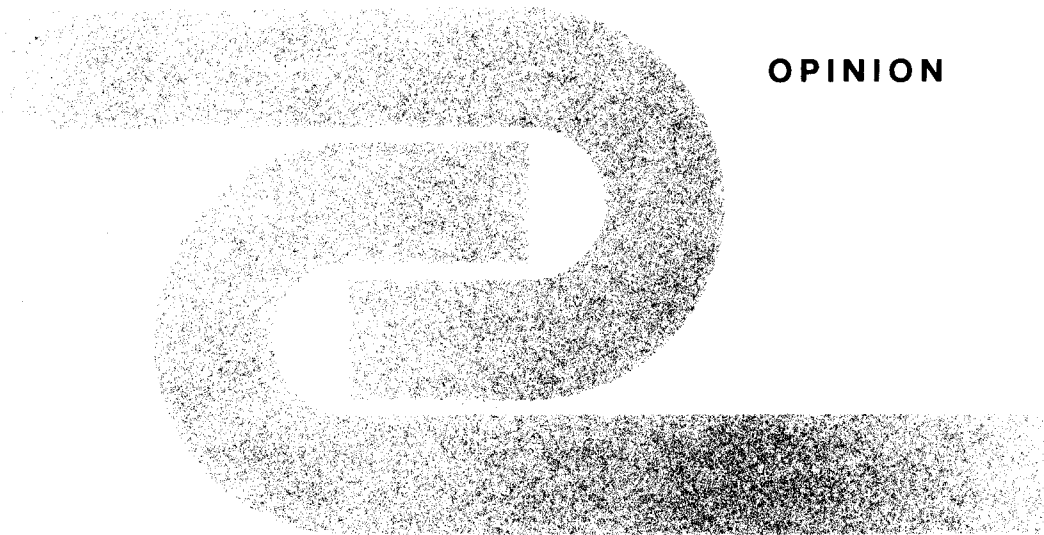


ECONOMIC AND SOCIAL COMMITTEE
OF THE EUROPEAN COMMUNITIES

**COMMUNITY
COMPETITION
POLICY**

OPINION



Brussels 1981

The European Communities' Economic and Social Committee, chaired by Mr Tomàs ROSEINGRAVE approved this opinion at its 187th Plenary Session, which was held on 29 and 30 April 1981.

The preliminary work was done by the Section for Industry, having Mr Edoardo BAGLIANO as Rapporteur and Mr Lothar NEUMANN as Co-rapporteur.

ECONOMIC AND SOCIAL COMMITTEE
OF THE EUROPEAN COMMUNITIES

O P I N I O N

COMMUNITY
COMPETITION
POLICY

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This publication is also available in :
Danish, Dutch, French, German and Italian.

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Catalogue Number : ESC-81-008-EN

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INTRODUCTION

This Opinion was adopted unanimously by the Economic and Social Committee of the European Communities at its meeting on 30 April 1981. It is the first devoted exclusively to the subject of competition policy and it appears at a time when a major review of Community policy in this field is underway, just after a special Council meeting, just before the adoption of an important resolution (the Moreau Report on the IXth Commission Report on Competition Policy) by the European Parliament, and with a new Commissioner and a new Director-General in charge at the Commission. It has therefore been thought appropriate to publish it, together with the Appendix and the Report, as a special brochure.

It is no accident that this review of competition policy coincides with the most severe recession the Community has experienced. The recession, together with the critical stage reached in the Community's own development, naturally provoke reconsideration of the main policy lines followed hitherto and of the need for change or adjustment to adapt the new circumstances. The Committee's reflexions on this do not question the basic principles set out in the Treaty of Rome. But they do conclude that the application of the rules require more flexibility and must be carried out in the overall framework of broad policy guidelines particularly regarding industrial policy.

Competition, as the EEC Commissioner, Mr ANDRIESEN, repeated in the Committee's debate, is not an end in itself. Competition policy - not, as the Rapporteur, Mr BAGLIANO, pointed out to be identified with competition itself - is a delicate balance of many conflicting

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interests. Some parts of the Committee's Opinion may therefore appear to the casual reader to be self-evident. In the present difficult economic and social conditions, it is no longer easy, nor therefore is it pointless, to make statements of the obvious and this official text, representative of a broad consensus of views, is therefore presented as a highly relevant contribution to the Community's further development in the difficult months and years ahead.

A. O P I N I O N
of the Economic and Social Committee
on the
Community Competition Policy in the Light
of the Current Economic and Social Situation

I. COMPETITION POLICY IN AN "OPEN" MARKET IN THE PROCESS OF
INTEGRATION

Background to this Opinion

The serious economic and social situation in the late '70s and early '80s requires the Economic and Social Committee to put the Community's competition policy under the magnifying glass, taking an overall, and above all, long-term view.

N.B. : The numbers in brackets refer to notes (quotations from documents) in the Appendix to this Opinion.

This is to shed light on the points made in the Opinion.

This Opinion was prompted by the profound conviction, born of experience, that in a period of such serious, persistent social and economic difficulties, all the Community policies ought to be implemented as effectively as possible, with the maximum coordination and with all reasonable speed.

To this end, discussion of the past is not enough; we must also undertake a realistic, scrupulous appraisal of the current economic and social situation. Above all, we must adopt a more imaginative approach to the future and display greater commitment in decisions and actions.

All the policies of the European Community should be given this new impetus without delay. This includes competition policy which has a basic, specific and vigorous role to play in a climate characterized by a change in economic relations and industrial structures, a concentration and "multinationalization" of capital in certain sectors, and a transformation of relations between the State and the economy.

In this context two trends emerge : firstly there is the growing importance of State and semi-State firms, stronger pressures for direct government aid, and more demands for Community aid or protection; secondly, stiffer and stiffer competition from imports originating outside the Community. Concurrently, ties are being forged more and more rapidly with the developing countries.

It is not the intention of this Opinion to duplicate the specific analyses submitted each year by the European Parliament to the Commission for critical evaluation. The Opinion seeks to tackle the problem of competition policy within an overall framework, with particular reference to changing conditions in and outside the Community.

Instruments and aims of the Treaty : rules on competition

Among the many instruments for implementing the objectives set out in Article 2 of the Treaty, Article 3 provides for "the institution of a system ensuring that competition in the common market is not distorted".

The rules on competition (Articles 85 et. seq.) are therefore one of the "instruments" for bringing about the "common market" (1).

Further, the establishment of a common market between the Member States is, according to Article 2, a means of "promoting" the objectives of the Treaty which are of course:

- a) harmonious development of economic activities
- b) an increase in stability
- c) an accelerated raising of the standard of living (Art.2).

These are clearly economic and social aims and it is therefore right and expedient that rules on competition should be increasingly considered in the light of the economic and social situation. This is precisely what this Opinion proposes to do.

Competition policy

In the present economic and social situation, both in and outside the Community, competition rules should be applied in accordance with principles and strategies that are geared to a genuine fully-fledged competition policy. (Moreover, the whole chapter on "rules on competition", from rules applying to firms to "aids granted by States", is contained in Part Three of the Treaty entitled "Policy of the Community").

This is all the more necessary in view of the fact that the original frame of reference - the economic and social situation in the '60s - has changed radically (particularly in the '70s) and bearing in mind that "integration" in a "single" market is among the primary objectives of the Community, even though various obstacles, differences and imbalances still remain between Member States.

Even a summary assessment of the '60s reveals that the competition rules were generally applied according to largely legal criteria (3).

After the period of initial notifications, and once "mass" solutions had been found (the vast majority of the ten thousand or so contracts notified related to exclusive distribution), the Commission clarified the limits of "co-operation" between firms and took position on a number of cases involving abuse of dominant position.

The increasing complexity of the issues involved and their considerable interdependence vis-à-vis many other issues have in recent years obliged the Commission to get to grips with situations which call for value judgments and a broader approach to realities, implications and constraints.

As is borne out by a number of practical examples, the "rules on competition" referred to in Articles 42, 85, 86, 92 et seq of the Treaty of Rome, should be implemented more effectively via a package of measures, norms and recommendations which are compatible with the overall framework of Community activity (2), in other words by means of a proper "policy" which is both complex, flexible and structured, and takes account of interdependence and interactions between a variety of initiatives and situations, both general and sectoral, within the Community and in the world outside.

An approach along these lines must be encouraged.

The open common market

The Treaty itself takes a clear line :

"By establishing a customs union between themselves, Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.

The common commercial policy shall take into account the favourable effect which the abolition of customs duties between Member States may have on the increase in the competitive strength of undertakings in those States". (Article 110).

The present situation confirms the validity of this line and the need to press on with efforts to achieve these objectives.

Similarly, the preamble to the Treaty states that the Community is created in the desire to "contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade".

Leaving aside all dogma, we must face the reality that the common market is open insofar as it is part and parcel of the vaster ambit of the world economy and international trade.

In this connection the Committee fully agrees with the Commission's introduction to the VIIIth Report on Competition Policy :

"To operate effectively, the common market is largely dependent on the setting-up of a large internal market in a Community with an outward-looking approach to the rest of the world. An extensive area in which economic activities may interact without purposeless constraints is a prerequisite for a developing economy; it is no longer reasonable to suppose that economic activity can expand within a confined space".

Similarly, the introduction to the IXth Report acknowledges that :

"every Community policy is required to adapt itself in order to fit into the perspective of a common market that is both unified and outward-looking at the same time".

Accordingly, competition policy must further the aims of the Treaty with a view to achieving a common market which is not isolated but open to trade and international competition in the widest possible sense (4).

II. INTERDEPENDENCE AND ITS EFFECTS - COMMUNITY COMPETITIVENESS
- RELEVANT MARKET

World-wide interdependence and Community competitiveness

The growing interdependence of markets necessarily entails a new international division of labour (7).

The European Community feels the impact of this interdependence more than any other Bloc and the initial practical response to this challenge can only be an increase and expansion of competitiveness, stimulated by a competition policy compatible with the objectives of the Treaty but also responsive to any adjustments that become necessary over time (5).

In an "open" market, a coherent competition policy must be increasingly orientated towards a realistic view of overall, world-wide interdependence (6). This economic interdependence embodies all the elements for more balanced North-South and East-West relations, from the flow of raw materials to trade and technological flows.

Ruling out protectionism, the only possible strategy open to us is to further the restructuring of production and structural adjustment with the help of all social and economic interests. At the same time, Community industry will be safeguarded and stimulated by a competition policy conceived in the broadest and most dynamic terms and thus placing increasing emphasis on global Community aims (8) (9) (10).

However, it must be remembered that terms of competition in many world export markets are often different - sometimes very different - from those existing in the Community. Close monitoring combined with suitable measures, possibly transitional or phased, will therefore be needed to prevent Community firms being adversely affected.

