Commission Notice on Case Referral in respect of concentrations

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(Text with EEA relevance)

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1. The purpose of this Notice is to describe in a general way the rationale underlying the case referral system in Articles 4(4), 4(5), 9 and 22 of the Council Regulation (EC) No 139/2004 of 20 January 2004[1] (hereafter "the Merger Regulation"), including the recent changes made to the system, to catalogue the legal criteria that must be fulfilled in order for referrals to be possible, and to set out the factors which may be taken into consideration when referrals are decided upon. The Notice also provides practical guidance regarding the mechanics of the referral system, in particular regarding the pre-notification referral mechanism provided for in Article 4(4) and (5) of the Regulation. The guidance provided in this notice applies, *mutatis mutandis*, to the referral rules contained in the EEA Agreement[2].

I. INTRODUCTION

2. Community jurisdiction in the field of merger control is defined by the application of the turnover-related criteria contained in Articles 1(2) and 1(3)[3] of the Merger Regulation. When dealing with concentrations, the Commission and Member States do not have concurrent jurisdiction. Rather, the Merger Regulation establishes a clear division of competence. Concentrations with a "Community dimension", i.e. those above the turnover thresholds in Article 1 of the Merger Regulation, fall within the exclusive jurisdiction of the Commission; Member States are precluded from applying national competition law to such concentrations by virtue of Article 21 of the Merger Regulation. Concentrations falling below the thresholds remain within the competence of the Member States; the Commission has no jurisdiction to deal with them under the Merger Regulation.

3. Determining jurisdiction exclusively by reference to fixed turnover-related criteria provides legal certainty for merging companies. While the financial criteria generally serve as effective proxies for the category of transactions for which the Commission is the more appropriate authority, Council Regulation 4064/89 complemented this "bright-line" jurisdictional scheme with a possibility for cases to be re-attributed by the Commission to Member States and vice versa, upon request and provided certain criteria are fulfilled.

4. When the Merger Regulation was first introduced, it was envisaged by the Council and Commission that case referrals would only be resorted to in "exceptional circumstances" and where "the interests in respect of competition of the Member State concerned could not be adequately protected in any other way"[4]. There have, however, been a number of developments since the adoption

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1 O.J. 2004, L 24. This Regulation has recast Council Regulation (EEC) n° 4064/89 of 21 December 1989.

2 See EEA Joint Committee Decision No 78/2004 of 4 June 2004

3 The jurisdictional criteria set out in Article 1(2) of Council Regulation (EEC) No. 4064/89 were supplemented in 1997 [Council Regulation 1310/97] by a more elaborate set of criteria designed to bring within the Regulation's scope transactions not covered by Article 1(2) but which nonetheless have a significant cross-border impact.

4 See the Notes on Council Regulation (EEC) 4064/89 ["Merger Control in the European union", European Commission, Brussels-Luxembourg, 1998, at p. 54]. See also *Philips v The*

of the Merger Regulation. First, merger control laws have been introduced in almost all Member States. Second, the Commission has exercised its discretion to refer a number of cases to Member States pursuant to Article 9 in circumstances where it was felt that the Member State in question was in a better position to carry out the investigation than the Commission[5]. Likewise, in a number of cases[6], several Member States decided to make a joint referral of a case pursuant to Article 22 in circumstances where it was felt that the Commission was the authority in a better position to carry out the investigation[7]. Third, there has been an increase in the number of transactions not meeting the thresholds in Article 1 of the Merger Regulation and requiring to be filed in multiple EU Member State jurisdictions, a trend which is likely to continue in line with the EU's growing membership. Many of these transactions affect competition beyond the territories of individual Member States[8].

5. The revisions made to the referral system in the Merger Regulation were designed to facilitate the re-attribution of cases between the Commission and Member States, consistent with the principle of subsidiarity, so that the more appropriate authority or authorities for carrying out a particular merger investigation should in principle deal with the case. At the same time, the revisions were intended to preserve the basic features of the Community merger control system introduced in 1989, in particular the provision of a "one stop shop" for the competition scrutiny of mergers with a cross-border impact and an alternative to multiple merger control notifications within the EU[9]. Such multiple filings often entail considerable cost for competition authorities and businesses alike.

6. The case re-attribution system now provides that a referral may also be triggered before a formal filing has been made in any EU jurisdiction, thereby affording merging companies the possibility of ascertaining, at as early as possible a stage, where jurisdiction for scrutiny of their transaction will ultimately lie. Such pre-notification referrals have the advantage of alleviating the additional cost, notably in terms of time delay, associated with post-filing referral.

7. The revisions made to the referral system in Council Regulation EC No. 139/2004 were motivated by a desire that it should operate as a jurisdictional mechanism which is flexible[10], but which at the same time ensures effective protection of

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Commission Case T-119/02 of 3 April 2003 [2003] ECR II-1433 (Case M.2621 *SEB/Moulinex*) at para. 354.

5 It is a fact that some concentrations of Community dimension affect competition in national or sub-national markets within one or more Member States.

6 M.2698 *Promatech/Sulzer*; M.2738 *GE/Unison*; M.3136 *GE/AGFA*.

7 In the same vein, Member States' competition authorities, in the context of the European Competition Authorities' association, have issued a recommendation designed to provide guidance as to the principles upon which national competition authorities should deal with cases eligible for joint referrals under Article 22 of the Merger Regulation - *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*.

8 While the introduction of Article 1(3) in 1997 has brought some such cases under the jurisdiction of the Merger Regulation, many are unaffected. See para. 21 *et seq* of the Commission's Green Paper of 11 December 2001 [COM (2001)745 final]

9 See Recitals 11, 12 and 14 to the Merger Regulation.

10 See Recital 11 to the Merger Regulation.

competition and limits the scope for "forum shopping" to the greatest extent possible. However, having regard in particular to the importance of legal certainty, it should be stressed that referrals remain a derogation from the general rules which determine jurisdiction based upon objectively-determinable turnover thresholds. Moreover, the Commission and Member States retain a considerable margin of discretion in deciding whether to refer cases falling within their "original jurisdiction", or whether to accept to deal with cases not falling within their "original jurisdiction", pursuant to Articles 4(4), 4(5), 9(2)(a) and 22[11]. To that extent, the current Notice is intended to provide no more than general guidance regarding the appropriateness of particular cases or categories of cases for referral.

II. REFERRAL OF CASES

Guiding principles

8. The system of merger control established by the Merger Regulation, including the mechanism for re-attributing cases between the Commission and Member States contained therein, is consistent with the principle of subsidiarity enshrined in the EC Treaty[12]. Decisions taken with regard to the referral of cases should accordingly take due account of all aspects of the application of the principle of subsidiarity in this context, in particular the suitability of a concentration being examined by the authority more appropriate for carrying out the investigation, the benefits inherent in a "one-stop-shop" system, and the importance of legal certainty with regard to jurisdiction[13]. These factors are inter-linked and the respective weight placed upon each of them will depend upon the specificities of a particular case. Above all, in considering whether or not to exercise their discretion to make or accede to a referral, the Commission and Member States should bear in mind the need to ensure effective protection of competition in all markets affected by the transaction[14].

More appropriate authority

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11 See, however, *infra*, footnote 14. It should moreover be noted that, pursuant to Article 4(5), the Commission has no discretion as to whether or not to accept a case not falling within its original jurisdiction.

12 See Article 5 EC Treaty

13 See Recitals 11 and 14 to the Merger Regulation.

14 See Article 9(8) of the Merger Regulation; see also *Philips v The Commission* (para. 343) where the CFI states that "..although the first sub-paragraph of Article 9(3) of Regulation No. 4064/89 confers on the Commission broad discretion as to whether or not to refer a concentration, it cannot decide to make such a referral if, when the Member State's request for referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard effective competition on the relevant market."; see also T-346/02 and T-347/02 *Cableuropa SA v The Commission* of 30 September 2003 (para. 215). Circumstances relevant for the purpose of the Commission assessment include, *inter alia*, the fact that a Member State: i) has specific laws for the control of concentrations on competition grounds and specialised bodies to ensure that these laws are implemented under the supervision of the national courts; ii) has accurately identified the competition concerns raised by the concentration on the relevant markets in that Member State (see paras. 346-347 of *Philips v Commission*, cited above).

