

# Competition problems as a consequence of legislation

## Summary

The purpose of this study is to increase the understanding of the way in which competition problems can arise as a consequence of legislation. These potential competition problems are presented in a systematic way. The report is written to serve as an input for a checklist of justified and non-justified limitations of competition, that can be used by everyone within the ministries who is involved with draft legislation.

The study distinguishes between a legal and an economical approach towards competition problems. The economical analysis shows that perfect competition leads to an optimal level of social welfare. Restrictions on competition usually decrease the level of social welfare, and hence are not recommended. In certain circumstances however, there can be a reason for governmental intervention to correct market failure, or to serve general interests of a non-economical nature. From the legal perspective, competition problems arise when the behaviour of firms violates European and national competition law. The legislator can regulate competition, but only to the extent that this does not infringe European (and national) competition law.

The study answers the questions in what circumstances legislation creates restrictions of competition, and when legislation (possibly) infringes European (and national) competition law. It also lists the points of concern to be taken into account in the design of legislation to make it compatible with competition law.

The rules on competition do not apply to any activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity, or which is connected with exercising the powers of a public authority. However, the rules on competition can be applicable to governmental actions within the sphere of economic activity. States can take on an economic undertaking themselves, they can grant special or exclusive rights to undertakings and/or can entrust firms with the operation of services of general economic interest or which have the character of a revenue-producing monopoly, by means of which competition may be restricted or distorted. This can be justified by social-economical concerns of a general nature, on the condition that this conforms to criteria such as subsidiarity and proportionality.

The competition rules can also be applicable to the actions of Member States in an indirect manner, because they are bound by the loyalty clause, which stipulates that Member States shall abstain from any measure which could jeopardize the attainment of the objectives of the EC Treaty. Accordingly, this imposes a duty on Member States not to adopt or maintain in force any measure which could deprive the competition rules of their effectiveness. This requires the Member States not to introduce or maintain in force measures of a legislative nature which may render ineffective the competition rules applicable to undertakings. Such would be the case if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to the competition rules or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere. In practice this does not necessarily limit the material scope for governmental intervention in the competitive relations between undertakings, as long as the government follows the right procedural approach by, amongst others, deciding on the content of the rules itself or reserving to itself the possibility to do so.

Finally, if advantages without any compensatory payment are granted directly or indirectly through State resources, which favour certain undertakings or the production of certain goods, this can be in conflict with the rules on state aid, and has to be notified to the European Commission.

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## Mededingingsproblemen bij het ontwerpen van wetgeving; onderzoek naar een mededingingstoets voor wetgeving

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