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REPORT

of the Committee on Economic and Monetary Affairs and
Industrial Policy

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

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* = Consultation procedure requiring a single reading

**II = Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment

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The European Parliament received from the Commission of the European Communities the Nineteenth Report on Competition policy.

On 17 July 1990, the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Desmond rapporteur.

The Committee on Legal Affairs and Citizens' Rights and the Committee on Agriculture, Fisheries and Rural Development decided to deliver opinions on this subject.

At its meetings of 16 and 17 July 1990, 19, 20, 21 September 1990, 5, 6, 7 November 1990 and 18, 19, 20 December 1990 the committee considered the report.

At the last meeting, on 19 December 1990, it adopted the report unanimously.

The following took part in the vote : Beumer, chairman; Desmond, first vice-chairman; Barton, Beazley, Bofill, Cassidy, Caudron, Colom i Naval; Cravinho, de Donnea, De Piccoli; Donnelly, Ferreira Ribeiro, Mr Friedrich, Herman, Hoff, Mr Lulling, Mattina, Merz, Metten, Patterson, Pinxten, Porto (for Visentini); Read; Roumeliotis, Simpson, Siso Cruellas, Titley (for Wettig), Tongue, van der Waal (for Lataillade).

The opinion of the Committee on Legal Affairs and Citizens' Rights is attached. The opinion of the Committee on Agriculture, Fisheries and Rural Development will be published separately.

The report was tabled on 20 December 1990.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.

A

DRAFT RESOLUTION

embodying the opinion of the European Parliament
on the Nineteenth report of the Commission of the European
Communities on Competition Policy

The European Parliament

- having regard to the Nineteenth report of the Commission of the European Communities on Competition Policy,
 - having regard to its earlier resolutions on competition policy,
 - having regard to the report of the Committee on Economic and Monetary Affairs and Industrial Policy and the opinion of the Committee on Legal Affairs and Citizens Rights and the Committee on Agriculture, Fisheries and Rural Development (A3-0374/90),
1. Emphasizes that the process of completing the single market, and the approach of the 1992 deadline for this task, gives an ever greater significance to Community competition policy; affirms that this requires:
 - regular and clear reporting on competition policy developments to ensure democratic accountability to the European Parliament and a clear understanding of these issues by the general public
 - vigorous, rapid and efficient administration of competition policy
 - a proper balance between competition policy and the other policy objectives of the European Community;

Timing and structure of the Commission's competition policy reports

2. Considers that the Commission's annual competition policy reports have a vital role to play in ensuring democratic accountability of the Commission to the European Parliament in a policy area where the Commission has very considerable power, and the final say on many sensitive issues; believes that the annual reports help to publicise competition policy developments at European Community level, and to increase awareness of their implications;
3. Regrets, therefore, that yet again the Commission does not appear to give a sufficiently high priority to its annual report, with the result that its presentation to Parliament is delayed year after year in spite of repeated protests by Parliament; considers it wholly unacceptable that its request (in paragraph 40 of its resolution on the Eighteenth Report) for the Nineteenth Report to be submitted by 30 April 1990 was disregarded; insists that the report be given a higher priority in the future, and that sufficient staff and other resources are provided by the Commission to DG IV to ensure that it can be presented in subsequent years by 30 April at the latest;

4. Further notes that the structure of the report has remained largely unchanged for the last 15 years while the complexity of the issues involved, the number of areas covered by competition policy, and experience in the application of the Treaty regulations have also expanded greatly;
5. Suggests, in order to ensure the full appreciation of major developments in competition policy as well as giving the vital technical details on particular sectors, firms, countries and business practices that the annual competition policy report should be re-organised as follows :
 - the general introduction to include a 1,500 word summary of the whole report (which could also be published separately on a stand-alone basis)
 - a detailed index to be provided to the report (as suggested in point 42 of its resolution on the Eighteenth Report) so as to enable, for example, easier location of the six separate sections in the Nineteenth Report where air transport is discussed;
6. Further believes, in view of the great expansion in the work of the Commission on state aids, and its forthcoming new activities in the field of merger controls, that the Commission should consider publication of its annual report in three separate parts; (i) general competition policy, (ii) state aids and (iii) mergers, with a summary and complete index for each part;
7. Emphasises finally the need for wider awareness of the obligations of Community competition law among the public in general, and among undertakings, and national, regional and local governments in particular; welcomes, in this context, the recent publication by the Commission of the consolidated Community rules applicable to undertakings, and trusts that this will be regularly updated; underlines, moreover, the importance of providing clear and concise summaries of these rules for the attention of small and medium-sized enterprises in particular;

