Opinion of the European Economic and Social Committee on the 'Draft Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' ([1])

(2004/C 10/11)

On 22 January 2003 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned notice.

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 Mr Hernández Bataller.

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 90 votes to 21 with 25 abstentions.

1. Introduction

1.1. Under Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ([2]), the Commission is empowered to appraise such operations provided they fall within the scope of the regulation.

1.2. The regulation has been supplemented by a number of Commission notices on:

— the concept of full-function joint ventures ([3]);

— the concept of undertakings concerned ([3]);

— calculation of turnover ([3]);

— alignment of procedures for processing mergers under the ECSC and EC Treaties ([3]);

— the simplified procedure for processing certain merger operations;

— remedies acceptable to the Commission ([4]);

— restrictions directly related and necessary to concentrations ([5]).

1.3. The regulation on the terms of reference of hearing officers ([6]) and the rules on notifications, time limits and hearings in concentration procedures ([7]) are to be added to this already complex legal framework.

1.4. Following the debate sparked by the publication of the green paper, on which the Committee has already issued an opinion ([8]), and recent Court of Justice case-law on concentrations ([9]), the Commission has had to shift its focus on merger operations. It has published a new proposal for a regulation on control of concentrations between undertakings ([10]) and the present notice, the purpose of which is the appraisal of horizontal concentrations under the Council regulation on the control of concentrations between undertakings.

2. Content of the draft notice

2.1. The subject of the draft notice is the criteria for appraising the impact on competition in the relevant market of 'horizontal concentrations' ([11]).

([1]) OJ C 331, 31.12.2002.
([2]) OJ L 395, 30.12.1989, as amended by Council Regulation (EC) No 1310/97 of 30.6.1997 (OJ L 180, 9.7.1997).
([3]) OJ C 66, 2.3.1998.
([4]) OJ C 68, 2.3.2001.
([5]) OJ C 188, 4.7.2001.
([6]) Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001.
([7]) Commission Regulation (EC) No 447/98 of 1.3.1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 61, 2.3.1998.
([8]) OJ C 241, 7.10.2002.
([9]) Including the judgments of 22.10.2002 (Case T-77/02) on Schneider Electric v Commission and of 20.11.2002 (Case T-251/00) on Lagardère SCA and Canal+ SA v Commission.
([10]) Proposal for a Council Regulation on the control of concentrations between undertakings [COM(2002) 711 final], OJ C 20, 28.1.2003.
([11]) Understood as concentrations in which the undertakings concerned are actively operating on the same market, or are potential competitors on that market. The distinction and its meaning are set out in detail in the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001.

2.1.1. These criteria are applied in two complementary ways:

i) definition of the relevant product and geographic markets, especially aspects such as market shares, concentration levels and the importance of innovation;

ii) assessment of the merger in competition terms.

2.1.2. The draft notice is therefore structured around the following questions:

a) the likely anti-competitive effects of the merger in the relevant markets in the absence of countervailing factors;

b) the likelihood that buyer power would act as a countervailing force to an increase in economic power as a result of the merger;

c) the likelihood that entry by new firms would maintain effective competition in the relevant markets;

d) the likelihood that efficiencies would result from the merger;

e) the conditions for a failing firm defence.

2.2. However, these elements are not all equally relevant to horizontal mergers. Efficiencies and the failing firm defence are usually only analysed if the notifying parties establish that the necessary conditions are met.

2.3. The Commission believes that there are three main ways in which horizontal mergers may significantly impede effective competition as the result of the creation or strengthening of a dominant position:

— a merger may create a paramount market position. A firm in such a position will often be able to increase prices without being constrained by actions of its customers and its actual or potential competitors;

— a merger may diminish the degree of competition in an oligopolistic market by eliminating important competitive constraints on one or more sellers, who consequently would be able to increase their prices;

— a merger may change the nature of competition in an oligopolistic market so sellers, who previously were not coordinating their behaviour, now are able to coordinate and therefore raise prices. A merger may also make coordinating easier for sellers who were coordinating prior to the merger.

