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(Preparatory Acts)

ECONOMIC AND SOCIAL COMMITTEE

Opinion on the proposal for a European Parliament and Council Directive amending Council Directive 89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses [1]

(94/C 388/01)

On 26 April 1994 the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Section for Protection of the Environment, Public Health and Consumer Affairs, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 7 June 1994. The Rapporteur was Mr Gardner, Co-Rapporteurs were Mr Jaschick and Mr Lappas.

At its 317th Plenary Session (meeting of 6 July 1994), the Economic and Social Committee unanimously adopted the following Opinion.

A. Introduction

Council Directive 89/398/EEC [2] regulates certain foods but only does so if dietetic benefits are claimed for them.

It contains general provisions such as:

— the foods must be clearly distinguishable from normal foods;

— the label must show what gives the product its special properties;

— nutritional labelling is compulsory.

In addition to these general requirements the Directive enables the Commission to elaborate specific directives giving further requirements for certain groups of foods. These specific sub-directives are elaborated by a Committee procedure, i.e. without the Opinion of the EP and ESC.

Since Directive 89/398/EEC was adopted other work on claims has been progressing, in particular:

— a general Directive on claims is in an advanced stage of preparation by the CPS;

— the labelling Directive (79/112/EEC) [3] is being improved in particular to include QUID (Quantitative Ingredient Declaration).

In this new situation and given the need to take into account the concept of subsidiarity, the Council felt several of the specific sub-directives were no longer needed and asked the Commission to review this and come up with proposals. Following this review the Commission proposes:

1. No change for the directive which already exists:

   — infant formulae and follow-on formulae;

(1) OJ No C 108, 16. 4. 1994, p. 17.
(2) OJ No L 186, 30. 6. 1989.
(3) OJ No L 33, 8. 2. 1979.

2. Work to continue on:

   — cereal based foods and other baby foods;

   — foods for weight control diets;

   — dietary foods for special medical purposes;

3. Abandon:

   — low sodium foods;

   — gluten free foods;

   — foods for intense muscular effort;

   — foods for diabetics.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

B. **Comments**

It must be remembered that Directive 89/398/EEC only regulates products in so far as claims are presented to satisfy consumers with particular nutritional needs. Without such presentation the same foods can normally be sold freely without any special controls.

Given the progress with claims and labelling in general and given the need to avoid unnecessary regulations as part of the citizens' Europe, the Committee agrees with the proposal.

However, in the proposal for infant formulae and follow-on formulae the Commission should look at national rules for residues to see how these can be better harmonized.

Opinion on the Commission Communication on the framework for action in the field of public health

(94/C 388/02)

On 3 December 1993 the Commission decided to consult the Economic and Social Committee, under Article 129 of the Treaty establishing the European Economic Community, on the abovementioned Communication.

The Section for Protection of the Environment, Public Health and Consumer Affairs, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 7 June 1994. The Rapporteur was Mr Ataíde Ferreira.

At its 317th Plenary Session (meeting of 6 July 1994), the Economic and Social Committee adopted the following Opinion by a large majority with 1 vote against and 3 abstentions.

1. Introduction

1.1. In view of the importance of public health in terms of both its economic and social repercussions and its possible positive or negative impact on generating solidarity in Europe and in developing European citizenship [1], a Communication on the subject warrants analysis by the ESC; for the Opinion to be clear and unambiguous, an analysis of the Communication's premises and technical/legal framework [2] is necessary.

1.2. This is not a legislative Opinion in the strict sense of the term, since referral to the Committee is part of the preparatory process for special intervention, where action will be rooted in a complex web of areas of responsibility, some pertaining to the Commission and others falling within the remit of the Member States, and which according to the case in hand come into contact in cooperation and coordination processes. The ESC therefore intends to clarify its views on how Article 129 of the Treaty can and should be interpreted. The Communication will have to be analyzed on the basis of its objectives and premises.

1.3. Before analysing the Communication itself, let us raise the preliminary question of how to interpret Article 129 of the Treaty against the background of the major social, economic and political issues affecting the everyday life of men and women living in the European Union, on whose behalf the ESC speaks.

2. The preliminary question — the Community and public health

2.1. One of the significant innovations contained in the new text of the Treaty of Rome, as inserted by Article G(38) of the European Union Treaty, is Title X, which deals with public health; Article 129 stipulates that:

'1. The Community shall contribute towards ensuring a high level of human health protection by encouraging cooperation between the Member States and, if necessary, lending support to their action.

Community action shall be directed towards the prevention of diseases, in particular the major health scourges, including drug dependence, by promoting research into their causes and their transmission, as well as health information and education.

Health protection requirements shall form a constituent part of the Community's other policies.

2. Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of public health.

4. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

— acting in accordance with the procedure referred to in Article 189b, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States;

— acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.'

2.2. The Commission is thus empowered to submit to the Council (i) proposals for recommendations to be

[1] The Citizens' Europe, OJ No C 313, 30. 11. 1992.
[2] Quality and impact of ESC Opinions — CES 592/92 rev.

made to the Member States and (ii) incentive measures to encourage cooperation between Member States so as to help secure a high degree of health protection.

Health is not yet an area dealt with in a Community policy, but it is an area of common concern particularly as regards disease prevention and drug addiction.

In accordance with the provision quoted above, the new legal basis does not jeopardize those interconnections and measures in the health field, resulting from the various Treaty provisions, which have allowed the Community to take important initiatives in this area supported by the ESC.

2.3. Indeed, the concept of public health as defined by Member States in the international organizations to which they belong, includes, in addition to disease prevention, health promotion for individuals and specific age and social categories in particular, and in specific environments (school, workplace, etc.). Under these circumstances, the Article 129 norm has to be interpreted in the light of Member States' prior experience and the various actions and programmes already undertaken and implemented by the Community, the legal basis for which consists of other provisions in the same Treaty.

2.4. The second paragraph of Article 129(1) should — hopefully — be interpreted by the Council and of course the Court of Justice in the light of the common history of Member States and the Community itself, and should be understood as being merely indicative because only in this way does it make sense. If interpreted literally (i) it would make no sense, (ii) it would mean that current programmes would be halted, (e.g. bio-medical research, which includes programmes going far beyond mere disease prevention), (iii) the AIDS and cancer programmes would be called into question, and (iv) drug addiction would automatically be classified as a disease.

3. General comments

3.1. The Commission's promptness in drafting this Communication on the framework for action in the field of public health is to be welcomed, coinciding as it does with the entry into force of the Maastricht revision of the treaty; this means that the importance of a health policy for Europe has clearly been recognized, as a guarantee for a rise in 'the standard of living and quality of life' [1] for European citizens.

3.2. Despite the difficulties in interpretation, the Commission has done good work in looking into specific aspects of disease prevention in depth and in trying to set the question in a broader framework.

3.3. The document attempts to consolidate successive analyses, discussions and studies by the various institutions, including work by the ESC.

To recap, the Opinions referred to in point 46 of the Commission's Communication are identified below in more detail:

— Information Report on public health — 11. 2. 1986 — CES 539/86 — ENVI/169;

— Opinion on the proposal for a Council Resolution on a programme of action of the European Communities on cancer prevention — OJ No C 101, 28. 4. 1986, p. 22;

— Opinion on the prevention of environmental pollution by asbestos — OJ No C 207, 18. 8. 1986;

— Opinion on the transparency of medicinal product prices — OJ No C 319, 30. 11. 1987;

— Opinion on the proposal for a Council Regulation relating to a research and development coordination programme of the European Economic Community in the field of medical and health research (1987-1989) OJ No C 105, 21. 4. 1987, p. 7, and Opinion on the 'Europe against Cancer' programme concerning the information of the public and the training of members of the health professions — OJ No C 105, 21. 4. 1987, p. 18;

— Opinion on the proposal for a Council Regulation on a Community action in the field of information technology and telecommunications applied to health care AIM (Advanced Informatics in Medicine in Europe) pilot phase — OJ No C 356, 31. 12. 1987, p. 8;

— Opinion on the specific research programme in the field of health-predictive medicine: human genome analysis 1989-1991 — OJ No C 5, 6. 3. 1989, p. 47;

— Opinion on the labelling of medicinal products for human use and on package leaflets — OJ No C 225, 10. 9. 1990;

[1] Article 2 of the EC Treaty.

— Opinion on the five proposals for Council Decisions concerning the conclusion of cooperation agreements between European Economic Community and the Republic of Austria, Kingdom of Norway, the Swiss Confederation, the Republic of Finland and the Kingdom of Sweden in the field of medical and health research — OJ No C 56, 7. 3. 1990, p. 11;

— Opinion on the legal status for the supply of medicinal products for human use — OJ No C 225, 10. 9. 1990;

— Opinion on the draft Council Resolution on improving the prevention and treatment of acute human poisoning — OJ No C 124, 21. 5. 1990, p. 1;

— Opinion on the proposal for a Council Directive on advertising of medicinal products for human use — OJ No C 60, 8. 3. 1991, p. 40;

— Opinion on the proposal for a Council Decision adopting a specific research and technological development programme in the field of biomedicine and health (1990-1994) — CES 1372/90 in OJ No C 41, 18. 2. 1991;

— Opinion on the Community procedures for the authorization and supervision of medical products for human use and establishing a European agency for the evaluation of medicinal products of 4 July 1991 — CES 882/91 — OJ No C 269, 14. 10. 1991;

— Opinion on the wholesale distribution of medicinal products for human use — OJ No C 225, 10. 9. 1990;

— Opinion on the Community's system of information on accidents involving consumer products — OJ No C 62, 12. 3. 1990;

— Opinion on the proposal for a Decision of the Council and the Ministers of Health for the Member States adopting a plan of action in the framework of the 1991-1993 Europe against AIDS programme — CES 700/91 in OJ No C 191, 22. 7. 1991 and 1994 CES 1237/93 (not published);

— Opinion on the proposal for a Council Regulation (EEC) on the establishment of a European drugs monitoring centre and a European information network on drugs and drug addiction (REITOX) — CES 635/92 in OJ No C 223, 31. 8. 1992;

— Own-initiative Opinion on health/safety at the workplace — training — OJ No C 249, 13. 9. 1993, p. 12;

— Opinion on the proposal for a Council Decision concerning the inclusion of a cooperation agreement between the European Economic Community and the Republic of Turkey in the field of medical and health research — CES 864/91 in OJ No C 269, 14. 10. 1991;

— Opinion on occupational medicine — OJ No C 307, 19. 11. 1984;

— Opinions on dangerous substances and operations.

This Communication is important for the future of European public health; it is preceded by an executive summary which provides a brief outline of the content of the Communication for the members of those Institutions to which the Communication is sent, and urges them to examine the subject in depth.

3.4. The main challenges in the public health field are clearly identified in the Commission Communication (from point 4 onwards).

3.5. The matter of the costs and financing of health spending must be looked into later; here the ESC will be able to make a contribution.

3.6. As a result of the difficulties encountered in interpreting the text, the chapter on 'Health status and trends in the Member States' (Part A — II, point 14 onwards) does not, in our opinion, give an analysis from a truly European perspective and for this reason it is incomplete, for it should be noted that achievements in public health at national level, be they major or minor, are not only the result of Community action in this area but are also rooted in the experience and knowledge accumulated and tested over decades by Member State organizations, with support from international organizations whose role here should not be forgotten, such as their contribution to the current concept of 'health promotion' (1) and the Environment and Health Charter (2).

(1) See glossary: Health promotion — International Conference on Health Promotion — Bonn, 17-19 December 1990, p. 21.

(2) European Charter on Environment and Health adopted by the European Ministers of the Environment and Health, Frankfurt, 7/8 December 1989.

The Commission should also mention significant events in the recent history of public health in Europe. This would help to improve our understanding of the contribution which the proposed public health policy represents.

Member States' past achievements are just as important as the future.

3.7. As regards the more specific area of disease prevention and the priorities indicated in point 122 of the Communication [1], the ESC agrees with the Commission's conclusions, notwithstanding a number of general reservations, about its stance on public health.

3.8. The ESC feels that a public health policy cannot be viewed in a restrictive sense (disease and drug addiction prevention), but should be viewed as health promotion based on a horizontal, interdisciplinary approach, involving cooperation between the various disciplines.

3.9. The Commission Communication contains imprecise terminology which creates difficulties in interpreting the text as regards the real aims pursued.

A policy for public health will only be such if organized on a horizontal basis. Health promotion has to deal with all aspects of the living environment, including disease prevention, but it should not be limited to the latter alone.

3.10. The fact that the information given in Annex I (Member States' preventive policies) does not follow a uniform, orderly pattern, has meant that there are shortcomings in the identification of priorities and definition of strategy in this document, as referred to above.

3.11. To avoid over-hasty reactions, it should be made clear that the proposed definition of a global, horizontal model for a health policy for the European Union in no way clashes with the responsibilities of the various Commission Directorates-General or services, nor does it clash with the various levels of Member State government (national, vertical or horizontal). This is merely a matter of managing synergies, avoiding ineffective action caused by a lack of communication or compatibility with other action and, essentially, of better management for ensuring a higher economic and social return.

[1] *Cf.* p. 34 of the Communication.

4. Specific comments

4.1. The chapters entitled 'Health status and trends' [2] and 'The European Community approach' [3] identify the Commission's main strategic options. Here lies the core of the approach to the subject, which the ESC intends to debate fully in keeping with its responsibilities set out in the Treaty and in response to the Council of Ministers' referral of the subject to the Committee.

4.2. The ESC feels that the Council should not limit itself to a literal interpretation of the sphere of public health, as defined in Article 129 of the Treaty.

4.2.1. This interpretation would involve restricting the sphere of public health as it is understood by the various Member States [4], and would clearly go against the development of the concepts of public health which are commonly accepted by scientific circles and by Member States.

4.2.2. The Commission itself seems to want a broader interpretation of this article in that it is proposed to take other health initiatives. Moreover, the Commission is proposing a policy for developing countries, based on an integrated, global approach [5].

4.2.3. This interpretation advocated by the ESC has the following advantages:

— it does not go against current trends in the public health thinking of most Member States, thereby avoiding greater fragmentation in practice;

— it makes it easier to link up and coordinate the Commission's European policy with Member States' policies, as well as those of other international organizations;

[2] See p. 6.
[3] See p. 15.
[4] For example:
a) The United Kingdom for England — 'Health of the Nation' (1993) — quoted in the Commission Communication — A series of health objectives linked up to the mechanisms for achieving these objectives, either through health services or initiatives centred on the community and supported by genuine intersectoral cooperation (education, transport, social services);
b) The Netherlands — 'Health Strategy of the Netherlands' (1993) — an equally broad and comprehensive series of health objectives;
c) France — A Public Health Strategy elaborated by the High Committee on Public Health (1993 preliminary) — quoted in the Commission Communication, which proposes a comprehensive health policy.
[5] COM(94) 77 final, 24. 3. 1994.

— it makes it easier to link up and coordinate public health policy with European socio-economic policies and options for developing health systems;

— it allows better management of the resources invested and will lead to a better cost/benefit ratio;

— it reconciles the wording of Article 129 of the Treaty with the spirit and overall objectives of the Community and the Union.

4.3. *A new approach*

4.3.1. The ESC feels it will be necessary to define more clearly, major areas of public health action, which are not fully understood by means of a disease-by-disease approach, i.e.:

a) Age groups

An up-to-date European public health policy should at least make a reference to the health problems faced by younger people (alcohol, violence, drugs, smoking) and the elderly (dependence, exclusion, health care), not forgetting those faced by mothers (and women in general), children and the least-privileged population categories in Europe.

b) Vulnerable groups

Consideration must also be given to the health of the immigrant population, the unemployed and the victims of the most acute forms of exclusion [1] (particularly the homeless).

c) Specific environments

Health at school and in the workplace should be given a prominent place in any public health policy. This also applies to unhealthy elements in the physical environment, such as air pollution, urban noise and pollution of waterways.

4.3.2. The process which every community — be it national, regional, local — or the European Union as a whole will have to go through to attain its health objectives, will involve the same challenges, irrespective of the nature of these objectives:

— how and by whom are those decisions taken which most affect citizens' health;

— what Community and health service infrastructures support or implement public health actions;

— and finally, how are public health actions to be financed?

4.3.3. Since Article 129 stipulates that in health protection the Community's role is not to set standards or align rules, but is more to provide impetus for, facilitate and support Member States' action, it would be particularly important for the Commission's analysis to set out more clearly the link between public health policy and social [2], farming, consumer, environmental and sport and leisure policy. Thus it is hoped that the Commission and finally the Council will be able to mesh all the different ways of improving quality of life [3].

4.3.4. In Member States, particularly at local level, there are hundreds of organizations made up of men and women, which have made significant contributions to public health, particularly in health education and information in the strict sense of the term but also linking these issues with consumer, food and environmental questions in particular. At Community level also there are bodies with considerable action capabilities whose merits should not be underestimated which should in fact be assessed by the Commission, so that at national and European Union level it might be possible to involve all interested parties, including administrative bodies, in implementing a health policy.

4.3.5. Finally, it is to be hoped that even in the limited scope of a Communication designed to promote disease prevention, the document under analysis would mention ways of guaranteeing a suitable link with national and European scientific circles. In this way, Community action will be assured a more solid scientific basis.

5. Conclusions and recommendations

5.1. A public health policy which responds to the requirements and concerns of European citizens has to (a) provide a bold response to the desire for improvements in quality of life, including health promotion and (b) take

[1] COM(92) 542 final — Communication entitled 'Towards a Europe of Solidarity', point III.3.

[2] Green Paper on European Social Policy, COM(93) 551 final, pp. 43-49 and 66-68.

