its own merits. Even if the stabilizer mechanism continues in one form or another, it does not necessarily follow that the co-responsibility levy arrangements should be continued. The arrangements, for example, lower the returns to growers without encouraging consumers to use more grain.

13. The Committee wishes to emphasize that since cereal substitutes are exempt from levy the arrangements act as a further incentive to switch from EC cereals to imported substitutes.

14. We may now be witnessing fundamental changes in the world supply and demand situation for food which may make the stabilizer arrangements redundant. However, should structural surpluses continue to be a threat, a balance is unlikely to be achieved through the stabilizer arrangements as they stand. More direct action on supply and demand would then become essential.

Done at Brussels, 19 December 1989.

The Chairman

of the Economic and Social Committee

Alberto MASPRONE

Opinion on the 18th Report on competition policy

(90/C 62/07)

On 1 December 1989 the Commission decided, under Article 198 of the Treaty setting up the European Economic Community, to consult the Economic and Social Committee on the 18th Report on competition policy.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the matter, adopted its Opinion on 29 November 1989. The Rapporteur was Mr Mourgues.

At its 272nd Plenary Session (sitting of 19 December 1989) the Economic and Social Committee adopted the following Opinion unanimously (apart from one abstention):

1. **Introduction**

1.1. The introduction to the 18th Report on competition policy states that Community competition policy is at a crossroads. The favourable short-term economic situation has led economic operators to incorporate increasingly in their planning the need to adapt to the new market conditions expected for 1993. The strategic planning implemented by firms leads them to overcome the Community's internal economic barriers by conducting a variety of transnational operations.

1.2. On these general grounds, the Committee has thought it best to divide the Opinion into two specific parts.

1.2.1. Part I will be a critical review — both positive and negative — of the 18th Report.

1.2.2. Part II will formulate suggestions for certain guidelines for Community competition policy in the run-up to the Single Market.

1.3. These suggestions will take account not only of competition conditions within the EEC but also of those associated with commercial transactions with third countries.

2. **Opinion on the 18th Report proper**

2.1. *General Comments*

2.1.1. The long wait for a Regulation on the control of mergers, acquisitions and joint ventures

2.1.1.1. Chapter I of the fourth part of the 18th Report makes an instructive assessment of the progress in links between firms. These data are not exhaustive, and are not based on official, systematic statistics, but on general information.

2.1.1.2. However, the data enable the Commission to distinguish operations which foster the harmonious development of competition from those which produce distortions in practice and structure. In this connection the Committee would point out that, in the absence of a specific provision under Article 86 of the Treaty, the Commission has no legal power to grant exemptions approving or encouraging concentrations which favour competition.

2.1.1.3. Moreover, if due account is taken of the 'Continental-Can' judgement of 21 February 1973, the abuse of a dominant position in the Common Market or in a substantial part thereof jeopardizes an effective competition structure.

2.1.1.4. Accordingly the Committee proposes that, at the next amendment of the Treaty, an additional provision should be incorporated into Article 86, similar in spirit to Article 85(3), enabling the Commission to grant exemptions for concentration operations regarded as compatible with the aims of improving production or distribution, or likely to promote technical or economic progress, and to the extent that they are ultimately beneficial to consumers.

2.1.2. The major disadvantages of this situation

2.1.2.1. The Commission states that 'the impact of mergers and majority acquisitions on competition is likely to be more severe in already highly concentrated industries, such as chemicals' and particularly 'downstream' for pharmaceutical products and certain food products (point 327). Price-fixing in these sectors shows that the degree of concentration has reached a critical point.

2.1.2.2. This tendency appears to be accelerated by:

— the imminent prospect of the Single Market;

— but also probably by the delay in introducing Community rules in this field, or by the temporary retention of sometimes illegally imposed prices;

— the promotion of research and development agreements which establish links between enterprises.

2.1.2.3. The juxtaposition of these reasons may prompt the belief that there is a combination of circumstances favourable to the development of capital movement operations (takeover bids, etc.) within the Community.

