M,10

444.01

European Communities

EUROPEAN PARLIAMENT

Working Documents

1981-1982

16 November 1981 **DOCUMENT 1-689/81**

Report

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

on the Tenth Report of the Commission of the European Communities on Competition Policy (Doc. 1-195/81)

Rapporteur: Mr P. BEAZLEY

1.2.1

English Edition

PE 74.354/fin.

The Commission of the European Communities forwarded to the European Parliament the Tenth Report on Competition Policy (Doc. 1-195/81), and at its sitting of May 1981 the European Parliament referred this report to the Committee on Economic and Monetary Affairs as the Committee responsible.

On 14 May 1981 the Committee on Economic and Monetary Affairs appointed Mr BEAZLEY as rapporteur. It considered the report at its meetings of 23-24 June, 22-23 September, 20-21 October and 27-28 October and adopted it on 28 October unanimously with 5 abstentions.

Present: Mr Moreau, Chairman; Mr Deleau, Vice-Chairman; Mr Beazley, rapporteur; Mrs Baduel Glorioso (deputizing for Mr Fernandez), Mr Beumer, Mr Bonaccini, Mr Caborn, Mr Delorozoy, Mrs Desouches, Mr I. Friedrich, Miss Forster, Mr Gautier (deputizing for Mr Walter), Mr Giavazzi, Mr Herman, Mr Hopper, Mr Leonardi, Mr Mihr, Mr Petronio, Mr Purvis, Mr Schnitker and Mr Wagner.

The opinion of the Legal Affairs Committee is attached.

C O N T E N T S

A

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

MOTION FOR A RESOLUTION

on the Tenth Report of the Commission of the European Communities on Competition Policy.

The European Parliament,

- having regard to the Tenth Report of the Commission of the European Communities on Competition Policy (Doc. 1-195/81),

- having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Legal Affairs Committee (Doc. 1-689/81).

Competition policy objectives

1. Re-emphasizes the importance of competition policy as one of the key objectives of the Treaties and indispensable for a responsible social market economy, but also underlines that it should not be treated as an objective in isolation but as one of a number of interrelated Community policies, notably in the fields of commercial and industrial policy;

2. Points out, with regard to the increased competitive threat from third countries, that it may prove necessary to interpret competition policy not merely in terms of the effects of a particular merger or agreement on competition within the Community but also in terms of the effects on competition with enterprises in non-Community countries;

3. Indicates, in this context, that there are many sectors where Community industries are too fragmented and consequently at a disadvantage with their competitors in other continents and where much greater cooperation, if not necessarily formal mergers, need to be encouraged and the existing obstacles to closer cooperation removed;

4. Calls for more research by the Commission into the effects on Community competitiveness of existing industrial structures, and also into the implications, both positive and negative, of increased industrial concentration within the Community; account must also be taken in this context of the competitive position of Community undertakings in the world economy as a whole;

5. Recognizes that, at a time of recession, derogations from competition policy may occasionally be necessary for certain industries to permit the needed restructuring, but with clear time limits and clear objectives;

6. Points out, however, that this again illustrates the need for better integration between competition and industrial policy objectives at Community level, in order to avoid ad hoc decisions, to permit the adoption of a Community rather than purely sectoral or regional perspective, and to avoid overlapping national measures that would distort the internal market;

7. Again calls for greater coordination between the different departments of the Commission, and for practical steps to be taken to ensure such coordination;

Scope of competition policy

8. Welcomes the Commission's recent initiatives in the field of air transport and insists yet again on the vital importance of applying Community competition rules in this sector in order to lower fares, liberalize access to the air transport market, and improve transparency of air fares and of airline finances and statistics;

9. Notes that the Commission has just presented a proposed regulation applying Article 85 and 86 of the Treaty to sea transport and hopes that outstanding difficulties in this field can be settled as soon as possible;

10. Calls again on the Commission to ensure the application of competition in the financial and insurance sectors, notes in the former context the recent judgement of the Court of Justice affirming that Community competition rules apply to banking activities;

Competition policy towards enterprises

11. Awaits the revised proposal of the Commission for a block exemption regulation for patent licensing agreements and insists on it being transmitted to the Parliament for its opinion;

12. Requests the Commission to ensure that the effects on competition within the Community of the proposed directive and regulation on trade marks have been fully analysed;

13. Believes that the overall competitive effects of distribution agreements need to be examined in greater detail from an economic rather than just a legalistic point of view;

14. Considers, in particular, that the issues posed by parallel importing need to be closely examined. Believes, in this context, that there needs to be a balance between opening up the internal market as fully as possible, and at the same time providing safeguards for capital and labour investments against speculative importers;

15. Requests to be kept closely informed of the Commission's findings on, and further intentions towards, competition with regard to exclusive supply agreements;

16. Expresses its wish that the Commission will soon be able to draw up general guidelines in the field of selective distribution agreements, in order to reduce the current uncertainty in this field so that undertakings can gain a better indication of what is and what is not permissible;

17. Regrets yet again the absence of any Council decision on the Commission's proposal for a regulation on merger control, wishes to know whether, in the light of the objections raised by individual Member States, the Commission is planning to modify its proposals in any way in order to help break the current deadlock, and finally requests further information on the implications of successful enactment of a merger control proposal on the staffing needs of DG IV;

Strongly urges the Commission, in the meantime, to continue making vigorous use of the possibilities granted by Article 86 of the Treaty and by the subsequent interpretation of this article by the Court;

Further recalls that action in this sphere, as well as in the fields of information disclosure and control of transfer pricing abuses, can help to control any anti-competitive effects caused by multinationals;

18. Calls on the Commission to include in its report a review of the action on the activities of transnational undertakings; emphasises that organized competition implies that the activities of transnational undertakings should be controlled without discrimination; deeply regrets that the Commission has still not submitted a proposal on transfer prices; calls on the Commission to respond to the repeated requests made by the European Parliament for more information on the activities of transnational undertakings by including in its next report a summary of the progress made in this field, both within the Community and in the various international bodies;

19. Calls on the Commission to discuss, pursuant to the Parliament's remarks in its previous opinions on competition policy, the whole subject of competition policy with regard to small and medium sized enterprises more fully in its next Annual Report, covering in particular measures to facilitate the creation of independent firms and the establishment of new undertakings on old and new markets;

Community competition policy and national competences

20. Recognizes the difficult task facing the Commission in policing national aids and other policies affecting competition, such as the creation of new technical barriers to trade, at a time of economic recession and industrial restructuring, but points out that these are perhaps the biggest single cause of distortions of competition within the Community, and consequently urges the Commission to show the maximum vigilance in ensuring that the internal market is strengthened by eliminating technical and administrative barriers to trade and preventing the creation of new barriers;

21. Recalls that the inadequate harmonization of laws and the lack of transparency with regard to public contracts seriously hampers the standardization of the conditions of competition;

22. Emphasizes again the significance of the Commission's directive to ensure greater transparency of financial relations between Member States and public undertakings, regrets that its scope is not even wider, and expresses its strong criticism of the action of the French, Italian and U.K. governments in trying to have this directive annulled;

23. Expresses its concern at the increasing tendency noted by the Commission not to notify certain aids granted and strongly supports the Commission's decision to write to all Member States reminding them of their obligations under Article 93-3 of the EEC Treaty;

24. Further suggests, in the interests of transparency, that it might well be useful, in an annex to forthcoming Annual Reports, or in another appropriate or perhaps more frequently updated form, to list all the state aids notified to the Commission;

25. Strongly supports the central principles emphasized in the Philip Morris case, and intends to closely monitor the way in which this decision will affect subsequent Commission practice;

26. Approves the general positions taken by the Commission with regard to sectoral and regional aids, but insists that these actions need to form part of more integrated Community strategies towards these sectors and regions, for instance in the sectors of shipping and shipbuilding, and of cars; asks for the next report to contain precise information on the results of the aids granted and in respect of the duration of those aids;

27. Again firmly underlines the importance of adjusting State monopolies of a commercial character and regrets the recent lack of progress in this sphere;

28. Regrets that the chapter on developments in national competition policy fails to outline the situation with regard to Greek competition policies;

29. Calls for the implications of Spanish and Portuguese entry into the Community for competition policy to be fully explored, as considerable problems of adjustment are likely to be encountered;

International issues

30. Notes with approval the adoption by the U.N. General Assembly of a set of principles and rules for the control of restrictive business practices, but regrets that there is currently deadlock on the parallel negotiations on the proposed international code of conduct on the transfer of technology, but points out, however, in this latter context, that if overly restrictive rules are adopted, a lowering of technology transfers to developing countries might well result;

