

## Opinion of the European Economic and Social Committee on 'Economic democracy in the internal market'

(2009/C 175/04)

On 27 September 2007, the European Economic and Social Committee decided to draw up an own-initiative opinion, under Rule 29(2) of its Rules of Procedure, on

*Economic democracy in the internal market.*

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 6 November 2008. The rapporteur was Ms SÁNCHEZ MIGUEL.

At its 449th plenary session, held on 3 and 4 December 2008 (meeting of 3 December), the European Economic and Social Committee adopted the following opinion by 110 votes to 29, with 22 abstentions.

### 1. Conclusions

1.1 Securing genuine democracy in the internal market is a basic requirement for ensuring that the rights of Europe's citizens are respected; only when this idea is accepted will we be in a position where all market players understand and endorse the market's importance to European integration.

1.2 To date, it is consumer protection that has enabled progress to be made towards a balance between the different market players, but European competition policy has certainly provided the legislative instruments that curb restrictions on competition, which have such detrimental effects on consumers, workers and the general public.

1.3 Economic democracy in the market means not only securing equality between all market players but also a better quality of life for everyone, which can be achieved by:

- developing and implementing the legislative instruments of competition policy and recognising the need to involve consumers and the other parties concerned in the Community and national bodies that have responsibility in this field.
- expanding this policy, in order to protect the economic interests of those directly affected by unlawful competitive practices.

1.4 For this objective to be met, a number of practical measures would need to be taken to raise and maintain the confidence of all players in the internal market. These measures could focus on:

- harmonising all relevant legislation and making it comparable, at least on key issues of substantive and procedural law.
- linking the protection of market players to the fundamental rights recognised in the Treaties, without it being necessary to establish new procedures, so as not to increase the administrative burden.
- involving the different market players in the bodies that regulate competition and setting up a fluid information network — proposals that the EESC has reiterated in a number of opinions.

1.5 The EESC has played an active role in promoting equal rights across all policies and greater civil society involvement in the Community bodies, especially in those regulating competition. In the Committee's view, achieving the objectives of the Lisbon Agenda, by creating a more competitive and dynamic economy, now requires securing economic democracy in the internal market.

### 2. Background

2.1 The Lisbon Treaty, in Article 6 TEU <sup>(1)</sup>, establishes that the Union recognises the rights, freedoms and principles set down in the Charter of Fundamental Rights of the European Union <sup>(2)</sup>, which shall have the same legal value as the Treaties.

2.2 The Charter establishes, *inter alia*, equality, the right to property, consumer protection and access to services of general interest as fundamental rights of the Union, which have an impact on the functioning and establishment of the internal market.

2.3 The principle of equality of citizens is one of the founding values of the EU (Article 2 TEU) and, as a democratic principle of the Union, is an obligation that, according to Article 9 TEU, the EU must observe in all its activities, including economic activities carried out in the internal market.

2.4 The EU has the exclusive power to establish the competition rules <sup>(3)</sup> necessary for the functioning of the internal market (Article 3(1)(b)).

(1) The articles are numbered according to the consolidated version of the Treaty on European Union and the Treaty on the Functioning of the Union published in OJ C 115, 9.5.2008.

(2) The text refers to the modification of the Charter carried out on 12 December 2007 (Strasbourg), published in OJ C 303, 14.12.2007. This second version was needed as footnote explanations had been added to the Charter after it was first adopted at the Nice summit in December 2000.

(3) See the *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, published in OJ C 31, 5.2.2004, p. 5).

2.4.1 In concrete terms, collusive practices and the abuse of a dominant position (antitrust rules) in particular are incompatible with the internal market and are therefore prohibited, because they are damaging to consumers, businesses and other market players such as workers.

2.4.2 Poor or misapplication of the rules on mergers can also be severely damaging to consumers, businesses and other internal market players such as workers.

2.4.3 The point of reference when assessing the efficiencies put forward is that consumers must not suffer damage as a result of the merger. The efficiencies must be substantial and achieved promptly, and must be beneficial to consumers within the relevant markets in which competition problems would otherwise be likely to emerge.

