INT/137
Merger control

Brussels, 17 July 2002

**OPINION**
of the
Economic and Social Committee
on the
**Green Paper on the Review of Council Regulation (EEC) No. 4064/89**
(COM(2001) 745 final)

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On 13 December 2001 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

*Green Paper on the Review of Council Regulation (EEC) No. 4064/89*
(COM(2001)745 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 26 June 2002. The rapporteur was **Mr Lagerholm**.

At its 392nd plenary session on 17-18 July 2002 (meeting of 17 July) the European Economic and Social Committee adopted the following opinion by 32 votes to eight.

## 1. Introduction

1.1 Since the adoption of the Merger Regulation, the European Union has expanded from 12 to 15 Member States, whose markets are becoming increasingly integrated. Moreover, the European Commission's exclusive competence for concentrations meeting the thresholds has been extended to cover the whole territory of the European Economic Area (EEA). European cross-border corporate reorganisation has received further impetus from the introduction of monetary union in 1999.

1.2 We are now facing the prospect of a European Union with significantly more Member States as of 2004, and the completion of the monetary union with the final phase of the introduction of the euro. At the same time the trend towards internationalisation, or even globalisation, of companies and markets is continuing at an increasing pace.

1.3 In a parallel development, an ever-greater number of pre-merger control regimes are being introduced across the globe, with a consequent increase in the costs associated with multiple filing requirements.

1.3.1 The Merger Regulation has been based on a principle by which concentrations are appraised in accordance with a criterion of market *dominance*. The main alternative merger control test, used in a number of major jurisdictions and currently contemplated in some Member States, is that of substantial lessening of competition.

1.3.2 The Green Paper launches a debate on the respective merits of the "dominance test" as laid down in the Merger Regulation and of the "significant lessening of competition test" used in certain other jurisdictions. The value and effectiveness of the dominance test is recognised and it is pointed out that international convergence is already occurring to a considerable extent, independent of any actual harmonisation of laws.

1.3.3 This review of the Merger Regulation complements the previously launched review of Regulation 17 (on the implementation of Treaty Articles 81 and 82 governing the prevention of

restrictive agreements, decisions and concerted practices). There is nonetheless a fundamental difference between the two systems, namely the fact that the Commission has exclusive competence over concentrations with a Community dimension, while competence is shared between the Commission and the Member States in the field of anti-trust. Notwithstanding this difference, due consideration is given to the review of Regulation 17, allowing the two review exercises to form part of a comprehensive modernisation of the European legislative framework in the field of competition[1].

## 2. General remarks

2.1 Some 2,000 proposed concentrations have been notified to the Commission since the coming into force of the Merger Regulation (see Green Paper (GP), point 8). Out of these 18 have been blocked and a further 150 or so were cleared only after commitments. In some cases notification has been withdrawn since the parties have understood that the Commission would oppose acquisition. Obviously, interventions are statistically rare. However, the figures also demonstrate that an extensive administrative procedure is operated in order to catch the very few cases that raise serious competition concerns. In addition, similar schemes are in place at national level across the EU triggering perhaps ten times as many notifications. Also, the number of regimes outside the Community is growing. This further underscores the need for simplifying the formalities, improving clarity and aligning the various systems, as already stated by the Committee[2]. (see point 3.1.2 below)

2.2 The impact of the merger control is not merely, and not even primarily a question of the number of cases formally dealt with. Obviously, it affects what structural moves are being proposed in the first place, and the ones where the authorities decide to intervene tend to be of great significance to the overall economy.

2.3 Against this backdrop, the Committee commends the Commission for opening the debate on how to improve the overall system of European merger control, and for its endeavours to put forward constructive ideas to that effect in a drive to speed up and simplify European merger control procedures.

2.4 However, the assessment under the merger rules is inevitably complex and being rendered even more difficult by the increasingly rapid change in economic conditions, caused i.a. by globalisation. As pointed out earlier by the Committee[3], this brings into focus the need to develop economic and productive structures so as to ensure ever-greater competitiveness for the overall Community economy on world markets.

