



Brussels, 23 November 2004

DRAFT
BACKGROUND NOTE¹
COMPETITIVENESS COUNCIL

Brussels, 25 and 26 November 2004

The Council session under the chair of Mr Brinkhorst, Dutch Minister for Economic Affairs and Ms Van der Hoeven Dutch Minister for Education, Science and Culture, will start on Thursday 25 November at 9.30.

In the margins of the Council, the first meeting of the Joint "Space Council" EU-ESA will take place on 25th November starting at 17.30.

*Upon the initiative of the Presidency, the meeting will be opened by an exchange of views on the **general economic situation and competitiveness**, followed by a political debate on the High Level Group **report on the Lisbon economic reform strategy**. Then, the Council is expected to adopt conclusions **on simplification of the legislation and better regulation**.*

The remaining agenda will be covered by a series of internal market, industry and research items:

*- On internal market, the Council will hold a political debate on two major legislative proposals: **chemicals (REACH) and services in the internal market**. The Council will try to reach an agreement on facilitating **cross border mergers**. An agreement is expected on enhanced measures for **monitoring trade precursors**.*

*- The Council will adopt conclusions on the **future of textiles and clothing industry**.*

*- Regarding research, the Council will prepare the Joint Space Council EU-ESA. On Friday, it will decide on amending negotiating directives on **ITER international negotiations** and it will be called to exchange their views and adopt conclusions on the **future EU research policy**.*

The Presidency will hold a press conference at the end of each Council session. The press conference on Thursday will take place around 17.00. A separate press conference to present the results of the EU-ESA Joint Space Council will be held on Thursday at 20.00. It will be attended by Mrs. Bulmahn, President of the ESA and ESA General Director, Mr. Dordain.

The press conference on Friday will take place around midday.

¹ This note has been drawn up under the sole responsibility of the Council Press Service.

HORIZONTAL FILES

➤ ***Current economic situation***

The Presidency's intention is to inform the Council on informal discussions held among Ministers over the dinner organised on the eve of the Council meeting. The dinner will be focussed on European competitiveness and the role that the Competitiveness Council should play in fostering growth and competitiveness and, on the follow-up to the Kok report. Moreover, the Presidency has invited Gunther Verhuegen, Commission Vice-President responsible for Enterprise and Industry to attend this informal dinner for exchanging views on these issues of common concern.

➤ ***Preparation of the mid-term review of the Lisbon process (Kok-Report)***

This point will be taken over lunch. The Presidency intends to have an extensive discussion among Ministers on the concrete proposals put forward by the High Level Group chaired by Wim Kok, former Prime Minister from the Netherlands. The Presidency will inform the Council in formal session on the outcome of such discussion.

The so called "Kok Report" contains a series of recommendations to the Commission for its preparations of the mid-term review of the Lisbon strategy that will take place at the spring European Council in March 2005.

The report was presented to the European Council on 4-5 November. The European Council held an exchange of views on the report and invited in its conclusions the Commission "*to bring forward the necessary proposals for the Mid-Term Review in the light of new challenges by the end of January 2005. Those comprehensive proposals should pay regard to the report by the High-Level Group chaired by Mr Kok and take into account the views of Member States..... The European Council invited the Council to examine these proposals in good time and looks forward to further concrete contributions with a view to the successful implementation of the Lisbon Strategy in all its dimensions*".

The Kok report identifies five broad priority areas:

- the knowledge society;
- the Internal Market;
- the business climate;
- the labour market, and
- environmental sustainability.

On these priority areas the report formulates key recommendations, covering action both at the European and the national level. The recommendations considered as being of particular relevance for the Competitiveness Council include:

- substantial investment in R&D;
- education and training;
- achieving agreement on the Community Patent;
- adopting and implementing the internal market in services;
- speedier implementation of internal market legislation;
- improvement in the quality of legislation at all levels, and
- paying due attention to the importance of SMEs in the overall strategy.