2.1.2.4. At the same time there is a blatant slowness in the development of social provisions and in regulating public tenders; these are other factors influencing the market and competition.

2.1.2.5. This discord in the factors contributing to competition policy threatens to cause serious difficulties, and the Committee, which is deeply concerned about this, feels duty bound to warn the Commission.

2.1.3. The direct and indirect causes of inequality of treatment of enterprises and holdings

2.1.3.1. The inequality results primarily from the 'notification' conditions required sometimes in advance and sometimes retrospectively.

2.1.3.2. In addition, some factors of inequality result from the fact that the Commission exercises control retrospectively by defining the Community dimension of a concentration operation mainly on the basis of a threshold based on a high turnover figure [1], but also

— because the only enterprises concerned are those engaged in trade between Member States or with third countries;

— because Community case law has introduced the concept of 'collective dominant position' (see point 2.1.4 below).

2.1.3.3. On the other hand, in those sectors exempted from Article 85 for which rules have been drawn up, prior notifications are controlled without a lower limit. This applies to know-how licensing, franchising and research and development agreements.

2.1.3.4. In this connection, attention is drawn to the Commission's positive stance in the following cases:

Research and development

In three interesting cases, the Commission proved that it favoured technical progress and innovation in the Community. The first of these cases concerns the development by the Continental and Michelin companies of a tyre of entirely new design requiring considerable investments and involving an economic risk which is difficult to assess.

In this context reference should also be made to the Commission decision in the case of Brown-Boveri AG, a company which had concluded agreements with the Japanese company NGK Insulators Ltd. This decision authorizes intensive cooperation between these two firms for the purpose of developing, manufacturing and marketing high-performance batteries, intended primarily for use in electrically powered vehicles.

Franchising

In a decision on franchising, the Commission also showed that it is prepared in certain cases to waive the conditions

(1) The draft rules currently before the Council seek to diversify notification conditions on the basis of geographical criteria, competition external to and within the Community and market shares held by a firm outside the country where it is based.

laid down by the block exemption regulation concerned where the structure of competition on the market in question so allows (Service Master).

2.1.3.5. The same applies to subsidies policy: in particular, CAP subsidies are precisely assessed irrespective of the size of holdings, whereas in other sectors the severity of the checks is a function of their impact on intra-Community trade.

2.1.4. The 'activism' of case law

2.1.4.1. There is a hallowed tradition that, when the Community legislator is marking time, the Courts move things along through case law, which emphasizes the spirit of Community law.

2.1.4.2. This is true of:

(a) The Van Eycke versus Aspa judgement, which confirms that Member States are prohibited from enacting or maintaining in force measures likely to render Articles 85 and 86 inoperative (point 98).

Attention should be drawn to the Court of Justice ruling in the case 'Pascal van Eycke versus Aspa' by which it confirmed and extended its critical case law in respect of national measures which prejudice competition. The Court ruled that Member States must not enact or maintain in force measures likely to render Articles 85 and 86 of the EEC Treaty inoperative. This judgement confirms earlier case law (e.g. Vereniging van Vlaamse reisbureaus — Association of Flemish Travel Agents, 1 October 1987) in that it maintains that the effective benefit of the competition rules is limited: when a Member State imposes or encourages the conclusion of agreements contrary to Article 85; or when by adopting certain rules, it reinforces the impact of such agreements; or when it undermines its own rules by delegating to private operators responsibility for taking decisions on economic intervention (ground No 16 of the judgement).

The need for this approach to competition law is seen (for instance) in the efforts made by cooperatives, faced with global competition, to set up an integrated cooperative network.

(b) Judgements relating to the concept of delegated monopolies (points 106 ff.) which hinge on 'whether the unconnected parallel conduct of several economically independent firms might be caught by Article 86 as constituting abuse of a collective dominant position' and confirm the Commission's conclusions in this respect.

