

Opinion of the European Economic and Social Committee on the 'Report from the Commission — Report on Competition Policy' 2008

COM(2009) 374 final

(2011/C 44/24)

Rapporteur: **Mr METZLER**

On 23 July 2009 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 from the Commission - Report on Competition Policy 2008

COM(2009) 374 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 15 June 2010.

At its 464th plenary session, held on 14 and 15 July 2010 (meeting of 14 July), the European Economic and Social Committee adopted the following opinion by 111 votes to one with eight abstentions.

1. Summary and conclusions

1.1 The European Economic and Social Committee (EESC) welcomes the fact that the Commission has for the first time devoted a chapter to the issue of consumers in the field of antitrust law. It would like to point out that the collective action procedure still has to be transposed. In addition, the impact and significance that competition and antitrust law can have on and for other areas of European civil society and the economy should be highlighted. Reports should be compiled on this in the future.

1.2 The EESC welcomes and supports the Commission's efforts, when recovering state aid and state guarantees, to restore and enforce fair competition in the pan-European market. The EESC is convinced that this is key to the credibility of European competition law.

1.3 The EESC encourages the Commission to make greater and more strenuous efforts to put these aspects of its work across to the European public through improved communication.

1.4 The EESC asks the Commission to explain whether and to what extent it will make changes to the rules and guidelines in place to date on the basis of its experience with emergency relief for the finance system and the real economy with state aid, triggered by the crisis. The Committee hopes that this will give an insight into how the Commission will in the future approach state aid for systemically relevant industries, such as the car industry.

Competition policy should also take into consideration the circumstances and requirements of globalisation.

1.5 The EESC would reiterate the statement made in its opinion on the 2007 Report, namely that the Commission should direct its attention to the importance of social dumping and non-compliance with employment protection

legislation, inter alia, and report on its findings. This should be a particular priority in the field of transport.

2. Content of the 2008 report

2.1 The European Commission's report for 2008 places particular emphasis on cartels and consumer protection. Citing as examples the banana cartel and the automotive glazing cartel (2008 proceedings), the Commission has demonstrated how producer cartels have a negative impact on not only consumers and the prices they pay, but also the innovation capacity of particular sectors.

The Commission has shown that the set of instruments under the Leniency Notice rules is effective. The creation of the possibility to take into account cooperation in uncovering cartels as a mitigating factor when imposing fines has a positive impact on the Commission's work and its successes. The Commission has set out how the imposition of heavy fines underpins the general deterrent effect of competition and commercial law.

2.2 In 2008, the Commission continued to take decisive action against cartels. It imposed fines totalling EUR 2 271 billion on 34 companies in seven cartel cases.

In the same year it made estimates of the damage. To do this, it looked at 18 cartels that were the subject of Commission decisions between 2005 and 2007. It added 5-15 % of the product prices of the cartel participants and estimated the damage caused by these cartels at between four and eleven billion euros.

Estimates by the British Office of Fair Trading (OFT) show that for each cartel that is discovered, five other undiscovered ones form and/or are dissolved before they are discovered. Based on these assumptions, the 18 cartel decisions taken in the years 2005 to 2007, including the deterrent effect, may have prevented damage to consumers amounting to around EUR 60 billion.

3. Instruments

3.1 Antitrust – Articles 81 and 82 EC Treaty

3.1.1 On 2 April 2008, the Commission adopted the White Paper on damages actions for breach of the EC antitrust rules. Because of the instrument of individual actions against violators of antitrust law, this project by the European Commission on antitrust and competition law was much discussed. The EESC has expressed its support for a Community instrument that would harmonise certain aspects of individual and collective actions claiming damages for breach of Articles 101 and 102 TFEU.

The Commission has also introduced a simplified settlement procedure for combating cartels. The package for settlement procedures entered into force on 1 July 2008. It was made up of Commission regulations and communications from the Commission. Reasonable cartel members who ‘confess’ once the procedure is opened and documents are accessed can thus have their fines reduced by up to 10 %. This really does make things much simpler.

