

Opinion on the XXIIInd Report on Competition Policy

(94/C 34/24)

On 9 July 1993 the Commission decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Economic Community, on the XXIIInd Report on Competition Policy.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 3 November 1993. The Rapporteur was Mr Bagliano.

At its 310th Plenary Session (meeting of 24 November 1993) the Economic and Social Committee adopted the following Opinion unanimously.

1. A new context, the slowdown in economic growth

1.1. The Single Market increasingly requires a uniform, clear and consistent competition policy. The Economic and Social Committee shares the Commission's view that we are living in changed circumstances resulting from the slowdown in economic growth and the application of the subsidiarity principle and that competition policy therefore needs new guidelines and greater vigilance.

1.2. The Commission includes among these new guidelines the need to take a dynamic view of markets, which calls for 'greater flexibility in adapting to the new situation and staying in tune with the objectives which the Community has set itself for economic and social cohesion,'.

1.3. It is with these correct, pragmatic remarks that the Commission opens its XXIIInd annual report on Competition Policy. As usual the Report is a clear document but this time it is even more meticulous and well-documented.

2. A dynamic view of markets

2.1. The Committee considers that the requirement to take a dynamic view of markets holds true not only for competition policy but also for economic operators. By taking account of 'potential' competition in its assessment of merger operations, the Commission is following the same strategic approach as companies, which have always had to be dynamic and look ahead.

2.2. Technical progress — evolving in the direction of greater flexibility and lower cost — combined with growing international competition (with the increasingly tangible threat of new players entering the market as markets become more and more open) has led to a radical change in corporate market strategies.

The guidelines of anti-trust and competition monitoring policies have gradually changed accordingly.

These guidelines are focusing more and more on the efficiency of businesses and the economic system as a whole and give priority to the strategies of firms rather than to their size or the goods they produce.

Protection or safeguard of the 'market' — seen as an agglomeration of consumers and producers (of both goods and services) — is therefore no longer static. It is no longer enough to ban 'all' restrictive agreements, mergers or take-overs which create more powerful producer groups.

Protection or safeguard of the 'market' (i.e. the rules for ensuring healthy, effective competition) must in future be dynamic: in short, restrictive agreements, mergers and take-overs must be assessed 'case by case'.

2.3. The pace of change is increasing, and not only in the economic sphere, and decisions need to be implemented more swiftly. It is right that all interested parties should be consulted before a decision is adopted, but excessively protracted drafting procedures and efforts to achieve consensus, and delays that lack any real justification, are no longer acceptable.

2.4. In its 1981 Opinion the Economic and Social Committee made it clear that it was necessary to shape competition policy on the basis of a realistic view of overall, world-wide interdependence.

The Committee mentions this not merely for the satisfaction of showing that it has in the past said things that remain topical today; the Committee feels it useful to recall its past Opinions because they are relevant to its consideration of the XXIIInd report. The quotation should give the Commission further confirmation of

the usefulness of consulting the Committee — a point which has become increasingly clear recently.

3. The subsidiarity principle

3.1. The Committee agrees with the Commission in identifying Treaty Articles 85 and 86 (whose general applicability to the entire Community market is confirmed in the selfsame Treaty of Rome) as an early example of the subsidiarity principle: the exclusion from the competition rules of minor agreements, and the criterion of the effect on intra-EC trade, are already a clear and practical illustration of this. The same is also true of the merger control Regulation, which allows the Commission to refer cases to the national authorities.

3.2. At national level, however, Member State legislation designed to safeguard the market and free competition continues to play a vital and complementary role. In this connection the Economic and Social Committee agrees with the Commission that, in order to ensure maximum consistency with Community legislation, there is a need to push ahead more vigorously with progressive harmonization of national anti-trust legislation in order to prevent distortions in intra-Community trade and significant changes in the equivalence of terms of competition between the Member States, which would undermine the Community's own competition policy.

3.3. Moreover, the situation in many sectors — such as the pharmaceutical industry, on which the Committee has already delivered specific Opinions — shows for example that there are differences in national laws and that marked price differentials between Member States can only be tackled at Community level.

3.4. In connection with the allocation of responsibilities between the Commission and the national authorities, concern might be raised by the Commission's reference in its Annual Report to its 'limited resources'.