(c) Particular attention should be given to judgements made by certain national courts (e.g. in the Federal Republic of Germany) which 'directly apply European competition law' (point 127).

2.1.5. The inadequacy of DG IV resources

2.1.5.1. The comments in 2.2 and 2.3 illustrate that insufficient manpower, equipment and legal resources, frequently prevent the Directorate-General for Competition from fully exploiting its high-quality work on analysing the markets and implementing competition policy in the Community — a policy which has the hallmarks of common sense and realism.

2.1.5.2. The Committee therefore notes that:

— the Annual Report appears much too late;

— there is a significant delay in decision-making on issues subject to the decision procedure (cf. point 45).

2.1.5.3. In these circumstances, the question arises whether 'an instrument to monitor concentrations with a Community dimension' (Introduction to the Report, penultimate paragraph) will have the resources necessary for its operation.

2.1.5.4. This leads the Committee to recommend:

— Continuing 'public relations' measures in order to ensure that all economic operators in whatever sector, and all consumers, are always kept informed of their rights and duties with regard to competition policy. Along these lines, the Commission has announced the publication of an additional *White Paper* for the Single Market.

This *White Paper* will give particular attention to setting out the economic and social significance of competition as a basis for a democratic society.

2.1.6. Coordination with anti-dumping policy

2.1.6.1. In consultation with the other Commission departments, the Directorate-General for Competition needs to take account of the safeguard measures in Community trade policy authorized by the Treaty of Rome. Moreover consideration should be given to re-opening the debate in the Community on the implementation of anti-dumping policy.

2.1.6.2. The Community, and especially Member States which joined recently, are sometimes threatened by uncontrolled competition from certain third countries — either from those at an advanced stage of technological development or from those with a large, low — paid workforce.

2.1.6.3. It is not unusual for some countries or their firms to engage in dumping in particular sectors, either to provide an outlet for their goods or to discourage incipient competitive initiatives in the Community.

2.1.6.4. While guarding against the risk of a market imbalance which would impair fair pricing, the Commission needs an effective bulwark against certain unfair trading practices employed by third countries — practices which are often forms of protectionism contradicting and indeed violating international agreements such as the GATT. In this context, the state of the Community market must be assessed not only in relation to world trade but also by production sector.

2.2. *Sectors of activity deserving special attention*

2.2.1. Maritime traffic is the subject of a Committee Opinion on positive maritime Mmeasures [1]. This involves certain competition policy aspects. These are:

— maritime conferences and exemptions by category, already referred to in 1986 (in this connection the 17th Report mentioned the formal complaints about the Regulation which came into force on 1 July 1987; the 18th Report provides little information on the follow-up to these cases);

— intra-European maritime traffic competing with land and air links, raising the problem of taxation planned in principle but whose application to Community flags should be extended to the flags of third countries to avoid distortions of competition (legal difficulties to be overcome);

— in connection with maritime traffic, subsidies to European shipyards: investments have considerable effects on freight charges, and difficulties are exacerbated by the disparity between subsidies;

— similarly, the taxes and social security contributions paid by ships' crews give rise to distortions which also have an effect on these disparities.

2.2.2. Competition rules and copyright

2.2.2.1. Throughout the twentieth century, the participation of 'authors' in economic activities has been increasing. Going beyond the traditional arts, the development of cinema and audio-visual productions calls for new talents. In addition, a new type of 'author' now exists, producing computer software.

2.2.2.2. Sometimes misguided protection of intellectual property rights, either by certain national provisions (e.g. a single price), or by exercising a dominant position with regard to software and refusing information, whether subject to copyright or not, prompts the statement that 'The exercise of exclusive copyrights will not prejudice the application of the competition rules and the imposition of effective remedies in appropriate cases ...'.

2.2.2.3. Such unfair protection is incompatible with the abolition of internal frontiers. It is essential for Community law to develop in such a way as to prohibit certain 'perverse' forms of discrimination which hamper free competition and create new non-tariff barriers.