9. In principle, jurisdiction should only be re-attributed to another competition agency in circumstances where the latter is the more appropriate for dealing with a merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the agency. Particular regard should be had to the likely locus of any impact on competition resulting from the merger. Regard may also be had to the implications, in terms of administrative effort, of any contemplated referral[15].

10. The case for re-attributing jurisdiction is likely to be more compelling where it appears that a particular transaction may have a significant impact on competition and thus may deserve careful scrutiny.

One-stop-shop

11. Decisions on the referral of cases should also have regard to the benefits inherent in a "one-stop-shop", which is at the core of the Merger Regulation[16]. The provision of a one-stop-shop is beneficial to competition authorities and businesses alike. The handling of a merger by a single competition agency normally increases administrative efficiency, avoiding duplication and fragmentation of enforcement effort as well as potentially incoherent treatment (regarding investigation, assessment and possible remedies) by multiple authorities. It normally also brings advantages to businesses, in particular to merging firms, by reducing the costs and burdens arising from multiple filing obligations and by eliminating the risk of conflicting decisions resulting from the concurrent assessment of the same transaction by a number of competition authorities under diverse legal regimes.

12. Fragmentation of cases through referral should therefore be avoided where possible[17], unless it appears that multiple authorities would be in a better position to ensure that competition in all markets affected by the transaction is effectively protected. Accordingly, while partial referrals are possible under Articles 4(4) and 9, it would normally be appropriate for the whole of a case (or at least all connected parts thereof) to be dealt with by a single authority[18].

Legal certainty

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15 This may involve consideration of the relative cost, time delay, legal uncertainty and the risk of conflicting assessment which may be associated with the investigation, or a part of the investigation, being carried out by multiple authorities.

16 See Recital 11 of the Merger Regulation.

17 The CFI in *Philips v The Commission* took the view, *obiter dictum*, that "fragmentation" of cases, while possible as a result of the application of Article 9, is "undesirable in view of the 'one-stop-shop' principle on which Regulation 4064/89 is based". Moreover, the CFI, while recognising that the risk of "inconsistent, or even irreconcilable" decisions by the Commission and Member States" is inherent in the referral system established by Article 9", made it clear that this is not, in its view, desirable. (See paras. 350 and 380).

18 This is consistent with the Commission's decision in cases M.2389 *Shell/DEA* and M.2533 *BP/E.ON* to refer to Germany all of the markets for downstream oil products. The Commission retained the parts of the cases involving upstream markets. Likewise, in M.2706 *P&O Princess/Carnival*, the Commission exercised its discretion not to refer a part of the case to the UK, because it wished to avoid a fragmentation of the case (See Commission press release of 11/04/2002, IP/02/552)

13. Due account should also be taken of the importance of legal certainty regarding jurisdiction over a particular concentration, from the perspective of all concerned[19]. Accordingly, referral should normally only be made when there is a compelling reason for departing from "original jurisdiction" over the case in question, particularly at the post-notification stage. Similarly, if a referral has been made prior to notification, a post-notification referral in the same case should be avoided to the greatest extent possible[20].

14. The importance of legal certainty should also be borne in mind with regard to the legal criteria for referral, and particularly – given the tight deadlines - at the pre-notification stage. Accordingly, pre-filing referrals should in principle be confined to those cases where it is relatively straightforward to establish, from the outset, the scope of the geographic market and/or the existence of a possible competitive impact, so as to be able to promptly decide upon such requests

Case referrals: legal requirements and other factors to be considered

Pre-notification referrals

15. The system of pre-notification referrals is triggered by a reasoned submission lodged by the parties to the concentration. When contemplating such a request, the parties to the concentration are required, first, to verify whether the relevant legal requirements set out in the Merger Regulation are fulfilled, and second, whether a pre-notification referral would be consistent with the guiding principles outlined above.

Referral of cases by the Commission to Member States under Article 4(4)

Legal requirements

16. In order for a referral to be made by the Commission to one or more Member States pursuant to Articles 4(4), two legal requirements must be fulfilled. There must:

    i) first, be indications *that the concentration may significantly affect competition* in a market/s, and

    ii) second, the market/s in question must be within a Member State and *present all the characteristics of a distinct market*.

17. As regards the *first criterion*, the requesting parties are in essence required to demonstrate that the transaction is liable to have a potential impact on competition on a distinct market in a Member State, 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. While

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19 See Recital 11 of the Merger Regulation.

20 See Recital 14 to the Merger Regulation. This is of course subject to the parties having made a full and honest disclosure of all relevant facts in their request for a pre-filing referral.

the parties are not required to demonstrate that the effect on competition is likely to be an adverse one[21], they should point to indicators which are generally suggestive of the existence of some competitive effects stemming from the transaction[22].

18. As regards the *second criterion*, the requesting parties are required to show that a geographic market/s in which competition is affected by the transaction in the manner just described is/are national, or narrower than national in scope[23].

Other factors to be considered

19. Other than verification of the legal requirements, in order to anticipate to the greatest extent possible the likely outcome of a referral request, merging parties contemplating a request should also consider whether referral of the case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the competition authority or authorities to which they are contemplating requesting the referral of the case is the most appropriate authority for dealing with the case. To this end, consideration should be given in turn both to the likely locus of the competitive effects of the transaction and to how appropriate the national competition authority (NCA) would be for scrutinising the operation.

20. Concentrations with a Community dimension which are likely to affect competition in markets that have a national or narrower than national scope, and which effects are likely to be confined to, or have their main economic impact in, a single Member State[24], are the most appropriate candidate cases for referral to that Member State. This applies in particular to cases where the impact would occur on a distinct market which does not constitute a substantial part of the common market. To the extent that referral is made to one Member State only, the benefit of a "one-stop shop" is also preserved.

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21 See Recital 16, which states that "the undertakings concerned should not … be required to demonstrate that the effects of the concentration would be detrimental to competition".

22 The existence of "affected markets" within the meaning of Form RS would generally be considered sufficient to meet the requirements of Article 4(4). However, the parties can point to any factors which may be relevant for the competitive analysis of the case (market overlap, vertical integration, etc).

23 To this end, the requesting parties should consider those factors which are typically suggestive of national or narrower than national markets, such as, primarily, the product characteristics (e.g. low value of the product as opposed to significant costs of transport), specific characteristics of demand (e.g. end consumers sourcing in proximity of their centre of activity) and supply, significant variation of prices and market shares across countries, national consumers habits, different regulatory frameworks, taxation or other legislation. Further guidance can be found in the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

24 See, for example, the Commission's referral of certain distinct oil storage markets for assessment by the French authorities in Cases M.1021 *Compagnie Nationale de Navigation-SOGELF*, M.1464 *Total/Petrofina*, and Case M.1628 *Totalfina/Elf Aquitaine*, Case M.1030 *Lafarge/Redland*, Case M.1220 *Alliance Unichem/Unifarma*, Case M.2760 *Nehlsen/Rethmann/SWB/Bremerhavener Energiewirtschaft*, and Case M.2154 *C3D/Rhone/Go-ahead*; Case M.2845 *Sogecable/Canal Satelite Digital/Vias Digital.*

21. The extent to which a concentration with a Community dimension which, despite having a potentially significant impact on competition in a nation-wide market, nonetheless potentially engenders substantial cross-border effects (e.g. because the effects of the concentration in one geographic market may have significant repercussions in geographic markets in other Member States, or because it may involve potential foreclosure effects and consequent fragmentation of the common market[25]), may be an appropriate candidate for referral will depend on the specific circumstances of the case. As, under such circumstances, both the Commission and Member States may be equally well equipped or be in an equally good position to deal with such cases, a considerable margin of discretion should be retained in deciding whether or not to refer such cases.

