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REPORT

on the Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (COM(1999) 101 – C5-0105/1999-1999/2108(COS))

Committee on Economic and Monetary Affairs

Rapporteur: Karl von Wogau

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PROCEDURAL PAGE

By letter of 30 April 1999 the Commission forwarded to the European Parliament its White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (COM(1999) 101-1999/2108(COS)).

At the sitting of 13 September 1999 the President of Parliament announced that he had referred the White Paper to the Committee on Economic and Monetary Affairs as the committee responsible and to the Committee on Legal Affairs and the Internal Market for its opinion (C5-0105/1999).

The Committee on Economic and Monetary Affairs had appointed Karl von Wogau rapporteur at its meeting of 27 July 1999.

It considered the White Paper and the draft report at its meetings of 31 August, 22 September, 19 October and 24 November 1999.

At the last meeting it adopted the motion for a resolution by 31 votes to 1, with 2 abstentions.

The following were present for the vote: Randzio-Plath, chairman; Abitbol, García-Margallo y Marfil, vice-chairmen; von Wogau, rapporteur, Agag Longo, Berenguer Fuster, Berès, Bullman, van den Burg (for Balfe), Della Vedova, Ettl (for Donnelly), Evans Jonathan, Färm (for Green), Gasoliba I Böhm, Goebbels, Huhne, Jonckheer, Karas, Kauppi, Konrad, Langen (for Burenstam Linder), Lulling, Mombaur (for Madelin), Marinos, Naranjo Escobar (for Sartori), Pérez Royo, Pomés Ruiz, Radwan, Rapkay, Schmidt, Tannock, Thyssen, Torres Marques, Villiers.

The Committee on Legal Affairs and the Internal Market decided on 23 November 1999 not to deliver an opinion.

The report was tabled on 30 November 1999 .

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

MOTION FOR A RESOLUTION

Resolution on the Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty[1] (COM(1999) 101 – C5-0105/1999 - 1999/2108(COS))

The European Parliament,

- having regard to the Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (COM(1999) 101 – C5-0105/1999,

- having regard to its resolution of 9 February 1999 on the 27th report of the Commission on competition policy[2],

– having regard to its resolution of 18 July 1997 on the Commission's Green Paper on vertical restraints in EC competition policy (Thyssen report)[3],

– having regard to its resolution of 15 April 1999 on the proposal for a Council regulation (EC) amending Regulation No 19/65/EEC on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, and on the proposal for a Council regulation (EC) amending Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty(Thyssen report)[4],

- having regard to the results of a hearing on the subject in the Committee on Economic and Monetary Affairs of 22 September 1999,

- having regard to Art. 160 of its Rules of Procedure,

- having regard to the report of the Committee on Economic and Monetary Affairs (A5-0069/1999),

A. whereas competition policy is a fundamental element of the social market economy,

B whereas an effective competition policy will promote the competitiveness of European businesses,

C. whereas an effective competition policy is, in particular, also in the interests of consumers, as competition constantly compels enterprises to make available better and cheaper products and services,

D. whereas the existing system for implementing European competition rules has remained virtually unaltered since its inception in the early years of the Community, although the context has changed radically;

E. whereas in the past the existing system was perfectly justified, and it has done much to help establish a European tradition of competition;

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1 Now Art.81 and 82 of the Treaty, this applies to the whole text
2 OJ C 132, 12/05/1999, p. 1
3 OJ C 286, 22/09/1997, p. 326-347
4 OJ C 219, 30/07/1999, p. 369-423

F. whereas under the present conditions the notification and authorisation system operates slowly and cumbersomely, and whereas in the period since Regulation 17 of 1962, during which hundreds of notifications have been received every year, there have been only nine cases in which the Commission has decided on prohibition,

G. whereas the possibility of application of Community competition law by the courts will give businesses suitable means of settling their private disputes with speed and immediacy, while allowing the Commission and the national competition authorities to focus their activity on the most important cases affecting the public interest,