Competition and cooperation

Since the European Community is more dependent than other advanced countries on external relations, it must succeed in introducing a system of "competition - cooperation" between the Community and the major non-Community Blocs in order to promote lasting North-South and East-West prosperity based on the principle of reasonable reciprocity and balanced economic progress in every sector.

A shrewd competition policy must take account of the need to reconcile competition and cooperation in both production and trade. Distortions within the common market must be avoided, unfair practices must be prevented and worthwhile cooperation compatible with the Community's overall progress must be promoted.

Relevant market

This trend in the Community and international economies requires - in addition to the criterion of "practices which may affect trade between Member States" - (Article 85(1)) - a broader criterion which effectively takes into account the relations between the "Community market" as a whole and other countries.

We should therefore approve and encourage the tendency of the Commission and the Court of Justice to consider Article 85 as applicable to agreements affecting the Community between companies whose registered offices are outside the Member States. (11).

While it is thus essential and correct from every point of view to evaluate the anti-competitive effects of agreements between Community businesses and those of other countries, it is equally necessary and correct, not to confine the analysis of a specific market situation (production, sales, substitute or similar products, etc.) to the common market alone.

The assessment of the "relevant market" is of course of considerable importance for the application of Articles 85 and 86 (12).

As part of this assessment, an increasingly careful analysis must be made of the position of individual companies with respect both to their competitors in the Community and to import flows from outside the Community. Assessments of the competitive position and the relevant market cannot be artificially confined to the Community area.

This is the only way to make the concept of an "open" common market effective, complete and coherent.

Competition policy is already moving in this direction and must be given every encouragement to do so.

III. IMPORTANCE OF THE ECONOMIC AND SOCIAL CONTEXT - COORDINATION OF COMMUNITY POLICIES

Impact of economic and social aspects

The aims of the Treaty emphasize the economic and social aspects.

The economic recession and inflationary pressures bedevilling all the Member States today, the need to protect employment, the need to promote technological progress and innovation, the continuing oil crisis and the disparities in national legislation in a number of key sectors are all factors, to name but the most important, which must be taken into account in assessing the behaviour of firms and Member States with a view to the application of Articles 85, 86, 92 et. seq.

Competition policy cannot be governed by abstract or theoretical criteria but must take into account the real conditions and requirements of the various countries and regions (13). The original frame of reference (setting in motion of an integration process in a high growth-rate economy) which marked the initial period of implementation of the rules of competition has now changed.

The major changes in the Community and international economies over the last few years have had serious repercussions in the social and productive sectors of a Community which is not yet fully integrated (14).

Given this state of affairs, application of the competition rules cannot disregard economic and social institutions and factors. Account must therefore be taken of the new "framework conditions" governing all facets of Community development (15).

For this reason the Commission should inform and consult employers' associations and trade unions in particular about its competition policy. The Economic and Social Committee is an ideal forum for briefing and consulting all socio-economic interest groups on this matter.

Inflation, social problems and the energy crisis

The hallmarks of the present economic and social situation include persistent inflation, rising unemployment

and the numerous effects of the energy crisis. Competition policy must therefore pay special heed to these vital aspects of the present economic situation.

A vigorous competition policy can also help to contain inflation, for instance by rationalizing production and promoting labour and capital mobility, with corresponding benefits in costs and prices. Stricter controls can check abuses and eliminate the various artificial constraints which distort competition (16).

On the social front, the re-distribution of labour within the Community should be orientated towards expanding sectors. The alignment (17) of social security systems (18) should also be pursued more vigorously, without ignoring the importance of the different traditions of industrial relations, particularly in the context of Community enlargement.

Competition policy should also keep a close watch on the wide disparities in energy prices in the Member States (19). It is vital to foster tax alignment and promote greater international cooperation in this area in order to permit a more accurate assessment of needs and strike a more satisfactory balance between supply and demand.

Rulings of the Court of Justice

The Commission and Court of Justice have already shown their responsiveness to socio-economic needs (23). This is both a realistic and far-sighted policy.

These institutions have, for example, recognized that the following considerations should be taken into account when defining the "promotion of technical or economic progress" (Article 85(3)) :

- a) the scope for (i) planning production and marketing on a long-term basis and with greater accuracy, (ii) restricting the market fluctuations, and (iii) lowering production, storage and marketing costs;
- b) the protection of employment as part and parcel of an overall stabilization plan, especially when the business climate is gloomy (20).

The Court - while acknowledging that "workable competition" (21) is a *sine qua non* - has also stated explicitly that competition may vary in nature and intensity according to the particular products or services in question and according to the economic structure of the sectors concerned. The Court has also ruled that price competition should not be given absolute priority in all circumstances (22).

These decisions show an awareness that rules on competition cannot be applied in a vacuum but are influenced by the economic and social context existing at any given moment in time.

Above all, it is clear that in practice the conditions under which Community firms operate differ from Member State to Member State in respect of: access (to domestic and international financial facilities; the labour market; research and development), scale of production and marketing; taxation and social security rules; infrastructure; transport and energy supplies.

To make its full impact, a competition policy needs to be carefully researched and take account of the various factors involved, while at the same time seeking to create conditions truly conducive to the changes required.

Coordination of policies

If there is agreement on an overall approach, interdependence and the need to take into account the constraints imposed by the widely differing economic and social situations within the Community, then, if the objectives of the Treaty are to be achieved, there must also be agreement that undistorted competition within the Community is a prerequisite for adjusting industrial structures which increasingly come into contact with one another in an open market.

Framed along these lines, a competition policy will spur Community firms to be more competitive and further a bold, far-sighted strategy of industrial restructuring whose main concern will be to reinforce the Community's industrial structures.

What is absolutely necessary is close coordination, particularly with overall sectoral and industrial policies, with the social, regional and commercial policies of the Community (24), and with the Common Agricultural Policy.

The Commission has shown in a number of cases that it has done just that (25).

Its 1978 and 1979 programmes concentrated on structural aid for ailing industries (steel, shipbuilding, textiles, footwear, paper). In addition, the Commission has issued detailed reports and various other initiatives concentrating on "growth sectors" designed to promote economic expansion and thereby increase job opportunities in industry and the tertiary sector (alternative energy sources, the aircraft industry, telecommunications, data-processing, electronics).

Competition policy should encourage a coordinated target-orientated approach to and settlement of such problems.

Regional imbalances and restructuring

It is also essential to prevent the restructuring of productive industries from being hampered by institutional inflexibility.

The most serious and crucial examples of institutional inflexibility are related to regional imbalances in the Community.

Competition policy at regional level must, on the one hand, respect the need for specific priorities but, on the other, must help to incorporate regional re-equilibrium and development needs into an overall policy, having a social dimension in order to prevent conflicts or delays.

If the socio-economic background is to be taken seriously, competition policy should be geared to general or medium-term goals and should observe the principles of gradualism and consistency. Coordination and harmonization should be entrusted jointly to senior officials in the General Directorates directly concerned. This would make it possible to hold comprehensive discussions and assessments before Commission decisions are taken (26).

IV. MIXED ECONOMY - FULL INFORMATION - AIDS

Mixed economy

It is generally recognized that, to varying degrees and in varying forms, the public sector is an ever-present feature of modern economies.

In some Member States, this intervention has deep-seated historical, socio-political roots and, in a number of ways, influences national economic and political decisions.

At all events, it is now a fact that many Member States have, even if to varying degrees, been involved for a considerable time in economic activity, through State and semi-State bodies.

The Member States have an undeniable right to pursue economic and social advance through the vehicle of such bodies.

However, competition rules must operate even in mixed economies, except of course where the notion of "public service" of specific general interest is concerned (Art. 90.2 of the Treaty).

Here it is hardly surprising that the issue of like treatment of private and public-sector firms competing in the same market (27), so crucial to the proper operation of the economy as a whole, should have arisen. The only means of ensuring such treatment is to eliminate any fiscal or financial discrimination and to dispense with preferential arrangements and measures of equivalent effect.

Competition policy has a crucial role here.

Full information

The direct or indirect allotment of public resources to public-sector firms, and the way such resources are used, must not be shrouded in secrecy. The recent Commission Directive on this matter is a step in the right direction.

This requirement must not be interpreted or applied so as to lead to discrimination between public and private-sector firms. It merely reflects the principle that public-sector firms must also be required to disclose appropriate particulars about their financial relations with the State, even though this information is not demanded by shareholders (29).

Identical market conditions for public and private-sector firms will facilitate non-distorted, increased competition. Where social factors - at the level of an establishment, region or sector - take precedence, convincing grounds should be provided along with a schedule for phasing out relief measures over a reasonable period of time.

It should be made clear that the derogations accorded to a number of sectors for an initial period are merely temporary. The requirement that full information should be given should be extended as soon as possible to cover the credit, insurance and energy distribution sectors.

Competition policy and aids

The ban on aids laid down in principle by Article 92(1) must be observed, but current economic and social circumstances in the Community require a new look at the interpretation and application of this ban. In particular, Article 92(3) must be applied consistently and with increasing stringency, account being taken of the purpose of aids and of specific national or regional circumstances.

However, since many factors are involved, it would be helpful if the Member States and firms received regular, detailed updates on the Treaty-compatibility criteria adopted by the Commission in the light of changing general and sectoral circumstances in the Community economy. Rather than encouraging applications for State aid, fuller disclosure of compatibility criteria could preclude concealed aid schemes and help to ensure that aids are consistent with Treaty aims at all levels (national and local) (30).

In addition to straightforward aids, which are direct and declared, there is also the problem of partial or full reimbursement of capital expenditure undertaken by private-sector firms for a variety of purposes, including R & D.

Community industry cannot overcome the present recession unless it sharpens its competitiveness. Competition policy must therefore allow adequate support for R & D, especially to enable Community firms to compete on equal terms with their rivals in non-Member countries, some of whom have specific incentives for R & D.

Conditions conducive to stepping up competitiveness can be achieved in this way.

Here again, there should always be a proper flow of information, and it should be possible to demand equally detailed particulars of special relations between private-sector firms and banks or financial consortia with public backing.

V. BUSINESS PRACTICES

The fragmentation and decentralization of productive investment, which is already under way in some sectors and desirable in others, together with the increasing rigidity of constraints and structures conditioning the behaviour of large firms, suggest that competition policy should do more to safeguard free access to the market, to preclude abuse and to further cooperation not only between small and medium firms, but also between the latter and large firms (31).

The Commission has already moved in this direction by eliminating a number of technical, administrative and legislative barriers and by encouraging cooperation between, in particular, small and medium firms. The small/medium business sector is more flexible than the large business sector, and adapts more readily to changing market requirements and to the many variables of risk and innovation.

The large number of small and medium firms, their geographical dispersion and the enterprising spirit of their managers are likely to stimulate competition and give consumers (particularly specific categories of consumers) possibilities of a wide choice and easy availability of supplies.

