The Federal Government

Modernising EU competition law

German proposals for the 2024-2029 term of the European Commission

Improving the competitiveness of the European economy is the key task for the coming years. Effective competition is a necessary pre-requisite for competitiveness. This requires a stringent competition framework that effectively protects competition in the internal market, while at the same time enabling European firms to scale up and be successful on global markets. We welcome the important reflections and recommendations on competition policy outlined in the recent Draghi report as well as in the mission letter for Executive Vice-President Ribera Rodríguez. However, from our perspective, additional measures are required to fully realize a competition framework that fosters competitiveness, innovation and resilience in order to meet Europe's economic, strategic, and climate ambitions. In the following, we present our proposals to adapt EU competition law.

Reforming merger control

For over 20 years, the EU merger control framework has remained nearly unchanged. However, both the internal market and the global economic situation have changed considerably. EU merger control has to keep pace with the fundamental changes of recent decades and should therefore be modernised, particularly in the following areas:

- **Adapting the scope of merger control and using the resources of DG COMP more efficiently**
  Increased price levels require an update of the turnover thresholds: Whether a merger has to be notified to the Commission depends in particular on the turnover of the firms involved. While the price level in the EU has increased considerably over the last decades, these turnover thresholds have remained unchanged for 35 years. In real terms, this has led to a significant expansion of the scope of the Merger Regulation (EUMR) and ties up more and more resources, which could be used for other priorities in DG COMP. Therefore, we call on the Commission to review the scope of the EUMR to increase turnover thresholds. The transactions that would fall outside the scope of EU merger control would be reviewed by national competition authorities (NCA).
- **Addressing killer acquisitions in a legally secure way**
  The emergence of conglomerate ecosystems and the increased relevance of killer acquisitions in particular in the digital economy requires the introduction of a new notification criterion based on transaction value: Killer acquisitions can stifle potential competition and cause serious damage to the innovative strength of the affected industries. The European Court of Justice has ruled that NCA's referrals under Article 22 EUMR are unlawful in cases where the Member States themselves do not have jurisdiction under national law. The Illumina judgment provides the opportunity to increase legal certainty as one of the core principles of EU merger control. A major strength of the EU merger control framework has been its clear and foreseeable (turnover) criteria determining which mergers have to be notified to the Commission. Therefore, we ask the Commission to present options on how to capture best such acquisitions and find a joint solution with Member States. One option could be to amend the notification criteria and include the price of the target company (so-called "transaction value threshold") as an additional criterion. The Draghi report also advocates for its introduction so that the Commission can review high value/low turnover acquisitions. The EU has a role model function globally in merger control. We believe that call in-options, if non-coordinated and adopted by more Member States, would both increase legal uncertainty and send the wrong signal on the international stage.
- **Considering the effects on competitiveness and security more comprehensively in the guidelines**
  The new global economic and geopolitical reality requires that some mergers are reviewed more comprehensively by taking greater account of non-competitive and innovation-related aspects: In general, competition in the internal market drives competitiveness on the global stage, and competition and diversification contribute to economic security. However, there are markets that are special due to their economic or security characteristics, requiring a more comprehensive view on optimal company size and ownership. These constellations include, in particular, (i) products that are of major importance for the resilience of value chains and the overall EU economy, (ii) globally rapidly growing markets featuring large economies of scale, (iii) key sectors for security policy, such as the defence industry, and (iv) new markets in highly innovative key technologies. In order to strengthen European competitiveness and resilience, competition law and practices must facilitate consolidation in key sectors. Against this background as well as the prerequisite of a strong and well-working competition law, we call on the Commission to review the relevant merger control guidelines.

Introducing a New Competition Tool (NCT)

A "New Competition Tool" (NCT) allows the competition authority to impose remedial measures in sectors with severe structural competition problems. Possible use cases include oligopolistic markets with characteristics that facilitate tacit collusion and sectors featuring significant barriers to market entry. As several of these cases could not be tackled under national competition law, Germany introduced an NCT in 2023. At the EU level, the situation is similar: Currently, there is a significant gap in the European Commission's toolbox. The characteristics of a market or the behaviour of large, established companies may result in a very low competitive pressure, without the Commission being able to address this with the existing antitrust instruments. Therefore, we ask the Commission to propose a Regulation on a New Competition Tool that could be based on Article 114 TFEU. In its resolution of 16 January 2024, the European Parliament also called on the Commission to introduce an NCT to avoid enforcement gaps. Similarly, the Draghi report advocates for the introduction of an NCT. With regard to global competitiveness, the application of the NCT could focus on sectors having an international dimension and being of high importance for the overall EU economy.

Streamlining Enforcement

The costs that European businesses incur due to administrative procedures can have a significant impact on their competitiveness. Legal uncertainty can be a drag on investment. We therefore need to speed up competition proceedings and simplify processes at EU and national level. This applies to merger control proceedings with excessive pre-notification phases, as well as to abuse of dominance proceedings that currently take many years. In addition to faster proceedings, there is the need for effective enforcement. Recently, the competition toolbox was upgraded, and the Commission can now use the Digital Markets Act to address unfair practices by digital gatekeepers and the Foreign Subsidies Regulation to level the playing field in the internal market. We call on the Commission to vigorously use its new tools to achieve these goals. Against the background of limited resources, it should make efficient use of these and consider new approaches. In particular, it should asses to what extent the introduction of an annual monitoring fee for gatekeepers could contribute to an effective Digital Markets Act enforcement in order to deliver concrete results for European business and end users. An additional option would be to improve cooperation within the European Competition Network, including assessing options to combine the Commission's resources and those of national competition authorities for appropriate sectors or cases.

Modernising Regulation 1/2003

After 20 years of practice and experience in the application, Regulation 1/2003 is currently under review. The evaluation presented in fall 2024 by the Commission has shown that the Regulation still contributes in an effective and efficient way to the enforcement of EU competition law. However, it also shows that there is a need for readjustments, especially with regard to the Commission's powers and digitalisation. For example, inconsistencies with recent legislative developments such as the ECN+ directive should be tackled by adapting the Commission's competencies. Furthermore, the requirements for ordering interim measures are too high and should be aligned to less stringent requirements at national level, for example in Germany as well as in other Member States. Mechanisms to simplify and speed up procedures should be anchored in Regulation 1/2003, such as allowing to enforce Article 102 TFEU in purely administrative procedures, without the threat of sanctions and fines, and without lowering the protection of legitimate interests and (judicial) rights of the undertakings concerned. This would allow for the application of a different standard of proof and on evidence, thereby facilitating a more robust and speedier protection of competition. To make use of stringent national rules and enforcement, no changes should be undertaken with regard to the possibility of having stricter national law in the area of abuse control (Article 3). It provides necessary leeway for Member States to step ahead and implement new rules that can become best practices and a role model for the EU level.

Increasing the space for cooperation to enhance innovation and sustainability

The Horizontal Guidelines have been updated only recently. However, we advocate for a re-assessment of the Horizontal Guidelines and of the enforcement practice in the new Commission term. European firms need additional space and legal certainty to cooperate, in particular to enhance innovation such as on data and AI as well as on sustainability. In addition to re-assessing the substantive limits for cooperation, DG Competition must give firms better and clearer guidance on cooperation agreements. This would also help to reduce the administrative burden for undertakings.