EU competition policy

Key to a fair single market

IN-DEPTH ANALYSIS

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This is the second edition of this EPRS publication, intended to explain the main features of EU competition policy and highlight new trends.

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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 (EC) 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. Under the Treaties the European Parliament is usually involved in competition matters through the consultation procedure, with notable exceptions being the directives on antitrust damages and on empowering the national competition authorities. In these two cases the Parliament acted as co-legislator together with the Council under the ordinary legislative 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 an 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. Fines issued for participation in cartels since 1990 amount to almost €30 billion.

The Commission also monitors planned mergers and acquisitions of companies if their combined businesses exceed specified revenue thresholds. Over the past 10 years (2009-2019), the Commission has approved over 3 000 mergers and rejected nine. Importantly, the Commission 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. Between 2009 and 2012, aid granted in the context of the financial and economic crisis constituted the vast majority of State aid, the trend however has stabilised since then. On the other hand, with the exception of 2015, non-crisis State aid has been growing since 2013. It increased in 2017 both in absolute amounts and relative to EU gross domestic product (GDP) reaching €116.2 billion, or 0.76 % of GDP. 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.

Recent major developments in competition policy include the new rules empowering the national competition authorities, the private antitrust damages actions directive 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 competition policy systems worldwide. The policy also applies to non-EU companies operating on the single market. Competition has been found to contribute to long-term economic growth. New challenges include reassessing the role of competition policy in shaping European industry and dealing with fresh issues arising from the specificities of digital economy, such as the role of data, online platforms and mergers between incumbents and fast-growing companies with significant competitive potential.

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1. Introduction

Competition is a crucial element in 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. Its main advantages are lower prices, better products, stronger innovation, wider choice and more efficient production than would be achieved under other arrangements, such as a monopoly situation. There is a consensus among mainstream economists that free competition systems should be designed to maximise welfare, be it total or consumer welfare (Jones, Sufrin 2016). (Neo-)classical economic theory, the predominant theory in mainstream economics, also argues that competition produces the best outcomes for society.

Companies can 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 subject to market pressures created by their competitors. The European Commission firmly believes that competitive markets create a downward pressure on prices, encourage quality of goods and services, widen consumer choice and stimulate innovation and entrepreneurship. Economic evidence further suggests that competition increases the productivity and efficiency of enterprises. It also creates favourable conditions for innovation and growth[1]. Many economists indeed argue that promoting competition is the best available tool for enhancing consumer wellbeing. Effective competition also increases market integration and boosts the competitiveness of European companies both in the single market and globally (European Court of Auditors, 2018).

EU competition policy was envisaged 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'.[2] The rules on competition in this market are contained in Articles 101 to 109 of the Treaty on the Functioning of the European Union (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 (national) barriers to competition. The aim of European competition policy is to facilitate the correct functioning of the single market.[3] 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 efficient internal market that delivers growth and jobs.

European competition rules are established principally to protect competition, prevent distortions in the market and ensure fairness for market participants. The framework strives to ensure that governments and companies obey EU rules on fair competition, while providing sufficient space for innovation, unified internal market standards and the development of small businesses.

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[1] This seems to be the mainstream view (Lianos, 2013). However, some economists observe that there is no consensus among researchers as to whether intensified competition increases innovation and growth. Proponents of national champions for example argue that monopolistic firms may be more innovative as they are subject to fewer financial restrictions and can cash in on innovations more quickly than smaller firms with low market shares.

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

[3] In this document the terms 'single market' and 'internal market' are used interchangeably.

It is necessary since practice shows that competition in the single market may be hindered in many ways, for example by:

- market participants' anti-competitive behaviour, e.g. coordinating their marketplace actions;
- exploitation of the dominant market position of an undertaking to distort competition;
- mergers of entities that risk reducing competition on the market considerably;
- interventions of Member States in the market (State aid).

EU competition rules also apply to conduct or agreements concluded outside the Union if they have effects within the internal market. Finally, it is worth noting that EU competition law applies to all the Member States as well as to other countries that form the European Economic Area: Iceland, Lichtenstein and Norway.

2. Main actors and their roles

2.1. European Commission, NCAs and courts

When violations of competition rules occur within one Member State or between two Member States, the national competition authorities (NCAs) are typically best placed to handle the case. Their increasing role in enforcing EU competition policy has been reflected in recently adopted rules (see point 4.1 for more detail) that ensure that they have effective investigative and decision-making powers, can impose deterrent fines, and dispose of appropriate leniency programmes and sufficient resources to enforce EU competition rules independently. Since 2003, the NCAs have been applying EU competition rules alongside the European Commission, which also monitors EU-wide markets, receives complaints, and acts if it finds evidence of anti-competitive activities affecting cross-border trade.[4]

European Competition Network (ECN)

The NCAs apply the EU competition rules to agreements or practices that could have an effect on trade between Member States. Both, the Commission and the NCAs of all the Member States enforce the EU competition rules in close cooperation under the European Competition Network (ECN). The ECN helps to divide up competition-related work and apply EC competition rules effectively and consistently across the EU. Its objective is to create an effective tool for cooperation against cross-border business activities that obstruct competition. The participants share information on new cases and planned enforcement decisions, coordinate and help each other with investigations, take on board comments of members and exchange evidence, information and best practice.

The Commission usually investigates anticompetitive practices or agreements that have effects on competition in three or more Member States or where it is essential to set a European-level precedent. It is also best placed to consider cases where conduct is linked with other Union provisions that may be exclusively or more effectively applied by the Commission (Jones and Sufrin, 2016). Acting on a proposal of Commissioner for Competition, the College of all the Commissioners formally adopts final decisions in competition cases as well as policy documents such as guidelines or legislative proposals to the Council. It can also impose fines or periodic penalty payments. The Competition Commissioner can adopt preparatory or intermediary acts, such as a statement of

[4] According to the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 2003, p.1).

objections or even final decisions in some cases. [5] The decisions taken by the College and the Commissioner are prepared and implemented by the Directorate-General (DG) for Competition.

DG Competition is primarily responsible for directly enforcing Articles 101 to 109 TFEU. The Commission has fully delegated its powers to the DG to examine the case and manage the due process. It may accordingly 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 (that 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 upheld 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 action 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 that has abused its dominant market position. In the case of State aid, the Commission can open a formal investigation and either approve (sometimes subject to conditions) or reject it, which results in an order to the Member State to recover the amount already paid out with interest. The post of chief competition economist was created in 2003 to increase the rigour of decisions.

Under a system of checks and balances, the Commission's decisions can be challenged in the Court of Justice of the European Union (ECJ), 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.[6] The Courts can reassess economic and technical appraisals made by the Commission, looking for correct compliance with procedures, any errors of assessment, or misuse of powers.[7] The Courts can also scrutinise the Commission's interpretation of economic or technical data.[8] Furthermore, Article 267 TFEU sets out a procedure whereby a national court or tribunal can ask the Court of Justice to give a preliminary ruling on a question of interpretation or validity of EU law when it is necessary for the court or tribunal to issue a judgment.

Furthermore, the ECJ is empowered by Article 31 of Regulation 1/2003 to review fines or penalty payments imposed by the Commission in antitrust proceedings. These payments can 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

[5] Notably, the Competition Commissioner was authorised in 2008 to approve aid schemes in the context of the financial crisis.

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

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

[8] 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.

or fine, or find that an infringement had a shorter time span than that decided in the investigation). In practice, 9 out of 10 Commission decisions are upheld by the courts.

When enforcing 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 last decades.

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.
- While competition rules cover the entire economy there are also sectoral provisions in areas such as agriculture, fisheries and transport (e.g. railway), and a substantial body of legislation stemming from court judgments.

Role of the European Parliament

At present the European Parliament is often involved in competition legislation under the consultation procedure. Parliament 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 Parliament opinion, the case-law of the Court of Justice indicates that it must not take a decision without having received it. The parliamentary committees that deal frequently with the issues regarding competition, be it at EU level or sectoral level, are the Committees on Economic and Monetary Affairs (ECON), Internal Market and Consumer Protection (IMCO) and Industry, Research and Energy (ITRE).

One important role of the European Parliament is scrutiny of the Commission. Since the late 1990s, the Commissioners for Competition have been reporting on DG Competition activities to Parliament. The Competition Commissioner appears several times a year before the ECON committee to report on the European Commission's approach and discuss individual decisions. Each year, Parliament adopts a resolution on the Commission's annual report on competition policy. Since 2011 this resolution has concerned the topical main issues of competition law and its application. Parliament has called in numerous resolutions for greater use of the codecision procedure in competition matters. Notably it has been a co-legislator in the files on compensation for victims of anti-competitive practices and on empowering the NCAs.

2.2. Other institutions

Competition policy is not usually subject to the co-decision procedure. The Council and the Commission have adopted a number of regulations in the field. The Council has notably adopted a number of important legislative acts such as Regulation 17 and Regulation 1/2003 where it conferred power on the Commission to enforce the competition rules. It has also granted the Commission power to adopt regulations exempting groups of agreements from the application of competition rules, so-called block exemptions. In addition, under the European Merger Regulation 139/2004, it conferred power on the Commission to decide on the compatibility of mergers above certain thresholds within the internal market. Furthermore, the appropriate ministers from each EU country can discuss competition issues in the Competitiveness Council.

