European Economic and Social Committee

INT/149
XXXIst Report on
Competition Policy 2001

Brussels, 22 January 2003

OPINION

of the

European Economic and Social Committee

on the

XXXIst Report on Competition Policy 2001

(SEC(2002) 462 final)

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On 29 April 2002, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

XXXIst Report on Competition Policy 2001
(SEC(2002) 462 final).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 19 December 2002. The rapporteur was **Mr Barros Vale.**

At its 396th plenary session (meeting of 22 January 2003), the European Economic and Social Committee adopted the following opinion by 120 votes in favour, nine votes against and five abstentions.

1. Introduction

1.1 The report opens with a reaffirmation of the importance of enforcing competition rules as one of the central elements in the economic functioning of the single market and as one of the Commission's key tasks. Emphasis is placed on the essential role of competition policy in establishing an ever more balanced and equitable framework which becomes more forceful the more the economy becomes globalised.

1.2 Referring to the main topics to be addressed, the introduction sketches out the broad content of the report, covering antitrust rules, EU enlargement, state aid and the prominence which all these measures should be given as instruments of benefit to European citizens.

2. General background

2.1 The final phase of introducing the euro and the unprecedented enlargement of the EU create a need to modernise the rules on antitrust, mergers and state aid, which, if not met, will mean that the Commission's action is out of step with this rapidly evolving economic environment.

2.2 In this respect, ensuring a level playing field in the new markets where competition is not yet fully established will continue to be a priority activity for the Commission.

2.3 With the globalisation of markets, there are now worldwide concentrations, making it necessary to intensify international cooperation between various bodies, namely through the International Competition Network.

2.4 The adoption of the state aid scoreboard and the opening to the public of an online state aid register are evidence of significant improvements in this field in 2001.

2.5 The present report covers the broad areas in which the Commission plays an active role in the field of competition policy. These are identified as constituting major obstacles to free competition. However, there is no mention of mechanisms to address other distorting factors which, looked at on a Europe-wide scale, have considerable significance.

2.6 Similarly, there does not seem to be any cooperation between the various Commission DGs to forge a concerted policy to promote free competition which goes beyond the components explicitly mentioned in the report and referred to in points 3.2.1, 3.2.2, 3.2.3 and 3.2.4 of this opinion. The EESC feels it would be useful to have some indication of whether or not procedures of this kind are in place to address issues which are very relevant to ensuring effective free competition.

3. Main topics of the report

3.1 In general terms, the report may be described as very comprehensive, not only in the large amount of information it contains, but also the many real-life cases which are described, the questions raised throughout and the solutions proposed, documenting as it does the Commission's intense activity in this area in 2001. The total number of new proceedings for that year was 1036, slightly less than the 2000 figure, which was 1211. Meanwhile, the number of cases settled rose to 1204, with a noteworthy reduction in the backlog.

3.2 The XXXIst Report on Competition Policy 2001 retains the same thematic structure and presentation as the 2000 report, divided as it is into five broad chapters covering the main topics. There follows a brief summary of these topics:

3.2.1 Antitrust – Articles 81 and 82; state monopolies and monopoly rights – Articles 31 and 86

3.2.1.1 The modernisation of the legislative framework of competition, particularly the rules implementing Articles 81 and 82, is still on the Commission's work agenda. A proposal for a regulation introducing a new system for implementing Articles 81 and 82 was adopted in September 2000.

3.2.1.2 In a wide-ranging debate on the subject in May 2001, the Council highlighted the functioning of the network of competition authorities in the interests of ensuring that these rules are implemented consistently in all Member States.

3.2.1.3 Another important point was the approval in 2001 of new draft rules aimed at facilitating the detection and eradication of cartels, especially those involved in price-fixing. As part of the fight against cartels, the Commission Notice on immunity from fines and reduction of fines in cartel cases was revised after five years[1].

1 EESC Opinion: OJ C 48 of 21.02.2002 (rapporteur: **Mr Sepi**)

3.2.1.4 Secret cartel agreements continue to be among the most serious restrictions of competition, but 2001 was a record year for cartel decisions, as shown in the significant increase in the number of cases dealt with.

3.2.1.5 In December the Commission adopted a report evaluating the functioning of the technology transfer block exemption regulation (TTBE). The report finds that the TTBE uses criteria relating more to the form of the agreement than to the actual effects on the market. The regulation is also felt to be too prescriptive and its scope is in need of review.

