EU competition policy: key to a fair Single Market

IN-DEPTH ANALYSIS

Author: Marcin Szczepański
Members' Research Service
European Parliamentary Research Service
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The aim of this publication is to describe the main actors and discuss key issues and recent developments in EU competition policy. The document also aims to analyse the efficiency of the policy, its impact on economic growth and its conduct in the current economic and financial crisis.

http://www.eprs.ep.parl.union.eu
http://epthinktank.eu
eprs@ep.europa.eu

EXECUTIVE SUMMARY

The aim of EU competition policy is to safeguard the correct functioning of the Single Market. In essence it ensures that enterprises have the possibility to compete on equal terms on the markets of all Member States.

Competition policy encompasses a wide range of areas: antitrust and cartels, merger examination, state aid, the liberalisation of markets and international cooperation. The European Commission enforces competition rules through its powers of investigation and sanction. Competition cases can be taken to the General Court with appeals heard by the Court of Justice. The European Parliament is only involved in the adoption of relevant legislation under the consultation procedure.

EU antitrust policy prohibits agreements between two or more independent market operators if they restrict competition. Furthermore, it prohibits abuse of a dominant market position by one or more undertakings. The most obvious example of infringement of antitrust rules is the creation of a cartel between market competitors, who join together to fix prices, collude on tender bids, limit production or share markets or customers between them. Between 1969, when the first cartel decision was adopted, and October 2013, 820 companies have been fined by the Commission for a total amount of over €19 billion.

The Commission also monitors planned mergers and acquisitions of companies if their combined businesses exceed specified revenue thresholds. Since 1990, the EC has been informed of more than 5 000 mergers, 24 of which were blocked for their possible anti-competitive effects. The EC also has the right to assess mergers between non-EU companies if they carry out a significant part of their business in the EU.

Member States are required to notify the Commission of any plan to grant or alter state aid unless it is of a type covered by the General Block Exemption Regulation. The Commission decides on the legality of state aid: it can monitor, restrict and recover any forms and levels of aid and must approve aid grants before they can be implemented. Between 2009 and 2012 aid granted in the context of the financial and economic crisis constituted the vast majority of state aid.

Liberalisation means opening up previously closed markets to competition. The liberalisation of network industries is especially challenging, with the impact of competition rules on the consumer benefits of such liberalisation being strongly debated.

Recent developments in competition policy include the private antitrust damages actions directive, the recommendation on collective redress and complex modernisation of the state aid rules. Even though the Commission has made progress in detecting cartels, finding an effective deterrent remains a challenge. Settlements, commitments and leniency programmes all have advantages and disadvantages.

Undoubtedly the EU has one of the strongest systems of competition policy worldwide. Competition itself has been found to contribute to long-term economic growth. In these times of crisis, the Commission arguably has ensured the proper application of state aid.

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1. Introduction

Competition is a crucial element of an open market economy. Nevertheless economists agree that competition in its purest form (when all firms compete for perfectly substitutable products and where no single firm can affect prices) cannot exist in the real world. Although there is a debate about its merits and demerits, competition in market economies is generally accepted as having more benefits than disadvantages (Cini, McGowan 2009). Its main advantages are lower prices, better products, wider choice and more efficient production than would be achieved under other arrangements, such as a monopoly situation (Whish 2012). Neoclassical economic theory, the predominant theory in mainstream economics, also argues that competition maximises social welfare.

The EU's competition policy was foreseen by the Treaty of Rome in 1957, which established the creation of a system safeguarding free competition in the common market as one of its goals. Article 3(3) of the Treaty on European Union (TEU) states that the EU "shall establish an internal market", based on "a highly competitive social market economy"[1]. The rules on competition in this market are contained in Articles 101 to 109 of the Treaty on the Functioning of the EU (TFEU).

The notion of an internal market is built on the principle that market participants should operate with the greatest possible degree of economic freedom, unhindered by any barriers to competition. The aim of European competition policy is to facilitate the correct functioning of the Single Market. In essence it ensures that enterprises have the possibility to compete on equal terms in the markets of all Member States. Effective competition is not a goal in itself but more a driver of an effective internal market.

Companies may compete with each other by reducing prices or by offering a better quality and variety of goods and services in order to attract a larger customer base and expand their market. Effective competition means that companies act independently of each other but are subjected to market pressures created by their competitors. The European Commission argues that competitive markets create a downward pressure on prices, encourage quality of goods and services, widen consumers' choice and stimulate innovation. Economic evidence suggests that competition increases the productivity or efficiency of enterprises (Holmes Schmitz 2010 and Aghion Schankerman 2004). It also creates favourable conditions for innovation and growth[2]. Many argue that promoting competition is the best available tool for enhancing consumer wellbeing (Stucke 2013). Accordingly, European competition rules are established to protect competition, prevent distortions in the market and ensure fairness for market participants.

Competition may be hindered in many ways, for example by:

- Anti-competitive behaviour of market participants, such as coordinating their actions in the marketplace.

[1] With the introduction of the Treaty of Lisbon the objective of creating an undistorted internal market was moved from Article 3 of Treaty on European Union to the "Protocol on the internal market and competition". This did not lead to any significant changes as Article 51 of the Treaty on European Union incorporates all Protocols of the Treaty in the Treaty itself.

[2] This seems to be the mainstream view (Lianos 2013). However, some economists observe that there is no consensus among researchers on whether intensified competition increases innovation and growth (Voigt, 2006). Some indeed argue that monopolistic firms may be more innovative due to less financial restrictions available to them and their ability to cash in on innovations more quickly than smaller firms with low market shares.

- Exploiting the dominant market position of an undertaking to distort competition.
- Mergers of entities that risk reducing considerably competition on the market.
- Interventions of Member States in the market (state aid).
- Discriminating against certain economic actors in public procurement.

The European competition rules apply also to conduct or agreements concluded outside the EU if they have effects within the Union.

2. Main actors and their roles

2.1. European Commission and Courts

When violations of competition rules occur within one Member State, the National Competition Authority (NCA) is typically best placed to handle the case. The European Commission monitors EU-wide markets, receives complaints, and acts if it finds evidence of anti-competitive activities affecting cross-border trade.

Acting on a proposal of Commissioner for Competition, the College of all the Commissioners collectively adopts final decisions in competition cases as well as policy documents such as guidelines or legislative proposals to the Council. The Commissioner for Competition can directly adopt some preparatory or intermediary acts such as a Statement of Objections or final decisions in less-important, "simplified" cases. The decisions taken by the College and the Commissioner are prepared and implemented by Directorate-General (DG) for Competition.

European Competition Network (ECN)

This network consists of the NCAs from all Member States and the Commission. The ECN helps to divide up competition-related work and apply EC competition rules consistently across the EU. Its objective is to create an effective tool for cooperation against cross-border business activities which obstruct competition. The participants share information on new cases and planned enforcement decisions, coordinate and help each other with investigations, and exchange evidence, information and best practices.

This DG is primarily responsible for directly enforcing Articles 101 to 109 of the TFEU. It may investigate on its own initiative or intervene when it has proof that competition rules have been violated. In cases concerning anti-competitive agreements between companies or abuse of a dominant market position, DG Competition opens cases on its own initiative (e.g. sector enquiries based on market monitoring) or acts after a complaint or a voluntary disclosure of wrongdoing (which companies may make with the prospect of leniency). In cases concerning state aid or mergers, the DG initiates proceedings based on notifications by Member States or the companies concerned.

DG Competition also cooperates with other DGs to ensure competition principles are respected in legislation and to identify markets that should be investigated. It also exchanges information and best practices with other international or third country competition bodies and works together with them on individual cases.

If DG Competition deems that a company or Member State has infringed competition rules, or that a planned merger would weaken competition on a market, it can propose that the College of Commissioners demand an end to the infringement, prohibit the merger, insist on remedial actions or impose fines (e.g. in antitrust cases, including those concerning cartels). In addition, the Commission has strong enforcement powers including the power to search private premises and seal business records or premises. It can also levy fines for procedural infringements such as not sharing evidence. The Commission can impose a range of remedial measures such as breaking up a company which has abused its dominant market position.

Under a system of checks and balances, the Commission's decisions can be challenged in the Court of Justice of the European Union, namely the General Court, with a final appeal possible before the Court of Justice. The Court reviews the legality of the Commission's decisions, assessing both the factual findings and their legal appraisal[3]. The Courts may also reassess economic and technical appraisals made by the Commission, looking for correct compliance with procedures, any errors of assessment or misuse of powers[4]. The Courts may also scrutinise the Commission's interpretation of economic or technical data[5].

Furthermore, the Court of Justice of the European Union is empowered by Article 31 of Regulation 1/2003 to review fines or penalty payments imposed by the Commission in antitrust proceedings. These payments may be cancelled, reduced or increased. If an action for annulment of the Commission's decision is found to be justified, the Court will void it. The Court may also partially annul the decision (e.g. reduce a penalty or fine, or find that an infringement had a shorter time span than that decided in the investigation).

In their enforcement of the competition rules, national courts need to apply EU competition law where an effect on trade between Member States is present. The Commission cooperates with national courts by sharing information when necessary, providing advice on questions regarding the application of rules, and submitting observations. The increased involvement of NCAs and national courts has led to a substantial increase in the number of cases decided over the past 20 years (Ibanez Colomo, 2013).

Role of the European Parliament

At present the European Parliament (EP) is generally involved in competition legislation under the consultation procedure. The EP is asked for its opinion on proposed legislation before adoption by the Council, and may propose amendments to it. Even though the Council is not legally obliged to take account of the EP opinion, the case-law of the Court of Justice indicates that it must not take a decision without having received it. The EP's Economic and Monetary Affairs (ECON) and Internal Market and Consumer Protection Committees (IMCO) deal with the issues regarding competition.

The main role of the EP is scrutiny of the Commission. Since the late 1990's the Commissioners for Competition have been reporting DG Competition activities to the EP. 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. Since 2011 this resolution concerns the topical main issues of competition law and its application. The EP resolution of 11 December 2013 on the 2012 report underlines that the lack of co-decision powers in competition matters constitutes a democratic deficit. The resolution also calls for equal treatment of Council and EP with regards to access to meetings and information.

