

Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation

I. Introduction

1. These Principles were agreed by the National Competition Authorities (NCAs¹) within the European Competition Authorities Association ("ECA") in 2005 and relate to Articles 4(5) and 22 EC Merger Regulation ("ECMR") as set out in Council Regulation (EC) No 139/04 of 20 January 2004 on the control of concentrations between undertakings². They replace the version of 2002³ and may be reviewed by the NCAs from time to time to reflect legislative developments (European or national) or decisional practice⁴.

The Principles should be read in conjunction with and as complementary to the EU Commission's Notice on Case Referrals in respect of concentrations⁵ (the EU Commission Notice) and the relevant parts of Commission Regulation (EC) No. 802/2004 implementing the ECMR including its annexes (Form CO, Short Form CO and Form RS)⁶.

2. In the area of merger control there is a clear separation of competencies between the European Commission (the "EU Commission") and the Member States. The EU Commission has exclusive competence to review concentrations as defined in Art. 3(1) ECMR when the turnover of the parties to the concentration meet the thresholds pursuant to Art. 1(2) or 1(3) ECMR. Concentrations falling below these turnover thresholds remain within the competence of the Member States as provided for by their respective national merger control provisions. However, a referral system makes it possible in certain circumstances for concentrations falling below ECMR thresholds to be dealt with by the EU Commission, and vice versa.
3. The Council negotiations leading to Council Regulation (EC) No 139/04, focused on making the referral system more flexible and effective in order to ensure that

¹ These are the National Competition Authorities of the EU and the EEA EFTA States. For the sake of clarity, the term "NCA" in the following refers to these authorities.

² Published in OJ L 24, 29.01.2004;

³ These Principles were based on the European Merger Control Regulation No 4064/89.

⁴ After the current discussions regarding the new EEA Agreement are finished, changes in this Agreement may need to be reflected in these Principles.

⁵ available at: <http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing>

⁶ available at: <http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing>; OJ L 133, 30.04.2004, pages 1-39

a concentration would be dealt with by the authority best placed to analyse its competitive effects and, where appropriate, to restore effective competition, whilst taking account of the principles of subsidiarity and the "one stop shop" as well as maintaining legal certainty to the utmost extent possible. Articles 4(5) and 22 ECMR, to which these Principles refer, provide for referrals of cases from the Member States to the EU Commission.

According to recital (14) ECMR, referrals of concentrations should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to both pre- and post-filing referrals. This entails close cooperation with efficient information-sharing and consultation between the EU Commission and the NCAs in applying their respective competencies.

4. NCAs have in the past debated multiple filing issues within the framework of the ECA Working Group on Multijurisdictional Mergers. Cooperation and coordination among competition authorities on mergers of common concern can enhance the efficiency and effectiveness of the review process, help achieve consistent, co-ordinated and non-conflicting outcomes, and reduce transaction costs. In order to achieve this, in 2001 the ECA established a system that provides for a prompt exchange of information as well as closer cooperation in the assessment of multijurisdictional concentrations⁷.

In the light of the experience gained and with a view to enhancing transparency in the application of Article 22 of Regulation 4064/89, NCAs published in 2002 a document on joint referrals entitled "Principles on the Application, by National Competition Authorities within the ECA Network, of Article 22 of the EC Merger Regulation" (the "ECA Principles") which explained the factors taken into consideration when dealing with a case that may be a candidate for a joint referral to the EU Commission.

Council Regulation 139/2004, by reviewing the former Article 22 ECMR and introducing through Article 4(5) ECMR the possibility of pre-filing referrals to the EU Commission, established a new framework for referrals that requires amendment to the ECA Principles.

5. NCAs will have regard to these non-binding Principles when considering possible referrals to the EU Commission. However, given that each concentration is unique, each case will be considered in the light of its particular circumstances, the available information and the particular time constraints. NCAs will therefore apply these Principles flexibly on a case by case basis.