3.2.1.6 In December the Commission adopted a notice on agreements of minor importance ("*de minimis*") which do not appreciably restrict competition under Article 81(1), defining more clearly and comprehensively when agreements between companies are not prohibited by the Treaty.

3.2.1.7 In May 2001 a decision was adopted on the terms of reference of hearing officers in certain competition proceedings, aimed at reinforcing the independence and authority of the hearing officer (who will now be attached to the Member of the Commission with special responsibility for competition).

3.2.1.8 The sector-by-sector evolution of competition is described in detail in the present report, focusing in particular on the energy sector (specifically the liberalisation of electricity and gas), postal services, telecommunications, transport (air, sea and rail), the media, motor vehicle distribution, financial services (implementing competition policy is intended to make Europe's financial markets more competitive and efficient), the information society and the Internet, sport and pharmaceuticals.

3.2.2 **Merger control**

3.2.2.1 There was a slight decline in merger operations in 2001 (after seven years of rapid growth), which by no means signalled a decline in the Commission's activities in this field. In fact, even though the number of notifications decreased, the Commission took 339 final decisions, including five prohibition decisions (the highest number of prohibitions to date in one year[2]).

3.2.2.2 The remedies found in 2001 were not restricted to directly restoring effective competition conditions by creating the conditions for the emergence of new competitors. The Commission showed itself to be open to other divestment remedies, as well as to more complicated commitments than straightforward divestment.

3.2.2.3 At the same time, significant progress was made in 2001 in relation to remedies decided upon in 2000, with considerable progress seen in the implementation of remedies by enterprises involved in authorised operations.

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2 Two of these decisions have since been annulled by the Court of Justice.

3.2.2.4 The fundamental objective of controlling mergers continues to be to protect consumers from the implications of monopoly power or of a dominant position (higher prices, lower quality and less innovation).

3.2.2.5 The definition of the relevant geographic market is a central element in competition analysis. In 2001 the Commission analysed market definitions adopted in its merger decisions over the last five years. The Commission has also carried out detailed research into product markets, reaching the conclusion that neither product market definition nor geographic market definition result in a static analysis of simple market share addition, but form the starting point for an analysis of the market dynamics prevailing in a specific industry.

3.2.2.6 The most important development on the subject of mergers was the publication in December of the **Green Paper on the Review of the Merger Regulation**[3], which looks at the new challenges posed by global mergers, the introduction of the euro and EU enlargement to 25 or more Member States.

The Green Paper proposes substantive, procedural and jurisdictional amendments:

3.2.2.6.1 With regard to competition, the Commission proposes to introduce automatic Community competence over cases subject to multiple filing requirements in three or more Member States. This would remove the turnover thresholds.

3.2.2.6.2 The Green Paper also proposes simplifying the requirements for referrals by facilitating proper work-sharing between the Commission and the Member States.

3.2.2.6.3 Business practices have evolved, which provides grounds for updating the concept of a concentration. The Green Paper points out the difficulties perceived in this area, but does propose some amendments to the current provisions, specifically with regard to multiple transactions. It also opens a debate on the virtues of the dominance test in effect in the current Regulation as a means of assessing mergers, but does not arrive at any conclusions.

3.2.2.6.4 Various measures are proposed for procedural simplification, particularly with regard to cases where there are no competitive concerns and certain venture capital transactions.

3.2.2.7 Lastly, it is worth noting that that Commission has built up cooperation with third countries in the field of competition, culminating in the creation of the International Competition Network. 2001 also saw a new development in the referral of merger analysis to national authorities.

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3 The EESC has already issued a favourable opinion on this subject (OJ C 241, of 27.10.2002, rapporteur: **Mr Lagerholm**)

3.2.3 **State aid**

3.2.3.1 The need to achieve further reductions in overall aid levels and to redirect aid towards horizontal objectives of Community interest was underlined by the Stockholm European Council of March 2001.

3.2.3.2 Among advances in transparency are a new state aid register which is accessible to the public and the publication of the state aid scoreboard.

3.2.3.3 A process of simplifying state aid procedures has also begun, especially for clear-cut cases.

3.2.3.4 In October 2001 a draft regulation was adopted which provides for exempting from notification state aid aimed at creating new jobs.