22. The extent to which concentrations with a Community dimension, and potentially affecting competition in a series of national or narrower than national markets in more than one Member State, may be appropriate candidates for referral to Member States will depend on factors specific to each individual case, such as the number of national markets likely to be significantly affected, the prospect of addressing any possible concerns by way of proportionate, non-conflicting remedies, and the investigative efforts that the case may require. To the extent that a case may engender competition concerns in a number of Member States, and require coordinated investigations and remedial action, this may militate in favour of the Commission retaining jurisdiction over the entirety of the case in question[26]. On the other hand, to the extent that the case gives rise to competition concerns which, despite involving national markets in more than one Member State, do not appear to require coordinated investigation and/or remedial action, a referral may be appropriate. In a limited number of cases[27], the Commission has even found it appropriate to refer a concentration to more than one Member State, in view of the significant differences in competitive conditions that characterised the affected markets in the Member States concerned. While fragmentation of the treatment of a case deprives the merging parties of the benefit of a one-stop-shop in such cases, this consideration is less pertinent at the pre-notification stage, given that the referral is triggered by a voluntary request from the merging parties.

23. Consideration should also, to the extent possible, be given to whether the national competition authority or authorities to which referral of the case is

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25 See Case M.580 *ABB/Daimler Benz*, where the Commission did not accede to Germany's request for referral of a case under Article 9 in circumstances where, while the competition concerns were confined to German markets, the operation (which would create the largest supplier of railway equipment in the world) would have significant repercussions throughout Europe. See also Case M.2434 *Hidroelectrica del Cantabrico/EnBW/Grupo Vilar Mir*, where, despite a request by Spain to have the case referred under Article 9, the Commission pursued the investigation and adopted an Article 8(2) decision.

26 For some examples, see M.1383 *Exxon/Mobil*, where the Commission, despite the UK request to have the part of the concentration relating to the market for motor fuel retailing in North west of Scotland referred to it, pursued the investigation as the case required a single and coherent remedy package designed to address all the problematic issues in the sector concerned; see also M.2706 *P&O Princess/Carnival*, where, despite the fact that the UK authorities were assessing a rival bid by Royal Caribbean, the Commission did not accede to a request for a partial referral, so as to avoid a fragmentation of the case and secure a single investigation of the various national markets affected by the operation.

27 See M. 2898, *Le Roy Merlin/Brico*, M.1030, *Redland/Lafarge*, M. 1684, *Carrefour/Promodes.*

contemplated may possess specific expertise concerning local markets[28], or is examining, or about to examine, another transaction in the sector concerned[29].

Referral of cases from Member States to the Commission under Article 4(5)

Legal requirements

24. Under Article 4(5), only two legal requirements must be met in order for the parties to the transaction to request the referral of the case to the Commission: the transaction must be a concentration within the meaning of Article 3 of the Merger Regulation, and the concentration must be *capable of being reviewed under the national competition laws for the control of mergers of three or more Member States*. (See also paras. 65 *et seq* and 70 *et seq*.)

Other factors to be considered

25. Other than verification of the legal requirements, in order to anticipate to the greatest extent possible the likely outcome of a referral request, merging parties contemplating a request should also consider whether referral of the case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the Commission is the more appropriate authority for dealing with the case.

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[28] In Case M.330 *MacCormick/CPC/Rabobank/Ostmann*, the Commission referred a case to Germany, because it was better placed to investigate local conditions in 85,000 sales points in Germany; a referral to the Netherlands was made in Case M.1060 *Vendex/KBB*, because it was better placed to assess local consumer tastes and habits; See also Case M.1555 *Heineken/Cruzcampo*, Case M.2621 *SEB/Moulinex* (where consumer preferences and commercial and marketing practice swere specific to the French market); Case M.2639 *Compass/Restorama/Rail Gourmet/Gourmet*, and Case M.2662 *Danish-Crown/Steff-Houlberg*.

[29] In Case M.716 *Gehe/Lloyds Chemists*, for example, the Commission referred a case because Lloyds was also subject to another bid not falling under ECMR thresholds but being scrutinised by the UK authorities: the referral allowed both bids to be scrutinised by the same authority; In M.1001/M.1019 *Preussag/Hapag-Lloyd/TUI*, a referral was made to Germany of two transactions, which together with a third one notified in Germany, would present competition concerns: the referral ensured that all three operations were dealt with in like manner; In case M.2044 *Interbrew/Bass*, the Commission referred the case to the UK authorities, because they were at the same time assessing Interbrew's acquisition of another brewer, Whitbread, and because of their experience in recent investigations in the same markets; Similarly, see also Cases M.2760 *Nehlsen/Rethmann/SWB/Bremerhavener Energiewirtschaft*, M.2234 *Metsalilitto Osuuskunta/Vapo Oy/JV*, M.2495 *Haniel/Fels*, M.2881 *Koninklijke BAM NBM/HBG*, and M.2857/M.3075-3080 *ECS/IEH* and six other acquisitions by Electrabel of local distributors. In M.2706 *P&O Princess/Carnival*, however, despite the fact that the UK authorities were already assessing a rival bid by Royal Caribbean, the Commission did not accede to a request for a partial referral. The Commission had identified preliminary competition concerns in other national markets affected by the merger and thus wished to avoid a fragmentation of the case (See Commission press release of 11/04/2002, IP/02/552).

26. In this regard, Recital 16 to the Merger Regulation makes it clear that requests for pre-notification referral to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Particular consideration should therefore be given to the likely locus of any competitive effects resulting from the transaction, and to how appropriate it would be for the Commission to scrutinise the operation.

27. It should in particular be assessed whether the case is genuinely cross-border in nature, having regard to elements such as its likely effects on competition and the investigative and enforcement powers likely to be required to address any such effects. In this regard, particular consideration should be given to whether the case is liable to have a potential impact on competition in a market/s affected by the concentration. In any case, indications of possible competitive impact may be no more than preliminary in nature[30], and would be without prejudice to the outcome of the investigation. Nor would it be necessary for the parties to demonstrate that the effect on competition is likely to be an adverse one.

28. Cases where the market/s in which there may be a potential impact on competition is/are wider than national in geographic scope[31], or where some of the potentially affected markets are wider than national and the main economic impact of the concentration is connected to such markets, are the most appropriate candidate cases for referral to the Commission. In such cases, as the competitive dynamics extend over territories reaching beyond national boundaries, and may consequently require investigative efforts in several countries as well as appropriate enforcement powers, the Commission is likely to be in the best position to carry out the investigation.

29. The Commission may be more appropriately placed to treat cases (including investigation, assessment and possible remedial action) that give rise to potential competition concerns in a series of national or narrower than national markets located in a number of different countries in the EU[32]. The Commission is likely to be in the best position to carry out the investigation in such cases, given the desirability of ensuring consistent and efficient scrutiny across the different countries, of employing appropriate investigative powers, and of addressing any competition concerns by way of coherent remedies.

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30 The existence of "affected markets" within the meaning of Form RS would generally be considered sufficient. However, the parties can point to any factors which may be relevant for the competitive analysis of the case (market overlap, vertical integration, etc).

31 See the joint referral by seven Member States to the Commission of a transaction affecting worldwide markets in M.2738 *GE/Unison,* and the joint referral by seven Member States to the Commission of a transaction affecting a Western European market in M.2698 *Promatech/Sulzer*; See also *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*, a paper published by the European Competition Authorities (ECA), at para. 11.