[3] Article 3(o) of the Treaty.

on board a series of horizontal and vertical actions, which in some cases will be the Community's responsibility and, in others, will be up to the Member States at national, regional or local level depending on the circumstances and each Member State's legal system within a specific framework for cooperation and coordination, depending on the case and circumstances involved.

5.2. The Communication as it stands is geared to and based on prevention and information, although it also indicates an accurate list of public health priorities, and thus does not constitute an adequate response to the Committee's expectations in this field.

5.3. The ESC therefore calls on the Council to adopt an overall coherent stance for public health policy, interpreting Article 129 of the Treaty in accordance with Article 2 of the same Treaty, since this is the fundamental, ordaining principle and thinking behind the establishment of the Community of States and Citizens.

5.4. To this end, the ESC also calls on the Council to give the Commission a mandate to supplement this timely, important Communication by making a global, horizontal analysis of public health, thus overcoming the limitations which have created shortcomings in the present analysis of public health policy.

5.5. To this end, the document should, as mentioned above, take account of the following:

a) the specific circumstances of various categories, i.e. in addition to diseases and drug addiction: age groups, vulnerable groups and specific environments;

b) an analysis of which proposed actions and initiatives fall or can fall within the Community's responsibilities, independently of Article 129, in line with its own powers and in accordance with the Treaty, and which ones could likewise be dealt with through cooperation and coordination;

c) such an analysis must take account of the vital link between public health policy and health care policy, particularly in terms of facilities, human resources, (management and technical work) and finance, without jeopardizing the specific nature, character and objectives of each of these policies;

d) it is recommended that a suitable link be made between health policy, as already indicated in the present Communication, and the socio-economic dimension, in terms of solidarity, competitiveness and employment, in the framework of a 'social Europe' and the 'Citizens' Europe', particularly by stepping up the horizontal approach to the subject (work, employment [1], urban living environment, housing, farming policy, consumption, environment, etc.) [2]. Full account must be taken of the freedom of the individual, of his or her particular lifestyle and of European diversity;

e) public health issues should be taken into consideration in the priorities for Structural Fund action, particularly Social Fund action, withdrawing all those which could jeopardize public health issues.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

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[1] OJ No C 295, 22. 10. 1994, p. 47.

[2] *Cf.* 'Investing in Health' World Development Report 1993 — World Bank — Oxford University Press 1993, pp. 7 and 14.

Opinion on:

— the proposal for a European Parliament and Council Regulation on the Community design [1], and

— the proposal for a European Parliament and Council Directive on the legal protection of designs [2]

(94/C 388/03)

On 20 December 1993 the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Community, on the abovementioned proposals.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 4 May 1994. The Rapporteur was Mr Pardon.

At its 317th Plenary Session (meeting of 6 July 1994), the Economic and Social Committee adopted the following Opinion by 83 votes to 52, with eleven abstentions (vote by name).

1. Procedure

Given the scale and importance of the subject referred to it, the Committee decided to draw up an immediate, initial Opinion, confined to the most significant and controversial issues, while intending to draw up a Supplementary Opinion at a later stage, covering all the other questions raised by the Commission's proposals.

2. General comments

2.1. Intellectual property rights, embracing trade marks, patents, geographical designations, industrial designs, copyright, semiconductor product topographies, computer programmes, data bases, biotechnological inventions and new plant varieties, are assuming everincreasing importance in trade.

2.2. The Economic and Social Committee shares the views expressed in the Green Paper on the legal protection of industrial design (III/F/5131/91), to the effect that such protection is becoming increasingly important: the products to which designs apply now occupy an important place in the economy.

2.3. The importance of industrial designs has increased dramatically over the last 10 years, as essential elements in the marketing of consumer products. The question of their legal protection has, quite rightly, attracted growing attention from interested groups in the industrialized world, including Europe.

2.4. It is in the interests of European industry to combat counterfeiting. Counterfeiters may unfairly exploit the intellectual, artistic, economic and commercial investment made by the manufacturer of the original product [3].

2.5. The Economic and Social Committee, like the Green Paper, believes that:

— investment in aesthetic industrial design should be promoted by industrial policy;

— creativity must be protected, with designs seen as an expression of the designer's creativity;

— confusion of consumers as to the origin of products having identical or similar appearance should be avoided, as should the risk of consumers falling victim to any safety shortcomings among them;

— the positive contribution made by designs to technical innovation should be considered;

— care should be taken to respect the principle of fairness in commercial transactions.

2.6. A single market in intellectual property is becoming an urgent necessity for the European Union. European-level law on industrial designs is required. Consequently, the Committee approves the decision to propose a Regulation on this question.

2.7. The Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations

(1) OJ No C 29, 31. 1. 1994, p. 20.
(2) OJ No C 345, 23. 12. 1994, p. 14.
(3) OJ No C 52, 19. 2. 1994.

includes an Agreement on Trade-Related Aspects of Intellectual Property Rights.

Article 7 of the Agreement states its objectives:

> 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'

2.8. Under Article 26(2), signatories may only allow limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

Article 26(3) stipulates that the duration of the protection available be at least ten years.

2.8.1. The authority of signatory parties to define the requirements and the scope of protection is not affected by the TRIPs-agreement.

2.9. By virtue of its Article 1, this Agreement, signed inter alia by the EU Member States and the European Communities will become obligatory and binding. In their domestic law, members will be able to implement more extensive protection than is required by this Agreement, only if such protection does not contravene the provisions of the Agreement.

2.10. The Regulation on the Community design must respect the commitments entered into.

2.11. Intellectual rights are designed to foster innovation and, thereby, to secure economic progress and improve the situation of consumers.

2.12. Under these conditions, the law grants innovators recognized exclusive rights in respect of the commercial use of their inventions for a certain period.

2.13. The ensuing profits, the generation and size of which are determined by the market, are intended to compensate the innovator for his work, research and investment.

2.14. This situation motivates other individuals to undertake similar endeavours and to innovate in the future.

2.15. If intellectual property rights are not safeguarded, innovators' work is copied, thereby wiping out any profit for the creator and reducing incentives for innovation.

2.16. The possibility of forbidding imitations is therefore the most important aspect of the rights accruing to innovators.

2.17. Recognition of intellectual property rights creates exclusive rights. These are the cornerstone of any effective market economy.

3. Requirements for obtaining protection

3.1. The primary requirement for protection is that the design is new.

3.1.1. The draft Regulation (Article 5) considers that novelty is to be assessed at the worldwide level.

3.1.2. This provision, as worded, would be difficult to apply in many fields, and particularly in the textiles industry. Sellers of counterfeit products often obtain false certification stating that the disputed design had already been created in a third country.

3.1.3. In these circumstances, the aim should be dissemination to interested parties within the European Community before the date of reference.

3.1.4. In the light of the above considerations, Article 5(2) might be worded as follows:

> 'A design shall be deemed to have been made available to the public if it has been published following registration, exhibited, used in trade or otherwise disclosed, unless this could not reasonably be known to specialist circles in the sector in question operating within the Community before the date of reference.' (last sentence unchanged).

3.2. Article 6 states the second condition for protection to be individual character.

3.2.1. The Explanatory Memorandum (p. 12) specifies that the term 'informed user' indicates that the similarity is not to be assessed at the level of 'design experts'. Under these conditions, the adjective 'informed' appears ambiguous and should be deleted.

3.2.2. An informed user is one with either a professional or personal interest in acquiring or reproducing a design.

3.2.3. The term 'significantly' has the effect of excluding numerous designs, particularly in textiles, from the proposed protection. It should therefore be deleted.

3.2.4. A design should be considered to have an individual character insofar as it produces an overall visual impression on the public concerned dissimilar to any other design known, in the normal course of their affairs, to specialist circles in the sector in question, operating within the Community.

3.2.5. The individual character of a design should result from a creation which distinguishes it, by virtue of the generally different impression it creates in the eyes of the user, from a configuration known to interested circles within the European Community, before the reference date.

3.3. In view of the proposed wording for Article 5(1), Article 11(1) should be drafted as follows:

> 'The scope of the protection conferred by a Community Design shall include any design which, notwithstanding any differences, produces on the user a similar overall impression.'

3.4. Paragraph 2 seems superfluous, given the wording proposed here, and could be deleted.

4. **Repair clause**

4.1. Like all other industrial property rights, design protection results in exclusive rights (monopoly rights). However, the monopoly granted to the owner of a design pertains solely to the appearance (the 'design') of a product, not to the product itself.

4.2. Design rights therefore grant a monopoly of forms, but not a product monopoly. 'Protection of the design of a watch does not hamper competition in the watch market' (Explanatory Memorandum 9.2).

4.3. With regard to spare parts (e.g. a fender or a front lamp of a car) covered by the repair clause the situation is different. The appearance, the 'design' of such spare parts cannot be made different as compared with the original component to be replaced.

4.4. Thus product monopolies are created if design protection is extended to such spare parts; design rights in a spare fender or a spare lamp totally eliminate competition in this product area.

4.5. This falls foul of the essential purpose of design protection which the legislator is authorized to define in detail (see point 2.8.1 above).

4.6. The repair clause contains such a definition: it does not affect the acquisition and the exercise of design rights where they operate as they should; it only stops the exercise of design rights where — as is the case in the repair sector — they cannot operate as they should. In this way the repair clause prevents monopolies from coming into existence, competitors from being driven from the market and consumers from being subjected to the dictate of pricing by a sole supplier.

4.7. At the same time it prevents the development of monopoly premiums, since the essential precondition for a design premium — that a market exists and consumers can exercise preferences (see 2.13 above) — does not apply if design protection is extended to the spare parts covered by the repair clause (see 4.4 above).

4.8. The repair clause proposed by the Commission is therefore supported by the Economic and Social Committee.

4.9. The attention of the Committee has been drawn to a lack of clarity as to the scope of Article 23. The Committee calls on the Commission to make clear, in particular, as to whether it is intended to apply to parts of a complex product where the intellectual property rights for those parts do not vest in the designer of the complex products, as for example in the case of car windscreens.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

APPENDIX I

to the Opinion of the Economic and Social Committee

The following members, in person or by proxy, voted in favour of this Opinion:

Mr/Mrs/Miss: ASPINALL, ATAÍDA FERREIRA, ATTLEY, Dame Jocelyn BARROW, BEALE, BELL, BELTRAMI, BONVICINI, BREDIMA-SAVOPOULOU, BROOKS, van den BURG, Vasco CAL, CARROLL, CASSINA, CEBALLO HERRERO, CHEVALIER, CHRISTIE, DAVISON, von der DECKEN, van DIJK, DOUVIS, DRAIJER, DUNKEL, ELSTNER, ENGELEN-KEFER, ETTY, EULEN, FERNANDEZ, FLUM, FRERICHS, GAFO FERNANDEZ, GARDNER, GEUENICH, GIESECKE, GIRON, GOMEZ MARTINEZ, GREDAL, GREEN, GUILLAUME, HAGEN, von HAUS, HILKENS, JASCHICK, KAARIS, KAFKA, de KNEGT, KORFIATIS, KORYFIDIS, LACA MARTIN, LANDABURU, LUSTENHOUWER, LYNCH, LYONS, MADDOCKS, MERCE JUSTE, MOLINA VALLEJO, MORELAND, MULLER E., NIELSEN B., NIELSEN P., NIERHAUS, OVIDE ETIENNE, PAVLOPOULOS, POMPEN, PRICOLO, RANGONI MACHIAVELLI, REA, RODRIGUEZ GARCIA-CARO, SAITIS, SANTIAGO, SCHADE-POULSEN, SCHLEYER, von SCHWERIN, SILVA, SMITH, SPEIRS, SPYROUDIS, STOKKERS, STRAUSS, TESORO OLIVER, THYS, VANDERMEEREN, WHITWORTH.

The following members, in person or by proxy, voted against the Opinion:

Mr: ABEJON RESA, AMATO, ARENA, BAGLIANO, BARBAGLI, BASTIAN, BENTO GONÇALVES, BERNABEI, BORDES-PAGES, BOTTAZZI, BRIESCH, CAVALEIRO BRANDÃO, COLOMBO, CONNELLAN, DECAILLON, DIAPOULIS, DONCK, d'ELIA, GHIGONIS, GIACOMELLI, HOVGAARD JAKOBSEN, KIELMAN, KIENLE, LAUR, LINSSEN, LITTLE, LIVERANI, MAYAYO, BELLO, McGARRY, MERCIER, MEYER-HORN, MORIZE, MOURGUES, MUÑIZ GUARDADO, NOORDWAL, PAPAMICHAÏL, PARDON, PASQUALI, PE, PELLARINI, PELLETIER R., PERRIN-PELLETIER, PROUMENS, QUEVEDO ROJO, ROMOLI, SALA, SALMON, SANTILLAN CABEZA, SAUWENS, SOLARI, STECHER NAVARRA, WICK.

The following members, in person or by proxy, abstained from the vote:

Mr: BAEZA, CUNHA, GAUTIER, GOTTERO, LÖW, MOBBS, de PAUL de BARCHIFONTAINE, PEARSON, PETERSEN, PETROPOULOS, SEGUY.

APPENDIX II

to the Opinion of the Economic and Social Committee

The following sections of the Section Opinion, which were replaced by amendments, secured at least a quarter of the votes cast and were rejected during the course of the debate:

'2.13. The ensuing profits are intended to compensate the innovator for his work, research and investment.'

Voting

Votes for: 53, votes against: 63, abstentions: 3.

'4. Repair clause

4.1. In view of the above comments, the repair clause contained in Article 23 of the draft Regulation runs counter to the basic principles of the protection of intellectual property. Intellectual property rights inherently confer a monopoly, characteristic of their nature: this is the very substance of the right (Court of Justice of the European Communities, 5 October 1988, case 53/87, Maxicar/Renault).

4.2. This clause also contradicts Article 26(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (see paragraph 2.8 above).

4.3. It is unwarrantedly detrimental to the normal use of a protected design and the interests of the owner of a protected design.

4.4. An exception cannot be made where it conflicts unreasonably with the normal use of an exclusive right, and is not justified by any particular reason pertaining to the legitimate interests of third parties. Such interests cannot be purely economic: they must also arise from special, compelling motives of general concern; otherwise the agreement will be meaningless.

4.5. Rules on competition should not be confused with intellectual property rights. Articles 85 and 86 of the Treaty give the Commission sufficient powers to ensure that free competition is upheld and to suppress any abuse which may occur. It is neither appropriate nor helpful to cause serious damage to intellectual property rights.

4.6. In its abovementioned judgment of 5 October 1988 (case 53/87), the Court recalled that the mere fact of securing the benefit of an exclusive right granted by law — the effect of which is to enable the manufacture and sale of protected products by third parties to be prevented — cannot be regarded as an abusive method of eliminating competition.

4.7. The proprietor of an exclusive right would not be able to rely on his right if the prohibition on importation or marketing he wished to avail himself of could be connected with an agreement or practice in restraint of competition, contrary to Article 85 of the Treaty of Rome (judgment of the Court of Justice of the European Communities of 14 September 1982, case 144/81, Keurkoop).

4.8. Although a right to a design, as a legal entity, does not as such fall within the class of agreements or concerted practice envisaged by Article 85(1), the exercise of that right may be subject to the prohibitions contained in the Treaty when it is the purpose, means or result of an agreement, decision or concerted practice (same judgment).

4.9. The exercise of the exclusive right may be prohibited under Article 86 of the Treaty of Rome if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level, or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation (Court of Justice of the European Communities, 5 October 1988, case 53/87).

4.10. The more specific case of higher prices being charged by a manufacturer for components than by independent manufacturers does not, according to Court case law, necessarily constitute an abuse, since the proprietor of protective rights may lawfully call for a return on the amounts which he has invested in order to perfect the protected design (Court of Justice, as above).

4.11. The Economic and Social Committee considers that this particularly judicious case law should be adhered to. Adoption of the Regulation under examination would not affect this.

4.12. In the case of the use of a Community design registered for repair purposes, however, it may be considered that the rights granted cannot be applied to a third party after the normal lifetime of the product incorporating the design.

4.13. Nevertheless, in accordance with Article 26(3) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, the duration of protection must amount to at least ten years. This provision is binding (see paragraph 2.9 above).'

Voting

Votes for: 61, votes against: 62, abstentions: 8.

Opinion on the Communication from the Commission on the financial problems experienced by small and medium-sized companies

(94/C 388/04)

On 22 February 1994 the Commission decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Community, on the abovementioned Communication.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 8 June 1994. The Rapporteur was Mr C. Lustenhouwer.

At its 317th Plenary Session (meeting of 6 July 1994), the Economic and Social Committee adopted the following Opinion unanimously.

1. Introduction

1.1. The Committee played an important part in the preparation of the Commission Communication now under discussion. The views expressed by the Committee on the financing of SMEs [1] have contributed to the growing interest in this question at European level.

1.2. At the meeting of the Council of the European Union of 11 November 1993 the Council adopted a Resolution [2] on strengthening the competitiveness of enterprises, in particular of small and medium-sized enterprises and craft enterprises, and developing employment in the Community. At the meeting the Commission also submitted the Communication now under discussion.

In its Resolution the Council asks the Commission 'to promote ... the relations of SMEs with financial institutions and, inter alia, a closer relationship between the creators of enterprises and suppliers of capital'.

The Council also asks the Commission to take care that the European Investment Fund assistance really did benefit the SMEs concerned and, in the case of the smallest SMEs, ensure that there was access to guarantee mechanisms.

The Council asks the Member States to:

> 'take care that both public and private intermediaries, specialized in financing SMEs, are in a position to call on the EIF for the granting of guarantees to SMEs',

and to

> 'take care that a stable and favourable financial climate exists for SMEs so that they can achieve the balanced financial structure they need to anticipate more accurately the various economic cycles'.

