

38
4
European Communities

444.01

EUROPEAN PARLIAMENT

Working Documents

1979 - 1980

14 January 1980

DOCUMENT 1-625/79

Report

drawn up on behalf of the Committee on Economic and Monetary Affairs

**on the Eighth Report of the Commission of the European Communities
on Competition Policy (Doc. 150/79)**

Rapporteur: Mr A. DAMSEAUX

121

The Commission of the European Communities forwarded to the European Parliament the Eighth Report on Competition Policy (published in conjunction with the Twelfth General Report on the Activities of the European Communities),

At its sitting of 9 May 1979 the European Parliament referred this report to the Committee on Economic and Monetary Affairs as the committee responsible,

On 3 October 1979, the Committee on Economic and Monetary Affairs appointed Mr Damseaux rapporteur. It considered the report at its meetings of 3 and 4 October, 30 and 31 October, 20 and 21 November and 18 December 1979.

At its meeting of 18 December 1979 the committee adopted the motion for a resolution by 17 votes to 1 with 8 abstentions.

Present: Mr DELORS, chairman; Mr MACARIO and Mr DELEAU, vice-chairmen; Mr DAMSEAUX rapporteur; Mr BALFOUR, Mr BEUMER, Mr von BISMARCK, Mr BONACCINI, Mr CABORN, Mr FERNANDEZ, Miss FORSTER, Mr GIAVAZZI, Mr HERMAN (deputizing for Mr TINDEMANS), Mr HOPPER, Mr LEONARDI, Mr Jacques MOREAU, Sir David NICOLSON, Mr PETRONIO, Mr PIQUET, Mr PURVIS (deputizing for Mr de FERRANTI), Sir Brandon RHYS WILLIAMS, Mr SCHNITKER, Mr SEAL (deputizing for Mr RUFFOLO), Mr WAGNER, Mr WALTER and Mr von WOGAU.

C O N T E N T S

	<u>Page</u>
A. MOTION FOR A RESOLUTION.....	5
B. EXPLANATORY STATEMENT.....	10
I. <u>The Competition policy as a factor for market unity</u>	
A. Enforcement of the Treaty rules on competition	10
(a) Enforcement of Articles 85 and 86 of the EEC Treaty and Articles 65 and 66 of the ECSC Treaty	10
(b) Industrial property	11
(c) The scope of the competition policy	13
B. Approximation of national legislation.....	15
(a) Main developments of national competition policies	15
(b) The legal provisions on monopolies	16
(c) Elimination of technical and administrative barriers to trade	16
(d) Fiscal harmonization.....	18
II. <u>Competition policy as a factor for economic efficiency</u>	
A. Providing a framework for national aid policies ..	19
1. State aid schemes	19
2. Public undertakings.....	22
B. Activities of national and multinational undertakings.....	22
(a) The control of concentration	22
(b) Activities of multinational companies.....	23
(c) Small and medium-sized enterprises	23
III. <u>Conduct of the competition policy</u>	
A. Coordination with other Community policies.....	25
B. Current procedures.....	25
(a) Comments received by the Commission	26
(b) Commission investigations	26
- on concentration	27
- on differences in prices	28
C. External aspects of competition policy	28

The Committee on Economic and Monetary Affairs hereby submits to the European Parliament the following motion for a resolution:

MOTION FOR A RESOLUTION

on the Eighth Report of the Commission of the European Communities on Competition Policy

The European Parliament,

- having regard to the Eighth Report of the Commission of the European Communities on Competition Policy (Doc. 150/79)
- having regard to the report of the Committee on Economic and Monetary Affairs (Doc. 1-625/79),
- 1. Points out that effective competition is fundamental to the smooth operation of the market and constitutes an essential component of economic and social policy;
- 2. Notes that the economic factors prevailing when the previous report on competition policy was considered, such as slow growth, the need for structural change, the risks of inflation and the temptation to resort to protectionism, are still present, making it difficult but essential to apply the rules on competition;
- 3. Reiterates, in these circumstances, its appeal to the Commission to pursue the effective, full and appropriate application of competition policy;
- 4. Stresses the vital controlling function which the European Parliament and its committee must exercise over the general conduct of competition policy by the Commission, to ensure that the Community's rules on competition contribute fully to strengthening market unity and economic efficiency;
- 5. Considers that the application of the rules on competition as laid down in the Treaties, and Articles 85 and 86 of the EEC Treaty in particular, however indispensable it may be, is by its nature limited and therefore calls for other measures to ensure greater harmonization of the conditions of competition;

on the harmonization of conditions of competition

- 6. Points out that the strengthening of market unity involves greater harmonization of the conditions of competition;

7. To this end:

- notes that in March 1979 the Commission published a draft proposal for a regulation exempting categories of patent licensing agreements,
- requests that, in cooperation with the sectors concerned, the work being done by the Commission to ensure that transfers of technology are not subjected to excessively restrictive provisions and to remove legal uncertainty on this matter, while at the same time giving guarantees of protection to small and medium-sized enterprises, should be continued,
- requests that the amended version of the draft regulation to be submitted to the Advisory Committee on Restrictive Practices and Dominant Positions should be sent to the European Parliament;
- requests that the Commission's present work on the drafting of a regulation creating a Community trademark and a European trade mark office should be completed as soon as possible;

8. Reiterates its concern that the scope of the rules on competition should be as wide as possible, and to this end:

(a) in the transport sector

- requests that the idea mentioned in the Commission's memorandum on the development of air transport services of drawing up a regulation applying the rules on competition to air transport, and comprising the procedures, decision-making powers and sanctions necessary to guarantee observance of these rules, should be put rapidly in hand,
- requests that the drafting of a proposal for a regulation applying the rules on competition to sea transport should be completed by an early date,