Administration of competition policy

8. Notes that Community competition policy has had to confront two major new challenges in 1990 :
 - the unification of Germany
 - the implementation of the recently adopted regulation on merger controls;
9. Further notes that, in addition to these new tasks, the Commission will have to pursue a number of other key policy objectives, and in particular:
 - effective follow-up to its second survey of state aids, and the major problems that it has revealed
 - consistent and effective application of Community competition policy in sectors such as automobiles, financial services, air transport and telecommunications

- extension of Community competition policy in fields where the Commission has been inadequately involved, or not at all, such as the liberal professions.
10. Emphasises that these new or reinforced tasks involve a great increase in an already heavy workload for the competition policy services of the Commission (DG IV); notes with concern, in this context, that there were already 3,239 cases pending at the end of 1989, and that only a small proportion of these cases were submitted during 1989, with many cases pending for several years;
 11. Considers, therefore, that there must be an urgent and immediate increase in the staff available for implementing Community competition law;
 12. Further considers that any reinforcement of DG IV staff should take into sufficient account the need for a wide mix of skills, in view especially of the increased complexity of the economic analysis that is required; suggests, in this context, that the European Community should look at the countries with the longest history of antitrust legislation such as Canada and the United States for their experience in handling staff requirements when faced with expansions in case load, case law and additional fields of activity, noting their widespread use of applied economists, those with joint economics and law degrees and those with business experience, especially in marketing;
 13. Considers that the Commission's programme of research as outlined in part IV of the report should be conceived as a valuable instrument in the implementation of Community competition policy, and that it needs, therefore, to be better integrated into the day-to-day work programme of DG IV; requests information on the criteria used by the Commission in defining its research priorities;

welcomes the valuable data that is provided in Chapter 1 of part IV of the report on mergers, acquisitions and recent structural changes in EC industry, but regrets the lack of detail in chapter 2 on the programme of studies and their results; asks the Commission to state briefly the countries and sectors covered by each research project, as was the custom in earlier reports, as well as giving full details in the Annex;
 14. Considers that the right balance must be struck in the administration of Community competition policy between the need for speed, efficiency and fairness, and recalls its previously expressed concern (as in paragraph 44 of its resolution on the Eighteenth Report) that there should be an effective separation of the Commission's functions as investigator, prosecutor and judge in its administrative procedures; calls for an updated assessment of the role of the Hearing Officer in this context; welcomes the fact that legal safeguards on competition policy matters have been strengthened as a result of the creation of the Court of First Instance;
 15. Calls for a report on the advisability of establishing a separate European Cartel Office responsible to the European Parliament; considers that this could have some advantages in terms of guaranteeing greater administrative independence, but points out that it could also lead to greater bureaucracy and duplication of functions between the proposed

cartel office and the Commission; believes that the effective staffing of DG IV is the priority at the present time;

16. Welcomes the recent decisions by the Court of Justice in the Hoechst, Dow Chemical and Dow Benelux cases which strengthen the Commission's investigation powers, including surprise investigations, in order to provide better factual evidence about particular enterprises; further requests the Commission, however, to give better particulars in its decisions ordering investigations of undertakings and thereby to respond to the critical remarks made by the Court of Justice in its judgment in joined cases 46/87 and 227/88 HOECHST v. COMMISSION;
17. Considers, in the interest of furthering democratic accountability, that the European Parliament should be informed of proposed Commission competition policy initiatives earlier than at present; calls, in particular;
 - for all draft block exemptions or other implementing Commission decisions to be sent to the Parliament at the same time as they are sent to the Advisory Committee on Restrictive Practices and Dominant Positions, the Advisory Committee on Mergers and to other interested parties;

German unification

18. Considers that German unification, and the process of incorporating the former GDR within the European Community and within a social market rather than a centrally planned economy, has major consequences for Community competition policy :
 - in terms of evaluating the state aids that are provided to reshape the former GDR's infrastructure and economy
 - in terms of evaluating the impact on competition of the privatisation process being carried out by the State Holding Company (the Treuhandanstalt);
19. Recognizes the need for state aids from the German Government to help in the former GDR, but insists that they be fully transparent, and that they do not create new distortions of competition at the expense, in particular, of other disadvantaged and peripheral regions of the Community;
20. Notes that the unprecedentedly rapid and far-reaching process of selling off the assets of the former "Kombinate" by the Treuhandanstalt should greatly increase economic efficiency but also poses considerable risks as far as fair and equal competition are concerned;
21. Warns against the possible creation of new monopolies and dominant positions as a result of take-overs of former GDR enterprises by German firms. Insists that there be fully transparent public sales procedures by the Treuhandanstalt, and that there should be no discrimination of any kind between German and other Community firms in this process;

