



EUROPEAN
COURT
OF AUDITORS

Background paper



Enforcement of EU competition policy

Information on a forthcoming audit

September 2018

Competition rules play a significant role in the EU economy: they ensure that companies can do business on a level playing field and provide a greater variety of products and services to consumers at competitive prices and conditions. The principle of fair competition on equal terms is crucial for the proper functioning of the EU Single Market. Competition policy covers all forms of anticompetitive behaviour by companies, the risks to competition posed by mergers between companies, and activities of public authorities of the Member States that may distort competition, such as the granting of state aid.

The Commission is the principal enforcer of the EU's competition rules. It has the power and responsibility to investigate suspected anticompetitive conduct, to issue prohibition decisions, to impose fines, and to conclude binding agreements with companies. In a system of parallel enforcement, the Commission also ensures that the national competition authorities of the Member States apply EU competition rules in a uniform manner. The Commission also plays an important role, together with the European Parliament and the Council, in drawing up EU competition rules.

The European Court of Auditors is currently examining whether the Commission has been effective in enforcing the EU's competition rules in the specific areas of antitrust and merger control. The focus of the audit will be on how the Commission identified anticompetitive behaviour, how it conducted its investigations, and how it assessed and communicated the effectiveness and impact of its work on competition and the resulting benefits for citizens in the Single Market. Our work seeks to identify strengths and weaknesses and to highlight areas where changes could be beneficial.

To perform our audit, we will conduct interviews with Commission officials and review various documents produced by the Commission relating to its competition policy enforcement activities. We will also visit several national competition authorities.

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COMPETITION POLICY IN THE EUROPEAN UNION

Competition rules set out in the EU Treaties

In 1957, the Treaty of Rome set out as an important policy goal the creation of ‘a system ensuring that competition in the common market is not distorted’¹. Ever since, the aim of protecting free competition through well-developed competition rules and enforcing them effectively has remained a constant focus of European Union (EU) policy.

Today, the goal of establishing a ‘highly competitive social market economy’² is enshrined in the Treaty on European Union (TEU), with the basic competition rules laid down in the Treaty on the Functioning of the European Union (TFEU)³.

Ensuring effective competition in the EU single market

Competition is essential for the proper functioning of a free market. The goal of competition policy is to ensure that companies compete fairly and on equal terms.

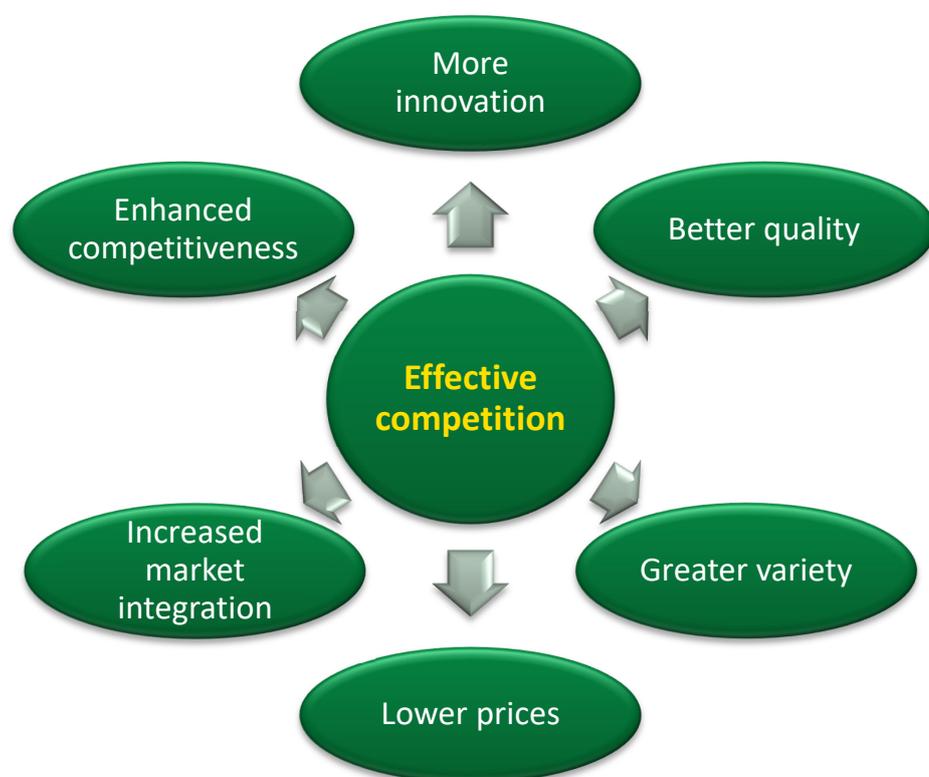
Effective competition enables the rational allocation of scarce resources to productive activities, creates the right incentives for companies and provides numerous benefits for consumers (see **Figure 1**):

- **lower prices:** companies that have competitors are likely to offer lower prices to consumers for the same products and services. This benefits existing consumers and also enables more people to afford the same products and services, thus boosting levels of economic activity in general;
- **better quality:** in a competitive market, companies compete not only on price but also on the quality of their products and services. Quality improvements can take many forms, such as longer-lasting or better-working products, and faster or more convenient services;
- **greater variety:** in order to stand out from competitors and win new customers, companies strive to offer products and services that are different from the rest. Consumers thus benefit from a wider choice of products or services that satisfy their preferred balance between price and quality;

- **more innovation:** competition provides incentives to innovate, because companies are encouraged by necessity to improve their production techniques, optimise their processes and offer new products and services;
- **increased market integration:** effective competition removes the remaining territorial barriers to trade and allows consumers in all Member States to benefit fully from integration into the EU's Single Market; and
- **enhanced competitiveness in Europe and beyond:** a competitive Single Market helps make European companies more efficient and allows them to act as global competitors in both European and foreign markets.

