# DIGITAL ECONOMY AND COMPETITION LAW

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## INTRODUCTION

Digital economy is a network of global economies, processes and social ventures by the aid of computer enabled technologies such as sensory networks, mobile application and internet platforms. The term 'Digital Economy' was coined in Don Tapscott's 1995 book The Digital Economy: Promise and Peril in the Age of Networked Intelligence. Digital economy refers to an economy that is based on digital computing technologies. The digital economy is also sometimes called the Internet Economy, the New Economy, or Web Economy. Increasingly, the "digital economy" is intertwined with the traditional economy making a clear delineation harder. Digital economy entails the exchange of different political, social and economic activities which include: education, business, financial undertakings as well as communication. It has been fostered by a number of forces such as globalization, change and innovation, access to internet tools and intellectual capital.

## FORCES THAT HAVE CONTRIBUTED TO DIGITAL ECONOMY

The evolution and expansion of digital economy has been propelled by a number of forces. These include: intellectual capital, growth of internet platform, globalization, change, increased creative entrepreneurship, emerging complexities, heightened competition and growth of information consumption. Intellectual capital has been the lead in the evolution of digital economies through commercial intellectual and copyright laws. Most countries have passed supportive laws that enhance the growth of digital economies. The increased use of internet platform has also contributed significantly to economic digitalization. As a way to increase competition and stimulate business growth, internet has increased the levels of returns through online sales besides helping in cost reduction. New processes, innovation and idea generation for economic investment are but some of the products of internet.

Globalization is also another important force that has necessitated the growth and faster evolution of digital economy. For instance, the pervasiveness of the internet and the rapid expansion of global companies, with numerous branches in different countries, have created boundary less economies that form a global village, which is the bigger part of digital economies. Tapscott (23) has also asserted the global economy is growing by a double digit due to embracement of digital economy. Increased creative entrepreneurship remains to be a key pillar in the development and sustenance of digital economy. Ranging from art,

  

culture, entertainment to technology, creative economy has been considered as a strong economic driver that could otherwise be generated through the traditional economy. Most virtual enterprises have been conceptualized through the concept of creative economy. It is therefore quite predictable that digital economy is the next driver that will propel world economies to higher grounds, both in terms of economics, social and political.

## THE FUTURE OF DIGITAL ECONOMY

Since digital economy is based on the evolvement and technological investment, it cannot become obsolete. However, though we may be experiencing the growth and benefits of digital economy, it is imperative to note the future digital technology will make human capital less competitive. Most manpower is likely to be replaced by computers and this will have negative implication on the world populations. In all these, the future of digital economy remains to be a competitive driver to facilitate growth and development in many countries

## THE DIGITAL ECONOMY, A CHALLENGE TO COMPETITION POLICIES

Digital service platforms typically operate in two- or multi-sided markets; in other words, they position themselves in between different categories of customers or users. Based on drawing profit from crossing the network effects stemming from these different categories, this new business model has fostered sometimes surprising practices, which contrast with the usual conclusions adopted by competition regulatory authorities. Economic studies of two- and multi-sided markets and of service platforms have developed considerably in the past few years (CAILLAUD & JULIEN 2001, 2003; ROCHET & TIROLE 2003, 2006). More recently, studies have focused on the implications of the digital economy for competition policies (EVANS 2003). They have recurrently emphasized that the major conclusions drawn for traditional markets cannot be extrapolated to e-businesses. This holds, in particular, for prices, which, if lower than costs, would be evidence of predatory (or abusive) behaviour, or for-profit margins, which, if too large, would necessarily be incompatible with strong competition (BEHRINGER & FILISTRUCCHI 2015; VASCONCELOS 2015; WRIGHT 2004). Despite these findings, several recent studies have suggested that the insights provided by the standard arguments about the manufacturing economy do still hold for service platforms. Competition policy has tools well adapted for overseeing the practices of manufacturing5 But what about the digital economy? What diagnosis should regulatory authorities make? Do they have the right tools for correctly evaluating situations and behaviors with respect to competition?

