

**Opinion of the European Economic and Social Committee on the Report from the Commission —
Report on Competition Policy 2006**

COM(2007) 358 final

(2008/C 162/05)

On 25 June 2007 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 2006

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 31 January 2008. The rapporteur was **Mr Chiriaco**.

At its 442nd plenary session, held on 13 and 14 February 2008 (meeting of 13 February 2008), the European Economic and Social Committee adopted the following opinion by 141 votes to 3 with 5 abstentions.

1. Introduction

1.1 The 2006 Report on Competition Policy highlights the changes to the internal organisation and working methods of the Commission in this field and provides evidence of the way the Commission ensures consistent European economic governance in line with the objectives of the Lisbon strategy.

2. Instruments

2.1 Antitrust ⁽¹⁾ — Articles 81 and 82 EC ⁽²⁾

2.1.1 In the Commission's view, fines are of central importance in deterring companies from breaking competition rules.

A new threshold for **immunity and reduction of fines** was adopted for cartel cases. Under new guidelines, the amount of the fine is based on a percentage of the company's yearly sales of the relevant product (up to 30 %) multiplied by the number of years of its participation in the infringement. The fine may be increased up to 100 % for repeat offenders.

2.1.2 With a view to a more effective control system, a **Green Paper on damages actions for breach of the EU anti-trust rules** as contained in Articles 81 and 82 of the EC Treaty was adopted. The Green Paper generated intense discussion across Europe, resulting in over 150 submissions from governments, competition authorities, industry, consumer organisations, lawyers and academics within the individual Member States.

⁽¹⁾ The following Commission decisions are the subject of appeals before the Court of Justice of the European Communities. There have been no definitive rulings to date, except in the De Beers case, in which the Commission decision was annulled by the Court: Cases COMP/38.638 *Synthetic rubber*, Commission decision 29.11.2006; COMP/39.234 *Alloy surcharge* (re-adoption) Commission decision 20.12.2006; COMP/38.907 *Steel beams* (re-adoption) Commission decision 8.11.2006; COMP/38.121 *Fittings*, Commission decision 20.9.2006; COMP/38.456 *Bitumen Netherlands*, Commission decision 13.9.2006; COMP/38.645 *Methacrylates*, Commission decision 31.5.2006; COMP/38.620 *Hydrogen peroxide and perborate*, Commission decision 3.5.2006; COMP/38.113 *Prokret/Tomra*; COMP/38.348 *Repsol CCP*, Commission decision 12.4.2006; and COMP/38.381 *De Beers*, Commission decision 22.2.2006.

⁽²⁾ OJ C 321 E, 29.12.2006.

In its opinion on the Green Paper ⁽³⁾, the EESC also welcomed the Commission initiative, following a wide-ranging discussion.

2.1.3 Regarding action taken on **cartels**, the Commission issued **seven final decisions**, fining 41 companies a total of EUR 1 846 million (as against 33 companies fined a total of EUR 683 million in 2005).

2.2 Merger control ⁽⁴⁾

2.2.1 The Commission has undertaken, through public consultation, to provide **better guidance on jurisdictional questions** ⁽⁵⁾ that arise regarding merger control under the Merger Regulation ⁽⁶⁾.

A new Notice, which was expected to be adopted in 2007, will replace the existing Notices on this issue.

2.2.2 In terms of application of the rules, the **number of mergers notified** to the Commission in 2006 **reached 356**. In total the Commission adopted 352 final decisions, 207 of which were taken in accordance with the simplified procedure.

2.3 State aid control

2.3.1 The Commission simplified the approval of **regional aid** by adopting a **block exemption Regulation** ⁽⁷⁾; aid for **Research, Development and Innovation** (R, D&I) ⁽⁸⁾ by adopting a new framework; **aid for investment in SMEs** ⁽⁹⁾ by improving access to finance for SMEs; and **environmental protection aid**.

⁽³⁾ INT/306. The EESC opinion is available at: http://eescopinions.eesc.europa.eu/EESCopinionDocument.aspx?identifier=ces\int\int306\ces1349-2006_ac.doc&language=EN.

⁽⁴⁾ Only one Commission decision was appealed before the Court of Justice of the European Communities: Case COMP/M.3796 *Omya/J. M. Huber PCC*.

⁽⁵⁾ Available at: http://ec.europa.eu/comm/competition/mergers/legislation/jn_en.pdf.

⁽⁶⁾ Regulation (EC) No 139/2004.

⁽⁷⁾ Regulation (EC) No 1628/2006.

