# COMPETITION POLICY

The main objective of the EU competition rules is to enable the proper functioning of the EU's internal market as a key driver for the well-being of EU citizens, businesses and society as a whole. To this end, the Treaty on the Functioning of the European Union (TFEU) contains rules that aim to prevent restrictions on and distortions of competition in the internal market. More specifically, it does so by prohibiting anti-competitive agreements between undertakings and abuse of market position by dominant undertakings, which could adversely affect trade between Member States. Moreover, mergers and takeovers with an EU dimension are monitored by the European Commission (the Commission) and may be prevented if they would result in a significant reduction of competition. Furthermore, State aid to given undertakings or products is prohibited when it leads to distortions of competition, but can be authorised in specific cases. Subject to certain exceptions, competition rules also apply to public undertakings, public services and services of general interest.

## LEGAL BASIS

— Articles 101 to 109 of the 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) TEU;

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

— Articles 37, 106 and 345 of the TFEU for public undertakings and Articles 14, 59, 93, 106, 107, 108 and 114 of the 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

The fundamental objective of EU competition rules is to ensure the proper functioning of the internal market. Effective competition enables businesses to compete on equal terms across Member States, while putting them under pressure to strive continuously to offer the best possible products at the best possible prices for consumers. This in turn drives innovation and long-term economic growth. Competition policy is thus a key instrument for achieving a free and dynamic internal market and promoting general economic welfare. EU competition policy also applies to non-EU businesses that operate in the internal market.

Societal, economic, geopolitical and technological changes constantly pose new challenges to EU competition policy. Such new developments compel policymakers to assess whether the current competition policy toolbox still provides the effective tools to achieve its overarching objective or whether it needs to be adjusted. The Commission has launched a comprehensive review of EU antitrust, merger and State aid rules[1]. Moreover, the COVID-19 pandemic has posed particular challenges to businesses, consumers and the economy as a whole, and has required a range of measures in the field of competition to enable an adequate response to these challenges. A number of other initiatives aimed at reinforcing EU strategic autonomy in a global context are planned, such as the proposal for an instrument to address potential distortive effects of foreign subsidies in the single market and the planned EU carbon border adjustment mechanism.

## COMPETITION POLICY TOOLS

Broadly speaking, the EU competition policy toolbox includes rules on antitrust, merger control, State aid, and public undertakings and services. The antitrust branch aims at restoring competitive conditions, should improper behaviour by companies (e.g. the formation of cartels or abuse of dominance) cause distortions of competition. The preventive branch of the competition policy tools encompasses merger control and State aid rules. The purpose of merger control is to pre-empt potential distortions of competition by assessing in advance whether a potential merger or acquisition could have an anti-competitive impact. The 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 of the TFEU)

If, instead of competing with each other, companies agreed to reduce competition, this would distort the level playing field and in turn cause harm to consumers and other businesses. This is why all agreements between undertakings which have as their object or effect a distortion of competition and which may affect trade between Member States are prohibited (paragraph 1) and automatically void (paragraph 2). This includes, for example, explicit agreements (such as those of cartels) and concerted practices for fixing prices or limiting production output, or dividing the market among companies (also called territorial protection clauses). Those types of agreement are always considered harmful to competition and are thus prohibited without exception.

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[1]Public consultation on competition policy and the European Green Deal.Overview of the planned timeline for merger and antitrust policy reviews (2020-2024)Overview of the planned timeline for State aid policy reviews (2020-2023).

On the other hand, other types of agreements may be exempted, provided that they contribute to improving the production or distribution of goods or to promoting technical or economic progress. For example, agreements on cost or risk sharing between companies, or on accelerating innovation through cooperation in research and development could bring significant economic benefits. The conditions for granting such 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 (paragraph 3). 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. The Commission is currently reviewing the Vertical Block Exemption Regulation[2], as well as the two Horizontal Block Exemption Regulations[3] together with the relevant guidelines. The aim of the review is to determine whether these regulations still take proper account of market developments and are still fit for purpose.

Moreover, certain agreements are not regarded as infringements if they are of minor importance and have little impact on the market (the *de minimis* principle), even if they do not fulfil the conditions for exemption under Article 101(3) of the TFEU (so-called agreements of minor importance). Such agreements are often seen as useful for cooperation between small and medium-sized enterprises. However, agreements which have the restriction of competition as their 'object' cannot be regarded as being of minor importance[4].

Following the outbreak of the COVID-19 pandemic, the Commission adopted a Temporary Framework communication in April 2020, which provides antitrust guidance to companies cooperating to increase the production and optimise the supply of, in particular, urgently needed hospital medicines in response to the crisis.

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

If a company that holds a position of strength (dominance) in a particular market were to abuse that position (e.g. by charging customers excessively high prices), it would cause harm to consumers and competitors alike. This is why such behaviour is prohibited under EU competition law. One of the most prominent cases of abuse of dominant position culminated in the 2004 Microsoft Decision[5]. The Commission found that Microsoft had abused its dominant position in PC operating systems by withholding

[2]Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.
[3]Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335, 18.12.2010, p. 36 and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43.
[4]Commission communication entitled 'Notice on agreements of minor importance, which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice), OJ C 291, 30.8.2014, p. 1.
[5]Case COMP/C-3/37.792 – Microsoft.

critical interoperability information from its competitors, meaning that providers of rival operating systems were unable to compete effectively.