H. whereas the process of liberalisation and privatisation in public service sectors has not brought about the disappearance of the dominant position of certain businesses, which are now in private hands, a concentration of considerable power enabling them to act as if they had no competitors, to the detriment of the latter, their suppliers, their customers and all consumers,

1. Considers modernisation of European competition rules to be urgent, in view of the shortcomings of the existing system on essential issues and the important changes that have taken place in the real economic world;

2. Welcomes the Commission's proposals as a sound, while still insufficient, basis for discussion on the reforms which are under consideration;

3. Notes that the proposals only concern the rules on agreements between undertakings which restrict competition within the common market, and stresses that the Commission envisages retaining the notification system for State aid and mergers;

4. Supports in principle the main points in the White Paper, namely the abolition of the notification and authorisation system further to Article 81 (formerly 85) of the Treaty and decentralised implementation of competition rules by enhancing the role of the authorities and courts of the Member States, as this could do much to bolster the European 'culture of competition';

5. Stresses that the modernisation of the existing system must not impair legal certainty or the consistent application of competition rules in the Community, and draws attention in this regard to its resolutions on the Commission's Green Paper on vertical restraints[1] and the ensuing regulations[2];

6. Considers it necessary, therefore, that the Commission should assist the national authorities and courts by means of group exemption regulations, guidelines and notices;

7. Notes that the White Paper does not contain any significant contributions for modernising the application of Article 82, and requests the Commission to emphasise the prevention of abuse of a dominant position, particularly in fields which have been the subject of liberalisation and privatisation;

8. Urges the Commission to adopt criteria for modernising the application of Article 82, by introducing elements of economic analysis and the consideration of market power to

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1 Resolution of 18 July 1997. OJ C 286, 22/09/1997, p. 326-347

2 Resolution of 15 April 1999. OJ C 219, 30/07/1999, p. 369-423

determine a dominant position; also insist on the prosecution of exploitative abuses as offences against suppliers, customers and consumers;

9. Considers there is a need to clarify the criteria on which cases must be analysed by a specific national authority, to prevent parties from choosing to apply to the authority likely to be most favourable to them;

10. Considers that, in cases where clarification is in the general interest, it should remain possible for undertakings to obtain advance clarification from the Commission, inter alia by means of reasoned opinions; however, this procedure must be confined to exceptional cases in which doubts need to be resolved, in order to prevent any repeat of the proliferating number of notifications that has made the present procedure ineffective;

11. Considers that there is a need for the Commission to show more precisely than it does in the White Paper that the reform proposals would not lead to a purely retrospective scrutiny of competition, and that the Commission's involvement will be guaranteed in equal measure in all the Member States;

12. Considers that Regulation 17/62 should be the subject of a thorough review in its entirety, as it does not meet the present requirements, and asks the Council to adopt a new procedural regulation that will include defence rights for the accused, separation of the distinct stages of the procedure, the definition of deadlines for official procedures – for the Commission as well – and the legitimation of those concerned and their access to the dossier;

13. Supports the Commission criterion of giving greater importance to complaints in the new system, and considers that the role of complainants must be strengthened in the Regulation itself. There is also a need to make it easier for consumer associations to intervene as complainants;

14. Notes that the priority of Community law must not be called into question;

15. Calls on those Member States which have not yet empowered their competition authorities and courts to apply Community law to do so as soon as possible;

16. Calls for concentration on specialised courts in all the EU Member States, in the interest of consistent application of the law in cartel proceedings, in order to safeguard legal certainty;

17. Considers it necessary, in connection with the forthcoming reform of European competition rules, to review the principle of subsidiarity, and considers it vital, in particular, to adopt clear criteria for the allocation of cases within the network of cartel authorities;

18. Calls on the Member States to establish a network of competition authorities and, if they have not yet done so, to create the national conditions for decentralised immediate application of Articles 81 and 82 of the EC Treaty and the establishment of competition authorities that are independent of instructions;

19. Observes that the central role of the Commission as guardian of the Treaties must not be called into question;

20. Considers it necessary to intensify cooperation between the Commission and national supervisory authorities, and among national supervisory authorities, and in this connection suggests promoting exchanges of officials and joint meetings such as study seminars and the like, at which they can exchange opinions and experience, and suggest to require the national competition authorities that want to abolish the advantage of Community group exemption, to provide the Commission and the other national competition authorities with information on the subject;

