Amendment 1
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on behalf of the S&D Group
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Report
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Annual Report on EU competition policy
(2011/2094(INI))

Motion for a resolution (Rule 157(4) of the Rules of Procedure) replacing non-legislative motion for a resolution A7-0424/2011

European Parliament resolution on the Annual Report on EU Competition Policy

The European Parliament,

– having regard to the Commission Report on Competition Policy 2010 (COM(2011)0328) and the accompanying Commission staff working paper (SEC(2011)0690),

– having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹,

– having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)²,

– having regard to the Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003³ (the Fining Guidelines),

– having regard to the Commission communication of 13 October 2008 entitled ‘The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis’⁴ (the Banking Communication),

– having regard to the Commission communication of 5 December 2008 entitled ‘The

¹ OJ L 1, 4.1.2003, p. 1.
recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition\(^1\) (the Recapitalisation Communication),

– having regard to the Commission communication of 25 February 2009 entitled ‘The treatment of impaired assets in the Community banking sector’\(^2\) (the Impaired Assets Communication),

– having regard to the Commission communication of 23 July 2009 entitled ‘The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules’\(^3\) (the Restructuring Communication),

– having regard to the Commission communication of 17 December 2008 entitled ‘Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis’\(^4\) (the original Temporary Framework),

– having regard to the Commission communication of 1 December 2010 entitled ‘Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis’\(^5\) (the new Temporary Framework, replacing the one which ended on 31 December 2010),

– having regard to the study, commissioned by Parliament, of June 2011 entitled ‘State aid – Crisis rules for the financial sector and the real economy’\(^6\),


– having regard to the draft Commission regulation amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty as regards the simplification of Member States’ reporting obligations,

– having regard to the Commission staff working document entitled ‘Public Consultation: Towards a Coherent European Approach to Collective Redress’ (SEC(2011)0173),

– having regard to the DG Competition document entitled ‘Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU’\(^7\),

– having regard to the DG Competition document entitled ‘Guidance on procedures of the

\(^1\) OJ C 10, 15.1.2009, p. 2.
\(^5\) OJ C 6, 11.1.2011, p.5.
Hearing Officers in proceedings relating to Articles 101 and 102 TFEU\(^1\),

– having regard to the DG Competition document entitled ‘Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases’\(^2\),

– having regard to the Framework Agreement of 20 November 2010 on relations between the European Parliament and the European Commission\(^3\) (referred to hereinafter as ‘the Framework Agreement’), in particular paragraphs 12\(^4\) and 16\(^5\) thereof,


– having regard to its resolution of 15 November 2011 on reform of the EU state aid rules on Services of General Economic Interest\(^8\),


– having regard to the report of the Committee on Economic and Monetary Affairs and the opinions of the Committee on the Internal Market and Consumer Protection and the Committee on Transport and Tourism (A7-0424/2011),


\(^3\) OJ L 304, 20.11.2010, p. 47.

\(^4\) ‘Each Member of the Commission shall make sure that there is a regular and direct flow of information between the Member of the Commission and the chair of the relevant parliamentary committee.’

\(^5\) ‘Within 3 months after the adoption of a parliamentary resolution, the Commission shall provide information to Parliament in writing on action taken in response to specific requests addressed to it in Parliament’s resolutions, including in cases where it has not been able to follow Parliament’s views. […]’


\(^7\) Text adopted, P6_TA(2009)0187.

\(^8\) Texts adopted, P7_TA-PROV(2011)0494.


\(^12\) Texts adopted, P6_TA(2009)0099.


