

# Obligation of the European Commission to review national civil court judgements?

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## **Abstract**

*National (civil) courts play a significant role in enforcing EU competition law as functional Union courts. This scientific article objective is to investigate the extent to which the European Commission is obligated to follow the decisions of national civil courts. The analysis requires an examination of the appropriate legal framework. As a result, in the first part of the paper, the European Commission obligation to take into account the decisions of the national courts from primary law perspective will be examined. Based on this, the second part explore the link between the European Commission and national courts from the standpoint of relevant secondary law. From the scientific methods we have used the analytical and descriptive method to analyse the current situation. By comparative method we introduce different views on the legal regulation. The presented topic has not been thoroughly examined in the literature on the subject thus far, giving the chance to identify avenues for future research.*

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## **1. Introduction**

Ensuring uniform application of Union law is considered the foundation of the EU, its guarantee a prerequisite of the legal community of its Member States. The uniform application of EU competition rules is not an objective in itself, but rather an integral component of the EU's efforts to construct a single market. From an EU standpoint, the European Commission is the primary authority in responsibility of enforcing EU competition legislation. However, the civil courts of the Member States have become more crucial institutions for enforcing it.<sup>3</sup> The starting point for the European Commission's EU competition law administrative action and the national civil courts' EU competition law case law is Art. 101 TFEU for antitrust law, Art. 102 TFEU for abuse control, and Art. 107 TFEU for state aid

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<sup>3</sup> Communication from the Commission to the European Parliament and the Council of 9 July 2014 COM(2014) 453 final, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives.

law, as well as the secondary legislation.<sup>4</sup> The EC Merger Regulation applies to merger control law.<sup>5</sup> The loyalty obligation in Art. 4 (3) TEU is intended to be a countercurrent principle. In light of this, we will investigate in the next parts the extent to which the European Commission is obligated to follow the decisions of national civil courts.

## 2. The aim and methodology

The aim of our article is whether the European Commission is obligated (or not) to follow the decisions of national civil courts. With regard to the characteristics of this article we apply the scientific methods of knowledge. The result of it is new knowledge which is organised into a certain system. On the basis of this, as well as on the content and scope of the article, we will also focus on the use of the logic method. Apart from the scientific methods of knowledge we have also used the analytical and descriptive method to approach and analyse the legal situation. We introduced different views on the legal regulation and the interpretation of examined notions. The data was collected from scientific literature through in-depth document analysis.

## 3. The fundamental principles and prerequisites for cooperation between the European Commission and national civil courts

### 3.1 Relationship between Union and national legal systems

From a Union perspective, "conflicts of law between Community and national antitrust law ... must be resolved according to the principle of the primacy of Community law".<sup>6</sup> Member State law that conflicts with Community/Union law is deemed inapplicable. The national courts are obliged to interpret national law in accordance with Community law/EU law. However, this finds its limits "in the general legal principles ... which are part of Community law, and in particular in the principle of legal certainty and the prohibition of retroactivity"<sup>7</sup> as well as in the principles of interpretation developed for the relevant Member State law. The overlapping administrative actions of the European Commission and national civil courts in the sphere of EU competition law,<sup>8</sup> which is addressed in this article, can occur only when EU legislation is directly applicable to the individual. National procedural law that weakens the enforcement of EU law is subject to the rule of the primacy of EU law; this is referred to as an important application of the so-called "indirect collision," whereby the conflict here is not necessarily resolved by non-

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<sup>4</sup> Whish, Bailey. *Competition Law*. 83-223.

<sup>5</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

<sup>6</sup> C-14/68, *Walt Wilhelm and others v Bundeskartellamt*, ECLI:EU:C:1969:4.

<sup>7</sup> C-213/02 P, *Dansk Rørindustri A/S v Commission of the European Communities*, ECLI:EU:C:2005:408.

