Opinion of the European Economic and Social Committee on the Report on Competition Policy 2004

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On 17 June 2005 the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the: *Report on Competition Policy 2004*.

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 21 February 2006. The rapporteur was Mr Malosse.

At its 425th plenary session, held on 15 and 16 March 2006, (meeting of 15 March), the European Economic and Social Committee adopted the following opinion by 138 votes to one, with two abstentions.

1. **Introduction**

1.1 EU competition policy has for a long time been considered to be the flagship of European integration and an unquestionable achievement. During the debate on the Constitutional Treaty, however, the justification for a policy aimed at ensuring *free and undistorted competition* raised a number of questions. Following the reform of mechanisms for controlling cartels and abuses of dominant positions, the European Commission carried out a reform of state aid arrangements by means of an action plan. The presentation of the 2004 report gives the EESC the opportunity to conduct an overall assessment of the aims and methods of Community competition policy, in particular against the following background:

— the globalisation of trade;

— EU enlargement, with the greater disparities between levels of development that this entails;

— the way in which the European Union is falling further and further behind its main economic competitors in terms of growth and employment;

— the general public's legitimate concern for better governance, greater legitimacy for the policies that are implemented and greater involvement in decision-making.

1.2 Following an introduction to the political background by the Director-General of DG Competition, the report gives an overview of the Commission's activities on:

— cartels and abuses of dominant positions (Articles 81 and 82 of the Treaty) together with a number of judgments handed down by the Community courts and by national courts in the EU Member States;

— mergers, with a sector-by-sector evaluation;

— state aid control, including legislative and interpretive rules and a number of judgments handed down by the Community courts;

— enlargement, and bilateral and multilateral cooperation at international level.

2004, the year of Europe's enlargement to encompass ten new Member States, was marked by the entry into force of the reform of Community competition law, on 1 May.

2. **Considerations on EU competition policy**

2.1 The report underlines the link between competition policy and the revised Lisbon Strategy: competitiveness, growth, employment and sustainable development.. The Commission wishes in this way to focus its action on key sectors for the internal market and the Lisbon agenda, with the emphasis on removing obstacles to competition in the recently liberalised sectors as well as certain other regulated sectors such as telecommunications, postal services, energy and transport. This link with the Lisbon agenda should be better explained and clarified.

2.2 The first question that needs to be asked is whether competition policy should reflect the political priorities of a given moment or instead adopt its own independent approach. The EESC favours the latter option for the following reasons:

2.2.1 Businesses, consumers and economic and social actors need a stable and predictable legal framework. If competition policy is forced to change according to the priorities of the moment, it will be a source of legal instability and consequently will not favour investment and employment.

2.2.2 Establishing free and undistorted competition is a fundamental aim in itself, not as part of an economic strategy, but in order to ensure that the single internal European market functions properly. Unless this happens, this market will lose all meaning as well as all the advantages it might bring to the European economy, such as stimulating demand, increasing supply, and the power of a market of 450 million consumers.

2.2.3 In today's enlarged Union, the disparities between the economic and social conditions in the different Member States are considerable. Against this background, competition policy is particularly important. In other words, establishing genuinely free and undistorted competition is crucial to ensuring that the economic and social actors, from the least developed countries as well as from the richest, are guaranteed equal opportunities and treatment and that the conditions for strengthening economic and social cohesion in the Union are met.

2.2.4 The independence of competition policy must be maintained and strengthened. It must also be linked to other EU policies, such as those aimed at supporting consumers, economic development, innovation, growth, employment and economic and social cohesion. The reforms that competition policy has undergone and will undergo in future must give it this outward-looking vision. With this in mind, the Commission must endeavour to strike a constant balance, in order to give consumers, businesses and the general interest of the Union the highest possible degree of protection. Consequently, guidelines for handling disputes should be drawn up on the basis of a number of imperatives, such as:

