

## II

(Preparatory Acts)

## EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

## 428TH PLENARY SESSION HELD ON 5 AND 6 JULY 2006

**Opinion of the European Economic and Social Committee on Regulating competition and consumer protection**

(2006/C 309/01)

On 14 July 2005, the European Economic and Social Committee decided to draw up an opinion, under Rule 29(2) of its Rules of Procedure, on: *Regulating competition and consumer protection*

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 31 May 2006. The rapporteur was Ms Sánchez Miguel.

At its 428th plenary session held on 5 and 6 July 2006 (meeting of 5 July 2006), the European Economic and Social Committee adopted the following opinion by 134 votes to none, with two abstentions.

**1. Conclusions and recommendations**

1.1 Free competition offers benefits to all market participants, especially consumers. Nevertheless, infringements of the laws governing this area have had a major impact on competing businesses and the rules allow for sanctions to be imposed, thus mitigating the economic impact of the lack of competition between companies.

1.2 In the past consumers have not had at their disposal any appropriate legal instruments based on competition law which would help them to take action or seek redress for any loss suffered in the market as a result of prohibited competitive practices. Only following on from the major changes in the internal market, in particular the liberalisation of sectors of general economic interest, has the debate opened on the need for instruments that would enable consumers to play a part in competition policy.

1.3 The first step in this direction was the appointment of a Consumer Liaison Officer within DG Competition to mediate between the DG and consumer organisations on competition-related matters in which his opinion was relevant. Today, three years later, his effectiveness has proved limited, owing to lack of resources.

1.4 In the meantime, in the main liberalised sectors, real restrictions on free competition have arisen, resulting in

competitors being excluded from the market and clearly limiting consumers' economic rights. One of the reasons for this negative impact is the national approach adopted by most Member States with regard to liberalisation, with a trend towards protection for national businesses. The Commission should be given the necessary means to put a stop to such practices.

1.5 Article 153(2) TEC provides the Commission with the legal base for establishing a horizontal consumer protection measure in all Community policies, and in competition policy in particular, to ensure that the provisions of Articles 81 and 82 TEC cover the interests of consumers as well as of competing businesses affected by infringements of competition rules. In turn, the Member States will be required to ensure that their national laws also serve this purpose.

1.6 With this in mind, measures should be put in place providing compensation for any damages, especially to economic rights, caused by prohibited practices.

1.7 Systems for informing and consulting consumers must also be strengthened. If DG Competition retains its liaison officer, he should be given the means necessary to perform his duties, and DG SANCO must involve all the bodies with which

it works, in order to have a greater impact on competition-related matters directly affecting consumer interests. In this regard, we believe that the European Competition Network could adapt its activities to incorporate any information and observations that national or Community consumer organisations wish to provide in order to make competition policy more efficient in the markets and to ensure that consumers' economic rights are recognised.

## 2. European competition policy today

2.1 Free competition is a fundamental principle of the market economy, which is based on the idea that economic players, and more generally all private individuals accessing the market, have freedom of initiative. The need for rules combining free competition in the market and the rights of all persons involved in the market gave rise to the Treaty rules used to regulate it. At the height of the liberalisations, the European Commission stated the need <sup>(1)</sup> to strike a balance between the interests of businesses and those of consumers, bearing in mind new economic situations that had not been foreseen in competition law. It also stated its support for making voluntary instruments workable and for promoting dialogue between consumers and businesses in order to increase consumer confidence in the market, because competition could not achieve this on its own.

2.2 The current situation features some new aspects as set out in the Commission report on competition policy 2004 <sup>(2)</sup> and in the speech given by Commissioner Kroes <sup>(3)</sup>. Both of these highlight the need to focus action on those sectors that are essential to the internal market and to competitiveness under the terms of the Lisbon agenda and, most particularly, taking account of consumers' interests, especially the effects of cartels and monopolies on their rights. This approach can be seen as a first step towards incorporating consumer protection as a measure for regulating the market from the consumer's point of view and not only from that of the supplier, which has been the case to date.