## DIGITAL ECONOMY, INNOVATION AND COMPETITION

Competition in major digital markets is different in some ways from competition in more traditional markets. This sector often includes platform-based business models, multi-sided markets, network effects and economies of scale which render competition issues more complex. Unlike in most economic sectors, as the digital economy becomes increasingly interconnected some co-ordination and co-operation between firms could be unavoidable and may indeed be pro-competitive. Finally, digital markets are characterized by high rates of investment and innovation, which lead to rapid technological progress in the sector, and to increased disruptive innovation. The increasing prominence of the digital economy has been requiring competition authorities to devote more and more of their time to intellectual property-intensive and high technology industries. Since the impact of the digital sector extends beyond information goods and services to other areas of the economy, competition authorities are finding questions related to the digital economy to be increasingly significant for their work.

## OECD WORK ON INNOVATION AND COMPETITION

The OECD Competition Committee first held a roundtable discussion on merger review in emerging high innovation markets in 2002. Since then, the OECD has held discussions on wide variety of related topics ranging from competition, patents and innovation (2006 and 2009); to two sided-markets (2009), the digital economy (2012); on disruptive innovation (in general as well as in legal services, financial markets and road transport); and, more recently, on big data (2016). In June 2017, more discussion topics include Algorithms and collusion, Radical Innovation in the Electricity Sector and Rethinking the use of traditional antitrust enforcement tools in multi-sided markets Future work

In 2016, the digital economy and innovation was selected as a long-term theme for discussions at the OECD Competition Committee. As a result, the Competition Committee has started to hold roundtables, hearings and other events on five main sub-streams:

1. The relationship between the digital economy, competition law and innovation. This stream will analyse the role of competition law in shaping the digital economy, the evolving role for competition authorities in the digital world and explore further work on multi-sided markets.

2. Challenges posed to prevailing antitrust tools and approaches. This stream will look at the suitability of existing antitrust tools and techniques for dealing with the digital economy and innovative disruption, at anticompetitive practices identified in the digital economy, at platforms becoming self-sustaining ecosystems and/or sealing themselves off from the rest of

the Internet, at how to treat mergers in digital markets, and into the identification of appropriate remedies in digital and innovation-intensive sectors.

3. Practical challenges to competition enforcement. Topics will include the timing of intervention in digital and innovation-intensive markets, and the increased need for international co-operation and co-ordination in the digital economy.

4. Detailed industries and sectors. Under this stream, we propose not only to look at specific industries or sectors being disrupted or affected by digital economy (such as transportation, online advertising, search engines, online software platforms or E-commerce), but also to carry out case studies to analyse the development and evolution of a number of technological sectors in the past.

5. Review of regulations This stream will consider how governments should review and revise existing regulations to avoid undue harm to competition, entrepreneurship and innovation while ensuring government policy objectives are met.

## THE ROLE OF COMPETITION POLICY

The fast developments in the digital economy challenge existing policy frameworks. This includes competition policy, but also policies with respect to (inter alia) consumer protection, privacy, taxation, and intellectual property rights. While current policies are being challenged, the public values they primarily aim to preserve may be at stake. In addition, these fast developments may result in competition problems. We discuss ten problems specifically related to the characteristics of the digital markets that are either caused by or result in a competition problem. These problems are that:

1. Digital monopolies can hamper competition and innovation;
2. Digital monopolies can monopolise other markets;
3. Digital monopolies have an incentive to lock-in customers;
4. Digitalization causes problems related to privacy and data protection;
5. Geo-blocking may hamper the Digital Single Market;
6. Patents can be used to prevent access to technology;
7. Gatekeeper positions of Internet Service Providers (ISP) may have a negative impact on market dynamics;
8. State aid for broadband deployment can disturb markets;
9. Spectrum auctions potentially create/raise entry barriers; and that
10. Tax planning/avoidance potentially distorts competition.

The horizontal conclusions that we draw from the analysis of these ten problems is that competition authorities and policy makers should focus on preventing the creation of entry barriers, facilitate entry into markets, and foster innovation. Competition authorities

should have a cautious attitude towards actual competition problems and to rely on the self-correcting powers of the market, provided that certain public values such as taxation, privacy and security are protected by appropriate (other) policy frameworks. If the latter is not the case and this causes competition problems, competition policy instruments can sometimes be used to temporarily fix the problem if changing respective adequate policy fields is problematic.