⁽⁸⁾ OJ C 323, 30.12.2006, p. 1.

⁽⁹⁾ OJ C 194, 18.8.2006, p. 2.

Finally, the Commission adopted a new **de minimis Regulation** ⁽¹⁰⁾ under which aid of up to EUR 200 000 ⁽¹¹⁾ granted over three fiscal years will not be regarded as State aid.

2.3.2 In terms of implementing the rules, the Commission examined 921 State aid cases in 2006, which represents a 36 % increase on 2005. The Commission adopted 710 final decisions, in most cases — 91 % — approving the aid without a formal investigation, deeming it compatible with the rules on free competition.

2.3.3 Furthermore, while the Commission has considered that **training aid** can contribute to the European common interest, it has taken a strict stance on **rescue and restructuring** (R&R) aid to firms in difficulty, considering it legitimate only if stringent conditions were fulfilled ⁽¹²⁾.

3. Sector developments

3.1 Energy

3.1.1 The **Final report on the energy sector inquiry**, adopted by the Commission on 10 January 2007 ⁽¹³⁾, highlighted Europe's steadily rising gas and electricity wholesale prices and relatively limited customer choice due to entry barriers for energy products.

3.1.2 The Commission carried out a number of **antitrust investigations** into hoarding of network and storage capacity, long-term capacity reservations, market sharing and long-term contracts between wholesalers/retailers and downstream customers.

3.1.3 The Commission considered and issued decisions on many energy **mergers**. The most significant cases were *DONG/Elsam/Energi E2* ⁽¹⁴⁾ and *Gaz de France/Suez* ⁽¹⁵⁾.

⁽¹⁰⁾ Regulation (EC) No 1998/2006.

⁽¹¹⁾ Amount doubled with regard to the previous Regulation (Cf. Regulation (EC) No 69/2001, OJ L 10, 13.1.2001, p. 30).

⁽¹²⁾ Cf. case of Northern Rock (IP/07/1859). The Commission concluded that the emergency liquidity assistance provided by the Bank of England on 14 September 2007, which was secured by sufficient collateral and was interest-bearing, does not constitute state aid. However the guarantee on deposits granted by the Treasury on 17 September, as well as the measures granted on 9 October, which provided further liquidity and guarantees to Northern Rock and were secured by a Treasury indemnity, do constitute state aid. These aid measures can be authorised as rescue aid in line with the Community Guidelines on state aid for rescuing and restructuring firms in difficulty. Under these rules, rescue aid must be given in the form of loans or guarantees lasting no more than six months, although there are certain exceptions to these rules in the banking sector, in order to allow for prudential requirements, which have been applied in this case. Also in line with the rules, the UK authorities have given a commitment to deliver to the Commission by 17 March 2008 a plan for Northern Rock going beyond the short term rescue. If a restructuring plan were to involve state aid, it would have to be assessed on its own merits under the rules on restructuring aid.

⁽¹³⁾ COM(2006) 851 final.

⁽¹⁴⁾ Case COMP/M.3868 *DONG/Elsam/Energi E2* Commission decision, 14.3.2006.

⁽¹⁵⁾ Case COMP/M.4180 *Gaz de France/Suez* Commission decision, 14.11.2006.

3.1.4 **Work on State aid control** has shown that contracts between public network operators and generators in Hungary and Poland has foreclosed parts of the wholesale markets and that in Italy favourable electricity tariffs for certain companies have been distorting competition. Also important was the State aid decision in the area of renewable energy aimed at ensuring that public financing covers only exceptional cases and does not favour businesses or activities that do not meet the required standards.

3.2 Financial services

3.2.1 In 2005 the Commission launched an **inquiry into the retail banking sector** ⁽¹⁶⁾, focusing particularly on cross-border competition. The final report was published on 31 January 2007 and the problems identified included entry barriers, market fragmentation and the high degree of concentration among issuers and acquirers of payment cards.

3.2.2 The Commission published its interim report on its extensive **inquiry into business insurance** on 24 January 2007.

3.2.3 Furthermore, the Commission cleared a large number of **mergers** in the area of financial services, as in the case of *Talanx Aktiengesellschaft* ⁽¹⁷⁾.

3.2.4 Through its **State aid control**, the Commission has ensured a level playing field in financial services, especially for new entrants and foreign banks. It also demanded the repeal of Luxembourg's system of hidden subsidies for holdings.