3.1.2 Also in 2008, the Commission published statements on its priorities in the application of Article 82 to cases of unfair hindrance of competitors by dominant firms. These set out the Commission’s analytical framework that enables it, when taking decisions, to understand and explain the process of harm to consumers.

3.1.3 In that same year, the revision of the block exemption regulations for vertical agreements, the motor vehicle sector and the insurance industry was started and/or continued.

3.1.4 Application of the rules to copyright unrelated to antitrust law

3.1.4.1 In 2008, the Commission prohibited the International Confederation of Societies of Authors and Composers from continuing restrictive practices through exclusivity agreements in their reciprocal agreements and thus maintaining territorial restrictions.

3.1.4.2 The Commission also acted in the area of abuse of dominant market position by imposing a definitive penalty of EUR 899 million on Microsoft. The dispute proceedings were completed in December 2009.

3.2 State measures for public enterprises or enterprises with exclusive and special rights

3.2.1 The public sector is also subject to EU competition policy under Article 86 of the EU Treaty.

The Commission had its say in this area with decisions on postal monopolies and the energy industry.

3.3 Merger control and monitoring of remedial action

3.3.1 Communication on remedial action

In October 2008, the Commission published a new communication and an implementing regulation on this subject. The aim of both is to make consumer protection more noticeable in this area, with the aim of lower prices, for example through tougher information requirements and systemisation of the information that has to be supplied with the product.

3.3.2 Enforcement of the rules

In addition, the Commission has set out what measures were used and steps taken to protect consumers. Here, too, the number of proposals reported to the Commission in 2008 was again very high at 347 (mergers and cases of collusion). The Commission made 340 final decisions.

3.4 State aid rules, development of rules on competition policy

3.4.1 This is where the Commission argued and exerted the greatest pressure for change in 2008. In the context of the financial crisis, it pushed on with implementing the action plan on state aid. Three communications on the role of state aid policy in overcoming the crisis and the process of recovery were published.

3.4.2 As regards the general development of competition rules, the Commission, as announced, adopted an implementation plan for the general block exemption regulation.

3.4.3 Communications on state aid in the form of guarantees (OJ C 155, 20.6.2008 and OJ C 244, 25.9.2008) set out how the aid elements of a guarantee should be calculated and provide for simplified rules for SMEs.

3.4.4 Also in 2008, the Commission continued working on improved enforcement and monitoring of compliance with decisions on state aid. It was concerned to demonstrate, by publicising the implementation of recovery decisions and their effective and immediate enforcement, that it was willing and able to limit the impact of state aid.

As already announced in the relevant action plan, the Commission launched proceedings in five cases under Article 88(2) and in eight cases under Article 228(2) of the EU Treaty against Member States that had not adequately enforced recovery decisions.

3.4.5 It is clear from the 2008 state aid scoreboard that EU Member States are complying with the Commission's wish that state aid be better targeted. 80 % of the cases of state aid provided by the Member States in 2007 thus have a horizontal aim.

3.4.6 With regard to the Community framework for research, development and innovation, DG Competition dealt with the state aid aspect (88 cases).

The Commission approved 18 risk capital schemes under the Risk Capital Guidelines in the area of risk capital financing for SMEs.

4. Sector developments

4.1 Energy and the Environment

The concentration in the energy sector and environmental aspects of climate change with support for the switch of energy production to CO₂-friendly processes were all looked at by the Commission. The Energy Council adopted compromises on 10 October.

Cartel investigations in this area focus on unfair hindrance of competitors, exploitative abuses and collusion. In particular, the issue of transmission for new energy suppliers keeps coming up in proceedings in almost all EU countries.

4.2 Financial Services

4.2.1 Aid to the financial sector in 2008 had a very significant impact on competition in the financial services sector.

The European Commission, together with the Member States, needs to monitor state aid in this area.

