Merger Referrals under the EU Merger Regulation

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The transaction referral provisions in articles 4(4), 4(5), 9 and 22 of Council Regulation (EC) No. 139/2004 (the EUMR) are unique to EU merger control and distinguish the EUMR from other merger control systems. Giving EU member state authorities and, since May 2004, merging parties the ability to reallocate jurisdiction helps to ensure that merger transactions are reviewed by the best placed authority in the EU to conduct the review. The resulting flexibility reduces the risk of sub-optimal jurisdictional allocation that can result from exclusivity of jurisdiction under article 21(3) EUMR combined with thresholds that look only to the merging parties' group-wide turnover.

The EUMR legal framework provides for post-notification referral at the initiative of member states' authorities, possibly following a request from the Commission (in articles 9 and 22), and pre-notification referral at the initiative of merging parties (in articles 4(4) and 4(5)). Helpful guidance on how these provisions are applied is set out in the Commission's Notice on Case Referral in respect of Concentrations (the Referral Notice) and in the European Competition Authorities Principles on the application by national competition authorities in the ECA of articles 4(5) and 22 of the EC Merger Regulation (the ECA Referral Principles). The present chapter presents an overview of how the referral mechanisms operate and comments on whether they achieve their objective or merit reform.

Referral at the initiative of member states' authorities

Since the entry into force of the first Merger Regulation (Council Regulation (EC) No. 4064/89) on 21 September 1990, the EU merger control framework has provided for post-notification referral of concentrations at the initiative of member states authorities. Concentrations that meet the Community dimension thresholds in article 1 EUMR can be referred to member state authorities, in whole or in part, under article 9 EUMR. Concentrations that do not have a Community dimension but have cross-border effects can be referred by the member states' authorities to the Commission under article 22 EUMR. The Commission has discretion to accept or refuse both types of referral. In 2004, the Commission was given the explicit power to invite member states to make referral requests under articles 9[1] and 22.[2]

Referral under article 9 EUMR: large transactions with localised competitive effects

To date, there have been ninety-one referral requests under article 9, leading to thirty-seven full referrals and thirty-nine partial referrals.[3] In the first six months of 2010, there were five article 9 requests, which may suggest that referral under article 9 is becoming more frequent given that only three article 9 requests were made in 2009, five in 2008 and three in 2007.

Circumstances in which article 9 applies

Article 9 entitles member states to claw-back jurisdiction over transactions that meet the Community dimension thresholds and:

- threaten to affect competition significantly in a market in the requesting member state which has the characteristics of a distinct market (ie, is no broader than national in scope); or
- affect competition in a market in the requesting member state which has the characteristics of a distinct market and which does not constitute a substantial part of the EU.[4]

Procedure

To trigger the article 9 referral procedure, a member state must submit its referral request to the Commission within fifteen working days after the transaction was notified to the Commission.[5] The article 9 procedure cannot be started until the transaction has been notified to the Commission. However, it is open to the Commission and member states to discuss prior to notification whether a given transaction should be referred under article 9 provided that such discussions do not breach the Commission's confidentiality obligations under article 17 of the EUMR and article 18 of Commission Regulation (EC) No. 802/2004 or the Commission officials' confidentiality obligations under article 339 of the Treaty on the Functioning of the European Union. If a referral request is made under article 9, the Commission must decide whether or not to make the referral within thirty-five working days after notification of the transaction or, if the Commission initiates a phase II investigation, within sixty-five working days after notification of the transaction. If the referral request has been made on the ground that the concentration affects competition in a market that is not a significant part of the EU (second point above), the Commission must make the referral. In all other referral requests under article 9, the Commission has regard to three guiding principles when determining whether or not to make the referral:

- More appropriate authority. Referral should be made only if the authority to which it is made is the more appropriate authority to review the concentration.
- One-stop-shop. Regard should be had to the value of one-stop-shop review and fragmentation of reviews should, therefore, be avoided where possible.
- Legal certainty. Given the importance of legal certainty regarding jurisdiction over mergers, departure from the original jurisdiction should occur only if there are compelling reasons.[6]

Although the Commission has regard to these guiding principles, it nevertheless has broad discretion to accept or refuse requests for referral under article 9 EUMR. Its decisions under article 9 are subject to review by the General Court and Court of Justice.[7]

Referral under article 22 EUMR: smaller transactions with cross-border competitive effects

Article 22 of the EUMR, originally known as the Dutch clause, was included in the predecessor to the EUMR to give member states that did not have national merger control laws a legal basis to ensure that potentially anti-competitive mergers were reviewed.