2.5 Thus merger control should be considered within the context of the global economy, in order to take account of the steadily rising international competitive pressure on European

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1 The Committee notes that the Green Paper presents some translation problems at least in its point 13 (Introduction)

2 ESC Opinion of 10 July 1996, OJ C 295 of 7.10.1996, rapporteur: **Mr Bagliano**

3 idem

companies. The Committee would stress the need to assess acquisitions on the basis of an in-depth global market analysis and hence not to focus only on European conditions. The Committee has repeatedly maintained that markets must not be defined in too narrow terms and that the Commission must take greater account of the fact that markets are constantly changing and expanding[4].

2.6 Given this perspective, the effects on competition must remain the focus of the merger control assessment. The purpose of competition policy is ultimately to protect consumer interests. Considerations belonging to other policy areas must not be allowed to inspire counterproductive measures. Obviously the Committee is aware of the multifaceted socio-economic issues that arise in connection with restructuring. It is not possible to deal with all of these in the context of acquisition control but an interaction is needed between general competition policy and, for instance, regional policy, research and education measures, employment policy, consumer policy, etc.

2.7 It should be pointed out that restructuring is necessary in order to ensure a sustainable business sector in the long term, and hence to avoid widescale unemployment. As specified in EC Treaty Article 127, the objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities. Workers therefore have a legitimate interest in making their views heard in connection with acquisitions (see 3.3.17 below). However, the Committee would point out that this must be done, as in consultation of other parties concerned, within the set timeframe and observing the need for secrecy. An overarching principle in all circumstances must be that government interventions in the restructuring process should be confined to those cases where it can be established with a high degree of certainty that the proposed merger will inflict severe and lasting damage to competition. The Committee will revisit these issues in more detail when addressing the substantive issues raised by the Green Paper (3.2, below).

## 3. **Specific remarks**

### 3.1 **Jurisdictional issues**

*A. Community dimension; extension of the Commission's competence*

3.1.1 The Committee notes with satisfaction the scrupulous and diligent manner in which the Commission has consulted interested parties and analysed the functioning of the present thresholds with regard to the problem of multiple filing. All the more so, as such procedures may constitute particular difficulties for SMEs.

3.1.2 In this context, the Committee again would like to lend strong support for the one-stop shop principle, and reiterate its view that mergers with significant effects extending beyond the borders of a Member State should be considered to be of Community dimension[5].

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4 Inter alia the ESC opinion of 6 July 1994, OJ C 388 of 31.12.1994, rapporteur: **Mr Petersen**

5 ESC Opinion of 25 October 1995, rapporteur: **Mr Petersen**, OJ C 18 of 22.1.1996; ESC Opinion of 10 July 1996, rapporteur: **Mr Bagliano** OJ C 295 of 7.10.1996.

3.1.3 From the information contained in Annex 1 of the Green Paper and the Commission's analysis it is evident that Article 1(3) as devised in 1997 has failed to meet its objective. Multiple filing continues to cause increasing problems to the detriment of both companies and the competition authorities. Obviously, the situation should be adequately addressed without any undue delay.

3.1.4 The Committee agrees with the Commission's conclusion that modifications to the current criteria of Article 1(3) or amendments of Article 22 are unlikely to produce the necessary improvement (GP, points 51- 53).

3.1.5 Thus, the Committee supports the proposal to grant automatic Community competence over cases involving three or more national notifications (GP, point 57). The result thereof will, in practice, be better in line with the Community dimension concept (3.1.2). Nonetheless the Committee considers that the proposal does not go far enough to tackle the problem effectively. The rule should instead be based on notification in *two or more Member States*. However, as national notification is not always mandatory, the criterion should rather be that the merger is subject to review (comes under national jurisdiction) in two or more Member States.

3.1.6 For reasons given in the Green Paper (footnote 10), jurisdiction would have to be confirmed by the relevant National Competition Authorities (NCAs). As speed is of the essence, the Committee supports the proposed introduction of a non-opposition procedure with a very short time limit. What results from that should be final and binding. Thus, a NCA declining jurisdiction should not be able to open the case at a later stage.

3.1.7 A more radical solution would be to remove the thresholds from the ECMR. However, such a move requires coordination of the thresholds at Member State level, so as not to make Community competence totally dependent on national legislation and to avoid usurping the concept of Community dimension.