2.4. The Commission applies a number of criteria to define 'firms with a paramount market position'. In general, they must have very large market shares (in excess of 50 %), particularly when smaller firms hold much smaller shares. However, the Commission also points to other factors which may be taken into account when determining the merged entity's economic power, including:

— economies of scale and scope;

— privileged access to supply;

— a highly developed distribution and sales network;

— access to important facilities or to leading technologies, which may give the merging firms a strategic advantage over their competitors;

— privileged access to certain inputs, such as physical and financial capital;

— other strategic advantages, such as ownership of the most important brands, a well-established reputation, or extensive knowledge of the specific preferences of customers.

Rather than an absolute value, 50 % is an indicator for the presumption of the existence of a dominant position; in practice, levels of up to 70 % have been tolerated which did not prevent competition or place insurmountable obstacles to access in the path of market competitors, as in Case T-114/02 of 3 April 2003. On the other hand, notifications of agreements below the 50 % mark may meet with a refusal if they would entail a serious risk to competition.

2.5. The Commission considers that on oligopolistic markets (non-collusive oligopolies), under certain circumstances some mergers may diminish the degree of competition by removing important competitive constraints on one or more sellers, who consequently find it profitable to increase prices or reduce output post-merger. In such cases, the Commission advocates the use of different measures of market concentration, depending on whether the goods are relatively homogeneous or differentiated.

2.5.1. In markets where output or capacity levels are the most important strategic decisions made by the oligopolists, the important concern for firms is how their output or capacity decision influences the prices on the market.

2.5.2. In contrast, there are markets in which setting prices is the most important strategic decision made by the oligopolists. Negative effects on competition may arise where, following the merger, the new entity finds it profitable to raise prices as a result of the loss of competition between the merging firms, thereby damaging the interests of consumers. The incentive to increase prices is strongly related to the proportion of lost sales that each merging firm would be expected to recapture in increased sales of the other merging party's product.

2.6. A merger may change the nature of competition in an oligopolistic market so sellers, who previously were not coordinating their behaviour, are now able to coordinate and thus raise prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 of the EC Treaty.

2.6.1. The alteration of the market structure may be such that such sellers would consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a course of action on the market aimed at selling at above competitive prices.

2.7. Lastly, the Commission looks at a number of particular cases relating to innovation, the potential entry of competitors into the market, mergers creating or strengthening negotiating power, corporate reorganisations meeting the requirements of dynamic competition, and failing firms.

3. **General comments**

3.1. The Committee warmly welcomes the Commission's adoption of the above-mentioned criteria, which clarify the analyses of the impact on competition of mergers. On an overall basis, the Committee finds the theoretical economic thinking applied in the draft notice to be adequate and fairly uncontroversial. The Committee however also feels that more can be done to provide guidance with regard to the practical implementation. In order to advise companies in individual cases, the notice needs to relate more to situations typically arising in practice, and to expand on issues of empirical evidence and standard of proof.

3.1.1. This will, firstly, promote consumers' interests by providing them with new guarantees for obtaining an excellent level of quality and price for goods and services. Secondly, it will spur businesses to strive harder for competitiveness and economic efficiency.

3.1.2. The proposal clarifies a number of aspects of the Commission's administrative rules for dealing with company merger notifications. By their very nature, these rules cannot take account of other aspects which, as a side-effect, assume importance in company mergers, such as those relating to employment and industrial policy.

3.1.3. The Committee believes that consideration should be given to such aspects in future supranational legislative projects on this question. One example might be the introduction of provisions concerning the employers' duty of information to workers.