32 This may, for example, be the case in relation to operations where the affected markets, while national (or even narrower than national in scope for the purposes of a competition assessment), are nonetheless characterised by common Europe-wide or world-wide brands, by common Europe-wide or world-wide intellectual property rights, or by centralised manufacture or distribution - at least to the extent that such centralised manufacture or distribution would be likely to impact upon any remedial measures.

30. –Similarly to what has been said above in relation to Article 4(4), the appropriateness of referring concentrations which, despite having a potentially significant impact on competition in a nation-wide market, nonetheless potentially engender substantial cross-border effects, will depend on the specific circumstances of the case. As, under such circumstances, both the Commission and Member States may be in an equally good position to deal with such cases, a considerable margin of discretion should be retained in deciding whether or not to refer such cases.

31. Consideration should also, to the extent possible, be given to whether the Commission is particularly well equipped to properly scrutinise the case, in particular having regard to factors such as specific expertise, or past experience in the sector concerned. The greater a merger's potential to affect competition beyond the territory of one Member State, the more likely it is that the Commission will be better equipped to conduct the investigation, particularly in terms of fact finding and enforcement powers.

32. Finally, the parties to the concentration might submit that, despite the apparent absence of an effect on competition, there is a compelling case for having the operation treated by the Commission, having regard in particular to factors such as the cost and time delay involved in submitting multiple Member State filings[33].

Post-notification referrals

Referrals from the Commission to Member States pursuant to Article 9

33. Under Article 9 there are two options for a Member State wishing to request referral of a case following its notification to the Commission: Articles 9(2)a and 9(2)b respectively.

Article 9(2)a

Legal requirements

34. In order for a referral to be made to a Member State or States pursuant to Article *9(2) a,* the following legal requirements must be fulfilled. The concentration must:

i) *threaten to affect significantly competition in a market*, and

ii) the market in question must be *within the requesting Member State, and present all the characteristics of a distinct market*.

35. As regards the *first criterion*, in essence a requesting Member State is required to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of

[33] See Recitals 12 and 16of the Merger Regulation.

prima facie evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

36. As regards the *second criterion*, the Member State is required to show that a geographic market/s in which competition is affected by the transaction in the manner just described is/are national, or narrower than national in scope[34].

Other factors to be considered

37. Other than verification of the legal requirements, other factors should also be considered in assessing whether referral of a case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the competition authority or authorities requesting the referral of the case is/are in the best position to deal with the case. To this end, consideration should be given in turn both to the likely locus of the competitive effects of the transaction and to how well equipped the national competition authority would be to scrutinise the operation. (See above at paras. 19-23)

Article 9(2)b

Legal requirements

38. In order for a referral to be made to a Member State or States pursuant to Article *9(2) b,* the following legal requirements must be fulfilled. The concentration must:

i) *affect competition in a market*, and

ii) the market in question must be *within the requesting Member State, present all the characteristics of a distinct market, and not constitute a substantial part of the common market*.

39. As regards the *first criterion*, a requesting Member State is required to show, based on a preliminary analysis, that the concentration is liable to have an impact on competition in a market. Such preliminary indications may be in the nature of *prima facie* evidence of a possible adverse impact, but would be without prejudice to the outcome of a full investigation.

40. As to the *second criterion*, a requesting Member State is required to show not only that the market in which competition is affected by the operation in the manner just described constitutes a distinct market within a Member State, but also that the market in question does not constitute a substantial part of the common market. In this respect, based on the past practice and case-law[35], it appears that

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[34] See Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

[35] See Commission referrals granted under Article 9(2)b in: M.2446, *Govia/Connex South Central*, where the operation affected competition on specific railway routes in the London/Gatwick-Brighton area in the UK; in M.2730, *Connex/DNVBVG*, where the transaction affected competition in local public transport services in the Riesa area (Saxony,

such situations are generally limited to markets with a narrow geographic scope, within a Member State.

41. If these conditions are met, the Commission has an obligation to refer the case.

Referrals from Member States to the Commission pursuant to Article 22

Legal requirements

42. In order for a referral to be made by a Member State/s to the Commission pursuant to Article 22, two legal requirements must be fulfilled as pre-conditions. The concentration must:

i) first, *affect trade between Member States*, and

ii) second, it must *threaten to significantly affect competition within the territory of the Member State or States making the request*.

43. As to the *first criterion*, a concentration fulfills this requirement to the extent that it is liable to have some discernible influence on the pattern of trade between Member States[36].

44. As to the *second criterion*, as under Article 9(2)a, a referring Member State or States is/are required in essence to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

Germany); and in M. 3130, *Arla Foods/Express Diaries*, where the transaction affected competition in the market for the supply of bottled milk to doorstep deliverers in the London, Yorkshire and Lancashire regions of the UK. For the purpose of defining the notion of a non-substantial part of the common market, some guidance can also be found in the case-law relating to the application of Article 82 EC Treaty. In that context, the Court of Justice has articulated quite a broad notion of what may constitute a substantial part of the common market, resorting *inter alia* to empirical evidence. In the case-law there can be found, for instance, indications essentially based on practical criteria such as "the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers", See Case 40/73, *Suiker Unie/Commission*, 1975, ECR 1663. See also Case C-179/90, *Porto di Genova*, 1991, ECR 5889, where the Port of Genova was considered as constituting a substantial part of the common market. In its case-law the Court has also stated that a series of separate markets may be regarded as together constituting a substantial part of the common market. See, for example, Case C-323/93, *Centre d'insémination de la Crespelle*, par. 17, where the Court stated "In this case, by making the operation of the insemination centres subject to authorization and providing that each centre should have the exclusive right to serve a defined area, the national legislation granted those centres exclusive rights. By thus establishing, in favour of those undertakings, a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market".

[36] See also, by analogy, the Commission Notice on the notion of effect on trade concept contained in Articles 81 and 82 of the Treaty (*Official Journal C 101, 27.04.2004, pages 81-96*).

Other factors to be considered

45. As post-notification referrals to the Commission may entail additional cost and time delay for the merging parties, they should normally be limited to those cases which appear to present a real risk of negative effects on competition and trade between Member States, and where it appears that these would be best addressed at the Community level[37]. The categories of cases normally most appropriate for referral to the Commission pursuant to Article 22 are accordingly the following:

- Cases which give rise to serious competition concerns in a market/s which is/are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets.

- Cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of countries of the EU, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.

III. MECHANICS OF THE REFERRAL SYSTEM

A. OVERVIEW OF THE REFERRAL SYSTEM

46. The Merger Regulation sets out the relevant legal rules for the functioning of the referral system. The rules contained in Articles 4(4), 4(5), 9 and 22 set out in detail the various steps required for a case to be referred from the Commission to Member States and vice versa.

47. Each of the four relevant referral provisions establishes a self-contained mechanism for the referral of a given category of concentration. The provisions can be categorised in the following way:

- Pre-notification referrals:
    - From the Commission to Member States (Article 4(4))
    - From Member States to the Commission (Article 4(5))

[37] See the joint referral by seven Member States to the Commission of a transaction affecting worldwide markets in M.2738 *GE/Unison,* and the joint referral by seven Member States to the Commission of a transaction affecting a Western European market in M.2698 *Promatech/Sulzer*; See also *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*, a paper published by the European Competition Authorities (ECA), at para. 11.

- Post-notification referrals:
    - From the Commission to Member States (Article 9)
    - From Member States to the Commission (Article 22)

48. The flowcharts attached as Annex I to this Notice describe in graphical form the various procedural steps to be followed in the referral mechanism set out by Articles 4(4), 4(5), 9 and 22.

Pre-notification referrals

49. Pre-notification referrals can only be requested by the undertakings concerned[38]. It is for the undertakings concerned to verify whether the concentration meets the criteria specified in Articles 4(4) (that the concentration has a Community dimension but may significantly affect competition in a distinct market within a Member State) or 4(5) (that the concentration does not have a Community dimension but is capable of being reviewed under the national competition laws of at least three Member States) are met. The undertakings concerned may then decide to request a referral to or from the Commission by submitting a reasoned request on Form RS. The request is transmitted without delay by the Commission to all Member States. The remainder of the process differs under Articles 4(4) and 4(5).