3.1.8 With the completion of the Internal market, and particularly in view of the enlargement, the various and differing schemes will have to come together and form an integrated system. Harmonised turnover thresholds could e.g. be established by setting them in proportion to Member State GDP.

3.1.9 As the Commission rightly says (GP, point 68), further harmonisation in substance will be necessary. Indeed, the Committee feels that in an economically integrated Europe, it does not make much sense to apply different rules in cases of Community relevance. Therefore, national merger controls should be brought in line with the ECMR, or the Regulation be applied directly by the NCAs, when the thresholds are not met in three (two) or more Member States (cf. the "modernisation" reform). Also, with the completion of the Internal market, there should be less need to deal with relatively small mergers, and national thresholds should be adapted accordingly. The Committee urges the Commission to initiate work on substantive as well as procedural harmonisation.

*B. Referrals to Member States*

3.1.10 Generally the Committee has reservations about referrals as they represent derogation from the proper balance between Community competence and subsidiarity[6]. Admittedly, this carries less weight concerning cases without significant cross-border effects. However, in the view of the Committee, such referrals are still not acceptable if they give rise to legal uncertainty or more than negligible delay.

3.1.11 Therefore, the criteria of Article 9 should be simplified and the time limit reduced accordingly. Thus, the Committee agrees with the general direction of the proposals put forward by the Commission (GP, point 81). However, the Committee is not convinced that the dominance requirement should go. It would seem reasonable that the requesting Member State should show at least that the case is likely to involve a dominant position within its territory. If it is unable to do so, the referral of a merger under the ECMR does not appear to be justified. The period for request should still be shortened by one week.

3.1.12 According to the Green Paper (point 82), notifying parties should not be put in a worse position by the referral. The Committee fully agrees with that, and consequently with the proposal to apply not only the ECMR timeframe, but also its procedure as such. This should include an obligation on the receiving NCA to accept the notification performed on Form CO, without requesting the parties to renotify under national rules. Indeed, the Committee considers that EC rules should apply in those cases. There would also seem to be a general need to seek at all times to improve international coordination and harmonisation of acquisition control procedures.

3.1.13 However, this principle of not putting parties in an aggravated position, and the overall interest to deal with a merger in a transparent and comprehensive manner (e.g. via a one-stop shop) bring into question the technique of partial referrals. In the view of the Committee it suffers from the same, if not worse, weaknesses and flaws, as does multiple filing. Therefore, the Committee is of the opinion that partial referrals should not take place, either geographically, or with regard to certain aspects of the merger. Hence any referral by the Commission may only be to a single national authority and the Member State to which the referral is made shall then have exclusive competence.

3.1.14 The Commission argues it should be empowered to refer cases at its own initiative (GP, point 81 b), subject to the same criteria as requesting Member States. The Committee can see the logic in this, but doubts it will make much difference in practice; it is hardly conceivable that the Commission would "force" a case upon a Member State unwilling to take it on.

*C. Joint Referrals to the Commission*

3.1.15 The shortcomings of Article 22(3) are well demonstrated in the Green Paper. Clearly, the provision has become obsolete, and attempts to make it more operational have been unsuccessful.

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6 ESC Opinion of 10 July 1996 (p. 7.7.1) OJ C 295 of 7.10.1996

If the Commission were given automatic jurisdiction by the proposed three-countries rule, joint referrals would in practice only be made by two Member States. Its potential for helping to resolve problems caused by multiple filing then seems to be even less than at present. If the provision is to be retained at all, the Committee feels referral should be subject to consent by the parties. As already indicated (point 3.1.5 above), the Committee is, however, in favour of automatic jurisdiction when *two* or more Member States are concerned. In such cases, Article 22(3) becomes irrelevant.

*D. The concept of "concentration"*

3.1.16 As for **minority shareholdings,** the Committee is convinced they should not be brought in under the ECMR, as long as they do not constitute the basis for control of the undertaking concerned. Control is the relevant and adequate criterion determining the scope of the Regulation in this regard. Introducing ambiguity would provoke legal uncertainty and increase the number of notifications to little or no avail. In the Green Paper there are no facts indicating significant problems associated with minority shareholdings, coupled or not with interlocking directorships, which cannot be dealt with effectively under Articles 81–82 EC.

