

III

(Preparatory acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

548TH EESC PLENARY SESSION, 11.12.2019-12.12.2019

Opinion of the European Economic and Social Committee on the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Report on Competition Policy 2018*(COM(2019) 339 final)**(2020/C 97/08)*Rapporteur: **Gerardo LARGHI**

Referral	European Commission, 15.10.2019
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	19.11.2019
Adopted at plenary	11.12.2019
Plenary session No	548
Outcome of vote	197/0/1
(for/against/abstentions)	

1. Conclusions and recommendations

1.1. The European Economic and Social Committee (EESC) welcomes the European Commission's (EC) report on Competition Policy 2018, in which the Commission develops an approach aimed at strengthening the Single Market, economic development and social policy objectives.

1.2. As it has pointed out in several documents, the EESC considers an effective and principled competition policy to be one of the pillars of the European Union and an essential tool in achieving the internal market, pursuant to the Treaty on the Functioning of the European Union, and in line with the Sustainable Development Goals (SDGs), the construction of a social market economy and the content of the Social Pillar ⁽¹⁾.

1.3. The EESC and the European Union must maintain a continuous dialogue on this question with the other institutions, civil society and, in particular, consumer associations.

⁽¹⁾ Articles 7, 9, 11 and 12 of TFEU.

1.4. For this reason, the EESC calls for the granting of aid to be accompanied at all times by maximum transparency with regard to the costs that are passed on to consumers and for consumers to be clearly informed of these costs in their bills ⁽²⁾. The EESC welcomes the Commission's intention to take action against horizontal and vertical restrictions to competition, in particular in relation to e-commerce, where the effects of anti-competitive behaviour can be felt.

1.5. Artificial intelligence (AI) merits special attention where discriminatory practices are concerned. EU legislation should be adapted in order to prohibit discrimination caused by AI-assisted profiling of consumers.

1.6. Big Data can be used against consumers, and specifically in ways detrimental to their well-being: by profiling consumers, their capacity for free choice is curtailed.

1.7. The EESC considers that competition authorities must have the expertise, skills and resources they need to apply specific legislation and resolve serious competition problems that are harmful to consumers.

1.8. With regard to State aid, the EESC welcomes the fact that the process of modernising control has allowed the authorities to focus their attention on the most important and relevant files, including with the help of the Transparency Award Module IT platform.

1.9. The EESC emphasises the need for consistency between environmental and State aid policies. In particular, the Committee takes note of the ongoing revision of the guidelines on environmental protection and energy.

1.10. The EESC welcomes the fact that the Commission guidelines on State aid aim to guarantee free competition on the European energy market through technology-neutral tenders. The latter are essential for the development of different renewable energy technologies, with a view to ensuring a resilient and competitive European energy market that guarantees security of supply. The EESC calls on the Commission and the Member States to adopt a comprehensive, long-term strategy as opposed to a short-term strategy based on corrective measures, which do not allow for more tangible and sustainable growth and job creation. In this context, it would be helpful if the Commission were to draw up a comparative study on the various plans to support the manufacturing industry recently adopted in the US, China, and Korea ⁽³⁾.

1.11. The EU calls for the same social and environmental rules to be guaranteed where competition with companies from outside the EU is concerned, in order to ensure a level playing field.

1.12. The EESC highlights the importance, with a view to creating a social free market, of a competition policy that strikes a balance between the development of social and economic objectives for workers and consumers and maintaining an efficient and competitive productive structure.

1.13. The EESC considers the internal market provisions on the right to free movement (particularly of people but also of services, goods and capital) to be the cornerstones of EU law and is of the view that the posting of workers and free movement of services should be guaranteed, so as to avoid all forms of social dumping.

1.14. Finally, the EESC is surprised at the omission in this report of any reference to the apparent deadlock in the negotiations between the Council and the EP on collective action, following the proposal on the New Deal for Consumers, as such action is essential to completing the system of effective redress for damages caused to consumers in the event of an infringement of the antitrust measures.

⁽²⁾ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158, 14.6.2019, p. 125).

⁽³⁾ OJ C 197, 8.6.2018, p. 10.

2. Gist of the 2018 Report on Competition Policy

2.1. The 2018 report addresses areas such as the digital economy, financial services, energy and the environment, agriculture and food, transport and manufacturing industry, as well as issues such as the decentralised application of antitrust powers in the Member States and extensive international cooperation.

2.2. The Commission's daily enforcement practices are based on the following principles: non-discrimination, fairness, transparency, predictability, the right to be heard and the protection of confidentiality. The protection of consumer welfare is an explicit objective of action taken under European Competition law.

2.3. The digital era presents new challenges for competition law such as the use of Big Data, algorithms and Artificial Intelligence (AI).

2.4. In line with the aim of streamlining procedures in competition cases, the Commission has published updated guidance for companies on business secrets and other confidential information during antitrust proceedings. Updated guidance has also been provided on the use of confidentiality rings.