Exceptionally, the proposed directive on compensation for victims of anti-competitive practices falls under the ordinary legislative procedure (see section 4.1).

2.2. Other institutions

Competition policy is not subject to the co-decision procedure. The Council (and the Commission) have adopted a number of regulations in the field. Furthermore, the appropriate ministers from each EU country may discuss competition issues in the Competitiveness Council.

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[3] See Joined Cases T-25/95 etc *Cimenteries CBR* and *Others v Commission* [2000] ECR II-508, para 719.

[4] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, point 87.

[5] Case T-201/04 *Microsoft v Commission*[2007] ECR II-3601, point 89; see, also Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, point 39.

The European Court of Auditors has the competence to audit fines imposed on companies found in breach of competition law. The European Central Bank regularly gives advice on competition issues related to the financial sector when consulted by the Commission. The European Economic and Social Committee's Single Market Production and Consumption (INT) section prepares opinions on competition policy.

3. Policy areas

This section outlines the main areas of competition policy. Cartels, even though part of antitrust policy, will be treated as a separate policy. Moreover, the Commission may launch sector-specific measures to address shortcomings on individual markets. These corrective measures may originate in all branches of competition policy[6] and take the form of dedicated sector legislation.

Main elements of the legal framework

- Articles 101 to 109 of the Treaty on Functioning of European Union (TFEU) and its "Protocol on the internal market and competition" incorporated in the Treaty.
- Merger Regulation (EC) No 139/2004 and its implementing Regulation 1269/2013.
- Articles 37, 106 and 345 TFEU for public undertakings.
- Articles 14, 59, 93, 106, 107, 108 and 114 TFEU for public services, services of general interest and services of general economic interest.
- Article 36 of the Charter of Fundamental Rights.

3.1. Antitrust policy

EU antitrust policy is based on two core legal provisions, Article 101 and 102 TFEU. The Commission reports that the majority of cases in the period 2004-2014 concern suspected violation of Article 101.

Article 101 TFEU prohibits agreements between two or more independent market operators that restrict competition. This provision applies to both horizontal agreements (i.e. between companies operating at the same level in the market such as wholesalers) and vertical agreements (i.e. between companies operating at different levels, such as producer and distributor). Article 101 prohibits[7] those agreements which have as their "object or effect the prevention, restriction or distraction of competition within the internal market." They may be exempted only if they have a redeeming virtue such as improving the production or distribution of goods, contributing to technical or economic progress or allowing consumers a fair share of any benefit. At the same time exempted agreements may neither impose restrictions on the parties nor give the parties the possibility to eliminate competition.

The Commission has three possible courses of action in case of a violation: it can launch an infringement procedure, give clearance to the agreement after examination, or issue an exemption (or a block exemption for a whole sector, e.g. the car industry).

3.1.1. Horizontal agreements

Horizontal agreements (e.g. to fix prices, restrict output or production, or split markets) are penalised heavily. Even though all market participants are free to establish their own prices, they may not cooperate or agree with competitors to set prices.

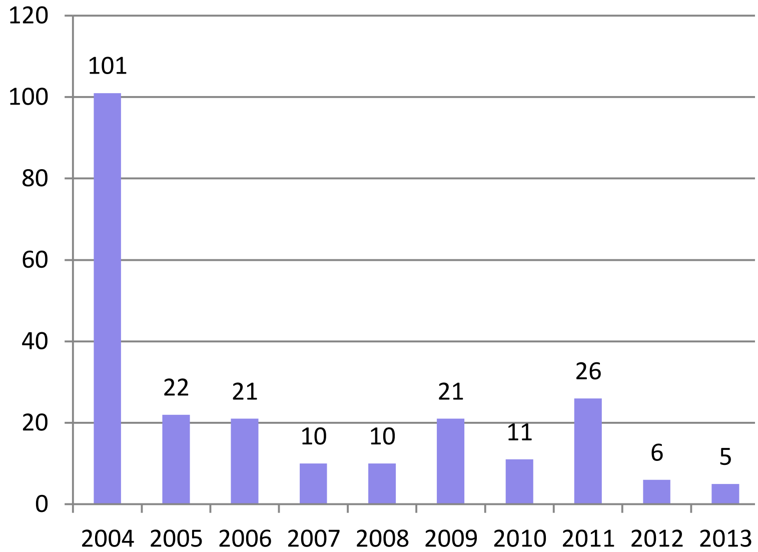
[6] With these sector-specific measures, the Commission has so far covered 13 different sectors of the EU economy. These comprise agriculture and food, consumer goods, energy and environment, financial services, information and communication technologies, media, motor vehicles, pharmaceuticals, postal services, professional services, sports, telecommunications, and transport.

[7] It also makes the existing agreements void.

Any attempts to fragment the EU's Single Market along national or territorial lines are viewed as "hard-core" infringements of competition rules. Examples include export bans, price fixing or market sharing.

However sometimes horizontal cooperation is allowed because it leads to significant economic benefits: companies may share risk, save on costs, raise levels of investment, enhance know-how, accelerate innovation, or increase product quality and variety. These cases may fall under the block exemption regulations for horizontal cooperation. Specific categories of agreements are allowed between undertakings with limited market power:

Figure 1: Commission antitrust investigations 2004-2013



Data source: European Commission, 2014.

- When joint market share is lower than 25% in the case of research and development (R&D) agreements between competitors[8].
- When joint market share is lower than 20% in the case of specialisation[9] or joint production agreements.

If these agreements respect certain conditions stipulated in the regulations, they are presumed to have no anti-competitive effects (or the resulting positive effects prevail over the negative ones) and so they may be exempted from the ban on restrictive agreements and business practices. The 2010 guidelines (OJ C 11, 14.01.2011) contain a framework for the analysis of horizontal agreements in the areas of R&D, production, purchasing, commercialisation, standardisation and information exchange. They promote a transparent standard-setting system and lay down the conditions for information exchange between companies.

3.1.2. Vertical agreements

Vertical agreements (such as when a supplier of goods demands that its retailers not purchase or resell other products) are considered by the Commission to be less harmful to competition.

For the majority of vertical restraints, rules are violated only if there is a certain concentration of market power in the hands of the supplier, the buyer or both. A restriction of competition may also take place if an agreement between a supplier and a buyer specifies "restraints" on the supplier or the buyer (e.g. a manufacturer sells only to selected buyers thereby excluding other buyers from the market).

[8] This policy is supported by economic theory which, provided that firms do not collude on the product market, recognises the potential for technical and economic progress, especially when the competitors contribute complementary skills. This has been challenged by a recent research paper which found that R&D cooperation may indeed be a stepping stone to collusion (Sovinsky Helland 2012).

[9] Specialisation agreements occur when one party ceases or reduces production of a certain product and purchases it from the other party. This may be reciprocal process.

If a vertical agreement is between companies that have limited market power (a combined market share of less than 30%), and if it contains no "hard-core" restrictions of competition (as listed above), the Commission (and the national competition authorities) conclude that it will usually have no anti-competitive effects. Or if it does, the positive effects are likely to outweigh the negative ones. This presumption allows Commission Regulation 330/2010 to "block exempt" them from the general prohibition.

However, vertical agreements between companies whose market share is larger than 30% are not exempted. On the other hand, such agreements are not presumed to be illegal: the Commission must assess the negative and positive effects on the market as defined in the 2010 Guidelines on vertical restraints (OJ C 130, 19.05.2010, p.1).

3.1.3. Abuse of a dominant position

Article 102 TFEU prohibits abuse of a dominant market position[10] by one or more under-takings. A dominant position is not anti-competitive by definition, but a company is able to restrict competition if it has a strong position on a market. If a company exploits its market position to hinder competition, by discriminating among distributors, licensees or customers, it is considered to have **abused** its dominant position in breach of Article 102 TFEU.

Market share is the most important factor used in determining whether a company has a dominant position on the market. The relevant product and geographical market must be clearly defined. The assessment of dominance depends on the nature and availability of the product concerned, consumers' behaviour and their willingness to switch to alternative products.

The company may be "dominant"[11] when operating only within a segment of an industry or in some parts of the EU´s Single Market. A

Google investigation

The EC started investigating Google in November 2010 after three of its competitors, including Microsoft, complained that it had abused its dominant market position. The main complaints were that Google was using its dominance in the online search market (90% share of the EU market) to demote its rivals' listings in search results, and place restrictions on advertisers that wanted to move to other search engines. In December 2012 the Commission expressed its concerns relating to Google's market conduct and demanded that Google present formal commitments to mitigate negative effects on competition (these it submitted on 31 January 2013). Reportedly, the complainants remained sceptical about the effectiveness of the proposed solutions

Google proposed remedial measures three times and finally – after making concessions on how it displays competitors´ links – reached an agreement with the Commission in February 2014. The company is to apply these binding commitments for five years.

The deal was criticised by Google's rivals, consumer groups, some MEPs and Commissioners. Their main objection was that stakeholders were not consulted in the third round of negotiations and therefore did not have the chance to scrutinise the measures.

[10] In one of the cases, *Hoffmann-La Roche (C-85/76)*, the European Court of Justice defined abuse of a dominant position, as a behaviour "which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".

[11] In *Hoffmann-La Roche*, the European Court of Justice defined a dominant position, stating that it "relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking, which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".

significant gap between the market share of a company and the rest of its competitors also indicates market dominance. According to case law, market shares of between 40% and 55% indicate a dominant position on the market (Eberhard 2006). The Commission notes that interventions typically take place in regulated sectors and involve incumbents (companies historically dominating the market) in fragmented (not yet single) markets, e.g. the energy sector. Even though a dominant position is not punishable, a dominant firm may not be allowed to follow the same business practices as non-dominant firms.

Abuse analysis is considered challenging. The assessment of level of dominance is a key prior process in deciding in which cases analysis is to be undertaken (Vivers 2009). Some argue that over the last decade violations of Article 102 are becoming more common, as market concentration in the EU is on the rise. "First mover" advantages and network effects also create situations where the market can be dominated within a very short time (e.g. Google, Facebook). Nevertheless, practitioners believe that relatively few companies are at risk of being investigated for dominant market abuse.

