

Glossary

Cartel: Agreement between competing companies to fix prices, limit production or divide up the market.

Department of Justice (DOJ): US federal executive department responsible for the administration of justice and enforcement of law, including competition law through its Antitrust Division.

Federal Trade Commission (FTC): US federal agency whose tasks include consumer protection and enforcement of competition law.

Development of EU and US competition policies

Fair competition in a market economy is considered to increase overall wealth, protect consumers and foster innovation. It also helps to make companies and their goods and services competitive on the world market.

Modern competition policy started with the adoption of the [Sherman Antitrust Act](#) by the US Congress in 1890. This law prohibits contracts and business alliances that restrain interstate trade and commerce. In 1911, the US Supreme Court applied the law to break up the Standard Oil Trust into independent companies.

Merger control was introduced with the [Clayton Act](#) in 1914. This law also prohibits practices such as price discrimination. In the same year the Federal Trade Commission was established in order to enforce the competition rules.

In Europe, competition policy gained momentum after World War II with the break-up of trusts that had played a role in wartime production. The [Paris Treaty](#) establishing the European Coal and Steel Community (1952) contained provisions regarding cartels, concentrations (mergers), and abuse of dominant position by firms.

Competition policy within the Member States developed around the same time, for example with the foundation of the German Federal Cartel Office in 1958.

The [Treaty of Rome](#) (1957) laid the foundations of European Community competition policy. It aims at ensuring that competition in the internal market is not obstructed by anticompetitive behaviour of companies or national authorities. The Treaty contains provisions on anticompetitive agreements (Article 85) and abuse of dominant position (Article 86), as well as state aid (Article 90). The European Commission (EC) was given authority to enforce the competition rules.

Cross-border mergers were initially often welcomed to overcome the fragmentation of European industries. Control of mergers was introduced into European Community law only in 1989 with the Merger Regulation (revised in 2004).

Regulation 1/2003, which came into force on 1 May 2004, gives national competition authorities a role in the enforcement of EU competition law. The European Competition Network, launched in 2002, facilitates cooperation and coordination among national competition authorities.

Since 2009, Articles 101-109 of the Treaty on the Functioning of the European Union (TFEU) form the legal basis of EU competition law.

Current developments in EU competition policy include the modernisation of state aid rules and legislation regarding compensation for damages.

Antitrust and cartels

Fighting cartels is a common objective of EU and US competition policies, but the instruments and methods are different. The EU has an administrative enforcement system, which relies on financial sanctions (fines) against undertakings. In contrast, the US system considers participation in a cartel as a property crime (like theft or burglary), subject to criminal sanctions including imprisonment.

European Union

[Article 101](#) TFEU prohibits anti-competitive agreements between companies, and [Article 102](#) prohibits abuse of a dominant market position.

The EC investigates cases of anticompetitive behaviour and can impose fines. Under a decentralised system of enforcement, introduced by [Regulation 1/2003](#) Member States' competition authorities also enforce Articles 101 and 102.

The EC opens cases following complaints, applications for leniency, or on its own initiative. Under the leniency policy, introduced in 1996, the first company to report a hitherto unknown cartel can benefit from immunity; other participants which cooperate with the Commission may also receive reductions of fines. The majority of cases are leniency cases.

Settlements, introduced in 2008, serve to speed up competition cases. After the EC has completed a cartel investigation, it can offer a settlement to the participants. If they agree, they receive a 10% reduction in fines and avoid costly litigation.

Between 1969, when the first cartel decision was adopted, and October 2013, the Commission has imposed fines on 820 companies, totalling over €19 billion.

The General Court and the Court of Justice have the power to annul the Commission's decisions or vary the fines it imposes.

Victims of anticompetitive behaviour can generally claim damages equivalent to the real damage they have suffered. A [proposed directive](#) harmonising national rules and an [EC Recommendation](#) on [collective redress](#) aim to facilitate such damage claims.

United States

The lead agency in US cartel cases is the Department of Justice. Among its tools are the grand jury with powers to compel both the production of documents and testimony, specialised lawyers and the support of FBI investigators. Since efforts to frustrate DOJ investigations are often federal crimes subject to imprisonment, the DOJ has strong powers to uncover and prosecute cartels. As most cartel cases involve interstate trade, they fall under federal law.