    - Under Article 4(4), the Member State/s concerned[39] have 15 working days from the date they receive the submission within which they can express agreement or disagreement with the request. Silence on the part of a Member State is deemed to constitute agreement[40]. If the Member State or States concerned agrees to the referral, the Commission has an additional period of approximately 10 working days (25 working days from the date the Commission received Form RS) in which it may decide to refer the case. Silence on the part of the Commission is deemed to constitute assent. If the Commission assents, the case (or part/s thereof) is referred to one or more Member States as requested by the undertakings concerned. If the referral is made, the Member State concerned applies its national law to the referred part of the case[41]. Articles 9(6)-9(9) apply.

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38 The term "undertakings concerned" includes "persons" within the meaning of Article 3(1)(b).

39 The Member State or States concerned are the ones identified in Form RS to which the case will be referred if the request is granted.

40 This mechanism is an essential feature of all referral procedures set out in the Merger Regulation. The mechanism may be termed "positive silence" or non-opposition: that is to say that failure to take a decision on the part of the Commission or a Member State will be deemed to constitute the taking of a positive decision. This mechanism was already a feature of Regulation 4064/89 in its Article 9(5). It is now included in Articles 4(4) (second and fourth sub-paragraphs), 4(5) (fourth sub-paragraph), 9(5), 22(3) first sub-paragraph, last sentence. The positive silence mechanism is, however, not applicable with regard to decisions by Member States to join a request under Article 22(2).

41 Article 4(4) allows merging parties to request partial or full referrals. The Commission and Member States must either accede to or refuse the request, and may not vary its scope by, for example, referring only a part of case when a referral of the whole of the case had been requested. In the case of a partial referral, the Member State concerned will apply its national competition law to the referred part of the case. For the remainder of the case, the Merger

- Under Article 4(5), the Member States concerned[42] have 15 working days from the date they receive the submission within which they can express agreement or disagreement with the request. At the end of this period, the Commission checks whether any Member State competent to examine the concentration under its national competition law has expressed disagreement. If there is no expression of disagreement by any such competent Member State, the case is deemed to acquire a Community dimension and is thus referred to the Commission which has exclusive jurisdiction over it. It is then for the parties to notify the case to the Commission, using Form CO. On the other hand, if one or more competent Member States has/have expressed its/their disagreement, the Commission informs all Member States and the undertakings concerned without delay of any such expression of disagreement and the referral process ends. It is then for the parties to comply with any applicable national notification rules.

Post-notification referrals

50. Pursuant to Articles 9(2) and 22(1), post-notification referrals are triggered by Member States either on their own initiative or following an invitation by the Commission pursuant to Articles 9(2) and 22(5). The procedures differ according to whether the referral is from or to the Commission.

- Under Article 9, a Member State may request that the Commission refer to it a concentration with Community dimension, or a part thereof, which has been notified to the Commission and which threatens to significantly affect competition within a distinct market within that Member State (Article 9(2)(a)), or which affects such a distinct market not constituting a substantial part of the common market (Article 9(2)(b)). The request must be made within 15 working days from the date the Member State received a copy of Form CO. The Commission must first verify whether those legal criteria are met. It may then decide to refer the case, or a part thereof, exercising its administrative discretion. In the case of a referral request made pursuant to Article 9(2)(b), the Commission must (i.e. has no discretion) make the referral if the legal criteria are met. The decision must be taken within 35 working days from notification or, where the Commission has initiated proceedings, within 65 working days[43]. If the referral is made, the Member State concerned applies its own national competition law, subject only to Article 9(6) and 9(8).

Regulation will continue to apply in the normal way, that is the undertakings concerned will be obliged to make a notification of the non-referred part of the concentration on Form CO pursuant to Article 4(1) of the Merger Regulation. By contrast, if the whole of the case is referred to a Member State, Article 4(4) final subparagraph specifies that there will be no obligation to notify the case also to the Commission. The case will thus not be examined by the Commission. The Member State concerned will apply its national law to the whole of the case; no other Member State can apply national competition law to the concentration in question.

42 i.e. those that would be competent to review the case under their national competition law in the absence of a referral. For the concept of "competent to review the case", see section B5 below.

As regards cases where the Commission takes preparatory steps within 65 working days, see Article 9(4) b and 9(5).

- Under Article 22, a Member State may request that the Commission examine a concentration which has no Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. The request must be made within 15 working days from the date of national notification or, where no notification is required, the date when the concentration was "made known"[44] to the Member State concerned. The Commission transmits the request to all Member States. Any other Member State/s can decide to join the request[45] within a period of 15 working days from the date it received a copy of the initial request. All national time limits relating to the concentration are suspended until it has been decided where it will be examined; a Member State can re-start the national time limits before the expiry of the 15 working day period by informing the Commission and the merging parties that it does not wish to join the request. At the latest 10 working days following this 15 working day period, the Commission must decide whether to accept the case from the requesting Member State/s. If the Commission accepts jurisdiction, national proceedings in the referring Member State/s are terminated and the Commission examines the case pursuant to Article 22(4) of the Merger Regulation on behalf of the requesting State/s[46]. Non-requesting States can continue to apply national law.

51. The following section of the Notice focuses on a number of detailed elements of the system with the aim in particular of providing further guidance to undertakings contemplating making requests at the pre-notification stage, or who may be party to transactions subject to the possibility of post-notification referral.

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44 The notion of "made known", derived from the wording of Article 22, should in this context 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.

45 It should be noted that Article 22 enables a Member State to join the initial request even if the concentration has not yet been notified to it. However, Member States may be unable to do so if they have not yet received the necessary information from the merging parties at the time of being informed by the Commission that a referral request has been lodged by another Member State. Notwithstanding the Member State's ability to contact the merging parties in order to verify whether they are competent to review any particular transaction, the notifying parties are therefore strongly encouraged to file, where feasible, their notification to all competent Member States simultaneously.

46 Where the Commission examines a concentration on behalf of one or more Member States pursuant to Article 22, it can adopt all the substantive decisions provided for in Articles 6 and 8 of the ECMR. This is established in Article 22(4) of the Merger Regulation. It is to be noted that the Commission examines the concentration upon the request of and on behalf of the requesting Member States. The Article should therefore be interpreted as requiring the Commission to examine the impact of the concentration within the territory of those Member States. The Commission will not examine the effects of the concentration in the territory of Member States which have not joined the request unless this examination is necessary for the assessment of the effects of the concentration within the territory of the requesting Member States (e.g. where the geographic market extends beyond the territory/ies of the requesting Member State/s).

B. DETAILS OF THE REFERRAL MECHANISM

52. This section of the Notice provides guidance regarding certain aspects of the functioning of the referral system set out in Articles 4(4), 4(5), 9 and 22 of the Merger Regulation.

1. The network of competition authorities

53. The Commission carries out the procedures set out in the Merger Regulation in close and constant liaison with the competent authorities of the Member States (National Competition Authorities, or "NCAs") as provided in Article 19(2) of the Merger Regulation. Cooperation and dialogue between the Commission and the NCAs, and between the NCAs themselves, is particularly important in the case of concentrations which are subject to the referral system set out in the Merger Regulation.

54. According to Recital 14 to the Merger Regulation, the Commission and the NCAs form together a network of public authorities, applying their respective competences in close cooperation using efficient arrangements for information sharing and consultation with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity, and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible.

55. The network should ensure the efficient re-attribution of concentrations according to the principles described in section II above. This involves facilitating the smooth operation of the pre-notification referral mechanism, as well as providing, to the extent foreseeable, a system whereby potential post-notification referral requests are identified as soon as possible[47].

