those expressly ruled out by the Commission or the Community Courts in previous decisions.

Met opmerkingen [DP223]: N3

193. Such obligation would inevitably expose parties to unrealistic requests.

Met opmerkingen [DP224]: N3

Solution:

Specify plausible or replace it by a another word that stays closer to the original.

194.

EXPANDED SECTION 5.4 **FORM CO** DOCUMENT REQUIREMENT

The increased scope of the proposed supporting document requirements, which exceeds corresponding US provisions under Article 4(c) HSR, would inevitably put a substantial additional burden on parties

Met opmerkingen [DP225]: N3

Solution:

Decrease scope of the proposed supporting document requirements.

Linklaters LLP

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

Plausible markets

195. Indeed, we fear that it may lead to results opposite to those intended by the proposed reform

Met opmerkingen [DP226]: N2

Solution

Therefore, we invite the Commission to revisit its proposal to include the "all plausible market definitions" in the definition of what constitutes an affected market. We believe that the Commission should continue to encourage notifying parties, where appropriate, to provide information on alternative market definitions. But we would prefer that the Commission does not make it an explicit condition of completeness.

Additional Section 5.4 Documents

The requirement to provide Section 5.4 documents is significantly expanded and is no longer limited to analyses associated with the concentration.

In particular, the proposed requirement of Section 5.4 (iv) to provide documents produced in the last three years for the purpose of assessing any of the affected markets goes far beyond what is necessary for the Commission to analyse most transactions. In the majority of cases, the Commission will neither require such information nor will it have the time or resources to review the large volume of documents such a request is likely to produce. Requiring such documentation as a condition for completeness of the **Form CO** is disproportionate. We believe that it would be better to maintain the current practice, in which the Commission can request these documents in appropriate cases, without making it a requirement in all cases. We note that parties are able to request a waiver in relation to the provision of such Section 5.4 documents. However, our experience shows that case teams may be reluctant to provide waivers – in particular early in the process, when they are still familiarising themselves with the case.

196. We believe that this change will have the effect of unnecessarily increasing the burden

197. and costs placed on the parties, and is at odds with claims in the Commission's statement in its recent press

Met opmerkingen [DP227]: N3

Met opmerkingen [DP228]: N1

Solution:

Delete or limit the three year limit.

Contact details and incompleteness

198. We note that the Commission has proposed a change effectively increasing the threshold for completeness as regards contact details. The wording has changed from “multiple instances of incorrect contact details may be a ground for declaring a notification incomplete” to simply “instances” of incorrect contact details. In our view this change is unnecessary and burdensome.

199. The provision of one or two contact details which are, in the Commission’s view, not complete should not be used as a reason to declare a filing incomplete. This would impose an unrealistically high burden on parties

200. and further delay the proces

Solution

“multiple instances of incorrect contact details may be a ground for declaring a notification incomplete” instead of simply “instances” of incorrect contact details.

Met opmerkingen [DP229]: N3

Met opmerkingen [DP230]: N3

Met opmerkingen [DP231]: N3

Merger streamlining group

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Market Share Thresholds for Simplified Procedure Eligibility

201. The MSG applauds the proposed increase in the Simplified Procedure thresholds for horizontal and vertical affected markets to 20% and 30%, respectively. These changes will reduce the resources expended on straightforward transactions.

Met opmerkingen [DP232]: P1

Solution

Keep

Plausible Alternative Markets

202. The MSG is very concerned that the requirement to identify all "plausible" markets will impose unnecessary costs

203. and burdens. The proposed revisions to Sections 6.1 and 6.2 of the revised draft Short Form CO provide that parties to concentrations must submit product and geographic market definitions they consider relevant, as well as "all plausible alternative product and geographic market definitions" that may be affected by the transaction.

Met opmerkingen [DP233]: N1

Met opmerkingen [DP234]: N3

Solution

The MSG respectfully submits that the Commission should not require merging parties to provide information regarding all "plausible" markets.

Supporting Documentation

The Proposals would expand the requirement to provide supporting documentation with a merger notification filing. The new Section 5.3 in the **Short Form CO** and **Section 5.4(ii) of the Form CO** require the production of all presentations analysing different acquisition options, "including but not limited to the notified concentration".

204. The MSG recognizes that the production of relevant documents can facilitate the review of transactions. However, the Group is concerned that the scope of these requirements is overly broad and unnecessarily burdensome on merging parties, particularly in relation to the Simplified Procedure.

