The revised system of case referral under the Merger Regulation: experiences to date

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This article reviews the functioning of the system of case referral from the Commission to Member States and vice versa, now that the revised Merger Regulation (2) has been in place for over one year (3). The article attempts to summarise, in a largely factual manner, the experiences to date, and to highlight some of the substantive, procedural and practical issues which have arisen during this period.

While this article does not purport to draw any broad conclusions from this early experience, it is possible, however, to at least tentatively conclude that the revised system of case referral appears to be enjoying considerable success, in terms of the extent to which it is being availed of by merging companies and by European competition authorities, in terms of the nature of the cases concerned and their suitability as candidates for referral, and in terms of how the system has been operating at a practical level.

A. Overview

Since the entry into force of Council Regulation 139/2004 on 1 May 2004, a Commission Notice on Case Referral (4) has been adopted, and each of the four provisions in the Regulation relating to the referral of cases from the Commission to Member States and vice versa (Articles 4(4), 4(5), 9 and 22) have been resorted to. To summarise briefly, between 1 May 2004 and 30 June 2005 (the reference period for the purposes of this article; hereafter ‘the reference period’), the Commission had received:

- 5 requests for referral pursuant to Article 4(4); all 5 requests were acceded to, and the cases transferred in their entirety.
- 34 requests for referral pursuant to Article 4(5); 2 of these requests were subsequently vetoed by Member States; the remaining 30 requests resulted in the cases acquiring a ‘Community dimension’. This represents roughly 10% of the cases notified to the Commission during this period (5).
- 5 requests for referral pursuant to Article 9 (6); 4 requests were acceded to, 3 in their entirety and one partially; 1 request was deemed to have been withdrawn.
- 1 request for referral pursuant to Article 22; this joint request by 4 Member States was acceded to.

B. Article 4(4)

Procedure

In order to ensure that the pre-notification referral system works effectively, especially in view of the tight deadlines provided for in Article 4, the Commission and the Member State/s concerned by an Article 4(4) request have generally taken up direct contact as soon as such a request seems likely.

The Commission also encourages parties contemplating making such a request to approach the Commission and the Member State/s concerned by a likely Article 4(4) request informally beforehand. The Commission will in particular advise parties contemplating making such a request on the legal requirements for referral, and on the categories of cases which the Commission considers appropriate for referral as set out in the Notice on Case Referral. A draft Form RS may sometimes be provided to the Commission. To date, parties have frequently availed of this opportunity to approach the relevant authorities informally before lodging Article 4(4) requests.

Following receipt of the formal request, and before sending the Form RS to Member States, the Commission generally carries out a ‘completeness check’ on the Form to ensure that it contains no obvious omissions. The Commission has also

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(5) 316 merger notifications were lodged with the Commission between 1 May 2004 and 30 June 2005.

(6) In May 2004, 2 further requests were received pursuant to Article 9 of the old Merger Regulation. Council Regulation 4064/89: M.3271 Kabel Deutschland/Ish and M.3373 Accor/Colony/Desseigne.
developed the practice of accompanying the Form RS which it transmits to Member States 'without delay' by a short memorandum indicating whether the Commission — based on a preliminary examination of the application — feels that the case is an appropriate one for referral, often with reference to the Notice as appropriate, providing the contact details of the case team at the Commission, and offering the Member States concerned the option of discussing the case in a phone conference (1); the date generally suggested for such a conference is about 10 days following the transmission of the Form RS (2).

If the Member State confirms that it agrees to the referral within the prescribed deadline, the Commission generally intends to take a decision accepting or refusing the referral, as it has done in relation to the requests filed to date, rather than allowing the 25 working day deadline provided for in Article 4(4), 4th sub-paragraph, to elapse. If the Member State does not agree to the referral, the case proceeds in the normal manner, with the parties filing Form CO on a date of their choosing.

**Nature of cases referred**

All 5 of the cases referred to Member States pursuant to Article 4(4) during the reference period were only liable to have an impact on competition in the Member State concerned, and each case was referred in its entirety. 2 cases were referred to Finland; one concerned only local Finnish markets, while the second involved several markets which appeared to be mainly Finland-wide in scope. One case, with an impact confined almost exclusively to the UK, was referred to that Member State; similarly, a case impacting only provincial markets in Spain was referred to that Member State, and a case with no impact outside of Germany was likewise referred to that Member State.

**Substantive standard for referral**

There appeared to be some early reluctance on the part of merging firms to avail of Article 4(4), perhaps arising from a fear that the making of such a request might be viewed as in some manner 'self-incriminating' with respect to the operation's likely impact on competition.

