

Referrals under the new EC Merger Regulation

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The new EC Merger Regulation No. 139/2004 of 20 January 2004 ('ECMR') which came into force on 1 May 2004 did not significantly change the revenue thresholds for qualifying as a Community dimension concentration.¹ However, the position on jurisdiction under the ECMR has been transformed more subtly. First, the increase of the number of Member States from 15 to 25 automatically creates a larger catchment area for the applicable revenue thresholds, de facto lowering the thresholds. Second, the situations where cases may be referred to the European Commission or to Member States have been expanded. Thus, the ECMR aims to maintain the goal of a one-stop shop merger control process within the EU, while recognising the sovereign competence of the Member States to review cases that more appropriately fall within their jurisdiction. The ECMR seeks to provide the means for cases having significant cross-border effects to be handled by the European Commission, but allows Member States to deal with cases having mainly national or local impact. This process is designed to give the parties to a concentration more influence on referrals early in the process and reduce the number of post-notification referrals.

Procedurally, the referral process falls into three broad categories: pre-notification referral requests by the parties under ECMR Article 4 (see flow chart 1), post-notification referrals by the European Commission under ECMR Article 9 (see flow chart 2), and referrals by Member States of non-Community dimension mergers to the European Commission under ECMR Article 22 (see flow chart 3). Referrals under ECMR Article 9 and Article 22 are well established.² This paper concentrates on the new referral procedures contained in ECMR Article 4. The process allows the parties to make a determination as to whether a given merger would be best dealt with by the European Commission, or at Member State level—but the process also makes it clear that they do not have the last word.

Referral to Member States under Article 4(4)

Pursuant to ECMR Article 4(4), a Community dimension merger may be removed from the jurisdiction of the European Commission before notification: the parties must demonstrate that, in the circumstances, it would be more appropriate for the case to be reviewed at the level of the relevant Member State(s). However both the Member State(s) in question and the European Commission must decide if they agree with the parties. Procedurally, the parties must submit a reasoned submission ('RS') to the European Commission showing that the merger in question has a significant effect on competition in a distinct market in one or more Member State(s).³ The RS is then transmitted (without delay) by the European Commission to all 25 Member States. Within 15 working days of receiving it, the Member State(s) identified in the RS must express its/their agreement or disagreement with the referral request. Silence means agreement, at which point the European Commission has to decide if it agrees with the referral arguments in the RS. (Disagreement by the Member

State(s) ends the referral process, and the standard notification under the Form CO process, timelines and best practice guidelines would apply.) The European Commission's decision will be based on whether it agrees with the parties that there is a distinct market in the Member State(s) and whether competition would be significantly affected in that market. If it does not take a contrary decision, the referral is accepted, either as a whole or in part. The European Commission's decision must be made within 25 working days of it first receiving the RS.

If a referral to the Member State(s) does take place, the Member State competition authority/ies must inform the parties of the results of its/their preliminary competition assessment and the next steps it/they will take within 45 working days of the referral by the European Commission. This period may be extended if the information in the RS is deemed to be incomplete. It is evident that a referral request means that the overall duration of the handling of a case may be extended, in particular where a straightforward notification in a given Member State (absent a Community dimension merger) would have been quicker.

Referral to the European Commission under Article 4(5)

The pre-notification referral process under ECMR Article 4(5) is potentially much more useful to the parties. In this instance, the purpose of the request is to obtain European Commission jurisdiction in a multi-jurisdictional merger, where national merger notification thresholds are triggered in three or more Member States, but the ECMR revenue thresholds for a Community dimension concentration are not met. The RS would essentially request that the European Commission deem the concentration to have a Community dimension. The RS is transmitted to all Member States by the European Commission (without delay) and the former have 15 working days to indicate whether they agree or disagree. The nuance, in comparison to an ECMR Article 4(4) referral, is that disagreement by any Member State ends the referral process. The European Commission would then be obliged to inform all the Member States and the parties of such disagreement, with the result that the parties are obliged to notify the concentration to the various national competition authorities of the Member States. It is hoped that the Member States will not be unreasonable in their use of the right to disagree and stop an ECMR Article 4(5) referral process.

