



European Economic and Social Committee

INT/868
Report on Competition Policy 2017

OPINION

European Economic and Social Committee

Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Report on Competition Policy 2017
[COM(2018) 482 final]

Rapporteur: **Baiba MILTOVIČA**

Referral	European Commission, 05/09/2018
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
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Outcome of vote (for/against/abstentions)	188/1/9

1. **Conclusions and recommendations**

- 1.1 The EESC welcomes the concise style and focus of the 2017 Report which is supported by an extensive Staff Working Document. An effective and enforced competition policy is the bedrock of a sustainable market economy. It can ensure a level playing field for producers of goods and services, reassure consumers, stimulate competition and deliver fundamental social objectives, such as consumers' freedom of choice, as well as political objectives, such as the well-being of European citizens and promoting European market integration. With third countries it also plays an important role in supporting positive business, environmental and social dynamics in international trade.
- 1.2 The 2017 report places a strong emphasis on compliance and enforcement and provides examples of forceful action taken by the Commission. Consumers and small and medium-sized enterprises are often placed at a disadvantage by large companies possibly abusing their dominant market position, and so the measures which tackle anti-competitive practices are particularly welcome.
- 1.3 The growth of anti-competitive activity in EU markets has seen the steady development of National Competition Authorities (NCAs) as important enforcers of competition law. The ECN+ Directive, empowering NCAs to be more effective, strengthens national capacity in this area.
- 1.4 The reinforcement of NCAs' autonomy and the provision of adequate resources is vital. Genuine independence, expertise and training are all necessary for effective work, and the ECN+ Directive should be closely monitored to see that this is achieved. Preventive action should be encouraged to avert anti-competitive conduct and penalties should be increased so that they are an effective deterrent.
- 1.5 The EESC supports the Commission in the area of private legal enforcement of the competition rules and argues that class actions should be facilitated by the legal systems of all Member States. The Commission should continue to monitor the effectiveness of collective redress mechanisms for competition law infringements in the various Member States and take further action if necessary. In this regard, the Commission's proposal on representative actions, included in the proposal for a New Deal for Consumers, is disappointing.
- 1.6 Further proposals on franchising, to be included in the Block Exemption Regulation in order to restore the commercial and contractual balance between franchisees and the franchisor, should be considered.
- 1.7 Where there are significant para-commercial activities run by local authorities which may benefit from public subsidy enabling unfair competition these should be studied to see whether an adaptation of state aid rules or other instruments is necessary.
- 1.8 Concerning the Whistleblowers' Directive, it is recommended that in its transposition and application, national law should affirm that whistleblowers have access to trade union

representatives at all times and that full protection is afforded to the whistleblower in all circumstances.

- 1.9 Where applicable to the enforcement of competition law it is suggested that a detailed analysis by the Commission of the practices of energy regulators across all Member States in conjunction with CEER and ACER may identify actions that could eliminate restrictive practices, which continue to be detrimental to consumers.
- 1.10 A new review of the functioning of the food distribution chain in future competition policy reports could identify and propose remedies for the continuing exercise of market power by dominant retailers, which may prove to be inappropriate.
- 1.11 There are a range of anti-competitive practices existing and continually being created within the digital economy. The Committee is concerned that adequate resources are not applied to monitoring this rapidly developing and financially vibrant sector and urges specific provision to do so within the Multiannual Financial Framework.
- 1.12 There are a number of factors which lie outside the immediate scope of competition policy yet create concerns about market distortions: wide variations in corporate taxation policy between Member States, employment practices collectively known as social dumping, practices arising within the gig economy and issues relating to the circular economy and global economic sustainability. The Committee urges the Commission to apply the full extent of its powers and capacity to ensure that those grey areas where anti-competitive behaviour exists are, where possible, monitored, clarified and remedied.
- 1.13 Competition law is one of the oldest parts of the *acquis* but is not always commensurate with the challenges of this century. In particular the artificial separation of market and socio-environmental spheres would benefit from a comprehensive and systemic review of EU competition law taking into account economic, environmental and social objectives.