In one early case, the merging parties had apparently given serious consideration to lodging an Article 4(4) request but, after approaching both the Commission and the national authority concerned, chose not to do so, apparently because of a certain uncertainty as to whether the substantive criteria set out in Article 4(4) were met and the consequent risk of the request not succeeding, together with the delay this would have entailed. The case in question appeared to be an appropriate candidate for referral. In that regard, the Commission would like to re-iterate its interpretation of the substantive criteria in Article 4(4), and its view that the standard to be met in terms of a possible impact on competition is not a very exacting one; the criteria set out in the Notice on Case Referral — at paragraphs 16 et seq, but notably at para. 17 — make this clear.

The requesting parties must, according to the Notice, show that 'the transaction is liable to have a potential impact on competition ... which may prove to be significant, thus deserving close scrutiny. Such indications may be no more than preliminary in nature, and would be without prejudice to the outcome of the investigation.' The Notice goes on to state that 'the parties are not required to demonstrate that the effect on competition is likely to be an adverse one', pointing to Recital 16 to Regulation 139/2004, which states that 'the undertakings concerned should not ... be required to demonstrate that the effects of the concentration would be detrimental to competition'. What the requesting parties should do is 'point to indicators which are generally suggestive of the existence of some competitive effects stemming from the transaction.' The existence of 'affected markets' within the meaning of Form RS would, for example, generally be considered sufficient to meet the requirements of Article 4(4).

It should moreover be added that there is, in the Commission's view, a difference in the interpretation which the Notice gives to the criteria in Article 4(4) and to those in Article 9(2)(a). At para. 35 it is indicated that, for the latter standard to be met, the requesting Member State must demonstrate a 'real risk' that the transaction is likely to have a significant adverse impact on competition. This difference in the substantive standard applied is, in the Commission's view, justified in policy terms: post-notification referrals, with all of the additional time and resources which they necessitate, should only be contemplated in cases where there is a real possibility that intervention will be necessary; pre-notification referrals, on the other hand, are primarily designed to ensure that the operation is examined by the authority best-placed to carry

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(1) It should be stressed that such a note is an informal communication between competition authorities containing no more than the preliminary views of the Commission services concerned. It is not a view expressed by the Commission itself, and does not in any way pre-judge the outcome of the referral procedure.

(2) While the Form RS is generally transmitted to Member States on the date of its receipt, the memorandum generally either accompanies it or follows it a day or two later.
out the investigation, and so only cases which are obviously non-problematic should be considered ineligible for a referral request.

**Addressees/language of Article 4(4) decisions**

The Regulation is not explicit concerning who should be the addressee/s of decisions taken by the Commission pursuant to Article 4(4) (\(^{(1)}\)). Consequently, the Commission has adopted the practice of addressing the decision to both the Member State/s to which referral is being made and the party/parties which made the referral request. The official version of the decision/s should be drafted in the language of the Member State/s to which referral is being made. If the referral request was made in a different language, a translation into this language will normally accompany the official version of the decision.

**C. Article 4(5)**

**Procedure**

The procedure followed by the Commission in relation to requests lodged pursuant to Article 4(5) is for all intents and purposes identical to that which it follows in relation to Article 4(4) requests (see above for details).

However, requesting parties are in particular encouraged by the Commission to make a thorough research before filing, if necessary by taking direct contact with the relevant national authorities, to ensure that the Form RS is accurate and complete as regards the Member States which it identifies as 'competent' to review the case in question.

**2 requests withdrawn**

During the reference period, of the total of 34 requests filed pursuant to Article 4(5), 2 of these requests were withdrawn. In one case, the Form RS had not yet been transmitted to Member States when the request was withdrawn. In both instances, the reason for the withdrawal was the non-fulfilment of the condition precedent for requests pursuant to Article 4(5), namely that the case should be reviewable in 3 or more Member States (\(^{(2)}\)).

**2 requests vetoed**

During the reference period, 2 of the requests filed pursuant to Article 4(5) resulted in Member State 'vetoes', as provided for in the 3rd sub-paragraph of Article 4(5). In one case, the vetoing Member State felt that there were not sufficient reasons to justify the referral of the case: neither a European-wide market nor a series of national markets were in its view affected. In the other case, the vetoing Member State felt that the competitive and economic focus of the transaction lay entirely within its own territory, i.e. that the overlap in terms of market share was essentially limited to that country and that, despite the parties' contention to the contrary, the market should be regarded as being national in scope (\(^{(3)}\)).

**Nature of cases referred**

The remaining 30 requests filed pursuant to Article 4(5) during the reference period resulted in the concentrations concerned automatically acquiring a 'Community dimension'. 2 of the cases referred were still pending at the time when this article was being written.