The merger control regulation

22. Welcomes the fact that the Council finally took the decision to adopt a merger control regulation in December 1989 after so many years of stalemate;
23. Congratulates the Commission, and in particular its mergers task force, on its rapid adoption of the implementing regulation and its creation of the necessary infrastructure so that the merger control regulation was able to come into force on 21 September 1990;
24. Regrets, however, that the first draft of the implementing regulation was prepared in April 1990 and circulated to interested parties, but that Parliament was only informed in June, giving it inadequate time to comment before the regulation's adoption in July;
25. Considers the aggregate world turnover threshold of ECU 5 billion to be unrealistically high; this high threshold, allied to the express provision that Articles 85 and 86, shall not apply to concentrations irrespective of the turnover of the undertakings involved, prevents the Commission from scrutinizing, on the basis of Regulation No 17, many concentrations which restrict competition within the EEC and have an effect on inter-State trade, the Commission thus being obliged to operate on the inadequate basis of Article 89; therefore supports any proposal to reduce the thresholds provided for in Article 1 of the merger Regulation;
26. Considers that the unsatisfactory relationship between the competences of the Commission and the Member States on merger controls must also be improved;

considers, in this context, that there are too many exceptions to the basic rules in Council Regulation 4064/89 and that too much legal uncertainty is created as a result; believes that unnecessary overlap and uncertainty are created, for example, by those provisions of the regulation which allow national scrutiny of certain mergers on the basis of criteria such as considerations of public security, plurality of the media, prudential control of financial institutions and even vaguer "other public interest" considerations pursuant to Article 21 of the Regulation;

calls on the Commission, moreover, to have recourse only in the most exceptional circumstances to Article 9 of the merger regulation, whereby it may refer a notified concentration to the competent authorities of a Member State in the event of a threat to competition in a distinct market in that Member State and to consider the repeal of this provision when it comes up for review before 21 December 1993;

recognizes that the regulation has now just come into operation, but believes that the problems outlined above should be immediately examined, with a view to eliminating them as soon as possible, taking account of the need first to gain adequate experience of the regulation and to ensure DG IV has sufficient resources to cope with any extension of competence;

27. Calls upon the Commission further to reduce the amount of information required in Form CO from the companies concerned, when notifying the

Commission of a proposed concentration, thereby saving them unnecessary time and financial costs;

28. Calls on the Commission to report back on other aspects of the functioning of the merger control regulation as soon as sufficient practical experience has been gained;
29. Welcomes the Commission's Notice regarding the concentrative and cooperative operation under the merger regulation (1990 OJ C 203/10) as being a very necessary clarification of its thinking as to when minority share acquisitions, partial mergers or concentrative joint-ventures may fall within the scope of the regulation;
30. Requests the Commission to submit its promised complementary guidelines on joint ventures;

Need for a proper balance between competition policy and the other policy objectives of the European Community.

31. Affirms that competition is a complex interaction of economic forces and not a simple solution to all economic problems, and that therefore the major objective of competition policy must be to create and maintain workable and effective competition in all sectors, rather than to strive for the unrealistic theoretical model of perfect competition;
32. Welcomes, for example, the Commission's widespread use of block exemptions (as in its latest proposals on insurance), in order to give firms the appropriate balance between legal security and freedom to compete; calls, however, for continued careful monitoring of how the adopted block exemptions are working in practice to see if they are really achieving their objectives;
33. Insists, moreover, that competition policy should not be carried out in isolation from other vital policy objectives of the Community, such as increasing Community industrial competitiveness, and strengthening economic and social cohesion and the achievement of sustainable development; considers that these objectives must be closely coordinated, and believes that one of the key ways of judging the effectiveness of Community competition policy is by reference to whether those wider objectives are being met;
34. Considers that this would be facilitated by systematic review of the impact of Commission decisions in the field of competition; calls, therefore, upon the Commission to include in each such decision 'an economic, social and environmental audit', looking at the impact on economic competitiveness, on levels of employment, on social security costs and on regional development;
35. Considers, finally, that in some cases Community competition policy has had too great a burden placed upon it, as in certain industrial sectors where the Community's competition rules have had to be interpreted by DG IV in the absence of a Community industrial strategy for the sector concerned, which would include aid criteria within a wider policy context;

36. Considers, therefore, that for this reason, and in the interests of maximum transparency in the Community's competition policy, the Commission should give further consideration to defining more clearly how industrial, regional and other policy considerations should be taken into account in decisions on competition policy, including state aids, and should report thereon;
37. Believes that the above principles are of particular importance in assessing the Commission's policy on state aids;