Met opmerkingen [DP235]: N3

Solution

The MSG encourages the Commission to reconsider the requirement to produce documents unrelated to the notified concentration.

Shearman & Sterling LLP

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

Review of Simplified Procedure

Thresholds applicable for the Simplified procedure (draft form CO)

The Commission's current proposal is that there should be a presumption that the simplified procedure is applicable for all transactions where there is: (i) a horizontal combined market share of less than 20%, raised from the previous level of 15%; and (ii) a vertical relationship and the individual or combined market share is less than 30%, raised from the previous level of 25%.

205. These changes are expected to increase the number of mergers that are applicable for consideration under the simplified procedure. However, we believe the increase will not be meaningful. We therefore urge the Commission to reconsider and increase the threshold for horizontal mergers still further to a level which will cover all mergers where it is reasonable to presume that there will be no significant impediment of effective competition. This will allow the proposed amendments to result in a material increase in the number of mergers applicable for review under the simplified procedure.

Met opmerkingen [DP236]: P3

Solution

We suggest that this level should be raised to a combined horizontal market share of 25% (i.e. the level at which the Horizontal Merger Guidelines2 and the EUMR3 consider a merger not to impede effective competition).

206. In Section 1.9 of the **draft Form CO** reference is made to "other competition authorities outside the EEA" without further qualification. In practice, such "blanket waivers" could lead to the disclosure of highly sensitive and confidential information to (numerous) competition authorities without a proven trackrecord of cooperation with the Commission.

Met opmerkingen [DP237]: N2

Solution

Against that background, we suggest that the Commission limits the scope of the current proposal to authorities with whom it has an established practice of cooperation.

Section 6.4 – Significant impact markets (draft form CO)

207. As regards the Commission's apparent intention to lower the market share threshold from 25% to 20% for markets on which one of the parties is active and another is a potential competitor, we respectfully submit that this change does not appear to be in line with the spirit of the simplification project and is unwarranted. Lowering the threshold creates additional information requirements and therefore an additional burden in situations which do not appear liable to raise competition concerns. In this respect, similar considerations apply as set forth in respect of the thresholds for affected markets, at paragraphs 31 - 33, above.

Met opmerkingen [DP238]: N3

Solution

Don't lower the market share threshold.

Section 7 Market Definition

208. That said, we are concerned that the requirement to provide information on any plausible market definition is overly broad and we, therefore, request that the Commission use restraint when interpreting these provisions. To provide considerable market data on multiple product market definitions, which may not be consistent with how the businesses view the markets, would be exceptionally burdensome on the parties.

Met opmerkingen [DP239]: N3

Solution

Request restraint when interpreting or to provide a different definition.

Vinge

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

Short Form CO section 6

Market definitions

209. A widened requirement to submit "all plausible alternative product and geographic market definitions" has been introduced in the Form CO, Short Form CO and the Form RS. This phrasing risks being interpreted as an increase in the information burden on the notifying parties, contrary to the Commission's rationale for the Proposal.

Met opmerkingen [DP240]: N2

Solution:

Change the word plausible or make sure that the definition of alternative product and geographic market definitions are discussed during the pre-notification phase.

Contact details

210. The use of fax for questionnaires is outdated in the case of most industries, and finding the correct fax numbers (in particular of competitors with which the notifying parties have no business relation), if indeed they exist, is a waste of time and

Met opmerkingen [DP241]: N3

211. resources.

Met opmerkingen [DP242]: N1

Solution:

Delete fax as a requirement.

212. There should not be any requirement to submit 5(4)-type documents under a Short Form notification. Such an obligation would constitute a significant increase in the burden of the Short Form procedure, which runs contrary to the spirit of the Commission's

Met opmerkingen [DP243]: N3

revision. Furthermore, there is no objective justification for such a burden in Short Form cases, which in principle are unproblematic.

Solution:

Delete

Annex 3: frames case 3

BusinessEurope

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Para 21.

1. We therefore suggest that it could be appropriate to change “or” to “and”, thereby ensuring that a high debt to equity ratio combined with an inability to service that debt are together a clear indication of an undertaking in difficulty.

Met opmerkingen [DP244]: P3

Solution:

We therefore suggest that it could be appropriate to change “or” to “and”

2. We welcome the fact that the compatibility criteria are now more detailed, as this will add to legal certainty.

Met opmerkingen [DP245]: P3

Solution:

Keep this way

3. We concur with the specific reference to the Deggendorf principle in point 99. However, we recommend that the draft makes it clear that the guidelines would not apply to a given company in difficulty if recovery of previous unlawful aid has not taken place, thereby reducing the possibilities that the beneficiary in question receives the aid.

