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Report on Competition Policy 2005
(2007/0000(INI))

Committee on Economic and Monetary Affairs

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

Report on Competition Policy 2005
(2007/0000(INI))

The European Parliament,

– having regard to the Commission Report on Competition Policy 2005,

– having regard to the Commission sector inquiries in the energy and retail banking sectors,

– having regard to the objectives of the Lisbon Strategy,

– having regard to the discussion paper by the Competition Directorate-General on the application of Article 82 of the Treaty to exclusionary abuses of December 2005,

– 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 Treaty[1] and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[2],

– having regard to the guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[3],

– having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[4],

– having regard to the Competition DG Merger Remedies Study 2005 of October 2005,

– having regard to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty[5],

– having regard to the Commission Green Paper on Damages actions for breach of the EC antitrust rules (COM(2005)0672) (Green Paper),

– having regard to the Commission State Aid Action Plan on Less and better targeted state aid: a roadmap for state aid reform 2005-2009 (COM(2005)0107),

– having regard to Commission Regulation (EC) No 1628/2006 of 24 October 2006 on

[1] OJ L 1, 4.1.2003, p. 1.
[2] OJ L 123, 27.4.2004, p. 18.
[3] OJ C 210, 1.9.2006, p. 2.
[4] OJ L 24, 29.1.2004, p. 1.
[5] OJ L 140, 30.4.2004, p. 1.

the application of Articles 87 and 88 of the Treaty to national regional investment aid[1] ,

– having regard to the Commission staff paper on a Community Framework for State aid for Research and Development and Innovation of September 2006,

– having regard to the Community guidelines on State aid for environmental protection[2],

– having regard to the draft Community guidelines on State aid and risk capital investments in small and medium-sized enterprises,

– having regard to the Guidelines on national regional aid for 2007-2013[3],

– having regard to Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest[4], in the version as forwarded to Parliament for its opinion on 8 September 2004,

– having regard to the case law of the Court of Justice of the European Communities relating to services of general interest and, in particular, to its judgment of 24 July 2003 in Case C-280/00[5],

– having regard to Rule 45 of its Rules of Procedure,

– having regard to the report of the Committee on Economic and Monetary Affairs and the opinions of the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Food Safety, the Committee on Industry, Research and Energy, the Committee on the Internal Market and Consumer Protection and the Committee on Transport and Tourism (A6-0000/2007),

1. Welcomes the Commission's action to modernise competition policy and, in particular, its reinforced stance on combating cartels, the renewed targeting of State aid and the launching of sector inquiries; congratulates the Commission on the steps it has taken towards the improved functioning of the European Competition Network (ECN);

2. Welcomes the preference attributed by the Commission to an economic rather than rules-based approach to competition policy enforcement; welcomes the approach of the sector inquiries, which is closer to the realities of business practices, particularly as regards the financial services and energy sectors; further stresses that those inquiries should shed light on the current sector situation and trends and stimulate a forward-focused policy;

3. Welcomes the Commission's efforts to improve the quality of enforcement of decisions

[1] OJ L 302, 1.11.2006, p. 29.
[2] OJ C 37, 3.2.2001, p. 3.
[3] OJ C 54, 4.3.2006, p. 13.
[4] OJ L 312, 29.11.2005, p. 67.
[5] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

in the context of the ECN through increased cooperation with and among national competition authorities (NCAs);

4. Renews the call, as regards cooperation with and enforcement by NCAs, for further progress in the reduction of uncertainty caused by diverging interpretations of EC competition law by national courts, as well as discrepancies in the speed, content and enforcement of final decisions; calls on the Commission to consider the creation of a network of judicial authorities, comparable to the existing ECN;

5. Renews the call in relation to services of general economic interest (SGEI), given the considerable differences in policies and concepts prevailing across the Member States, for further progress in relation to both the clarification of concepts and the practical application of the existing competition rules;

6. Welcomes further clarification of public service obligations and the improved enforcement of such obligations in the case of SGEIs, given the varying regulatory traditions, degree of participation of civil society, and enforcement capacities across the different Member States;

