COMPETITION POLICY

Articles 101 to 109 of the Treaty on the Functioning of the European Union (TFEU) contain rules on competition in the internal market, prohibiting anti-competitive agreements between undertakings. Businesses with a dominant market position must not abuse their position in a way which adversely affects trade between Member States. Mergers and takeovers with an EU dimension are monitored by the European Commission (‘the Commission’) and may be prevented in certain cases. State aid to given undertakings or products is prohibited when it leads to distortions of competition but can be authorised in specific cases. Competition rules also apply to public undertakings, public services and services of general interest. However, exceptions may be granted where application of the rules would jeopardise the realisation of the objectives of those services.

LEGAL BASIS

— Articles 101 to 109 TFEU and Protocol No 27 on the internal market and competition, where it is made clear that fair competition is included in the objective of the internal market in Article 3(3) TFEU;
— Merger Regulation (Regulation (EC) No 139/2004));
— Articles 37, 106 and 345 TFEU for public undertakings and Articles 14, 59, 93, 106, 107, 108 and 114 TFEU for public services, services of general interest and services of general economic interest; Protocol No 26 on services of general interest; Article 36 of the Charter of Fundamental Rights.

OBJECTIVES

The fundamental objective of EU competition rules is to prevent distortion of competition. This is not, however, an end in itself. It is rather a condition for achieving a free and dynamic internal market and is one of several instruments promoting general economic welfare. Since the Lisbon Treaty came into force, this objective has no longer been set out expressly in Article 3 TFEU but subsumed into the term ‘internal market’ under Protocol No 27. This is not expected to have any practical implications, as no changes have been made to the competition rules themselves. The conditions for the application of these rules and their legal effects have become so entrenched in the Commission’s administrative practice over many years, and in the case law of the European courts, that they may be regarded as fixed.
RESULTS

A. Comprehensive ban on anti-competitive agreements (Article 101 TFEU)

All agreements between undertakings which have as their object or effect a distortion of competition and which may affect trade between Member States are prohibited (paragraph 1) and automatically void (paragraph 2). Agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress may be exempted, provided that consumers are allowed a fair share of the resulting benefit and that the agreement does not impose unnecessary restrictions or aim to eliminate competition for a substantial part of the products concerned (paragraph 3).

Council Regulation (EC) No 1/2003 has governed the implementation of the rules laid down in Articles 101 and 102 TFEU since 1 May 2004. This allows national competition authorities and the courts of the Member States to apply Articles 101 and 102 TFEU themselves. Directive (EU) 2019/1 is intended to empower the competition authorities of the Member States to be more effective enforcers of EU competition law. It will make certain that the same legal basis applies to all national competition authorities, in their cooperation within the European Competition Network (ECN), and that they have appropriate tools to enforce the competition rules. Generally speaking, when applying EU antitrust rules, the following instruments have proved useful in practice:

— Block exemptions: these cover groups of similar specific agreements which usually have a comparable impact on competition. If one of these groups can be expected regularly to fulfil the conditions for exemption set out in Article 101(3) TFEU, it may be granted block exemption, in the legal form of a regulation, from the prohibition under Article 101(1) TFEU. This procedure is intended to reduce the administrative burden on the Commission.

— Agreements of minor importance: certain agreements which do not fulfil the conditions for exemption under Article 101(3) TFEU are not regarded as infringements if they are of minor importance and have little impact on the market (the de minimis principle). Such agreements are often seen as useful for cooperation between small and medium-sized enterprises. The de minimis notice was revised in 2014 to reflect changes to a number of block exemption regulations and recent case law (2014/C 291/01). The main change is the clarification that agreements which have as their ‘object’ the restriction of competition cannot be regarded as being of minor importance.

Certain types of agreement are always considered harmful to competition and are thus prohibited without exception. These are, first and foremost, price-fixing agreements and territorial protection clauses.

Settlement procedure in cartel cases: it is possible, under Regulation (EC) No 622/2008, for a procedure to be accelerated and a fine to be reduced by 10% if the undertakings concerned support the Commission in its work and disclose their participation in an anti-competitive arrangement at an early stage. This procedure may
apply alongside the leniency provision (Communication 2006/C 298/11, last amended 2015/C 256/01).

Claims for damages: in order to heighten the deterrent effect against prohibited agreements and to provide better protection for consumers, the Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Directive 2014/104/EU) was adopted in 2014. For cartel cases, it will have two consequences in particular: damages become an option in addition to fines; and the effectiveness of leniency policy continues to be guaranteed. A Commission report on the implementation of the directive is expected in 2020.

As regards vertical restraints, the Commission is currently preparing the revision of Regulation (EU) No 330/2010 concerning exemptions regarding categories of vertical agreements and the relevant guidelines. In this connection, special attention will be paid to digital distribution issues.

B. Abuse of dominant market positions (Article 102 TFEU)

A dominant position is ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers’ (Case 27/76, United Brands). Dominant positions are assessed in relation to the internal market as a whole, or at least a substantial part of it. How much of the market is taken into account will depend on the nature of the product, availability of alternative products, and consumers’ behaviour and readiness to switch to alternative products. Article 102 TFEU provides a non-exhaustive list of examples of abusive practice.