Clearly it is not for this reason, i.e. to lighten its workload, that the Commission intends to give an increasing role to the national authorities. The criteria should remain — rightly — both legal and economic, in line with the rules, practice and policy of the Commission.

Precisely because of this concern about 'limited resources' the Committee has repeatedly called for the Competition Directorate-General to be allocated more

staff. Today, even in a period of budget austerity, a solution could be found by making better use of existing resources. The Maastricht Treaty in any case brings with it new structures and responsibilities which will inevitably alter the balance of means/ends in some Directorates-General.

4. The role of the national courts

4.1. Article 5 of the Treaty establishes the principle of permanent, fair cooperation between the Community and the Member States. However, cooperation between the national courts and the Commission — now formalized in the Commission's notice of 13 February 1993, albeit only in indicative terms — still has to prove itself.

4.2. Concern arises from the traditional independence of the national courts and the difficulties of carrying out complex economic assessments which do not fall within the usual sphere of responsibility of courts of first instance.

4.3. At all events, cooperation between national courts and the Commission must not be understood as entailing any 'renationalization' whatsoever of the Community's competition policy. Community competition laws still need to be interpreted and applied uniformly in all the Member States — something which can be guaranteed by the Court of Justice — although the national courts should be encouraged to involve themselves more closely in procedural matters and questions of application.

5. Activities of the Commission

5.1. The Committee recognizes that the Commission was extremely active in 1992, both in handling individual cases and in approving general measures. The latter included Regulations and notices designed in particular to encourage certain types of cooperation between firms; measures to broaden the scope of certain block exemption Regulations; and a notice on cooperative joint ventures.

5.2. The Committee urges the Commission to issue official guidelines, in the form of notices spelling out the stance taken by its departments, as it is they who in practice assess firms' circumstances and action. This would help to improve the relationship between businesses and the Directorate-General for Competition and would speed up administrative procedures and legal proceedings. Indeed, the litigation stage could be shortened.

5.3. The Commission is also issuing an increasing amount of information. The Committee is particularly pleased that it has become regular practice to publish guidelines, codes and draft frameworks for certain sectors and problems in the EC Official Journal.

5.4. The neat if brief presentation of a number of 'studies' in one of the Annexes is of great interest and value. Some of these studies nevertheless deserve more detailed coverage and wider dissemination. The Committee is well aware that the complex topic of 'competition', embracing as it does all aspects of social and economic life, civic activities and the activities of individuals, requires those responsible for analyzing and taking decisions regarding the implementation of market-regulating provisions to continually update their professional skills and general culture; this is a splendid investment which is duly reflected in the high quality of the work of those concerned.

6. Coordination of Community policies

6.1. The XXIInd report begins by noting that 'alongside the establishment of a common market, competition policy is one of the two great strategies by which the Treaty of Rome sets out to achieve the Community's fundamental objectives'. Hence competition policy is not 'an end in itself', but an instrument for implementing the objectives set out in Article 2 of the Treaty of Rome. This was already the view of the Commission in its first annual report in 1971, and the point was also stressed by the Committee in its first Opinion in 1981.

6.2. While these repeated affirmations may reassure us as to the source of this provision — Article 2 of the Treaty — they also bring a need for consistent action. In the case of competition policy, where the aim is to pursue the objectives enshrined in the Treaty, this means taking account of a broader context which embraces all Community policies. Hence the need for coordination.

6.3. In this respect the Economic and Social Committee has already made clear, as far back as its first Opinion of 1981, the need for 'close coordination' with other Community policies.

6.3.1. This need to increase coordination of all Community policies can to some extent be met if appropriate Commission procedures are used within the Commission and if all decisions concerning the implementation of Articles 85 to 93 and the merger control Regulation (notices and decisions) are rigorously adopted by the Commission acting collectively. Any 'derogations' could be restricted to the preparatory stage and to internal administrative measures.

6.3.2. It is not a question of lack of trust in a particular Commissioner or Director-General; on the contrary, the abovementioned procedure is a practical mechanism for consistently applying the Commission's full political responsibilities in the delicate task of monitoring, correcting and stimulating the EC economy in order to promote harmonious development throughout the Community and boost economic and social cohesion.

A truly dynamic and flexible competition policy cannot stop short at applying fixed rigid structural criteria. It must be responsive to all aspects of changing economic and social trends, and these are often not moulded solely by the behaviour of the individual protagonists.

Each decision thus also acquires a political value, and is a matter of 'Community policy' in the fullest and most responsible sense.