This sets in motion a virtuous cycle where productive economic activity stimulates sustainable economic growth.

Figure 1 – Positive effects of effective competition



CHALLENGES FOR COMPETITION POLICY IN THE EU'S SINGLE MARKET

While the benefits of competition are numerous and significant, it is not an easy task to safeguard competition and ensure the proper functioning of the EU's Single Market. There are many challenges. Not all companies are willing to compete on fair and equal terms, and some of them choose to implement anticompetitive strategies. In addition, seemingly benign mergers between companies ostensibly aimed at achieving economies of scale or creating synergies with each other's technology and expertise can potentially pose risks to competition. Even well-intentioned public intervention, in the form of state aid, can result in an unjustified and disproportionate distortion of competition. For all these reasons, competition policy requires effective enforcement across three main areas: antitrust, merger review and state-aid control.

Antitrust

In the context of EU competition policy, the Commission uses the term 'antitrust' to designate two different forms of conduct that can distort competition: anticompetitive agreements (a form of concerted behaviour between companies) and abuses of a dominant position (a form of unilateral behaviour by a specific company) (see **Box 1**).

Box 1: 'Antitrust' – what does it mean?

Anticompetitive agreements: these are agreements between two or more companies that restrict competition. The most obvious form of such restriction are cartel agreements, which are prohibited by Article 101 TFEU. Typical examples of anticompetitive agreements are agreements that fix prices, limit production or share markets or customers.

Abuse of a dominant position: a company is considered to be dominant if it has a strong position in a given market such as having a large market share. A dominant position is not in itself a violation of competition rules, but Article 102 TFEU prohibits the abuse of such a position to eliminate or restrict competition. Abuse can take many forms such as imposing excessively low purchase or high selling prices or other unfair trading conditions on customers, or limiting production, markets or technical development to the detriment of consumers.

Merger control

A merger that aims to create or to strengthen an existing dominant company can harm consumers through higher prices, reduced choice or less innovation as the competitive pressure that motivates companies is lessened or eliminated.

As with antitrust, merger control aims to prevent distortions to competition. However, unlike antitrust, merger control aims to prevent anticompetitive effects before they occur while, generally speaking, antitrust deals with eliminating anticompetitive harm that has already occurred.

The Commission reviews mergers before they occur to prevent the development of excessive market concentrations that would distort competition and limit the freedom of action of individual market participants.

However, not every merger is subject to EU merger control rules. The conditions for the applicability of EU rules are set out in the EU Merger Regulation⁴. In general, mergers of large companies with cross-border activity in multiple Member States and with an annual

turnover in the Single Market that exceeds a given threshold are subject to EU rules. Merger control involves the relevant competent authority proactively reviewing the merger before it occurs to ascertain whether or not it poses a risk to competition.

State aid

Public authorities of Member States sometimes intervene to support companies that are experiencing difficulties. Such state aid can either be necessary and justified by circumstances, or disproportionate and liable to create unfair advantages that distort competition. In order to preserve the proper functioning of the Single Market, it is necessary that state aid is controlled to ensure that companies only receive legitimate and proportionate support that does not go beyond what is strictly necessary. The rules regarding the compatibility of state aid with the EU's single market are set out in the TFEU⁵ and secondary legislation (Regulations, Directives), as well as soft law such as guidelines and notices adopted by and binding on the Commission providing the necessary detail to implement them in practice. The fact that state aid can take many forms (it is not limited to direct financial grants) adds to the complexity of enforcing EU competition rules.

ENFORCING EU COMPETITION RULES

European Commission

The Commission is responsible for ensuring that competition in the Single Market is not distorted. Within the Commission, the Directorate-General for Competition (DG COMP) has the responsibility for elaborating the EU's competition policy, investigating cases of alleged anticompetitive behaviour and taking the necessary decisions to maintain or restore the proper functioning of competition in the Single Market. The European Commission has broad investigative powers, such as the ability to carry out unannounced inspections at companies' premises, or to compel companies to provide evidence relevant for its investigations. Any final, formal decision must be adopted by the College of Commissioners, and thus engages the responsibility of the Commission as a whole.

