Opinion of the European Economic and Social Committee on the 'Proposal for a Council Regulation on the control of concentrations between undertakings (the EC Merger Regulation)'

(COM(2002) 711 final — 2002/0296 (CNS))

(2004/C 10/10)

On 14 January 2003 the Council decided to consult the European Economic and Social Committee, under Article 308 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 3 September 2003. The rapporteur was Mrs Sánchez Miguel.

At its 402nd plenary session of 24 and 25 September 2003 (meeting of 24 September) the European Economic and Social Committee adopted the following opinion by 102 votes to 27 with 16 abstentions.

1. Introduction

1.1. The proposal for a regulation submitted by the Commission sets out to recast in a single text Regulation (EEC) No 4064/89, the amendments made by the Act of Accession of Austria, Finland and Sweden and Regulation (EC) No 1310/97 amending the original regulation. The aim of this new proposal is, on the one hand, to make the legal texts more readily understandable to all those involved in company mergers with a Community dimension, and on the other hand to comply with the requirements of the regulation itself for a revision of the turnover thresholds used for establishing whether a merger has a Community dimension.

1.2. The Green Paper on the review of the regulation [1] identified three areas in which amendments were required: the operation of the turnover thresholds, the substantive test to be applied by the Commission for the review of concentrations and procedural issues. The EESC drew up an Opinion on the Green Paper [2], setting out its views on each of the above aspects.

1.3. Since the regulation came into force the Court of Justice has issued a number of judgments significantly affecting the interpretation of the merger rules and the assignment of competence to the Member States or the Commission; this has made it necessary to extend the reform proposed in the Green Paper in order to comply with the requirements set out in that document.

1.4. The result will have to be assessed once the new regulation enters into force. It appears from the Commission's consultation of the institutions that the need for reform is accepted, as the difficulties being encountered were detracting from the effectiveness of the regulation.

1.5. It would appear essential for the new regulation to be adopted before EU enlargement. The economic concentration which is likely to occur in many of the applicant countries will be facilitated by simplifying procedures and, above all, by defining the turnover thresholds applicable to Community mergers.

2. Content of the proposal

2.1. In general terms the proposal for a new regulation covers the following issues:

— jurisdictional issues

— substantive issues

— procedural issues

— other proposed amendments.

2.2. *Jurisdictional issues*

2.2.1. In this area the Commission proposal envisages the establishment of a system of streamlined referrals aimed at optimising the allocation of competence between the national authorities and the Commission, so that:

— the criteria for referrals can be improved, with a closer 'mirroring' of the criteria for referral in both directions;

— the applicability of Articles 9 and 22 at the pre-notification stage can facilitate the right of initiative of the notifying parties at this stage of the procedure;

[1] Green Paper on the Review of Council Regulation (EEC) No 4064/89 (COM(2001) 745 final).

[2] OJ C 241, 7.10.2002, p. 130.

— exclusive jurisdiction can be conferred on the Commission, if all the Member States concerned, or at least three of them, agree to a case being referred under Article 22;

— the Commission can apply for a case to be referred, under Article 22. In this way a formal right of initiative can be established.

2.2.2. The substantive criteria, especially regarding referral, are improved by deleting in Article 9(2)(a) the reference to the Member States assessing whether or not the proposed concentration threatens to create a dominant position and replacing it with a request for referral on the basis that competition would be significantly affected on a distinct market within a given Member State. Articles 9 and 22 would also apply during the previous phase of the notification, at the request of the merging parties or when at least three Member States were affected.

2.2.3. The clarification and rationalisation of the procedural rules for joint referrals, laying down deadlines for Member States to request referral or lend their support to such a request, will make it possible to adapt Commission procedures in specific cases ([1]).

2.2.4. The general definition of concentration in Article 3(3) has been amended so as to explicitly include the criteria according to which a concentration requires a change in control and that this control has to take place on a lasting basis. It is also proposed that multiple transactions or those which are conditional on one another or closely connected be deemed to constitute a single concentration.

2.3. *Substantive issues*

2.3.1. The substantive criteria on which Commission intervention is based were debated in the Green Paper, especially substantial lessening of competition. In order to improve legal certainty, a new Article 2(2) is proposed clarifying the concept of dominance, in accordance with the criteria laid down by the Court of Justice ([2]), to cover suspected oligopolies (in the absence of concerted practices) ([3]).

