

II

(Preparatory Acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

414th PLENARY SESSION, HELD ON 9 AND 10 FEBRUARY 2005

Opinion of the European Economic and Social Committee on the XXXIIIrd Report on Competition Policy — 2003

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On 4 June 2004, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the XXXIIIrd Report on Competition Policy — 2003

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 11 January 2005. The rapporteur was Mr Chiriac.

At its 414th plenary session, held on 9 and 10 February 2005 (meeting of 9 February), the European Economic and Social Committee adopted the following opinion with 75 votes in favour and one abstention:

1. Introduction

1.1 The 2003 annual report highlights changes to the internal organisation of the sector and to the working methods of the Commission, and documents the way the Commission secures coherence within the fabric of European economic governance.

1.2 EU competition policy plays an important role in achieving the competitiveness goals set out in the Lisbon strategy. It encompasses not only antitrust and merger rules, but also the application of an efficient and firm state aid discipline.

1.3 To enable trouble-free accession for the 10 new Member States, the Commission developed a common set of competition rules for all the Member States, to ensure fair application of state aid rules, highlighting the importance of tackling state intervention which distorts competition, with the same commitment as is applied to company law.

1.4 In 2003, 815 new cases of competition law infringements were recorded, and measures included the establishment of the post of consumer liaison officer to ensure a permanent dialogue with European consumers, whose welfare is the prime

concern of competition policy, but whose voice is not sufficiently heard when individual cases are handled or policy issues discussed. The role of the consumer liaison officer is not confined to merger control, but also concerns the antitrust field — cartels and abuses of dominant positions — as well as other competition-related policies.

1.5 In October 2003, the European Commission published draft rules and guidelines on technology transfer licensing agreements, on which the EESC has already issued an opinion⁽¹⁾. The proposed reform takes into account developments in this type of agreement in recent years and is aimed at simplifying and broadening the scope of the Community block exemption regulation. The new provisions offer the following advantages:

- the block exemption regulation will have only a black list: whatever is not explicitly excluded from the block exemption is now exempted;
- a clear distinction is drawn between agreements between competitors and agreements between non-competitors;
- there are already plans to adopt a 'modernisation package'.

⁽¹⁾ OJ C 80 of 30.3.2004

1.6 The Commission appointed a chief competition economist to take up office on 1 September 2003, while also giving a positive boost to the role of the hearing officer. The chief economist has three main tasks:

- to provide guidance on economics and econometrics in the application of EU competition rules; this may include contributing to the development of general policy instruments;
- to provide general guidance in individual competition cases from the early stages;
- to provide detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis.

1.7 Hearing officers, meanwhile, have been granted greater powers and autonomy in the role of defending the right to be heard in certain competition proceedings. They are directly answerable to the commissioner responsible and do not take instructions from the Competition DG. They may intervene whenever legitimate due process issues are at stake, must organise and conduct oral hearings objectively, and decide whether third parties should be heard and whether fresh documents may be produced. They refer to the relevant Commissioner on all issues.

2. Application of antitrust rules — Treaty Articles 81 and 82

2.1 In October 2003, the Commission launched the final phase in the process of reforming the enforcement of EU antitrust rules (known as the modernisation package) to facilitate the application of the enforcement powers vested in the competition authorities and to elaborate on the cooperation mechanisms with national competition authorities (NCAs) and national courts provided for by Regulation 1/2003.

2.2 The modernisation package contains a new implementing regulation, addressing the modalities for hearing the parties concerned and a range of other procedural issues, such as access to files and the treatment of confidential information. The six draft notices concern in part mechanisms for cooperation within the network of European competition authorities and between the Commission and national courts, the concept of effect on trade between Member States, the treatment of

complaints, and guidance letters to be issued to assist companies in assessing novel or unresolved questions. For comments on the modernisation package as a whole, the reader is referred to the EESC opinion (1).