State aids

38. Welcomes the publication of the Commission's second survey on state aids as an invaluable instrument for analyzing the different types and volume of state aid within the Community and the distortions that they can cause; regrets that certain countries (notably Belgium and Greece) have not fully cooperated with the Commission in preparing the survey; requests clarification from the Commission as to how and when its proposed standardised system of annual reporting on state aids will be fully introduced, and what sanctions there will be for non-compliance;
39. Reaffirms that state aids should not be judged as a good or bad phenomenon in their own right, nor in terms of their absolute levels, but according to the criteria for which they are used;
40. Believes, however, that differentials in levels of state aid for the same objective from one Community country to another may cause severe distortions of competition, and could be one of the key factors in impeding the creation of a true internal market by 1992;
41. Calls, therefore, for :
 - the fullest possible transparency of aids granted by national and regional authorities
 - a clearer and more effective Community framework for national and regional aids, which would require any such aids to be justified in terms of consistent and strictly defined social, environmental, regional or industrial policy considerations
 - a sustained effort at Community level to reduce aid differentials from one country to another where this is needed in order to ensure fairer conditions of competition;
42. Believes, however, that certain aid differentials should be permitted in favour of disadvantaged areas within the Community, in order to take due account of differences in levels of employment and economic development between different regions and countries;
43. Calls upon the Commission to vigorously apply Articles 92 and 93 to both public and privately owned companies; regrets the tendency of certain Member States to unduly favour certain of their own private or public companies by means of illegal and disguised aids;
44. Calls the attention of the Member States to the need to comply with the provisions of Article 93(3) concerning the obligation to inform the

Commission in sufficient time of all plans to grant or alter aid; urges the Commission to use all means at its disposal to enforce the law in this respect; further urges the Commission to continue to recover any sums illegally paid by Member States by way of State aid, and to have such aid paid into the Community budget;

45. Insists that all Community countries fully respect the Commission's framework of state aids for the motor vehicle sector, and that the Commission takes tough action to combat abuses throughout the Community; calls, moreover, for a Commission investigation as to whether unreasonable differences in prices and delivery times for similar vehicles have again opened up within the Community;
46. Requests clarification as to why the recent Commission guidelines for the examination of state aids to Community shipping companies were forwarded to the Council but not apparently to the European Parliament;
47. Welcomes the Commission's acceptance of certain state aids to help the long-term unemployed, which could be of particular value as Europe faces the prospect of an economic downturn in the light of the Gulf crisis, the fall in agricultural prices and other factors;

Other specific issues

48. Welcomes the Commission's increased emphasis on opening up competition in the audiovisual media, but calls on the Commission to take whatever additional legal measures are necessary to safeguard pluralism and freedom of expression and to reduce the concentration of ownership in the hands of transnational multi-media groups, such as those led by Murdoch, Maxwell and Berlusconi;
49. Calls on the Commission to specify what new measures it will take :
 - to apply competition rules in the energy sector more strictly than in the past
 - to further open up competition in the banking and insurance sectors, and with particular reference to bank charges for intra-Community payments
 - to open up competition in the often closed "liberal" professions;
50. Demands that the Commission, in the run-up to further liberalization of competition in the air transport sector after 1 January 1993, remains extremely vigilant in ensuring that currently proposed cooperation agreements and practices between the flag-carrying airlines (for example the proposed joint venture or merger between British Airways, SABENA and KLM, the "cooperation agreement" between Air France and Lufthansa or the proposed absorption of UTA by Air France) do not serve as a means for these airlines further to secure their already dominant market positions before greater liberalization measures are introduced;
51. Notes with concern the increased concentration in the food sector caused by many acquisitions and mergers; commends the Commission's decision to keep a close watch on restructuring in this sector, and asks for this

- vigilance to include the distribution of food products by the grocery trade, and concentration in retailing more generally;
52. Welcomes the Belasco judgement of the Court of Justice which made it clear that a Belgian cartel concerned with the marketing of products purely within Belgium could have a significant influence on intra-Community trade through its restrictions on foreign competition in Belgium, and believes this has important implications for Community competition law;
 53. Considers that increased cooperation on, and if possible, common rules on competition policy should be an important objective of the current negotiations for a European economic space with the EFTA countries; believes that this should also apply to the countries of Central and Eastern Europe which are developing a social market economy, although their special problems in the short and medium term should also be recognized;
 54. Supports the concept of closer cooperation between the Community and US competition authorities on the issue of extra-territorial application of Community law;
 55. Calls on the Commission to provide, within eight weeks of receipt of this report, a point-by-point initial written response indicating the Commission's views and intended actions and, where the initial response indicates a need for further consideration and/or further action, the timescale for such consideration and/or action;
 56. Instructs its President to forward this resolution to the Commission, the Council, the competition authorities in the Member States and the governments and parliaments of the Member States.