7. Welcomes the increase in the adoption of procedures within the ECN Model Leniency Programme; stresses, however, that further refinement of that instrument is required in order to avoid its possible misuse, in particular by unfairly disadvantaging the weaker participants in the collusion;

8. Recalls, in this light, the need to coordinate the dual instruments of damages actions and leniency procedures, in order to ensure that adequate incentives for proper behaviour are in place;

9. Expresses concern about the excessive delay in the processes of recovery of unauthorised State aid granted by several Member States; stresses that inadequate enforcement of rules in this area may seriously harm fair competition;

10. Points to the need to monitor new forms of competition distortion among European firms, namely through the abuse in the utilisation of low-cost highly skilled labour under the umbrella of internship contracts; suggests that new regulation in that field would be welcome;

11. Reaffirms the need for an increased role of Parliament, including the promotion of co-decision powers, in the development of competition policy;

12. Welcomes the efforts to strengthen the ECN in the field of antitrust, through the harmonisation of practices and interpretation of norms, as well as the delegation of competences and the exchange of experiences between NCAs;

13. Expresses its concern at the relative failure to date in achieving genuine competition in the energy markets; notes that, in many Member States, ownership unbundling has proven insufficient to ensure proper competition, as very high incumbent market shares are associated with insufficient market access and market foreclosure;

14. Wonders if the completion of ownership unbundling in the energy sector, alongside the dismantling of vertical conglomerates and the guarantee of conditions for effective market access, should not be given stronger priority; in this context, suggests that further clarification of national and European champion strategies would be welcome;

15. Recalls the Commission's commitment to reviewing the 'two-thirds rule' as a proxy for the Community impact of merger proposals; suggests that progress in this area and a more consistent approach in the evaluation of comparable merger operations would be welcome, namely whenever decisions taken at national level may have a strong impact on the market structure of neighbouring Member States;

16. Welcomes the Commission's Green Paper and underlines that the right of victims who have suffered losses as a result of anti-competitive behaviour to obtain compensation must be effective;

17. Applauds the Commission's efforts to strengthen the instruments for cartel vigilance, in particular its revision of leniency procedures and the new guidelines on the method of setting fines, which focus on long-standing agreements in large markets;

18. Believes that the application of the EC and national merger control rules would benefit highly from cooperation among NCAs towards the implementation of a common database registering all the individual cases examined, in the context of a specific network for information exchange;

19. Notes that, according to the Commission's Merger Remedies Study, the effectiveness of structural remedies is often undermined by the uncompetitive behaviour of the firms concerned, in particular by the limitation of market access; consequently calls on the Commission to increase its vigilance as regards that possible loophole in merger remedy enforcement;

20. Welcomes the Commission's efforts to increase the transparency and public accountability of the existing mechanisms of State aid; welcomes further efforts to improve transparency in this context;

21. Recalls the need to avoid competition and duplication among Member States' State aid schemes, as well as any distortions that different national technical and financial capacities to support State aid may introduce in the internal market; suggests that further efforts from the Commission towards harmonising national practices and promoting the exchange of information and best practices are of the utmost relevance;

22. Recalls the principle of compatibility between State aid and EU cohesion policy; recalls that individual regional aid approved outside authorised regional aid schemes entails intrinsically higher risks of distortion to competition;

23. Considers that EC State aid policy, particularly regarding sectors that operate in the globalised market, must focus on aid practices by third-country governments in relation to competitors; suggests, however, that balance should be achieved by giving preference to cooperative and mutual recognition efforts, rather than through subsidy competition;

24. Stresses that the Commission's new trade agenda, in the context of which Free Trade Agreements with selected partners will be negotiated, requires the close involvement of the Commissioner for Competition so that the main competitive issues are appropriately dealt with in the context of such agreements;

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

EXPLANATORY STATEMENT

1. GENERAL CONSIDERATIONS

In 2005 a number of the broad lines previously laid down for competition policy reform entered into force and were consolidated, and important new steps were taken to update, and enhance the effectiveness, transparency, and coherence of, European competition policy.