In 2009 the Commission published guidelines to "exclusionary abuses" (OJ C 45, 24.2.2009, p. 7-20) which introduced a more effect-based approach to the assessment of practices such as below-cost pricing, the granting of fidelity rebates and tying clauses (conditioning the sale of one product on the purchase of another). The document stipulates that such practices are illegal only if they cause a genuine risk that competitors would be excluded from the market.

3.1.4. Implementation rules

The implementation of the competition rules is governed by Council Regulation (EC) 1/2003. It stipulates the Commission's specific investigative powers. Antitrust rules are also contained in sector- and conduct-specific regulations and non-regulatory documents such as notices and guidelines. An antitrust investigation launched by the Commission is most likely to result in one of two outcomes. The first is the formal issue of a "prohibition decision" recognising the existence of an infringement pursuant to Article 7 of Regulation No 1/2003 on the implementation of Articles 101 and 102 of the Treaty. The Commission may require the company in question to stop the infringement, or impose remedies and/or fines. Alternatively, the Commission may take a "commitment decision" based on Article 9 of Regulation 1/2003. This article permits undertakings to propose commitments which aim to address the competition concerns raised by the Commission.

These could be behavioural (e.g. the company agrees to provide goods or services under certain conditions) or structural (e.g. the company promises to divest itself of assets in order to restore competition). If the Commission agrees to these commitments, it adopts a formal decision making them legally binding without recognising that an infringement took place.

The decision to accept commitments offered by the company depends on the nature of the suspected infringement and the commitments themselves. The Commission may accept commitments if they are deemed sufficient to quickly and effectively solve the concerns raised, and if they are likely to deter similar behaviour.

Microsoft: failure to comply with its commitments

In 2009, the EC accepted Microsoft's commitment to offer (throughout a five-year period) options other than its own browser, Internet Explorer, to European users of its Windows operating systems. Initially the company offered a screen choice through which users could download alternative browsers, but in July 2012 a failure to do so was detected and documented. Microsoft claimed a "technical error" as the cause. On 6 March 2013 the Commission imposed a €561 million fine on Microsoft, which marked the first time that a company was fined for non-compliance with its legally binding commitments.

However the Commission does not accept commitments in secret or "hard-core" cartel cases.

3.2. Cartels

The most blatant example of infringement of antitrust rules is the creation of a cartel between market competitors, who join together to fix prices, rig bids, limit production or share markets or customers between them. These agreements and practices, known as "hard-core cartels", have been universally acknowledged as the most aggressive form of violation of competitive rules.

A key element of the EU´s competition policy since the 1990s, cartels have been gaining in importance, with an increasing number of investigations and record high fines imposed on cartel members. Sectors such as the pharmaceutical, paper, cement and glass industries seem to be more vulnerable to the formation of cartels than others, and cartels are considered to be a strategic option chosen by many companies in the modern economy (McGowan 2010).

3.2.1. Damage to economy

According to the Commission, most cartels increase the prices of input and intermediate goods used in the manufacture of consumer goods. In the current crisis low demand and difficult credit conditions cut the profit margins of EU firms. Cartel activities increase the pressure on these margins by raising production costs. Estimating the total damage to the economy is challenging as many cartels are never discovered. In its 2008 Report on Competition Policy, the Commission estimated that the damage inflicted by the cartels investigated in the period 2005-2007 was €7.6 billion. It assumed cartels cause overcharging by 10%; however earlier estimates by the OECD and in the economic literature[12] suggest harm to society to be 20% to 25% of the trade volume affected by cartels. Other research shows that in the period 2001-2012 the value destroyed by uncovered cartels was between €18.7 and €33.1 billion (Mariniello 2013). However, assuming that the great majority remain undetected, as much as €320 billion, or 3% of the EU's 2012 GDP, might have been transferred from customers to cartels.

3.2.2. Anti-cartel enforcement

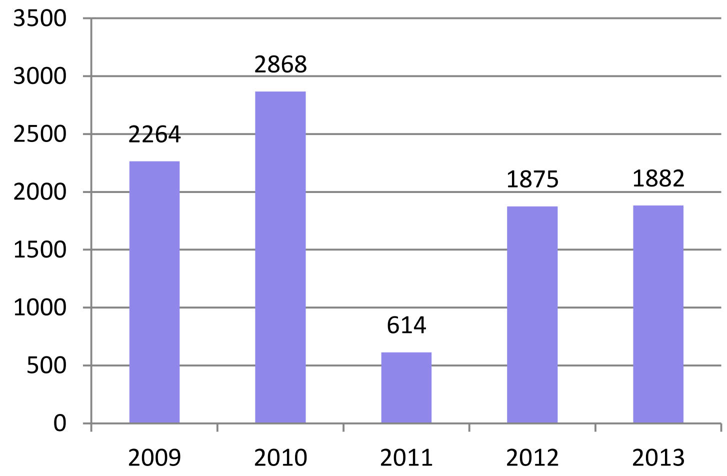
The Commission and NCAs have strong investigative powers under Regulation 1/2003. The Commission's investigations may start with a cartel member approaching the Commission, a complaint made by a third party, an own initiative action or the reference of a case from an NCA due to a cross-border effect on trade. The Commission may gather information by entering the premises of any company, examining all business records and questioning staff to get explanations of documents. The Commission also has wide powers to request information from companies. Furthermore, within the framework of the European Competition Network, the Commission and NCAs share increasing amounts of confidential case-related information.

The proceedings may result in a written "Statement of objections" which is examined by the parties and to which they can respond. The final decision on cartels is taken by the full College of Commissioners. The main sanction at the Commission´s disposal is the imposition of fines, which may be very substantial – as much as 10% of worldwide group turnover in the financial year preceding the decision. Since 2008 there have been three cases of fines exceeding €1 billion.

[12] See 2002 OECD Report on cartels and 2007 paper "Cartel Overcharges and Optimal Cartel Fines".

The Commission encourages members of cartels to provide evidence of infringement that will help it to build a case. The current trend in dealing with cartels includes increased use of both leniency and settlement procedures. The leniency policy encourages cartel members to hand over evidence: the first company to do so is granted immunity from fines. Members cooperating subsequently can receive reductions of up to 50% of the fine that would otherwise be imposed. Under the settlement procedure, fines may be reduced by up to 10% (cumulative with any reduction under leniency) if companies acknowledge their involvement in the cartel. The economic literature recognises two main beneficial effects from such procedures. The first is reduced fines for cartel members who report evidence of a cartel in order to benefit from immunity or admit wrongdoing. Prosecution is also quicker and easier, as leniency applicants provide the necessary evidence.

Figure 2: Cartel fines levied by the EC (*)



Data source: European Commission, 2014, (*) in € million.

Recent assessment of settlement cases shows efficiency gains as compared to the traditional process: in particular the Commission has less drafting work and the companies can move on with their business more quickly (Laina Laurinen 2013). Settlement cases are also not likely to result in further litigation at the European Courts. Importantly, the number of applications to the EC for reduction of a cartel fine due to the culprits' "inability to pay" has also risen during the crisis.

3.3. Mergers

The main legal texts on merger decisions are the EC Merger Regulation 139/2004 and its Implementing Regulation 1268/2013, supplemented by notices and guidelines. They define the Commission´s jurisdiction over business concentrations (mergers).

The Commission must be notified of a planned merger if the annual turnover of the combined businesses exceeds specific thresholds. These rules apply even for companies based outside the EU if they do business in the Single Market. Failure to notify a merger may result in the imposition of fines.

Merger analyses are highly complex and cover both legal reasoning and economic analysis. Mergers are examined to see if they would have a negative effect on competition in the EU – for example, by merging major competitors or creating or strengthening a dominant player – which could lead to higher prices, reduced choice or less innovation. The Commission also considers whether the anti-competitive effects of the merger can be offset by efficiencies realised by the combined entity. These efficiencies must benefit consumers, e.g. the combined entity's increased productivity offers it a comparative advantage and hence stimulates competitors to respond by improving their own products or services. However, a merger which leads to a market position close to monopoly is unlikely[13] to be approved (Rosenthal Thomas 2010).

[13] e.g. see Case No COMP/M.4439 – *Ryanair / Aer Lingus* or Case No COMP/M.4000 - *Inco / Falconbridge*.

Some inconsistencies within the Single Market may exist when national authorities decide on mergers with the aim of creating national champions while other Member States prevent high concentrations (Cini McGowan 2009). However, despite using some political influence from the Member States to affect merger decisions, the instances of actually being able to change the outcome appear to be rare[14].

The Commission may approve a merger conditionally if the parties commit to taking actions which correct possible distortions of competition. Such a "subject to conditions" action could be divestment of certain parts of the business before the merger is approved. Between 1990 (when the Merger Regulation came into force) and 31 January 2014, the EC cleared more than 5 400 deals and blocked 24. The vast majority were approved in the initial phase, with only 219 referred for further investigation (almost ten times the number of refused mergers). Recently the Commission noted that merger activity has been relatively limited following the financial and economic crisis.

Recent cases of merger refusals

In January 2013, the EC blocked the €5.2 billion merger of parcel delivery companies UPS and TNT, which would have reduced competition in 15 countries and likely led to price increases.

In February 2013, the Commission prohibited the takeover of Aer Lingus by Ryanair, a merger which would have led to very high market shares on 46 routes and an outright monopoly on 28 routes. The Commission confirmed the existence of high barriers to entry in the Irish market, judging that there would be no prospect of a new entrant on the market after the conclusion of the proposed merger.

3.4. State aid

The EU's state aid provisions have become an important mechanism for influencing the development of conditions for competition. Granting financial advantages to selected undertakings can distort competition and affect trade between Member States. For this reason, state aid is defined in the EU Treaties as being incompatible with the internal market. EU law contains a general prohibition of state aid, allowing only for a number of exceptions under the supervision of the European Commission:

- Regional aid is granted to promote the economic development of certain disadvantaged areas.
- Sector-specific aid is granted to resolve structural problems in specific sectors.
- Horizontal aid is granted to benefit all sectors of the economy, e.g. research and development, small and medium-sized enterprises (SMEs).