(b) in the financial sector

- approves the measures taken by the Commission to extend the rules on competition to the banking sector, while conceding the difficulties inherent in controlling possible agreements in this sector because of the very existence of special regulations designed to meet the needs of the financial policies of individual governments,
- nevertheless reminds the Commission that the creation of a common capital market is one of the aims of the Community, and that monopolistic practices and national differences hinder development in this direction; accordingly insists that the Commission, together with the monetary authorities of the Member States, should make the most specific studies possible of the obstacles to the free movement of capital and to a common credit market;

(c) in the insurance sector

requests the Commission to draw up the provisions needed to free the provision of services in the insurance sector and to ensure the strict application of the rules on competition in all insurance sectors and especially in life insurance and export credit insurance;

9. Can find no evidence, in the chapter of the Eighth Report concerned with the main developments in national policies, that specific initiatives have come from the Commission to remedy the gaps and contradictions in national legislation on competition, and stresses that the Member States are responsible for reinforcing and coordinating their national competition policies;
10. Appreciates, however, the results obtained by the Commission during the financial year under review with regard to the adjustment of State monopolies of a commercial character and supports its activity in this area;
11. Draws attention to the serious risks to market unity posed by technical and administrative barriers to trade, and repeats its call for a simplified procedure for eliminating technical and administrative barriers to trade, based on Article 155 of the EEC Treaty, to be quickly extended to cover all barriers;
12. Stresses once again that inadequate harmonization of legislation, and lack of clarity with regard to State procurement and supply contracts, seriously impair the harmonization of conditions of competition and are consequently detrimental to the industrial development of the Community; requests the Commission carefully to ensure that the two directives adopted so far are respected by all the Member States; asks that the work undertaken by the Commission in sectors not yet covered by the directive on public supply contracts be completed swiftly;
13. Emphasizes that the inadequacy of fiscal harmonization and controls encourages tax evasion and seriously undermines the equality of conditions of competition; to this end:
 - urges the Commission steadfastly to pursue and speed up its work on the fiscal controls and the fiscal harmonization of taxation systems, rates of tax and the calculation of the assessment basis for direct company taxation;
 - criticizes the fact, after the adoption on 16 May 1979 of the OECD recommendation in this sphere, that the Commission has still not put forward a proposal on transfer prices;

on economic efficiency

14. Emphasizes once again the need for close coordination at Community level of regional, sectoral or general aid policies, and the Commission's responsibility for ensuring that they are compatible and consonant with the aim of restructuring the vital need for our economy to be competitive and with social requirements;
15. Notes in this regard:
- greater flexibility since 1 January 1979 in the use of criteria for assessing the transparency of regional aid, particularly aid designed to stimulate job-creating investment,
 - the abolition, at times after a lengthy procedure, of certain general aid schemes,
 - hopes that the Council will shortly adopt the necessary draft decision establishing Community rules for aid in favour of the iron and steel industry,
- asks the Commission to continue to ensure that the rules providing a framework for aid, which as a general rule must be degressive and temporary, are applied effectively;
16. Has noted the Commission's general guidelines for a directive on the transparency of financial relations between Member States and public undertakings; reaffirms in this regard its determination that, whilst safeguarding the efficiency of the special functions with which they are entrusted, there should be an attempt to achieve full equality of conditions of competition between private and public undertakings operating in the competition sector;
17. Deplores the fact that the Council has still not adopted the proposed regulation introducing the preventative control of concentration submitted as long ago as 1973 and approved by the European Parliament, despite the fact that the vitality of the economy and the interests of consumers cannot be safeguarded unless adequate competition is maintained;
18. Points out that the activities of multinational companies must be subject to appropriate rules achieving a balance between the obligations which must be imposed on them and the need to avoid discrimination against them; expects the Commission to adopt a more active approach in this sector, particularly with regard to combatting tax evasion; requests the Commission to include in its annual report a list of the measures relating to the activities of multinational companies.

19. Points out that the activities of small and medium-sized enterprises should be stimulated since they make a vital contribution to the dynamism of the economy, innovation and the maintenance of employment; calls upon the Commission to pursue its action on behalf of small and medium-sized enterprises to enable them to overcome certain competitive disadvantages and specific handicaps particularly:
- in the fiscal sector, where the tax burden on small and medium-sized businesses seems to vary appreciably from one Member State to another,
 - in the financial sector, by making it easier for them to obtain Community loans,
 - in the technological sector, by access to new technology,
 - in the administrative sector, by reduction of formalities.

on the conduct of competition policy

20. Considers in general that the procedure followed for enforcement of the rules on competition laid down in the Treaties often seems extremely slow and asks the Commission to seek a swifter approach, without which competition policy will lose much of its credibility and effectiveness and requests the Commission in its next annual report to make concrete proposals for a simplified procedure.
21. Urges the Commission to seek the closest possible coordination between the aims of the various common policies, above all between the industrial policy and the competition policy, so that in each sector undergoing restructuring the solutions chosen are the least expensive in social and budgetary terms and most suited to re-establishing competitiveness;
22. Appreciates the content and scope of the investigations carried out by the Commission into the extent of concentration and differences in price levels in the Community, but stresses once again that publication of these surveys, must, if it is not to remain a dead letter, be followed up by specific measures;
23. Instructs its President to forward this resolution to the Council, the Commission and the parliaments of the Member States.

