

Special Report

The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight



EUROPEAN
COURT
OF AUDITORS

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Executive summary

I The Treaty on the Functioning of the European Union protects fair competition of companies in the EU internal market and in the interest of consumers. To this end, the Commission enjoys significant investigative and decision-making powers whereby it can prohibit anti-competitive agreements between companies or act against companies that abuse their position in the internal market (known as "antitrust proceedings"). The Commission also reviews larger concentrations of companies for their impact on competition in the internal market (known as "merger control").

II Both the Commission and the national competition authorities (NCAs) in the EU Member States can directly enforce EU competition rules in antitrust cases affecting trade between Member States. The Commission has defined criteria for allocating cases between the Member States and the Commission.

III This is the first audit we carried out on the Commission's role as enforcer in the areas of merger and antitrust. Over the last 10 years, EU competition enforcement has experienced significant changes in market dynamics and been at the centre of public interest and debate. In our audit, we looked at whether the Commission, through its Directorate General for Competition, enforced EU competition rules in its merger control and antitrust proceedings well. To this end, we examined the Commission's detection and investigation capacity, and how it used its enforcement powers in merger control and antitrust proceedings. We also examined how the Commission cooperated with the NCAs, how it reported on the results of its enforcement activities, and how it received feedback. Our report highlights issues which may have an impact on the Commission's success now and in the future.

IV We found that overall the Commission made good use of its enforcement powers in merger control and antitrust proceedings and addressed competition concerns with its decisions. However, improvements are necessary in a number of areas.

V In order not to depend solely on complaints received, the Commission acted on its own initiative to identify problems potentially affecting the internal market. However, it did not invest appropriate resources in monitoring markets. Incentives put in place to encourage self-reporting of cases worked but numbers have fallen since 2015. By prioritising cases, the Commission allocated resources to relevant investigations but this was not based on a clear weighting of criteria ensuring the selection of cases with the highest risk.

VI Merger control absorbed a substantial part of the available resources. The Commission successfully applied a simplified procedure but still needs to act upon further streamlining measures. We also found that the turnover-based thresholds used for deciding whether a transaction would affect competition in the internal market may not ensure that all significant transactions are subject to the Commission's review.

VII The Commission's antitrust decisions addressed competition concerns but investigations were generally lengthy. As antitrust enforcement only takes place after a competition problem has arisen, the duration of the proceedings might negatively affect the effectiveness of the decisions. The Commission took action to speed up its antitrust proceedings but also had to cope with complex investigations. This was particularly the case for the new digital markets where traditional assumptions of effective competition needed to be adapted and where the effectiveness of the existing legal tools for intervention had to be evaluated. The Commission has also not yet updated its guidelines and notices to improve legal certainty for companies active in these markets and to support the NCAs in their own decision-making.

VIII Effective enforcement requires deterrent fines. The level of the fines imposed by the Commission for the infringement of competition rules is among the highest in the world. However, the impact of large fines depends on the size of the companies concerned, the probability that infringements are detected, the potential for profits associated with the infringements, and the duration of the Commission's investigations. So far, the Commission has not evaluated the deterrent effect of its fines.

IX NCAs take most of the decisions in cases where EU antitrust rules apply. The NCAs and the Commission cooperated well in the European Competition Network, with the exception of market monitoring and enforcement priorities which had not been closely coordinated. A mechanism for efficient allocation of antitrust cases between the Commission and NCAs was not used in an optimal way

X The Commission defined the objectives to be achieved only in a very general way. Along with a lack of suitable data to monitor results, this made it challenging to assess the performance of the enforcement activities. Although ex post evaluations of the effectiveness of its work would support better decision-making and better allocation of resources, the Commission did not regularly carry them out. The Commission's reporting on the results of its enforcement action still focuses on activity rather than on impact and there is currently no regular, independent assessment of the performance of competition authorities in the EU.

XI We make a number of recommendations that aim at strengthening the Commission's capacity to

- increase the probability of detection of infringements;
- increase the effectiveness of competition enforcement;
- use the potential of the European Competition Network better; and
- improve performance reporting.

Introduction

Competition rules in the EU

01 The Treaty on the Functioning of the European Union (TFEU) prohibits certain practices that are incompatible with the internal market¹. These practices include any sort of collusion between companies which has the effect or object of restricting or distorting cross-border competition within the internal market. The clearest example of such illegal conduct is collusion between competitors in the form of secret cartels, whereby companies fix prices or market shares, unjustifiably increasing their profits to the detriment of consumers. Cooperation may be permitted if it takes place with the aim of improving the production or distribution of goods or promoting technical or economic progress. This is on the condition that consumers receive a fair share of the resulting benefits and that the impact on competition is proportional and does not eliminate it².

02 The TFEU also prohibits companies which hold a dominant position in a given market from abusing that position with a view to eliminating or reducing competition³. Examples of such behaviour include:

- requiring buyers to purchase a particular product only from the dominant undertaking (exclusive purchasing);
- setting prices at a loss-making level (predatory pricing);
- imposing unfair conditions to prevent competitors from entering the market (foreclosure);
- charging unfair (excessive) prices to buyers; and
- limiting production or technical development and thus reducing consumer choice.

¹ Article 101(1) TFEU, OJ C 326, 26.10.2012, p. 47.

² Article 101(3) TFEU. The Commission can generally recognise certain types of agreements or business practices as pro-competitive and exempt them from the general prohibition ("block exemption regulations") or assess in individual cases whether the pro-competitive effects of an agreement outweigh the anti-competitive effects.

³ Article 102 TFEU.

The Commission's role as enforcer of competition rules

03 Under the Treaties, the EU has exclusive competence for establishing the competition rules necessary for the functioning of the internal market. The Commission is responsible for the uniform enforcement of these rules. This is essential for a functioning EU internal market, because the Commission corrects imperfections in the functioning of markets and takes action when companies do not respect the rules⁴.

04 The independence of competition authorities is a prerequisite for effective enforcement. In other words, a competition authority should decide independently from economic actors and from governments and their political priorities on which cases to investigate and enforce. Independence also implies that competition authorities need sufficient resources (both human and technical) to act as effective enforcers.

05 EU legislation⁵ confers a number of important investigative and decision-making powers on the Commission such as inspecting companies, prohibiting cartels or other anticompetitive conduct, or imposing pecuniary penalties on companies that violate EU competition rules. Such investigations are commonly known as "antitrust proceedings". Commission decisions prohibiting a specific anti-competitive practice are binding on the companies involved, but they also set a precedent for analogous cases. Within the framework of the TFEU, Regulation 1/2003 and case law set by the EU courts, the Commission enjoys discretion in:

- defining the objectives and underlying economic concepts of "effective competition";
- deciding how to use its investigative powers and conduct its investigations; and
- defining the remedies necessary to stop anti-competitive practices or problematic concentrations.

⁴ For the legal objectives of the EU's competition enforcement see [Annex I](#).

⁵ Article 105 TFEU and Council Regulation (EC) No 1/2003 of 16 December 2002 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.

06 The Commission aims at protecting an effective competitive structure of markets, with a view to enhancing consumer welfare and contributing to achieving an integrated EU internal market⁶. There is no universally accepted definition of consumer welfare, but in simple terms, it means that the Commission looks from an economic point of view at how competition in markets in the EU works in the interest of consumers in terms of the price, quality and choice of goods or services, and innovation.

07 The Commission is also responsible for monitoring industry restructuring when it has a potential anti-competitive impact on the internal market: for example, where two independent companies merge or set up an autonomous joint economic entity (a so-called "full-function joint venture"). These consolidations, which are a normal feature of a market economy, can promote the efficient allocation of productive assets, but can also have a harmful effect on competition. In that case, it may be necessary for the Commission to intervene to protect the functioning of the internal market. This is known as "EU merger control" and is regulated by a Council Regulation⁷.

08 While merger control takes place before the implementation of the transaction and within tight deadlines ("ex ante" control system), the Commission is entitled to initiate antitrust proceedings only after a company is suspected of having infringed competition rules ("ex post" control system). On average, in the last ten years, the Commission examined more than 300 merger notifications and some 200 antitrust cases per year.

09 Within the Commission, all key decisions on competition cases and questions of policy, such as legislative proposals, notices and guidelines, are the collective responsibility of the college of Commissioners. The college has delegated to the Commission Member responsible for competition the power to unilaterally adopt certain types of decisions of lesser importance that do not raise particular policy issues. The Commissioner for Competition oversees the Directorate-General for Competition (DG COMP), which reviews merger notifications, conducts antitrust and merger investigations and, in cooperation with other Commission departments,

⁶ Strategic Plan 2016-2020 of the Directorate General for Competition
https://ec.europa.eu/info/sites/info/files/comp_sp_2016_2020_en.pdf

⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation"); OJ L 24, 29.1.2004, p. 1.

prepares decisions and policy documents, including legislative proposals, for adoption by the Commission.

Role of Member State authorities in antitrust proceedings

10 The Commission and the EU Member States' national competition authorities (NCAs) are both empowered to directly enforce EU competition rules in antitrust cases affecting trade between Member States (see [Box 1](#))⁸.

Box 1

Powers of the national competition authorities of Member States

NCAs apply the EU competition rules in parallel with national competition rules. They act on their own initiative and their decisions are binding in the respective Member State. Procedural rules and the level of fines remain fully in the remit of the Member States subject to the measures of harmonisation required by Directive 2019/1⁹. In accordance with their national legislation, Member States can, under certain circumstances, apply stricter competition rules to unilateral conduct and impose higher or lower fines than the Commission.

11 While this decentralised approach of "parallel enforcement" has significantly extended the scope of application of the EU antitrust rules, the Commission remains ultimately responsible for ensuring that NCAs apply the rules uniformly¹⁰. The Commission is also competent for taking decisions that apply to the entire territory of the European Economic Area (EU Member States, Iceland, Liechtenstein and Norway)¹¹.

⁸ Article 5 of Regulation (EC) No 1/2003.

⁹ 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.

¹⁰ Article 16 of Regulation (EC) No 1/2003.

¹¹ Articles 53-65 of the Agreement on the European Economic Area; OJ L 1, 3.1.1994, p 3.

12 The parallel enforcement of EU antitrust rules requires close cooperation between the Commission and the NCAs. To this end, the Commission and the NCAs have set up the European Competition Network (ECN)¹², a mechanism through which they (i) decide which competition authority will investigate a case and (ii) exchange information about investigative measures and enforcement decisions they intend to take. The ECN also features an advisory committee, comprising representatives of NCAs, which the Commission must consult before adopting final competition decisions.

13 National courts play a complementary role in enforcement, as they deal with litigation between private parties involving questions of EU antitrust rules. National courts' decisions cannot overrule a Commission decision¹³.

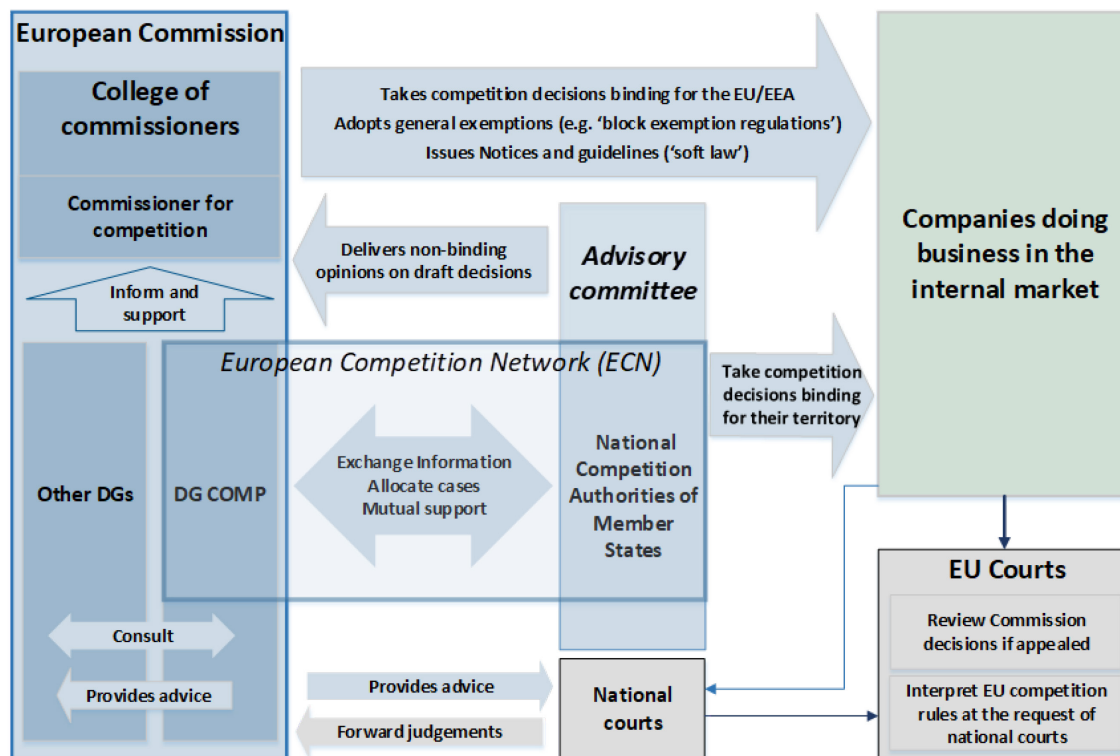
14 NCAs have considerable discretion in deciding whether or not to investigate an infringement and what penalties to impose. In their decisions, which are binding for the territory of the Member State, they must respect the principles established by the Commission's own decisions or by a court. The Commission's notices and guidelines regarding the enforcement of antitrust cases are not binding for the NCAs but they influence their decisions. National courts may request opinions on the interpretation of EU competition rules from the Commission, and may submit requests for a preliminary ruling to the EU Court of Justice. When the Commission initiates its own investigation, the NCAs are relieved from further involvement with the case concerned.

¹² Article 11 of Regulation (EC) No 1/2003.

¹³ Article 16 of Regulation (EC) No 1/2003.