\(^14\) Texts adopted, P7_TA(2011)0023.
A. whereas the financial and economic crisis which broke out in autumn 2008 has not yet been overcome; whereas financial turmoil and recessionary fears have become once again acute over the last months;

B. whereas the Commission responded to the eruption of the crisis in a prompt and reasonable manner by adopting special State aid rules and using competition policy as a crisis management tool; whereas this was, and still is, meant to be a temporary regime although its timeframe has exceeded what was originally expected;

C. whereas between 1 October 2008 and 1 October 2010 the Commission took more than 200 decisions on State aid for the financial sector; whereas in 2009 the nominal amount of aid to the financial sector used by Member States constituted EUR 1 107 billion (9.3% of EU GDP); whereas the maximum volume of Commission-approved measures since the beginning of the crisis until 1 October 2010 (including both schemes and ad hoc interventions) amounts to EUR 4 588.90 billion;

D. whereas the Commission introduced a requirement applicable from 1 January 2011 onwards to submit a restructuring plan for every beneficiary of a recapitalisation or an impaired assets measure, irrespective of whether the bank is considered to be fundamentally sound or distressed;

E. whereas sizable amounts of State aid given during the crisis in the form of, for example, guarantee schemes, recapitalisation schemes and complementary forms of liquidity support on bank funding have contributed to severe imbalances in public finances; whereas it is still unknown how far-reaching the impact this State aid, in particular of the guarantees provided to banks, may be in the future if some of those guarantees are actually called in;

F. whereas protectionism and non-enforcement of competition rules would only deepen and prolong the crisis; whereas competition policy is an essential tool to enable the EU to have a dynamic, efficient and innovative internal market and to be competitive on the global stage;

G. whereas, notwithstanding all the efforts to cope with the economic crisis, cartels remain the most serious threat to competition, consumer welfare and the proper functioning of markets, and consequently cannot be accepted even during an economic crisis;

Commission Report on Competition Policy 2010

1. Welcomes the Commission Report on Competition Policy 2010; highlights, on the occasion of the 40th anniversary of this report, that EU competition policy has brought numerous benefits in terms of consumer welfare and has been an essential tool to eliminate obstacles to the free movement of goods, services, persons and capital; points out that competition policy continues to be an essential tool for preserving the single market and protecting the consumer interest; stresses that some rules need to be updated to deal with new challenges;

2. Notes that the combined effect of robust principles and flexible procedures has enabled competition policy to be a constructive and stabilising factor in the EU’s financial
system and in the real economy in general;

**Competition policy recommendations**

3. Believes that improved price transparency is essential in stimulating competition in the single market and offering real choice to consumers;

4.Welcomes the existing exchange between the Commission and consumer associations in the field of European competition law and encourages the Commission to further promote these exchanges, including other stakeholders if appropriate;

**Control of State aid**

5. Welcomes the Commission Staff Working Paper drafted to evaluate the effects of temporary State aid rules adopted in the context of the financial and economic crisis; takes note of the Commission’s assessment that globally State aid ‘has been effective in reducing financial instability, improving the functioning of financial markets and cushioning the effects of the crisis on the real economy’; wonders, however, whether such an optimistic analysis can be sustained;

6. Stresses that the temporary regime applicable to State aid has been positive as an initial reaction to the crisis, but that it cannot be prolonged unduly; emphasises the need to discontinue temporary measures and exemptions as soon as possible and as soon as the economic situation allows it;

7. Notes that a new permanent regulatory system for the application of State aid rules is necessary in order to tackle the flaws found in the pre-crisis legal system, in particular as regards the financial sector, as well as to remedy distortions created during the financial and economic crisis;

8. Notes the announcement of specific rescue and restructuring guidelines for the banking sector; suggests to the Commission that it takes into account the impact, in terms of distortion of competition, of the liquidity support provided by central banks during the rescue stage, and provides for the orderly restructuring of banks, with shareholder and bondholder involvement, prior to the injection of public capital;

9. Urges the Commission to link the extension of the temporary State aid to the banking sector beyond 2011 with enhanced and more stringent conditions related to the reduction of the balance sheet composition and size, including a proper focus on retail lending as well as stronger restrictions on bonuses, distribution of dividends and other crucial factors; deems that these conditions should be explicit and should be assessed and summarised on an ex post basis by the Commission;

10. Takes note of the measures adopted so far by the Commission in order to reduce the balance sheet size of certain ‘too big or interconnected to fail’ institutions which have received State aid over the crisis; deems that more measures are required with that purpose;