1.3. In the White Paper on Growth, Competitiveness and Employment submitted by the Commission to the European Council of 9 and 10 December 1993, the Commission draws attention specifically to the question of improving the financing of companies (chapter 2.7). The Commission points to the need for measures to improve relations between financial institutions and SMEs for the purpose of paving the way for a more generous allocation of private finance to SMEs, and to ensure that the most appropriate financial instruments are made available to a greater number of companies. The Commission also says that the 'introduction of new financial facilities for SMEs' should be one of the three main pillars of a future integrated Community initiative for this sector.

The proposal for this Community initiative has now been submitted [3] and the Committee will be issuing a separate Opinion on this.

2. Reasons for an EU Policy on the financing of SMEs

2.1. The financing problems of SMEs have so far not been dealt with systematically at European level. Existing facilities (the seed capital project, the Community SME initiative, the Adapt initiative and R&D facilities) have been drawn up in isolation with a single, ad hoc objective.

The European Investment Bank also lends large amounts to SMEs for its own account, by making global loans to financial institutions or trade banks at national or regional level.

The very limited number of EU financing arrangements available include seed capital funds.

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(1) In this Opinion SMEs are defined as small and medium-sized private-sector enterprises in all sectors (industry, trade, crafts, services) excluding agriculture.

(2) OJ No C 326, 3. 12. 1993, p. 1 et seq.

(3) The future of Community initiatives under the Structural Funds [COM(94) 46 final, 16. 3. 1994].

2.2. Despite the sources of finance for SMEs referred to in point 2.1, it cannot yet be said that the EU has a coherent overall policy for the financing of SMEs. One possible explanation for the European Union's reticence in this area is that small companies are by their nature usually active only in local markets and in most cases therefore have to be financed locally.

Differences between firms in various sectors also make a European initiative in this area difficult; the financing situation of commercial companies, for instance, is very different from that of industrial companies.

In this connection, it is striking that the Round Table of High-Level Representatives of the Banking Sector, set up by Commissioner Vanni d'Archirafi, does not include any representative of the wholesale or retail trades.

2.3. Despite all the differences, European SMEs do have sufficient common characteristics to make an EU financing policy worthwhile.

Reasons why such a policy is needed:

— SMEs in all EU Member States have the same financing problems (point 2.3.1);

— the establishment and operation of viable SMEs creates employment (point 2.3.2);

— SMEs are becoming increasingly international (point 2.3.3);

— it would provide an opportunity for new entrepreneurial activity at EU level by making EU and national financial infrastructures more transparent (point 2.3.4);

— there must be healthy competition between firms in the EU Member States (point 2.3.5).

For a more complete account supported by statistical data, the Committee would refer to the Second Annual Report of the European Observatory for SMEs [1], which contains a separate chapter (Chapter 6 — Capital and Finance) summarizing the similarities and differences with regard to the financing of Europe's small companies.

2.3.1. Financing problems of SMEs in the EU

Some fifteen problems affecting the financing of SMEs are listed in the Commission Communication.

These can be categorized as follows:

a) Lack of knowledge:

— on the part of SMEs, of forms and sources of finance and management skills;

— on the part of providers of capital, of SME demand for capital

b) Lack of security which can be offered by SMEs

c) Attitude of financial institutions:

— the rigid policies of banks and leasing companies;

— the increasing risk-aversion of venture capital companies;

— the reduced willingness to finance small investments

d) The high cost of supervising and assisting SMEs

e) The lack of capital markets for SMEs:

— the inadequate number of 'marriage bureaus' bringing together private investors and SMEs;

— lack of exit routes for venture capital companies;

— the lack of a properly functioning 'over the counter' stock market.

Studies of SMEs in the various Member States reveal common problems. However, the Commission Communication also shows that the willingness of banks to take equity stakes in firms varies.

An EU policy could help solve some of these common problems.

2.3.2. Job creation, inter alia, by the setting up and operation of viable SMEs

It is by now well known that SMEs' contribution to economic development and employment is substantial. The EU has some 14.7 million very small companies (0-9 employees) and the total number of SMEs (0-499 employees) is some 15.8 million. The SME sector employs over 68 million workers, i.e; 72% of the total workforce in the private, non-primary sector (excluding agriculture). The average number of employees ranges from four in Italy and Spain to ten in Luxembourg and the Netherlands (1990 figures).

SMEs' share of total employment remains very stable, particularly in times of economic downturn. SMEs shed

[1] The European Observatory for SMEs, Second Annual Report, April 1994 by the European Network for SME Research and coordinated by EIM, Zoetemeer, The Netherlands, ISBN 90-371-0499-1.

jobs more slowly than large companies and take on workers more quickly when economic growth resumes.

It is for this very reason that Commission President Delors' White Paper on Growth, Competitiveness and Employment draws attention to support for the development of SMEs. As the White Paper states [1], financing and improved access to financing and credit facilities play a role here, at EU level too.

Small promising companies (i.e. companies which want to grow and which have the potential to do so) must be given the chance by the EU to grow and thus contribute to job creation. Corporate life cycles and patterns of development ensure that companies with growth potential can take the place of firms ceasing to trade. One of the conditions for continued growth is financing. The question arises as to whether suitable forms of finance can be offered by suitable sources to these growing firms.

2.3.3. The increasing internationalization of SMEs

As Europe progresses towards a single market, European SMEs will be increasingly encouraged to increase their interests in companies in other Member States. There is already evidence that small firms are increasing their export activity (including direct exports) and entering into more transnational associations with other small firms and also larger firms.

This, coupled with direct cross-border investment, means that the financial interests of SMEs, and thus the demand for finance abroad, are likely to grow substantially.

More Community measures and instruments are needed to help counter the deterioration in the financial situation of small firms. This need is highlighted by recent research showing an increase in the average time taken to pay bills in all the Member States (*cf.* point 3.5.2).

2.3.4. Transparency of EU and national financial infrastructures

Against this background, it is not just the availability of finance in the home country (national, regional) which is important, but also knowledge of availability abroad (national, regional). A knowledge of EU financial facilities for SMEs also becomes more important.

It is often particularly difficult for small companies lacking specialized staff to find their way through the maze of regulations in order to identify the most suitable financial instruments and the bodies (public authorities, banks, financial markets) which manage them.

2.3.5. Healthy competition between Member States

The non-distortion of competition between Member States is one of the EU's most important policy aims. National policies are in competition in the financial and tax fields. The EU is using the Community Framework Regulation to attempt to establish a framework for national government support for SMEs.

EU policy includes many financial facilities. The Commission Communication lists a number of these which are of relevance to the financing of SMEs. What is not clear, however, is how, and to what extent, SMEs in the various Member States make use of these.

The Commission may increasingly need to coordinate and even initiate financial facilities in the interests of healthy competition. This will necessitate a real EU policy vision on the financing of SMEs.

3. Basis for EU Policy

3.1. *SMEs' lack of knowledge*

3.1.1. The financing of small companies is only one of the many questions demanding the attention of entrepreneurs. Often the small, independent entrepreneur is a specialist rather than an all-round manager. But in a dynamic internal market specialization will have to give way to modern entrepreneurial skills if the small company is to stay in business. This requires investment in the abilities and skills (specialist, management and language skills, knowledge of the laws of other Member States, etc.) of both the entrepreneur and his workforce. It should be reiterated that an efficient human resources policy is needed, particularly in small companies where experience accumulated in large com-

[1] White Paper on Growth, Competitiveness, Employment, December 1993, chapter 2, B, points 2.6 and 2.7.

panies can be applied, mutatis mutandis. As well as staff policy and internal organization, more professional SMEs need to pay attention to financing. Entrepreneurs' expertise in this area needs to be kept constantly under review and here the European Union has a role to paly in lending support.

3.1.2. The Commission's view on the EU policy to be developed in this area is set out in paragraph 67 of its Communication, where it states that EU measures should be coordinated with existing national and regional measures. It is difficult to gain an overview of new measures to promote financial and management skills in SMEs. SMEs thrive best on local business knowledge.

The ESC endorses this view but stresses that the EU should encourage the Member States to do more to raise the level of financial and management skills in SMEs. This can be done by making EU resources available to national authorities, and thus indirectly to SMEs. The Member States would be able to use these resources to develop counselling and training programmes for entrepreneurs. Investing in the improvement of management skills often makes a greater structural impact than one-off financial assistance.

3.2. *Lack of security which can be offered by SMEs*

3.2.1. Apart from good management and the prospect of good investment returns, lending institutions require security for their loans.

Many EU SMEs are not in a position to provide such security. Another factor is that in some Member States banks are very risk-averse. They justify this attitude by the need to protect their depositors' savings. The Committee feels that the banks place too much emphasis on security. It is regrettable that more weight is not attached to the applicant company's medium to long-term prospects.

3.2.2. A way round this situation has been found in some Member States, where mutual guarantee companies have been set up specifically to provide security for loans to small companies. For example, Germany has long had its 'Bürgschaftsbanken', and France its 'sociétés de cautionnement mutuel'. In the last few years a European association of guarantee institutions of this kind has been set up with the help of the European Commission, and efforts have also been made to establish institutions of this kind in countries where there is a need for them. In its Opinion on the subject [1] the Committee wholeheartedly endorsed the role of mutual guarantee systems of this kind, as well as the Commission's activities in this area.

3.2.3. The ESC also strongly recommends the use of guarantee arrangements by the Member States as a policy instrument for the financing of companies unable to provide sufficient security. Experience accumulated over several decades in the Netherlands shows that loans needed for investment can often be obtained in this way where there is a shortage of security. The Commission should look into the possibility of setting up EU guarantee arrangements for financing joint investments by firms from different Member States.

3.3. *Financial independence of SMEs*

The heads of many SMEs attach great importance to their independence. Medium-sized firms are often reluctant to make use of external risk capital for fear of losing part or all of their financial independence. Shareholders expect a say in the running of the company, and dividends. This does not always suit the firm's owner or majority shareholder. The desire to retain financial independence may even result in potentially profitable investments being forgone. Entrepreneurs often tend to resist interference by outsiders.

The entrepreneur sometimes fails to appreciate that the loss of financial independence can have compensating benefits (financing of expansion, stronger balance sheet, improved image, greater share liquidity).

It should also be borne in mind that ideas on the independence of SMEs have changed radically over the years.

Cooperation is now often seen in a positive light. Through cooperation entrepreneurs can increase their market strength, consolidate their competitive position and improve their market performance as they form part of a network of firms and organizations which create added value. A few decades ago even the taking on of (bank) loans was approached with great reserve.

Loans and cooperation have, however, opened up new and promising prospects for entrepreneurs and boosted their competitiveness.

[1] The Role of Mutual Guarantee Systems in the Financing of SMEs in the European Community, ESC Opinion of 29. 4. 1992, CES 492/92, OJ No C 169, 6. 7. 1992, Rapporteur: Mr E. Muller.

The ESC feels that more needs to be done to convince SME entrepreneurs of the advantages of attracting external risk capital. Banks and investors unrelated to firms should be encouraged to take more equity stakes.

3.4. *Start-ups*

In most Member States start-ups have difficulty obtaining finance, especially during recessions. During recessions financial institutions, including private venture capital firms, banks and leasing and factoring companies are less willing to finance start-ups. This is a consequence of losses on equity stakes in, and loans to, start-ups in the recent past.

The cost of supervising and assisting start-ups is also relatively high in all the Member States. This creates high barriers for many firms.

Consequently, many new companies are established with an inadequate capital base, which rapidly puts the brakes on future expansion. The ESC stresses once again how important it is that an entrepreneur be properly prepared before setting up a company. Drawing up a realistic business plan requires thorough training and preparation. A newly established firm should always be based on such a business plan. It gives an insight into the market prospects of the new firm and is an important management tool, e.g. with regard to obtaining credit facilities.

The ESC therefore urges the banks to pay more attention to the financing of start-ups, even in periods of recession. The handling of loan applications from young entrepreneurs starting up in business will in particular require extra supervision. An increasing number of these entrepreneurs are women and in many cases it will be necessary to assess the technological and innovative calibre of the starting-up company.

The ESC advocates financial support to offset the high cost of supervising and assisting SMEs.

In particular, the ESC asks that attention be paid to the supervision and assistance of restarts. The problems of this specific group of companies have not been sufficiently studied. Assistance should be made available from Community (e.g. the new Community SME initiative) and national resources to offset the cost of advice and information.

3.5. *Cross-border transfers of small amounts*

3.5.1. The cross-border transfer of relatively small sums (ECU 2,500-10,000) is another under-researched aspect of international and European business deals. There are problems with speed, cost and transparency. The main suffers are SMEs, which make the most use of this kind of small-scale transfer.

The ESC urges the EU, in consultation with the banks, to tackle in the near future the technical problems of cross-border payments, in particular the cost of small transfers. Commissioners Scrivener and Vanni d'Archirafi have taken an initiative aimed at improving the transparency of such transactions and tackling the problem of the duplication of fees [1]. The Committee will be looking into this issue in greater detail in a separate Opinion.

3.5.2. In this connection, the ESC draws attention to the problem of late payment of bills. Small supplier companies suffer particularly from this practice. The Committee awaits with interest the Commission's reaction to its Opinion on this point.

3.6. *Capital market*

3.6.1. The Commission Communication highlights the problem identified in many Member States of venture capital companies' lack of an exit route from their equity stakes.

The Communication also points out that there is no properly functioning over-the-counter market for the shares in medium-sized companies.

Medium-sized companies have access to only a limited market for external risk capital.

In order to fill this gap in the financial infrastructure for SMEs, the possibility should be studied of establishing a formal capital market for SMEs.

A number of initiatives of this kind have been taken over the last few years in some Member States.

Some of these initiatives are at the experimental stage, others still in their infancy.

The ESC feels that the EU should support initiatives of this type.

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[1] 'Transparence et qualité d'exécution des paiements transfrontaliers', Communication from Mr Vanni d'Archirafi and Mrs Scrivener, Brussels, 2. 12. 1993, 0/93/358.

3.6.2. The lack of an official capital market for SMEs has been compounded by the absorption of markets on which the shares of medium-sized companies were previously traded, such as Britain's third market and the Netherlands' 'parallelmarkt', into stock markets with more stringent admission conditions, which many medium-sized, and even large, companies cannot meet.

It may be that the disappearance of these national capital markets will make room for an official European capital market for SMEs. The advantage of such a market is that shares in companies would be in adequate supply and demand, thus enhancing liquidity.

The ESC urges the EU to carry out a feasibility study on the establishment of a recognized European market giving European firms, especially small firms, access to (risk) capital.

3.7. *The accessibility of EU funds*

The ESC has stated in the past that SMEs cannot make sufficient use of EU funds, as a result of complex, non-transparent rules, limited accessibility and inadequate information. There are similar problems over government contracts for works and the supply of goods and services.

The ESC calls for simplification of EU financial facilities for SMEs and better information.

Information could be improved by the inclusion of examples in the explanatory material. This would make it easier for entrepreneurs and their advisers to understand the rules.

3.8. *European Investment Fund (EIF)* [1]

3.8.1. The ESC notes with satisfaction that following the Commission's proposal to boost economic development in the EU, which was submitted to the Edinburgh Summit in December 1992, a new ECU 1 bn loan facility, the EIF, has been launched for SMEs. It has also been decided to set up an interest-rate subsidy instrument for SMEs. The Committee is, however, surprised that it has taken so long to make such an instrument available.

Under this instrument, banks lending EIF funds as European Investment Bank (EIB) intermediaries may make use of interest-rate subsidies of up to two percentage points.

Loans must be used for job-creating investment in SMEs. However, it is expected that little use will be made of this instrument in some Member States. In some Member States the problem of financing is one of obtaining risk capital, e.g. in the form of subordinated loans or equity. The EIF is not likely to help solve this problem.

The ESC urges all those involved in implementation, the EIF, the EIB and the national intermediaries, to make the facilities as accessible as possible to small as well as medium-sized firms. This includes firms with fewer than ten employees, which find it less easy to obtain information on EU facilities. In the interests of accessibility, the facility should be tailored to the firm.

The implementing EU institutions must ensure that the firms concerned obtain the full benefit of EU interest-rate subsidies.

3.8.2. In conclusion, another aspect of the accessibility of financial facilities for SMEs is the big difference that exists between firms with a few hundred employees (up to a maximum of 500) and firms with fewer than 25 employees. A Commission report [2] issued two years ago stated that Brussels financial facilities would define SMEs differently, according to the target group.

It is more difficult for small firms to obtain information on Brussels facilities than for larger ones.

If the aim really is that financial facilities should also reach smaller SMEs, then in the course of implementation account needs to be taken of smaller firms' difficulties in obtaining access.

3.9. *Financial infrastructure for SMEs*

In tackling the financing of SMEs, it is important to aim for optimum diversity of supply on the capital market (in the broadest sense), combined with greater opportunities for internal financing. However, the supply of risk capital in many cases lacks transparency. It has repeatedly been established that sufficient funds are on offer, but the

[1] In this connection the ESC would refer to its Opinion on the role of the EIB (Rapporteur Mr E. Muller), which deals in greater detail with the relationship between the EIB and SMEs (OJ No C 133, 16. 5. 1994).

[2] Report from the Commission to the Council on the definitions of small and medium-sized enterprises (SMEs) used in the context of Community activities [SEC(92) 351 final], Brussels, 29. 4. 1992.

only access to these funds is via informal personal and institutional networks.

It is also not clear what forms of finance are on offer, how much, and on what conditions. Nor is it clear whether these networks are interconnected, and if so, how. No overview of total supply is available. Large companies know their way around these networks, but an SME entrepreneur is less well placed. These informal networks do little or nothing to facilitate SMEs' access to capital. This part of the financial market is effectively closed to SMEs.

3.10. *Private individuals*

3.10.1. Private individuals have traditionally played a major part in the financing of SMEs. But government policy in some Member States does not reflect this. The continuing involvement of this important group of investors is of great importance to SMEs.