3.2.3.5 The Commission adopted a Communication on state aid and risk capital designed to promote the provision of risk capital in different Member States, which illustrates how these rules are geared to market developments.

3.2.3.6 The monitoring of state aid in the form of taxation remains one of the Commission's priorities. Tax schemes conferring advantages on certain types of activity (financial services, off-shore activities) continue to warrant special attention. This form of state aid should also be given particular attention in the context of EU enlargement.

3.2.3.7 One aspect which is dealt with in this section of the report is the **concept of aid**. It lays down the principle of disallowing all those cases where aid granted by a Member States distorts or threatens to distort competition by conferring an advantage on certain undertakings or types of production.

3.2.3.8 The issue of granting direct EU aid to enterprises is not addressed. Such aid should come under the heading of public aid, thus warranting appropriate examination by the Commission in future.

3.2.4 **Services of general interest**

3.2.4.1 The importance of services of general economic interest continues to be highlighted, especially in view of the role they play in promoting social and territorial cohesion in the EU, that is, as an essential component of the European social model.

3.2.4.2 The Laeken European Council of December 2001 recommended increased legal certainty in the application of competition rules to services of general interest. It is also suggested that there should be better coordination between methods of funding services of general economic interest and the monitoring of state aid, as well as a regular assessment of such services.

3.2.4.3 In the interests of greater transparency, the Commission undertakes to devote a specific section of its annual competition report to services of general interest.

3.2.4.4 Following the guidelines set by the Lisbon European Council of March 2000, the Commission continued in 2001 to promote market opening in areas such as gas, electricity, postal services and transport by making legislative proposals and by monitoring the implementation of existing EU legislation on competition.

3.2.4.5 The preparation and negotiation of the accession processes for new EU Member States, bilateral cooperation (especially with the USA, Canada and other OECD countries) and multilateral cooperation were the broad areas covered by the Commission in 2001 in terms of general economic interests.

3.2.4.6 The Commission has drawn up regular reports on the progress made by each candidate country.

3.2.5 **Outlook for the future**

3.2.5.1 There is a proposal for a new **regulation implementing Articles 81 and 82 EC**[4].

3.2.5.2 There is a proposal to adopt an updated and revised notice on **enforcement activities**.

3.2.5.3 It is proposed to continue the consultation work started with publication of the **Green Paper on the Review of the Merger Regulation**[5].

3.2.5.4 There is a proposal to speed up and simplify the handling of the simplest **state aid** cases, as well as making rules and procedures more transparent.

3.2.5.5 **In the international sphere**, the Commission intends to continue to pursue its **dual policy** of enhancing bilateral cooperation with its foreign counterparts (USA and Canada, Japan) and exploring possibilities for expanding multilateral cooperation.

4. **Conclusions/Recommendations**

4.1 With a view to the forthcoming enlargement, the Committee feels it is vital that the Commission focus greater attention on the candidate countries so as to ensure that the same rules are applied, with the same effectiveness, throughout the EU.

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4 EESC Opinion, OJ C 155 of 29.05.2001 (rapporteur: **Mr Bagliano**)

5 See footnote 3.

4.2 In the context of the forthcoming enlargement, the Committee is anxious to know whether the CEECs will in fact be able to comply with all the provisions of the acquis communautaire on competition, bearing in mind the practice and history of state aid to particular enterprises.

4.3 The EESC feels that there is an urgent need to introduce a new, more efficient and decentralised system which is less bureaucratic. This will necessarily involve national authorities taking greater responsibility for competition without undermining the Commission's powers of investigation and monitoring in the process, so as to enhance the internal market and guarantee a level playing field for enterprises.

4.3.1 With regard to consistency in implementing these measures, it is worth highlighting the fact that notifications are not compulsory and that agreements are always assumed to be legal whenever they are below the threshold of established market shares.

4.4 Given that the detection of secret cartels is one of the key elements of competition policy, the Committee agrees that it is vital to increase and extend the Commission's powers of investigation.

4.5 The EESC endorses the Commission proposal for automatic Community competence, as referred to in point 3.2.2.6.1 of this opinion, as this will enable the Commission to take direct action in such situations, thereby strengthening the level playing field in European merger control.

4.6 With the globalisation of markets happening at an ever faster rate, the EESC feels that there is a greater need for cooperation between the relevant bodies in the various countries and/or economic blocs responsible for controlling competition. This cooperation must be developed further, either within the WTO or on other, less formal levels, bearing in mind the need to obviate tension and to seek compromise between different conceptions/values found in the various regional markets.