2. **Gist of the 2017 Report on Competition Policy**

- 2.1 Competition policy is the bedrock of the Single Market and has been in place since the Treaty of Rome and the foundation of today's European Union. It has been set within a framework enshrined in provisions such as Articles 101 and 102 TFEU, which clarify its substance and scope.
- 2.2 2017 saw specific actions to the benefit of consumers and European industry in key areas: the digital economy, energy, the pharmaceutical and agro-chemical sector, the network industries and the financial markets. This summary highlights the main points of the Report, which is itself a summary of extensive work across numerous economic sectors.
- 2.3 Policy needs to be translated into rules and rules must be enforced. The European Commission is a founder member of the International Competition Network and is also active in all international forums devoted to competition, including the OECD, UNCTAD, the WTO, and the World Bank. In particular, the Commission works closely with national competition authorities

and has proposed new rules in the form of a Directive¹ to enable Member States' competition authorities to be more effective enforcers of EU antitrust rules.

- 2.4 It is important that individuals who have knowledge of the existence or functioning of a cartel or other types of antitrust violations have the means to bring such practices to light. A new, anonymous whistleblower tool has been launched which facilitates this and it is in active use.
- 2.5 Requirements regarding the notification of smaller and less problematic state aid measures have been simplified and exemptions introduced, and 24 Member States have joined the Transparency Award Module providing state aid information.
- 2.6 Rigorous competition enforcement in concentrated markets has been undertaken. The pharmaceutical sector saw the Commission's first investigation into concerns about excessive pricing practices in the pharmaceutical industry; several mergers in the agro-chemical sector were scrutinised and a merger in the cement industry which would have reduced competition was prohibited.
- 2.7 In the energy sector, enforcement actions got underway in relation to state aid and capacity mechanisms and the investigation of Gazprom's business practices in Central and Eastern Europe continued with a preliminary finding that EU antitrust rules were being broken.
- 2.8 In transport, acquisitions in the aviation sector were examined and anti-competitive actions in rail transport were identified in Lithuania, resulting in fines and remedial action, and the provision of state aid to the sector in Greece and Bulgaria was supported. Anti-cartel action was taken against Scania with regard to road haulage, and several firms in the car parts sector were subjected to heavy fines.
- 2.9 The extension of the General Block Exemption Regulation to ports and airports facilitated the provision of appropriate state aid.
- 2.10 The Commission's investigation into the proposed merger between Deutsche Börse and London Stock Exchange Group concluded that this would be monopolistic, and as a result it was prohibited.
- 2.11 It is noted that EU competition policy will need to respond constructively and creatively to the challenge of UK withdrawal from the EU. As set out by the European Council, any future trade agreement should ensure a level playing field, notably in terms of competition and state aid.

3. **General comments**

- 3.1 The EESC welcomes the 2017 Report, which contains numerous examples of the Commission's focus on the promotion of consumer well-being and the prevention of consumer harm. A consequent effect of this approach is not only to strengthen the integration of the Single Market but also to strengthen economic development and related social policy objectives.

¹ http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf

3.2 In the last year, the EESC's opinions have frequently identified the importance of an effective and applied competition policy. Consumer welfare and well-being benchmarks alongside the maintenance of an effective competitive structure provide the rationale for addressing exploitation, exclusionary practices, and restrictive agreements. By encouraging best economic practice, a firm competition policy encourages the strengthening of European business in competitive world markets and the promotion of those social objectives on which it is founded.

3.3 Automotive emissions

3.3.1 In the EESC Opinion on EU actions to improve environmental compliance and governance² it was noted that lack of respect for the mechanisms that guarantee the implementation of environmental legislation and governance is a regrettable factor that contributes to unfair competition and economic harm. The Committee notes that compliance and adherence to the rule of law is fundamental to a strong competition policy.

3.3.2 In this context the Committee appreciates the fact that the Commission's preliminary investigation of a possible cartel involving BMW, Daimler, Volkswagen, Audi and Porsche, into whether the companies restricted the development of selective catalytic reduction systems and particulate filters, potentially limiting the roll-out of more environmentally friendly technologies, has now led the anti-competition team to open a formal investigation.