The European Court of Auditors has the competence to audit fines imposed on companies found in breach of competition law. The European Central Bank (ECB) regularly gives advice on competition issues relating 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. Furthermore, the Advisory Committee on Restrictive Practices and Dominant Positions constitutes the forum where experts from the national competition authorities discuss individual cases and general issues of the competition law.

Under Article 228 TFEU, the European Ombudsman, elected by the European Parliament, is empowered to handle complaints regarding maladministration by EU institutions including enforcement of the competition rules by the Commission.

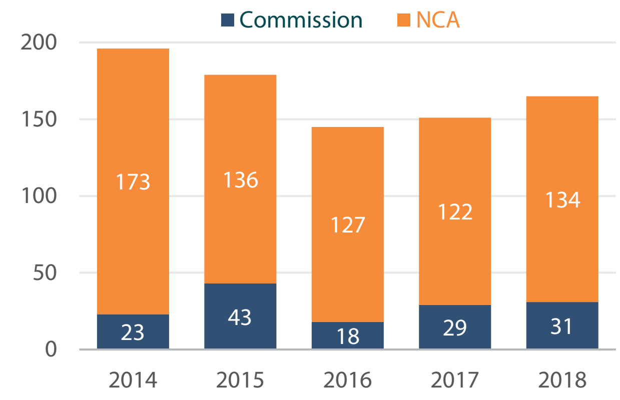
3. Policy areas

This section outlines the main areas of competition policy. Cartels, despite being covered by antitrust policy, will be treated as a separate policy. The Commission can launch sector-specific measures to address shortcomings on individual markets. These corrective measures can originate in all branches of competition policy[9] and take the form of dedicated sector legislation.

3.1. Antitrust policy

EU antitrust policy is based on two core legal provisions, Articles 101 and 102 TFEU. The Commission reports that most cases in the 2004-2014 period related to Article 101.

Figure 1 – Number of antitrust cases 2014-2018



Data source: European Commission, 2019.

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[10] those agreements that 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. Meanwhile, exempted agreements may neither impose restrictions on the parties nor give them the possibility to eliminate competition. The Commission has three possible courses of action in cases 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 or maritime transport).

Articles 101 and 102 also apply to NCAs, which must ensure that competition between firms is not distorted or restricted. National courts may also apply necessary provisions to safeguard individual rights conferred on citizens by the Treaty. It is worth noting that the multiple enforcers of competition rules ensure their much wider application than before the 2004 reform increasing NCA involvement. The number of cases handled by NCAs greatly outnumbers those processed by the Commission (see Figure 1).

It is also worth mentioning that the significant development of recent years has been the emergence of a policy on the application of EU competition law to actions for damages before national courts. Fundamentally, in 2018, following a rather difficult process, all Member States implemented the Directive 2014/104/EU on Antitrust Damages Actions at national level. This

[9] 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.

[10] It also makes the existing agreements void.

directive makes it easier for victims of infringements of EU antitrust law to seek compensation (see Section 4.3 for more detail).

3.1.1. Horizontal agreements

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

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

On the other hand, the Commission recognises that most horizontal agreements between companies that do not have market power do not have anticompetitive effects. Consequently, many forms of horizontal cooperation are 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 agreement are allowed between undertakings with limited market power:

- when joint market share is lower than 25 % in the case of research and development (R&D) agreements between competitors;[11]
- when joint market share is lower than 20 % in the case of specialisation[12] or joint production agreements;
- when joint market share is lower than 15 % for purchasing[13] and commercialisation agreements.[14] There is no block exemption in such cases but rather a 'safe harbour' under the 2010 horizontal guidelines.

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 do not purchase or resell other products) may also be considered by the Commission to be harmful to competition, albeit to a lesser degree than horizontal agreements.[15]

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[11] This policy is supported by economic theory that, 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 one research paper that found that R&D cooperation may indeed be a stepping stone to collusion (Sovinsky and Helland, 2012).

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

[13] These occur when companies make joint purchases for example to obtain volume discounts.

[14] These occur when companies cooperate in selling, distribution and promotion activities.

[15] This approach has been reflected by the adoption in 1999 of a general block exemption on vertical restraints.

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 (for example a manufacturer sells only to selected buyers thereby excluding other buyers from the market) – a so-called 'hard core' restraints. Furthermore, vertical agreements that are restrictive by 'object' (such as requiring buyers to observe fixed or minimum resale prices, conferring territorial protection on a distributor) are also illegal.

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' or 'object' 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 (VBER). However, vertical agreements between companies whose market share is larger than 30 % are not exempted.[16] 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, 19.5.2010, p.1).

3.1.3. Abuse of a dominant position

Article 102 TFEU prohibits abuse of a dominant market position[17] by one or more undertakings. 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. Examples include charging excessive prices, selling at artificially low prices to win over customers of smaller competitors, forcing consumers to buy a product artificially tied to a more popular, demanded product, rejecting certain customers or giving special discounts to those who buy all or most supplies from the dominant company, and making the sale of one product conditional on the purchase of another product.

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'[18] when operating only within a segment of an industry or in some parts of the EU single market. A 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

[16] Some practitioners criticise this threshold as too restrictive arguing that it is way below the threshold of 40-50 % at which issues of Article 102 dominance generally arise.

[17] 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 that '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'. For the breach to be determined it also needs to affect trade between the Member States.

[18] 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'.

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. When the Commission establishes that a violation of Article 102 has occurred, it can order the undertaking to end the abuse, or impose fines or structural remedies, such as divestment or break-up of companies. It can also accept binding commitments from an undertaking to mitigate the situation before the final prohibition decision.

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. Some argue that over the last decade violations of Article 102 TFEU have become 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, many practitioners believe that relatively few companies are at risk of being investigated for dominant market abuse. Some critics argue that application of Article 102 is often controversial due to insufficiently clear way in which dominance is determined and policy goals that may be contradictory (Jones and Sufrin, 2016).[19]

In 2009 the Commission published guidelines on 'exclusionary abuses' (OJ C 45, 24.2.2009, pp. 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 carry a genuine risk of competitors being excluded from the market. Importantly, the case law and principles established by the courts have primary authoritative value, and in some cases these have taken a different approach to those expressed in the guidelines.

Google

This American company has been found to be in breach of Article 102 in three cases for a total of €8.21 billion. In June 2017 the Commission issued a decision stating that Google gave illegal advantage to its own comparison shopping service making it more visible than those of the rivals and effectively directing traffic to it, abusing its dominant position as a search engine. The company was fined €2.42 billion and ordered to end the conduct.

In July 2018, the Commission fined Google €4.34 billion for illegal practices concerning Android mobile devices to strengthen the dominance of its search engine. The Commission found that the company imposed illegal restrictions on Android device manufacturers and mobile network operators. These included requirement for manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store); paying some large manufacturers and mobile network operators in return for exclusively pre-installing the Google Search app on their devices; prohibiting manufacturers wishing to pre-install Google apps from selling any devices using alternative versions of Android that were not approved by Google.

In March 2019 the Commission fined Google €1.49 billion for imposing a number of contractual restrictions on third-party websites regarding online advertising. This effectively prevented Google's rivals from placing their search adverts on these websites. Google appealed all three cases.

3.1.4. Implementation rules

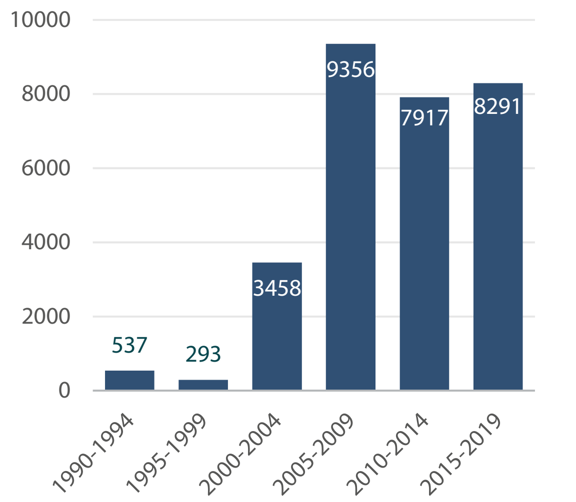
The implementation of the competition rules is governed mainly by Council Regulation (EC) 1/2003. The regulation sets out the Commission's specific investigative powers. Antitrust rules are also

[19] Excessive enforcement may effectively hamper competition and be detrimental to consumers, since some arrangements may be pro-competitive but appear to be in breach of Article 102.

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. However, the Commission does not accept commitments in secret or 'hard-core' cartel cases. A more detailed examination of commitments can be found in Section 6.3 below.

Figure 2 – Cartel fines 1990-2019 (in € millions)



Data source: European Commission, 2019.

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 to be 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 significant number of investigations and record high fines imposed on cartel members (see Figures 2 and 3). Some economic sectors such as the car industry or financial services seem to be more vulnerable to the formation of cartels than others. Despite the financial losses when found out and the inevitable associated ethical stigma cartels are considered to be a strategic option chosen by many companies in the post-crisis economy.