The kind of private investor involved can be described and categorized in greater detail. At all events these investors are private individuals, not institutional investors, such as pension funds and insurance companies, nor private venture capital companies.

Private investors can be subdivided into:

— informal investors;

— medium-sized passive private investors;

— small passive private investors.

3.10.2. Large-scale private investors fall into the informal category. They are usually actively involved in the running of the firms which they part-finance. They provide advice as well as funds. The informal investor can be briefly defined as a medium-sized active private investor.

3.10.3. Medium-sized passive private investors are another identifiable group. These are investors willing to invest a large sum but not wishing to be actively involved in the business.

3.10.4. Finally, there are small passive private investors who invest relatively small sums. These are typically men or women who, in addition to saving via institutions, are able to save, or have already accumulated, substantial sums.

Small private investors include the entrepreneur's family, friends and acquaintances (the traditional source of finance for SMEs). It is not known what proportion of external risk capital is contributed by this group. No research has been carried out in this area.

Although the involvement of this group is believed to have declined over the years, its importance should not be underestimated. The fact that the size of the group is not known is evidence of failure to appreciate its past, and possibly present, importance.

3.10.5. The ESC feels that more attention should be paid to this group of investors, and stresses its importance in the financing of SMEs. A particularly interesting phenomenon is the emergence of 'business angels', themselves often entrepreneurs, or former entrepreneurs, who are willing to invest relatively small sums (in the UK approximately £ 50,000 per deal) in young companies with good prospects.

Except in the United Kingdom and the Netherlands, where some data is available, further research is needed to fill the large gaps in our knowledge of private individuals' preferences with regard to investment in high-risk projects and firms, and their objectives with regard to the risk-reward ratio of investment in SMEs.

3.11. *Professional investors and the provision of risk capital to SMEs*

3.11.1. The previous paragraph emphasized the role of the small private investor. But this leaves aside the very important role in the provision of risk capital of professional investors, who could form the (hard) core of a (formal) capital market for SMEs.

These investors can be categorized as:

— operating in a more or less professional environment;

— having extensive business knowledge;

— taking sizeable stakes, linked with a degree of supervision.

This category includes informal investors, medium-sized passive investors, institutional investors, banks, investment funds, specialized investment institutions and private venture capital companies. These investors have a greater need than the small private investor for information on the firm, the sector in which it operates, and other relevant information.

3.11.2. Firms wishing to raise risk capital in a (formal) capital market need to bear this in mind. Relevant information needs to be made available periodically. The company needs to keep its shareholders informed on its financial situation. This requires good financial

management. This and the publicizing of financial information are an important part of company policy.

The ESC stresses the need for professionalism in managing the financial affairs of SMEs. Where financial knowledge appears insufficient, the problem needs to be tackled by means of information and courses. More emphasis should be placed on finance in the training of self-employed entrepreneurs.

3.12. *Institutional investors and the provision of risk capital*

Many EU institutional investors invest a relatively small part of their funds in risk capital in large, usually stable, companies. The rest of their funds are invested in lower-risk instruments (property, mortgages, bonds etc).

The institutions could be encouraged to invest a greater part of their funds in SMEs.

The institutions point, however, to the limited returns on investment in SMEs, and the associated risks, but many SMEs produce good returns.

4. Fiscal instruments

Apart from the direct financing instruments listed above, the Member States' tax systems are clearly also relevant to the financing of small firms. Thus, many Member States offer tax breaks to stimulate certain types of entrepreneurial activity. The business angel phenomenon could, for example, be encouraged by providing tax incentives for investments of this kind. Moreover, the absolute level of taxation affects firms' competitive position. Although these instruments fall within the sphere of direct taxation, and thus to a great extent outside the European Union's field of responsibility, the ESC nonetheless feels that attention should be paid at European level to the tax aspect of the financing issue. The Committee is pleased to note that this issue receives attention in Commission Communication on a strategic programme for the internal market [1]. This deals specifically with the self-financing capacity of (usually small) firms which are not incorporated.

The Communication also looks into the question of taxes levied on transfers of ownership of undertakings. The Committee feels that the Recommendation to be published on the matter should take as its starting point the need to maintain the liquidity position of companies changing ownership. Transfers of ownership often take place within families, and the tax liability thus arising often represents a serious threat to the continuation of the firm as a going concern.

In conclusion

As the above text makes clear, there are many aspects to the financing of small and medium-sized enterprises. The discussion of the matter at European level, currently underway, must examine each of these aspects and identify the right level at which to tackle problems. In most cases the solution will have to come from the market itself, by granting small firms easier access to sources of finance.

The Committee has also noted with interest the results of the Round Table of High-Level Representatives of the Banking Sector, as set out in the Report entitled 'Towards a more effective partnership between the financial institutions and SMEs', submitted to Commissioner Vanni d'Archirafi. Whilst valuing the work of the Round Table, the Committee cannot help being slightly disappointed by the 'toughness' of the recommendations contained in the Report. The recommendations on bank credit and the strengthening of SMEs' equity bases in particular do not go far enough. Moreover, the recommendations pay little or no attention to the need for the banks to become less risk-averse and more open to the growth potential of new clients. It is striking, however, that in the Report the banks themselves concede that the skills their staff bring to the assessment of loan applications from small firms leave room for improvement.

Despite these reservations, the Committee welcomes this initiative by a member of the Commission and suggests that he continue these activities in the form of a round table of high-level representatives of non-banking areas, such as the venture capital sector, informal investors and business angels, institutional investors and operators in the capital markets (secondary and tertiary markets). In some other cases financing problems will be mainly a matter for the Member States. And yet action is also needed from the European Union in a significant number of areas discussed above.

Attention has been drawn to the importance of training of entrepreneurs and workers, and improved information. The recently submitted proposal for a Com-

[1] Communication from the Commission to the Council — Making the most of the internal market: Strategic Programme, COM(93) 632 final, Brussels, 22. 12. 1993.

munity initiative aimed at SMEs can be put to good use here. But the Committee feels that financing SMEs is a problem in all regions of the Community. To the extent that the Community initiative is limited in scope, being aimed at specific backward areas, the Committee feels that the need for additional policies to meet small entrepreneurs' need for skills should be looked into now.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

Opinion on the proposal for a Council Decision relating to a multi-annual programme (1994-1996) of work for cooperatives, mutual societies, associations and foundations in the Community (1)

(94/C 388/05)

On 10 March 1994, the Council decided to consult the Economic and Social Committee under Article 198 of the Treaty establishing the European Economic Community on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 8 June 1994. The Rapporteur was Mr Ramaekers.

At its 317th Plenary Session (meeting of 6 July 1994) the Economic and Social Committee adopted the following Opinion by a unanimous vote.

1. Introduction

1.1. In putting forward the programme under review the Commission is pursuing the goals set out in its 1989 Communication on 'Businesses in the "économie sociale" sector and Europe's frontier-free market' (2). In the explanatory memorandum to the Proposal for a Council Decision the Commission rightly points out that cooperatives, mutual societies and associations, whilst having their own specific features, play a full part in the market and in the business world. At the same time the role which they can play in overcoming the economic crisis affecting Europe is well known. The *économie sociale* sector is demonstrating its value to the full and it is also referred to in the section on employment in the Commission's White Paper on Growth, Competitiveness and Employment (3).

1.2. The Committee cannot fail to support this goal. It has always recognized and given its support to the important role played by cooperatives, mutual societies and associations in European economic activity, regional development and their contribution to the building of a social Europe. This has been achieved while applying certain values which distinguish these forms of business, such as the primacy of the individual over capital, development of the individual, free association, democratic management and the values of autonomy and citizenship. The Committee has also helped, through the medium of its various Reports and Opinions, to promote a better understanding of this sector and its requirements (4).

1.3. The Committee, would, however, question the procedure which has been followed. It would appear that certain categories were not consulted as much as

(1) OJ No C 87, 24. 3. 1994, p. 6.

(2) Communication from the Commission to the Council, SEC(89) 2187 final.

(3) See Bulletin of the European Communities, Supplement 6/93.

(4) See for example, the Committee's Opinion on the Communication from the Commission to the Council on 'Businesses in the "économie sociale" sector and Europe's frontier-free market' (OJ C 332/1990) and the Committee's 1986 Report on cooperatives, mutual societies and associations in the European Community.

they should have been at an earlier stage in the drafting of the programme. Furthermore, the Committee was consulted on 10 March but as early as December of the previous year a declaration of interest was published in the Official Journal (OJ No C 332/93) setting out the principal guidelines defined in the programme. Would it not have been more logical to have consulted the Committee at an earlier stage?

2. General comments

2.1. *Mention of foundations in the title of the programme*

2.1.1. The Committee notes that 'foundations' are mentioned in the title of the programme, alongside cooperatives, mutual societies and associations. The Committee cannot allow this fact, which tends towards the recognition of foundations as a fourth category, to pass without comment, although the Commission cannot be held responsible. It questions the justification and advisability of this usage.

2.1.2. Foundations are clearly not new bodies. References are made to them in Declaration 23 appended to the Treaty of Maastricht, and they contribute to the funding of projects involving the development of cooperatives, mutual societies and associations. The question arises, however, as to whether all foundations can be included here. The aim, activities and organization of foundations are extremely varied. They are sometimes used as a cover for legal or fiscal purposes by enterprises for whom the values shared by cooperatives, mutual societies and associations are far from constituting a priority.

2.1.3. The legal arrangements applying to foundations vary between Member States, and cannot always be distinguished from those governing associations. The laws applying to associations and foundations are not the same in France, but no distinction is drawn in Belgium. It is also significant in this regard that there is no draft statute for a European Foundation and the term foundation is merely listed in the annex to the draft provisions in respect of a European Association in which a 'foundation' is described as a legal person who may help to establish a European Association.

2.1.4. In the Committee's view such a standpoint is not acceptable without at least providing a definition of a foundation which may be part of this sector, and deciding whether it should be considered as a fourth component.

2.2. *Ambiguity between cooperatives, mutual associations and associations, and small and medium-sized enterprises*

2.2.1. It is clear from an examination of the contents of the programme that there is a degree of ambiguity between the types of business in question and small and medium-sized enterprises. In its explanatory memorandum the Commission points out that 'the majority of cooperatives, mutuals and associations are small and medium-sized enterprises or are at the service of SMEs' (page 1). This statement is toned down at a later point in the Commission's document where it is stated that 'this sector features entities of widely differing size; not all would qualify as SMEs' (page 10).

2.2.2. It is understandable that on policy grounds and for budgetary reasons there is a need to refer to SMEs and it is a fact that many cooperatives for example are SMEs. Due regard must, however, be paid to the larger cooperatives, mutual societies and associations, which must not be underestimated or excluded since they operate in a Community-based and multi-national way, and also contribute to the overall dynamism of the area.

2.3. *An ambitious programme*

2.3.1. The proposed programme is comprehensive, not to say ambitious. There are four main thrusts to the programme, namely: the need to achieve a better understanding of the area; the identification and removal, where necessary, of obstacles preventing the development of the sector; the establishment of transnational collaborations; and the promotion of pilot projects. This is the reason why the Commission rightly draws attention to the ban on establishing pharmacies in the form of cooperatives in a number of countries. The Committee does, however, question whether such a programme is realistic and it fears that pursuing such lofty — and, above all, so many — objectives, may jeopardize their achievement.

2.3.2. Beyond specific action for cooperatives, mutual societies and associations, the programme also refers to strengthening action within other Community policy areas, where such action may apply to them [1]. The Committee supports this initiative, since the enterprises concerned are not always aware of the opportunities offered by these policies, despite the fact that they can actively contribute to the achievement of the objectives pursued.

2.3.3. The Commission also puts great emphasis on the transfrontier aspect. This is an essential condition for the sector's development — which, however, is only possible within an intersectoral framework, itself rooted in an intersectoral approach at national level.

2.3.4. The Committee welcomes the fact that non-member countries and future Union Member States have not been neglected. They may lend considerable new impetus to this field and help achieve the objectives set.

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[1] Developing Community statistics, for example (p. 20), or policy on development of cooperation with non-member countries (p. 23).

2.4. *Non-reference to statutes*

The programme mentions neither draft statutes for cooperatives, mutual societies and associations nor directives on the role of workers. The Committee realizes that the procedure is in progress, and that the programme cannot intervene on this matter. Nevertheless, it would have been helpful to mention its importance, if only in the explanatory memorandum, since the enterprises concerned require an appropriate legal instrument.

3. Specific comments

3.1. *Essential ingredients for the development of cooperatives, mutual societies and associations*

3.1.1. Training

3.1.1.1. The Committee wholeheartedly endorses the inclusion of a paragraph on training. While checks on whether these bodies are using existing schemes are quite justifiable, it is even more essential that the sector's particular features are acknowledged by setting up relevant pilot projects.

3.1.1.2. Training must not be restricted to the heads of societies or associations. It should of course involve the members of cooperatives, mutual societies or associations, but also employees and management. The Committee assumes that all training questions will be discussed with staff representatives, who need to be aware of belonging to something different and unique, to be seen in a European context. To this end, one of the primary concerns is to impart to these target groups not only an awareness of the area as a whole, but also of their particular sector of activity.

3.1.1.3. The Committee feels bound to point out that no training effort will succeed unless it receives the backing of national governments willing to attach importance to training, specifically in the area in question.

3.1.1.4. The programme should also encourage the development of types of training aimed at promoting the concept of economic democracy among the general public. One way might be through school education, from primary level onwards. This would also allow the unfamiliarity which surrounds the sector to be dissipated. From this point of view, training must, of course, go hand-in-hand with information.

3.1.2. An appropriate legal instrument

The Committee would reiterate that an appropriate legal instrument is essential if the transfrontier experiments contained in the programme are to be conducted.

3.1.3. Financial aspects

3.1.3.1. Cooperatives, mutual societies and associations often face difficulty in seeking funding. Financial resources are a key question for them, especially during a recession when growth and joint action are needed to secure a place on the wider market. The working programme provides for checks on the degree of use of existing Community resources with a view to their improvement, if required. This is a necessary aim.

3.1.3.2. It might, however, be helpful to recall the other financial projects either under way or planned. SOFICATRA exemplifies the establishment of a European mechanism for quasi-capital funding of such entities. At national level, a number of financial construction initiatives are under way, attempting to set up projects which reflect the sector's values. The results of such experiments should be disseminated, and they should be made accessible at European level.

3.2. *Programme applicability and follow-up*

3.2.1. The need for a consultative body

3.2.1.1. The Commission refers to the need to set up a permanent structure for contact between cooperatives, mutual societies, associations and foundations on the one hand, and the Community institutions on the other.

3.2.1.2. It is to be regretted that a such a structure had not been set up prior to the present Opinion, since the Commission would have benefited from better consultation with the area's representatives on their needs.

3.2.1.3. A structure of this kind is also necessary if the programme is to succeed: indeed, it will have no impact unless a framework for contact is set up.

Reference is often made to the designation and dissemination of pilot projects, establishment of partnerships, transnational cooperation, or identification of problems encountered. A consultative committee bringing together the Commission and representatives of the area is a necessary forum for exchange and coordination, not only for the European Institutions but also between the various countries. Without a body of this type, the Commission will only be able to achieve the objectives it has set itself in part, based on incomplete data.

3.2.1.4. Such a committee is also essential for programme follow-up. Provision has been made for an evaluation report on the implementation of the programme, to be submitted to the Council, Parliament and the ESC. In the interests of real efficiency, however, information must be available on whether action taken meets the needs of the sector, and only those involved in it are truly qualified to assess this. This is where the committee is valuable.

3.2.1.5. The Economic and Social Committee therefore strongly urges the EC Commission to establish a European consultative committee for cooperatives, mutual societies and associations. One of its main tasks would be to deliver opinions to the Commission on questions relating to these enterprises, and to assess the impact on these sectors of Commission activities in other fields, without overlooking the interests of the area's employees. The committee would also need to maintain constant contact with the economic and social interest groups concerned.

3.2.2. Budgetary resources for the programme

3.2.2.1. It should be borne in mind that in addition to the programme's own budget, budget lines for the implementation of other Community policies such as training, the SME programme, or consumer policy may be tapped, thus increasing the resources available for developing cooperatives, mutual societies and associations, and allowing the necessary vertical approach to be strengthened.

3.2.2.2. The planned budget is for ECU 5.6 million for three years: an ambitious programme despite extremely modest resources, as the Commission points out. In view of the importance of this sector, and its economic and social role, the Committee feels that the budget should be increased. There should at least be agreement between the European Institutions. Parliament has called for an increase in the *économie sociale* budget: it might then be asked why the proposed budget fails to reflect this by taking the new budget line voted by Parliament as its basis.

4. Conclusions

To sum up, the Committee considers that priority should be given to the following in the proposed programmes of work:

— the introduction of training and information programmes;

— the provision of resources and the introduction of instruments for financing cooperatives, mutual societies and associations;

— the establishment of a consultative committee for the purpose of ensuring comprehensive and timely consultation of the economic and social interest groups concerned;

— the implementation of innovative pilot measures.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

Opinion on the proposal for a European Parliament and Council Directive relating to cableway installations designed to carry passengers [1]

(94/C 388/06)

On 17 February 1994 the Council decided to consult the Economic and Social Committee, under Articles 57, paragraph 2 and 100a of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 8 June 1994. The Rapporteur was Mr Mobbs.

As its 317th Plenary Session (meeting of 6 July 1994), the Economic and Social Committee adopted the following Opinion unanimously.

1. Background

1.1. The Machinery Directive 89/392/EEC [2] includes certain types of lifts installed for the transport of handicapped persons and devices fitted to staircases. Most types of lifting equipment including those covered by the present cableway proposal are excluded.