B.

EXPLANATORY STATEMENT

1. The Commission's 19th Report is a detailed and lengthy document (339 pages, with an additional 79 pages of annexes), which covers the whole range of the Commission's activities on competition policy in 1989-90. Since its publication (in provisional form only, the final printed version was still not available in mid October 1990 !) there have been further major developments in the field of competition policy, and, in particular, the new challenges to competition policy posed by the process of German unification, implementation of the new Community merger control regulation, and publication of the Commission's second survey on State aids.
2. To do full justice to this report and to these subsequent developments, would require in-depth examination by a specific competition Committee, or at the very least sub-committee of the Parliament. Instead this task has to be carried out within the context of one annual report from within the already overstretched Economic Committee. It is inevitable, therefore, that the accompanying resolution is a lengthy one. Nevertheless your rapporteur has sought to group the main issues under a number of key headings :

(i) The timing and structure of the Commission's competition policy reports :

Production of the Commission's reports should be speeded up, their structure should be changed, and they should receive wider publicity.

(ii) Administration of competition policy :

The Commission's DG IV should be given further staff (including staff with economic and business backgrounds) to carry out its increasingly complex range of tasks. The Commission's economic research on competition issues should be better integrated into DG IV's day-to-day work programme. The Commission's procedures should be improved, but a separate European cartel office would be premature at the present time. The Parliament should be kept informed of proposed Commission competition policy initiatives earlier than at present.

(iii) German unification :

The impact of this process on conditions of competition will have to be carefully monitored, especially in terms of evaluating State aids, and the privatisation process being carried out by the Treuhandanstalt (the State Holding company).

(iv) The merger control regulations :

Its implementation is to be welcomed, but the regulation needs to be improved (with lower thresholds, and greater legal certainty as to whether mergers will be considered at Community or national level).

(v) The need for a proper balance between competition policy and the other policy objectives of the Community :

Competition policy is of vital importance for the Community, especially in the 1992 context, but it should not have too great a burden placed upon it, and it should not be carried out in isolation from other vital policy objectives of the Community, such as increasing Community industrial competitiveness, and strengthening economic and social cohesion. An economic and social audit of Commission decisions on competition policy matters would be invaluable in this context.

(vi) State aids :

The Commission's second survey of State aids is to be strongly welcomed, but vigorous follow-up is required. State aids should be judged according to the criteria for which they are used, but differentials in levels of State aid for the same objective from one Community country to another may cause severe distortions of competition. Certain differentials are justified, however, in favour of the most disadvantaged areas within the Community.

3. In addition to these six major sets of issues, your rapporteur has listed a number of other specific issues at the end. He has sought, however, to restrict these to a minimum.

OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Legal Affairs and Citizens' Rights
for the Committee on Economic and Monetary Affairs
and Industrial Policy

Draftsman: Mr Anthony SIMPSON

At its meeting of 19 September 1990, the Committee on Legal Affairs and Citizens' Rights appointed Mr SIMPSON draftsman.

At its meetings of 30/31 October 1990 and 28/29 November 1990, it considered the draft opinion and at the latter meeting adopted its conclusions as a whole unopposed with one abstention.

The following took part in the vote: VAYSSADE, acting chairman; SPERONI, vice-chairman; SIMPSON draftsman; FALCONER, GARCIA AMIGO, GRUND, McINTOSH, MEDINA ORTEGA, MERZ, SALEMA, TAZDAIT and VALENT.

I. Introduction

1. In respect of the Commission's Report on Competition Policy for 1989, the observations below of the Committee on Legal Affairs and Citizens' Rights touch on the following:
 - (i) procedural safeguards;
 - (ii) the Council Regulation on the control of concentrations between undertakings¹ (the merger Regulation), the major event in the field of competition law in 1989;
 - (iii) air transport;
 - (iv) state aids.

II. Procedural safeguards

2. The 19th Report gives an outline of 3 important judgments of the Court of Justice on the Commission's powers regarding requests for information from undertakings under investigation for alleged anti-competitive practices (p. 126-134, joined cases 46/87 and 227/88 HOECHST v. COMMISSION judgment of 21 September 1989, case 374/87 ORKEM v. COMMISSION and case 27/88 SOLVAY v. COMMISSION judgments of 18 October 1989).
3. The European Parliament has constantly underlined its concern at the Commission acting as both investigator, prosecutor and judge during administrative procedures under Articles 85 and 86. This concern must also have been shared by the Court of Justice in the Orkem and Solvay cases, in finding that undertakings enjoy a privilege against self-incrimination and are permitted not to answer investigators' leading questions, which would amount to an admission of an infringement of EEC competition rules. The Court held that the preliminary fact-finding investigations of the Commission must not be conducted in such a way that the chances of a fair hearing during the procedure following the delivery of the Statement of objections are compromised and that the burden of proof incumbent on the Commission to prove its case should not be reversed.