21. Calls on the Commission to analyse the reasons why it has been difficult for the courts in the Member States to apply Community competition law, and asks it to devise the necessary measures to remove the present obstacles;

22. Considers it important that reasons for competition decisions should continue, in the interest of the policy's transparency, to be stated in terms of their benefit to the consumer in order to make it clear to what extent decisions have taken account of the principle of 'allowing consumers a fair share of the resulting benefit';

23. Considers it necessary to further clarify the rules on small and medium-sized enterprises and to protect such enterprises from possibly dubious penalty procedures, so that only wilful and grossly negligent violations of the cartel prohibition are penalised with fines, as well as extending the cases in which cooperation between small and medium-sized enterprises should not be regarded as an infringement of Article 81, especially when such collaboration has the aim of competing with economic operators with considerable market power, or negotiating standard conditions with suppliers or customers who have such power;

24. Considers that any increase in the Commission's investigating powers should not imply any diminution in the defence rights of those concerned;

25. Observes, with reference to the future enlargement of the European Union, that the applicant countries, all of which have undergone a protracted planned-economy phase, face special challenges in establishing an effective competition system;

26. Calls on the Commission, therefore, to assist these countries more by means of information and cooperation in order to ensure that the requisite institutions and the requisite staff are available in time;

27. Considers that, as part of the modernisation process, the application of competition rules by the Commission would gain further in efficiency and consistency if competition issues relating to all sectors were dealt with by a single Directorate-General, and calls therefore for competition issues relating to agriculture, fisheries, transport, coal and energy to be transferred to the Directorate-General for Competition;

28. Emphasises that the Commission's annual report on competition must remain the central document of Community competition policy even after the reform of the European competition system, and that the report must include all the developments and decisions that are essential for the Community and that will take place in the Member States after decentralisation;

29. Takes the view, that the modernisation of the European competition system as proposed in the White Paper is feasible under the existing provisions of the EC Treaty;

30. Instructs its President to forward this resolution to the Commission, the Council, the Court of Justice and the governments, parliaments and national competition authorities of the Member States.

EXPLANATORY STATEMENT

I. Background

The existing system of European competition rules was introduced in the early years of the European Community. Ludwig Erhard, then Finance Minister of the Federal Republic of Germany, made a significant contribution to the setting up and successful implementation of the European competition regulations.

The 1957 Treaty of Rome stipulated that competition within the internal market had to be protected from distortions and that the economic policy of the Community was committed to the principle of an open market economy with free competition.

These principles were put into effect in the competition rules in Articles 85 to 94 of the EEC Treaty. The key elements of European competition law are Article 85 (prohibition of restricted practices) and Article 86 (abuse of a dominant market position).

To enable the Commission to apply the competition rules in full, in 1962 the European Commission under President Walter Hallstein and the Commissioner responsible for competition at the time, Hans von der Gröben, framed the necessary implementing regulation.

The European Parliament was also consulted on the proposals and its rapporteur, Arved Deringer, made a significant contribution to drafting the provisions. Under the system set up, which was modelled on the German restriction of competition act, agreements between undertakings that restrict competition are in principle prohibited (prohibition rule). However, they may be permitted on certain conditions. Exemptions of this kind – after prior notification – may, however, be authorised only by the European Commission.

At that time, when most Member States had limited experience of regulating competition and only a few, apart from Germany, had enacted competition laws and set up competition authorities, it was right to opt for a centralised notification and authorisation system. In a manageable Community of six Member States it was also the practical solution. In subsequent years the system has proved its worth and has made a significant contribution to creating a European culture of competition.

Now, almost forty years later, the general environment is very different but European competition rules remain virtually unchanged. The European Commission has therefore embarked on an ambitious reform programme, which was launched under the last competition Commissioner, Karel van Miert.