4.2.2 The Commission issued guidelines for state measures. It has now looked at appropriate measures for recapitalising financial institutions and put in place a minimum number of measures to combat disproportionate distortions of competition. On the basis of these provisions, specific measures for guarantees, individual aid and liquidity aid were approved in respect of more than 16 countries of the European Community and innumerable institutions in those countries.

4.2.3 The Commission considers that it acted quickly so as to restore market confidence.

4.2.4 By taking the measures it did, it demonstrated that competition law is an effective set of instruments for overcoming crises.

4.3 Instruments for the real economy

4.3.1 For businesses in the 'real economy', the Commission authorised state aid, loan guarantees, subsidised loans and risk capital aid.

Proof of market failure as a prerequisite for approval of export credit guarantees was simplified.

4.4 Electronic communication

4.4.1 Here, the Commission worked to convert national monopolies into competitive markets. The Commission recommendation of 2007 is showing an impact. In 2008, most national regulators came to the conclusion that national specifics were not an obstacle.

4.4.2 In the area of information technology, major proceedings were completed or made ready for completion. The transition from analogue to digital broadcasting is mentioned in the report, as are critical comments on state aid for public broadcasters.

4.5 Transport

4.5.1 Here, the Commission reports on proceedings regarding rail and multimodal transport and on the entry into force of the guidelines on state aid for rail operators, as well as merger control and decisions on promoting rail transport in multimodal transport. In respect of maritime transport, it raises the prospect of the process of reforming the competition rules being completed. As in the case of air transport, services of general economic interest are the subject of specific activities in this area too.

Further concentration can be expected in this area.

4.5.2 There are no comments on maintaining social standards for competition in the transport sector.

4.6 Pharmaceuticals

4.6.1 The Commission acted in this sector on the basis of information and tip-offs. In particular, it examined the area of bringing generics onto the market and noticed a general decline in innovation.

Over 100 companies and samples of 219 chemicals were investigated.

The Commission noted that the introduction of a single Community patent and a unified and specialised patent judiciary in Europe would be good for this sector's innovation capacity. Marketing authorisation, pricing and reimbursement procedures, which are different in individual countries, should, according to the Commission's report, be simplified.

4.7 Food

4.7.1 The Commission did not note any trend towards consolidation in the food sector or other supply sectors. The Commission has drawn up two communications on food prices (COM(2008)321/F and COM(2008)821/F), which support this view.

5. Consumer Liaison Unit

5.1 The Consumer Liaison unit was created in 2008 within DG Competition. It passes on information that is helpful for a better understanding of the markets and receives information and findings on market failure. The Consumer Liaison unit successfully carried out consultations with consumers' associations and took part in the debate with the EESC in the context of the process to draw up the own-initiative opinion on 'Economic democracy in the internal market'. It is hoped that this cooperation will continue, ensuring that the end goal of competition policy is both the wellbeing of consumers and the defence of civil society values.

6. The European Competition Network and national courts

6.1 In 2008, cooperation within the European Competition Network between the national competition authorities and the Commission Directorate-General worked smoothly and is described by the Commission as a success.

6.2 The same applies to work and cooperation with the courts.

7. International activities

7.1 The Commission reports that, in the area of international cooperation, it worked together with China and Korea in 2008. It plays an active role within the OECD and the International Competition Network.

8. Interinstitutional cooperation

8.1 DG Competition highlights its excellent relations with the EP, the Council and the EESC.

9. The EESC's stance

9.1 Consumer protection

9.1.1 The Committee welcomes the fact that DG Competition has placed more emphasis on consumer issues, with particular reference to the publication of its White Paper on damages actions for breach of the EC antitrust rules, which warrants the EESC's support. It is to be regretted, however, that more than two years on, the judicial collective action mechanism for consumer protection to which it refers and for which the EESC has stated its support in a number of opinions, has still not materialised.