3.3 Electronic communications

3.3.1 The vast majority of providers of electronic communication services operate within the confines of the EU regulatory framework for electronic communications networks and services. The Commission has thus recommended **18 specific product and services markets at both wholesale and retail level for ex ante regulation** by national regulators ⁽¹⁸⁾. **Broadband access markets** provide an example of the application of ex ante sector-specific regulation and ex post competition law.

3.4 Information technology

3.4.1 The Commission continued to ensure that competition is not distorted in the IT sector, which is currently characterised by digital convergence and the growing importance of interoperability.

⁽¹⁶⁾ Commission decision, 13.6.2005 (OJ C 144, 14.6.2005, p. 13).

⁽¹⁷⁾ Case COMP/M.4055 *Talanx/Gerling* Commission decision, 5.4.2006.

⁽¹⁸⁾ *Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible for ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services*, OJ L 114, 8.5.2003, p. 45. The Commission approved a new recommendation on 17 December 2007 (OJ L 344, 28.12.2007, p. 65) which refers to only eight markets.

Of huge significance in this regard is the case of **Microsoft**, which was fined for not providing the information requested by the Commission, within the deadline set. Microsoft's appeal against the Commission decision ⁽¹⁹⁾ was rejected by the Court of First Instance in its judgment of 17 September 2007 ⁽²⁰⁾.

3.4.2 In the area of **merger** control the Commission cleared the mergers between **Nokia** and the network equipment business of **Siemens AG** and between **Alcatel** and **Lucent Technologies**, as it considered that the supply of optical networking equipment and broadband access solutions would not become less competitive.

3.5 Media

3.5.1 The objective of competition policy in the media sector is to guarantee a level playing field, whether between different commercial operators or between commercial operators and publicly-funded operators.

3.5.2 In the area of **digital broadcasting**, the Commission opened infringement proceedings against Italy to investigate whether, in the digital switchover, restrictions had been placed on broadcasters and competitive advantages granted to existing analogue operators, in clear violation of the Competition Directive.

3.5.3 With regard to **premium content**, State aid for **films and other audiovisual works** and **rights management**, the Commission has intervened repeatedly to ensure effective competition.

3.6 Transport

3.6.1 The main problem areas are protected national markets in the case of road transport, low levels of interoperability in rail transport, and a lack of transparent access to competitive port services.

3.6.2 In the case of road transport, the Commission has maintained its policy of approving State aid in order to favour the uptake of cleaner technology and for public service obligations.

3.6.3 Regarding **rail transport**, the Commission issued an important decision concerning State aid for rail infrastructure, which was considered to be within the remit of the public authorities and not to constitute State aid ⁽²¹⁾.

3.6.4 In the area of maritime transport, the Commission has undertaken to issue guidelines on the application of competition law so as to help smooth the transition to a fully competitive regime. Concerning State aid, the Commission has insisted on the dismantling of any nationality clause exempting ship-owners from payment of the social contributions of their seafarers.

3.6.5 Finally, in the area of **air transport**, the Commission adopted Regulation (EC) No 1459/2006 discontinuing, from 1

January 2007, the exemption from the prohibition under Article 81(1) EC of IATA passenger tariffs for routes within the EU as well as the exemption for slots and scheduling.

3.7 Postal services

3.7.1 Following significant changes in the postal market, the Commission proceeded to reduce the services for which monopoly rights are granted to Universal Service Providers, on the one hand, and preserve competition in liberalised areas, to avoid de facto re-monopolisation, on the other hand.

3.7.2 Also of importance was the Commission's decision that compensation for Services of General Economic Interest should only be considered compatible with the State aid rules in cases where the amount of the compensation did not exceed the cost of the public service obligation and provided that the other conditions were also met.

The Commission also examined whether postal operators were enjoying other advantages. In this context, it recommended that France ⁽²²⁾ should end the unlimited State guarantee enjoyed by the French Post office in its capacity as a public body by the end of 2008.

4. The European Competition Network (ECN) and national courts

4.1 2006 was an important year, in which the system set up by Regulation (EC) No 1/2003 was further bedded down and cooperation strengthened both between the members of the ECN, i.e. between national competition authorities (NCAs) and the Commission, and between the national courts and the Commission.

4.2 Cooperation between the ECN members is organised around two principal obligations on the part of the NCAs, namely to inform the Commission when new cases are opened and to do so before the final decision is taken. The Commission was informed of some 150 case investigations launched by NCAs, and reviewed or advised NCAs regarding 125 of these.

4.3 Close cooperation within the ECN included a meeting between the Director-General of the Competition DG and the NCAs, where the ECN leniency model programme was endorsed. The Commission and the NCAs also met to discuss issues relating to antitrust policy, sector inquiries and particular sectors.

