2023 OUTLOOK: FOUR THEMES FOR THE COMPETITION YEAR AHEAD

18 JANUARY 2023

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Forecasting the future can be challenging at the best of times, but as the world heads into 2023 the outlook seems particularly uncertain. Against the backdrop of a lingering pandemic, a European war, rocketing inflation, the fallout from Brexit and growing tensions between the world's two economic superpowers, making just about any prediction in the field of economics or policy can feel like a fool's game. Nonetheless, Frontier's competition team have put their cards on the table and predicted four themes that will feature prominently in competition law debates this year in Europe and elsewhere. These are:

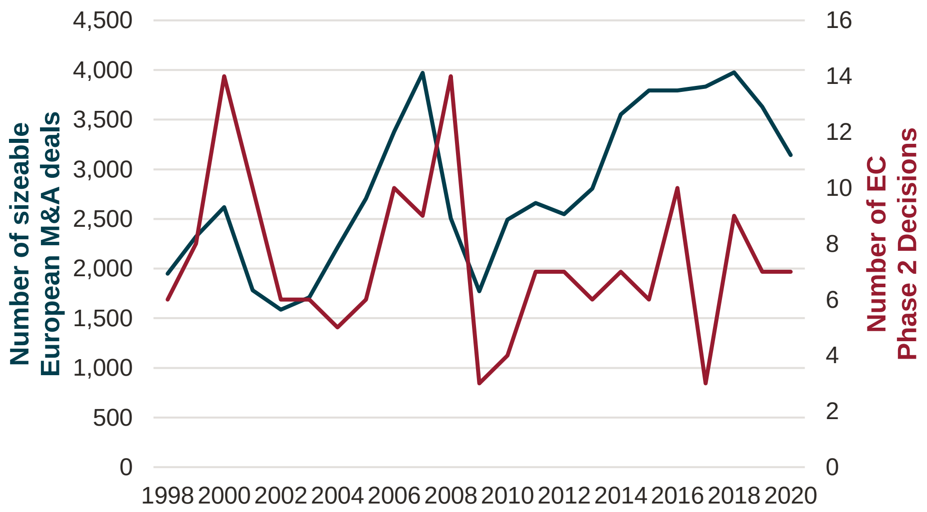
1. growing pressure on competition regulators to intervene in the cost-of-living crisis;
2. the ongoing 'digital revolution' in antitrust, as new competition regimes for digital markets come into contact with reality;
3. the transformation of the competition litigation landscape in Europe, with the rise of collective claims; and
4. louder – and sharper – debates around subsidy control.

1 A more targeted response to the cost-of-living crisis?

With consumers across Europe facing an unparalleled squeeze on living standards, lawmakers and regulators alike will come under intense pressure to show they are doing whatever they can to help bring inflation under control while mitigating the worst effects of what looks set to be a drawn-out recession. Competition authorities will be no exception.

Traditionally the job of smoothing out the ups and downs of economic cycles has been left to central banks and treasury departments, leaving "microeconomic regulators" like competition authorities free to focus on other matters. Antitrust watchdogs use the same toolkit to investigate competition issues in a recession as they do when the economy is in good health, and the overall mix of work they take on usually changes comparatively little over the cycle. Take merger investigations. As the charts below show, both the European Commission (EC) and the UK's Competition and Markets Authority (CMA) undertake a handful of in-depth merger investigations every year, and year-on-year changes in the number of cases they take on have only been loosely correlated with total levels of M&A activity since the 2008 financial crash. The number of investigations that competition authorities carry out into cartel activity and abuses of dominance similarly show no strong correlation with the economic cycle.