<sup>8</sup> Funta. *Social Networks and Potential Competition Issues*. 193-205.

application of national law, but, to the greatest extent possible, by an application that takes into account the objective of Union law.<sup>9</sup>

### 3.2 Direct applicability of EU law, in particular EU competition law

Direct applicability means that Union law is not only directed at the Member States, but also has an impact on individuals in the absence of national implementation. Directly effective norms must be obeyed and (directly) enforced by authorities and courts; however, subjective rights of individuals might be related with directly effective norms. In its first paragraph of Art. 101 TFEU prohibits "agreements and concerted practices between two or more undertakings (or associations of undertakings) which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market." The second paragraph declares anti-competitive "agreements or decisions" null and void. The ban in Art. 101 (1) TFEU can "be declared inapplicable" in specific circumstances, according to the third paragraph of Art. 101 TFEU.<sup>10</sup> Abuse of a "dominant position" is considered "incompatible and prohibited with the internal market," according to Art. 102 TFEU, and is therefore expressed explicitly, unambiguously, and without reservation of implementation by the Member States.<sup>11</sup> As a result, in the *BRT-I*<sup>12</sup> ruling, the ECJ stressed the direct effect of Art. 102 TFEU. The direct applicability of Art. 102 TFEU is rarely substantially contested anymore, partly because it is also ordered by Art. 1 (3) regulation 1/2003 under secondary legislation. Unlike Art. 101 (1) TFEU and Art. 102 TFEU, the wording of Art. 107 (1) TFEU does not necessarily contain a prohibition, but rather indicates the incompatibility of specific assistance with the internal market, which can and will be read as a ban.<sup>13</sup> This could also be interpreted as having a direct effect.

### 4. Primary law

The considerations on the priority of national court decisions relate to the question whether a national court should give priority to a European Commission decision or a final court decision when evaluating it.<sup>14</sup> The question of how the European Commission would cope with the existence of a national (civil) court decision in its own decision-making process has yet to be answered in broad details. As functional Union courts, national (civil) courts play a significant role in enforcing

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<sup>9</sup> Funta, Golovko, Juriš. *Európa a Európske právo [Europe and European Law]*. 201-204.

<sup>10</sup> Kindl, Kupčík, Mikeš, Svoboda. *Soutěžní právo [Competition Law]*. 307-358.

<sup>11</sup> Jones, Sufrin, Dunne, Niamh. *EU Competition Law: Text, Cases, and Materials*. 137-204.

<sup>12</sup> C-127/73, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*. ECLI:EU:C:1974:6.

<sup>13</sup> Stehlík, Hamuřák. *Legal issues of EU Internal Market: Understanding the Four Freedoms*. 21-66.

<sup>14</sup> Karpat, *Zásada lojality v práve európskej únie [The principle of loyalty in the law of the European Union]*. 16-19.

EU competition legislation.<sup>15</sup> As a result of the courts becoming increasingly important, the question arises as to whether national courts are not only obliged to take into account (intended or adopted) decisions of the European Commission from primary law, but also whether the European Commission is obliged to take into account the decisions of the national courts. The European Commission is seen by the ECJ as the key decision-maker in the sphere of EU competition law, with the responsibility of ensuring its consistent application. The ECJ further stated in the *Masterfoods*<sup>16</sup> ruling that the European Commission, "is not bound by a decision" "which a national court in application of Article 85 paragraph 1 and 86 of the EC Treaty has taken." As a result, "the national law of a Member State or its previous practice in taking decisions cannot bind the Commission or the Courts of the European Union."<sup>17</sup> This viewpoint will be challenged further below.