11. Stresses however that the ongoing consolidation in the banking sector has actually
increased the market share of several major financial institutions and, therefore, urges the Commission to maintain a close watch on the sector in order to enhance competition in European banking markets, including by imposing restructuring plans that imply the separation of banking activities where retail deposits allow these institutions to fund riskier investment banking activities;

12. Notes that the ECB performed several non standard liquidity injections over the crisis; takes note of the Commission’s assessment that this type of measure does not constitute State aid strictly speaking, as the Commission mentions in its study; stresses, however, that policy action at EU level must be coordinated and that the Commission should take the effects of support from the ECB or other central banks and of other public interventions into account when evaluating State aid given to banks which are also the beneficiaries of support from the ECB or other central banks;

13. Notices that the effects of ECB support and other public interventions received by banks during the crisis have not been included in the Commission’s compatibility assessment; asks the Commission to assess such operations on an ex post basis;

14. Calls on the Commission to quickly come forward with the foreseen legislative proposal to address in a true European framework the resolution of failing banks, guaranteeing a common rulebook as well as a common set of intervention tools and triggers, and limiting taxpayers’ involvement to a minimum, namely through the creation of harmonised self-financed (on a risk based approach) industry resolution funds;

15. Stresses that State aid must be allocated in a way that does not distort competition or favour established companies at the expense of emerging ones;

16. Is of the opinion that State aid should support innovation and research clusters and thereby support entrepreneurship;

17. Calls on the Commission to ensure that the intended simplification of State aid rules for SGEI will not lead to a deterioration in the monitoring of overcompensation;

18. Takes note of the Commission’s intention to introduce a ‘de minimis’ arrangement in respect of State aid for SGEI; underlines that clear and unambiguous criteria are needed to determine what services would be covered by it;

19. Insists that any proposal to exempt in principle further categories of SGEI from the notification requirement must be based on evidence that such an exemption from the rules is justified and necessary, and does not unduly distort competition;

20. Underlines the importance of fostering competition in all sectors and not least in the service sector, which constitutes 70% of the European economy; further highlights the right to establish new companies and services;

**Antitrust**

21. Suggests, should the Commission submit a proposal for a horizontal framework governing collective redress, that where appropriate a principle governing follow-on
action could be adopted whereby private enforcement under collective redress may be implemented if there has been a prior infringement decision by the Commission or a national competition authority; notes that establishing the principle of follow-on action does not in general preclude the possibility of providing for both stand-alone and follow-on actions;

22. Notes that ADR mechanisms often depend on the trader's willingness to cooperate, and believes that the availability of an effective judicial redress system would act as a strong incentive for parties to agree to out-of-court settlements, which is likely to obviate the need for a considerable number of cases, thereby reducing the volume of litigation; encourages the setting-up of ADR schemes at European level so as to make for fast and cheap settlement of disputes as a more attractive option to court proceedings; stresses however, that these mechanisms should remain, as the name indicates, merely an alternative to, not a precondition for, judicial redress;

23. Emphasises that following the Court judgments in Cases 360/09, *Pfleiderer*, and 437/08, *CDC Hydrogen Peroxide*, the Commission must ensure that collective redress does not compromise the effectiveness of the competition law leniency system and settlement procedure;

24. Believes that proper account should be taken of the specific issues arising in the competition field and that any instrument applicable to collective redress must take full and proper account of the specific nature of the antitrust sector;

25. Reiterates that, as regards collective redress in competition policy, safeguards need to be introduced in order to prevent the development of a class-action system involving frivolous claims and excessive litigation and to guarantee equality of arms in court proceedings; stresses that such safeguards must cover, *inter alia*, the following points:

- the group of claimants must be clearly identified before the claim is brought (opt-in procedure);
- public authorities, such as ombudsmen or prosecutors, as well as representative bodies, may bring an action on behalf of a clearly identified group of claimants;
- the criteria used to define the representative bodies qualified to bring representative actions need to be established at EU level;
- a class-action system must be rejected on the grounds that it would promote excessive litigation, may be contrary to some Member States’ constitutions and may affect the rights of any victim who might participate in the procedure unknowingly whilst being bound by the court’s decision;

(a) individual actions allowed:

- claimants must in all circumstances be free to make use of the alternative of individual compensatory redress before a competent court;
- collective claimants must not be in a better position than individual claimants;
(b) compensation for minor and diffuse damages:
   – claimants seeking minor and diffuse damages should have appropriate means of
     access to justice through collective redress and should secure fair compensation;

(c) compensation for actual damage only:
   – compensation may be awarded only for the actual damage sustained; punitive
     damages and unfair enrichment must be prohibited;
   – each claimant must provide evidence for his or her claim;
   – the damages awarded must be distributed to individual claimants in proportion to
     the harm they sustained individually;
   – by and large, contingency fees are unknown in Europe and must be rejected;

(d) loser-pays principle:
   – no action may be brought if the claimant is defenceless as a result of a lack of
     financial means; moreover, the procedural costs, and hence the risk, involved in
     legal action are to be borne by the party which loses the case; it is a matter for the
     Member States to lay down rules on the allocation of costs in this context;

(e) no third-party funding:
   – proceedings should not be pre-financed by third parties, in return, for example, for
     claimants agreeing to surrender to third parties possible subsequent entitlements to
     compensation;

26. Stresses that any horizontal framework must ensure compliance with two basic
    premises:
    – Member States will not apply more restrictive conditions to the collective redress
      cases arising out of the infringement of EU law than those applied to cases arising
      out of the infringement of national law;
    – none of the principles laid out in the horizontal framework will prevent the
      adoption of further measures to ensure that EU law is fully effective;

27. Welcomes the legislative instrument announced by the Commission in its 2012 Work
    Programme covering actions for damages for breaches of antitrust law; stresses that it
    should take account of earlier Parliament resolutions on the topic, and emphasises that it
    should be adopted under the ordinary legislative procedure;

28. Believes that the fining policy is an important tool for public enforcement and
    deterrence;

29. Notes that behaviours are motivated not only by penalties but also by encouraging
    compliance; favours an approach that serves as an effective deterrent while encouraging
compliance;

30. Emphasises that a policy of high fines is not and should continue not to be used as an alternative EU-budget financing mechanism;

31. Notes that the method for setting fines is contained in a non-legislative instrument - the 2006 Fining Guidelines - and urges once again the Commission to incorporate a detailed basis for calculating fines, along with new fining principles, into Regulation (EC) No 1/2003;

32. Encourages the Commission to review its fining guidelines and suggests that it evaluate principles such as:

- taking into account that the implementation of robust compliance programmes should not have negative implications for the infringer beyond what is a proportionate remedy to the infringement;

- introducing a distinction on the level of fines for undertakings who have acted intentionally or negligently;

- taking into account the interaction between public and private liabilities under EU antitrust law; the Commission should make sure fines take into account any compensation already paid to third parties; this should be also applicable to undertakings benefiting from leniency; furthermore the infringer could be encouraged to pay damages on an out-of-court settlement basis before the final decision on the fine is taken;

- specifying conditions under which parent companies who exercise decisive influence over a subsidiary but are not directly involved in an infringement should be made jointly and severally liable for antitrust infringements on the part of their subsidiaries;

- requiring, as regards recidivism, a clear connection between, on one hand, the infringement under investigation and past infringements and, on the other, the undertaking concerned; a maximum time-limit should be taken into consideration;

33. Notes that the number of requests for fine reduction on account of an inability to pay has increased, particularly from ‘mono-product’ undertakings and SMEs; deems that a system of delayed and/or split payments could be considered as an alternative to fine reduction in order to avoid putting undertakings out of business;

34. Awaits an adaptation of the fining guidelines concerning ‘mono-product’ undertakings and SMEs, as announced by Commission Vice-President Joaquín Almunia;

35. Welcomes the use of the settlement procedure in cartel cases with a view to making the process more efficient;

36. Urges the Commission to take a closer look at trickle-down economics when analysing possible abuses of dominant positions, when it discovers that the dominant position has
not been abused;

**Merger control**

37. Believes that the economic and financial crisis cannot justify a relaxation of EU merger control policies; calls on the Commission to ensure that mergers, and in particular mergers designed to rescue or restructure ailing banks, do not create more ‘too big to fail’ and more generally systemic institutions;