However, though it should be possible to upgrade the role of the small/medium business sector, by providing appropriate support and incentives, this should be done without impairing free competition.

While their size makes it easier for SMEs to adapt rapidly and relatively cheaply to changing market needs, it also makes them more vulnerable in respect of access to the

capital market, supplies and any unfair economic and trade practices. It is therefore necessary, in the interests of maintaining an undistorted and workable competition system, to protect SMEs against such practices through adequate legislative and administrative measures as well as through legal means. At the same time the notion of "sectoral markets concerned" should be made to work more to the advantage of SMEs when evaluating the competitive position of bigger firms.

As a result of increasing difficulties in adjusting to changing conditions of competition, both in and outside the Community, it will be necessary for large firms to make considerable efforts to reorganize their structures and production and to adopt a new strategy on vertical and horizontal cooperation for the purpose of cutting back expenditure and achieving optimum efficiency; however, one must not ignore the need for effective controls, given the dangers that can result from productive or financial mergers.

There are, however, still many legislative and tax obstacles to the most efficient forms of inter-firm cooperation in the fields of both R & D and services.

The Draft Regulation on the "exemption by category" of patent licence agreements should further simplify the application of Article 85(3). It should ensure greater legal clarity and certainty and should create a more favourable climate for R & D and the transfer of technologies (32).

Far from discouraging firms from concluding licence agreements, the new Regulation should ensure that "patents" and "industrial property" are harnessed to competition and to technological and economic advance.

All firms irrespective of their size, should be able to participate in the exchange of technology and know-how. A more active licence market, with a system that adequately protects property rights, is - together with appropriate research incentives - a sine qua non for faster innovation.

In the distribution sector, competition policy should put particular emphasis on the primary need to rationalize channels and methods and preclude abuses that could inflate retail prices.

When exclusive dealing arrangements and selective distribution systems are being considered, due weight should be given to their constructive contribution in sectors where there are objective reasons for a high-grade, well-organized distribution system linked inter alia to the nature of the product (33) and the responsibilities of the producer.

The variety of types of marketing, and the continued existence of the small/medium business sector, must be safeguarded.

In connection with the restructuring of individual sectors and firms, the present economic situation in the Community is such that the waivers provided for in Article 85(3) should, until a satisfactory balance has been restored, be applied to partial agreements (even between business rivals) designed to enhance the participants' competitiveness and especially their ability to compete with non-Community firms (34).

Close monitoring will be necessary at all times to prevent abuses of dominant positions.

With regard to business mergers, one must remember that if legal instruments lack the requisite flexibility and phasing in both conception and implementation, their practical impact will vary from Member State to Member State.

In particular one should remember that market and productive-capacity structures, and hence the levels of mergers, differ from Member State to Member State for historical, economic and social reasons.

Business mergers should be vetted, though many cyclical and structural factors, including at the present time employment difficulties, militate in favour of policies free of legal and other rigidities. (35) (36)

The Draft Regulation currently being examined by the Council might be a satisfactory frame of reference insofar as it takes realistic account of the many and varied aspects of the problem. (37)

The consultation and approval procedures for the company law directives which are still in the pipe-line should be speeded up. However, it would be wrong to try to resolve all the problems at one go (38) (39).

Inter alia, the Commission should stress the importance of adopting the Draft Regulation on the creation of a European Cooperation Group, which in many instances would be a useful legal vehicle. (40)

The procedures for applying competition rules to firms, and the time they take to complete, have a direct impact on costs, because they protract legal uncertainty and are detrimental to the interests of the parties.

A speeding-up of procedures could be held to reduce this uncertainty, though accurate analysis and optimal decision-making remain as essential as ever.

The overall legal framework should be reformed by providing for better access to files, more respect for information, the confidential nature of certain documents, appropriate delays for reply, oral evidence, greater precision of complaints and provision of fuller information and reasons for decisions. (41) (42)

Thought should also be given to ways of ensuring more objective decision-making and information in matters where no formal decisions have been taken.

Keeping tabs on the fairness of company advertising is also a valid instrument of competition policy. (43)

The Court of Justice has in various rulings confirmed that the prohibitions set out in Articles 85 and 86 are directly applicable in national provisions; by now there is more or less general agreement on the principle that Community law takes precedence over national law.

Although growing harmonization between national and Community law diminishes the theoretical risk of conflict, national laws (even if not developed to the same degree in

each Member State) should provide the necessary back-up via a decentralized and effective competition policy which does not exclude close cooperation between the Member States. (44)

VI. CONSUMER PROTECTION

Competition policy is complementary to, and closely linked with, a Community policy on consumer protection. (47)

Information and market transparency generally, are essential if consumers - and firms - are to be able to make the proper choice. However, information should not be provided exclusively by suppliers; the consumer must be able to evaluate alternatives within the framework of a system which is more rational and balanced than the present one.

It is particularly important to supply information on prices since these are the consumer's main indicator of rising inflation.

However, competition policy alone cannot be expected to create the prerequisite for achieving uniform or equivalent prices for comparable and rival products within the market. (45)

Tax structures vary, widely and so do the production situations of individual firms, distribution arrangements, and sales policies. (46)

However, those responsible for competition policy, especially where inexplicably large differences are found to exist, should keep prices under close review. Price differences are not in themselves proof of such malpractices, nor do they necessarily indicate that barriers to trade continue to exist or that markets have not been integrated. (48)

VII. CONDITIONS FOR THE DEVELOPMENT OF A COMPETITION POLICY

In an "open" competition situation, like that in the Community, it is necessary to pursue an "open" competition policy, that is to say a flexible, overall, realistic and dynamic policy that takes account of changing social and economic circumstances in the Community, of international trade patterns, and of economic and production trends outside the EEC that influence the Community's relations with the rest of the world.

However, it is hardly possible to claim the benefits of free trade, and thus of healthy and effective competition, without accepting the constraints, ranging from fair pricing and advertising to abstention from agreements and abusive practices which violate the principles of non-distorted competition or the specific anti-trust rules of the Community, individual Member States and regional areas. (49)

Monitoring, therefore, though not an end in itself, is essential.

A Community competition policy must also safeguard effective competition between products and services within the Common Market. But, particularly in relations with the rest of the world, it must also preclude abnormal competition, dumping, malpractices, concealed protectionist retaliation and any distortion of the terms of competition.

At international level, steps should be taken to ensure that anti-trust rules in non-EEC countries do not distort competition. Cooperation between the Member States would be helpful here. (50)

Generally speaking, an intelligent Community policy - based on a close and continuing review of changes in the international division of labour and resources - can do much to contain inflationary pressures and high unemployment, and leave adequate room for competition and collaboration between firms both in and outside the Community.

With this end in mind, effective coordination of the different Community policies must be a priority to ensure compliance with the aims of the Treaty and mutual consistency; national sectoral policies should show similar convergence and compatibility. (52)

Finally, the Commission's resources should be boosted so as to improve the efficiency of its services. The Commission will then be able to play to the full its vital, unique role in the construction of a forward-looking Europe. (51) (53)

A P P E N D I X
to the
O P I N I O N
of the
Economic and Social Committee

I. COMPETITION POLICY IN AN OPEN MARKET IN THE PROCESS OF
INTEGRATION

(1) In the first "Report on Competition Policy" back in 1971 the Commission acknowledged that the competition policy :

"is an important instrument for furthering the aims of the Treaties."

(Report - Introduction - Page 1, sub-section 2)

(2) Calling for a wider scope for the EEC's competition policy, the European Parliament :

"2. stresses, however, the need for the Commission to extend the scope and application of its competition policy to ensure that the whole range of Community activity is covered;

3. urges the Commission, therefore, to consider how competition policy might fruitfully be applied to such diverse areas as social policy, the approximation of laws, the relations between the EEC and state-trading countries, the accession of new Member States, the common agricultural policy, fishing policy, and the law of the Sea;

4. regrets the absence from the Fifth Report of any mention of the competition aspects of energy policy, of consumer protection, of credit institutions, of the relationship between Community and national law, or of industrial policy, fields in which competition policy clearly has a role to play and to which the European Parliament has referred in previous resolutions."

(Resolution of the European Parliament on the Fifth Report of the Commission on Competition Policy, O.J. No. C 238 of 11.10.76).

(3) On the application of the rules on competition, the European Parliament :

"4. considers that, to be comprehensive, competition policy should not be confined solely to the application - to which the Commission rightly devotes its efforts - of the rules of competition laid down in the Treaties, but should also comprise greater equalization of the conditions of competition as a whole;"

(Resolution of the EP on the Seventh Report of the Commission on Competition Policy, OJ No. C 261 of 6.11.78).

(4) The European Parliament also :

"10. Considers that the Community's competition policy must be viewed not merely in an intra-Community context, but also in the light of the need to ensure that undertakings are able to compete effectively and on an equal footing with third- country manufacturers."

(Draft Resolution of the EP's Economic and Monetary Committee on the European Automobile Industry : Doc. EP 68.264/A of 5.11.80).

II. INTERDEPENDENCE AND ITS EFFECTS - COMMUNITY COMPETITIVENESS - RELEVANT MARKET

(5) Commissioner DAVIGNON answered a parliamentary question by saying :

"The Commission interprets the concept of competitiveness as the ability of a business to meet competition from the rest of the world. In the economies like that of the Community - open to international trade - the concept implies the constant adaptation of businesses to economic change and to market conditions and prospects so that, in the long run, receipts cover the cost of production with an adequate margin for investment and return on capital, and ensure the continuity of the business.

The Commission is aware of the fact that businesses have to contend with several factors they can do little or nothing to alter. Examples are a country's laws, international commitments, the distortion of competition in the market and monetary policy. Yet these are facts of life that have to be allowed for, particularly at a time of increasing economic interdependence, and businesses must respond by increasing the efficiency of the factors of production."

(Written question No. 562/80 in OJ No. C 283 of 3.11.1980 "The concept of competition as understood by the Commission").

(6) The EP had the following to say about the "overall" approach :

"(ii) Shortcomings

10. In spite of the progress made, the Community's competition policy as outlined in the Fifth Report remains in many ways insufficient, particularly in this period of change.

A less legalistic view of competition policy should go beyond scrutiny of the application of Articles 85-94 of the Treaty and include a more comprehensive approach which is unfortunately lacking in the Community competition report. It seems that when the scope and functions of competition policy are considered, its effects are or could be wider than the Commission thinks.

12. As far as relations between the EEC and third countries are concerned, a complete examination of competition policy should be made as part of an overall study of the EEC's commercial policy. Consideration of competition policy cannot be disassociated from consideration of various very important problems upon which the Fifth Report does not expand at all."

(Report of the EP's Economic and Monetary Committee on the Fifth Commission Report on Competition Policy - Doc. EP No. 243/76 of 1.9.76).

