

Merger Referrals under the EU Merger Regulation

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Introduction

The merger referral provisions in Council Regulation (EC) No. 139/2004 (the EUMR) have become a well established feature of European merger control. For the most part, they are considered to be successful in ensuring that merger transactions are reviewed by the best-placed competition authorities, although calls for procedural simplification and shortening of the referral time frames are a recurring theme.

It will be recalled that the EUMR provides for pre-notification referrals at the initiative of the merging parties, and post-notification referrals at the initiative of the European Commission (the Commission) and national authorities. The EUMR gives merging parties the right to request a pre-notification referral in two types of situation:

- article 4(4) of the EUMR, which provides for the referral of transactions from the Commission to the member states' authorities; and
- article 4(5) of the EUMR, which provides for the referral of transactions from the member states to the Commission.

Referrals to the member states by the Commission under article 4(4) occur far less frequently than referrals to the Commission pursuant to article 4(5). As of 30 June 2012, there have been 78 applications under article 4(4), and 236 applications under article 4(5). However, as described below, there currently seems to be a resurgence in referrals under article 4(4).

Post notification referrals can occur pursuant to articles 9 and 22 of the EUMR.

Under article 9 of the EUMR, transactions that meet the EU dimension thresholds in article 1 of the EUMR can be referred to member state authorities, in whole or in part. As of 30 June 2012, there have been 101 referral requests under article 9, leading to 41 full referrals and 42 partial referrals.¹

Under article 22 of the EUMR, transactions that do not have an EU dimension but have cross-border effects can be referred by the member states' authorities to the Commission. As of 30 June 2012, there have been 27 article 22 requests and only three cases where the Commission refused the request, pursuant to article 22(3).²

The Commission has the discretion to accept or refuse both types of referral. In 2004, the Commission was given the explicit power to request member states to make referral requests under articles 9³ and 22.⁴

This chapter will focus on some recent developments in the use of article 4(4) and article 22, which may contain useful lessons for companies seeking greater predictability in their transaction planning.

Article 4(4): recent developments

Article 4(4) allows notifying parties to request the referral of a concentration with an EU dimension, which would otherwise be within the Commission's jurisdiction, to the competent authority of a member state. When making such a request, notifying parties must show both that the concentration could significantly affect competition in a market within the member state to which referral is being

requested, and that this market presents all the characteristics of a distinct market.

The request can be for partial referral or full referral. Partial referrals are rare; of the 71 article 4(4) referral decisions taken by the Commission as of 30 June 2012, only two were for a partial referral. Given that a partial referral will split jurisdiction between the competition authority of the member state (which would review the referred part of the concentration within its territory) and the Commission (which would review the remainder of the concentration within the EEA), it is inconsistent with the 'one-stop-shop' principle that underpins the rules on jurisdiction in the EUMR. For that reason, it is not surprising that partial referrals have occurred so infrequently under article 4(4).

From a practical perspective, article 4(4) referrals are most opportune for transactions that raise prima facie concerns in a single member state, or where the national competition authority has in the past expressed an interest in, or has significant merger enforcement experience in the markets. In such situations, there is a risk that the member state will request a referral of the concentration to its competition authority pursuant to article 9(2) of the EUMR. Referral under article 4(4) can be used to pre-empt referral under article 9(2), thereby avoiding wasted effort of preparing an unnecessary Form CO notification and the delay and uncertainty in establishing jurisdiction.

Procedure

In order to request a referral under article 4(4), notifying parties must make a reasoned submission to the Commission showing that the concentration could significantly affect competition in a market within this member state, and that this market presents all the characteristics of a distinct market. The Commission must transmit this submission to the member states without undue delay. The member state to which referral is being requested has 15 working days to agree or disagree with the referral request, failing which the member state is deemed to have agreed to the referral request. The Commission must decide whether or not to refer the concentration within 25 working days as of receiving the reasoned submission. Unless the member state to which referral is being requested disagrees with the referral (in which case the concentration will not be referred), the Commission has discretion over whether to make the referral, provided that it agrees with the notifying parties that competition in a distinct market within the member state in question may be significantly affected by the concentration. If the Commission does not make a decision within the 25 working day deadline, it is deemed to have made the referral as requested by the notifying party or parties.