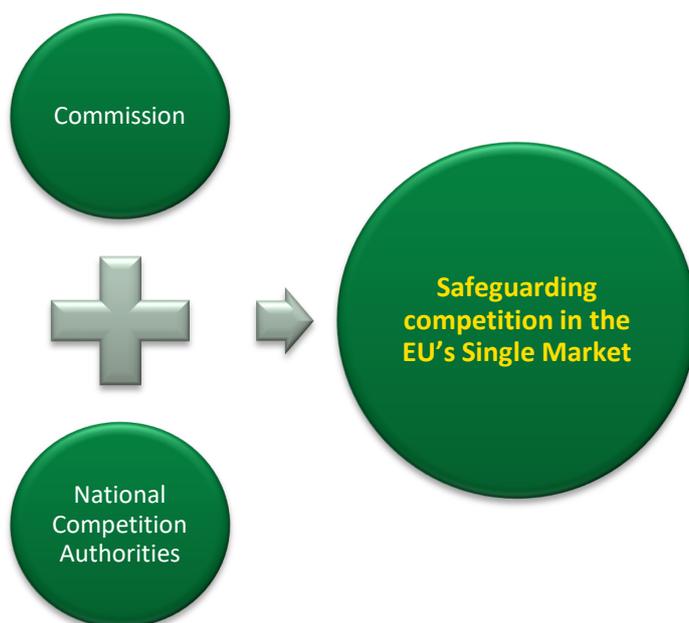
The Commission's decision-making powers in enforcing EU competition rules are specific to each of the three above-mentioned areas: concerning

- **antitrust:** the Commission can prohibit anticompetitive conduct, impose substantial fines of up to 10% of the annual turnover of the concerned companies, and impose any other conditions on companies (in the form of binding commitments) that it considers necessary to restore effective competition in the Single Market.
- **mergers:** the Commission can either prohibit them, authorise them subject to conditions that eliminate or lessen the risk of anticompetitive effects resulting from the merger or simply authorise the merger. In the context of merger control, it also has the power to impose fines for procedural violations by companies, such as not notifying the merger, accomplishing the merger before being granted an authorisation or providing incomplete or misleading information.
- **state aid:** the Commission can prohibit specific support measures granted to companies and order Member States to recover any state aid that has been provided by them if it is incompatible with the proper functioning of competition in the Single Market.

National Competition Authorities

As regards antitrust rules, before 2004, the Commission was the sole authority that had the legal competence to enforce EU competition rules. A major reform then introduced a new enforcement system whereby both the Commission and the national competition authorities (NCAs) of EU Member States directly apply EU competition rules (see **Figure 2**)⁶.

Figure 2 – Cooperation with national competition authorities



In this system of parallel enforcement, each competition authority can act independently, launch its own investigations and take competition decisions. To this end, the Commission and NCAs cooperate closely through the European Competition Network (ECN) in order to determine which authority is well placed to conduct an investigation. By the end of 2017, this resulted in more than 2 000 investigations and over 1 000 decisions, with the Member State competition authorities being responsible for 85% of them⁷.

While the Commission is directly responsible for its own investigations, it also has the overall responsibility and necessary legal tools to ensure that all NCAs apply EU competition rules in a uniform way. This makes the Commission the key enforcer of EU competition rules.

MAIN ISSUES IDENTIFIED WHEN PREPARING THE AUDIT

When preparing our audits, we carry out an analysis to identify issues surrounding the policy area or programmes that we intend to examine. Since these issues are identified before the audit work commences, they should not be regarded as audit observations, conclusions or recommendations.

Our audit will assess whether the Commission has been effective in enforcing the EU's competition rules in the specific areas of antitrust and merger control. In particular, we will examine how the Commission has:

- identified anticompetitive behaviour;
- conducted its investigations; and
- assessed and communicated the effectiveness and impact of its work on competition and the resulting benefits for citizens in the Single Market.

Our work seeks to identify strengths and weaknesses and highlight areas where changes could be beneficial.

This audit builds on previous work carried out in the area of competition policy⁸.

To perform our audit, we will conduct interviews with Commission officials and review various documents produced by the European Commission relating to its competition policy enforcement activities. We will also visit several national competition authorities.

ABOUT ECA SPECIAL REPORTS AND BACKGROUND PAPERS

Our special reports set out the results of audits of EU policies and programmes or management topics related to specific budgetary areas.

Background papers provide information based on preparatory work undertaken before the start of an on-going audit task. They are intended as a source of information for those interested in the audited policy and/or programme.

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- ¹ Article 3(1)(g) of the Treaty establishing the European Economic Community, 25.3.1957.
- ² Article 3(3) of the Treaty on European Union (consolidated version); OJ C 202, 7.6.2016, p. 13-46.
- ³ Articles 101 to 109 of the Treaty on the Functioning of the European Union (consolidated version); OJ C 202, 7.6.2016, p. 47-200.
- ⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance); OJ L 24, 29.1.2004, p. 1-22.
- ⁵ Articles 107 to 109 TFEU.
- ⁶ Council Regulation (EC) No 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; OJ L 1, 4.1.2003, p. 1.
- ⁷ <http://ec.europa.eu/competition/ecn/statistics.html>.
- ⁸ *'Special report No 15/2011: Do the European Commission's procedures ensure effective management of state aid?', 15 December 2011, and 'Special Report No 24/2016: More efforts needed to raise awareness of and enforce compliance with State aid rules in cohesion policy', 4 October 2016.*