7. Competition policy and the consumer

7.1. The advantages of the single market must be allowed to rebound fully on the consumer, as in the final analysis it is the consumer who should be the ultimate beneficiary of the goals of the Treaty of Rome.

7.1.1. In order to benefit fully from the single market, consumers must be allowed to play a more effective role in the various representative bodies; this would also help to boost the speed and effectiveness of the monitoring which the Commission already carries out as far as is practically feasible in the light of the resources available.

In particular, in order to allow consumers' representatives to play an active part in the application of competition policy, third parties should be given the widest possible access to dossiers, and allowed reasonable deadlines for the submission of comments; these deadlines should take account of the need to collect and analyze relevant data.

7.2. Competition policy must be allowed to operate effectively in all Member States, not only in order to tackle the problems generated by considerable differentials in the prices of goods and services but also to help break up the monopolies which still exist in certain sectors in some Member States and which, in particular, are actually created by substantial price differentials.

7.3. The most sensitive sector — and the one which consumers can judge most directly, in terms of end-price — is undoubtedly the distribution sector (goods and services).

Moreover, the efficiency of the distribution sector also depends on efficient infrastructure, which plays a key role in the transportation of food and energy.

8. Block exemption regulations — Cooperation — Technology transfer — Cooperative ventures

8.1. The Committee warmly supports the move to extend the scope of the block exemptions allowed by the Regulations on specialization agreements, research and development agreements, patent licensing agreements, and knowhow licensing agreements.

8.2. Subject to a maximum market share and turnover, cooperative and non-concentrative joint ventures are now also to be exempted from Article 85(3) of the Treaty. This fills a gap which in some ways benefited 'concentrative' joint ventures subject to the more favourable procedures of Regulation 4064/89.

8.3. Such measures are a practical way of encouraging cooperation between firms.

8.4. The Committee would here stress the close interrelation between competition policy and technology transfer, which is conducted largely by means of cooperation, this being the key feature of the structural economic changes taking place in response to the new challenges of international competition. The planned Regulation on technology transfer is therefore eagerly awaited, since it should enable the Commission to act with greater flexibility and help strike a balance between research and the protection of intellectual property.

The Committee recalls its Opinion on the XVIIIth annual report, which proposed that preparatory studies be carried out to assess the case for special rules. The Commission has acted upon this.

8.5. Another area where special rules are justified is the cooperative sector, which has its own totally unique characteristics.

8.5.1. Specific firms should receive specific treatment, especially as regards restrictive agreements and mergers. This is particularly true of the users' cooperatives which operate in many sectors (insurance, savings banks, housing, pharmacies, etc.). Where the intention of such cooperatives is to form a federation and cooperate on a transnational basis, it is self-evident that they will operate in the interest of the user-owners. This distinguishing feature — recognized in the draft statute for a European cooperative society — prompts the Committee to urge the Commission to adopt a special approach in this matter.

8.5.2. At all events, the Committee urges the Commission to extend the possibility of exemption from Article 85(3) to small and medium-sized cooperative-type distribution and craft businesses, so as to allow this important economic group to form effective associations and groupings that will enable them to compete with the large distribution groups.

9. Merger control

9.1. The Commission views the absence in 1992 of decisions to prohibit mergers, and the rise in the number of cases where plans were approved after modification, as a welcome development. This is one possible interpretation, but in some cases it could also indicate that firms prefer compromise to lengthy, costly legal proceedings of uncertain outcome.

9.2. The Committee would here reiterate its earlier calls for a more cautious approach to: dominant positions held by single firms; dominant positions held jointly by a number of firms; and the creation or strengthening of duopolies and oligopolies. Care must be taken to avoid influencing the market in pointless and perhaps damaging ways which the Commission itself may not intend. The Commission obviously does not seek to dictate the optimum number of competitors in a given sector. Monitoring and disciplinary measures must be clearly circumscribed to avoid any temptation or danger of dirigisme.

9.3. Whilst it may be said that businesses are 'in general' reasonably satisfied with the application of the merger control Regulation, there is still plenty of room for improvement, particularly with regard to procedures. This has become clear now that the Regulation has been in force for a few years.