EXPLANATORY STATEMENT

The economic circumstances prevailing when the Seventh Report on Competition Policy was considered have changed very little during the financial year with which the Eighth Report of the Commission is concerned. The danger of protectionism still exists at every level; and since market unity is an essential condition for economic development, it is important that the Commission, which has wide powers in this area, should be taking scrupulous care to ensure that the activities of undertakings or the policies of Member States do not undermine the conditions of competition. It is the responsibility of the European Parliament to satisfy itself, on the basis of the report submitted to it annually, that the general conduct of competition policy by the Commission is such as to safeguard the operation of the main functions of competition, such as regulation of the market, economic efficiency and protection of the consumer.

I. THE COMPETITION POLICY AS A FACTOR FOR MARKET UNITY

1. Greater harmonization of the conditions of competition is necessary to achieve real market unity. It requires not only the rigorous enforcement of the rules on competition in the Treaties, but also the approximation of national legislation at various levels.

A. Enforcement of the Treaty rules on competition

Three points will be considered: enforcement of Articles 85 and 86 of the EEC Treaty; the particular field of industrial property; and the scope of the competition policy.

(a) enforcement of Articles 85 and 86 of the EEC Treaty and Articles 65 and 66 of the ECSC Treaty

- enforcement of the Treaty rules

2. In 1978 the Commission adopted 14 decisions enforcing Articles 85 and 86 of the EEC Treaty and 16 decisions enforcing Articles 65 and 66 of the ECSC Treaty. In the former sphere, almost 200 cases were settled by amicable agreement. The Commission intervened in particular¹ to oppose:

- market sharing clauses,
- the establishment of quota systems,
- export bans (notably, fining the Kawasaki Motors 100,000 EUA).

¹ Eighth Report on Competition Policy, points 78 to 149

Enforcement by the Commission of the Treaty provisions is one of the main aspects of competition policy. It is important that illegal agreements, the abuse of a dominant position, and any other practice at variance with respect for fair competition should be penalized. But the Commission's decisions are taken in isolation; they are often prompted only by an individual complaint, which means that the control of compliance with the rules on competition is sporadic, covering only a few cases whilst letting many others through; for this reason it cannot be said to be adequate,

- exclusive dealing agreements

3. The Commission has continued work on the draft regulation amending Regulation 67/67 on the exemption of certain categories of exclusive dealing agreements.

During its consideration of the Seventh Report, the Committee on Economic and Monetary Affairs commented on this draft regulation, and referred in particular to the proposal to exclude from exemption agreements between manufacturers of competing products, whether the obligations were on one side only, or mutual. It also commented on the limitation of exclusive dealing contracts to a market of 100 million inhabitants¹,

The Eighth Report does not state whether the draft regulation as re-drafted by the Commission, on which the Advisory Committee on Restrictive Practices and Dominant Positions will be asked for its opinion in the final reading, takes all these comments into account.

(b) industrial property

4. The application of the rules on competition in the Treaties necessarily covers industrial property. Here the Commission is attempting to reconcile the aims pursued by industrial and commercial property law on the one hand and Community competition law on the other.

- patent licensing agreements

5. The Commission's work on patent licensing agreements has been in progress for several years. The draft regulation on the application of Article 85(3) to categories of patent licensing agreements is based on the Commission's experience with individual decisions taken in this field. The purpose of the regulation is to define a category of licensing agreements which may be deemed to fulfil the conditions for exemption laid down in Article 85(3). The regulation lists admissible and prohibited clauses.

¹ See DAMSEAUX Report on the Seventh Report on Competition Policy, Doc. 334/78, Explanatory statement, point 6, p. 11

This regulation, which should enter into force on 1 January 1980, would, in the opinion of the Commission, provide greater security for the undertakings which, in the past, have been reluctant to conclude patent licensing agreements. Indeed, of the total number of notifications or applications still pending with the Commission, 61% concerned licensing agreements¹.

However, the Commission's position has been sharply criticized by Community industrial circles.

Certainly, on a number of occasions, the European Parliament has invited the Commission to draw up a regulation providing for an exempted category of patent licensing agreements. This wish was shared by industrial circles, who considered that such a regulation would help towards greater legal security, a rationalization of the problems encountered by the Commission in applying Article 85(3) and a climate favourable to both research and development, and the transfer of technology.

Nevertheless, the different versions of the draft regulation put forward by the Commission, and in particular the latest one, published in the Official Journal of the European Communities, No. C 58 of 3 March 1979, only go a short way towards meeting the wishes of industry, which does not share the Commission's approach to this question.

Indeed, the restrictions imposed by the Commission on exclusive rights and export bans constitute, in industry's view, an infringement of the rights of the proprietor of the patent, and the draft regulation, by moving away from the international principles governing these matters, would, in fact, damage the Community's commercial and industrial interests as well as the world competitiveness of European industry. Moreover, these provisions would clearly be at variance with the provisions of the Luxembourg Convention on the Community patent.

6. Moreover the draft regulation, by listing a series of clauses which, if they are included in a contract, prevent it from benefitting from the exemption category, weakens legal security rather than strengthening it.

It is therefore considered in industrial circles that the Commission's extremely restrictive approach does nothing at all to encourage industry's capacity for innovation, throws doubt on the whole matter of the transfer of technology, and represents an extremely unwelcome erosion of patent rights.

¹ Eighth Report on Competition Policy, point 78

Industry's main observations have been set out in the two reports from UNICE of March 1978 and July 1979, which have been sent to the Commission. As became clear at the hearing organized by the Commission on this draft regulation in October 1979, all parties concerned largely share the objections raised.

