COMPETITION POLICY

The main objective of the EU competition rules is to enable the proper functioning of the EU's internal market. The Treaty on the Functioning of the European Union (TFEU) aims to prevent restrictions on and distortions of competition, such as the abuse of dominant positions, anti-competitive agreements and mergers and acquisitions should they reduce competition. Furthermore, State aid is prohibited when it leads to distortions of competition, but can be authorised in specific cases.

LEGAL BASIS

— Articles 101 to 109 TFEU and Protocol No 27 on the internal market and competition, which make clear that a system of fair competition forms an integral part of the internal market, as set out in Article 3(3) of the Treaty on European Union;

— The Merger Regulation (Council Regulation (EC) No 139/2004) and its implementing rules (Commission Regulation (EC) No 802/2004);

— Articles 37, 106 and 345 TFEU for public undertakings and Articles 14, 59, 93, 106, 107, 108 and 114 TFEU for public services, services of general interest and services of general economic interest; Protocol No 26 on services of general interest; Article 36 of the Charter of Fundamental Rights of the European Union.

OBJECTIVES

Competition policy is a key instrument for achieving a free, dynamic and functioning internal market and promoting general economic welfare. Competition enables businesses to compete on equal terms across Member States, while at the same time incentivising them to strive to offer the best products at the lowest price for consumers. This, in turn, drives innovation and spurs long-term economic growth. EU competition policy also applies to non-EU businesses that operate in the internal market. Societal, economic, geopolitical and technological changes pose challenges to EU competition policy.

In 2020, the Commission launched a comprehensive review of the EU antitrust, merger and State aid rules. The November 2021 Commission communication on a competition policy fit for new challenges summarises the key elements of that review. It also highlights how the policy review helps to promote the EU's post-pandemic recovery and create a more resilient internal market to foster the implementation of the European Green Deal and to accelerate the digital transition.

In an increasingly digitalised economy, new tools have become necessary to address emerging challenges. The new Digital Markets Act, finalised by the co-legislators in September 2022, aims to keep digital markets fair and contestable and introduces ex-ante regulation for so-called gatekeeper online platforms. A number of other initiatives intended to reinforce the EU's open strategic autonomy in a global context have been launched. For example, the new Regulation on Foreign Subsidies seeks to address potential distortive effects of foreign subsidies in the single market.

COMPETITION POLICY TOOLS

Broadly speaking, the EU competition policy toolbox includes rules on antitrust, merger control, State aid and public undertakings and services. Antitrust aims at restoring competitive conditions, e.g. in case of the formation of cartels or abuse of dominance. Preventive competition policy tools encompass merger control and State aid rules. Merger control pre-empts potential distortions of competition by assessing in advance whether a potential merger or acquisition could have an anti-competitive impact. State aid rules aim to prevent undue state intervention wherever preferential treatment of given undertakings or sectors distorts, or is likely to distort, competition and adversely affects trade between Member States. Services of general economic interest (SGEI) are particularly important to consumers and are subject to specific rules in the context of State aid, with a view to promoting social and territorial cohesion, a high level of quality, safety and affordability, and equal treatment.

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

Collusion between companies distorts the level playing field and causes harm to consumers and other businesses. Agreements between undertakings, such as cartels, are prohibited and automatically void. However, agreements may be exempted if they contribute to improving the production or distribution of goods or if they promote technical or economic progress. The conditions for granting an exemption are that consumers are allowed a fair share of the resulting benefit and that the agreement does not impose unnecessary restrictions or aim to eliminate competition for a substantial part of the products concerned. Rather than such exemptions being granted on a case-by-case basis, they are most commonly governed by the Block Exemption Regulations.

These regulations cover groups of similar specific agreements, which usually have a comparable impact on competition. In May 2022, the Commission adopted the revised Vertical Block Exemption Regulation. It is also reviewing the two Horizontal Block Exemption Regulations together with the relevant guidelines.

Finally, certain agreements are not regarded as infringements if they are of minor importance and have little impact on the market (the de minimis principle). Such agreements are often seen as useful for cooperation between small and medium-sized enterprises.

B. Prohibition of abuse of a dominant position (Article 102 TFEU)

According to the Court of Justice of the EU, a dominant position is 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'. It is assessed in relation to the internal market as a whole, or at least a substantial part of it.

A dominant position is not in itself an infringement of EU competition law, and the holders of such positions are allowed to compete on merit. However, a position of dominance confers on the undertaking a special responsibility to ensure that its conduct does not distort competition. Examples of behaviours that would amount to abuse of a dominant position include setting prices at below cost level (predation), charging excessive prices, tying and bundling, and refusal to deal with certain counterparts.

In addition, the new Digital Markets Act sets out specific obligations for the so-called gatekeeper online platforms. Once an entity is designated as gatekeeper by the Commission, it will need to comply with certain obligations or bans on certain behaviours as envisaged in the law (such as self-favouring, pre-installation and tying of certain software products, etc.). Those obligations are supplementary to the general competition rules, which continue to apply.

