

EEC COMPETITION AND ENLARGEMENT POLICY IN PORTUGAL

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Ladies and Gentlemen,

INTRODUCTION

It is with great pleasure that I accept to speak to you during my visit to Portugal.

The competition rules of the European Community are an increasingly important body of law of which new Member States wishing to join the EEC must be fully informed.

It therefore seems quite appropriate to me to devote some reflexions on the competition policy of the European Community in the view of Portugal's future accession to the Common Market.

But firstly I will say a few words on the general economic framework in which this policy is pursued and analyse some of its purposes and functions.

Secondly, I will give you a general view of the basics of the European Community's competition rules.

Finally I will make some comments on some of the specific points which might arise in this field in the context of Portugal's accession to the European Communities.

## THE PURPOSE AND FUNCTIONS OF EUROPEAN COMPETITION POLICY

I shall therefore start to explain the European Commission's view on the purpose and function of the European competition policy.

It is clear from a reading of the Treaty of Rome (Treaty establishing the European Economic Community), that the European Community is essentially based on a market economy in which fair and undistorted competition has a fundamental role to play. This is already apparent from one of the first articles of that Treaty stating that the European Community shall include the institution of a system ensuring that competition in the Common Market is not distorted. In this context it is necessary to remind you from the start that the competition rules of the European Treaties have a constitutional character. The Community authorities can pass legislation implementing the Treaty rules, but they cannot change them.

Competition policy plays a crucial role in the application of the basic rules which govern the integration of the European markets and contributes to the creation of a unified market. The free flow of trade in this market creates the need for constant structural adaptation. What Europe needs most of all is enterprises which are capable and willing to face competition, within the European Common Market as well as internationally. The

.../ existence of a big single

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existence of a big single market is one of the most important assets for our enterprises. It provides them with a basis for production and sale, but forces them also to adapt in order to remain competitive. The policy of the European Community must therefore be to enforce competition rules actively. This is the best contribution to enhance the necessary structural adaptations.

Let's now examine the economic functions of this system of competition.

Its functions are :

- to ensure that available resources are located to the most productive sectors ;
- to stimulate undertakings to make the best use of their knowhow and skills and
- to encourage them to invent, develop and exploit efficiently new techniques and new procedures.

The European Commission firmly believes that competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provision of the Treaty makes it easier for the supply and demand structures continually to adjust to technological development.

.../ Through the interplay

Through the interplay of decentralized decision-making machinery competition enables and obliges enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the European Community. From this point of view, competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society.

It is a measure of the importance which the European Community attaches to competition policy that this is the one area in which the European Commission has its own autonomous powers of decision-making.

In a phrase, the competition policy which the Commission is pursuing is the maintenance and reinforcement of an effective competitive structure in the European Common Market. One is facing a process of desindustrialization in the EEC, or at least in important parts of it. This cannot be the fate of this highly developed part of the world and this tendency must be reversed. Competition policy is one of the instruments to achieve this goal.

#### THE COMPETITION RULES IN THE EUROPEAN TREATIES

Having pictured the broader objectives of our competition policy, I will now give you a general overview of the basics of the Community's competition rules, first of the Coal and Steel Community and thereafter of the EEC.

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But first it has to be made clear that there are two kinds of competition rules. First there are those which are intended for private undertakings and which I will comment in a minute. But in addition there are various rules which are intended for the Member States themselves or for their public sector. Amongst the latter are not only the rules on State subsidies which I will not comment today, but also the very important rules of nondiscrimination embodied in Articles 37 and 90 of the Treaty relating to State monopolies of a commercial character and public undertakings. It is clear that these rules are particularly important in the context of the Portuguese accession and I will make some specific comments in the last part of this presentation about them.

Starting now with the rules addressed to private undertakings.

.../ The Paris Coal and Steel

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The Paris Coal and Steel Community Treaty contains a well-defined prohibition of cartel agreements - subject to specific exemptions - in Article 65. The European Commission has, however, developed a practice of granting such exemptions in economically justified conditions, especially for specialization agreements.

The Coal and Steel Treaty further forbids the abuse of dominant positions and contains rules of the control of mergers in Article 66. These provisions leave no room for application of the competition rules in these sectors.

The application of these rules of competition takes of course place in connection with the use of the wider power which this Treaty gives for establishing an industrial policy, including such measures as fixing of quotas and/or minimum prices, taking special measures in the field of commercial policy and controlling the granting of State subsidies.

The EEC Treaty covering in principle all other sectors forbids all types of agreements or concerted practices - horizontal as well as vertical - in restraint of competition, by virtue of Article 85, paragraph 1. The second paragraph of the same Article goes on to say that prohibited agreements and decisions are automatically null and void. This prohibition and the sanction of nullity which flows from it are mitigated by a possibility of exemptions, provided by paragraph 3 of Article 85.