1.2. During discussions concerning harmonization of all other lifting equipment, cableway installations were originally intended to be included in proposals for other lifts. Subsequently this was found to be impossible due to many differing applications.

1.3. Thus Article 1(3) of the Machinery Directive 89/392/EEC amended by Directives 91/368/EEC [3] and 93/44/EEC [4] now specifically excludes:

— cableways, including funicular railways, for the public or private transportation of persons.

1.4. The present legislative position relating to lifting equipment involving persons/passengers, now all of a sectoral nature, is:

— Passed by Council. Industrial Applications — Directive 89/392/EEC and amendments. (Legal basis — Article 100a of the Treaty).

— Under discussion within Council. Proposed Passenger Lifts Directive COM(92) 35/EEC. (Legal basis — Article 100a of the Treaty).

— This proposed Cableway Installations Directive COM(93) 646/EEC. (Legal basis — Articles 57(2), 66, 100a of the Treaty).

The legal bases are shown above in order to demonstrate the different Articles involved.

2. The Commission's proposal

2.1. This proposed Cableway Installations Directive covers safety and health, environmental issues, consumer protection as well as technical standards relating to the machines and equipment involved, their operation and provisions for evacuation and rescue. This means the complete installation of cableways from planning through the purchase and or manufacture of components, installation, operation and maintenance. The proposal follows the current practices in most individual Member States with approval by existing national regulators.

2.2. Current national regulations in Member States covering both components and installations, are usually of a very detailed nature and invariably incompatible between Member States due to the use of techniques peculiar to a national industry as well as local customs and know-how. Almost all installations are unique. Whilst the installation may be based upon a standard design concept, using some standard components, it is specially designed, constructed and installed at each and every location. This produces a situation in which the ability of manufacturers to sell freely their equipment and provide their services within the European Union may be adversely affected. This can reduce competitiveness and restrict the free movement of goods and services within the European Union.

2.3. Member States, as a result of discussions within Council, have brought cableway installations within the scope of the public purchasing Directive 90/531/EEC [5] to be replaced by Directive 93/38/EEC [6] which comes into effect on 1 July 1994 and includes services for the

[1] OJ No C 70, 8. 3. 1994, p. 8.
[2] OJ No L 183, 29. 6. 1989.
[3] OJ No L 198, 22. 7. 1991.
[4] OJ No L 175, 19. 7. 1993.
[5] OJ No C 139, 5. 6. 1989.
[6] OJ No L 199, 9. 8. 1993.

first time — all in one Directive. Cableway installations are carefully monitored by public services in the Member States, whether the actual installations are publicly or privately owned.

2.4. In order to achieve transparency and the genuine opening up of the market, a specific course of action is needed, having considered the following:

— Mutual recognition can only be envisaged if each Member State accepted the regulations of other Member States. This is neither technically nor politically possible.

— Voluntary standardization can only apply to components and thus does not cover installation. Since this comes up against the barrier of regulatory incompatibility, such an approach is also not possible.

This unsatisfactory situation can only be resolved by a Community measure.

2.5. The Commission proposes a Directive which is as far as the components are concerned based on the concept of the new approach on technical harmonization and standards (Council Resolution 7 May 1985) [1]. In addition, the Commission's cableway proposal also covers the installation, operation and maintenance. The Commission's proposal lays down the basic requirements with which the whole installation and its operation has to comply. The proposal does not detail the manner in which it shall be achieved but merely specifies the results required. Furthermore the proposal draws attention to the authorities in the Member States of their responsibilities regarding the approval and operation of cableway installations.

2.6. The Commission's cableway proposal involved all national authorities in such additional matters as essential requirements, harmonized standards, safeguard clauses, conformity assessment modules, notified bodies, etc.

2.7. As in the case of existing national regulations, responsible authorities will be required to carry out controls at two levels:

— components critical to safety;

— complete installations to ensure, in particular, safety of users and respect for the environment.

3. General comments

3.1. The Committee welcomes the Commission's proposal and understands after determining their views that generally industry and operators also welcome the proposal. The Committee is especially supportive of the Commission in its perceived objective of ensuring that all Member States act in a coordinated manner and that vital supervision is organized throughout the European Union in order to achieve and maintain a high level of safety and thus reduce the risk of future accidents.

3.2. The result of the Commission's proposal should be a broader based and more competitive industry which is better placed to compete in world markets. This is important since the European Market for new installations is rather small and is reducing. Since most of the manufacturers for world use are from Europe, any action taken to enhance sales prospects must be a sensible and supportable approach.

3.3. The legal bases cited by the Commission are worth noting:

— Articles 57(2) and 66 of the Treaty are required to allow installers to practice freely throughout the European Union in order to plan, design, install and maintain the equipment.

— Article 100a of the Treaty for the acknowledged base for the free movement of goods and services.

3.4. Whilst it may be thought that this proposal applies only to those Member States with ski resorts, the description of equipment covered also includes passenger carrying installations to be found in a wide range of locations. Furthermore the proposed Directive is of interest to those Member States having industries producing components.

3.5. It is important to differentiate between installations for the transportation of passengers which are covered by this proposal and installations for the amusement of people, normally found at themeparks and funfairs, which are not covered by this proposal.

3.6. The Committee considers that:

3.6.1. there are weaknesses in some of the translations. The Commission should have all translations double checked for consistency and clarity of translation;

3.6.2. the competent authorities in the Member States must ensure that the general conditions and essential requirements are also complied with by manufacturers and operators, as well as all other involved bodies;

3.6.3. the Commission's use of the statement 'State of the Art' preceded by either 'current' or 'acknowledged' may be confusing. The Committee would like to see a consistent use of these words especially since the 'State of the Art' is not a wholly definable statement anyway;

[1] OJ No C 136, 4. 6. 1985.

4. Specific Comments

4.1. *Article 1*

In order to be consistent with the manner of description used in sub-paras. a-d, subpara. e should be reworded as:

'drag lifts where persons standing on their skis are moved upwards'.

4.2. *Article 10*

In order to ensure that only genuine wholly or partially new designs are affected, the words 'involving real innovation for a significant item(s)' should be inserted. Unless this is included it is conceivable that there could be endless discussions and or disputes over what is meant by wholly or partially new.

4.3. *Article 14*

The Committee understands from the commission that only work which has been subject to major repairs or alterations is meant to be covered by this part of the proposed directive. The Commission should make this absolutely clear since, in accordance with Annex II of the proposal, virtually every single part of an installation is considered an essential requirement. Also a clear definition of 'major' (in the context of this Article) is considered necessary.

If the intention of this Article is not completely clear and it can be understood to mean the whole installation comes under the proposed Directive, then there may be an unacceptable risk that some desirable repairs will not be undertaken by cableway operators.

4.4. *Article 18*

The Commission has verbally stated that due to the proliferation of Committees, it is planned to establish a new/expanded Committee responsible for all 'Guided Transport' viz, trains, metros/underground trains and cableways etc.

4.5. *Articles 20 and 21*

The Commission has explained that the wording here is a new legal approach and is designed to avoid abuse by any Member State who does not promptly enact agreed legislation.

4.5.1. Problems may arise regarding work in progress (that is installations being considered but not yet in operation) and the Committee considers that this should be clarified. Some installations can take many years from inception to operation. The Committee has been told by the Commission that when a Directive like this proposal is passed, it is not normal practice for a Directive to be retroactive. However, the Commission would expect new installations to be reviewed especially from the point of view of meeting the essential requirements and especially safety. Any action then considered necessary would be on a case by case basis. The Committee asks the Commission to review carefully these specific problems and ensure solutions are found.

4.5.2. The Committee considers that the Commission should make absolutely clear the requirements of these Articles and avoid any ambiguity and possible misinterpretation.

4.6. *Annex II*

4.6.1. Sub-para. 2.6

The Committee considers that since the heading of this paragraph is 'Integrity of the installation', 2.6.1 should have more exact wording than 'adequate margin' and 'highly improbable'.

4.6.2. Sub-para. 4.2

The requirements for 'control devices' should be no less severe than those required for equipments or components covered by 2.6.1.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

Opinion on the proposal for a Council Decision on a specific programme of research and technological development and demonstration in the area of telematics applications of common interest (1994-1998) [1]

(94/C 388/07)

On 14 April 1994 the Council decided to consult the Economic and Social Committee, under Article 130i of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Committee decided to appoint Mr Tesoro Oliver as Rapporteur-General with the task of preparing its work on the subject.

At its 317th Plenary Session (meeting of 6 July 1994), the Economic and Social Committee adopted the following Opinion unanimously.

1. Preamble

1.1. The Committee deplores the fact that this is the fourth time it has been called upon to deliver an Opinion as a matter of urgency on one of the specific RTD programmes proposed by the Commission. Moreover, the Committee is not convinced that the urgency is justified by the need to avoid discontinuity in research activities or a break in their financing. The reason lies rather more in the progress of the legislative procedure in the Council itself.

1.2. Be that as it may, the Committee has already emphasized that the tight deadlines set by the Council prevent it from fully playing its advisory role on RTD as enshrined in the Treaty and, more especially, from making a detailed analysis of the scientific and technical content of the proposed programmes.

1.3. Like the other three proposals on which it has already given its views, this is one of seventeen proposed specific programmes presented together by the Commission in implementation of the fourth European Community framework programme for research, technological development and demonstration activities (1994-1998), adopted by the European Parliament and the Council under the co-decision procedure on 26 April 1994 [2].

1.4. By this means the Commission has also adopted a uniform presentation designed both to simplify and rationalize procedures. The Committee welcomes this.

1.5. The Committee would, however, have liked to make a number of comments on the package of proposals and on the framework programme itself. The present constraints regrettably do not allow it, once again, to do so in the present Opinion.

1.6. Nevertheless, the Committee reserves the right to make such comments in a subsequent Opinion on the other proposals for specific programmes and on the three specific programmes implementing the framework programme for Community research and training activities for the European Atomic Energy Community (1994-1998), which the Council also adopted on 26 April [3].

1.7. As regards the general conditions for participation in the specific programmes and for their implementation, the Committee would also refer back to the many comments and suggestions made in its Opinion of 1 June 1994 (CES 749/94) on the two proposed Decisions concerning the rules for the participation of undertakings, research centres and universities in the specific research programmes [4].

2. Introduction

2.1. The proposed programme comes under the first of the four activities scheduled in the fourth framework programme, namely the implementation of RTDD programmes by the promotion of cooperation with and between undertakings, research centres and universities. This first activity covers the bulk of Community research initiatives.

2.2. This programme is designed to take over from the programme adopted by the Council on 7 June 1991 for the period 1990-1994 [5]. The Committee issued an Opinion on the relevant proposal on 20 November 1990 [6]. Total funding allocated to that programme came to ECU 430 million.

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[1] OJ No C 113, 23. 4. 1994, pp. 4-15, 24.
[2] OJ No L 126, 18. 5. 1994, p. 1.
[3] OJ No L 115, 6. 5. 1994, p. 31.
[4] OJ No C 81, 18. 3. 1994, p. 9.
[5] OJ No L 192, 16. 7. 1991, p. 18.
[6] OJ No C 41, 18. 2. 1991, p. 6.

2.3. The programme now proposed will pursue two objectives:

— firstly, a traditional objective, namely to 'promote the competitiveness of European industry' and 'to stimulate job creation through the development of new telematics systems and services in such areas as telework and teleservices';

— secondly, a new objective introduced in the EU Treaty, namely 'to promote research activities necessary for other common policies'.

2.4. The proposed research activities, for which the Commission has earmarked ECU 843 million from the Community budget, will cover nine vertical application sectors grouped around three major areas. A fourth area groups horizontal RTD activities supporting and reinforcing the sectoral activities; these activities will be complemented by a series of accompanying measures on international cooperation, the dissemination of results and the training of researchers and users.

2.5. The proposed breakdown of funding between the various areas of activity (in million ECU) is as follows:

— Telematics for services of public interest		395
— Administrations	50	
— Health care	135	
— Transport	210	
— Telematics for knowledge		146
— Research	50	
— Education and training	66	
— Libraries	30	
— Telematics for employment and improving the quality of life		125
— Urban and rural areas	40	
— Elderly and disabled people	65	
— Exploratory action (environment)	20	
— Other exploratory actions	pm	
— Horizontal RTD activities		136
— Telematics engineering	15	
— Language engineering	81	
— Information engineering	40	
— Horizontal actions (of which ECU 19 million for the dissemination and exploitation of results)		41

3. General comments

3.1. The Committee is broadly in agreement with the Commission proposal and endorses its content.

3.2. Nevertheless, the Committee would like to put forward some specific amendments which would contribute to the attainment of the objectives of the fourth framework programme. These are based on the preamble to the Commission proposal and take account of the difficult economic and social circumstances currently facing the European Union.

3.3. To give as quick a boost as possible to economic recovery, competitiveness and job creation, it is very important to reinforce and give priority to all RTD activities which can be carried out and their findings disseminated rapidly throughout the European Union and to activities which will raise the technological level of SMEs.

3.4. In this connection the development and progressive liberalization of telematics infrastructure networks is vital, as highlighted in the White Paper and Report of 26 May 1994 on Europe and the Global Information Society.

3.4.1. The aims of the recommendations contained in this Report include:

— speeding up the dissemination of technological innovation and the response to market needs, and

— making as many people as possible, especially SMEs, the public administrations and young generations, more aware of the potential of telematics networks and the prospects which they offer for enhancing economic and social cohesion.

3.5. The Committee wishes to stress the importance of this Report, on the basis of which the EU Council Summit in Corfu at the end of June will choose ten major successful projects from the third framework programme and promote their practical implementation within the framework of the trans-European networks. This decision should set a precedent to be repeated for the fourth framework programme.

4. Specific comments

4.1. The allocation of 10.3% of funding to staff and administrative expenditure is excessive and at odds with the aim of simplifying the administration of the programmes. The Committee urges the Commission to take effetive measures to reduce this percentage substantially, the money thus saved being used to increase the assistance to this specific RTD programme.

4.2. *Annex I — Areas of research*

4.2.1. Area 1 — Telematics for services of public interest

4.2.1.1. Administrations

The relationship to the IDA programme needs spelling out more clearly.

4.2.1.2. Health care

The following theme should be included: 'Applications of mobile communications in the health field'. The aim should be to extend this service to scattered rural populations, temporary camps for industrial, scientific or sporting activities, etc.

4.2.1.3. Transport

The reference to pilot projects and demonstrators should be generic; in particular any reference to large-scale or pan-European demonstrators should be avoided.

4.2.2. Area 2 — Telematics for knowledge

4.2.2.1. Telematics for research

The section on 'Nature of the work' should include a reference to the 'improvement of access to research networks from technology parks'; this would strengthen the channels for SME technological progress.

4.2.2.2. Education and training

Greater emphasis should be placed on the importance of the validation tests, and in particular the validation of telematics applications for training geared to the needs of SMEs.

4.2.2.3. Libraries

Highlight the importance of the interoperability of existing, heterogeneous systems.

4.2.3. Area 3 — Telematics for improving employment and quality of life

No comments.

4.2.4. Area 4 — Horizontal RTD activities

4.2.4.1. Language engineering

A reference to the work on voice recognition systems should be included.

4.2.4.2. Information engineering

It is necessary to spell out the need to steer RDT towards new methods of presentation and access to information, avoiding the development of new data base technologies peculiar to other specific programmes (Esprit).

4.2.5. Area 5 — Horizontal actions

The section on international cooperation, which refers to central and eastern Europe, should also contain a reference to the future potential of the Latin American market.

4.3. *Annex II — Indicative breakdown of the amount estimated as necessary*

4.3.1. The indicative breakdown of the total amount of ECU 843 million should be brought more into line with the objectives laid down for the programme. It is the Committee's view that the appropriations for the dissemination and exploitation of results, transport, health care, education and training, and libraries should be increased substantially; on the other hand, the appropriations which could be reduced are telematics for research, telematics engineering, language engineering, and telematics for the quality of life.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

Opinion on the Communication and draft proposal for a Directive on the Transparency and Performance of Cross-Border Payments

(94/C 388/08)

On 22 April 1994 the Economic and Social Committee decided, in accordance with Article 23(3) of its Rules of Procedure, to draw up an Opinion on the Communication and draft proposal for a Directive on the Transparency and Performance of Cross-Border Payments.

The Section for Economic, Financial and Monetary Questions, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 14 June 1994. The Rapporteur was Mr Meyer-Horn.

At its 317th Plenary Session (meeting of 6 July 1994) the Economic and Social Committee adopted the following Opinion with one vote against and five abstentions.

Summary

1. The ESC welcomes the attempts of the Commission and the credit industry to improve the cross-border payments markets and regrets that these attempts were not undertaken earlier.

2. The ESC prefers a code of good conduct to a directive. Under the proposals of the Commissioner responsible for consumer protection, Christiane Scrivener, such a code would be signed by the European credit sector associations (ECSAs), users (consumers, commence and SMEs) and the Commission, which would make it sufficiently binding and known to the public.

3. If a directive is proposed at all it should be limited to setting out a general framework. If a European directive imposed detailed binding conditions for cross-border transfers, it is to be feared that many, above all smaller, banks would then simply refuse orders for cross-border transfers, especially to accounts with local banks in remote regions. This would lead to gaps in a Europe-wide, all-embracing cross-border transfers market.

4. The ESC points out that there is a need for comprehensive technical measures and the corresponding agreements in order to handle cross-border transfers between over 10,000 credit institutions with 200,000 bank branches in twelve countries, most of which have no business relations with each other. Cross-border transfers represent only 1.3% of all payments in the EU.

5. At the end of 1992 the European credit sector associations set up a joint body for the standardization of cross-border transfers, the ECBS in Brussels, which works together with the Commission, the European Monetary Institute, Europay, Visa and SWIFT.