Article 4(4) referral requests have recently become more frequent. After only six such requests in 2010 and 10 in 2011, the Commission has already received 11 article 4(4) requests in the first six months of 2012.

Resurgence of article 4(4) referrals

The following table shows the article 4(4) referral decisions since 1 January 2011.

Article 4(4) referral decisions since 1 January 2011

| Case No. | Parties | Authority to which the transaction was referred | Decision/Date | Sector | National Decision |
|-------------|---|---|------------------------------------|--|--|
| COMP/M.6094 | HTM Group/Media Concorde SNC | Autorité de la concurrence (France) | Full referral/ 24 January 2011 | Retail sale of household appliances and consumer electronics | Conditional clearance, 10 June 2011 |
| COMP/M.6131 | Advent/Priory | Office of Fair Trading (UK) | Full referral/ 21 February 2011 | Care homes | Unconditional clearance, 19 April 2011 |
| COMP/M.6143 | Princes/Premier Foods Canned Grocery Operations | Office of Fair Trading (UK) | Full referral/ 5 April 2011 | Food | Undertakings in lieu of reference to Competition Commission, 22 June 2011 |
| COMP/M.6146 | Xella/H+H | Bundeskartellamt (Germany) | Partial referral/ 1 March 2011 | Building materials | Prohibition, 12 March 2012 |
| COMP/M.6153 | Anglo American/Lafarge/JV | Office of Fair Trading (UK) | Full referral/ 16 May 2011 | Supply of construction materials | Reference to Competition Commission, 2 November 2011; conditional clearance, 1 May 2012 |
| COMP/M.5154 | Carlyle/Palamon/IDH | Office of Fair Trading (UK) | Full referral/ 22 March 2011 | Dental practices | Undertakings in lieu of reference to Competition Commission, 10 June 2011 |
| COMP/M.6179 | Alpha Flight/LSG Sky Chefs/JV | Office of Fair Trading (UK) | Full referral/ 19 July 2011 | In-flight catering services | Reference to Competition Commission, 10 October 2011; unconditional clearance, 14 March 2012 |
| COMP/M.6294 | Shell/Rontec Investments | Office of Fair Trading (UK) | Full referral/ 1 August 2011 | Petrol stations | Undertakings in lieu of reference to Competition Commission, 3 February 2012 |
| COMP/M.6359 | Saint-Gobain/Build Center | Office of Fair Trading (UK) | Full referral/ 27 October 2011 | Wholesale distribution of building materials | Undertakings in lieu of reference to Competition Commission, 17 April 2012 |
| COMP/M.6379 | Saint-Gobain/Brossette | Autorité de la concurrence (France) | Full referral/ 10 November 2011 | Distribution of construction and plumbing materials | Conditional clearance, 23 March 2012 |
| COMP/M.6428 | Helios/Damp | Bundeskartellamt (Germany) | Full referral/ 23 February 2012 | Hospitals | Unconditional clearance, 5 March 2012 |
| COMP/M.6488 | Carrefour/Guyenne et Gascogne | Autorité de la concurrence (France) | Full referral/ 16 March 2012 | Distribution of consumer goods | Unconditional clearance, 9 May 2012 |
| COMP/M.6457 | Antena 3/La Sexta | Comisión Nacional de la Competencia (Spain) | Full referral/ 14 March 2012 | Free-to-air TV/TV advertising in Spain | Phase 2 investigation opened, 21 March 2012 (ongoing at the time of writing) |