9.4. Although the Committee is fully aware of the efforts which have already been made, it nevertheless calls upon the Commission to show greater transparency by increasing the quality and quantity of the information provided to third parties during the first and second stages. It would also improve transparency, and be very useful for subsequent discussions if the Commission were to publish the Opinions of all the Advisory Committees, and not just that of the Advisory Committee on Concentrations. Press releases should also be more comprehensive and contain the views of interested parties. The latter should at the very least be sent a copy of the Preliminary Report.

9.5. The Notice regarding merger and cooperation transactions under Regulation 4064/89 should also be updated in the light of new Regulations and subsequent case law in the area.

10. State aids

10.1. This is undoubtedly a complex and delicate subject, in which regional and temporal aspects (i.e. the duration of aid) are interwoven. A given aid may have different implications, and its justification be stronger or weaker, depending on whether it is short, medium or long term. The social aspects should also be very carefully scrutinized in tandem with the regional considerations.

10.2. The Commission is showing a growing flexibility. Experience shows that 'case by case' assessment is more helpful than strict bureaucratic application of rigid rules.

However, the Commission's responsibility in applying a criterion of flexibility here needs to be backed by fair cooperation from the Member States, so as to ensure that economic and social cohesion is pursued fairly and effectively.

10.3. Member States' state aid policies continue to differ markedly, depending to a large extent on the level of prosperity and hence the resources available. The Commission itself points out that between 1988 and 1990 the manufacturing industries of the four largest Member States received 79% of the total amount of state aid granted to this particular sector in the whole of the Community.

This concentration of State aid in the strongest economies is deplorable, particularly in the light of the repeated calls for cohesion.

10.4. The Committee applauds the regular attention — in the form of periodic reports — which the Commission devotes to this problem, which varies greatly from one sector to the next. Suffice it to consider the coal, steel and shipbuilding industries. There is a clear contradiction between the Commission's policy of phased but radical reductions in aid, and the situation in a number of Member States which subsidize certain industries (e.g. coal) or which levy special energy taxes.

10.5. The Committee remains strongly in favour of a phased reduction in state aid, though this must be pursued with consistent determination. Particular commitments and derogations should be rigidly limited in time-scale and area, and extensions should not be granted. The Committee is pleased to read in the XXIInd annual report that the Commission supports the idea clearly repeated in the Committee's Opinion on the XXIst annual report, namely that state aid should be 'transparent, temporary and degressive'. The Committee also urges the Commission to apply the same rules to public and to private firms, without any form of discrimination.

10.6. While the cooperation provided for in the Treaty on the European Economic Area as regards the control of state aid is welcome and necessary, the policy of drawing up precise provisions on aid involving third countries merits even greater approval and encouragement.

10.6.1. The agreements with the Central and Eastern European nations are a concrete and positive example, but the Committee calls for a more determined and prompt response to aberrant State aids which run counter to the Commission's policy of aligning anti-trust laws more closely.

This may be an ambitious goal, but strict controls are vital.

10.6.2. This combination of alignment and control must, as a matter of principle, be borne in mind when dealing with all third countries with which the Community has or seeks to have general or special relations, particularly within the framework of the common trade policy.

10.7. At all events, the Committee would like to see openness about aid rules on both sides, as this is a precondition for fair relations regardless of their exact nature or purpose.

10.8. The Committee also wishes to draw the Commission's attention to the question of 'indirect' aid, i.e. concessionary State export credits and export credit guarantees.

It is not only export credits facilitated by a State which can constitute aid within the meaning of Articles 92 et seq. of the Treaty, but also — and this problem too seems to have received insufficient consideration — credits which one State grants another in order directly or indirectly to support its home industry.

10.9. The Committee is particularly concerned at the Commission's admission that it is receiving more and more complaints about failure to notify aid measures. One must ask why national and — perhaps more frequently — regional authorities are not meeting their obligation to notify aid measures in advance. The Commission may be correct in saying that these complaints demonstrate economic operators' growing interest in state aid. However, it is also possible that even the public authorities are poorly informed about such key Community subjects as aid, and do not pay sufficient attention to the matter.

11. Competition policy and small and medium-sized enterprises (SMEs)

11.1. The Commission should strengthen its SMEs policy, and make this policy more selective so as to ensure that the aid it authorizes is genuinely calculated to make SMEs more efficient and boost their training, funding sources and research activities.

11.2. The aim is not to protect SMEs from large firms, but to prevent abuses of dominant positions. Particular attention needs to be paid here to the phenomenon of concentrations of hypermarkets.