2.3 It should be stated that competition policy must apply to the EU as a whole, in cooperation with the Member States, not only because it applies to the single market and consequently to cross-border transactions but also because its purpose is to harmonise national legislation so that protectionist national policies are not implemented in order to favour domestic markets, discriminating against competitors. The Community authorities, especially the Commission, thus have a crucial role to play. The Commission is not only responsible

for drawing up legislative proposals to regulate competition, but also for controlling mergers and state aid, in which the general interest must take precedence over each state's national interest.

2.4 The liberalisation of sectors of general interest and the regulation of financial services have led to attempts to establish a link between competition policy and other Commission policies, in particular consumer policy. In fact, the latest Report on Competition Policy (2004) states that one of the reasons for applying this policy rigorously is to increase consumer interest and confidence in the internal market.

2.5 Despite this declaration of principles, the analysis of the different provisions setting out European competition policy gives few practical details and indeed its position remains the same as before. In 2003, on the European Day of Competition <sup>(4)</sup>, it was announced that a Consumer Liaison Officer would be appointed within DG Competition, with the remit to act in each of the areas covered by this policy, in order to watch over consumer interests. Information leaflets are also being published <sup>(5)</sup> to guide and inform consumers as to the content of competition policy and how it could affect their interests.

2.6 The tasks to be fulfilled by the Consumer Liaison Officer <sup>(6)</sup> include the following:

- acting as a contact point for consumer organisations and individual consumers <sup>(7)</sup>;
- establishing regular contacts with these organisations and in particular the European Consumer Consultative Group (ECCG);
- alerting consumer groups to competition cases where their input might be useful, and advising them on how they can express their views;
- maintaining contacts with National Competition Authorities (NCA) regarding consumer protection matters.

2.7 This trend in competition policy towards considering consumer interests as well would have to be applied across the board, thus putting an end to the clear-cut divisions between the Directorates-General for Competition and for Health & Consumer Protection. There would have to be ongoing coordination between all policies, not only at European level, but also between these and national policies, in order to ensure free market competition that benefits economic and social actors and consumers too.

<sup>(1)</sup> Consumer policy action plan: 1999-2001.

<sup>(2)</sup> SEC(2005) 805 final, 17.6.2005. EESC opinion: OJ C 110 of 9.5.2006, p. 8.

<sup>(3)</sup> London, 15 September 2005, at the conference 'European Consumer and Competition Day'.

<sup>(4)</sup> Rome, 6 December 2003, Commissioner Monti announced the appointment of Mr Rivière y Martí.

<sup>(5)</sup> EU competition policy and consumers: Publications Office, Luxembourg.

<sup>(6)</sup> See XXXIII Report on Competition policy 2003 p. 6. et seq. SEC(2004) 658 final, 4.6.2004. EESC opinion — OJ C 221, 8.9.2005.

<sup>(7)</sup> This can be done via e-mail at: comp-consumer-officer@cec.eu.int.

### 3. EU competition policies that affect consumers

3.1 Competition policy could be said to have recently undergone a major change, due not only to the widespread occurrence of what is known as economic globalisation but also to the much-needed reconciliation of service-sector liberalisation with other public service goals, such as ensuring the pluralism and reliability of the providers of these services. Competition policy is committed to playing a key role in implementing the aims of competitiveness as defined in the Lisbon Agenda, which focus on the smooth operation of the market economy and above all of economic mergers, which are crucial to the success of the European economy, vis-à-vis our international competitors, without any consequent loss of rights for European competitors and especially consumers.

3.2 The need to define competition policy as it affects consumers calls for a close look at the points regulating this matter, in other words, those corresponding to the articles in the Treaty and to its implementing regulations. Some of these have recently been amended, whilst others are pending adoption.

#### 3.3 Restrictive agreements and practices

3.3.1 Agreements between undertakings are part and parcel of market relations and help to ensure that markets operate as they should, but these agreements are not always concluded for competitive reasons. Often the opposite is true; and even when the common market was created, there was discussion of the need to ban such agreements, where these aim to prevent, restrict or distort free competition. The same applies to associations of undertakings, which are most evident in cartels operating as business groupings, without any obvious coordination between them. Where their activity restricts or prevents free competition, it will be covered by the prohibition.

3.3.2 The legal basis of agreements and decisions between undertakings is the contract, which imposes obligations on the parties concerned. In both cases, their validity is conditional on compliance with the relevant legal provisions. The issue under consideration here is the effects of these agreements on third parties and in particular on the rules governing competition in the market.