4.7 The EESC agrees that it would be a positive step if the block exemption regulation for technology transfer agreements (RITT) were to stop working as a "straitjacket", as it is described in the report, instead serving to encourage more efficient and balanced transactions.

4.8 The Committee feels that the more economics-based approach of the notice on agreements of minor importance ("de minimis") is a positive development, as is the reduction of the administrative formalities, which will benefit smaller enterprises in particular.

4.9 The Committee feels it is important to establish mechanisms to make competition more intense, especially in highly regulated markets where competition is not very intense and where customers are highly dependent given the small number of suppliers.

4.10 In the EESC's view, it would be very interesting if the Commission report gave a clear account of how the candidate countries have been prepared for competition, with particular regard to their legal systems.

4.11 The Commission report does not mention the question of limitations imposed on competition by professional associations. Bearing in mind the implications this can have, the Committee feels that it merits attention and, if necessary, intervention by the Commission.

4.12 On the subject of sport, and football in particular, based on Box 5 of the Commission report, the Committee would draw attention to the fact that the penalties mentioned may act as an obstacle to the free movement of labour, thereby distorting competition. The Commission should examine all agreements that might jeopardise the free movement of workers.

4.13 The Committee feels that it must be a concern of the Commission to publicise the laws on competition widely, as well as information on how to report infringements, so that the general public, who are one of the most important allies in the fight against anti-competitive conduct, are aware of this issue and know how to go about reporting such cases.

4.14 In the EESC's view, it is important that the rules and parameters for analysis of the relevant geographic markets are transparent and clear.

4.15 The Committee suggests that, for ease of reading, the case studies should come at the end of the report, thereby making it possible to get a rapid grasp of the content.

4.16 Although not the direct responsibility of DG Competition, there are questions which have not been addressed under the general headings of the Commission report and which, in the EESC's view, should be considered in the analysis of competition. Specifically, these include competition between SMEs and big companies, between outlying and/or disadvantaged regions and geographically more advantaged regions, between rich and poor countries, and between the European legal framework and accounting regulations and those of North America, in particular, and the impact of these accounting regulations on the ability to raise capital on stock markets.

4.17 In the EESC's view, faced with globalised markets, the revision of the EU merger regulation cannot be neglected bearing in mind the ever more globalised environment in which commercial relations are conducted, nor can cooperation with international authorities, which can assist the Commission in implementing preventive measures to uphold competition.

4.18 In the view of the EESC, it follows from point 3.2.2.6.3 of this opinion that a better and clearer definition of concepts would certainly help to ensure more consistent and effective implementation of the merger control arrangements.

4.19 For the EESC, it is extremely important that, in response to the questions raised in the Green Paper, the review of the merger regulation is carried out in an open manner, with all interested parties (enterprises and Member States) being invited to submit constructive comments.

4.20 The Committee feels that the involvement of national authorities in mergers will bring advantages as they tend to be far more qualified in terms of their knowledge of the industries and markets concerned. Nevertheless, it should be very clear that the Commission holds sway.

4.21 The enhancement of this kind of cooperation will certainly reduce the risk of discrepancies and inconsistencies in the decisions adopted.

4.22 Another important matter in the EESC's view is the distortion of competition that can be caused by the merger and purchase of banks which, by reducing the number of competitors, can have adverse consequences for consumers, especially in the area of credit access.

4.23 In the same way, large-scale distributors can cause distortions of competition through their negotiating power, which can enable them to hold in check both their suppliers and their smaller-scale direct competitors. The EESC feels that the Commission should also focus on this issue when considering the abuse of dominant positions.

4.24 With regard to state aid, the EESC feels that there are grounds for greater efforts in the practical implementation of the rules already adopted on risk capital and credit aid for SMEs, as well as for proceeding with the policy reviews concerning aid for employment, for research and development and for large regional investment projects.

4.25 In the EESC's view, it is essential to exercise effective control over state aids to ensure that funds are used efficiently, thus helping to create a strong economic framework, specifically by creating sustainable employment opportunities for European citizens.

4.26 On the subject of the state aid scoreboard, the Committee believes it would be appropriate to carry out ex-ante and ex-post assessments of aid arrangements.