15 The parallel enforcement of EU antitrust rules is illustrated in *Figure 1*.

Figure 1 – Parallel enforcement of EU antitrust rules



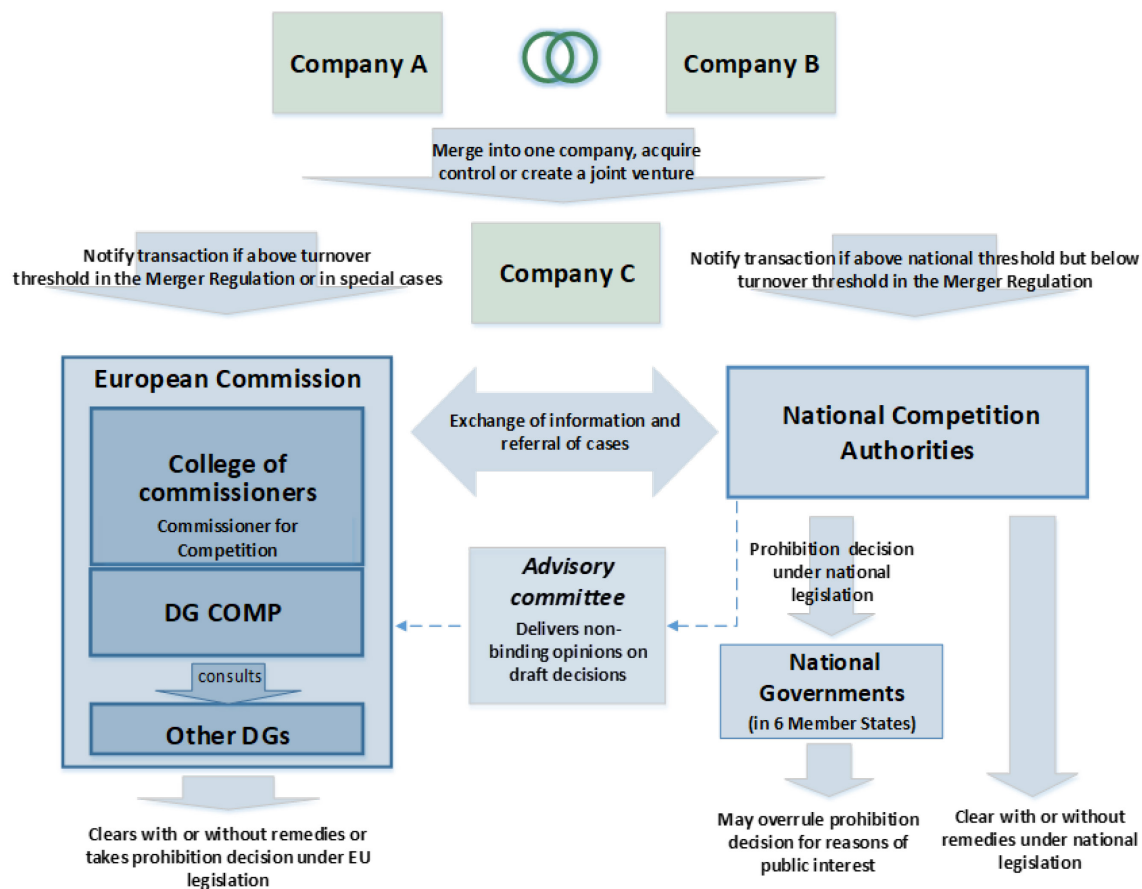
Source: ECA.

EU and national merger control

16 The Commission is responsible for investigating concentrations of companies when the turnover of the merging companies exceeds a threshold laid down in EU legislation¹⁴. Below this threshold, Member States may be responsible for assessing mergers under their national legislation. Cases can be transferred under the referral system between the Commission and the Member States, allowing for some flexibility: for example, the Commission can reattribute a case to a Member State or vice versa under certain conditions (see *Figure 2*).

¹⁴ Article 1 of the Merger Regulation. As a rule, this is (i) a combined worldwide turnover of all the merging companies of more than €5 billion, and (ii) an EU-wide turnover of each of at least two of the companies of more than €250 million. Transactions are also subject to EU merger control where the merging companies have (i) a worldwide turnover of more than €2.5 billion, (ii) a combined turnover of more than €100 million in each of at least three Member States, (iii) a turnover of more than €25 million for each of at least two of the companies in each of the Member States included under ii, and (iv) an EU-wide turnover for each of at least two of the companies of more than €100 million.

Figure 2 – EU and national merger control



Source: ECA.

17 If the Commission finds that a proposed concentration would significantly impede effective competition, it can either prohibit the merger or authorize it subject to the implementation of binding commitments proposed by the merging parties, which aim at preventing competition problems in the relevant markets.

18 Where a merger falls within the remit of an NCA, it decides autonomously whether or not to approve it under national legislation only. However, in six Member States national governments, usually by their Ministers for Economic Affairs, may exceptionally overrule a merger prohibition decision or modify commitments on public interest grounds, for example where they believe that anti-competitive effects in the relevant markets are outweighed by the need to preserve jobs or develop specific national industries¹⁵.

¹⁵ Germany, Spain, France, Italy, the Netherlands and Portugal.

Audit scope and approach

19 Over the last ten years, the number of EU relevant merger operations has grown by some 40 % and the emergence of new digital markets has put significant challenges on the enforcement of competition rules. We have not yet reported on the Commission's activities with regard to merger control and antitrust proceedings. In carrying out this audit, we sought to shed light on how the Commission carries out these activities and highlight issues which may have an impact on their success now and in the future.

20 We asked whether the Commission enforced EU competition rules in merger control and antitrust proceedings well. More specifically, we assessed whether the Commission had:

- (a) an appropriate detection and investigation capacity;
- (b) made good use of its enforcement powers in merger control and antitrust proceedings;
- (c) cooperated with the NCAs well; and
- (d) set up a framework to report about the results of its enforcement activities and receive feedback.

21 For the purposes of the audit, we examined documentation available at the Commission and conducted interviews with Commission staff. For merger control, we audited the files on 13 proposed mergers notified to the Commission under the Merger Regulation between 2010 and 2017. For antitrust, we audited a sample of 37 cases which the Commission started investigating during the same period but also reviewed reports and other documentation of activities for 2018 and 2019. We also reviewed, on the basis of a sample of 38 cases, the Commission's analysis of notifications from NCAs under Article 11 of Regulation No 1/2003, i.e. where an NCA had formally informed the Commission about the opening of a national antitrust investigation or submitted a draft enforcement decision. We selected all cases on the basis of risk criteria.

22 In addition, to gather information, we visited the NCAs of Bulgaria, France, the Netherlands and Poland, because of their largely different institutional characteristics. We also held meetings with representatives of the Organisation for Economic Co-operation and Development (OECD).

23 We did not examine in this audit how the Commission enforces state aid rules which is another area of Commission oversight on competition¹⁶. Many factors at EU or Member State level can influence the effectiveness of competition, including patent law, national tax law, sector-specific regulation (of passenger transport or telecommunications, for example), specific rules for consumer protection, or trade policy where non-EU countries are concerned. These go beyond the Commission's specific competition enforcement role under Regulation No 1/2003 and the Merger Regulation, and were therefore not included in our audit scope.

¹⁶ We recently examined the Commission's control of state aid to financial institutions. See special report 21/2020: "Control of State aid to financial institutions in the EU: in need of a fitness check": https://www.eca.europa.eu/Lists/ECADocuments/SR20_21/SR_state_aid_EN.pdf. In 2016, we had audited state aid rules in cohesion policy. See special report 24/2016 "More efforts needed to raise awareness of and enforce compliance with State aid rules in cohesion policy": https://www.eca.europa.eu/Lists/ECADocuments/SR16_24/SR_STATE_AIDS_EN.pdf

Observations

Some limitations in the Commission's market monitoring, detection and investigation capacity

24 The Commission receives a multitude of more or less formal information from market participants and NCAs about possible competition issues or potential infringements of antitrust rules. For formal antitrust complaints, the Commission has a legal obligation to consider carefully the issues brought to its attention. However, the quality of this information varies significantly, and may not necessarily reflect the most important competition problems in the internal market. Therefore, to be fully effective, a competition authority should not only react to complaints brought to its attention, but should also encourage the reporting of cases and be capable of detecting high-impact antitrust cases on its own initiative.

25 While DG COMP has to examine all notified mergers (see paragraph [16](#)), it enjoys discretion in deciding whether to investigate alleged infringements of antitrust rules. As DG COMP usually receives more information on competition problems than it can actually investigate with the resources it has available, it has to set priorities.

26 We assessed whether the Commission:

- (a) had appropriate capacities for detecting anti-competitive practices;
- (b) had set antitrust enforcement priorities according to objective criteria in order to concentrate its resources on cases with the largest potential impact.

Limited resources affect the Commission's detection capacity

27 To be able to start antitrust investigations on its own initiative, the Commission needs expertise about the economic sectors relevant to the internal market, combined with targeted intelligence. To this end, the Commission can use a number of tools to monitor markets and detect infringements. For example, it can collect and analyse publicly available information or market data, or make assessments on specific topics or cases (known as scoping or screening exercises). It can also conduct more in-depth

analyses of competition restrictions in the form of market studies or formal sector inquiries¹⁷.

28 When it comes to allocating resources to competition enforcement, DG COMP depends on the Commission's annual budgetary allocations and thus has to compete with the Commission's other DGs for resources. The total number of staff remained comparatively stable over the last 10 years¹⁸ and transfers between the three instruments (merger control, antitrust investigations and state aid) were limited. We observed that since 2010 the number of new antitrust cases registered by DG COMP remained relatively stable, while the number of new merger cases had increased steadily over this period. As merger control is a legal obligation of the Commission, DG COMP had to dedicate significant resources to it (see paragraph 41). With the remaining staff available, DG COMP is not in a position to pursue all complaints received but has to set priorities.

29 Therefore, resources for market monitoring and capacities to detect new cases proactively, such as on the basis of sector inquiries, are limited. The level, consistency and quality of market monitoring depended largely on the initiative, availability and experience of individual DG COMP staff. Due to limited resources, since 2005 the Commission has conducted only four sector inquiries, which enabled the detection of infringements of competition rules¹⁹. The 2015 inquiry into e-commerce required a team of around 15 full-time equivalents over a period of 18-24 months.

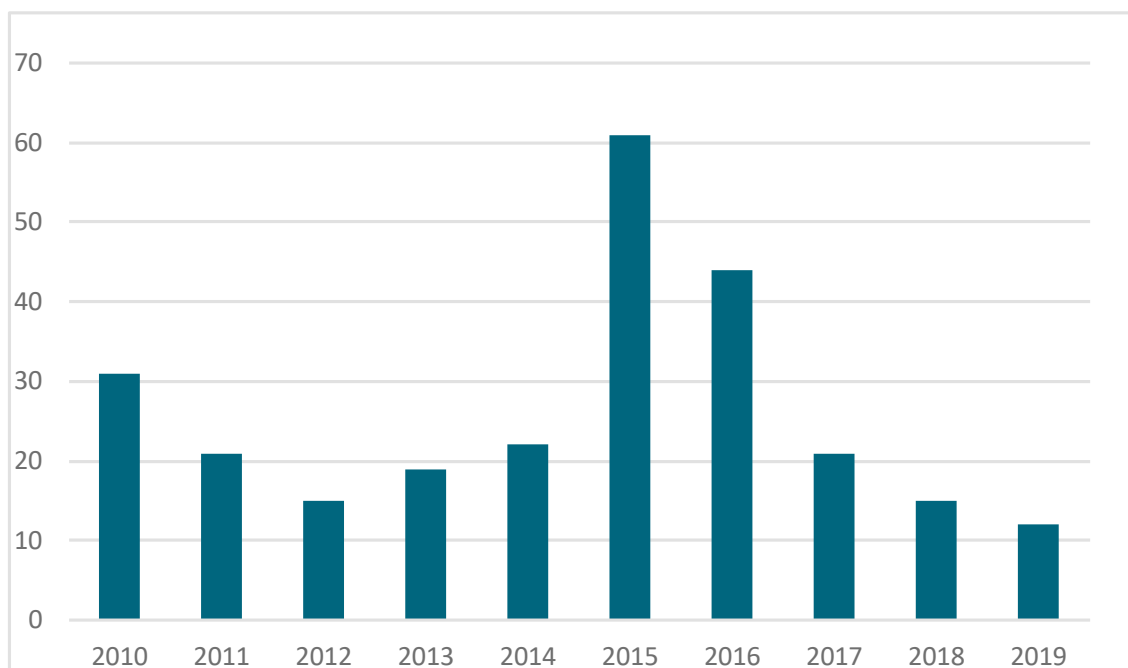
30 In spite of new investigations started on e-commerce, after a peak in 2015, the overall number of cases identified by DG COMP acting on its own initiative has been constantly decreasing (see *Figure 3*).

¹⁷ Article 17 of Regulation (EC) No 1/2003.

¹⁸ Between 2010 and 2018 the number of posts in DG COMP was reduced slightly from 830 to 804. As of 31.12.2018, DG COMP had 77 posts in the cartel units, 171 posts in operational antitrust non-cartel units and 117 posts in operational merger units.

¹⁹ Since 2005, the Commission conducted sector inquiries for financial services (2005), in the energy sector (2005 – 2007), in the pharmaceutical sector (2008) and for e-commerce (2015); https://ec.europa.eu/competition/antitrust/sector_inquiries.html

Figure 3 – Evolution of new own-initiative investigations



Source: European Commission.

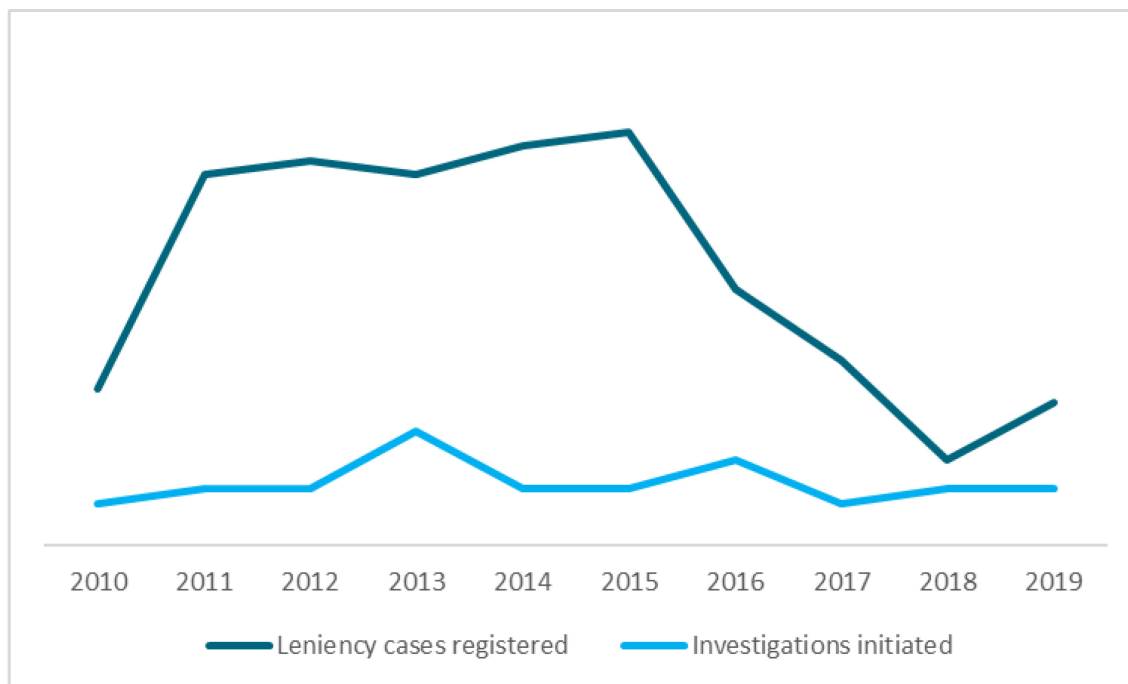
31 As early as 1996, the Commission decided to provide incentives (a "leniency programme") for companies involved in cartels to report insider information to the Commission. The first company in a cartel to do so can benefit from a total immunity from fines. Other companies that follow suit may benefit from a reduction of any fine.