4.4 Application of EU competition rules by national courts in the EU

4.4.1 Article 15(1) of Regulation (EC) No 1/2003 allows national courts to ask the Commission for its opinion or for information in its possession. The same Article also requires the Member States to forward to the Commission a copy of any judgment issued by national courts.

⁽¹⁹⁾ The text of the decision is available at: http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/art24_2_decision.pdf.

⁽²⁰⁾ Case T-201/04 (OJ C 269, 10.11.2007, p. 45).

⁽²¹⁾ Case N 478/2004, 7.6.2006 (OJ C 209, 31.8.2006).

⁽²²⁾ Case E 15/2005, *Recommandation proposant l'adoption de mesures utiles concernant la garantie illimitée de l'État en faveur de La Poste* (not yet published).

4.4.2 Continuous training of national judges is of crucial importance for increasing knowledge of EU competition law. To this end, the Commission co-finances training projects each year in all Member States.

5. International activities

5.1 In preparation for their accession to the EU, the Commission helped promote the enforcement of the competition rules in Romania and Bulgaria, as it is now doing in Croatia and Turkey.

5.2 **Bilateral dialogue** on competition was stepped up between the Commission and numerous competition authorities, as well as contacts with the United States, Canada and Japan. The Competition DG also assisted China and Russia in the drafting of competition law.

5.3 Finally, in the framework of **multilateral cooperation**, the Competition DG is playing a leading role in the International Competition Network and participates in the work of the OECD Competition Committee.

6. Interinstitutional cooperation

6.1 Each year, the European Parliament issues an own-initiative report on the Commission's annual competition report. The Commissioner responsible for competition policy holds regular talks with the Council and the relevant Parliamentary Committees.

6.2 Also noteworthy is that the Commission informs the EESC and the CoR about major initiatives and participates in the debate on the adoption of the EESC's yearly opinion on the Commission's annual Report on Competition Policy.

7. Conclusions and comments

7.1 *Relationship between competition policy and economic growth policy*

By restoring entire economic sectors to the logic and dynamic of the market, competition policy has made a practical contribution to the creation of a cohesive single European market, with fewer rules and regulations.

7.1.1 Competition policy is playing an increasingly important role in European economic policy. Both the Commission ⁽²³⁾ and the EESC ⁽²⁴⁾ have on previous occasions pointed out the need to launch new economic policy instruments aimed at directing both competition and industrial policy towards the objectives of increased economic and social cohesion, employment protection, inter alia through control systems on State aid and forms of relocation, environmental protection and the promotion of major, weighty research and development programmes.

Competition policy is currently closely coordinated with other

⁽²³⁾ Fostering structural change: an industrial policy for an enlarged Europe, COM(2004) 274 final.

⁽²⁴⁾ Opinion of the European Economic and Social Committee on Fostering structural change: an industrial policy for an enlarged Europe (COM (2004) 274 final), OJ C 157 of 28.6.2005.

policies, such as the internal market and consumer policy, with a view to creating better functioning markets for the benefit of consumers and European competitiveness.

7.1.2 Based on an update for the seven largest Member States, the Commission forecast economic growth in 2007 at 2.8 % in the EU and 2.5 % in the euro area ⁽²⁵⁾. Despite the IMF's downward revision of the growth forecast for the euro area from 2.1 % a 1.6 %, the EESC maintains that European growth should continue, supported by sound fundamentals and a favourable global environment.

7.1.3 The EESC considers it important that the EU achieves balanced economic growth and price stability, a highly competitive social market economy that promotes training and aims at full employment and social progress, and a high level of protection and improvement of the quality of the environment.

7.1.4 In a market where competition policy will continue to gain importance, economic, social and environmental indicators are key factors in measuring competitiveness, not only for end consumers but particularly for business.

7.1.5 The EESC maintains that the competitiveness of European businesses and services must be safeguarded by a clear regulatory framework based on the proper application of competition policies hand in hand with trade policies.

The EU is currently the world's most open market to foreign goods; abolishing the EU's most fundamental safeguards against dumping and subsidies would indiscriminately hit all EU manufacturers that operate in compliance with the competition and legal trade rules and EU standards and without recourse to State aid.

In this regard, the EESC calls on the Commission to, on the one hand, to be more attentive to reporting to the WTO cases of distorted international competition and, on the other, to undertake to insert a clause into bilateral trade agreements that requires its trading partners to comply with competition rules, including the effective control of State aid.