31. Points out that the issues posed by the extra-territorial application of competition laws, as shown by the enactment of "blocking" laws in certain Community countries and by possible problems in the field of sea transport, and of disclosure of documents, are growing in importance, and considers that earlier consultation between governments and wider international agreement on the taking of evidence abroad in civil and commercial matters might well, among other possible steps, be appropriate in the future;

32. Takes the view that the Community cannot, without weakening its own position, create a genuine internal competition policy unless it actively seeks to extend the rules it imposes on itself to the other countries of the world; calls on the Commission, therefore, not to confine itself simply to participating in the activities of the international bodies concerned but to contribute its utmost to:

- the campaign against international tax evasion,
- the abolition of tax havens,
- the elimination of flags of convenience,
- the abolition of other unfair practices in the field of competition;

Commission powers and procedures

33. Emphasises the cardinal role played by the Commission in the application of Articles 85 and 86 of the EEC Treaty and of Articles 65 and 66 of the ECSC Treaty; appreciates the increasingly complex tasks faced by the Commission in the enforcement of Community competition policy, and calls for an increase in the number of staff in DG IV, including an appropriate number with practical industrial experience;

34. Believes, however, that the Commission has failed to provide satisfactory answers to the criticisms aimed at its procedure by various organizations and also the requests on this subject in previous opinions of the Parliament; and urges it again to seek to implement a more rapid and more transparent procedure for dealing with cases submitted to it;

35. Calls on the Commission, therefore, to report back to Parliament within the next year with proper appraisal of the advantages and disadvantages of the following major suggestions for improving its procedures:-

- the possible establishment of an intermediate tribunal to deal with competition cases, and to review questions of fact, leaving the present Court of Justice as a final court of appeal, dealing essentially with points of law;

- the possible appointment of an independent person or persons, from within the Commission but independent of DG IV, or else appointed by the Court, who would participate in the investigative process and handle certain procedural aspects;

- possible ways of expediting procedures for granting exemptions, such as that discussed in point 72 of the explanatory statement below;

36. Calls for more information to be provided in the Annual Reports and in other publications, on the principles and criteria guiding the Commission in reaching its informal settlements, in order to provide more guidance for affected undertakings;

37. Underlines the need to remove the lack of legal certainty as to the status of notified new agreements, by requiring the Commission to issue preliminary decisions, analogous to the preliminary opinions provided for by Article 15(6) of Regulation 17/62 within a fixed time limit, and of 'comfort letters' by requiring the Commission to deal with every notification or application for negative clearance by formal decisions or certification and to publish the same;

38. Welcomes the possibilities opened up in the field of interim procedures and hopes that they will be used when appropriate by the Commission;

39. Calls for the views of industry associations, trade unions, consumer and other groups with regard to general or specific aspects of Community competition policy to be described in future Annual Reports in order to ensure their closer participation in the development of Community competition policy as previously called for by the Parliament;

Calls on the Commission to make all necessary arrangements to provide more extensive information on the aims and principles of its competition policy to consumer associations and to trade union and employers' associations;

Takes the view that the Commission should seek the cooperation and support of all interested parties - consumers' organizations, national monopolies commissions and the Economic and Social Committee - in order to improve its possibilities for action through a better exchange of information and by pooling available resources and experience acquired;

40. Calls for a reinforcement of the economic assessment capabilities of DG IV and for its economic research to be better integrated with the rest of its activities, and again reminds the Commission that more thorough economic research could back up competition policy in such fields as the definition of the relevant market (which might well be a worldwide market in some cases), the advantages and disadvantages of further economic concentrations, the achievements and failures of crisis cartels and the longer-term impacts of state aids.

41. Regrets the fact that a number of the recommendations approved by the Parliament in its previous opinions on competition policy have not been acted upon, nor sometimes even acknowledged by the Commission. Insists that in each subsequent report subjects previously raised by the Parliament receive an effective response from the Commission;

42. Instructs its President to forward this resolution to the Council and Commission.

B

EXPLANATORY STATEMENT

INTRODUCTION

1. Competition policy is one of the pillars of the Treaties, and one of the areas where the Community has direct powers. These powers must be used even more energetically in the future, to protect the consumer by controlling both the abuses of private and state enterprises acting in collusion with others or exploiting individual dominant positions, as well as those protectionist measures of national governments and their agencies which can distort competition to an even greater extent.

2. Nevertheless, the objectives of Community competition policy need to be coordinated with other Community policies so as to avoid possible conflicts, particularly at a time like the present of intensified commercial competition from third countries, and of economic recession. This is why the first section of this report consists of an examination of the overall objectives of Community competition policies and their relationship with other policies, notably commercial and industrial policies.

3. The second section briefly examines the field of scope of competition policy and its needed extension into sectors such as sea, and particularly air transport, where it again emphasizes the need for real progress in this sphere.

4. The third section examines the development of Community policy towards private enterprises as outlined in the Commission's report, and the fourth section looks at the complex area of the relationship between Community competition policy and national competences, that is to say the issues posed by differences in national competition laws, by state aids and state monopolies and by the public sector in general. A short fifth section reviews some of the international issues that have arisen over the last year.

5. The administration of competition policy is emphasized in a further section of the report. The Commission is clearly understaffed to meet its important competition policy responsibilities. At the same time, however, as putting its political weight behind an increase in Commission resources devoted to competition policy, the Parliament also recognizes that a number of criticisms continue to be made about the implementation of competition policy, and that these criticisms need to be studied and possible remedies put forward.

6. Finally, the report comments on the economic research section of the Commission's report and makes some suggestions as to the way future Commission reports might be improved.

Objectives of competition policy

7. The purpose of this first section of the report is to examine the objectives of Community competition policy within the broader context of Community policies as a whole.

8. The central objective of Community competition policy should be that, wherever, there should be real and undistorted competition. It is undesirable that firms and citizens should have no effective choices in their economic activities, and thus be at the mercy of their customers or suppliers (or indeed an association of their competitors). It is also undesirable that firms should lack the stimulus which competition provides to greater enterprise, efficiency and to suitable adaptations to changed circumstances. But, where these dangers are absent or minimal, pursuit of the letter of competition law can be unprofitable and may be counterproductive; the Treaties themselves acknowledge certain exceptions to the general rules as outlined, for instance, in Articles 85 (3), 92 (2) and 92 (3) of the EEC Treaty.

9. Interpretation of the general rules of competition, and the exceptions provided, is particularly difficult at a time like the present, when Community industry is faced with accentuated competition from enterprises from third countries, and when industrial restructuring is often necessary to face up to the consequences of recession and changing industrial circumstances.

10. With regard to intensified competition from outside, it is clear that the achievement of satisfactory competition within the Community can be outweighed if major inroads are being made by imports from the enterprises of third countries. While the consumer may often benefit, there are also serious costs of such inroads as well, in terms of the potentially far-reaching effects on the industrial structure of the Community, and also on employment. In these circumstances the achievement of competition within the Community must also be balanced by an evaluation of the competitive situation of Community enterprises within the world economy as well.

11. This issue was raised, for instance, in the context of Parliament's recent opinion on the European automobile industry (OJ C.28,9.2.81 p.19), which argued that the European industry, not just the large integrated manufacturers but even the associated component manufacturers, was much more fragmented than that of its competitors. It went on to

state (point 12) "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".

12. This sort of consideration poses broad questions about the nature of industrial policy at Community level. In the 1960's Community policy towards industry appeared to be leaning towards the promotion of large European-scale enterprises to compete more effectively with often much larger non-EEC firms, but this has been downplayed in recent years.

13. It would certainly appear that the experience of formal mergers between enterprises in different Member States has not always proved very successful. In addition a certain concern has developed about some of the diseconomies (instead of just the economies) of scale involved in very large enterprises. There has also been a certain academic literature concerned with the adverse effects of mergers, and of increased industrial concentration.

On the other hand, there may at times have been over-concern about the negative effects of bigness and an over-emphasis on the virtues of smallness. In certain sectors and, in certain circumstances, such as particularly fierce foreign competition, or rapid technological change, increased concentrations may well be desirable.

14. What this would appear to indicate is that there is a need for:

- more analysis into the effects, both positive and negative, of increased industrial concentration, and of mergers;
- more analysis into why the experience with mergers across national boundaries has not been more successful;
- most fundamentally of all, more study of the consequences of the Community's current industrial structure not just for competition within the Community, but for Community competitiveness within the world market.