3.1.4. The draft notice further develops 'the dominance test' [1] and 'significant lessening of competition' set out in the Green Paper on the review of Council Regulation (EEC) No 4064/89 [2], by introducing new parameters, particularly with regard to 'efficiencies'. The clarification provided in this respect by the draft notice does not entail any amendment to the Council regulation. However, dominant firms now seem to be all those that are capable of influencing appreciably and sustainably the competition parameters. The Committee feels this enlarges the scope, and subsequently lowers the threshold of intervention considerably. The proposed definition appears to be very wide and ambiguous. In the view of the Committee, the draft notice is insufficient to alleviate this problem, which however first and foremost should be rectified by a more precise definition in the regulation. To clarify that it applies to so-called unilateral affects of non-collusive oligopolies, it could use a formula saying just that, with a reasonable degree of precision (cf. the concept indicated in footnote 7 of the draft notice). The Committee would like to emphasise the crucial importance of predictability here. Uncertainty as to the scope and substance of the merger regime causes a severe and undesirable deterrent effect. It will dissuade not only truly harmful mergers, but also impede legitimate, useful and necessary restructuring.

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[1] Firms have usually been considered to hold a dominant position if their economic power enables them to operate on the market without taking account of the reaction of their competitors or of intermediate or final consumers.

[2] COM(2001) 745 final. The Commission Notice on the definition of relevant market for the purposes of Community competition law is also worth consulting in this respect, OJ C 372, 9.12.1997.

3.1.5. The Committee supports the Commission's on-going drive for greater institutional transparency in other areas of its relations with individuals (for instance, a series of administrative commitments in processing complaints against Member States' failure to comply with their obligations under Community law ([1])).

3.2. With a view to more accurate analyses of the impact on competition, the draft notice focuses only on situations created by horizontal mergers, excluding comparable events involving joint ventures or cooperation agreements between firms ([2]) from its scope.

3.3. Applying the criteria laid down in the draft notice will result in more detailed appraisals. Companies will consequently have to provide more exact detail on certain aspects in the notifications, particularly concerning their specialised sector. The Commission must ensure that an excessive or unnecessary administrative burden is not placed on undertakings.

3.3.1. This strengthens the principle of legal certainty and will presumably avoid the kind of disputes recently settled by the Court of First Instance ([3]), in which the appropriateness of the appraisal criteria currently used by the Commission ([4]) are questioned.

3.3.2. The Commission should nevertheless also examine the suitability of including some of these concepts, criteria, parameters and rules in the draft regulation on merger control ([5])) as statutory obligations, so as to ensure greater legal certainty in the assessment of merger situations.

4. **Specific comments**

4.1. Further efforts to clarify the content and scope of certain terms used by the Commission in its draft notice would however be advisable. They are set out below.

4.2. Points 11(a) and 19 mention 'a paramount market position'. This is a new concept, which cannot easily be distinguished from the concept of 'dominant position' as used in the Commission's own practice and in the case-law of the CJEC ([6]), and which is expressly referred to in point 20. The EESC proposes that the expression 'paramount market position' be deleted on account of its lack of legal precision. The effect would be to increase transparency and legal certainty in the Commission's assessment.

4.3. Point 25 also introduces the new concept of 'non-collusive oligopolies'. This term appears to give separate legal treatment to a situation comparable to that of 'individual dominant position' defined in the Commission's practice and the case-law of the CJEC ([7]). Parameters consolidated by the USA anti-trust authorities — referred to in a number of recent Commission decisions — should be used when establishing 'non-collusive oligopolies'.

4.3.1. The particularity of 'non-collusive oligopolies' is apparently that they create neither a collective nor an individual dominant position. On what criteria can the Commission then establish their existence?

4.4. In footnote 28 and in point 27 the Commission refers to 'relatively homogeneous products', deeming them to exist 'if customers consider the products from one producer as a sufficiently good substitute for the product from any other producer'. These should be defined in more practical terms, if possible on the basis of actual cases.