Article 22 entitles member states to request the referral of concentrations to the Commission that do not meet the Community dimension thresholds but which:

- affect trade between EU member states; and
- threaten to significantly affect competition within the territory of the requesting member state.

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In practice, this is a relatively easy test to meet. Any merger involving an undertaking that supplies goods or services cross border will have an actual or potential effect on trade between EU member states. To meet the second limb of the test, an authority has to provide only prima facie evidence of a significant adverse effect on competition within its territory.[8]

Procedure

A member state competition authority wishing to refer a transaction under article 22 must submit its request for referral to the Commission within fifteen working days from the date on which the transaction was notified to it or, in the absence of notification, within fifteen working days from the date on which the transaction was made known to it. The making of a request under article 22 automatically suspends all time limits that are running under national merger control laws in the EU member states, thereby freezing any pending reviews of the transaction by member state authorities until the Commission has decided where the transaction is to be reviewed.

The member states' competition authorities have stated in the ECA Referral Principles that to determine whether a transaction is a suitable candidate for referral under article 22 they have regard to the following factors:

- whether the relevant affected markets are broader than national and whether the main competitive impact of the transaction is linked to such markets;
- whether they expect difficulties in information gathering because the parties or main third parties from whom they are likely to seek information are not based in their member state; and
- whether there are particularly significant competition concerns in a number of national (or smaller) markets and whether they expect problems in identifying and/or enforcing suitable remedies, should that prove necessary, in particular when suitable remedies could not be secured under their national laws or through co-operation with other EU competition authorities.[9]

Following receipt of a referral request under article 22, the Commission must inform all member states and the parties to the transaction that it has received the request. Other member states wishing to join the request must do so within fifteen working days.[10] The Commission must, by the tenth working day after the expiration of the fifteen-working day period, decide whether or not to accept jurisdiction over the transaction. As indicated above, the Commission has the power to invite member states to request referral under article 22.

The making of a referral request under article 22 can add significant delay to the antitrust clearance timetable, particularly if, following referral, the Commission opens a phase II investigation.[11] For example, approval of the acquisition by Associated British Foods plc (ABF) of certain yeast businesses from GBI Holding BV (COMP/M. 4980 *ABF/GBI Business*) took nearly eleven months.[12] Even if the Commission clears the referred transaction at the end of a phase I investigation, the process takes longer than a phase I review conducted by the national authorities. For example, it took approximately four months from the time the first referral request was made for the Commission to grant phase I approval of Proctor & Gamble's acquisition of Sara Lee's Air Care business.[13] Given the implications for timing, parties negotiating transactions that could be candidates for referral under article 22 should bear in mind that although the EUMR thresholds are not met, the transaction may, at the behest of a national competition authority (perhaps following invitation from the Commission or a complaint from a third party) be reviewed by the Commission.[14] Accordingly, they should take account of that possibility when negotiating the conditions precedent to closing and the transaction drop-dead date.

Referral at the initiative of the merging parties

The introduction of procedures to allow merging parties to request reallocation of jurisdiction was one of the major innovations in the current EUMR. Referral from the Commission to member states (article 4(4) EUMR) has been considerably less frequent than referral from the member states to the Commission (article 4(5) EUMR). To date, there have been fifty-five applications under article 4(4) for referral from the Commission to member states authorities and one hundred and ninety-seven applications under article 4(5) for referral from member states to the Commission. Although the procedural aspects of articles 4(4) and 4(5) could be made less burdensome (see the concluding remarks to this chapter), the extensive use that has been made of these referral mechanisms confirms that they serve a worthwhile purpose in EU merger control.

Referral under article 4(4) EUMR: large transactions with localised competitive effects

Under article 4(4) EUMR, merging parties can request the Commission, at the pre-notification stage, to cede jurisdiction over concentrations that meet the Community dimension thresholds but may significantly affect competition in a distinct market in a member state. To trigger the procedure, the notifying party must file a reasoned submission (using Form RS) with the Commission. The reasoned submission must set out in detail the basis on which the parties believe that the transaction will significantly affect competition in a distinct market in the relevant member state and why the authorities in that state would be better placed than the Commission to review the transaction. The Commission sends a copy of the reasoned submission to all member states. The member state to which referral is sought has fifteen working days from receipt of the reasoned submission to accept or refuse the referral. If the member state accepts the referral and the Commission concludes that the transaction fulfils the conditions for referral, the Commission may (at its discretion) refer all or part of the review of the transaction to the member state. The Commission has twenty-five working days from receipt the parties' reasoned submission to decide whether or not to grant the referral.[15]