2.5 The EU has shared competence in the field of consumer protection (Article 4(2)(f)).

2.5.1 In defining and implementing other EU policies and actions, consumer protection requirements should be taken into account, in accordance with the new Article 12 TFEU.

2.5.2 This translates to a cross-cutting approach to consumer policy, expressly recognised within original Community law, under which, for the completion of the internal market, consumer interests must be considered in all relevant political and economic fields in order to guarantee a high level of consumer protection throughout the EU.

2.5.3 When it comes to the proposals for approximation of consumer protection laws, the Commission must take as a base a high level of protection (Article 114(3) TFEU). This obligation means that it is the Commission's duty to promote consumer interests and ensure a high level of consumer protection by the EU (Article 169 TFEU).

2.5.4 Generally speaking <sup>(4)</sup>, the harmonisation of consumer protection has hitherto been based on the principle of '*minimum harmonisation*', under which Member States can adopt or maintain higher protection measures and which has on occasion led to legislative clashes between consumer protection and the completion of the internal market.

2.6 In its opinion on *Regulating competition and consumer protection* <sup>(5)</sup> the EESC highlighted that although free competition offered benefits to all market participants and consumers in particular, in the main liberalised sectors, real restrictions on free competition had arisen, resulting in competitors being excluded from the market and consumers' economic rights being limited.

<sup>(4)</sup> One exception is Directive 2005/27/EC on unfair commercial practices.

<sup>(5)</sup> OJ C 309, 16.12.2006, p. 1.

2.6.1 It stressed the need to strengthen systems for informing and consulting consumers, and considered that the European Competition Network should adapt its activities to incorporate any information and observations that national or Community consumer organisations wished to provide in order to make competition policy more efficient in the markets and to ensure that consumers' economic rights were recognised.

2.6.2 With regard to compensation of damages caused by infringement of antitrust rules, the EESC has already expressed its opinion <sup>(6)</sup> on the Commission's Green Paper, calling for common guidelines setting the conditions for bringing an action for damages arising from infringements of Articles 81 and 82 of the Treaty.

2.6.3 The EESC has also expressed its opinion on the establishment of a Community regulation on collective action for compensation brought by bodies representing social and economic players in the internal market, particularly that brought by consumer organisations <sup>(7)</sup>.

2.6.4 The EESC is currently drawing up an opinion on the White Paper on Damages actions for breach of the EC antitrust rules <sup>(8)</sup>, in anticipation of the opinion on this matter and which should be referred to in this context.

2.6.5 Consequently, this opinion does not aim to address issues relating to civil compensation of damages resulting from infringement of antitrust rules or the bringing of collective actions by consumer organisations in the internal market, as these are subjects on which the EESC has already made its position known. Instead, this opinion will focus on economic democracy in the internal market.

### 3. Approaching the concept of economic democracy in the internal market

3.1 Competition policy aims to create and safeguard conditions enabling markets to operate competitively, for the benefit of both consumers and businesses. It involves:

- effectively combating practices that distort competitive market conditions;
- creating the conditions needed for the active involvement in competition policy of consumers and all those with economic rights resulting from their economic activities in the market, including workers;
- helping to ensure that information has a constant influence and consultation can be carried out flexibly, with visible results;

<sup>(6)</sup> OJ C 324, 30.12.2006, p. 1.

<sup>(7)</sup> OJ C 162, 25.6.2008, p. 1.

<sup>(8)</sup> COM(2008) 165 final. OJ C 309, 16.12.2006, p. 1.

- establishing the legal instruments or measures to properly protect the equality of market players — not forgetting small and medium-sized enterprises, which would also benefit considerably from this Community policy — the right to property, consumer protection and access to services of general interest.

3.2 This is why there is a need to guarantee 'economic democracy in the internal market'. This aim is implicit in the objectives of the Lisbon Agenda which call for the EU to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, creating more and better jobs and greater social cohesion <sup>(9)</sup>.

3.3 To guarantee the existence in the internal market of an economic democracy that improves the quality of life of European citizens, there are three broad areas in which action and progress are required.

3.3.1 The first area concerns the development and implementation of traditional competition policy instruments, relating to antitrust rules, mergers and state aid, and focusing particularly on certain, primarily liberalised sectors.