Therefore the Committee on Legal Affairs and Citizens' Rights repeats its request that "the Commission's DG IV be structured in such a way that there is a separation of its functions as investigator, prosecutor and judge within its internal administrative procedures" (cf. Opinion of Committee on Legal Affairs and Citizens' Rights on 18th Report on Competition Policy-PE 134.288/fin.).

4. The Committee on Legal Affairs and Citizens' Rights would also recommend that, although the Court in the HOECHST case accepted the legality of the investigation decision taken by the Commission under Article 14(3) of Regulation 17, nonetheless the Commission heed the Court's comment that the decision would have benefitted from being more precise and in this respect is to be criticized.

¹ Council Regulation N° 4064/89, 1989 OJ L 395/1

III. Control of concentrations

5. On 21 December 1989, 16 years after the first Commission proposal on merger control, the Council adopted a Regulation on the control of concentrations between undertakings - the merger Regulation.

There is no doubt that the Council was moved to adopt this Regulation not only because of the looming date of 1 January 1993, but also because of the Commission's willingness to examine mergers under Articles 85 (1) and 86 EEC Treaty in the absence of a Regulation¹.

6. The Regulation is to apply to concentrations of a Community dimension, which is deemed to pertain where:

- the total world turnover of the undertakings concerned is over ECU 5 000 million, and
- the aggregate Community turnover of at least 2 of the undertakings concerned is over ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community turnover within a single Member State.

7. Furthermore, the Regulation alone is to apply to concentrations, irrespective of their turnover, since Regulation N° 17, adopted under Article 87 EEC Treaty to give effect to the principles enshrined in Articles 85 and 86, shall not be applicable to concentrations (Article 22 of the Regulation).

¹ In case 6/72 Europemballage v Commission "Continental Can" 1973 ECR 215, the Court of Justice held that Article 86 could apply to a merger when "an undertaking in a dominant position strengthens that position in such a way that the degree of dominance substantially fetters competition."

In joined cases 142 and 156/84 BAT & REYNOLDS v. COMMISSION, judgment of 17 November 1987, the Court of Justice held that Article 85(1) could apply to an agreement whereby an undertaking acquired a minority interest in another undertaking (both undertakings continuing to remain independent) if the acquisition of that interest influences the market behaviour of the undertakings in such a way that competition is or may be restricted.

The Commission has applied Article 85(1) and Article 86 to a number of mergers or takeover bids reported in the newspapers:

- British Airways' takeover of British Caledonian and the joint takeover bid of Allied Lyons, Guinness and Grand Metropolitan for the Irish Distillers Group (cf. 18th Report on Competition Policy p. 99-101) (Article 85(1)),
- the proposed joint take-over of Plessey by GEC and Siemens (Article 85(1)),
- the takeover bid of Minorco for Consolidated Gold Fields (Article 86) and the link-up between Rhone-Poulenc and Monsanto as regards 2 product lines (Article 86) (cf. 19th Report on Competition Policy, pp. 110-114).

8. Thus one is entitled to ask whether the fixing of such a high turnover threshold constitutes a step backwards, since it will prevent the Commission from examining directly under Articles 85 and 86 mergers and concentrations, which it would otherwise have been able to scrutinize before the coming into force of the Regulation.

The Commission only anticipates 50 notifications in the first twelve months; it has been estimated that of the 200 major UK mergers in 1989, only 8 would have had to be notified under the Regulation.

9. While the promotion of the "one-stop" concept, whereby concentrations of a Community dimension will be subject to the Regulation, all other concentrations being subject to national law, is to be approved as being in the interest of legal certainty, nonetheless the Committee on Legal Affairs and Citizens' Rights would approve:

- any Commission proposal for a downward revision of these thresholds to be adopted by Council before 21 December 1993;
- any Commission initiative provided for under Article 89 EEC Treaty to ensure that concentrations, not meeting the high turnover thresholds of the Regulation, nonetheless respect the principles enunciated in Articles 85 and 86.