3.3.3 The aim of the law is definitively to prohibit the end result, which is restriction on competition but it goes beyond this, since it declares all agreements or decisions void, with all the practical consequences that this entails for compensation for the harm done to competitors and to the economy in general by the distortion of the way in which markets operate.

3.3.4 The complexity of the situations covered by the rules set out in Article 81 of the Treaty, in national markets as well as in the European internal market, led the Commission to

draw up what is known as the 'modernisation package'<sup>(8)</sup> which helps to bring the Treaty's provisions into line with the case-law of the courts and with the many situations which have occurred in the course of its application.

3.3.5 Rules on block exemptions have also been updated<sup>(9)</sup>. This regulation presents new rules for exemptions in line with current market needs, and in particular for exemptions of technological agreements. The need for clear legislation that will make it easier to secure agreements between undertakings, without falling foul of the prohibition, requires boundaries to be set for cooperation between undertakings and must above all ensure that consumers never suffer as a result of these exemptions.

#### 3.4 Abuse of a dominant position

3.4.1 Article 82 of the Treaty prohibits *any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it*. This provision does not prevent a dominant position from occurring (in fact the trend has been to encourage economic mergers that allow European undertakings to compete with others throughout the world) but rather aims to prevent the dominance acquired being used to impose conditions on competitors, thus eliminating competition. In this case, the provision contained in this article is not concerned with the origin of this dominant situation, unlike Article 81, which is interested in the origin of the agreement or of the decisions, in order to be able to declare them void.

3.4.2 The effects of a dominant position are different to those of collusive practices, since this does not appear to affect competition, which may already be limited by an absence of competitors or by the insignificant role of competitors in the market. However, intervention is necessary on behalf of the consumer, whose interests will suffer as a result of the conditions imposed by the dominant enterprise in question<sup>(10)</sup>.

<sup>(8)</sup> 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 and later amended by Council Regulation (EC) No 411/2004 (OJ L 68 of 6.3.2004); 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 (OJ L 123, 27.4.2004, p. 18). Also published was a series of communications and guidelines with a view to laying down the procedures for relations between competition authorities and the Commission and between the Commission and the judicial authorities.

<sup>(9)</sup> Commission Regulation (EC) No 772/2004, 27 April 2004, on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004, p. 11).

<sup>(10)</sup> The case-law of the ECJ has had to define the concept of a dominant position because it is not defined in the Treaty and does so by considering this to be an economic position held by one or more undertakings, enabling them to prevent real competition in the market, by acting independently of their competitors, customers and consumers.

3.4.3 Against this background, the Commission has been taking action in the main sectors where, because the sectors were liberalised only recently, companies enjoyed a dominant position in most EU countries, such as the telecommunications sector<sup>(11)</sup>, or where, because major technological innovation was involved, companies faced no genuine competition, as in the case of Microsoft<sup>(12)</sup>. Both cases were found to involve an abuse of a dominant position. In the first case, as a result of illegal price-fixing in the provision of telecommunications services<sup>(13)</sup>. The ruling was also noteworthy because it concerned an economic sector subject to state regulation and the Commission thus felt that it should take action, even though prices were subject to sectoral regulation.

3.4.4 In the second case, concerning Microsoft, the issue was more complicated, because this is a US company with an almost total monopoly over the use of its computer systems. Nevertheless, the Commission decided that Article 82 had been infringed, through Microsoft's abuse of a dominant position in the PC operating systems market by refusing to provide information on interoperability and above all by bundling Windows Media Player with Windows. The Commission not only imposed substantial fines for a very serious infringement, but also required Microsoft to adopt a set of measures, making available information on its operating systems and unbundling the individual components of its Windows operating system.

### 3.5 Merger control

3.5.1 The EC Treaty contained no specific article regulating mergers, initially because this type of economic operation was not common and later because Member State authorities supported mergers in order to make national companies more competitive. Nevertheless, when these mergers resulted in dominant positions, both Articles 81 and 82 were applied, but with one proviso; these mergers would not be examined as a matter of course, but only when an abuse of a dominant position had occurred.