Actors

The principal actors in EU competition policy are Council as legislator and the EC as the institution which applies and enforces the laws. DG Competition, the responsible EC department, investigates competition cases, and the College of Commissioners takes the formal decisions.

The European Parliament is consulted on legislation. The Court of Justice of the EU has the power to cancel or modify EC decisions.

Member States' competition authorities may enforce European and national competition laws.

In the US, Congress legislates in the area of competition law. Competition laws are enforced at the federal level by the [Department of Justice \(Antitrust Division\)](#) and the [Federal Trade Commission \(Bureau of Competition\)](#).

Where antitrust cases cannot be settled, the courts take the final decision. Congress can hold hearings on individual merger and antitrust cases.

Competition law is also applied at the level of the states. The courts also play a role in the private enforcement of US competition law.

In 2012, the DOJ filed 67 criminal cases and obtained \$1.14 billion in fines. Courts imposed 45 prison terms with an average sentence of just over two years.

The US states typically focus on monetary redress, and may recover damages on behalf of their citizens.

Like the EU, the US operates a [leniency programme](#) to encourage reporting of anticompetitive conduct in exchange for immunity from fines or criminal convictions.

[Plea bargaining](#) is an arrangement under which a party that pleads guilty and cooperates with the agency can receive a reduced sentence. In contrast to EU settlements, plea bargaining in the US can take place at any time in a procedure.

Under US federal competition law, private parties may recover three times the amount of the damages they have suffered, plus attorney's fees. However, participants in the leniency programme are only liable for their *pro rata* share of the damages. The treble-damages provision offers private parties an incentive to undertake costly antitrust litigation, and acts as a [powerful deterrent](#) to potential cartel activity. About 75% of US antitrust cases are brought to court by private enforcement, typically as class actions.

EU/US cooperation

The EC and the US authorities (DOJ and FTC) cooperate on competition policy cases that affect both jurisdictions. The cooperation is based on the [1991 Cooperation Agreement](#) and the [1998 Positive Comity Agreement](#). Under the latter, a party that is adversely affected by anticompetitive behaviour in the other's territory may request the other party to take action.

Merger control

European Union

The EC enforces merger control in the EU, on the basis of the [Merger Regulation](#). Planned mergers and acquisitions of companies that do significant business in the EU must be notified to the EC if the combined businesses exceed certain revenue thresholds. More than [5 000 mergers](#) have been notified to the EC since 1990, of which 24 were blocked.

The EC also has the right to review mergers between non-EU companies provided that they conduct significant business in the EU.

If the EC concludes that a merger would distort competition, it may block it unless the companies propose remedies. The fact that the EC acts as both investigator and decision-maker is compensated by extensive procedural rights for the parties. EU merger control is characterised as 'symmetric', in the sense that the Commission has to demonstrate either that a merger is anti-competitive or that it is not. Whichever it decides, its decision can be appealed in court.

United States

Merger control in the US is typically performed at the federal level by the FTC and the DOJ. They coordinate which of them will handle each case, and conduct about 50 in-depth merger investigations per year. The US states are also active in merger control, but private merger litigation is rare. The US system is thus less centralised than the EU system.

Unlike the EC, the federal agencies do not have the authority themselves to block mergers, but must obtain an injunction from a federal court. However, if a federal

agency decides not to pursue a case or to accept commitments, this decision cannot be appealed in court. The US procedure is therefore characterised as 'asymmetric'.

EU/US cooperation

If mergers are notified in both the US and the EU, the federal agencies and the European Commission work in cooperation, under the terms of the [1991 Cooperation Agreement](#) and the [2011 best practices document](#).

State aid control

European Union

[Article 107](#) TFEU prohibits state aid that distorts competition in the internal market. Member States must notify the EC of planned state aid measures unless they fall under a [general exemption](#). The EC has the sole competence to decide on the legality of state aid.

The [state aid scoreboard](#) shows that EU-27 non-crisis state aid in 2012 amounted to 0.52% of GDP. In the context of the financial crisis, the Commission took more than 400 decisions between October 2008 and October 2013 authorising state aid to the financial sector.