56. Pursuant to Articles 4(4) and 4(5), the Commission transmits reasoned requests made by the undertakings concerned "without delay"[48]. The Commission will endeavour to transmit such documents within one working day from the day they are received or issued. Information within the network will be exchanged by various means, depending on the circumstances: e-mail, surface mail, courier, fax, telephone. It should be noted that for sensitive information or confidential information exchanges will be carried out by secure e-mail or by any other protected means of communication between these contact points.

57. All members of the network, including both the Commission and all NCAs, their officials and other servants, and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States, will be bound by the professional secrecy obligations set out in Article 17 of the Merger Regulation. They shall not disclose non-public information they have acquired through the application of the Merger Regulation,

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47 Advance knowledge of the possibility of a referral request might, for example, be taken into account by the Commission in deciding not to accede to a request for derogation from the suspensive effect pursuant to Article 7(3) of the Merger Regulation.

48 It should be noted that, as provided for in Article 19(1) of the Merger Regulation, the Commission is also under an obligation to transmit to the NCAs copies of notifications and of the most important documents lodged with or issued by the Commission.

unless the natural or legal person who provided that information has consented to its disclosure.

58. Consultations and exchanges within the network is a matter between public enforcement agencies and do not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring that due process is observed in the cases it deals with.

2. Triggering the pre-notification referral system; information to be provided by the requesting parties

59. For the referral system to work swiftly and smoothly, it is crucial that the requesting parties, provide, whenever required, complete and accurate information in a timely fashion and in the most efficient way possible. Legal requirements as to what information needs to be provided and the consequences of providing incorrect, incomplete or misleading information are set out in the Merger Regulation, the Merger Implementing Regulation and Form RS[49].

60. As specified in Form RS, all information submitted in a reasoned submission must be correct and complete. If parties submit incorrect or incomplete information, the Commission has the power to either adopt a decision pursuant to Article 6(1)(a) of the Merger Regulation (where failure to fulfill the conditions of Article 4(5) comes to its attention during the course of the investigation), or to revoke any Article 6 or 8 decision it adopts following an Article 4(5) referral, pursuant to Article 6(3)(a) or 8(6)(a) of the Merger Regulation. Following the adoption of a decision pursuant to Article 6(1)(a) or following revocation, national competition laws would once again be applicable to the transaction. In the case of referrals under Article 4(4) made on the basis of incorrect or incomplete information, the Commission may require a notification pursuant to Article 4(1). In addition, the Commission has the power to impose fines under Article 14(1)(a) of the Merger Regulation. Finally, parties should also be aware that, if a referral is made on the basis of incorrect or incomplete information included in Form RS, the Commission and/or the Member States may consider making a post-notification referral reversing a pre-notification referral based on such incorrect or incomplete information[50].

61. When providing information on Form RS or generally in making a request for a pre-notification referral, it is not envisaged or necessary for the undertakings concerned to show that their concentration will lead to detrimental effects on competition51. They should, however, provide as much information as possible showing clearly in what way the concentration meets the relevant legal criteria set out in Articles 4(4) and 4(5) and why the concentration would be most appropriately dealt with by the competition authority or authorities specified in the request. The Merger Regulation does not provide that the fact of a Form RS

Form RS is annexed to the Merger Implementing Regulation No 802/2004 of 7 April 2004, OJ 2004, L 133.

50 This would be the appropriate "remedy" where the requesting parties have submitted incorrect or incomplete information not affecting fulfilment of the conditions of Article 4(5), which comes to the Commission's attention during the course of the investigation.

51 See Recital 16 to the Merger Regulation.

having been lodged should be published, and it is not intended to do so. A non-public transaction can consequently be the subject of a pre-notification referral request.

62. Even though, according to the Merger Implementing Regulation, the Commission will accept Form RS in any official Community language, undertakings concerned providing information which is to be distributed to the network are strongly encouraged to use in their communications a language which will be understood by all addressees of the information. This will facilitate Member State treatment of such requests. Moreover, as regards requests for referral to a Member State or States, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s to which the referral is being requested.

63. Beyond the legal requirements specified in Form RS, the undertakings concerned should be prepared to provide additional information, if required, and to discuss the matter with the Commission and NCAs in a frank and open manner in order to enable the Commission and NCAs to assess whether the concentration in question should be the subject of referral.

64. Informal contacts between merging parties contemplating lodging a pre-filing referral request, on the one hand, and the Commission and/or Member State authorities, on the other, are actively encouraged, including following the submission of Form RS. The Commission is committed to providing informal, early guidance to firms wishing to use the pre-notification referrals system set out in Article 4(4) and 4(5) of the Merger Regulation[52].

3. Concentrations eligible for referral

65. Only concentrations within the meaning of Article 3 of the Merger Regulation are eligible for referral pursuant to Articles 4(5) and 22. Only concentrations falling within the ambit of the relevant national competition laws for the control of mergers are eligible for referral pursuant to Articles 4(4), and 9[53].

66. Pre-filing referral requests pursuant to Articles 4(4) and 4(5) of the Merger Regulation must concern concentrations the plans for which are sufficiently concrete. In that regard, there must at least exist a good faith intention to merge on the part of the undertakings concerned, or, in the case of a public bid, at least a public announcement of an intention to make such a bid[54].

4. The concept of "prior to notification" under Articles 4(4) and 4(5)

67. Articles 4(4) and 4(5) only apply at the pre-notification stage.

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[52] A request for derogation from the suspensive effect pursuant to Article 7(3) of the Merger Regulation would normally be inconsistent with an intention to make a pre-notification referral request pursuant to Article 4(4).

[53] By contrast, the reference to "national legislation on competition" in Articles 21(3) and 22(3) should be understood as referring to all aspects of national competition law.

[54] See Recital 34 to, and Article 4(1) of, the Merger Regulation.

68. Article 4(4) specifies that the undertakings concerned may make a referral request by means of reasoned submission (Form RS), "prior to the notification of a concentration within the meaning of paragraph 1". This means that the request can only be made where no Form CO has formally been submitted pursuant to Article 4(1).

69. Likewise, Article 4(5) specifies that the request may be made "prior to any notification to the competent [national] authorities". This means that the concentration in question must not have been formally notified in any EU jurisdiction for this provision to apply. Even one notification anywhere in the EU will preclude the undertakings concerned from triggering the mechanism of Article 4(5). In the Commission's view, no penalty should be imposed for non-notification of a transaction at the national level during the pendency of a request pursuant to Article 4(5).

5. The concept of a "*concentration capable of being reviewed under national competition law*" and the concept of "*competent Member State*" in Article 4(5)

70. Article 4(5) enables the undertakings concerned to request a pre-notification referral of a concentration which does not have Community dimension and which is "capable of being reviewed under the national competition laws of at least three Member States".

71. "Capable of being reviewed" or reviewable should be interpreted as meaning a concentration which falls within the jurisdiction of a Member State under its national competition law for the control of mergers. There is no need for a mandatory notification requirement, i.e. it is not necessary for the concentration to be required to be "notifiable" under national law[55].

72. Pursuant to Article 4(5)(third and fourth sub-paragraph), where at least one Member State "competent to examine the concentration under its national competition law" has expressed its disagreement with the referral, the case shall not be referred. A "competent" Member State is one where the concentration is reviewable and which therefore has the power to examine the concentration under its national competition law.

73. All Member States, and not only those "competent" to review the case, receive the Form RS. However, only Member States "competent" to review the case are counted for the purposes of Article 4(5) third and fourth sub-paragraph. Pursuant to Article 4(5) third sub-paragraph, "competent" Member States will have 15 working days from the date they receive the Form RS to express their agreement or disagreement with the referral. If they all agree the case will acquire Community dimension pursuant to Article 4(5) fifth sub-paragraph. According to Article 4(5) fourth sub-paragraph, by contrast, if even only one "competent" MS disagrees, no referral will take place from any Member State.

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[55] Even in circumstances where a notification is voluntary *de jure*, the parties may in practice wish or be expected to file a notification.