Met opmerkingen [DP246]: P3

Solution:

Make clear that the guidelines would not apply to a given company in difficulty if recovery of previous unlawful aid has not taken place.

European Trade Union Confederation (ETUC) and industriAll – European Trade Union

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade unions and professional associations

Para 18 (part of 2.1 sectoral scope)

4. The scope of the guidelines should be extended to the coal and steel sectors, so that they can also be protected by this general rule, now that their specific protective regimes have expired.

Solution:

Proposed amendment: "These guidelines apply to aid for all undertakings in difficulty, ~~except to those operating in the coal sector or the steel sector~~ and those covered by specific rules for financial institutions"

§ 31 (part of 2.4: Aid to cover the social costs of restructuring) "Restructuring normally entails reductions in or abandonment of the affected activities. Such retrenchments are often necessary in the interests of rationalisation and efficiency, quite apart from any capacity reduction that may be required as a condition for granting aid. Regardless of the underlying reason, such measures will generally lead to reductions in the beneficiary's work force".

5. Proposed amendment: To be suppressed altogether. It is worded as if it sets a standard for restructuring measures, and that this norm will be that the work force will be reduced. This is clearly not acceptable for organisations whose objective clearly is the preservation of high-quality employment.

Solution:

To be suppressed altogether

NEFI

II - In-house lobbyists and trade/business/professional associations

Met opmerkingen [DP247]: P3

Met opmerkingen [DP248]: P3
In the eye if the writer this is a negative consequence

and more precisely:

Other organisations

Chapter 2.2. Meaning of ‘undertaking in difficulty’

6. New independent conditions (e)(1) and (e)(2) have been added for a company to state that it is in difficulty. We feel that the scope of the proposed criteria (e)(1) and (e)(2) for the definition of an undertaking in difficulty is unnecessarily expansive. The new proposed criteria are disproportionately restrictive compared to previous criteria for the definition of an undertaking in difficulty.
7. Consequently, such a strict criterion would significantly increase the number of undertakings in difficulty, as defined here, even if they were actually viable
8. As a result of this, implementation of criteria (e)(1) and (e)(2) in accordance with the proposal would significantly restrict the granting of aid/funding in situations where public intervention and the addressing of market failure would be most justified.
9. If the draft is realised in its proposed form, it will have considerable negative impacts on the availability of funding for small and medium sized enterprises and, in turn, on the general financial market situation.
10. This would surely lead to an increase in otherwise avoidable bankruptcies in Europe's already difficult economic situation

Met opmerkingen [DP249]: n1

Met opmerkingen [DP250]: n3

Met opmerkingen [DP251]: n3

Met opmerkingen [DP252]: n1

Met opmerkingen [DP253]: n3

Solution:

As a result, we recommend that proposed criteria (e)(1) and (e)(2) be omitted from the definition of ‘undertaking in difficulty’. Instead of these separate and independent criteria, we want to emphasise the importance of a comprehensive examination of an undertaking’s economic situation. This must be made by using at least two or three different criteria that all must deliver until the undertaking can be classified as an undertaking in difficulty.

11. We would also like to draw attention to the criteria concerning the loss of share capital/assets mentioned in point 21(a) (b). We would like to point out that this criterion may also become problematic if given a strict interpretation. Our experience shows that in some situations the loss of

Met opmerkingen [DP254]: n2

share capital/assets may be of temporary nature and can still be rectified with private funds.

Solution:

Thus, we propose that the period for examining these criteria is extended to two successive years.

Chapter 3.7. Transparency

12. The draft Guidelines require Member States to publish on a central website, information on the notified State aid schemes. It seems disproportionate (in terms of administrative management)
13. and contrary to bank confidentiality to include the name of the recipient firms, the form and amount of aid granted.

Met opmerkingen [DP255]: n2

Met opmerkingen [DP256]: n2

Solution:

The website could be limited to include the following information: the full text of the notified aid scheme, its implementing provisions and the name of the authority granting the aid.

European Association of Public Banks

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Trade and business associations

Point 21 a) and b)

14. According to Paragraphs a) and b) a limited liability company will be considered in difficulty when, where more than half of its subscribed share capital has disappeared as a result of accumulated losses. The current definition also includes the criterion that “more than one quarter

of that capital has been lost over the preceding 12 months". By removing this dynamic perspective recent positive developments in the company are ignored.