The principal legal provisions are Articles 107 to 109 TFEU. The specific rules and their interpretation are established by secondary legislation – Frameworks, Directives, Regulations, Communications and Guidelines – and by EU case law.

Member States are required to notify the Commission of any plan to grant or alter state aid unless it is of a type covered by the General Block Exemption Regulation (e.g. investment and employment aid to SMEs). The Commission then decides on the legality of state aid: it can monitor, verify, restrict and recover[15] any forms and levels of aid and must approve aid grants before they can be implemented.

[14] See Robert Schuman Centre for Advanced Studies Working Paper 2014/20 on merger control.

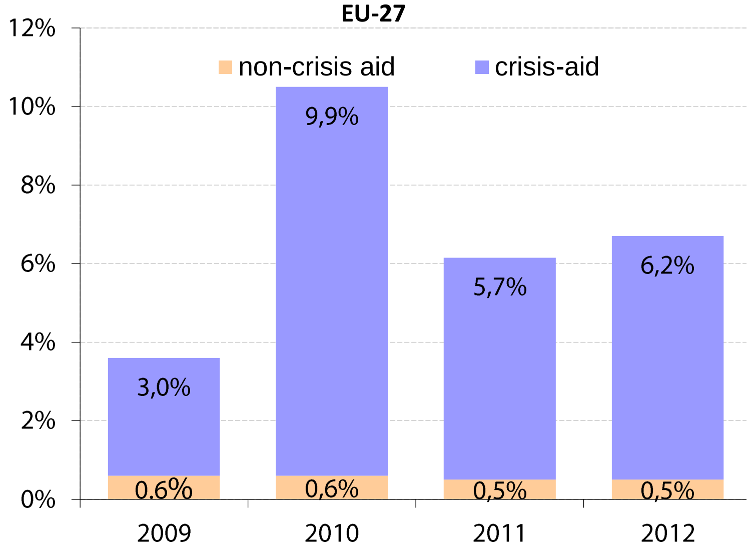
[15] In fact, the Commission orders the Member States to recover the aid granted (sometimes with interest). Failure to do so may result in referral to the Court of Justice.

3.4.1. Trends

Between 2009 and 2012, state aid granted in the context of the financial and economic crisis constituted the vast majority of all state aid. Between October 2008 and 31 December 2012, Member States provided €591.9 billion of capital support (both recapitalisation and asset relief measures) to the financial sector; this sum represented 4.6% of EU GDP in 2012.

During 2012 the effects of the crisis on the financial markets weakened, but Member States maintained provision of support to financial institutions through a number of state aid measures. In addition, support was provided to the real economy, mainly in the form of subsidised guarantees and one-off €500 000 subsidies, based on temporary crisis rules which expired in 2011. The Commission's 2012 State Aid Scoreboard indicated that total support[16] to the real economy amounted to €4.8 billion in 2011, compared to €11.7 billion in 2010 and €21 billion in 2009. This trend may be explained by the increasing availability of funding for real economy enterprises over that period and the persistent budgetary restrictions of Member States.

Figure 3: State aid granted as percentage of GDP, EU-27



Data source: European Commission, 2014.

Non-crisis state aid has often been at levels higher than those recently, reaching levels of more than 0.9% of GDP in the 1990s. During most of the crisis non-crisis state aid has been decreasing. According to the Commission it has continued to be directed toward horizontal objectives of common interest. These objectives include regional development, research and environmental protection, all of which contribute to the EU 2020 strategic objectives. Horizontal aid is considered less distortive than sectoral aid as it targets market failures[17] and benefits society (e.g. regional aid). The great majority of total non-crisis aid is granted under block exemptions or schemes which do not require prior notification to the Commission (e.g. exemption of aid of less than €200 000 over a three-year period).

3.4.2. Services of general economic interest

Services of general economic interest (SGEI) are specific economic activities identified by the public authorities on the basis of two characteristics:

- They have particular importance to citizens.
- They would not be supplied by market forces alone – or at least not in the form of a

[16] Aid values correspond to the used volume of the aid implemented by the Member States and declared to the Commission in their annual reports. Total approved aid level is always higher (around €4 500 billion committed and €1 600 billion actually used in the period 2008-2011). Detailed remarks on methodology are contained in the 2011 Scoreboard, p.32-33.

[17] Market failure occurs when free markets do not result in an efficient (i.e. welfare-maximising) outcome.

service which is affordable for all and provided indiscriminately. In other words, these services would be supplied under different conditions without public intervention.

Examples include network industries – postal or transport services – and social services.

State aid control is involved when a company providing services is financed from public resources. The main concern is overcompensation for the services provided as it may lead to switching the funds obtained from public authorities to other areas of activity which could distort competition. In its 2003 Altmark judgement, the European Court of Justice deemed that public service compensation is considered state aid unless each of four separate conditions is met:

- The recipient of compensation must have clearly defined public service obligations.
- The compensation must be calculated in an objective and transparent way and set in advance.
- The compensation cannot be higher than the amount of full or partial costs.
- When the undertaking is not selected under the public tendering procedure[18], its level of compensation must be established based on analysis of the costs of a "typical well-run company".

The 2012 SGEI package covers three main areas. The *De minimis* Regulation 360/2012 sets thresholds below which compensation is deemed not to constitute state aid. The SGEI Decision of 20 December 2012 sets limits for a compatible aid exempted from notification of compensation under state aid rules (in a similar way to block exemptions). The SGEI framework includes a more comprehensive check for large compensation amounts that consequently have to be notified to and approved by the Commission.

3.4.3. State aid and competition

Economic analyses show that the more differentiated[19] the market is, the less likely it is that state aid will have a negative effect on competition (Vives 2009). In such markets, aid to a domestic firm does not cause significant harm to foreign competitors but may benefit the domestic market and customers. Some recommend a more lenient approach when assessing state aid in highly differentiated markets.

Crisis aid to financial sector

From the competition point of view, state-financed bailouts have several negative effects. They protect financial institutions from bankruptcy, indirectly encouraging moral hazard by rewarding the excessive taking of risks in the pre-crisis era. State aid stops market forces from sanctioning and eliminating unsustainable business models. Bailouts may even reinforce the market power of the aided banks by helping them to absorb the consequences of risky pre-crisis decisions (e.g. acquisitions). State aid can also create an uneven playing field by lowering the cost of capital for some institutions and strengthening perceptions of their soundness and safety, and can cause long-term changes in market structure.

The economic analysis by the Commission (Economic Paper 286/2007) points out that state aid may be disadvantageous to non-aided competitors. Ultimately, if inefficient firms are aided and the more efficient ones are not, consumers' welfare may suffer.

[18] Public procurement in the EU is governed by rules and regulations which describe how public authorities may enter into contracts with suppliers of goods and services. The EU has established these rules to preserve competition, ensure transparency in the bidding process and prevent discrimination against economic actors.

[19] A differentiated market means one in which products differ from each other rather than being near substitutes.

The main objective of state aid control should be to contain such negative effects. The Commission suggests the existence of the following relationships:

- Larger firms are less likely to be financially constrained and more likely to use state aid for unintended, anti-competitive purposes.
- Vertically integrated firms are more likely to use aid to favour their own inputs and discriminate against rival firms.
- Highly concentrated markets and markets with high barriers to entry suffer bigger distortions when state aid is given.
- Markets with high exit costs are less likely to be harmed by state aid.
- In a mature market, harm to non-aided rivals is more direct and significant than in a growing market.
- State aid may discourage investment from abroad.

Measuring the effect of state aid on investment, innovation and research and development activities leads to varied conclusions. Some say that it is impossible to predict how the granting of aid will change the expectations of economic operators and therefore their levels of investment and R&D development in the long term. Others argue that when spill-over effects[20] are high, state aid to R&D increases society's welfare.

Some researchers suggest that the use of state aid can increase competitiveness of industry and manufacturing and consequently foster exports (a correlation exists for both intra- and extra-EU exports). According to their estimates, "one million of additional aid to the manufacturing sector leads to an increase of manufacturing value-added exports of 1.37 million for the average EU Member State". However, the best effects are found in countries with greater government efficiency and the cost of the stimulus is always borne by the taxpayer (Holzner Stöllinger 2013).

Furthermore, according to some studies, industrial policy and competition policy may mutually reinforce each other when they share a common goal (such as consumer welfare) and employ compatible targets (Padilla 2012). There could be merit in focusing less on promoting rivalry and using more well-targeted state support (e.g. in investments in renewable energy).

3.5. Liberalisation

Liberalisation means opening up previously closed markets to competition. When markets previously dominated by national providers open up to international competition, positive effects are usually observed: the choice of suppliers increases, prices fall and new services are offered.

In two of the markets that were liberalised some time ago (aviation and telecommunications), prices have fallen significantly. On the other hand, in the so-called network industries[21] such as electricity, gas, rail transport and postal services – which opened up to competition later or not at all – no decreases or only limited decreases in price were recorded. The Commission argues that this may indicate that consumers benefit to a greater extent from lower prices on markets that are more open to competition.

[20] See the 2005 Commission Working Paper "State aid to investment and R&D". Economists used the term "spill-over" to illustrate accruing of some of the economic benefits of the R&D activities to economic agents other than the party that carried out the R&D activities.

[21] Network industries may be defined as those "in which the principal activity it is to convey people, products or information from one place to the other via a physical network of a certain kind".

Some economists argue that new entrants in recently liberalised industries merit protection measures since in the short term they are the only ones applying competitive pressure on the incumbent company. They also often suffer from disproportionate disadvantages of scale and retaliatory reduction of prices by the incumbent (Lofaro Van Der Deer 2013). Protective measures can take the form of sector-specific regulation of pricing behaviour. Regulated prices can be based on the costs of reasonably efficient rivals.

3.5.1. Network industries

Network industries constitute a special case: often they are fragmented markets with a dominant incumbent company protected by the state (which fully or partially owns it) and high entry barriers. According to the Commission, the main competitive issue in network industries is ensuring fair access by all suppliers to the existing network, as constructing parallel facilities is very costly and hence economically inefficient. The Commission has carried out regular performance reviews, finding that in all of these industries the slow pace of integration hampers the development of more competitive markets.