2.3 In 2003, the Commission issued five decisions against unlawful horizontal agreements, involving: French beef, sorbates, electrical and mechanical carbon and graphite products, organic peroxides, and industrial copper tubes. The fines imposed totalled EUR 400 million. The level of fines set should act as a deterrent. Investigations involve company inspections. Full immunity is granted to companies that are first to reveal the existence of an agreement and that provide sufficient evidence to carry out an investigation. The Commission will express a favourable opinion in cases where agreements between companies do not restrict competition on the relevant markets, and where consumers benefit from the cooperation. Also in 2003, the Commission ruled on three cases of violations of Article 82, relating to:

- the rates imposed by Deutsche Telekom AG on competing companies for access to the local infrastructure of its telecommunications network,
- Wanadoo's pricing strategy for ADSL services, and
- the abuse of a dominant position by Ferrovie dello Stato SpA in markets for access to the rail network, traction and passenger services.

3. Competition policy developments at sectoral level

3.1 2003 brought significant, though not entirely satisfactory, progress for the liberalisation process in the energy sector (electricity and gas). In June, a legislative package was passed ensuring that all European consumers will be able to choose their supplier by 1 July 2007. These provisions aim to strike a balance between incentives to build new infrastructure and the completion of the common market.

3.2 Nevertheless, there is still widespread dissatisfaction among consumers and companies in various EU countries regarding the persistently high prices and relative efficiency of these services. In the new Member States in particular, social partners and consumer organisations strongly emphasise the need for national competition authorities and public utility regulators to be guaranteed full independence.

(1) OJ C 80 of 30.3.2004

3.2.1 When appropriate and comprehensive competition legislation is in place, it is sometimes the case, in the new Member States in particular, that monitoring and enforcement agencies encounter difficulties in fulfilling their role independently. As a result, competition legislation sometimes fails to promote either consumer interests or market efficiency. The Committee is in favour of a more functional relationship between competition policy and consumer protection policies. A more organised and involved consumer movement could also aid government decision-making, and provide information on markets and anti-competitive practices.

3.3 In the field of postal services, the directive adopted in 2002 is geared towards completion of the internal market, in particular through a progressive reduction of the reserved area and the liberalisation of outgoing cross-border mail. Furthermore, on the basis of an agreement reached by the European Council, the Commission will carry out a study in 2006 to assess the impact of universal services for every Member State. Working from the results of that study, it will adopt a proposal to open up the postal market completely from 2009, including measures to secure the universal nature of the service.

3.4 The deadline for transposing the new regulatory package on electronic communications expired in July 2004. In its report on the subject, the Commission stressed the following principles in particular: markets must be analysed on the basis of the principles of competition; operators can be regulated only if they have a dominant position; all electronic communications services and networks are to be treated in a similar manner (technological neutrality). Development of, and generalised access to, electronic communications are not enough in themselves to secure the relaunch of economic growth. For that it is fundamental to increase the knowledge and skills levels of all those required to use information and communication technologies.

3.5 In the air transport sector, in 2003 the Commission decided to launch a comprehensive and non-case-related dialogue with all the industry stakeholders, in order to prepare transparent guidelines on competition enforcement issues in the field of airline alliances and mergers.

3.5.1 Progress has also been made on defining and implementing common guidelines on the application of antitrust rules in the rail sector for both goods and passenger transport.

3.5.2 In addition, there have been developments in industry dialogue in the maritime transport, motor vehicle distribution and insurance sectors, with a view to adopting or revising block exemption regulations.

3.5.3 This dialogue should also consider comparable forms of tax treatment.

3.6 *Media:* the Commission believes that media pluralism is fundamental to both the development of the EU and the cultural identity of the Member States, but stresses that responsibility for the control of media concentration rests primarily with the Member States. The application of competition policy instruments is limited to addressing the structure of the underlying market and economic impact of media undertakings' behaviour, and to controlling state aid. They cannot replace national media concentration controls and measures to ensure media pluralism. The function of competition rules is limited to resolving problems raised by the creation or strengthening of dominant positions in the respective markets and the foreclosure of competitors from those markets.