.../Article 86 forbids

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Article 86 forbids the abuse of dominant positions. Unlike in the American antitrust rules, however, in the European system the mere possession of a dominant position is not forbidden. Companies must engage in abusive behaviour on the market to infringe Article 86. There is a wide range of examples of such abusive behaviour of which discrimination, refusal to sell and market exclusion are the most obvious.

In this context it should be emphasized that the European Court of Justice in Luxemburg, which acts as a Supreme Court for reviewing the decisions of the Commission, has substantially upheld the practice of the Commission and in particular as regards the prohibition of abusive behaviour under Article 86. Indeed several judgments of this Court confirmed over the years the Commission's opposition to exclusionary practices, refusals to sell and discriminations.

It has further to be reminded that the EEC Treaty does not have the same rules on mergers as the Coal and Steel Treaty. According to the European Court's Continental Can decision the Commission can invoke Article 86 against mergers which reinforce or extend an already existing dominant position.

Nevertheless, the fact remains that the Commission's powers of intervention and control are inadequate to deal effectively with all concentration situations capable of harming competition. The Commission is therefore trying to get its powers extended.

.../ A draft regulation for



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A draft regulation for merger control has been under discussion by the Community's main law-making body, the Council of Ministers, for several years. It is based on Article 235 of the EEC Treaty. This is a "cover-all" provision which allows the Community law-making bodies to fill in for gaps in the Treaty if this is necessary for the Common Market to operate properly or to achieve one of its goals.

The European Parliament had already long ago given a favourable opinion on the Commission's proposed draft regulation. However, the Council of Ministers could not come to adopt it. This was the reason why the Commission has modified its proposal on several points in 1981. In a resolution of November 1983, the Parliament renewed its backing to the amended proposal of the Commission, taking it upon itself to make some further suggestions about the draft. The Commission finally announced during the December session of the Parliament last year that it would incorporate most of these suggestions into its draft and make a new attempt in the Council of Ministers calling for final adoption.

It must also be remembered that the EEC Treaty's rules on competition apply to restrictive or abusive practices by undertakings situated in non-member countries where their conduct has an appreciable impact within the Common Market. The European Commission was thus one of the first antitrust authorities to have applied this internal effect theory to foreign companies,

.../ both to their advantage

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both to their advantage and to their detriment. According to this theory the jurisdiction of the European Community is established as soon as a behaviour has a perceptible effect inside the European Common Market. Putting the theory into practice can, it is true, have repercussions outside the European Community : but that is not a reason for regarding it as an inadmissible exercise of extra-territorial jurisdiction. To assert the contrary would be tantamount to preventing public or juridical authorities from effectively dealing with competition cases falling within their jurisdiction. It is, however, clear that the Commission exercises political control over the exercise of that jurisdiction and can take various considerations into account when exercising it.

The Commission shares with the national Courts of the Member States the power to enforce the competition rules. Since Article 85(1) and 86 are directly applicable, individuals are free to invoke them before national Courts. Any questions that may arise on the interpretation of the provisions can be referred to the European Court of Justice. Its decision is binding on the referring Court.

Even if in the enforcement of Community competition law, actions before the national Courts have not gained the importance of treble damage actions under US antitrust law, it has to be made

.../ clear that the

clear that the enforcement of these competition rules through national Courts is of great importance to the proper functioning of the system. This is why the Commission is at present studying the possibility of further legislative action to strengthen such enforcement by private damage actions.

The enforcement of these rules is also backed by the possibility for the European Commission to impose fines when infringements have been established. The amount of those fines - which cannot exceed 10 % of total annual turnover - are subject to appeal procedures before the European Court of Justice in Luxemburg.

Last but not least it has to be mentioned that the European Commission has the exclusive power to make exemptions from the interdictions of the competition rules by virtue of paragraph 3 of Article 85. The Commission can exercise this power either by way of individual decision or by way of generally applicable regulations which it has been authorised to adopt by the Council of Ministers. These regulations are called block exemptions. Several ones have already been passed such as those concerning exclusive distribution or exclusive purchase agreements and one concerning specialization agreements; several more are presently in preparation to be adopted in 1984; amongst these are to be mentioned those concerning patent licenses, cooperation in the field of Research and Development and selective distribution in the automobile sector.

.../ It is therefore

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It is therefore to be expected that this power to grant such exemptions will become the major instrument by which the European Commission steers its competition policy in coordination with the other policies of the European Communities.

Competition policy thus becomes part of the overall economic policy the Commission is pursuing. This is not surprising since the European Court already indicated in one of its judgments in 1969 that

"...Article 85 of the EEC Treaty applies to all the undertakings in the Community whose conduct it governs either by prohibitions or by means of exemptions, granted - subject to conditions which it specifies - in favour of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress. While the Treaty's primary object is to eliminate by this means the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the Treaty...."

