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THE EUROPEAN UNION**

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REPORT

from : Competition Working Party
to : Permanent Representatives Committee

No. prev. doc. : 8607/03 RC 6
No. Cion prop. : 5007/03 RC 1 (COM(2002) 711 final)

Subject : Proposal for a Council Regulation on the control of concentrations between undertakings
("The EC Merger Regulation")

I. INTRODUCTION

- (1) On 13 December 2002, the Commission submitted to the Council the abovementioned proposal. The proposal is based on Articles 83 and 308 of the Treaty.¹
- (2) The Brussels European Council (held on 20 and 21 March 2003) noted that "a proactive competition policy is essential for the efficient working of the internal market; this should be taken forward by the final adoption of the proposed reform of the mergers regime before the 2004 Spring European Council".

¹ OJ C 20, 28.1.2003, p.4.

- (3) The European Parliament delivered its Opinion on 9 October 2003.²
The Economic and Social Committee delivered its Opinion on 24 September 2003.³
- (4) The Competition Working Party examined the Commission's proposal in a series of meetings under Greek and Italian Presidencies. At these occasions, the Working Party discussed the Meeting Documents MD 01/03- 32/03 and MD 34/03 to MD 39/03. The outcome of these discussions is summarized below.
- (5) The text of the recast Merger Regulation in the light of the results of discussions in the Working Party, is set out in the Addendum to this report. Delegations' positions are set out in the footnotes to the text.

II. MAIN OUTSTANDING ISSUES

1. The "substantive test" (Article 2)

The "substantive test" determines what the Commission should examine in order to declare a concentration incompatible with the common market. The Merger Regulation currently provides that the Commission can prohibit a concentration that "creates or strengthens a dominant position, as a result of which effective competition would be significantly impeded in the common market" ("Dominance Test"). The Commission felt that there was a doubt whether "non-collusive oligopolies" were covered by this test. In order to make sure that these cases are addressed by the Merger Regulation, it proposes to add specific criteria that would subsume them under the dominance test.

The Working Party's discussion focussed mainly on three alternatives to the Commission proposal:

- some delegations feel that the Dominance Test should be preserved to the maximum extent possible; these delegations are of the opinion that there is no clear indication that "non-collusive oligopolies" are not covered by the Dominance Test and therefore do not advocate any dramatic change in the current test;

² not yet published in OJ.

³ not yet published in OJ.

- some delegations feel that the best solution would be to switch to the "substantial lessening of competition" (SLC) test; as this test has been applied for some time in the USA, it would provide for legal security based on existing jurisdiction;
- a large majority of delegations seem to support a compromise solution which combines the Dominance Test with the "significant impediment of effective competition" (SIEC) test as the threshold currently being applied by the Court of Justice. This solution is perceived as closing any possible gap with regard to non-collusive oligopolies and therefore providing a maximum certainty for business while preserving existing case law by the Court of Justice.

2. **Multiple transactions (Article 3(4), Recital 16)**

The Commission proposes to treat as one and the same concentration multiple transactions that “are conditional upon each other, or that are so closely connected to one another that their economic rationale justifies their treatment as a single transaction”. Separate concentrations that do not have a Community dimension (and, therefore, would normally be examined by the national competition authorities) could therefore be considered as one single concentration, which would potentially satisfy the thresholds for "Community dimension" leading to the exclusive competence of the Commission.

The Working Party examined a series of suggestions to introduce criteria (same acquiring party, two-year period, same economic sector etc.) to clarify the Commission's competence to examine cases that have already been dealt with at national level. Some delegations were prepared to accept a solution based on these suggestions.

Several delegations question whether this proposal introduces an expansion of the Commission’s competence to examine cases in the framework of multiple transactions. The compromise suggestions presented were perceived by these delegations as being confusing to economic operators and it was therefore suggested to revert to the status quo as foreseen in the current Merger Regulation with the possibility of reviewing the situation at a later stage in the light of experience gathered.

3. Time limit for report of announcement of the findings after referral to Member States - Article 9(6)

In the case of a referral from the Commission to a Member State, the Commission proposes that the Member State concerned should make public a "*report or any announcement of the findings of the examination of the concentration*" within 90 working days after the referral.

The Working Party largely agreed on a compromise proposal which foresees that "*within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of any preliminary competition concerns it may have*".

However, one delegation prefers 90 working days instead of 45 and two delegations support an alternative text based on a time limit of 30 workingdays.

4. Ancillary restrictions (Articles 6(1)b, 8(1) and (2), Recital 17)

The Commission proposes that it should not be obliged to assess whether various legal obligations or restrictions of the parties to a concentration are directly related and necessary for the implementation of that concentration ("ancillary restrictions"). These "ancillary restrictions" should be deemed to be covered by the positive decision on the concentration. National courts and competition authorities should be competent to examine them in detail.

A compromise text inserted in Recital 17 was largely accepted by a majority of delegations who felt that the Commission should be obliged to pronounce in its decision, under certain circumstances, whether restrictions are ancillary (at the request of the undertakings concerned, in cases presenting novel or unresolved questions giving rise to genuine uncertainty).

However, some delegations feel that this solution gives the Commission too much discretion in the appreciation of whether the case in question was a "novel or unresolved case giving rise to genuine uncertainty". One delegation requested moving the text contained in the Recital to the body of the Regulation.

5. Group derogations from the suspensive effect (Article 7(4))

The Merger Regulation currently prohibits the implementation of a concentration prior to the adoption of a Commission decision declaring it compatible with the common market (“suspensive effect” of a notification). However, the Commission may, by decision, exceptionally authorize the implementation of a specific concentration even before a final decision is adopted. The Commission proposes that it may adopt “group derogations” for particular categories of concentrations that do not in general raise significant competition concerns.

Some delegations do not see sufficient justification for group derogations given that the current simplified procedure can be applied.

Some delegations prefer group derogations to be adopted by the Council and not by the Commission.

One delegation suggests that these questions would be dealt with in a Recital or, alternatively, for the adoption of block derogations by the Council.

6. Filing fees (Article 23(1)e)

The Commission requests the legal authorization to impose on the parties to a concentration a fee for the notification (and examination by the Commission) of their concentration.

The Working party examined a compromise text introducing the principle of a flat rate and the possibility for the Commission to charge lower fees in specific cases.

One delegation is opposed in principle to the introduction of “filing fees” by the Commission.

Several delegations request that additional criteria should be laid down or that, alternatively, the fee should be fixed by a Council Regulation.

III. CONCLUSIONS

The Permanent Representatives Committee is invited to take note of the outcome of proceedings of the Working Party and to discuss and resolve the outstanding issues in order to enable the Council to reach a political agreement at its meeting on 27 November 2003.

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