3.1.17 As shown by the Alitalia-KLM case, a **strategic alliance** can fall under the ECMR (GP, point 114). However, this is rather the exception than the rule, due to the fact that such alliances are usually not structural in nature. Currently, the Committee sees no justification for extending the reach of the ECMR in this respect. Thus, the Committee agrees with the conclusion of the Green Paper (point 113).

3.1.18 In 1998 so called **full-function co-operative joint ventures** were brought under the Merger Regulation. Experience confirms this was an appropriate measure. The Committee concurs with the Commission that there is no reason for reconsidering the amendment.

3.1.19 However, the Committee does not fully agree nothing should be done with regard to **partial-function production joint ventures** (GP, point 123). Obviously, they should not all be subjected to the application of the Merger Regulation. As pointed out by the Commission, they are not in general more suited to ex ante control than e.g. R&D joint ventures. However, some bring about lasting structural change *and* large investments, and could therefore justify notification. This goes mainly for those partial-function joint ventures that involve productive assets. In order not to trigger unnecessary filing, and given the fact that such joint ventures are in the structural measures – cooperation grey zone, notification could be made optional; if not used, Article 81 EC would apply.

3.1.20 Concerning **multiple transactions**, the Committee agrees, in principle, with the Commission. Thus, formally separate transactions that are economically coherent and closely linked in time, should be treated as one and the same concentration. Nevertheless, the Committee wants to warn against amending the present rules without further and careful analysis of the consequences. Obviously, this involves some highly technical issues, and it is not always easy to foresee the practical impact. Also, transactions, which really are separate, risk being unjustifiably dealt with as one.

3.1.21 For instance, the Commission proposes to cover **"creeping" take-overs**, but the Committee finds it difficult to see how that would work in practice. Nor is it clear how one should deal with acquisitions which do not lead to control, some of which may lack any structural intent. As for "hostile" takeovers, the Committee is of the view that the rules should stay as neutral as possible, and not work to the advantage of either party.

3.1.22 It emerges from the Green Paper (point 144) that the Commission wants to exclude certain **venture capital transactions** from being looked at by expanding Article 3(5). The Committee supports the idea as a step towards minimizing the number of unnecessary notifications. Any further assessment would require more technical details on the intended amendment.

3.1.23 The Commission points to certain discrepancies between Articles 3(3) and 5(4) caused by the definitions of **"control" and "group"**. In principle, the Committee feels those inconsistencies are unsatisfactory and should preferably be removed, even though they in practice seem to be problematic only rarely. The basis should clearly be the concept of "control". It appears Article 5(4) could be rephrased to state simply that a company shall be considered part of a group if the group controls it (in the sense of Article 3(3)).

3.2 **Substantive issues**

*A-B. The substantive test; efficiencies*

3.2.1 First, the Committee would like to commend the Commission for opening the debate on this crucial issue, which is not only a regulatory question, but also links itself to various important aspects of application.

3.2.2 In view of the ongoing globalisation of the economy, and the increasing cross-regional restructuring, the Committee would also like to emphasise the need for further international harmonisation.

3.2.3 In this context, the Committee finds it essential to highlight some of the key features of the change currently happening to the overall economy.

3.2.4 Globalisation is deeply affecting business and society as a whole. It causes fundamental and lasting change. For many sectors of strategic importance to European growth, employment and wealth, it means they have to up-grade substantially their adaptation abilities. Re-structuring is at the heart of this. It should be borne in mind that European industry, compared to that of other important regions – notably the US – is still too diverse in structure. In terms of growth rate, Europe is still trailing behind the US.

3.2.5 The competition pressure is steadily growing, on a global basis. Hence national borders and markets become less and less significant. Product and technology development is accelerating, and customer preferences shift more quickly. This, in combination with a greater freedom of choice, enhances the economies of scale related to i.a. R&D and marketing. The

restructuring of companies, internally as well as externally, takes place faster and faster. Sectors and companies are integrating and combining in new patterns.