— continuing to apply competition rules strictly, on state aid in particular, in order to avoid bias towards national policies to support national flagship companies or companies holding a monopoly, which could stifle competition at national and European level, to the detriment in particular of small and medium-sized enterprises. Instead, support should be given to public innovation and research efforts, in order to favour large-scale projects which bring Europe together and to support the innovation potential of small and medium-sized enterprises. Similarly, job-creation policies should give preference to support for individuals, such as lifelong learning, childcare, mobility and combating all forms of discrimination, rather than direct aid that could distort competition;

— attacking new anti-competitive practices such as replacing public monopolies with private ones and de facto dominant positions held by one economic activity; e.g. distribution's dominant position in relation to producers and vice versa; Greater account must thus be taken of the specific characteristics of small and medium-sized enterprises, which are the motor for growth in Europe but whose efforts to start up and grow are often hampered by practices that discriminate against them, such as state aid, monopolies and dominant positions. What is needed more than anything is support for cooperation between SMEs and for groupings of such businesses, which often constitute the only way in which such companies can meet their competitors on a level playing field;

— ensuring that consumers really benefit from economies of scale and from the potential of the single European market.

2.2.5 Account must be taken of the specific characteristics of services of general interest, in particular in the health, social protection and education sectors, whilst respecting the values of social justice and transparency, in line with national traditions and practices. Where public services of general economic interest are entrusted fully or partially to private actors, competition authorities must ensure that equal treatment for all potential actors and the efficiency, continuity and quality of the service are guaranteed. In this regard, the Committee welcomes the Commission's work, which has, since the Altmark judgment, consisted of clarifying the rules for financing public service obligations. This will make the management of SGEI more transparent.

2.2.6 More generally, the problem with Community competition policy is that it is based on the assumption that the single market operates in the best possible way — actors are given complete and free information, companies are free to enter and leave the market as they wish, there are as many markets as the actors concerned are able or wish to create, no increasing returns to scale, and no dominant positions. The reality is quite different, however, in particular as regards the behaviour of certain Member States, who continue to think nationally.

2.2.7 DG Competition should carry out economic and social assessments to follow up the cases on which it is working. It should also carry out impact studies of its most important decisions, at the economic level, including the Union's competitiveness in the world, at the social level and, lastly, in terms of sustainable development.

3. **Comments on the implementation of competition policy in the EU in 2004**

3.1 The report's presentation would be clearer and the system would be easier to understand if it included, in particular in the field of state aid, a list of decisions in which no objections were made to aid being granted, explaining why, in certain cases, the aid was not covered by Article 87(1). This table would form the framework of good practice for Member States when granting aid.

3.2 Furthermore, given that the defining event of 2004 was enlargement, it is to be regretted that the report provides relatively little information about the new Member States' implementation of Community competition policy. The Committee thus hopes that the 2005 report will provide more complete and up-to-date information.

3.3 *Implementation of legislation against cartels*

3.3.1 The report reveals that economic analysis has become an integral part of competition policy, which is something the EESC has consistently called for. In this context, changes in competition law (Articles 81 and 82) have been marked by a specific and pragmatic advance, consisting of better defining the market and of refining the approach regarding both horizontal and vertical practices.

3.3.1.1 Under Article 81(3) (exception from the prohibition on restrictive agreements), it can be seen that economic analysis has gained in particular from taking efficiency gains into account. Companies can thus demonstrate that they are making use of new technologies, more suitable manufacturing methods, synergies arising from integrating staff and economies of scale. They can also promote technical and technological progress through common research and development agreements, for example.

3.3.2 Leniency policy

3.3.2.1 As shown by the cases referred to in the report, leniency policy has been a success. It will be recalled that this mechanism is based on encouraging businesses forming a cartel to inform the competition authorities about this agreement, which in turn allows them to be exempted, in part or in full, from any fines incurred. To this end, the Commission and some Member States have established leniency programmes applying these conditions. These are of particular importance to businesses because, even if they have not colluded in a genuine cartel, they often discover that they have unwittingly created a de facto cartel, largely as a result of faxes or emails exchanged between their commercial agents and those representing other companies.