15. A further implication is that there needs to be much closer cooperation between the directorate-general responsible for competition and the other departments of the Commission, notably with DG III, responsible for industrial policies and the internal market. This is not to suggest that competition policy needs to be subordinate to a "dirigiste" and precisely defined industrial strategy, but that overall there needs to be better integration between competition and industrial policy objectives.

16. This is also illustrated by a set of problems where a balance may often need to be found between competition policy and other objectives, those posed by the restructuring of industries in crisis. Problems are posed all the way along the line for competition policy, in that cartels may be formed, derogations may have to be granted from competition rules, and state aids may be granted whose compatibility with competition rules may often be extremely difficult to assess. Pragmatic judgements will be necessary in these cases; what is clear is that competition policy cannot be the only criterion for judgement.

17. Nevertheless, these decisions should not just be taken on an ad hoc basis. There is a need for Community-wide rather than merely narrow sectoral criteria to be taken into account. Again industrial, commercial and social policy factors, as well as one of regional balance, need to be evaluated. Mere assurances that adequate coordination exists is not enough; there needs to be more evidence that it is a reality.

Extension of scope of Community competition policy

18. The Tenth Report concentrates on two key areas where the competition policy rules of the Community have not been applied, and where the Parliament has consistently insisted on their application, air transport and sea transport.

Air transport

19. At a time when popular support for the Community is not at a high level, particularly in certain countries, more tangible evidence that Community citizens can benefit from Community action would be of great value. Much firmer application of the rules of competition to the air transport sector could provide such evidence. As Parliament has pointed out in the past, the current fare system lacks transparency and is too costly, access to the scheduled air transport market needs to be liberalized and there needs to be much greater transparency of airline finances and statistics. While certain safeguards should remain, much can and should be done in this field.

20. The Commission outlines the problems that are involved in making progress in this sphere in points 11 to 14 of its Report. It shows the step-by-step approach that would have to be adopted and the difficulties that would arise at each step.

21. Firstly the Commission would have to promulgate a regulation to give itself the power to investigate and punish infringements, but, as the Commission itself admits, this would have only limited application (such as in the area of charter services) since it is chiefly governments who have the final say, for instance, in setting fares for scheduled services.

The Commission would, consequently, then have to decide whether to challenge the conduct of the Member States themselves, as opposed to the individual airlines.

The next step would be to consider whether national air tariff regulations were contravening Articles 85 and 86 and whether they fell within the exemptions provided. Such an examination would be lengthy and would have to be done on a case-by-case basis.

Finally, the Commission would have to assess Article 90(2) of the EEC Treaty which states that the rules of competition should apply to public undertakings, "insofar as the application of such rules does not obstruct the performance, in law or of fact, of the particular tasks assigned to them".

22. Whatever the difficulties, however, the current situation is indefensible. The Commission illustrates this with its description (in points 136 to 138 of its Report) of its handling of the Sterling Airways case, when the latter airline lodged complaints against SAS and the Danish government.

In the course of its investigation the Commission encountered initial difficulty in acquiring the needed information from the Danish government. Although it then found evidence that might indicate a prima facie infringement of Article 86 in 1977 and 1978, by the time the Commission was in a position to do anything it felt that the situation had eased and that there were no longer any grounds for it to consider further action. The whole procedure is cumbersome and unsatisfactory.

Furthermore, the difficulties that are described of the Commission trying to establish a valid comparison between the existing service of SAS and the proposed service of Sterling Airways, including assumptions about the relative attractions for passengers of being able to make, or not make, advance bookings or change their flights, indicate the advantages of much bolder deregulation where the consumer himself would be left to make the decisions.

23. The Commission has recently decided to formally propose a regulation to the Council extending the application of EEC Treaty competition rules to air transport. At the same time the Commission has also adopted a report concerning passenger air fares on EEC scheduled flights. The Commission has further announced that it will be asking the EEC governments to submit to it information on air fare policy by the middle of October, and to request information from the various airlines concerning such practices as rules on luggage weight, meals

served to passengers, and others agreed between airlines. A draft directive on procedures for the control of air fares may then be submitted.

These initiatives should be strongly welcomed, and progress in this sphere will have to be closely monitored.

Sea transport

24. The Report also outlines how the Commission had intended proposing a draft regulation to the Council applying Articles 85 and 86 of the Treaty to Sea Transport.

25. The position so far has been that the Community has not yet endorsed the United Nations Code of Conduct for Liner Conferences, which was adopted in 1974 but has not yet come into force. The Commission would like to see this endorsed, but at the same time feels that its provisions need to be supplemented. Certain points need to be explicitly spelled out "which the code does not touch upon or on which its provisions are not mandatory" (point 10).

National sea transport experts, however, apparently seem to prefer a simple endorsement of the U.N. code, and the Commission consequently postponed the presentation of its proposal to the Council[1]

The reasons for the reluctance of the national experts are unfortunately not clearly spelled out in the report. It is to be hoped that consultations with the Member States can solve the outstanding difficulties as soon as possible and the Parliament should be kept closely informed of new developments.

The development of competition policy towards enterprises

26. The Tenth Report outlines developments in this sphere in the chapter on main developments in Community policy, in which it discusses proposed regulations and also the main Court decisions interpreting Article 85 and in the chapter on main decisions and measures taken by the Commission in which it outlines some of the central issues that have been raised in individual cases with which it has dealt.

27. The number of such cases is very large. The Commission lists 4,203 pending cases on 31 December 1980, (3,775 applications or notifications, 233 complaints from firms and 195 proceedings on the Commission's own initiative). And yet only 25 formal decisions were taken during the year (of which only 9 applying Articles 85 and 86 of the EEC Treaty), and 183 informal settlements.

[1] The Committee notes that a proposal (COM (81) 423 fin.) has just been transmitted to the Council

64% of the pending cases concerned licensing agreements, 25% distribution agreements and 11% horizontal agreements. In this context the importance of block exemptions is obvious, in reducing the work load of the Commission and creating greater certainty for enterprises.

Patent licensing

28. In the light of the above figures adoption of a block exemption regulation for patent licensing agreements would clearly be a particularly useful step, provided that it is well thought out and broadly acceptable. Nevertheless the Report states that progress on the Commission's draft block exemption regulation has had to be postponed, pending the Court's decision in the "Breeders' rights - maize seed" case, which raises a number of key legal issues in this field.

Marked differences in view between the Commission, between groups who feel that the proposed regulation would restrict industrial property rights too far, and others such as the Consumers Consultative Committee, who feel that the proposal is too weak, are described in the Report (in point 6). The Commission should again be reminded that, when the new draft is ready, it should be sent to the Parliament, so that it can give its opinion on this important proposal, on which subject serious doubts have been raised.

Exclusive dealing and selective distribution agreements

29. The general issues posed by exclusive dealing agreements and by selective distribution agreements, are also touched on in the report.

30. Regulation 67/67 has provided for block exemptions for exclusive dealing agreements. The Commission had originally intended to amend this before it expired at the end of 1982 but the draft that they produced in February 1978 was so criticized, notably on the grounds that it would create far more uncertainty for firms as to whether they fell within the category exemption, that this approach was abandoned. As outlined in the Report the Commission has now concluded its work on a new draft block exemption Regulation on exclusive dealing agreements which will replace Regulation 67/67 EEC from 1 January 1983.

31. Though no really major changes are anticipated there are still a number of provisions which create considerable uncertainty as to their full implications, such as proposed Article 3(b) providing that the block exemption would not apply where the goods to which the contract related were not available from independent intermediaries and

proposed Article 3(c) providing it to be sufficient to exclude the block exemption that one of the participants to an agreement makes it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers, within or outside the Community. The uncertainties which these proposed Articles, in particular, raise need to be clarified and Parliament should also be consulted on this.

32. The situation is not very clearly outlined with regard to exclusive supply agreements. These are currently covered by the block exemption, but the Commission merely states that it is considering whether the appropriate rules for such cases should not form the subject of a separate regulation. The Commission has produced a draft regulation covering "tied house" agreements for beer but further clarifications as to the Commission's longer-term intentions towards other networks of exclusive supplying agreements, such as solus site agreements for petrol, would be helpful. In the meantime, the Commission would now appear to be putting forward a draft regulation, providing for exclusive supply agreements to be covered by the block exemption until 1984 as a provisional measure.

The effects of networks of similar contracts on the workings of competition within the Common Market is clearly a subject which merits closer examination. As stated by the Commission such networks could clearly jeopardize the maintenance of effective competition, but they could also have economic advantages as well. The Parliament should be kept closely informed of the Commission's findings in this area. At the moment the block exemption provides some certainty in this field; if exclusive supply agreements were not to benefit from a new block exemption after 1984, with the exception of one or two limited sectors, this degree of certainty would be lost.

