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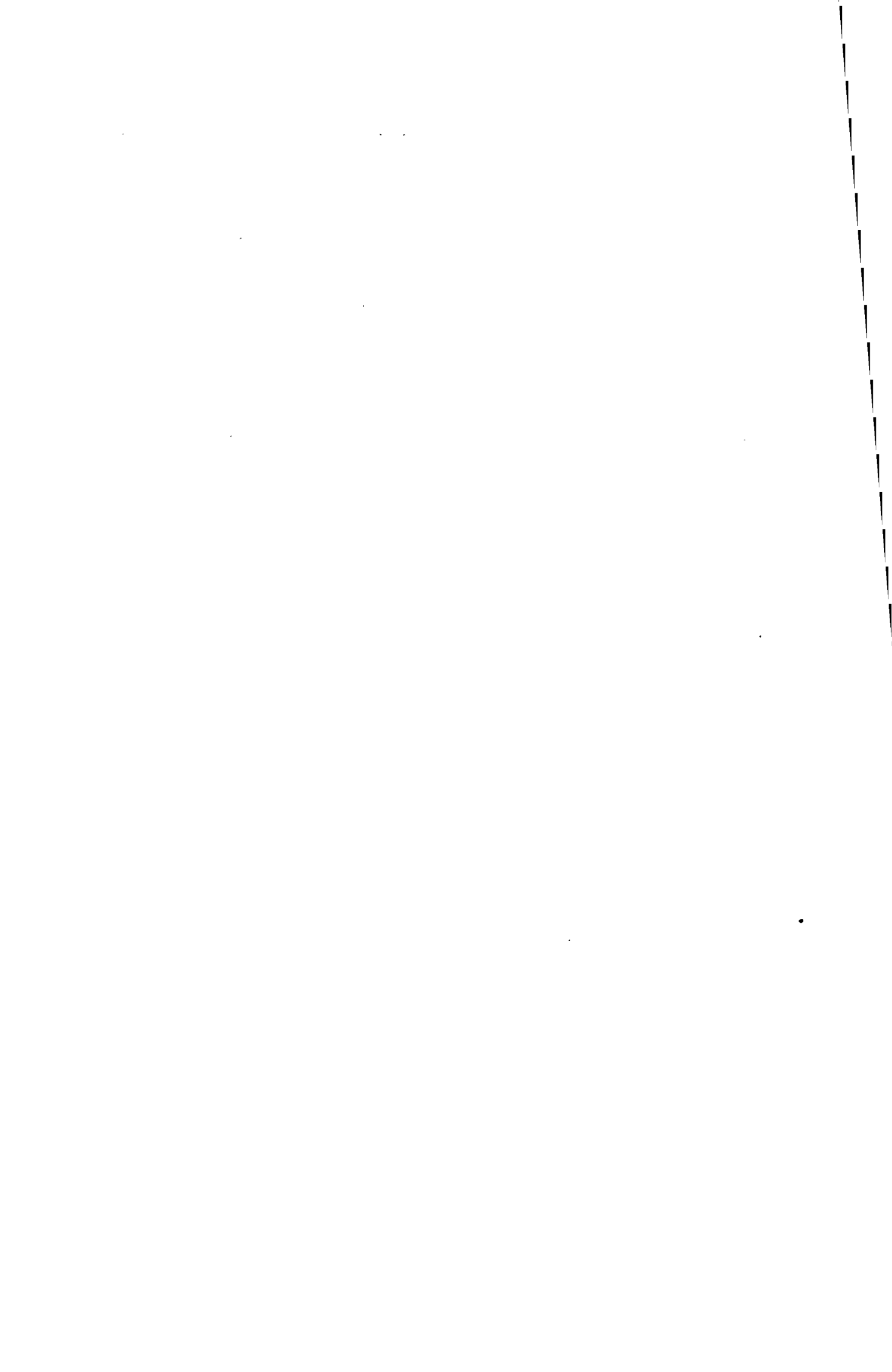
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Report

drawn up on behalf of the Committee on Economic and
Monetary Affairs

on the ~~Eleventh~~ Report of the Commission of the European
Communities on Competition Policy (Doc. 1-86/82)

Rapporteur: Mr. J. PAPANTONIOU



The Commission of the European Communities forwarded to the European Parliament the Eleventh Report on Competition Policy (Doc. 1-86/82). At its April 1982 part-session the European Parliament referred this report to the Committee on Economic and Monetary Affairs as the committee responsible and to the Legal Affairs Committee for its opinion.

On 28 April 1982 the Committee on Economic and Monetary Affairs appointed Mr J. PAPANTONIOU rapporteur. It considered the report at its meetings of 27/28 May 1982, 27/28 September 1982 and 3/4 November 1982 and, at the last of these meetings, adopted it unanimously with two abstentions.

The following took part in the vote: Mr J. Moreau, chairman; Mr Hopper, vice-chairman; Mr Papantoniou, rapporteur; Mr Beazley, Mr Bonaccini, Mrs Desouches, Mr de Ferranti, Miss Forster, Mr Franz, Mr Herman, Mr Leonardi, Mrs Nielsen (deputizing for Mr Delorozoy), Mr Purvis (deputizing for Sir Brandon Rhys Williams), Mr Rogalla (deputizing for Mr Walter), Mr Rogers, Mr von Bismarck, Mr Wagner, Mr Wedekind (deputizing for Mr Schnitker) and Mr Welsh.

CONTENTS

	<u>Page</u>
A. MOTION FOR A RESOLUTION	5
B. EXPLANATORY STATEMENT	
I. Introduction	18
II. General objectives of Community Competition Policy	20
III. Application of the rules of competition to air and sea transport	22
IV. Competition policy with regard to enterprises	24
Distribution agreements	24
Competition in the motor vehicle sector	27
Patent licensing	28
Competition policy and small and medium-sized enterprises	29
Merger controls	30
Competition policy and multinational enterprises	31
V. Competition policy and government assistance	33
General aids	33
Regional aids	34
Sectoral aids	34
Adjustment of State monopolies	35
Transparency of financial relations between Member States and public undertakings	35
Implications of enlargement on competition policy ...	36
VI. International issues	36
VII. Procedural issues	38
VIII. Commission's economic research on competition policy matters	43
IX. Final remarks	44
Opinion of the Legal Affairs Committee	46

The Committee on Economic and Monetary Affairs hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

on the Eleventh Report of the Commission of the European Communities on Competition Policy

The European Parliament

- having regard to the Eleventh Report of the Commission of the European Communities on Competition Policy (Doc. 1-86/82),
- having regard to the report of the Committee on Economic and Monetary Affairs Committee and the opinion of the Legal Affairs Committee (Doc. 1-845/82),

General objectives of Community competition policy

1. Reaffirms its belief that competition policy has a key role to play in the present period of adjustment of Community production structures to the changes in relative prices, in cost and demand conditions as well as in the international economic environment that have occurred over the last decade; this role essentially consists in organizing the play of market forces so as to encourage the shift of productive resources from less to more efficient uses while ensuring that the consumer reaps the benefits of higher productivity;
2. Agrees that the significant intensification of international competition and the Community's diminished competitiveness in important sectors make a coordinated approach to industrial restructuring imperative and that, in this connection, the role of public assistance and mergers needs to be considered;
3. Points out, in this context, that the need for Community competition policy to account for scale economies and the uneven distribution of adjustment costs is greater now than at any other time in the Community's history owing to the adverse effects of the prolonged economic recession on employment and incomes;
4. Renews its call to the Commission for greatly expanded research on the efficiency and competitiveness of the Community economic structures, especially

in a world context, and on the role of public assistance and intervention and of mergers in the process of economic adjustment;

5. Points out, however, that such a coordinated approach must respect the Treaty's fundamental principles governing competition policy and that there is a danger that the lack of a common structural policy in important sectors will impose a burden on competition policy which it will be unable to cope with without basic modifications;
6. Urges the Commission to introduce measures ensuring greater coordination between DG IV and other departments, especially those dealing with economic, fiscal, industrial and regional problems, so as to provide the organizational structure for integrating the objectives of competition policy with those of other Community policies;

Field of application of the rules on competition

7. Recalls its approval of the Commission's proposal for a regulation applying Articles 85 and 86 of the Treaty to the air transport sector, and calls for careful implementation of competition policy in this sector, balancing measures towards liberalization against the need to avoid sudden disruption in the market; further calls on the Commission to draw up guidelines for state aids to air transport;
8. Approves the principle of extending the rules of competition to the sea transport sector, while reserving judgement on the Commission's specific proposals pending the forthcoming report from its Committee on Economic and Monetary Affairs;
9. Calls on the Commission to extend the scope of its directive on the transparency of financial relations between Member States and their public undertakings to include the transport sector as well, taking account of the regulations already adopted for the railways;
10. Asks the Commission to establish to what extent port charges are made competitive by the different methods of imputing infrastructure costs;
11. Calls for a Commission analysis of the state of competition in the banking sector, in view of the 1981 judgement by the Court of Justice¹ that the