The policy debate on the Kok report will be structured on the following questions suggested by the Presidency:

- i. Do Ministers agree that a focus on growth and employment is the appropriate way forward to underpin social cohesion and sustainable development?
- ii. Do Ministers agree with the 5 broad priority areas to raise Europe's productivity and growth and the concrete recommendations made by the High Level Group of Mr. Kok? Which of the recommendations are particularly relevant for the work of the Competitiveness Council? Are there policy areas that receive insufficient attention in the Kok report?
- iii. With reference to the Kok report proposal for national action programmes, do Ministers consider this helpful for achieving the Lisbon targets at the national level, especially if this would be aligned with existing coordination mechanisms to minimise the overall 'reporting burden' on Member States ?

➤ ***Better regulation and Simplification of legislation***

The Council is expected to adopt conclusions on Better regulation and Simplification of legislation. In particular, conclusions deal with two specific items: projected measures for improving impact assessments and Council priorities for simplifying Community legislation.

As regards the Commission's recent Report on impact assessment, the draft conclusions reiterates the need to enhance the competitiveness dimension and endorses the objectives and the general thrust of the Commission's Report, in particular as regards the improved methodology and guiding principles for the integrated approach to impact assessments.

Concerning simplification of legislation, work has been completed as requested by the last Competitiveness Council 24 September under the impulse of the Dutch Presidency. This work has led to a list of priority legislative acts on which delegations within the Council have agreed to submit to the Commission with the invitation to include these in future updates of its rolling programme of planned legislative proposals or to take any other appropriate action.

The selection was made on the following criteria:

- 1) The suggestion is not yet part of the Commission's simplification programme
- 2) The suggestion concerns existing legislation, not legislation in preparation
- 3) The suggestion does not call into question the political goals (*finalités politiques*)
- 4) The suggestion directly relieves the regulatory and/or administrative burden for companies
- 5) The suggestion concerns legislation that has been in force long enough to allow sufficient experience to have been gained
- 6) The suggestion is sufficiently precise in pointing at specific legal acts, analyzing the current problem, and suggesting a possible solution
- 7) The suggestion does not concern legislation that will expire or be replaced shortly.

The draft list of Council priorities for simplification of EU legislation, includes 17 legislative acts, *inter alia*, Directive 2000/13/EC on the approximation of laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, Directive 2000/76/EC on the incineration of waste or Directive 91/689/EC on hazardous waste.

INDIVIDUAL POLICY FILES

➤ ***REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals)***

The Council will hold a policy debate on the REACH proposal in the light of the discussions so far in the *ad hoc* Working Party on Chemicals, established in November 2003.

During the Dutch Presidency, the Ad-hoc Working Party on Chemicals has continued the examination of the Proposal and has made substantial progress in the examination of Titles I (General issues), II (Registration of substances) and III (Data sharing and avoidance of unnecessary testing). These discussions have largely focussed on the joint Hungarian/United Kingdom "One substance-One registration"²

With a view to providing general guidance, the Presidency has prepared a questionnaire focussed on the following three items:

1. Conclusions and recommendations from the REACH Impact Assessment Workshop: The Council will be invited to take note of the observations, conclusions and recommendations of the Workshop on impact assessment and provide further guidance on how to take these into account. The workshop on impact assessment stressed, inter alia, the need to:
 - make REACH more cost-effective, in particular for Small and Medium-sized Enterprises (SMEs);
 - elaborate further possibilities for increasing benefits and reducing costs;
 - increase efforts to facilitate accessibility of the REACH legislation and early preparation for implementation.

2. Mandatory sharing of non-animal data, agreeing core data set and cost sharing: The Council will exchange views on economic and legal implications of changes to the Commission's proposal on registration and data-sharing. In particular, the discussion will be focussed on agreement on and joint submission of data including cost sharing. Ministers will then be invited to deal with the following questions:

A:
 - whether mandatory sharing of data, other than those obtained through tests on vertebrate animals, can be justified by public interest (in terms of benefits for competitiveness of industry, in particular SMEs, workability or improved protection of environment and health), in case there is an infringement of property rights for those data,
or
 - whether mandatory data sharing can only be justified for vertebrate animal data because animal welfare is a public interest, which could justify an infringement of property rights for those data.