15. Consequently companies that work with market means in a positive development phase to get out of an economic through could benefit from rescue and restructuring aid but not from other means for example advice or measures and investments reinforcing the turnover.

Met opmerkingen [DP257]: n3

Met opmerkingen [DP258]: n3

Solution:

Against this background the current rule which correctly reflects the increased use of capital in such a situation (and thus confirming the status of undertaking in difficulty) should be maintained.

Point 21 e)

16. According to the draft a company falls into the definition when the undertaking's book debt to equity ratio is greater than 7.5. This would mean that an equity ratio of less than 12% would be sufficient to make a company be considered in difficulty. This would have serious consequences for the European SME sector as many companies would fall under the definition and be excluded from support measures.

Met opmerkingen [DP259]: n3

Solution:

Change the ratio or explain that this is not the case.

A further newly proposed criterion is that the undertaking's [EBIT]/ [EBITDA] interest coverage ratio has been below 1.0 for the past two years. Our members believe that it should be considered that depreciations are non-cash items so that the use of EBIT does not automatically imply payment difficulties for the observed duration of company. Especially for undertakings in a strategic reorientation it can easily happen that their EBIT is below the interest coverage. The criterion is therefore unsuitable to define undertakings in difficulties. It should be noted that in order to verify the EBIT or the EBITDA it is necessary to issue a financial statement. However in certain Member States smaller companies do not fall under the obligation of preparing a financial

report (such as self-employed entrepreneurs, etc.). When verifying the possibility to grant aid to any company the status of undertaking in difficulty and thus the two criteria would have to be checked.

17. This would lead to a de facto obligation for all companies to issue financial statements. This would be disproportionate and not in line with the "Think Small First" principle of the EU Small Business Act.

Met opmerkingen [DP260]: n3

Solution:

Change the criterion.

BDI

No frames

Salzgitter

No frames

Denmark - ministry

VI - Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.

18. We believe Undertakings in need of aid should discontinue all activity connected with the expansion of business - production- and/or service-capacity until there is no longer a need for state aid. It would create difficulty if an undertaking requiring aid based on the guidelines is taking in extra orders, where the restructuring work has not yet commenced. They should be required to cancel these orders to prevent state aid from creating an overcapacity in the respective markets.

Met opmerkingen [DP261]: n3

Solution:

Explain that businesses need to cancel extra orders until the restructuring is done.

Finland - ministry

VI - Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.

Changes proposed to the definition of 'undertaking in difficulty'

19. In Finland's view, however, the shift to using hard assessment criteria should not mean that the set criteria are so strict that perfectly viable undertakings are excluded from the scope of State aid legislation. There is a risk that the unconditional and one-sided application of individual hard criteria may have a negative effect on the access to finance for SMEs especially in sectors which experience great seasonal variation.
20. Individual hard criteria may also, under certain circumstances, make the system of granting State aid unnecessarily rigid.

Met opmerkingen [DP262]: n1

Met opmerkingen [DP263]: n2

Solution:

Thus, we consider it appropriate to increase the flexibility of the hard criteria included in the guidelines.

Finland supports the Commission's proposal to combine the indicators concerning debt to equity and interest cover ratios and to make them cumulative (paragraph 21(e) of the draft guidelines). In Finland's view, it is also reasonable to use EBITDA instead of EBIT to ensure the uniform application of the definition in all Member States.

21. In our view, the proposed draft guidelines will cause obvious problems because a business activity that has, in practice, begun well but has not become profitable in three years could not be supported, for example, under the Block Exemption Regulation or the Risk Capital Guidelines.
22. In such situations, the withdrawal of public financing may make it considerably more difficult to finance SME growth in a way that cannot be considered in line with the common objectives of the EU.

Met opmerkingen [DP264]: n3

Met opmerkingen [DP265]: n2

Solution:

Finland proposes that in the above-mentioned forms of aid the assessment of whether a given undertaking is in difficulty should be based on paragraph 21(c) of the draft guidelines and that the safe harbour period of a newly created

undertaking should be extended from three to five years (paragraph 23(b) of the draft guidelines).