3.5.2 To remedy this shortcoming and to make proper monitoring possible, on the basis of Articles 83 and 308 TEC, which allow for additional powers to achieve the stated aims — in this case free competition — the Council adopted a number of regulations leading up to the current Regulation 139/2004<sup>(14)</sup> amending and improving Regulation (EC)

1310/97<sup>(15)</sup> and in particular incorporating the case-law arising from the Gencor/Commission ruling<sup>(16)</sup>.

3.5.3 The new regulation also amends jurisdictional aspects, by referring what the Commission or at least three Member States deem to be national issues to the national authorities in order significantly to reduce the work of the Community competition authorities. In our view, however, this responsibility can only be handed over to the Member States if it does not affect a substantial part of the common market, which makes it easier to prevent restriction of competition and protect the interests of those affected, especially consumers.

3.5.4 With regard to the amendments of substantive aspects, both the quantitative thresholds set out in Article 1 and the conceptual thresholds in Article 2 are more clearly defined, thus clarifying in what situations a dominant position occurs and in particular where competition is substantially reduced.

3.5.5 Other, equally important, aspects that have been changed, are those covering procedures, which have been substantially amended with regard to extending deadlines for referring cases to Member States, enabling the parties concerned to take more effective action, whilst respecting the provisions of national legislation. The same applies to deadlines for the requesting parties; in this case 15 working days at the very beginning of the procedure could be seen as being too rigid, as this would deny the parties the opportunity to familiarise themselves with any arguments submitted to the Commission in connection with the case. In any event, it should be pointed out that at no stage of the procedure is there any provision that allows consumers to take action and, what is more, the requirement to consider the interests of the employees of the undertakings and employment when evaluating mergers has disappeared from the text.

### 3.6 Types of restriction on competition

3.6.1 In Articles 81 and 82, the Community legislative authority has drawn up a non-exhaustive list of what it considers to be prohibited practices, with the first article covering collusive practices and the second abuse of a dominant position. It must be stated first of all that these lists are not complete, but simply indicate common practices in which these two forms of behaviour occur, which means that others having the same effects could be identified and would consequently be subject to the same prohibition.

<sup>(11)</sup> Deutsche Telekom Case COM/C1/37. OJ L 263, 14.10.2003, p. 9.  
<sup>(12)</sup> Microsoft Case COM/37/792.

<sup>(13)</sup> Deutsche Telekom substantially reduced its bundled line rates for broadband Internet access on its fixed telecommunications network.

<sup>(14)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. OJ L 24, 29.1.2004; Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004, OJ L 133, 30.4.2004, p.1.

<sup>(15)</sup> Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.1989, p.1) and the amendments made to this regulation by the Act of Accession of Austria, Finland and Sweden, were amended by the Regulation referred to. The new regulation is thus a reworking of all the legal texts and of the amendment of the articles subject to interpretation in the light of case-law.

<sup>(16)</sup> Case T-102/96, in which the ECJ defined the concept of a dominant position and that of a substantial reduction in competition to include previously unclear situations, such as oligopolies, for example.

3.6.2 The types of practice listed are similar in the two articles:

- price fixing;
- limiting or controlling production, markets, technical development, or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

3.6.3 All of the behaviour listed can be classified into two groups, reflecting the situation in which they occur:

- a) Abuse of competition, which brings together a large number of anti-competitive practices, such as refusal to supply, fixing prices below cost price, loyalty bonuses or discriminatory pricing. This behaviour has an economic effect; it reduces or prevents competition in the market or in a substantial part of it.
- b) The abuse or unfair exploitation of undertakings that depend on the dominant position of one or more companies for buying goods or services, by means of unfair pricing, discrimination, inefficiency or negligence or even abuse of industrial property law.

3.6.4 One of the most common types of abuse is price fixing, a concept which is interpreted broadly, to cover discounts, excessive profit margins, payment terms or rebates. Also covered are failing to honour prior commitments, deviating from price lists and not selling at the stated price. Consumers are affected in all of these cases — despite specific legislation protecting their rights, they are in a position of weakness vis-à-vis businesses that occupy a dominant position in the market and which are often the only supplier in that particular market.