38. Underlines that the application of competition rules to mergers must be evaluated from the perspective of the entire internal market;

**International cooperation**

39. Highlights the importance of fostering the global convergence of competition regulation; encourages the Commission to participate actively in the International Competition Network;

40. Encourages the Commission to conclude bilateral cooperation agreements on competition enforcement; welcomes the announcement of the negotiation of such an agreement with Switzerland, and encourages greater coordination of policy and enforcement actions;

**Specific sectors**

41. Takes note of the Commission’s Energy 2020 initiative; urges the Commission to pursue the full implementation of the internal energy market package; encourages the Commission, insofar as an open and competitive single market in energy has not yet been fully achieved, to actively monitor competition in energy markets, specifically whenever privatisation of public utilities originates in monopolistic or oligopolistic markets;

42. Recalls its invitation to the Commission during the early steps of the implementation of the third energy package to closely monitor the level of competition, since the three largest players still represent about 75 % (electricity) and above 60 % (gas) of the market, despite the gradual opening of the markets in the mid-1990s; invites the Commission to issue guidelines in order to improve the access by renewables to the energy network;

43. Recalls its invitation to the Commission to examine in its next annual report the extent to which the concentration of critical raw materials suppliers may be harmful to the activity of client sectors and a more eco-efficient economy, since some of these are of paramount importance for the deployment of eco-efficient technologies such as photovoltaic panels and lithium-ion batteries;

44. Asks the Commission to intensify the efforts that it is making in order to open up competition in the credit rating agencies sector, particularly in so far as barriers to entry, alleged collusive practices and abuse of dominant positions are concerned; calls on the Commission to ensure that all rating agencies abide by the highest standards of
integrity, disclosure, transparency and conflict of interest management as set out in the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies\(^1\) in order to ensure the quality of ratings;

45. Calls for the Commission to actively monitor developments in commodity-related markets following the conclusions of the European Council of June 2008 (paragraph 40) and to push forward ambitious legislative proposals within the revision of MiFID and MAD framework in order to tackle speculative practices which adversely affects European industry and generate distortion in the Single Market;

46. Underlines that recent investigations carried out by US, UK and Japanese regulators have revealed that, during the crisis, evidence has emerged that US and European banks have manipulated LIBOR rates; is therefore concerned about potential market distortions generated by such practices;

47. Encourages the Commission to investigate the competition situation in the retail sector, in particular the consequences of alleged abuse of market power by dominant retail chains with negative consequences for small retailers and producers, namely in the agriculture and food market;

48. Recalls its demands to the Commission to carry out a competition inquiry in the agro-food industry to investigate the effect of the market power that major suppliers and retailers hold on the functioning of that market;

49. Notes the complexity of the food supply chain and the lack of transparency in food pricing; believes that an improved analysis of costs, processes, added value, volumes, prices and margins across all sections of the food supply chain, including enhanced quality transparency, in line with competition law and commercial confidentiality, will enhance the information available to consumers and the transparency of price-setting mechanisms of the food supply chain, thereby improving choice for consumers and avoiding unfair consumer discrimination; welcomes the establishment of the High Level Forum for a Better Functioning Food Supply Chain and its positive effects on the improvement of trading practices;

50. Reiterates its call on the Commission to conduct a sector inquiry into online advertising and search engines;

51. Reiterates its call for an inquiry into the application of public procurement rules, and whether national differences lead to a distortion of competition;

52. Stresses that the completion of the internal market for all transport modes needs to be and to remain the main goal of the European transport policy;

53. Shares the Commission’s view that the EU still lacks a sufficiently interconnected, interoperable and efficient cross-border transport infrastructure network, which is indispensable for fair competition within the completion of the internal market;

54. Takes the view that competition policy should contribute to promoting and enforcing open standards and interoperability in order to prevent the technological lock-in of consumers and clients by a minority of market players;