3 of the referrals resulted in a decision adopted in application of Article 6(1)(b) and Article 6(2) of the Merger Regulation (clearance with commitments): M.3465 Syngenta/Advanta; M.3570 Piaggio/Aprilia; and M.3692 Reuters/Telerate. In M.3465, multiple national markets were impacted by the transaction and the commitment obtained was EU-wide in scope (the divestment of one of the merging parties' European business, i.e. the 'overlap'); in M.3570, multiple national markets were impacted by the transaction, although the commitment obtained was confined to the Italian market (the only one in which competition concerns were identified); in M.3692, the scope of the relevant geographic market was left open in the decision, but the decision makes it clear that it was probably Europe-wide or world-wide in scope, and the commitment obtained was worldwide in coverage.

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(\(^{(1)}\)) There is an apparent discrepancy between what is said in the Case Referral Notice (para. 79, i.e. that the undertakings should be the addressees, with copy to the Member State concerned), and the somewhat ambiguous wording of Article 4(4), 4th sub-para., 2nd sentence («The Commission shall inform the other MS and the persons or undertakings concerned of its decisions» (emphasis added); this seems to imply that the Member State concerned should be the addressee).

(\(^{(2)}\)) In one of the two cases, the requesting parties belatedly came to the realisation that the operation was not reviewable in a Member State they had originally identified as competent; in the other, following informal contacts with a national authority, the requesting parties belatedly came to the realisation that the operation was not reviewable in that Member State.

(\(^{(3)}\)) The vetoing Member State in that case was, moreover, of the view that the requesting parties had provided inadequate information in Form RS.
The remaining 25 cases resulted in clearances pursuant to Article 6(1)(b); 10 of these 25 decisions were adopted in conformity with the simplified procedure \(^{(1)}\). In all but one (M.3582) of these 25 cases, at least some of the markets impacted by the transaction were wider than national; in many of these cases, however, the definition of the relevant geographic markets was ultimately left open (i.e. the precise scope of the market is left undefined), as is common practice in Commission decisions adopted pursuant to Article 6(1)(b) \(^{(2)}\). In M.3582, while the definition of the relevant geographic market was ultimately left open, it seemed likely that multiple national markets were impacted by the transaction; these markets were characterised by common brands and by centralised manufacturing and distribution.

**Impact on multi-jurisdictional filing requirements in the EU/EEA**

Based on the number of Member States which the requesting parties identified in Form RS as being the ones in which these 30 proposed transactions would have otherwise been reviewable, it can be concluded that 214 separate national reviews would have taken place, in lieu of the 30 Commission investigations. That amounts to an average of about 7 national filings for every Article 4(5) request.

**Article 4(5) and Article 7(3) derogation requests**

In one case, the parties requesting referral via Article 4(5) approached the Commission to explore the possibility of obtaining an Article 7(3) derogation from the ‘stand-still’ obligation. The Commission indicated that this would not be possible. Indeed, while Article 7 does not specify that a merger must have a Community dimension for it to be eligible for a derogation, it is submitted that it is clearly implicit that it should.

\[\text{See the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004; OJ C 56. 5.3.2005, p. 32. In some instances, it was apparent from the outset that the case was unlikely to give rise to competition concerns, and the Commission signalled this in the Note to Member States accompanying the transmission of Form RS; in such cases, the rationale for resorting to the Article 4(5) procedure is generally to avoid the burden of multiple national filings.}\]

\[\text{Market definitions (in terms of product or geographic scope) can be left open (i.e. the precise scope of the market can be left undefined), when competition concerns would not arise on the basis of all reasonably plausible alternative market definitions.}\]

**D. Article 9**

**Nature of cases referred**

During the reference period, the Commission acceded to 2 referral requests pursuant to Article 9(2)(a) and 2 referral requests pursuant to Article 9(2)(b). One request to the Commission pursuant to Article 9(2)(a) was deemed to have been withdrawn.

The referrals made pursuant to Article 9(2)(a) consisted of referrals to Spain (M. 3275) and Germany (M.3674). In both instances, the affected markets were exclusively in the referring Member States, and the whole case was thus referred. Moreover, in both instances, the affected markets were no wider than national.

The referrals made pursuant to Article 9(2)(b) consisted of referrals to the UK (M. 3669) and Germany (M.3754). In the former case, the affected markets were exclusively located in the UK, and so the whole case was referred \(^{(3)}\); in the latter case, only a partial referral was made. In both instances, the Commission concluded that the markets referred were ‘non-substantial parts of the common market’; in the former case, the markets referred were for local care-home services in the UK, and in the latter case the referred market concerned the supply of asphalt mix in Hamburg.