6. The ESC welcomes the Commission's intention to encourage cooperation between banks aimed at improving cross-border payment systems and asks the Commission to check under what conditions waivers from Article 85 of the EEC Treaty could be granted, similar to those in the Eurocheque agreement.

7. A code of good conduct would, in particular, include a clause obliging individual banks to advise their customers on the advantages and disadvantages of various means of payment (transfer, cheque, card) including the time actually taken and the approximate costs involved. For customers the conditions must be clear and be such as to enable the offers of competing banks to be compared.

8. The ESC supports the call of the European Bureau of Consumer Unions (BEUC) for a ruling on liability in the event of improper execution of mass cross-border payments. The ESC can go along with the setting-up of complaints centres in all the Member States but feels that binding EU rules on cooperation between centres or the setting-up of a European ombudsman would be unnecessary.

9. The ESC considers that double charging (i.e. of both sender and beneficiary when the sender has undertaken to pay all transfer charges) is unacceptable and inadmissible. Banks interested in discovering the reasons for double charging should be given the means to carry out an investigation so that such cases were no longer repeated.

10. The Commission's study on the performance of cross-border payments should be given a wider remit in order that it might be more representative and its pronouncements carry greater weight. In particular, it should not just consider schematically four banks in the larger and two in the smaller Member States nor simply investigate the fastest possible performance of 1,000 transfers of ECU 100 each.

1. Preliminary remarks

1.1. Under pressure from the Commission, the European credit sector associations (ECSAs) [1] prepared guidelines for customer information on cross-border payments which, after consultations with the Commission and its Payment Systems Users Liaison Group (see point 1.3) were submitted in March 1992. The Commission suggested that these guidelines be implemented by the banks by the end of 1992, obviously with an eye on the deadline for the implementation of the single market. The associations thereupon declared themselves ready to work towards having the guidelines applied by their member institutions as soon as possible. To the guidelines was appended a Commission working document entitled 'Easier Cross-Border Payments: Breaking Down The Barriers' [2] in which the Commission stated it would monitor the guidelines' implementation.

1.2. To do this the Commission ordered a study to be carried out in February 1993 which looked at:

— the quality of the written information given in 287 bank branches to customers wishing to make a cross-border payment; and

— the actual performance of carrying out around 1,000 transfers of ECU 100 each between accounts with 34 banks in all Member States.

1.3. The study's findings were discussed in September and October 1993 in two Commission advisory groups:

— the Payment Systems Technical Development Group (PSTDG); and

— the Payment Systems Users Liaison Group (PSULG).

Both advisory groups had already expressed their views on the implementation of the 1990 Commission Recommendation on the transparency of banking conditions relating to cross-border financial transactions (90/109/EEC) [3]. The PSULG discussed and agreed with the guidelines referred to in point 1.1.

1.4. The study's findings and the advisory groups' Opinions on them were summarized in a Communication to the Commission on Transparency and Efficiency in the Performance of Cross-Border Payments [4]. In this Communication the Commissioners responsible, Mr Vanni d'Archirafi and Mrs Scrivener, suggested the following line of action, which was approved by the Commission on 14 December 1993.

1.4.1. The banking industry would be given a further deadline for achieving the desired results in terms of transparency and performance through self-regulation.

1.4.2. The Commission would examine the progress made before August 1994 by conducting a second and definitive study in March/April 1994, which would be submitted at the end of July.

1.4.3. As a precaution, a draft proposal for a Council Directive on Transparency and Performance of Cross-Border Payments would be prepared. If insufficient progress had been made in this field, the Commission would immediately initiate legislative action in the form of a Directive. A first draft proposal for such a Directive was attached to the Communication. Since April 1994 this draft Directive has been under examination by the Commission working party of government experts.

1.4.4. Finally the Commission began talks in the PSULG (see point 1.3) about guidelines in which the fullest possible instructions about 'face-to-face' payments are to be laid down [5]. This covers cross-border payments which customers of a credit institution in a Member State arrange themselves by means of a card or cheque while they are in another Member State.

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(1) The Banking Federation of the European Community, the European Savings Banks Group and the Association of Cooperative Banks of the EC.
(2) SEC(92) 621, 17. 3. 1992.
(3) OJ No L 67, 15. 3. 1990, p. 39.
(4) SEC(93) 1968.
(5) See Commission document XV/106/94.

It remains to be seen to what extent guidelines on what information should be given to customers before and after face-to-face payments may supplement the 'Code of Best Practice' [1] drawn up by the three ECSAs on 14 November 1990.

1.5. The ESC has general and specific comments to make in chapters 2 and 3 below on:

— the Communication to the Commission and the studies referred to in it, together with the Opinions of the PSTDG and PSULG; and

— the first draft proposal for a Council Directive appended to the Communication, which is to be enacted in the light of the Opinions of the European Parliament and the Economic and Social Committee.

2. General comments

2.1. The ESC welcomes the attempts of the Commission and the credit industry to improve the cross-border payments market, as regards:

— the transparency of conditions; and

— the speed, reliability and costs of such operations.

The ESC regrets that these attempts were not undertaken earlier and that the 1990 Commission Recommendation referred to in point 1.3 has been put into effect so late.

With the completion of the internal market in 1993 and the transition to an economic and monetary union by no later than 1999 scheduled by the Maastricht Treaty, cross-border payments, especially large-scale transfers of smaller amounts, are becoming increasingly important. The ESC therefore thinks it is of pressing importance that cross-border transfers become more transparent and efficient and that the steps still necessary to this end be taken soon (see point 2.9).

2.1.1. According to the Banking Federation of the European Community (1991 and 1992 Annual Reports), cross-border transfers by cheque, transfer or cards totalled some 323 million in 1990 and around 398 million in 1991. This represents around 1.2% of all payments in the Community in 1990 and 1.3% in 1991 (out of 26 billion and 31 billion transactions respectively).

2.1.2. The number and value of cross-border transfers of sums below ECU 2,500 have been of little significance to date. So, the banks at first hesitated to invest in standardising and automating cross-border transfers of small amounts. As a result, processing here is still comparatively labourintensive and is more expensive and slower than payments within a country.

2.2. The Commission therefore thinks it only right to ensure that cross-border payments within the internal market are as quick, reliable and cheap as is the case now for payments within the same Member State. But cross-border payments are subject to different conditions from those applying to domestic payments.

2.2.1. Among these are (still) differences in currency, language and even types of writing, the need to report payments abroad to the central banks and, above all, the different means of payment used. For instance, cheques used for cross-border payments may not be machine-readable (or only partially), unlike those used for domestic payments.

2.2.2. Cross-border transfers are hampered above all by differences between countries in the structure and density of bank branch networks, the processing of data and in regional and national clearing arrangements within and between individual banking groups. According to the statistics of the three European banking associations (mid-1993) there are:

— 2,762 commercial banks with 85,300 branches;

— 1,580 savings banks with 63,800 branches; and

— 10,590 cooperative banks with 55,800 branches.

2.2.3. There is a need for comprehensive technical measures and the corresponding agreements in order to handle cross-border transfers between so many banks of varying size with operations ranging from the local to the inter-regional and with branch networks of varying density. It should particularly be borne in mind that very often the banks of the sender and recipient have no business relations and belong to different banking groups.

2.2.4. The ESC drew attention to these factors in its Opinion of 20 March 1991 [2]. It will not be possible without more ado — and certainly not in the short term — for cross-border payments to become exactly like domestic payments, even though such a goal is desirable in itself. But the ESC thinks that considerable

[1] Code of Best Practice of the European Banking Industry on Card-Based Payment Systems (doc. 135/90).

[2] ESC Opinion on the discussion paper on payments in the internal market (OJ No C 120, 6. 5. 1991).

improvements in the performance of cross-border payments are both necessary and possible.

2.2.5. On 17 December 1992 the ECSAs (see footnote 1) set up the ECBS [1], a joint body for the standardization of cross-border transfers. The ECBS works with the Commission, the European Monetary Institute, Europay International, Visa International, the Society for Worldwide Interbank Telecommunication and the standards committees of the CEN and ISO.

2.3. The ESC welcomes the Commission's intention to discuss guidelines for customer information regarding cross-border face-to-face payments (see point 1.4.4) in the first half of 1994 with the parties represented in the PSULG (banks, consumers, commerce and SMEs).

2.4. The ESC recommends that the second study on the performance of cross-border payments announced by the Commission, and referred to in point 1.4 [2], be given a wider remit than the first study of February 1993 referred to in point 1.2. The second study would be more representative and its pronouncements carry greater weight if it were given a broader basis. A broader study should not be blocked because of the additional costs borne by the Commission in the field. The findings of the second study would be more representative than those of the first if the following suggestions by the ESC were taken into account:

2.4.1. The study should cover more banks, and not just 34, in all twelve EU Member States. It should preferably include banks which constantly — and not just occasionally — make cross-border transfers to many EU countries for a large number of customers.

2.4.2. It should include institutions in other banking categories such as regional, savings, cooperative and private postal banks, in addition to big banks. Instead of simply covering four banks in the larger and two in the smaller countries, the study's sample should be as representative as possible. It could then reflect more accurately the importance and market share of the institutions and individual countries concerned in cross-border transfers. Otherwise, the percentages mentioned have little value.

2.4.3. In connection with the study there should be an examination of the cross-border payment initiatives taken (or announced) by European banking groups, such as IBOS, Europartners or TIPANET as well as B.EPSYS and the ACH (Automated Clearing Houses) alliance, and the experiences of, for instance, the Banco Popular Español in transferring annuities on behalf of the social security institutions of several countries (Switzerland, Italy, France, Germany, Netherlands) for 1.8 million Spanish workers formerly working abroad.

2.4.4. Also worth looking at by the Commission in connection with the study are the possibilities offered by banking groups with closely-knit member networks of mostly small banks with branches in all — or almost all — Member States. These banking groups use their own transfer facilities, network operators, clearing houses and 'gateways', such as the private postal banks' 'Euro-Giro' or the savings banks' 'Eufiserv'. Within these networks, and thanks to their common institutions, they can avoid correspondent banks and make direct payments to accounts with members institutions in other countries.

2.4.5. Instead of just considering schematically the fastest possible performance of 1,000 transfers of ECU 100 each, the study should also look at how long transfers take when the sender is more interested in cheapness than speed. Finally, as well as ECU 100 transfers, the study should investigate cross-border transfers for sums of ECU 1,000-3,000 made by both private households and smaller businesses.

2.5. The ESC welcomes the Commission's intention to encourage useful forms of cooperation between banks aimed at improving cross-border payment systems. It asks the Commission to check first under what conditions the competition rules in Article 85 et seq. of the EEC Treaty would be applicable, by analogy with the waivers granted under the Eurocheque agreement.

2.6. Cross-border payment systems can only be based on the principle of agreement between all the institutions involved. In Annex C of its working document of March 1992 [3] the Commission itself declared that cross-border payment services could not be provided efficiently without agreements.

2.6.1. Without agreements it is not possible to make large numbers of payments via several institutions in

(1) ECBS: European Committee for Banking Standards/Comité Européen de Normalisation Bancaire/Europäischer Ausschuß für Bankstandards Secretariat: Place Jamblinne de Meux 34/35, B 1040 Brussels.

(2) Invitation to tender 94/C 09, OJ No C 515, 7. 1. 1994; this study should not be confused with that on the cross-border payments services offered by large credit institutions, which was requested by the Commission's consumer policy department from Mr Bruno Dupont.

(3) SEC(92) 621, 17. 3. 1992; see also the Report of the European Commission on Competition Policy (COM(94) 161 fin, 5. 5. 1994) chapter III, 119 and 120.

both the sender's and recipient's countries on terms known in advance, because not all the institutions involved have business relations with each other. Such agreements must cover technical specifications and banking standards. Cross-border payment procedures and the calculation of costs and fees must also be the subject of common accord. Only joint agreements make it possible to work out flat-rate fees which are independent of the distance between the countries and locations of the sender and the beneficiary.

2.6.2. Equally, the desired transparency of the conditions which are to be the subject of customer information is only possible on the basis of agreements. And if the various cross-border payment systems are to be mutually accessible — and therefore accessible to the customers of other banking groups — agreements must also be concluded between these systems and with the credit card companies, which operate worldwide.

2.6.3. The Commission has defended the following principles since its Decision of 10 December 1984 on the Eurocheque Agreement [1].

2.6.3.1. Agreements between institutions on the fees to be charged to clients are incompatible with Article 85 of the EEC Treaty.

2.6.3.2. Exceptions can be made for interbank agreements on the fees to be charged between institutions under Article 85(3). According to the Commission [2] exceptions are justified if the agreements bring about an improvement for customers and if only maximum rates are laid down for fees and these rates may be undercut by the banks in competition with each other. Under no circumstances may the maximum rates be systematically applied across-the-board and passed on to customers.

2.6.4. Exceptions have already been made under Regulation No. 17 for interbank charges on Eurocheques. Such exceptions under Article 85 seem all the more justifiable in the case of largescale cross-border payments involving thousands of mainly smaller institutions which are not all linked together in their business relations. An agreement on maximum charges for interinstitutional business would give the network operator a base for calculating how to offset some of his costs within a payments system embracing a multitude of countries, banks, means of payment, gateways and settlement houses. The ESC asks the Commission to consider these arguments with regard to cross-border payments systems which compete with each other in offering services to their customers. The Commission has already considered this matter in Annex C, paragraph 3C, of its working document of March 1992 [3].

2.7. Subject to the study being widened as recommended in point 2.4.1, the ESC agrees with the following criteria for measuring progress in the performance of cross-border payments.

2.7.1. As regards the requirement that full written customer information in accordance with the guidelines set out in point 1.1 must be provided in at least two-thirds of the branches of the banks surveyed, it should be borne in mind that there are some 200,000 bank branches in the 12 Member States. The constant provision of written customer information in such a big branch network should mean that this information is available to customers on demand. Account should also be taken in this part of the survey of verbal information and advice given to customers by bank staff.

2.7.2. Double charging (i.e. of both sender and beneficiary) is unacceptable and inadmissible. In accordance with the criteria laid down the Commission would only consider progress to have been made in cross-border transfers if double charging occurred in less than 10% of cases. It would be more realistic for the evaluation of the study to relax this criterion to 25% of all cases. Banks interested in discovering the reasons for double charging should be given the means to carry out an investigation so that such cases were no longer repeated. Double charging should be defined as follows: charging both the sender and the beneficiary for the performance of a cross-border payment even though the sender has given instructions that all transfer costs are to be borne by him alone and these instructions have been accepted by the sender's bank.

2.7.3. A cross-border transfer should be considered to have been performed on time if the deadline agreed with the customer is not exceeded. The processing of a payment order no later than one working day after the day on which it is received should be subject to the entry of the amount of the payment itself.

2.8. The ESC supports the call of the European Bureau of Consumer Unions (BEUC) for a ruling on liability in the event of improper execution of mass cross-border payments. The ESC understands the Commission's Recommendation of February 1990 on the setting-up of complaints centres. In its Opinion of

(1) OJ No L 35, 7. 2. 1985, p. 43.
(2) See C.D. Ehlermann in the Quarterly Review of European Law 3/1993, p. 457 et seq. and 'The Vanni d'Archirafi Doctrine' in European Institutions and Finance, No 1a (March 1994), p. 2.
(3) SEC(92) 621, 17. 3. 1992.

20 March 1991 [1] the ESC had already spoken of the success of such centres in Belgium. The complaints centres set up in the Member States could work together informally at European level (see point 3.7.3). Customers could then apply to a complaints centre in their own country, which could contact complaints centres in the beneficiary's country for an explanation.

2.9. The ESC prefers a code of good conduct to a directive. The ECSAs' guidelines referred to in point 1.1. amount largely to such a code. The users of cross-border payment systems represented on the Commission's PSULG (consumers, commerce and SMEs) were consulted on these guidelines. The guidelines could be further developed into a code or charter in which the provider of cross-border payment services would have to assume certain obligations. For instance, the obligations in Article 4 of the draft proposal for a Directive (point 3.3.4) would be better regulated in a code or charter. The idea of a charter is particularly supported by the Commissioner responsible for consumer protection, Christiane Scrivener [2]. In her view such a charter would be signed by the ECSAs, consumer associations and the Commission. To this extent it would be a binding charter and a charter that the public has heard of.

2.9.1. The self discipline of a code of good conduct would, in particular, include individual banks having to advise their customers on the advantages and disadvantages of various means of payment (transfer, cheque, card) including the time actually taken by these means and the approximate costs involved. For customers the conditions must be clear and it must be possible to compare the offers of competing banks. Since more and more customers have accounts with several banks, competition will make for greater transparency.

2.9.2. If a Directive is proposed at all it should be limited to setting out a very general framework. A European Directive which imposes detailed binding conditions on banks for crossborder transfers could bring consumers more disadvantages than advantages. It is to be feared that many, above all smaller, banks would then simply refuse orders for cross-border transfers because they would be unable (or unwilling) to comply in advance with the obligations laid down in detail in the Directive.

2.9.2.1. Such orders for transfers could be refused on principle, especially transfers to beneficiaries in areas situated far from financial centres or to accounts with small local banks. This could give rise to significant gaps in a Europe-wide, all-embracing cross-border transfers market.

2.9.2.2. According to the Commission's study of February 1993 some 7,800 of the total of some 10,000 credit institutions in the 12 Member States are active in cross-border transfers, i.e. less than 80%. This figure could fall sharply if cross-border transfers were made subject to detailed legislation. That would be the very opposite of what the Commission, the credit industry and customers want.