² In August 2004, the Hungarian and United Kingdom delegations suggested an alternative approach to registration of chemical substances. This approach would imply that each substance, in principle, should be registered only once.

- B: - whether industry's responsibility for risk management, for which access to available and reliable information on the substance is needed, justifies a requirement to agree for each substance on one set of information on those intrinsic properties for which mandatory data sharing is appropriate,

or

- whether voluntary agreement on such a set of information meets this need.

- C: - whether guidelines on cost-sharing, based on legally embedded criteria (fairness, transparency and non-discrimination in cost-sharing among registrants) are sufficient, or if detailed provisions in the Regulation are necessary for cases where the parties concerned are unable to agree.

3. Information requirements for low volume substances: the Council will exchange views on whether it is, in view of the balance between costs to enterprises and benefits for human health and the environment, appropriate to extend the information requirements for low volume substances and in such case if this should be introduced already from the entry-into-force of REACH or whether such a possible extension should be examined in connection with the review of REACH.

Legal basis: Article 95 of the Treaty (qualified majority required within the Council and co decision with the European Parliament)

➤ *Services in the internal market*

The Council will hold a policy debate on a draft Directive establishing a general legal framework for services in the internal market. The objective of this proposal is to eliminate the obstacles to the freedom of establishment for service providers and the free movement of services between the Member States. It covers a wide variety of economic service activities – with some exceptions, such as financial services, electronic communications services and networks and most transport services – and applies only to service providers established in a Member State.

The discussions in the Council Working Party on Competitiveness and Growth so far have confirmed that all Member States support the necessity and the general objective of the proposal. Under the Dutch Presidency, this Working Party completed a very thorough second read of the proposal including a series of meetings dedicated to specific topics such as the posting of workers or health services.

Following these discussions, it appeared that a majority of delegations support in general those sections of the Directive dealing with administrative simplification, rights of recipients of services – with the exception of assumption of costs for healthcare – quality of services and administrative cooperation, although a certain number of technical issues will still have to be further elaborated. Nevertheless, a number of other issues are still unresolved. Among them, issues which have been identified by the Presidency as important ones requiring further work are : the scope of application of the proposed Directive or provisions on posting of workers.

Consequently, the Presidency suggested that the Council focus its attention on three major issues of the proposal, namely the Country of Origin principle, Administrative cooperation and Administrative simplification as follows:

- 1) Can Member States support the country of origin principle as a basic element of the Directive, whilst taking into account the need to further clarify and elaborate the exact scope of this principle and the derogations to it?
- 2) Taking into account the importance of administrative cooperation not only for the Services Directive but also for the creation of a better functioning internal market, could Member States give their support to further elaborating the system and procedures of administrative cooperation provided for in the proposed Directive?
- 3) Can Member States support the objective of administrative simplification as a fundamental component of the Services Directive and the Lisbon Strategy?
Should the Council Working Party further examine details for the practical functioning of the single point of contact?

This Commission proposal forms part of a political process launched in **March 2000**, when the Lisbon European Council adopted a programme of economic reform aimed at making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. In this context, the EU Heads of State and Government invited the Commission and the Member States to devise a strategy aimed at eliminating the obstacles to the free movement of services³.

In December 2000, in response to the call launched at the Lisbon Summit, the Commission set out "An Internal Market Strategy for Services"⁴. It is based on a horizontal approach across all economic sectors involving services and on a two-stage process, the first involving identification of the difficulties hampering the smooth functioning of the internal market in services, and the second involving the development of appropriate solutions to the problems identified, and in particular a horizontal legal instrument.