¹Züchner v. Bayerische Vereinsbank

banking sector is only exempted from the competition rules to the extent that any anti-competitive conduct by banks is imposed upon them by the monetary authorities;

Competition policy towards enterprises

12. Notes that the Commission has now published draft proposals to replace Regulation 67/67 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements by two new and separate regulations, one dealing with exclusive distribution agreements, and the other with exclusive purchasing agreements, including special provisions for brewery and filling station agreements;
13. Believes that a number of important policy questions are raised by the draft proposals to replace Regulation 67/67 (such as whether or not they could be made shorter and simpler without reducing the effectiveness of Community competition policy), and consequently regrets that Parliament was not consulted on these proposals at an appropriate stage;

Requests the Commission not to adopt its proposals before hearing the views of the appropriate committee of Parliament;

14. Fully supports the need for new block exemptions in these areas; expresses concern, however, that there may well be too many detailed conditions in the new drafts, and that the end result might be to increase the number of notifications to a degree that might partially undercut the value of the block exemptions;

Points out that these drafts could be made simpler and shorter without reducing the effectiveness of Community competition policy, which could be properly enforced by other means, including making full use of the possibilities opened up by Article 86 of the Treaty concerning abuse of a dominant position, having on hand more detailed economic findings on the special characteristics of particular markets and making greater use of the power of withdrawing the benefits of exemption in the case of findings of abuse;

15. Expresses its concern that the special provisions applied to exclusive purchasing arrangements which link Title 1 to Title 2 of the published text of the proposed amendment to Regulation 67/67 may not improve competition but could seriously affect the range of consumer choice;

16. Reaffirms its requests in its resolution on the Tenth Report on Competition Policy for the overall competitive effects of distribution agreements to be examined in greater detail from an economic rather than just a legal point of view, and for the complex issues posed by parallel importing to be more closely examined;
17. Awaits the formulation of general guidelines spelling out the restrictions which may and may not be incorporated in selective distribution systems, as promised by the Commission; further requests the Commission to outline the results of its examination of selection distribution agreements in the hi-fi sector;
18. Recognizes that there is considerable evidence of possible distortions of competition in the motor vehicle distribution sector, including attempts by some Community manufacturers to impede parallel imports of their products, even by potential direct purchasers, and also the existence of very great disparities in the retail prices of new motor vehicles which may not always be wholly justified by differences in the market conditions in the various Member States due to differing national, fiscal, monetary and exchange rate policies;
Calls, in consequence, for the Commission to pursue its study of the whole range of problems associated with competition in the motor vehicle distribution sector, to examine the degree to which there really are unjustified distortions of competition and to look, in particular, at the reasons for such major price discrepancies as clearly exist;
Calls for vigorous Commission action in cases where distortions of competition are clearly established;
19. Notes that the Commission has put forward a preliminary draft regulation on motor vehicle distribution and servicing agreements and considers that the establishment of appropriate guidelines for such agreements, which would preserve the benefits of such agreements while preventing competitive distortions, would be of great utility;

Endorses the view that the block exemption for motor vehicle distributors should be conditional on their undertaking to supply a full range of products suitable for use in all parts of the Community;
20. Notes, as regards a possible block exemption regulation for patent licensing, which has been under consideration now for some years, that the European Court

of Justice has recently made a ruling in the Breeders-rights-maize seed case; awaits an analysis from the Commission on how it is proposing to proceed in this field in the light of this judgement, and whether it is planning to make any modifications to its original proposals; recalls in this regard the promise made by the Commission to submit any revised proposal for patent licensing to the Parliament for its review;

21. Regrets the inconsistency of the Commission in submitting certain proposals, such as its preliminary draft regulation on motor vehicle distribution and servicing agreements, to the appropriate committee of Parliament for its comments before formal publication of the proposals in the Official Journal, while not submitting others, such as the draft proposals to replace Regulation 67/67; requests that all such proposals be transmitted to Parliament's appropriate committee at a preliminary stage, in order to permit Parliament to offer timely comments to the Commission;
22. Notes the Commission's decision¹ that the terms of an agreement providing for a joint resale price maintenance system among the Dutch-language book associations (VBVB and VBBB) were not compatible with Article 85 of the Treaty; recalls its resolution on the fixing of book prices² to which the Commission has not yet properly responded, and requests the Commission to develop guidelines for the application of the rules of competition in the book sector taking into account the special features of the sector; further requests the Commission to keep it fully informed of the results of the special studies that it has commissioned³ in regard to competition in the book publishing industry, and of the conclusions that it has drawn;
23. Expresses satisfaction that the Commission has included new sections on the application of competition policy to small and medium-sized enterprises and to non-Community undertakings, including multinationals, in the Eleventh Report; requests that sections on these themes be included in subsequent annual reports;
24. Expresses doubt as to whether smaller and medium-sized enterprises (SME) are fully aware that the Community's rules on competition offer valuable scope for cooperation and agreements between small and medium-sized enterprises; calls on the Commission, as part of a policy to promote small and medium-sized

¹ Decision of 25.11.1981, OJ L 54 of 25.2.82

² OJ C 50 of 9.3.1981

³ Answer to Written Question No. 514/81 by Mr. Beyer de Ryke - OJ C 240 of 18.9.1981

enterprises, to ensure that they are better informed of the possibilities open to them in this field;

25. Considers that it would be useful, in the context of the 1983 year of SME, for the Commission to publish a guide on Community competition law for SME, pointing out, in particular, the enhanced possibility for SME to cooperate with other enterprises, especially at a time when the development of the new information technologies is opening up particular new possibilities for such cooperation;
26. Calls on the Commission to carry out a more detailed review of the application of the competition rules to small and medium-sized enterprises and of any special problems that have arisen, with a view to seeing whether further measures are needed;
27. Welcomes renewal of the regulation on the application of Article 85(3) of the Treaty to categories of specialization agreements, a regulation which is of particular interest to SME; wonders, however, if its scope could not be extended even further to help enhance, in particular, the world-wide competitive potential of Community firms in certain highly technical fields;
28. Notes that the Commission has adopted an amended version of its draft regulation on the control of concentration between undertakings, on which Parliament has continually called for progress and on which no action has been taken by the Council since the original proposal was transmitted in 1973; awaits the report of its competent committee on the special details of this revision, but again points out the need for more background economic research on the development of concentration in specific sectors, and the advantages and disadvantages of such concentration;

Further reiterates the need to ensure sufficient Commission personnel to be able to effectively implement any regulation that might eventually be adopted;

Strongly urges the Commission, in the meantime, to continue making vigorous use of the possibilities granted by Article 86 of the Treaty and by the subsequent interpretations of this Article by the Court;

29. Believes that the competition policy must be developed in the light of the increasing prevalence of transnational operations, always remembering that the purpose is to assist and not to impede the operation of economic forces;

30. Deplores, in this regard, the Commission's failure to acknowledge Parliament's repeated calls for action to eliminate transfer pricing abuses; calls on the Commission to proceed to a review of the transfer pricing practices of multinational enterprises, assess the resulting distortions of competition and suggest ways to eliminate such abuses; requests the Commission to report back on progress in implementing the 1977 Directive on mutual assistance between the relevant authorities of the Member States in the field of direct taxation, and in particular, as to whether it is now appropriate to draw up a body of rules on transfer pricing following the pooling of experience in this field called for in Article 10 of the Directive;

Competition policy and government assistance

31. Recognizes the difficult task facing the Commission in controlling national aids in a period of economic recession and industrial restructuring; believes however, that, in view of the growing importance and complexity of aid programmes, the pragmatic approach adopted by the Commission no longer faces up to the task and that policy rules, alongside the practical guidelines devised so far, should encompass a more rigorous conception of the Community interest;
32. Believes that the Commission's efforts must be directed towards the progressive elimination of all national aids which are not covered by specific exemptions applying equally in all Member States;
33. Invites the Commission, following the recent Court of Justice decision in the Philip Morris case, to take a broad view of Community objectives with regard to aids that are not specific to regions or sectors;
34. Approves the general positions taken by the Commission with regard to regional aids, but insists that initiatives in this field should be better integrated with the Community's overall regional policy; calls on the Commission to provide more precise information in its next report on the criteria and indicators it uses for scrutinizing national aid schemes;
35. Supports the principle of assisting crisis sectors, but expresses concern at the commitment of an increasing amount of resources to industries with limited growth potential in the Community as a whole; points out that some forms of intervention, in particular the introduction of the quota system in the steel

industry, tend to punish the efficient producers and may not lead to competitive production patterns from the Community point of view; considers that the problem of national aids, which constitute a major threat to the unity of the common market, can best be approached through a series of detailed policies which apply the principles of Articles 85 and 86 to individual sectors; calls, therefore, on the Commission to integrate its action in this field into the framework of an overall industrial strategy for the Community and requests more information on the methods employed for, and the results obtained from, the a posteriori monitoring of sectoral policies and aids;