## THE RELATION OF THESE PROBLEMS TO COMPETITION POLICY

While the above-mentioned problems all somehow relate to competition, not all of the identified problems can or should be addressed by competition policy. Three categories of problems can be distinguished:

1. Competition problems that are caused by other policies and should be fixed by amending these other policies;
2. Competition problems caused by other policy fields, but other policy fields cannot be adjusted to fix the problem; and
3. Genuine competition problems.

## WHEN TO USE COMPETITION POLICY?

A first step in assessing whether a problem should be addressed by competition policy instruments is to analyse whether there is a competition problem. Reference to the objectives and principles of competition policy can guide this assessment. The rule of thumb is that, if the problem results from flaws or limitations of other policies (e.g. tax laws), the use of competition policy tools is a second-best option. Solutions are preferred within the realm of those other policies because they are more specifically designed to tackle such problems.

## COMMISSION DECISION ON FACEBOOK/WHATSAPP

When Facebook acquired WhatsApp, concerns were raised in relation to data protection and privacy. Both companies offer applications (WhatsApp and Facebook Messenger, respectively) for smartphones that allow users to communicate by sending text, photo, video and audio messages. Facebook also provides online advertising services on its social networking platform. The data for the purposes of online advertising is collected regarding the users of the social networking platform who are the same users as the Facebook Messenger users because the messaging service is available only with a Facebook account. WhatsApp had a strict privacy and data protection policy: it stores only limited information about its users that is necessary for connection and transmission of messages and does not use it for advertising purposes. The fear was expressed that Facebook might change relevant

WhatsApp policies – as happened when Facebook purchased Instagram in 2012. WhatsApp messaging data is perceived to be of high value because, by comparison to the more public platform of Facebook, WhatsApp contacts are more permanent and close, and the information shared is more accurate. When examining the concentration under the EU Merger Regulation, the Commission clearly defined the reach of competition law rules in this regard. It stated that 'any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules' . The accumulation of data by Facebook was analysed in so far as it could strengthen Facebook's position on the market for online advertising services. The Commission dismissed competition law concerns in this regard because both introduction of advertising on WhatsApp and use of WhatsApp data to improve targeting of Facebook advertising were found unlikely.

## EUROPEAN COURT OF JUSTICE JUDGEMENT BY MURPHY

The Murphy case109 was about exclusive territorial licensing of broadcasting rights on live transmissions of Premier League football matches combined with the prohibition to supply the territorially based decoding devices outside the licence territory. The issue that the Murphy case was about can be considered analogous to geo-blocking. Both practices are aimed at matching audience to territories, for which intellectual property rights have been assigned, and at preventing users from accessing protected material based on their location. In the Murphy case, the Court found the licensing practices to be in breach of Article 101(1) TFEU. The geographical restrictions to supply decoding devices effectively recreated national barriers on the Single Market and eliminated competition between broadcasters. The Court decided the matter by evaluating the effects of the practices on competition – as it would do in any other case concerning agreements or concerted practices. However, the question whether territoriality of intellectual property rights are compatible with the Single Market is beyond the reach of competition law. It is appropriately studied by the Commission in a number of Communications and during the public consultation 'On content in the Digital Single Market' in 2012 with a view to propose a reform of intellectual property rights.

## COMMISSION DECISION ON AMAZON

The Amazon case is about State aid allegedly provided by Luxembourg to Amazon in the form of corporate tax reduction. More specifically, the Commission investigates national tax rulings concerning transfer pricing arrangements (prices for goods and services traded within the same group of companies) that are used in order to optimally allocate the group's taxable profit between the subsidiaries of one group situated in different jurisdictions. The

problem is that EU Member States are in a state of tax competition with each other due to the absence of the harmonized tax policy. Various taxation methods and strategies are used to attract large multinationals to a certain tax jurisdiction resulting in legal loopholes and opportunities for tax avoidance. Taxation remains within the competence of EU Member States. Hence, from the European law perspective, such practices are only problematic if they violate EU competition law, in particular State aid or the Internal Market rules. The European Commission assesses if national tax decisions distort competition and trade in the internal market by giving a selective advantage to individual undertakings (Article 107 TFEU).