55. Notes the lack of competition in the roaming market and stresses the need for improved price transparency; welcomes in this regard the new EU telecom framework rules and the Commission’s proposal for a Roaming III Regulation (COM(2011)0402) which proposes structural measures to improve wholesale competition, with expected benefits on retail competition, prices and choice for consumers; in particular, urges the Commission to meet the objective set in the Digital Agenda for Europe (COM(2010)0245/2) that differences between roaming and national tariffs should be eliminated by 2015;

56. Stresses that increased competition in the broadband sector is essential to achieve the Europe 2020 goal of full coverage for European citizens, bringing benefits to consumers and businesses; asks the Commission to look into possible cases where access to broadband services has been limited at national level;

57. Urges the Commission to examine the extent to which a too generous allocation of free European Union Allowances (EUA) permits in certain sectors may distort competition, given that these permits, whose efficiency has diminished since the slowdown of the activity, have generated windfall profits for certain companies while reducing their incentive to play their part in the transition to an eco-efficient economy;

58. Recalls that the Commission has launched a number of infringement procedures against Member States for not properly implementing the First Railway Package;

59. Calls on the Commission to ensure that bilateral agreements between countries in the air transport sector do not give formal preference to a specific airport for flights going from one country to another;

60. Urges the Commission to analyse the aviation sector, in particular code-share agreements between airlines which in many cases do not produce any benefits for consumers but merely contribute to greater closure of the market, leading to abuses of dominant positions and concerted practices between undertakings which would otherwise have to act competitively;

61. Looks forward to the results of the public consultation on the application of the 2005 Aviation Guidelines; encourages the Commission to examine carefully the provisions for assessing social and restructuring aid for airlines in order to clarify whether they are still able to provide a level playing field for air carriers in the market conditions of today, or whether they need a revision;

62. Calls on the Commission and the Member States to take action against any discriminatory policies that may be applied in the context of agreements between EU and third countries, in order to avoid competitive distortions between international airlines and thus ensure fair competition;

63. Stresses the need to complete the Single European Sky, which will provide a
performance scheme to guarantee transparency of service pricing;

64. Repeats that the rules on the obligation to show real, transparent and complete prices of flight tickets should be strictly enforced in the interests of fairer inter- and intra-modal competition;

65. Looks forward to the results of the Commission’s and Parliament’s studies on the financing of seaport structures, which should enable both institutions to evaluate whether the present rules are applied in a coherent way or whether they need to be redefined;

**Competition dialogue between Parliament and the Commission**

**Competition Dialogue**

66. Welcomes the attendance of Commission Vice-President Joaquín Almunia at exchanges of views with Parliament, along with the positive cooperation demonstrated this year through the briefings organised by DG COMP; takes the view that an annual meeting between MEPs and the Director-General of DG COMP is a good practice which should be continued;

67. Calls, on the occasion of the 40th anniversary of the Commission’s Report on Competition Policy, for the conclusion of an agreement between Parliament and the Commission setting up a comprehensive dialogue on competition policy which should strengthen the role of Parliament as the directly elected body representing European citizens; notes that this practical arrangement should deepen the existing dialogue and maybe institutionalise, without prejudice to the Commission’s exclusive powers under the Treaty, regular dialogue between Parliament and the Commission by setting out the procedures and commitments regarding the follow-up given to Parliament’s recommendations;

**Annual Competition Report**

68. Urges the Commission to include in its Annual Report:

- a description of the legislative and non-legislative, binding and non-binding, instruments adopted during the year in question, together with a justification for the changes made;

- a summary of the contributions received from Parliament and from stakeholders in the context of public consultations, together with a justification as to why it has accepted some of the views expressed and not others;

- a description of the measures taken by the Commission during the year in question to enhance the transparency of its decision-making and ensure greater regard for due process; this section should include a report on Competition Dialogue with Parliament;

**Annual Competition Work Programme**
69. Urges the Commission to present the Competition Work Programme at the beginning of each year, including a detailed list of the binding and non-binding competition instruments expected to be adopted during the coming year and of the public consultations envisaged;

70. Stresses that both the Report and the Work Programme should be presented before the ECON Committee by the Commissioner for Competition;

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

Or. en