36. In this context, calls attention to the sectoral agreement to reduce man-made fibre capacity and requests the Commission to investigate allegations that in some cases production capacity is being artificially maintained and to report to Parliament as soon as possible;
37. Welcomes the inclusion in the Annex to the Eleventh Report of a list of aids to which the Commission raised no objection at the time; asks that such a list be not only included in subsequent reports but also expanded into a full list of all current aids, specifying their duration; emphasizes again that the Commission has the important task of ensuring that the Member States report their plans for granting aid and that these aids are of a degressive and temporary nature;
38. Welcomes the substantial progress made in eliminating the discriminatory aspects of state monopolies of a commercial character, but points out that there is still much to be done regarding the tobacco monopolies, the quota system for intra-Community road transport permits and air transport in particular;
39. Welcomes the recent decision by the European Court of Justice reaffirming the validity of the Commission's Directive on the transparency of financial relations between Member States and public undertakings;
40. Renews its call for a study on the implications of Spanish and Portuguese entry into the Community for competition policy, as considerable problems of adjustment are likely to be encountered;

International issues

41. Points out the need to complement action on competition policy within the

Community with action aimed at controlling distortions of competition at international level;

42. Considers that the Community must take an active part in the different international fora in improving the operation of international competition procedures and rules for the free exchange of goods and services. The planned GATT ministerial meeting offers a useful point of departure for new initiatives in this area;
- Regrets that the deadlock in negotiations for the proposed United Nations code of conduct on the transfer of technology has still not been broken;
- Notes that negotiations on the establishment of rules concerning flags of convenience have been taking place under UNCTAD auspices, but that no final decisions have yet been taken; asks to be kept fully informed of the progress of these negotiations;
43. Points out again that the issues posed by the extra-territorial application of competition laws, as shown by the enactment of 'blocking' laws in certain Community countries, and of disclosure of documents, are growing in importance and urges the Commission to improve its cooperation with the anti-trust authorities of non-member countries for dealing with them;
44. Urges the speedy implementation of a Community convention on the reciprocal recognition of copyright and of judgements in Community courts of law as to copyright, as a first step towards a concerted Community stand against copyright infringements by producers in third countries and the unfair competition this represents;
45. Deeply regrets that the Commission fails to respond to Parliament's repeated calls for a campaign to eliminate competition abuses in other parts of the world; points out that this is an essential condition for the establishment of genuine internal competition and stresses again that fragmentation of responsibilities within the Commission should not be an obstacle to taking the necessary initiatives; renews, therefore, its call on the Commission not to confine itself simply to participating in the activities of the international bodies concerned, but to contribute its utmost to:
- the campaign against international tax evasion,
 - the abolition of tax havens,
 - the elimination of flags of convenience,

- the abolition of other unfair practices in the field of competition such as the existence of sharp international differences in foreign investment incentives and regulations;

Commission procedures

46. Welcomes the new section in the Eleventh Report devoted to procedural issues, responding to Parliament's prior criticisms¹ in a far fuller way than ever before, and putting forward a number of suggestions for improving its own procedures; believes that the Commission's response, while not wholly satisfactory, constitutes a basis for making real improvements to these procedures;

47. Notes that the Commission has come down firmly in the Eleventh Report in favour of a two-tier system of judicial review of Commission decisions, a court of first instance dealing with questions both of fact and of law, and a court of second instance merely re-examining questions of law;

Believes that a reform of this kind could well be highly desirable and calls for the Commission to report back as soon as possible, and at the latest by the next year's report, on the practicalities of such a proposal and, in particular, on how a competition court might be constituted and on the exact range of its functions;

48. Notes that Parliament's prior suggestion² for the possible appointment of an independent person or persons from within the Commission but independent of DG IV, or else appointed by the Court, is regarded unfavourably by the Commission; further notes that the Commission is envisaging the appointment of hearings officers, and has in fact recently appointed an 'adviser-listener' to ensure the smooth running of hearings;

Requests the Commission to give more details on how it is proceeding on this matter and on the scope of the 'adviser-listener's' responsibilities; recognizes the value of having such a person within DG IV, and with direct access to the Commissioner responsible, but believes that the scope of his function should not be limited to ensuring the smooth running of hearings alone;

¹ e.g. in its resolutions on the Ninth and, in particular, on the Tenth Annual Reports on Competition Policy.

² In point 41 of its resolution on the Tenth Report, op. cit.

49. Notes that applications for exemption and for negative clearance, in particular, have taken up to 18 years to be disposed of, and seldom less than 18 months, and that the number of pending cases of all kinds before the Commission has risen to 4,365, with no less than 185 applications or notifications being made in 1981 alone; further notes that in contrast the Commission took 11 formal decisions in 1981 applying Articles 65 and 66 of the ECSC Treaty and 11 applying Articles 85 and 86 of the EEC Treaty, and that 121 cases were settled without the need for a formal decision;

Believes that this great backlog of undecided cases underlines the urgent need to expedite Commission procedures;

50. Notes the Commission's proposal to strengthen the legal value of so-called comfort letters by ensuring prior publication of a Notice in the Official Journal, and also its proposal to take simplified exemption decisions to solve the problem of the numerous cases having common features, but requests the Commission to clarify what it has in mind in this latter regard;

51. Considers that the Commission will also have to take other measures to expedite its procedures and should consider, for instance, the proposals recently made in this regard¹ to amend Regulation 17 so as to confer automatic exemption on an agreement after the lapse of a specified period or else to provide some form of provisional exemption after an uncontested period (such as 90 days) from the publication of an agreement and until a final decision by the Commission;

52. Requests the Commission to provide further details as to how far it intends to go allowing firms involved in a procedure to have access to the file in a particular case, and also as to how it intends to proceed in the field of legal professional privilege, in the light of the decision by the European Court of Justice in the A M and S case;

¹In the report on competition practice by the Select Committee on the European Communities of the British House of Lords

Strengthening and redirecting the Commission's economic research on competition policy matters

53. Notes that the economic research carried out by the Commission in the field of competition policy - as outlined in the final chapter of the report - especially that concerning market and price structures, while occasionally providing valuable insights, lacks clarity, is short on analysis and often seems insufficiently linked to the practical economic issues encountered by DG IV in its everyday work;
54. Further notes that considerable criticism has often been expressed of the Commission's economic judgements in specific cases, such as in its definition of the relevant market, while whole areas of its activity, in particular the control of government assistance to, and intervention in, industry do not receive any systematic analytical treatment;
55. Calls, therefore, for a reinforcement of the economic research capability of DG IV and urges the Commission to ensure greater integration of DG IV's economic research with the rest of its activities;
56. Points out that such more clearly focussed research could consist of the following:
- (i) Analyses of the state of competition and efficiency in individual sectors, including the definition of the relevant market, the international aspects of competition, the advantages and disadvantages of industrial concentration, and the existence of, and reasons for, major price disparities for similar products in particular sectors;
 - (ii) Research on more general competition policy problems common to a number of sectors, such as the effects on competition of selective and exclusive distribution agreements and of patent licensing agreements; and
 - (iii) Research in the area on more general competition policy problems common to a number of sectors, such as the long-term impact of aids on industrial structures and efficiency and the effectiveness of crisis cartels;

57. Calls for more explanation by the Commission as to how it chooses particular subjects to be studied by outside experts in the 'evolution of concentration and competition series'; asks for more information on the practical use subsequently made of these studies and stresses once again that the Commission must follow up its enquiries on price structures with measures designed to eliminate unacceptable price disparities;

Final remarks

58. Welcomes the inclusion in the report of a separate chapter on competition policy and the role of socio-economic and political interest groups, as well as the Commission's decision to consult the Economic and Social Committee on competition policy issues of general Community interest covered in the Annual Report; believes, however, that the effective cooperation and support of industry associations, trade unions, consumer and other interest groups with regard to general or specific objectives of Community competition policy require a greater effort on the part of the Commission consisting of more frequent bilateral contacts and better exchange of information;

59. Calls most emphatically for the inclusion of a chapter on non-tariff barriers and asks to be informed of further action taken on the Commission's proposal relating to the provision of information in the field of technical standards and regulations¹;

60. Welcomes the fact that the Commission has acted upon some of the recommendations approved by the Parliament in its previous resolutions on competition policy, but notes that there still is a considerable number of issues which have not been adequately covered or even acknowledged by the Commission; believes that the progress registered in the Eleventh Report should now be built upon, and insists that in each subsequent report subjects previously raised by the Parliament receive an effective response from the Commission;

61. Instructs its President to forward this resolution and the report of its committee to the Council and the Commission.