4.5. The benchmark to be used by the Commission in assessing particular concentrations also needs to be clarified. Point 16 refers to the market concentration index (HHI below 1 000 points), while point 29 mentions the market share (maximum 25%), which could cause problems in the case of homogeneous products. What would happen if the parties concerned had a market share of less than 25 % but their HHI concentration index exceeded 1 000 points? In this regard, 1 000 HHI points would appear to be too low, considering that other Commission documents, such as the guidelines on

([1]) COM(2002) 141 final, in OJ C 244, 10.10.2002.
([2]) These are governed by the block exemption regulations for R+D and specialisation agreements, and by the guidelines referred to in footnote 13 above.
([3]) See Case T-342/99: Airtours v Commission; Case T-310/01: Schneider Electric v Commission, not yet published in the European Court Reports.
([4]) Application of the new criteria will not affect the Commission's degree of tolerance towards horizontal mergers. The aim is not to make it harder to grant authorisations, but rather to provide a clearer definition of the terms on which the relevant administrative act is based in each case.
([5]) COM(2002) 711 final, 12.12.2002.
([6]) Michelin v Commission, judgment of 9.11.1983, ECR p. 3461.
([7]) DLG judgment of 15.12.1994, ECR I-5641.

horizontal agreements [1], describe a concentration index of between 1 000 and 1 800 as 'moderate'. The reference to the HHI index could perhaps be raised to 1 300 or 1 400. Under exceptional circumstances, the HHI index may rise above 1 000, even reaching the 2 000 mark. In conclusion, the Committee finds the draft notice too ambiguous as to how the thresholds would apply. Also, in practice the delimitation between differentiated and homogeneous markets may not be that clear-cut, but involve various grey areas. Clarifications should therefore be made, with a view to creating 'safe-havens' of practical use and greater generality of the thresholds, preferably relating them to all types of effects dealt with.

4.6. The same confusion arises in point 41, which states that 'it is unlikely that the Commission would approve a merger' if coordination was already taking place between the members of an oligopoly on the oligopolistic market in question prior to the transaction, unless the merger was likely to disrupt such coordination. This does not fit in well with the test contained in Article 2(3) of the Concentration Regulation according to which the Commission may only prohibit a merger if it creates or strengthens a dominant position significantly impeding competition.

4.7. Lastly, section VI on 'efficiencies' merits particular consideration. In essence, efficiencies may be decisive in determining that a merger is to be approved if the benefits for competition make the restrictions acceptable. Efficiencies must be demonstrated, by applying pre-established criteria to be specified in a Commission document or instrument. Undertakings will have to place special emphasis on the benefits for consumers; by way of exception, these benefits could also be viewed in a long-term perspective [2] (e.g. benefits deriving from R&D). Consideration of the long-term benefits must nevertheless be restricted to highly specific sectors of business activity.

4.7.1. However, point 21 also mentions efficiencies as an element which can increase the likelihood of a merger leading to greater 'market power' (a concept which is not defined). Would efficiencies generating economies of scale be considered as positive elements or, on the contrary, as strengthening market dominance? How could a balance be struck between the positive and negative effects of efficiencies?

4.7.2. In order to avoid confusing situations of this kind, the Commission must provide clear and concrete examples. It should be borne in mind that analysis of 'efficiencies' is probably the most innovative feature of the Commission's draft notice. Indeed, until very recently efficiencies were not considered to be of particular importance in analysing merger notifications to the Commission (as in European Commission Decision/Honeywell 2001 [3]). For the sake of legal certainty, the Commission should clarify explicitly, in the notice, that there is indeed no such thing as an 'efficiency offence'.

[1] OJ C 66, 2.3.1998.

[2] Caution should be exercised in introducing the long-term benefits criterion, as the CJEC itself appears to do in its clarification of the consideration given to such benefits in the Kramer case set out in the *obiter dictum* contained in the judgment of 12.12.2002, Case C-281/01, which states, *inter alia*, that: 'It is true that in the long term, depending on how manufacturers and consumers in fact behave, the programme should have a positive environmental effect as a result of the reduction in energy consumption which it should achieve. However, that is merely an indirect and distant effect, in contrast to the effect on trade in office equipment which is direct and immediate'.

[3] Commission Decision of 3.7.2001 in Case COMP/M.2220.

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 amendment, which received more than one quarter of the votes cast, was rejected in the course of the discussion:

Point 3.1.3

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 vote

In favour: 53, against: 78, abstentions: 10.