#### 4.1 Principle of legal certainty

The notion of legal certainty has been acknowledged as an unwritten part of the ECJ's Community law, and it is incorporated into primary law under Art. 2 sentence 1 TEU.<sup>18</sup> Legal certainty is an essential component of the rule of law.<sup>19</sup> This principle mandates that legislation be clear and specific so that those subject to jurisdiction understand their rights and obligations and can take appropriate action.<sup>20</sup> The principle of legal certainty also applies to cases such as the prohibition of retroactivity and the preservation of legitimate expectations, the latter of which is primarily aimed at defending individuals' legitimate interests against the Union's law enforcement interests.<sup>21</sup> The fact that national courts are called upon to directly apply European Union law demonstrates the trust that the European Union legal order has in their jurisdiction. It is debatable whether the principle of legal certainty, which is basically founded on the common legal principles of the Member States, can be regarded as a separate legal source or should rather be regarded as a norm for interpreting (written) primary legislation.<sup>22</sup> It is also possible to claim that the principle of legal certainty, as an embodiment of the rule of law, at the very least prescribes the uniform application of Union legislation. The common principle of legal certainty can also be utilized to ensure that the European Commission and courts make consistent decisions. An obligation to consider this contributes to increased transparency of the legal position and can thus (at least in part) be inferred from the principle of legal certainty. The principle of legal certainty is closely linked

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<sup>15</sup> Miskolczi-Bodnár, Szuchy. *Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States*. 85-109.

<sup>16</sup> C-344/98, *Masterfoods Ltd proti HB Ice Cream Ltd*, ECLI:EU:C:2000:689.

<sup>17</sup> T-704/14, *Marine Harvest ASA v. European Commission*, ECLI:EU:T:2017:753.

<sup>18</sup> C-101/78, *Granaria BV v. Hoofdproduktschap voor Akkerbouwprodukten*, ECLI:EU:C:1979:38.

<sup>19</sup> Svoboda. *Úvod do evropského práva [Introduction into EU Law]*. 115-116.

<sup>20</sup> Králik, Králiková. *Základná inštitucionálna báza ochrany ľudských práv*. 16.

<sup>21</sup> Svák, Grünwald. *Nadnárodné systémy ochrany ľudských práv [Transnational human rights systems]*. 1-588.

<sup>22</sup> Tridimas, *Fundamental Rights, General Principles of EU Law, and the Charter*. 361-392.

to the idea of the area of law from Art. 3 (2) TEU and Art. 67 (1) TFEU, which seeks, on the one hand, an area without internal boundaries and, on the other, the preservation of the legal systems and traditions of the Member States. Even if these regulations are more about target norms than substantive regulations, and the goal is more judicial cooperation than overarching aspects of the law, it is clear that the principle of legal certainty is also in tension, as a result of the internal market concept on the one hand and decentralized enforcement of Union law on the other.<sup>23</sup> When comparing decisions of the European Commission and decisions of national courts, the criterion of legal certainty is not necessarily indicative of a gap in trustworthiness. Rather, the fact that national courts are called upon to explicitly execute Union law indicates the Union legal order's confidence in their ability. This speaks against deriving an obligation to take into account the principle of legal certainty entirely at the expense of national courts, and it could also be the reason why the ECJ no longer concentrated considerably on the principle of legal certainty in the *Masterfoods* case. It is also questioned whether the concept of legal certainty, whose source is essentially the common legal principles of the Member States, can serve as a separate legal source at all, or whether it should rather be viewed as a norm for interpreting (written) fundamental legislation. However, in this opinion, the ECJ should also be allowed to develop the law in the sake of legal certainty. It can also be argued that the principle of legal certainty, as a manifestation of the rule of law, at the very least specifies a uniform application of Union law as a goal, because a uniform assessment of the same facts contributes to the stability of legal relationships between economic operators, and thus to a stable foundation for the economy in the internal market (and the individual Member States).<sup>24</sup> This would also be reinforced if national courts, at least in principle, took into account rulings or even intended decisions of the European Commission.

Just as it can be argued that a national court's (relevant) consideration of an existing (or even intended) decision of the European Commission (in the sense of a ban on contrary decisions) serves to ensure legal certainty, it can also be argued that the European Commission's (relevant) consideration of an already existing civil court decision (in the sense of a ban on contrary decisions) serves to ensure legal certainty, especially when the court decision is final. However, it should be noted that civil courts in adversarial procedures employ a different method to determining the facts. The court determination of the facts is based on the parties' submissions. This can result in the civil court conducting a thorough investigation of the facts based on witness testimony, documents, and so on, which (at least in theory) corresponds to an official inquiry of the facts by the European Commission. The underlying facts, on the other hand, can be largely reliant on civil procedural processes. As a result, it is conceivable that this does not totally or accurately reflect reality in all areas. However, if the European Commission concludes that the facts to be assessed by it and the facts assessed by the civil court are identical, the question

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<sup>23</sup> Niels, Ralston. *Two-sided market definition: some common misunderstandings*. 118-133.