¹ European Parliament resolution of 8 May 1981, OJ C 144, 15.6.1981, p.122

EXPLANATORY STATEMENTI. INTRODUCTION

1. The central importance of Community competition policy is illustrated by the fact that it is less and less easy to do justice to the subject within the framework of one annual review by the Parliament. Indeed a number of key competition policy issues will not be covered in detail in the present report, since they have been, or will be, the subject of separate reports by the Parliament, such as the Commission's proposals to apply the rules of competition in the air transport, and in the sea transport sectors, the Commission's revised proposals on merger controls, the issues of aids to the steel industry, possible distortions of competition in the automobile sector.

2. Furthermore the field of competition policy is not one which is particularly suitable to Parliament's traditional procedures for giving its opinion on specific new proposals, since what is at stake is often more the Commission's continuing administration of competition policy rather than just the examination of new initiatives. Even when the Commission does put forward draft regulations, as it has on several occasions this year, the normal Community consultation procedures do not apply, as it is the Commission itself which has the final say, after having consulted the Advisory Committee of experts from the member states. No formal opinion by the Parliament is therefore, required, although Parliament has been informally consulted on the proposal for a directive on the transparency of financial relations between member States and public undertakings, and the preliminary draft regulation on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements.

3. And yet competition policy is an area where the Community through the Commission has direct powers raising the need for a more systematic review on the part of the European Parliament than has been the case in the past.

4. This report then briefly examines the range of topics covered in the Commission's 11th Report on competition policy, treating in little detail those which are being covered elsewhere within Parliament and concentrating on some issues of central importance. In particular, section II analyses the basic objectives of Community competition policy in a period of economic recession. Section III comments on some of the initiatives the Commission has taken in the course of the last year in order to apply the rules of competition to the air and sea transport sectors. Section IV reviews a wide range of activities with regard to the application of competition policy towards enterprises with particular emphasis on the question of distribution agreements and the application of the competition rules to multinational undertakings. Section V discusses the action of the Commission in the field of government assistance, especially as regards the control of national aids. Section VI examines briefly some of the international aspects of the application of Community competition policy. Section VII comments in some detail on the Commission's response to Parliament's criticism's of its procedures. Section VIII discusses some of the problems connected with the Commission's economic research on competition matters and makes recommendations on how to improve it. Finally, section IX evaluates the progress made in the direction of closer involvement of socio-economic and political interest groups in the conduct of Community competition policy, including the Commission's responsiveness to Parliament's comments and requests.

II. GENERAL OBJECTIVES OF COMMUNITY COMPETITION POLICY

5. The considerable changes in relative prices, demand patterns, technology as well as in the international economic environment that have occurred over the last decade pose problems of structural adjustment to an extent not yet experienced in the Community's history. Such problems tend to be particularly pronounced in those lines of activity which are large consumers of energy, produce goods and services for which substitutes have been found, suffer from technological retardation or face competition from the newly industrialising countries. Competition policy is a key element in an adjustment strategy since its central objective is to prevent economic agents from exploiting undue advantages in their access to factor and product markets so as to extend the area for economic choice and establish the conditions necessary for achieving an efficient allocation of productive resources.
6. The pursuit, however, of this central objective should be tempered by two considerations. The first is the existence, in modern industrial economies, of important scale economies pointing to the need for bigger units than those deemed compatible with the classical rules of competition. The second consideration is that economic agents are not endowed with the same assets or face the same circumstances so that the cost of a certain economic choice differs depending on the position of the agent involved. Certain regions may experience high unemployment or have inadequate infrastructure, particular groups of workers may be disadvantaged while some sectors may face more intense international competition than others. The effects of closing a plant, or the incentives required for setting up a new one, therefore differ according to the region, social group or sector involved and such differences should be made good if the desired restructuring is to proceed in a smooth and efficient way.
7. The importance of such considerations has grown recently on account of the prolongation of the economic recession and the associated intensification of international competition. As recently pointed out by the OECD, "the need to combat inflation and improve balance-of-payments equilibrium

encourages most governments to adopt restrictive measures of a budgetary or monetary character which mainly affect overall demand" so that "the adjustment or conversion of certain sectors takes place against a background of reduced economic growth, and this can only aggravate the problems of unemployment and regional development" (1). At the same time intensified international competition, by squeezing profit margins, tends to reinforce the trend to increased concentration.

8. The effective application of Community competition policy is thus a complex task involving the reconciliation of a number of often competing considerations and, in a more general way, the integration of the particular objectives of the Community. Such integration is not manifest in the Commission's action in the competition field as will be suggested in subsequent sections of this report, particularly in the section dealing with government assistance. A first requirement for improved performance is to strengthen and redirect the economic research carried out by, or on behalf of, the Commission with a view to developing an integrated concept of competition policy.

The scope of such research is reviewed in the last section of this report and includes the efficiency and competitiveness of Community industrial structures, especially in a world context, and the role of public assistance and intervention in the process of economic adjustment.

9. A second requirement for achieving greater integration is to introduce measures ensuring the coordination of DG IV and other departments, especially those dealing with economic, fiscal, industrial and regional problems. Such coordination does not seem to be sufficiently developed in the Commission, a recent example being the absence of DG IV involvement in the study on the competitiveness of Community undertakings vis-à-vis its rivals in third countries. It is evidently important that the Commission coordinates the results of this study with the work of DG IV.

(1) "The Role of Competition Policy in a period of Economic Recession with Special Reference to Crisis Cartels", OECD November 1981.

III. APPLICATION OF THE RULES OF COMPETITION TO AIR AND SEA TRANSPORT

10. The Commission describes, in the 11th Report, the initiatives that it has taken in the course of the last year to apply the rules of competition to the air and sea transport sectors.
11. The Commission's regulation applying Articles 85 and 86 to air transport has been the subject of a recent resolution from the European Parliament on the basis of a report drawn up by Mr. Schwarzenberg.⁽¹⁾ The Parliament approved the Commission's initiative but requested the Commission to give more precise indications as to its exact scope.
12. The Commission's second major initiative in the field of air transport, its draft Council Directive on tariffs for scheduled air transport, is currently being examined within the Parliament's Committee on Economic and Monetary Affairs. Already a division of opinion is apparent between those who would approve the proposal as a useful first step towards opening up competition and those who would prefer other approaches which would leave the present system more intact.
13. The 11th Report also mentions the Commission's initiative in sending questions to national governments aiming to find out where to draw the line between the powers of public authorities and the responsibilities of the companies in relation to tariff fixing, and to airlines concerning the application of certain practices such as capacity-sharing arrangements. The Commission should present a summary of its findings as soon as possible.
14. Finally it should be noted that a number of other competition policy problems remain untackled in the field of air transport, such as the fundamental question of market access and the non-applicability of the Commission's Directive on transparency of financial relations between public enterprises and Member States to the sector of air transport. The formulation of Community guidelines

(1) OJ

to cover national aids in this field is apparently being considered by the Commission but no such guidelines have yet appeared. The air transport sector has special characteristics which pose particular problems for the straightforward application of Community competition policy but, nevertheless, the issues raised above should be tackled by the Commission as soon as possible.

As regards the Commission's draft regulation applying Articles 85 and 86 to sea transport, this is clearly an area of intense controversy and will be covered in a separate report by the Committee on Economic and Monetary Affairs.

IV COMPETITION POLICY WITH REGARD TO ENTERPRISES

16. The 11th Report outlines a wide range of activities with regard to the application of competition policy towards enterprises. Besides description of the major cases decided by the Court of Justice, and the main decisions and measures taken by the Commission, the 11th Report also outlines progress on the initiatives taken by the Commission, to replace Regulation 67/67 on exclusive dealing by two new regulations, its preliminary draft regulation concerning distribution and pre and after sales service in the motor vehicle sector, and its revised merger control proposal. It also includes new sections on the application of the competition rules to small and medium-sized enterprises, and to non-Community undertakings and multinationals.

Distribution Agreements

17. The Commission has now published ⁽¹⁾ its latest draft proposals to replace Regulation 67/67 on the application of Article 85-3 of the Treaty to certain categories of exclusive dealing agreements. As a result of its experience it is now proposing two separate regulations. The first would grant a block exemption to exclusive distribution agreements meeting certain criteria. The second would give a block exemption to certain exclusive purchasing agreements, and it defines three such categories of agreement for which specific conditions for exemption are spelled out, exclusive purchasing obligations of short and medium duration such as occur in all sectors of the economy, and long term exclusive purchasing agreements, firstly for the resale of beer, and finally of motor spirit and lubricants for motor vehicles in filling stations.
18. Well thought-out block exemptions deserve strong support, and clearly have the potential to be highly valuable instruments in the administration of competition policy. Put forward in areas where experience has shown that the advantages of such agreements generally override certain anti-competitive effects that they may have, and where the Commission would otherwise have an enormous amount of extra work to do, they have several potential benefits.