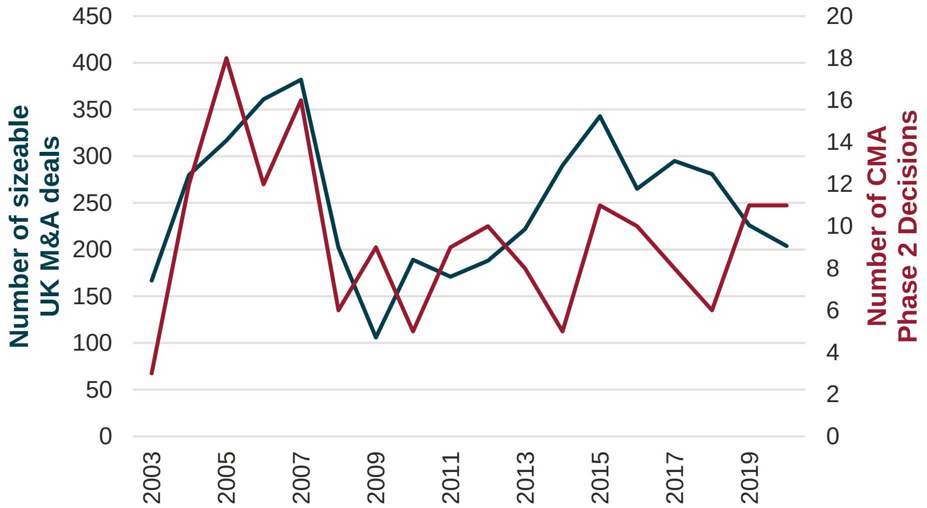
Figure 1 – comparison of number of in-depth EC merger investigations to levels of M&A activity in Europe



Sources: Frontier Economics analysis of EC merger investigation portal; Bloomberg.

Notes: The annual number of M&A deals tallies up all deals (excluding minority investments) with a value of at least $100m that were announced each year, where the target was located in Europe.

Figure 2 – comparison of number of in-depth UK merger investigations to levels of M&A activity in the UK



Sources: Frontier Economics analysis of CMA investigation portal; Bloomberg.

Notes: The annual number of M&A deals tallies up all deals (excluding minority investments) with a value of at least $100m that were announced each year, where the target was located in the UK; the investigation count tallies up Phase 2 merger investigations conducted by the UK Competition Commission up to 2013 and by the CMA thereafter.

On one level this is unsurprising. The analytical techniques that competition authorities use allow them to take account of the wider economic backdrop when, for example, considering the impacts that a proposed merger will have on competition. And calls to relax competition law during economic downturns are rightly met with scepticism: monopolies and cartels are bad news for consumers at all stages of the economic cycle, and allowing shotgun mergers or state aid to prop up underperforming companies in a recession could have damaging long-term consequences.

Nonetheless, at a time of intense pressure on government budgets and ominous talk of "quango bonfires", regulators are being asked to think again about whether they are making the most effective use of their limited resources. And competition authorities may find themselves with questions to answer. For instance, with a continued drop-off in merger activity forecast for 2023, should they be filling their boots with their standard quota of merger investigations, or should they focus on other priorities?

What might a more targeted competition policy regime look like? Two issues that have been pre-occupying competition authorities for some time are whether competition policy needs to be updated to facilitate green initiatives (a topic we covered in our 2022 outlook article) and the regulation of digital markets (see next section). However, the severity of the cost-of-living crisis is prompting some to ask whether there should be a greater emphasis on markets that matter most to households that are struggling to make ends meet. A thought-provoking recent study in the UK found that that markets for essential goods that take up a larger share of the budgets of poorer households tend to be more concentrated than other markets – a point noted by the CMA in its 2022 report into the state of competition. From a societal perspective, might it be more important to concentrate on eking out modest improvements in these markets than on assessing the impact of mergers in, say, the computer games sector?

All very well, competition authorities might respond, but we have limited room for manoeuvre. And they would have a point. The EC, for example, has a duty to investigate all mergers that meet certain turnover thresholds. This means that economic sectors with high levels of M&A activity can take up much of the bandwidth of regulators in Brussels, irrespective of whether the markets concerned are essential or could greatly improve outcomes for consumers. And even where they do investigate mergers in these sectors, their freedom to act is limited, since merger control cannot be used to address wider competition problems that might beset these markets: regulators can block a deal if they think it will substantially damage competition, but they cannot take any further steps to leave the market in a better state than they found it.

However, some national competition authorities have more flexibility as to where they direct their efforts. The UK, for example, has a voluntary merger reporting regime, under which there is no hard obligation on firms to notify their transactions to the CMA. This gives the CMA more discretion as to which mergers it chooses to investigate. Moreover, the CMA – alongside a handful of other European competition authorities in Italy, Romania, Greece and Iceland – has wide-ranging investigation powers that allow it to make targeted interventions to boost competition in markets even where there have been no breaches of competition law. In practice, the CMA has made limited use of this tool in the last five years (perhaps out of wariness, after completing two heavy-going market investigations into the energy and retail banking sectors in 2016 and 2017). This year, however, could mark a new chapter for UK competition policy, with a new chair and chief executive having taken up their posts at the CMA in recent months. And with the UK government publicly pressurising the CMA to ensure that tax cuts designed to mitigate inflationary pressures on businesses are swiftly passed on to customers, a revival of the CMA’s market investigations regime could be on the cards.