32 The Commission depends heavily upon this mechanism for detecting cartels. Over the 2010-2017 period, 23 out of 25 cartels investigated were the result of leniency applications; only two resulted from Commission's own detection work.

33 When it comes to the Commission's overall number of antitrust decisions relating to cases registered in the period from 2010 to 2017 including cartel cases, 50 % of the decisions adopted until 31 December 2018 originated from leniency applications.

34 Approximately 15 % of the leniency applications received resulted in a formal investigation by the Commission. In 60 % of these cases, the investigation resulted in prohibition decisions and fines. The low number of 15 % is explained by the fact that often applicants did not satisfy the conditions, there was no prima facie evidence of any infringement, cases were not a Commission priority, or the Commission was not the best placed authority within the ECN to investigate the case. In the latter case, NCAs may initiate proceedings based on the case transferred by the Commission or on their own initiative. Moreover, since 2015, the annual number of leniency cases reported to the Commission has significantly decreased (see [Figure 4](#)).

Figure 4 – Evolution of leniency cases 2010-2019



Source: European Commission.

35 The Commission has not yet assessed in detail why the number of leniency or immunity applications show a falling trend. This trend, which seems to reflect also the trend elsewhere, makes it difficult to draw conclusions on whether the number of cartels in the internal market has actually declined, which is a theoretical possibility, or whether companies are afraid that such an application would expose them to private damage actions of victims of infringements of EU antitrust rules. An EU Directive adopted in 2014 aimed at facilitating claims for such compensation payments²⁰. We can thus not rule out that companies involved in a cartel refrain from submitting a leniency application: while they can avoid a fine, victims of the cartel may claim from them high compensation payments for the damages they suffered. Alternatively, companies could just have become more successful at hiding cartels.

36 In 2016, DG COMP decided to work on enhancing its means of detecting potential cases with high impact on the internal market. As part of this initiative, since 2017, the Commission has made available on its website a whistle-blowing tool which anyone can use to anonymously submit information on cartels and other anti-competitive practices. Information received has fed into the Commission's market monitoring

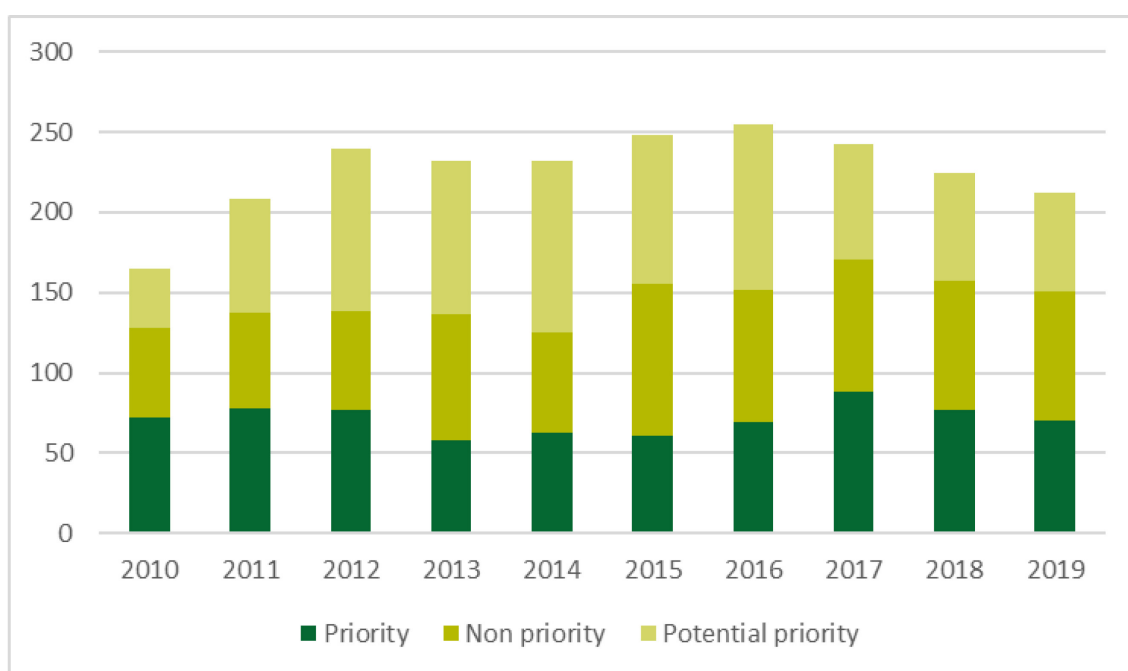
²⁰ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union; OJ L 349, 5.12.2014, p. 1.

activities, but at the time of the audit, it had resulted only in one on-site inspection and this did not lead to the opening of formal proceedings. The Commission has not yet proposed other incentives to encourage the reporting of infringements, such as financially rewarding whistle-blowers²¹.

The approach to prioritising cases was not optimal

37 As mentioned in paragraph 28, due to the large number ("stock") of potential antitrust cases in the pipeline to be dealt with (see [Figure 5](#)), DG COMP has to make a selection of the cases it can investigate. To make effective use of its resources it should give priority to those cases which have the highest potential impact on the internal market and on consumers.

Figure 5 – Evolution of stock of antitrust cases 2010-2019



Source: European Commission.

²¹ In EU-28, reward schemes for whistle-blowers exist in Hungary, Lithuania, Slovakia and the United Kingdom.

38 DG COMP used a number of criteria to select cases for action. For example, according to the guidance for potential infringements of Article 102 TFEU²², it should focus *inter alia* on those types of exclusionary conduct that are most harmful to consumers. However, we found no clear weighted criteria to be in place to ensure the selection of cases with the highest risk to competition or consumer welfare in the internal market and across all relevant economic sectors.

The Commission made good use of its enforcement powers but challenges remain

39 An effective enforcement of mergers and antitrust rules requires the Commission to act in the interest of EU citizens, to ensure that they can buy high-quality goods and services at fair prices. Therefore, we assessed how the Commission:

- (a) conducted its merger control procedures;
- (b) conducted its antitrust investigations;
- (c) addressed new enforcement challenges; and
- (d) imposed fines which should function as a deterrent.

The Commission took all merger decisions within the legal deadlines, but their increasing number puts pressure on its limited resources

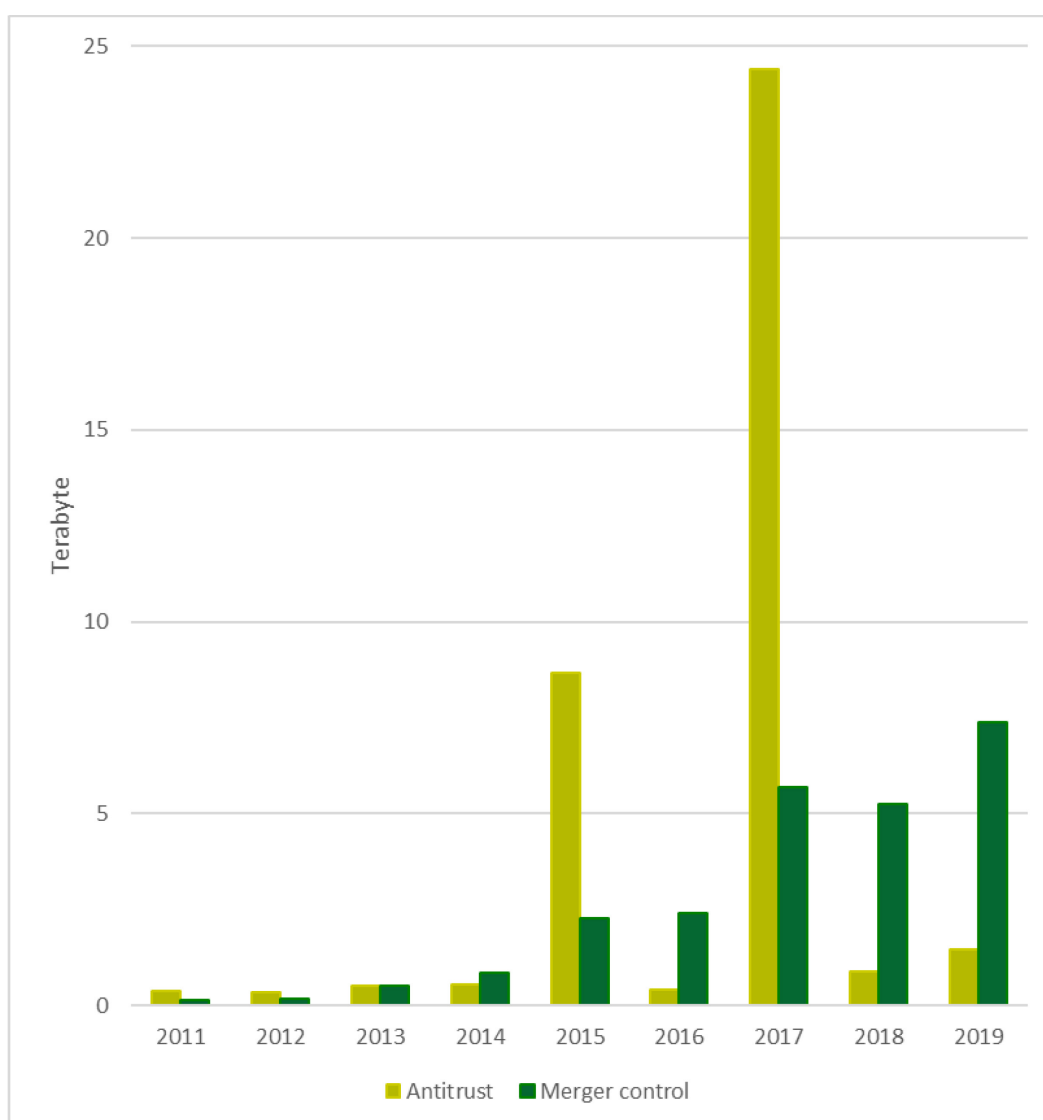
40 Under the rules in force, the Commission generally has to assess the impact of a merger on the relevant markets within 25 working days ("Phase I investigation") and decide to authorise it, or to open a second, in-depth "Phase II investigation"²³. We assessed whether the Commission, while respecting the deadlines, had addressed all relevant aspects of a notified transaction before taking a decision, and whether it had effective oversight over all mergers that could significantly affect competition in the EU internal market.

²² Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7).

²³ The deadline for completing a Phase II investigation is 90 days with some possibilities for extension up to a maximum duration of 125 working days.

41 Merger control generated a substantial workload: According to DG COMP data, between 2012 and 2017 merger control absorbed on average around 28 % of the total time spent on cases under the three instruments (merger control, antitrust and state aid) and between 11 % and 14 % of DG COMP's total available resources. While the level of human resources involved remained relatively stable, the number of cases notified to the Commission has risen in recent years and so has the volume of data to be analysed (see [Figure 6](#)).

Figure 6 – Evolution of the volume of data processed in merger and antitrust investigations



Source: European Commission.

42 We noted that in 18 Member States as well as in non-EU countries such as Australia, Canada and the United States, NCAs charge a fee on companies that file a merger notification. By doing this, public budgets can recover at least partly the costs incurred for reviewing a concentration. The Commission decided not to propose the introduction of fees as an alternative source for financing its enforcement activities, but this was not based on a detailed cost-benefit analysis. Instead, under the 2021-2027 multiannual financial framework, the Commission has proposed a dedicated budget for competition enforcement within the general budget of the EU, as reflected in its 2018 proposal for a Single Market Programme²⁴. This proposal aims, among other things, to enable the Commission to cope better with the challenges resulting from a continuous increase in the volume of electronic communications, big data, artificial intelligence and algorithms.

43 Our review of a sample of notifications showed that the Commission assessed the relevant aspects of the transactions and completed its merger reviews within the legal time limits in all cases. For the vast majority of notifications (94 % over the 2010-2017 period), the Commission had no competition concerns and declared the mergers to be compatible with the internal market.

44 Due to the tight legal deadlines, DG COMP substantially relied on data and information provided by the merging parties, publicly available information such as industry or trade statistics, and the responses of third parties (i.e. market participants) to Commission questionnaires in the context of market investigations. Particularly in complex investigations, the Commission faces challenges to systematically cross-check the accuracy of the information, given the lack of resources and the amount of information to verify. In addition, third parties asked to provide an opinion on the planned merger are not necessarily in a position to reply within the short deadlines set, in which case their opinion cannot be taken into account.

²⁴ Legislative proposal for establishing a programme for single market, competitiveness of enterprises, including small and medium-sized enterprises, and European statistics and repealing Regulations (EU) No 99/2013, (EU) No 1287/2013, (EU) No 254/2014, (EU) No 258/2014, (EU) No 652/2014 and (EU) No 2017/826; 18.6.2018.

45 To reduce the workload for the Commission and the companies concerned, the Commission decided in 2013 to expand the categories falling under the simplified procedure, i.e. mergers which are usually unproblematic (see [Figure 7](#)). Until the COVID-19 pandemic, it has not been possible for merging companies to submit merger notifications entirely electronically, even though this could have facilitated data processing.

Figure 7 – Evolution of EU merger control decisions 2010-2019



Source: European Commission.

46 In 2016, the Commission launched an evaluation of selected aspects of the EU merger system, including the possibilities to further streamline its merger procedures. However, we found that it has not yet taken substantive measures to deal, for example, with the following situations:

- Currently companies have to go through a complex and time-consuming referral procedure if they want a transaction which is below the turnover threshold (see paragraph [16](#)) to be reviewed by the Commission where they have activities in several Member States whose NCAs would otherwise each have to review the case.
- Around 25 % of the simplified notifications submitted between 2010 and 2017 concerned cases where large companies acquired joint control over another company (joint venture) with limited or no current or planned future commercial activities in the EU. For example, a large EU company creates a joint venture with

a company in Asia but the joint venture will only be active on markets in Asia. However, such transactions do not normally raise any competition concerns for the internal market.