The solution put forward does not therefore satisfy Community industry, and in these circumstances it would be presumptuous to declare that the Commission's work has entered its final phase. Moreover the Commission admits that it must give very careful consideration to the observations of the parties concerned. In particular, the regulation envisaged must guarantee equal opportunities to small and medium-sized enterprises, and must at the same time ensure that they have access to technology and that their patents are sufficiently well protected. To this end, it is important that the revised version of the draft regulation which will be forwarded to the Advisory Committee on Restrictive Practices and Dominant Positions should be sent to the European Parliament.

- trademark law

7. As the European Court of Justice has recently pointed out, the essential function of the trademark is to provide the consumer or ultimate user with an assurance as to the origin of the branded product. It is also essential that restrictions on the use of this trademark by a third party do not constitute 'a disguised restriction on trade between Member States' under Article 36, second sentence, of the EEC Treaty¹. Trademark law applicable throughout the territory of the Community will contribute to the liberalization of trade in goods and services covered by these trademarks.

The Twelfth General Report on the Activities of the Communities confines itself to stating that progress has been made in drafting the regulation establishing a Community trademark and a European trademark office. The Economic and Monetary Committee can only reiterate its wish to see this work completed in the course of 1980, as the Commission has since specified.

(c) the scope of competition policy

8. On several past occasions the Committee on Economic and Monetary Affairs has stressed that the non-application of the Treaties' rules on competition to certain sectors, such as air and sea transport and the financial sector, seriously prejudices the harmonization of conditions of competition in the Community. The Eighth Report on Competition Policy records some progress in this field.

¹ Eighth Report on Competition Policy, point 27 et seq.

- application of the rules on competition to air and sea transport

9. During its consideration of the Seventh Report on Competition Policy the committee noted a deterioration in the conditions of competition in the air transport sector and called for more vigorous action from the Commission in this sphere. To this end the Commission held an investigation into the role the national governments play in the determination of fares. It is clear from this investigation that in most cases the national governments have full responsibility for the determination of fares. In its memorandum on improving and developing air transport services in the Community, the Commission notes that it does not at present have the practical means to ensure that airline companies fully comply with the rules on competition applying to the air transport sector.

In its judgment on Case 67/73, the European Court of Justice held that air and sea transport were subject to the general provisions of the Treaty on competition. The Committee on Economic and Monetary Affairs must therefore urge the Commission to put forward the appropriate regulation needed to supervise the application of the rules on competition, not only in the air transport markets where there is little or no state intervention, but also where such intervention does affect airline services to varying degrees. Moreover, there should also be measures to coordinate the aid granted by the Member States to airline companies and ensure that the right of establishment is respected in the air transport sector.

10. With regard to sea transport, the Eighth Report on Competition Policy merely states that the Commission has begun work on a proposal for a regulation applying the rules of competition to sea transport and that it has begun consulting interested circles, notably shippers and charterers. These consultations should be completed in November 1979, and the Commission hopes to be in a position to submit a draft regulation to the Council before the end of the first half of 1980.

The Committee on Economic and Monetary Affairs would like to see the proposals now in preparation in these two fields presented at an early date and to be consulted at the appropriate moment on these two subjects of particular importance.

- application of the rules on competition to finance

11. In accordance with the wish expressed by the Committee on Economic and Monetary Affairs in its last report, the Eighth Report on Competition Policy gives details of a number of Commission initiatives designed to supervise the application of competition rules in the financial sector.

The Commission has, in particular, examined the compatibility with the competition rules of cooperation agreements linking banks in several Member States. Whatever the advantages of integration and the interpenetration of markets, this form of cooperation between banks is nevertheless likely to give

rise to restrictions on competition. The soundings made by the Commission led it to the conclusion that these cooperation agreements had not entailed an appreciable restriction of competition¹.

Nor did the investigation of certain banking practices relating to the cashing of cheques in the light of the competition rules result in the conclusion that Articles 85 and 86 of the EEC Treaty had been breached. However, following discussions with the Commission, the Bank of England has modified the system for admission of broking houses to the foreign exchange market to comply with the rules on competition in the EEC Treaty.

The Committee on Economic and Monetary Affairs appreciates the Commission's initiatives in these fields, reflecting as they do a determination fully to extend the rules on competition to the financial sector, in spite of the difficulties resulting from the undeniable idiosyncrasies of this field. Indeed, the free movement of capital is one of the main aims of the Community.

12. In its Communication on the protection of savings in times of inflation and the question of indexing, which was drawn up at the request of the Committee on Economic and Monetary Affairs, the Commission observes that, as regards liquid or semi-liquid savings, competition in the banking sector 'quite often now takes the form of the growth of new costly activities, rather than of variations in rates, which are more or less controlled by the monetary authorities or the banking organizations'².

The Commission should examine this question, which implies a deficiency of competition, and consider the means of providing greater clarity and harmonization in the rules on banking in relation to customers and to savers in particular³.

B. Approximation of national legislation

Genuine harmonization of conditions of competition is still being impeded by too many legal, fiscal and administrative divergences, calling for further work on the approximation of national legislation and practices in this field.

(a) main developments in national competition policies

13. The past year has seen the development in several Member States of major initiatives to strengthen the control of competition, with a new law on the control of mergers, takeovers and monopolies in Ireland, recommendations for a

¹ Eighth Report on Competition Policy, point 33

² Doc. COM(77) 549/final, p. 60

³ DAMSEAUX Report on formation and protection of savings, Doc. 662/78, resolution, paragraph 5

more critical approach to mergers in the United Kingdom, and the adjustment of economic policy in France with a view to strengthening industrial responsibility and competition.