3.2.6 General market liberalisation and decreasing barriers to entry have brought about a severe pressure of potential competition; global players have the capacity and capability to act on all markets. Products can be manufactured almost anywhere, and modern information technology makes it possible to provide services over long distances. Thus, companies may encounter competition originating from around the world. Also, European companies often face very powerful competitors.

3.2.7 Therefore, it is crucial that the European business climate is such as to foster competitiveness. Economic policy, therefore, has to keep up the transformation pressure, but also to facilitate the reshaping of companies into entities that render them truly effective. If that is not allowed to happen, the goal set by the Lisbon Summit cannot be achieved, i.e. to make the European Union "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion".

3.2.8 Against this backdrop, the Committee finds it evident that a more long-term and dynamic approach is needed when assessing a proposed merger. The development underscores and confirms statements already made by the Committee[7]. It is of importance to the delimitation of the relevant market, and even more so to the execution of the competition test. The heart of the matter lies in keeping the merger control in phase with economic realities, not at making the protection of competition more lax. The Committee is of course alive to the fact that the assessment of mergers is not an exact science, and that capturing market dynamism involves some complexity. However, this makes it even more important to address the issue. It cannot be avoided, and the Committee maintains it is fully feasible. In particular the Committee would stress that it is of key importance that assessment of an acquisition does not become counter-productive and give major competitors such as the USA an unjustified structural advantage. The Committee urges the Commission to waste no time in tackling this matter.

3.2.9 This raises the question whether the so called SLC-test is better suited to apply a dynamic perspective. Apart from that, international convergence obviously has a value in itself.

3.2.10 The Committee is of the same opinion as the Commission in saying there are many similarities between the dominance test and the SLC-test (GP, point 162). The Committee maintains that differences for the most part are to do with application and interpretation, rather than being of a conceptual nature. The second limb of the dominance test relates in particular to economically oriented analysis and assessment. It provides for a high degree of flexibility and discretion[8], characteristics often ascribed to the SLC-test.

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7 ESC Opinion of 10 July 1996 OJ C 295 of 7.10.1996

8 See e.g. the *Kali und Salz* judgement of 14.5.1975, ECR 1975, p 499

3.2.11 The Merger Regulation is applied using a wide range of assessment criteria, which by and large are also used in the SLC-test. The problem with the ECMR is that it does not provide any comprehensive and theoretically well-founded analytical model into which the listed factors and tests can be fitted. Arguably, it is therefore currently less apt to accommodate dynamics etc. as described above. However, that appears as more or less entirely a question of developing the methodology for the application.

3.2.12 Where there seems to be a discernible and important difference is in the area of merger-specific efficiencies. In any event it seems unclear what scope currently exists under EC law for taking account of them. The pursuit of such effects is often among the legitimate motives for a proposed merger. When they further the consumer interest and promote the objective of overall economic efficiency, the Committee fails to see why they should not be taken into account. Again, the explicit inclusion of efficiencies in the ECMR would seem objectively justified and would also seem to serve the interest of harmonisation.

3.2.13 To conclude, the Committee holds that the desirable alignment towards a global standard can be achieved by international cooperation and by putting the emphasis on a developed second limb of Article 2(3). Thus the Committee does not consider any transition to the SLC-test to be necessary; on the contrary, it would generate unnecessary legal uncertainty. Retention of the dominance test will make it possible to avoid discrepancies between EU law and the Member States' national rules on acquisitions. The Committee would also point to the advantage of consistency between the Regulation's concepts and other competition rules (Article 82). Further, it should be noted that scope for intervention already covers situations where companies jointly occupy a dominant position. The conclusion is therefore that the SLC-test should not be introduced into the Merger Regulation. The Committee would also like to stress the importance of increased efforts to coordinate the American and EC procedures pragmatically, as it imposes a heavy burden on the parties to run cases in parallel.

*C. Simplified procedure*

3.2.14 The Committee congratulates the Commission on the success of the simplified procedure (GP, point 174), and urges the Commission to develop it e.g. by means of a shortened Form CO. Furthermore, the Committee is of the opinion that referrals should not be possible in cases under the simplified procedure. Article 9(2) should be amended accordingly.