3.6.1 It can be seen that the Commission's approach, though correct in theory, has not been able to prevent or oppose dominant positions and the related anti-competitive practices in certain countries in particular. Different markets are concerned, and the television advertising market, not yet adequately examined, is of increasing importance when it comes to protecting pluralism.

3.6.2 Furthermore, the methods some media groups use to strengthen a dominant position have been overlooked, in particular the use of poison pills and multiple voting rights which permit a minority shareholder to control a company through voting rights in excess of their shareholding.

3.6.3 The Commission will therefore have to be exceptionally vigilant in the application of competition rules and practices.

3.7 *Liberal professions:* A study carried out for the Commission by the Vienna-based Institute for Advanced Studies (IHS) has been made accessible to the public. The study reveals differing levels of regulation of service provision among Member States and among the various professions. The study concludes that in countries with less regulation and more freedom in the professions, more wealth can be created overall.

3.7.1 The conference on the regulation of professional services held in Brussels in October 2003 brought together 260 representatives of the professions to discuss the effects of rules and regulations on business structure and consumer protection.

3.7.2 At the conference, Commissioner Monti announced the Commission's intention to issue a report on competition in professional services in 2004. This report, which contains some important pointers and guidelines, was published on 9 February 2004.

4. Reform of the merger control system

4.1 On 27 November 2003, the Council reached a political agreement on a recast Merger Regulation incorporating most of the reforms proposed by the Commission in December 2002. These reforms involved non-legislative measures designed to streamline the decision-making process, strengthen economic analysis and provide better protection for the rights of defence. In addition, a chief competition economist was appointed and panels set up to ensure the conclusions are totally independent. On the subject of merger evaluation, the reader is referred to the EESC opinion on the *Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital* ⁽¹⁾.

4.2 *Objective:* to ensure that the substantive test in the Merger Regulation (dominance test) would cover all anti-competitive mergers effectively while at the same time ensuring continued legal certainty. The substantive test criteria were compared with those of the 'substantial lessening of competition' test and the terms of the new test adopted are as follows: 'a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market'.

4.2.1 The new regulation, in stating '*in particular as a result of the creation or strengthening ...*' hints at potential for enlarging the scope of application of the ban, no longer strictly linked to the requirement of a dominant position. Nevertheless, this rule will have to be interpreted in the light of the content of the joint Council and Commission declaration on Article 2 with reference to the 25th recital to the Regulation ⁽²⁾, which states that this concept '*should be interpreted as extending, beyond the*

concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.' It follows that the scope will continue to be defined in relation to the concept of dominance.

4.3 *Guidelines on assessing horizontal mergers:* i.e. mergers between competing, or potentially competing, firms. These mergers will only be unlawful to the extent that they enhance the market power of companies in a manner which is likely to have adverse consequences for consumers, notably in the form of higher prices, poorer quality products, or reduced choice. This is irrespective of whether the anticompetitive effects result from the creation or strengthening of a single dominant market player or from a situation of oligopoly. The impact of a merger will, moreover, be assessed in relation to what would otherwise have occurred in the market. This may mean, for example, that the acquisition of a failing firm would not justify intervention by the Commission.

4.4 *New best practices:* as part of the 2002 package of reforms, a consultation was held and completed in February 2003. The aim was to provide guidance for interested parties on the day-to-day conduct of EU merger control proceedings.

5. International cooperation

5.1 The Commission is an active participant in the International Competition Network's Working Group on multi-jurisdictional merger control. The group's activities have been in three sub-groups:

- notification and procedures,
- investigation techniques,
- analytical framework.

5.1.1 The Commission takes part in the work of all three sub-groups. The basic aim is to improve mutual understanding between different jurisdictions so as to make merger control activities more effective.