## COMMISSION DECISIONS ON SAMSUNG AND MOTOROLA

In the Samsung case122 and the Motorola case123 the Commission started proceedings under Article 102 TFEU. The companies were accused of violating Article 102 TFEU by seeking injunctions against Apple on the basis of SEP which they had committed to license on FRAND terms. From the competition law point of view, the relevant question is whether and in what circumstances the behaviour of a patent holder seeking an injunction can constitute an abuse of dominance. The Court needs to establish whether there is willingness on the part of the licensee. In Samsung and Motorola, the Commission has applied a rather low legal standard to establish willingness on the basis of direct documentary evidence. The low standard applied by the Commission is in a sharp contrast with the practice of national courts. In Germany, for instance, the Federal Supreme Court introduced the so-called Orange Book Standard Test to evaluate willingness on the basis of observed conduct of the licensee. It requires that once a potential licensee has made an offer, it must behave as an actual licensee and pay the royalties resulting from the licensing contract. The different approaches by the Commission and the German Court illustrate that there is an inconsistency of approaches to enforce the rights of patent holders. This limits the ability to intervene on the basis of competition law. For example, in Motorola, the Commission concluded that Motorola's conduct constituted an abuse under Article 102 TFEU. However, 'the Commission decided not to impose a fine on Motorola in view of the fact that there is no case-law by the European Union Courts dealing with the legality under Article 102 TFEU of SEP-based injunctions and that national courts have so far reached diverging conclusions on this question'. Despite these shortcomings, competition law enforcement may have remedial effects. For example, in Samsung the Commission issued Statements of Objections against Samsung over SEP abuse. Bakers et al (2014) explain that the case was quickly resolved as 'Samsung subsequently decided to take steps back in [all] law cases it had instigated in Europe against implementing firms; among other things it gave up seeking preliminary injunctive relief.

## THE EUROPEAN COMMISSION'S FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY

On 10 May 2017, the European Commission published its final report on the e-commerce sector inquiry, setting out the principal potential barriers to competition identified following an extensive fact gathering exercise. The findings summarised below largely follow the conclusions outlined in the Commission's preliminary report (see our earlier newsletter). Notably, the Commission does not call for the Vertical Block Exemption Regulation (VBER) to be reviewed prior to its expiry in May 2022. This final report will, however, serve as a springboard for further EU antitrust enforcement action.

1. Non-exempted contractual territorial restrictions the final report re-iterates that "geo-blocking" measures (which range from blocking access to websites to simply refusing to deliver cross-border) based on unilateral decisions fall outside the scope of Article 101. It is only where geo-blocking results from an agreement or concerted practice between undertakings that Article 101 concerns will arise. Unilateral conduct by dominant undertakings may, however, still be caught by Article 102. The Commission identifies the following contractual cross-border sales restrictions as contrary to the framework laid down in VBER: • restriction of active sales by retailers outside a designated territory, when these other territories have not been exclusively allocated to other retailers or reserved for the supplier; • restriction of passive sales; and • restriction of authorised retailers within a selective distribution network from actively selling outside a limited group of customers. A Commission proposal for a regulation addressing geo-blocking is currently being negotiated with the European Parliament and the Council. The Commission has also issued proposals for the modernisation of EU copyright rules aimed at facilitating access to digital content across borders.
2. Warning for brick and mortar requirements the final report acknowledges that a brick and mortar requirement (under which resellers must operate at least one physical shop) can promote competition on distribution quality and/or brand image and that these clauses are generally covered by VBER. However, the Commission re-iterates its concerns that, in certain cases, such requirements are imposed to exclude pure online players. Contractual obligations to operate a brick and mortar shop with no evident link to efficiencies may therefore face further scrutiny under Article 101.
3. Restrictions to sell on online marketplaces the final report finds that restrictions on the use of online marketplaces (e.g. Amazon, eBay) generally do not amount to an actual prohibition on selling online or restrict the effective use of the internet as a sales channel. Without prejudice to the preliminary ruling currently pending before the Court of Justice in Coty, the Commission therefore concludes that marketplace bans do not constitute hardcore restrictions within the meaning of VBER. However, the

final report does not endorse these restrictions as generally compatible with EU competition rules, and emphasises that a case-by-case assessment is required