(1) OJ C 172 of 10.7.82

They can greatly lessen the administrative burden on the Commission, thus freeing limited Commission resources for other priority tasks, they can provide greater certainty for firms, and also speed up the taking of decisions, and the making of agreements with beneficial effects for the Community economy. They can often be of special help to small and medium-sized firms.

19. In evaluating proposals for such block exemptions, and in these cases for the revision of an existing block exemption, these criteria must always be borne to the fore. To what extent will the proposals really reduce the Commission's work load, and provide greater certainty for enterprises? And if the benefit to the public of such agreements are real, to what extent will the benefit be ensured by such proposals?
20. Bearing these criteria in mind a certain number of questions need to be raised in connection with these draft proposals.
21. The first is whether there are too many detailed conditions in the new drafts, and whether the end result might not be to increase rather than diminish the number of notifications that would be necessary, compared to the position under the existing Regulation.
22. One such example is Article 6 of the draft text on exclusive distribution agreements, which sets out a number of circumstances in which the Commission can withdraw the benefit of the regulation. Article 6 (a), for instance defines one such case as when "the goods to which the agreement relates are not subject, in the territory covered by the agreement, to effective competition from goods considered by the consumer as similar goods in view of their properties, price and intended use." Exclusive distribution agreements covering entirely new products being tried out in a particular market, might, therefore, not be covered.
23. Then Article 6 (d) (2) would provide for the withdrawal of the benefit when "the exclusive distributor ... sells the goods to which the agreement relates at excessively high prices."

24. It is clear that major pricing discrepancies in the Community need to be rigorously analyzed by the Commission, and action taken when necessary, but the inclusion of this clause in the draft could create more rather than less uncertainty. What is an excessively high price?
25. Furthermore the draft block exemption on exclusive purchasing agreement gives an exemption (in Article 1) to agreements "... of not more than one year ...". This would appear to be too short a period of time. Might it not be a better approach to have a longer time period, perhaps combined with stipulation of a maximum period for the termination of an agreement, such as not more than 12 months?
26. In addition both drafts lay down size criteria, whereby the exemption will not apply in cases where manufacturers of competing goods enter into a non-reciprocal exclusive purchasing agreement between themselves unless at least one of them has a total annual turnover not exceeding 100 million ECU. The objective is a good one, and yet the result may be overly restrictive when combined with the very far reaching definition of what constitutes a manufacturer in Article 5 of both texts.
27. Conversely there may be agreements which would not be excluded from the operation of the block exemption by the size criterion where more protection is necessary, such as when a small manufacturer is dealing with a more powerful exclusive distributor or purchaser.
28. Another set of questions concerns whether the alleged benefits of exclusive distribution agreements are not at least partially undercut by the fact that the draft texts appear to put too great an emphasis on unrestricted parallel imports. Do the drafts provide an insufficient measure of protection for an exclusive dealer to offset his special promotion and other expenses?
29. Finally the draft on exclusive purchasing singles out two sets of special provisions for brewery agreements, and for filling station agreements. Are there not other categories of agreement to which such special longer-term provisions could apply?

30. That these and other questions about the drafts are important ones is illustrated by the fact that replacing Regulation 67/67 is proving to be a difficult and lengthy process, and that four attempts have been made so far to come up with a satisfactory drafting. In its next report the Commission should give more indication than in the 11th Report on the nature of the comments that have been made, and on the difficulties that have arisen.
31. For a case can certainly be made out that these drafts could be made simpler and shorter without undercutting the effectiveness of Community competition policy. This latter could be reinforced by making vigorous use of the possibilities opened up by Article 86 on abuse of a dominant position, and also by having on hand more detailed economic findings on, for instance, the definition of relevant markets, and on the special characteristics of particular markets, and making greater use of the power to withdraw the benefits of exemption in the case of findings of abuse.
32. As regards economic research in this area, the Commission has not responded to paragraph 16 of Parliament's resolution in the 10th Report which called for the overall competitive effects of distribution agreements to be examined in greater detail from an economic rather than just a legalistic point of view, nor to Paragraph 17 which called for the issues posed by parallel importing to be closely examined.
33. A further area on which more research is needed is on price discrepancies in specific markets where they appear to be particularly great, and also on the reasons, whether justified or apparently unjustified for such discrepancies.

Competition in the motor vehicle sector

34. One obvious area where closer examination by the Commission on the lines called for above is clearly needed, is the field of motor vehicle distribution. In this context the Commission have issued a preliminary draft Commission regulation on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements.

35. Parliament will be examining the issues posed for competition in this sector in a separate report, and detailed comments will not be made here. Nevertheless, there has been considerable evidence of possible competition policy distortions in this sector, including attempts by some Community manufacturer to try to impede parallel imports of their products by any means possible, such as by instructing their authorized dealers to refer inquiries from potential purchasers to the authorized dealers in their country of origin, to announce unreasonable delivery times or to refuse to sell altogether. Furthermore there are very great disparities in the retail prices of new motor vehicles from one member state to another.
36. Naturally there are explanations for many of these disparities, such as different levels of taxation in the various member States. Nevertheless they merit closer investigation, and where necessary, firm action by the Commission.
37. An appropriate regulation on motor vehicle distribution and servicing agreements could certainly be of great utility in helping to lay down certain ground rules. But this should also be complemented by a thorough Commission study of the whole range of problems associated with competition in the motor vehicle distribution sector, to examine the degree to which there really are unjustified distortions of competition and to look, in particular, at the reasons for such major price discrepancies as clearly exist.

Patent Licensing

38. Enactment of a block exemption regulation for patent licensing has now been pending for some time. The initial proposals of the Commission came in for strong criticism, and then presentation of a subsequent draft was held up pending the decision of the Court of Justice in the Breeders rights - maize seed case, a decision which was recently announced. Parliament now awaits an analysis from the Commission on how it is proposing to proceed in this field in the light of this judgement, and whether it is planning to make any modifications to its original proposal.

Competition Policy and Small and Medium-sized Enterprises

39. The Eleventh Report includes a short section on application of the competition rules to small and medium sized enterprises, pointing out, in particular, some of the ways in which special measures have been taken in their favour by the Commission. These include more favourable treatment in a number of current Commission initiatives, including its recently published proposals for block exemptions for exclusive distribution and purchasing agreements, and also in its patent licensing proposals.
40. These provisions are to be strongly welcomed in principle. While the actual quantitative criteria, which are used to define the thresholds below which firms will be treated more leniently, are clearly somewhat arbitrary, this is surely inevitable, and certain rules-of-thumb must be established (although see the comments in para .26. above)
41. What does need to be carefully examined, however, is the extent to which small and medium-sized enterprises are fully benefiting from more lenient treatment, and are fully aware of the possibilities open to them. For a central characteristic of most smaller firms is their more limited access to information and limited number of specialist advisers. In 1976 the German authorities published a cooperation manual, (Kooperationsfibel), to serve as a guide on competition law for enterprises wishing to cooperate with other enterprises. It would be useful for such a guide to be produced at European Community level, especially at a time when the development of the new information technologies are opening up many new possibilities for such cooperation. The Commission might therefore, publish such a guide as part of the activities during the 1983 year of Small and Medium-sized Enterprises.
42. In addition the Commission should carry out a more detailed review of the application of the competition rules on small and medium-sized enterprises and of any special problems that have risen, with a view to seeing whether further measures are needed.

43. Finally your rapporteur notes that the Commission has recently presented a new draft Regulation on the application of Article 85(3) of the Treaty to categories of specialization agreement, to replace the existing regulation which is about to lapse. This regulation, which provides that the prohibitions in Article 85.1 of the Treaty will not apply to certain agreements concluded between undertakings for the purposes of specialization of production, is clearly of special interest to smaller firms. Indeed it will only apply if the products involved do not represent, in a substantial part of the Common Market, more than 15% of the market for such products, if the total annual turnover of the participating undertakings does not exceed 300 million ECU or if none of the participating undertakings has an annual turnover of more than 100 million ECU.
44. The Commission's new proposal appears to vary little from the existing regulation. The renewal of this regulation is clearly to be strongly welcomed. Nevertheless it might be asked whether its scope could not have been extended even further since even certain smaller firms in certain highly specialized fields might exceed, for instance, the 15% market share criterion in a substantial part of the Common Market. Certainly this is yet another area where the balance between competition policy, and industrial policy objectives (in particular the promotion of new technologies) needs to be carefully judged.