10. There are three exceptions to the "one-stop" concept, which are commented on briefly below:

- (i) under Article 9(2) of the Regulation, Member States may "inform" the Commission that a concentration of a Community dimension may create or strengthen a dominant position on a "distinct" market within that Member State; under Article 9(3), the Commission may itself deal with the case in order to maintain effective competition in the market concerned or refer the case to the competent national authorities; the Committee on Legal Affairs and Citizens' Rights would give every encouragement to the Commission to deal with the case without a referral to the national authorities, while attaching, to any decision on the compatibility of the concentration in question with the common market, conditions which take into account the special circumstances of the distinct market; when reviewing this Article before 21 December 1993, the Commission should consider its repeal;
- (ii) under Article 21(3) of the Regulation, Member States may take "appropriate measures" (presumably blocking a merger that has been cleared by the Commission) to protect "legitimate interests" which shall include "public security, plurality of the media and prudential rules";
- (iii) under Article 22(3) the Commission may be invited by a Member State to scrutinize a concentration which, while not of a Community dimension, nevertheless restricts competition within a Member State and effects inter-State trade.

11. By and large the Regulation is to be welcomed; especially welcome is the Commission Notice regarding the concentrative and cooperative operations under the merger Regulation,¹ which sheds much light on the extent to which partial mergers and concentrative joint-ventures as opposed to cooperative joint ventures fall within the scope of the Regulation.
12. The Regulation in Article 4(1) requires notification to the Commission within one week of a bid or deal. This must be made on Form CO.² While appreciating that the Commission has already taken steps to reduce the amount of information required, further such steps should be taken. The time and expense for the companies concerned of furnishing all the information required is disproportionate to the value of such information.

IV. Air transport

13. The Community has adopted a not unimpressive panoply of measures to liberalize competition in the air transport market.

The block exemption regulations in force until 31 December 1992, which provides a useful transitional regime in readiness for more intense competition after that date, may be briefly summarized as follows:

- joint planning and coordination of capacity is permitted to allow for scheduling of flights at the busy times of the day, subject to conditions to prevent illegal market sharing;
- revenues may be pooled, but only to compensate effectively for carriers providing services at less busy times;
- price consultations have been permitted in response to increased price competition introduced by Council Directive 87/601, replaced by Council Regulation N° 2342/90 (cf. footnote 2 below); participation must be voluntary, the results non-binding and the Commission services must be kept fully informed;
- consultations between air carriers on slot allocations are permitted provided that access to such consultations are open to all carriers and that any rules of priority established "are neither directly nor indirectly related to carrier identity or nationality or category of service";
- joint ventures for the development and operation of computer reservation systems are permitted, provided that participating carriers have fair access to the system, that schedules, fares and availability are displayed in a neutral way and that fees charged are reasonable.

14. Further liberalization measures after 1 January 1993 should include:

¹ 1990 OJ n. C 202/10

² Cf. Annex I to Commission Regulation (EEC) N° 2367/90 on the notifications, time limits and hearings provided for in Council Regulation (EEC) N° 4064/89 on the control of concentrations between undertakings

- the abolition of capacity sharing restrictions between Member States (from 1 November 1990, a Member State shall be obliged to permit another Member State to increase its capacity share for an season up to 67.5%);
 - the objective of a double-disapproval system for fares, whether a fare schedule submitted by a carrier for scheduled flights between two Member States may only be rejected if both Member States concerned disapprove the proposed schedule;
 - the extension of the competition rules to flights between the Community and third countries;
 - a review of the existing block exemptions.
15. In its 19th Report on Competition Policy, the Commission has mentioned 12 joint venture agreements between air carriers relating to services on certain routes (e.g. the joint venture agreement between AIR FRANCE and ALITALIA relating to the Paris/Milan and Paris/Turin routes).

However of greater concern are agreements, presently before the Commission (for example the British Airways, Sabena, KLM joint venture or merger, the "cooperation agreement" between AIR FRANCE and LUFTHANSA or the absorption of UTA by AIR FRANCE), which are of far greater import than the twelve agreements above-mentioned.

The Committee on Legal Affairs and Citizens' Rights demands that the Commission remains exceptionally vigilant and scrutinizes these commercial transactions between flag-carriers so as to ensure that no anti-competitive practices will result therefrom which would serve to secure their dominant market position before fuller liberalization measures come into effect. Otherwise such fuller liberalization measures could be rendered nugatory. In this regard it is especially important that hub domination, whereby an airline dominates scheduling at an airport which benefits from considerable feeder traffic for onward flights, is not allowed to develop.

V. State aids

16. The Committee on Legal Affairs and Citizens' Rights welcomes the Commission's decision to review existing State aid schemes more systematically under Article 93(1) and assures the Commission that it can rely on the support of the Parliament in this exercise. The Committee on Legal Affairs and Citizens' Rights feels that the Member States must be more scrupulous in cooperating with the Commission and in notifying their State aids to it, where required by Community law, and urges the Commission to take the necessary steps to ensure such cooperation (the judgement of 14 February 1990 of the Court of Justice in case 301/87 France v. Commission is instructive in this regard).
17. The Committee on Legal Affairs and Citizens' Rights draws particular attention to the problem of State aids for state-owned companies, often in a disguised form. State-owned companies should not be treated in any different way to privately owned companies. The Commission must be particularly vigilant on this subject.

