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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

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 Förster, 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.

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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.

EXPLANATORY STATEMENTINTRODUCTION

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 Council¹

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