<sup>24</sup> Peráček, *The perspectives of European society and the European cooperative as a form of entrepreneurship in the context of the impact of European economic policy*. 38-56.

arises as to whether the principle of legal certainty does not obligate the European Commission to take the civil court's position as decisive (in the sense of a ban on contrary decisions). This is supported by the fact that the fact that national courts are relied upon to implement Union law directly is a statement of the faith that the Union legal order places in their competence. From the standpoint of legal certainty, attributing a binding or even non-binding orientation impact to pending civil court rulings in adversarial procedures makes little sense. The European Commission is not required to evaluate ongoing civil procedures since the parties to such a procedure have the ability to withdraw the court's decision-making authority at (nearly) any moment and the judges only make their judgment after all arguments have been exchanged. This is especially true given that the factual foundation of court and official processes is not always the same. The European Commission must consider the regulatory impact of a final national court ruling if EU primary legislation protects it on the basis of constitutional considerations (legal peace, stability of legal relationships, orderly administration of justice). The concept of legal peace can prevail over acknowledging the legal power of a judicial ruling.

#### **4.2 Loyalty requirement in conjunction with the assignment of tasks under primary law**

The principle of community loyalty was already understood as a constitutional principle based on reciprocity, according to which not only did member states have a duty of loyalty to the EU, but also the EU and its institutions had a duty of loyalty to the member state;<sup>25</sup> this principle is positively worded for the Union in Article 4 (3) TEU. Because this requirement of loyalty is understood as a fundamental principle of a federal order, and because Art. 4 (3) TEU emphasizes "mutual respect... for each individual's own spheres of action in the network of Union and Member States," it appears imperative that the European Commission comply with existing decisions of national courts issued on the same facts, must not fundamentally ignore them, but must at least take them into account. As demonstrated above, the concept of legal certainty supports this conclusion.<sup>26</sup> The need of loyalty is conceptualized as an equal, reciprocal commitment to collaborate and, viewed in isolation, does not imply a hierarchical gradient. This could argue against an obligation of the European Commission to refrain from taking decisions that are contrary to national court decisions.<sup>27</sup> The dual enforcement concept of Union law - direct enforcement by EU agencies, indirect enforcement by member state authorities and courts - is based on the organizational premise of a member state administration. However, the system of implementing competences in EU competition law deviates from this, because in EU competition law, only the

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<sup>25</sup> De Baere and Roes. *EU loyalty as good faith*. 829-874.

<sup>26</sup> Smulders, Gippini-Fournier, Gippini-Fournier. *Some Critical Comments on the Report of the Global Competition Law Centre on the Directly Applicable Exception System and the Direct Applicability of Article 81 (3) EC: Positive Enforcement and Legal Certainty*. 1-12.

<sup>27</sup> Králiková, Surma. *Mediation in Bankruptcy Procedure*. 14-19.

European Commission is permanently assigned implementing competences under primary law (Art. 105 TFEU), while national "authorities" are only assigned until there is a secondary law regulation according to Art. 103 TFEU, and Art. 107 TFEU. In this regard, the fact that the loyalty requirement not only does not specify any hierarchical gradient in favor of the courts, but – on the contrary – the European Commission as "primus inter pares" with regard to Art. 17 TEU and the special EU competition law provisions, works in favor of the European Commission. Against this backdrop, it is not evident that the European Commission is also obligated, under the loyalty duty, to avoid from making decisions that contradict national legal judgements.<sup>28</sup>