In July 2002, the Commission presented its report on "The State of the Internal Market for Services", which marked the completion of the first phase in the strategy and provided as exhaustive a list as possible of barriers that exist in the internal market for services. This report also analyses the common features of these barriers and makes an initial evaluation of their economic impact⁵.

In March 2003, with the aim of reinforcing the economic dimension of the Lisbon strategy, the Spring European Council called for the strengthening of the horizontal role of the Competitiveness Council in order to increase competitiveness and growth in the framework of an integrated approach to competitiveness to be set out by the Commission. The establishment of a clear and balanced legal framework to facilitate the free movement of services in the internal market is one of the elements necessary for the success of the new integrated competitiveness strategy.

³ Presidency Conclusions, Lisbon European Council, 24.3.2000, paragraph 17. The need to take action in these fields was also highlighted at the Stockholm and Barcelona Summits in 2001 and 2002.

⁴ "An Internal Market Strategy for Services" Communication from the Commission to the Council and the European Parliament. COM(2000) 888 final, 29.12.2000.

⁵ This report took up, in certain respects, in the case of services, the idea provided for in the former Article 100b EC of an inventory of national measures.

*In October 2003, the European Council identified the internal market as a key area for improving the competitiveness of the European economy and thus creating conditions conducive to growth and employment. It "calls on the Commission to present any further proposals necessary to complete the internal market and to fully exploit its potential, to stimulate entrepreneurship and to create a true internal market in services, while having due regard to the need to safeguard the supply and trading of services of general interest"*⁶.

Legal basis: Articles 47(2), 55, 71 and 80(2) of the Treaty (qualified majority required within the Council and co decision with the European Parliament).

➤ ***Cross-border mergers***

The Council will try to agree on a general approach on a Directive on cross-border mergers of limited liability companies. This proposal lays down Community provisions to facilitate the carrying-out of cross-border mergers between various types of limited liability companies governed by the laws of different Member States.

This legislative text is justified by the need for cooperation and consolidation between companies from different Member States and the difficulties encountered, at the legislative and administrative levels, by cross-border mergers of companies in the Community. It is expected to reduce costs of such operations, while guaranteeing the requisite legal certainty and enabling as many companies as possible to benefit.

Under the Dutch Presidency substantial progress towards an agreement has been achieved at technical level, however a number of issues remain outstanding. At this stage, some delegations maintain their reservations on the Presidency compromise proposal concerning the companies covered by this draft Directive and provisions on employee participation on the new company.

There is broad support for the Presidency text as regards the following issues:

- Member States' discretionary power in regulating cross-border mergers: the Commission proposal provided that the same provisions and formalities applying to domestic mergers would apply also to cross-border mergers. Several delegations having argued that in some cases a cross-border merger might raise different concerns from a domestic one, the Presidency has provided in Article 2(2) the possibility for Member States to apply some of these provisions and formalities in a manner which takes into account the cross-border nature of cross-border mergers. In addition, Member States are granted the possibility of adopting specific provisions regarding the protection of minority members of a merging company, who have opposed the cross-border merger.
- The establishment of a minimum content of the common draft terms of cross-border merger for each of the companies concerned in the various Member States while leaving the companies free to agree on other items.

⁶ Presidency Conclusions, Brussels European Council, 16-17.10.2003, para 16.

- The principle that the common draft terms of cross-border merger must be approved by the general meeting of each of these companies.
- The monitoring of the completion and legality of the decision-making process in each merging company must be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of the completion and legality of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger.

Further negotiations are required on these two main outstanding issues:

- Scope: The Commission proposal provided in the definition of “company with share capital” the criteria determining whether a certain type of company is covered by the proposed Directive. According to the Commission, this definition, in conjunction with Article 2, was in line with the Commission’s objective to make the Directive applicable to as broad a circle of national companies as possible, thus limiting the differential treatment of cross-border mergers as compared to the treatment of domestic mergers to what is absolutely necessary. While some delegations supported the Commission’s approach, others expressed strong concerns about the uncertainty which such a general definition would cause in terms of determining precisely which types of companies fall under the scope of the Directive. Furthermore, a number of delegations expressed the view that in the absence of complete harmonisation of company law across the European Union, it would not be appropriate to go as far as assimilating cross-border mergers to domestic ones.