Elsewhere in Europe moves are afoot to arm competition authorities with investigatory tools similar to those of the CMA. The EC itself got the ball rolling in 2020, with proposals for a New Competition Tool (NCT) that would allow it to intervene in markets pre-emptively to improve competition, rather than having to wait for a formal breach of competition law. These proposals met resistance, with concerns expressed that there was not a strong legal basis to give the EC these powers under the current treaties governing its operation. However, it is possible that they could resurface with the intensification of the cost-of-living crisis and calls for a more joined-up EU-wide response.

In any event, national competition authorities are now picking up the baton. In Germany concerns about a decoupling of prices charged at the petrol pump from the crude oil price in the aftermath of Russia's attack on Ukraine have led to calls for the Federal Cartel Office (FCO) to be handed investigatory powers similar to those held by the CMA. The FCO has already published an interim report into the operation of refineries in Germany and the pass-through of costs to consumers, while moves are underway to update German competition law to give the office more powers to intervene off the back of its findings. With Europe’s most powerful economy revamping its competition regime to respond to the crisis, it will be intriguing to see whether others follow.

2 Antitrust's digital revolution – first contact with reality?

Tightening the regulation of digital markets remained high on competition authorities' priority list in 2022, and this trend looks set to continue. But after a dramatic – and torrid – year for many tech firms, what new competition questions will confront the sector in 2023? Recent developments suggest that key issues will include:

- the interplay between digital competition regimes in different jurisdictions as new rules come into force;
- how competition policy should accommodate the dynamism of the sector and the diverging performance of different tech firms; and
- the interaction between competition law and other areas of digital markets regulation, such as data privacy and security.

Digital competition regimes: how to manage uncertainty and divergence?

In 2022 the European and UK approaches to introducing ex-ante digital competition regulation continued to differ in their timings and substance. These differences look set to persist into 2023.

In the EU the Digital Markets Act (DMA) came into force in November 2022, moving to the early stages of implementation before it starts to apply to firms from May 2023. A number of open questions remain as to which firms will meet the thresholds for "gatekeeper" designation, and where the Commission will choose to focus its enforcement resources, given the range and complexity of potential complaints.

In the UK the reform of digital markets regulation is at an earlier stage. While for much of 2022 the timing of the introduction of the relevant powers for the UK's Digital Markets Unit (DMU) remained uncertain, the required legislation is now set to go ahead on an accelerated timetable. The wait for legislation has raised an enforcement challenge for the CMA, requiring it to push forward its digital agenda using its existing enforcement toolkit, despite a 'shadow' DMU having been in operation since 2021.

The final details of the DMU's approach are still uncertain. However, there are indications that the substance will diverge significantly from the stance taken by Brussels. For example, the EC's approach to gatekeeper designation focuses on quantitative thresholds, potentially capturing a wider group of firms than just the traditional Big Tech names. In contrast, the UK's proposed approach to designating firms with Strategic Market Status is expected to be narrower, and based on a more subjective assessment of firms identified as having "substantial and entrenched market power".

These different approaches reflect a wider divergence between the CMA and the EC in their application of competition law and have led some to wonder whether more aggressive enforcement in the UK will result in a "digital Brexit". For the global tech firms that will be subject to these new regulatory regimes, the uncertainty and divergent approaches raise questions about how to engage and comply in an environment of increasing complexity.

Dynamism in the tech sector: when is market power 'entrenched'?

2022 proved to be a challenging year for the tech sector, with a number of leading firms registering sizeable falls in their market capitalisation. This was partly a result of macroeconomic headwinds that buffeted the whole sector, with severe inflation, tightening monetary policy and a global economic slowdown. However, as the chart below illustrates, there was a wide divergence in the performance of different companies: while shares in Apple fell by roughly 20% in 2022, Amazon and Meta slumped by more than 40% and 60% respectively.