3.3.2.2 The report does not give enough emphasis, however, to a number of underlying problems: existing leniency programmes in the EU vary widely, both in terms of the basic requirements for receiving leniency and in terms of their procedures; furthermore, not all national competition authorities have set up leniency programmes; only 18 authorities (plus the Commission) have done so ([1]).

3.3.2.3 Lastly, a request for leniency submitted to one authority does not apply to the others. This being the case, if the company concerned wishes to obtain immunity, it is obliged to apply to all the competent competition authorities. The EESC therefore considers that it is of crucial importance to upgrade the mechanism to cater for multiple requests from companies. The procedures in place must, therefore, be simplified so that a harmonised system can be implemented for 'informing' on a cartel, which would automatically stop all involvement in such an arrangement.

3.3.3 The European Competition Network (ECN)

3.3.3.1 According to the report, the initial results of the ECN appear to be satisfactory. The European Commission and the national competition authorities in all EU Member States cooperate with one another by informing each other of new cases and decisions through the network. Where necessary, they coordinate investigations, providing assistance and exchanging evidence.

3.3.3.2 This cooperation creates an effective mechanism to counter companies which engage in cross-border practices restricting competition and helps to eliminate those that abuse market rules and cause considerable damage to competition and to consumers.

3.3.3.3 One fundamental issue concerns the confidentiality of information. This is guaranteed by a specific service, the ADO (Authorised Disclosure Officer), which allows one or more persons to intervene in the transmission of confidential information. These mechanisms have been implemented on several occasions since 1 May 2004, mainly with the Commission and apparently with success.

3.3.3.4 Although the economic players claim that the ECN has been a great success, the EESC nevertheless wishes to warn the Commission of the potential long-term problem — with there being many more cases to handle — of ensuring that confidential information is fully protected when it is exchanged.

3.4 *Article 82 — Abuse of a dominant position*

3.4.1 Article 82 of the Treaty prohibits the abuse of a dominant position by a company (in the form of imposing unfair prices, dividing up markets by means of exclusive sales agreements or loyalty rebates which discourage customers from using competing suppliers). Furthermore, merger control is subject to this provision whenever a merger involves an abuse which strengthens the dominant position of the company launching the operation. This interpretation of the article, which is an essential component of antitrust legislation, has been ambiguous in some respects, as can be seen from an analysis of companies' behaviour and the implications of their commercial practices. In other words, the concept of abuse of a dominant position has yet to be properly defined and consequently companies sometimes find it extremely difficult to know what they are or are not allowed to do. With regard to price abuses, such as predatory or discount pricing, a particular form of behaviour can have different effects; a very efficient competitor might be able to prosper in a market in which the dominant company maintains prices at a certain level, whilst a 'less efficient' competitor might find itself excluded from the market. Should competition policy protect this second category of company? Would it not be more productive to develop rules based on the principle that only excluding efficient competitors constitutes an abuse?

3.4.2 The Commission recently published draft guidelines concerning the implementation of Article 82, which meet with the EESC's approval. In so doing, the Commission wishes to establish a method for assessing some of the most common practices, such as tied goods and rebates and discounts likely to undermine competition ([2]). The EESC welcomes the Commission's efforts, which aim to direct maximum resources towards those practices most likely to harm consumers, in order to provide clarity and legal certainty, with a clear definition of what might constitute abuse of a dominant position. The

([1]) Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Sweden and the United Kingdom.

([2]) DG Competition discussion paper on the application of Article 82 of the treaty to exclusionary abuses. Public Consultation, December 2005.

Committee hopes that the guidelines now under consideration will enable businesses in a dominant position to make a clear assessment of whether their behaviour is legal and points out that to complete the discussion, dialogue with the players concerned, (businesses, in particular SMEs, consumers, the social partners, etc.) must be guaranteed.