23. The criteria in paragraphs 21(a) and (b) of the draft guidelines concerning the loss of share capital / capital may turn out problematic when they are applied as individual indicators in assessing the financial difficulties of an undertaking. For example, microenterprises that typically have a small share capital may easily fulfil the criterion. It should also be noted that in certain situations the loss of share capital / capital may be temporary and can be corrected with private funds.

Met opmerkingen [DP266]: n2

Solution:

Therefore, we propose that the time period considered in relation to these criteria be extended from one year to two consecutive years.

Rules governing the compatibility of aid

24. Finland supports the Commission's proposal of including in the scope of the guidelines a new form of aid, temporary restructuring support. The new form of support involves a lighter procedure and allows Member States to better address the liquidity problems of undertakings in difficulty. We find it reasonable that State aid rules allow the support to be granted for a period of 18 months.

Met opmerkingen [DP267]: p3

Solution:

Keep this way

25. In addition, farms in difficulty have usually already cut down their forests and sold the timber or have sold the forest land altogether. Selling assets related to production would reduce the future chances of the farm to survive as a production unit. Particularly when the structure of a farm has been significantly improved with investments, often including considerable public financing, the fact that a farm that is in itself viable

ends its production may have adverse effects on the production structures in the area.

Met opmerkingen [DP268]: n2

Solution:

Finland is of the opinion that the guidelines should continue to include the exceptions for the agricultural sector included in Chapter 5 of the current guidelines that are now missing from the draft. In Finland's view, such specific rules would provide a means of addressing the problems mentioned above.

Croatia - ministry

VI - Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.

26. On the other hand, when it comes to definition of undertaking in difficulties (paragraph 21), Croatia is of an opinion point "d)" should be removed, considering the fact that establishing credit ratings of undertaking implies existence of registered credit rating agencies within Member States, in line with Regulation (EC) No 1060/2009 of the European parliament and of the Council of 16 September 2009 on credit rating agencies. This would result in undertakings from Member States with less developed financial institution infrastructure not being able to satisfy the requested condition.

Met opmerkingen [DP269]: n2

Solution:

Remove point 21D or if this provision is to remain within the final text of the Guidelines, it is Croatia's proposal to exempt SMEs from its scope (having in mind expenses of credit rating), or, as an alternative to that – to exempt at least micro and small entrepreneurs.

IER:

No frames

Ryanair

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Companies & groups

27. It's also worrying that the Guidelines (at paragraph 78) seem to allow situations to continue such as the Alitalia scenario in 2008, where a new Alitalia rose following a contrived and politically motivated asset transfer, allowing the new entity to free itself from its aid repayment obligation.

Met opmerkingen [DP270]: n2

Solution:

This part of the Guidelines needs to be drafted more strictly by the Commission, to prevent these types of evasions of EU state aid law.

COMPER

I - Professional consultancies/law firms/self-employed consultants

And more precisely:

Law firms

28. Most importantly, COMPER would like to comment on the new suggested definition of undertaking in difficulty. In our opinion as practitioners of State aid, the lack of time limit for the fulfilling of hard criteria (par. 21.a and 21.b) might be the reason of allowing unjustified aid for undertakings.

Met opmerkingen [DP271]: n2

29. Moreover, the lack of definition of the time period within which at least half of the capital was lost might cause unequal approach towards undertakings in similar economic situation due to possible interpretations of the definition.

Met opmerkingen [DP272]: n2

Solution:

In our opinion, prolonging the time limits from the current Guidelines or, optionally, delimitation the time period for two years (as in par. 21.e.2) might

prevent the uncertainty of the new, suggested definition, caused by the lack of time limit in par. 21.a and 21.b.

ECLF

I - Professional consultancies/law firms/self-employed consultants

and more precisely:

Law firms

30. First, we consider that the proposal to limit the use of soft criteria to exceptional circumstances, could unnecessarily limit the flexibility and discretion that the Commission currently has in assessing an undertaking's situation.

Met opmerkingen [DP273]: n2

Solution:

We would therefore suggest that the word "exceptionally" in the first sentence of paragraph 22 is deleted and that some of the soft criteria included in the Current Guidelines are retained. We would also suggest that, in line with the approach taken in paragraph 119 of the Guidelines, the opening line of paragraph 21 is rephrased by adding "or is expected to occur in a period of one month."

(ii) Content of restructuring plan

Para 52.

31. In addition, we would welcome additional guidance in relation to the requirements for the sensitivity analysis that the aid beneficiary is required to provide. In our experience this is an area that causes particular difficulties for aid beneficiaries and their financial advisers when trying to prepare a restructuring plan and where greater specificity as to what the Commission expects this analysis to cover would be of assistance in speeding up the process to prepare a restructuring plan.