74. Given the above mechanism, it is crucial to the smooth operation of Article 4(5) that *all* Member States where the case is reviewable under national competition law, and which are hence "competent" to examine the case under national competition law, are identified correctly. Form RS therefore requires the undertakings concerned to provide sufficient information to enable each and every Member State to identify whether or not it is competent to review the concentration pursuant to its own national competition law.

75. In situations where Form RS has been filled in correctly, no complications should arise. The undertakings concerned will have identified correctly all Member States which are competent to review the case. In situations, however, where the undertakings concerned have not filled in Form RS correctly, or where there is a genuine disagreement as to which Member States are "competent" to review the case, complications may arise.

- Within the period of 15 working days provided in Article 4(5) (third sub-paragraph), a Member State which is not identified as being "competent" in Form RS may inform the Commission that it is "competent" and may, like any other "competent" Member State, express its agreement or disagreement with the referral.

- Likewise, within the period of 15 working days provided in Article 4(5)(third sub-paragraph), a Member State which has been identified as "competent" in Form RS may inform that Commission that it is not "competent". This Member State would then be disregarded for the purposes of Article 4(5).

76. Once the period of 15 working days has expired without any disagreement having been expressed, the referral, if made, will be considered valid. This ensures the validity of Commission decisions taken under Articles 6 or 8 of the Merger Regulation following an Article 4(5) referral.

77. This is not to say, however, that undertakings concerned can abuse the system by negligently or intentionally providing incorrect information, including as regards the reviewability of the concentration in the Member States, on Form RS. As noted at para. 60 above, the Commission may take measures to rectify the situation and to deter such violations. The undertakings concerned should also be aware that, in such circumstances, where a referral has been made on the basis of incorrect or incomplete information, a Member State which believes it was competent to deal with the case but did not have the opportunity to veto the referral due to incorrect information being supplied, may request a post-notification referral.

6. Notification and Publication of Decisions

78. According to Articles 4(4)(fourth sub-paragraph), 4(5)(fourth subparagraph), 9(1) and 22(3)(second sub-paragraph), the Commission is obliged to inform the undertakings or persons concerned and all Member States of any decision taken pursuant to those provisions as to the referral of the concentration.

79. The information will be provided by means of a letter addressed to the undertakings concerned (or for Article 9.1 or 22(3) decisions, a letter addressed to the Member State concerned). All Member States will receive a copy thereof.

80. There is no requirement that such decisions be published in the Official Journal[56]. The Commissionwill, however, give adequate publicity to such decisions on DG Competition's website, subject to confidentiality requirements.

7. Article 9(6)

81. Article 9(6) provides that, when the Commission refers a notified concentration to a Member State in accordance with Article 4(4) or 9(3), the NCA concerned must deal with the case "without undue delay". Accordingly, the competent authority concerned should deal as expeditiously as possible with the case under national law.

82. In addition, Article 9(6) provides that the competent national authority shall, within 45 working days after the Commission's referral or following a notification being submitted at the national level if such is required, inform the undertakings concerned of the result of the "preliminary competition assessment" and what "further action", if any, it proposes to take. Accordingly, within 45 working days after the referral or following notification, the merging parties should be provided with sufficient information to enable them to understand the nature of any preliminary competition concerns the authority may have and be informed of the likely extent and duration of the investigation. The Member State concerned may only exceptionally suspend this time limit, where necessary information has not been provided to it by the undertakings concerned as required under its national competition law.

IV. FINAL REMARKS

83. This Notice will be the subject of periodic review, in particular following any revision of the referral provisions in the Merger Regulation. In that regard, it should be noted that, according to Article 4(6) of the Merger Regulation, the Commission must report to the Council on the operation of pre-notification referral provisions, Articles 4(4) and 4(5), by no later than 1 July, 2009

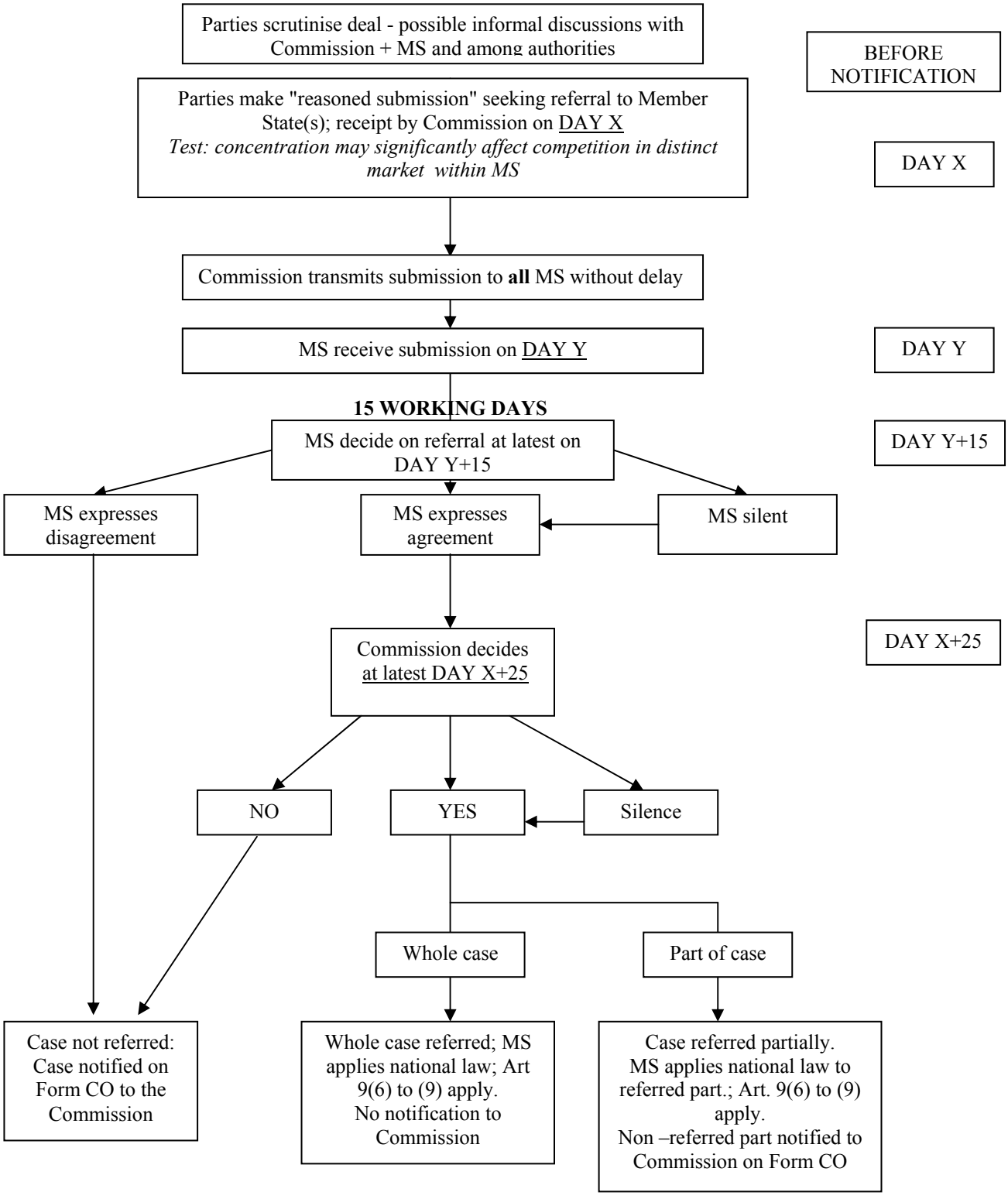
84. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice.

[56] Pursuant to Article 20 of the ECMR this is only required for decisions taken under Article 8(1)-(6), 14 and 15.