Independent evaluations show that liberalisation in European network industries essentially implies a movement from a natural monopoly under public (or less frequently private) ownership to an oligopolistic market with either private or public ownership (Ugur 2007). Researchers argue that it is difficult to establish whether liberalisation has led to decreased prices (with the exception of the telecommunications sector) and that evidence does not support the conclusion that the new market structure is more efficient than the old. Some studies show that opening of markets did not lead to the levels of competitiveness expected or to the envisaged consumer benefits (Cseres 2008).

Recent think-tank analysis[22] points out that the path of liberalisation and the rate of success vary a great deal among the different network markets. These researchers argue that the EU has come a long way in the complex process of creating the Single Market. With persistent political, regulatory and anti-trust enforcement, accompanied by investment and entrepreneurial efforts, a single market for network industries can perhaps be achieved within the next decade.

3.6. International dimension

In view of globalised mergers, cartels, markets and companies, effective enforcement of EU competition policy requires cooperation with competition authorities outside the EU. The Commission collaborates with external competition authorities with the objective of promoting the convergence of policy tools and practices and of enabling cooperation in enforcement activities with other jurisdictions.

Cooperation may occur on a bilateral or a multilateral basis. Bilateral agreements such as memoranda of understanding define EU cooperation with a number of third countries. The nature of the cooperation varies depending on the country involved and may involve coordination of enforcement actions, mutual notification of cases, sharing of information on cases, competition policy dialogue and building up of common capacity. However, according to some analysts, concerns arise with such agreements, in particular the cost and time to set up and monitor them and their proneness to

[22] See the February 2013 study "Enjoying a Single Market for network industries?".

failure when laws or interests conflict too much[23]. Another issue is very slow progress on so-called second-agreements which enable authorities to exchange confidential information without getting prior assent from the parties under investigation. The only such agreement between the EU and a third country was signed[24] with Switzerland in December 2013.

The Commission also takes part in competition-related activities within the framework of multilateral organisations such as the International Competition Network (ICN), the Organisation for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organisation (WTO). The cooperation covers promotion of policy convergence through an exchange of views and the establishment of recommended practices.

The Commission stated in 2013 that there are over 100 jurisdictions with competition law enforcement and that without further closer cooperation, global companies will be tempted to play them against each other. The Commission also underlined that more effort is needed especially in convergence and better interoperability between these different regimes. Closer bilateral cooperation was also singled out as being crucial. Recent efforts in this respect include the signing of memoranda of understanding with China (2012) and India (2013).

3.6.1. EU´s international influence in competition law and policy

A study on the international dimension of EU competition policy (Papadopolous 2010) points out that bilateral enforcement cooperation agreements (such as the EU-US agreement) are very useful, but fail to provide comprehensive solutions to international practices which restrict competition. The EU has signed such agreements with only its most important economic partners[25], focusing efforts (and influence) on other forms of cooperation such as bilateral trade agreements (which contain a chapter on competition provisions) and negotiations on multilateral agreements on competition law and policy.

Bilateral trade agreements are closer to so-called international hard law (based on precisely formulated and legally binding obligations) than bilateral enforcement agreements; they have been used by the EU to export its competition model to a number of accession countries and trade partners. In the end, the effectiveness of these regimes depends on their implementation.

Most of the multilateral regional agreements across the world seem to follow the EU model (more centralised) rather than the North American Free Trade Association (NAFTA) model (more voluntary). However, the extent of provisions in these agreements differs, with only a few covering mergers, state aid or abuse of dominance. The influence and focus of the EU has been less strong at the international level (such as within the WTO).

It would seem that the degree of EU influence varies depending on the type of the agreement and that, since the international dimension of competition law and policies is relatively recent, binding multilateral competition agreements will take time to develop.

[23] See, for example, a 2006 economic study on "European Competition policy in International markets".

[24] It was signed by the European Commission and Swiss Competition Commission and approved by the European Parliament on 2 February 2014. It will enter into force once approved by the Swiss national assembly.

[25] As of May 2014, they include agreements with the US, Japan, Canada, South Korea and Switzerland.

4. Recent policy developments

4.1. Antitrust damages actions

4.1.1. Current system

An effective system of antitrust damages should in principle allow customers and companies affected to reclaim some of the losses they incur. Currently only 16 EU Member States[26] provide for "private enforcement", allowing victims to sue for antitrust damages. Therefore, in practice most victims of competition law infringements do not obtain compensation for damages. In the period 2006-2012, less than a quarter of the Commission's antitrust decisions were followed by civil damage claims. These damage claims were mostly filed in the UK, Germany and the Netherlands, while more than two-thirds of Member States reported no claims in the period 2008-2012. Researchers estimate that "foregone compensation" – the compensation that could potentially be collected from EU-wide and national infringers of competition law – could amount to as much as €23.3 billion annually.

According to the Commission, the main obstacles to a more efficient system of antitrust damages include: the difficulty in proving anti-competitive practice and quantifying the damage; the lack of effective collective redress mechanisms (pooling claims together); procedural obstacles; legal uncertainty, in particular concerning time limits for a claim to be brought to court; the lack of evidential value that the decisions of national authorities sometimes have in civil courts; and the substantial costs of bringing an action to court. All of these factors make obtaining compensation difficult and discourage SMEs and individual customers from attempting to do so. The wide diversity of national rules governing actions for antitrust damages makes settling cross-border cases particularly challenging.

4.1.2. The proposal

On 11 June 2013, the Commission proposed a directive aimed at harmonising the rules on antitrust damages within the EU. The goal was to optimise interaction between public and private enforcement of competition law in order to achieve comprehensive and effective overall enforcement in the EU. The proposal was accompanied by a communication and a practical guide providing a methodology for quantifying damages, a complex process which requires an estimation of "non-infringement" values (i.e. how the market would have performed had there been no infringement). The proposal would make it easier to gain access to evidence to support a claim, set time limits for bringing an action, introduce the possibility to receive compensation for both the actual loss suffered and lost profits, and clarify the legal implications of the "passing on" of harm[27]. It would also ensure the recognition of decisions of national competition authorities or the Commission as full proof of infringement before a civil court, introduce a rebuttable presumption that cartels cause harm, place full responsibility with any infringer for all damages caused by the infringement (infringers

[26] Including Germany, France, UK, Spain, Italy, Poland, the Netherlands, Belgium, Austria and Finland.

[27] "Direct" customers (e.g. suppliers) of an infringer sometimes raise prices charged to their own "indirect" customers to compensate for the increased price paid. When this occurs, the infringer's compensation to direct customers may be reduced by the amount they passed on to the indirect customers. However, since it is difficult for indirect customers to demonstrate that they were affected by this pass-on, the directive would establish a rebuttable presumption (assumptions which are considered true unless proven otherwise) that they suffered from the increased prices. The value of the damage is to be estimated by the judge.

that cooperate during the investigation, and obtain immunity from fines under the leniency procedure, would only compensate their own customers, and would not pay for the indirect damage caused by the cartel).

Stakeholder views

Practitioners[28] argue that the proposed directive on antitrust damages actions may result in an increase in civil antitrust cases and in damages awarded for antitrust breaches. The European Consumer Organisation (BEUC) strongly supports the proposal and calls for the possibility of qualified organisations acting on behalf of customers and SMEs to bring actions for compensation[29]. Businesses fear that the safeguards identified by the Commission to prevent abusive and opportunistic litigation are insufficient. On the other hand, some observers describe the proposal as being watered down and not providing real incentives for SMEs or consumers to bring costly damages actions to court, as the proposed directive barely addresses the critical issues of costs, funding and possibility of using “class actions”[30]. Some fear that the proposal may discourage amicable settlement between claimants and defendants.

Legal analysts[31] suggest that the new measures will facilitate civil claims due to the introduction of the rebuttable presumption of harm caused by anti-competitive practices. They expect that the requirement for national competition authorities' decisions to be recognised in Member States' civil courts may lead to inconsistent approaches resulting in "forum shopping" (filing a court case in a Member State whose attitude the claimants consider most favourable). The Bruegel think-tank argues that the proposal makes compensation for damages easier to obtain and hence increases the expected costs for infringers, which may provide a disincentive to engage in anti-competitive behaviour. However, further predictions are difficult to make at this stage as the outcome of the implementation process is uncertain and the key exercise of quantifying damages remains complex.

In its resolution of 17 April 2014 (rapporteur Andreas Schwab, EPP, Germany) the European Parliament underlined that as a general rule, national courts should not order disclosure of leniency statements or settlement submissions. The EP called for Member States to ensure that national courts limit disclosure of evidence to that which is proportionate and relates to action for damages.

The harm caused by anti-competitive practices is often spread amongst a large number of victims with only low-value damage suffered by each. These victims are less likely to bear the significant costs of a legal action single-handedly. Hence, together with the antitrust damages directive, the Commission published complementary non-binding guidelines on the issue of collective redress.

The recommendation on collective redress has immediate effect. Despite not being binding, it states that within two years Member States should implement collective redress mechanisms which would enable consumers or SMEs to collectively bring legal action before the courts. Unless Member States comply, the Commission will consider further legislation within four years, including possible requirements to create aligned mechanisms. Importantly, the proposal establishes a series of procedural safeguards to prevent abusive litigation. These safeguards include a provision that the entities representing plaintiffs must be of a non-profit character, and a prohibition on punitive damages and contingency fees.

[28] Published on Gibson Dunn website on 14 June 2013.

[29] Published on BEUC website on 13 June 2012.

[30] Published on Centre for Competition Policy at the University of East Anglia website on 15 June 2013.

[31] Published on Freshfields Bruckhaus Deringer website on 15 June 2013.

Stakeholder views

BEUC emphasises the need for a stronger, legally-binding EU-wide legal instrument for compensation for victims of anti-competitive practices, which would include provisions for collective redress[32]. The business community criticises the recommendation of the Commission to establish collective redress mechanisms, arguing that it lacks the necessary legal basis and that its timing is unfortunate, as it may raise legal costs for companies in difficult economic times[33]. As national legal systems vary significantly, imposing a collective redress system on every country may open the door to abuse and lead to "forum shopping".