Merger Controls

45. The need for a Council decision on the Commission's proposals in the field of merger controls has been emphasized again and again by Parliament. The issue is clearly highly complex. In some sectors further concentration through mergers may indeed be desirable in order to face up to competitive threats from elsewhere in the world, while in others the process of concentration may already have gone too far. Even in the former case, however, intensified forms of cooperation may be preferable to full-scale mergers. Economic research also points in different directions, with economies of scale arguments being matched by certain evidence of diseconomies caused by mergers. The need for a Community mechanism for reviewing mergers, which would of course allow for a balancing of these various factors, remains overwhelming, however, as long as the Commission is given sufficient resources to carry out this difficult new set of tasks. The Commission has now put forward a revised proposal, which is currently the subject of separate examination within the Committee on Economic and Monetary Affairs.

Competition Policy and Multinational Enterprises

46. For the first time the 11th Report includes a section on application of the competition rules to non-Community undertakings, and in particular their application to multinational undertakings. Some general considerations are put forward on the former topic, followed by a list of some of the major Community competition policy decisions affecting multinationals.
47. This is a useful summary, and represents a partial response to Parliament's repeated requests for more information from the Commission on this subject. Nevertheless it is indeed only partial in that it telescopes more than a decade's worth of Commission decisions with regard to multinationals into 5 paragraphs of description.
48. Furthermore, at the outset, the Commission states that multinational undertakings of Community origin "have no particular features that would distinguish them from other European undertakings for the purposes of competition law" (point 38) and concludes (point 42) that "until now the Commission has not experienced any particular difficulties in applying the competition rules to multinationals".
49. While this may well be true from a narrowly legal point of view multinational enterprises clearly pose special problems for competition policy to a degree not recognized by the Commission. Parent-subsidiary relationships pose particular problems in a multinational context (for Community company law as well as competition policy), causing potential clashes of jurisdiction (notably between the United States and the Community) and (as described elsewhere in the 11th Report, in point 162) helping to block agreement on the restrictive practices chapter of the proposed international code of conduct on the transfer of technology. It is less easy to control possible abuses by multinational firms, such as transfer pricing abuses, which if not purely a competition policy problem, can clearly distort competition between firms. Multinationals are in a better position to take advantage of differences in national taxation and wages, and of unfair investment

incentives, offered by individual states, and which can distort world-wide competition. More generally, such firms by drawing on large amounts of world-wide resources are often able to exercise significantly greater market power than that indicated by their share in the respective markets in which they operate making thus difficult to ascertain the existence of a dominant position in the sense of Article 86 of the EEC Treaty.

50. Multinationals do, therefore, pose special problems for competition policy which need to be squarely faced and dealt with. At the level of the research carried out by, and on behalf of, the Commission, it is necessary to include international considerations such as the extent to which particular markets are predominantly world-wide, Community-wide, national or regional in scope, and the relative importance of multinational enterprises in such markets.

Closer links should also be established between the Commission and the United Nations Centre for Transnational Enterprises, which has among its other activities established a data bank on multinationals, and carried out research projects on the degree of concentration, and the role of multinationals in particular sectors. These links could be very useful to the Commission in carrying out the research called for above.

51. At a more practical level measures should be introduced promoting the disclosure of information on the part of multinational enterprises so as to make more transparent the economic links of the subsidiaries to their parents and thus limit the possibilities of abuse. It should also be stressed that fragmentation of responsibilities within the Commission should not be an obstacle to taking action on important issues such as transfer pricing. Here, there is a clear need for close cooperation between DG IV and DG XV which deals with financial institutions and taxation. At the very least the Commission should report back on progress in implementing the 1977 Directive on mutual assistance between the relevant authorities of the Member States in the field of direct taxation, Article 10 of which called for the member States, together with the Commission, to pool their experience within the field of transfer pricing with a view to improving cooperation and, where appropriate, drawing up a body of rules. The Commission should also undertake a study of the transfer pricing practices of multinational enterprises ⁽¹⁾, assess the resulting distortions of competition and suggest ways for eliminating the abuses.

(1) The Commission has recently indicated that it is not doing research in this area in its reply to written question No. 99/82 by Mr. Welsh (OJ C 151/27 of 21.6.82)

V. COMPETITION POLICY AND GOVERNMENT ASSISTANCE

52. The Commission states in the Eleventh Report that, in the face of continuing recession and the need for industrial restructuring, its role in controlling aids has become increasingly complex, particularly from the point of view of reconciling the competing pressures to which the grant of aids responds with the sometimes not necessarily confluent objectives of Community policy. There is no doubt that this statement is largely true. However, the Commission's task could be made less difficult by complementing the practical guidelines devised so far for scrutinizing national aid programmes with a more rigorous conception of the Community interest and a better understanding of the role of public authorities in assisting the process of structural adjustment. As already pointed out, the key to developing an integrated approach to competition policy is to expand economic research on the competitiveness of Community industrial structures and the effectiveness of policy instruments in influencing their development, and to ensure closer coordination of DG IV with other departments of the Commission dealing, in particular, with economic, fiscal, industrial and regional problems.

General Aids

53. With regard to aids which are not specific to regions or sectors the Commission states that derogations from Article 92 (3) of the EEC Treaty place on it a heavy responsibility underlined in the recent decision of the European Court in its judgement in the Philip Morris case. The central principle upon which this decision is based is that national objectives are not sufficient to justify the use of aids unless shown to contribute to the achievement of Community objectives. The Commission further states that the development of the so-called "future industries", and of small and medium-sized enterprises as well as the promotion of such activities as research and development, protection of the environment, and energy saving and substitution may qualify as being in the common interest and compatible with the common market. The criteria for selecting such areas, however, are far from clear and there is considerable need for research and conceptual classification. In doing

so the Commission should take a broad view of the Community interest bearing in mind that convergence of national economies is a key Community objective so that national aid schemes applying to the less developed areas of the Community and aiming at escalating their development should be eligible for exemption, and, further, that "future" or "growth" industries are not a uniform set with universal validity throughout the Community, but depend on the stage of development of particular Community areas and countries : industries with limited or no future in developed areas may have considerable future in less developed areas while it may take a very long time for the latter areas to gain access to the industries that presently are at the frontier of technical knowledge.

Regional Aids

54. In the field of regional aids the central problem is to achieve better integration with the Community's overall regional policy. In assessing progress in this direction it would help if the Commission provides more precise information in its next Annual Report on what it calls "other criteria based on the European context" for scrutinizing national aid schemes.

Sectoral Aids

55. As regards sectoral aids, the main developments are the issuing of a new code of aids in the steel industry (Decision 2320/81/ECSC), Council agreement on the Fifth Directive on aids to shipbuilding and the tightening of the system of aid control in the textile industry. There is clearly a need for assisting crisis sectors, but great restraint must be exercised in order to avoid committing large amounts of resources to industries with limited growth potential in the Community as a whole. Some of the points included in the Decision on steel, namely the establishment of a timetable for the progressive phasing out of aid, the stress on capacity reduction and greater transparency, are to be welcomed in this regard. Concern should be expressed, however, about

the continuing application of the quota system in the steel industry in view of the fact that it tends to punish the efficient producers and may not lead to competitive production patterns from a Community point of view. The need for better integration with the Community's overall industrial policy is evident in this field as well. Furthermore, the Commission should provide more information on the methods employed for, and the results obtained from, the a posteriori monitoring of sectoral policies and aids.

Adjustment of State monopolies

56. The Commission's statement that decisive progress has been registered in the process of eliminating the discriminatory aspects of the French and Italian manufactured tobacco monopolies is to be strongly welcomed.

In response to reasoned opinions served to them by the Commission, the French authorities finally complied with all the requests of the Commission while the Italian authorities (which had also to deal with certain aspects of the match monopoly) settled all the points raised except the question of compulsory fixed retail margins which has now been brought before the European Court of Justice.

Transparency of financial relations between Member States and Public Undertakings

57. Parliament has strongly welcomed the adoption by the Commission of its Directive 80/723 on the transparency of financial relations between Member States and public undertakings, and regretted the subsequent action of three member States, Italy, France and the United Kingdom in seeking to have the Directive annulled by the Court of Justice.

It is to be noted with satisfaction, therefore, that the European Court of Justice has recently taken a decision reaffirming the validity of the Directive, and rejecting the various arguments put forward by the three member States. The Court asserted that the Commission did indeed have

the powers to adopt such a directive, that a directive was necessary since the complex financial relations involved were hard to examine in its absence, that it created no discrimination between public and private enterprises, and that the Commission had generally not exceeded its role.

Implications of enlargement on competition policy

58. The Commission does not respond to Parliament's request for a study of the implications of Spanish and Portuguese entry into the Community for competition policy. The request is renewed as considerable problems of adjustment are likely to be encountered.