5.1.2 More generally, the ICN acts as a virtual network between various national competition authorities, with a view to facilitating international cooperation and making proposals to reduce regulatory costs and encourage procedural harmonisation and real convergence.

⁽¹⁾ OJ C 117 of 30.4.2004

⁽²⁾ Council Regulation 139/2004, of 20.1.2004

5.1.3 The Second ICN Conference held in Merida, Mexico in June 2003 highlighted the need to adopt clear and easily accessible language in the area of competition rules and also stressed the strategic nature of activities promoting competition in the field of regulated sectors, with a view to reducing regulatory costs and overcoming obstacles to a mutual understanding of merger policy between jurisdictions.

6. State aid

6.1 The control of state aid focuses on the effects on competition of aid measures granted by Member States to undertakings. *Objective:* to ensure that government interventions do not interfere with the smooth functioning of the internal market, to foster competition and competitive markets and to enhance structural reforms. Particular attention is given to ensuring that the beneficial effects of liberalisation are not undermined by state aid measures. *Stockholm European Council:* Member States are to reduce the general level of state aid and redirect it towards horizontal objectives of Community interest (strengthening of economic and social cohesion, employment, environmental protection, and promotion of SME R&D). The Commission considers the recovery of unlawful aid granted by Member States a priority.

6.1.1 In this context, the failure of a number of Member States to open up their public purchasing to bidders from other Member States is highly regrettable. Public procurement in the EU totals over EUR 1,500 billion annually and certain Member States' practice of favouring 'national champions' harms competition and adds to the tax burden on consumers.

6.2 *State aid for rescuing and restructuring firms in difficulty:* The relevant guidelines, which expired in October 2004, stated that aid may be regarded as compatible only under certain strict conditions. These guidelines have been reviewed, with a special focus on the following issues:

- ensuring that rescue aid is limited to reversible, temporary, short-term financial support which is granted only for so long as is necessary to put a comprehensive restructuring plan into effect;
- focusing state aid control on large enterprises that trade across the EU;
- reinforcing the principle, in particular in the case of large enterprises, that the aid recipient is obliged to finance a large part of the restructuring cost without any state aid;
- applying the 'one time, last time' principle.

6.3 *Multisectoral Framework for large investment projects:* strict rules in sectors with structural difficulties. A list of such sectors was to have been established by the end of 2003. Due to methodological and technical difficulties, the Commission has decided to postpone the adoption of the list and to extend the existing transitional rules for large investment projects in 'sensitive' sectors until December 2006.

6.4 *R&D aid for SMEs:* aid for research and development can contribute to economic growth, strengthening competitiveness and boosting employment. For SMEs, this is particularly important.

6.5 *Environmental aid, research and development aid, training aid, fiscal aid* In the latter field, special attention has been given to alternative taxation methods, such as the cost-plus method (taxable income calculated on a flat-rate basis as a percentage of the amount of operating expenditure and expenses). In the field of sectoral aid (see in particular the application of the temporary defensive mechanism (TDM)), the following sectors have been addressed: steel, telecommunications, coal, rail transport, combined transport, road transport, maritime transport and air transport.

6.6 *Agriculture:* on 23 December 2003, the Commission adopted a new regulation introducing a block exemption regime for certain categories of state aid, meaning that Member States no longer need to notify them in advance to the Commission for approval. The new regulation, which will apply until the end of 2006, concerns state aid granted to SMEs in the agricultural sector. In view of the definition of an SME (no more than 250 employees, a turnover of no more than EUR 40 million or a balance-sheet total of no more than EUR 27 million), the provisions cover almost all agricultural sector enterprises. Lastly, the Commission is introducing a *new transparency standard:* a summary of all exempted state aid measures, by Member State, will be published on the Internet five days before the aid is first paid out, so as to ensure all interested parties have all the necessary information.