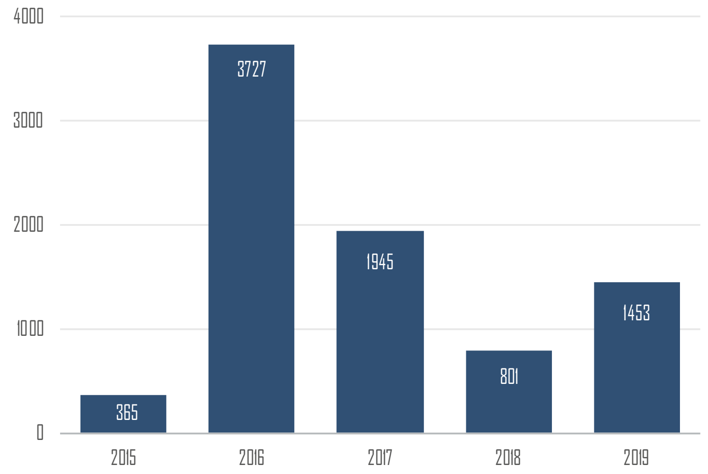
3.2.1. Damage to the economy

According to the Commission, most cartels increase the prices of input and intermediate goods used in the manufacture of consumer goods. Cartel activities increase the pressure on non-participating companies' margins by raising production costs. Firms may collude by concluding agreements to fix prices, restrict output share markets or rig bids. From the consumers' point of view they raise prices and limit the choice transferring the welfare from consumers to the cartel participants (Jones and Sufrin, 2016). Estimating the total damage to the economy is challenging as many cartels are never discovered. The Commission approximated that the cartels cause consumers' overcharging by 15 % to 20 %; however other estimates by the Organisation for Economic Cooperation and Development (OECD) and in the economic literature[20] suggest harm to society to be 20 % to 25 % of the trade volume affected. Recent EU-level estimations show that each year losses of €181-320 billion accrue because of undiscovered cartels that increase prices by an average of between 17 % and 30 %. These figures may not fully represent reality – given that that the vast majority of cartels remain undetected, even more welfare may have been transferred from customers to cartels.

3.2.2. Anti-cartel enforcement

The Commission and national competition authorities (NCAs) have strong investigative powers under Regulation 1/2003. The NCAs have been further empowered by the Directive (EU) 2019/1 (discussed in more detail in Section 4.1). Investigations may start with a cartel member approaching the Commission, a complaint made by a third party, an own initiative action or the referral 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 system has been improved, as reflected by the substantial total of cartel fines imposed on companies.

Figure 3 – Cartel fines 2015-2019 (in € million)



Data source: European Commission, 2019.

The proceedings can 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 five cases of fines exceeding €1 billion. Fines for cartel participation are paid into EU budget. The Commission has a wide margin of discretion when determining the deterrent effect of the fines, but it must state the reasons for decisions imposing them (Vogel, 2015).

The Commission encourages cartel members 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. Indeed in recent years, the Commission has detected most cartels after one cartel member provided evidence and asked for leniency. 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. Cartel members that do not qualify for immunity may receive these reductions in fines on the condition that they provide evidence representing 'significant added

[20] Roger and MacCulloch mention, based on economic studies, that the median overcharge from a cartel is 25 %. Europe-wide cartel overcharge is as high as 43 %.

value' to that already held by the Commission and cease their participation in the cartel. The first company to fulfil these conditions is granted a 30 to 50 % reduction, the second 20 to 30 % and subsequent companies up to 20 %. The European Commission also encourages individuals to share any inside knowledge they may have of a cartel. They can come forward with the evidence openly or anonymously through a 'whistleblower' tool available since 2017 (more detail in Section 4.3).

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. An assessment of settlement cases shows efficiency gains as compared with the traditional process: more specifically, the Commission has less drafting work and companies can move on with their business more quickly. Settlement cases are also not likely to result in further litigation in the European courts. Since the first settlement decision was adopted in 2010, about half of decisions have been made following the settlement procedure.[21] The Commission retains a wide margin of discretion to determine which cases are suitable for settlement (Ezrachi, 2018). It can also adopt a final position that is different from its preliminary position expressed in a statement of objections, which endorses settlement submissions of companies concerned. Discussions between DG Competition and companies focus on the alleged facts, the gravity and duration of infringement and the range of fines (Rodger and MacCulloch, 2015). The 2008 notice was amended in 2015 to introduce the right for the Commission to adopt a statement of objections that does not reflect parties' settlement submission and prohibiting unilateral withdrawal of a settlement submission by the parties that have introduced them. A more detailed discussion of settlements follows in Section 6.2 below.

3.3. Mergers

Mergers and acquisitions can help company's external growth if they allow it to materialise benefits such as economies of scale, information access, licences, patents and a wider consumer base. They could be beneficial for the market, bringing lower prices, higher quality and selection of products and services, reinforce innovation and efficiency, and increase consumer welfare. They can also however weaken competition by segmenting markets or allowing significant market power and high market concentration. Merger control therefore seeks to differentiate between harmful and pro-competitive transactions (Ezrachi, 2018). 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).

Siemens-Alstom merger case refusal

In February 2019, the Commission blocked the proposed acquisition of Alstom by Siemens, which would have created an entity with combined revenue of around €15 billion. The decision stated that the merger would have resulted in the creation of the undisputed market leader in certain signalling markets and a dominant player in very high-speed trains. The Commission decided that the merger would have negative effects on competition in both these markets, depriving customers, such as train operators and rail infrastructure managers of a choice of suppliers and products and raising prices on the markets, which would then affect the final consumers. The case has invigorated debate on the creation of national champions in the EU. This is discussed in more detail in Section 6.4.

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

[21] Commission notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases.

fines. EU merger rules apply when the transactions are found to have a Community dimension. Generally, the Commission assesses concentrations with EU dimension while national courts are referred cases without such a dimension. The Merger Regulation determines as incompatible with the internal market rules those concentrations that would have significant negative impact on competition in the internal market or substantial part of it, in particular when created as a result of the creation or strengthening of a dominant position.

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 consequently reducing consumer welfare. 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 that leads to a market position close to a monopoly is unlikely[22] to be approved (Rosenthal and Thomas, 2010). Horizontal mergers (between competitors) are more likely to affect competition since they lower the number of players on the market and increase the market share of a post-merger entity (Jones and Sufrin, 2016). However, non-horizontal mergers may also harm competition where one of the parties has market power in at least one market.

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. However, despite using some political influence from the Member States to affect merger decisions, instances of actually being able to change the outcome appear to be rare.[23]

The Commission may approve a merger conditionally if the parties commit to taking action that 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. Data confirms that the great majority of merger transactions in the EU are cleared unconditionally. Over the past 10 years (2009 to 2019), the Commission has approved over 3 000 mergers and rejected nine. A number of significant merger transactions creating 'European champions' while safeguarding effective competition were cleared, such as Peugeot's takeover of Opel, or AB InBev's acquisition of SABMiller. Between 1990 (when the Merger Regulation came into force) and 30 June 2019, the Commission has been notified of 7 381 deals and has blocked 30. The vast majority were approved in the initial phase, with only 268 referred for further investigation (almost nine times the number of mergers refused).[24] After relatively limited merger activity due to the financial and economic crisis, numbers have been on the rise over the past five years.

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

[22] See for instance Case No COMP/M.4439 – *Ryanair / Aer Lingus* or Case No COMP/M.4000 – *Inco / Falconbridge*.

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

[24] Heim and Middes (2019) analyse the more recent period in detail: out of 4 680 transactions notified to the Commission under the EU Merger Control Regulation (Council Regulation 139/2004), only 11 notifications were prohibited (out of 106 reviewed in Phase 2) with 17 notifications aborted/withdrawn before a final decision was taken. The Commission has imposed remedies on 60 mergers as a condition of clearance at Phase 2.

in the EU Treaties as being incompatible with the internal market. EU law contains a general prohibition of State aid, allowing for only a number of exceptions, such as aid promoting the execution of an important project of common European interest, to remedy a serious disturbance in the economy of a Member State, or to facilitate the development of certain economic activities or areas.

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. For a measure to be considered State aid it needs to fulfil the following criteria: there must have been intervention by the state or use of state resources (e.g. through grants or tax reliefs); the result must have been to grant the recipient an advantage on a selective basis; competition must have been or may be distorted; there is likely to be an effect on trade between the Member States. 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) or falls under the 'de minimis' rule.[25]

The Commission then decides on the legality of State aid: it can monitor, verify, restrict and recover[26] any forms and levels of aid and must approve aid grants before they can be implemented. For example, in a highly publicised 2016 case, the Commission issued a decision that Ireland granted undue tax benefits to Apple, which led to a recovery of €14.3 billion by the country.[27]

Council Regulation No 994/98, amended by Council Regulation No 733/2013, allows the Commission to adopt block exemption regulations for State aid. It can declare some categories of State aid compatible with the Treaty if they meet certain conditions. This means that they are exempted from the requirement of prior notification and Commission approval.[28] Commission Regulation (EU) 2017/1084 extended block exemptions to aid for port and airport infrastructure (more detail in Section 4.2).

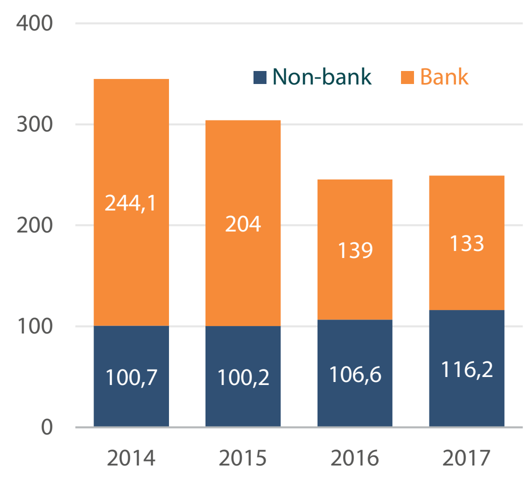
[25] The GBER enables the Commission to declare specific categories of State aid compatible with the Treaty if they fulfil certain conditions, exempting them from the prior notification requirement and Commission approval. The 'de minimis' rule exempts aid amounts of up to €200 000 per undertaking over a three-year period from notification requirements.