4.2. Merger simplification package

In December 2013, the Commission adopted Regulation 1268/2013 simplifying some of the procedures under the EU Merger Regulation for assessing concentrations or mergers of companies which result in a significant market share for the new entity. This package extends the scope of the so-called simplified procedure to review unproblematic mergers by raising market thresholds for candidates for such a procedure. According to the Commission, the total ratio of cases reviewed under this procedure would be approximately 60% or 70% which represents about a 10% increase. This procedure permits the use of a shorter notification form for mergers which are not likely to cause competition distortions.

Under the new rules, companies need to supply significantly fewer details, and the Commission can clear a merger without having to examine its effects on customers, competitors and other parties. The amount of information needed for notifying transactions in all cases (also outside the simplified procedure) has also been reduced and the so-called pre-notification procedure has been streamlined. The Commission suggests these changes may lead to reducing lawyer´s fees by up to one-third.

Stakeholder views

Critics of the proposal argue that the Commission did not go far enough in reducing the number of documents needed for merger clearance and even introduced new requests for information which are likely to increase the notifying party´s burden and costs[34]. On the other hand, some practitioners[35] welcome the expansion of the scope of the simplified procedure but note that the informational burden for non-qualifying transactions has increased significantly[36]. It is uncertain whether these new requirements will undermine the positive effects of the extended simplified procedure.

4.3. State aid modernisation

In May 2012, the Commission presented a Communication on state aid modernisation (COM(2012)0209) which introduces reforms of state aid rules in order to foster the internal market and promote economic growth. The reform aims to increase the focus on those cases with the biggest impact on the internal market, streamline the rules and accelerate the decision-making process. The Commission proposed to identify common principles for assessing the compatibility of aid with the internal market and to revise a series of state aid guidelines and regulations.

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[32] Published on BEUC website on 7 October 2013.

[33] Published on Eurochambres website on 11 June 2013.

[34] Published on Reich Rohrwig Hainz website on 17 December 2013.

[35] Published on Skadden website on 16 December 2013.

[36] Published on Taylor Wessing website on 13 January 2014.

Notably, the reform of the guidelines on regional state aid includes a reduction in the maximum levels of aid allowed, increased focus on less developed regions, greater attention to competition-distorting effects, rigorous evaluation of the value added by aid and measures to ensure that the aid goes to investments which would not occur without it. In 2013 the Commission adopted Regulation 733/2013 introducing new categories of block exemptions and Regulation 734/2013 streamlining the handling of complaints. In May 2014 the Commission adopted a revised General Block Exemption Regulation which adds new categories of aid to those exempted from the notification requirement (such as aid for broadband infrastructure), broadens categories already covered (e.g. investment aid for research infrastructure) and sets higher notification thresholds. In particular, new rules on state aid for research and development and innovation now cover all aid in this domain and double the notification thresholds up to which aid can be granted without prior notification of the Commission.

Stakeholder views

Observers[37] point out that the speedier decision-making envisaged by the modernisation of state aid may address the frustrations of Member States which complain about delays in aid approval. Analysts[38] argue that giving national governments more oversight over state aid, as proposed under the reform, may create a potential for conflict of interest, as governments would be responsible both for monitoring and granting state aid. The Centre for European Policy[39] claims that the Commission is using the reform to steer the economic policies of Member States, most notably to increase the likelihood of achieving Europe 2020 goals.

On 17 January 2013, the European Parliament adopted a Resolution on state aid modernisation, welcoming the reform and particularly the accelerated procedures. MEPs underlined the need for less, but better targeted, state aid which will support the shift to a knowledge economy. The EP stressed that the intention to exempt more measures from notification requirements should not lead to increased aid levels.

5. Specific issues and policy impacts

5.1. Cartel deterrence

In all likelihood cartels that are exposed represent only "the tip of the iceberg": the Commission has estimated that only about 10% of cartels are discovered. In the period 2009-2013, fines imposed by the Commission for participation in cartels amounted to more than €9.5 billion. These fines are meant to penalise the culprits and discourage other potential infringers. Even though the Commission has made progress on the detection of cartels, finding an effective deterrent remains a challenge (McGowan 2010).

Economic theory suggests that companies abstain from anti-competitive practices if the expected gain (e.g. profits) is lower than what they perceive they would lose (e.g. fines) in case of discovery by authorities. The Bruegel think-tank points out that the Commission lacks the enforcement capabilities, such as criminal sanctions, that Member States possess, arguing that the deterrent effect on cartels of fines alone is not assured. Indeed, sanctioning cartels as criminal offences strongly increases the

[37] Published on EU Observer website on 9 May 2012.

[38] Published on Oxford Analytica website on 17 May 2012.

[39] Published on their website on 3 December 2012.

antitrust effect of policy. Some suggest that private actions for damages will increase the perceived risk and contribute to deterring cartels; when actions for damages in court constitute a credible threat, that threat should reduce incentives for breaking the law (Motta 2007 & Davies and Lande 2012). Fines used by the Commission are also an important tool for preventing violations (Wils 2008).

Other researchers recommend imposing personal penalties on executives, even criminal sanctions, since these are perceived as a high deterrent to anti-competitive practices (Riley 2010). The average duration of a cartel is between 6 and 14 years, and arriving at an infringement decision may take four to six years after the investigation commences. Therefore an executive deciding to take part in a cartel may reasonably anticipate that any sanctions will only apply 10 to 20 years later. As a result, fines effectively punish shareholders but rarely constitute a threat to the individual taking the decision to participate in a cartel.

5.2. Settlements and their attractiveness to companies

The settlement procedure is a relatively new instrument used to settle cartel cases under a simplified procedure. The Commission introduced the procedure in June 2008. Under this procedure, companies may choose to acknowledge their involvement in a cartel (and their liability for it) after they examine the evidence and the Commission's objections against them and have made their own observations. The Commission's settlement decisions establish the existence of an infringement, describing and providing proof of all the relevant details. They also oblige the companies concerned to terminate the infringement, and impose a fine on the infringers. In return, the companies obtain a 10% reduction in the fine and benefit from quicker and less detailed Commission decisions, which makes fewer compromising details available to the public at large and reduces harm to their reputation. The Commission's acceptance of a settlement is at its discretion and depends on the degree of cooperation from the companies, their number, their participation in discussions and their positions on the Commission's objections.

After a slow start, the procedure has proved increasingly popular: between 2010 and 2014 nine cartel settlement decisions were taken, and the resulting fines represented about one-third of all cartel fines imposed by the Commission. The Competition Commissioner Joaquin Almunia recently predicted that in the coming years about half of cartel cases would be concluded with settlements.

Settlements in cartel in the interest rates derivatives industry

In December 2013 the Commission fined 8 financial institutions a total of €1.7 billion for participation in the cartel setting interest rates on derivatives markets. The companies' fines were reduced by 10% as they decided to opt for the settlement procedure. However, three banks pulled out of the talks with the Commission and decided to defend their case. The main advantage for doing so is that it may be concluded in the course of formal investigation that there were no infringements by these banks. There are many disadvantages though, such as loss of control over what information will be published (with possible "PR disaster"), risk of ensuing private law suits and ultimately being fined anyway. The banks are believed to have taken a "calculated risk".

On the other hand, from a company's point of view, there may be some downsides of taking part in the procedure: a 10% reduction in the fine may be too low to attract much interest. Nevertheless, observers point out that the majority of settlement case time has been taken up by discussions between the cartel participants and the Commission. This indicates that one of the key incentives for a company's participation is not the 10% fine reduction but the possibility of influencing the overall scope/content of the Commission's decision and the level of fines imposed. Furthermore, experts point out that the settlement procedure helps to avoid high legal costs[40].

Some criticism arises from the fact that the timespan needed for the procedure is longer than the 15 months which was originally envisaged. However, the Commission expects future cases to be shorter due to learning on both sides and stresses that the standard procedure is much longer, with a possible appeal to courts extending the procedure by further years.

When agreeing to settle, a company gives up the opportunity of contesting the fine in the Courts, which could lead to a much larger reduction in the fine. If only some cartel members accept the settlement procedure, the remaining ones will be open to actions for damages based on the information revealed under the procedure. On the other hand some suggest (cf. ICLG Report) that the Commission is unlikely to start the settlement procedure unless all members of the cartel agree to it, as partial settlements have created legal difficulties in the past.

Legal analysts also argue that the procedure is not suitable for complex and difficult cases. They observe that the Commission tends to decide on the settlement procedure only where the evidence is strong and there are no complex or novel legal questions which could lead the Commission to setting a precedent. Granting early access to the Commission's file for disclosure purposes is a delicate issue: refusing access may lead the company to claim that its rights of defence have not been respected while overly generous access may compromise the Commission's investigation. Furthermore, analysts argue that the procedure may discourage possible participants by creating legal uncertainty: the Commission has the right to discontinue the procedure even after the company has made admissions, and these admissions are likely to influence any subsequent procedures.

On the other hand, since the Commission's Antitrust Damages Directive protects documents used in settlement submissions from private claimants, it may provide a powerful incentive to submit to the settlement procedure just to be protected from possible cases under the new Antitrust Damages Directive and to ensure that submissions do not provide a "roadmap" for damage claims. Interplay between the leniency and settlement procedures also seems to play an important role in incentivising companies. Cartel members may obtain rewards for both procedures. Some legal analysts argue (cf. ICLG Report) that there is a risk that companies which could receive the smallest awards for leniency (up to a 20% fine reduction) may favour settlement over leniency. They may decide to wait and see how the case develops and potentially withhold evidence at an early stage of the investigation, making it difficult and lengthy to prosecute the cartel. In the UK, the fine reduction for settlement is as high as 20-35% which suggests that the level set by the Commission is very low to ensure the attractiveness of the procedure. Some argue this low level makes the settlement procedure attractive mainly for companies which have already opted for leniency, but perhaps not sufficiently attractive for the others.

Finally, cartel settlement procedures are arguably leading to reduced enforcement costs, allowing the Commission to increase enforcement and deterrence (Rubinfeld 2010). However, reducing the penalty to cartel members weakens deterrence.