.../ A link therefore

A link therefore exists between the economic objectives of Article 2 of the Treaty and the competition rules, and in particular with Article 85/3. This explains why the European Commission does not limit itself to merely apply the competition rules of the Treaty as a prosecution authority would do, but conducts a real policy in this field.

### III. SOME SPECIFIC POINTS RELATED TO THE PORTUGUESE ACCESSION

In the context of the application of the European competition rules to Portugal after its accession to the European Community, several points seem worth mentioning. First there is the question of the date at which the application of the new system starts. Other questions relate more to public undertakings and State monopolies of a commercial character.

Concerning the transition it has to be recalled that in the case of the previous accessions of the United Kingdom, Denmark and Ireland in 1973 and of Greece in 1981, the application of articles 85 and 86 to the new Member States was organised in an identical way.

Indeed, these rules were made immediately and directly applicable to these new Member States on the very date of accession without any transition period. Nevertheless, a special period

.../ of six months

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of six months was introduced in the implementing regulation to permit some implementing rules to apply.

According to a special provision in an additional Article introduced in the implementing Regulation, restrictive agreements existing at the date of accession and to which Article 85 applies by virtue of that accession had to be notified within six months from the date of accession. During this same period these agreements were also immune of fines in as far as they had been notified during that period. Undertakings had, therefore, the possibility to notify these agreements either in their existing form or, preferably, after having modified them to adopt them to the requirements of the competition rules of the Treaty. No special difficulties were encountered at the occasion of the previous accessions in the operation of this system.

It is therefore to be expected that an identical system will apply in the case of Portuguese accession. As was the case for previous accessions, the services of the Commission remain at the disposal of undertakings should specific problems arise.

Another point worth mentioning concerns the application of the competition rules to public undertakings. As you well know, the EEC Treaty has a specific position in Article 90 ensuring

.../ that Member States

that Member States shall, regarding this public undertakings, neither enact nor maintain in force any measures contrary to the rules of the Treaty and in particular to the rules of competition. This rule also becomes directly applicable upon the date of accession of a new Member state. I deem it therefore necessary to make a few comments on this point.

Article 90 does in no way limit the freedom of a Member State to decide the scope and the composition of its public sector, and this in pursuit of its specific economic and social objectives. Article 90 only aims to ensure that the exercise of this freedom does not negatively effect the correct application of the Treaty principles and rules and of the proper functioning of the economic Common Market it created.

The ultimate goal of Article 90 is therefore to create a guarantee between the Member States on a basis of reciprocity for the possibilities of economic interpenetration which the EEC Treaty provides, regardless of the - sometimes very different - importance of their public sector. This is the balance established by the EEC Treaty between the general community interest and the exercise of this retained power of the Member States.

.../ And of course it is

And of course it is not contested that the exercise of this retained power could obey in the various Member States to different economic and social choices resulting from their democratic decision making process.

Turning now to competition rules, which are specifically mentioned in Article 90, it has to be pointed out that this provision ensures that public undertakings cannot engage in restrictive practices and abuses of dominant positions.

Possible instructions by Member States to one or more of its undertakings to infringe competition rules would therefore be illegal. It would be the task of the European Commission to put an end to such infringements when they are discovered, with recourse to the infringement procedures of the Treaty when necessary.

The existence of such infringements would, however, not constitute a good excuse for these public undertakings since they also remain directly exposed to the interdictions of Articles 85 and 86. They could of course under certain circumstances benefit from the exemptions based on Article 85 (3), which have for public undertakings to be completed by those exemptions provided for in Article 90 (2). These latter exemptions concern specifically enterprises charged with the management of services of general economic interest.

.../ The exact scope of this



The exact scope of this latter exemption for certain public enterprises must be established by the European Commission on a case to case basis. It has, however, to be remembered that the development of trade may not be effected to such a degree as would be contrary to the interest of the Community as a whole.

It seems also of great interest to say in a few words something about the State monopolies of a commercial character. The Commission emphasizes its large interest in these monopolies since they must be in conformity with the EEC Treaty.

Generally speaking, State monopolies are contrary to the free functioning of the Common Market. They disturb competition and especially the imports of products from other Member States. This is the reason why the Treaty has imposed the rule in Article 37 that they should apply without discriminations.

At the moment at which Portugal will become a member of the Community, the existing monopolies will in principle have to be adapted to this requirement of the Community legislation. It is, of course, possible to provide that the existing monopolies should be adapted during a transitional period. Portugal would then be obliged to ensure that abovementioned discriminations will be abolished. In the case of Greece it had, however, been

.../ decided that as from

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decided that as from the moment of accession to the European Communities the new Member State should already abolish all exclusive export rights and some exclusive import for specific products. For the remaining adaptation a five year transition period was foreseen.

I understand that the negotiations on State monopolies with Portugal still have to start. I do hope that there will be a clear understanding to both partners about the application of this provision. I do also hope that we can close the negotiations about this topic very soon.

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