C. Merger control

Under the EC Merger Regulation (EC) No 139/2004, concentrations, which would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position, must be declared incompatible with the common market (Article 2(3)). The Commission must be notified of planned mergers if the resulting company would exceed certain thresholds (so-called concentrations with a Community dimension). Below those thresholds, national competition authorities can review mergers. The merger control rules equally apply to companies based outside the EU, if they do business in the internal market. The review process is triggered when control is acquired over another undertaking (Article 3(1)). After an assessment of the likely impact of the merger on competition, the Commission may approve or reject it, or it can grant an approval, subject to certain conditions and obligations (Article 8). There is no systematic subsequent scrutiny or unbundling of associated companies.

Following a lengthy review process that started in 2014, the Commission amended its Merger Implementing Regulation and the Notice on Simplified Procedure with a view to having the new rules applicable as of September 2023.

D. Prohibition of State aid (Article 107 TFEU)

Article 107 TFEU contains a general prohibition of State aid in order to prevent distortions of competition in the internal market that could result from the granting of selective advantages to certain companies. All direct aid granted by Member States (e.g. non-repayable subsidies, loans on favourable terms, tax and duty exemptions, and loan guarantees) as well as similar advantages are banned.

The TFEU leaves room to grant certain exemptions from this general ban, if they can be justified by specific overarching policy objectives, for example addressing serious economic disturbances or for reasons of common European interest. During the COVID-19 outbreak, the Commission adopted the State Aid Temporary Framework to address serious economic disturbances caused by the pandemic, which has already been phased out. In March 2022, the Commission adopted a Temporary Crisis Framework, which has since been broadened further, to enable Member States to use the flexibility given under State aid rules to support the economy in the context of Russia's invasion of Ukraine. Most recently, in March 2023, the Commission further transformed the temporary framework into the Temporary Crisis and Transition Framework, by adding measures to foster support measures in sectors which are key for the transition to a net-zero economy, in line with the Green Deal Industrial Plan. As a consequence, by adding new aims, the essence of EU competition policy is currently undergoing profound changes, which might be considered a departure from decades of practice.

In the past, similar steps were taken in the context of the global financial crisis to prevent major negative spillover effects for the entire financial system due to the failure of an individual financial institution.

Member States are required to notify the Commission of any planned State aid, unless it is covered by a general block exemption (as set out in Commission Block Exemption Regulation for State aid) or the de minimis principle applies. State aid measures can be implemented only if the Commission has granted approval. It has also deemed preferential tax treatment for certain individual companies in some Member States to constitute prohibited State aid. The Commission has the power to recover incompatible State aid.

Since 2021, the Commission has completed a range of reviews of different aspects of the EU's State aid policy. This includes the new Guidelines on State aid for climate, environmental protection and energy, the revised Communication on State aid rules for important projects of common European interest and the revised Guidelines on State aid to promote risk finance investments, among others.

E. Public services of general economic interest

In some Member States, certain essential services (e.g. electricity, post and rail transport) are still provided by public undertakings or undertakings controlled by public authorities. Such services are considered to be SGEIs and are subject to specific rules in the context of the EU State aid framework. Article 36 of the Charter of Fundamental Rights of the European Union also recognises the access that European citizens should have to SGEIs.

ENFORCEMENT

Rigorous and effective enforcement of the EU competition rules is essential to ensure the achievement of the competition policy objectives. The Commission is the main body responsible for ensuring the correct application of these rules and has wide-ranging inspection and enforcement powers. However, Council Regulation (EC) No 1/2003 allows an enhanced enforcement role of national antitrust authorities and courts, which was reinforced by Directive (EU) 2019/1. Coordination between the levels is supported by the European Competition Network, which consists of the national competition authorities and the Commission.

In the area of antitrust law, the Actions for Damages Directive was adopted in 2014 in order to heighten the deterrent effect against prohibited agreements (cartels and abuse of a dominant position) and to provide better protection for consumers. It facilitates the process for obtaining compensation for harm.

ROLE OF THE EUROPEAN PARLIAMENT

In competition policy, Parliament's principal role is scrutiny of the executive. The Commissioner for Competition appears several times a year before Parliament's Committee on Economic and Monetary Affairs (ECON) to explain the approach taken and discuss individual decisions. With regard to the adoption of competition policy legislation, Parliament is usually involved only through the consultation procedure. However, the ordinary legislative procedure can be applied, such as for the adoption of the above-mentioned directives on actions for damages and measures to strengthen the competition authorities of the Member States.

During the eighth parliamentary term, the Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE 1, TAXE 2 and TAXE 3) analysed the measures taken to assess the compatibility of tax rulings in the Member States with State aid rules and the possibility of further clarifying the rules on the reciprocal exchange of information. In September 2020, the Subcommittee on Tax Matters (FISC) was created to continue this work and ensure that Parliament promotes fair taxation at national, EU and global level.

Parliament continues to monitor the developments in competition policy and the Commission's work in this field. The dedicated ECON Working Group on Competition Policy and Parliament's yearly resolutions on the Commission's annual report on competition policy provide policy input and guidance for Parliament's view on addressing the EU's competition policy challenges.

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