Since September 2016, the Commission has also been making use of an accelerated settlement tool in addressing infringements of Article 102 TFEU under the cooperation procedure.

C. Merger control procedure

Under Regulation (EC) No 139/2004, concentrations which would significantly impede effective competition in the common market or in a substantial part of it, in particular through the creation or strengthening of a dominant position, must be declared incompatible with the common market (Article 2(3)). The Commission must be notified of planned mergers. Investigations are initiated when control is acquired over another undertaking (Article 3(1)). The merger may not be completed until the Commission has given its authorisation (Article 7). There is no systematic subsequent scrutiny or unbundling of associated companies.

The procedure can comprise two phases. Most procedures are completed in the first phase (25 working days); a more exhaustive investigation takes place during a second phase (90 working days) in more complex cases. Decisions on compatibility may be subject to conditions and obligations (Article 8).

In 2014, the Commission presented the White Paper entitled ‘Towards more effective EU merger control’, aimed at improving the combined effectiveness of the rules at EU level and at national level.
D. Prohibition on aid under Article 107 TFEU

State aid includes all state-funded aid granted directly by Member States. It covers not only non-repayable subsidies, loans on favourable terms, tax and duty exemptions, and loan guarantees, but even state participation in undertakings in so far as preferential treatment of given undertakings or sectors distorts, or is likely to distort, competition and adversely affects trade between Member States.

The prohibition on aid does not apply to the cases listed in paragraph 2. Such aid is compatible with the internal market and is automatically permitted. Individual examination by the Commission is required for the cases listed in paragraph 3. The de minimis principle is also applied in relation to State aid control, and a general block exemption (Regulation (EC) No 800/2008), which was extended in scope in 2014, 2017 and 2018, has been in force since 2008.

The Banking Communication on the application of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 216, 30.7.2013, p. 1) — part of the response to the economic and financial crisis — has been applied since 1 August 2013 in respect of decisions pursuant to Article 107(3)(b). Other communications cover subjects including the recapitalisation of financial institutions, the treatment of impaired assets, and the return to viability and the assessment of restructuring measures.

The subsidies for banks are intended to promote lending and investment in sustainable growth. A large number of regulations were revised as part of the modernisation of State aid rules in 2012, the aim being to focus on those State aid cases which have the most serious impact on the internal market and to tighten up the procedure. Since the establishment of the Joint Resolution Mechanism as the second pillar of the Banking Union, bank aid has to be assessed in the light of the Banking Communication provisions on the one hand and Directive 2014/59/EU regarding the recovery and resolution of credit institutions on the other.

In a number of decisions, the Commission has deemed preferential tax treatment for certain individual companies in some Member States to constitute prohibited State aid, the repayment of which must be demanded. For example, in 2016, the Commission instructed Ireland to seek payment from Apple of EUR 13 billion in taxes. Both Apple and the Irish authorities have challenged the decision and a court case is pending.

E. Public services, services of general interest and services of general economic interest (SGEIs)

For the first time, the second sentence of Article 14 TFEU assigns shared legislative powers to the European Union. Under the ordinary legislative procedure, the European Parliament and the Council are co-legislators on an equal footing, as set out in Articles 52 and 114 TFEU. Article 14 TFEU is supplemented by Protocol No 26, which refers to Article 14 TFEU and again emphasises the importance of these services, their diverse nature, the wide measure of discretion enjoyed by national, regional, and local authorities, and the principle of universal access. Article 36 of the Charter of Fundamental Rights confirms the particular importance of Article 14 TFEU. Here too,
the access which European citizens should have to SGEIs is recognised with a view to promoting social and territorial cohesion within the Union.


ROLE OF THE EUROPEAN PARLIAMENT

Parliament is usually involved in competition legislation only through the consultation procedure. Its influence is thus limited compared to the influence of the Commission and the Council. Parliament has already called, on several occasions, for the ordinary legislative procedure to be extended to cover competition law, for example in its yearly resolutions on the Commission’s Annual Report on Competition Policy.

Parliament’s principal role is therefore scrutiny of the executive. The Commissioner responsible for competition appears several times a year before Parliament’s Committee on Economic and Monetary Affairs (ECON) to explain the approach taken to and discuss individual decisions.

The ordinary legislative procedure was adopted in connection with the above-mentioned directives on actions for damages and measures to strengthen the competition authorities of the Member States. In both instances, Parliament (with ECON as the committee responsible) acted as co-legislator. The Members were anxious to ensure that consumers could be fully compensated for such damage as they might have suffered, but they also sought to avert the possibility of overcompensation. Again with consumer interests in mind, they managed to ensure that decisions of national competition authorities would be considered prima facie evidence of a breach of competition law. They also stressed the importance of competition authorities being able to issue interim injunctions in competition proceedings.

Companies in the digital economy and services sector such as FinTech continue to pose a challenge. Having investigated and discussed the matter, the ECON Working Group on Competition Policy has, in annual resolutions, called on the Commission to take action.

During the eighth parliamentary term, the Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE 1, TAXE 2, TAXE 3) deliberated on what was being done in practice to assess the compatibility of tax rulings in the Member States with State aid rules what could be done to clarify the rules on the reciprocal exchange of information.

Stephanie Honnefelder
04/2019