(7) The Commission has the following to say about the international division of labour, interdependence and the danger of protectionism :

"The Community was designed by the Treaty to be particularly outward-looking vis-à-vis the rest of the world. With an estimated 30% share in world trade, it is the world's major trading partner. The age-old international division of labour - raw materials/industrialized products - is progressively, and sometimes rapidly, being replaced by a new redistribution of activities as more and more developing countries become internationally competitive in an increasing range of manufactured products. Technological, industrial and commercial interdependence marches steadily on, even when economic difficulties are widespread.

It is particularly important for the Community, as a major importer and exporter, that an open system of world trade based on fair competition should be fostered. The Commission has consistently made use of its powers that are directly applicable against firms to pursue the struggle against restrictive practices at international level.

Turning, then, to the external aspects of the Commission's work on competition, the first step was to establish that restrictive or abusive practices originating outside the Community are covered by the Community rules of competition where they have an appreciable effect within the common market. In doing so, the Commission has become one of the first anti-trust authorities to have applied effectively the theory of internal effect so as to impose penalties on foreign companies, especial-

ly multinationals and foreign signatories of voluntary restraint agreements. All firms wishing to operate inside the common market must respect its rules of fair conduct.

The Commission looks to its competition policy to provide it with effective means of keeping the common market open to foreign trade, and thereby to safeguard the liberal nature of the Community's commercial policy. This latter policy provides a substantial buttress against the risk of a rising tide of world protectionism, from which the Community, as the world's major trading partner, would be the first to suffer."

(Introduction to the Eighth Commission Report on Competition Policy - pp. 13 and 14).

In the introduction to the Sixth Report, the Commission said categorically that :

"Willingly or unwillingly, Europe is in the throes of a long-term process of structural transformation and must somehow restore some kind of equilibrium within a new international division of labour."

(8) This concept was fully illustrated by Commissioner VOUEL in his introductory speech to the work of the EP's Economic and Monetary Committee on the Eighth Report on Competition Policy) :

"Even if Community competition should not be regarded as an aim in itself, it is still undoubtedly one of the fundamental pillars of an open economy, as advocated by the Treaties, a vital instrument for ensuring, within a market economy, that industrial structures are permanently compatible with economic development.

Competition policy must therefore resist protectionist tendencies and must set itself up against those who believe that immediate problems can be solved by

artificial protection and that there can be protection in the long term against international competition and intra-Community competition. Such a "withdrawal" symptom is untenable in an interdependent world economy where the Community must look to the future with open frontiers so as not to lay itself open to the risk of suffocation.

It is therefore the task of the Commission to preserve a balance between the maintenance or long-term recovery of Community competition on the one hand, and the pursuit of more immediate priorities such as growth, the reduction of unemployment and industrial restructuring on the other."

(9) For more material on the concept of "interdependence" with particular reference to Third World Countries, see :

"Communauté - Tiers Monde : le défi de l'interdépendance" (Bulletin de renseignements documentaires - A numéro spécial, Bruxelles, 1980)."

(10) "Understanding the concept of "interdependence" is the title of a paragraph in Chapter III of the well-known BRANDT report : "North-South - A programme for survival" - 1980.

(11) In 1973 the Court of Justice made the following ruling :

"Community law is applicable to a transaction which influences market conditions within the Community irrespective of the question whether the business in question is established within the territory of one of the Member States of the Community."

(Judgment of the Court of Justice of 21 February 1973, case 6-72
Europemballage Cooperation and Continental Can Company against European Community
(Report of Cases before the Court, 1973 - vol. 2 - page 216 - maxim No. 5).

(12) In the same judgment (11) the Court of Justice underlined the importance of the concept of "relevant market" :

"For the appraisal of LSW's dominant position and the consequences of the disputed merger, the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products."

III. IMPORTANCE OF THE ECONOMIC AND SOCIAL CONTEXT - COORDINATION OF COMMUNITY POLICIES

(13) In the introduction to the Sixth Report on Competition Policy, the Commission recognized that :

"The principle of competition, so basic to the common market, is therefore by no means rigid or dogmatic."

(14) The Commission began the introduction to the Ninth Report on Competition Policy with the following words :

"The persistence of conditions of crisis prompts questions as to the role that competition policy should play and as to the respective merits of rigidity and flexibility in its application. In the case of the Community, delineation of the general thrust of its competition policy must not be based on a dogmatic approach but requires reference back to the fundamental provisions of the EEC Treaty. The Treaty stipulates that the Community's primary task is, by establishing a common market, to promote the harmonious development of economic activities throughout the Community. The methods prescribed for accomplishing

this task include the institution of a system for ensuring undistorted competition, a prerequisite for the proper functioning of the common market, which is the rock on which economic integration is to be founded.

It follows that the Community's competition policy must persist in its pursuit of a group of basic objectives."

(15) Later on (page 10) the Commission introduces the concept of fairness in the market place :

"Thirdly, the competition system instituted by the Treaty requires that the conditions under which competition takes place remain subject to the principle of fairness in the market place. In the Commission's view, this principle is of prime importance in the present economic circumstances. In its application to the Commission's activities three main aspects emerge."

In connection with the third aspect the Commission says :

"Finally, equity demands that the Commission's competition policy takes account of the legitimate interests of workers, users and consumers. These persons should be allowed a fair share of the benefits derived by firms from agreements that restrict competition between themselves. The same considerations, particularly the development of employment prospects, play an important part in the Commission's assessment of proposals for State aids."

(16) On the role of competition policy in containing inflation we have the following passage :

"c) Competition Policy

95. Implementation of the programme must draw on an active competition policy. Such a policy can improve the effectiveness of the instruments of overall demand management and in particular help to fight inflation. Its objective, in the general interest, must be :

- to obtain as rational as possible an allocation of the factors of production, in particular by exerting constant pressure on costs and prices;
- to promote continuous adaptation of the productive apparatus by encouraging a rapid re-allocation of labour and capital towards those sectors which have the greatest future potential;
- to prevent firms from using restrictive or abusive practices to compartmentalize and dominate the market, or indeed manipulate demand.

96. Action aimed at controlling the inflationary effects resulting from inadequate competition in the public or private sectors must have three objectives :

- improving information on, and control over, dominant positions,
- promoting the creation and maintenance of profitable small- and medium-sized enterprises,
- more generally, combatting all artificial obstacles which distort competition."

(Fourth medium-term economic policy programme (1976 - 1980) in OJ No. L 101 of 25.4.1977. Part III, point B : Progressive control of inflation).

(17) On harmonization, particularly with regard to night work, the Commission said in reply to a parliamentary question :

"Too great a divergence between national legislations could lead to distortions of competition. In examining the question of night work the Commission was concerned to obviate such distortion, which could arise should reforms presently under discussion at national and international level (in the ILO context, in particular) be adopted without regard to their effects on the conditions of competition."

(Written question No. 15/79 in OJ No. C 205 of 14.8.1979 : "Community rules for night work").

- (18) "The fact that the Member States' social security systems are financed in different ways does not in itself cause a distortion of competition.

.....

A problem can arise, if a Member State, for one reason or another, amends its financing system to assist a specific branch of industry, for example to maintain employment.

It is then for the Commission to determine whether there is a distortion of competition and to take any steps required under the Treaty.

(Written question No. 649/79 in OJ No. C 301 of 31.12.1979 : "Distortions of competition").

- (19) "It is quite correct that energy prices vary substantially from one Member State to another. For example, at the end of 1979 the price differential was around 30% for petrol, 50% for domestic fuel, and even higher for gas and electricity. The main causes for these discrepancies are as follows

1. Significant tax differences between the various Member States and between sources of energy;
2. Diversity in the structures of the energy industry and in the sources of primary energy in the different Member States;
3. Price control systems which differ widely between the various countries and between sources of energy;

4. Differences in the policy and financing of European public energy-producing undertakings;
5. Significant variations in productivity, labour costs and energy requirements in the different Community countries.

Such disparities could well affect the conditions of competition. For this reason and also because of its desire to further its common energy policy the Commission attaches considerable importance to attaining greater market transparency and to reducing such disparities within the Community".

(Written question No. 1708/79 in OJ No. C 131 of 2.6.1980 : "Energy prices").

- (20) "Furthermore, the establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article 85(3)."

(Judgment of the Court of Justice of 25 October 1977 in case No. 26/76 - Metro against Commission of the European Communities : Reports of Cases before the Court of Justice 1977-6, page 1914).

- (21) "The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.

In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.

(Judgment of the Court of Justice 1977-6 pages 1902-1903, see point 20).

- (22) "However, although price competition is so important that it can never be eliminated, it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded."

(Judgment of the Court of Justice 1977-6, page 1903, see point 20).

- (23) In Case 730/79 of 17.9.80 the Court of Justice said among other things that :

"The Commission has discretionary powers whose exercise implies economic and social judgments that have to be made in a Community context."

(Case Philip Morris/Commission).

- (24) In its Resolution on the Eighth Commission Report on Competition Policy (OJ No. C 85 of 8.4.1980, the EP :

"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."

- (25) The Commission gave the following answer to a parliamentary question :

"1. By maintaining undistorted competition within the Community and thus forcing firms to adapt to market conditions, competition policy stimulates competitiveness and efficiency in firms. This must have a favourable effect on firms' export capacity."

The Commission has always taken care to ensure that its competition policy, which is not viewed as an end in itself, operates in harmony with the other common policies. However, the one aim of improving Community firms' export capacity on the world market would not be enough to justify practices of behaviour otherwise forbidden by the competition rules laid down in the Treaty."

(Written question No. 710/79 in OJ No. C 316 of 17.12.79 : "Competition Policy").

(26) In its Opinion on the control of concentrations, the Economic and Social Committee had the following to say about coordination, including coordination within the Commission itself :

"VI. NEED FOR COORDINATED ACTION

The Committee accepts that the basic criterion for accessing a concentration is its likely effect on competition. However there are other important factors to be taken into account. These include, for example, the commercial and regional interests of the Community, the industrial interests of the Community, notably the effect on small and medium-sized businesses, and the social interests of the Community, notably the impact on employment and the rights of workers. The necessary consultation on these matters should be carried out.

Consequently, the Committee wishes to stress the need for close liaison and consultation between the several Directorates of the Commission whenever a concentration is examined under the terms of this Regulation."

(Opinion of the Economic and Social Committee on the Draft Council Regulation on the control of concentrations : point VI - "Need for coordinated action", in OJ No. C 88 of 26.7.1974).

IV. MIXED ECONOMY - FULL INFORMATION - AIDS

(27) In its Resolution on the Eighth Commission Report on Competition Policy, the EP :

"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."

(OJ No. C 85 of 8.4.1980).

(28) Commission Directive of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ No. L 195 of 29.7.1980).