[26] 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.

[27] Since June 2013, the Commission has been investigating the tax ruling practices of Member States. A dedicated task force on tax planning practices was established and resulted in numerous tax rulings where the Commission ordered tax recovery. The full list can be found on the Commission website.

[28] In 2019 the Commission reported that: 'Since 2015, more than 96 % of new measures for which expenditure has been reported for the first time fell under the General Block Exemption Regulation, i.e. an increase of about 28p.p. [percentage points] compared to 2013. Looking at all measures for which expenditure has been reported (and not only new measures), about 82% of all measures were block exempted in 2017, an increase of respectively about 6p.p. and 22p.p. compared to 2015 and 2013'.

Figure 5 – State aid granted (in €billion)

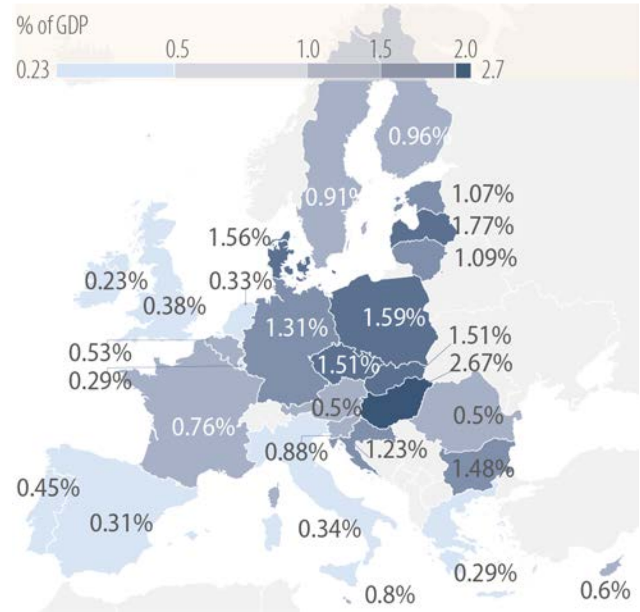


Data source: European Commission, 2019.

3.4.1. Trends

The amount of State aid dispensed by the Member States varies, with values ranging from 0.23 % of GDP in Ireland to 2.57 % of GDP in Hungary in 2017 (see Figure 4). Between 2009 and 2012, State aid granted in the context of the financial and economic crisis constituted the vast majority of all State aid, both in terms of supporting the financial sector (both recapitalisation and asset relief measures) and providing funding for real economy. During those years, State aid reached unprecedented levels.[29] The situation has improved since then: the amount of approved State aid to the financial sector stabilised and the amount of State aid used further decreased compared to previous years (see Figure 5).

Figure 4 – State aid expenditure as a % of GDP, 2017



Data source: European Commission, 2019.

Levels of non-crisis State aid have often been higher than recent levels, exceeding 0.9 % of GDP in the 1990s. During most of the crisis, non-crisis State aid decreased. According to the Commission, it has continued to be directed toward horizontal objectives of common interest. These objectives include regional development, research, development and innovation and environmental protection (96 % of State aid in 2017 was spent on these). Horizontal aid is considered less distortive than sectoral aid as it targets market failures[30] and benefits society (e.g. regional aid). The great majority of total non-crisis aid is granted under block exemptions or schemes that do not require prior notification to the Commission (82 % in 2017). Nonetheless, with the exception of 2015, non-crisis State aid has been growing since 2013. It increased in 2017 both in absolute amounts and relative to GDP, reaching €116.2 billion (0.76 % of GDP), an increase of about 0.4 % of GDP compared with 2016, or 9 % in nominal terms (€9.6 billion).

3.4.2. State aid and competition

Economic analyses show that the more differentiated[31] the market is, the less likely it is that State aid will have a negative effect on competition. In such markets, aid to a domestic firm does not cause

[29] For example in 2010 crisis aid represented as much as 9.9 % of the EU's GDP.

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

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

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.

State aid may be disadvantageous to non-aided competitors and create market disruptions. Ultimately, if inefficient firms are helped and the more efficient ones are not, consumer welfare may suffer. 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. On the other hand, foreign companies may be incentivised to invest when expecting State aid from host country.

The Commission also considers that State aid affects the distribution of economic activities among sectors and among Member States. This could disturb efficient allocation and create incentives to use State aid to attract activity on domestic territory. Furthermore, firms benefitting from State aid may reduce their efforts and have fewer incentives to invest and innovate, which can create long-term negative consequences for consumer welfare.

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[32] are high, State aid to R&D increases society's welfare. Furthermore, the use of State aid can also increase competitiveness of industry and manufacturing and consequently foster exports (a correlation exists for both intra- and extra-EU exports).

3.4.3. Services of general economic interest

Services of general economic interest (SGEI) are specific economic activities identified by public authorities on the basis of two characteristics: (i) they have particular importance to citizens and (ii) they would not be supplied by market forces alone – or at least not in the form of a service that 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.

In its 2003 *Altmark* judgment, 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;
- 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;

[32] See the Commission working paper on State aid to investment and R&D. Economists use the term 'spill-over' to illustrate accrual 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.

- when the undertaking is not selected under the public tendering procedure,[33] its level of compensation must be based on analysis of the costs of a 'typical well-run company'.

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 that could lead to the funds obtained from public authorities being switched to other areas of activity, thus distorting competition. The 2016 study also confirmed that entities that receive public funding can use the proceeds from overcompensation to compete in adjacent markets and that the competitive tendering is not always used. Another issue is excessive ex-post compensation.

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 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.

3.5. International dimension

When it comes to 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 on enforcement activities with other jurisdictions. Between 2010 and 2017, the Commission cooperated with external competition agencies in 65 % of all cartel cases and in 54 % of complex merger cases. The number of cartel cases involving an external participant has increased by 450 % since 1990 and mergers with external companies more than doubled between the late 1990s and 2010.

The EU commonly negotiates insertion of competition law provisions in trade agreements and has specific arrangements with accession candidate countries. Free trade agreements should contain a competition chapter, which provides rules and disciplines on both antitrust, mergers and subsidies. 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 build-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 failure when laws or interests conflict too much.

Another issue is the very slow progress on what are referred to as second-agreements that 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 with Switzerland in December 2013. Second agreements are also negotiated with Canada and Japan. Memoranda of understanding are now in place with Brazil (2009), Russia (2011), India (2013), South Africa (2016) and China (2004, 2012, 2017 and 2019). The EU also signed an administrative agreement on cooperation with Mexico in 2018. Furthermore, the Commission takes part in competition-related activities within the framework of multilateral organisations such as the International Competition Network (ICN), which now has more than 130 members, the OECD, the

[34] These include countries such as the US, Japan, Canada, South Korea and Switzerland.

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.

3.5.1. The 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 that restrict competition. The EU has signed such agreements with only its most important economic partners,[34] 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 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). Nonetheless, there is some evidence of the global influence of the EU on competition agencies that are seeking to update existing provisions or introduce new ones. Many of these have taken up European rather than US principles for guidance; including, for instance, certain Commission guidelines and block exemptions, detailed decisions that are publicly available and the growing case law from the European courts. These principles have influenced both the substance and procedural framework in many of these jurisdictions.[35]

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

3.5.2. Policy concerns about unfair foreign competition

In its 2019 communication 'EU-China: the strategic outlook', the Commission stated that current EU policy tools do not fully address the effects that subsidies granted by foreign governments have on the internal market. On the other hand, EU competition policy tools apply indiscriminately to all economic operators, irrespective of their origin. While EU State aid rules only cover aid granted by Member States, there is evidence of substantial government help being dispensed to companies located elsewhere. Unfair foreign subsidies can distort the EU market, create unfair competition and in effect be damaging to European industry.

Furthermore, EU merger control does not have a provision to stop the acquisition of a European company solely because the acquirer benefitted from foreign subsidies. Trade defence instruments only target subsidies that affect the price of products imported into the EU. WTO rules on the other hand ban only some types of subsidies that harm competition, which does not fully mitigate the risks for the internal market. Disputes are lengthy and difficult. It is also possible to request the opening of an anti-dumping proceeding by the importing country, but the results are often very

[34] These include countries such as the US, Japan, Canada, South Korea and Switzerland.

[35] For more detail see M. Pollard, More Than a Cookie Cutter: the Global Influence of European Competition Law, 2014.

limited. To close these multiple gaps, it is necessary to identify how the EU could improve the way it deals with the distortive effects created by foreign state ownership and state financing of foreign companies on the EU internal market. To address these effects properly, the Commission is working on ways to close existing gaps in EU law, with the first results expected by the end of 2019. Recent international tensions related to competition also include criticism of EU policy by President Trump (not least over court cases against the big American tech firms) and the threat of unilateral US tariffs on EU cars and car parts.