3.2.15 The Committee strongly supports the idea of removing “harmless” concentrations from the process altogether (GP, point 177). The Committee, however, has some doubts with regard to the proposed technique of a block-exemption, which potentially could introduce more complications than it resolves.

3.2.16 Also, the concept of a *de minimis* threshold has some attractions. However, it remains unclear how it would work in practice and what its legal effects would be. The Committee finds the proposal concerning “small markets” (GP, point 178) interesting, but it needs to be amplified. The

Committee would stress that the introduction of a threshold of the present type must not result in the application of national sets of rules instead, leading to multiple filing, etc.

3.3 **Procedural issues**

*A. Notification – triggering event*

3.3.1 As explained in the Green Paper (point 182) the parties want to notify as early as possible in order be allowed to implement the concentration in question. It also emerges that the current one-week rule is not upheld. Therefore, the Committee feels it should be repealed, and thus left to the parties to decide when to notify. It should be kept in mind that notification cannot take place earlier than when the parties are able to provide the necessary information according to Form CO.

*B. Suspension of concentrations*

3.3.2 The Committee takes the general view that similar cases should be treated in the same fashion, and would therefore not object to the proposed extension of Article 7(3). However, the Committee would also like to reiterate that where there typically is a conflict between the parties, the rules should remain as neutral as possible (above, point 3.1.21). Any amendment should be done with a view to achieve such neutrality.

*C. Calculation of time limits*

3.3.3 The Committee can clearly see the simplification achieved by consistently using working days instead of calendar days. However, the switch must not in practice lead to an extension of the time limits.

*D. Administrative efficiency*

3.3.4 Obviously, for the parties it is an integral part of the one-stop shop to have a single filing point. Therefore, the Committee does not consider it a good idea to make them responsible for copies to Member States. Instead, the Commission can establish a system for electronic exchange of information, as envisaged for the "modernisation" reform, subject of course to reliable secrecy safeguards. For practical reasons, electronic filing should remain optional.

*E. Completeness of filings*

3.3.5 The Committee notes with satisfaction the decrease in the number of declarations of incompleteness resulting from the 1999 guidelines (GP, point 199). Nevertheless, the Committee feels, as a matter of principle, a deadline should be fixed. Alternatively, a rule could be introduced to the effect that after a certain period, declaration of incompleteness would require the consent of the Hearing Officer.

*F. Commitments procedure*

3.3.6 The problems with the current procedure are well described and explained in the Green Paper (e.g. point 207). In short, parties are sometimes unduly "squeezed" between late Statements of Objections and the final time limit. The Committee is therefore supportive of a "stop the clock provision", provided it is entirely for the parties to trigger it.

3.3.7 Clearly, such a provision will have its greatest value in the second phase. However, it should be made available also in the first phase. If it is kept within a short timeframe, the Committee fails to see why the Commission should be able to overrule a request in the first phase (GP, point 219). Generally, more time is needed in the second phase, and the Committee could accept the possibility of extension to up to thirty days, provided that full advantage is not necessarily taken of this facility. The rule should therefore be flexible, in the sense that the parties could take advantage of the number of days required without triggering the full period. The Commission and Member States would be given the same number of days.

3.3.8 Also, the Committee feels problems could be more easily resolved if the Commission were to be more active in advising the parties as to what measures would be required to clear the concentration.

3.3.9 A further amendment of the procedure to be considered would be to set a deadline for the Statement of Objections.

*G. Article 8(4) – reversal of implemented mergers*

3.3.10 The Committee is not convinced there is a problem of practical importance, and tends to agree with the Commission's interpretation of the relevant provisions.

*H.-I. Enforcement provisions; Filing fees*

3.3.11 As the Merger Regulation does not relate to prohibited activities, the Committee finds the analogy to Regulation 17 incorrect and not relevant. Nor does the Committee see any other reasons in support of the need for the indicated remedies and sanctions.

3.3.12 The Committee firmly objects to the introduction of filing fees. The Committee maintains the services of the Commission should be funded via the Budget, law enforcement activities in particular.