In general terms this report notes that there has been an encouraging tendency in recent years for competition policy to favour understanding of the actual or potential effects of given practices or changes to business structures and move away from application of competition rules in a strictly formal sense (i.e. the 'rules-based' approach). Though welcome, this option is more challenging than the traditional rules-based method. The greater complexity of the new approach must not be allowed to create uncertainty for business, especially smaller firms, or an aversion to risk that would run counter to the aims of competition policy.

Also to be welcomed is the trend towards decentralisation that has increasingly been making itself felt in European competition policy; however, much more work is needed in order to harmonise the criteria for interpretation and implementation of norms in the various Member States and individual institutions. It is vital to ensure a consistent degree of enforcement in the different countries; to that end, national legal systems and especially courts need to be involved alongside the competition authorities.

The report under review confirms that competition is still severely wanting on markets of strategic importance (energy, for example) and in services (including services of general economic interest). Given the concerns regarding strategic security and universal coverage, it is necessary to clarify the sector objectives governing competition rules and the brief assigned to regulators; furthermore, the need to reconcile public regulation capacity with the growing power of market players can be demonstrated more clearly by sector-based analysis. When determining their priority sectors, therefore, the Commission and the national competition authorities must lay down clear-cut criteria and establish a coherent basis on which to assess the impact of their actions on the well-being of consumers and protection of their interests.

2. PRACTICES RESTRAINING COMPETITION ('ANTITRUST')

Among the most notable new steps, in the right direction, are the Green Paper on Damages actions for breach of the EC antitrust rules and, published back in late 2005, the guidelines on the application of Article 82 to exclusionary abuses; as regards action taken, the Model Leniency Programme has been launched, as have two sector inquiries, and the guidelines for fining cartels have begun to be reviewed. The European Competition Network (ECN) is, in addition, central to successful implementation of the new rules embodied in Regulation (EC) No 1/2003. These measures all make for a more effective competition policy.

However, the Commission's attention should be drawn in this section to certain areas in which there is room for improvement where competition is concerned.

In the financial sector there are still serious competition and regulation problems. The

European market continues to be subject to exceptional arrangements that serve in practice to favour national players. Further steps should also be taken towards general harmonisation of the respective criteria and practices applied by regulators and supervisory bodies.

Regarding the work set in motion by the Commission on the guidelines on the application of Article 82 to exclusionary abuses, the EP's recommendations, set out in a letter sent to the Commissioner in March 2006, emphasised the need to guarantee high standards of vigilance as regards market abuses and make decisions more consistent and predictable, proceeding on the understanding that assessment of the economic efficiency of practices had to take second place to protection of consumers' rights.

The Community Model Leniency Programme brings indisputable advantages from the point of view of detecting and condemning collusion, but they could be improved if the programme were implemented more effectively at the practical level. It is essential to prevent the programme being misused, whether by allowing applicants to artificially exploit leniency applications or by, in relative terms, penalising firms which, as smaller stakeholders, would be less able to add anything of relevance to the proceedings.

Once again, what matters is to produce initiatives enabling clear and transparent guidelines to be passed on to business, especially SMEs.

As a complement to the above initiative, Parliament welcomes the fact that the practice of 'damages actions for breach of the EC antitrust rules' is to be applied as provided for in the conclusions of the Green Paper, since this will create the conditions required in order to exercise the right to compensation for damage caused to citizens and firms, in particular SMEs. It will be necessary to reduce the risk of potential conflict between the incentives granted under the Community Model Leniency Programme and the obligation to make amends, as laid down in the Green Paper.

One final cause for concern is that firms could be drawn into new forms of unfair competition stemming from the fact that highly skilled young workers are increasingly being recruited as trainees under open-ended unregulated arrangements not conforming to minimum wage and employment rights standards.