7. General assessment

7.1 Having summed up and offered some comments on the Commission's XXXIIIrd report on competition policy in 2003, the Committee will now make a number of general observations on the report as a whole and in particular on its most significant, forward-looking aspects.

7.2 Relationship between competition policy and economic growth policy

7.2.1 The introduction of new procedures for applying anti-trust rules, the review of the Merger Regulation and the new organisational set-up in the Commission have made the European Union's competition policy more efficient and more open to a positive relationship with companies and consumers.

7.2.2 Competition policy has enabled the EU to make considerable steps forward in the liberalisation process, by restoring entire economic sectors to the logic and dynamic of the market and thus making a practical contribution to the creation of a single European market. Competition policy is therefore essential and must always be allowed full autonomy.

7.2.3 Working alone, it cannot however meet the particularly acute need throughout the EU for an intense upturn in growth and for a sustainable economic development policy based on innovation and social dialogue. Structural changes in production and world trade, starting with those generated by the new technological system, require the Commission to launch and coordinate other economic policy instruments. The goal is to safeguard and revive the competitiveness of the European economy and to bolster economic and social cohesion, employment and environmental protection while also promoting major, weighty research and development programmes. This is the thrust of the Commission's communication on *Fostering structural change: an industrial policy for an enlarged Europe* and the relevant EESC opinion⁽¹⁾. The Lisbon agenda outlines the way ahead. Its implementation must however be facilitated and speeded up at both general and sectoral levels.

7.2.3.1 At sectoral level, in confirmation of the points it made in its opinion of 30 June 2004 on *LeaderSHIP 2015 — Defining the Future of the European Shipbuilding and Repair Industry — Competitiveness through Excellence*⁽²⁾, the EESC would reiterate the need to push forward with the new fully integrated approach defined by the Competitiveness Council of November 2003 with a view to strengthening industrial competition and encouraging all sectors of research, development and innovation.

7.3 State aid and services of general interest

7.3.1 The reform process designed to streamline and simplify procedures for the control of state aid has made major progress, following the course set by the Stockholm European Council towards reducing the level of state aid and redirecting it towards horizontal objectives of Community interest, including the cohesion objectives. Examples of this are a

⁽¹⁾ OJ C 157 of 28.6.2005.

⁽²⁾ OJ C 302 of 7.12.2004

number of measures adopted by the Commission, such as extending to a degree the scope of aid to research and development; producing guidelines on technology transfer agreements, on restructuring companies in difficulty, and on aid for training and for environmental protection; and establishing multisectoral rules for major investment projects.

7.3.2 With its judgment on the Altmark case in July 2003, the Court of Justice confirmed that compensation to companies responsible for providing services of general interest will be excluded from the definition of state aid, subject to a few conditions. There are still some unresolved issues, however, relating in particular to establishing an optimal link between state aid and services of general interest (SGI). The nature of the conditions imposed by the Court demands an improvement in legal certainty, particularly in the area of assessing costs, defining financing for services⁽¹⁾ and specifying more clearly the public service obligations eligible for compensation. Meanwhile, the Green Paper on services of general interest (SGI), published in May 2003, had already acknowledged the need to assess whether the principles governing SGI should be further consolidated within a general Community framework, and to define optimal rules for the services and measures, in order to increase legal certainty for all operators.

7.3.3 If they are not correctly defined and financed, universal service obligations could cause the companies responsible to suffer increasing losses, owing to the potential entry of competitors into the most profitable areas of their activity.

7.3.4 The EESC would therefore stress the need, already highlighted in its opinion⁽²⁾ on the Commission's Green Paper, to adopt a clear legal text on SGI in order to secure effective and fair access for all users to high quality services that meet their requirements. Furthermore, it recommends instigating as broad as possible a dialogue with the social partners and NGOs, particularly regarding the reorganisation and functioning of social services.