In 2012, the EC initiated a comprehensive [state aid modernisation](#) programme, with the aim of better focussing state aid on targeting market failures and on objectives of common European interest, as well as streamlining and accelerating procedures.

Recent EC in-depth investigations of state aid include German exemptions from the [renewables surcharge](#) for energy-intensive industries, and [UK measures supporting nuclear energy](#).

United States

In contrast to the EU, US competition law has no rules on state aid. However, US courts have in several cases ruled against aid by local authorities or US states on the grounds that it discriminates against interstate commerce.

International competitiveness, WTO and TTIP

European companies, whose access to state aid is limited by EU competition rules, may be at a disadvantage if competitors outside the EU receive state aid. Although the World Trade Organisation (WTO) has provisions on subsidies, these are not as comprehensive as EU state aid rules, and not as strictly enforced. [Competition Commissioner Joaquín Almunia](#) said that the EU may address the issue of subsidies and state aid in the EU-US negotiations on a Transatlantic Trade and Investment Partnership (TTIP).

Roles of European Parliament and US Congress

European Parliament

According to Articles [103](#) and [109](#) TFEU, legislation in the field of competition policy is adopted by Council on proposals from the EC, after consultation of Parliament.

An exception is the [proposed Directive](#) regarding compensation for victims of anticompetitive practices – long supported by the EP – which falls under the ordinary legislative procedure. EP and Council reached a [trilogue agreement](#) on 18 March 2014. The EP plenary vote is planned for April.

The main role of the EP is scrutiny of the Commission. The Competition Commissioner appears several times per year before the EP's ECON Committee to report on the Commission's approach and discuss individual decisions. Each year, the EP adopts a resolution on the EC's [annual report](#) on competition policy. The [EP resolution of 11 December 2013](#) on the 2012 report considers that the lack of codecision powers for the EP constitutes a democratic deficit, and calls for equal treatment of Council and EP regarding access to meetings and information.

The [EP resolution of 17 January 2013](#) on state aid modernisation welcomes the reform and the streamlining of procedures. It emphasises the need for less but better targeted state aid.

To assess competition in specific sectors, the EP organised a workshop on [competition in the transport sector](#) on 3 September 2013, and a workshop on [fuel prices](#) on 18 December 2013. A recent EP [policy department study](#) concludes that EU competition policy contributes significantly to economic growth and the objectives of the EU's 2020 Strategy.

US Congress

Besides legislating on competition policy, the [US Congress](#) also plays a greater role in individual merger and antitrust cases through the competent subcommittees:

- US Senate Committee on the Judiciary, [Subcommittee on Antitrust, Competition Policy and Consumer Rights](#)
- US House of Representatives Committee on the Judiciary, [Subcommittee on Regulatory Reform, Commercial and Antitrust Law](#)

Both committees organise hearings on high-profile merger and antitrust cases. Recent examples are the [TWC/Comcast merger](#) and the [Google antitrust](#) investigation. High levels of legislative scrutiny increase the workload of the US competition authorities. The FTC may give confidential briefings to senior congressional officials on pending merger reviews.

Members of Congress convey their views on individual cases to antitrust agencies by letters or phone calls. The parties planning a merger strive to mobilise congressional support, sometimes by promising to make investments, or to preserve or create jobs. However, the final decisions are taken independently by the competition authorities.

Further reading

[Merger control procedures and institutions: a comparison of the EU and US practice](#) / W. Kovacic, P. Mavroidis, D. Neven, Robert Schuman Centre for Advanced Studies, 2014

[Antitrust federalism in the EU and the US](#) / Firat Cengiz, London, Routledge, 2012

[Public and Private Antitrust Enforcement in the United States](#) / Bill Baer, European Competition Forum, February 2014

[Fighting cartels in Europe and the US: different systems, common goals](#) / Alexander Italianer, Annual Conference of the International Bar Association, October 2013

[Global forum on competition: roundtable on competition, state aids and subsidies](#) / OECD, May 2011

[EU competition policy: antitrust, cartels and merger control measures](#) / Marcin Szczepanski, European Parliament Library Briefing, March 2013

[EU competition policy: state aid control measures](#) / Marcin Szczepanski, European Parliament Library Briefing, April 2013

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