### 3.7 Competition developments in some liberalised sectors

Community competition policy, as set out in the TEC, was designed with the traditional sectors of the European economy in mind. Consequently, its implementing regulations have had to develop in line with new economic developments, which required greater competitiveness. The procedures under which the liberalisation of major market sectors has taken place have had a negative impact on consumers, since in most cases the enterprises in question have gone from being public services to undertakings with a dominant position in their respective markets, with which other businesses struggle to compete.

### 3.7.1 Energy

3.7.1.1 In recent years, great progress has been made on opening up the European energy (electricity and gas) sector which until a short while ago was part of the public sector and as such was controlled in terms of supply pricing and terms. The Commission had provided for a market opening for all non-domestic customers by 1 July 2004 and for all domestic customers by 1 July 2007. The first deadline has not been entirely met and as matters stand today, total liberalisation of domestic consumption will also not be achieved.

3.7.1.2 The situation is complicated and the performance of privatised networks, especially in the electricity market, could even be described as a poor, with these companies investing little in maintenance, which has a significant impact on users, who experience frequent power outages.

3.7.1.3 However, the current electricity regulation<sup>(17)</sup> promotes cross-border trade in electricity and it can help to increase competition in the internal market, by means of a mechanism compensating network operators and by establishing non-discriminatory and transparent tariffs that are not distance-related.

3.7.1.4 The Commission then set up an energy sub-group, as part of the European Competition Network, in order to discuss and draw up an agreement on applying Community competition rules to the energy markets.

### 3.7.2 Telecommunications

3.7.2.1 Legislation relating to the telecommunications sector developed significantly in 2002<sup>(18)</sup>, largely due to the updating of the package of rules on electronic communications, which adapted the networks so that they could be used by the new technologies. The various Member States' adaptation of the legislation produced uneven results; in fact, the Ninth Report<sup>(19)</sup> on the Implementation of the EU Electronic Communications Regulatory Package focused on the process of incorporating these regulations into national legislation, and on the tasks to be performed by the national regulatory authorities (NRAs).

3.7.2.2 The Ninth Report notes that the number of operators has remained stable, although some of these have simply stayed in their home market, whilst competitive pressure between operators has shifted from the international markets and long-distance calls to the local call market, with traditional operators experiencing a gradual reduction in calls of this type. Consumers have benefited from this in terms of call prices, but they can also lose out in some cases as a result of their original position being abused when it comes to signing new contracts.

<sup>(17)</sup> Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity. OJ L 176, 15.7.2003.

<sup>(18)</sup> Directive 2002/77/EC, (OJ L 249, 17.9.2002, p.21).

<sup>(19)</sup> COM(2003) 715 final.

3.7.2.3 Monitoring the telecommunications markets closely to determine the current state of competition to some extent helps to monitor operators in a dominant position, so that specific obligations can be imposed on them to ensure that consumers do not suffer the imposition of unfavourable conditions and prices. In any event, the Commission closely followed up the implementation of Directive 2002/77/EC in each of the Member States <sup>(20)</sup>, with a view to remedying any shortcomings detected that not only restricted competition but also affected consumers' interests.

### 3.7.3 Transport

The transport sector must be considered in the context of the different modes of transport used; we will refer mainly to air, rail and maritime transport, which have undergone substantial changes, in particular with a view to improving passenger protection in the first case and maritime safety in the third.

#### 3.7.3.1 Air transport

3.7.3.1.1 In 2003, the Commission opened dialogue with the civil aviation sector with a view to drawing up a common position on implementing competition policy in the alliances and mergers taking place in that sector. It also became clear this year that Regulation (EC) 1/2003 needed to be amended, in order to increase air transport between the Union and third countries, with the aim of creating an 'open sky' that would enable action to be taken on alliances between undertakings from Europe and from third countries, in particular the United States. During this period, the Commission looked at various agreements between undertakings and ruled that some contravened the rules of competition <sup>(21)</sup> and imposed changes in content and duration on others.

3.7.3.1.2 In the same period, the regulation setting out passengers' rights was adopted <sup>(22)</sup>.

#### 3.7.3.2 Rail transport

3.7.3.2.1 Regulation 1/2003 allows the national competition authorities to apply rules to defend competition in the rail sector. Community and national authorities are required to identify issues of common interest relating to rail liberalisation, in cooperation with the Directorate-General for Energy and Transport.