Figure 3 – evolution of share prices of selected tech firms, 2022

Source: Google Analytics

While the largest tech firms have struggled, some rivals have gone from strength to strength. TikTok, for example, has continued its meteoric rise: having passed 1bn users in 2021, it was closing in on 2bn by the end of 2022. Meta has acknowledged this growing competition for users to be one of the factors that has dented its financial performance. At the same time, Meta has also cited actions taken by rival tech firms – most notably Apple's decision to give users the option to opt out of being tracked by apps. This has damaged Meta's advertising model and, according to its own projections, wiped more than $10bn off its 2022 revenues.

This varied and dynamic picture raises questions about the suitability of the concepts of "gatekeepers" and "substantial and entrenched market power" that underpin the DMA and DMU. Are these static concepts really appropriate in such a fast-changing environment in which larger and smaller rivals alike are taking lumps out of each other? And could such a starkly binary antitrust regime for "the gatekeepers" and "the rest" end up distorting competition in a world where rival firms are converging on – and potentially crossing – the threshold separating the two groups from both directions? If the trends of 2022 continue into 2023, expect these questions to be asked with greater urgency.

Interaction between competition and other policy areas: how should overlapping issues be tackled?

There is an ongoing debate about which issues facing the digital sector can be most effectively addressed via competition regulation rather than via other, potentially overlapping, regulatory frameworks. For example, with consumer data playing an ever more central role in the digital economy, the worlds of antitrust and privacy regulation have been on a collision course for some time. The resulting uncertainty about which regulators will take the lead in policing these overlapping issues, and what legal or regulatory frameworks they will apply, risks creating unhelpful confusion for both digital businesses and their customers.

Developments in 2022 brought more clarity to some of these issues. In September one of the European Court of Justice's advocates general issued an Opinion on a case brought by Germany's FCO against Meta, which related to Facebook's collection and use of data. The Opinion clarified that while ruling on infringements of the EU's General Data Protection Regulation (GDPR) is beyond the jurisdiction of a competition authority, it may take into account whether a commercial practice is GDPR compliant. And that, in turn, may be indicative of whether the practice infringes competition rules.

Nevertheless, many questions remain unanswered and the issue of privacy is expected to stay on the digital competition agenda in 2023. A UK consumer class action case on the topic brought by Dr Liza Lovdahl Gormsen against Meta is set for a certification hearing as soon as January.

Nor is data privacy the only area where different regulatory frameworks can come together. Digital firms are already required to interface with multiple regulators policing competition and other matters with potentially overlapping powers or enforcement remits. For example, in late 2022 the UK's Financial Conduct Authority published a discussion paper considering the competition impacts of Big Tech in retail financial services, a conversation that will continue into 2023. Addressing overlapping issues requires regulators to cooperate to leverage their respective expertise and avoid duplication. While a number of European regulators have acknowledged this, the need for close practical cooperation will assume even greater importance as tailored digital competition regimes come into force in 2023.

3 The rise and rise of collective actions

Private enforcement of competition law infringements has increased in several European countries in recent years, following the implementation of the EU's 2014 Damages Directive. We expect this growth to continue into 2023 and beyond, with new regulatory developments providing further momentum.

What's new under the (European) sun?

In 2020 the EU approved the Representative Actions Directive (Directive 2020/1828/EU). This new legislative package, which should come into effect in 2023, aims to guarantee that consumers from all EU member states will be able to seek compensatory damages in a collective manner. The aim of the directive is to harmonise collective actions across EU members states in a number of respects. Among other provisions, the directive:

- establishes common criteria governing who can act as a representative in collective claims and certain processes they must follow in bringing domestic and cross-border collective actions;
- clarifies how funding from third parties can be organised to support collective actions;
- guarantees access to documents and other sources of relevant information for claimants and defendants to prepare economic evidence and quantify any alleged damages; and
- establishes procedures to interrupt the prescription of potential individual actions when collective actions are initiated.

The Representative Actions Directive focuses on infringements of general consumer protection law but will apply to infringements of competition law unless member states expressly state otherwise when transposing the directive into national law. It would therefore not be a surprise if the directive further fuelled private actions for damages relating to competition law infringements in the coming years.