33. The Commission is apparently also considering further action in the field of selective distribution agreements, but it is planning to wait until a number of further decisions have been taken in individual cases before establishing general guidelines. It is, however, planning to finalise in the near future a draft block exemption regulation for selective distribution systems in the motor industry.

It is to be hoped that the Commission will soon be able to draw up general guidelines in order to reduce the current state of uncertainty in this field so that firms can gain a better indication of what is and what is not permissible.

34. It is also clear that the whole area of distribution agreements needs to be examined in greater detail from an economic point of view. A recent article[1] for instance, has argued cogently that "there is a need for the Commission to analyze in much greater depth the economic structure and performance of the markets in which exclusive distributorship agreements are made in order that it can take an informed view of the balance of advantage and disadvantage in such cases". It argues, inter alia, that the "Commission's analysis of the possible advantages of exclusive supply agreements seems to have been inadequate" and that there has, perhaps, been an over-emphasis on the problems caused by parallel imports since, in certian circumstances "territorial restrictions may be essential to provide protection for desirable dealer services, while if there is effective interbrand competition, any adverse effects may be minimal". On the other hand, other anticompetitive practices may be insufficiently emphasized.

Similarly it may not always be helpful to judge selective distribution systems primarily on whether they are based on objective criteria of a qualitative nature, since such agreements based on quantitative criteria may well be justifiable in certain circumstances.

The comments of the Economic and Social Committee in its recently adopted opinion[2] on Community Competition Policy in the light of the current economic and social situation should also be noted in this context, in which it states (page 23) that "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 and the responsibilities of the producers".

All this indicates the need for comprehensive and empirical economic analysis into the overall effects on competitiveness of particular agreements, and particular industry structures, in order to avoid an overly legalistic perspective and an over-concentration on theoretical criteria.

Such analysis should not be an end in itself. Where possible, clear cut rules should be derived. Nevertheless, competition policy will

---

(1) "The economics of exclusive distributorship arrangements with special reference to EEC Competition Policy". John Chard. The Antitrust Bulletin/Summer 1980.

(2) CES 561/81 pd

have to maintain a certain flexibility to take account of changing economic circumstances.

Merger controls

35. The Parliament once again notes the absence of any Council decision on the Commission's proposal for a regulation on merger control, submitted to the Council on 20 July 1973. The Parliament has on numerous occasions expressed its strong regret at this delay, and called for the proposal's enactment as soon as possible.

The Parliament notes, however, the comments of the Economic and Social Committee on this subject, in which its opinion states (op. cit., page 24) that "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". Certainly there is a danger of considerable delays being caused in mergers going through, with consequent uncertainty and possible adverse effects on the undertakings concerned, which will have to be carefully balanced against the need for the prevention of certain harmful concentrations at Community level. The comments made earlier in this report about the need to examine competition policy in a world-wide and not just Community context, also need to be recalled at this juncture.

Parliament will be following closely the definition of the relevant criteria for the evaluation of mergers at Community level.

It would also be helpful to know whether the Commission is intending to modify its original proposals in any way, for instance, with regard to the time taken for approvals.

A further point on which guidance from the Commission would be appreciated is the implications of successful enactment of a merger control proposal on the staffing needs of DG IV, since the extra demands on its resources will surely be considerable.

In the meantime the Commission must be strongly urged to make vigorous use of the possibilities granted by Article 86 of the Treaty and by the subsequent interpretation of this article by the Court.

36. Among a number of important other cases described in the Report in the chapter on main decisions and measures taken by the Commission, the following points can be singled out:-

- the Commission's statement (in its description of its decisions in the French and German special steel producers cases in point 109

of the Report) that "poor demand and excess capacity do not justify producers breaking the competition rules of the EEC Treaty"; this is an important point of principle deserving of longer discussion;

- the Commission's decision to impose for the first time a fine for an export ban in the pharmaceutical industry (Johnson and Johnson case, point 117 of the Report);

- its clarification as to under what conditions and to what extent a joint buying pool is compatible with the Community competition rules (National Sulphuric Acid Association case, point 112 of the Report);

- the Commission's continuing efforts (as in the Moulinex and Bauknecht cases, point 121 of the Report) to persuade firms to extend guarantee terms to provide coverage throughout the Community.

37. A further comment concerns small and medium-sized enterprises.

In its description of the Solnhofener Natursteinplatten case (in point 114 of the Report) the Commission states that it resulted in the spelling out once again of the conditions for cooperation between small businesses consistent with the rules of competition. An earlier association of the same producers had been struck down by the Commission but negative clearance was granted for a new association providing for a more limited cooperation between the undertakings concerned.

Nevertheless, while noting with interest this particular decision, the Committee feels that, pursuant to its remarks in its previous reports on competition policy, the whole subject of competition policy with regard to small firms needs to be discussed more fully in a subsequent Annual Report.

38. It should also be noted that certain other important issues, such as the field of trademarks, the control of transfer pricing abuses, and application of the rules of competition policy in the financial and insurance sectors, all mentioned in recent Parliament opinions on competition policy, have not been tackled in the Tenth Report.

Community competition policy and national competences

39. The relationship between Community competition policy and national competences, the issues raised by state aids and state monopolies, and the different scope of national competition laws, raise problems

of particular difficulty for the Community. Not only is there the problem mentioned in the first section of this report, of having to balance Community competition and other policy objectives, regional, social, industrial and so on, but also of asserting Community over purely national and sectoral objectives.

The need for transparency

40. If difficult economic and other judgements are to be made at Community level it is essential that adequate information is put at the Community's disposal. The need for the maximum possible transparency is thus of central importance.

41. The significance of the first directive to ensure greater transparency of financial relations between Member States and public undertakings (80/723/EEC) must again be strongly emphasized. Although the difficulties involved are understandable it is to be regretted that its scope is not even wider, since many of the most important public monopoly sectors, such as posts and telecommunications and transport, are excluded, as well as all public undertakings whose turnover is less than 40 million units of account. Strong criticism must again be expressed of the action of the French, Italian and U.K. governments in trying to have this directive annulled.

Notification of aids

42. The Parliament also notes with concern, in the context of state aids, the growing tendency which is outlined in the Commission report, and which is "particularly marked in certain Member States, not to fulfil the obligations laid down by Article 93(3) EEC in respect of notification of aid cases and their non-implementation during the time allowed to the Commission to evaluate their compatability with the Treaty" - a tendency which it sees as indicating "the possible existence of a general decision not to respect the provisions in question". The Commission is particularly concerned about this in the already difficult area of general aid schemes.

The Parliament thus strongly supports the Commission's decision to write to all Member States reminding them of their obligations under Article 93(3) of the EEC Treaty. A further suggestion is that it might well be useful, in an annex to forthcoming Annual Reports or in another appropriate, and perhaps more frequently updated form, to provide a list of all the state aids notified to the Commission, thus providing a handy check list for interested parties and making at least somewhat more transparent cases where no notification is provided.

General aids

43. As regards the aids mentioned in the report, particularly difficult problems seem to be posed by general aids, those which are neither sectorally nor regionally specific. In this context the Court's decision in the Philip Morris case appears to be of special importance for the interpretation of the Community rules of competition. The Commission's conclusions from the Court's judgement is again worth citing (paragraph 216 of the Tenth Report); "State aids are in principle incompatible with the common market. The discretionary power of the Commission should only be exercised when the aids proposed by Member States contribute to the achievement of the Community objectives and interest set out in Article 92(3) EEC. The national interest of a Member State or the benefits obtained by the recipient of aid in contributing to the national interest do not by themselves justify the positive exercise of the Commission's discretionary powers".

Of course the assessment of what is of Community, rather than of merely national interest is not always easy. The central principles re-emphasized in the Philip Morris case, however, should be strongly supported. The Parliament looks forward to closely following the way in which the decision will affect subsequent Commission practice.

Indirect aids and sectoral and regional aids

44. A further important issue underlined by the Commission is the possibility of Member States circumventing the control system on national aids through the granting of indirect aids, and it cites two such cases which have been dealt with in the last year.

45. The Parliament supports action in this field, and also notes with approval the positions taken by the Commission with regard to sectoral and regional aids, and would merely add, however, that such actions need to form part of more integrated Community policies towards these sectors and regions.