3.5 *Merger control*

3.5.1 The EESC welcomes the pragmatic development of setting up a 'one-stop shop' for notifications of proposed mergers and of providing much-needed clarification for the competitiveness test, bringing this further into line with the reality of the economic situation and making it more compatible with the rules in force in the main merger investigation systems across the world. Lastly, although it is still difficult in practice to prove the efficiency gains resulting from mergers, it is to be hoped that, against this healthier background, merger control may be of lasting benefit to European consumers.

3.5.2 With regard to relations between the retail giants and local shops, an enormous number of mergers has taken place in the last few years, reducing the market share of local businesses, to the benefit of the large retail sector. As a result of commercial practices that are sometimes highly restrictive, pricing policies, and discounts tied to the size of purchases, local businesses struggle to compete on price given the large margins available to the retail giants, which makes the latter even more attractive to consumers. Similarly, producers are also subject to sometimes excessive pressure. Lastly, the increased number of mergers must lead to the aims of competition policy being brought into line with those of consumer policy in order to ensure that market supply remains constant, that what is on offer is diverse in terms of positioning and the quality of the range. At the same time, no limits should be imposed on cooperation between small businesses as long as they do not have a significant market share in the sector concerned.

3.6 *The reorganisation of DG Competition*

3.6.1 The report expresses satisfaction at the reorganisation of DG Competition in response to public criticism of the Commission concerning a number of cases (Airtours/First Choice, Tetra Laval/Sidel and Schneider/Legrand).

3.6.2 Creating the post of Chief Competition Economist — to be assisted by a team of economists — appointing a group of experienced officials to take a fresh look at the conclusions of DG Competition's investigators into sensitive mergers and strengthening the role of the Hearing Officer in the merger control procedure are all measures that share a common goal: to make the merger investigation procedure more rigorous and transparent. The measures thus respond to the repeated calls of the EESC and are to be welcomed.

3.6.3 The EESC also approves of the appointment of a Consumer Liaison Officer to represent consumers vis-à-vis DG Competition but regrets that, almost a year after this appointment was made, the report does not provide any details on the real dialogue opened with European consumers. The EESC thus hopes that the 2005 report will provide practical information that will help to gauge the effectiveness of this dialogue. The Committee has also launched an own-initiative opinion on the matter.

3.6.4 Recent EESC opinions have highlighted the issue of the European Commission's resources, in particular for monitoring mergers, which are deemed to be too limited, given the funds likely to be mobilised by the players involved. This issue has yet to be resolved. It appears that DG Competition does not have enough qualified staff to examine cases involving certain states and, in particular, the new Member States. The Committee is concerned and puzzled at this lack of foresight in the Commission's human resource management and at its potential consequences and calls for remedial measures to be adopted as a matter of urgency.

3.6.5 Despite recent efforts to improve transparency, the Committee notes that there is no real policy for actively consulting the actors concerned; in fact, regarding the cross-sectoral cases that DG Competition has opened, the limited information on mergers provided on the Commission website cannot be considered to be an adequate means of gathering the informed opinions of civil society and of the various organisations concerned, as part of the process of good governance.

3.6.6 With regard to the publication of national judgments on the Commission's Internet site for competition, it must be noted that the stated aims of informing and educating have not been met (Article 15(2) of Regulation EC 1/2003). The system used on the Commission website only provides some of the information it is supposed to. Specifically, the new Member States do not — or rarely — post judgments handed down by their national courts. This impairs understanding of the way in which competition law is applied in those countries and obstructs the desired harmonisation of this law. Furthermore, these national judgments are available only in the language of the country of origin, which means that very few people, if any, read them even though they are of considerable practical importance due to the new problems that they highlight.

3.7 *State aid control*

The European Council of March 2005 stated the aim of continuing working towards a reduction in the general level of State aid, while making allowance for any market failures.

3.7.1 On 7 June 2005, the European Commission presented an action plan for state aid, on which the EESC delivered an opinion [3], to which the reader is referred. Our examination of the 2004 report does, however, give rise to the following general comments:

[3] OJ C 65, 17.3.2006.