7.4 Liberal professions

7.4.1 The in-depth analyses carried out by the Commission on the regulatory systems for professional services in the Member States have proved very useful, as they have reinforced the message on the need to carefully review the restrictive regulations in this field and to make the major cultural and knowledge-related resources existing in the professional world more productive and competitive. This clearly brings major benefits, not just for the professionals themselves, but also for firms and consumers.

⁽²⁾ OJ C 80 of 30.3.2004

7.4.2 The principle repeated several times by the Court of Justice is now generally accepted, namely, that suppliers of professional services must also respect competition rules. While it is absolutely true that economic criteria cannot be the only parameter by which professional services are assessed, as they are not simply repetitive technical applications but rather services that apply knowledge to a problem, it is also true that they are an economic activity which, when carried out with respect for competition rules, generate greater welfare and can make an important contribution to the Lisbon agenda.

7.4.2.1 The content of the Commission Communication on *Competition in Professional Services* ⁽¹⁾ is interesting in this respect. This report in fact underscores the important role the professional services can play in improving the competitiveness of the European economy, inasmuch as they are essential inputs for companies and families. At the same time, it uses empirical research to argue the negative effects that excessive or outdated regulations, such as those regarding pricing, advertising, entry requirements, exclusive rights and business structure, can and do have on consumers.

7.4.3 The priority is therefore to implement and accelerate the reform process. To this end, the EESC urges the Commission to stand by its commitment to publish a new report on 'progress in eliminating restrictive and unjustified rules' in 2005. In this context, the Commission has also committed itself to looking more closely at the link between the level of regulation, economic results (prices and quality) and consumer satisfaction.

7.4.4 Meanwhile, the EESC would reiterate the importance of the Court of Justice ruling of 9 October 2003 on the *Conorzio Industria Fiammiferi* case, which allows the national authorities to 'disapply' national rules obliging companies to engage in conduct contrary to Article 81.

7.4.5 Lastly, efforts must be made to promote greater and more informed involvement in the reform process on the part of the sectors concerned.

7.5 *Plurality of information and competition law*

7.5.1 In its XXXIIIrd report on competition policy, the Commission states that maintaining and developing media pluralism and the freedom to provide and receive information

are fundamental objectives of the European Union as values crucial to the democratic process. It also states that responsibility for the control of media concentration rests primarily with the Member States. The application of competition policy instruments in the media sector, it adds, is limited to addressing the problems raised by the creation or strengthening of dominant positions in the respective markets and the control of foreclosure of competitors from those markets. In the EESC's opinion, the distinction between the EU's tasks and those of national governments is somewhat vague, and also leaves a number of important issues unresolved:

- It should be noted that in the various Member States there are differing regulations and approaches requiring harmonisation: the Commission began the process in 1989 and then continued in 1997 with the Television without Frontiers directive, whose objectives were not only economic efficiency but also respect for cultural diversity, protection of minors, right of reply, etc.
- A distinction must be drawn in the media field between general antitrust rules and rules specifically designed to defend the pluralism of information. Operational competition rules are a basic condition for promoting pluralism, but not enough in themselves. Unlike a competitive system in which the market power of each company must face up to the initiative and activities of competing companies, the promotion and defence of pluralism demands the explicit recognition of the public's right to have effective access to independent sources of information and to alternative and potentially differing information, a right that should be protected at all levels.
- Lastly, the process of the gradual convergence between telecommunications, IT, radio, television and publishing makes it difficult to pinpoint the structures of the various markets. The danger of failing to properly understand this process is that the competition rules will be diminished and the principle of pluralism weakened.

7.5.2 The new European Constitution will significantly expand the Commission's brief. The EESC is convinced that the new legal framework will inject additional vigour into the Commission's role in guiding and/or intervening directly to defend and develop the freedom and pluralism of information.

Brussels, 9 February 2005.

The President
of the European Economic and Social Committee
Anne-Marie SIGMUND

⁽¹⁾ COM(2004) 83 final of 9.2.2004