46. In the section on aids to shipbuilding, for instance, the Commission says that the proposed Fifth Directive will give it scope to examine whether aids to shipowners are, in present conditions, having an effect similar to aids to shipbuilding. This is a field where on several occasions Parliament has called for an overall industry policy embracing the interdependent sectors of shipping, shipbuilding, ship-repairing and commercial trade policy.

47. In the car sector the Parliament has called for the establishment of an overall Community strategy. The Parliament welcomes, therefore, the Commission's statement that it is prepared to recognize the value of certain forms of cooperation between undertakings as well as certain aids in order to help create a favourable environment for the industry to take full advantage of the Community market, and to compete more effectively with third country producers.

48. Overall the Parliament recognizes the difficult task facing the Commission in policing national aids, and in interpreting its discretionary powers, at a time of economic recession and industrial restructuring, and can only urge the maximum vigilance in ensuring that, along with parallel action in the elimination of technical barriers to trade, the internal market is strengthened and not undercut.

Adjustment of state monopolies

49. The adjustment of state monopolies of a commercial character is a further area where the Tenth Report indicates important remaining problems, and where "increasing national resistance is being encountered". Again the Commission is forced to state (paragraph 228) that "the disregard of time limits for answering enquiries is causing considerable delays to the Commission's work in this area".

Delays are particularly marked with regard to the adjustment of the French and Italian manufactured tobacco monopolies, and the Commission has initiated infringement procedures in both cases, as well as against Italy for its failure to carry out sufficient adjustment of its matches monopoly.

The Parliament again firmly underlines the importance of making further progress in this field.

Disparities in national competition policies

50. The Tenth Report again demonstrates the continued existence of major disparities in the individual competition policies of the Member States, as outlined in the chapter on main developments in national competition policies. These national policies range from ones where competition policy is treated as a major objective in its own right, to less activist policies but where competition policy is still an important factor among a number of factors, to ones where it is either weak or practically non-existent. The lack of any change in the latter situation is noted regularly in each Annual Report of the Commission.

Different conceptions of competition policy are clearly linked to differing national circumstances and economic philosophies. It is clearly impractical, and indeed undesirable, to seek for them to be harmonized. It is, nevertheless, worth emphasizing that vigorous national competition policies can help to back up the Community's own competition policy, and that the complete absence of any national policy may help to create distortions within the internal market.

51. It would have been helpful if the chapter on developments in national competition policies had outlined the situation with regard to Greek competition policies.

52. The implications of enlargement for competition policy needs to be further explored. The Report hints at one problem in the area of plant breeders' rights and trade marks (paragraph 135) where it states that the practice of third parties in Spain systematically registering as trade marks varietal names of plants appearing in the common catalogue of varieties of agricultural plant species could represent a substantial barrier to the freer movement of goods and competition when Spain accedes to the Community.

Other problems will undoubtedly be encountered in the process of transition from a relatively closed economy to the much more open environment within the Common Market.

International issues

53. With regard to international issues the Tenth Report outlines the developments in OECD and in UNCTAD, and describes cooperation between the Commission and the anti-trust authorities of non-member countries.

O.E.C.D.

54. In the light of the earlier remarks in this report the current emphasis within OECD on obtaining more information on mergers and concentrations is to be welcomed. A further point not covered in the Commission's report, however, and which would be helpful to know, is the use that has been made so far of the chapter on competition in the OECD guidelines.

U.N. guidelines on restrictive business practices

55. The Parliament notes with approval that on 5 December 1980 the United Nations General Assembly adopted a "set of multilaterally agreed equitable principles and rules for the control of restrictive

business practices", and that the Commission welcomes the result of the negotiations as meeting "the fundamental concerns of the Community .....". Such broadly applicable guidelines should perform a valuable function. Although non-binding, and capable of interpretation in different ways by governments with very different conceptions of competition policy, they should at least provide a framework on which to build.

Proposed code of conduct on technology transfer

56. On the other hand it is noted that there is currently a deadlock on the parallel negotiations within UNCTAD on the proposed international code of conduct on the transfer of technology. The problems involved are listed by the Commission. The core of the dispute would seem to be that the negotiations on the chapter on restrictive business practices are less concerned with the types of abuse that are generally condemned by competition law within the Community and within the industrialized world as a whole, but instead with the attempt by certain developing countries to impose greater control over the terms of involvement of foreign business within their countries. The issue of parent-subsidiary relations within multinationals is a related and important point of dispute. What is being negotiated is clearly little to do with traditional competition policy concepts.

The legitimate concern of developing countries must be recognized, and it is to be hoped that agreement will be reached. It would be helpful, however, if a more flexible attitude could prevail on the part of the developing countries. Overly restrictive rules might merely result in a lower level of technology transfer to the developing countries.

U.N. code

57. In another sphere it would be useful to know what progress is being made with the chapter on competition of the proposed United Nations Code on Transnational Corporations which is currently being negotiated.

Extra-territorial application of competition laws

58. A final point on which more emphasis should be put in a subsequent Commission report is the issue of the extra-territorial application of competition laws, and the clashes that this can cause. The Tenth Report cites the growing cooperation between the Commission and the anti-trust authorities of non-member countries, and this is to be

strongly welcomed. Nevertheless, while the Community as such has not been primarily involved, the question of extra-territorial application of U.S. competition laws in particular has been seen as sufficiently important to justify "blocking" laws being enacted in the last year by France and the United Kingdom against the extra-territorial effect of foreign laws on actions by their domestic firms, and in particular against the communication of information or the supply of documents.

Any directive on extending competition to the sea transport sector will clearly involve possible clashes of jurisdiction.

59. Clearly this whole set of issues is of considerable importance, and merits further discussion. Among the ideas that have been put forward in this context is a possible code on the extra-territorial application of competition laws, perhaps including conciliation and arbitration provisions. Even if such ideas are not practically feasible there should at least be more consultations between governments before proceedings are instituted, and there should also be much wider agreement on the taking of evidence abroad in civil and commercial matters.

A further issue is that of export cartels. National attitudes to these vary greatly, and they are specifically allowed or subject to few controls in many countries. National attitudes towards the export cartels of other countries, however, are much more unfavourable. Some type of international agreement on these could well be useful.

The conduct of Community competition policy - Commission powers and procedures

60. The ways in which competition policy has been implemented by the Commission has been the subject of considerable debate in recent years, concerning the resources and powers of the Commission, and the fairness and effectiveness of the procedures used. Various organisations have submitted comments, a number of Parliamentary questions have been addressed to the Commission, and successive Parliament reports on competition policy have discussed these issues and made recommendations.

The Commission has never presented these arguments fully, nor tackled the issues adequately in the context of its Annual Reports, and it has only responded defensively on other occasions.

61. The paragraphs which follow, then, first outline some of the procedural issues which are brought out by the Commission in its Tenth Report and then briefly review some of the major comments and suggestions on topics which the Commission has failed to cover.

62. The Tenth Report limits itself (in points 33 to 57) to describe those decisions of the European Court of Justice tending to clarify and strengthen the rules of procedure in competition matters, on the obligation to notify agreements, on the form of and effects of notification, on powers of Commission investigation, on rules to be followed in the administrative procedure, on the status of so-called "comfort letters" terminating a procedure, and on the Commission's powers to take interim measures. Without going into details a number of these points are worthy of attention.

63. The Court has confirmed the powers of the Commission to carry out investigations following a formal decision without informing the undertakings in question in advance. This would appear to strengthen the powers of the Commission to prevent tampering with needed evidence (Panasonic case - described in point 43 of the Report).

64. The Court has also confirmed its earlier decisions that the Commission procedures in the field of competition are administrative rather than judicial in nature (Fedetab case - point 49 of the Report). As discussed later the issue of the nature of these procedures has been a central feature of the comments submitted to the Commission.

65. The status of letters terminating a procedure is also discussed in the Report (in points 50-52). The court apparently regards these notifications as being simply administrative letters. While they have important legal effects, they cannot be relied upon as against third parties and cannot prevent national courts, if they so wish, from taking up the matters concerned. Unfortunately, such letters would thus appear to do little to reduce the state of often prolonged uncertainty in which many firms can find themselves, almost inevitably, with such a backlog of cases being dealt with by so few Commission officials.

66. Finally the Report outlines the Commission's potential powers to take interim measures which have been recognized by the court in the recent Camera Care case (point 55 of the Report). The Commission can thus take interim decisions using an accelerated procedure "in duly established cases of urgency with a view to remedying a situation which may cause serious and irreparable damage to the party who has requested such measures or intolerable harm to the general interest" (point 56). Such a need might come up in such cases as contested mergers, refusals to supply or unfair pricing practices.