2.2.2.4. In this connection, the Committee has reservations about the 'Tetra Pak' decision. In this case the Commission took the view that an enterprise may exploit its dominant position by acquiring another enterprise which holds exclusive licence rights. The Commission did not oppose this concentration, but in order to avoid competitive disadvantage for one of Tetra Pak's competitors, the Commission threatened to withdraw Tetra Pak's exemption from the patent licensing agreements. Tetra Pak had to relinquish its exclusive licence rights, whilst its competitor benefited from a non-exclusive licence. By doing this the Commission interfered with a contractual relationship which was in existence before the merger and had no connection with that merger. This case leads the Committee (a) to stress the sometimes arbitrary attitude adopted by the Commission for a particular purpose, and (b) to oppose its attitude strongly in order to stop this becoming a trend.

2.2.3. Competition policy and intervention by public authorities in favour of enterprises

2.2.3.1. In its first report on state aid in the European Community, published at the beginning of 1989, the Commission seeks to shed some light on the jungle of European subsidies, and ultimately to exercise tighter control on national aid granted by Member States.

2.2.3.2. The concept of aid distinct from capital input, on which this study is based, covers the widest possible field. Thus subsidies to public enterprises (particularly national concerns) are included. Taking its cue from Articles 92 and 93 of the EEC Treaty, the report regards measures to encourage certain enterprises or forms of production as subsidies which distort or threaten to distort competition and which affect trade among Member States.

2.2.3.3. An overall survey of all Member States shows that the bulk of the aid goes to railways, agriculture, coal and regional development. In France and Ireland, however, the emphasis is more on promoting trade and exports. In the Federal Republic of Germany regional aid frequently has higher priority, arising partly from the federal structure. The importance of regional aid is further

(1) Doc. CES 1257/89 of 16 November 1989.

enhanced by the special situation of Berlin and the economic position of the regions bordering on the GDR.

2.2.3.4. The first report on subsidies in the Community has some gaps, mainly due to the inadequacy of the data:

— Important areas of the taxation and social security systems have not been taken into account.

— The survey does not include funds granted to public establishments' research projects, or the funding of university research and research assignments (including the military field), although these budget headings constitute subsidies under the very broad basic definition of aid.

— Because so-called general measures are excluded, some subsidies whose importance has been proved by experience (e.g. the European Regional Fund or the EAGGF Guarantee Section) have not been taken into account.

— There is great uncertainty about subsidies granted in a wide variety of forms by local and regional authorities, especially in federal structures.

— Some sectors are omitted, e.g. defence, energy (except coal), transport (except rail and inland waterway transport), press and media, banking, building and public utilities services.

— The data compiled in some Member States (Greece and Italy) are insufficient.

2.2.4. Other comments on the 18th Report

2.2.4.1. The programme of studies

Studies commissioned from bodies independent of the Community enable it better to analyse the positive and negative impact of competition in the various sectors of activity.

These studies follow on from the proposal made in the Committee Opinion on the 12th Report, and their continuance is to be welcomed.

In connection with the 18th Report, it is interesting to note that the border posts, whose abolition is envisaged by the 1984 *White Paper*, are not the only 'barrier to entry' and that advertising expenditure within or beyond an internal frontier can also be regarded as a brake on free competition.

It must also be noted that the idea of a merger analysis grid could be used in implementing the expected Directive.

Moreover, in the case of many enterprises, and particularly in countries which have recently joined the Community (as well as in developing countries) technology transfer contracts include leonine clauses preventing these enterprises from exporting or obtaining supplies where they wish and from having free access to the market. This delicate issue should be the subject of a research project, to be included in the study programme, to decide whether adequate competition-law procedures should be established.

The Committee hopes that the annual Competition Report will assess the results of the independently completed studies and the benefits reaped from them by the Commission.