2.3.2. In the discussion of the substantive aspects account has been taken of the efficiency of merger control, by stipulating in Article 2(1)(b) that account shall be taken of the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2.4. *Procedural issues*

2.4.1. In Article 4 (1) the reference to one week for the prior notification of a concentration is dropped, but the requirement for prior notification is clearly spelt out.

2.4.2. With regard to the suspension of the implementation of concentrations until a final clearance decision has been taken by the Commission, two automatic derogations are provided for in respect of:

— acquisitions through the stock market;

— simplified procedure cases.

2.4.3. Deadlines are stated in working days.

2.4.4. The timetable is made more flexible in both Phases I and II, as experience has shown that in some complex cases time may be short. The following are proposed:

— Phase I: 35 working days if remedies are proposed;

— Phase II: optional extension of the deadline by 20 working days and automatic extension by 15 working days.

2.4.5. With regard to the procedure following annulment by the European Courts, it is proposed that Article 10(5) be clarified to take account of the new requirements for concentrations.

2.4.6. The enforcement provisions, both in relation to procedure and to the sanctions provided, have been spelt out, inter alia, as follows:

— as a general principle, the enforcement provisions will be kept in line with antitrust rules;

— the ceilings for fines and periodic penalty payments related to 'fact-finding' will be increased;

— the ceilings for periodic penalty payments related to the enforcement of certain types of Commission decision will also be increased;

— the Commission is empowered to request information from private individuals.

([1]) Cases: Promatech/Sulzer Textil, decision of the Commission 24.7.2002 and GEES/Union, decision of the Commission 17.4.2002.

([2]) Footnotes 17 and 18 (COM(2002) 711 final — 2002/0296 (CNS)).

([3]) With regard to horizontal concentrations, a draft Commission communication has been published in accordance with Regulation (EEC) No 4064/89 (OJ C 331, 31.12.2002, p. 18), on which the EESC is drawing up an opinion.

2.5. *Other proposed amendments*

2.5.1. Report from the Commission to the Council on the operation of the thresholds. The Commission is required to report to the Council by 1 July 2007.

2.5.2. The deadlines for pre-notification referral are amended in accordance with the provisions of Article 1.

2.5.3. With regard to the Commission's power to prohibit a concentration after the event, Article 8(4) allows the Commission to require the separation of assets brought together, the cessation of joint control or any other action that may be appropriate to restore conditions of effective competition.

2.5.4. The treatment of ancillary restraints is directly related to that of concentrations, and it is intended that these should be covered by the Commission's clearance decision.

3. **General comments**

3.1. The EESC welcomes the proposal for a new Community merger control regulation which, in accordance with the principle of legislative simplification, recasts various legal texts to facilitate their application in the single market [1]. The consultations carried out in connection with the Green Paper have highlighted the need to seek flexible and comprehensible rules, facilitating both the work of the Commission and that of the authorities of the Member States but more especially the use of the legal instrument by firms, preventing legal uncertainty and damaging consequences for all merging parties.

3.2. It should be pointed out that the case law laid down by the Court of Justice during the period of validity of the amended rules has been incorporated into the proposal for a regulation. This gives the proposed regulation a practical slant, as the cases studied, which had been brought by companies before the Court of Justice, derived from interpretation problems arising from the lack of precision of certain articles of the regulation with regard to (i) the allocation of competence between the various authorities concerned and (ii) the criteria used to establish the existence of an economic act falling within the field of competence of the Commission.

3.3. The EESC considers that reviews carried out under the merger control rules are necessarily complicated and are increasingly being impeded by rapidly changing economic conditions as a result of other aspects of globalisation. All these circumstances make it necessary to develop economic and productive structures guaranteeing greater competitiveness of the Community economy.

3.4. Merger control also has to be analysed against the background of the global economy, as required by Article 1(3)(a), in order to take account of the constant and growing international competitive pressure on European companies. The EESC would stress the importance of ensuring that reviews of takeovers are based on a detailed analysis of the global market, rather than being restricted to conditions in Europe.

3.5. In the light of this, the impact on competitiveness must continue to be a central focus of reviews carried out in connection with merger control. Competitiveness should be assessed not only in terms of the European market but also, as suggested in point 3.4, in an international perspective, with greater account taken of world-level economic considerations. One of the objectives of competition policy is to safeguard the interests of consumers. The EESC is of course aware of the great variety of economic and social issues raised by structural change and is broadening its focus to include other market-related subjects.