4. Restriction on price comparison tools the final report finds that absolute bans on price comparison tools (which are not linked to quality criteria), potentially restrict the effective use of the internet as a sales channel and could amount to a hardcore restriction under VBER. This reasoning appears to be in line with the Bunderkartellamt's infringement decision relating to Asics, recently upheld by the Düsseldorf Higher Regional Court.
5. "Most favoured nation" or "parity" clauses the final report confirms the Commission's preliminary conclusion that parity clauses in vertical agreements are covered by VBER, provided the parties' market shares do not exceed 30%. Where market shares exceed 30%, a case-by-case assessment will be required, as their use may for example be justified by a need to recoup investments and avoid free-riding.
6. Dual pricing According to the final report, pricing practices under which manufacturers set two different wholesale prices for the same product to a hybrid retailer (depending on whether the product is to be resold via the retailer's online or offline channels) constitutes a hardcore restriction under VBER. However, there could be efficiency justifications for such dual pricing, such as addressing free-riding between online and offline retail channels. This creates an interesting opening for the many suppliers and brick and mortar retailers that are confronted with such free-riding and could be worthwhile further exploring.
7. Data exchange While data-related issues were not a point of focus of the sector inquiry, the final report acknowledges the increasing importance of 'big data' (see our earlier newsletter). In particular, the Commission identifies exchanges of competitively sensitive data (such as pricing information or inventory levels) as a potential competition concern in situations where the relevant companies are direct competitors.

## FIT FOR THE DIGITAL FUTURE? THE GERMAN LAWMAKER'S RESPONSE

Does the digital economy require special treatment by competition law makers and regulators? Although still up for debate, many aspects seem to point in this direction: the importance of social media and big data, the influence of search and pricing algorithms, politicians and consumer protection organisations asking for enhanced scrutiny of large internet corporations; to only name a few subjects currently resonating in the media. Now the German lawmaker has given its response: it is a clear yes. Reform of the German Act against Restraints of Competition on March 31, 2017, the German Parliament signed off on new provisions for the German Act against Restraints of Competition (GWB). Some of these modifications directly address the digital economy and, more specifically the regulator's concerns following the Facebook/ WhatsApp acquisition in 2014. The new

legislation provides the Bundeskartellamt with new tools to make it fit for the digital future including new merger control thresholds, which facilitate the review of acquisitions of start-up companies, and new ways to assess market power in platform markets. New Merger Control Thresholds The new thresholds will capture transactions involving parties with combined worldwide turnover of EUR 500 million, provided one of the parties involved has domestic turnover of EUR 25 million and the transaction value exceeds EUR 400 million and the target has significant activities in Germany (i.e., the need for a second party to have domestic turnover of EUR 5 million then does not apply). Although not formally limited to acquisitions of tech companies and digital start-ups, the lawmaker expressly modelled the threshold to capture transactions such as Facebook/WhatsApp, which would have escaped German merger control. While WhatsApp is Germany's favourite messenger application, it did not generate revenues of more than EUR 5 million in Germany at the time of the transaction. Market Power on Digital and Platform Markets Pursuing the rationale of the new merger control thresholds, digital or other services can now be considered a relevant "market" even if users do not pay in money, but rather "pay" with their personal data. Aligning German law with the European Commission's case practice; the lawmaker confirmed that competition law provisions are applicable to social media, online search or comparison machines and other online services even where they are offered "for free". The new legislation also makes clear that an assessment of market power needs to consider direct and indirect network effects, single and multi-homing behaviour, access to competitively relevant data and innovation. In preparing this list of factors the lawmaker picked up many of the views published by the Bundeskartellamt's own digital task force June 2016 working paper Market Power of Platforms and Networks. Data Protection and a New Digital Watchdog? The German government's plans to boost its digital fitness go beyond the introduction of the Bundeskartellamt's new tools. In its March 2017 White Paper on Digital Platforms, the Federal Ministry for Economic Affairs and Energy announced its intention to create a new digital watchdog. Designed as a "think tank" which will "close the digital policy gap at the interface of politics, economy and society", it is supposed to complement enforcement activities of the Bundeskartellamt and its sister agency, the Bundesnetzagentur, by focusing on subjects such as net neutrality, the shared economy, cloud-computing, open data, and M2M (machine to machine).