⁷ see the ECA Procedures Guide "The Exchange of Information between Members on Multijurisdictional Mergers", which is published at the websites of some of the NCAs.

II. Principles

6. Only concentrations within the meaning of Article 3 ECMR are eligible for referrals under Articles 4(5) and 22 ECMR from Member States to the EU Commission.

Cooperation on pre-filing referrals from Member States to the EU Commission pursuant to Article 4(5) ECMR

(i) Legal Provisions and Substantive Criteria

7. According to Article 4(5) ECMR, notifying parties ("the parties") may request that a concentration which does not have a Community dimension within the meaning of Article 1 ECMR and is capable of being reviewed under the national competition law for the control of mergers of at least three Member States be referred to the EU Commission⁸.

Article 4(5) ECMR does not permit partial referrals by only some of the Member States capable of reviewing a concentration. If any Member State capable of reviewing the concentration expresses its disagreement, the concentration remains subject to the applicable national competition law for the control of mergers. If no Member State capable of reviewing the concentration expresses its disagreement, the Commission has no discretion but has to accept that referred concentration.

8. Taking into account the specific characteristics of the concentration, a concentration where a potentially significant competitive impact extends beyond national boundaries will generally deserve careful scrutiny as a possible candidate for a pre-notification referral.

In general, NCAs, when considering whether a transaction is suitable for referral to the Commission under Article 4(5) ECMR, will take account of the following factors:

- whether the market(s) in which there may be a potentially significant impact on competition is/are wider than national in scope⁹ and whether the main competitive impact of the concentration is linked to such market/s¹⁰;

⁸ Note, however, that Article 4(5) ECMR is applicable only if no notification has been made within the EU.

⁹ As the EU Commission and the Court of First Instance have explained, NCAs are deemed to be at least as well placed as the EU Commission to examine mergers that affect national markets due to the prior experience and direct knowledge in dealing with the relevant markets, the parties to the merger and third parties within their respective Member States. See judgment of the Court of First Instance, T-346/02 and T-347/02 (*Cableuropa et.al* against Commission), para. 178.

¹⁰ Note, however, that the mere fact that an undertaking is active in more than one Member State is not in itself an indication that markets are greater than national (see judgment of Court of First Instance, T-346/02 and T-347/02, *Cableuropa et.al* against Commission; para. 126).

- whether NCAs expect to encounter difficulties in information-gathering as the parties or the main third party(ies) from whom information is likely to be sought is/are not based in their Member State, or
 - whether there are potentially significant competition concerns in a number of national or sub-national markets located in the EEA, and whether NCAs expect problems in identifying and/or enforcing appropriate and proportionate remedies ("suitable remedies"), should these prove necessary, in particular where suitable remedies could not be secured by the NCAs under national law or through cooperation among NCAs.
9. Some examples of circumstances in which a NCA might be less inclined to agree to a referral request could include the following:
- where the NCA is already examining a concentration which involves the same parties and/or the same product markets;
 - where the concentration has its main competitive impact in that NCA's national or sub-national market(s);
 - where it would avoid a risk of a subsequent referral back from the EU Commission under Article 9 ECMR.

(ii) Procedure

Pre-referral contacts by parties with NCAs

10. Pre-Form RS filing contacts with NCAs and with the EU Commission may be helpful in order to confirm that the criteria of Article 4(5) ECMR are met. However, NCAs cannot decide whether they agree to refer a concentration before they have received and studied the Form RS.

Pre-referral contacts with NCAs will be particularly useful whenever parties identify any need for clarification, in particular when they have questions related to:

- whether a concentration is capable of being reviewed by a particular Member State. Form RS needs to include sufficient information for each Member State to be able to verify whether the concentration qualifies for review under the applicable national competition law for the control of mergers.
- whether additional information regarding the geographic or product market definition may be needed or advisable,
- what language to use in the request for referral.

Parties are welcome to contact NCAs concerning any other relevant issue they wish to discuss before they file Form RS with the EU Commission.