II. Reform of the European competition system

The proposal to modernise European competition rules, put forward by the European Commission in its White Paper, has received a mixed reaction. Although no one would deny that the existing system is in urgent need of reform, some experts and interested parties feel that the Commission's modernisation plans go too far.

However, in my view, when an authority that is often criticised for its bureaucratic and centralising tendencies comes up with a proposal to reduce bureaucracy and decentralise, that proposal has to deserve at least serious consideration.

A hearing recently organised in Parliament's Committee on Economic and Monetary Affairs highlighted the differences in opinion. The proposals can indeed be described as radical and, if implemented, would substantially change the present European competition system.

A review of the way in which the system operates nonetheless also suggests that it is not sufficient to treat the symptoms but that a root and branch reform is necessary. The environment has changed. The Community has grown to 15 Member States and further accessions are imminent. The creation of the European internal market and the introduction of the single currency have significantly altered the general framework for the economic life of the Union. Furthermore, since the system was introduced, a European culture of competition has grown up - although national and regional differences do, of course, persist. Finally, all the Member States now have competition authorities that are used to applying competition law.

In these circumstances, such a centralised notification and authorisation system is too time-consuming, bureaucratic and cumbersome. This is a major disadvantage for undertakings because agreements are often made for short periods and require rapid decisions. The European Commission faces a backlog of 1200 unprocessed cases. It currently receives about 220 notifications a year. Against this, there are only between 5 and 10 exemption decisions a year and about 170 comfort letters, which are not legally binding.

The present system has been commended for imposing a discipline on undertakings in that they will formulate their agreements in compliance with the law on restraint of competition in order to obtain an exemption. However, agreements that restrict the market and have no chance of securing an exemption are, of course, not even reported to the Commission. In other words, the Commission is inundated with mostly straightforward notifications, which means that serious breaches of European competition law, the 'hard core cartels', are not even uncovered.

Over the 37 years in which the Commission's notification and authorisation system has been in existence, in only nine cases has a decision to prohibit an agreement been taken solely on the basis of a notification. Given the hundreds of cases each year, this is an extraordinarily low figure.

The modernisation proposed by the Commission has four main objectives: consistent implementation of the competition rules, effective decentralisation, simplification of procedures and uniform application of law and policy throughout the European Union. According to the Commission, this will require abolition of the notification and authorisation system. It will then be up to undertakings themselves to assess whether their agreements comply with the ban on restrictive practices. The national authorities and courts, which are to play a greater role in application of the competition rules, would have to decide, in the event of disputes, whether this assessment is correct.

The White Paper – according to its title – covers only restrictive practices (Article 1, former Article 85 of the Treaty) and the abuse of a dominant market position (Article 82, former Article 86). The notification procedure for state aids and corporate concentrations remains unchanged. However, the provisions concerning the abuse of a dominant market position (Article 82) have not been altered either – here the arrangements that the Commission proposes to introduce for agreements under Article 81 already apply, namely undertakings with a dominant position themselves have to assess whether they are abusing that position and thereby damaging trade between the Member States.

However, a prior declaration may be made to the Commission informally and the relevant provisions may be applied by both the Commission and the authorities and courts of the Member States. To this extent the title of the White Paper goes further than its actual contents.

What are we to make of these proposals? The major advantage of the Commission's proposals is that the goal of decentralisation is fully consistent with the principle of subsidiarity underlying Community policy. This principle was written into the Maastricht Treaty on two grounds, firstly it will lead to greater effectiveness and secondly it will increase public acceptance of Community regulations.

The question we have to ask today is whether the authorities and courts in all 15 Member States are in a position to play an enhanced role in applying the competition rules without jeopardising the consistent application of law in the Community. As far as the national monopolies and mergers commissions are concerned, it can be assumed that they have become sufficiently familiar with applying the competition rules over the past forty years. However, to avoid disputes and greater discrepancies, in practice they should cooperate more with each other and with the Commission. This entails consolidating and expanding the existing information and communications network and staff exchange programmes.