In an effort to strike a compromise, the Presidency has submitted the following package:

- 1/ A new definition of the term “limited liability company”, which encompasses the types of companies falling within the scope of the Council Directive 68/151/EEC (First Company Law Directive)⁷, as well as those types of companies which meet the criteria of a definition very similar to the one contained in the Commission proposal;
- 2/ The explicit exemption from the scope of the Directive of undertakings for collective investment in transferable securities within the meaning of Article 1 of Directive 85/611/EEC⁸ (UCITS Directive);
- 3/ A provision allowing Member States to decide whether or not apply this Directive to cross-border mergers involving a cooperative society even in the cases where the latter fall within the definition of limited liability company;
- 4/ A provision making it clear that the possibility for two or more companies to carry out a cross-border merger shall depend upon whether such companies are allowed to merge under the national law of all Member States involved.

⁷ OJ L 65, 14.03.68, p. 8.

⁸ OJ L 375, 31/12/1985 p. 3

- Employee Participation: As regards employee participation rights, the Commission proposal (Article 14) provided that it would be the national law governing the company resulting from the cross-border merger which would apply. As an exception to this general principle, where that national law did not impose a compulsory employee participation system and at least one of the merging companies was operating under an employee participation system, the Commission proposal provided that the employee participation system set up by the European company (SE) Regulation and Directive should apply.

The Commission original proposal has been lengthily discussed within the Council and the Dutch Presidency is still working for finding a balanced solution that could be supported by delegations that consider the text as it stands now does not adequately take into consideration the interests of those Member States which do not provide for any system of employee participation under their national law.

Legal basis: Article 44 (1) of the Treaty (qualified majority within the Council and co decision with the European Parliament)

➤ ***Trade in drug precursors (public deliberation)***

The Council is expected to reach a political agreement on a Draft Regulation on the monitoring of trade between the Community and third countries in certain substances frequently used for the illicit manufacture of narcotic drugs and psychotropic substances.

This proposal aims to prevent the illicit use of drug precursors by intensifying the import and export requirements for these chemicals, by extending monitoring requirements with regard to Community operators facilitating trade between third countries, by introducing a Community approach with regard to procedures for granting licences and by strengthening monitoring requirements governing suspensive customs procedures.

In 1990, the Council adopted Regulation (EEC) No 3677/90 laying down rules to monitor trade of drug precursors between the Community and third countries and has established a system of reporting suspicious transactions. This system, which is based on close co-operation with operators, is reinforced through measures, such as documentation and labelling, licensing and registration of operators, procedures and requirements governing exports.

The legislative scheme having being adopted more than a decade ago, it seemed appropriate to evaluate the Community monitoring system of trade in precursors with a view to drawing conclusions from the implementation of the existing Community legislation in this field and in order to be able to effectively counter new patterns and trends of precursor diversion and illicit traffic in narcotic drugs and psychotropic substances.

According to this assessment, it was found necessary to extend monitoring requirements with regard to operators based within the Community facilitating trade between third countries, to introduce a Community approach with regard to procedures for granting licences and to strengthen monitoring requirements governing suspensive customs procedures. Therefore, procedures and requirements for exports have been further intensified to target and concentrate controls on the most sensitive consignments mainly depending on the sensitivity of the precursor and the third country of the trading partner.

In order to allow operators to fulfil these requirements, provisions governing external trade in drug precursors have, to the extent possible, been aligned with the provisions governing intra-Community trade of drug precursors in accordance with Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004.

Legal basis: Article 133 of the Treaty (qualified majority required within the Council)

➤ ***Textiles and clothing***

The Council will adopt conclusions on the Commission's Communication "Textiles and clothing after 2005- Recommendations of the High-level Group on textiles and clothing".