2.2.4.2. Regional policies and the agricultural sector

In practice, these mean above all subsidies for regional purposes; the ESC Opinion on the 17th Report mentioned these. Subsidies for agriculture are closely linked with CAP subsidies. Some general measures may lead to distortions of competition (EAGGF Guarantee Section). The result is that the level of agricultural subsidies is sometimes significantly underestimated. It was also asked whether instituting the incomes subsidy had had beneficial effects. The 18th Report confines its treatment of these issues to analysing the subsidies granted by Member States, and refers to a publication in the 'Green Europe' series; it gives no answer to the question raised by the Committee.

The Committee feels it is very important for the Community and its trading partners to work in GATT for trade relations which lead to more balanced terms of competition in the agricultural sector.

2.2.4.3. Comparison of prices

For the consumer, whose freedom to choose his purchases is essential, 'domestic' competition policy holds out the possibility of comparing quality/price ratios. For the time being, prices, and especially large price disparities within the EEC Member States, are important indicators for the consumer as to whether competition is working.

The ESC's Opinion on the 17th Report sets great store by this and the segmentation of national markets, separated by the above-mentioned non-tariff barriers. The Committee confirms its wish that the aspect be taken into consideration and that everything possible be done to ensure that the Community's competition policy accords with the above (see point 3 below).

3. Proposals for a necessary development of the Community's competition policy

3.1. In its successive Opinions, and latterly in examining the economic situation of the Community in mid-1989, the

Committee mentioned certain conditions in the development of competition policy.

3.1.1. Genuine competition needs to be preserved in the Community in order to secure the advantages of the Single Market. All citizens will undoubtedly gain from its cost benefits. Thus the expected intensification of competition and improvement in firms' productivity and ability to innovate will come about naturally. On the other hand, the European Community must be given legal powers to vet concentrations of importance to the Community as a whole. The powers to vet these mergers and the powers provided by national legislation must be clearly demarcated under the Commission's authority. The Committee would refer to the its 1988 Opinion on this matter (1). Once barriers to trade have been abolished, market structures and the changes brought about by mergers will also have to be assessed in a Community-wide context. This would appear necessary when markets are open in principle to the rest of the world, if Community industry is to be capable of competing with the United States, Japan and some highly efficient, newly industrialized countries.

3.2. Community and national authorities must pay particular attention to small and medium-sized enterprises which are worse off than large firms with regard to information and planning. Public information and advisory services can help to offset these disadvantages. The Committee welcomes the steps taken by the Commission in helping to set up EC information and advice services in all Member States. In addition, support for cooperation between firms is important for the reduction of small and medium-sized enterprises' competitive disadvantages.

3.3. In the introduction to its l8th Report, the Commission states that 'Community competition policy has reached a crossroads'. This observation is of fundamental importance.

3.3.1. It should be noted at this point that neither the *White Paper* on the Single Market nor the Single Act involve Treaty amendments or decisive new prospects in the development of competition policy, which now appears to have lost its initial 'institutional lead' over the other Community policies.

3.3.2. It must now take account not only of commercial transactions between Member States but also of those within each of the Member States and of those with third countries.

3.3.3. DG IV must remain the driving force, and continue its work with the help of the relevant Government departments of Member States (including that of the customs services for commercial transactions with third countries) (1).

(1) OJ No C 208, 8. 8. 1988, p. 11.

3.3.4 The approach must be a global one since, in the overall Community context, competition policy acts as a jack-of-all-trades and represents the highest common denominator of the various policies which help to create EEC economic policy.