3.6. One general point to which attention should be drawn is the lack of complete consistency between the recitals and the corresponding articles; some of the comments made on the Green Paper and during the consultation of the economic and social interest groups and other players, have been incorporated into the recitals but not into the operative part of the regulation. One striking example of this is recitals 32 and 42, concerning the rights of workers of firms involved in mergers; the text of the articles, however, makes no mention of these rights, which are nonetheless enshrined in the Treaty itself [2], in recognition of the fact that mergers often have significant economic consequences in terms of employment at the firms concerned. The Commission should carry out its review with an eye to the fundamental objectives laid down in Article 2 of the Treaty, including the objective of strengthening economic and social cohesion (see also Article 158).

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[1] In addition to the legal texts already referred to the Commission has published a broad range of interpretative notices in response to the complexity of the texts, including the Commission Notice on the concept of full-function joint ventures (OJ C 66, 2.3.1998), the Commission Notice on the concept of concentration (OJ C 66, 2.3.1998), the Commission Notice on the concept of undertakings concerned (OJ C 66, 2.3.1998) and the Commission Notice on the calculation of turnover (OJ C 66, 2.3.1998) etc.

[2] Article 127(2) of the EC Treaty states that 'The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities'.

3.7. There are also discrepancies between the various language versions of the proposed texts; this question is highly relevant to the correct application of the regulation, as each individual language version constitutes the authentic text in the Member State in question.

3.8. In examining the proposed rules, we will follow the same thematic approach used by the Commission to facilitate comparison with the EESC's Opinion on the Green Paper. At all events, the recasting of the previous legal texts will provide a more systematic overview of each of the subjects as well as facilitating application, with the promise of better results.

3.9. The jurisdictional issues have been the subject of a wide-ranging debate in the proposals set out in the Green Paper. The proposals relating to the concept of concentration, the regulation of referral (although the question as to whether a concentration should be deemed to have a Community dimension when it affects two or more states, as proposed in the Green Paper, perhaps needs further consideration) and thus the allocation of competence between the Commission and the Member States can all be considered reasonably satisfactory. Two comments should, however, be made.

3.9.1. In order to determine whether a concentration involving one or more Member States, whose authorities might be better placed to scrutinise the operation, should be referred, the Green Paper proposed that in Article 9(2)(b) the requirement that the concentration should 'not constitute a substantial part of the common market' be replaced by a requirement for proof that 'the effects do not extend beyond the Member State's borders'. This change does not, however, appear in the proposal. The EESC considers that it should be incorporated, as it facilitates the more effective allocation of competence between the Community and national authorities.

3.9.2. The new Article 4(4) allows the notifying parties to ask the Commission for referral to the national authorities prior to notification. The question arises as to whether the wording is appropriate to the desired objective, as the Commission reserves the right not only of total but also of partial referral of a matter to those authorities. In the event of partial referral, the parties, wanting the matter to be examined by a single authority, would find themselves in a situation where it was being analysed by the two different bodies. The EESC considers that the only provision made should be for total referral to the national authorities by the Commission. Similarly, if the Commission decides, following a request by the entrepreneurs concerned, that a concentration has a Community dimension, the Member States should not be given the power of veto and the concentration should be examined at Community level only.

3.10. The substantive issues concern the criteria on which competition policy is based, particularly 'dominant position' and 'substantial lessening of competition', which have been interpreted by the Court of Justice [1] so as to include areas previously considered borderline as regards application of the regulation, such as oligopolies. We therefore consider that the new Article 2(2) fulfils its intended objective of clarification, although the quantitative thresholds set out in Article 1 would exclude from Community review a large number of concentrations which would nonetheless have clear economic repercussions for the common market. At all events, when analysing these substantive issues, account should be taken of the arguments put forward in points 3.4 and 3.5 above.

3.10.1. However, the EESC considers that, if the operative part of the regulation is to be brought into line with the recitals, the part of the regulation dealing with the evaluation of concentrations should take account of the interests of workers and the impact on employment, as EU workers' right to information and consultation cannot be ignored.

3.10.2. At the same time, Articles 3(4) and 5(2) should be brought into line. The first of these stipulates that when 'two or more transactions which are conditional on one another or are so closely connected that their economic rationale justifies their treatment as a single transaction shall be deemed (by the Commission) to constitute one and the same concentration'. The provisions of Article 5(2) relating to the calculation of turnover thresholds should make reference to the above provision.

3.11. The procedural issues have undergone a radical revision. In fact, not only have the legal texts been recast but they have also been corrected in order to adapt and simplify the request and notification procedures.