4. Recent policy developments

4.1. Empowering the NCAs

One of the most important recent legislative files has been Directive (EU) 2019/1 empowering all the national competition authorities to be more effective enforcers of competition policy.[36] The new rules were set up to make sure that competition rules are applied uniformly across the EU, ensuring the proper functioning of the internal market. This is to be achieved by boosting the independence, resources and powers of NCAs. The main provisions therefore strengthen the investigation and decision-making capacity of NCAs, allow them to impose deterrent sanctions for breaches of antitrust rules, introduce better design and coordination of leniency programmes, and provide NCAs with sufficient human and financial resources to enforce competition rules independently and impartially.

The European Parliament was involved as a co-legislator in this file on equal footing with the Council. The final agreement reached between the institutions introduced some important modifications to the Commission proposal. It set out requirements for clear and transparent procedures to be used to select, recruit or appoint members of NCAs' decision-making bodies. It states that in cases where two remedies are equally effective, NCAs should choose the least burdensome for the undertaking concerned. It also clarified rules on languages used in applications, to lessen to reduce the burden on applicants, introduced the possibility to use expedited appeal procedures when considering interim measures and a leniency programme as a tool for NCAs. Importantly, the directive ensures the protection of current and former directors, managers and other members of staff of applicants, offering immunity from fines owing to competition authorities and sanctions imposed in administrative and non-criminal judicial proceedings if they cooperate with the competition authorities. The directive must be transposed by 4 February 2021.

4.2. State aid

On State aid, the Commission maintained its approach to be 'big on big things and small on small things'. It adopted Regulation (EU) 2017/1084, which exempts a significantly larger number of smaller and unproblematic State aid measures from prior notification in exchange for strengthened controls at Member State level. The new rules are allowed under the 2014 General Block Exemption Regulation (GBER) and extend exemptions to ports and airports.

Investment aid for airports handling up to 3 million passengers per year will be exempt from State aid notification under certain conditions. Small airports handling up to 200 000 passengers per year are now subject to more flexible rules for investment aid and the regulation also allows aid to cover

[36] For more information see C. Karakas, Empowering National Competition Authorities, 2019.

operating losses. Concerning maritime and inland ports, it introduced new thresholds and conditions under which State aid does not have to be notified to the Commission. It also introduced a higher upper limit for aid to culture and to multi-purpose sports arenas, clarified rules on State aid to support the EU's outermost regions, authorised start-up aid for small companies up to five years from their registration, and simplified methods for calculating costs eligible for support.

The GBER seems to be effective in simplifying State aid control: the Commission recently announced that since 2015 more than 96 % of new aid measures, for which expenditure was reported for the first time, fell within its scope.

Furthermore, the Commission developed the new 'analytical grids' (guidelines) on the application of State aid rules to the public financing of infrastructure projects. The grids, together with amended GBER allow infrastructure investments to be implemented quicker and offer legal certainty for project developers and aid-granting authorities. Also, in 2014 the Commission published criteria under which Member States can support transnational projects of strategic importance for the EU. It allows State aid to be dispensed for these projects if they address a need the market cannot meet alone and do not harm competition.[37] The first joint project supporting joint research and innovation in microelectronics was accepted in December 2018 and there is growing interest from Member States in launching more similar initiatives using State aid.

On the other hand, the EU did not succeed in making State aid policy more coherent with regional policy objectives.

4.3. Antitrust

In March 2017, the Commission launched a new anonymous whistleblower tool. The novelty is that now individuals who know of the existence or functioning of a cartel or other illegal antitrust arrangements can inform the Commission about it. Whistleblowers can choose whether to reveal their identity or remain anonymous. The information can concern past, ongoing or planned anti-competitive behaviour. The Commission reported that it receives messages regularly, increasing the likelihood of detection and prosecution of anticompetitive practices.[38]

In March 2019, the Commission launched a new online tool for cartel leniency and settlements and non-cartel cooperation. The aim is to facilitate the submission of statements and documents as part of leniency and settlement proceedings in both cartel and non-cartel cooperation cases. Companies and their legal representatives can file statements and submissions online and can decide whether or not to come to the Commission's premises to provide oral statements. An eLeniency tool is also available for replying to requests for information from the Commission, providing comments or making formal settlement submissions.

In 2018, following a rather difficult process, all Member States implemented Directive 2014/104/EU on antitrust damages actions at national level.[39] This directive makes it easier for victims of infringements of EU antitrust law to obtain compensation and applies to all damages actions, both individual and collective. Quantification of harm inflicted by antitrust actions is a complicated but necessary part of the process. In 2019, the Commission issued guidelines for national courts on how

[37] Communication on important projects of common European interest (IPCEI).

[38] The EU also adopted a directive on protection of whistleblowers in 2019.

[39] The process involved delays and the launch of infringement procedures against numerous Member States. More details are available on the dedicated Commission website.

to estimate the share of the overcharge passed on to the indirect purchaser, a particularly challenging issue. It will help the national courts and parties involved to determine whether and to what extent the harm was passed on down the supply chain.

5. Pending issues

The Commission recently launched a number of consultations indicating where it considers new policies may need to introduced. These include a review of the Vertical Block Exemption Regulation (VBER). The regulation, which exempts certain agreements and practices from the EU's general competition rules, expires on 31 May 2022. The Commission is in the process of determining whether it should let the VBER lapse, prolong its duration or revise it, not least given the influence of digital economy on distribution processes and the findings of the e-commerce sector inquiry published in 2017, which identified many flaws.

In January 2019, the Commission signalled its intention to extend seven sets of State aid rules for a period of two years (until 2022) and launched an in-depth policy evaluation (fitness check) in the area of State aid, including an evaluation of the functioning of the 'de minimis' rules. The General Block Exemption Regulation (GBER) and the sectoral guidelines are also under close examination.

Furthermore, the Commission reportedly intends to review the horizontal agreements framework, since these include for example rules on research and development that play a key role in European competitiveness and the development of technology-driven markets.

Another issue pending is the re-examination of the Liner Shipping Consortia Block Exemption. In September 2018, the Commission launched a consultation on the renewal of the current rules, which will expire in April 2020. Currently, shipping carriers can enter into cooperation agreements for joint cargo transport services if their combined market share is below 30 %. This is not considered illegal since their users benefit from increased productivity and an improved service. Taking into account the fact that in recent years the shipping industry has undergone consolidation, the Commission needs to consider whether application of the rules should be prolonged.

6. Specific issues and policy impacts

6.1. Cartels: deterrence and leniency policy

In all likelihood, cartels that are exposed represent only the tip of the iceberg: the Commission estimated in 2015 that only one in five cartels is discovered. The fines imposed on cartel members are meant to penalise the culprits and discourage other potential infringers. Even though the Commission has made substantial progress on the detection of cartels, finding an effective deterrent remains a challenge.

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 antitrust effect of policy. Some suggest that private actions for damages will increase the perceived risk and help to deter cartels; when actions for damages in court constitute a credible threat, that threat should reduce incentives for breaking the law. New rules on antitrust damages actions may therefore help to achieve both cartel deterrence (via increased financial penalties) and protection of the rights of the harmed individuals. Importantly, in countries where cartel participation is not financially penalised at the level of the individual, private claim actions can do just that, increasing the deterrent effect (Rodger and MacCulloch, 2015).

Fines used by the Commission are also considered to be an important tool for preventing violations. They are not a perfect tool though. Some observers recommend imposing personal penalties on executives, even criminal sanctions, since these are perceived as a high deterrent to anti-competitive practices. 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. Furthermore, the 10 % global turnover cap may be too low to have a strong deterrent effect given the profitability generated by participation in the cartel (Rodger MacCulloch, 2015).

In parallel, the reform of the EU leniency programme could also improve implementation of competition policy. This mechanism proved to be working well over the last decade, but is reportedly used less frequently in recent times (Dumont, 2018). It could be due to some flaw in the programme design or preference for other mechanisms such as settlement decisions. Considering the significant harm caused to consumers and the single market by cartels, the Commission may wish to re-examine the system for reporting cartels. One possible idea would be to reward individual whistleblowers financially, as is the case in the US. In 2019, the EU agreed on a directive to improve protection for whistleblowers. However, the new rules have been criticised by some antitrust observers, who claim they do not offer a strong incentive to report on cartels and as such would have limited impact on increasing leniency applications.