(29) The Commission had already clearly enunciated the principles underlying the above Directive, stating among other things that :

"The undeniable liberty of a Member State to choose the system of property ownership it prefers does not diminish its responsibility to ensure that both its administration of the public sector and the market behaviour of its public undertakings are in accordance with Treaty rules. It follows that the economic and financial operating conditions of public undertakings providing goods or services in a competitive situation in the common market, must in principle be determined by the free interplay of the factors of production. The financial equilibrium of these undertakings as well as the remuneration of their operating capital should therefore normally be based upon the revenue resulting from their industrial and commercial activities. To have recourse to other means than these revenues and the credit facilities which go with them is to risk distorting the conditions of competition, and may come under the rules concerning State aids. That is why greater transparency in this field is essential."

(Eighth Commission Report on Competition Policy (1978) Chapter III : "Public firms" - No. 254).

(30) The Commission is exceedingly cautious and even somewhat at a loss in this respect :

"The Commission would point out that only for very good reasons does it depart from its general policy of not publishing general frameworks setting out levels and types of assistance which may be granted. If such frameworks became too common, this could well be interpreted as an encouragement of State aids, contrary to the basic philosophy of the Treaty. However, when it is clear that an industry is or is likely to be in particular difficulty throughout the Community, certain principles can be defined to explain the Community's policy on aid which might be granted to overcome the problems of the industry concerned. Policy frameworks have therefore been produced on State aids for regional development, shipbuilding, steel, textiles and environment. The Commission is considering that advantages and disadvantages inherent in frameworks for State aid to employment and research and development. State aid for small- and medium-sized enterprises is already viewed in a favourable light pursuant to the Commission's general policy. Rescue cases are subject to individual analysis. The Commission's policy and activity in the field of State aids, of which the points raised above are but a small part, are described in detail in the Annual Report on Competition Policy sent to the Parliament."

(Reply of Commissioner VOUEL to written question No. 1695/79 "General aid schemes" in OJ No. C 160 of 30.6.1980).

V. BUSINESS PRACTICES

(31) The Economic and Social Committee had the following to say in its Opinion on the Report on Certain Structural Aspects of Growth :

"2.4.3.3. As regards policies to stimulate innovation by small business, all industrialized countries now accept that the public authorities ought to help with training of research workers, to

encourage and support innovative entrepreneurs, to stimulate research (technological research) by direct finance and public contracts, and to encourage collaboration between big and small businesses so as to make for the dissemination of innovations throughout the public and private sectors. From the institutional point of view, the relevant public regulations must provide the innovating entrepreneur with a reliable frame of reference which minimizes non-market risks."

(OJ No. C 146 of 16.6.1980).

(32) Draft Commission Regulation on the Application of Article 85.3 of the Treaty to Certain Categories of Patent Licensing Agreements (OJ No. C 58 of 3.3.1979).

(33) Judgment of the Court of Justice of 25 October 1977 in Case No. 26/76, Metro versus Commission of the European Communities :

"... In the sector covering the production of high quality and technically advanced consumer durables, where a relatively small number of large- and medium-scale producers offer a varied range of items which, or so consumers may consider, are readily interchangeable, the structure of the market does not preclude the existence of a variety of channels of distribution adapted to the peculiar characteristics of the various producers and to the requirement of the various categories of consumers.

On this view the Commission was justified in recognizing that selective distribution systems constituted, together with others, an aspect of competition which accords with Article 85(1), provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the re-seller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential re-sellers and are not applied in a discriminatory fashion."

(Reports on the Cases before the Court of Justice of the EP - 1976-6 - page 1903).

(34) Draft Resolution of the European Parliament's Economic and Monetary Committee on the "European automobile industry" (December 1980).

"The European Parliament ...

15. Urgently calls for an end to be put to the fragmentation of the Community industries, by the adoption of measures aimed at encouraging fuller cooperation between companies through joint programmes covering research, experimentation and components and motor vehicle production as well as other forms of collaboration and joint ventures within the Community and with undertakings in third countries, such as would help improve European production and deserve to be approved and supported. While concentration may also have their drawbacks, they should positively be encouraged in suitable cases (for example, in certain sectors of the components industry), when the result would be substantial economies of scale and a better organization of the production process."

(35) Reply of the Commission to written question No. 210/78 in OJ No. C 192 of 10.8.1978 on "Trends in concentration operations" :

"1. Against the current background of economic crisis and changes in the international division of labour, higher productivity rates and increased competitiveness in the Community economies can only be ensured if the structure of industries and firms is adjusted as required. In some cases the necessary changes may involve an increase in merger activity. If this brings about an improvement in the efficiency and international competitiveness of the firms concerned, the Commission will take a sympathetic view.

2. Nevertheless, since competition might be adversely affected, the Community must have at its disposal the necessary means of determining whether a merger will prevent effective competition, as stated in the fourth medium-term economic policy programme. In this connection, the Commission would hope that the Council will shortly adopt the proposal for a merger control Regulation which the Commission presented to it in 1973. The fourth programme also stresses the need to set up, at national levels the necessary legal instruments by instituting laws in areas where none exist or by extending the field of application of existing laws. This objective is still valid today."

(36) Opinion of the Economic and Social Committee on the Council Regulation on the Control of Concentrations (28.2.1974) in OJ No. C 88 of 26.7.1974 :

"GENERAL COMMENTS

I. Basic principles

The Committee accepts that it is necessary for the Community to control certain concentrations of enterprises in order to preserve the competitive system with the benefits it brings in efficiency and in freedom of choice. At the time the Committee recognizes that, in some cases concentration may bring substantial benefits through economies of scale and by rationalization which it may be necessary to achieve in order to make European industries competitive with those in other major industrialized countries. The problem of controlling concentration must therefore be approached on a "case-by-case" basis within a framework of general principles and having regard to the economic and social provisions of the Treaty."

(37) In a reply to questions, the Commission summed up the situation in November 1979 as follows :

"It has so far proved impossible to reach agreement with the Council on the proposal for a Regulation on control of concentration submitted by the Commission on account of the reservations on a number of basic features which are fundamental to the very fabric of the Regulation.

The first problem is recourse to preventive control of concentrations, which gives rise to the point whether a Regulation providing for such control can be based on Articles 87 and 235 of the Treaty. Furthermore, it has been impossible to define with accuracy the scope of the Regulation either as regards determining sectors liable for exemption or establishing thresholds in terms of turnover or market share to be used as a basis in applying the Community rules. One further outstanding issue is the definition of the conditions for the smooth application of parallel Community and national control of concentrations.

Similarly, the conditions for securing consistency between industrial, social and regional policies and whatever decisions might be taken at Community level for the control of concentrations still need to be defined. Finally, there remains the unsolved issue of the conferral of decision-making powers under the projected regulations.

As these basic points are still under discussion, the provisions for the control of concentrations called for by the Heads of State or of Government in 1972 cannot at this juncture be adopted in the form of a Council Regulation. However, the Commission proposal remains before the Council, which has not abandoned the quest for possible agreement on the Regulation, thereby meeting the wishes of the Heads of State or Government."

(Written question No. 225/79 in OJ No. C 282 of 12.11.1979 : "Control of Concentrations").

(38) Proposal for Fifth Directive on the Management Structures of Limited Liability Companies (OJ No. C 131 of 13.12.1972).

(39) Amended proposal for a Seventh Directive on Group Accounts (OJ No. C 14 of 17.1.1979).

(40) The Sixth and Seventh Progress Report of the Business Cooperation Centre (COM(80) 448 fin of 12.8.1980 - page 9) also favours this trend :

"3.2. The European Cooperation Grouping

The painful gestation of this Community legal instrument seems sometimes to raise doubts about its usefulness or necessity.

It is true that quite rightly, the legal obstacles to transnational cooperation no longer have the prohibitive importance that was attributed to them during the first decade of the Common Market's existence. It is also true that a Community Statute is not necessarily intrinsically superior or more effective.

However, the EEC can bear witness to the fact that the psychological importance of making use of a Community Statute will often be decisive : since small and medium-sized enterprises are involved, the fact of having to choose a national legal structure automatically places one of the partners on unfamiliar ground, which he distrusts, and the BCC has seen several groupings fail for want of an ECG that could have put all partners on the same footing.

The future member countries have also already expressed their interest in the existence of such a statute."

(41) Judgment of the Court of Justice of 13.2.1979 in Case No. 85/76, HOFFMANN - La Roche versus Commission of the European Communities - Maxim No. 1 :

"Observance of the right to be heard is, in all proceedings in which sanctions, in particular fines or penalty payments, must be imposed, a fundamental principle of Community law, which must be respected even if the proceedings in question are administrative proceedings.

In the matter of competition and in the context of proceedings for a finding of infringements of Articles 85 or 86 of the Treaty, observance of the right to be heard requires that the undertakings concerned must have been afforded the opportunity to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission in support of its claim that there has been an infringement."

(Report on the Cases before the Court of Justice 1979-2 - page 462).

(42) EP Resolution on the Eighth Commission Report on Competition Policy in OJ No. C 85 of 8.4.1980.

"The European Parliament

20. Considers in general that the procedures followed for enforcement of the rules on competition laid down in the Treaties needs clarification and amplification so that it will work fairly for the parties and others concerned; considers, furthermore, that the procedure in question 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."

(43) "Whereas unfair and misleading advertising is likely to restrict the establishment of a system to ensure that competition is not distorted within the common market."

(Second recital of the Proposal for a Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Misleading and Unfair Advertising (OJ No. C 70 of 21.3.1978).

- (44) "This summary of aspects of competition policy within the Community would not be complete without a reference to the important recent developments in national competition legislation in most Member States, and the renewed vigour with which the law has been applied. In each case, the national legislation has been brought more and more into line with the Community rules, and the theoretical danger of conflict between national law and Community law has been reduced accordingly - in fact the energetic and fruitful cooperation between the appropriate national authorities and the Commission has practically eliminated the danger of such conflicts. It would be fair to say that the practical implications of the Community's active competition policy have done much to encourage progress at national level. The means of maintaining effective competition throughout the Community have therefore been appreciably strengthened, thanks to the improved consistency between the various bodies of law and the way in which national and Community policies have converged on similar objectives.

One of the side-effects of these recent changes in national legislation has been to highlight situations existing at national level where it may be necessary to reconcile an acknowledged adherence to the principle of competition with industrial, social or regional policy objectives. The same problems may arise at European level. Each case must be considered on its own merits. This applies, for example, to the difficulties currently facing Europe's man-made fibres industry and iron and steel industry."

(Eighth Commission Report on Competition Policy - Introduction, page 13).

VI. CONSUMER PROTECTION

(45) "1.

The Commission's constant policy has been to condemn restrictive or unfair pricing practised by firms in collusion or by dominant firms, and to impose fines on offenders. However, it must stress that it would be totally unrealistic to assume that prices could be uniform throughout the common market particularly in the case of non-homogeneous products, not only because the objective factors determining pricing policy vary from firm to firm but also because normal competition does not necessarily make for uniform prices.

.....".