The burden is thus on the parties to analyse whether any competition or political issues exist at national level which might lead to a Member State competition authority challenging the referral. It might be expected that cases primarily involving national markets, or potentially having a significant impact on job losses through factory closures and the like would face a difficult process and likely be challenged—even if a matter is apparently a natural one for review by the European Commission because of the number of Member States in

Chart 1: Pre-notification referral requests by parties (ECMR Art 4)

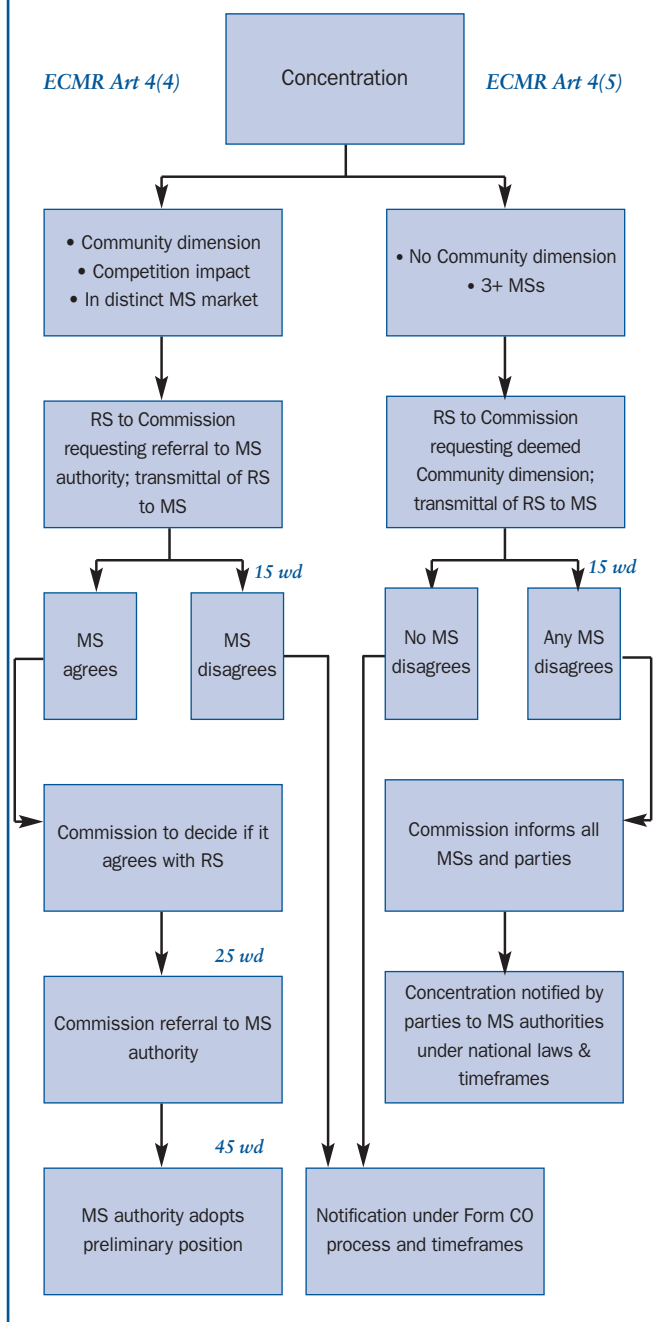


Chart 2: Post-notification referral by Commission to MS (ECMR Art 9)