3.3.1.1 In other words, this refers to services of general economic interest, which have moved from a system of monopoly to a newly opened market system, where one company holds a dominant position and competition is restricted due to the low market penetration of other operators.

3.3.1.2 In this area, support should be given to consumer action that makes it feasible to implement antitrust rules. In other words, it should be consumers, who instigate the relevant procedures when they observe a potential breach of antitrust rules, because they have the authority to do so. The main ways of achieving this are: informing, educating and raising the awareness of consumers themselves and of course giving consumers and consumer organisations the authority to act, as well as access to the relevant institutions and procedures.

3.3.2 The second area concerns the study of competition policy that affects consumers and all those with economic rights resulting from their economic activities in the market, including workers.

3.3.2.1 Practices by non-compliant businesses which distort competition, whether concertedly or by abusing a dominant position, can eventually reduce the income or increase the costs of the injured parties, which affects their right to property over that income and makes them victims of a breach of the law.

3.3.2.2 Therefore, the effects of infringements of competition rules can be compared to an undue appropriation of income from consumers, from all those who receive income from their economic activities and from companies operating in the market in compliance with competition rules. This new vision of competition protection policy would also strengthen the position of small and medium-sized enterprises which, as is widely known, form the backbone of Europe's economy.

3.3.3 The third area concerns strengthening and developing essential cooperation between the members of the European Competition Network and the Commission, between national courts and the Commission, and between national consumer authorities, national consumer bodies and the Commission.

3.3.3.1 Mutual assistance will make it possible to decide more quickly who should bring the case concerned, and to resolve cases more effectively.

#### 4. Comments on issues surrounding the concept of economic democracy

4.1 In order to achieve genuine economic democracy, the EU should adapt its competition policy and its measures to harmonise national legislation to meet the needs and expectations of European consumers and of all market players. Practical steps must consequently be taken in these areas to secure and improve the confidence of all parties involved in the internal market:

##### 4.2 Harmonisation of legislation:

4.2.1 Without comparable legislation, at least for key issues regarding both material and procedural law, it will be very difficult to conceive of real economic democracy in the internal market as recognised by Article 114 TFEU *et sequitur*, particularly Article 116.

4.2.1.1 A genuine internal market can only become a reality when consumers feel sufficiently secure and confident to make a purchase anywhere in the European Union, secure in the knowledge that they have equivalent and effective protection from any possible infringement of their economic rights by businesses. The cross-border movement of goods and services will enable consumers to seek out better deals and innovative products and services that will help them to make the most advantageous choice. Minimising differences in consumer protection laws throughout the EU is thus essential.

<sup>(9)</sup> Presidency conclusions. Feira European Council, 2000.

4.2.2 Although the Member States have adopted national provisions equivalent to Articles 101 and 102 (former Articles 81 and 82), there are still major differences between different national competition laws. These differences are apparent both in the material definitions of the concepts of dominance, abuse and economic dependence and in the procedural rights of consumers, the recognition of the role of consumer organisations, and the relations between these organisations and the national competition authorities.

4.2.2.1 The principle of 'minimum harmonisation', which is applied when harmonising national legislation, is the most appropriate way of uniting the aims that have been set for the internal market and for consumer protection. When compared, however, with the principle of 'country of origin' in conjunction with another type of 'internal market clause' on the mutual recognition of consumer protection legislation, this principle is incompatible with a 'high level of consumer protection'.

4.2.2.2 In order to attain this high level of consumer protection and, furthermore, in line with the latest Community strategies for consumer policy (2002/2006 and 2007/2013), it would make sense to move towards full harmonisation on individual issues deemed to be of vital importance, such as principles, definitions and certain procedural aspects.