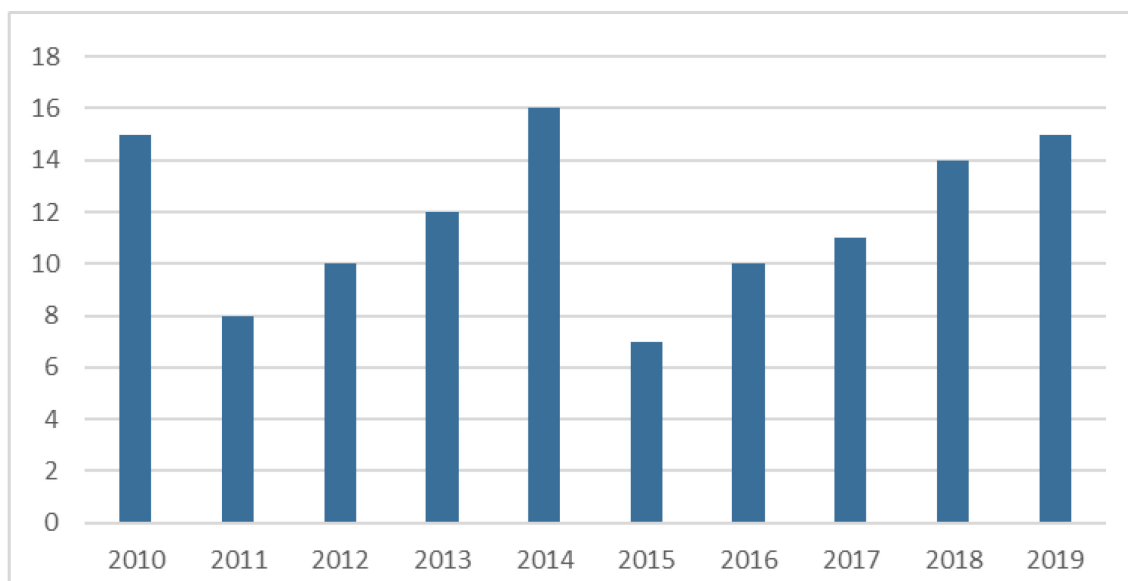
47 As mentioned in paragraph 16, the EU dimension of a concentration of companies is defined by reference to the annual turnover of the merging companies. This is a good indicator of the size of a transaction and thus its potential impact on markets. However, it may fail to cover important mergers. For example, in the pharmaceutical industry, in new technology markets or in the digital sector, high-value acquisitions of companies with still low turnover can be a risk to effective competition in the internal market: In such cases, the acquisition may allow the buyer to quickly achieve a dominant position in a new but still small market or the buyer may decide to discontinue the development of new products to protect its own portfolio. We note that the Commission is aware that with the exception of a few cases referred by NCAs, such transactions fell outside its merger control. The 2019 report of the expert group founded by the Commission on "Competition Policy for the Digital Era"²⁵ concluded that it is too early to change the legal thresholds. Therefore, and contrary to some Member States, the Commission has not yet acted to resolve the issue²⁶.

The Commission's antitrust decisions addressed competition concerns but proceedings remain lengthy

48 The Commission deals with a variety of antitrust cases, including large and small cases in terms of market volume or geographic markets concerned. Between 2010 and 2019, the Commission took 118 formal prohibition decisions or accepted commitments of companies to cease anticompetitive conduct in antitrust cases (see *Figure 8*).

²⁵ European Commission, "Competition policy for the digital era", a report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 2019, <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

²⁶ Germany and Austria decided in 2017 to amend national legislation and take also into account the value of a merger.

Figure 8 – Commission antitrust decisions 2010-2019

Source: European Commission.

49 We assessed whether the Commission conducted its investigations in an appropriate manner and within a reasonable time frame. We found that developments over the last years challenged DG COMP's resources and technical capacity:

- the increasing number of decisions over the last years;
- the increasing amount of information and data to be processed and analysed, since the Commission has the "burden of proof"; and
- the increasing complexity of legal issues to be treated.

50 The objective of the Commission's intervention in antitrust cases is to terminate any infringement of EU competition rules and to bring a market back to fair and effective competition. Based on our sample of Commission decisions, we conclude that, when the Commission decided to open formal proceedings, it achieved an outcome in terms of a prohibition or a commitment decision which addressed the competition concerns.

51 An important factor in the effectiveness of the Commission's enforcement of competition rules is its capacity, in close cooperation with Member State NCAs, to mobilise resources and conduct simultaneously on-site inspections in a multitude of Member States. We observed that this has enabled the Commission in the large majority of the cases audited to collect the evidence necessary to conduct its proceedings successfully.

52 Many companies subject to Commission investigations appeal the decisions at the EU courts. The number of cases is higher than the number of competition decisions, as one Commission decision can be addressed to several companies. By its nature, the courts' review is limited to legal soundness and quality of the administration. The number of cases pending before the courts is decreasing and, overall, the Commission was able to successfully defend a constantly high number of its decisions (see [Table 1](#)).

Table 1 – Evolution of competition cases before the EU courts

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Competition cases decided	57	127	110	133	113	91	69	82	70	49
Commission overall success rate (full or partial)	85 %	90 %	93 %	75 %	95 %	72 %	90 %	84 %	92 %	88 %
Pending appeals on competition cases	337	325	275	215	172	148	129	106	103	119
New appeals on competition cases	107	117	79	76	69	65	52	56	46	59

Source: European Commission.

53 An effective enforcement of competition rules requires the Commission to take its decisions within a reasonable timeframe, in a way which minimises the economic costs of companies and consumers who are the victims of any infringement.

54 Unlike for merger control (see paragraph [40](#)), EU legislation does not stipulate a timeframe within which the Commission has to conduct its investigations in the field of antitrust. On average, starting from the registration of a case i.e. usually the moment when there is enough evidence to start a preliminary investigation, it took the Commission around four years²⁷ to terminate an antitrust investigation with a formal decision. Proceedings were particularly long for cartel investigations, which took more than four years on average, and in complex cases of abuse of dominant positions in the transport, energy and digital sectors. For the period covered by our audit, we found several cases where it had taken the Commission up to eight years to come to a decision.

55 Some delays to cases were within the direct control of the Commission. Others were not: for example, there have been cases where companies under investigation systematically requested prolongations of deadlines and replied to requests for information only with substantial delays of between four to eight months and up to 1.5 years, or prolonged proceedings by submitting ineffective proposals for

²⁷ When taking the median value it is 3.8 years.

commitments they would take. Moreover, since parties often appeal before the EU courts (see paragraph 52), this can add significant delays to a Commission decision in taking effect.

56 Since 2017, DG COMP has made considerable efforts to accelerate proceedings:

- o In 2018, it introduced a new “cooperation practice” for companies involved in a non-cartel antitrust investigation. This is similar to the “settlement procedure” which the Commission applies already since 2008 in cartel investigations. Companies which recognise the infringement and their liability for it and cooperate closely with the Commission during the investigation can benefit from a reduction of fines.
- o It streamlined its organisation by introducing simplified authorisation chains for non-case related documents, better guidance for case handlers, a more flexible allocation of staff across DG COMP and a better coordination of the case management between the various departments concerned. It also started developing a new, process-oriented common case-management. However, there were significant delays and the system will not be fully operational for antitrust and merger control before the end of 2020. Until then, the processing of cases will remain unnecessarily resource-intensive.
- o In 2018, DG COMP adopted a strategy to use artificial intelligence techniques to further accelerate searches for information and to assist the analysis of documents. Given the budgetary and human resources constraints, the first set of actual results is expected to be available in 2020 only in pilot mode, with a scale up foreseen as of 2021.

The Commission has not yet fully addressed the complex new enforcement challenges in digital markets

57 With the digital age, new forms of markets, products and services have emerged where traditional assumptions and definitions of effective competition needed to be adapted (see [Box 2](#)). Over the last years, competition authorities have been reflecting on how to address these challenges in various forums, such as the OECD round tables and the ECN. On the basis of our review of available documents and Commission decisions we assessed whether the Commission’s current tools are sufficient to address the challenges emanating from the digital markets.

Box 2

Digital markets have resulted in new challenges for competition enforcement

Competition enforcement traditionally considers the market shares of companies, prices of goods or services in the relevant markets and profit margins of companies. However, the classic concepts are not sufficient to define market power and evaluate competition in digital markets. These markets are often "multi-sided" i.e. a firm serves as an intermediary between other providers of services or products and consumers who may be able to use the services provided by the firm at no cost ("zero-price markets"). The firm may use its market power on one side of the market (e.g. the large number of users) to harm market participants on the other side (e.g. by imposing unfair conditions).

Firms could grow quickly beyond a "tipping point" where they almost automatically gain more and more users due to network effects and accumulate enormous volumes of data which can further strengthen their market power and dominant position. Such data may include sensitive personal information of individual users which makes EU rules on data protection relevant to the enforcement of competition policy. Companies may then use their market power to reduce competition and consumer choice. The European Data Protection Board, a body representing EU data protection authorities, requested the Commission and other competition authorities to include in their assessment data protection and privacy concerns of individuals that may have an impact on competition²⁸. Indeed, a particular characteristic of the digital age is that companies compete for a market instead of in a market, leading to "winner-takes-all" outcomes²⁹.

By means of algorithms, firms may also collude or act unilaterally to raise prices to the detriment of consumers (swift adjustment of prices to match those of competitors, or manufacturers intervening swiftly when retailers reduced prices).

58 Although the Commission has taken a number of case decisions tackling challenges resulting from the digital economy, significant challenges remain to be resolved. For example, practices in digital markets can cause damage to consumers. However, it is difficult for the Commission to find appropriate remedies to tackle an apparent competition problem as determining consumer harm can be particularly

²⁸ Statement of the European Data Protection Board of 27.8.2018, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_economic_concentration_en.pdf

²⁹ Big data: Bringing competition policy to the digital era, DAF/COMP(2016)14, OECD, 2016.

complex³⁰. This is not only relevant for internet firms, but also for all other economic sectors that are embracing digital innovation, such as energy, telecommunications, financial services and transport.

59 Under EU legislation in force, the Commission's enforcement of antitrust rules can only take place ex post i.e. after a competition problem has emerged. Particularly in the digital economy, this may be too late to tackle a competition problem. However, outside merger control (see paragraph **08**), the Commission has currently no tools in its hands that would allow it to intervene ex ante i.e. before competition problems would occur. In that respect, we note that two Member States have already started initiatives aiming at amending their national legislation.

60 Other companies affected by competitors' infringements of competition rules may have suffered a massive decrease in turnover or even had to exit the market during the years it took the Commission to reach a decision. EU legislation empowers the Commission to order interim measures before reaching a final decision on the merits of a case. This can limit damage in appropriate cases. However, from the entry into force of Regulation No 1/2003 until 2019, the Commission did not use this tool, because it obliges it prove that a company is causing "irreparable harm to competition"³¹. As a consequence, the Commission saw a risk that such measures could even further slow down proceedings and that premature or inappropriate interim measures could even further damage competition. The Commission made its first use of this tool against one company in October 2019.

61 The Commission develops its views on competition problems from case to case along the general principles of effective competition and consumer welfare (see paragraph **06**). To improve the predictability of its enforcement decisions, the Commission has published a complex set of guidelines, notices, decisions, exemption regulations and other communications (see *Annex II*).

62 We found that the Commission's guidelines and notices gave a good insight into how the Commission sees certain competition issues. However, it has not yet updated guidelines or notices to take new challenges into account, even though this would clarify the Commission's position, provide better insights into the decision-making process, and improve predictability for companies. For example, the Commission's

³⁰ See final report of the expert group founded by the Commission, "Competition Policy for the Digital Era" which identified challenges and made recommendations.

³¹ Article 8 of Regulation (EC) No 1/2003.

notice on the definition of the relevant market³² dates back to 1997, when the digital world was still in its infancy. Similarly, the Commission's 2009 guidance on enforcement priorities regarding abusive exclusionary conduct by dominant undertakings³³ or the block exemption regulation on categories of vertical agreements and concerted practices do not mention any of the features specific to the digital age³⁴.

63 The need to provide guidance, also ex ante, before case law has developed (see paragraph **61**), was also recently highlighted for example in (i) the final report of the expert group "Competition Policy for the Digital Era" funded by the Commission and (ii) in a "Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world"³⁵. Such guidance would help NCAs and reduce the risk of uncertainty and incoherent decisions when confronted with new competition cases.

The Commission imposed high fines, but has no assurance on their deterrent effect

64 The Commission has significant discretion when deciding whether to impose a fine on companies for infringement of competition rules. It also decides on the amount of fines in antitrust cases as long as it stays below the legally set ceiling of 10 % of a company's annual worldwide turnover in the year before the Commission's decision³⁶. The purpose of fines is to deter companies from entering into anti-competitive practices.

³² Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

³³ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7).

³⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU, OJ L 102, 23.4.2010, p. 1. The Regulation expires on 31 May 2022.

³⁵ Memorandum of October 2019, <https://www.belgiancompetition.be/en/about-us/publications/joint-memorandum-belgian-dutch-and-luxembourg-competition-authorities>

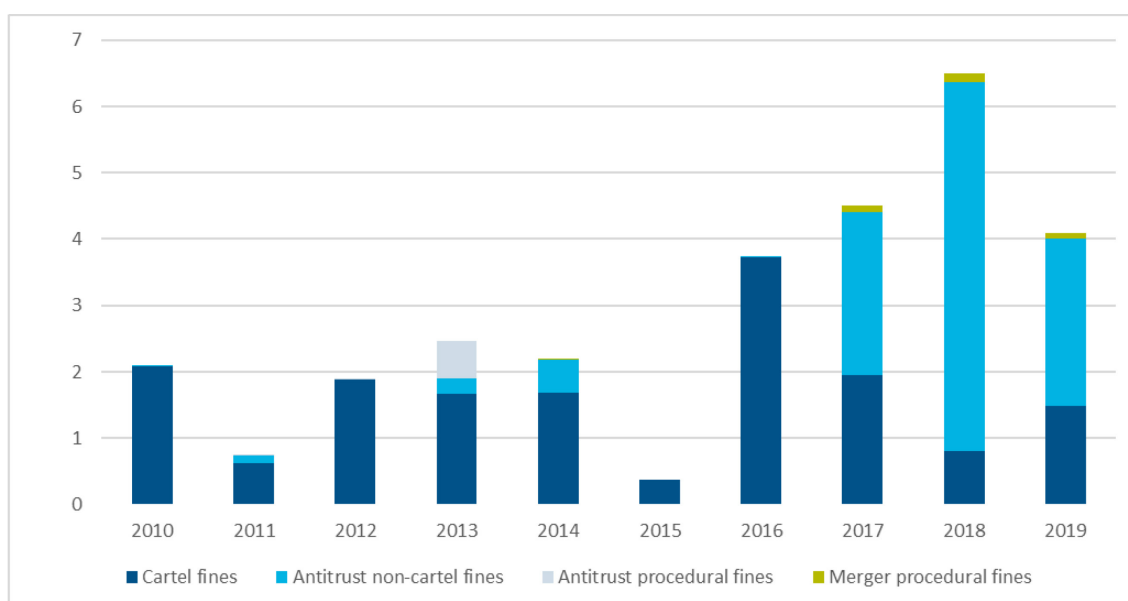
³⁶ Article 23(4) of Regulation (EC) No 1/2003.