2.9.3. The gaps which might arise in a Europe-wide, all-embracing cross-border transfers market if a Directive were introduced could at best be filled by the public postal services. Only the public postal services, as part of the public sector, could, and indeed would have to, accept orders for cross-border payments at any branch, and indeed would have to meet all the obligations relating to these operations which would be regulated in detail in a European Directive. In this connection cash-carrying postmen could make payments to beneficiaries in isolated areas who do not have an account.

2.10. The specific comments which follow in chapter 3 will state the ESC's position on the proposed Directive which the Commission took the precaution of announcing in its Communication of December 1993.

3. Specific comments

3.1. If the Commission decides to send the Council a proposal for a Directive on the transparency and efficiency of cross-border payment systems, this should only lay down minimum requirements for the whole EU. The ESC is pleased that Article 1(3) leaves it up to the Member States to enact, where appropriate, additional provisions in which the structure of the credit industry and the special features of cross-border transfers can be taken into account. The Commission has justified the initiatives it has taken since 1990 by stating that the large-scale transfer of small amounts should be encouraged. This aim is not expressly mentioned in the draft of the proposal for a Directive. Neither is the scope limited exclusively to cross-border transfers of small amounts on a large scale (see point 3.2).

(1) ESC Opinion on the discussion paper on payments in the internal market (OJ No C 120, 6. 5. 1991).

(2) See contribution of Christiane Scrivener to the colloquium on cross-border payments in Paris on 1 March 1994.

3.2. *Scope (Article 2)*

It should be made clear that the proposed Directive is designed for large-scale crossborder transfers of small amounts, and not for the larger amounts involved in traditional foreign trade, which are now already sent via SWIFT (Society for Worldwide Interbank Financial Telecommunication). The fourth recital stresses the need to make a distinction between cross-border transfers of large sums and transfers of large numbers of small sums. But mention is simply made of a threshold of ECU 10,000, above which cross-border payments have to be reported for statistical purposes in many Member States. Moreover, in Article 7(2) payments over ECU 10,000 are exempted from the refund obligation. If this upper limit is to be used — even if only implicitly — as a definition for large-scale transfers of smaller amounts, it should be made clear that the Directive would apply to transfers by private households and small and medium-sized enterprises (SMEs).

3.2.1. It should also be made clear that the Directive does not apply to cross-border transfers in non-EU countries.

3.2.2. The Directive should apply not only to credit institutions within the meaning of Article 1 of Directive 77/780/EEC(1) but also to other institutions which perform cross-border payments as part of their professional duties, such as credit card companies. It should include all means of payment such as transfers and cheques and all processes such as standing orders or POS (point of sale) debiting. It therefore seems advisable for Article 2d to mention Eurocheque cards and credit cards, since these plastic cards are increasingly being used across borders for 'tele-shopping' and mail orders, especially in frontier areas.

3.2.3. Credit institutions which cannot make cross-border payments (or which do not wish to do so because of the terms of the proposed Directive) should be excluded from its scope, especially from Article 3.

3.3. *Transparency (Articles 3 and 4)*

3.3.1. The written information which must be given to customers before a cross-border transfer is made largely corresponds to the voluntary obligation which was taken over by the member institutions of the three big European credit industry associations in their guidelines of March 1992 (neither the public postal banks nor the British building societies belong to any of the ECSAs).

3.3.2. An important complement to the written information is the verbal advice normally given by most banks to customers about the most advantageous way for them to make a cross-border transfer. On the basis of such advice customers can decide, for example, to make out a Eurocheque to a beneficiary for small amounts or accept a longer delivery time for non-urgent payments so as to avoid the higher costs of a 'premium speed service'.

3.3.3. Some information about a cross-border transfer, especially in remote regions, cannot be given to a customer in advance with absolute certainty. Such matters, especially about exact delivery time, cannot therefore be covered by a European Directive.

3.3.3.1. In many cases, when an order is given, the bank can only give the customer an estimated delivery time for payment based on experience. Very often cross-border transfers involve several successive banks which have no business relations with the sender's bank (see point 2.2.1.2). In 'network to network' transfers in particular (i.e. to an account with a branch of a bank from another banking group) the sender's bank possibly has no experience in the rapid forwarding of funds abroad or in how to use foreign clearing systems. So, customers cannot be given a binding figure for the exact time taken before the amount is credited to the beneficiary's account. The second indent should therefore read: 'the approximate time'.

3.3.3.2. The sender can only be told in advance the value date of the debit from his account, not the date on which the beneficiary's account is credited.

3.3.3.3. It seems obvious that the customer should be notified in advance of the exchange rate for a cross-border transfer. However, some currencies can undergo massive exchange rate fluctuations. This was shown particularly in autumn 1992 and again in 1993. Since 2 August 1993 parities in the EMS exchange rate mechanism can each fluctuate 15% above or below their central rates. It would therefore be a good idea to tell the customer the current exchange rate when the order is given and indicate it on a notice alongside the counters. However, conversion rates cannot be given in printed brochures and other written information for customers because it would soon be out of date. At any event, this would have to be pointed out to customers, who expect written information to include the exact exchange rate.

3.3.3.4. The beneficiary should be told the exchange rate used if conversion is not carried out until the payment reaches his country. It is not necessary to inform the beneficiary about the exchange rate if it was

(1) OJ No L 322, 17. 12. 1977.

agreed to transfer a given amount in the currency of his country, as is normally the case. In these cases, the beneficiary does not need to know the amount paid by the sender in his currency, especially as the sender may possibly have been granted special terms which are covered by banking secrecy. However, the beneficiary can rightfully expect to be told the name of the sender and the purpose of the payment.

3.3.4. As regards information for the sender after a cross-border transfer, most banks comply with the industry guidelines of March 1992. This means that senders receive the evidence referred to in Article 4 about the performance costs charged with a listing of fees, commissions and taxes and an exchange rate statement, which according to the February 1993 study happened in over 80% of cases.

3.3.5. In cases where the sender also bears performance costs in the beneficiary's country, these should be communicated to the beneficiary with the proof of payment. The February 1993 study shows that this is clearly not always the case. Banks should therefore take care to ensure that when a cross-border payment is forwarded the sender's wish to pay the costs charged by the beneficiary's bank is also passed on to the various institutions involved.

3.4. *Obligations to execute in good time (Article 5)*

3.4.1. The ESC supports the wish that a cross-border transfer should be performed as quickly as possible unless the sender agrees otherwise. This seems in any case to be normal banking practice.

3.4.2. There are reservations about the deadline of six working days laid down in Article 5. Some cross-border transfers are not made directly between two correspondent banks in major financial centres, as would ideally be the case. Take, for example the cases where the sender and/or beneficiary are based in areas away from the financial centres and have accounts with branches of small local or regional banks. In these cases several institutions from the same banking group — or even from another group — often have to be involved; not all of them have business relations with each other. This means:

3.4.2.1. Transfers can take much longer if they have to go through several parties (e.g. from the branch of a local bank in the sender's country to another regional or national institution with correspondents in the beneficiary's country and then on again through a national or regional institution to a local institution and its branch).

3.4.2.2. In the beneficiary's country there are often foreign banking groups with which the sender's bank has no business relations. The latter then has no more influence on the execution of payment in the other country or on any omissions which may arise there.

3.4.2.3. A further consequence is that a bank involved in the transaction cannot be obliged to ensure payment no later than the working day following receipt of the order when it itself has not yet been credited with the payment. On the contrary, it must be left up to this bank to decide whether or not to take the risk and pay out the money before it has received cover itself from the foreign bank.

3.4.3. According to the February 1993 study, a cross-border transfer takes 3.2 days on average if one counts the time taken between the debiting of the sender's account and the crediting of the beneficiary's account, and 4.6 days if one counts the time taken between the sender placing his order and the crediting of the beneficiary's account. This result can already be regarded as satisfying even if it is largely made up of the present large number of direct transfers between correspondent banks in the major financial centres. The banks use the 'value' definition for calculating the time taken for a transfer, which is important in the case of larger amounts because of the losses or gains of interest involved. The Commission, however, thinks it better to count the time taken from the giving of the order. The ESC supports this method, which is also contained in the UNCITRAL framework provisions.

3.4.4. A binding deadline for cross-border transfers seems inadvisable, for the reasons given in point 3.4.2. Even the Commission's Legal Framework Group doubts that such conditions are necessary (point 19 of the Report of the Legal Framework Group and XV 154/93 of 3 December 1993).

3.4.5. If a binding deadline is introduced, many banks — especially smaller ones — may simply refuse to accept transfer orders when they themselves have no say in the execution of payment by foreign banks in another country.

3.5. *Obligation to execute in accordance with the payment order (Article 6)*

3.5.1. In cross-border transfers each party has so far normally (in 94% of all cases) paid his own bank charges

(the so-called SHARE regulation). But the proposed Directive will aim to make it the general rule for the sender to bear all costs so that the beneficiary is credited with the full value of the transfer without deductions. This so-called OUR regulation (all costs to sender) is becoming increasingly important in smaller transfers. New payment networks such as TIPANET or the ACH (automated clearing houses) alliance are based on, or are due to be based on, the OUR regulation.

3.5.2. The February 1993 study only looked at 'OUR regulation' cross-border transfers. It emerged that in 43% of cases the beneficiary also had to pay charges even though the sender had specifically agreed with his credit institution to pay all costs and have the beneficiary credited with the full amount without deductions (see point 2.7.2). In the event of such 'double charging' the sender's bank should refund this 'unjustified charge' to the sender, in accordance with Article 6(2), and forfeit the fee originally charged to him, even if the beneficiary's bank is the sole party responsible. For the sender, who can only hold his own bank liable, such a rule seems understandable. But for the sender's bank such a wide-ranging liability seems unreasonable in view of the conditions mentioned in points 2.2.2, 2.2.3 and 3.4.2, at least if the beneficiary's bank is insolvent.

3.5.3. For reasons of confidentiality the European credit industry's associations were not allowed to see the data for the February 1993 study. So they still do not know the reasons for the reported cases of double charging.

3.5.4. The Commission should ensure that the second, 1994 study referred to in point 1.4 gives exact details of any cases of double charging. The credit industry could then investigate these cases, which are quite contrary to normal banking practice but which might have been caused by incomplete or even incorrect information from the sender. Article 6(2) should therefore, as a precaution, make an exception in the event of any contributory negligence on the part of the sender.

3.6. *Obligation of institutions to refund in case of failed transfers (Article 7)*

3.6.1. Article 7(1) lays down that if the transfer is not properly completed by the sum being credited to the beneficiary's account, the sender's bank must refund the full amount of the transfer plus fees to the sender. For the sender's bank this would introduce the concept of no-fault liability. On the other hand, the sender's bank is entitled to claim a refund from the other institutions involved in the payment chain which have not carried out instructions properly. But the refund is by no means so certain as to offset the no-fault liability completely.

3.6.2. Article 7(2) lays down that the refund can be applied for no earlier than 20 working days after the date on which the cross-border transfer should have been made. Even with this time limit it is conceivable that the sender will get his money back, even though the beneficiary has been credited with payment in the meantime and has the sum at his disposal.

3.6.3. It is not clear to what extent the refund obligation applies in the event of force majeure. In Article 7(2)(j) reference is made to the definition of force majeure in Directive 90/314/EEC [1]. It should be made clear whether the refund obligation still applies if the beneficiary's bank declares a moratorium or if bankruptcy proceedings are initiated before it can credit the transfer to the beneficiary. Such cases would obviously not be regarded as force majeure, at any rate not for amounts of less than ECU 10,000.

3.7. *Complaints centres (Article 8)*

3.7.1. For customer complaints which are not resolved by the institutions concerned independent complaints centres are to have competence in all matters, in accordance with Article 8(3). Depending on the prevailing principle of subsidiarity within a country the centres may be set up either by the banks themselves or by the central banks or authorities in the Member States.

3.7.2. As the complaints centres cannot be part of the legal system, it seems to be going too far to tell Member States in a European Directive [as in Article 8(5)] that they have to see that the decisions of the complaints centres are published regularly.

3.7.3. Cross-border cooperation between complaints centres may be a good idea. Customers could then apply to a complaints centre in their own country, which could

[1] OJ No L 158, 23. 6. 1990, p. 59.

then get in touch with centres in the beneficiary's country. For such cooperation between centres, and for the setting-up of a European ombudsman, binding EU rules would be unnecessary.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN

Opinion on the Report from the Commission to the Council on the implementation of the merger Regulation

(94/C 388/09)

On 23 November 1993 the Economic and Social Committee, acting under the third paragraph of Article 23 of its Rules of Procedure, decided to draw up an Opinion on the Report from the Commission to the Council on the implementation of the merger Regulation.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 8 June 1994. The Rapporteur was Mr Petersen.

At its 317th Plenary Session (meeting of 6 July 1994) the Economic and Social Committee adopted the following Opinion by a large majority with 2 abstentions.

1. Introduction

1.1. The European Union faces major political and economic challenges. Deep-seated problems of growth and employment must be overcome, four candidates for accession to the Union integrated, and reform processes in the fledgling democracies of Central and Eastern Europe underpinned. The globalization of markets and the increasing economic interdependence of economies are triggering dynamic changes in the European internal market, thus creating a need for new economic cooperation structures and leading to corporate restructuring, with wideranging consequences for jobs.

1.2. Given this conjuncture of circumstances and growing competitive pressures, sustained and effective interaction between national and European competition policy is more than ever needed. The welcome progress made on the approximation of national competition laws should facilitate this. Belgium, France, Greece, Italy, Portugal and Spain have already brought their competition laws into line with the European model. Greater willingness on the part of the other Member States to follow suit would yield considerable benefits.

1.3. The need regularly to reassess and extend the scope of European merger control is beyond dispute. The great advantage of European merger control is the sole responsibility of the Commission, which has the greatest expertise in this area ('one-stop shop' principle). In terms of integration policy it is illogical to have cross-border mergers assessed by different authorities, using different legal systems and standards. Until mergers with a cross-border dimension are assessed uniformly by a single authority, there is a danger of divergent decisions, legal uncertainty and time-consuming procedures. The presumed accession to the European Union of four EFTA countries and the closer relations with the associated countries of Central and Eastern Europe will only add to the regulatory labyrinth. It should be borne in mind that burgeoning bureaucracy means rising costs and thus disadvantages for industry located in the EU. Divergent legal systems and the exhaustive information on market conditions required by the authorities in respect of cross-border mergers

already constitute a disproportionate administrative burden for European firms. The burden, not only on the firms making the submissions but also on third party (often small or mediumsized) enterprises which are either competitors or customers, is no longer justifiable.

1.4. In its most recent Report on Competition Policy, the Commission rightly said that there would have to be major developments on merger control in 1993, as the first revision of the Regulation was due. To the Committee's great regret, this expectation proved to be unfounded. Particularly disappointing is the reluctance of some Member States, despite thorough preparatory work by the Commission, to review Regulation (EEC) No 4064/89 [1] and to reduce the thresholds. Although the timeframe is spelt out unambiguously in Articles 1(3) and 9(10) of the Regulation, the review is to be postponed for three years and will not be carried out until the end of 1996. This confirms the fear voiced by the Committee as early as 1990, that some Member States would like to perpetuate the political compromise hammered out for the initial phase of the merger control Regulation [2].

1.5. In view of the proliferation of national merger control systems, it would be disastrous if misguided attachment to the principle of subsidiarity were to promote fragmentation of merger controls in the Union and condemn the Commission to inactivity in the exercise of its right of proposal. Moreover, as the Committee pointed out in its Opinion on the XXIInd Report on Competition Policy [3], the principle of subsidiarity has been enshrined in the competition provisions of the Treaty of Rome since the outset. Articles 85, 86 and 92, as well as Article 90 of the EC Treaty, are applicable only where agreements between undertakings, decisions by associations of undertakings and concerted practices may affect trade between Member States. The same applies to European merger control which draws a distinction between European and national merger control based on threshold values and thus takes sufficient account of subsidiarity. In this connection the Committee stresses the need to retain the 'Dutch clause' [Article 22(3) of the Regulation]. In future it ought also to be possible to apply the clause on application from the companies concerned.

2. Commission Report on implementation of the merger control Regulation

2.1. Contrary to initial fears, the Committee feels that the Commission's existing administrative practices have generally proved their worth. The Commission has succeeded in fleshing out the merger control Regulation. Given the multiplicity of legal and practical difficulties which a completely new instrument of this kind entails, the achievement of the Commission and of its Merger Task Force in particular, is considerable. A point to stress is that the deadlines laid down by the Regulation have been met. Accelerated procedures are, however, needed for all concerted practices assessed under Articles 85 and 86 of the EC Treaty. The Directorate-General for Competition took a first step in this direction with regard to cooperative joint ventures (see point 2.15). The Committee sees this as evidence of the Merger Task Force's activities positively influencing the other departments of the Directorate-General for Competition.

2.2. The focus of European merger control is the establishment or strengthening of a market-dominating position. However, prohibition, as provided for in Article 2(3) of the Regulation, requires that effective competition in the common market, or a substantial part of it, be significantly impeded by the creation or strengthening of a dominant position. In the course of its competition assessment, the Commission has analyzed not only the firms' existing market share, but also many other individual criteria [Article 2(1) of the Regulation] in order to establish whether the proposed merger would cause lasting damage to the market structure. The Commission has adopted a dynamic approach. In particular the position of competitors and customers and vertical relations (e.g. the specific problems of suppliers) in the sectors concerned are important criteria for the Commission's prognosis. But it is clearly the Commission's responsibility — and the Committee would emphasize this — to assess whether the merged company exhibits behaviour indicative of a lack of competition.