The Commission set up a High Level Group (HLG) for textiles and clothing in early 2004, with a mandate to formulate recommendations on an integrated set of concrete initiatives that could be undertaken at regional, national and EU level to facilitate the sector's adjustment to major challenges, and to suggest actions to improve its competitiveness.

The High Level Group brought together top EU decision-makers in the sector. It comprises Commissioners, Government representatives from four EU Member States with a strong textiles and clothing presence, a Member of the European Parliament, industrialists, retailers and importers, European trade associations, trade unions and representatives of local textile and clothing associations. It presented its first recommendations in the form of a report entitled "The challenge of 2005 – European textiles and clothing in a quota free environment" on 30 June 2004⁹.

The draft conclusions to be adopted by the Council stresses the Council support to the Commission's strategy towards the textiles and clothing sector as it focuses on competitiveness factors linked to research and innovation, training and better skills, protection of intellectual property rights, access to third country markets and encouraging the development of strategies at the level of the Euro-Mediterranean zone for the textiles industry.

In particular, the Council is called to urge the Commission to continue to promote a proactive approach seeking to obtain better market access to third country markets. In addition, at this stage there is agreement within the Council to address the situation arising from the end of the Multi Fibre Agreement textile quota scheme within the discussion of the new General System Preferences scheme.

⁹ The full text of the Report of the High Level Group for textiles and clothing is available on: http://europa.eu.int/comm/enterprise/textile/documents/hlg_report_30_06_04.pdf

➤ ***Space policy***

The Council will prepare the first meeting of the "Space Council"¹⁰ which is a joint meeting of the Council of the European Union and of the Council of the European Space Agency (ESA) at ministerial level.

The Space Council will start at 17.30 on Thursday 25 November at the Justus Lipsius building. Commissioner Verheugen and DG ESA Mr Dordain will introduce these major policy issues concerning the development of an European Space Programme (ESP) for discussion by ministers, on the basis of a questionnaire drawn up by the two Presidencies concerned (EU and ESA). The questions may vary from the scope of a space programme to governance, industry policy principles and possible mechanism's for funding.

In addition, the "Space Council" is called upon to propose 'orientations' relating to the future development of ESP which require to be formally adopted by both the EU Competitiveness Council and the ESA Council, in accordance with their own rules and procedures.

➤ ***ITER (International Thermonuclear Experimental Reactor)***

At the Council meeting of 24 September 2004, the Commission was requested to actively pursue the international negotiations on an ITER agreement .

Following recent international negotiations in Vienna 9/10 November among the future ITER partners, the Commission presented last week a Communication containing recommendations on how to best conclude the negotiations. This should be on the broadest possible basis and involve as many partners as possible.

The Council is expected to endorse the necessary amendments to the Commission's negotiating directives.

Legal basis: Article 101 of the Euratom Treaty

➤ ***Future of the European Union policy research***

The Council will hold an in-depth debate on the essential features of the future Seventh Framework Programme and it is expected to adopt conclusions on this issue.

¹⁰ The Framework Agreement between the European Community and the European Space Agency (ESA) entered into force on 28 May 2004. This agreement provides a common basis for the coherent and progressive development of an overall European Space Policy and establishes under Article 8 regular joint and concomitant meetings of the Council of the European Union and of the Council of ESA at ministerial level, the "Space Council", for coordinating and facilitating cooperative activities.

Since the last Competitiveness Council 24 September, the Council has reflected further on the Commission's Communication " Science and Technology, the key to Europe's future - Guidelines for future European Union policy to support research", among others on the basis of further clarifications provided by the Commission.

As a result, Council draft conclusions relating to the future Seventh Framework Programme and future European research policy will be the basis for an exchange of views among ministers. These draft conclusions deal with essential issues such as transnational collaborative research, European technologies initiatives, basic research at European level, making Europe more attractive to the world's best researchers, improving the coordination of national research programmes, and security and space research. The Council is expected to urge the Commission to bring forward its formal proposals in early 2005.

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