(Except from the Commission's reply to written question No. 194/79 in OJ No. C 214 of 27.8.1979 : "Protection of consumers against misleading prices").

(46) "2.

The differences in national legislation, VAT rates, taxation, wage costs and social security contributions, together with the differences in trade forms and patterns, and consumer habits, make it difficult to carry out a meaningful comparison of prices in the various Member States, even for identical products.

.....".

(Excerpt from the Commission's reply to the question referred to in point 45).

(47) In answer to a parliamentary question Commissioner VOUEL began by saying that :

"Protecting the interests of the consumer always has been one of the main objectives of competition policy".

(Written question No. 434/80 in OJ No. C 198 of 4.8.1980).

- (48) "It would be unforgivable not to seize the opportunity to warn you to steer clear of the idea that there can be a uniform price in the Common Market, i.e. a "European" price, even if such an idea is frequently voiced in Parliament.

Differences in production and distribution costs are usually, and naturally, reflected in different selling prices though differing prices are also an important factor per se and indicate the existence of effective competition. The aim of the Commission is not therefore to control prices but to eliminate unfair discrimination by firms, which, because of their position, are able to dominate the market."

(Excerpt from the introductory speech of Commissioner VOUEL on the work of the EP's Economic and Monetary Committee on the Eighth Report on Competition Policy).

VII. CONDITIONS FOR THE DEVELOPMENT OF A COMPETITION POLICY

- (49) "2.2.2. Demand from the industrialized countries

2.2.2.1. As far as economic relations with the other industrialized countries are concerned, the Committee stresses that the Community must be vigilant in making sure that the rules of competition are observed and in fostering the development of balanced commercial relations."

(Opinion of the Economic and Social Committee on the Report on Certain Structural Aspects of Growth in OJ No. C 146 of 16.6.1980).

- (50) "The Commission participates in the OECD's work on monitoring restrictive trading practices. Cooperation here is on a multilateral level, but the Commission also has regular bilateral contacts with the appropriate national authorities in the United States and Canada, and occasionally with the authorities in other non-member countries. In this context it should be borne in mind that the basic rules contained in the free-trade agreements between the Community and the EFTA countries to maintain efficient trading relations between the Community and each of the signatory countries are very similar to the principles on which the rules of competition in the EEC Treaty are based.

The United Nations Conference on Trade and Development (UNCTAD) is currently the scene of preparations for an important step towards a new economic world order. Once the aim of redefining international economic relations has been achieved a set of universally recognised rules governing fair conduct will have to be brought into effect."

(Eighth Commission Report on Competition Policy - Introduction, page 14).

- (51) "16. We have found that there is a certain lack of cohesion in the college of Commissioners, an imbalance between portfolios, insufficient coordination among senior officials, a maldistribution of staff between departments, and shortcomings in the career structure of the civil service of the Commission. The fact is that the Commission is being managed in a manner and with techniques which are inappropriate in present circumstances and can only be more so after further enlargement."

(Proposals for reform of the Commission of the European Communities and its departments - "SPIERENBURG Report" - 24.9.1979 - page 5).

- (52) "The European Parliament

20. Calls on both the Commission and the Council to override administrative compartmentalization or habitual procedures in order to give greater consistency to the various activities which should, directly or indirectly, contribute to the effective implementation of competition policy and to its credibility."

(EP Resolution on the Seventh Commission Report on Competition Policy - OJ No. C 261 of 6.11.1978).

- (53) Some of the statements in the Report on the European Institutions presented by the Committee of Three Wise Men to the European Council (October 1979) are significant.

".....

Since the enlargement of the Commission in 1967, there has been a loss of collegiality in its members' method of working, combined with inadequate internal coordination.

In its organization generally, there is a lack of collegiate management and no collective policy approach ...".

(Page 66 of the Report).

B. R E P O R T

on

Community Competition in the Light of
the Current Economic and Social Situation

Rapporteur : Mr BAGLIANO
Co-Rapporteur : Mr NEUMANN

This Report sets out members' comments on the various chapters of the Opinion.

The comments should therefore be read in the light of the relevant passages of the Opinion - passages which are not reproduced here for reasons of space.

N.B. :(The numbers in brackets refer to the appendix to the Opinion, which comprises quotations which may help to elucidate the problems discussed in this Report).

PRELIMINARY REMARKS

On 4 July 1979, the Section for Industry, Commerce, Crafts and Services was addressed by Mr SCHLIEDER, Director-General at the Commission, on the Eighth Report on Competition Policy.

After a wide-ranging and thorough discussion of the matter, the Section decided to ask the Committee's Bureau for authorization to deliver an own-initiative Opinion on Community Competition Policy in the light of the Current Economic and Social Situation.

At the July Plenary Session the same year the Bureau and the Plenary Committee approved this request. On 3 October 1979 a Study Group chaired by Mr LAVAL, with Mr BAGLIANO and Mr NEUMANN as Rapporteur and Co-Rapporteur, was set up to prepare the Draft Opinion and Draft Report.

SHORT EXPLANATION OF RULES ON COMPETITION

Rules on competition policy are dealt with in Articles 60, 65 and 66 of the ECSC Treaty as well as Articles 85 to 90 (rules applying to firms) and Article 92 et seq. (aids granted by States) of the EEC Treaty.

Under the Treaty of Paris, the Commission is entitled, under certain conditions, to fix production quotas and programmes as well as maximum and minimum prices for coal and iron and steel products. The Treaty of Rome which deals with the European Economic Community, does not have provisions of this sort.

The provisions of the two Treaties also differ significantly on the subject of mergers. The Treaty of Paris provides for prior merger control whereas the Treaty of Rome merely bans abuse of dominant position (Article 86).

In particular, Regulation 17/62 and the Implementing Regulations thereto provide the Commission with the instruments it needs to administer implementation of Articles 85 and 86 of the Treaty of Rome. These consist of negative clearance and decisions on exemption and abuse. Negative clearance means that the Commission finds that an agreement does not warrant action, in accordance with Article 85(1) and Article 86. Decisions in inapplicability lead to temporary derogations being granted in the case of agreements between undertakings, decisions by associations of undertakings and concerted practices complying with Article 85(3). When deciding that abuse exists, the Commission may ask firms to desist from the abusive practices concerned and may even impose fines. Since Regulation 17/62 provides for the notification of agreements or concerted practices coming within the scope of Articles 85 and 86 of the Treaty of Rome and many such notifications were received, it became necessary to introduce regulations exempting specific categories of agreements.

Regulation 67/67 and Regulation 2903/77 on exclusive dealing and specialization agreements respectively, were therefore adopted and a Regulation on exemptions for certain categories of patent licence agreements is pending.

Lastly, the Commission issues "communications" concerning the interpretation of Article 85(1) of the Treaty.

Public aid to firms (Article 92 et seq.) is incompatible with the common market insofar as it affects trade between Member States by distorting or threatening to distort competition.

Acceptable, however, is regional or sectoral aid to remedy regional imbalances or facilitate the development of certain economic activities.

In implementation of the rules of competition, the Commission has adopted more than 150 individual decisions affecting firms whilst the Court of Justice has issued more than 60 judgments (ruling on appeals by firms or following requests by national courts for a preliminary ruling on points relating to the interpretation of Article 85 and 86 of the EEC Treaty). This constitutes a substantial and steadily expanding body of case law.

COMMENTS BY THE SECTION

I. COMPETITION POLICY IN AN "OPEN" MARKET IN THE PROCESS OF INTEGRATION

The present economic and social situation justifies special attention being paid to the implementation of the rules of competition. The latter are, after all, an "instrument" for achieving the objectives of the Treaty of Rome (1). A dogmatic (13) or theoretical approach should be avoided and competition policy should be considered from the point of view of the Community's overall activities (2) (3) which, in turn, need to be seen in the wider world context (4).

We shall start by describing some of the basic features of competition in a market economy and by presenting various information models.

In our competition and information models, the key sectors of the economy are organized according to the principles of the market economy. This means that suppliers compete with one another. A realistic model, however, does not mean "perfect", homogenous competition - a concept still taught in parts of neo-classical theory using an analytical model. Our "realistic model of competition" is roughly as follows :

- there exist not only markets where there are many suppliers (polypolistic and atomistic competition) but also markets where there are few suppliers (oligopolistic competition);
- competition between suppliers is not limited to prices but includes other factors (parameters) such as conditions of sale, advertising, etc.);
- competition affects not only reasonably homogenous, comparable goods but also concerns the possibility of spending incomes in a wide variety of ways, for example on holidays as opposed to buying a new car (substitution competition);
- There are very many different types and sizes of firms pursuing different economic objectives (not only bent solely on profit-making); this obviates any risk of standardization of the economy via wholesale nationalization or wholesale denationalization;

- Market-economy processes do not operate in a vacuum and do not end up by "spontaneously" regulating the market, as traditional liberal economic thinking would have it; they are in fact "steered" (overall control of economic sectors' activities) by a vast array of economic policy instruments (cyclical, reflationary and monetary policies);
- There is no consumer sovereignty as there would be if consumers' decisions led to an "optimum production structure";
- Consumer freedom is protected in principle (free choice of consumers) though this does not rule out the possibility of consumer choice being restricted; alternative ways of utilizing one's income cannot, however, be completely blocked by restrictions;
- The autonomy of the various parties involved is in principle guaranteed, which means that all legal relations are freely negotiated between the contracting parties (principle of freedom of contract);
- The State guarantees free competition and punishes infringements of rules of competition; it does this by fighting against the least desirable and least tolerable forms of distortion (for example discrimination, price-fixing);
- The income effects of a distribution of the economic cake (the household distribution of incomes) are "corrected" by redistribution imposed by the authorities (taxes, social security contributions).

From the point of view of the consumer, the main effects of this rough competition model are as follows :

- Consumers are adequately supplied with goods at acceptable prices from a distribution-policy point of view; this means that "institutionalized" competition should not become too expensive;
- Competition fulfils a power-allocating role which favourably affects the position of consumers;
- Competition gives consumers sufficient choice.

Closely linked to though covering more ground than the competition model is the information model. Such an information model can be a frame of reference for competition policy. One of the most important hypotheses propounded by the competition model in point of fact is that economic agents behave rationally (i.e. all economic agents strive to increase their profits - "personal profits axiom"), which in turn presupposes that consumers are fed with sufficient information.

The information model assumes that consumers can only properly fulfil their role as economic agents in the economic process if they are provided with sufficient information to enable them to make their buying decisions. This implies a detailed understanding of how the economy functions, plus up-to-date information. Information of course should not

come solely from the supply side : there should also be a system of counter-information, or at least neutral information, which would counterbalance, for example, one-sided or misleading advertising. Once in possession of such information, consumers would - with this information model - be in a position to take rational decisions.