This recognition of the Commission's powers is clearly to be welcomed. It should be noted though that the Commission, in its informal "Practice Note", put out in the context of the Camera Care case and setting out some criteria for deciding upon interim measures, has adopted a generally cautious attitude. There are clearly certain questions to be settled in implementing these powers, regarding when the Commission should intervene, the role of national courts, and the nature of the accelerated procedures which the Commission should adopt, and so on. The Committee urges that these powers be used, and will follow their practical implementation with close interest.

67. In addition to the above issues drawn from the Commission's report itself, a number of other important issues have been raised in the context of comments submitted in the last few years on the conduct of competition policy[1].

68. Among the criticisms which have been made are:

- the staff of D.G. IV is too small;
- too few staff members have industrial experience;
- procedures are too slow, and result in too much uncertainty for firms;
- in contrast to the lengthy periods of investigation the times allotted for replies from firms are often too short;
- there appears to be insufficient, or haphazard case planning;
- the procedures for fact-finding and analysis sometimes seem inadequate; the economic analysis, such as on the relevant market, and the existence of a dominant position, are often weak;
- the Commission is investigator, prosecutor and judge at one and the same time;
- defendants are not always kept fully in the picture, are sometimes given inadequate documentation and given inadequate possibilities of cross-examining the Commission;
- the Advisory Committee on Restrictive Practices and Monopolies may be given inadequate time to study cases, its decisions should not be kept secret[2];
- there is insufficient coordination between the work of DG IV and other DG's within the Commission, they are sometimes given insufficient time to offer their views;

---

[1] for instance by the ICC, UNICE, CBI, CCBE, etc.

[2] It should also be noted that in Advocate-General Warner's decision in the Distillers case (30/78) in which he concurred that there were certain procedural irregularities, he expressed his doubts about the secrecy concerning the work of the Advisory Committee.

- the remedy of appeal to the Court is not a wholly satisfactory one in that the Court is not really able to re-open questions of fact, etc.

69. The Commission has not specifically answered these criticisms in the Tenth Report, nor for that matter in its predecessors. Nor has it responded to the Parliament's opinion on the Ninth Report which suggested that employers, trade unions and consumer associations needed to be given more information on, and be more involved in competition policy, and which also made (in point 7 of the Resolution) some specific suggestions for improving procedures.

The Commission has, however, indicated its general attitude in response to certain Parliamentary questions[1], which is that it is generally satisfied with its procedures and that the changes suggested are unnecessary and might well have the effect of frustrating or rendering substantially more difficult the application of Community competition law. The specific comments are rejected one-by-one.

70. The difficulties faced by the Commission are evident, and must be recognized. On the one hand they are criticized for being too slow, on the other of taking shortcuts and avoiding certain safeguards. They have to protect complainants who may wish to remain anonymous, and also sometimes they must make unannounced visits, yet they must also guarantee fairness for defendant firms. Some of the criticisms may represent special pleading. And with a small number of staff the Commission must not only deal with interpretation of Articles 85 and 86, with a caseload growing every year, but also the increasingly thorny problems posed by state aids and adjustment of state monopolies.

71. Nevertheless, the Commission should be more responsive to the suggestions made, and at least give a more detailed analysis of why it considers them to be misguided. Most countries with effective competition laws have split the functions of fact-finding and prosecution from final decision-making. Procedures with more confidence reposed in them would be even more effective.

---

(1) Oral question No. 25 by Mr Ansquer, written questions No. 677/79 and 2003/80 by Lady Elles, written questions Nos. 840/80 and 1950/80 by Mrs Walz

72. The Commission is therefore called upon to report back to Parliament with its detailed comments on the advantages and disadvantages of the following major suggestions for improving its procedures:

- the establishment of an intermediary tribunal to deal with competition cases, and reviewing questions of fact, with the present Court of Justice as a final court of appeal, dealing essentially with points of law. Such an idea has been tentatively put forward by the court itself in its memorandum to the Council of August 1978;

- the appointment of an independent person or persons, who could be from within the Commission but independent of DG IV, or appointed by the court, who would participate in the investigatory process, and handle certain procedural aspects;

- ways of expediting procedures for granting exemptions, such as that suggested by which "applications for exemption, made in the prescribed form, would be deemed to have been granted at the expiry of a fixed period, such as 90 days, unless within that period DG IV raises serious doubts as to the applicability of Article 85(3)". This would be accompanied by appropriate safeguards and might initially be limited to certain categories of case.

73. It is also suggested, in view of the large number of informal settlements that are made each year (the Tenth Report lists 9 Commission decisions applying Articles 85 and 86 of the EEC Treaty and 16 applying Articles 65 and 66 of the ECSC Treaty, but 183 settlements without a formal decision being taken in proceedings under the EEC Treaty) that more information is provided in the Annual Report on the principles and criteria used by the Commission in reaching these settlements, and on the background facts involved. This could act as a useful guide to concerned firms.

74. There should also be a reinforcing of the economic assessment capability of DG IV and for its economic research to be better integrated with the rest of its activities.

75. Finally, there also needs to be an increase in the number of Commission staff dealing with competition matters, including staff with appropriate industrial experience.

Final remarks

76. The final section of the Commission's Report examines the development of concentration and competition within the Community.

77. Most of the section is quantitative and descriptive in nature. It would be helpful to have somewhat more qualitative interpretation in future reports.

78. Nevertheless, there is one central conclusion to this section which is a striking one indeed, namely that (page 179) "despite the many special aspects involved, a tendency seems to be emerging towards keener competition in the Community" for certain mass consumer goods, and this is evidenced by the arrival of new products and few manufacturers and in many cases in relative falls in prices. Furthermore it may well be (p. 197) "that a new pattern of markets is emerging which are competitively open structures" and that the relatively high level of concentration and the oligopolistic nature of these markets do not impede new entrants and even encourage the development of competitive behaviour".

79. These are welcome conclusions, which contrast sharply with the more guarded comments about the possible dangers of oligopolization and of price disparities, which emerged from the Ninth Report. The conclusions of further Commission Reports on this theme are thus awaited with great interest.

80. Nevertheless, one comment which has been made several times in the course of this report again needs to be re-emphasized in this context, and this is the need for the economic research carried out in DG IV to be better integrated with the rest of its activities. This report has hinted at a number of areas where economic research can back up competition policy, definition of the relevant market for individual products (which might mean the worldwide market for certain products), more rigorous analysis of the advantages and disadvantages of market concentration at Community level as well as of distribution agreements, the economic arguments concerning patent licensing agreements. Other themes such as the long-term impacts of state aids on industrial structures, (a recent Swedish study has outlined certain long-term adverse impacts of such aids), and the role of competition policy in promoting the new information technologies might also be explored.

81. A further comment concerns the contents of the Report. It would be helpful if, besides the descriptions of the actions of the Commission and Court, and the developments in national policies, the positions of industry associations, trade unions, consumer groups and other groups were presented, if only in summary form, in future Reports. Reactions to specific proposals would be especially helpful in this respect. Furthermore, a greater readiness to outline criticism of the Commission's proposals and procedures on the part of the Commission would surely not weaken the Commission's competition policy, but could even strengthen it in the long run.

82. Finally, the Commission has never adequately responded to calls to discuss competition policy within the wider context of other Community policies, and other national policies affecting competition. Past Parliament opinions have talked of the adverse effects of the lack of fiscal harmonization, energy pricing disparities, and so on. Most striking of all, perhaps, is the persistence of technical barriers to trade within the internal market, and where new barriers spring up as soon as old ones are removed. The distortions caused to competition are clearly great. Better integrated Community policies are thus called for if the internal market is to be strengthened. Besides this the links between competition and other Community policies, notably in the industrial and commercial relations fields, was strongly emphasized earlier in this report. A better coordination of Community competition policy with other Community objectives will thus be needed in the future.

OPINION OF THE LEGAL AFFAIRS COMMITTEE

Draftsman: Mr MEGAHY

On 15 June 1981 the Legal Affairs Committee was asked to give its opinion on the Tenth Report on Competition Policy to the Committee on Economic and Monetary Affairs.

On 26 June 1981 the Legal Affairs Committee appointed Mr Megahy draftsman of the opinion.

The Legal Affairs Committee examined the draft opinion drawn up by Mr Megahy at its meetings of 22 and 23 September 1981 and of 19 and 20 October 1981 and adopted the draft opinion unanimously at the latter meeting.

Present: Mr Ferri, chairman, Mr Turner, vice-chairman; Mr Megahy, rapporteur, Mr Dalziel, Mr Guersten, Mr Janssen van Raay, Mr Malangré, Mr Peters (substitute for Mr Plaskovitis), Mr Prout, Mr Sieglerschmidt, Mr Tyrrell and Mr Vetter.