In this context, attention is drawn to a number of examples:

- (i) Finmeccanica, an Italian state holding company, which owned Alfa-Romeo, received heavy government finance to restore Alfa to health, before selling the car company to Fiat. The Commission has ordered repayment by Finmeccanica of ECU 405 million in illegal aid paid in 1985 and 1986; the case is currently before the Court of Justice (case 305/89);
- (ii) the operating losses of ENI-Lanerossi, a state-owned textile company, were covered by public funds to the extent of 100% of its turnover. Having received a complaint from European textile competitors, the Commission took a decision, ordering the Italian government to recover ECU 170 million, illegally paid over in aid; this decision has been appealed against before the Court of Justice (case 303/88);
- (iii) the French government has failed to fulfil its undertaking to supervise a restructuring programme of Renault, which was a condition of the Commission's acceptance of a FF 12 million write-off (cf. 19th Report on competition policy, p.236) and the illegally assisted take-over of the Rover Division of British Leyland by British Aerospace.

VI. Conclusions

In the light of the foregoing the Committee on Legal Affairs and Citizens' Rights requests the Committee on Economic and Monetary Affairs and Industrial Policy to include in its motion for a resolution on the 19th Report on Competition Policy the following paragraphs:

- 1. - "requests the Commission to take all necessary steps to continue to lower the unacceptably high number of files still outstanding (3239 cases pending at year end 1989 as against 3451 at year end 1988);"
- 2. - "demands an explanation from the Commission as to why it has not yet met the request, made in Parliament's Resolution of 18 January 1990 on the 18th report on competition policy, that the Commission introduce within its internal operational procedures a separation of its functions as investigator, prosecutor and judge of alleged anti-trust practices, the confusion of these roles being instrumental in the partial annulment of the Commission decisions requesting information (case 374/87 ORKEM v. COMMISSION and case 27/88 SOLVAY v. COMMISSION); further requests the Commission to give better particulars in its decisions ordering investigations of undertakings and thereby to respond to the critical remarks made by the Court of Justice in its judgment in joined cases 46/87 and 227/88 HOECHST v. COMMISSION;"
- 3. - "welcomes Council Regulation (CEE) N° 4064/89 (the merger Regulation) on the control of concentrations between undertakings, but considers the aggregate world turnover threshold of ECU 5 billion to be unrealistically high; this high threshold, allied to the express provision that Articles 85 and 86, shall not apply to concentrations irrespective of the turnover of the undertakings involved, prevents the Commission from scrutinizing, on the basis of Regulation N°17, many concentrations, which restrict competition within the EEC and have an effect on inter-State trade, the Commission thus being obliged to operate on the inadequate basis of Article 89; therefore supports any proposal to reduce the thresholds provided for in Article 1 of the merger Regulation;"

4. - "calls on the Commission to have recourse, only in the most exceptional circumstances, to Article 9 of the merger Regulation, whereby it may refer a notified concentration to the competent authorities of a Member States in the event of a threat to competition in a distinct market in that Member State and to propose the repeal of this provision when it comes up for review before 21 December 1993;"
5. - "calls upon the Commission further to reduce the amount of information required in Form CO from the companies concerned, when notifying the Commission of a proposed concentration, thereby saving them unnecessary time and financial costs;
6. - "welcomes the Commission's Notice regarding the concentrative and cooperative operation under the merger Regulation (1990 OJ C 203/10) as being a very necessary clarification of its thinking as to when minority share acquisitions, partial mergers or concentrative joint-ventures may fall within the scope of the Regulation;"
7. - "demands that the Commission, in the run-up to further liberalization of competition in the air transport sector after 1 January 1993, remains extremely vigilant in ensuring that currently proposed cooperation agreements and practices between the flag-carrying airlines (for example the proposed joint venture or merger between British Airways, SABENA and KLM, the "cooperation agreement" between Air France and Lufthansa or the proposed absorption of UTA by Air France) do not serve as a means for these airlines further to secure their already dominant market positions before greater liberalization measures are introduced;"
8. - "calls the attention of the Member States to the need to comply with the provisions of Article 93(3) concerning the obligation to inform the Commission in sufficient time of all plans to grant or alter aid; urges the Commission to use all means at its disposal to enforce the law in this respect; further urges the Commission to continue to recover any sums illegally paid by Member States by way of State aid;"
9. - "calls upon the Commission to apply Articles 92 and 93 as vigorously to public companies as to privately owned companies; regrets the tendency of certain Member States unduly to favour public companies by means of illegal and disguised aids."