Criticism of this abstract information model from the point of view of consumer policy (consumer policy taking its cue from the information model) boils down to the following three problems :

- information on its own cannot give consumers the knowledge they are looking for;
- information is not properly taken in by a high proportion of consumers because consumers do not (or do not wish to) behave rationally;
- information is used as a pretext for not taking the necessary measures to protect consumers.

Although this can be a useful frame of reference, many members consider that a pragmatic and undogmatic approach to the problem of competition is more appropriate.

The Commission in fact - as the Commission representative said when discussing the matter - has always affirmed that rules of competition are applied in a undogmatic spirit both from the purely economic view and from the point of view of political philosophy. Implementation of the legal rules on non cut-throat competition is pragmatic, realistic and designed to be effective. It cannot merely be the reflection of a temporarily dominant theoretical concept. Such a concept would, in any case, not necessarily be shared by public opinion in all the Member States.

Some members point out that rules of competition have an important role to play in achieving the common market though they are not one of the "instruments" for doing so.

As long as there are still a great many disparities between the economies of the Member States, integration through application of rules of competition would harm Community industry and the general interests of the Community.

The same members consider that the sporadic implementation of Articles 85 and 86 is not likely to reduce existing economic disparities between Member States.

Some members note that, applying exclusively legal criteria, the Commission in some cases sees competition policy as an end in itself and has even taken this view quite recently.

Other members, in the belief that competition policy is not an end in itself but must address itself to the economic and industrial reality of the Community, maintain that competition policy must take into account the need for EEC industry to be able to compete effectively both within and outside the Community against foreign competitors, some of whom come from countries where "competition" has little or no meaning or where the competitive conditions are very different. In practical terms, this means that these factors must be taken into account in evaluating for example proposals for joint ventures, specialisation and cooperation agreements and the like. Conversely, the rules of competition must be applied to every enterprise operating within the EEC, either directly or through a controlled subsidiary or other agents, regardless of whether the firm is "Community" or "foreign" owned or established.

Lastly, some members point out that competition policy is essential to the proper functioning of the economic system and in this respect is unique and different from all other Community policies.

II. INTERDEPENDENCE AND ITS EFFECTS - COMMUNITY COMPETITIVENESS RELEVANT MARKET

The Community is "open" to international competition and must therefore be able to compete with other areas of the world (5) (6) (8) (9) (10).

In defining a "substantial part of the market" account must be taken of this overall approach (11) (12).

"Cooperation", however, is necessary not only between firms but also between Member States and third countries - particularly developing ones and particularly in the context of a new international division of labour (7).

Some members point out that in encouraging an "open" market the free movement of goods between the EEC and other countries can sometimes act against the interests of Community industry - the latter being an industry where some products are still constrained by local market requirements and problems of supply.

These same members believe that in pursuing the objective of progressively abolishing restrictions on international trade, we must not ignore the fact that the competitive conditions in many export markets around the world are often very different from the EEC. It may, therefore, be damaging to EEC export trade to require free circulation of goods whilst these differences persist.

Special attention should therefore be paid to the texts of the free-trade agreements which have been concluded. These agreements include provisions similar to Article 85(1) but do not include any power to grant temporary exemptions even where justified on grounds of policy. Thus, for example, whereas in relation to intra-community trade, the Commission -

has taken the view that certain selective distribution agreements are contrary to Article 85(1) but can be permitted under Article 85(3), such an exemption does not appear possible in the context of the free trade agreements unless negotiated and agreed by the Joint Committee set up under each of the agreements. This could produce difficulties therefore for those whose products are most efficiently distributed through a distribution network. This anomaly and its potentially adverse consequences for Community industry should be borne in mind whenever efforts are made to encourage the "open market system", and when the agreements are renegotiated, if at all.

III. IMPORTANCE OF THE ECONOMIC AND SOCIAL CONTEXT - CO-ORDINATION OF COMMUNITY POLICIES

With a realistic approach, economic and social aspects (13) (14) (15) and the main features of the present economic situation (inflation, unemployment and energy) (16) (17) (18) (19) are put into their proper perspective.

Even the Court of Justice has shown its sensitivity (20) (21) (22) (23), the main consequences being a call for more coordination between Community policies (24) (25) and a greater interest in regional imbalances and structural problems (26).

It should be borne in mind, however, that the prerequisite for a Community competition policy is that the basic features of the economic and social systems of the Member States are the same, or at any rate, pretty similar. This

does not mean of course that economic and social systems have to be absolutely identical in all details but it does mean that structural differences should not be mutually antagonistic. Two examples illustrate this :

- A clampdown on the right to strike in one of the Member States could, under certain circumstances, lead to serious distortions of competition;
- Similarly, if social security systems are not basically similar in structure, distortions of competition could arise.

Theories regarding the impact of free competition cannot be divorced from the approach adopted to competition policy, and economic policy in general. Within the EEC, competition policy is indisputably a vital component of overall economic policy as well as being interwoven with policies in the social, industrial, regional and other sectors related to economic policy and with structural policy as a whole.

Generally speaking, a European economic policy must be founded on the principle that competition policy is on a level with structural policy. In each case at issue we must therefore ask ourselves which of the two policies is to take precedence. However, competing economic policies, and structural policy in particular, should be so framed as to be compatible, in the medium term, with the aims of a general competition policy.

Given the existence of a Regional Fund and a Social Fund, we can but adhere to the widespread conclusion that competition policy takes second place to regional structural policy and social policy in many practical spheres. In cases where social policy and regional structural policy takes precedence, however, competition policy is not entirely submerged. As is well known, the Community is not usually faced with alternative, radical solutions but is able to propose step-by-step solutions. The most intractable problems are the conflicts between the goals of competition policy on the one hand and those of sectoral structural policies on the other. If an economic sector enters a crisis then the spectre of a structural crisis is conjured up more often than not. This is then used to justify structural action. But if the crisis is not structural but part of a long-drawn-out cyclical problem, then precipitate structural action would lead in the medium term to misguided allocation of resources. Nor should it be forgotten that "normal" structural changes in a market economy must be carried through with the help of competition policy. After all, the salient features of market economies is that structures can be changed and adopted through competition. Naturally there are frequent occurrences of genuine structural crises in individual sectors when priority is given to sectoral structural policies. Even in such cases, however, sectoral structural policy should be applied in such a way as not to undermine the goals of a general competition policy in the medium term.

Competition policy and structural policy both co-exist, and find themselves in opposition to one another, in the Treaty establishing the European Economic Community. Competition policy basically derives from Articles 85 and 86 of the EEC Treaty, whilst structural policy is based principally on Article 92 et seq. However, Article 92(1) clearly gives pre-eminence to competition policy.

Other members are afraid that the persistent and grave problems facing the Community in the economic and social spheres may result in the Treaty's rules of competition remaining a dead letter. In their view it would be a serious error both in terms of legality and expediency to subordinate competition policy to other Community policies such as the social, regional or industrial policy, etc. Rules of competition should, on the contrary, act as a frame of reference for all other policies.

Other members draw attention to the fact that the geographical area of the EEC comprises disparate markets with strong divergencies in consumer preferences; taxation, and social security systems; political, economic and social structures and national price and other market controls. As everyone knows, energy policies differ considerably but to suggest that competition policy can "concern itself" with such differences is totally inconsistent with the concept of competition and strikes of a dirigiste or interventionist

system; on the other hand these disparities are all factors which must be taken into account by the Commission in applying the rules of competition. It is clear that, as against this background, a theoretical approach to integration, application of the rules on free movement and on competition and the corollary that anything resembling a territorial restriction is anathema to the Treaty, could be very damaging to Community industry, and interests generally.

As regards the comment in the Opinion on the need to steer surplus labour to growth industries a number of members consider it essential that they should be coupled with retraining measures.

IV. MIXED ECONOMY - FULL INFORMATION - AIDS

In a mixed economy there needs to be "full information" about financial relations between public-sector firms and governments (27) so that competition is not distorted (28) (29).

There is also a need for case-by-case monitoring of the "aids" that can be granted under the Treaty on specific conditions.

The Commission has repeatedly taken a stand on state aid, the most recent being its decision of 1 February 1980 on the introduction of Community rules on specific aids for the iron and steel industry.

Aid policy should be planned in a more "transparent" way.

In most Member States there is no openly available information on state aid. Aid can be open or hidden and can be centralized or decentralized right down to local authority level.

Reports should periodically be drawn up on all these aids.

In the context of state aids, public enterprises and quasi-public enterprises have a special role to play and receive special mention in Article 90 of the EEC Treaty. Historically, public enterprises, quasi-public enterprises and public utilities were frequently given the task of competing in certain markets. These enterprises then became instruments of state competition policy.

Irrespective of whether public enterprises, quasi-public enterprises and public utilities may still be regarded as instruments of state competition today, the financial relations between public enterprises and public budgets should be spelt out clearly.

The fact that there can also be competition-distorting "aids" for private enterprises and private economic organizations is also something that should not be overlooked when discussing state-aid policy. Thus, for example, well-heeled consortia in a number of sectors are able to subsidize their own loss-making branches. Small and medium-sized enterprises, however, which do not have the same opportunities for crosssubsidization, are at a serious disadvantage from the point of view of competition. Time and time again big firms have penetrated hitherto medium-sized markets by buying up small and medium-sized firms, thereby permanently affecting market structures. Competition policy has paid too little attention to these phenomena for a long time now. There can of course be no question of preserving

specific markets for small and medium-sized enterprises but state competition policy and state structural policy have a legitimate right to take action when efficient small and medium-sized enterprises are forced out of the market by newcomers with greater financial power.

Other members, however, consider that full knowledge of the financial relations between private firms on the one hand and banks or financial consortia with predominantly public capital on the other is not necessary.

Other members by contrast are convinced of the need for full information, for example in cases where it is important to know the extent to which aid granted to a firm or group of firms will lead to the firm in question setting abnormally low prices, thus altering competition and rendering it artificial.

Take for example the case of a steel group which receives subsidies from the Community to enable it to be profitable in the prevailing climate. Now if a shipbuilding firm belonging to this group snaps up orders on the market by setting particularly low prices (deliberately lower than Japanese prices), full information is needed to gauge the extent to which aid to the firm or group makes for distorted terms of competition in the shipbuilding industry.

Other members consider that the present economic recession, and internal political pressures in each Member State, lead governments to abandon their "Communitative" approach and to assist, or protect, their own industries by granting aids, and/or by taking other protectionist measures. Such steps are to an extent understandable, but help in the form of aids, be they direct grants or subsidiaries, remission of taxes or social security payments or other types, may have the effect of simply exporting the economic problems of one area to another and distorting the competitive situation. Similarly, protectionist measures, such as controls on advertising, tax discrimination, imposition of standards and quality controls, may hamper effective competition within the EEC, and the Commission must be encouraged to continue its efforts to eliminate those which cannot be justified on a short-term basis or at all.

V. BUSINESS PRACTICES

The whole of this chapter is devoted to the main problems concerning business practices.