3.7.2 It is crucial to improve transparency concerning information given to companies receiving individual aid (such as the date of notification and the reasons given by the Member States). This transparency is all the more necessary because the risk that illegal aid will be recovered weighs heavily on businesses, in particular on small and medium-sized enterprises, even very small companies, even if the notification procedure has been engaged by their own Member State!

3.7.3 The national authorities responsible for assessing whether or not aid meets the required criteria do not always have the necessary knowledge to carry out an economic analysis as part of the notification procedure: regional or local authorities often grant aid for job-creation or the environment, for example, without undertaking a thorough market-share analysis and this imposes considerable financial uncertainty on companies, should the aid prove to be illegal.

3.7.4 In examining aid for restructuring or rescue, it is a fact that Community policy focuses mostly on the economic consequences for the competitors of a beneficiary of state aid and, in particular, on resources for 'compensating' them. Indeed, out of concern to prevent distortions of competition occurring, the Commission imposes certain restrictions on beneficiary companies, such as restricting the percentage of market share in a given geographical area, as happened in the Thomson Multimedia case, or obliging the beneficiary to forge partnerships with its competitors.

3.7.5 The EESC deplores the fact that this concern conceals another, equally crucial aspect: the effects of these actions on the end consumer (the customer as taxpayer), with the Commission not considering carefully enough whether state aid will or will not prevent a fall in prices, a wider choice of products and services or even higher quality. Consumers' interests lie at the heart of competition policy, however, and the right to state aid must necessarily be subject to the same requirements for rigour, in the form of long-term analyses, as cartels or mergers.

3.7.6 In general terms, the EESC wishes to express its unease at distortions of competition that could arise from differences in the way state aid is granted in the different Member States. Above all, the EESC is concerned at the often highly discriminatory nature of state aid. States often rally round to invest in and rescue large companies, whilst neglecting small and medium-sized enterprises (which actually account for four out of five jobs in the Union) and give certain sectors or types of business preferential treatment. This situation does nothing to encourage entrepreneurship and contributes to paralysing the economic climate, which is not sufficiently dynamic and conspires against new entrants to the market.

4. **Proposals for a stronger competition policy**

The EESC's analysis thus leads it to make the following recommendations:

4.1 *Technical aspects*

4.1.1 The Commission should pay particular attention in its forthcoming reports to the effects of enlargement and even devote a specific chapter to taking stock of changes in legislation and in the way the implementation of Community law is monitored.

4.1.2 To improve legal security, simplifying the leniency system would appear to be crucial. Given the sensitive nature of the information that must be provided and the constraints imposed by having to conduct the same procedure with the different authorities concerned (a cartel can affect a number of Member States), a reform undertaken by means of mutual recognition or even a 'one-stop shop' would be appropriate.

4.1.2.1 It would also be highly desirable for national leniency programmes to be brought closer into line with one another by means of a flexible and indirect harmonisation that could take the form of best practice.

4.1.3 As part of the current review of Commission policy on abuse of a dominant position, on the basis of the draft guidelines, a number of questions must be clarified in order to refocus assessment of such abuses on their harmful effects on the consumer. The Commission must clarify what is to be understood by 'dominant position', and especially what constitutes an abuse and what the different types of abuse are. It must ultimately draw a clearer dividing line between legitimate competition based on performance and abusive competition that undermines the way in which competition operates and thus attacks consumers.

4.1.4 As regards merger control, in order to assess how useful taking into account the efficiency gains has been, the Commission report could in future look at what has been happening in the operations concerned and the effects on consumers.

4.1.5 To ensure a fairer balance between production and distribution and within distribution itself (ensuring that businesses in rural areas, disadvantaged urban areas or sparsely-populated regions do not disappear altogether), a study should be carried out on the competition, commercial regulation or aid measures to small businesses, so as not to prevent potential players from accessing the market and to enable SMEs to benefit from state aid.