A request by Germany for the Commission to refer case M.3178 Bertelsmann/Springer pursuant to Article 9(2)(a) was deemed to have been withdrawn by the Member State in question pursuant to Article 9(5), when it failed to issue ‘a reminder’ to the Commission before the 65 working day deadline provided for in that sub-paragraph had elapsed. The Commission had expressed the view to the Member State in question that some of the product markets affected by the operation were wider than national in scope.

**E. Article 22**

**Nature of case referred**

Only one referral request was made pursuant to Article 22 during the reference period: M.3796 Omya/Huber. This was a joint request, initiated by Finland, and subsequently joined by Sweden, Austria and France. The Commission accepted the joint request and requested a notification on Form CO of the merging parties; the case was still pend-
ing when this article was being written. The referral request pointed out that the operation appears to affect markets which are wider than national in scope.

Requests by 'non-competent' Member States

The Commission accepted the joint request in M.3796 notwithstanding the fact that the case apparently fell outside of the scope of the merger control laws in 2 of the referring Member States. This is consistent with the Commission's interpretation of Article 22(1) and (2) (1), as explained at para. 65 of the Commission Notice on Case Referral (2). The historical background to Article 22 is that it was intended to allow Member States without merger control legislation to request examination of a transaction (the 'Dutch clause'). This remains a legitimate rationale for requests under Article 22, and nowhere in the Article is there a reference to, or a distinction made between, Member States who are not competent to make a referral despite having merger control laws and Member States who are not competent to make a referral because they have no merger control law at all.

Deadlines for making or joining a request

During the reference period, the possibility of an Article 22 referral request being made by one or more Member States was moreover contemplated in relation to another proposed merger. Informal contacts took place involving the Commission and the relevant national authorities, but the Member States concerned ultimately decided not to make a referral request. One of the issues which arose in the course of these discussions concerned the deadlines for initiating or joining Article 22 referrals, and in particular the interpretation of the second sub-paragraph in Article 22(1) ('Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned').

The Commission takes the view that, for jurisdictions in which notification is voluntary (such as in the UK), this provision should be interpreted as meaning that where notification is sought by the national authority or contemplated by the merging/acquiring firm/s (despite not being mandatory), the 15 working days should run from the date of notification, thus putting these jurisdictions on an equal footing with those in which notification is mandatory. Where no notification is sought or contemplated, then it is submitted that 'made known' should be interpreted as implying sufficient information to enable a preliminary assessment to be made of the existence of the criteria set out in Article 22(1) (3).

One other issue relating to deadlines arose in the context of an informal consultation treated by the Commission services during the reference period, and that concerned the question of whether it is possible for a Member State to join a request, notwithstanding the fact it has itself been notified of the case for more than 15 working days. The Commission takes the view that this is possible under the Regulation; to conclude otherwise would significantly restrict the scope of referrals under Article 22, by making it difficult to have a request joined by many Member States unless the requesting Member State is one of the first to be notified by the merging parties. It is submitted, however, that it would be difficult for a Member State to join a request if the case had already been cleared under its national law.

F. Logistical issues

The Commission is generally satisfied with the practical arrangements which are now in place for the transmission of documents under Articles 4, 9 and 22. It should in particular be noted that the Commission actively encourages requesting parties to file Form RS in electronic form (4). When the Commission receives a Form RS in this format, it normally sends the request through to the 25 Member States within a few hours.

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(1) Article 22(1) allows Member States requesting examination of «any» concentration meeting the 2 substantive criteria in Article 22(1); Article 22(2) allows «any other» Member State to join the initial request; Article 22(3) sets out the 2 criteria which must be fulfilled before the Commission may accept/refuse to take the case from all those requesting (including any joiners), and those criteria (which are the same as those in 22.1) do not include the need for the requesting Member States to be themselves competent to review the case.

(2) Para. 65 of the Case Referral Notice clearly implies that Member States which are not competent under their national merger control laws may request the examination of a concentration, or join a request, under Article 22. If that were not the intention, a reference to Article 22 would have been added in the second sentence of that paragraph.

(3) See para. 50 of the Case Referral Notice, at footnote 44.

(4) If the Form RS is filed in electronic form, the Form RS on the CD Rom does not have to be signed (The Merger Registry endeavours to send the least voluminous version of any document, and scanned documents tend to be voluminous). The Merger Registry will accept such unsigned forms if the original has been signed and sent to the Commission; the Registry will then certify to the Member States that the Commission is in possession of a signed original.