Special attention must clearly be paid to the small/medium business sector (32) though there must be no discrimination against large firms.

Obstacles to cooperation between firms and to research and innovation still remain, however, and have to be removed.

The regulation on exemptions for certain categories of patent licence agreements can be improved (32).

Distribution is a sector that has come under more scrutiny than any other but it still calls for legal certainty (32) - and not only in respect of selective distribution.

In discussing "agreement" (34) competition policy must take into account the international context. The international context and also the various national circumstances must also be given their due weight in the Draft Regulation on business mergers (35) (36) (37).

Swifter alignment of company laws (38) (39) (40) can be a fillip to competition policy. Procedures used in applying competition rules to firms should be speeded up and interested parties (41) (42) should be given full information and better protection.

Advertising also has an important role to play (43). Finally, the primacy of Community laws over national laws should be reflected in more and more concrete ways within the framework of increased cooperation between national administrations (44).

Some members point out that the Commission has in certain cases shown an unjustified and perhaps dangerous predilection for small firms, for example in the Draft Regulation on block exemptions for patent licences.

The same members maintain that patents are not an anomaly from the point of view of competition but are an incentive to innovation and competitiveness.

An active licence market is a very positive sign provided technological property rights are not diminished.

Other members note the Commission's tendency to exercise arbitrary discrimination in favour of the small/medium business sector and refer again to the Draft Regulation on block exemptions for patent licences whereby small and mediumsized firms can have exclusive control over initial sales.

There is similar and likewise unjustified discrimination against bigger firms in respect of distribution agreements.

The implication that mere size is automatically indicative of anti-competitive behaviour or is otherwise bad, without any analysis of the structure of the relevant market, cannot be accepted.

Dealing with the notion of "dominant position", the Commission makes it clear that it is not important whether a firm is big or not.

What is more important than size, is whether a medium-sized or big firm has a dominant position, i.e. influences the market by its position in that market.

Other members stress the role of small firms.

The large number of small and medium firms, their geographical dispersion and the individualistic and enterprising spirit of their managers, stimulates competition and gives consumers possibilities of choice and easy supplies.

If their size makes it easier for SMEs to adapt rapidly and relatively cheaply to changing market needs, it also makes them more vulnerable to competition from firms in dominant positions insofar as the latter make use of their economic power in the market, or their wide range of products on offer, to wipe out SMEs by abnormal means. It is therefore necessary, in the interests of maintaining a healthy and workable competition system, to protect SMEs against unfair practices through adequate legislative and administrative measures as well as through legal means; at the same time the notion of "relevant market" should be made to work more to the advantage of SMEs when evaluating the competitive position of bigger firms, especially those operating in the field of distribution.

Many members stress the importance of the "preventive" nature of merger control and hope that the Council will approve the Regulation heavily supported by the Committee in an Opinion in 1974.

The Commission realizes that the need for Community merger control is generally recognized by all Member States.

There is broad agreement that :

- the scope of the Regulation should be determined on the basis of both market share and overall turnover. Should either of these criteria not be fulfilled, the Regulation would not be applicable;
- state undertakings should be covered, along with banks and insurance companies, unless these sectors are dealt with separately in special regulations;
- exemption might be granted for a merger precluded by the competition rules if so warranted on grounds of economic, social, regional or other policies acknowledged to have priority. Whether or not account should be taken solely of Community policies has not yet been settled;
- the emphasis should be on prevention.

The main outstanding issue is how the Member States are to be involved in the decision-making process, viz. whether the Commission alone should take decisions and whether consultation of the Member States is to be compulsory.

As far as the harmonization of company law is concerned, a large number of members underline the need to concentrate efforts on a specific number of urgent questions rather than to speed up the "mass" adoption of directives, some of which are of marginal importance and others so controversial that consensus appears impossible.

Efforts should be concentrated on V (structure of company bodies) and VII (consolidated accounts). Some members feel that efforts should also be concentrated on the "VREDELING Directive".

On the question of procedural rules for applying rules of competition to firms, some members point out that it is important - as with any system of law - that both parties to a case do not feel that decisions are being made on arbitrary or subjective grounds.

In some circles such confidence is waning rapidly. It is even felt that the Commission has on occasions based its decisions on inaccurate facts, and its arguments have been weak or insufficiently thought through, while an effective control over the Commission has been absent.

This is because, in the view of some members, appeals to the Court of Justice can be a waste of time and energy and have the added disadvantage that the Court has shown reluctance to examine and analyse in detail the often frequently complex facts of a case and to exercise full control over the Commission's procedure. According to these same members, such problems could be overcome if firms felt

they had adequate opportunities to respond to evidence cited by the Commission and therefore had the opportunity of agreeing the facts of a case. In their view, the procedures adopted by the Commission have also cast doubts on the care and fairness involved in the conduct of the Commission's oral hearing, and on the ethics of using the confidential advice of a company's legal advisers in examining a company's conduct - something which invades the whole concept of "legal professional privilege".

As regards the supremacy of Community law in general, the Commission encourages the development of national legislation on competition as this is an essential adjunct of an active Community competition policy.

It will also make it possible in some measure to decentralize implementation of Community law. Repeatedly, in its rulings, the Court has dwelt on the direct impact of the bans provided for in Articles 85 and 86 of the EEC Treaty.

A distinction must be drawn between contractual situations, which are governed by Article 85, and structural situations, possibly falling within the scope of Article 86 or the future merger control regulation.

By common agreement, national authorization cannot overrule a Community ban under Article 85. The matter is less clearcut in cases involving Article 85(3) (authorization of exemptions), where national law may be more restrictive.

Where potential conflicts between Community and national law are dealt with, notably by regulation but also by individual decision, it would seem to be accepted in theory that national law could to some extent act as a corrective.

The fundamental consideration must be that a decision by the Commission under Article 85(3) to recognize that an agreement complies with a vital priority economic aim cannot be set aside by a decision based on national law.

Caution is even more necessary in the complex matter of mergers (structural operations). The co-existence of a future merger control regulation, under which exemptions could be granted on political, industrial or social grounds for mergers, in for instance the chemicals industry of a Member State, with a Government ban on mergers in that industry, cannot automatically be ruled out.

On the other hand, where a Community decision to ban a merger is based on the regulations, authorization should not be possible under national law.

Some members, however, point out that where a decision under Article 85(3) has not been taken, the national authorities have the power and indeed the duty to apply Article 85(1) and 86 where appropriate, and also to apply their own national laws except to the extent that these prejudice the application of Community law. National laws

co-exist with the Community rules because they take into account different considerations. The co-existence of national and EEC law was recently explained by the Court.

VI. CONSUMER PROTECTION

It is widely recognized that consumer protection has an important role to play in competition policy (45) (46) (47) (48).

The concept of consumer protection is somewhat ambivalent as interpretations and the arguments invoked vary widely.

For instance, one approach is that consumers must receive extensive protection if they are to play their part properly in a market economy governed by the rules of competition.

In short, consumer protection is seen as a prerequisite for effective competition.

However, consumer protection policy is not in general founded on this interpretation. The underlying principle is far more that the competing forces of supply and demand leave the consumer inadequately protected and that special safeguards are therefore required.

Governments unable to conduct effective economic and competition policies find consumer protection a convenient stop-gap solution.

Consumer protection can be broken down into the following sub-divisions :

- legal protection and protection of property;
- protection of information;
- protection of public health;
- environment conservation.

Seen in this perspective, protection of information basically operates on two levels :

- firstly, setting limits for advertising and other sales drives;
- secondly, determining what minimum details are to be provided to the consumer.

Suppliers are prone to criticize any improvement in consumer protection as an intolerable financial or administrative constraint.

The matter, however, can also be approached from the consumer's angle.

In any event, one consideration must be borne in mind: most improvements to consumer protection are expensive.

Though the supplier is admittedly usually the one to pay, the higher costs involved are incorporated into retail prices, at any rate in the medium term, with the result that when all is said and done, consumers land up financing their own protection.

The vast majority of members have no particular objections to this or to the Opinion's conclusions.

VII. CONDITIONS FOR THE DEVELOPMENT OF A COMPETITION POLICY

In the light of what has already been said, there are a number of conditions for the development of a competition policy. These are as follows :

- need for an "open" competition policy that takes into account (a) changing social and economic circumstances in the Community and (b) trade developments with the rest of the world;
- monitoring of dumping and all abnormal forms of competition (49);
- cooperation between Member States (50) (52);
- coordination of Community policies (52) by, among other means, the improved efficiency of the Commission's departments working together in closer harmony (51) (53).

Some members suggest that in order to further the "political" interpretation of rules of competition (a tendency already underway with the Commission and Court of Justice) it would help "de jure condendo" if competition policy were vigorously administered by a body with active discretionary powers (incentives) and not by a jurisdictional body whose sole authority was to impose fines.

Other members stress the importance they attach to the "harmonized" co-existence of Community policy and national competition policies.

Other members consider that since the Community is based on free trade and a mixed economy, vigorous competition is seen as the best way of encouraging efficiency in production and distribution at an optimum price; encouraging new technologies; investment; encouraging new entrants to the market; containing prices; fighting inflation; indeed, consumers regard competition as their best friend.

Competition policy and laws are intended to ensure the free play of market forces and to ensure that competition is fair by prohibiting abuses of dominant positions. But in the EEC, competition policy has an additional and special aspect : that is, it has an important role to play in the development of a common market from among its constituent members.

With regard to the aims of a general competition policy, the same members point out that over many years there have been attempts to reach agreement on an international basis on restrictive business practices but these have always failed; the main reason for failure is that competition laws reflect the political, economic and social policies of each country and it follows that what might be acceptable in the interests of one country may not be acceptable to another and in practice it has proved very difficult to settle disputes of this kind, and thus it is imperative that each country respects the sovereignty of another.

Lastly, some members reiterate the principles they propounded earlier, namely that it is absolutely essential to consider the rules of competition laid down in the Treaty as a frame of reference for other Community policies. Only by doing so can solid foundations be laid for the economic and social development of the Community.

European Communities - Economic and Social Committee

"Community Competition Policy in the Light of the Current
Economic and Social Situation"

Own-Initiative Opinion of the Economic and Social Committee
Brussels : General Secretariat of the Economic and Social
Committee

1981 - 86 pages

DK, D, E, F, I, N.

This Opinion was prompted by the profound conviction that in a period of such serious, persistent social and economic difficulties, all Community policies ought to be implemented as effectively as possible, with the maximum possible coordination and with all reasonable speed.

The current economic and social situation warrants special attention for the implementation of the rules on competition. The latter are, after all, an 'instrument' for achieving the objectives of the Treaty of Rome. The Committee feels that any dogmatic or theoretical approach should be avoided from now on and that competition policy should be viewed in conjunction with the Community's overall activities which, in turn, must be seen in the broader world context.



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