These are important developments, because the maintenance of effective competition in the Community demands, in addition to an effective Community policy, the development of competition policies in the Member States. The Commission's role is to take the necessary initiatives to ensure that the absence of legislation (Italy still does not have the necessary legal instruments to provide for efficient control of competition) or divergences of legislation do not have a damaging effect on competition policy at Community level. In this regard the Commission has said that it is satisfied with the climate of cooperation between itself and the relevant authorities in the Member States¹.

(b) the legal provisions on monopolies

14. With regard to State monopolies of a commercial character, the Commission hopes that by the end of 1979 its work will have reached a point where none of the remaining monopolies is at variance with Article 37 of the EEC Treaty, which stipulates that any discrimination 'regarding the conditions under which goods are procured and marketed' between nationals of Member States will be eliminated.

The adjustment required of the French and Italian tobacco monopolies concerns the retail marketing system for cigarettes and cigars. As to the French and German alcohol monopolies, an infringement procedure is still open, pending judgments by the European Court of Justice on this subject; the procedure concerns charges of a fiscal nature imposed on alcohol manufactured by the Member States concerned and on imported alcohol, the revenue from which is credited exclusively to the national monopoly.

Finally, the problems raised by the French oil monopoly are about to reach solution, as the French Government has decided that the system of distribution quotas for motor fuel will be dropped and distribution permits will be granted according to objective criteria².

(c) elimination of technical and administrative barriers to trade

- procedure for eliminating technical barriers

15. Work has continued on the elimination of technical barriers to trade, although the pace of adoption by the Council of the relevant directives has

¹ Eighth Report on Competition Policy, point 50 et seq.

² " " " " " " , points 248 et seq.

slackened. There can be no doubt that economic integration, technical progress, prices and competitiveness are affected by the protection of some sectors against competition¹. Administrative and technical provisions can create a greater barrier to trade than customs duties ever did. For this reason, and despite some reservations, the Committee on Economic and Monetary Affairs approved the proposal from the Commission for a directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to construction products, which includes a new simplified procedure for this sector for the elimination of technical barriers to trade. Based on Article 155 of the EEC Treaty, this simplified procedure has been called for on numerous occasions by Parliament and should be extended to cover all barriers to trade.

- public supply contracts

16. The date of entry into force of the Directive of 21 December 1976 on public supply contracts, namely 23 June 1978, was not observed in all the Member States. The Commission has taken the necessary steps under Article 169 of the EEC Treaty to ensure that this situation is put right.

Indeed, the public supply contracts directive establishes the conditions in which 'a Community invitation to tender' must be dispatched. It forbids the splitting up of a contract in order to avoid the application of Community procedures to it, and the introduction into the contractual clauses relating to a given contract of technical specifications which have the effect of favouring or eliminating certain undertakings, unless such specifications are justified by the subject of the contract.

When questioned about the application of these provisions in practice, the Commission replied that up to that time it had not received any complaint about their non-observance. The table below sets out the number of public supply contracts published in the Official Journal of the European Communities from the time the directive came into force in June 1978 until 30 September 1979, broken down by Member State having the contracting authority.

¹ NYBORG Report on the approximation of the laws, regulations and administrative provisions in respect of products for the building trade (Doc. 30/79)

² Twelfth General Report on the Activities of the Communities, point 121

MS	Total 1978	1/79	2/79	3/79	4/79	5/79	6/79	7/79	8/79	9/79	Total 1-9 1979
B	16	1	2	5	1	5	2	7	17	11	51
DK	13	3	1	5	2	-	2	-	2	4	19
D	1	-	1	-	-	4	11	18	22	32	88
F	9	-	2	6	9	44	33	25	22	23	164
Irl	-	1	1	1	1	-	-	1	-	-	4
I	-	-	-	-	-	-	-	-	-	-	-
Lux	-	-	-	-	-	-	-	2	1	-	3
NL	-	1	1	-	-	-	-	1	1	1	5
UK	290	46	48	35	37	54	32	38	41	23	354
Total	329	51	56	52	50	107	80	92	106	94	688

This table is not at all clear, especially on the precise way the directive on public supply contracts has been applied in each Member State.

Moreover, the Commission has begun preliminary work on sectors not yet covered by the directive on public supply contracts, that is on telecommunications, transport, water and energy¹.

The Committee on Economic and Monetary Affairs has repeatedly pointed out, in reports on competition and the report on the four-year programme for the development of informatics², that the inadequate approximation of legislation in the field of public procurement, apart from being detrimental to the industrial development of the Community, obstructs harmonization of the conditions of competition.

(d) fiscal harmonization

17. Harmonization of the conditions of competition also implies a minimum of fiscal harmonization, without which all manner of distortions and discrimination practices are perpetuated. The committee recently approved the proposals for seventh and eighth directives on the system of VAT to be applied to antique and used goods, and certain refunds. It has also been asked for its opinion on a draft tenth directive on the application of VAT to the hiring out of movable tangible property.

¹ Twelfth General Report on the Activities of the Communities, point 121

² COUSTE Report on a four-year programme for the development of informatics (Doc. 235/77), resolution, paragraph 8

It is gratifying to note that progress is being made in this field, where much remains to be done. As the committee recently had occasion to point out,¹ fiscal harmonization should not be confined to taxation systems, but should also cover rates of taxation and systems of tax assessment.

II. COMPETITION POLICY AS A FACTOR FOR ECONOMIC EFFICIENCY

Competition policy contributes still more directly to economic efficiency, either by providing the guidelines and framework for various aid policies in the Member States, or by controlling or stimulating the activities of national or multinational undertakings.

A. Providing a framework for national aid policies

1. State aid schemes

18. The Community's action on State aid schemes is based not only on acceptance of the new international division of labour and the resulting renewal of industrial structures, but also on the rejection of protectionist tendencies inside and outside the Community.