4.2.3 Victims of infringement of competition rules must obtain effective, full damages, and offenders should not be able to make any unfair financial gain. To this end, instruments could be adopted such as:

- procedures enabling public authorities to confiscate undue profits. Any unlawful funds recovered should be used for purposes of general interest as previously defined in national legislation, and should be used primarily to fund public measures for supporting victims. National measures should comply with the principles of equivalence and effectiveness under the terms set out by the ECJ;
- establishment of effective, dissuasive and proportionate enforcement measures (administrative or criminal) for the most serious infringements affecting the functioning and establishment of the internal market. The definition of 'unlawful' should cover subjects over which the EU has exclusive competence, in order to ensure optimum implementation of Community law through the definition of minimum, common criteria for offences <sup>(10)</sup>. The Lisbon Treaty provides for the adoption of minimum provisions on the definition of criminal offences and sanctions via the co-decision process, establishing minimum standards for particularly serious crime with a cross-border dimension (Article 83(1) TFEU);

<sup>(10)</sup> See the Commission's proposal on the protection of the environment through criminal law (COM(2007) 51 final), and ECJ case law (cases C-176/03 and C-440/05).

- publicising penalties can be an effective measure, by setting up publicly accessible resources such as offender databases, etc. Penalties for anti-competitive practices have a dissuasive effect on potential offenders. Publicising decisions to apply penalties shows the victims of infringement how important the issue is and helps to raise public awareness of antitrust measures;
- These measures would in any event supplement compensation for damages which, as referred to above, does not fall within the remit of this opinion, and will be covered by the opinion dealing with the White Paper on Damages actions for breach of the EC antitrust rules.

4.2.3.1 In order to make damage compensation more effective, one question that should be asked is whether national courts would be authorised to decide on the end use of administrative fines and incorporate them into the civil process to evaluate compensation of infringement victims.

4.2.4 How to adequately combine full legislative harmonisation in certain cases without reducing consumer protection in some Member States is one of the aims that legislative reforms affecting regulation of the internal market should take into account.

#### 4.3 Impact on fundamental rights

4.3.1 The infringement of internal market laws affects a number of fundamental EU rights, such as the principle of equality (Article 20 of the Charter of Fundamental Rights), the right to property (Article 17 CFR), consumer protection (Article 38 CFR) and access to services of general interest (Article 36 CFR), which the EU's institutions and bodies also have the duty to protect. Some of these rights, especially the principle of equality and the prohibition of unequal treatment, have been given legislative form in the field of competition as a guiding principle for all economic players, with regard to both their competitors and consumers <sup>(11)</sup>.

4.3.2 This raises the following questions:

- Are special measures needed to protect these rights?
- What could be the best measure under Community law?
- Would it be fitting, under Articles 17, 20 and 38 of the Charter of Fundamental Rights, to set down the rights of consumers, businesses and all those with economic rights resulting from their economic activities in the market, including workers, as specific rules within Community free competition legislation?

<sup>(11)</sup> See articles 101(1)(d) and 102(c) TFEU.

4.3.3 Setting a 'high level of protection' could be considered to be one means of applying and protecting fundamental rights in the market, because establishing a special method or a single procedure would entail further red tape. The EESC considers that it would be more appropriate to use existing instruments, giving consumer organisations greater authority. It would be desirable to promote, through the appropriate policies and channels, the inclusion in specific EU and Member State legislation — especially in certain areas, such as contracts for essential goods and services, antitrust, unfair practices — clauses expressly recognising the rights of consumers or of any other person with economic rights, including workers and ensuring that these rights are protected by legislation. This would also help to inform the public and to raise people's awareness, something that as has already been stated, the Committee considers to be essential.

#### 4.4 Participation of market players

4.4.1 The Lisbon Treaty, via Article 15 TFEU, stipulates that in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. Transparency is a basic prerequisite if the public is to accept Community policies.

4.4.2 Participation must be developed by setting up smooth, effective communication systems between the Commission, competition authorities and consumer organisations, so that preventive action towards cross-border infringements can be taken at the outset and to achieve this, answers to the following questions must be found:

- What measures could be used to improve cooperation?
- How can preventive aspects be stepped up?

The European Parliament proposes <sup>(12)</sup> establishing a 'European Consumer Ombudsman', and supports the idea of appointing advisers responsible for consumer relations within the European Commission. In this context: It might be useful to consider setting up an 'ad hoc' position such as a European consumer ombudsman, or it might be more constructive to extend the powers of the existing European Ombudsman. With the aim of introducing the criterion of reasonableness as regards the methods used to ensure a high level of consumer protection in competition policy and in order to make the best use of existing resources,

<sup>(12)</sup> Report by MEP Lasse Lehtinen on the EU Consumer Policy strategy 2007-2013.

the EESC considers that it would initially be enough to appoint an adviser responsible for consumer relations <sup>(13)</sup> within the Commission departments that have a particular interest in consumer policy.