4.26.1 Although a public state aid register exists, it is difficult to access, either because much of the information is unavailable in more than one language, or because of the way the information is structured. The Committee suggests that the page containing this information be updated to make it clearer and more transparent, and that a search engine be added.

4.27 The Committee feels that efforts to simplify, modernise and clarify the Community rules on state aid should continue**.**

4.27.1 The Commission resources freed up in this process should be focused on the most serious cases of distortion of competition.

4.28 The Committee believes that actually laying down Community guidelines for state aid granted to undertakings entrusted with the provision of services of general economic interest, as proposed for 2002, would increase legal certainty.

4.29 Finally, the EESC would like to express its appreciation of the Commission's hard work, while nevertheless drawing attention to the need to substantiate any decision thoroughly and rigorously.

5. The mergers section of the competition DG has recently suffered a major setback with the Court of Justice deciding to overturn certain decisions in this field, especially in two well-known cases, Schneider-Legrand and Tetra-Laval.

5.1 The Court's rulings were based on its finding that the quality of technical information underpinning the Commission's decisions was clearly insufficient.

5.2 The Commission's reaction to these legal rulings has been to defend its position, but nevertheless to admit that there are some weaknesses in the system and that there is a need to take on a chief economist to take responsibility for coordinating this area.

5.3 The EESC conducted a survey of the human, financial and technical economic information resources available to the Competition DG, which revealed the following:

- Staff
  - with an economics degree: 71
  - with a law degree: 141
  - with another degree (maths, engineering, philosophy etc.): 59
  - with other qualifications: 187
  - annual budget (2002): € 1,414,417 (not including staff)
  - outside studies commissioned: 31, involving a sum of € 939,475.

5.4 The EESC also established that:

– The Competition DG is also an important centre of revenue for the Commission, specifically in view of the funds generated by fines, which amounted to some 2,000 million euros in 2001. However, there has not been a matching input of resources into supporting the DG's decisions with sufficient detail.

– The Competition DG relies very sparingly on the help of outside specialist bodies either to collect and process technical economic data to back up its decisions, or to support its positions when they are contested in the courts.

– The Competition DG does not make full use of the technical economic data which national competition authorities hold or could hold (at the Commission's request).

– The large-scale mergers which the Commission is expected to pronounce upon involve major economic interests and very large sums, which means that the parties involved are able to afford powerful resources in support of their case (economic studies, international consultancy firms)

and highly competent specialist lawyers. The Commission does not seem to have the same level of resources to support its position.

– Companies which, under current regulations, require the authorisation of the Commission to carry out any kind of merger or acquisition are not charged for the public service involved, unlike what happens in the courts, where legal costs are charged whenever a case is heard.

5.5 In the EESC's view, the reshaping/restructuring of the Competition DG's services, which the Commissioner responsible admits is necessary, should be preceded by a series of studies including: the deployment of its human and budgetary resources, the need to increase these and the ways of doing so; guaranteeing independence in the performance of its functions; the quality and detail of the technical economic and legal information used both as a basis for the Commission's decisions and to defend its positions in court and, finally, a study of the compatibility of the statutory deadlines with the quality and detail of the information collected and processed, which is crucial in taking decisions.

Brussels, 22 January 2003

The President of the European Economic and Social Committee	The Secretary-General of the European Economic and Social Committee
Roger Briesch	**Patrick Venturini**

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N.B.: Appendix overleaf.

APPENDIX
to the Opinion
of the Economic and Social Committee

The following amendment, which received at least a quarter of the votes cast, was defeated in the course of the discussion of the text of the opinion:

Point 4.12

Delete the point.

Reason

The draft paper sweepingly describes all rules imposed by professional associations as limitations. For the European Economic and Social Committee to take a confrontational stand against these decisions is neither expedient nor objectively necessary, particularly as both the European Parliament (Committee on Legal Affairs and the Internal Market) and the European Court of Justice have, in various resolutions and decisions, addressed the rules governing the liberal professions and found them to be, in principle, both permissible and useful.

Furthermore, the draft fails to address other, broader considerations in favour of establishing and maintaining the rules governing the liberal professions, such as the special position of trust and commitment to the public interest of these professions. In any case, a debate on a matter as complex as this would go beyond the paper's scope and shift its focus completely.

Result of the vote

In favour:	31
Against:	80
Abstentions:	12