(a) regional aid

19. The establishment of the European Monetary System has revealed still more sharply the need to reduce regional imbalances; for if these imbalances are allowed to persist or increase, durable implementation of the European Monetary System may be jeopardized. While the different Member States' regional aid policies are necessary, they must not unduly impair the conditions of competition. The Commission's work on the measurability of 'opaque' aid culminated in the Communication of 21 December 1978 on new principles to be applied with effect from 1 January 1979².

Fixed investment is no longer the sole denominator for evaluating the transparency of regional aid schemes; an alternative denominator, expressed in EUA per job created by the new investment, has been added. This means that the Member States of the regions concerned will be able to grant projects in the labour-intensive industries a larger amount of aid than was permitted previously³.

¹ NYBORG interim report on a proposal for a directive concerning the harmonization of company taxation and of withholding taxes on dividends (Doc. 104/79), resolution, paragraph 3

² OJ No. L 31, 3.2.1979, p. 9

³ Eighth Report on Competition Policy, points 151 et seq.

The introduction of these new coordination principles, which will be subject to review in three years' time, is a valuable achievement. Indeed, the process of economic convergence cannot be dissociated from the provision of increased aid to the less prosperous regions, always providing this is contained in strictly defined policies, without which it would merely generate inflationary liquidity.

Here, as in the field of sectoral aid, the competition policy must, without ignoring the indispensable nature of such aid, ensure that it is compatible with the true aim in view, and must oppose any protectionist diversion of such aid.

(b) sectoral aid

20. The evaluation of sectoral aid is an equally delicate matter. According to the Commission 'a system which leaves the field open to competition provides for optimum distribution of production factors and ensures the most rapid economic and social progress possible'¹. However, the free play of market forces must be checked to take into account:

- the need to make essential adjustments in certain industries and the social reasons justifying these;
- the need to rectify serious regional imbalances and temporarily to neutralize certain distortions of competition due to action outside the Community.

These various reasons are themselves enough to justify the granting of sectoral aid.

In the shipbuilding industry, the Commission has implemented the Fourth Directive on aid to shipbuilding adopted by the Council on 4 April 1978. The directive provides a ceiling of 30% of the vessel's contract price for production aid, as well as a prior notification procedure. Investment aid must not cause any increase in production capacity and projects likely to cause such an increase must be notified to the Commission in advance. A number of Member States notified the Commission of aid schemes in this sector; in particular the Commission induced the United Kingdom Government to revise certain excessive aid levels granted under the 1978/79 Intervention Fund².

As regards the iron and steel industry the Committee on Economic and Monetary Affairs approved the draft Commission decision establishing rules for aid in favour of the iron and steel industry³. This draft decision,

¹ Eighth Report on Competition Policy, point 175

² " " " " " " , point 189

³ ANSQUER Report on the draft Commission decision establishing Community rules for aids and interventions by Member States in favour of the iron and steel industry (Doc. 335/78)

based on Article 95 of the ECSC Treaty, contains a number of specific criteria. The aim of restructuring would be seriously compromised in the absence of a Community framework for aid schemes. Parliament insisted that this aid must actually be used for restructuring and be of a degressive and temporary nature, to ensure that the return to freedom of competition in this sector is not compromised.

(c) general aid

21. The Member States must notify their projects in advance to the Commission, which must give its opinion on general aid schemes within two months at the most and even as little as one month where general aid is concerned. The Commission ensures that these general aid schemes do not lead to distortions of competition. The Eighth Report explains that in two complex cases the Commission succeeded, after a lengthy procedure made necessary because these arrangements had not been notified in advance, in achieving the abolition of general aid schemes.

The United Kingdom, for instance, finally discontinued the system of medium and long-term credit at fixed interest rates benefitting British exporters on 1 April 1978. The effect of this scheme was to subsidize 'substantially' the interest rates granted to British exporters. It took the Commission two years to persuade the British Government to abandon this aid scheme.

A similar situation prevailed in France with the 'Special financing scheme for investments to increase exporting firms' production capacity', which adversely affects trading conditions to an extent detrimental to the common interest. The French Government only decided to comply with the Commission's request in November 1978 although the system had been running since 1975¹.

22. In the case of all national aid schemes, whether for export, 'rescue' or 'back-up' purposes, the Commission should take great care to exercise strict control. For the effect of unjustified aid of this sort can only be to transfer the social or industrial problems of one Member State to another, only granting an illusory respite to the undertakings benefitting from it.

This is also true of employment aid, on which subject the Committee on Economic and Monetary Affairs has already, in discussing the previous report, stressed the need for greater coordination of these restructuring aids at Community level so as to ensure that they are compatible and consistent with the objective of restructuring our economy and maintaining its competitiveness².

¹ Seventh Report on Competition Policy, point 244

² DAMSEAUX Report on the Seventh Report on Competition Policy, Doc. 334/78 - Explanatory statement, point 20

Generally speaking, the consideration of State aid schemes shows how necessary it is, from the point of view of economic efficiency, to co-ordinate regional, sectoral and social policies with the aims of competition policy.

2. Public undertakings

23. The competition policy must also apply to public undertakings, whilst taking into account their special function. Work has progressed on the Commission draft directive, based on Article 90(3) of the EEC Treaty, designed to afford a clearer insight into the financial relations between Member States and their public undertakings. The Committee on Economic and Monetary Affairs has noted the Commission's general guidelines in this field (Doc. COM(79) 761 final). The 'detailed consultations' which preparation of a legal instrument involves in this complex sphere should not, however, be allowed to delay for too long the work undertaken by the Commission¹; the committee calls for this directive to be submitted at the earliest possible date.