One of the drawbacks of using article 4(4) is that it requires merging parties to put forward arguments and evidence on why their transaction may significantly affect competition in the member state to which referral is sought. While it is not a requirement for merging parties to demonstrate that the transaction will affect competition adversely,[16] putting forward arguments as to why a transaction will affect competition, as opposed to being neutral to competition, is not a position that businesses (or their legal advisers) always find comfortable. One of the advantages of using the article 4(4) procedure can be to pre-empt a request by the member state for referral under article 9 EUMR. Used in that way, article 4(4) can overcome uncertainty regarding the risk of article 9 referral by ensuring that jurisdiction is settled between the Commission and national authorities before the transaction is formally notified. Another potential advantage of using article 4(4) is that, in certain circumstances, it may enable UK-centric transactions to close sooner than if the transaction remained subject to the EUMR suspensory obligation. As the merger provisions of the UK's Enterprise Act 2002 do not preclude closing of a transaction prior to the conclusion of review by the Office of Fair Trading or Competition Commission, transferring jurisdiction

over a UK-centric transaction from the Commission to the UK authorities can remove a legal impediment to closing. Whether such a strategy would be worthwhile in a given situation requires careful thought. The UK authorities would be likely to require the merging parties to give interim undertakings to prevent integration of the target with the acquirer until they have completed their review (although such undertakings would not prevent completion of the sale to the acquirer of the shares in, or assets of, the target). Careful consideration is also required to determine whether the additional time added to the review timetable through use of the article 4(4) procedure would make the strategy ineffective to accelerate closing of the transaction.

Referral under article 4(5) EUMR: one-stop shop for smaller transactions that meet multiple national thresholds

The referral mechanism in article 4(5) EUMR enables transactions between undertakings whose turnover does not meet the EUMR thresholds but is sufficiently large to meet the review thresholds in multiple member states to be reviewed by the Commission on a one-stop-shop basis. Article 4(5) was introduced into the EUMR as an alternative to the more politically sensitive solution to the multiple notification problem, namely reducing the thresholds set out in article 1(2) and 1(3) EUMR.

Article 4(5) applies only with respect to concentrations that are eligible for review under the national merger review laws of at least three EU member states. Merging parties trigger the procedure by filing a reasoned submission (on Form RS) with the Commission. The reasoned submission must set out the reasons why the merging parties believe it appropriate for the Commission, and not the relevant national authorities, to review the transaction. The Commission sends a copy of the reasoned submission to every member state, which triggers a non-opposition period of 15 working days. If within the 15 working-day period, no member state objects, jurisdiction over the transaction is transferred to the Commission by operation of law. If any member state objects within the 15-working day period, jurisdiction remains with the relevant member states. Unlike referrals under article 4(4), article 9 (unless the affected market is so small as not to be a significant part of the EU) and article 22, the article 4(5) procedure gives member states, not the Commission, the power to decide on the transfer of jurisdiction. In view of the member states' broad power to veto reallocation of jurisdiction to the Commission, it is highly advisable for merging parties contemplating using article 4(5) to make early contact with the competition authorities in member states that may have an interest in the transaction. The purpose of such contact is to enable the parties to explain why they believe the Commission would be the best placed authority to review the transaction and to try to obtain a sense of whether those member states may veto the transfer of jurisdiction.[17]

Article 4(5) can be used for all concentrations that do not meet the EUMR thresholds but are capable of review in at least three member states, regardless of the level of substantive antitrust difficulty that the transaction may pose. The article 4(5) procedure has been used for cases that are so straight forward as to benefit from the Commission's simplified review procedure as well as for transactions that require complex substantive analysis.[18]

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Overall, the EUMR jurisdictional reallocation provisions provide welcome flexibility for merging parties, the Commission and member state authorities. The Commission highlighted in its report in June 2009 on the functioning of the EUMR, that the pre-notification referral provisions in articles 4(4) and 4(5) have considerably enhanced the efficiency jurisdictional flexibility of merger control in the EU.[19] However, beneficial as the provisions may be, it is clear that article 4(5) does not capture a significant number of multiple-filing transactions that would benefit from one-stop-shop treatment by the Commission.[20] A possible explanation for this leakage is that the attractiveness of reallocation under article 4(5) (as well as under article 4(4)) is being undermined by the cumbersome and protracted procedural aspects of those mechanisms. The preparation of a reasoned submission (Form RS) is a burdensome exercise and calls for market definitions and analysis in largely the same level of detail as a full Form CO. All but the simplest cases require pre-notification of the draft Form RS with the Commission and, in most cases, a parallel dialogue is required with relevant member state authorities. The additional time required under article 4(4) for the Commission to decide whether to take jurisdiction (25 working days) and under article 4(5) for member states to object to the transfer of jurisdiction (15 working days) could be shortened. Although the post-notification referral provisions in article 22 EUMR have been part of the EU merger control since its very beginning, the utility of that mechanism now appears to be questionable. Inevitably, referral under article 22 adds delay and cost to the merger control process, which is not welcome news for merging parties. A possible solution to ensure that more transactions with cross border effects are reviewed by the Commission while adding to procedural predictability would be for the EUMR to provide for automatic referral to the Commission of transactions that meet the pre-merger review thresholds in at least three member states. Making this change would also remove much of the need for the article 22 referral mechanism and could justify its deletion from the EUMR.