Leniency policy is considered by some researchers to have lost some if its relevance. Ysevyn and Kahmann (2018) argue that there has been a significant fall in the number of immunity applications over the last few years, which has an impact on the Commission's ability to detect cartels. Despite having numerous advantages for the applicants, such as immunity from fines or avoidance of appeal costs, the authors identify many drawbacks in the system, such as legal uncertainties, high administrative hurdles and lengthy investigations, and the rising risks of potentially significant associated private damages claims made following a cartel case under the 2014 directive.[40] The suggested improvements include widening the amnesty programme to incentivise cartel members to step forward. Papanikolau (2019) on the other hand concludes that empirical data on leniency does not allow firm conclusions to be drawn on its decline and that it is entirely possible that the number of leniency applications could tend to be somewhat cyclical. The role of the 2014 Antitrust Damages Actions Directive and the related court cases is yet to be fully understood. On one hand, it offers some protection, for example in terms of disclosure of documents for private litigation, on the other hand some researchers say that there is an ongoing tension between private and public enforcement in the EU and that the current rules may need better rebalancing. They ought to

[40] Potential disadvantages include: the uncertainties around the cartel concept, the risk of losing a fighting chance, uncertainty concerning jurisdiction, the duration of cartel investigation and damage claims, the discretionary marker regime (the opportunity to protect an applicant's place in the queue), the domino effect through the extension of the cartel into other markets and jurisdictions, the broader impact on the relationship with competitors, and the implication of employees.

uphold private rights to sue for cartel damages while at the same they should not discourage companies from revealing themselves.[41]

6.2. Settlements and their attractiveness

After a slow start, the procedure has proved increasingly popular.[42] While the Commission's settlement decisions establish the existence of an infringement, there are some advantages for companies: they obtain a 10 % reduction of the fine and benefit from quicker and less detailed Commission decisions, making fewer compromising details available to the public and reducing harm to their reputation. On the other hand, from a company's point of view, there may be some downsides to 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 is 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.[43]

Hybrid settlements

There are cases in which some alleged cartel participants take part in settlement procedures while others hold out. The Commission may still settle with the willing parties and then proceed with the 'normal' procedure with parties that refused to settle. This creates number of difficulties because settlement decisions are taken before the infringement decisions. In effect, the hybrid settlement cases are less procedurally efficient. The later (infringement) decision may reveal some information against the parties that settled, and conversely there is a risk of bias towards the parties that did not settle, which may be manifested for example in fine setting.

The General Court has recognised some of these concerns in two court cases. Firstly, in November 2017 in *ICAP* it upheld the principle of presumption of innocence of non-settling parties. In March 2019, in *Pometon* the Court confirmed that the Commission must ensure that procedural rights of non-settlers are protected. On the other hand, companies that stayed out of settlement procedures cannot expect that the principle of innocence will make the Commission ignore facts admitted by other, settling, parties.

When agreeing to settle, a company gives up the opportunity to contest 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.

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 that 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

[41] Particularly important for document disclosure are the *Pfleiderer*, *Donau Chemie* and *Axa Versicherung* cases, which confirmed that access to documents used in leniency programmes should be granted on a case by case basis.

[42] Settlements are on the rise and the phenomenon was also observed by the OECD in 2018.

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

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 private litigation cases 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.

Other factors that may impact the efficiency of settlements include the fact that the procedure is fully controlled by the Commission, giving it the possibility to revert to the normal procedure right up to the very end (Jones and Sufrin, 2016). On the other hand, in the US a faster and more flexible process is available under its plea bargaining system. It also includes a right to appeal that is missing from the EU framework. In effect, it is very successful. It could benefit the EU to introduce modifications to the current procedure, to free up resources and be able to find out more cartels (Rodger and MacCulloch, 2015).

Finally, cartel settlement procedures are arguably leading to reduced enforcement costs, allowing the Commission to step up enforcement and deterrence. It also leads to fewer appeals to European courts. However, reducing the penalty on cartel members weakens deterrence.

6.3. Use of commitments

In non-cartel cases, many of the Commission's antitrust decisions do not formally end in the establishment of an antitrust violation but are settled with commitments. Similarly, many of abuse of dominant position cases are resolved with commitment decisions. Some legal experts see that use of commitments by the Commission as growing and perhaps becoming excessive.[44] However, Wils (2015) points out that according to historical statistics the percentage of cases terminated by commitments rather than by infringement decisions appears to be stable and is oscillating around 60 %.[45] It makes commitments a very important and frequently used policy enforcement tool.

The Commission underlines that commitments enable speedy restoration of competition, for example the interventions concerning air transport payments and the information technology markets had a quick and positive impact. It also argues that commitment remedies could be more effective than imposed ones, more forward-looking and

Lessened role of commitments in EU law?

In November 2017, the Court of Justice issued its ruling in Case C-547/16 *Gasorba et al.* v *Repsol*. Firstly, it underlined that EU competition law must be uniformly applied, so that the national courts and competition authorities do not take decisions contrary to those adopted by the Commission. However, the commitments decision does not certify compliance of the practice in question with Article 101 TFEU. As such, the adoption of a commitments decision cannot create a legitimate expectation for the enterprise in this regard. Consequently, adoption of a commitment decision cannot preclude national courts from examining whether the agreement, which is subject to a commitment decision, is in breach of the competition rules. This agreement may also be voided if necessary.

The ECJ underlined that national court must take preliminary assessment included in the commitment decision into account 'as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement'. It therefore recognised that commitments have only informational and not precedential value.

While many experts argue that this has made commitments less attractive and diminished their role, the longer-term impacts of the case have yet to materialise.

[44] See for example D. Kosteseck, Has the Commission kicked its addiction to commitments decisions?, Kluiwert Competiton Law Blog, 2016.

[45] He compares case resolutions under Regulation 17/1962 (which allowed for informal commitments) and under Regulation 1/2003.

more finely tuned. Commitment decisions are therefore often used to act on the market quickly 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 fewer formal and procedural rules than a standard investigation. Commitments do not establish an infringement, so there is no base for civil 'wrongdoing' for the 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. For both sides, the fact that enterprises design the commitments themselves facilitates their implementation.

However, some argue 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 only some information[46] about the decisions and therefore the guidance to the markets is limited, which may reduce the deterrent effect. Without an infringement decision there is no chance of review by the courts, which results in diminished jurisprudence which may not be in the public interest (Jones and Sufrin, 2016).

On the other hand, there is also evidence of successful use of the commitment procedure on nascent, fast-paced technology markets having 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. On such complex and fast moving markets proving an infringement could have been difficult and possibly alleged abusive behaviour would not have been corrected (Rodger and MacCulloch, 2015). Conversely, the OECD (2016) noted that 'the limited legal certainty and the lack of judicial review may deprive businesses of necessary guidance on how to apply the competition law, especially if commitment decisions are used in areas of law which are still unsettled or in highly dynamic sectors where businesses may have more difficulties in screening legal from illegal conduct'.

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. The correcting measures agreed often 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. 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.[47]

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

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

Some economists remark that conflicting incentives when discussing commitments may render them inefficient: the company is interested in offering the narrowest[48] 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. Counterbalancing the conflicting interests of third parties and the investigated companies may to a certain degree be supported in the procedure by performing the market test, but many commentators argue that the role of the Commission remains largely unchecked. 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 (i.e. steering cases towards a commitment solution to avoid the risk of future judicial review) remains to be seen.

6.4. Merger control

Some economists argue the Commission blocks too few mergers and instead imposes remedial conditions that 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. Others add that there tends to be under-enforcement of policy, as there are certain types of potentially anti-competitive mergers that need to be scrutinised in a more detailed way and the Commission is in a disadvantaged position concerning the burden of proof (Motta and Peits, 2019).

On the other hand, merger control decisions are considered to send a strong signal to firms that 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. 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 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).[49] Indeed, researchers argue that over the years the Commission started to use remedies more frequently and that they also became increasingly complicated: 'being complex and untested, such remedies carry a considerable degree of uncertainty and therefore may not correct the anti-competitive effects of the merger, or only partially do so' (Motta and Peits, 2019). Competition remedies have become very important to competition law enforcement as they are meant to restore or preserve undistorted competition. Some researchers therefore argue that little is known about their effectiveness and call for new ex-post assessment of their implementation (Dumont, 2018).[50] Furthermore, the arrival of the digital economy and companies whose economic models are based on harvesting big data has resulted in calls to base the assessment of merger cases on non-monetary criteria as well. That could

[48] The minimum scope of concessions offered by the company and their frequent inefficiency was confirmed in a Commission merger remedies study.

[49] 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 competitors of the merged entity access to technology.

[50] A study of this kind was carried out in 2005 for mergers.

allow the value present in merger cases that currently escapes the market regulators to be effectively captured.

Interestingly, some studies find evidence of increased merger activity after cartel breakdowns (Hüschelrath and 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 alternative way to dominate the market. On the other hand it cannot be ruled out 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.

EU merger control can have positive effects on consumer savings. It may reduce the number of companies that would dominate markets strongly or address undesirable consequences of mergers by remedies. In 2019, the Commission mentioned that that average annual customer savings from its merger decisions over the last years amounted to between €5 billion and 8.5 billion.

Even though merger control is sometimes criticised for obstructing the formation of European champions, there is evidence that the Commission does not often prevent the appearance of large European companies and is even sometimes in favour of such transactions. However, the Commission is rather wary of national preferences when applied by the Member States in merger transactions. In December 2018, in a joint statement, 18 Member States announced their support for exploring 'adaptations to be made to European competition policy so that it allows European players of international scale to emerge'.[51] The argument for helping to create large companies is that without scale they are not able to conquer worldwide markets and achieve global competitiveness. Market concentration however may increase prices in the EU.

The recent prohibition of the Siemens-Alstom merger reignited the debate on the topic. The governments of France and Germany supported the merger and the decision 'unleashed a significant backlash against EU competition policy.'[52] In the aftermath of the decision, ministers from the two countries tabled a joint manifesto in which they proposed to examine changes to competition policy.[53] These include increasing state control and subsidies in the framework of merger control, updating merger guidelines to increase flexibility for the Commission and take into account global and future competition, clarifying and extending scope of State aid guidelines and considering whether the Council can appeal and ultimately override Commission decisions.