4.4.3 The administrative procedure within the Commission may need to be reformed when it comes to instituting penalty proceedings, in full compliance with the confidentiality principle. The problem could be solved by applying the provisions of Article 41 of the European Charter of Fundamental Rights guaranteeing access to the file, the right to be heard, reasons for decisions and the right to appeal.

4.4.4 Feedback on the minimum standards for consultation should be improved, making it mandatory for each DG to undertake an impact assessment of the consultation for all the proposals made, and not just for strategic proposals, as the EESC has pointed out <sup>(14)</sup>. Moreover, the Commission should examine issues of major importance for all European citizens, such as the languages that consultations are carried out in, the neutrality of questions and the response times.

4.4.5 The role that consumer organisations and other representative bodies could play is one issue that needs to be solved, once it is accepted that they have the authority to act throughout the complaints procedure. This matter will have to be resolved by means of an appropriate legislative instrument, once discussions have concluded on the White Paper on Damages actions for breach of the EC antitrust rules referred to above.

4.4.6 One key aspect is to raise public awareness of the importance of civil participation in competition policy. Prohibited practices (such as cartels formed by certain companies) must not be seen by the public as unassailable or resolvable only at the highest political or economic echelons. Rather, they should be seen to have serious social consequences, endangering and even undermining victims' right to property. For all of these reasons, discussions would have to take place and solutions found to determine the most suitable education and awareness measures in order to ensure that European consumers understand the consequences of

<sup>(13)</sup> Article 153(2) of the Treaty Establishing the European Community states that 'Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'. This obligation is incumbent on all officials working in the European institutions. The post of adviser responsible for consumer relations could help to alert other officials and remind them of their commitment to the public in their daily work.

<sup>(14)</sup> See: Green Paper — European Transparency Initiative — OJ C 324, 30.12.2006.

such unlawful practices. This would primarily entail continuing to support all aspects of the European Consumer Centres Network's activities and running publicity campaigns, both general ones and specific campaigns covering certain areas, which would help to inform the public in a swift and straightforward manner of their rights as consumers and of the centres or bodies they should turn to in order to make a complaint or seek advice.

#### 4.5 *Services of general interest*

4.5.1 The legal basis for Community intervention with regard to services of general interest is found in Article 14 TFEU and protocol No 26. In order to ensure high quality, economic accessibility and security, equal treatment and the promotion of universal access and user rights, the following questions need to be raised and answered:

- How should periodical assessments be carried out at Community level?
- What measures should be adopted to deal with distortion of competition in recently liberalised sectors?
- How can it be ensured that it is consumers who benefit from market-opening processes?

4.5.2 Broadly speaking, the lack of transparency in the management of these services, in addition to the unjustified tariffs imposed on business customers and consumers mean that these questions need to be answered.

Brussels, 3 December 2008.

*The President of the European Economic  
and Social Committee*  
Mario SEPI

#### 4.6 *The role of competition policy in the internal market*

4.6.1 The EU has exclusive power to establish the competition rules needed for the functioning of the internal market.

4.6.2 Competition policy must ensure that the best options in terms of price, quality and variety are available to consumers, particularly when it comes to basic goods and services such as food, housing, education, healthcare, energy, transport and telecommunications, thus bringing them lower prices.

4.6.3 Nevertheless, what is needed, in addition to market efficiency, is to improve the quality of life and wellbeing of consumers. To achieve this, a legislative institutional framework must be established for active consumer participation, rather than making consumers the passive subjects of the welfare concept.

4.6.3.1 To this end, the current legislative framework must change, by readjusting the way that the rules are interpreted or by creating new legal bodies for competition policy. Lastly, it would be useful to consider the adoption of new legal measures to supplement or replace the current ones.

*The Secretary-General of the European Economic  
and Social Committee*  
Martin WESTLAKE

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