65 As an alternative to prohibiting anti-competitive conduct and imposing a fine, the Commission can also take a binding "commitment decision". In such cases companies offer commitments that are intended to address the competition concerns identified by the Commission without, however, formally establishing an infringement. The Commission can impose a fine if companies do not respect their commitments.

66 Fines can also be imposed to ensure compliance with procedural rules, for example where companies do not provide correct and complete information in merger control and antitrust proceedings.

67 In the period from 2010 to 2019, the Commission has imposed fines amounting to a total of €28.5 billion for infringements of Articles 101 and 102 TFEU or of other rules under Regulations 1/2003 and 139/2004 (see [Figure 9](#)). In some cases, fines were record-breaking.

Figure 9 – Fines imposed by the Commission 2010 – 2019 (in billion euros)



Source: European Commission.

68 In antitrust cases, the Commission determines the level of fines for each company that participated in an infringement of competition rules as a percentage of the sales affected by an anti-competitive practice. Further criteria for the final amount of the fine are the duration and the degree of gravity of the infringement. The Commission may also take into account aggravating circumstances such as where companies commit infringements repeatedly, mitigating circumstances such as a limited participation in the infringement or reduce the fines otherwise applicable where companies cooperate.

69 While the level of the fines imposed by the Commission is among the highest in the world, their amount alone does not allow conclusions to be drawn about whether these fines are an effective deterrent. To draw an informed conclusion, the amounts would need to be put into perspective with the turnover of the companies concerned, the duration of the infringements, the chance of detection in case of secret cartels, the possible undue profits which a company could make from an infringement and the time which has elapsed between the infringement and the Commission's fine decision.

70 With regard to possible undue profits, we found that neither the Commission nor the four NCAs that we visited considered them in their fine calculations. This is due to the recognised difficulties in quantifying price effects for individual cases, and the considerable resources that would be required to do so.

71 Nearly two-thirds of the fines which the Commission imposed in cartel cases since 2006 stayed below 0.99 % of global annual turnover, well below the ceiling of 10 % of a company's annual worldwide turnover (see paragraph 64). The ceiling itself can also limit the deterrent effect in serious cases. For example, we found that already in 2014, the Netherlands had amended their national legislation to enable its NCA to impose in serious cartel cases a fine of up to 40 % of the worldwide annual turnover of a company.

72 By the time of the audit, the Commission had not performed any overall evaluation of the deterrence effect of its fines. Moreover, although the effectiveness of deterrence is determined by the severity of the fines and the probability of detection, the Commission's fine-setting methodology did not take into account the probability of detection.

The Commission cooperated closely with the national competition authorities, but there is room for improvement

73 Since Regulation 1/2003 empowered NCAs to assess antitrust cases with a cross-border context under EU competition rules, they conducted more than 85 % of antitrust investigations in the EU and took nearly 90 % of decisions (see [Annex III](#)). Directive 2019/1, adopted in January 2019, was aimed at strengthening the NCAs in enabling them to become more effective in enforcing EU competition rules.

74 We assessed based on available ECN documents and data as well as on interviews with staff of the four NCAs visited in this audit whether the Commission and the NCAs cooperated effectively with regard to various aspects relevant for competition enforcement.

75 Within the ECN (see paragraph 12), DG COMP cooperated closely with the NCAs in various working groups. However, in spite of the many contacts, in the period audited, DG COMP and NCAs did not closely coordinate their market monitoring and sector inquiries. DG COMP had no clear information about which markets NCAs specifically monitored and whether there were overlaps or gaps rather than complementarity with its own monitoring activities. DG COMP had also no full knowledge about Member States' enforcement priorities and had not endeavoured to coordinate its own priority-setting with them. This was partly because some NCAs were not empowered to set priorities, although Directive 2019/1 allows them to do so in future.

76 NCAs have to inform the Commission once they have commenced a "formal investigative measure" to allow the allocation of the case to a well-placed competition authority (see paragraph 12). The Commission sees itself particularly well placed if anticompetitive practices have effects on competition in more than three Member States, are closely linked to EU legislation in other policy areas, or for new competition issues that may arise³⁷. However, in practice, each competition authority investigated the cases it had detected, and reallocations of cases from NCAs to the Commission occurred only very exceptionally. Whether an antitrust case is investigated by the Commission or an NCA can have a significant impact on the outcome of the proceedings, as the procedural rules and the rules on determining fines are not harmonised. However, common minimum tools for setting fines were introduced by Directive 2019/1.

77 We found in one case that 11 NCAs, and in another that four NCAs had to deal with similar competition problems concerning the same companies active in digital markets. The NCAs concerned could not refer them to the Commission, although it could have solved the matter more efficiently and conclusively (especially when similar cases are running concurrently in several Member States: a judgment in favour of a company in one Member State can be invoked as a precedent in others). Investigating such cases was particularly challenging for NCAs of smaller Member States which

³⁷ Notice on cooperation within the Network of Competition Authorities (ECN-Notice), OJ C 101, 27.4.2004, p. 43.

lacked resources and experience for investigating these markets. In response, the Commission launched an early warning mechanism in 2016, through which both NCAs and the Commission can inform each other about new competition issues in pending cases. However, this mechanism was not yet extensively used by NCAs to report potential cases earlier.

The Commission provides only limited information on the achievement of objectives such as consumer welfare

78 Assessing the Commission's performance in enforcing competition rules in the internal market enhances transparency and accountability to the European Parliament and other stakeholders, and enables them to provide feedback. It requires a clear definition of the objectives to be achieved, and should result in opportunities being identified to improve future decision-making.

79 We examined whether the Commission:

- (a) had set up a framework for assessing the performance of its activities';
- (b) had ensured transparency and accountability to its stakeholders by reporting on its performance appropriately.

The Commission's assessment of the performance of its enforcement activities faced challenges

80 There are currently no internationally recognised standards for measuring the performance of a competition authority. DG COMP measures the performance of its enforcement activities in merger control and antitrust as part of the Commission's general approach for assessing its performance.

81 Performance assessment at the Commission works on the basis of specific, measurable, achievable, relevant and timed objectives and includes mandatory indicators to measure the contribution to the Commission's general objectives³⁸. However, this framework is not fully fit for assessing the performance of DG COMP's enforcement activities.

³⁸ For a list of DG COMP performance indicators concerning merger control and antitrust see [Annex IV](#).

- o As the enforcement of competition rules is mainly driven by factors not under the Commission's control (e.g. merger notifications, formal complaints and leniency applications), DG COMP's workload can fluctuate significantly from year to year, as can the number of decisions. From the outset, this made it difficult for DG COMP to define a baseline against which it could measure performance, set meaningful indicators and targets, and compare performance over time.
- o The indicator set by the Commission for the general objective of "effective enforcement of antitrust rules with a view to protecting consumer welfare" (see [Annex IV](#)) and considered to contribute to the wider Commission objective of boosting jobs, growth and investment, is the EU's gross domestic product (GDP). Singling out the impact on GDP of the Commission's competition activities alone is a challenging task. The Commission carried out model simulations to assess the impact on growth of cartel and merger decisions over the period 2012-2018 but by the end of this audit the results were not yet officially published. Also, this indicator does not give any information about consumer welfare. It is also not possible to ascertain whether the Commission's decision to intervene in one sector of the economy resulted in a higher impact on GDP growth than if it had intervened in another one. Such information would, however, be valuable for an efficient and performance-oriented allocation of the Commission's resources.

82 DG COMP estimates the level of direct benefits that consumers are expected to gain from its cartel and merger prohibition decisions. This approach, developed by the OECD³⁹, provides only a partial view of the impact of the Commission's work, since consumer welfare is far more complex than this process reflects. DG COMP itself acknowledges the limitations of the approach it uses: in particular the difficulty to quantify (i) the potential savings for consumers resulting from antitrust enforcement (other than cartels), and (ii), partially due to the lack of a methodology, the dynamic effects of the Commission's decisions on innovation, quality and productivity.

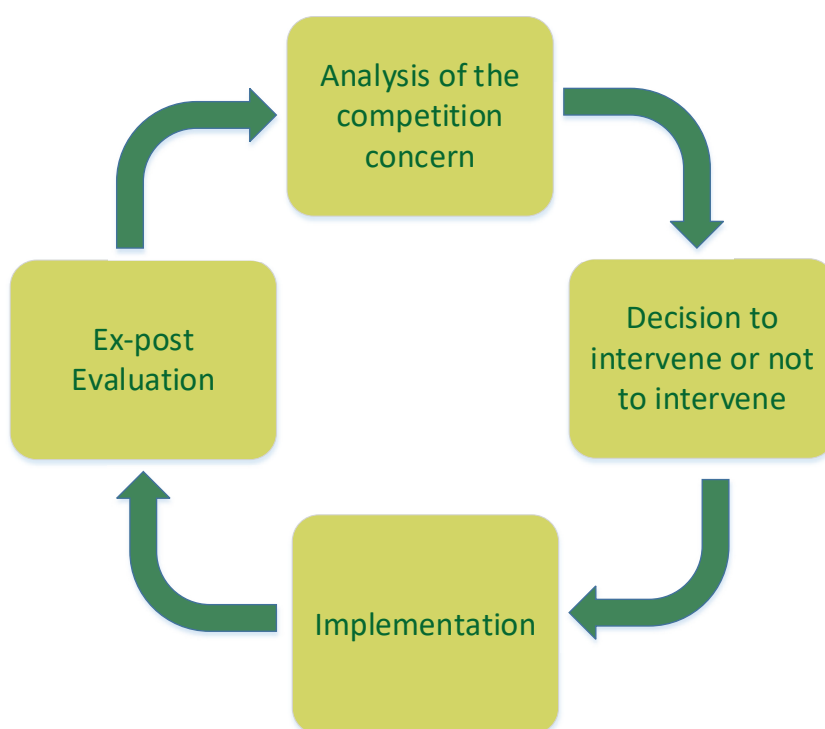
83 There is no information available on the achievement of other relevant objectives of the Commission's enforcement which derive either from the TFEU or the strategic plan and were defined only at a very general level, such as "creating a fair level playing field for companies in the internal market", "legal certainty", "enhanced market integration", or "ensure a fair share of the benefits of growth between consumers and companies".

³⁹ Guide helping competition authorities assess the expected impact of their activities, OECD, April 2014; <http://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf>

84 In addition, only little information is available on how NCAs perform in enforcing EU competition rules, as there is no common approach for assessing the NCAs' performance. Consequently, no single body has an overview of the impact of the enforcement of competition rules in the EU.

85 Periodic ex post analyses of enforcement decisions are a key tool for assessing the global effectiveness of the Commission's work (see *Figure 10*). For example, they allow an assessment to be made of whether assumptions about market developments after intervention in a merger operation were correct, or whether the prohibition of a given anticompetitive practice by a dominant company actually resulted in more competitive market structures and brought longer-term benefits for consumers, in terms of price, output, quality, choice, or innovation. Such assessments, including lessons learned, can help to improve future decision-making and to increase the Commission's accountability⁴⁰. We observed that the Dutch NCA had conducted ex post evaluations in a few selected cases. For the other three NCAs visited by us, such activities had been very limited or even absent.

Figure 10 – Role of ex post evaluation in decision-making



© OECD (2016), Reference guide on ex-post evaluation of competition agencies' enforcement decisions.

⁴⁰ OECD (2016), Reference guide on ex-post evaluation of competition agencies' enforcement decisions, <http://www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf>

86 In the audited period, the Commission conducted a limited number of ex post evaluations: on the effects of interventions in selected energy and telecoms markets and one in the hard disk drive market⁴¹. However, the cases were not chosen as part of a strategic approach towards making evaluations. Since the evaluation was not based on an examination of a representative sample of the Commission's pool of decisions, it could not provide lessons to be taken into account in future casework.

The Commission's reporting focused on activities rather than on impact

87 The Commission reports annually to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions about its activities in competition policy⁴². In a separate exercise, as part of the Commission's overall performance reporting, DG COMP includes information in its annual activity reports about the key results of its work⁴³.

88 Both reports are an informative but non-exhaustive summary of activities undertaken by the Commission in the field of competition policy; they provide detailed information on the most important policy development, as well as on important enforcement decisions adopted or investigations launched during the previous year. However, they do not include other important information such as (i) the number of antitrust investigations in progress at the end of the reporting year and (ii) the stock of antitrust cases. They provide also very little information on the impact of the decisions, and consequently on the achievement of general policy objectives, such as the effect on prices or on the quality of products or services.

89 As pointed out above (see paragraph 73), it is the NCAs that take most of the enforcement decisions based on EU competition rules. However, NCAs report about their activities in different ways, as the Commission and the NCAs have not agreed on standards for presenting activities or describing their performance. As a result, stakeholders have hardly any information on the extent of this cooperation and on how well it worked.

⁴¹ For details see http://ec.europa.eu/competition/publications/reports_en.html

⁴² https://ec.europa.eu/competition/publications/annual_report/index.html

⁴³ https://ec.europa.eu/info/publications/annual-activity-report-2018-competition_en

90 We also noted that the absence of a framework for independent assessments of the performance of competition authorities in the EU means that there is no independent and regular assessment of the Commission's effectiveness in contributing to the achievement of strategic enforcement objectives. In 2005, the OECD conducted a peer review at the Commission, with experts assessing how it dealt with competition and regulatory issues⁴⁴.

⁴⁴ OECD Country Studies - European Commission - Peer Review of Competition Law and Policy, <http://www.oecd.org/eu/35908641.pdf>.