In response, the European Strategic Policy Centre has warned against the dangers of a deterioration of competition policy and the weakening of the EU economy if the proposed changes were to become law in the EU. It advised against relaxing merger control rules and enabling the Council to overrule Commission decisions arguing that this would pose a risk of approving anticompetitive transactions and cause 'a downward spiral of economic inefficiency and political arbitrariness'. Heim and Middes (2019) added that establishing clear and robust criteria on which to base the 'European champions' policy is fraught with difficulties. The lack of proper definition is in effect likely to lead to abuse and arbitrary decisions. Bruegel in another paper zooms in on the views of economists who

[51] Friends of Industry, Joint Statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain, December 2018.

[52] European Political Strategy Centre, EU industrial policy after Siemens-Alstom, 2019.

[53] Franco-German Manifesto for a European industrial policy fit for the 21st Century, February 2019.

are wary of giving Member States a greater say over competition policy.[54] This debate will continue in the coming years.

7. Appraisal of EU competition policy

7.1. Effectiveness of EU competition policy

The previous chapter presented some views on the effectiveness of competition policy tools with regard 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 is a multitude of varying approaches.

For its annual Global Competitiveness Report, the World Economic Forum estimates the effectiveness of antitrust policy using a scale between 1 (antitrust policy is considered lax and not effective at promoting competition) and 7 (antitrust policy is extremely effective). It covers 137 countries. In the 2017-2018 report, twelve of the EU Member States are in the first 21 places in the global ranking[55] and a further six are in the first 49 places with values of 4 or above. (Finland is first in the world ranking.) Similarly, in terms of market dominance (1 means dominated by a few business groups, while 7 means spread among many firms) 20 Member States are in the 44 highest ranked, with values above 4.[56] Even though this indicates relatively strong anti-trust and pro-competitive policies in the EU, the index has flaws and is rather simplistic: it does not, for example, distinguish between the effects of national competition policy and EU competition policy.

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 and 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 (applying the '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 US, mainly on account of the absence of prison sentences. Not surprisingly, empirical studies 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.

The empirical research on the microeconomic impact of competition policy carried out by the Commission in 2015 demonstrated that the deterrent effects of merger control and antitrust enforcement significantly outweigh the costs of maintaining an effective competition regime. It also showed that robust enforcement of cartel policies helped to reduce overcharging.

Earlier studies showed that EU competition policy appears to increase competition intensity. Increasing the effectiveness of the policy (by better design, implementation and enforcement) may

[54] For wider commentary on the proposed changes to competition policy see for example the following online articles by the Bruegel think-tank, the European Centre for International Political Economy, Open Europe and Peterson Institute for International Economics.

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

[56] In addition, the 2018 report shows that the scores are generally weaker concerning the level of competition in network services.

also help to curb the exercise of market power and lower the price-cost margin in individual markets. Furthermore, effectiveness of the policy is supported by recent empirical research that demonstrates that until the 1990s, US markets were more competitive than European markets. Today, the latter have lower concentration, lower excess profits, and lower regulatory barriers to entry. This could be explained by the differing setup of the competition system on both continents. A common regulator set up by different countries is more independent and pro-competition than the national ones it replaces. As such, EU institutions are more independent than their American counterparts, and enforce pro-competition policies more robustly than an individual country. More specifically, countries with weak institutions benefit strongly from the delegation of antitrust enforcement to the EU level. Political and lobbying expenditures increased to greater extent in the US than in the EU, and this explains the stronger increase of concentration and market power in the US (Gutierrez and Philippon, 2018). This reverse in strength of competition is also confirmed by recent analysis showing a sharp increase in profit margins in the US, but not in the EU. Furthermore, between 2000 and 2015, prices increased by 15 % more in the US than in the EU, while wages rose only by 7 % more in the US than the EU. This represents an average increase of 8 % in purchasing power for European consumers (Jean Perrot and Philippon, 2019). Declining competition in the US is also manifested by the fact that, unlike in Europe, there was a substantial reallocation of resources from low mark-up to high mark-up companies.[57]

In 2019, ECB researchers analysed the market power and intensity of competition in the euro area. They concluded that concentration ratios have remained broadly flat in the last 10 years, with exception of manufacturing, which is characterised by relatively higher levels than other sectors. Furthermore, the aggregate euro area mark-up has been fairly stable, even declining marginally since late 1990s/early 2000s, driven mainly by manufacturing. The paper concluded that a 'relatively strong anti-trust framework at the aggregate euro area level looks to be a positive aspect'.[58]

Alternatively, a 2019 analysis shows that, since the crisis, market competition has been declining in Europe. This has been manifested by rising market concentration in most Member States, declining business churn and a high level of market power.[59] Some markets such as tourism, and legal and accounting services have some of the highest margins across the Member States while the auto, chemicals, and construction industries have shown the fastest growth in mark-ups. At the same time, new entrants stay away because of high fixed costs incurred for capital investment or legal compliance. Restrictive regulation in many cases acts as an effective entry barrier. Therefore, European markets are not as open to competition as is frequently claimed (Guinea and Erixon, 2019).

There are also some links suggested between antitrust effectiveness, per capita income and supranational policy leadership, pointing to an increase in effectiveness in the new Member States after joining the EU. Policy effectiveness is driven by applying an economic approach and analysis in determining dominance and abusive practices, which focuses on welfare goals and efficiency and uses formal models to demonstrate them. Such an economics-based approach is one of the core concepts behind EU competition policy and its role has increased progressively over recent decades (Zalewska-Głogowska, 2017). This has also arguably improved the standard of decision-making by the Commission. On the other hand, an 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

[57] For more detail see the paper on declining global competition by Diez, Fan and Villegaz-Sanchez (2019).

[58] See Cavalleri, Eliet, McAdam, Petroulakis, Soares, Vansteenkiste, Concentration, market power and dynamism in the euro area, Working Paper Series No 2253, March 2019.

[59] Churn is the number of companies leaving the market. It can also be the number of consumers leaving the company.

SMEs, completion of the single market and improving EU firms' competitiveness, still seem to play an important role in 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 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'.[60] A book examining EU competition policy's international dimension concludes that it has progressively become a leading global regulator (Damro and Guay, 2016).

7.2. EU competition policy and growth

The bulk of economic research suggests a positive relationship between market competition and economic growth. 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. 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 growth and/or productivity in the economy.[61] Furthermore, in 2014 the OECD analysed the existing evidence and concluded that stronger competition policy and laws result in more competition in markets, which in effect results in faster productivity growth – directly linked to economic growth. Productivity growth is positively affected by the fact that only the most effective companies stay on the market and by strong managerial incentives to outperform competitors (Marinello, 2014).

Importantly, some papers support the positive macroeconomic and redistributive effects of EU competition policy. Interventions by competition authorities strengthen competition in the market, which reduces profit margins (or mark-ups) and price levels. This contributes to lower inflation while reduced prices boost consumer demand. In order to meet this demand, firms invest in production capacity and better technology, which increases their productivity. They also hire more workers, which increases employment and stimulates demand further. As such, the negative effect of profitability shrinking due to lower mark-ups is more than offset by the positive effect of stronger demand. All these changes lead to an increase in GDP. Commission decisions on cartels and mergers have deterrent effects (fewer cartels or dominant firms translate to lower prices). Estimations of the effect of these shocks to mark-ups on EU GDP show it increases by 0.4 % after five years and by 0.9 % in the long term. Employment goes up by 0.3 %, which means 650 000 additional jobs. Furthermore, the model shows that after five years poorer households increase consumption proportionally four times more than richer households, which is an argument for the positive redistributive effects of EU competition policy, benefitting the poorest in society. Similarly, the 2017 World Bank study confirms sizeable impact of EU competition policy on GDP growth and its significant redistributive effect – competition policy interventions lead to reduced prices, and better quantity and variety of products, which has the strongest positive impact on the poorest households.[62]

The Commission analysed the macroeconomic impacts of competition policy in 2015 and concluded that it has a positive effect on growth, particularly through its beneficial effects on mark-

[60] For more information on the Google case see C. Karakas, Google antitrust proceedings: Digital business and competition, EPRS (2015).

[61] For an overview, see the European Parliament study 'Contribution of Economic Policy to Growth and the EU 2020 strategy'.

[62] For more detail, see Ilzkovitz and Dierx (2016 and 2017) and the World Bank paper entitled: 'Distributional Macroeconomic Effects of the European Union Competition Policy: A General Equilibrium Analysis.'

ups, business dynamism, innovation and productivity. An earlier study commissioned by the European Parliament also found that 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.

8. Competition policy in the digital era

There is a growing consensus among observers that the EU has already taken on the role of global enforcer of competition rules in the digital economy. Ezrachi (2019) argues that the multitude of goals that underpin competition policy are unique to the EU, and provide the flexibility necessary to address the plethora of challenges raised by the digital economy.[63] Shapiro (2019) estimates that a series of decisions by the Supreme Court left antitrust enforcement in the US notably weaker than in the EU and recommends readers 'look to Brussels for much of the action.'[64] For more than a decade the Commission has dealt with numerous related cases, the most publicised being perhaps the Google and Microsoft investigations. It has also completed an inquiry into e-commerce markets in the EU, based on evidence from nearly 2 000 European businesses. In April 2019, the report of three special advisers on how the EU competition policy should tackle digital challenges was published. It discusses many concerns already present in policy deliberations, provides important input to the Commission's ongoing reflection on the topic, and gives a sense of what the EU competition policy on digital issues may look like.