It is also important to establish clear criteria for referring cases to the competition authorities within the network. Multiple checks and forum shopping must be avoided. The European Commission should therefore retain the option of taking over a specific case in the event of disputes between authorities. The Commission must also provide the authorities with support, in the form of regulations on group exemptions, guidelines and notices.

The national courts will face major challenges in applying European competition rules. Critics of the Commission proposals maintain that the civil courts in most Member States are not sufficiently familiar with the examination of complex matters of restraint of competition law. They are not used to dealing with detailed economic analyses and studies, nor do they have specific knowledge of market mechanisms, on top of this they have limited resources and an already heavy workload. This could result in time-consuming court proceedings and contradictory court decisions.

The Commission does, however, point out that under current case law the national courts are already empowered to apply Articles 81(1), 82 and 86. Consequently, they already have the task of applying European law and assessing complex economic matters.

The courts can also refer to decision-making practice over a period of forty years. When in doubt, there is the possibility of referring cases to the European Court. This will ensure that the law is applied in a uniform manner.

Finally, the Commission can provide the civil courts with support not only by issuing guidelines and notices but also by intervening as *amicus curiae*. In some countries, for instance Germany, there are specific authorities dealing with competition matters.

Undertakings often argue that the modernisation of the competition rules proposed by the Commission would jeopardise legal certainty. Particularly in the case of agreements in the grey area, it is claimed that removal of notification would lead to considerable uncertainty that might in some cases prevent firms from concluding agreements. This might ultimately also lead to job losses.

Uncertainty would arise firstly with regard to how a court might view an agreement in the event of a complaint and secondly because the immunity from payment of fines would be removed. Under the existing system, undertakings are protected against having to pay fines as soon as they notify the Commission of an agreement. However, the German restriction of competition act likewise gives no immunity from the payment of fines. Even the comfort letters sent by the Commission in virtually all cases – as mentioned earlier – do not provide any protection in terms of legal certainty since they are not legally binding.

It is nonetheless reasonable that under certain conditions undertakings should have the option of clarifying matters with the Commission beforehand. However, quantitative and qualitative criteria should be established to restrict this possibility so as to avoid a vast influx of questions. In connection with prior clarification, the Commission could draw up business review letters which, like the comfort letters, would have no legal force, but would provide guidance, for instance, in court, by clarifying the Commission's assessment of a particular case.

In re-framing the procedural rules, it is particularly important to take account of the interests of small and medium-sized undertakings. One of the tasks of the competition system is to protect small businesses from powerful monopolies. The review of the competition regulations should be used to clarify the rules relating to SMUs.

In view of the forthcoming enlargement of the European Union, the modernisation of the competition rules raises a number of other issues. The Commission says that the 1962 decision introducing a notification and authorisation system was justified on the grounds that 'the competition authorities of the Member States, where they existed, had been set up recently and had little experience in the field of competition'[5]. This is exactly the position in which the countries of Central and Eastern Europe applying to join the European Union now find themselves. They face a huge challenge in creating a viable system of competition after decades of a planned economy. To enable their authorities and courts to do their job of applying the competition rules properly, the provision of information and advice must be continued and stepped up.

The German Monopolies Commission and other authors have maintained that abolition of the notification requirement would not be possible without a change in the Union Treaty. On this point, Parliament's Legal Service takes the view that the Community legislator deliberately left open the possibility of a directly applicable exception system like that now proposed. At the end of the 1950s the authors of Article 81 were unable to agree on an authorisation system (the German position at that time) or a directly applicable exception system (the French position), they therefore worded the article in a way that left the choice to the Community legislator. At the time it was decided to introduce an authorisation system. However, the switch to a directly applicable exception system would be perfectly possible, legally speaking, under the existing Treaty provisions. All it would require would be a Council regulation.

It should be pointed out that both these systems are based on the prohibition principle. The proposed reform would merely make the system more effective and more manageable.

The Commission's White Paper is a valuable contribution to the debate on the forthcoming reform of European competition rules. It affords us opportunities but has potential risks. Although a series of improvements and clarifications could be made, the proposals are on the right lines.

[5] White Paper, paragraph 15, p. 11.