2.5. Rewarding cooperation by companies in antitrust proceedings has proved to be effective in helping the Commission to increase the relevance and impact of its decisions, by speeding up its investigations.

2.6. Directive (EU) 2019/1 of the European Parliament and of the Council⁽⁴⁾ (the 'ECN+ Directive') allows the competition authorities of the Member States to implement EU competition rules more effectively.

2.7. Modernising State aid policy has made it simpler for Member States to implement measures to promote investment, economic growth and job creation, has enabled rapid implementation of State aid measures in the Member States and has had a significant impact in terms of reducing costs for the least-distorting State measures.

2.8. The Commission's settlement procedure has enabled cartels to be identified more quickly, freeing up resources for other investigations and reducing the cost of investigations. In addition, companies have benefited from faster decisions.

2.9. The 2018 report highlights the decisions adopted in 2018 (and in previous years) on cartels in the automotive sector and the launch of an in-depth investigation into the possible collusion between car manufacturers regarding the technological development of emission cleaning systems for passenger cars.

2.10. *Digital economy*

2.10.1. Competition policy is an integral part of creating a functioning single market. In this regard, 'network giants' should be prevented from using their market power to weaken competition and thus weaken innovation in digital markets.

2.10.2. Maintaining resale prices on e-commerce platforms is one of the most widespread restrictions in the digital economy. An increase in the use of pricing algorithms for this purpose was found.

2.11. State aid in the green economy supports the investments needed to guarantee security of supply while decarbonising the European energy system.

⁽⁴⁾ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14.1.2019, p. 3).

2.12. *Energy*

2.12.1. State aid clearances granted in 2018 in the renewable energy field have led Member States to promote sustainable energy and reduce costs for consumers in the electricity system as a whole.

2.12.2. The Commission states that State aid measures will contribute to guaranteeing security of supply without pushing prices up for consumers or preventing electricity flows beyond EU borders.

2.12.3. The EU needs to increase the share of renewable energy in its energy mix, with regard to diversifying the gas supply and to ensure it has well-targeted European and national energy legislation.

2.13. *Competition in the Single Market*

2.13.1. The Commission prohibited the proposed acquisition of Alstom by Siemens. In the agri-food sector, it authorised the merger between Bayer and Monsanto with the condition that certain assets be sold. With regard to the steel market, the acquisition of Ilva by Arcelor Mittal was approved subject to certain divestments. The planned acquisition of Alstom by Siemens was blocked because it was harmful to competition.

2.14. *Financial sector*

2.14.1. The general stabilisation of the sector has reduced public budgetary interventions in State aid cases in this sector. However, in some Member States, non-performing loans have not yet been eradicated.

2.15. *Ensuring a level playing field in the area of taxation*

2.15.1. A level playing field where companies can compete on their merits must be created. Member States cannot offer tax advantages to multinational companies to the detriment of SMEs.

3. **General comments**

3.1. The 2018 report develops an approach aimed at strengthening the Single Market, economic development and social policy objectives.

3.2. The digital economy will require major investment — some EUR 500 billion — over the next 10 years to achieve connectivity objectives. It is essential to put in place a robust competition policy, especially in rural and less-urbanised areas.

3.3. The digital era presents new challenges for competition law such as the use of Big Data, algorithms and Artificial Intelligence (AI). It must therefore be ensured that 'tech giants' do not use their market power to weaken competition with them. Competition authorities should have the expertise, skills and resources they need to apply specific legislation and resolve serious competition problems that are harmful to consumers before it is too late.

3.4. Implementation should also be based on proactive use of tools to compile information and carry out sectoral investigations.

3.5. Any delay in applying the rules should be avoided by making proactive use of the competition toolbox (for example, interim measures) in cases where there is clear harm to competition and to consumers.

3.6. It is crucial to transfer the burden of proof to companies that engage in mergers on the digital markets, so that they can prove that such agreements do not distort competition.

3.7. There should be more rigorous assessment of whether operators are able to block entry onto the market, restricting consumer choice and information flows, and manipulating users' behaviour.

3.8. In order to draw attention to competition problems raised by certain practices, companies should be given guidelines and they should be helped to work within the confines of legislation.

3.9. AI is currently having an impact on pricing policies and monitoring, producing effects that are not entirely harmless. Algorithms allow e-commerce platforms to control and restrict retailers' freedom in terms of their pricing policies and competition within the large retail sector (with unfair practices that it will be impossible to maintain in the future).

3.10. The same is happening in the tourism sector, where sales platforms are marked by abuse of their dominant positions. There are four major sales networks that wield enormous power over hotels, small operators and SMEs.

3.11. AI merits special attention where discriminatory practices are concerned. EU legislation should be adapted in order to prohibit discrimination caused by AI-assisted profiling.

3.12. The EESC supports the Commission's decision to consider companies using algorithms as being solely responsible for the actions that flow from these algorithms. Big Data can be used against consumers, and specifically in ways detrimental to their well-being: by profiling consumers excessively, their capacity for choice is reduced.