<sup>(20)</sup> See a detailed summary of measures adopted in the XXXIII Commission report on competition policy — 2003 p. 41 et seq.

<sup>(21)</sup> The Commission refused to authorise the initial version of the Air France/Alitalia agreement and requested that the other parties concerned submit their views on the matter. With regard to British Airways and Iberia, the Commission limited the agreement's duration to six years.

<sup>(22)</sup> Regulation (EC) 261/2004 (OJ L 46, 17.2.2004, p.1).

3.7.3.2.2 The first package of rail directives aimed at opening up the market was intended to ensure free movement in cross-border goods transport and to establish a reference framework for access to both goods and passenger services, setting routes, fares, etc.

3.7.3.2.3 The second package includes the liberalisation of national freight markets, and the opening-up of the national and international passenger market.

3.7.3.2.4 The overall aim is to secure a common approach to implementing competition legislation in the rail sector in order to prevent conflicting decisions being taken by national authorities and the Commission.

#### 3.7.3.3 Maritime transport

3.7.3.3.1 The maritime sector has one of the highest numbers of block exemptions, relating in particular to liner conferences and consortia, which comply with Regulation (EC) 823/2000, currently under review <sup>(23)</sup>, and which seek to develop Article 81(3) TEC, because this allows maritime consortia and conferences to exceed the limits laid down in legislation provided that, the Commission having been notified, authorisation is obtained for the opposition procedure.

3.7.3.3.2 In practice, some consortia have taken advantage of these procedures to engage in practices not covered by the exemption, such as price fixing, which has led to the Commission taking action <sup>(24)</sup>, to restrict the content of agreements. Similarly, the Court of First Instance (CFI) <sup>(25)</sup> delivered a ruling on an agreement between maritime transport undertakings not to give their customers discounts on the published tariff charges and surcharges.

### 3.8 Effects on consumers in the liberalised sectors examined

3.8.1 The procedures under which the liberalisation of the sectors referred to above have taken place at national level, can be considered to be harmful as regards the internal market, having created oligopolies that have denied consumers genuine competition that would help to bring prices down and to stimulate competition between undertakings. The Commission should also look closely at the effects that mergers in the liberalised sectors have had to date, especially on consumers.

<sup>(23)</sup> OJ C 233, 30.9.2003, p. 8.

<sup>(24)</sup> The Wallenius/Wilhelmsen/Hunday case 2002.

<sup>(25)</sup> Case IV/34.018. L 268, 2000, p. 1.

3.8.2 In general terms, the lack of transparency, the high and unjustified charges imposed on business customers and consumers and the vertical integration of undertakings have not brought about real competition in the liberalised markets. In fact, the terms of consumers' contracts have in many cases failed to meet the standards set for standard contracts.

3.8.3 The issue concerns the tools available to consumers for enforcing their rights in disputes with such companies, in particular by bringing legal action based on competition law, in particular on Articles 81 and 82 of the Treaty. The vast majority of complaints lodged with the competition authorities, the Commission and national authorities are made by businesses and the ECJ has not ruled on a single complaint made by a private individual.

3.8.4 The Commission's presentation of the Green Paper on *Damages actions for breach of the EC antitrust rules*<sup>(26)</sup> must provide a tool for consumers, which will be discussed in detail in the EESC opinion to be drawn up on the subject.

#### 4. Competition policy and consumer protection

4.1 Consumers do, of course, have a specific body of legislation setting out their rights and obligations<sup>(27)</sup>. Article 153(2) TEC lays down that '*Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities*'. This is a horizontal policy and, as such, must form part of all policies affecting consumers. There is no doubt that, in the context of competition policy, consumers are an integral part of the market covered, because they represent demand within that market.

4.1.1 This paragraph attempts to determine which of consumers' recognised rights are affected by competition policy, in particular by the effects of non-compliance with these rules in the internal market, and in what manner these rights are affected. There is also a need to treat consumers as interested parties in this policy so that the Commission can take account of their interests when it has to take action in specific cases to establish market rules.

#### 4.2 Economic rights

4.2.1 The concept of consumers' economic rights is based on the absence of any financial loss preventing the consumer or user from using or enjoying the goods or services acquired under the terms agreed with the undertaking should be clari-

fied. The basic principle regulating this entire matter is that of good faith and proper balance between parties, which means that any instrument or clause contravening this principle can be deemed an abuse or contrary to the consumer's interest.