11.3. SMEs play a vital economic and social role in the Community. Small and medium-sized businesses, including craft firms, account for 70% of the EC's employment and turnover.

11.4. To help these firms boost their competitiveness in the single market, competition policy must promote Community cooperation and information instruments, strengthening them and ensuring that they are disseminated as widely as possible.

12. Environmental policy and competition policy

12.1. While national and regional environmental legislation is necessary, it must not be used as a pretext for granting or not granting concessions, or for introducing discriminatory measures. Situations which distort competition must at all events be avoided. Careful ongoing monitoring is needed, with due consideration for the fact that environmental policy now figures among the basic policies of the Treaty.

12.2. The Committee would highlight the special situation surrounding the transport of oil, as this has implications for competition and is also important on social and safety grounds. In order to cut costs wherever

possible, there is a tendency to sacrifice transport safety, thereby increasing the potential danger of pollution of sea and ports. The low costs caused not only by inadequate safety equipment and inadequate maintenance, but also in many cases by the low wages paid to the crews, constitute a clear example of 'dumping'.

13. Competition policy at international level

13.1. Trade in goods and services between countries, economic areas and continents is growing apace and increasingly becoming a feature of the economic scene.

The gradual dismantling of tariff and non-tariff barriers, though vital, is not sufficient to achieve effective liberalization of international trade on the basis of fair terms of competition.

However, 'freedom' implies 'responsibility'.

Greater, more open free competition on a world scale must go hand in hand with heavier responsibility for all operators: private or public enterprises, governments, international or supranational organizations.

13.2. It is now generally acknowledged that all economic developments are partly conditioned by non-economic factors — especially social aspects, for which everyone bears a mandatory responsibility.

In particular, differences in working conditions and labour regulations in certain third countries, because of their significant impact on costs, may generate abnormal, artificial discrepancies which are totally alien to the natural, healthy and effective process of fair economic and productive competition.

13.3. The major challenge — requiring courage and steadfastness — which the Commission must meet without delay is to reconcile measures devised to safeguard competition effectively at international level with Community policies.

This is particularly the case where preferential relations still exist with less-favoured or developing countries. On no account must such relations cause distortion of trade or unwarranted changes in terms of competition.

13.4. The current crisis, both within and outside the Community, makes this problem a top priority.

To set in motion a process of economic recovery in these difficult times for the Community and the world at large calls above all for a forceful policy encompassing the entire range of the Commission's operational responsibilities.

13.5. To create new outlets and markets we must foster the conditions needed to enable the economies of less-favoured countries, or those grappling with the difficult task of transforming their internal political and socio-economic structures, to launch themselves speedily in international competition on equal terms, both as suppliers and buyers, and thus to play a constructive part in the general integration and socio-economic growth process.

13.6. Such a wide-ranging and all-embracing approach must not, however, obscure the need for more incisive action to harmonize national anti-trust legislation, both within and outside the Community, so as to attain the desired goal of effective, fair international competition.

Though the Commission is already working along these lines, the Committee would urge it to press ahead with greater conviction and decisiveness.

13.7. Bearing in mind that the Community derives its competence in matters relating to competition policy directly from the Treaty, the Committee calls on the Commission to frame its own 'policy' regardless of the delays and discouragement generated by failure in the monetary sector and on the GATT front, to quote just two examples.

Done at Brussels, 24 November 1993.

14. Conclusions

The competitiveness of Community firms, both within the EC and at international level, is a sine qua non for growth and development, besides being indispensable to enable other Community policies speedily to recover their original momentum.

A major drive, backed by firm conviction and a clear vision, is needed to achieve a policy commensurate with the present challenge.

Now more than ever, Community competition policy must kindle entrepreneurial spirit and initiative while concurrently expanding the options available to consumers and hence their powers to select.

A new openness is also needed in international trade.

Businesses must be able to make the choices which suit them, and accept the risks involved, in a climate of openness that also applies to laws and regulations.

Likewise, consumers — who are playing an increasingly active role on the economic stage — must be kept more fully informed so that they can make rational choices. They must therefore have access to a broader, more varied and reasonably priced range of goods and services, with optimum quality and safety guarantees.

The Commission must find the resources needed to give its full attention to these matters and adopt a firmer stance in the relevant international negotiations.

The Chairman
of the Economic and Social Committee
Susanne TIEMANN