Besides helping more victims of competition infringements bring claims for damages, the Representative Actions Directive may also boost the efficiency of competition litigation cases in EU member states by allowing for more consolidation of individual proceedings into single actions. This could be particularly welcome in countries such as Spain, where the wave of competition litigation that followed the implementation of the Damages Directive has resulted in thousands of individual claims threatening to overwhelm the country's commercial courts.

Still work to do...

However, the Representative Actions Directive is not a panacea. While it will harmonise some features of collective action proceedings across EU member states, there will still be plenty of scope for divergence, for example in relation to whether collective action claims should be brought on an opt-in or opt-out basis. Moreover, a number of challenges relating to the development and use of economic evidence in such actions remain unresolved.

- First, debates around competition law infringements and their impact on consumers and businesses are often technical in nature and require courts to scrutinise and form a view on complex economic evidence. As a result, there may be benefits from having specialist courts responsible for handling private claims for damages relating to competition law infringements, such as is the case in England and Wales and Portugal.

- Second, the economic evidence prepared by experts often relies on different sources of information held by claimants and defendants - some of which may not be available to another expert involved in the proceedings. This may serve to compound the court's task in assessing the competing submissions. By contrast, in jurisdictions such as the UK more extensive and ordered information disclosure processes make it easier for economic experts to base their assessments on a common body of evidence, which can in turn help judges appraise competing approaches for evaluating the extent of losses.

If left unaddressed, these challenges may limit the ability of courts in some member states to engage meaningfully with the economic evidence. This could result in estimates of the level of damages that are not grounded in rigorous economic analysis, for example by relying instead on legal presumptions of harm and the use of judicial discretion.

Any uptick in competition litigation activity that the Representative Actions Directive brings about could throw these challenges into sharp relief. It will be down to member states to decide whether and how they respond. For example, the new Representative Actions Directive, like the 2014 Damages Directive, grants national courts the power to set disclosure procedures that facilitate access to private information required to assess the damages resulting from infringements of competition law. Whether member states choose to exercise these powers in 2023 or beyond remains to be seen.

Lessons from the UK

It may also be instructive for EU practitioners to cast a glance at their neighbours across the English Channel, where a number of relevant developments are underway:

- The UK's Competition Appeal Tribunal (CAT) already has a fully operational class action regime, and a glut of cases has started to make its way through the system. While not all claims were certified by the CAT in 2022, the bar for achieving certification continues to be low. The CAT's judgment in relation to foreign exchange trading, in which it refused to certify two related opt-out claims, was the only exception. But even in this case, the judgment left the door open for the claims to be pursued on an opt-in basis.

- As we explored in our 2022 outlook article, the focus of proceedings before the CAT has now begun to shift from certification to knotty practical questions around a range of issues such as case management, disclosure and expert evidence. These will continue to play out in 2023 as the first class action cases to be certified by the CAT move towards trial. *Merricks v Mastercard*, the first ever collective claim to be certified on an opt-out basis, will go to trial on the issue of causation this summer, while *Le Patourel v BT*, the second case to be certified (and the first where no infringement decision has been made by a competition regulator), is scheduled for trial in early 2024. As in-depth legal and economic arguments are put before the court, these trials can be expected to increase clarity and start informing the strategy for class action cases that are still at an earlier stage.

- Experience of collective proceedings before the CAT will therefore potentially furnish some insights as to the challenges that EU countries will need to resolve as their competition litigation pipelines continue to grow. Some potential solutions to these challenges may also emerge. For example, the CAT has recently introduced the Practice Direction on Umbrella Proceedings, which provides for an innovative – and, in some quarters, controversial – approach to dealing with situations where large numbers of claims are brought in relation to the same competition law infringements outside of the class action regime. Where different individual proceedings raise the same or similar issues, the new Practice Direction allows the CAT to group the cases together. The CAT has already deployed the Practice Direction in order to assess pass-on in the large number of interchange fee proceedings that it is handling.

4 Subsidy control in 2023

This year is set to usher in fundamental reforms in subsidy control in both the EU and the UK. In the EU the Foreign Subsidy Regulation will bring extra-EU subsidies within the EC's scope of review, while in the UK the Subsidy Control Act will replace the EU's state aid regime, rendered void by Brexit.

The Foreign Subsidy Regulation – widening the scope of merger control

The Foreign Subsidy Regulation was adopted by the European Parliament on 10 November 2022, and is due to enter into force in late 2023. This regulation extends the scope of EU subsidy control to directly encompass subsidies provided by third-party states outside the EU.