2. MERGERS AND ACQUISTIONS (M & A)

The latest developments on the single market, especially where energy and financial services are concerned, demonstrate the inadequacy of the current Community regulation applying to mergers and acquisitions.

As the Commissioner publicly admitted in November 2005, the 'two-thirds' rule, referring to domestic market turnover, is no longer an appropriate cut-off point for the Commission's power to assess mergers with Community impact. The disparities among national regulation arrangements add to the distortion, and operations with a comparable impact are thus not treated in a consistent way.

Concentration of market power in one Member State can have significant effects in one or

more other Member States if their domestic markets depend on the industrial design being developed on neighbouring markets. To make matters worse, it can happen that a national regulator approves mergers subject to commitments with a cross-border impact and the necessary link-up with the regulators in neighbouring countries does not exist. These problems become more severe on the more outlying markets of the Union because of the difficulties of interconnection and the typically smaller market size.

Parliament is therefore calling on the Commission to submit a proposal to revise the regulatory framework so as to enable the internal market to be built on foundations of coherence.

A further suggestion, to improve the standard and consistency of decision-making, is to set up a database as part of the ECN cooperation arrangements to provide a centralised record of M & A cases examined in order to assist comparative impact assessment of the commitments proposed when merger plans were dealt with.

The case of energy

The energy sector and the solutions employed could set a pattern for other sectors. The sector inquiry on the gas and electricity markets has clearly revealed a complex set of obstacles to consolidation of the single market and a guarantee of genuinely fair competition.

In particular, ownership unbundling has not yet happened on several national electricity markets. Worse still, there are cases in which unbundling has been carried out, but production and distribution remain vertically integrated. The implementation of unbundling, as called for by the Second and Third Electricity and Gas Directives, should be a priority for the Commission's action.

The experience of the Union's most developed energy markets shows that the single market cannot be consolidated until regional markets are operating smoothly: that is a precondition. Regional markets have to be properly interconnected, but this, though necessary, is not sufficient to achieve the desired aims. Further action is accordingly required: regulators must work together in performing standardised tasks; any form of public market protection must be abolished, as must the differences in product specifications from one Member State to another.

3. STATE AIDS

The Commission's State Aid Action Plan should be welcomed, and the new regional aid guidelines, the drafting of which began in 2005, and the communication on aid for innovation likewise give cause for satisfaction.

Despite the Commission's efforts to harmonise practices and guarantee transparency, there is evidence of de facto incentive rivalry among EU regions and Member States; combined with the fact that other policies, not least fiscal policy, have not been harmonised, this can have the end effect of inflating the amount of aid granted and encouraging artificial company

relocations within the European area, leading to serious consequence for some regions and countries.

Another factor disruptive to healthy competition is the differences in the Member States' performances regarding actual and prompt recovery of aid paid out in error. The Commission should be applauded for its efforts to improve this situation.

The EU's major international commitments as regards noxious emission control must not become a further factor serving to distort competition in sector terms. The different ways in which Member States allocate emission allowances among individual sectors, the differing extent to which companies are able to pass on the cost of acquiring emission allowances to consumers, and the diverse nature of environment-related State aids are all matters that the Commission needs to keep under review.

4. THE INTERNATIONAL DIMENSION

Given that competition in the key sectors has become globalised, the international dimension of Community competition policy is of paramount importance. The Commission should thus be congratulated on its achievements in the area of multilateral cooperation and bilateral cooperation with leading partners, including the United States, Canada, Japan, South Korea, and, above all, China.

The Commission's attention should be drawn to the fact that, when laying down the aid scheme for each sector, it should take into account the level of State aids granted by the EU's main international competitors, as every move should be supported if it is intended to bring balance and harmonisation to the practices in question.

It is essential for EU competition policy to be consistent with commercial policy, especially in view of the new agenda entitled 'Global Europe: competing in the world', which is oriented towards bilateral and regional free trade agreements. The Competition DG needs to be very actively involved so as to bolster the efforts to secure mutual recognition of competitive practices, especially in the areas of State aids, public procurement, services, investment, and trade facilitation.