### 4.3 Effet utile

The ECJ has also argued in support of an obligation to consider the effet utile.<sup>29</sup> It could be claimed that national courts' autonomy in applying EU antitrust law does not necessarily hinder its practical efficacy. The ECJ used the idea of effet utile in favor of the national courts being obliged to take decisions of the European Commission into account. With this in mind, it may be claimed that the European Commission's examination of the application of EU competition law by national courts serves its practical efficacy, especially if these courts are particularly specialized. However, it is also justifiable that the European Commission's autonomous enforcement of Union competition law supports this purpose. It might thus be claimed that, on the basis of the effet utile notion, national courts are obligated to take European Commission judgments into account. Furthermore, on the basis of the concept of effet utile, it can be argued that a factual matter determined by the European Commission as the central authority (from the standpoint of primary law) and on which a final decision is based should no longer be able to be called into question before civil courts. In addition, the effet utile idea is also to be applied to secondary law and the European Commission is also the central decision-making body within the framework of the merger control regulation, so that here too (in conjunction with the loyalty requirement) there is an obligation of such relevant consideration.

### 4.4 Interim conclusion

Insofar as the facts of the case are identical, according to the view represented here, the duty of loyalty in the light of the principle of legal certainty results in the obligation of the European Commission to deal with the court decision, because primary Union law assigns an important task to the national courts when enforcing Union competition law, so that their voice should be heard by the European Commission. The question of whether the European Commission in this

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<sup>28</sup> Aravantinos. *Competition law and the digital economy: the framework of remedies in the digital era in the EU*, 134-155.

<sup>29</sup> Cullen. *Otis: Effet Utile and the Endless Expansion of Article 101 TFEU*. 618–620.

case has to use the court's assessment as a decisive basis (in the sense of a ban on contrary decisions) arises from the tension between the goal of a coherent application of Union law on the one hand and the European Commission's prominent position on the other. According to it the European Commission is required to consider "community interests," whereas national courts are not required to do so.<sup>30</sup> It's debatable whether this is correct in this context. National civil courts must deal with a complaint brought by a party in adversarial proceedings and within the framework of civil procedural regulations,<sup>31</sup> whereas the European Commission has a pick-up point where it discontinues Union interests. However, inasmuch as the European Commission has decided to take up a matter, it has done so in the interests of the Union. If the European Commission is confronted with a judgement by a national court on the same issue, it should be remembered that national courts<sup>32</sup> operate as functional Union courts in the implementation of Union competition legislation and are likewise expected to take Union interests into account, as stated in Art. 4 (3) TEU. The notion of loyalty does not presuppose any hierarchy, and under primary law, the division of tasks is established by the European Commission rather than by national courts. If the European Commission wishes to make a decision that would undermine the regulatory effect of a final court decision, it must consider whether a balance can be struck between effective enforcement of Union competition law<sup>33</sup> and the Union law goals of legal peace, stability of legal relationships, and orderly administration of justice, and whether the principle of legal certainty<sup>34</sup> under Union law already requires that a conflicting decision be avoided. The European Commission therefore contributes to the unity of the Union's legal framework.

## 5. Secondary law

Regulation 1/2003 is regarded as a significant secondary law formulation of the loyalty obligation. Regulation 1/2003, for example, outlines the objective of consistent implementation of competition rules and, in this context, discusses the mechanisms of collaboration between member-state courts and the European Commission. At the secondary law level, EU competition legislation imposes no requirements on the European Commission to take into account national, civil court judgements. However, Art. 11 (6) of the Regulation 1/2003 allows the European Commission to commence procedures at the expense of the authorities of the

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<sup>30</sup> Mihálik, Šramel. *Constitutional and Legal Foundations for Local Self-Government Law-making: Does the Slovak Republic Need More Precise Legal Regulation?* 393-415.

<sup>31</sup> Lazar, Dulak, Dulaková-Jakúbeková, Jurčová, Kirstová, Novotná, Muriň. *Občianske právo hmotné 2. Závazkové právo: Právo duševného vlastníctva [Substantive civil law 2. Law of obligations: Intellectual property law]*. 1-660; Horváth, *Princípy v. občianskom súdnom konaní [Principles in civil proceedings]*. 229-237.

<sup>32</sup> Szegedi. *Several Thoughts on the Coming into Force of the New Hungarian Civil Code, With Respect to Company Law*. 235-250.