4.1.6 It would be useful if forthcoming reports could contain a description listing any links between the Consumer Liaison Officer and consumer organisations when examining cases: if necessary, could these organisations have delivered an opinion or forwarded information to the Commission on mergers, cartels or abuses of a dominant position? It is crucial to show that the work of the person responsible for consumer relations is effective.

4.1.7 In order to improve the system of publishing judgments handed down by national courts, it would be useful to set up a network of correspondents entrusted with the task of compiling legal rulings in order to make the current system more effective in real time. This measure would need to be given more substantial human and financial resources.

4.2 *Political and economic aspects*

4.2.1 Improving analysis of the most serious distortions

4.2.1.1 Assessing how competition policy works must help to determine whether it genuinely favours *free and undistorted competition* in the EU and to measure the effectiveness of the fight against de facto monopolies and abuses of a dominant position, their impact on the creation of new businesses and on entrepreneurship. The Commission should not impose limits on agreements between SMEs, so that they can combat competition from large integrated groups and should provide more resources so that the most serious distortions can be combated effectively.

4.2.1.2 Where the liberal professions are concerned, following its communication of 9 February 2004, the Commission published a report on competition in this sector ([4]), setting out the progress that had been made on removing unnecessary restrictions on competition such as price regulation, rules on advertising, entry barriers to the profession and reserved tasks. The EESC calls on the Commission to honour its commitment and reiterates the point of view expressed with unanimous support in its opinion on the report on competition policy 2003, which states that introducing mechanisms that are more favourable to competition will help the liberal professions to improve the quality and range of their services, which will directly benefit consumers and businesses.

4.2.2 Combating the partitioning of the market and drawing up economic and social impact studies

4.2.2.1 The EESC considers that competition-related issues should be studied in the context of the EU's overall cohesion and that the question should be raised as to whether behaviour that is still too nationally-focused (state aid, whether direct or 'disguised', to national flagship companies, aid to attract investment, discriminatory behaviour, the continuing presence of de facto monopolies and abuses of a dominant position, etc.) does not partition the market or hinder closer links between the Union's economic players. Accordingly, the Commission must also carry out economic and social analyses of the overall impact of its policy decisions and call on the Council and the Member States to ensure that changes take place in behaviour and practices which result in a partitioned market, adversely affecting the interests of all economic and social players.

4.2.3 Ensuring the best information and the broadest consultation

4.2.3.1 The EESC offers its services to the Commission to discuss ways of ensuring greater transparency — within the limits imposed by the need to respect business confidentiality — with regard to the actors affected by competition policy: businesses, economic and social partners, consumers and other civil society actors. With regard to mergers in particular, consideration should be given to ensuring that the latter are more actively involved, through a consultation procedure and hearings, which would satisfy the concern for good governance and participatory democracy. More generally, a local information network should be established, better to publicise the priorities of competition policy and to inform companies and consumers of their rights and obligations. This would be based on DG Enterprise's Euro Info Centres and on all of the networks of chambers of commerce and industry and of consumer organisations. Making this information available efficiently and on an ongoing basis is of vital importance, in particular in the new Member States and the candidate countries.

4.2.4 Ensuring that competition policy as a whole is consistent with other Union policies

4.2.4.1 Competition policy is crucial to ensuring that the European internal market operates effectively. Its failings underline the urgent need to ensure the completion of the single market and to bring an end to practices that tend automatically to carve up the market. This policy on its own will not be enough, however; there must be coordination with all of the Union's policies, in order to ensure the success of the revised Lisbon strategy and the efficacy of consumer protection policy. In any event, a blueprint for economic and social cohesion must be drawn up for the Union, giving competition policy a specific role and providing a new legitimacy, ensuring equal opportunity of access for all to the single market, so that consumers, businesspeople and employees genuinely benefit from the advantages of the world's largest market.

Brussels, 15 March 2006.

The President

of the European Economic and Social Committee

Anne-Marie SIGMUND

([4]) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions COM(2004) 83, of 9 February 2004, (SEC(2005) 1064).