The EC has stated that the goal of the Regulation is to address distortions to the internal market caused by foreign subsidies, in particular by preventing "*an unfair advantage to acquire companies or obtain public procurement contracts in the EU*". It seeks to achieve this goal primarily by providing for two additional types of mandatory notification:

- for **mergers** a new mandatory and suspensory notification threshold of €500m (for either the acquiring or acquired party, or for the joint venture) where the combination of those firms has received a foreign financial contribution of at least €50m over the preceding three years;
- for **procurement contracts** with a value of €250m or more, where the bidding firm has received a foreign financial contribution of at least €4m over the preceding three years.

The term foreign contribution is drawn very widely in both cases and includes tax exemptions, grants, loans and capital injections. It also covers the provision or purchase of goods and services, which, if interpreted broadly, could widen the scope of the Regulation to catch firms that are, for example, suppliers of goods on commercial terms to the British or American governments.

This is potentially a significant change, particularly for merger control purposes. It brings into the Commission's purview a range of mergers which would have escaped review under the previous turnover threshold of €2.5bn worldwide. If arm's length commercial transactions that do not represent state aid are included, then a contribution of €50m is a relatively low threshold. This may be of particular relevance for UK firms seeking to expand into the EU, especially in the immediate term, since all Covid-related loans and payments would be captured.

Moreover, the timeline for dealing with foreign subsidies under the Regulation is considerably shorter than has been usual for state aid granted by EU governments. Whereas it has typically taken months, or indeed years, to review state aid cases, the Regulation provides for the same deadlines as under the EU Merger Regulation. This is likely to be challenging both for the merging parties and for their advisers.

Subsidy Control Act – private enforcement of state aid

In the UK, the Subsidy Control Act (SCA) came into effect on 4 January. The SCA incorporates into domestic UK law the broad set of principles to which the UK signed up under the 2021 Trade and Cooperation Agreement. It is, to some extent, the domestic successor to Article 107 of the Treaty on the Functioning of the European Union, which fell away with Brexit.

However, it is a significantly different beast to Article 107, both in its underpinning principles and in the manner in which enforcement will be carried out. Several of the seven principles are familiar from state aid practice – for example, that subsidies should be limited to what is needed to achieve a policy objective and should not normally cover everyday business expenses. Others are rather different, notably the balancing test in the final principle. This effectively involves a cost benefit analysis of the subsidy, trading off its positive impact for the policy objective being pursued against the harm it causes by distorting competition and investment. This is a considerably more of an economic balancing test than usually undertaken by the EC, which has traditionally eschewed effects-based approaches to state aid in favour of a legalistic, form-based procedure.

However, the greater changes in subsidy control compared to Article 107 may be in the manner in which enforcement is carried out. As is well known, the EC's state aid procedure is a matter solely for the EC and the Member State in question; aid recipients have no standing beyond that of a potential intervener in proceedings. This has on occasion led to bizarre situations, such as the *Charleroi* case, where (alleged) aid given by the region of Wallonia to Ryanair was the subject of proceedings between the EC and the Kingdom of Belgium, with neither the alleged grantor nor recipient directly involved. Moreover, the procedures have been largely administrative, with courts stepping in only on appeal.

Under the SCA, the role of the CMA, as the UK analogue of the Commission, will be limited to an advisory review of public authorities' own assessment of whether the subsidy is compatible with the SCA principles. Any enforcement will be via litigation in the CAT, with adversely affected firms serving as the plaintiffs. The first cases to go through the CAT, which may well commence in 2023, are likely to be crucial in determining the practical impact of the SCA.

Looking ahead

By the end of 2023, it seems likely that the subsidy control regime will look very different to that at the start of the year. However, many questions remain to be answered:

- To what extent will the EU's foreign subsidy control regime catch in its net not just state-owned bodies from the likes of China but major UK- or US-based firms that have won government tenders?

- How will the CAT set the bar for subsidy control litigation – and how much discretion will it give to public authorities?
- Will advisers be able to deal with the accelerated timelines for reviewing subsidies in both the EU and the UK – a handful of months, rather than the years which have been common for state aid reviews?

The precise answers to these questions are likely have a significant impact on the role of subsidies around the world for years to come.