



Bundesministerium  
für Wirtschaft  
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MINISTERSTWO  
PRZEDSIĘBIORCZOŚCI  
I TECHNOLOGII

## Modernising EU Competition Policy

In view of the importance of having a globally integrated, sustainable and competitive industrial base, the European Council invited the European Commission to present, by the end of 2019, a long-term vision for the EU's industrial future, setting out specific measures on how to implement it. Such a holistic strategy should address, in line with the Competitiveness Council Conclusions of 27 May 2019, the challenges European industry faces, touching upon all relevant policy areas.

In doing so, it is necessary to examine starting points particularly in foreign trade, investment-related, commercial, public procurement, competition rules and state aid, which can contribute to fair competitive conditions.

The Manifesto for a European industrial policy fit for the 21<sup>st</sup> century of 19 February 2019 presented the French and German vision regarding in particular the need to modernise state aid rules and to adapt our trade policy (adoption of IPI, implementation of investment screening and WTO modernisation). Poland also presented in June 2019 its position on the EU industrial policy strategy to 2030 underlining necessity for integrated industrial policy focusing on competition, disruptive innovation, environmental and trade matters.

With regard to competition policy, France, Germany and Poland invite the European Commission to consider the following options:

### 1. Taking into account third countries state interventions in merger control

Current EU merger control does not sufficiently take into account the specificities of third countries' state control and subsidies for undertakings. In order to counter the distortive effects of such state control and subsidies, the European Commission should modernise its guidelines on merger control:

- For the decision under EU jurisdiction, the state control of undertakings should be stringently taken into account when calculating turnover, in coherence with the European Commission's practice regarding public undertakings.
- For the decision on whether a merger significantly impedes competition, the financial power of state-controlled and subsidised undertakings should adequately be taken into account.

### 2. Tackling excessive market power of big tech firms

The European Commission should strengthen and speed up both merger control and antitrust law enforcement vis-à-vis big tech undertakings which distort competition.

This should entail:

- Simplifying interim measures in case of emergency due to the risk of serious and irreparable damage to competition on dynamic markets. A shorter timeframe can help to avoid the risk of a loss of competition on fast-changing digital markets;
- Extending merger enforcement to examine more thoroughly potentially predatory acquisitions. Some large companies in the digital economy pursue a policy of predatory acquisitions of young companies, with the aim of eliminating potential competition and preserving their dominant position. Their anti-competitive effects are difficult to predict. But to preserve (potential) competition of digital ecosystems, the European Commission and national competition authorities should use their broad mandate to scrutinise such mergers more intensely. The opportunity to control those mergers *ex post* should be explored and be subject to an impact assessment;
- Identifying a range of systemic actors, such as major digital platforms that should be subject to specific scrutiny, and if relevant to a specific regulatory framework, in accordance with the particular responsibilities of these players
- Setting rules to ensure the efficient functioning of markets and enhance innovation in the data economy. These rules should include: data access, data portability, platform interoperability, unbundling, and auditability. Importantly, they should also comprise accountability for the use of algorithms, including transparency, legal compliance, and non-discrimination.

In addition the European Commission should evaluate whether the introduction of a transaction-based threshold in merger control would adequately widen the merger net to also deal with potentially anti-competitive mergers.

### **3. Modernising merger control**

The European Commission should evaluate and modernise current guidelines on the assessment of horizontal mergers and on the definition of relevant market in order to introduce more flexibility, better take into account competition at global level and protect strategic common European interest.

Such modernisation should include a more thorough assessment of potential competition. The assessment of potential competition, including imports-related competition, should pay attention to the specifics of the markets' long-term outlook. The overall trade and industrial policy approach of third countries should be taken into account, in order to assess the likelihood of market entry and the future strength of competitors from third countries.

The Commission should take a clearer position in its decisions in regard to the relevant geographic markets especially in relation to global markets, even if a definitive distinction is not strictly necessary on a case-by-case basis. This would provide companies greater legal certainty for assessing future mergers.

Particular attention should be paid to competition from third countries' state-backed or subsidised companies, which could create long-term market conditions detrimental to European consumers. Likewise, a low profitability of market entry may not be a significant barrier to entry for directly or indirectly subsidised third country companies that adopt a strategic approach.

The Commission should also provide greater clarity to the stakeholders on the efficiencies brought about by a merger and on the evaluation of the competitiveness of

industry in the appraisal of mergers. Specific guidelines could develop the range of efficiencies that could be taken into account in the competitive analysis. The overall aim would be to strengthen the competitiveness of EU industry and European value chains without distorting competition on relevant European markets that would allow negative effects to arise for consumers and enterprises.

#### **4. Strengthening European joint ventures and cooperation**

Guidelines on the creation of European joint ventures which aim to strengthen their entry, clout and thus competition on foreign markets would provide clarity and certainty for EU firms, in particular SMEs and start-ups – similar to the idea of an IPCEI under state aid rules. In addition, European firms and entrepreneurs need greater clarity on the conditions for cooperation. The European Commission should strengthen its advisory capacity to give enterprises of all size guidance on cooperation to reinforce cross-border European value chains.

#### **5. Reinforcing advisory capacities and broadening the expertise**

The European Commission should extend the capacities in regard to digital markets and the challenges of the digital economy. It should be explored, if a specialised Commission unit or independent scientific expert body could support DG COMP and provide expertise which would enable a more holistic and comprehensive approach towards ever more complex challenges.

The role of the Advisory Committee in merger control should be reinforced and upgraded to allow for broader competition policy discussions with the Member States. It could conduct independent assessments of efficiency gains linked to mergers and of the economic relevance of remedies in order to strengthen the Commission's decision in this field. The role of the Ministries in charge of competition policy in Member States should be reinforced, such as in the meetings of the Directors-General for Competition.

The Commission should also extend the expertise to DG COMP by drawing upon the expertise of sector specialists from others DGs in order to develop a more detailed and comprehensive approach to markets affected by mergers.

#### **6. Strengthening the Council's input into policy- and decision-making**

At a political level, the Competitiveness Council should, in agreement with the respective Presidency, have the opportunity to discuss merger policy with regard to the competitiveness of EU industrial sectors in order to provide input into the European Commission's strategy and policy. At a technical level, the Advisory Committee in merger control should make use of the potential it has to feed input from the Member States into decision-making based on competitiveness considerations.

#### **7. Encouraging behavioural remedies**

The European Commission should pay more attention to the relevance of behavioural remedies (e.g. commitments regarding price, quality or choice of contractual partners), especially if competition conditions may change in the short run, since such remedies are more flexible than structural ones (including sales of assets and other one-off irreversible measures modifying the companies structure). Such behavioural remedies should be subject to proper monitoring.