European Economic and Social Committee

INT/758
Merger control

Brussels, 10 December 2014

OPINION

of the
European Economic and Social Committee
on the
White Paper – Towards more effective EU merger control
COM(2014) 449 final

_____

Rapporteur: **Juan Mendoza Castro**

_____

Rue Belliard/Belliardstraat 99 — 1040 Bruxelles/Brussel — BELGIQUE/BELGIË
Tel. +32 25469011 — Fax +32 25134893 — Internet: http://www.eesc.europa.eu

EN

On 16 July 2014 the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

White Paper – Towards more effective EU merger control
COM(2014) 449 final.

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 19 November 2014.

At its 503rd plenary session, held on 10 and 11 December 2014 (meeting of 10 December 2014), the European Economic and Social Committee adopted the following opinion by 137 votes to 1 with 1 abstention.

*

* *

1. Conclusions and recommendations

1.1 The EESC welcomes the White Paper in as much as it strengthens one of the pillars of EU competition policy and simplifies procedures.

1.2 The Commission's White Paper is seeking a balance between the public interest in closing a loophole in the regulatory system and the corporate interest in keeping administrative costs to a minimum. Nevertheless, care should be taken to ensure that the broad scope of the terms of the amendments to the Merger Regulation does not conflict with this aim. Consideration must also be given to the benefits that mergers bring to businesses.

1.3 On the basis of the case-law of the Court of Justice of the European Union (CJEU) and administrative practice, the EESC suggests that the theory of harm which the White Paper takes as its basis:

a) consist in duly identifying how competition, and therefore ultimately consumers, might possibly be harmed;
b) be internally coherent;
c) take account of the benefits motivating all of the parties; and
d) be consistent (or, at least, not inconsistent) with the empirical evidence.

1.4 The EESC recommends that the social repercussions, particularly employment and companies' ability to compete on world markets, should also be taken into account in the new regulatory framework.

1.5 The Committee believes that the "targeted" transparency system the Commission is advocating should make sufficiently clear the concepts of: "competitor" based on the criterion applied in antitrust measures, "vertically related company" (considering the setting of thresholds), the nature of the links making the acquired shareholding "significant", and the case of corporate groups with activities in a range of sectors.

1.6 The EESC believes it is important for the reputation gained by the EU merger control system to be maintained and even enhanced.

1.7 Although the WP is a step in the right direction, consideration must be given to whether it should have a broader focus, given the changes that have come about over the last 25 years (increased number of cases and control authorities) and the European economy's requirements in the 21st century.

1.8 There are currently 28 control authorities in the EU (31 including the EEA) but they do not apply the same criteria. The EESC therefore suggests re-thinking the White Paper with a view to:

- harmonisation of Member States' legislation;
- a review of requirements with regard to compulsory notifications; and
- more progress towards a "one-stop shop" system.

1.9 The Committee welcomes the procedural changes announced in the White Paper that concern:

- simplification of the mechanism for pre-notification referral from Member States to the Commission;
- removing the "element of self-incrimination" in pre-notification referrals from the Commission to Member States; and
- changes in Member State referrals to the Commission after notification.

1.9.1 The Committee also welcomes the measures for simplifying procedures, which are a continuation of those brought in by the 2013 "Simplification Package", particularly in the case of joint ventures outside the EEA.

2. Content of the White Paper

2.1 In this White Paper, ten years after the major overhaul of the EU Merger Regulation in 2004[1], the Commission takes stock of how the substantive test of "significant impediment of effective competition" (SIEC) has been applied and provides an outlook on how to further foster convergence and cooperation between and amongst the Commission and the Member

[1] Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004.

States. It also puts forward proposals for specific amendments aimed at making EU merger control more effective.

2.2 It firstly proposes ensuring that the Merger Regulation addresses all sources of possible harm to competition, and thus consumers, caused by mergers or corporate restructuring, including those stemming from acquisitions of non-controlling minority shareholdings.

2.3 It also aims to achieve closer cooperation between the Commission and national competition authorities ("NCAs") and an appropriate division of tasks in the field of merger control, in particular, by streamlining the rules for transferring merger cases from Member States to the Commission and vice versa.