Conclusions and recommendations

91 The Commission made, overall, good use of its enforcement powers in merger control and antitrust proceedings and addressed competition concerns with its decisions. However, its capacities for monitoring markets and identifying new antitrust cases were limited. Increasing amounts of data to be processed in proceedings, the emergence of digital markets and limitations in the available enforcement tools put challenges to the Commission's enforcement capacities and have not been fully addressed yet. Also, in spite of a generally close cooperation with the NCAs, there is room for better coordination. To explain and demonstrate benefits to citizens, in its public reporting, the Commission focussed more on activities rather than on impact.

92 In order to identify infringements of antitrust rules, the Commission did not only react to complaints or market information received but also acted on its own initiative. However, considering the significant number of complaints and other information received, the amount of resources available for own detection of antitrust cases was relatively limited. The number of new own-initiative antitrust cases which were launched has fallen since 2015. The Commission did not demonstrate that it had a consistent approach to market monitoring (paragraphs [24](#) to [30](#)).

93 The Commission put in place incentives to enhance reporting by external parties (i.e. market participants or consumers) on possible infringements of antitrust rules but uptake of the most important tool ("leniency programme") had fallen since 2015 (paragraphs [31](#) to [36](#)).

94 Given the large number of potential antitrust cases and resource limitations, the Commission selects cases that it can investigate. The Commission applies criteria to prioritise cases, but these were not clearly weighted to ensure the selection of those antitrust cases with the highest risk to competition or consumer welfare in the internal market (paragraphs [37](#) and [38](#)).

Recommendation 1 – Increase the probability of detecting infringements

In order to ensure a high level of enforcement, appropriate detection of infringements is a necessary first step. Therefore, the Commission should follow a more proactive approach by gathering and processing market relevant information in a consistent and cost efficient manner and select cases based on clearly weighted criteria, for example by using a scoring system.

Timeframe: by the end of 2022

95 The Commission simplified merger control for less risky transactions (i.e. the majority of transactions) and also identified scope for further streamlining of proceedings. But it has not yet acted upon that. The Commission completed its merger reviews within the legal deadlines. However, as it had to cope with an increasing number of concentrations of companies and more and more data to be analysed, it was not always in a position to perform checks of the accuracy of all the information provided given the lack of resources and the amount of information to verify. To date, the Commission has not looked in detail at the costs and benefits of introducing merger filing fees as an autonomous source for financing its merger control (paragraphs [40](#) to [46](#)).

96 As EU legislation defines the EU dimension of a transaction by reference to the annual turnover of the merging parties alone, certain transactions with relevance for the internal market fell outside the Commission's scrutiny (paragraph [47](#)).

97 Antitrust enforcement traditionally only takes place after a competition issue has arisen. While the Commission's antitrust decisions that we audited addressed competition concerns, the duration of the Commission proceedings was generally long. Lengthy proceedings can negatively impact the effectiveness of competition enforcement, in particular in rapidly growing digital markets where a fast reaction is needed to avoid potential damage. The reasons for the delays did not only lie with the Commission but also with the companies under investigation. Although the Commission made considerable efforts to accelerate proceedings, also to deal with an increasing amount of information and data, these efforts have not yet been fully successful (paragraphs [48](#) to [56](#)).

98 Under the current antitrust rules, ex ante interventions are not allowed, and the conditions required to use interim measures (i.e. order companies to cease suspected conduct while investigating the case) render their use difficult. Moreover, while the emergence of digital markets has resulted in new challenges to competition where traditional assumptions about markets and effective competition needed to be adapted, the Commission has not yet updated its guidelines, notices or block exemption regulations to deal with these new features and to improve legal certainty for companies and support the decision-making of NCAs (paragraphs 57 to 63).

99 Lastly, effective enforcement depends on the deterrent nature of the fines imposed. Although the absolute level of fines imposed by the Commission is among the highest in the world, it has not yet evaluated their deterrent effect (paragraphs 64 to 72).

Recommendation 2 – Increase the effectiveness of competition enforcement

In order to address all competition issues in EU merger control in an efficient manner and to respond faster to the evolution of markets, in particular the digital ones, the Commission should take the following action:

- (a) Further optimise merger procedures and case management with a view at covering all transactions relevant for the internal market and conduct a detailed analysis of the costs and benefits of charging merger filing fees.
- (b) Strengthen its antitrust intervention tools and update notices and guidelines as well as block exemption regulations upon their expiry to take into account new market realities (mainly those resulting from the digital markets).
- (c) Perform a study of the deterrent effect of its fines and update its fine-setting methodology as appropriate.

Timeframe: By mid 2024, or upon the expiry of the relevant block exemption regulations for (b)

100 NCAs take most of the decisions in cases where EU competition rules apply. There was good cooperation between them and the Commission but market monitoring was not closely coordinated and the Commission had little knowledge about the NCAs' enforcement priorities. Reallocation of cases occurred only rarely and an early warning mechanism, introduced in 2016 for mutual information on issues in pending cases, was not yet extensively used by the NCAs and thus could not be used for better case allocation (paragraphs 73 to 77).

Recommendation 3 – Better use the potential of the European Competition Network

In order to use the full potential of the ECN, the Commission should better coordinate market monitoring with the NCAs and enhance sharing information on priorities within the ECN to increase transparency and strive for complementarity, and promote (i) better use of its early warning mechanism as well as (ii) an allocation of cases (in particular in complex digital markets) which avoids many competition authorities looking at a similar behaviour by the same company.

Timeframe: 2022

101 EU legislation defines only general objectives for competition policy in the EU. DG COMP must measure the performance of its enforcement activities in line with the Commission's overall approach to assess its performance. Nevertheless, the nature of competition enforcement and lack of suitable data made it difficult for DG COMP to define a baseline against which to measure performance, set meaningful indicators and targets and compare performance over time (paragraphs 78 to 84).

102 The Commission did not regularly carry out ex post evaluations on the effectiveness of its decisions although this would help to improve future decision-making and better allocation of resources (paragraphs 85 and 86).

103 The Commission reports the results of its enforcement work in its annual report on competition policy and, separately, in DG COMP's annual activity report. However, both reports focus on activities rather than on impact, but even on these activities important information is missing (for example, investigations in progress at the end of the reporting year, stock of cases, etc.). Lastly, there are no regular independent assessments of the performance of competition authorities in the EU, such as peer reviews (paragraphs 87 to 90).

Recommendation 4 – Improve performance reporting

In order to enhance transparency and accountability to the European Parliament and citizens, the Commission should:

- (a) regularly carry out ex post evaluations of performance of its enforcement decisions, including of their impact;
- (b) together with NCAs, develop an approach for regular independent assessments of the achievement of strategic enforcement objectives, such as in the form of peer reviews.

Timeframe: 2023 for (a) and 2024 for (b)

This Report was adopted by Chamber IV, headed by Mr Alex Brenninkmeijer, Member of the Court of Auditors, in Luxembourg on 6 October 2020.

For the Court of Auditors

Klaus-Heiner Lehne
President

Annexes

Annex I – Legal objectives of EU competition enforcement

Article 101 TFEU	Article 102 TFEU	Merger Regulation
<p>Prohibit agreements between companies which can prevent, restrict or distort competition in general</p>	<p>Protect the structure of markets and thus competition as such</p> <p>Prevent companies from abusing their dominant positions by imposing unfair prices or other trading conditions or by limiting production, markets or technical development to the detriment of consumers</p>	<p>Ensure that concentrations are compatible with the internal market in terms of the need to maintain and develop effective competition</p>
<p>Achieve an integrated internal market in the EU</p>		

Annex II – Key references to EU competition rules

Antitrust (Art. 101-102 TFEU)	Cartels (Art. 101 TFEU)	Merger control	
Council Regulation (EC) No 1/2003		Council Regulation (EC) No 139/2004	
Commission Regulation (EC) No 773/2004		Commission Regulation (EC) No 802/2004	
Notice on the definition of relevant market			
Notice on agreements of minor importance which do not appreciably restrict competition (De Minimis Notice)		Guidelines on the assessment of horizontal mergers	
Commission Regulation (EU) No 1217/2010 on research and development agreements	Commission Notice on the conduct of settlement	Guidelines on the assessment of non-horizontal mergers	
Commission Regulation (EU) No 1218/2010 on specialisation agreements	Commission Regulation (EC) No 622/2008 on settlement procedures	Commission Notice on remedies	
Guidelines on horizontal cooperation agreements		Commission Notice on restrictions	
Commission Regulation (EU) No 330/2010 on vertical agreements	Commission Notice on Immunity from fines and reduction of fines in cartel cases ("leniency notice")	Commission Notice on a simplified procedure	
Guidelines on vertical restraints		Commission notice on case referral	
Commission Regulation (EU) No 316/2014 on technology transfer			
Guidelines on technology transfer			
Notice: Guidelines on the effect on trade concept			
Notice: Guidelines on the application of Article 81(3) of the Treaty			
Guidance of the Commission's enforcement priorities in applying Article 82 of the Treaty			
Guidelines on the method of setting fines			
Inability to pay information note			
Communication on quantifying harm in actions for damages			
Notice on cooperation within the Network of Competition Authorities			
Notice on the co-operation between the Commission and the courts of the EU Member States			
Directive 2014/104/EU on actions for damages under national law for infringements of the competition law provisions			
Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ("ECN plus")			
Notice on the rules for access to the Commission file			
Decision on the function and terms of reference of the hearing officer in certain competition proceedings			

Annex III – Investigations and draft decisions notified via the ECN 2010 – 2019

Member State	Investigations	in %	Draft decisions	in %
Belgium	40	2,6 %	15	1,7 %
Bulgaria	13	0,8 %	4	0,4 %
Czech Republic	28	1,8 %	14	1,6 %
Denmark	33	2,1 %	35	3,9 %
Germany	117	7,6 %	77	8,5 %
Ireland	13	0,8 %	1	0,1 %
Greece	38	2,5 %	32	3,5 %
Spain	112	7,3 %	100	11,1 %
Estonia	3	0,2 %	1	0,1 %
France	120	7,8 %	100	11,1 %
Croatia	9	0,6 %	2	0,2 %
Italy	124	8,1 %	117	13,0 %
Cyprus	28	1,8 %	10	1,1 %
Latvia	14	0,9 %	2	0,2 %
Lithuania	21	1,4 %	12	1,3 %
Luxembourg	28	1,8 %	7	0,8 %
Hungary	66	4,3 %	32	3,5 %
Malta	7	0,5 %	3	0,3 %
Netherlands	51	3,3 %	25	2,8 %
Austria	105	6,8 %	35	3,9 %
Poland	21	1,4 %	8	0,9 %
Portugal	69	4,5 %	26	2,9 %
Romania	65	4,2 %	54	6,0 %
Slovakia	32	2,1 %	20	2,2 %
Slovenia	21	1,4 %	19	2,1 %
Sweden	52	3,4 %	12	1,3 %
Finland	23	1,5 %	11	1,2 %
United Kingdom	69	4,5 %	33	3,7 %
Total	1 322	86,1 %	807	89,5 %
Commission	213	13,9 %	95	10,5 %
Grand Total	1 535	100 %	902	100 %

Annex IV – DG COMP Performance indicators for merger control and antitrust proceedings

No	Relevant general objective	Result indicator	Rationale	Source of data
1	Effective enforcement of antitrust rules with a view to protecting consumer welfare	GDP growth	Increase GDP by enforcement interventions	Eurostat
Specific objectives for Antitrust (including cartels)				
1	Effective enforcement of antitrust rules with a view to protecting consumer welfare	Estimate of customer benefits resulting from the Commission decisions prohibiting cartels	Quantitative indicator to ensure positive impact of competition enforcement on consumer welfare	DG Competition calculation
		Deterrent effect of the Commission's fines	Qualitative indicator to measure the perception of the stakeholders on the deterrence of our fines in antitrust and cartels	Stakeholder survey
2	A. Effective and coherent application of EU competition law by national competition authorities	Number of cases signalled to the European Competition Network (ECN)	Benchmark for the level of the ECN activity to ensure coherent application of EU competition law	ECN case system
		Number of envisaged enforcement decisions and similar case consultations in the European Competition Network (ECN)		
	B. Effective and coherent application of EU competition law by national courts	Compliance rate of national judgments with Commission replies to requests for opinions (Article 15(1) of Regulation 1/2003)	Benchmark for coherence of the activities by the courts and the Commission to ensure coherent private enforcement of EU competition law	DG Competition statistics on the basis of national judgments transmitted
Compliance rate of national judgments with Commission 'amicus curiae' briefs (Article 15 (3) of Regulation 1/2003)				
		Number of Member States having fully implemented the Directive ensuring the right for victims of EU competition law infringements to obtain compensation through national courts	Benchmark for ensuring equal opportunities to obtain compensation for competition law infringements in all Member States	DG Competition statistics based on evaluation
Specific objectives for Merger control				
4	Facilitating smooth market restructuring by assessing non-harmful mergers in a streamlined manner	Ratio of merger decisions adopted in a simplified procedure	Quantitative indicator demonstrating reduced regulatory burden facilitating smooth market restructuring	DG Competition calculation
5	Prevention of anticompetitive effects of mergers with a view to protecting consumer welfare	Estimate of customer benefits resulting from merger interventions (<i>before 2017 only benefits from horizontal merger interventions</i>)	Quantitative indicator to ensure positive impact of competition enforcement on consumer welfare	
Specific objectives concerning both antitrust and merger control				
3 and 6	EU competition law instruments maintained aligned with market realities and contemporary economic and legal thinking	Stakeholder consultation on new rules	Benchmark for key quality parameters related to DG Competition's work	Eurobarometer Standard Qualitative Study
15	Promoting international cooperation and convergence in the area of competition policy and greater transparency and basic disciplines on subsidies control internationally	Promotion of competition culture and policy convergence at international level		
16	Ensuring the highest standards in the enforcement of competition policy	Legal soundness of Commission decisions in competition cases		
		Quality of economic analysis		
		Market knowledge		
		Impact on the markets		
		Timeliness of decisions		
		Informing in a timely manner	DG Competition Stakeholder Survey	

Acronyms and abbreviations

DG COMP: European Commission – Directorate General for Competition

ECN: European Competition Network (network of the Commission and national competition authorities of Member States)

GDP: Gross Domestic Product

NCA: National Competition Authority

OECD: Organization for Economic Cooperation and Development

TFEU: Treaty on the Functioning of the European Union

Glossary

Antitrust: An area of competition law and policy tackling anti-competitive practices (such as cartels) and the abuse of a dominant market position.