Since it may be useful for NCAs to have informal contacts with each other at the pre-referral stage on common issues, it might be helpful to provide details about which other NCAs are likely to be capable of reviewing the concentration. Parties should also state whether the proposed concentration has been or is about to be made public or whether it remains confidential.

11. If parties wish to benefit from short pre-referral consultations between NCAs capable of reviewing the concentration, they should be prepared to provide confidentiality waivers to the NCAs.

The Reasoned Submission and its information requirements

12. Form RS sets out in general terms the information parties should provide if they wish to have their concentration referred from Member States to the EU Commission prior to notification¹¹. Upon its receipt, NCAs will first check whether the proposed concentration meets the legal criteria, in particular whether the concentration is capable of review under their national competition law for the control of mergers. They will also consider other substantive criteria such as those set out in the EU Commission Notice and in paragraph 8. and 9. above and, using their discretion, decide on the request within 15 working days.
13. NCAs will normally assess the referral request based on information provided in the Form RS, without undertaking further investigation. It is in the parties' interest to ensure that the Reasoned Submission is correct and complete as any doubts may result in the request being vetoed by a Member State¹².
14. When filling in Form RS, parties should take careful note of the following issues which are particularly important for Member States' ability to properly assess whether they agree to refer the concentration:
 - the scope and type of information on which they intend to base their Reasoned Submission¹³;
 - in order to verify which Member State is capable of reviewing the concentration, the relevant data has to be checked by all NCAs. It follows, therefore, that Reasoned Submissions should be made in a language that all NCAs understand; and
 - if parties wish to submit supporting documents, they are encouraged to contact NCAs capable of reviewing the concentration to verify whether a translation of all or part of a document is advisable or whether an executive summary would suffice. If a NCA asks for an executive summary, the submitting party should confirm that it is correct and complete.

¹¹ Form RS is ANNEX III to Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings; see Footnote 6

¹² Furthermore, the provision of incorrect or misleading information in the Reasoned Submission could lead to the Commission revoking the decision it had taken under Article 6 or 8 ECMR and/or imposing fines. The provision of incorrect or misleading information could also lead to a post-notification referral of a case from the EU Commission to the Member States, rectifying any referral made at the pre-notification stage

¹³ This is particularly pertinent in situations where the EU Commission has given waivers for information normally required in Form RS

Contacts among NCAs

16. If questions of mutual interest concerning the data submitted in the Reasoned Submission arise, NCAs may wish to contact each other to exchange views on the relevant issue. Apart from informal discussions among NCAs on general issues such as market definition or precedents, informal debate with the EU Commission might also be constructive for clarifying issues.

If a NCA considers that it is unlikely to agree to the request, it will try to inform the other NCAs and the EU Commission as soon as possible.

Communication between the EU Commission and NCAs and between NCAs concerning Article 4 (5) ECMR cases are confidential. All written exchanges of information will take place using secure means such as the Merger-Referrals Mailbox operated by the EU Commission. NCAs will not exchange confidential information unless they are either entitled to do so under national law or have been given waivers by the parties. Likewise, they will keep any information they receive from other NCAs concerning another NCA's decision under Article 4 (5) ECMR confidential unless that NCA itself has made its decision public.

Cooperation on post-filing referrals from Member States to the EU Commission pursuant to Article 22 ECMR

(i) Legal Provisions and Substantive Criteria

17. While the following principles concentrate on *joint* referrals from several Member States to the EU Commission, NCAs might also wish to apply all or part of the criteria described below when a concentration is referred to the EU Commission by only one Member State.
18. According to Article 22(1) ECMR, one or more Member State(s) may request the EU Commission to examine a concentration that does not have a Community dimension within the meaning of Article 1 ECMR but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the EU Commission of the initial request, according to Article 22(2) ECMR.