3. General comments

3.1 The EESC welcomes the White Paper in as much as the proposed reforms will strengthen one of the pillars of competition policy and, above all, because it includes measures that will help simplify procedures.

3.2 The Commission bases the White Paper's central proposal - to widen its powers to include control of anti-competitive minority shareholdings as well - on the fact that Regulation 139/2004 may only be applied when mergers represent "a change of control on a lasting basis" (Article 3(1)), but that is not the case here. Moreover, it believes that Articles 101 and 102 TFEU alone do not constitute a sufficient legal basis for tackling the case of minority shareholdings.

3.3 The Commission's White Paper is broadly seeking a balance between the public interest in closing a loophole in the rules governing corporate mergers and the corporate interest in keeping administrative costs to a minimum.

3.4 Nevertheless, the EESC believes that care should be taken to ensure that the broad scope of the proposals in their current form does not actually lead to an overall increase in costs. This should, however, be assessed in the light of the benefits that companies derive from the new provisions.

3.5 The EESC also considers that some aspects of the White Paper need clarification to ensure that the outcome does not run counter to the intention of facilitating merger control without increasing the administrative burden.

3.6 The framework for assessing merger transactions set out in the White Paper is the "theory of harm" which the Commission included from 2002 after experiencing legal setbacks[2]. The theory of harm requires its application to:

a) consist in duly identifying how competition, and therefore ultimately consumers, might possibly be harmed;
b) be internally coherent;
c) take account of the benefits motivating all of the parties; and
d) be consistent (or, at least, not inconsistent) with the empirical evidence[3].

3.6.1 These principles - which are supported by CJEU case-law and the Commission's administrative practice[4] - must also apply to cases involving minority shareholdings.

3.7 Given that the White Paper proposes a substantial broadening of the Commission's powers, the EESC recommends that the analysis of merger procedures should also take account of social repercussions and, more specifically, of employment.

4. The EU needs a European Merger Area that meets the needs of the internal market of the 21st century

4.1 The European Union's merger control system has gained a reputation over the years and serves as a model worldwide. The EESC considers it important to maintain and even enhance this reputation.

4.2 The Committee welcomes the White Paper's proposal to improve coordination between the Commission and the NCAs and pave the way towards a "European Merger Area" that facilitates the uniform handling of mergers and increases legal certainty. But the proposed measures must go beyond ad hoc reforms to the Regulation to more broadly undertake an overhaul of the current control system.

4.3 Merger control in the EU has been stepped up considerably over the last 25 years whilst European businesses have increased in size and global reach. There were only three national authorities competent in this area in 1989; in 2000, there were 14, including the Commission; the current total stands at 28 (or 31 including the EEA).

4.4 The differences in rules and application criteria represent an additional burden for companies which, in many cases, is unnecessary: fewer than 5% of merger transactions notified to the

2 In particular, cases: T-342/99 Airtours plc v. Commission, 2002 E.C.R II-2585; T-310/01 Schneider Electric S.A. v. Commission, 2002 E.C.R II-4071; and T-5/02 Tetra Laval v. Commission, 2002 E.C.R II-4381.

3 See Hans Zenger and Mike Walker: Theories of Harm in European Competition Law http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009296.

4 Case IV/M.938 Guinness/Grand Metropolitan (15.10.1997) and case IV/M.1524 Airtours/First Choice (22.9.1999).

Commission have been deemed to be potentially harmful for competition[5]. The control system must make consumer and user protection compatible with the imperative requirement for European companies to compete in global markets.

4.5 The EESC therefore suggests re-thinking the White Paper and setting it in a broader framework that includes:

- harmonisation of Member States' legislation to avoid disparities in the implementation criteria;
- a review of requirements with regard to compulsory notifications, given that experience shows that they are unnecessary in many cases; and
- more progress towards a "one-stop shop" system, given the increased number of control authorities.