Firstly, it says that digital economy is characterised by extremely high returns to scale, incumbency advantages (it is not enough to have superior quality and price than the incumbent, new entrants must convince users to switch), and the growing importance of data, which becomes a competitive parameter. It makes it very difficult to challenge the incumbent company, which on the other hand has strong incentives to engage in anticompetitive behaviour. The report recommends vigorous policy enforcement and adjustments to the current way of applying competition law.

This requires a rethink of some fundamental concepts. The report recommends reflection on the consumer welfare standard, the timeframe on fast-paced markets, the standard of proof, and the forbidding of competition-reducing strategies of dominant platforms without measuring consumer harm precisely, when there are no clear consumer welfare gains.[65] The advisers also stress the need to focus analysis on capturing the interdependence of digital markets and identifying anticompetitive strategies. At the same time, the specific lock-in strategies of firms should not be overlooked. Furthermore, any discussion of market power should analyse access to data available to the presumed dominant firm (but not to its competitors), even on

Competition programme 2021-2027

The single market programme, proposed as part of the 2021-2027 multiannual financial framework (MFF), includes the new competition programme. With a proposed financial envelope of €140 million, the programme's main aim is to support the Commission in addressing new challenges for EU competition policy posed by the digital economy, such as the use of big data and algorithms. It will focus on the development of the necessary IT tools and expertise. Furthermore, the programme will support closer cooperation between Member States' authorities and courts and the Commission.

[63] He mentions in his analysis the protection of consumer wellbeing and welfare; the interests of competitors and consumers; the efficient allocation of resources; the structure of the market; undistorted competition; and the promotion of European market integration.

[64] See report on 'Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets'.

[65] Standard of proof signifies quantity and quality of the evidence that is sufficient to prove a legal violation.

apparently fragmented markets. The enforcers should impose on the incumbent the burden of proof concerning the pro-competitiveness of its conduct.

The report analyses in detail the concerns related to online platforms. It describes means to safeguard competition allowing new market entrants, discusses strategies that dominant platforms might use to minimise the threat of market entry, or expand their market power into related markets. It also has recommendations on how to respond to these practices, such as strict scrutiny of dominant platforms, and examining whether their practices aimed at protecting investment are minimal and well targeted. Secondly, it focuses on protecting competition on a dominant platform, which acts as a regulator setting rules for its users and therefore has responsibility to ensure competition. Practices such as leveraging of market power from one market to another or preferential treatment of one's own product merit careful examination.

On data, the advisers recommend a more stringent data portability regime for a dominant firm in order to mitigate strong lock-in effects. This could be complemented by stricter regimes of data access, including data interoperability, in specific sectors. They also say that more research into the anticompetitive consequences of data sharing is needed. The report advises carrying out careful analysis when competitors request access to data from a dominant firm, to determine if it is truly indispensable. Competition authorities or courts should however be entitled to demand data access and interoperability under specific conditions. There also may be a need for legislation in cases where a dominant firm is required to grant access to continuous data to ensure data interoperability.

Lastly, the report talks about specific type of merger: when dominant platforms acquire small start-ups with a quickly growing user base and significant competitive potential. Many of them escape the thresholds of merger regulation because the start-ups have not yet generated enough turnover. To maintain legal certainty and minimise the administrative burden, the advisers do not recommend changing the thresholds yet. They do however propose ways to scrutinise mergers in case a dominant platform and/or ecosystem, which is protected by high barriers to entry, strategically acquires an expanding competitor with high future market potential.

9. Outlook

In the fast changing world, it is inevitable that EU competition policy will face a number of new challenges, while remaining an established guardian of fair play on the single market. To start with, revived interest in energising European industrial policy is likely to have important implications. One valid issue that needs addressing is that of how to support the European industry and businesses in relentless global competition. Industry points out that the global market share and export share of European manufacturing is declining due to the robust growth of Chinese and other Asian producers. While the lost share of manufacturing added value is similar to the US, the lost share of manufactured exports is much higher. Views on how to increase the competitiveness of European industry vary. Some Member States see increased deployment of State aid and relaxed merger control – actively creating European champions – as a panacea. The Commission firmly supports its long-standing view that competiveness is improved through the exposure of businesses to merit-based competition, which needs to be open and take place on the level playing field. Furthermore, the way to increase the competitiveness of European firms requires a well-functioning single market that provides many opportunities for businesses to scale up and grow into large businesses. The political debate about the extent to which EU's future competition framework can actively support industry has already been rekindled and will continue. Importantly, the links between competition policy and trade policy are becoming more evident. Accordingly, policy making is likely to focus increasingly on the need to address the distortive effects of foreign state ownership and subsidies in the internal market and to strengthen strategic value chains.

The ECB adds that strong antitrust will be an asset in helping to remove barriers to entry on markets, improve European R&D, high-tech activities and their diffusion, and advance structural reforms in product markets and the integration of services. Effective competition is indeed fundamental to the further integration and delivery of the single market. As mentioned in the 2019 'Cost of Non-Europe report', policy actions that increase competition would in effect generate significant economic value in important areas such as digital single market and services.

The application of competition policy to digital markets is likely to be another fundamental issue over the coming years. Ensuring effective competition is challenging when digital platforms and large digital companies move further towards dominance, creating asymmetry towards other businesses with weak bargaining power. Fundamental concepts of competition policy, such as market definition, the notion of dominance and abuse and effective remedies, may need rethinking. While this adaptation of rules is a global phenomenon, the EU is well positioned to use its clout and leadership to shape the future global system and lead the discussion.

Competition policy will also need to respond to the changing nature of collusion. Communication methods are becoming increasingly sophisticated, making cartels harder to detect, and more active screening policy may be necessary. Markets with real time trading information and a limited number of dominant players and opaque and complex markets such as cryptocurrency raise new concerns as to whether they facilitate collusion. The role of other emerging trends, such as the availability of big data and the emergence of pricing algorithms, may also need to be examined carefully (Abrantes-Metz and Metz, 2019). Furthermore, an increasingly interdependent economy can make international cooperation even more important and highlight the importance of the question of how to increase the convergence of external competition regimes with the EU model.

In addition, competition policy will continue to play a fundamental role in delivering the benefits of the Union to European citizens. Action such as breaking down cartels, ensuring that firms can enter markets, safeguarding fair play among companies and governments, and helping to further integrate the single market will continue to play a key role in demonstrating the EU's added value. As many as 8 out of 10 European citizens today agree that effective competition has a positive impact on them as consumers, ensures a wider choice of products offered at lower prices and encourages innovation and economic growth in the economy. At the same time, 6 in 10 EU citizens are in favour of a digital single market within the EU. As such, effective enforcement of competition policy in a fast-changing digital realm that encompasses more and more aspects of life in Europe, is likely to be pivotal in the way the effectiveness and deliverables of policy will be perceived by the public. Furthermore, competition policy may contribute to many other fundamental goals of the Union helping to align citizens' expectations with EU actions. For example, 9 out of 10 Europeans consider that protecting the environment is important to them personally. At the same time, a strategic shift of the EU towards achieving a climate-neutral economy is likely to require corresponding modifications to the State aid rules.

The competition policy system may also come under some strain from political developments. Researchers are already pointing out the emergence of 'antitrust populism', which challenges well-established bases of competition law such as maximising consumer welfare, and seeks to politicise the goals of competition policy. Populism in competition matters entails 'both the rejection of rigorous economic analysis in favour of a politically driven competition enforcement, as well as a suspicion of the role of experts and independent agencies in antitrust matters' (Portuese, 2019). This is a part of broader phenomena: with the rise of new political forces, open markets and liberal internationalism – underpinned by independent competition policy - have become a clear target. Use of competition policy to achieve political goals may be manifested by protectionist use of competition rules, as well as limitations on the powers of national competition authorities, which can have detrimental effect on the coherent functioning of the single market. These problems are compounded by risks to the rule of law and independent judiciary, are growing concern in some Member States (Bernatt, 2019). Since the competition system in the EU is strongly interconnected it may come under the strain from these developments. Furthermore, the UK's expected withdrawal from the EU is likely to increase the complexity of enforcement particularly in the initial phase. Even if certain processes of competition authorities will be carried out in parallel (e.g. in merger review), companies will no longer benefit from the one-stop-shop principle.

In response to these challenges, competition policy will play an important role in upholding a rules-based system in the EU and globally. A system in which decisions are taken on the basis of law and economic evidence and can be challenged by impartial courts, while recently contested, is fundamental to the functioning of the Union, and competition policy is one of its most visible symbols. Importantly, fair competition policy helps to infuse the market economy with democratic values – such as participation, accountability, equality of chances and the same rules for everyone (OECD, 2017). Since competition policy helps to support the democratic nature of economic processes – and by doing so contribute to the broader state of democracy – its role in this aspect, during what many consider turbulent times ahead, may become more important than ever.

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Competition policy has been found to make a positive contribution to the EU's economic growth and the EU has one of the most robust competition policy systems in the world. European competition policy encompasses many fields, not least antitrust measures, merger control and State aid. It is enforced by the European Commission, whose decisions can be contested in the Court of Justice of the European Union. Recent policy developments include the antitrust damages system and the framework empowering national competition authorities. Topics discussed in this paper include the role of competition policy in the digital era, merger control, instruments such as the leniency programme, commitments and settlements, and the potential impact of current political developments.

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