I. Introduction

1. For the first time since direct elections, the Legal Affairs Committee now discusses competition law and policy. The Committee acknowledges the Commission's efforts in the last 19 years in enforcing EEC competition law; this has contributed to opening up national markets and afforded consumers a better choice of products.

2. The Legal Affairs Committee, in its selection of a number of subjects which have been treated in the Commission's Tenth Report on Competition Policy, will discuss the following:

(1) exclusive dealing agreements (cf Tenth Report, pts 1-4),

(2) administrative proceedings before the Commission (cf Tenth Report, pts 33-57),

(3) merger control (cf Tenth Report, pts 20-21),

(4) the draft patent licence group exemption (cf Tenth Report, pt 6),

(5) aids with special reference to the Philip Morris case (case 730/79) (cf Tenth Report, pts 158-227, especially pts 214-217)

II. Exclusive dealing agreements

3. The Tenth Report does not give much coverage to the Court of Justice's ruling in Distillers v Commission (case 30/78)[1], which raises important policy considerations as regards (i) the need to open up the internal EEC market and (ii) the need to protect the sole distributor against the "free rider"; the "free rider" is the economic operator who effects parallel imports of the products distributed by the official distributor.

4. Distillers operated a dual price system, one price for whisky sales on the UK market and another (higher) price for whisky sales on the Continent. The difference in price was considered by Distillers justified as their official distributors on the

---

[1] 1980 ECR 2229. In the Tenth Report the Distillers case is mentioned at points 23, 33 and 37

Continent needed support in return for their promotional and other efforts in penetrating the Continental market and competing against tax-favoured local drinks. The Commission in its Distillers Decision (1979 OJ L50) rejected these arguments. The Court of Justice dismissed Distillers' claim on a technicality (the general conditions of Distillers had not been notified in due form to the Commission so that an exemption under Article 85(3) was not available) without going into the merits. The Advocate-General found largely for Distillers. The upshot of the Distillers Decision was the withdrawal of Johnny Walker Red label from the UK market.

5. While basically agreeing with the Commission's policy that parallel imports must be permitted if national markets are not to become isolated, the Legal Affairs Committee would welcome an exchange of views with the Commission as regards the need to protect a distributor's investment (a distributor would often only be a small or medium-sized undertaking) against the "free-rider" perhaps, for a limited time only, by means of a dual price structure or compensatory payments from the manufacturer to his official distributor to compensate him for loss of potential clients. After all, the Commission permits a certain amount of client restriction in selective distribution agreements (cf Tenth Report, pt 31)[1].

6. The Tenth Report at point 3 intimates that the Commission may reserve Regulation 67/67[2] for exclusive selling agreements (whereby a manufacturer agrees to sell his products in a given market only to an appointed distributor for resale in the market) and produce a separate regulation for exclusive supply agreements (whereby an undertaking agrees to secure his supplies of a given product only from a specified manufacturer for resale on a given market). Perhaps it would be in the interests of greater legal certainty, for "requirements" contracts, where an undertaking agrees to secure his supplies of a given product (not necessarily for resale but for further processing), either to be included in this separate Regulation or to form the subject of an explanatory Commission Notice.

---

[1] For good examples of permitted selective distribution agreements, cf the Court's judgement in the Metro case (case 26/76, 1977 ECR 1875) and the Commission's Decision in BMW (1975 OJ L29)

[2] 1967 JO No 57

7. Nevertheless the Legal Affairs Committee would welcome the opportunity for the European Parliament to debate the final draft of Commission Regulation 67/67, complete with modifications, before its adoption by the Commission.[1]

III. Administrative proceedings before the Commission

8. Hitherto the development of the EEC's competition law has been more concerned with substantive matters rather than with procedure. However, as the Tenth Report on Competition Policy shows, the Court of Justice's attention has been recently drawn to procedural problems between the Commission and undertakings whose activities are being investigated by the Commission.

9. The Legal Affairs Committee considers that, amongst possible topics of discussion, it would like to raise two subjects:

(a) the Commission as both prosecutor and judge in administrative proceedings conducted by the Commission;

(b) the delay between notification of an agreement under Regulation 17/62 and the adoption of the Commission's formal Decision.

(a) The Commission as both prosecutor and judge

10. The facts surrounding the following cases suggest that undertakings being investigated by the Commission are perhaps not content with the administrative procedure that is followed:

(a) in joined cases 209 - 215/78 and 218/78 Fedetab (1980 ECR 3125), submissions raised by the plaintiffs to challenge the legality of the administrative proceedings before the Commission, included the following:

(i) the Commission refused to hear certain interested associations of wholesalers and retailers;

(ii) the Commission refused to accede to Fedetab's request to hear associations of wholesalers;

---

[1] Proposed amendments to Regulation 67/67 published in 1978 OJ C31

(iii) the Commission refused to disclose the file containing the evidence on which the Commission's case against Fedetab was based.

The Court rejected all three submissions, but as regards submission (iii) held that it had not been proved that as regards essential facts, the Commission refused to produce the relevant documents (cf Tenth Report, pts 44-49);

(b) in case 155/79 AM & S v. Commission (not yet decided) where the Commission affirms that it has the right (i) to inspect a document, for which the undertaking being investigated claims privilege, (in this case documents between lawyer and client) and then (ii) to decide whether or not the document is privileged. The Advocate-General disagreed with the Commission's submission (cf Ninth Report, pt 136);

(c) in case 36/78 Distillers v Commission (1980 ECR 2229), the plaintiff complained that (i) the Advisory Committee, when consulted by the Commission, was not in possession of the minutes of Distillers' hearing before the Commission, (ii) the Advisory Committee was not given several supplements to the plaintiff's answer to the statement of objections and (iii) the Advisory Committee was forwarded a complete text of the third party intervener's complaint, whereas only an excised version was forwarded to the plaintiff. The Court did not consider these alleged irregularities (cf pt 4 above).

11. The Legal Affairs Committee notes that neither in the Tenth Report on Competition Policy nor in its previous reports has the Commission carried out an appraisal of its administrative procedures in the field of competition. The Legal Affairs Committee would welcome a dialogue with the Commission on this subject and on the basis of these and other cases suggests that the Commission consider the possibility of submitting the whole file to the undertakings concerned before the statement of objections (except where outstanding cases for the need to protect professional secrecy dictate otherwise) and of giving the undertakings concerned sufficient time in which to answer the said statement.

12. If the Commission were to do this, this would go some way to answering a charge made by the International Chamber of Commerce already in 1975:[1]

> "Facts are collected by the Commission from various sources, but the accused party is often not informed sufficiently early of all the facts on which the Commission bases its charges and subsequently its decision so that in such instances the party in question is unable to correct, qualify or amplify those facts.
>
> The result is that in these cases it is only when the Commission's decision is handed down that it becomes evident that the charges and/or decision have been based either on incomplete facts, or on a misunderstanding of the facts, omitting what to the accused party are important considerations. Even at that stage it may sometimes be difficult for the accused to be clear as to what facts the Commission has used to arrive at its decision, since the Commission's reasoning may be insufficiently set out."

Further on the same ICC document reads:

> "In practice the hearings are used by the Commission as a further means of seeking information, often to add emphasis to the charges which have been made and to the draft decision which has already been prepared, but seldom provide adequate opportunity for comment by the accused parties."

The Legal Affairs Committee would welcome an opportunity to discuss the possibility of having independent hearing examiners distinct from the investigative services of the Commission, as this is an issue which has given rise to perhaps justified adverse criticism.

(b) The delay between notification under Regulation 17/62 and the Commission's decision

13. The Tenth Report informs us that in 1980 the Commission took 9 decisions applying Articles 85 and 86 EEC Treaty and settled some 183 cases without a formal decision.[2] These would presumably have been settled and terminated with a so-called 'comfort letter' sent to the undertaking concerned by a senior Commission official stating that the Commission with its current knowledge of the available facts considers the agreement or practice not to be caught by Articles 85 and 86. However, a 'comfort letter' is neither a negative clearance or an exemption under Article 85(3).

The Court of Justice's decisions in the Perfume case (joined cases 253/78 and 1 to

---

[1] ICC Paris Doc. No. 225/206

[2] Cf Tenth Report, pt 104

3/79 and case 37/79, 1980 ECR 2327, 2481 and 2511) and the Oréal case (case 31/80 not yet reported in the ECR)[1] rather diminish the attraction of a 'comfort letter' for the following reasons:

(a) "Comfort letters" terminate the provisional validity of 'old' agreements (agreements in force before Regulation 17/62 was adopted)[2], thus rendering the agreements concerned liable to be declared void by a national court if that court believes the agreement to be contrary to Article 85(1).