3.3.5. But the essential monitoring of compliance with the rules of competition and harmonization of subsidies policy are not enough. Account must also be taken of:

(a) protection of the environment (constraints of an environmental policy and duties imposed on producers should be identical and have an equal effect on cost prices within the Single Market);

(b) equality of consumers, who must reap the benefits of healthy competition and obtain equal advantages for comparable services;

(c) the workers who help to keep the EEC economy going are entitled to improved remuneration and social security at levels such that their impact on costs of production or services is likely to improve the terms of competition even further and encourage fair competition;

(d) this statement refocusses attention on the risks attached to work carried out and paid illegally, already mentioned in the Opinion on the 17th Report; this is a special case, similar to the practice of non-invoiced sales in the commercial sector;

(e) the introduction to the 18th Report states: 'It would seem that economic operators are making increasing provision in their forward planning for the need to adapt to the new market conditions of 1993'; accordingly, it should be ascertained whether, in the present state of legislation (Directives and Regulations) there is sufficient response to the need for such adaptation:

— in the various fields of application of Community instruments,

— in the internal legislation of Member States;

(f) in this connection it should also be stressed that 'The prohibition principle is translated, under Articles 85 and 86 of the EEC Treaty, into prohibition decisions which can comprise heavy fines'. (Introduction to the Report, p. 12). This raises the issue of whether the fairness of contracts and markets could perhaps be facilitated by more positive measures.

4. Conclusions

4.1. In the Committee's view, the abolition of barriers within the Community should lead the Commission to

consider an amendment — now essential — of the Treaty provisions covering the implementation of a healthy competition policy within the Common Market.

4.2. In this context, the Committee would ask the Commission to take up and implement the suggestions and practical proposals contained in this Opinion.

4.3. It is therefore important for the Commission to ask the Council to give it the resources needed to ensure that its departments are in a position — both in terms of manpower and work organization — to achieve this objective.

4.4. The Committee takes the view that the maximum effort must be made to strengthen competition policy within the EEC, so that a state of competition may be perpetuated both within the Community and in relation to third countries which will contribute to the prosperity of all. The future growth of the Community's prosperity and that of its citizens will depend to some extent on the success of Community competition policy.

Done at Brussels, 19 December 1989.

The Chairman

of the Economic and Social Committee

Alberto MASPRONE

Opinion on the communication from the Commission to the Council and to the European Parliament on completion of the internal market and approximation of indirect taxes

(90/C 62/08)

On 23 October 1989 the Commission decided, in accordance with Article 198 of the Treaty establishing the European Economic Community, to ask the Economic and Social Committee for an Opinion on the communication from the Commisson to the Council and to the European Parliament on completion of the internal market and approximation of indirect taxes.

The Section for Economic, Financial and Monetary Questions, which was responsible for the preparatory work on the matter, adopted its Opinion on 5 December 1989. The Rapporteur was Mr Della Croce.

At its 272nd Plenary Session (meeting of 19 December 1989), the Economic and Social Committee adopted the following Opinion by a substantial majority, with three dissenting votes and 11 abstentions:

1. **Introduction**

1.1. The Commission's purpose is to amend its Communication of 4 August 1987 and the accompanying draft Directives [COM(87) 320-328] relating to completion of the internal market through the approximation of indirect tax rates and structural harmonization.

The 1987 proposals had prompted considerable doubts and concern in the Council and the Member States and within various specialist study groups.

1.2. In this connection, reference should be made to the eight ESC Opinions adopted on 7 July 1988 [1]. The Opinions broadly endorse the idea of harmonizing indirect tax rates while highlighting the shortcomings of the proposals and stressing the need for substantial changes.

The Commission Communication implicitly takes account of these ESC Opinions but contains no specific reference.

1.3. Attention is also drawn to the Committee's statement in Opinion CES 739/88 on the Commission's Global Communication on Completion of the Internal Market that it 'fully endorses the aim of removing all frontiers and all border checks by 1 January 1993'.

This Opinion held that tax convergence in the broad sense, i.e. encompassing direct taxes and parafiscal charges, could not be considered as an absolute prerequisite for the establishment of the Single Market but only as one component of a global strategy embracing, for instance, macroeconomic back-up policies.

It is also clear that the current wide differences in VAT rates could generate sharp distortions of competition in a

(1) OJ No C 237, 12. 9. 1988.