Met opmerkingen [DP274]: p3

Solution:

Additional guidance in relation to the requirements for the sensitivity analysis that the aid beneficiary is required to provide.

(iii) Duration of the restructuring plan

32. The Current Guidelines provide that the restructuring plan must be "as short as possible" and must restore the long-term viability of the firm "within a reasonable timescale".7 This wording is repeated in the Draft Guidelines but in addition the Guidelines provide that the restructuring plan should not in principle exceed three years and (in a footnote) that this three year period may in exceptional cases be extended "up to a maximum of five years where the Member State can demonstrate that, due to the specific characteristics of the market concerned, a period of three years is not sufficient".8 We consider that these proposed changes unduly limit the Commission's discretion to accept a longer restructuring period.

Met opmerkingen [DP275]: n3

Solution:

We therefore do not see it as helpful or necessary for the Draft Guidelines to specify an arbitrary maximum duration of three or five years.

33. In addition, we would like greater clarity on the start date of the restructuring period. We consider that, provided there are no arbitrary limits on duration, the starting point should be the date on which the undertaking in difficulty began the restructuring operation that is the subject of the aid decision, irrespective of whether this date falls before or after the date of the decision (and therefore receipt of the aid). This will ensure that aid beneficiaries (i) are not discouraged from implementing restructuring measures as soon as possible and appropriate;

Met opmerkingen [DP276]: p3

34. and (ii) are not penalised, in the form of a disregard of restructuring measures already taken, if the State aid approval process for whatever reason takes longer than expected.

Met opmerkingen [DP277]: p3

Solution:

We consider that, provided there are no arbitrary limits on duration, the starting point should be the date on which the undertaking in difficulty began the restructuring operation that is the subject of the aid decision, irrespective of whether this date falls before or after the date of the decision (and therefore receipt of the aid).

B.2 Need for State intervention (Subsection 3.2 of the Draft Guidelines)

35. Member States that intend to grant restructuring aid will also be required to present a specific counterfactual, i.e. "a comparison with a credible alternative scenario not involving State aid" (such as debt reorganisation, asset disposal or private capital raising) demonstrating how the relevant objective of common interest would not be attained, or would be attained to a lesser degree, in the case of that alternative scenario. In the interest of greater legal certainty

36. and transparency,

Met opmerkingen [DP278]: p3

Met opmerkingen [DP279]: p3

Solution:

we urge the Commission to provide more detail on what would typically be required (or sufficient) in this respect.

B.3 Appropriateness (Subsection 3.3 of the Draft Guidelines)

37. The Draft Guidelines provide that aid should be in the appropriate form to address the beneficiary's difficulties. For rescue aid, this means, inter alia, that it must consist of temporary liquidity support in the form of loan guarantees or loans. We are concerned that the restriction of rescue aid measures only to loan guarantee or loans unduly restricts the range of possible measures that could be used.

Met opmerkingen [DP280]: n3

Solution:

Don't restrict it only to loan guarantee or loans.

International Airlines Group

II - In-house lobbyists and trade/business/professional associations

and more precisely:

Companies & groups

New Public interest filters

38. The Commission's proposed revised language would require that state aid be permitted only in the case of 'disruption to an important service which is hard to replicate'(45B) or which plays 'an important systemic role'(45c). While we appreciate the intent here, we are concerned that his language could be exploited to justify support for air services especially by national flag carriers that are in fact easier to replace and less vulnerable to airline insolvency than both state aid recipients and subsidising governments are likely to suggest.

Solution:

Change the language or make clear that this is not the case.

UK- ministry

VI - Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.

Definition of a company in difficulty

39. The UK considers that as currently drafted the definition may prove to be too wide. We are particularly concerned about the new points d and e in article 21 which we believe could have a disproportionate effect on Small and Medium Enterprises (SMEs).
40. A significant number of SMEs would be caught by the debt criteria in point e, but by no means would all of these actually be in difficulty. This means that they may be unnecessarily denied further sources of funding.

Met opmerkingen [DP281]: n2

Met opmerkingen [DP282]: n2

Met opmerkingen [DP283]: n3

Solution:

We note that the Commission intends these criteria to be cumulative. We welcome this and propose that if points d and e are retained in the final guidelines, these are only taken into account if an entity also meets either points a or b as well