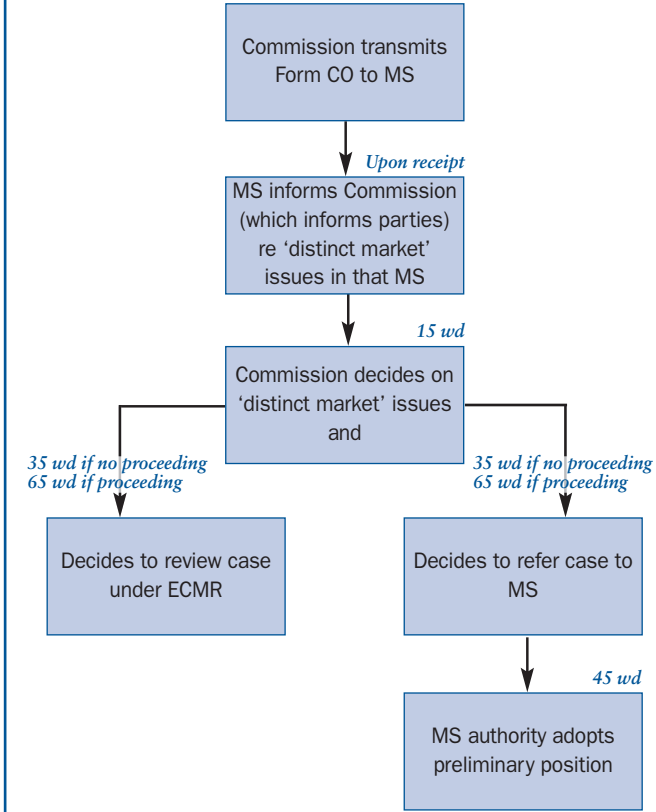
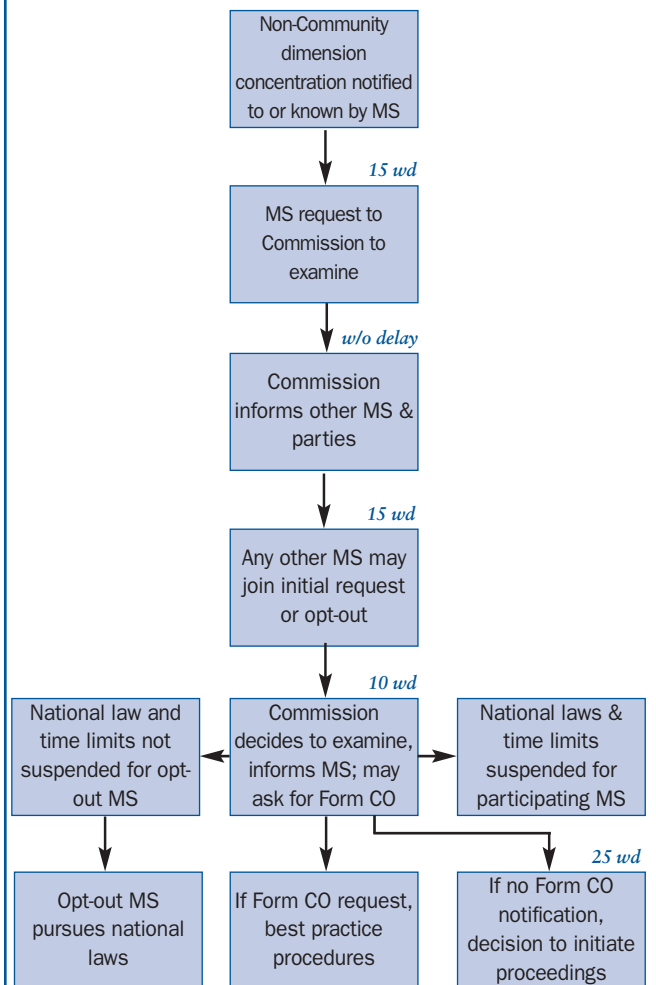


Chart 3: Referral by MS to Commission (ECMR Art 22)



which a notification will be required. By contrast, cases where markets are regional, or European, or global and where the national impact is limited will likely be the ideal candidates for referral.

Timing and process

An important element in the parties' decision whether to ask for referral or not will be timing. If national procedures have the potential to be long and/or burdensome, there is a greater likelihood of parties seeking to use the Article 4(5) process, even with the addition of 15 working days for the RS process, as described above (plus best practice pre-notification contacts with the European Commission that are a necessary precursor to filing a Form CO under the ECMR in case the process is successful). In this regard, given the content of the RS and the nature of the information requested (see below), the pre-notification contacts with the European Commission effectively begin with the parties' submission of the RS. It is too early to judge precisely what type of cases will most readily benefit from the ECMR Article 4(5) procedure in addition to the obvious candidates identified above. To date, a limited number of cases appear to have used the procedure⁴ but are not fully reported. In truly multi-jurisdictional cases which may trigger many Member State notifications, and which have broad geographic markets and no overriding national issues, the simplicity of dealing with the European Commission may override any concerns on extending the timeline for notification and clearance—especially if the European Commission has experience in the product market(s) in question.