ANNEXES: Referral Charts

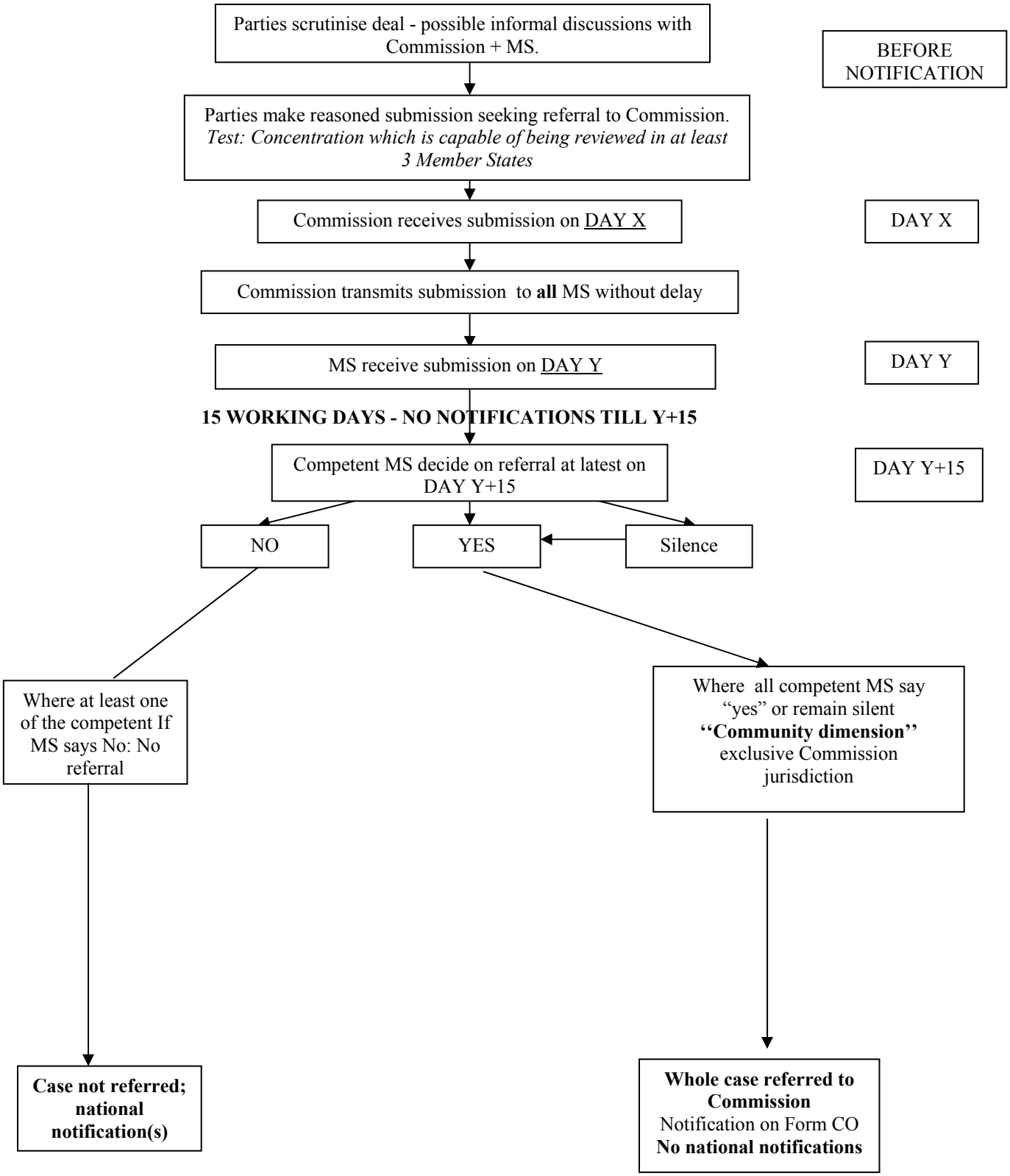
Article 4(4)

Concentration with Community Dimension



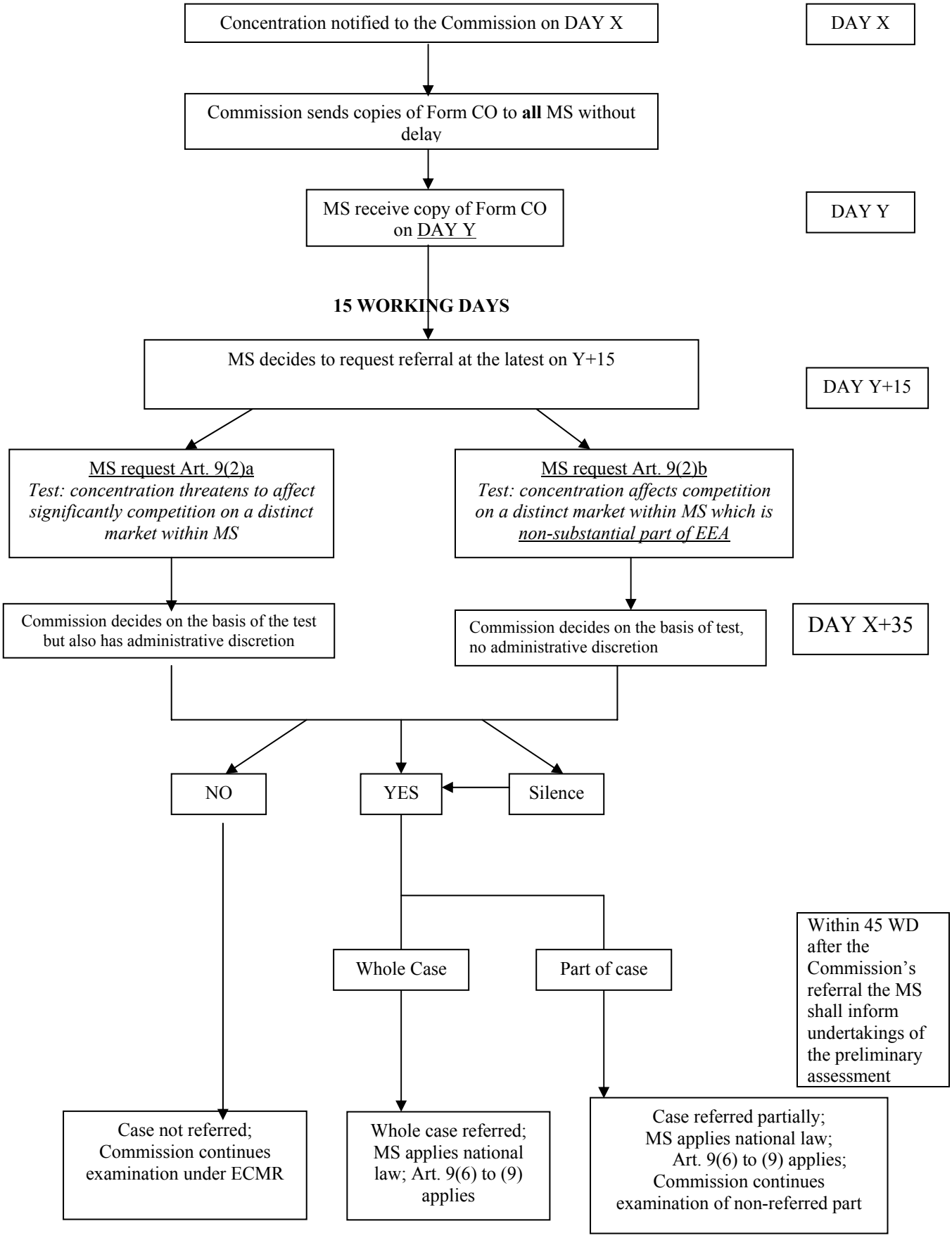
Article 4(5)

Concentration without Community Dimension reviewable in at least three MS under national law



Article 9

Concentration with Community Dimension



Article 22

Concentration without Community dimension