4.2.2 The relationship between antitrust policy and freedom of choice for consumers has been one of the main concerns of Community legislation, as recognised in former Article 85(3) and in the current Article 81 TEC, which establish that collusive agreements can only be authorised where, despite restricting competition, they offer some benefit to consumers. A typical example of this would be competitors sharing out geographical areas in order to secure total market coverage, even in areas that are not profitable.

4.2.3 In terms of consumer protection, supervising the market means being attentive to potential horizontal agreements, such as voluntary agreements, price cartels, common purchasing centres, market sharing, etc., as well as vertical agreements, such as contracts regulating relations between producers and importers, etc. Attention is also paid to abuses of a dominant position by means of practices that obstruct or prevent competitors from entering the market, to setting prices that are excessively high or low, exclusionary pricing or offering terms that discriminate between customers.

4.2.4 In its annual report, the Commission presents a large number of decisions on alleged concerted practices and abuses of a dominant position and some ECJ rulings that frequently mark changes in interpretation of the law and even require legislative changes to be made.

4.2.5 In recent years, the Commission has considered fewer and fewer cases, largely due to the firm line that national competition authorities have taken towards their own markets, and in particular as a result of the abolition of the notification system. DG Competition resolved 24 cases by formal decision, a very small number in comparison with the field of merger control, in which a large number (231) of formal decisions were taken<sup>(28)</sup>, complying with the procedure set out in the amended regulation. Fewer decisions will be issued in the new phase, when in most cases national authorities will take over responsibility in this area.

4.2.6 Of the cases examined, some directly affected consumers or were particularly important to them. The individual decisions concerned the mobile telephone, broadcasting and airline sectors<sup>(29)</sup>, and in the sectoral initiatives, measures were

<sup>(26)</sup> COM(2005) 672 final of 19.12.2005.

<sup>(27)</sup> See EESC opinion — INT/263, AC 594/2006, rapporteur, Mr Pegado Liz.

<sup>(28)</sup> See Annual Report — 2003, p. 191 et seq.

<sup>(29)</sup> See Box 3 in the 2003 Annual Report, p. 29 referring to abuses in the telecommunications sector; Box 2 in the 2004 Annual Report, p.28: the sale of sports rights for use over 3G networks, in the Annual Report for 2004, p. 43.

adopted in the transport, liberal professions, motor-vehicle and media sectors<sup>(30)</sup>. All of the cases examined concerned price-related abuses, with Article 82 applying, as a result of abusive exclusionary pricing for the provision of goods or services<sup>(31)</sup>.

#### 4.3 *The right to be informed and to participate*

4.3.1 The effectiveness of consumer policy will depend on consumers' participation in the policies that affect them, and they must thus be involved in all policies in which they have to date been excluded. One of the aims of the Consumer Policy Strategy<sup>(32)</sup> was to ensure that consumer organisations were sufficiently involved in Community policies and, indeed, one year later, a Consumer Liaison Officer was appointed in DG Competition.

4.3.2 Consumer organisations have a forum — the Consumers' Committee — the mechanism for taking action specifically on consumer policy, but this has not been extended to include participation in other policies. The current aim is for consumers to be able to make a contribution to Community initiatives, at all stages of the EU decision-making process. Minimum requirements will have to be set, enabling consumers to participate in consultative bodies, as already happens in agriculture and in particular in the newer bodies, such as those for transport, energy, telecommunications or any other that might be set up.

4.3.3 With regard to the issue now under consideration, there is no formal means of participation, and consumers are not even consulted on issues that the Treaty considers to concern them, such as exemptions from the rules on concerted practices, Article 81(3) and abusive practices that limit or control production, markets or technical development to the detriment of consumers, Article 82(b). It is therefore the responsibility of DG competition and consumer organisations to set up mechanisms for participation and consultation, through rules agreed on jointly and which will have an impact on the internal market, as set out in the White Paper on European Governance<sup>(33)</sup>.

4.3.4 Equal responsibility falls to DG SANCO: it could use the European Consumer Consultative Group to take action on competition-related issues that affect consumers' rights.

