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From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	5049/21
Subject:	Draft Council Conclusions on Special Report No 24/2020 from the European Court of Auditors entitled: <i>"The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight"</i>

Delegations will find attached a new revised Presidency text of the Draft Council Conclusions on the ECA's Special Report no. 24/2020

Changes to the previous version of the draft Council Conclusions are marked **in bold underline** (when text has been added) and in ~~strike through~~ (when text has been deleted).

The document will be presented and discussed at the Working Party on 20 January 2021.

Draft Council conclusions

on Special Report No 24/2020 from the European Court of Auditors entitled:

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

THE COUNCIL OF THE EUROPEAN UNION

1. WELCOMES the European Court of Auditors' Special Report No 24/2020 entitled "The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight" and **TAKES NOTE of** the Commission's observations to the Report.
2. HIGHLIGHTS that it is the first audit carried out by the Court on the Commission's activities as enforcer in the areas of merger and antitrust and NOTES that the Court's audit focused on: how effectively the Commission detected and enforced infringements of EU competition rules regarding mergers and antitrust; how the Commission cooperated with the national competition authorities (hereinafter "NCAs"); and how the Commission assessed its own performance and reported on it.
3. NOTES that, for the purposes of the audit, the Court examined documentation available at the Commission and conducted interviews with Commission staff. For merger control, the Court's audit focused on 13 proposed mergers notified to the Commission under the Merger Regulation between 2010 and 2017. For antitrust, the Court audited a sample of 37 cases which the Commission started investigating during 2010-2017, but also reviewed reports and other documentation of activities for 2018 and 2019. Also, the Court 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.

4. UNDERLINES that the Court's report 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 but NOTES the Court's conclusions that a number of improvements are necessary in a number of areas.
5. TAKES NOTE of the findings of the Report, in particular that:
 - There are some limitations in the Commission's market monitoring, detection and investigation capacity;
 - The Commission made good use of its enforcement powers but challenges remain;
 - The Commission cooperated closely with NCAs, but there is room for improvement;
 - The Commission provides only limited information on the achievement of objectives such as consumer welfare.
6. NOTES the Court's first recommendation that, in order to improve the detection of infringements, 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 on clearly weighted criteria, for example by using a scoring system.
7. NOTES the Court's second recommendation that in order to address competition issues on EU merger control in an efficient manner and to respond faster to the evolution of markets, in particular the digital ones, the Commission should:
 - 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;
 - 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);

- Perform a study of the deterrent effect of its fines and update its fine-setting methodology as appropriate.
8. NOTES the Court’s third recommendation that, in order to use the full potential of the European Competition Network (hereinafter “ECN”), the Commission should (i) better coordinate market monitoring with the NCAs and enhance sharing information on priorities within the ECN to increase transparency and strive for complementarity, and (ii) promote better use of its early warning mechanism as well as an allocation of cases (in particular in complex digital markets) which avoids many competition authorities looking at a similar behaviour by the same company.
9. NOTES the Court’s fourth recommendation that, in order to enhance transparency and accountability to the European Parliament and citizens, the Commission should:
- Regularly carry out *ex post* evaluations of its enforcement decisions, including of their impact;
 - 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.
10. **CONSIDERS that those regular independent assessments should also be developed together with Member States, carried out by independent institutions and focused on the impact of important enforcement decisions.**
11. ACKNOWLEDGES the importance of EU competition rules enforcement in enabling the proper functioning **and competitiveness** of the EU internal market and as a key driver for the well-being of EU citizens, businesses and the European society as a whole, TAKES NOTE of the observations of the Commission to the Court’s findings and recommendations and CONSIDERS the report to be a useful contribution to reflections of the Commission and Member States on how to further improve EU competition rules and their enforcement.
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