*J. Due process and "checks and balances"*

3.3.13 To block a merger is indeed a very far-reaching measure. Therefore the courts should be more involved in practice. Admittedly, there have been some appeals, but the parties do still often not perceive that as a realistic option. The improved procedure of the CFI is of course commendable, but the Committee finds it too early to judge its impact.

3.3.14 In many countries a blocking decision has to be taken by a court of law. Under the current EC regime, however, the Commission has the dual role of investigator and decision maker. In the Committee's view, these provisions therefore need to be discussed from the angle of legal certainty. It considers that strong arguments of principle can be levelled against a situation where, in cases which typically involve extensive economic implications, the decisionmaking body is the same as the investigating body. At the same time the Committee is of course aware that no fundamental change can be made in the existing provisions without careful reflection and such a reform will take more time than the current review allows. In view of the major importance of the principles at issue, the Committee would anyway call on the Commission to instigate a more in-depth debate on which system is ultimately the most satisfactory and appropriate.

3.3.15 The Committee can also see some scope for "internal" improvements. The role of the Hearing Officer should be strengthened so that he is able to monitor the procedure throughout. He should be independent of DG Competition and be able to act both on his own initiative and following a complaint by the parties to the acquisition. The resources must be increased so as to be commensurate with the tasks involved.

3.3.16 The Commission stresses in the Green Paper (points 242-244) that it is important for the process to draw on the views both of the consumer groups affected by the proposed merger and of the workforce and solicits proposals as to how this can effectively be achieved. The Committee agrees that it is important in many mergers that all parties concerned – both employees and consumers, but also in many cases local and regional authorities – should have an opportunity to express their views. Arrangements compatible with efforts to speed up and simplify the merger control procedure need to be worked out. Regarding the workforce, the new Directive on information and consultation of employees will – when implemented – in many cases oblige the companies involved to inform and consult with their employees about the effects of the concentration being considered. The information originating from that process can make it easier for the Commission to obtain the views of the workforce. Provision should be made to ensure that consultation takes place every time and that it takes place before the definitive approval of the merger.

3.3.17 It is obvious that the Commission should invariably give employees in the enterprises directly concerned a chance to make their voices heard but the Committee considers that the Commission should also seek to consult workers' organizations in sectors affected at European level. In many cases these organizations would seem to be best placed to assess the long-term, broader impact on employment of a proposed merger.

3.3.18 However, the Merger Regulation needs to be applied in the light of its aim to promote competition with a view to boosting the efficiency and competitiveness of EU business. This means that it should be possible to apply the Regulation in such a way that the long-term beneficial impact on competitiveness, growth and employment as such is a valid ground for authorising a merger, even if the concentration in the short run could have some negative effects on competition.

Brussels, 17 July 2002.

| The President<br>of the<br>Economic and Social Committee | The Secretary-General<br>of the<br>Economic and Social Committee |
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| **Göke Frerichs** | **Patrick Venturini** |

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**N.B.**: Appendix overleaf.

**APPENDIX**
to the
**OPINION**
of the Economic and Social Committee

The following amendment (slightly modified by the rapporteur) was rejected by the Assembly but obtained more than one quarter of the votes cast:

**Point 3.3.16**

The point should end after the sentence:

"*Arrangements compatible with efforts to speed up and simplify the merger control procedure need to be worked out*."

**Point 3.3.17**

Rewrite as follows, incorporating the text deleted from point 3.3.16:

"*Regarding the workforce and their representatives, their rights to information and consultation on the possible consequences of proposed concentrations are already comprehensively protected by the Directive on European Works Councils and the Directive on information and consultation of employees. These provisions guarantee the employees of the enterprises directly involved and, if they wish, representatives of workers in the industries concerned at European level the opportunity to express their views. The information originating from that process can make it easier for the Commission to assess the impact of a planned merger on employment*."

**Reason**

Firstly, it makes sense to deal with the consultation of workers in a single paragraph. Secondly, clearer reference should be made to the current legal situation at European level.

**Outcome**

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|---|---|
| For : | 18 |
| Against: | 21 |
| Abstentions: | 2 |