3.13. In the EESC's view, the impact of Big Data on competition must not be overlooked and will become increasingly important. An overly interventionist policy could however reduce the incentives for innovation (i.e. better services and lower prices that may depend on innovation in the distribution of products and purchasing platforms).

3.14. Advantages over competitors generated by Big Data can enable leading operators to occupy dominant market positions. Big analytics (data trading, online marketing, pattern recognition, demand estimation, price optimisation) can constitute exploitative practices.

3.15. In the context of the Digital Single Market strategy, European Commission investigations have shown that restrictions on resale prices are by far the most prevalent restrictions of competition on the e-commerce market. In 2018, the Commission issued a number of decisions fining companies for imposing online resale price restrictions, in violation of EU competition rules.

3.16. In the area of taxation, the EESC welcomes the measures put in place by Commission in 2018. At the same time, it is important that fair competition between different countries also be ensured in this area too. In particular, greater vigilance is needed with regard to tax rulings and unfair competitive advantages gained through agreements between certain countries and 'big players'. This behaviour can distort the free market, is damaging to SMEs and creates unfair competition between countries.

3.17. In the area of energy, the EESC notes that full and general transparency with regard to household bills is not yet guaranteed in some countries. Without transparency, consumers have less opportunity to make informed choices and the status quo is favoured, to the advantage of the big players.

3.18. Agriculture and food. In this sector, it is important to protect products of European designation of origin. The seeds and pesticides sector is essential for farmers and consumers, but also raises concerns that go beyond consumer protection, food safety and ensuring compliance with environmental and climate standards.

3.19. In relation to transport, it is recommended that the Commission examine whether and to what extent the kerosene tax exemption may constitute undue aid to airline companies compared with rail transport.

3.20. In order to strike a balance between the freedom of the market and concentrations, it is not enough to refer to competition from other major global players, especially if they come from countries that are closed to competition from foreign companies. In this regard, the Committee suggests that as an alternative to company mergers that weaken competition, measures should be put in place aimed at overcoming barriers to entry to third markets, more robust tax incentives for R & D and agreements between European producers to coordinate export and investment strategies abroad.

3.21. In any case, consumer protection must be balanced with action to support and promote innovative companies and SMEs (in ways that do not adversely affect dynamic competition on the market). This is the main way to create quality jobs and to ensure the dynamic sustainability of the production system.

3.22. As regards the labour market and protecting competition, the EESC considers the legal framework on respect for fundamental social rights and the free movement of workers and services as one of the areas to be addressed in order to ensure genuine free competition between businesses in the current market.

3.23. The aim is to prevent all forms of 'social dumping' (unfair competition in terms of wages and working conditions, which causes a downwards spiral) in order to ensure the equal treatment of workers, regardless of where they work and where they come from, and the non-discrimination of workers and companies in the place where work is carried out.

3.24. Finally, the EESC is surprised that, unlike in all of its reports in recent years, the Commission has for the first time, both in the report under consideration and in Working Document SWD(2019) 297 final which accompanies it, omitted any reference to the lack of progress in relation to collective action — which is not covered by Directive 2014/104/EU ⁽⁵⁾ on actions for damages due to infringement of the anti-trust rules — as a means of promoting effective redress for damages caused to consumers by the infringements of the anti-trust measures, particularly in the light of the EESC opinion ⁽⁶⁾ on the Commission's proposal on the New Deal for Consumers ⁽⁷⁾ and the Council's decision to exclude all collective action ⁽⁸⁾ from the recently adopted directive, which in the EESC's view clearly falls short.

4. Specific comments

4.1. With regard to digitalisation, the EESC agrees with the Commission's choice to prioritise this area and to focus its competition programme for 2021-2027 on challenges linked to Big Data, algorithms and AI. The EESC calls on the Commission to follow up on the report on 'Competition Policy for the digital era' from April 2019, in particular with regard to:

4.1.1. the strategies to be implemented to counter any restrictions to competition and the free market put in place by digital platforms, including in the trade and tourism sectors;

4.1.2. the user-consumer's real and complete knowledge of personal data and their ability to transfer such data from each platform;

4.1.3. tackling all forms of exclusion of businesses that certain digital platforms see as potentially dangerous to their dominant positions;

4.1.4. safeguarding the free market by protecting small start-ups with market potential which are often taken over by big digital sector players who see them as dangerous future competitors.

⁽⁵⁾ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1).

⁽⁶⁾ OJ C 440, 6.12.2018, p. 66.

⁽⁷⁾ Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final — 2018/0089 (COD).

⁽⁸⁾ See document PE-CONS 83/19 of 18 October 2019.

- 4.2. The EESC believes that operators which have, at all levels, delegated tasks of general interest to digital platforms must also have the legislative tools to access and control the algorithms used by those platforms.
- 4.3. The EESC suggests that the Commission should step up measures to monitor the implementation of free trade agreements and to protect European companies' free access to the world markets.
- 4.4. To this end, genuine reciprocity on global public procurement markets must be guaranteed.

Brussels, 11 December 2019.

*The President
of the European Economic and Social Committee*
Luca JAHIER