As can be seen, the referred transactions affected a variety of different economic sectors. The two referrals to the Bundeskartellamt appear to have been made in order to preempt referral requests by the Bundeskartellamt under article 9 given the Bundeskartellamt's prior practice in relation to the sectors concerned. Specifically, the Bundeskartellamt had previously looked into the building materials sector and had requested referral under article 9 of two prior mergers in that sector: *Haniel/Fels* and *Haniel/Ytong*.⁵ Mergers in the other relevant sector (health care), in particular between companies that operate hospitals, have been an important focus of the Bundeskartellamt's recent enforcement activities.⁶ It will be interesting to see whether merging parties' increased liking for article 4(4) is sustained over a longer period of time.

Article 22: recent developments

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. However, the Netherlands (like most other member states that did not have domestic merger control laws when the original EU Merger Regulation took effect), now has a well established domestic competition regime with extensive merger review powers. The only EU member

state that still does not have a merger control regime is Luxembourg, which, to date, has never invoked article 22.

Article 22 entitles member states to refer concentrations to the Commission that do not meet the EU dimension thresholds, but which:

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

In practice, this is a relatively easy test to satisfy. Any merger transaction 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.⁷

Procedure

There is no doubt that referral under article 22 adds significant delay to the merger review process. A member state competition authority wishing to refer a transaction under article 22 must submit its request for referral to the Commission within 15 working days from the date on which the transaction was notified to it or, in the absence of notification, within 15 working days of the date on which the transaction is '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 made a decision on where the transaction is to be reviewed. In addition, the making of an article 22 request triggers a suspensory obligation with respect to implementation of the transaction (insofar as it has not already been implemented).

Following receipt of a request for referral 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 15 working days.⁸ The Commission must, by the tenth working day after the expiration of the 15-working day period, decide whether or not to accept jurisdiction over the transaction at issue. As indicated above, the Commission has the power to invite member states to request referral under article 22.

In practice, these time periods are not as firm as they appear. Consequently, the article 22 referral process can take significantly longer than a literal reading of article 22 would suggest. The scope for a protracted referral is well illustrated by the recent *Syngenta/Monsanto Sunflower Seed* case.⁹ Syngenta notified the transaction to the National Competition Commission (CNC) on 19 August 2009. However, the CNC did not make a referral request under article 22 until 1 October 2009, more than 15 working days after it received Syngenta's notification of the transaction. The CNC, following notification, suspended the running of the Spanish domestic time limits twice – namely, from 31 August until 11 September and from 18 September until 30 September – in order to gather additional information from the parties to assess whether a referral was justified. The Commission states in its article 22 decision relating to the transaction that it considers that a suspension of national time limits to enable a national authority to obtain information necessary to decide on whether to make an article 22 request suspends the 15-working-day period laid down in article 22.¹⁰ On that basis, the CNC's request for referral was made on the thirteenth working day from the date of notification, and thus within the 15 working-day period. It is legally debatable whether the clear time periods set out in the EUMR for the making of an article 22 request can be extended in this way. The time periods were inserted into the EUMR in 2004 in order to give merging parties greater legal certainty on timing of the article 22 procedure.¹¹ Neither the EUMR itself nor the Commission's notice on case referral in respect of concentrations state, or imply, that there is scope to extend the 15-working-day period in relation to transactions that have been notified to the referring authority. In addition, as the legal test to make an article 22 request is easily met, there would seem to be little practical need to give the national authorities additional time to gather the relevant information. In spite of these factors, the Commission's position is clear, and is likely to remain unchanged unless the General Court or Court of Justice rule that it is legally incorrect.