Block exemption regulations: EU regulations permitting certain types of restrictive agreements which are otherwise prohibited. Block exemption regulations have a limited period of validity and the Commission reviews them in regular intervals.

Cartel: A group of manufacturers or suppliers which takes coordinated action to keep market prices at a certain level or restrict competition in other ways, such as by limiting production or sharing markets or customers.

Competition: A situation in a market in which multiple independent suppliers of goods or services contend to attract customers.

Consumer: An end user of a good or service, or an indirect user such as a producer or retailer.

Gross domestic product: A standard measure of a country's wealth: the monetary value of all the goods and services produced in a specific period within the economy.

Interim measures: Measures that allow the Commission to order a company to stop conduct that it considers at first sight to be illegal.

Leniency: The principle whereby fines imposed on companies in a cartel may be waived or reduced under certain conditions if the companies cooperate with the antitrust authorities in their investigation.

Merger: The joining of companies through the absorption of one into the other or the creation of a new entity, with the effect of concentrating the market.

Private damage action: The taking of legal action by individuals and companies for damages arising from the violation of competition rules.

Remedy: The means by which a competition concern resulting from a merger or in an antitrust case is resolved.

Undertaking: Any entity, such as a company, providing goods or services on a given market.

**REPLIES OF THE EUROPEAN COMMISSION TO THE EUROPEAN COURT OF
AUDITORS SPECIAL REPORT**

**” THE COMMISSION’S EU MERGER CONTROL AND ANTITRUST PROCEEDINGS: A
NEED TO SCALE UP MARKET OVERSIGHT”**

EXECUTIVE SUMMARY

Common Commission reply to paragraphs I-XI.

EU competition rules remain as relevant today as when they were laid down in the Treaty more than 60 years ago. These provisions defining the powers and responsibilities of the European Commission in the field of EU competition policy have remained remarkably stable, while the economic and political environment have at times changed significantly.

Throughout the decades, the Commission has developed and enforced EU competition law to reflect market realities under the watchful eye of the EU Courts and the evolving jurisprudence. It regularly adapts competition rules and procedures to correspond to the developments on the markets and to align it with contemporary economic and legal thinking .

The Commission, together with the national competition authorities (NCAs), have a shared competence to directly enforce EU competition rules (Articles 101-109 of TFEU) to make EU markets work better, by ensuring that all companies compete equally and fairly on their merits. The purpose of competition rules is to help in the establishment and the proper functioning of the internal market. In the area of merger control, the Commission preserves competitive market structures by preventing large concentrations from causing harm to competition. This benefits consumers, businesses and the European economy as a whole. Within the Commission, the Commissioner and the Directorate-General for Competition are primarily responsible for these direct enforcement powers.

Both antitrust and merger control entail work for the Commission subject to legal obligations. These legal obligations must, despite resource constraints, be first and foremost met, enforcement conducted in a fair manner, based on facts, evidence and thorough analysis while respecting due process. It must be emphasised that the EU Courts have unlimited jurisdiction to review the enforcement decisions of the Commission brought by the parties before them as regards the substance, procedure and, where applicable, the amount of the fine imposed.

The Commission notes that it has a variety of sources to identify infringements to competition rules: formal complaints, immunity and leniency applications, meetings with stakeholders, whistle-blower tool, cooperation within the Commission, with the NCAs and other national regulators and authorities, market studies, specialised and general press and other publicly available sources and data bases to name a few. Pro-active market monitoring is an integral part of the Commission’s detection work and the capability is continuously developed further.

As regards to the potential infringements that are brought to its attention, the Commission is not in a position, due to its limited resources, to pursue all potential infringements of EU antitrust rules, each proposed new investigation is subject to a detailed internal priority assessment in several phases. The priority setting applies quantitative and qualitative criteria (including possible harm to the market and to consumers, precedent value of the case etc.) and provides a good basis for the priority setting of the Commission, namely which cases to pursue. The Commission is particularly transparent in publishing the initiation of antitrust proceedings and providing sufficient details to allow the media and the general public to be aware of the rationale underlying that particular investigation. As regards conduct of antitrust investigations, the Commission emphasises that quality, relevance and speed of

investigations are all important parameters when enforcing competition rules. Investigations should be swift, not least given the rate at which the economies and societies are evolving. However, investigations are also becoming more complex. Speed is an essential complement to quality and relevance but cannot be their replacement or compromise quality or relevance. Yet, the Commission constantly seeks ways to make its proceedings more efficient. Ensuring the quality of the Commission decisions and full respect of the rights of defence are of the essence in a Union built on and governed by the rule of law.

The Commission also reviews its policy framework of different Regulations, notices and guidelines and has a significant ongoing policy review agenda in antitrust to ensure that new and updated rules reflect market reality, including notably the impact of digitalisation. Ongoing reviews also include a major evaluation in the area of merger control, which looks into questions of simplification potential and jurisdictional issues, the outcome of which cannot be prejudged. Policy reviews are an extensive process, including public consultations, evaluations and impact assessments in line with the Commission Better Regulation Agenda and can span over several years.

The Commission underlines the evident effect of shared EU antitrust enforcement by the Commission and the national competition authorities (NCAs). The Commission organises and steers a large number of meetings with the NCAs on policy matters and cases with the aim of increasing joint expertise and ensuring buy in to common solutions. Regulation 1/2003 does not, however, as such provide the Commission any role in, or power to, coordinate market monitoring or enforcement priorities within the European Competition Network (ECN).

The Commission is also an active participant and contributor to the work by the OECD and the International Competition Network (ICN), to improve performance measurement and agency effectiveness among competition authorities worldwide. The Commission agrees with the ECA that more investment into ex-post evaluation benefits future enforcement by the Commission but also requires sufficient resources (both human and technical) being available for this function. The Commission agrees with the ECA that competition authorities need sufficient resources (both human and technical) to act as effective enforcers.

The Commission accepts recommendations 2b, 2c, 3 and 4a, partially accepts recommendations 1 and 2a, and does not accept recommendation 4b.

INTRODUCTION

06. The Commission refers to Protocol 26 TFEU and the case law of the Court of Justice (Case C-501/06 GlaxoSmithKline, points 61-63) and points out that consumer welfare is not a separate, self-standing standard to be met by enforcement action under the competition rules.

08. The Commission notes that since 2016 the number of concentrations reviewed has been closer to 400 than 300 per year (or even above 400 as in 2018).

Box 1

Powers of the national competition authorities of Member States

The Commission notes that Directive 2019/1¹ introduced common minimum powers for national competition authorities (NCAs) as well as rules ensuring that all NCAs can impose deterrent fines. In addition, it introduced an almost fully harmonised procedure for leniency applications.

¹ 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

OBSERVATIONS

Some limitations in the Commission’s market monitoring, detection and investigation capacity

24. The Commission emphasises that pro-active market monitoring is an integral part of its detection work, and that it is continuously developing this ability, relying on a mix of different sources. This includes for example scoping exercises, sector-inquiries, ex-officio investigations and a whistle-blower tool. The manner of identifying infringements necessarily differs between sectors; in some sectors, formal complaints are the norm, whereas other sectors rely more on informal contacts and sector specific information sources. The Commission relies on the tools and sources that it believes has the greatest chance of generating leads and detecting possible infringements, striking a balance between the costs of further market monitoring activities and the potential benefits of such activities.

In the Commission’s view, its procedures and practices provide a good basis for it to continue its efforts to ensure a proactive detection of competition infringements subject to the availability of sufficient resources.

Limited resources affect the Commission’s detection capacity

29. Sector Inquiries are only one (the most resource intensive) of many tools used to conduct screening for monitoring/detection purposes. The Commission points out that DG Competition at all times had (and has) qualified and capable staff to perform its tasks but agrees that additional resources are key to enable additional detection and enforcement.

30. The Commission notes that the number of newly registered own-initiative cases per year is prone to considerable variation and has to be seen both in relation to already ongoing cases and the number of new complaints that are pursued (after a peak in new cases, focus is also naturally on advancing these investigations). An indication of the effectiveness of the Commission’s own-initiatives is that they constitute the clear majority of all non-cartel antitrust decisions.

The approach to prioritising cases was not optimal

38. Each new investigation is subject to a detailed internal priority assessment in several steps, based on well-established criteria. Issues that are to be assessed include indications of possible harm to the market and to consumers, as well as issues such as precedent value and whether competition law – and if so at the EU or national level – is the most effective answer. Similarly, enforcement in priority areas, as identified in the Commission’s annual Management Plan, must be reconciled with the need for enforcement across a broad range of sectors. These are issues that cannot be numerically balanced, but for which the current priority setting rules and procedure provide a solid basis.

44. The Commission relies on different sets of data and information to carry out its assessment of concentrations beyond information provided by the parties notifying a merger. By relying on those different sources of evidence, the Commission is able to carry out its own assessment (including when necessary market reconstruction exercises when the data provided by the “Notifying Party” risks being incomplete or inaccurate) and to cross-check and verify information provided and the statements made by the Notifying Party (and where appropriate show that they were not supported by evidence).

functioning of the internal market (Text with EEA relevance.) PE/42/2018/REV/1,OJ L 11, 14.1.2019, p. 3–33.

Also, the Merger Regulation foresees the possibility to impose fines when companies provide incorrect, misleading or incomplete information, which it has recently used in two cases (Facebook/WhatsApp and GE/LM Wind).

The Commission points out that third parties who have important comments on the proposed transaction are likely to reply in time or request an extension of deadline for the reply. Extensions are frequently granted.

45. The Commission notes that in the context of the measures adopted during the COVID-19 pandemic, the Commission decided to temporarily allow undertakings to submit merger filings electronically.

46. Second indent - The Commission notes that paragraph 5(a) of the Simplified Notice contemplates two categories of cases: (i) JVs with no activities in the EEA (extra EEA JVs) and (ii) JVs with small activities in the EEA (generating less than 100 million turnover in the EEA).

47. Since 2016, there is an ongoing Commission Evaluation of selected aspects of EU merger control, including, among other topics, the effectiveness of the turnover-based thresholds to capture relevant transactions sufficiently under the EU Merger Regulation.

The Evaluation seeks to assess, in particular, whether an enforcement gap currently exists (and if so how large) as a result of the design of the Merger Regulation or whether the existing tools (for instance the referral system) allow to sufficiently capture and review the relevant transactions even if those are not captured by the turnover based thresholds of the Merger Regulation.

The Commission's antitrust decisions addressed competition concerns but proceedings remain lengthy

52. The Commission points out that the EU Courts have full jurisdiction to review the enforcement decisions of the Commission brought by the parties before them as regards the substance, procedure and, where applicable, have unlimited jurisdiction as regards the amount of the fine imposed.

58. The Commission points out that, also in determining antitrust infringements of undertakings in the area of the digital economy, the Commission is not required to determine consumer harm, in accordance with the applicable legal standard.

59. The Commission notes that part of the rationale of the impact assessment for a possible New Competition Tool, which it launched on 2 June 2020,² is to address structural risks for competition that may require early intervention to prevent the creation of powerful market players with an entrenched market and/or gatekeeper position. Such scenarios cannot be addressed under the current competition rules but could be tackled through a new market investigation tool that would allow the Commissions to remedy any adverse effect on competition resulting from such structural competition problems.

60. The Commission clarifies that following its successful adoption of an interim measures decision in 2019, it is prepared to continue to apply interim measures in appropriate cases.

62. The Commission has been proactive in tackling new challenges brought by developments in the digital markets. In 2019, it organised a conference “*Shaping competition policy in the era of digitisation*” with a large number of stakeholders and academia as well as published a report by three external advisers to the Competition Commissioner.³

Between 2018 and 2020, the Commission has launched an extensive policy evaluation and review agenda including a number of Regulations, Guidelines and Notices in the area of antitrust and

² See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>.

³ See https://ec.europa.eu/competition/scp19/conference_en.html.

mergers, to ensure that the rules reflect today's business reality, including notably the impact of digitalisation⁴. The reviews are carried out under the Commission Better Regulation principles, and in line with the Mission letter of Executive Vice-President Vestager⁵ and the Commission Work Programme.⁶

This is an inclusive process, including public consultations, which can span over several years. For example, the Vertical Block Exemption Regulation⁷ and guidelines and Horizontal Block Exemption Regulation⁸ and guidelines are currently under review in view of their expiry in 2022. The Relevant Market Notice is also currently under review. A timetable of the procedural steps of the various reviews is published on DG COMP's website in order to provide transparency to the public.⁹

The Commission imposed high fines, but has no assurance on their deterrent effect

64. The Commission notes that while it has a certain discretion when determining the fine for infringements of competition rules, it has to respect the case law of the EU Courts and is bound by its guidelines on fines.

70. Experience gained by the few NCAs that had rules obligating them to quantify illegal gains for fining purposes revealed that this task comes with enormous practical difficulties, including the difficulty of identifying a hypothetical 'competitive price' against which to precisely compare the overcharge. Assuming it is even possible to accurately do so, the calculation of undue profits for fines purposes would not only require significant resources (as recognised by the ECA), but also likely lengthen many investigations by a significant period of time and increase the number and complexity of appeals. This in turn would affect the Commission's ability to pursue greater numbers of cases at a given point in time, which would tend to decrease deterrence. Further, a pattern of very lengthy investigations may in and of itself adversely impact deterrence.

72. As far as the overall evaluation of the deterrence effects of its fines is concerned, the Commission highlights that it has indeed not conducted an overall evaluation, but has already reviewed alternative approaches proposed in the literature to assess the deterrent effects of cartel and merger enforcement policies.

The Commission cooperated closely with the national competition authorities, but there is room for improvement

75. The Commission underlines that Regulation 1/2003 does not give the Commission any power to coordinate market monitoring or enforcement priorities within the ECN. In addition, as recognised by this report, not all NCAs have today the power to prioritise between cases. That power will be given

⁴ This includes, inter alia, the Commission Market Definition Notice for both antitrust and merger cases across different industries; the Commission Vertical Block Exemption Regulation and the accompanying Vertical Guidelines, the Commission Research and Development and Specialisation Block Exemption Regulation (together "HBERs") and the accompanying Horizontal Guidelines; the Commission Motor Vehicle Block Exemption Regulation, New Competition Tool, Evaluation of procedural and jurisdictional aspects of EU merger control, White Paper on foreign subsidies.

⁵ https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf.

⁶ https://ec.europa.eu/info/publications/2020-commission-work-programme-key-documents_en.

⁷ See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1936-Evaluation-of-the-Vertical-Block-Exemption-Regulation>.

⁸ See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation>.