[40] See 2014 International Comparative Legal Guide (ICLG) on Cartels & Leniency and recent legal analysis by Latham & Watkins published on their website on 11 April 2013.

5.3. The implications of increased use of commitments

In non-cartel cases, 62% of the Commission`s antitrust decisions in the period from May 2004 to December 2013 did not formally end in establishment of an antitrust violation. Furthermore, the majority of abuse of dominant position cases (75%) were resolved with commitment decisions.

Some economists explain this trend by the growing confidence of the Commission in the parameters of the commitment procedure (with guidance given in the landmark 2009 Alrosa case); the introduction of more complex economic analysis in Article 102 investigations (avoided when using commitments); the need to accelerate liberalisation in highly regulated sectors; and the preference for applying quick remedies in fast-evolving markets. The Commission argues that commitments enable speedy restoration of competition. Many cases have concerned energy markets, and the Commission believes that interventions concerning air transport payments and the information technology markets had a quick and positive impact.

Commitment decisions are therefore often used to quickly act on the market and correct abuses that risk hampering its development. Prohibition decisions by the Commission are more likely when the abuse was significant and are intended to send a deterrent signal. Also, when a precedent needs to be set, prohibition is more likely as these decisions are detailed and often contested in the Courts, which affords the opportunity to clarify the law. Finally, the Commission is more likely to propose commitments when they are the only remedy needed to terminate anti-competitive behaviour (i.e. there is no need for fines).

For the company, the main advantage of the commitment procedure is that it can design its own remedies following dialogue with the Commission and third parties – subject, of course, to approval by the Commission. Also, this procedure is much faster and is subject to less formal and procedural rules than the standard investigation. Commitments do not establish an infringement, so there is no base for civil "wrongdoing" for purposes of private damages. Finally, the risk of reputational damage associated with infringement decisions is substantially reduced. For the Commission, commitments save resources, enable more creative remedies than under a prohibition decision and limit the risk of further litigation.

The Alrosa case

In June 2010, the European Court of Justice (ECJ) took its first decision concerning the use of the commitment procedure. The original 2006 Commission decision was appealed by Alrosa and the General Court (GC) in 2007 annulled it. The ECJ however overturned the GC´s judgment. The 2006 decision included commitments to gradually stop purchases of rough diamonds from Alrosa by De Beers, the world's largest rough diamond producer (Alrosa being the second largest).

The case is considered of fundamental importance for commitments decisions. The ECJ affirmed that the Commission may only be challenged for manifest errors of assessment which gives the Commission wide discretionary scope and makes challenging the use of commitments over the standard procedure unlikely to succeed. The Court also confirmed that the scope of the commitments must be proportional but did not oblige the Commission to compare them with alternative measures (as under the standard procedure which may lead to prohibition). This increased the Commission´s discretionary powers as it is free to obtain commitments beyond what it would have obtained by establishing an infringement decision.

However, a recent study argues that commitment decisions come at a cost: they are based on a less in-depth, preliminary analysis of the possible infringements (Mariniello 2014). Furthermore, they do not formally recognise the infringement. Since settlements are not likely to be challenged in courts, the Commission releases very little information[41] about the decisions and therefore the guidance to the markets is limited, which may reduce the deterrent effect (Botteman Patsa 2013). Even though the Commission says it will resort to settlements when quick interventions are needed, some argue that there are still many novel areas such as patent abuse or standard setting that are not covered[42]. However, there is also evidence of successful use of the commitment procedure on nascent, fast-paced technology markets which arguably offered a better solution than the more lengthy standard procedure leading to a prohibition, a fine or even the dropping of the case after extensive investigation (Cavicchi 2011).

Economists also argue that commitments may correct the functioning of the market more efficiently than prohibitions, but that they mostly fail to deliver a strong deterrence signal. They are a trade-off between early restoration of competition and deterring similar practices in the future (Chone Souam Vialfont 2013). Importantly, in cases where the commitment is only to stop the infringement, the company is allowed to keep the profits from the period of the violation.

The Commission mentions, however, that the agreed correcting measures cost the companies involved significant sums of money. Furthermore, there has been some evidence of the negative impact of antitrust investigations on companies' stock market valuations, whether or not a fine is imposed (Guenster van Dijk 2011). Some suggested improvements to the commitment procedure include more "proactive" remedies such as the opening of the market to favour the entry of new competitors and to increase competition. This was achieved in the past by requiring the incumbent to divest substantial assets to prevent further capacity increase and to facilitate new investments by competitors[43].

Economic evidence shows that, in order to achieve optimal policy effects, competition authorities must make a credible announcement of their commitment policies prior to firms' taking strategic decisions (Chone et al. 2014). If companies perceive the use of commitments as very probable, they may not be deterred from anti-competitive behaviour since they will expect it less likely that they face a more costly infringement decision. Furthermore, if the competition authority relies heavily on commitments, case law may be rendered gradually obsolete as there are fewer appeals and judgments.

Some economists remark that conflicting incentives when discussing commitments may render them inefficient: the company is interested in offering the narrowest[44] possible commitments, third parties will aim at securing the broadest scope of commitments and the Commission may use commitments to a larger extent than is strictly necessary to restore efficient competition on the market. Indeed, this seems to have occurred in the past when the Commission made binding commitments covering geographic and product markets not concerned by the investigation (Cavicchi 2011). Counterbalancing the conflicting interests of third parties and the investigated companies may be to a certain degree supported in the procedure by performing the market test, but some commentators argue that the role of the Commission remains largely unchecked

[41] The average length of commitment decisions is 21 pages as compared to 160 for prohibition decisions.

[42] See the antitrust study by Bruegel "Standard setting abuse: the case for antitrust control" and the recent analysis of the Samsung case posted on 17 January 2013 on Leiden Law Blog.

[43] See, for example, the 2010 E.ON case.

[44] The minimum scope of concessions offered by the company and their frequent inefficiency was confirmed in a 2005 Commission's Merger Remedies study.

(Botteman Patsa 2013). This is due to the wide scope of its discretionary powers confirmed in the Alrosa case. Whether or not increased discretion will reorient the policy toward alternative goals (e.g. steering cases towards a commitment solution to avoid the risk of future judicial review) remains to be seen. At this point there seems to be a consensus among commentators and researchers that commitments may either be too far-reaching or not strong enough, in both cases disrupting competition.

5.4. Leniency and the new antitrust damages directive

The Commission considers that the current lack of harmonisation concerning access to documents creates problems for undertakings that wish to cooperate with a competition authority under the leniency procedure. This procedure allows companies that have participated in a cartel to avoid or to reduce heavy fines[45]. An enterprise considering cooperation with the authorities cannot know at the time of collaboration whether the victims of the infringement will have access to the case documents. The Court of Justice of the EU, in the landmark 2011 *Pfleiderer* case, ruled that access to documents should be determined according to national law. Decisions on access must balance the interests in favour of, and against, disclosure of documents received under the leniency procedure. Practitioners argue that competition authorities are naturally reluctant to disclose such information for fear of jeopardising their leniency regimes which are crucial in fighting cartels[46].

Case law from the UK and Germany that draws on *Pfleiderer* shows that decisions to hand over leniency documents to claimants of damages are taken on a case-by-case basis, depending on the interests at stake. The outcome of a decision to grant access is unpredictable and may also vary by Member State. Considering that this uncertainty might discourage a cartel member from contemplating an application for the leniency procedure, the Commission aimed to protect the incentives for companies to cooperate with competition authorities by including specific safeguards that protect the disclosure of evidence to national courts.

However, as argued in the European Antitrust Review 2014, the proposed directive may not be reconcilable with the 2006 Leniency Notice. Even though leniency corporate statements are fully protected from disclosure under the proposed directive, other prior information such as e-mails and minutes of meetings – which normally fall under the scope of paragraph 40 of the Leniency Notice and are protected – could be disclosed at any time, as long as the national court considers that the claimant's request is proportionate. Extended limitation periods and the presumption of harm for the benefit of claimants may also deter potential whistle-blowers.

The example of the US system shows that guaranteeing the confidentiality of leniency documents so that they are not passed on to subsequent claimants is a key factor in increasing the rates of participation in leniency programmes (Kelly Terzaken 2013). The ECON Committee of the European Parliament stressed the need for protection in principle of all leniency documents; this protection could only be lifted by national courts under strict conditions. On the other hand, the proposed exclusion of some

[45] The highest fine imposed on a single company was €896 million, while the largest fine imposed on all the members of a cartel was €1.47 billion.

[46] In the period 1998-2006 alone leniency was granted to approximately 150 companies.

leniency documents from disclosure may also trigger controversy, as it is debatable whether this provision is consistent with a recent judgment of the Court of Justice[47].

5.5. Merger control

Some economists argue the Commission blocks too few mergers and instead imposes remedial conditions which are frequently not effective in safeguarding competition after the merger. Remedies are also found not to work when the pre-merger market structure was not competitive (Davies Olczak 2008).

On the other hand, merger control decisions are considered to send a strong signal to firms which are contemplating mergers. These firms often modify their proposal in anticipation of the outcome of the merger examination. Some research points to the existence of the "tip of the iceberg" effect when about seven-eighths of the merger considerations are invisible to the regulator (Vives 2009). There could be positive effects from these signals, such as modifying or abandoning anti-competitive mergers (or finding another merger partner) before the Commission is notified. There could also be negative effects when efficient mergers are abandoned or made less effective by the choice of a less than optimal partner.

Interestingly, the Commission's own early 2005 study demonstrated that investigated companies tend to offer the least inconvenient remedies to clear the merger. In particular, asset divestiture remedies were often too narrow as they were designed to avoid taking key assets into account. The same study also concluded that many behavioural remedies proved to be ineffective due to unfavourable terms of access offered to competitors (e.g. too restrictive or costly licensing remedies[48]).

Even though merger control is sometimes criticised for obstructing the formation of European champions, there is evidence that the Commission does not prevent the appearance of large European companies or is even sometimes in favour of such transactions. However, the Commission is wary of national preferences when applied by the Member States in merger transactions (Gerardin Layne-Farrar Petit 2012).