B. Activities of national and multinational undertakings

Competition policy may also benefit economic efficiency with regard to national or multinational undertakings and small or medium-sized businesses.

(a) the control of concentration

24. While Articles 85 and 86 of the EEC Treaty provide a legal basis for combatting the harmful effects of agreements and the abuse of dominant positions, the Commission does not have the legal means - with the exception of the ECSC Treaty in the case of the particular sector which it covers - to control the phenomena of concentration, to the dangers of which the Eighth Report, like its forerunners, draws attention. The Commission again reaches the conclusion that 'the intensity of the triopolistic and duopolistic dominance is very high, which raises a formidable barrier to entry by other firms ... in 9% of cases ... single-firm dominance has reached such a high level as to eliminate virtually any possibility of competition by other firms'².

The Eighth Report states that no significant progress has been made by the Council on the proposal for a regulation on the control of concentrations of enterprises. Yet this proposal for a regulation, introducing the preventative control of mergers as desired by Parliament, was approved as long ago

¹ Eighth Report on Competition Policy, point 253 et seq.

² " " " " " " , point 277

as 1974¹. It is deplorable that the Council should postpone adoption of this regulation when the vitality of the economy and the interests of consumers cannot be safeguarded unless adequate competition is maintained.

(b) activities of multinational companies

25. To be beneficial to the economy, the activities of multinational companies must be pursued within the framework of appropriate rules achieving a balance between the obligations which must be imposed on them and the need to avoid discrimination against them. Parliament has given its view on the principles which should be observed by enterprises and governments in international economic activity².

The Eighth Report contains little that is new on this subject. It does, however, provide some information, as requested by the committee, on the work being done by the OECD following the Recommendation adopted in July 1977 on Restrictive Business Practices of Multinational Enterprises³.

There is also mention of progress having been made at the United Nations Conference on an International Code of Conduct on Transfer of Technology, held in Geneva from 16 October to 10 November 1978. It is essential that the Commission should be able to put forward a joint Community position during these negotiations. Finally, it is regrettable that the Commission has not yet submitted the proposal on transfer prices requested by Parliament following adoption of the LEENHARDT Report on multinational undertakings and Community regulations (Doc. 292/74).

(c) small and medium-sized enterprises

26. While the role of competition policy is to control certain trends towards industrial concentration and some of the practices of multinational companies, it is also its function to stimulate the activity of small and medium-sized enterprises. As the Commission has recognized, small businesses make an important contribution to the dynamism of the economy and to innovation; the rules on competition should not needlessly restrain their development.

The Commission has announced several measures on behalf of small businesses, concerning exclusive dealing agreements, licensing agreements or agreements on specialization⁴. The Commission notice concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the

¹ ARTZINGER Report on a regulation on the control of concentrations between undertakings (Doc. 263/73)

² LANGE Report on the principles to be observed by enterprises and governments in international economic activity (Doc. 547/76)

³ Eighth Report on Competition Policy, point 45

⁴ DAMSEAUX Report on the Seventh Report on Competition Policy (Doc. 334/78), Explanatory statement, point 24

EEC Treaty, published on 3 January 1979¹, defines contractual clauses on subcontracting which are justified in relation to Article 85(1) and those which are not. This notice will strengthen the legal security of small businesses and should stimulate the growth of subcontracting, which is a source of development opportunities for this sector.

The section of the Eighth Report on aids to small and medium-sized firms shows that the Commission is favourably disposed to State aids enabling small businesses to overcome specific obstacles and adapt to normal conditions of competition².

Generally speaking it is important that the Commission should continue its work on behalf of small businesses, and most particularly on the drawing up of a draft regulation for the exemption of patent licences, as well as in the field of fiscal harmonization, as the tax burden on small businesses seems to vary appreciably from one Member State to another³.

¹ OJ No. C 1, 3.1.1979, p. 2

² Eighth Report on Competition Policy, point 241

³ Written Question by Mr DAMSEAUX

III CONDUCT OF COMPETITION POLICY

27. The value of the Commission's report should be to permit an annual stock-taking of the conduct of Community policy in the area of competition, its strengths and weaknesses and its relationship with other Community objectives. It should provide a forum for interested parties to comment on its overall direction. This final section looks at the conduct of competition policy in this light.

A. Coordination with other Community policies

28. The issue of coordination with other Community policies has never been more important than now when structural problems are affecting a number of major Community industries. Community measures designed to face up to those problems, such as industry restructuring, clearly involve potential clashes with competition policy.

In addition, the relationship between competition and other objectives is not always clear. One example of this is acknowledged in the introduction to the report, which cites the problems of drawing up 'a clear definition of the difficult relationship between competition law and industrial and commercial property rights'.

Interpretation of Article 85-3 of the Treaty, which provides for conditional derogation from the competition laws in the case of agreements or practices which 'contribute to improving the production or distribution of goods or to promoting technical or economic progress ...' also poses problems of reconciling different objectives.

Finally, there are few Community policies whose implementation does not have a major potential impact on competition within the Community. Fiscal policy and the harmonisation of laws and elimination of technical barriers to trade are amongst those with particular impact.

The upshot of all this is that competition policy must not be looked at in isolation.

While it is clearly not the conscious wish of the Commission for this to happen, there are certainly possible dangers. The Parliament, therefore, strongly reiterates its call of last year to both Commission and Council to override administrative compartmentalisation in order to give greater consistency to all those activities affecting competition policy in its broadest sense.

It also suggests that a short section in the report be devoted to the impacts on competition of other Community policies so that possible clashes between competition and the other policies can be made more explicit.