3.11.1. The proposal for a regulation has introduced certain changes to the deadlines for referral to the national authorities (Article 9(4) et seq.). Thus, the deadlines for resubmission have been considerably extended to facilitate application, as these could constitute an obstacle in the light of the considerable time taken for each of the phases of the procedure.

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[1] The ECJ clarified the definition of dominant position in Case T — 112/96 Gencor/Commission.

3.11.2. Moreover, the deadline within which the parties are required to request extension of the Phase II time limit, 15 working days following the beginning of the phase, is rather rigid, given that the request has to be presented at a very early stage of the procedure, at which time the parties probably have no detailed knowledge of the objections which the Commission might make to the notified operation. It should also be made clear whether the 15 and 20-day deadlines can run consecutively or whether the second deadline begins from the time an extension decision is taken. In the former case, if it is the Commission which takes a decision on extension, this could mean a substantially longer timeframe.

3.12. The other proposed amendments are generally satisfactory, reflecting issues of major significance for competition in the single market. There are, however, two issues which the EESC considers should be the subject of revision:

3.12.1. First, ancillary restraints, where these are necessary, will be covered by Commission clearance, although it is not obliged to make any express declaration on the subject. Under this approach firms will be deprived of the legal certainty of a specific declaration. The ancillary nature of the restraints might then be questioned by the national authorities, thus, if these authorities were to judge them independent restraints, obliging the merging parties to provide proof of their legality in the course of a national procedure.

3.12.1.1. It would therefore be desirable, in line with the case law of the Court of Justice [1], for the Commission to continue to be obliged to make a specific declaration on the ancillary nature of restraints identified as such by the parties.

3.12.2. If, however, this requirement is not retained, it would be advisable, in order to ensure an acceptable level of legal certainty for: (i) the burden of proof as to the non-ancillary nature of the restraint to lie with the third-party plaintiff (ii) the principles and guidelines published by the Commission to be given force of law [2].

3.13. The provisions of Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 have been incorporated into Article 13 of the proposal for a regulation. Although the Commission's powers of inspection must be broad and undisputed, individual circumstances may differ, at least where voluntary notification is concerned, so that some limitation of these powers should be considered; they would, however, apply in cases involving suspected failure to notify when required to do so or failure to comply with procedural obligations, as well as in all cases where the Commission's action is directed against third parties separate from the notifying companies.

3.14. Article 23(1)(e) provides that the Commission may impose administrative fees for submission of notifications, which is unacceptable.

3.15. Lastly, the Committee feels that the Commission should take the opportunity of the new Regulation to give a stronger legal basis to the various concepts and a more solid operational basis to the explanatory guidelines for merger assessment, which are contained in certain of its communications on this subject, particularly its December 2002 draft Communication OJ C 331, by incorporating these points in the definitions and procedural rules set out in the draft Regulation.

4. **Proposed amendments**

The EESC, with a view to more effective application of the regulation, and above all in order to ensure that the development of the regulation is as beneficial as possible to all parties concerned, proposes the following changes to the Commission's text:

4.1. Recital 17: The second and third sentences ('The Commission should not be obliged ... compatible with the common market.') should be deleted, in view of our comments in point 3.12.1.

4.2. The Spanish text of Article 1(2)(b) should be amended.

4.3. Article 2(1)(b) should read as follows:

> '(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, employment trends in the economic sector and in the areas in which the merging companies' productive facilities are located, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.'

[1] Judgment T-251/00 Lagardère v Canal +/Commission 20.11.2002.

[2] Communication of 27.6.2001.

4.4. In Article 3(6)(a) replace 'financial institutions' by 'investment firms'.

4.5. Add the following paragraph to Article 4(2):

'Simultaneously with, or immediately following, notification of the Commission, the notifying persons or enterprises shall also notify representatives of the employees of the enterprises involved in the concentration.'

4.6. In the final line of the first paragraph of Article 4(4) the words 'or in part' should be deleted.

4.7. In the first line of the third paragraph of Article 4(4) the words 'unless the Member State concerned disagrees' should be deleted.

4.8. The fourth paragraph of Article 4(5) should read as follows:

'Where all the Member States concerned, or at least ~~three~~ two such Member States, have requested the Commission to examine the concentration, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2 of this Article.'

4.9. The penultimate paragraph of Article 4(5) should read as follows:

'Where the Commission decides to examine the concentration, it may request the submission of a notification pursuant to paragraphs 1 and 2. The Member States or States ~~having made the request to the Commission~~ affected shall not apply their national legislation on competition to the concentration.'