(b) As regards 'new' agreements (concluded since Regulation 17/62), no provisional validity from the date of notification exists and receipt of a 'comfort letter' means that an exemption is unlikely. Thus, the possibility that the agreement might later be declared illegal by a national court and indeed even by the Commission remains.

14. The Legal Affairs Committee is concerned that economic operators would be deprived of legal certainty for their agreements if the time-lag between notification and decision is too long (in Campari it was 15 years).[3] Legal certainty is necessary if they are to carry out investments and other operations in good heart. 'Comfort letters' may be an administrative convenience but do not really give much 'comfort' to the recipients.

IV. The draft patent licence group exemption[4]

15. The draft Regulation on the patent licence group exemption[5] will only afford exemption to licencing agreements where either the licensor grants the licensee an

---

1 Cf Tenth Report, pts 50-52 for these cases

2 Regulation 17/62, 1962 JO No. 13, amended by subsequent Regulations published in 1962 JO No. 162 and 1971 OJ L285

3 Commission Decision Campari 1978 OJ L70

4 Cf Tenth Report, pt 6

5 1979 OJ C 58 and 110

exclusive territory where neither the licensor nor other licencees may sell directly the patented product, or the licensee agrees not to sell the licensed product in a territory reserved for the licensor or other licensees, but on condition that the annual turnover of the licensor or the licensee does not exceed 100 million U.A.

16. The Legal Affairs Committee believes that by not affording the group benefit of a properly limited exploitation territory to large undertakings, the Commission might be restricting the flow of new technology from large undertakings to small and medium sized undertakings and from large third country undertakings to EEC undertakings. After all, an exclusive territory only restricts competition that would not otherwise exist without the patent licence.
In the opinion of the Legal Affairs Committee, the draft Regulation is also a disincentive for know-how licences, as to benefit from the group exemption (i) no territorial exclusivity would seem to be permitted, (ii) the licence would not be limited in time but would be virtually perpetual. Nevertheless, the Committee considers that it is right that field of use restrictions of licensed know-how should not be permitted.

17. Certainly, the fact that know-how licences may virtually not be limited in time is a serious disincentive to transferring technology and ignores the 'spring-board' doctrine prevalent in the UK and in the Federal Republic of Germany, as well as in the USA, whereby an undertaking (ie. the licensee) should not have a head-start on his competitors by being able to retain licensed know-how that has not fallen into the public domain.

18. To overcome these difficulties, undertakings may notify their agreements to the Commission, with a view to obtaining an individual exemption, but the hazards and delays involved are set out in Section III (b) above.

V. Merger Control[1]

19. The Legal Affairs Committee shares the Commission's disappointment that the Council has not yet adopted the Commission's proposal for a Council Regulation on merger control.[2] However, this Committee believes that at the root of the problem is the highly political nature of merger control inherent in the relevant legislation of some Member States.

20. In the UK, for example, there is no obligation to notify, but mergers creating a monopoly or involving the take-over of assets in excess of £5 million may be referred by the competent minister to the Monopolies and Mergers Commission. However, the minister is not obliged to make such a referral. Furthermore, the minister alone decides on what action to take, even when he chooses to refer the merger to the Monopolies and Mergers Commission. The political nature as opposed to the juridical nature of UK Merger control was illustrated recently in the newspaper sector: why was the take-over of Times Newspapers by Mr Rupert Murdoch (the owner of the 'Sun' newspaper) not referred to the Monopolies and Mergers Committee, whereas the minister referred to the MMC the proposed take-over of the 'Observer' newspaper by the Lonrho industrial group?

21. In France concentrations of undertakings whose turnover exceeds 40% of consumption in the goods or services concerned or of undertakings of whom at least two have turnovers each exceeding 25% of consumption in the goods or services of a similar nature, are subject to control. However, notification is not obligatory, but optional. The competent minister may take action against the concentration if the 'bilan économique' warrants it.

---

1 Cf Tenth Report, pts 20-21

2 Commission proposal published 1973 OJ C 92; European Parliament's opinion (1974 OJ C 23) based on two Reports by Mr Artzinger Docs 263/73 and 362/73 and on Mr Bermani's opinion drawn up on behalf of the Legal Affairs Committee Doc 263/73/Ann.

22. In Ireland also the competent minister has the power of final decision as to the fate of a notified merger. At any rate mergers involving undertakings each with gross assets in excess of £1.5 million or with turnover in excess of £2.5 million must be notified to the competent minister.

23. In the Federal Republic of Germany, the control of mergers under the Gesetz gegen Wettbewerbsbeschränkungen of 1957, is subject to less political influence. Any merger which increases or creates a market share by or of 20% or involves an undertaking with a 20% market share in another market or involves undertakings with a combined turnover in excess of DM 500 million or with a combined workforce of over 10,000 persons must be notified to the Bundeskartellamt before or after the act of merger. The Bundeskartellamt is an independent administrative authority. However, there is a political content, for the Minister of Federal Economics may authorize a merger, prohibited by the Bundeskartellamt if the interests of the economy as a whole are served.

24. Denmark, Belgium, the Netherlands and Italy have no thorough rules on merger control. In Luxembourg, the competent minister may terminate a merger or take-over if its effect on competition would be contrary to the public interest.[1]

25. The Legal Affairs Committee considers it important that there is some control of mergers at Community level if any common industrial strategy is to emerge.

VI. State aids

26. Prominence in the Tenth Report is given to the Philip Morris case (case 730/79, not yet reported in the ECR) where the award of a general state aid was declared by the Commission to be incompatible with the common market. Philip Morris challenged this decision of the Commission.[2]

---

1 A working paper (PE 73.148) prepared for the Committee on Economic and Monetary Affairs gives a synopsis of the legislation in the different Member States, not only on merger control but also on competition law generally

2 Cf Tenth Report, pts 212-217

27. One wonders whether Philip Morris in respect of its investment in Bergen-Op-Zoom would have received its state aid without any intervention on the part of the Commission or indeed with the Commission's blessing, if the state aid had been awarded in the context of the Dutch regional aid programme, the "Investeringspremieregeling", in which Bergen-Op-Zoom is designated as a development centre (cf pt 167 Eighth Report on Competition).

28. Furthermore the summary of the Commission on the legal position of state aids given at pt 216 of the Tenth Report is misleading, as the said summary should only be applicable to general state aid schemes. After all, the Court's ruling in Philip Morris was concerned with a general aid scheme.

VI. Conclusion

29. In conclusion the Legal Affairs Committee draws to the attention of the Committee on Economic and Monetary Affairs the following points :

(1) the desirability for the European Parliament to debate the final text of Commission Regulation 67/67 and of the draft Commission Regulation granting a block exemption to certain patent licences before the Commission definitively adopts these texts (cf. points 2-7 and points 15-18 above);

(2) while endorsing the Commission's policy of promoting a single Community market through parallel imports, the Legal Affairs Committee considers that the small or medium-sized distributor representing a new product should be given greater protection, even for a limited time, than that currently available under Regulation 67/67 (cf. points 3-7 above);

(3) the administrative procedure followed during Commission investigations of alleged anti-competitive behaviour is being more and more challenged by undertakings before the Court of Justice (cf points 8-12 above). Fundamental questions include whether the Commission should, in effect, be both prosecutor and judge during the administrative proceedings and whether the Commission should transmit its whole file to the undertaking being investigated (except where in respect of individual documents or part of documents outstanding reasons of professional secrecy dictate otherwise);

(4) the need for, and the need to define the extent of, professional privilege (cf. point 10 (b) above);

(5) the need to remove the lack of legal certainty as to the status of notified new agreements, by requiring the Commission to issue preliminary decisions, analogous to the preliminary opinions provided for by Article 15 (6) of Regulation 17/62 within a fixed time limit, and of "comfort letters" by requiring the Commission to deal with every notification or application for negative clearance by formal decision or certification and to publish the same (cf points 13-14 above);

(6) the need for Community rules on merger control, if any common industrial policy is to emerge (cf. points 19-25 above);

(7) the legality of a given state aid programme would seem to depend overmuch on the label attached to it, whether it be general, regional or sectoral, as shown by the Philip Morris case (cf. point 27 above);

(8) the need for the Commission to monitor the commercial consequences of its decisions and to include a section in its annual report evaluating the effects of its decisions on competition.