3.4 Collective redress mechanisms

3.4.1 The Committee notes the final transposition of the Damages Directive³ which, in part, addresses the issue of providing a legal mechanism for collective actions. However, the withdrawal of the proposal for a directive prepared by DG COMP in 2009, when taken together with the proposal recently included in the New Deal for Consumers package, signals a lack of political will to take significant steps towards establishing a genuinely efficient framework for representative actions at European level. The EESC therefore urges the Commission to continue to monitor the effectiveness of collective redress mechanisms for competition law infringements in the various Member States and take further action if necessary.

3.5 Retail franchising

3.5.1 The EESC notes that there is a growing problem relating to franchise contracts in the retail sector which may have serious competition implications. For example, a major dispute in the Netherlands between the franchisor HEMA and a number of franchisees concerning existing contracts and the portion of earnings from internet sales has resulted in the cancellation of franchisee contracts. The Committee calls on the Commission to analyse this situation and come forward with additional proposals on franchising that could be included in the Block Exemption

² [OJ C 283, 10.8.2018, p. 69.](#)

³ Directive 2014/104/EU on Antitrust Damages Actions.

Regulation⁴ in order to restore the commercial and contractual balance between franchisees and the franchisor.

3.6 Subsidies at local authority level

3.6.1 In many Member States, local authorities are turning to the development of commercial activities using publicly owned resources or facilities. This can lead to unfair competition if an element of subsidy is present. For example, SMEs in the food services industry and tourism are faced with subsidised activities in the canteens of sports clubs, leisure centres etc. Local authorities own or offer public funds to these clubs and associations who are often exempted from paying VAT and benefit from social premiums, such as volunteer work. These para-commercial activities are frequently organised (in terms of turnover and profits) as a normal commercial enterprise. The Committee calls on the Commission to monitor this phenomenon and see whether an adaptation of state aid rules or other instruments could be developed at EU level to regulate these local activities, which in some cases are even subsidised with EU funds!

3.7 Information on state aid

3.7.1 The availability and use of the Transparency Award Module (TAM) is particularly welcome as it allows interested stakeholders (the Commission, competitors and the wider public) to verify the conformity of State aid with the rules. To date, about 30 000 aid awards have been published.

4. **Specific Comments**

4.1 The ECN+ Directive

4.1.1 The EESC is encouraged by the emphasis on enforcement in the report and has taken this opportunity to restate its views⁵ about the ECN+⁶ Directive, which empowers NCAs to be more effective.

4.1.2 The Committee has previously stated its view that a Regulation could be a more effective legislative instrument in this area but recognises the need for proportionality. In addition, competition policy should guarantee equal opportunities, with NCAs having at their disposal the legal measures and instruments needed to tackle secret cartels.

4.1.3 Although the ECN+ Directive should guarantee independence, resources and an effective toolbox to carry out enforcement, questions remain about NCAs' autonomy and capacities. Genuine independence, expertise and training are all necessary for effective work. Preventive action should be encouraged to avert anti-competitive conduct and penalties increased so that

4 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010R0330>.

5 [OJ C 345, 13.10.2017, p. 70](#).

6 Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM/2017/0142 final.

they are an effective deterrent. NCAs should also have the power to institute legal proceedings in their own right.

4.2 Whistleblowers' protection

4.2.1 Further work needs to be undertaken with regard to informing the public about competition rules. This will enhance the effectiveness of new tools which are available for reporting infringements, such as the whistleblowers tool. Although the EESC is encouraged to see that this tool is in regular use, it has a number of concerns about the proposed Directive, which aims to strengthen whistleblowers' protection⁷.

4.2.2 The EESC refers the Commission to its Opinion on this Directive⁸ where it recommends that the scope of the Directive should not be limited to compliance with EU law but rather extended to include compliance with national law.

4.2.3 It is also important that reference be made to the inclusion of workers' rights and that trade union representatives and NGOs be mentioned as examples of legal persons. Whistleblowers should have access to trade union representatives at any stage of the process.

4.3 The digital economy

4.3.1 The EESC notes that the new Consumer Protection Cooperation Regulation⁹ was adopted at the end of 2017 and should ensure better coordination among consumer networks to enforce measures against cross-border anti-competitive practices. For example, the Regulation identifies geo-blocking practices in the e-commerce sector, which, by its very nature, is a cross-border issue. European Consumer Centres have worked on this issue for many years, gathering cross-border examples and practices. Together with the European Competition Network and the Consumer Protection Cooperation Network, better coordinated enforcement action is now anticipated.