5. Specific comments

5.1 The "targeted" transparency system

5.1.1 The Commission is proposing a "targeted" transparency system based on two cumulative criteria to determine whether or not the obligatory requirement of the SIEC is present:

a) acquisitions of minority shareholdings in a competitor or vertically related company; and
b) the link is considered "significant" if the acquired shareholding is "around" 20% or between 5% and "around" 20%, but accompanied by additional factors such as rights which give the acquirer a *de facto* blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target.

5.1.2 The EESC suggests that the following aspects be clarified when drafting amendments to the Regulation:

- First, the concept of "competitor", which should be considered in terms of the definition applicable to antitrust measures in distinct geographical markets.

- Second, the parameters that should be taken into account for applying the concept of "vertically related companies". Consideration should be given to the case for setting specific thresholds, given that the generic formula may lead to a substantial increase in the number of information notes required by the Regulation.

- Third, the legal nature that relationships should have for the acquisition of shareholdings to be deemed "significant".

5 http://ec.europa.eu/competition/mergers/statistics.pdf.

– Finally, whether the SIEC analysis should also include the overall activities of corporate groups operating in different sectors of the economy.

5.2 Simplification of the mechanism for Member State referrals to the Commission before notification

5.2.1 The EESC welcomes the proposal to abolish the two-step procedure required by Article 4(5) of Regulation 139/2004 (reasoned submission followed by notification) and replace it with a direct notification to the Commission. The few vetoes to which Member States are entitled justify this revision which will speed up procedures.

5.2.2 Another positive aspect is the proposal to facilitate the exchange of information between the Member States and the Commission by forwarding the initial information document from the parties or the request for the case be assigned to the Member States so that they are aware of the transaction during the contacts prior to notification.

5.3 Referrals by the Commission to the Member States before notification

5.3.1 It is proposed to remove from Article 4(4) of Regulation 139/2004 the "element of self-incrimination" whereby the parties involved in a merger or takeover may submit a reasoned submission informing the Commission that the merger may significantly affect competition in a distinct market in a Member State. Under the reform it would suffice to demonstrate that the transaction is likely to have its main impact on this market.

5.3.2 The Commission believes that removing that dissuasive requirement could encourage the use of this voluntary declaration and the EESC shares that view.

5.4 Referrals to the Commission from the Member States following notification

5.4.1 The White Paper proposes amending Article 22 of the Regulation to allow only those Member States with competence to assess a merger transaction (at present "one or more" of them are able to do so) to decide to refer it to the Commission within fifteen working days and in accordance with their national legislation. The Commission may decide whether to accept or reject a referral request. If it were to accept the request, the Commission would have EEA-wide jurisdiction. However, if one or more Member States were to oppose the referral (without being required to give a reason), the Commission would relinquish EEA-wide jurisdiction and the Member States would retain theirs.

5.4.2 In the Committee's view, although the proposal might simplify the procedures, its effectiveness is limited because, of the EU states, only Germany, Austria and the United Kingdom are recognised as having jurisdiction in the case of acquisitions of non-controlling minority shareholdings.

5.4.3 The changes in post-notification referrals also involve an extension of the Commission's powers, which the EESC welcomes: if there are no objections from other Member States and the Commission accepts the recommendation, it would be responsible for reviewing transactions in the whole of the EEA and not merely in the territory of the reference Member State (unless the Member State authority had already cleared the transaction in its territory before the Commission assumed responsibility).

5.5 Other amendments

5.5.1 Following the adoption of the 2013 "Simplification Package"[6], the White Paper proposes other measures with the same objective that merit the EESC's approval.

5.5.2 The most notable of these is the intention of excluding from the scope of the Regulation agreements for setting up joint ventures outside the EEA which have no impact on competition within the EEA.

5.5.3 The White Paper also raises the possibility of the Commission giving exemption from compulsory prior notification to certain categories of transactions which do not normally raise competition concerns.

Brussels, 10 December 2014.

The President
of the
European Economic and Social Committee

Henri Malosse

---

6 Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013, OJ L 336, 14.12.2013, p. 1and Commission Communication on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, , OJ C 366, 14.12.2013, p. 5; corrigendum: OJ C 11, 15.1.2014, p. 6.