## E-PAYMENTS AND COMPETITION LAW

The rapid growth of e-commerce and the introduction of mobile payments have completely changed the dynamics of the payment sector industry in recent years. The Directive on EU-wide Payment Services in the internal market ("PSD 2") aims to create an integrated internal market for electronic payments. Its entry into force, in January 2018, will bring sweeping changes to the industry: it will allow third-party payment service providers to access customer accounts and obtain information about them. A core aim of these reforms

is to enable new players to join the payment services market; increasing competition & choice and lowering prices for consumers. Thus, not only banks but also international card schemes, telecom operators, Fintechs and BigTechs such as Facebook, Apple, Google or Amazon will compete for a portion of the electronic payments cake. However, PSD 2 also imposes strict security requirements for electronic payments and the protection of consumers' financial data. The balance between the need to ensure protection of such data and avoid the misuse of the information, and the obligation to grant third parties access to the data, may not be easy to achieve. Competition authorities have recognised that innovation in this area may only be achieved by active market players cooperating with each other (see for example the EPC case). However, compatibility of those initiatives with competition laws should be carefully assessed since it may involve contacts between, at least potential, competitors. Therefore, this cooperation should comply with Article 101 in order to ensure a balance between both adverse effects on competition and procompetitive effects. In particular, the indispensability of any restrictions included therein as well as the potential restrictive effects of the agreement. In this regard, the expansion to date of e-payment systems has only been possible thanks to agreements between financial institutions and/or telecom companies. For example, the joint venture agreements regarding the development of mobile wallets (such as Everything Everywhere in the UK and the JV jointly created by Belgacom and BNP Paribas in Belgium) were subject to merger control review by the European Commission. Although these JVs were both cleared unconditionally at Phase 1, the European Commission looked closely at potential foreclosure effects that could result from these JVs and whether alternative players remain active in the market. Other banking industry initiatives to create mobile payment platforms or ensure interoperability between different platforms were subject to the general rules regarding cooperation between competitors but not a merger control review. To date, neither the European Commission nor any Member State national competition authority has raised competition concerns regarding such initiatives but it cannot be excluded that they may be considered in the future. Competition laws and e-payments regulations are also likely to interact regarding access to infrastructure that could be considered essential to develop new services. A clear example of this are the claims made by financial entities in several jurisdictions regarding the conditions imposed by Apple for the Apple Pay service and the limited access to the iPhone's NFC functionality and the negative decision issued by the ACCC regarding the application made by four Australian banks to jointly negotiate with Apple regarding Apple Pay or the claims submitted before the Swiss and South Korean Competition Authorities. Financial entities have claimed that such restrictions are likely to reduce the potential for innovation in mobile wallets and mobile payments and have invoked competition law arguments to sustain their claims.

## THE SOLUTION: COMPETITION POLICY

Competition policy is primarily a public policy aimed at ensuring that 'competition in the marketplace is not restricted in a way that is detrimental to society'. To this end, the goals of competition policy are directed at shielding society from harmful competitive behaviour. One way to assess whether competition is harmful is on the basis of the outcome of the competitive process. For example, some argue that it should primarily be assessed on the basis of consumer welfare. Others have argued that it should be assessed on the basis of the broader concept of economic efficiency which has different dimensions94. Recently innovation (or dynamic efficiency) gained in significance in the relevant debates and practices of antitrust enforcement in the USA, especially in the internet-related context. Another way to distinguish harmful from beneficial competition is on the basis of assessing whether the competitive process is free from any obstacles arising from the behaviour of public agents or more powerful private actors. As such, economic freedom and fairness in competition are two goals of competition policy that can be traced to the origins of European integration.

## RELATION WITH OTHER POLICY FIELDS

Competition policy cannot serve its objectives in isolation from other policies; particularly if a competition problem results from flaws or limitations of other policies. For example, suppose that property rights of asset X are not clearly defined by law and a company claims sole ownership over that asset. The objectives of competition policy are harmed if the claim of the company restricts competition in the marketplace in a way that is detrimental to society. But since the problem is caused by how property rights have (not) been defined, the problem should be solved by fixing property right laws and not by competition policy/law. Sometimes it is difficult to adjust other policies because of practical/political reasons (e.g. when the subsidiarity principle requires Member States to coordinate and they fail to do so). In such cases we may have to rely on competition policy as a second-best alternative to deal with resulting competition problems, but the option for using competition policy tools should be critically assessed for their proportionality.