VI. INTERNATIONAL ISSUES

59. With regard to the international action of the Community on competition matters the guiding principle should be, as pointed out in Parliament's resolution on enterprises and governments in international economic activity, the establishment of appropriate checks and balances at international level through legislation, guidelines, codes, multilateral agreements, and through greater cooperation and exchange of information between States.
60. Guidelines in the field of competition policy, and restrictive business practices should form an important element in the proposed United Nations code of conduct on multinational enterprises. It is also to be hoped that the deadlock in negotiations for a proposed United Nations code of conduct on the transfer of technology, can be broken as soon as possible; problems in this area seem to lie primarily in differing concepts of what constitute restrictive business practices.
61. The apparent absence of any Commission initiative in the fields of tax avoidance (of which the problem of transfer pricing, mentioned above, forms a part), tax havens and flags of convenience is very regrettable

irrespective of whether it is due to a failure to appreciate the importance of these issues or to the fragmentation of the Commission's relevant responsibilities. The existence of grossly unfair fiscal regimes and practices outside the Community poses a serious threat to

competition within the Community as they confer undue advantages to the persons or companies who are able to make use of them. It is, therefore, important that the Commission reverses its passive attitude and initiates a vigorous international campaign in all appropriate fora in order to abolish such regimes and practices.

62. A related issue concerns the establishment of a set of international ground rules in the area of foreign investment and governing investment incentives and disincentives as called for in Parliament's resolution mentioned above. Such ground rules could help to achieve in this sphere what the GATT does, unevenly but still relatively successfully in the field of international trade. The Commission rightly places a major emphasis on reducing distortions of competition within the Community through a strict control of State aids. A greater grip now needs to be taken of this problem at international level to prevent world-wide distortions of competition in what are often world-wide markets. The issue of tax havens, referred to on several occasions in Parliament's past resolutions on competition policy, represent just one aspect of this problem.

63. One final point to emphasize in that context is that the Community should be able to participate fully in its own right in all international fora in the field of competition policy where the Community has a direct role. The 11th Report notes (in point 161) that the Community's present status in the operation of the Intergovernmental Group of Experts on Restrictive Business practices (which was set up in 1981 and is to meet annually) "does not yet allow it to participate fully, and so it cannot play the important role which should fall to it in a body that seeks to deal effectively with the control of restrictive business practices at a world level." This situation should be redressed.

VII PROCEDURAL ISSUES

64. Parliament has a long-standing interest in the Commission's procedures in enforcing Community competition policy and in ways in which they can be improved through achieving the right balance between ensuring fairness, speed and legal certainty. This concern has been reflected in Parliament's recent resolutions on competition policy, as well as in numerous written questions from individual members of Parliament. In particular, Parliament's resolution on the 10th Annual Report placed a considerable emphasis on procedural issues (in paragraphs 40 -45) and pointed out that the Commission had failed to provide satisfactory answers to the criticisms of its procedures.
65. The 11th Report represents a welcome change in this respect, in that the Commission has responded to Parliament's criticisms in a far fuller way than ever before, and has put forward a number of suggestions for improving its own procedures. While some of these suggestions seem tentative, and need considerable further clarification, and while the Commission has responded negatively on certain other points, the Commission's response does permit a more constructive dialogue than in the past.
66. In evaluating the Commission's procedures your rapporteur has also been able to study the recent report on competition practice prepared by the Select Committee of the House of Lords of the United Kingdom. Many of the recommendations of this report are of wide validity.
67. In paragraph 41 of its resolution on the 10th Report Parliament requested the Commission to report back to Parliament within the next year with proper appraisal of the advantages and disadvantages of three possible methods of improving its procedures, creation of an intermediate tribunal below the Court of Justice to deal with competition cases, appointment of an "independent person" or persons, and finally ways of expediting procedures for granting exemptions.

68. In the 11th Report the Commission has come down firmly in favour of a two-tier system of judicial review, a court of first instance dealing with questions both of fact and of law, and a court of second instance merely re-examining questions of law. The Commission does not spell out, however, any details as to how this might work, how such a competition court might be constituted and the exact range of its functions. There seems to be fairly general agreement that a reform of this kind could well be highly desirable, but also concern that a number of procedural obstacles would first have to be overcome and that this might only constitute a solution in the longer term. In the view of your rapporteur a dialogue must now be initiated between the Parliament and the Court and Commission to examine the practicalities of such a proposal and to ensure that decisions on what the Commission itself describes as "the most appropriate way of improving all administrative and legal procedures relating to competition cases" are not indefinitely postponed.
69. Parliament's second suggestion, for the possible appointment of an independent person or persons from within the Commission but independent of DG IV, or else appointed by the Court, is, on the other hand regarded unfavourably by the Commission in its comments on the idea in the 11th Report. The Commission claims that this would raise, although to a lesser degree, many of the problems which would be implicit in the appointment of autonomous administrative law judges, a further suggestion which the Commission dislikes, in that it feels that these would not be compatible with the institutional scheme of the Treaty, and could well make competition procedures in individual cases even more complicated and prolonged.
70. The Commission does, however, state that it is envisaging the appointment of hearings officers, "duly authorized to chair hearings, vested with genuine autonomy and the right of direct access to the responsible members of the Commission".
71. The idea of an independent person has been put forward by numerous organisations including UNICE, and constituted a considerable part of the discussion at the hearings held by the Select Committee on the European Communities of the House of Lords. Several of the witnesses argued strongly the case for such

an independent person and suggested some of the functions that he might carry out, such as giving his prior authorization for "dawn raids" on firms' premises, examining matters of legal privilege, chairing hearings and generally examining the fairness of Commission procedures. There was a general feeling that no new institution should be created, but that such an independent person, if created, should come within the Commission, and perhaps even from within DG IV, but clearly distinct from its existing functional directorates. There were also a few adverse comments about the idea and particularly that it might lead to a new tier of bureaucracy.

72. Particularly useful evidence came in a written submission from the consultative committee of the Bars and Law Societies of the European Community in which was stated that perhaps the central problem at present is "that there is no clear division in the structure of the Commission between the functions of:
- preliminary investigation
 - objective assessment of the facts disclosed by that investigation
 - formulation of the charges (objections) against the defendant undertakings
 - objective assessment of the case as it finally stands in the light of the undertaking's defence; and
 - decision, including the decision to impose fines."
73. The submission went on to state that "so far as the CCBE has been able to discover there is no Member State in which all those functions are performed by a single authority. It may be suggested that there is a de facto separation of these functions within the Commission that is open to doubt but, in any event, the functions are not seen to be separated and there is no guarantee that they are in fact separated." The CCBE's conclusions were that "the key to the problem... is to ensure a formal separation (or at least a complete and overt de facto separation) of the functions enumerated... above and/or to introduce an objective guarantee of fairness through the appointment of an entirely independent person or tribunal to whom an immediate right of recourse is possible, with an unlimited supervisory role in matters of detail."

The House of Lords Committee itself recommends the creation of an additional post of Director in DG IV, who would preside over hearings, and be "responsible for the subsequent conduct of the case, for example advising the Directorate-General what recommendation to make to the Commission and drafting the decision."

74. Such a suggestion could be implemented more quickly and with less procedural difficulties than the establishment of an independent Competition Court. The two are of course not incompatible and it may well be desirable to concentrate first on a separation of roles within DG IV itself, which could be complemented later by the Commission's proposal for a two tier system of judicial review. Whether the Commission's proposal for hearing officers goes far enough to meet the former need is open to question, since the scope of such hearing officers responsibilities is not discussed in any detail by the Commission. Your rapporteur requests the Commission, therefore, to clarify its proposals in this regard.
75. The third major demand of Parliament was for the Commission to look into possible ways of expediting procedures for granting exemptions. This has become an increasingly major problem. As the Commission points out in the 11th Report, the number of pending cases has risen to 4,365 of which 3,882 were applications or notifications (no less than 185 made in 1981), 250 were complaints from firms and 233 were proceedings on the Commission's own initiative. In contrast the Commission took 11 formal decisions applying Articles 65 and 66 of the ECSC Treaty and 11 applying Articles 85 and 86 of the EEC Treaty. 121 cases were settled without the need for a formal decision but, nevertheless, the huge backlog is evident.
76. As the House of Lords' report points out "samples taken of these cases have revealed the shortest time for an exemption to be 18 months and the longest 15 years" and the shortest time for a negative clearance 19 months and the longest 18 years. The Commission is the first to admit that this poses great practical problems for firms, especially in such cases as cooperation agreements involving substantial investments.

