

Case referral under the EEA Agreement

1. Introduction

When the Commission has jurisdiction to deal with a case under the Merger Regulation¹, it is the sole competent authority in the EEA², which means that it exercises its powers not only with respect to the EC Member States, but also with respect to the territories of the EFTA States³. The rules on referral of cases under the EEA Agreement are included in Protocol 24 to the EEA Agreement. These are based on the Merger Regulation's system for referral of cases, but have been subject to certain adaptations. Following the adoption of Council Regulation 139/2004, many of the new rules on referral (pre-notification and post-notification) of cases included in the Regulation have likewise been incorporated into the EEA Agreement⁴.

The referral rules in Protocol 24 of the EEA Agreement apply with regard to cases referred to or from the EFTA States. The referral rules in the Merger Regulation are applicable in parallel with regard to cases referred to or from the EC Member States. Thus, in a case which involves referrals involving both EFTA States and EC Member States, the two sets of rules are applicable. When a referral involves EFTA States only, the EEA Agreement alone applies. Similarly, when a referral involves exclusively EC Member States, only the rules of the Merger Regulation apply.

According to the referral rules in the EEA Agreement, there is a more limited scope for the EFTA States than for the EC Member States to request the referral of a case to the Commission. The rules on referral of cases from the Commission to the EFTA States are, however, essentially identical to those in the Merger Regulation.

2. Pre-notification referrals under the EEA Agreement

The EEA Agreement provides for **pre-notification referrals from the EFTA States to the Commission**, by allowing the parties to a concentration to request the Commission to examine a concentration which is "capable of being reviewed under the national competition laws of at least three EC Member States and at least one EFTA State"⁵. Such a request is optional for the parties. It constitutes an "add-on" to a request for referral from three or more EC Member States under Article 4(5) of Regulation 139/2004. This means that if a case is capable of being reviewed under the competition laws of, e.g., France, Poland, and Norway, this is not sufficient for the case to be referred to the Commission; it is necessary that the case is reviewable also under the national law of a third EC Member State.

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/1, 29.1.2004.

² This follows from Article 57 (2) and Annex XIV to the EEA Agreement. The EEA Agreement and its Annexes and Protocols can be found on the web site of the EFTA.

³ For the purpose of this note, the term EFTA States, which is the term used in the EEA Agreement, refers to Iceland, Lichtenstein and Norway, and not to Switzerland which has not ratified the EEA Agreement.

⁴ See the Commission's web-site:
<http://europa.eu.int/comm/competition/mergers/legislation/regulation/regulation139/>

⁵ See Article 6(5) of Protocol 24 to the EEA Agreement, and Article 4(5) of the Merger Regulation.

If one or more EFTA States vetoes the referral, the competent EFTA State(s) shall retain its/their competence to examine the case under its national competition law and the case shall not be referred from any EFTA State. However, a veto by an EFTA State has no impact on the fate of the request for referral from the EC Member States concerned and the Commission.

The parties can also request the **pre-notification referral of a case from the Commission to a competent EFTA State**. In this situation, the rules of the EEA Agreement are essentially identical to those of the Merger Regulation.⁶ They provide that an undertaking concerned may inform the Commission by means of a reasoned submission that the “concentration may significantly affect competition in a market within an EFTA State, which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that EFTA State”. In such circumstances, the rules applicable to the assessment of that request by the Commission and by the EFTA State(s) concerned are in substance the same as those set out in the Merger Regulation.

3. Post-notification referrals under the EEA Agreement

The EEA Agreement enables **post-notification referral from the Commission to an EFTA State** of a case or of a part or parts of a case.⁷

The Commission may refer a notified concentration to an EFTA State in two situations. First, a case may be referred where the concentration “threatens to affect significantly competition in a market within that EFTA State, which presents all the characteristics of a distinct market”. Second, the Commission may refer a case to an EFTA State where the concentration “affects competition in a market within that EFTA State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the territory covered by the Agreement”.⁸

As regards **post-notification referral of cases to the Commission**, an EFTA State may only join a referral request made by an EC Member State; it may not initiate such a request itself. This is consistent with the “two-pillar” system of the EEA-Agreement, and means that the powers of the EFTA States are in this regard somewhat more limited than those of the EC Member States.

Accordingly, where a concentration may affect trade between one or more EC Member States and one or more EFTA States, and it threatens to significantly affect competition in one or more EFTA States, that State or these States may join a request for referral put forward by one or more EC Member States⁹.

⁶ See Article 6 (4) of Protocol 24 to the EEA Agreement, and Article 4 (4) of the Merger Regulation.

⁷ See Article 6 (1) of Protocol 24 to the EEA Agreement.

⁸ These provisions closely correspond to the provisions in Article 9(2)(a) and 9(2)(b) of the Merger Regulation, but are not identical to them. In particular, it should be noted that the Commission has no discretion regarding a case meeting the requirements set out in Article 9(2)(b) of the Merger Regulation, but does enjoy discretion regarding referral of the corresponding category of cases under Article 6 (1) of Protocol 24 to the EEA Agreement.

⁹ See Article 6(3) of Protocol 24 to the EEA Agreement.

As under the Merger Regulation, the EEA Agreement provides that when the EFTA States receive the request by an EC Member State to refer a case to the Commission, all national time limits relating to the concentration shall be suspended in all the EFTA States competent to review the case until it has been decided whether the Commission will examine the case or not. Once an EFTA State has informed the Commission that it does not wish to join the request, that EFTA State retains its competence to examine the case and its national time limits start running anew. If the Commission decides to examine the referred concentration, the EFTA State or the EFTA States that joined the request are no longer competent to examine the case under their national competition law. An EFTA State that does not join the request can apply its national competition law to the concentration.

4. Calculation of time limits

In general, the procedure governing referral requests including the EFTA States is the same as for requests applicable to requests involving only EC Member States. However, although the time limits are the same for the EFTA States as for the EC Member States, the manner in which they are calculated differs somewhat. The time limits start to run, for pre- and post notification referrals involving the EFTA States, upon receipt of the request for referral and other relevant documents by the EFTA Surveillance Authority, and not upon the receipt by the EFTA States of the documents in question¹⁰.

5. Submission of pre-notification referral requests

As regards the submission of requests for pre-notification referrals, an unofficial version of the Form RS, which is intended to give guidance on the information undertakings may wish to provide should they seek a referral involving any of the EFTA States, has been published on the web site of DG Competition.¹¹ Merging parties are therefore encouraged to use this form.

According to Section D of that unofficial version of the Form RS, where a reasoned submission is made according to the EEA Agreement¹² in an official language of an EFTA State which is not an official language of the Community, the submission must simultaneously be supplemented by a translation into an official language of the Community.

¹⁰ See Article 13 of Protocol 24 to the EEA Agreement.

¹¹ http://europa.eu.int/comm/competition/mergers/legislation/regulation/regulation139/form_rs_eea_en.pdf

¹² See Article 12 of Protocol 24 to the EEA Agreement.