Notes

1 Article 9(2) provides that a member state may request referral on its own initiative or upon the invitation of the Commission.

2 Article 22(5) EUMR.

3 All statistics in this chapter are taken from DG Competition's website: http://ec.europa.eu/competition/mergers/statistics.pdf

4 Article 9(2) EUMR.

5 The Commission sends a copy of every notification it receives under the EUMR to each of the 27 member states.

6 Referral Notice, paragraphs 8-14.

7 See cases T119/02 – *Royal Philips Electronics Commission* and T346/02 and T347/02 – *Cableuropa and Others v Commission*. In both, the General Court upheld the Commission's decisions on article 9 referral. In the pending case T-224/10 – *Association Belge des Consommateurs Tests – Achats v Commission*, the applicant is seeking, among other things, annulment of the Commission's decision not to refer the Belgian aspects of the EDF/Segebel transaction to the Belgian competition authority.

8 See, for example the UK Office of Fair Trading's article 22 request in relation to Proctor & Gamble's acquisition or Sara Lee Air Care, available at www.oft.gov.uk/shared-oft/mergers-ea02/2010/proctor-gamble-ar22.pdf

9 ECA Referral Principles, paragraph 19.

10 Nothing in article 22 itself, or in its underlying purpose, suggests that only member states that have jurisdiction under their national merger control laws to review a transaction can request referral of the transaction under article 22 or join a request made by other member states under article 22. The Commission takes the clear view that member states can make or join article 22 referrals regardless of whether the transaction meets their national review thresholds (See Commission Staff Working Paper accompanying the Commission Report on the functioning of Regulation

No. 139/2004, 18 June 2009, at paragraph 144). The French competition authorities take the same view and joined the referral of Omya AG's acquisition of JM Huber Corporation under article 22 notwithstanding that the transaction did not meet the French merger review thresholds (COMP/M. 3796 – *Omya/JM Huber*).

11 Once a request has been made under article 22, the parties must freeze the implementation of the transaction until the requisite approvals have been granted (article 22(4) EUMR).

12 The Spanish authority made a referral request under article 22 on 7 November 2007, which was joined by the Portuguese and French authorities on, respectively, 28 and 29 November 2007. The Commission accepted the referral requests on 13 December 2007. ABF formally notified the transaction to the Commission on 22 February 2008. The Commission opened a phase II investigation on 16 April 2008 and granted clearance (subject to conditions) on 23 September 2008.

13 The Bundeskartellant made the initial referral request in February 2010. Six member states (Belgium, Spain, Portugal, Hungary and the UK) joined the referral. The Commission approved the transaction unconditionally on 17 June 2010.

14 The referral could occur after certain member state authorities have granted approval of the transaction or even after the transaction has closed. For example, the transaction in COMP/M. 4465 – *Thrane & Thrane/Nera* was referred (by the UK Office of Fair Trading) under article 22 because of a third party complaint. The referral and the ensuing investigation by the Commission occurred after the transaction had closed.

15 To date, the Commission has not refused any referrals requested under article 4(4).

15 Recital 16 of the EUMR.

17 The ECA Referral Principles highlight the value of pre-referral contacts but indicate that member state authorities will not decide whether to accept or veto a referral request under article 4(5) until they have reviewed the parties' reasoned submission.

18 For example, COMP/M.4854 – *TomTom/Tele Atlas* and COMP/M.4942 – *Nokia/Navteq*, the Commission's seminal cases on vertical concerns were referred to the Commission under article 4(5) EUMR.

19 Communication from the Commission to the Council: Report on the Functioning of Regulation No. 139/2004 (18 June 2009), paragraph 17.

20 The report cited in footnote 19 above states (at paragraph 12) that in 2007 there were at least 100 transactions that were notifiable in three of more member states, necessitating more than 360 parallel investigations by the national competition authorities.

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