In contrast to the situation under Article 4(5), Article 22 ECMR permits referral by one or some of the Member States examining the concentration (partial referrals). If there is a partial referral, the NCAs examining the concentration will, insofar as timing permits, co-operate with each other and with the EU Commission in order to avoid, to the greatest extent possible, conflicting results.

19. In addition to the legal criteria referred to in Article 22(1) ECMR, when trying to establish whether a concentration might be a suitable candidate for a joint referral, NCAs will take account of the following factors:
- whether the relevant geographic market(s) affected by the concentration is/are wider than national in scope and whether the main competitive impact of the concentration is linked to such market/s;
 - whether NCAs expect to encounter difficulties in information gathering as the parties or the main third party(ies) from whom information is likely to be sought is/are not based in their Member State; or
 - whether there are potentially significant competition concerns in a number of national or sub-national markets located in the EEA, and whether NCAs expect problems in identifying and/or enforcing suitable remedies, should they prove necessary, in particular where suitable remedies could not be secured by the NCAs under national law or through cooperation among NCAs.

(ii) Procedure

Informing the NCAs about a multijurisdictional merger

20. Whenever a NCA receives a notification or learns about a concentration which might be a possible candidate for a referral to the EU Commission, it will ask the parties concerned:
- whether the concentration is capable of being reviewed by any other NCA within the ECA and,
 - which NCA will or has received a notification.

When the parties to a concentration inform a NCA that the concentration is subject to review by another NCA within the ECA, the information procedure as described in the ECA Procedures Guide will be put into effect. In particular, all NCAs within the ECA network should be informed of the concentration and which NCAs, according to the parties, are capable of reviewing the concentration. Thus, the process of identifying a concentration as a possible candidate for a joint referral does not depend on it having been notified to all NCAs which are capable of reviewing it under their applicable national competition law for the control of mergers.

The assessment of the concentration

21. NCAs assessing whether the concentration might be suitable for a joint referral to the EU Commission under Article 22(1) ECMR should try to evaluate as quickly as possible whether the concentration is expected to fulfill the above mentioned legal and substantive criteria. This can only be done on a *prima facie* basis.

Launching the referral

22. If a NCA involved in the assessment of a concentration considers that it might be a suitable candidate for a referral, it will inform all other NCAs.

Alternatively, according to Article 22(5) ECMR, the EU Commission may inform one or several Member State(s) that it considers a concentration to be suitable for a referral and invite that or those Member State(s) to make a request pursuant to Article 22(1) ECMR. NCAs that have received such an invitation will inform all other NCAs of this fact.

Notifying parties may also informally indicate to one or several NCAs that they would favour a concentration to be referred.

The consultation process

Contacts between NCAs

23. After the first NCA has informed the others that it considers a concentration is a suitable candidate for a joint referral, consultations will be conducted without delay in view of tight deadlines, in order to verify as soon as possible, whether there is support for a joint referral.

Since under Article 22(2) ECMR all national time limits relating to the concentration are suspended when a referral request is made by an NCA, any NCA seriously considering triggering the referral by making a request should inform the other NCAs without delay.

24. Once a request for referral to the EU Commission has been made under Article 22(1) ECMR by one or more Member States, the EU Commission forwards it to all the NCAs and national time limits relating to the concentration are suspended. Under Article 22(2) ECMR, other NCAs can join the request within 15 working days of being informed by the Commission of the request made.

Every NCA should inform the other NCAs and the Commission as soon as possible of its decision whether or not to join the request.

As soon as a NCA informs the EU Commission that it is *not* joining the request but examining the concentration itself, the suspension of that NCA's national time limits ends. That NCA should also inform the other NCAs of the fact and should continue to co-operate with the other NCAs and the EU Commission during the parallel examination of the concentration. It should also inform the other NCAs and the Commission about the results of its examination.

Whilst NCAs will try to avoid as far as possible diverging decisions on whether or not to jointly refer a concentration to the EU Commission, national conditions for competition may lead a NCA to conclude that its participation in the joint request would not be appropriate. No NCA is bound by another NCA's decision.