7.2 *State aid control*

7.2.1 The EESC appreciates the Commission's modernisation strategy with regard to the State aid action plan, which is based on: targeted State aid, economic analysis, effective procedures and shared responsibility between the Commission and the Member States. It also supports the stance taken by the Commission to welcome State aid for technology transfer, innovation and the multisectoral framework for major investment projects and treat such aid differently.

7.2.2 When investigating State aid cases, the Commission should accept as justified the specific tax treatment adopted by Member States for mutual societies, such as cooperatives and companies with a major social impact.

⁽²⁵⁾ Cf. IP/07/1295. More information is available at: http://ec.europa.eu/economy_finance/publications/european_economy/2007/interim_forecast_1107_en.pdf.

7.3 Banks and financial markets

7.3.1 The EESC welcomes the action taken by the Commission to control cross-ownership of shares and the management of financial products. It has happened in certain cases that credit institutions were major shareholders (shareholders' agreements) in other companies, and that therefore loans granted by banks were ultimately used to finance the purchasing of shares in those same banks.

7.4 Energy

7.4.1 The EESC emphasises that energy should not be viewed as merely a market but also in terms of development, employment and the environment. Currently, the EU is faced with new global competitors⁽²⁶⁾ and the new market structures must often take account of power politics.

7.4.2 The EESC maintains that the specific nature of the gas sector needs to be taken into account when addressing the issue of separating generation from supply (unbundling)⁽²⁷⁾.

7.5 Plurality of information and competition law

7.5.1 The EESC recommends that a distinction be drawn in the media field between rules specifically designed to defend the pluralism of information and general antitrust rules. It must also be stressed that while operational competition rules are a basic condition for ensuring pluralism, they are not enough in themselves.

7.5.2 The danger of failing to properly understand this is that the competition rules will be diminished and the principle of pluralism weakened.

7.6 Telecommunications

7.6.1 The EESC maintains that the functional unbundling of telecoms networks and the creation of a sectoral EU agency must be properly assessed relative to other sectors given that investment in a crucial sector for European competitiveness is key to its competitive development, particularly considering the speed of technological change.

7.7 Enforcement of the competition rules and strengthening of national courts in the EU

7.7.1 To ensure effective enforcement of the rules, there is a need for continuous training and education of national judges and all legal professionals in EU competition law.

In this regard, the EESC calls on the Commission to adopt guidelines, as soon as possible, on the application of Article 82 EC, particularly regarding exclusive practices.

7.7.2 While welcoming the co-financing of the projects set up by the Commission, the EESC maintains that above and beyond the 15 training projects launched in 2006 for the 25 Member States, more can and should be done to meet the challenges that competition policy poses and to address the problems that arise in relations between the Commission, business, associations and consumers.

7.7.3 In particular, EESC-Commission relations were recently strengthened following the signing, at the EESC plenary session of 30-31 May 2007⁽²⁸⁾, of an addendum to the cooperation protocol of November 2005. The agreement places the EESC at the centre of the communication drive, thanks to the EESC's privileged position as a facilitator of dialogue with the public.

7.7.4 The EESC calls on the Commission and the Parliament to develop an interinstitutional cooperation policy aimed at making national systems compatible with EU legislation.

The EESC supports the process of adopting a new treaty (the so-called Treaty of Lisbon) to simplify the statutory framework and meet the needs of a 27-Member-State EU, allowing the EU to reach agreement on new policies and to take the necessary decisions to overcome the new challenges it faces.

7.7.5 The EESC stresses that competition policy must not be associated with separate objectives but must continue to be a fully-fledged activity of the European Commission⁽²⁹⁾.

In a bid to bring more transparency to the ongoing negotiations, the EESC held a conference at its headquarters on 27-28 September last. Entitled *IGC 2007: organised civil society has its say on the future of Europe*, the conference achieved a high level of participation.

Brussels, 13 February 2008.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

⁽²⁶⁾ Particularly *Gazprom* and *Sonatrach*.

⁽²⁷⁾ Neelie Kroes, *More competitive energy markets: building on the findings of the sector inquiry to shape the right policy solution*, Brussels, 19 September 2007.

⁽²⁸⁾ A summary of the opinions adopted at the above-mentioned plenary session is available at:
http://www.eesc.europa.eu/activities/press/summaries_plenaries/2007/grf_ces83-2007_d_en.pdf.

⁽²⁹⁾ The text of the Treaty of Lisbon, adopted in Brussels on 3 December 2007 by the Conference of the representatives of the governments of the Member States is available at:
<http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>.