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'[6]. Dominant positions are assessed in relation to the internal market as a whole, or at least a substantial part of it. How much of the market is taken into account will depend on the nature of the product, the availability of alternative products, and consumers' behaviour and readiness to switch to alternative products. The Commission is currently preparing a comprehensive review of its approach to defining the concept of relevant market.

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, like any other company. However, a position of dominance confers on undertaking a special responsibility to ensure that its conduct does not distort competition. This means that the same conduct, if engaged in by a non-dominant firm, would not necessarily be illegal. Examples of behaviour that would amount to abuse of dominant position include setting prices at below cost level (predation), charging excessive prices, tying and bundling, and refusal to deal with certain counterparts. Article 102 of the TFEU provides a non-exhaustive list of examples of abusive practice.

**C.** Merger control procedure

Mergers or acquisitions can be beneficial for companies and the economy as a whole, as they can create efficiencies, synergies and economies of scale. However, if they result in strengthening market power or increasing market concentration, they can also weaken competition. This is why certain mergers and acquisitions must be reviewed and may not be completed until authorisation is granted.

Under Regulation (EC) No 139/2004, concentrations which would significantly impede effective competition in the common market or in a substantial part of it, in particular through the creation or strengthening of a dominant position, must be declared incompatible with the common market (Article 2(3)). The Commission must be notified of planned mergers 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.

In 2014, the Commission carried out a consultation on possible amendments to EU merger control rules[7], aimed at improving the combined effectiveness of the rules at

[6]Judgment of Court of Justice of 14 February 1978, *United Brands Company and United Brands Continentaal BV* v *Commission of the European Communities,* Case 27/76, ECLI:EU:C:1978:22.
[7]Commission White Paper entitled 'Towards more effective EU merger control' (COM(2014)0449).

EU level and at national level. It was followed by an evaluation of certain aspects of EU merger control, launched in 2016, the findings of which were published in March 2021. The specific outcome of this process is still pending.

## D. Prohibition of State aid (Article 107 of the TFEU)

Article 107 of the TFEU contains a general prohibition of State aid (paragraph 1) 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) is banned. So are any other advantages granted as preferential treatment to given undertakings or sectors which distort, or are likely to distort, competition and adversely affect trade between Member States.

The TFEU leaves room to grant certain exemptions from this general ban, if they can be justified by specific overarching policy objectives (paragraphs 2 and 3), for example addressing serious economic disturbances or for reasons of common European interest. A recent example is the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak[8], which was adopted to address serious economic disturbances caused by the pandemic. In the past, similar steps were taken in the context of the global financial crisis[9] 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 Regulation (EC) No 800/2008) or the de minimis principle applies. The State aid measure can be implemented only if the Commission has granted approval. The Commission also has the power to recover incompatible State aid. In a number of decisions, the Commission has deemed preferential tax treatment for certain individual companies in some Member States to constitute prohibited State aid, the repayment of which must be demanded. For example, in 2016, the Commission instructed Ireland to seek payment of EUR 13 billion in taxes from Apple. The outcome of the court case on the matter is pending.

A range of reviews of different aspects of the EU' State aid policy are currently underway. The State aid Modernisation fitness check, launched in 2019, covers planned reviews in respect of, *inter alia*, energy and the environment, important projects of common European interest, risk finance investment, airports, airlines, etc.

## E. Public services of general economic interest (SGEIs)

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. SGEIs are economic activities of particular importance for consumers which would not be produced by market forces alone, or at

[8]Consolidated version of the framework.
[9]See for example the communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, p. 1. It was preceded by six other communications addressing further State aid measures in the context of the crisis (the crisis communications).

least not in the form of an affordable service available indiscriminately to all. The TFEU emphasises the importance of these services, their diverse nature, the wide measure of discretion enjoyed by national, regional and local authorities, and the principle of universal access. Article 36 of the Charter of Fundamental Rights of the European Union also recognises the access that European citizens should have to SGEIs, with a view to promoting social and territorial cohesion within the Union.

## 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.

Moreover, since 1 May 2004, in the context of antitrust rules (Articles 101 and 102 of the TFEU), the competition authorities of the Member States have assumed some competition enforcement functions. Council Regulation (EC) No 1/2003 allowed an enhanced enforcement role of national antitrust authorities and courts, which was reinforced by Directive (EU) 2019/1[10]. In such a decentralised enforcement context, efficient coordination between the national and EU competition enforcement authorities is key. Therefore, the European Competition Network, consisting of the national competition authorities and the Commission, serves as a platform for the exchange of information aimed at improving coordination in the enforcement of competition rules.

In the area of antitrust law, the Actions for Damages Directive[11] 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 caused to individuals or other businesses by an infringement of competition law.

## 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. Its influence is thus limited compared to the influence of the Commission and the Council. Parliament has called, on several occasions, for the ordinary legislative procedure to be extended to cover competition law, for example in its yearly resolutions on the Commission's Annual Report on Competition Policy.

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[10]Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3. The directive has been in force since 3 February 2019 and had to become law in the Member States by 4 February 2021.

[11]Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

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

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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