Contacts with the parties

25. NCAs should inform the parties as soon as possible that a joint referral of the concentration is being considered.

If a NCA learns about a concentration which has not been notified to it but that is being considered by other NCAs as a possible candidate for a referral, the NCA might wish to contact the parties to ask for details concerning the concentration with a view to starting national merger control proceedings.

Consultations with the EU Commission

26. The NCAs should contact the EU Commission as soon as possible in order to verify its position regarding a possible (joint) referral. The Commission's informal agreement to a referral should be sought and the other NCAs accordingly kept informed.

The Coordinator of the procedure

27. The NCAs participating in a joint referral will try to identify amongst themselves an informal Coordinator to act as an informal liaison contact among NCAs, the EU Commission and the parties.

The Coordinator will act as a focal point for information. He/she maintains contact with the NCAs and the EU Commission informing them about the state of affairs and also exploring their views on the initiative.

28. The Coordinator should consult NCAs verifying their position regarding initiating the referral or later joining it. Moreover, he/she should secure coordination on procedural and substantive issues relating to any joint referral, as far as national confidentiality rules permit. Both the intention and the execution of any initial request for referral should be communicated to all NCAs concerned without delay as this affects all other national procedures. The Coordinator should keep NCAs informed about which Member State has joined the initial request for referral.
29. The role of the Coordinator is meant to facilitate cooperation among NCAs. It does not prevent NCAs from undertaking their own consultations with the EU Commission and/or the parties. It will also not influence any NCA's independent assessment of whether it considers a case suitable for a referral under Article 22 (1) ECMR or whether it will join any initial request according to Article 22 (2) ECMR.

Timing

30. According to Article 22(1) ECMR, a referral request must be made 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.

As far as possible, NCAs will endeavour to reach informal consensus among themselves as regards the joint referral before the expiry of the deadline.

31. With regard to Member States which do not have a mandatory notification system, "made known", which triggers the 15 working day period as laid down in Article 22(1) ECMR, should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request pursuant to Article 22 ECMR¹⁴.

The request for referral

32. In either initiating a request under Article 22 (1) ECMR or in joining the request under Article 22(2) ECMR, the NCAs agree generally to address, where appropriate, the following issues:
 - i) that the merger is a concentration as defined in Article 3 ECMR;
 - ii) that the concentration has no community dimension within the meaning of Article 1 ECMR;
 - iii) whether a relevant geographic market is wider than national;
 - iv) the jurisdictions under which it is subject to review;
 - v) the potential of the concentration, on a *prima facie* assessment, to significantly affect competition within the territory of the Member State making the request
 - vi) potential problems in identifying and/or enforcing suitable remedies should these prove necessary;
 - vii) the possible effect of the concentration on trade between Member States;
 - viii) the fact that the deadline imposed by Article 22 (1) or (2) ECMR is met;
 - ix) whether consensus has been reached between several NCAs to refer jointly the concentration to the EU Commission; and
 - x) whether, if known, the parties are favourable (or not) to the referral.NCAs may address any other point they might find important.

The transmission of the request to the EU Commission

33. Each NCA is responsible for transmitting its own referral request to the EU Commission.

The conclusion of the proceedings

34. According to Article 22(3) ECMR, the EU Commission has discretion whether to accept the referral. Should the EU Commission inform the NCAs that it has decided to examine the concentration, the referring NCAs will transmit to the EU Commission as quickly as possible the documents received in the context of the national proceeding, to the extent that this is possible under national

¹⁴ See footnote 44 of EU Commission Notice

confidentiality rules. Where national confidentiality rules do not permit this, a waiver from the parties will be necessary before transmitting the documents to the EU Commission. In such circumstances, NCAs will, in anticipation of the referral, ask the parties as well as third parties where appropriate, to give a waiver concerning the documents they provided to the NCAs during its national investigation.