B. Current procedures

adequacy of these procedures

29. The annual report provides invaluable guidance as to the scope of Commission activities in the area of competition policy, but very little as to the adequacy of its procedure. Is it being too activist or insufficiently active? Is its current staffing adequate or inadequate to carry out its tasks? Is there any case for splitting the Commission's investigation and enforcement activities. How effective is the Advisory Committee on restrictive practices and dominant positions - in paragraph 79 the report says it met 10 times in 1977 and gave opinions on 14 cases: has it always upheld the Commission and if it has differed from its opinion, on what issues?

(a). Comments received by the Commission

30. Naturally the annual report focusses on what the Commission has done during the year and intends to do in the future - however, to facilitate discussion of the conduct of competition policy it would be helpful to have more of an idea of reactions to Commission policy and, in particular, comments the Commission has received on its proposed regulations.

At present, for instance, the report has over 60 pages on its research programme but only a few paragraphs on its proposed regulations. It notes, for example, in paragraph 2 that there have been 'a large number of comments from the various economic and business circles affected' by its proposed amended resolution on exclusive dealing agreements. It then mentions again 'the scale of the reaction'. It would be useful to give some idea of the nature of these comments.

It would also be valuable to learn of reactions to the Commission's proposal on the subject of patent licensing agreements.

(b). Commission investigations

31. One way for Commission competition policy to be made more effective is for better integration of its economic research with the rest of its activities: the Parliament therefore again reiterates the importance of this research having practical consequences.

The account of last year's research programme raises some questions with important practical implications, in two major areas in particular, the development of industrial concentration and differences in price levels.

- Concentration

32. Initial conclusions on the subject of industrial concentration are that single firm dominance is comparatively rare but that a growing number of national product markets are dominated by two or three firms.

In many cases markets are dominated by two very powerful firms which are frequently comparable in size. This dominance may well raise 'a formidable barrier to entry by other firms' and the research indeed appears to indicate a rigidity of market shares over time in most of the markets studied.

Clearly the potential significance of these findings is very great, particularly in implementation of Article 86 of the Treaty of Rome, dealing with abuse of dominant positions.

The research described in the reports has, however, concentrated far more on the overall structure of markets and on the possible existence of 'dominance' than on the implications of such dominance. The importance of the United Brands decision, also mentioned in the report and the economic considerations in which are cited in some detail, is that it indicates a number of ways in which this research must be furthered if it is to have any practical significance.

Not only, however, do these considerations indicate new lines of research. They also point out the dangers of making theoretical generalizations. 'The existence of a dominant position' for instance, 'may derive from a combination of several factors which, taken separately, would not necessarily imply dominance'. Also a company with a large but less than monopolistic market share does not automatically control the market, and its actual market share must be assessed having regard to the strength and number of its competitors'. All this reinforces the need for pragmatic and painstaking market-by-market research.

This is also needed to investigate the causal links between degree of strength in the market and actual market behaviour, the links where they exist between established 'dominance' and 'abuse' of that dominance.

The report, for instance, mentions one such problem when it states, in paragraph 273, that 'the study of duopolistic and triopolistic dominance is particularly complex as such structures may give rise to at least two diametrically opposite types of behaviour - fierce competition between the dominant firms or parallel behaviour and peaceful coexistence'. Where the first hypothesis is the case, a 50% market share may be less harmful to competition than a 10% share where the remaining 90% of the market is split between a number of much smaller firms.

The research on concentration cited in the report opens up valuable lines of inquiry but it is only a first step - the intentions expressed in section 296 of the report must be followed up.

This is even more true of the section on the number of national and international takeovers and mergers, share purchases and joint ventures in the Community. Their number apparently increased from 1976 to 1977. This and the other statistical findings need to be amplified by discussion of their implications. There is some evidence, though highly controversial, that many mergers may have adverse effects. Is the Commission doing research in this area? Is it looking not just at dominance within individual markets but at conglomerate development and horizontal integration of major firms over a number of markets not necessarily related? The Commission has been calling, and the Parliament has consistently supported it, for a more suitable means of control for monitoring major concentration operations. More convincing research in this area may strengthen the Commission's hand.

- Differences in prices

33. In its research on price levels the Commission has found that 'international price differences are too high to be explained solely by exchange rate differences'. Furthermore, it claims that these differences cannot

'be explained by local price dispersion phenomena since the various highest, lowest and average prices confirm that there is a fundamental disparity of national pricing systems'.

The Parliament can only support the expressed intentions of the Commission to conduct specific research into each of the relevant products, not only on price levels but also on price variations over time, to look at the reasons for such disparities and to examine the relationships between manufacturers and the distributive trade.

(Incidentally the description of this research on prices comes under the overall chapter title 'the development of concentration' which is rather misleading since this is surely but one element in the research).

C. External aspects of competition policy

34. One final important element in reviewing the conduct of Community competition policy is to examine those external elements which might have an impact on it.

As previously cited, the most important international initiatives in the eighth report are currently going ahead under the auspices of OECD and UNCTAD.

The activities in UNCTAD, to work out principles and rules governing restrictive business practices and to prepare an international code of conduct on the transfer of technology, appear to pose a possibility of clashes with Community competition policy. This is because their definition of what are restrictive business practices appear to go well beyond the requirements of EEC competition policy and indeed of the competition policies in the various Member States. In fact, the UNCTAD proposals combine competition with other policy objectives.

The report deals rather cursorily with these two UNCTAD initiatives. The Committee would like to re-emphasise the possible danger mentioned above and asks to be kept closely informed of future developments.

Luxembourg
P.O.B. 1601