⁹ https://ec.europa.eu/competition/antitrust/legislation/timeline_table_M_AT_final.pdf.

by the implementation of Directive 2019/1, which is foreseen for February 2021. However, even after the implementation of Directive 2019/1, any such coordination would be dependent on NCAs agreeing to such a coordination. Most NCAs are influenced by specific issues in the national context when setting their priorities and the national priorities do not necessarily coincide with the priorities of the Commission.

The Commission underlines that it has increased information sharing on sector inquiries with the NCAs on a voluntary basis and applies a specific IT application for it. From 1 November 2018 (release date of the tool) to 29 June 2020, 22 sector enquiries have been shared within the ECN. Even before planned or on-going sector inquiries were frequently discussed both at sectoral subgroup meetings and at the working group for Vertical agreements, the working group for Horizontal Agreements and Abuse as well as the working group for Digital markets.

76. The Commission points out that Directive 2019/1 introduces common minimum tools and ensures all NCAs can impose deterrent fines.

77. The Commission points out that in cases where the geographic market is national, such as the cases referred to, it is not a given that an investigation by the Commission could have solved the matter more efficiently.

The Commission provides only limited information on the achievement of objectives such as consumer welfare

80. The Commission agrees with the statement that there are currently no internationally recognised standards for measuring the performance of a competition authority. However, the important work conducted by the OECD and the International Competition Network (ICN) in this area to which also the Commission contributes should be recognised.

The Commission points out that the OECD has developed indicators measuring the strength and scope of competition policy regimes in 34 OECD and 15 non-OECD jurisdictions.¹⁰

In addition, measuring the performance of the Commission's enforcement in merger control and antitrust (as part of the Commission's general framework) also includes reporting on performance indicators in line with guidance developed by the OECD to competition authorities helping them to assess the expected impact of their activities.¹¹

The Commission also points out that the mission of the Agency Effectiveness Working Group (AEWG) of the International Competition Network (ICN) is to identify key elements of a well-functioning competition agency and good practices for strategy and planning, operations, and enforcement tools and procedures. AEWG's mandate is to share experience among ICN members and NGAs (> 130 members world-wide) and to develop and disseminate good practices for agency effectiveness.¹²

81. Second indent - The Commission points out that the model simulations assessing the impact of the Commission's merger interventions and cartel prohibitions over the period 2012-2018 were published in 2020. These model simulations not only consider the macroeconomic impact on GDP growth, job creation and investment, but also the spill-overs of price reductions associated with competition policy interventions from one sector to another. Five industries (motor vehicles, finance,

¹⁰ See Working paper: Alemani, E., et al. (2013), "New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries", OECD Economics Department Working Papers, No. 1104, OECD Publishing, Paris, <https://doi.org/10.1787/5k3ttg4r657h-en>.

¹¹ OECD 2014, <http://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf>.

¹² Its most recent Report on Agency Effectiveness is published in 2019: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/AEWG-Organisational-design-2019-report.pdf>.

telecommunications, basic metals and electronics) were at the origin of two-thirds of the total amount of spill-overs created.¹³

82. The Commission points out that the approach, developed by the OECD, provides the best practice methodology recommended by the OECD to its Members and therefore is acceptable for competition authorities to apply. Further work has recently been conducted by the Commission on the deterrent effect of competition policy, as already indicated.

83. The Commission points out that DG Competition reports on its outputs and results annually within the Commission performance framework in line with its specific objectives and contribution to the general objectives defined at the Commission level, defined as more long-term impacts on the society. Whereas defining the contribution of the outputs and results towards impacts by the Commission can be challenging, the link needs to be made in the narrative of the Management Plan and Annual Activity Report, and since 2016 also in the Strategic Plan. This DG Competition has done.

84. The Commission points out that NCAs participate in the work conducted in this area at the OECD and International Competition Network (ICN).

In the ECN Advocacy and Communication Working Group, the Commission has shared and discussed the results of the Eurobarometer Flash Surveys (2009, 2014 and 2019) on perceptions of EU citizens of key objectives of competition policy and competition problems in the Member States and in the EU. The Commission has also shared and exchanged with the Working Group its results of Eurobarometer Stakeholder Survey (2009 and 2014), which it has used in performance measurement.

The Working Group has also exchanged on structural reforms at Member States level (including boosting competition in product and service markets and specific sectors), in the context of the European Semester cycle of economic and fiscal policy coordination.

In addition, the Commission has together with the NCAs produced and published reports of competition issues and enforcement actions in the area of food and pharmaceuticals, accounting for both the EU and Member State level.

85. Evaluations are a key component of the Commission's decision-making process on policy and legislative initiatives (Better Regulation Agenda). Important proposals for a major revision of legislation/guidelines should be based on an evaluation of the policy framework already in place. Ex-post analysis of individual enforcement decisions complements the evaluations related to Better Regulation review of policy frameworks.

The Commission has also conducted ex-post reviews of its enforcement action but notes that periodic ex-post analysis of competition policy intervention in particular sectors, or of particular decisions, requires further investment and more dedicated resources, currently unavailable in DG Competition.

86. The Commission acknowledges that mainly due to a lack of resources, it does not conduct ex post evaluations on a systematic or regular basis.

However, when policy instruments come for a review, the Commission applies the evaluation framework in the Commission's Better Regulation context.

In addition, it has evaluated a number of merger and antitrust interventions in targeted sectors such as energy and telecoms. These sectors were identified as priorities in the work programme of the Commission. In spite of the fact that these evaluations were not necessarily based on a representative sample of cases, some lessons could be drawn for future enforcement.

¹³ See Ilzkovitz et al. (2020), 'The macroeconomic and sectoral impact of competition policy', Chapter 13 in Ex post economic evaluation of competition policy: The EU experience, Wolters Kluwer.

The Commission carried out a number of ex post evaluations: (1) two mergers in the HDD market (in the 2017 feasibility study); (2) one merger and one antitrust case in the 2017 telecoms market study; (3) one merger and one antitrust case in the 2016 energy market study; and (4) two mergers in the 2015 telecoms market study.

The Commission's reporting focused on activities rather than on impact

88. In view of the large number of the Commission decisions annually, not all case related information can be accounted in full in these reports. However, transparency is also provided when the Commission initiates or closes proceedings in an investigation in press releases. Where the issues of price and quality of products or services have been central to the Commission's concerns, these are generally mentioned and references to more details in the decision included in the footnotes.

More reporting on the impacts of the Commission decisions can only be achieved through more ex-post-evaluations of individual enforcement decisions, which can follow some years after the Commission decision, and therefore are less apt for these two annual reports but rather providing guidance for future enforcement.

89. The Commission points out that the co-operation within the ECN is reported both in the ACR and AAR on an annual basis.

Nevertheless, the Commission can bring the issue of mapping best practices for ECN reporting and performance in application of EU competition law for discussion within the ECN. It points out, however, that NCAs report on their activities and performance according to their preferences and the Commission does not have a role or final say in the matter.

CONCLUSIONS AND RECOMMENDATIONS

91. The Commission takes note of the ECA's conclusion and is ready to continuously develop its already well-established ability for detecting infringements. At the same time, and as pointed out by the ECA, certain types of monitoring are very resource intensive and can only be enhanced if the corresponding resources are made available. The Commission underlines that it is actively tackling challenges related to issues such as digital markets, and has significant evaluations and reviews ongoing¹⁴ to ensure that its tools are fit for purpose but that many of these processes (legislation, IT, etc.) have a certain obligatory lead-time. DG Competition is requested to report on major policy developments and key achievements in its annual reporting (outputs and results). The Commission points out that at the time of the adoption of every major Commission intervention in antitrust and merger control, the impact of the intervention on EU citizens is explained in the press release. The Commission has included estimated consumer savings as result indicators in its Annual Activity Report.

92. The Commission points out that own initiative investigations constitute the clear majority of all non-cartel antitrust decisions. The number of newly registered own-initiative cases per year is prone to considerable variation and has to be seen both in relation to already ongoing cases and the number of new complaints that are pursued.

¹⁴ This includes, inter alia, the Commission Market Definition Notice for both antitrust and merger cases across different industries; the Commission Vertical Block Exemption Regulation and the accompanying Vertical Guidelines, the Commission Research and Development and Specialisation Block Exemption Regulation (together "HBERs") and the accompanying Horizontal Guidelines; the Commission Motor Vehicle Block Exemption Regulation, New Competition Tool, Evaluation of procedural and jurisdictional aspects of EU merger control, White Paper on foreign subsidies.

93. A decrease of leniency applications is also observed by other competition authorities worldwide.

94. The Commission applies a detailed priority setting, which balances a number of criteria. These criteria are not suited to mathematical weighing, since they also include issues such as precedent value and whether competition law – and if so at the EU or national level – is the most effective answer.

Recommendation 1 – Increase the probability of detecting infringements

The Commission partially accepts the recommendation.

The first part of the recommendation is accepted, although the Commission notes that further investments in pro-active ex-officio information and processing capabilities would require that sufficient resources are made available.

The Commission does not accept the second part of the recommendation. It considers that its methodology for priority setting in antitrust, including a review of a number of essential criteria, is well balanced to grant priority to those potential infringements that have a significant impact on the internal market. It also considers that it is not appropriate to include a numerical weighing into the priority setting methodology.

95. As regards the scope for further streamlining, the Commission notes that there is currently an ongoing Evaluation on selected aspects of the Merger Regulation. Results of that evaluation are expected early 2021.

As to the accuracy of the information provided, the Commission notes that it relies on different sets of data and information. The Commission considered the option of introducing filing fees in 2018. As it did not appear to constitute a promising source of significant financial resources, it opted for the Competition Programme within the Single Market Programme in the context of the Multiannual Financial Framework for 2021-2027.

96. There is an ongoing Commission Evaluation of selected aspects of EU merger control, including, among other topics, the effectiveness of the turnover-based thresholds to capture all relevant transactions under the EU Merger Regulation.

97. The Commission points out that quality, relevance and speed of investigations are all important when enforcing competition rules. Investigations should be swift, but also need to be thorough and fully respect the right of defence. The Commission is constantly seeking to make proceedings more efficient (e.g. the new cooperation practice), but at the same time investigations are also becoming more complex. The EU Courts hold the Commission to very high standards on substance and on procedure.

98. As further explained in its reply to paragraph 62, the Commission is currently reviewing a number of different Regulations, notices and guidelines. The reviews are carried out under the Commission's Better Regulation principles and a timeline of the procedural steps is published on DG COMP's website. On 2 June 2020, it also launched an impact assessment for a possible New Competition Tool to address certain structural risks for competition that may require early intervention.¹⁵

99. The fining methodology of the Commission essentially aims to sanction infringements and deter future infringements. The Commission has already conducted a review of alternative approaches to assess the deterrent effects of cartel and merger enforcement policies.

¹⁵ See press release at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977.

Recommendation 2 – Increase the effectiveness of competition enforcement

The Commission partially accepts recommendation 2 (a).

The Commission accepts to look into possible ways to optimise merger procedures and case management, but cannot prejudge the outcome of the ongoing Commission Evaluation of selected aspects of EU merger control. The Commission does not accept the second part of the recommendation on the merger filing fees.

The Commission accepts recommendation 2 (b)

The Commission will pursue the already launched reviews of a number of Regulations, Guidelines and Notices, in line with the steps indicated in the time-table referred to in its reply to paragraphs 62 and 98. It will also continue to identify the need for further reviews.

The Commission accepts recommendation 2 (c).

Recommendation 3 – Better use the potential of the European Competition Network

The Commission accepts recommendation 3

The Commission, however, underlines that a certain number of NCAs do not yet have the power to prioritise between cases since they are bound by the principle of legality. This power will, however, be given by Directive 2019/1.

The Commission notes that in cases where the geographic market is national it is not a given that an investigation by the Commission is the most efficient solution.

101. Like other competition authorities, the Commission also provides publicly output information on inter alia decisions, fines, statements of objections and initiation of proceedings in its reporting, in addition to its nearly daily press releases of important enforcement actions. This is important since enforcement activity and actions, including fines, have a deterrent effect on the behaviour of economic operators. DG Competition does not set quantitative targets for its enforcement activity, since enforcement by definition is reactive to market situations and cannot program case numbers or decisions.

Recommendation 4 – Improve performance reporting

The Commission accepts recommendation 4a).

The Commission notes that additional resources are key to enable more regular ex-post evaluations of enforcement decisions. Therefore, the implementation of the recommendation would be subject to the availability of sufficient resources.

The Commission does not accept recommendation 4 (b).

The Commission notes that the OECD has conducted in-depth reviews of competition laws and policies in different jurisdictions (including the European Union) since 1998. The OECD is well-placed to carry out such peer reviews also in the future because it is independent and has the necessary expertise. The Commission has no power to oblige NCAs to engage in such peer reviews. However, it notes that NCAs participate in the work of the ICN Agency Effectiveness Working Group.

Audit team



Alex Brenninkmeijer (ECA member)

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This report was produced by Audit Chamber IV – headed by ECA Member Alex Brenninkmeijer – which has a focus in the areas of regulation of markets and competitive economy. The audit was led by ECA Member Alex Brenninkmeijer, supported by Raphael Debets, Head of Private Office, Di Hai, Private Office Attaché, and Marion Colonerus, Principal Manager.

Sven Kölling was the Head of Task. The audit team consisted of Agnieszka Plebanowicz, Aleksandar Latinov and Giorgos Tsikkos. Richard Moore provided linguistic support.

Timeline

Event	Date
Adoption of Audit Planning memorandum (APM) / Start of the audit	24.4.2018
Official sending of draft report to Commission (or other auditee)	17.6.2020
Adoption of the final report after the adversarial procedure	6.10.2020
Commission's (or other auditee's) official replies received in all languages	26.10.2020

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In its antitrust proceedings, the Commission enforces the EU's competition rules, together with the national competition authorities (NCAs). The Commission is also responsible for reviewing mergers of companies that are significant for the EU's internal market.

In this audit, we examined how effectively the Commission detected and enforced infringements of EU competition rules regarding mergers and antitrust, and how it had cooperated with the NCAs. We also looked at how the Commission assessed its own performance and reported on it.

We found that the Commission's decisions addressed competition concerns. But due to limited resources, capacities for monitoring of markets and own detection of antitrust cases were limited. Increasing amounts of data to be processed and the emergence of digital markets made investigations complex and not all challenges have been addressed yet. Cooperation with the NCAs was good, but certain aspects could benefit from better coordination. Also, the way the Commission assesses and reports on the performance of its activities needs improvement.

We make recommendations aimed at helping the Commission to improve its capacity to detect and enforce infringements of competition rules, cooperate more closely with the NCAs, and improve performance reporting.

ECA special report pursuant to Article 287(4), second subparagraph, TFEU.



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