9.1.2 The Committee considers that placing emphasis on cooperation with consumer protection – if these activities continue without limitation – should not lead people to forget or neglect the fact that antitrust law must cover areas other than consumer protection, such as:

— ensuring access to fundamental rights and freedoms;

— ensuring that democratic and free institutions are not jeopardised by economic power ('too big to fail');

— preventing system or sector dominance; and

— protecting SME structures.

9.2 State aid

9.2.1 The Committee supports efforts to supervise Member States in recovering the loans and guarantees so that a level competitive playing field can be restored.

9.2.2 From specific reports on individual proceedings, the EESC can see that the Commission has achieved a number of successes with the new set of instruments in terms of creating new packages aimed at settling antitrust proceedings out of court. It therefore believes that procedural law in particular continually needs to be adapted to changing circumstances.

9.2.3 In the financial sector, the credibility of European competition law will be put to the test over the coming decades. The re-establishment of a level playing field is missing. The action the Commission takes will determine public confidence in European institutions and legislation.

9.2.4 The Committee calls on the European Commission, when monitoring state aid and the conditions relating to it, to ensure that - in the financial sector - the recapitalisation of the banks remains linked to the restoration of financial flows and the supply of credit. The burden on public finances can only be justified if the beneficiaries' role in the real economy is supported sustainably.

9.3 The Commission is asked to explain whether and to what extent a) its case-by-case approach and consideration of political expediency when approving state aid for the financial sector represents a long-term break with the principles and rules it has applied hitherto and b) by extension, authorisations under Article 107 (2A3) for other key industries (e.g. the automotive sector) are likely to be given.

9.4 Services of general interest

9.4.1 The Committee supports the Commission's efforts to ensure that the arrangements for the provision of electricity, gas, telephone and public transport services are beneficial to consumers.

9.5 Transport

9.5.1 The Committee supports the efforts of the European Community.

Commenting on the 2007 report, the Committee noted that compliance with social provisions has a competition aspect in this sector.

9.5.2 The EESC calls for more attention to be paid to this aspect in the interests of transport workers. There is still a competition-distorting disparity in social standards in the European transport sector. The Committee considers that the European Commission should be firmer in standing up to the Member States in this area.

9.6 *Electronic communication and media*

9.6.1 The EESC considers that consumer interests, democracy, transparency and civil society's freedom of expression are all affected.

More attention should be paid to these as aims.

9.7 **Consumer Liaison Unit**

9.7.1 The Committee welcomes the establishment and operation of the Consumer Liaison Unit and supports the Commission in its expansion.

9.8 *European Network and cooperation among Member States*

9.8.1 The EESC notes that the European Competition Network is operating both among national competition authorities and the courts.

9.8.2 The international importance of competition law is not, in the EESC's view, accorded the significance it deserves.

9.8.3 In its opinion on the 2007 competition report, the EESC made clear statements on the significance to competition law of social dumping, non-compliance with employment law and non-compliance with environmental regulations. At the

time, it called on the Commission to report on these matters. This has not happened, and needs to be remedied.

9.8.4 The EESC calls on the Commission to strike a balance between industrial policy and competition policy.

9.9 *Competition and globalisation*

9.9.1 The Committee proposes that aspects of globalisation, namely GATT and WTO guidelines, also be taken into account when assessing competition issues.

9.9.2 An area that, in the EESC's view, is missing from the 2008 competition report is that of tackling the competition-distorting effect of state ownership of holding companies, including those outside the EU. In addition, the effect of European businesses being bought out using funds from other states – including those outside the EU – and the exercising of strategic state interests through equity participation is an area of concern.

10. **Competition and copyright**

10.1 The competition aspects of copyright should also be looked at.

10.2 Fair trade and free trade cannot fully work where copyright violators are involved. Competition law is an effective weapon in this area. The Commission would do well to pay attention to it.

11. **Cooperation with other European institutions**

11.1 The European Economic and Social Committee points out that it is willing to engage in such cooperation.

Brussels, 14 July 2010.

The President
of the European Economic and Social Committee
Mario SEPI