Notification – more guidance needed?

In December 2012 the General Court rejected Electrabel’s appeal against the €20 million fine the Commission had imposed for breaking the notification rules. The Commission concluded that Electrabel had completed the merger without the necessary prior clearance and had completely failed to notify the Commission. It sent a strong signal that failure to notify or at least consult the Commission is therefore likely to result in high penalties. European Antitrust Review 2014 argued that more guidelines on this aspect of merger control are needed since some issues are either unclear or too broad. Consulting the Commission to clarify these issues may significantly delay the transaction timetable.

Interestingly, some studies find evidence of increased merger activity after cartel breakdowns (Hüschelrath Smuda 2013). These findings suggest that mergers could be a "second best" alternative to cartels, and that the Commission would benefit from taking into account any previous history of collusion in a given market when assessing the merger. This could help to eliminate instances when a merger is used as an

[47] Case C-536/11, *Donau Chemie AG and Others*. The Court found that national law must not prohibit the possibility for the national court to balance the interests involved when deciding whether or not to provide third-party claimants with access to leniency documents. It therefore sent a signal that leniency documents are not under absolute protection.

[48] The Commission may accept as a remedy a licensing agreement instead of divestiture so as not to hamper on-going research. Such licensing would grant access to technology to competitors of the merged entity.

alternative way to dominate the market. On the other hand it cannot be excluded that a post-cartel increase in merger activity is part of the process of moving from an inefficient cartel market structure to an efficient competitive market structure.

6. Outlook: competition policy, effectiveness and economic growth

6.1. Effectiveness of EU competition policy

The previous chapter presented some views on effectiveness of competition policy tools with regards to the deterrence of cartels and anti-competitive behaviour. For a broader analysis, empirical research gives many alternative ways to evaluate the effectiveness of competition policy. However, policy assessment is a complex and problematic issue and there are a multitude of varying approaches (Nicholson 2007).

For its annual Global Competitiveness Report, the World Economic Forum calculates an index of the effectiveness of anti-monopoly policy using a scale between 1 (antitrust policy is considered lax and not effective at promoting competition) and 7 (antitrust policy is effective and promotes competition). It covers 148 countries. In the 2013-2014 Report, half of the EU Member States are in the first 31 places in the global ranking[49] and a further six are in the first 77 places with values of 4 or above. (Finland is first in the world ranking.) Even though this indicates relatively strong anti-trust and pro-competitive policies in the EU, this index has flaws and is rather simplistic: it does not, for example, distinguish between the effects of national competition policy and EU competition policy. Another widely used indicator is compiled by the International Institute for Management Development in the World Competitiveness Yearbook. These two indices are reportedly similar, with a correlation of more than 80%.

Interestingly, earlier research points out that these two indicators of efficiency of competition policy are also highly correlated with macroeconomic performance measured in terms of growth (Dutz Hayri 2000) or total productivity (Borrell Tolosa 2006; Voigt 2006), which suggests that a stronger competition regime has positive effects on the economy.

An important study based on data from 102 countries suggests that the EU has the strongest competition regime in the world when it comes to the scope of coverage (Hylton Deng 2007). The same study finds that the most extensive national competition laws are also generally found in the EU. It also points out that the EU regime has the widest scope for qualifying abuse of dominant position, mergers, restrictive trade practices and collusive behaviour as unlawful (the so-called "smallest size of the net"). Consequently, the study concludes that company exposure to antitrust risk is highest in the EU. However, in terms of the variety of punishments available to a competition authority, the EU comes far behind the USA mainly due to a lack of prison sentences. Not surprisingly, empirical studies[50] confirm that the severity of sanctions and damages provided for by national law, together with the level of power of the Competition Authority during the investigation, play the most important role in fostering competition among firms.

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[49] These include Finland, Sweden, the Netherlands, Germany, Belgium, Luxembourg, the United Kingdom, Denmark, Malta, Ireland, Austria, Cyprus and Estonia.

[50] See e.g. Lear "Study on the effectiveness of competition policy", 14 October 2008.

EU competition policy appears to increase competition intensity (Buccirosi, 2008). Increasing the effectiveness of the policy (by better design, implementation and enforcement) may also help to curb the exercise of market power and lower the price-cost margin in individual markets.

Another study concludes that antitrust effectiveness depends on per capita income and supranational policy leadership, pointing to an increase in effectiveness in the new Member States after joining the EU. It also shows that effectiveness is driven by applying an economic approach and analysis in determining dominance and abusive practices (Borrell Jimenez 2008). Such an economics-based approach is one of the core concepts behind EU competition policy and its role has been progressively increased over the last two decades (Hildebrand 2008). This has arguably improved the standard of decision-making by the Commission (Colomo Ibanez 2013).

On the other hand, the increased emphasis on strict economic analysis results in the narrowing of EU competition policy goals to the enhancement of economic efficiency and the promotion of consumer welfare. Nevertheless, non-efficiency objectives, such as the protection of SMEs, completion of the Single Market and improving EU firms' competitiveness, still seem to play an important role in actual practice and reveal a more pluralistic goal framework for EU competition policy (Van Rompuy, 2012).

Comparative information on the effectiveness of different competition authorities is scarce. The Global Competition Review in its 2013 survey assessed DG Competition, together with the US authorities, as an "elite global enforcer", mentioning the high total value of cartel fines and the Google investigation as its main achievements.

6.2. EU competition policy and growth

The debate about the exact effects of competition policy on growth is not settled. A 2000 World Bank study found a strong correlation between long-run growth and effective enforcement of antitrust and competition policy. In 2011, OECD research confirmed a causal relationship between strong competition enforcement and long-term economic growth, finding that institutional set-up and antitrust activities play a more prominent role than merger control. The bulk of the economic literature suggests that competition may increase productivity by increasing the efficiency of firms and pushing out less productive firms, while it has an ambiguous effect on a company's incentives to innovate. Empirical evidence shows that certain elements of increased competition such as open markets, competitors from abroad and new market entrants have also been found to support the growth and/or productivity in the economy[51]. The well-known "Sapir" Report from a High-Level Study Group suggested that EU competition policy may have contributed to technological innovation and the EU's macroeconomic stability.

Many, however, contest the positive relationship between competition policy and growth as an "intuitive statement" or "conventional wisdom" (Voigt 2006). In fact, there seems to be relatively few attempts to evaluate accurately the effects of competition policy on long-term growth (Gerardin Layne-Farrar Petit 2012). An overview of existing research suggests that the consensus is that competition enforcement is justified and possibly should be increased to limit the enormous cost to society imposed by the exercise of the market power.

[51] For an overview, see the EP study "Contribution of Economic Policy to Growth and the EU 2020 strategy".

A 2013 study commissioned by the European Parliament found that the antitrust policy, merger control, state aid control and liberalisation (as well as their application in sector-specific measures) all contributed significantly to economic growth in Europe. Ten cases from seven industries were analysed and suggested causal relationships between EU competition policy and growth.

In its series of annual Competition Policy Reports, the Commission presents the ways in which the policy has contributed to economic growth. The latest 2013 edition mentions enforcement of competition rules, to ensure the correct functioning of the Single Market, notably through state aid control (including revised state aid rules for banks) and state aid modernisation, as well as launching antitrust proceedings and investigations on digital markets, facilitating access and encouraging investment in energy markets and imposing sanctions on the financial and pharmaceutical markets.

6.3. EU competition policy and the crisis

State aid has been one of the main instruments through which the Commission responded to the crisis (see section 3.4). The Commission has been much more flexible than under normal circumstances. It has accelerated its decision-making and has introduced temporary frameworks to provide a new basis of clearance for state aid. This has increased enormously the availability of state aid to both the financial sector and sections of the real economy in distress (Kokkoris Olivares-Caminal 2010). In its 2011 assessment of the effects of state aid granted during the crisis, the Commission drew attention to the unprecedented levels of state aid granted and the limited number of recipients who had the potential to strongly distort competition. The paper argues that state aid control mitigated these risks and prevented significant disruptions to the competitive structure of the market. The financial sector was forced to restructure and accept to share the burden on taxpayers of rescue packages. The Commission imposed a series of measures such as divestments and debt reduction to ensure the long-term financial stability of recipients.

Economic research on state aid in the crisis presents a generally positive evaluation of EU policy which managed to restrain aid levels despite the crisis (Aydin Thomas 2012). In particular, aid to services and to industry did not deviate significantly from their pre-crisis levels. An evaluation of state aid to the non-financial sector during the crisis, commissioned by the EP, found that it was relatively well-targeted (particularly towards SMEs) and prudent. However, as for the financial sector, the urgent need to inject public capital left little time in the initial phases of the crisis to improve balance sheets, consider mergers thoroughly or ensure that shareholders also bore losses. The Commission argues that the state aid modernisation strategy will provide a long-term response to the crisis by establishing a modern set of criteria for the assessment of state aid. These criteria aim to help better target the use of scarcer resources.

Interestingly, some point to the fact that in the crisis the Commission was exposed to conflicting motivations. For example, refusing a merger with a failing firm when that merger would save jobs is not compatible with the employment and social protection goals of the EU. In the short term, financial or macroeconomic stability is more important than competition enforcement in terms of preventing an exacerbation of the effects of the crisis (Kokkoris Olivares-Caminal 2010). Nevertheless, the Commission has insisted that it has not been more lenient in approving mergers during the crisis.

In a recent statement the Commission hinted that it intends to make competition issues more prominent in fiscal surveillance and economic policy recommendations.

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The EU has one of the strongest competition policy regimes in the world. European competition policy encompasses antitrust, cartels, mergers, state aid, liberalisation and international cooperation. It is enforced by the European Commission whose decisions may be contested in the Court of Justice of the EU.

Recent policy developments include the antitrust damages system, merger simplification package and state aid modernisation. Currently debated topics of the policy concern its deterrence effect as well as the novel instruments used by the Commission such as settlements, commitments, leniency and impacts of merger control.

Competition has been found to contribute to long-term economic growth but the debate on its exact effects is far from being settled. In times of economic crisis the Commission has arguably ensured the proper application of state aid despite major cases in the financial sector.

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