4.3.2 In the fast-growing area of the digital economy, anti-competitive practices of many other types are continually being created. For example, the use of sophisticated algorithms can adjust prices based on a person's data collected from various online sources, and it also helps companies engage in online collusion. Adequate budgetary resources need to be at the Commission's disposal to monitor and counteract these practices.

4.4 The EESC believes that better cooperation between the NCAs and consumer organisations would be beneficial for both sides, especially as national consumers' organisations are very well placed to inform the NCAs about suspected infringements. In fact, they can provide the authorities with valuable data from their own handling of complaints.

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Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law [COM(2018) 218 final].

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EESC opinion on *Strengthening whistleblower protection at EU level*. Rapporteur: Franca Salis-Madinier (not yet published).

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Regulation (EU) 2017/2394.

- 4.5 The Energy Union can stimulate the ongoing process of bringing fair competition to the EU energy sector, which is still an area where there is a wide range of consumer and industry pricing and where market choice can be restricted. The EESC believes that a detailed analysis of regulatory practices – which vary considerably between Member States – will provide the basis for constructive dialogue to resolve discrepancies and this should be jointly conducted by NCAs, national energy regulators and the Commission. This may shine a light on the lack of choice and restrictive practices in, for example, district heating schemes.
- 4.6 The inappropriate exercise of market power in the food retail sector is an ongoing issue. The Commission raises the question of whether large retail chains have obtained too much bargaining power (in the bilateral negotiations with their suppliers) and buyer power (in the market overall) thanks to their dual role of customers and competitors (through private labels) of their suppliers¹⁰. The Committee urges action in line with its recent Opinion on this subject¹¹ and repeats its recommendation that the Commission includes monitoring of the functioning of the food distribution chain in future competition policy reports.
- 4.7 Competition law and the wider public interest
- 4.7.1 Market distortions can be caused by a number of factors which lie outside the strict scope of competition policy. Amongst these are wide variations in corporate taxation policy between Member States, employment practices collectively known as social dumping, practices arising within the gig economy and issues relating to the circular economy and global economic sustainability.
- 4.7.2 Competition law, rooted in mid-20th century economic perspectives, now needs to live up to the challenges of the 21st century. To overcome the artificial separation of market and socio-environmental spheres, a comprehensive and systemic review of EU competition law should be initiated, taking into account economic, environmental and social objectives.
- 4.7.3 The EESC believes that the commitments made by the EU on the Sustainable Development Goals (SDGs) and the Paris Agreement on climate change, in addition to the existing commitments in the treaties, should be taken into account as public interest objectives in the application of competition law alongside those of consumer interests.
- 4.7.4 The effects of market concentrations on future generations of consumers and producers should be acknowledged. Different calculation models for detrimental long-term effects should be assessed, e.g. as already done in public procurement via life cycle costing.
- 4.8 The EESC, in several recent opinions¹² has called for measures relating to fair taxation undertaken by the European Commission (regarding multinationals and individuals) to be

¹⁰ Commission Staff Working Document SWD(2018) 349 final.

¹¹ [OJ C 283, 10.8.2018, p. 69.](#)

¹² [OJ C 262, 25.7.2018, p. 1;](#) [OJ C 197, 8.6.2018, p. 29;](#) [OJ C 81, 2.3.2018, p. 29.](#)

strengthened as many outstanding issues remain unresolved. These include the fight against tax fraud, tax havens, aggressive tax planning, and unfair tax competition between Member States.

- 4.9 In particular there are ongoing and substantial market distortions caused by the widely varying national corporate tax regimes between Member States, where corporate taxation ranges from 9%-35% and even lower rates are available in some countries in categories such as intellectual property rights. Because taxation policy is a national competence, EU competition policy will always struggle to moderate the distortions caused.
- 4.10 The Anti-Tax Avoidance Directive (ATAD), which should be applied via Member States' laws by 1 January 2019, lays down rules against tax avoidance practices that directly affect the functioning of the internal market and contains elements that should help to avoid some divergent national approaches, and this is to be welcomed.

Brussels, 12 December 2018

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