If, following referral under article 22, the Commission opens a Phase II investigation, significant delay is added to the antitrust clearance timetable.¹² 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 11 months.¹³ Similarly, the approval of the acquisition by P H Glatfelter Company of a UK production facility of J R Crompton Ltd (in administration) took nine months (COMP/M. 4215 – *Glatfelter/Crompton Assets*).¹⁴ In the case of Arsenal Capital Partners' acquisi-

tion of chemical company DSM Special Products, the whole process took 10 months (COMP/M. 5153 – *Arsenal/DSP*).¹⁵

Even if the Commission clears the referred transaction at the end of a Phase I investigation, the process takes materially longer than a Phase I review conducted by the national authorities. For example, it took approximately four months from the first authority's referral request for the Commission to grant Phase I approval of Proctor & Gamble's acquisition of Sara Lee's Air Care business.¹⁶ The parties involved in the recent acquisition by Aditya Birla Group of the Columbian Chemicals Company underwent a similarly protracted process (COMP/M.6191 – *Birla Group/Columbian Chemicals*).¹⁷

In extreme cases, the delay can extend beyond one year. In June 2010, SC Johnson announced their plans to acquire the Sara Lee household insecticides business, extending the buyer's reach into the market for pest control (COMP/M.5969 – *SC Johnson/Sara Lee*). However, nearly one year later, in May 2011, the parties withdrew their notification after an extended Phase II review and the submission of remedies. This case also raises interesting questions regarding process and jurisdiction: the national competition authorities in Spain, France, Belgium, the Czech Republic and Greece all requested a joint referral to the Commission. However, of these, only the Spanish authority had jurisdiction over the transaction under its domestic merger control laws. The transaction fell below the applicable jurisdictional thresholds in the other referring member states. The Portuguese authority cleared the transaction subject to remedies in December 2010 after notification in June 2010.¹⁸ It is submitted that article 22 was not designed at the outset to be a form of 'catch all', whereby member states that have their own merger control regime can refer transactions to the Commission, even when they do not have jurisdiction over the transaction.

Given the potentially far reaching 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 an 'invitation' from the Commission or a complaint from a third party), be reviewed by the Commission.¹⁹ Accordingly, they should take account of that possibility when negotiating the conditions precedent to closing and the transaction drop-dead date.

Conclusions

Overall, the EUMR jurisdictional reallocation provisions provide welcome flexibility for merging parties, the Commission and member state authorities. The significantly increased use of article 4(4) was not predicted and cannot be explained by any obvious change in the legal or commercial environment.

Although the post-notification referral provisions in article 22 EUMR have been part of EU merger control since its very beginning, the need to retain those provisions now appears to be questionable, particularly given the scope for substantial delay and cost in an article 22 referral. The use of article 22 by member state authorities to refer transactions that fall below their own domestic jurisdictional thresholds could be seen as an unwelcome erosion of legal certainty for mergers that do not meet the EUMR jurisdictional thresholds.

Notes

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1. All statistics in this chapter are taken from DG Competition's website:

- <http://ec.europa.eu/competition/mergers/statistics.pdf>.
- 2 Case COMP/M.4124 – *Coca Cola Hellenic Bottling Company/Lanitis Bros*, 24 February 2006 and Case COMP/M.3986 – *Gas Natural/Endesa*, 15 November 2005. The request of the Hungarian Competition Office for the referral of the acquisition of Sara Lee’s air care unit by Procter & Gamble was also refused. However, the Commission accepted the requests of the competition authorities in Germany, Belgium, Spain, Portugal and the United Kingdom to refer this case. Please see Case COMP/M.5828 – *Procter & Gamble/Sara Lee Air Care*, 17 June 2010.
 - 3 Article 9(2) provides that a member state may request referral ‘on its own initiative or upon the invitation of the commission.’
 - 4 Article 22(5) provides as follows: ‘The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.’
 - 5 Case COMP/M.2495 – *Haniel/Fels*, 17 October 2001, and case COMP/M.2568 – *Haniel/Ytong*, 30 November 2001. Both mergers were eventually cleared subject to conditions by the Bundeskartellamt, see *Haniel/Fels*, B1-187/01, 26 March 2002, and *Haniel/Ytong*, B1-263/01, 26 March 2002. See also the Bundeskartellamt’s decision in *Nord-KS/Xella*, B1-116/04, 9 August 2006.
 - 6 See *Uni-Klinikum Freiburg/Herz-Zentrum Bad Krozingen*, B3-174/08, 8 January 2009; *Gesundheit Nordhessen/Gesundheitsholding Werra-Meißner-Kreis*, B3-215/08, 18 June 2009; *Klinikum Region Hannover/Landeskrankenhaus Wunstorf*, B3-587/06, 10 May 2007; *LBK/Mariahilf*, B3-6/07, 6 June 2007.
 - 7 See, for example, the OFT’s article 22 request in relation to Procter & Gamble’s acquisition of Sara Lee Air Care, available at www.oft.gov.uk/shared-oft/mergers-ea02/2010/procter-gamble-ar22.pdf.
 - 8 Nothing in article 22 itself 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 J M Huber Corporation under article 22, notwithstanding that the transaction did not meet the French merger review thresholds (COMP/M. 3796 – *Omya/JM Huber*).
 - 9 Case COMP/M.5675 – *Syngenta/Monsanto’s Sunflower Seed Business*, decision dated 12 November 2009.
 - 10 *Ibid*, paragraph 4.
 - 11 The original wording of article 22 in the 1989 version of the EUMR stated that ‘The request must be made within one month at most of the date on which the concentration was made known to the Member State or to all Member States making a joint request or effected.’ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.
 - 12 As indicated above, once a request has been made under article 22, the parties must freeze the implementation of the transaction until the Commission has granted approval (article 22(4) EUMR). The combination of article 22 referrals and Phase II reviews became particularly topical in late 2010 and early 2011: the Commission opened in-depth inquiries in Case COMP/M.5675 – *Syngenta/Monsanto’s Sunflower Seed Business* on 21 June 2010 (conditionally cleared on 17 November 2010), in COMP/M.5969 – *SC Johnson/Sara Lee* on 22 December 2010 (withdrawn by the parties in May 2011), and in Case COMP/M.6106 – *Caterpillar/MWM* on 5 May 2011 (unconditionally cleared on 19 October 2011).
 - 13 The CNC made a referral request 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.
 - 14 The Bundeskartellamt made a referral request on 4 April 2006, which was joined by the OFT on 2 May 2006. The Commission accepted the referral requests on 15 May 2006 and the parties formally notified the transaction on 16 August 2006. On 20 September 2006, the Commission opened a Phase II investigation. The transaction was cleared on 20 December 2006.
 - 15 The CNC made a referral request on 2 April 2008 and was joined by the Bundeskartellamt on 28 April 2008. The Commission accepted the referral on 16 May 2008 and received the notification from the parties on 17 June 2008. The Commission opened a Phase II investigation on 6 August 2008, issued its statement of objections on 7 October 2008 and cleared the transaction on 9 January 2009. This was subject to the divestment of

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Arsenal's whole liquid and solid benzoic acid production, as well as sodium benzoate production in the EEA.

- 16 The Bundeskartellamt 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.
- 17 The Bundeskartellamt made the initial referral request on 2 March 2011 and the OFT joined this request on 25 March 2011. The parties notified the transaction on 5 May 2011 and the Phase I clearance was granted on 15 June 2011.
- 18 The transaction was notified in Spain on 7 July 2010 and subsequently referred by the CNC to the Commission. On 18 and 23 August 2010, respectively, the Belgian and Greek authorities made referral requests. On 8 September 2010 the Commission stated that it had accepted the 'referral requests' of Belgium, Czech Republic, France, Greece, Italy and Spain and requested SC Johnson to notify the transaction. (Commission press release IP/10/1099).
- 19 The referral could occur after some 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 OFT) under article 22 because of a third-party complaint. The referral and the ensuing investigation by the Commission occurred after the transaction had closed.

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Mr Rodriguez is acknowledged as a leader in competition law in the *Chambers Global* and *Chambers UK* directories.