4.10. The first paragraph of Article 5(2) should read as follows:

'2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers; account shall, however, be taken of the interdependence of, or links between, other parts of the merging companies, in accordance with Article 3(4), in aggregating their turnovers.'

4.11. The title of Article 5(3)(a) should read:

'Income from equity capital investments.'

4.12. In Article 5(3)(a) replace the references to 'other financial institutions' with 'investment companies'.

4.13. The second paragraph of Article 6(1)(b) should read as follows:

'A decision that a concentration is compatible with the common market shall also cover the restraints directly connected with, and necessary for, the concentration, as indicated in the notification or the Commission decision.'

4.14. The third paragraph of Article 8(2) should read as follows:

'A decision that a concentration is compatible with the common market shall also cover the restraints directly connected with, and necessary for, the concentration, as indicated in the notification or the amendment thereto, or in the Commission decision.'

4.15. Article 9(2)(b) should read as follows:

'(b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not ~~constitute a substantial part of the common market~~ extend beyond the frontiers of the Member State in question.'

4.16. Article 9(4): In view of the arguments set out above, it would be advisable to shorten the deadlines laid down here.

Brussels, 24 September 2003.

The President

of the European Economic and Social Committee

Roger BRIESCH

APPENDIX

to the opinion of the European Economic and Social Committee

The following amendments, which obtained more than one quarter of the votes cast, were rejected during the discussions:

Point 3.6

Delete.

Reason

The criticism in point 3.6 is unjustified. The balance struck in the Commission proposal is reasonable. It is quite appropriate for the recitals to include self-evident remarks to the effect: (a) that the Regulation must be interpreted and applied without prejudice to fundamental rights and principles and (b) that it does not detract from 'the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law'. Such remarks are unnecessary in the text of the Regulation proper and, if anything, their inclusion could give rise to uncertainty as to the aims of the Regulation.

Result of the voting

In favour: 48, against: 71, abstentions: 11.

Point 3.10

Replace with the following:

'3.10. On the substantive side, the Commission proposes the retention of the dominance criterion. The Committee agrees that there should not be a transition to the "substantially less competition (SLC) test". [1] However, the definition introduced in Article 2(2) alters the content of the concept. Under the proposal, any undertaking which can influence appreciably and sustainably the parameters of competition is deemed to be in a dominant position. This seems to be a particularly vague and elastic definition. The Committee feels that it would lead to a significant and unwarranted extension in the scope of control. It would also be a source of considerable uncertainty, with potentially adverse consequences for structural change. It is obvious that predictability is vital in this regard.

3.10.1. A lack of clarity in the concentration rules may have serious and undesirable deterrent effects; it is not just acquisitions that are really harmful to the economy that are to be held back, but also business transactions that are quite legitimate, beneficial and necessary. In the Committee's view it is precisely this which must be avoided. Therefore the Committee feels that the current definition of dominant position must be retained so that the system remains stable and stays within reasonable limits. It can be noted that if the aim is specifically to extend the scope to non-synergy oligopolies (which, it must be said, is an unlikely situation), this can be achieved by adding a provision clarifying the scope.'

Reason

The original wording of the first sentence in 3.10 does not appear to be correct; as far as we are aware, the Court of Justice has not interpreted the 'substantially less competition' test. In general: self-explanatory.

Result of the voting

In favour: 39, against: 86, abstentions: 9.

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[1] See also the EESC opinion of 17 July 2002, point 3.2.13, OJ C 24, 7.10.2002.

Point 3.10.1

Delete.

Reason

Employee rights to information and consultation are regulated by other provisions. It is up to the Commission to decide how it obtains the information it needs to take a decision. In most cases assessments by, *inter alia*, workers' organisations should be included in the grounds for the decision. It seems unnecessary to incorporate provisions on this in the Regulation.

The impact on employment must never in itself be a reason for opposing a planned merger. The Regulation should only be used to prevent concentrations that would clearly impede competition.

Result of the voting

In favour: 45, against: 84, abstentions: 11.

Point 4.3

Delete.

Reason

The impact on employment must never in itself be a reason for opposing a planned merger. The Regulation should only be used to prevent concentrations that would clearly impede competition. The proposed addition to Article 2(1)(b) could cause confusion and make decisions under the Regulation much more difficult to predict.

Result of the voting

In favour: 53, against: 76, abstentions: 8.