77. The Commission makes two suggestions to alleviate this problem in the 11th Report. The first is to strengthen the legal value of the so-called "comfort letters" by ensuring prior publication of a Notice in the Official Journal, to give interested third parties the opportunity to submit comments. This could certainly help to undercut some of the criticism that has been aimed at comfort letters and, while these may not be as satisfactory as more formal procedures, they may well be necessary in the interests of speed.
78. The Commission also proposes to take simplified exemption decisions to solve the problem of the numerous cases having common features. Unfortunately the Commission does not spell out at all what it has in mind in this regard.
79. In the long run the granting of well-though out block exemptions will be of far greater value. Nevertheless, the Commission will also have to consider other possible measures.
80. The House of Lords' report offers two possible sets of measures. The first would involve the amendment of Regulation No. 17 so as to confer automatic exemption on an agreement after the lapse of a specific period. The second would provide that after the summary of an agreement has been published, and a period of 90 days has elapsed without notification of dissent from the Commission, the agreement would be provisionally exempt until a final decision by the Commission. The provisional protection thus granted would then not be affected in the event of a final adverse decision, except in the case of fraud or deceit. The Commission should report back to the Parliament on the practicality of these two suggestions.
81. Besides these points the Commission has already indicated that it is envisaging a number of other changes to its rules of procedure to respond to various other criticisms that have been made.
82. Perhaps the most important of these concerns access to the Commission's files where the Commission states that, subject to factors of confidentiality,

it is considering going beyond the requirements laid down by the Court and allowing, in principle, firms involved in a procedure to have access to the file on the particular case. Such a reform would go a long way towards increasing confidence in the Commission's procedures, although problems could indeed be raised in cases, for instance, where a very large number of parties are involved. The Commission must now indicate how it intends to proceed on this matter, and clarify how much access it intends to give and when.

83. A particular problem is raised by the issue of "legal professional privilege" where the Commission says that it does recognize this principle but is awaiting the decision of the Court of Justice in the AM and S case. This decision has now appeared and has unfortunately left a number of matters still unclear and in particular the status of communications with in-house lawyers, in countries where many of them are subject to the same professional disciplines as independent lawyers.

VIII COMMISSION'S ECONOMIC RESEARCH ON COMPETITION POLICY MATTERS

84. The economic research carried out by the Commission and outlined in the final chapter of the 11th Report, while offering interesting insights into existing trends in market and price structures, suffers from two weaknesses. First, there is insufficient information or discussion with respect to the indicators and criteria used for defining certain key concepts such as industrial concentration and the relevant market. Second, there is a lack of qualitative analysis, in particular as regards the international aspects of competition and the advantages and disadvantages of industrial concentration. Furthermore, there is no indication as to whether any use is made of the results of this research in the Commission's work in the competition field and the same holds for the research conducted by outside consultants and organisations on behalf of the Commission.
85. Your rapporteur's concern about the unsatisfactory state of economic research on Community competition policy is not "academic", but springs from the belief that more and better research is necessary for improving the effectiveness of Commission's action in the competition field. This belief

is reinforced by the fact that considerable criticism has often been expressed of the Commission's economic judgements in specific cases, in particular as regards the definition of the relevant market ⁽¹⁾, as well as by the conceptual weakness of its approach to the problems posed by the various forms of government assistance and intervention.

86. A number of practical requests follow from the above analysis. There is, first, a clear need for an increase in the economic research staff of DG IV and for better integration of research with the rest of DG IV's activities. Research should also be extended so as to cover the state of competition and efficiency in individual sectors, especially in a world context, more general competition policy problems common to a number of sectors, and the problems associated with government assistance to, and intervention in industry. Finally, there is a need for more information on the part of the Commission about the criteria used for selecting subjects to be studied by outside experts, and the practical use subsequently made of the results of this research. In this regard, it should be stressed again that the Commission must follow up its enquiries on price structures with practical measures designed to eliminate unacceptable price disparities.

IX. FINAL REMARKS

87. The inclusion in the 11th Report of a separate chapter on competition policy and the role of socio-economic and political interest groups as well as the Commission's decision to consult the Economic and Social Committee on competition policy issues of general Community interest covered in the Annual Report is a welcome response to Parliament's repeated calls for closer involvement of interested organisations in the conduct of Community competition policy. However, the effective cooperation and support of industry associations, trade unions and consumer groups with regard to the objectives of this policy requires more direct contacts and the creation

(1) As, for instance, in the Continental Can case and the Hugin case, see "Reports of Cases before the Court", Luxembourg 1979.

of better channels of information and communication.

88. Your rapporteur fully acknowledges that in a number of ways the Commission's 11th Report on competition policy is much more responsive to Parliament's comments in its resolutions on competition policy than any of its predecessors. New sections, and chapters have been introduced to cover themes on which action has been called for by the Parliament, in particular as regards the question of procedures and the involvement of socio-economic and political interest groups. Nevertheless on a number of issues, such as transfer pricing and the international action of the Commission in the competition field, gaps still remain while, in a more general way, progress is not evident in the direction of Parliament's earlier call for strengthened economic research and better integration of competition policy objectives with the objectives of other Community policies. However, the Eleventh Report could mark the beginning of better cooperation between Parliament and Commission in the competition field based on the understanding that in each subsequent report subjects previously raised by the Parliament receive an effective response from the Commission.

O P I N I O N

of the

Legal Affairs Committee

Mr D'ANGELOSANTE was appointed draftsman on 30 April 1982.

At its meetings of 19/20 October and 2 November 1982, the Legal Affairs Committee considered the Eleventh Report on Competition Policy (Doc. 1-86/82) on the basis of a draft opinion prepared by its draftsman and the amendments tabled thereto (PE 80.659, PE 80.659/Am. 1-5 and PE 80.659/Am. 6).

At the meeting of 2 November 1982, the committee adopted the text reproduced on the following pages by 13 votes to 3. Consequent upon this decision, Mr D'Angelosante resigned as draftsman.

The following took part in the vote: Mrs Veil, chairman; Mr Chambeiron, vice-chairman; Mr Berkhouwer (deputizing for Mr Geurtsen), Mrs Cinciari Rodano, Mr Cottrell (deputizing for Mr Turner), Mr D'Angelosante, Mr Dalziel, Mr Del Duca (deputizing for Mr Ercini), Mrs van den Heuvel (deputizing for Mr Ferri), Mr Irmer (deputizing for Mr Visentini), Mr Janssen van Raay, Mr Prout, Mr Sieglerschmidt, Mr Tyrrell, Mrs Vayssade and Mr Vié.

The Legal Affairs Committee urges the Committee on Economic and Monetary Affairs to take account of the following points in its report:

- (a) the importance of Commission control over undertakings; this control should retain its administrative nature and aim at maximum effectiveness;
- (b) in view of the need for a regulation governing mergers and in the light of the changes which have taken place in the economy, the Commission should also be instructed to give closer consideration to the application of Article 85 of the EEC Treaty in such a way that it stimulates economic activity rather than complicating or restraining it;
- (c) the need for a favourable assessment of a number of measures exempting small and medium-sized undertakings from the prohibition on restrictive practices;
- (d) the need for a neutral attitude by the Community to the nationalization of undertakings in the Member States;
- (e) the beneficial progress made by the Commission in its procedures for investigation and adjudication in the field of competition policy in accordance with the recommendations of the European Parliament in its report on the Tenth Competition Policy Report (Doc. 1-689/81);
- (f) the procedures of the Commission in the exercise of its jurisdiction in the field of competition policy should ensure maximum effectiveness together with fairness and transparency for the undertakings under investigation. The following procedural matters are relevant:
 - i. the Commission should ensure that, pursuant to its assurance in paragraph 17 of the Eleventh Competition Policy Report, the subjects of investigation under Article 14 of Regulation 17/1962 are fully and precisely specified in order that undertakings are aware of their nature and extent.
 - ii. the Commission should supply the undertaking which is the subject of an investigation with a copy of the investigators' report or at least a summary of its conclusions.
 - iii. the Commission should specify the procedures it intends to adopt in order to implement the principles established by the European Court of Justice in its decision in A.M. & S. (Europe) Ltd v. Commission (case 155/79) concerning legal professional privilege.

- iv. the Commission's statements concerning access to the file and the development of non-confidential summaries of its contents are to be welcomed. The Commission should nevertheless review the working of these matters in practice, to ensure a consistent and fair approach. Further, the Commission should, while respecting confidentiality, disclose the substance of complaints against the undertaking.
 - v. the Legal Affairs Committee recalls to the Commission the resolution of the European Parliament calling upon it to publish its internal Rules of Procedure in the investigation and adjudication of suspected infringements and the Commission's assurance to the Legal Affairs Committee that it intended to do so;
- (g) the positive attitude of the Commission to a two-tier system of judicial review (paragraph 16). Such a system, favoured by both the Commission and the European Court of Justice, would obviate much of the current procedural difficulties and criticisms.

EUROPEAN PARLIAMENT

C O R R I G E N D U M

to the report by Mr PAPANTONIOU on the Eleventh Report
of the Commission on competition policy (Doc. 1-845/82)

Motion for a resolution

Paragraph 56

Subparagraph (iii) to read as follows :

- (iii) Research in the area of government assistance to,
and intervention in, industry, such as the long-term
impact of aids on industrial structures and efficiency
and the effectiveness of crisis cartels;'