2.3. However, the Commission has a tendency to demarcate the market too narrowly, both in business and geographical terms. Because consumer behaviour tends to be 'nationally' based, the Commission has frequently used the national market as the basis for its decision. This is short-sighted. The Committee has repeatedly stressed that the Community is now the minimum frame of reference, and that the worldwide dimension should not be lost sight of [4]. The United States and Japan have long since tailored their competition policy to cross-border markets, including world markets. The Committee also refers to the wording of Article 2(1) of the Regulation, which requires the Commission in assessing mergers, to take account of 'actual or potential competition from undertakings located either within or without the Community'. The

[1] OJ No L 395, 30. 12. 1989.
[2] OJ No C 225, 10. 9. 1990, p. 60.
[3] OJ No C 34, 2. 2. 1994, p. 83.
[4] OJ No C 333, 29. 12. 1986, p. 86.

Committee feels therefore that, before taking a decision on a planned merger, the Commission must carry out a detailed analysis of the relevant international market and consider the relative positions of the firms concerned in this worldwide market. At the same time the Commission should take greater account than hitherto of the fact that the reference markets are constantly changing and expanding.

2.4. The Committee also points out that Opinions on merger control have repeatedly urged that proposed mergers be assessed in the light of overall Community policy and taking into account the need to safeguard social values and employment. In this context the Committee is of course aware that 'the multifarious economic and social problems created by [mergers] cannot all be solved by a [merger] control Regulation based on competition policy' ([1]). This makes coordination of competition legislation with other policy areas, such as regional and sectoral structural policy, research and development policy and consumer policy all the more urgent. Council and Commission should continue their work on approximating laws. Particularly in the field of company law, the Committee considers the European Company Statute a suitable instrument for improving cross-border cooperation between enterprises and promoting economic integration in the European Union ([2]). The Committee assumes that the European Company Statute will also be available to SMEs.

2.5. In the light of experience with the Regulation so far the Committee would comment on the Commission's Report as follows:

Proposals for updating the Regulation

2.6. *Turnover thresholds*

2.6.1. The Committee has in the past criticized the extraordinarily high referral thresholds ([3]). It considered them a political compromise, unjustifiable in economic, and thus competition, terms.

2.6.2. The Committee cannot endorse the Commission's intention of not at present submitting to the Council any formal proposal for revision of the merger control Regulation, and in particular for a reduction of the turnover thresholds. The Commission's reference to the outcome of its 'extensive consultations' is not convincing, particularly as the reservations expressed by the national administrations and competition authorities (subsidiarity, inflation, enlargement of the European Union) are largely irrelevant to the underlying question. The Commission correctly asserts that 'it would be wrong to delay reexamination of the threshold indefinitely' ([4]). The Committee considers that the Commission should at the earliest opportunity submit proposals for revision to the Council and urge the Member States to ensure that the thresholds can still be reduced before the follow-up conference on the Treaty on European Union. Otherwise there is a danger that the Member States' allegedly excessive workload will be used as a pretext for a further postponement of the necessary amendment of the merger control Regulation.

2.6.3. The aim should be a reduction of the main threshold (worldwide turnover) from ECU 5 bn to ECU 2 bn. This would be in line with the Commission's original 1989 proposal. It would offer a practicable distinction between mergers which in general have a Community dimension and those which do not. A phased reduction of the main threshold could be envisaged. However, a precondition for this, the Committee feels, would be binding provisions in the Regulation governing the reduction (e.g. from ECU 5 bn to 3 bn and subsequently to 2 bn) and its timing. Article 9(1) of the Regulation provides an appropriate procedure for mergers which, despite exceeding the ECU 2 bn threshold, affect only local or regional markets.

2.6.4. At the same time the threshold for Community turnover should be reduced from ECU 250 m. to ECU 100 m. The Regulation's two-thirds criterion (Article 1(2)) should be dropped. The two-thirds rule makes it possible even for large companies to merge in a Member State, without the Commission being entitled to intervene. It is easy to see that mergers of this kind are likely to constitute a significant obstacle to effective competition in the common market or a substantial part of it.

2.7. *Reasons for the reduction of thresholds*

2.7.1. The Commission's own figures indicate that only 20% of mergers with a Community dimension are at present referred to it. This means that 80% of cross-border mergers are assessed — if at all — according to divergent criteria and, still worse, divergent procedures. The Commission report, states that of the 282 mergers with a Community dimension listed in the

([1]) OJ No C 208, 8. 8. 1988, pp. 12 and 15.
([2]) OJ No C 23, 30. 1. 1989, p. 37.
([3]) OJ No C 208, 8. 8. 1988, p. 12 and OJ No C 225, 10. 9. 1990, p. 60.
([4]) COM(93) 385 final, p. 22.

Annual Report on Competition Policy (1991/92), only 50-60 were referred to the European merger control authority. The Commission also points out that some mergers may be authorized without the possible adverse effects at Community level being taken into account. There is also a danger that the cumulative effect of mergers in several Member States may not be taken into account.

2.7.2. The resulting problems for the functioning of the internal market are many and serious:

— Industrial policy measures in some Member States sometimes promote high barriers to market entry. Such barriers are incompatible with an open, competition-orientated industrial policy. They are, above all, detrimental to small and medium-sized enterprises (SMEs). Also, in other markets, SMEs often come up against 'giants' which can use their human and financial resources to deny market opportunities to others. A striking example of this is SMEs' still inadequate access to public procurement contracts. This makes it all the more important that there be a single cross-border merger authority for the entire internal market.

— The Regulation's two-thirds criterion, under which a merger is assumed to have no Community dimension if the companies participating in the merger each derive more than two thirds of their Community turnover from a single Member State, is of dubious value in terms of integration and competition policy. As has already been pointed out, whole sectors are thereby removed from the Commission's remit. For example, in its Report, the Commission refers to steel, textiles, automobile components, machine tools and electrical equipment for railways. Acceptance of the Committee's suggestion that this criterion be dropped would ensure that mergers in reference markets 'typically much wider than the national level' (1) would no longer be excluded.

— European denationalization policies, particularly with regard to banks, insurance companies, energy, transport and telecommunications, also require strong competition control at European level. In some cases, companies in these sectors enjoy, at least for a transitional period, a 'de facto' national monopoly. Monitoring their conduct at European level would be of great importance not only for consumers but also for the framing of future competition structures in the internal market. But the high turnover thresholds and two-thirds criterion make this impossible at present.

— Services are steadily increasing their percentage share of GDP. The Commission has established that many key activities in the services sector such as publishing, advertising and computer services, are increasingly being structured on cross-border lines but, given the existing thresholds, they remain outside Community jurisdiction. Dominant positions in these markets which significantly hinder effective competition can damage the interests of intermediate and final consumers and impede economic and technological progress.

2.7.3. The application of fixed quantitative thresholds is admittedly, as the Commission also points out, an approximate and somewhat crude method for allocating jurisdiction between the national and Community authorities. But for reasons of legal certainty, the Committee feels that the threshold criterion must be retained. Other criteria, such as market share or the size of the company (e.g. number of employees) are, as national experience shows, impracticable.

2.8. *Decentralized application of European competition law?*

2.8.1. It is beyond dispute that a reduction of the thresholds would approximately double the number of cases to be assessed. There are therefore fears that the Commission's growing workload could permanently impair the efficiency of the current control procedures.

2.8.2. The Committee feels that the Member States' lack of confidence in the Commission's capacity is unfounded. The establishment and operation of the Merger Task Force is in itself proof of the Commission's organizational capacity, where tight deadlines are required. With regard to the rising workload, the Commission points out that the increase in staff needed to deal with additional work following a reduction of the threshold is likely to be proportionately much lower than the rise in the case-load (from approx. 60 to approx. 110 cases annually). Moreover, the Committee has repeatedly stressed — most recently in its Opinion on the Commission's XXIInd Report on Competition Policy — that an increase in the staffing of the Directorate-General for Competition is in any case both desirable and feasible. 'Even in a period of budget austerity' this could be achieved 'by making better use of [the Commission's] existing resources' (2).

(1) COM(93) 385 final, p. 10.

(2) OJ No C 34, 2. 2. 1994, p. 83.

2.9. *European cartel office*

2.9.1. The discussion of the setting up of a European cartel office raises very complex questions. The role of this office will depend in particular on the future institutional structure of the European Union. Central issues such as the position of the Commissioner for competition policy or the consideration of other, non-competition-related parameters (structural policy, cohesion policy etc) by a political control body require detailed and informed discussion. The Committee therefore feels that when the merger control Regulation is revised, the question of setting up a European cartel office should be kept strictly separate from that of a reduction of the referral thresholds.

Other suggested improvements

2.10. *Referral under Article 9(2) of the Regulation*

2.10.1. In its Report the Commission saw no reason to suggest that the Article 9 referral procedure be changed. It does however consider whether a more flexible approach — outlined in its Report — is needed. Under Article 9(2) of the Regulation, the Commission may, on application by a Member State, refer a planned merger to the competent national competition authority, if a merger threatens to create or strengthen a dominant position, as a result of which effective competition will be significantly impeded on a market within that Member State. The Commission suggests that a more flexible referral procedure could be considered when the thresholds are reviewed.

2.10.2. The Committee reminds the Commission that the provision under Article 9 of the Regulation constitutes an exception to exclusive Community competence. As an exception it should be interpreted narrowly. The Committee has repeatedly stressed the principle of the primacy of Community over national law. If the Regulation's thresholds [within the meaning of Article 1(2)] are attained, the planned merger by definition has a Community dimension. The Committee therefore strongly endorses the restrictive interpretation of the provision applied so far. It calls on the Commission not to relax this provision in the future.

2.11. *Commitments in the first phase of the procedure*

2.11.1. The Commission Report suggests ways in which the commitments made in the first, one-month phase of the procedure could be improved. The current procedure lacks transparency, third parties are not heard and commitments are not published. Moreover, there is no standard to ensure possible subsequent enforcement of conditions. Article 8(2) of the Regulation applies only to conditions imposed during the second phase of the procedure. The Commission therefore considers whether the first phase should be extended for a further month, and whether it should be made clear that Article 8(2) will also apply during the first phase of the procedure.

2.11.2. The Committee supports the Commission's intention of specifically stipulating that Article 8(2) will also apply during the first phase. However it does not consider an extension of the first phase by one month necessary. Extension would undermine one of the pillars of the Regulation, its short deadlines. If the case creates obvious difficulties and if these difficulties cannot be resolved via conditions in the first phase, the Commission should embark on the second, more detailed phase of the assessment. The principles of the accelerated procedure in any case require the Commission to adopt its decision as early as possible [Article 10(2)]. In the second, four-month phase of the procedure the Commission has sufficient time to hear third parties and the Member States.

2.12. *Improved transparency of commitments in the second phase*

2.12.1. The Commission Report expresses calls for greater transparency in the second phase of the decision too. The Commission says that commitments are usually proposed only at a late stage. This is detrimental to the consultation of third parties and the Member States. The Commission therefore suggests that the four-month time limit of the second phase also be extended by a maximum of a further month. The Commission also suggests that the Regulation could make express provision for firms' commitments to be published in the Official Journal before a clearance decision is adopted.

2.12.2. The Committee has strong reservations on these proposals. Here too, for administrative reasons, the procedure should not be prolonged. Consultation is no more important than firms' need for a swift, clear-cut legal decision on their merger plans. It is also up to the Commission to put its conditions as early as possible. If it does this, there will be sufficient time to consult the Member States and competitors. Further ramifications of the complicated rules would merely confuse firms and diminish legal certainty. In any case, commitments by firms are already published in the Official Journal in the second phase. This is sufficient as any third party affected by the decision can institute proceedings in the

Court of First Instance. Moreover, conditions are brought to the attention of third parties via publication of the decision and its conditions in the Official Journal.

2.12.3. The Committee also supports the Commission's general quest for greater transparency. Specifically, the quantity and quality of information in the first and second phases must be improved. In particular, the Committee feels that the parties should enjoy improved access to the case files and should receive copies of the preliminary draft decision submitted to the advisory committee on merger control. This would enable them to put their arguments to the advisory committee, as the right to legal hearing requires. And, as the Committee has also suggested [1], the Commission press releases should be more comprehensive and contain the views of interested parties.

2.12.4. The fact that the Committee approves the proposal for an improved information policy is dictated not least by the desire to enable third parties, which demonstrate sufficient interest in a planned merger, to make an application for hearing in time and have the opportunity to be heard. They include in particular the recognized representatives of the employees of the undertakings concerned. In its Opinion on the amended proposal for a Council Regulation (EEC) on the control of concentrations between undertakings [2] the Committee emphasized this requirement. However, lack of information or late submission by the companies concerned in individual cases prevented workers' legitimate representatives from making their application for hearing on time in accordance with Article 18(4) of the Regulation; they were thus only able to make informal representations on behalf of the workers concerned to the Commission. In the light of this experience, the Commission should draw up, in cooperation with the Member States, a proposal ensuring that the legally-recognized representatives of the workers of companies participating in mergers can submit their applications for a hearing to the Commission on time and state their views on the planned merger in the context of a formal hearing. In this context, the ETUC's recommendation to the Commission for an improved hearing procedure should be studied. This refers in particular to the practice of the United Kingdom's Monopolies and Mergers Commission (MMC).

2.13. *Changes with respect to banking and credit institutions [Article 5(3)a of the Regulation]*

2.13.1. In its Report the Commission argues that the 'turnover' criterion, estimated on the basis of balance-sheet assets, should be replaced by 'banking income' as defined in Directive 86/635.

2.13.2. The Committee feels that this proposal has some merits. Using banking income is more conclusive and logical than the current approach. The technicalities of calculating banking income require further detailed study however. The Committee is therefore not at present in a position to comment on this.

2.13.3. Under the second paragraph of Article 5(1) of the Regulation, turnover is calculated by reference to the place of residence of the party acquiring the product or service. The Committee feels that it would be very expensive, if not actually impossible, to calculate banking income in relation to the place of residence of the beneficiary of the service. It would be far better to calculate the turnover of banking and credit institutions by reference to the place of establishment of that part of the institution in question (branch, subsidiary) which carried out the transaction and received the income.

2.14. *Appraisal criteria*

2.14.1. The Commission stresses that it is a priority objective of the Regulation to ensure undistorted competition within an open market economy. However the Regulation also requires the Commission to place its appraisal of mergers within the general framework of the achievement of the fundamental objectives referred to in the Treaty on European Union (recital No 13 of the Regulation). The Committee expects the Commission — subject to its central task of ensuring effective competition — to take account as far as possible of the Community objectives referred to above in its forecasts of the future development of markets.

2.14.2. In this connection, the Committee endorses the Commission's view that it would be wrong to allow dominant positions to be created which could hinder effective competition on the Community market. Such a policy would primarily harm consumers, cause the disintegration of the markets and ultimately not only act to the detriment of European firms themselves but also endanger jobs. Moreover, as the Committee has pointed out, Article 2(1) of the Regulation provides a flexible framework to take account of future structural developments, actual or potential competition from undertakings located either within or without the Community and scientific and technological progress.

2.15. *Joint ventures*

2.15.1. The Committee concurs with the Commission's view that the distinction between concentrative and cooperative joint ventures is at present unsatisfactory. The Commission has attempted to alleviate the problem via a package of measures (broadening of the

(1) OJ No C 34, 2. 2. 1994, p. 83.
(2) OJ No C 208, 8. 8. 1988.

existing group exemption Regulations, and publication of guidelines). By speeding up proceedings in cases of cooperative full function joint ventures, the Commission has also attempted to treat all forms of joint venture (whether cooperative or concentrative) equally (see also point 2.1).

2.15.2. The Committee considers these measures to be an important step in the right direction. Cooperative joint ventures however have the major disadvantage that they do not fully benefit from the Commission's exclusive competence. They are assessed in accordance with the principles of Articles 85 and 86 of the EC Treaty and the provisions of Regulation 17/62. As in most cases the Commission takes its decision in the form of a comfort letter, there is considerable legal uncertainty for firms, given that the comfort letters are recognized neither by the national courts nor the national competition authorities. The Committee therefore suggests that the Commission either upgrade its comfort letter and/or amend Regulation 17/62. The merger control Regulation [Article 6(1)(b)] should be matched by a corresponding provision in Regulation 17/62.

2.15.3. As the Committee made clear in its Opinion on the XXIInd Report on Competition policy, it would be a good idea to update the Commission's Notice regarding merger and cooperation transactions under Regulation 4064/89 in line with new developments in administrative practice.

2.16. *De minimis joint ventures*

2.16.1. The Committee welcomes the Commission's plans to introduce a simplified notification and assessment procedure for smaller 'de minimis' joint ventures. The Committee assumes however that third parties will continue to be heard. Simplified assessment procedures mean less bureaucracy for companies and more efficient administration for the Commission. This enables the 'effects doctrine' of international law to be more effectively applied. Only cross-border mergers with a tangible impact on competition conditions in the common market should be assessed by the Commission.

2.16.2. The Committee also feels that a general simplification of all notification procedures is needed. In view of the increasingly global economy and the resultant proliferation of procedures, the competition authorities must distinguish between significant and insignificant cases. There must be greater administrative efficiency and concentration maxims must be applied. The simplified notification forms (the Commission is thinking in terms of sections 1 and 2 of the form and certain additional market data) should not be restricted to concentrative joint ventures. Rather, a twostage (notification) procedure of this type should apply to all joint ventures assessed in accordance with the principles of Article 85/86 of the EC Treaty and the provisions of Regulation 17/62. This would be of particular help to SMEs and would reduce costs. It would also bring the merger and cooperation procedures further into step.

2.17. *Calculating the turnover of joint ventures*

2.17.1. The Committee agrees with the Commission that there is no need to change Article 5(5) of the Regulation, concerning the calculation of the turnover of joint ventures. The Commission has in practice found adequate solutions to the allocation problem. Moreover, legal continuity will enhance the standing of the Regulation and public acceptance of administrative practices in general.

Done at Brussels, 6 July 1994.

The President

of the Economic and Social Committee

Susanne TIEMANN