<sup>33</sup> Šmejkal. *Three challenges of artificial intelligence for antitrust policy and law*. 97-118.

<sup>34</sup> Portuese, Gough, Tanega. *The Principle of Legal Certainty as a Principle of Economic Efficiency*. 1-35.



Member States. Because there is no corresponding regulation for national civil courts, which decide on civil claims in adversarial proceedings, it can be deduced that parallel proceedings in front of European Commission and courts are possible, but there is no obligation to take one or the other direction into account. Art. 15 (2) of the Regulation 1/2003, which provides for a member state's obligation to transmit corresponding judgments to the European Commission, may support the fact that the European Commission orients itself on such judgments.

#### **6. No obligation for the European Commission to identify relevant national court decisions**

Insofar as the European Commission is obligated to deal with the opinion of national civil courts where the facts of the case are identical, the question of whether the European Commission can get information of the relevant judgements at all arises. According to the point of view expressed here, the European Commission is required under the loyalty requirement to investigate any past court judgements if there are signs that such a decision has been made. This already corresponds to its role as monitor of the application of Union law (Art. 17 (1) TEU). However, it is debatable whether the duty of loyalty extends so far that the European Commission would be obligated without cause to investigate pending decisions to see if a court in one of the Member States has already dealt with the issue. The goal of a coherent implementation of Union competition law and the task of the European Commission to monitor Union law on the one hand, and the goal of a meaningful self-organization of the European Commission on the other, can be drawn from Art. 13 TEU and Art. 249 (1) TFEU. Thus, if a national court requires information that only the European Commission can provide, the principle of loyal cooperation will, in principle, require the European Commission to provide that information as soon as possible when requested by the national court, unless refusal is justified by overriding reasons.<sup>35</sup> This raises the question of whether national courts must notify the European Commission about their decisions. According to the view represented here, the obligation to cooperate from Art. 4 (3) TEU is not sufficient to the extent that the national civil courts, which decide in adversarial proceedings, would be obliged to make their judgments available to the European Commission proactively, i.e. on their own initiative, without cause and without request. Similarly, prior to the adoption of Regulation 1/2003 and the implementation of today's Art. 29 Regulation 2015/1589, the ECJ concluded that national courts should only be allowed to ask questions if this "proves to be compatible with the national procedural provisions".<sup>36</sup> This corresponds to the fact that the EU legislative has provided for secondary law regulation, but only for antitrust law: Art. 15 (2) of the Regulation 1/2003 requires member states to send judgements on Union antitrust law to the European Commission. In summary, the national courts only have to transmit their decisions

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<sup>35</sup> C-275/00, *European Community, represented by the Commission of the European Communities v First NV and Franex NV*. ECLI:EU:C:2002:711.

<sup>36</sup> C-234/89, *Stergios Delimitis v Henninger Bräu AG*. ECLI:EU:C:1991:91.

to the European Commission if they are obliged to do so under secondary law. Conversely, the European Commission must research corresponding decisions if it has any indication that such a decision has been made.

## 7. Conclusions

Even while national civil courts play an essential role in the implementation of Union competition law, the European Commission's responsibility to take national civil courts judgements into consideration cannot be inferred from basic legislation and is not governed by secondary law. Above all, the role of the European Commission as *primus inter pares*, which is laid down in primary law, speaks against such a duty. However, insofar as the facts of the case are identical, according to the view represented here, the obligation of the European Commission to deal with the court decision results from the requirement of loyalty in the light of the principle of legal certainty. In this case, the European Commission must also examine whether Union law protects the regulatory effect of a final court decision and whether contrary decisions should therefore be avoided. If the European Commission has cause to think that such a decision has been made, it must conduct an investigation. The European Commission is not compelled to conduct inquiries without a reason. There is a supplementary legal regulation for the domain of Union antitrust law with Art. 15 (2) of the Regulation 1/2003, which considerably streamlines the European Commission's access to national court judgements. However, there is no such obligation for the other areas of Union competition law, state aid law and merger control law.

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