In terms of process, the form RS is not a mere request form; it effectively focuses on the key elements required by Form CO and parallels the Form CO procedures (35 copies, the requirement for completeness, confidentiality and the like). A key difference is that in addition to the RS being submitted in one of the official languages of the EU (which will be the language of the case), according to introductory point D of the RS, "parties are strongly encouraged to provide the European Commission with a translation of their reasoned submission in a language or languages which will be understood by all addressees of the information." In an ECMR Article 4(4) referral to a Member State(s), the parties are "strongly encouraged to include a copy of the request in the language(s) of the Member State(s) to which referral is being requested." In addition to provid-

ing the general background details on the parties and the concentration, as well as ownership and control issues, Sections 4 and 5 mimic Sections 6 and 7 of Form CO concerning market definitions (by product and geography) and information on affected markets (in other words horizontal markets where the parties have a combined market share of 15 per cent or more, or vertical markets where the parties have individual or combined market shares of 25 per cent or more). Parties submitting an RS need to have conducted detailed reviews of markets in order to be able to submit the RS, providing sufficient reasons to justify why the European Commission should take jurisdiction, both to convince the European Commission and to set the groundwork as to why a specific Member State should not challenge the referral request.

It is to be hoped that the European Commission's aim to ease administrative burdens on business will prevail against unreasonable challenges, though this does tend to enter into a minefield as regards impinging on national sovereignty.

Article 4(6) of the ECMR provides that the European Commission is obliged to report to the European Council by 1 July 2009 (as part of the European Commission's normal review process of the ECMR) concerning the manner in which Articles 4(4) and 4(5) of the ECMR have functioned, with a view to revising them if necessary. It is possible, however, that the case law of the European Commission—and possibly the Court of First Instance and the European Court of Justice—will indicate earlier than that as to how the Article 4 referral process is working and which types of cases are able to benefit from this provision.

Notes

1 The primary jurisdictional test set out in Article 1(2) gives the European Commission jurisdiction to review a concentration if, in the most recent financial year (adjusting for acquisitions and divestitures):

- the combined worldwide turnover of all parties involved exceeded €5 billion, and
- at least two parties individually had a turnover within the European Community in excess of €250 million;
- unless each party to the concentration generated at least two thirds of its aggregate Community-wide turnover in one and the same EC Member State.

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The secondary test, set out in Article 1(3), was introduced in 1998 to catch smaller transactions that were nonetheless likely to require a filing in multiple Member States. Under this test, the European Commission has jurisdiction to review a concentration if:

- the combined worldwide turnover of all parties involved exceeded €2.5 billion, and
- at least two parties individually had a turnover within the European Community in excess of €100 million, and
- the combined turnover of all parties involved exceeded €100 million within each of three EC Member States, and
- within the same three EC Member States, the individual turnover of each of at least two parties exceeded €25 million,
- unless each party to the concentration generated at least two thirds of its aggregate community-wide turnover in one and the same EC Member State.

For the purpose of determining whether the jurisdictional thresholds have been met a party's turnover includes the aggregate turnover of the entire corporate group, including companies in which the parent directly or indirectly holds more than half of the assets, capital, voting rights or board appointments.

- 2 However, it is worth highlighting at least one key difference in each instance: (i) in principle old Article 9 did not permit Member State competition authorities to request referral to investigate spill-over effects (although the issue was never decided, in at least one case a Member State authority sought to circumvent this limitation by arguing that a joint venture would strengthen its parents' position of collective dominance in a downstream market). The new version of Article 9 removes this limitation by allowing referrals to Member State competition authorities where a concentration "threatens to affect significantly...[or]...affects competition" in a market within a single Member State; (ii) the opt-out possibility introduced into Article 22 permits one or more Member States to not accept a referral to the European Commission, creating the possibility of a situation where a merger may be reviewed both by the European Commission and by the opt-out Member State(s).
- 3 Annex III to Regulation 802/2004 (2004–L133/1) implementing the ECMR contains the form to be used in making a reasoned submission pursuant to ECMR 4.
- 4 Eg, Case No. COMP/M.3506—*Fox Paine/Advanta*, notified on 16 July 2004 (OJ C193/2 of July 29, 2004; Case No. COMP/M.3483—*Voestalpine AG/Nedcon Group NV*, notified on 8 July 2004 (OJ C183/2 of 16 July 2004); Case No. COMP/M.3439—*Agfa–Gevaert/Lastra*, notified on 5 July 2004 (OJ C180/7 of 13 July 2004).