4.3.5 Consumers' right to information concerning competition has been given a boost by the appointment of a liaison officer to act as a point of contact with them. European consumer organisations are informed regularly and national organisations and individual consumers have their own web

<sup>(30)</sup> See Annual Report 2004, transport, p. 52; Liberal professions, Annual Report for 2003, p.60; motor vehicle distribution, Annual report for 2004, p. 44.

<sup>(31)</sup> The British Telecommunications Case, OJ L 360, was particularly significant because it concerned what was still state monopoly.

<sup>(32)</sup> Commission Communication on Consumer Policy Strategy 2002-2006 — COM(2002) 208 final.

<sup>(33)</sup> COM(2001) 248 final.

page<sup>(34)</sup> which even includes a complaints form<sup>(35)</sup> for any harm they might suffer as a result of companies' anti-competitive behaviour.

## 5. Representative bodies

The EESC considers that, in order to make consumers' right to be informed and to participate a reality, it must firstly be ensured that they are legitimately represented by their organisations. Secondly, it must be determined which body will ensure this genuine participation, as discussed below.

### 5.1 *For consumers*

5.1.1 Consumer organisations are regulated by national rules that lay down minimum requirements for them to be recognised and legitimate, to ensure that they have the legitimacy to exercise their rights as consumers when these rights are affected by any prohibited practice.

5.1.2 At European level, all organisations registered with DG SANCO are fully recognised and are entitled to be informed and consulted and are involved in any matter that is considered to fall within their sphere of competence.

5.1.3 This legitimacy, which is somewhat exclusive, can be questioned when competition-related issues are at stake, given that these tend to concern breaches of tangible consumer rights, including those that are limited to certain territories and to certain issues. A wide-ranging debate should be held on the concept of having the legitimacy to take action in this area.

### 5.2 *The European Competition Network*

5.2.1 Regulation 1/2003 EC<sup>(36)</sup> and what is known as the 'modernisation package' established the means of cooperation between the Commission and the competition authorities that form the European Competition Network (ECN)<sup>(37)</sup>. This network started its work in 2003, with a working group that examined more general issues such how it would operate and the arrangements for communication between national authorities. It is now fully operational, and is divided into 14 sub-groups, which address sectoral issues<sup>(38)</sup>.

<sup>(34)</sup> Web page:

[http://europa.eu.int/comm/consumers/redress/comp/index\\_en.htm](http://europa.eu.int/comm/consumers/redress/comp/index_en.htm).

<sup>(35)</sup> Will be appended.

<sup>(36)</sup> Of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, subsequently amended by Regulation (EC) 411/2004, OJ L 68, 6.3.2004, p. 1.

<sup>(37)</sup> Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43).

<sup>(38)</sup> In 2004, the sub-groups examined 298 cases, 99 of which had been referred by the Commission and 199 by national competition authorities.



5.2.2 Regulation 1/2003 grants the ECN's member authorities the means to help one another and to act on the instructions of the competent authority and more generally to gather all information needed to solve the problems under their consideration. They also take charge of investigations requested by national authorities, the results of which are forwarded in line with established procedure, so that they can be accessed by all parties concerned.

5.2.3 The ECN's action as part of the leniency programme is very important because Member States have signed a declaration committing themselves to abide by the rules set out in the notice referred to above. The network thus provides practical assistance to the national courts with jurisdiction over competition, which are also responsible for keeping up to date with the case-law of the European Court of Justice <sup>(39)</sup>.

Brussels, 5 July 2006.

5.2.4 The necessary communication between the ECN, the competition authorities and the courts helps to disseminate information on cartels and abuses of a dominant position and the applicable procedure, thus enabling a decision to be taken on who should bring the case more rapidly than has until recently been the norm.

5.2.5 Another of the ECN's tasks is to detect infringements and this activity, which is really a form of prevention, diminishes the harmful effects on competitors and consumers. One task that should be highlighted is the network's action on exemption procedures, in which it must be assessed whether the outcome benefits consumers and even whether the agreement should include a reference to the tangible benefits that consumers can expect from it.

The President  
of the European Economic and Social Committee  
Anne-Marie SIGMUND

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<sup>(39)</sup> Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, (OJ C 101, 27.4.2004, p. 54).