



# Pre- and post-notification referrals under the EU Merger Regulation

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***Disclaimer:*** All views expressed are strictly personal and do not necessarily reflect the official position of the European Commission



## Legal framework

### ➤ Jurisdiction:

- EU Commission has exclusive jurisdiction over all concentrations with '**Union dimension**':
  - 'Bright line test' of turnover thresholds
- Concentrations **without Union dimension**: MS competence according to their respective merger regimes
- More flexibility through case referrals



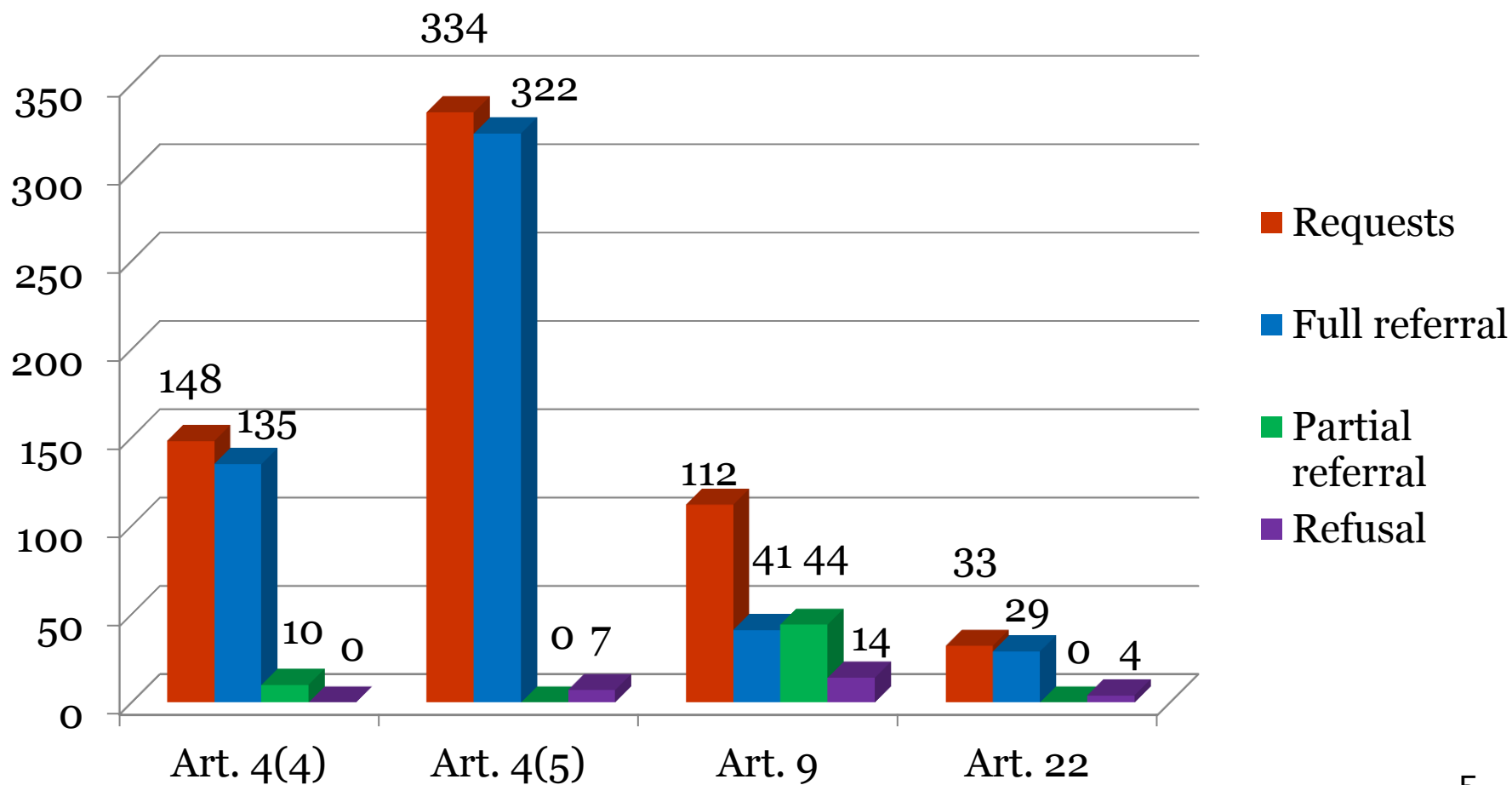
# Legal framework

- EU Merger Regulation 139/2004
- **Commission Notice on case referral** in respect of concentrations (OJ 2005 C 56/2)
- European Commission practice
- Judgments of the European Courts

# Different types of Referrals

	<b>Pre-notification: Parties' request</b>	<b>Post-notification: MS' request</b>
Commission → MS	<p><b>Art. 4(4)</b></p> <ul style="list-style-type: none"> <li>• EU dimension</li> <li>• Significant effect on competition</li> <li>• National or regional market</li> <li>• <u>COM discretion</u></li> <li>• MS can oppose</li> </ul>	<p><b>Art. 9(2)(a)</b></p> <ul style="list-style-type: none"> <li>• Significant effect on competition</li> <li>• Separate geographic market within the MS</li> <li>• <u>COM discretion</u></li> </ul> <p><b>Art. 9(2)(b)</b></p> <ul style="list-style-type: none"> <li>• Effect on competition</li> <li>• Non-substantial part of the common market</li> <li>• <u>No discretion of COM</u></li> </ul>
MS → Commission	<p><b>Art. 4(5)</b></p> <ul style="list-style-type: none"> <li>• Reviewable in at least 3 MS</li> <li>• Voluntary basis (parties)</li> <li>• Competent MS can oppose – 15 days</li> <li>• <u>No discretion of COM</u></li> </ul>	<p><b>Art. 22</b></p> <ul style="list-style-type: none"> <li>• Affect trade between MS</li> <li>• Significant effect on competition</li> <li>• Real risk of negative effects</li> <li>• <u>COM discretion</u></li> </ul>

## Referrals statistics (2004-2017)





## Guiding principles

- Decisions taken with regard to the referral of cases should take account of:
  - **Principle of subsidiarity:** which authority is more appropriate to carry out the investigation
  - **'One-stop-shop':** administrative efficiency, avoid duplication and fragmentation of enforcement, reduce costs, eliminate risk of conflicting decisions
  - **Legal certainty:** respect 'original jurisdiction', refer only when there is a compelling reason for departing
  - **Need to ensure effective protection of competition** in all markets affected by the transaction

# Guiding principles

- When deciding to refer other factors also need to be considered:
  - The likely locus of the competitive effects
  - Scope and number of affected markets
  - Investigative effort
  - Consistent and efficient scrutiny
  - Expertise
  - Coherent remedies

## Cases referred under Art. 4(4) – full referral

### ➤ Supermarkets:

- Cases M. 8374 - UAB RIMI LIETUVA / UAB PALINK, M.8005 - CARREFOUR / EROSKI ASSETS, M.7933 - CARREFOUR / BILLA ROMANIA, M.7920 - NETTO / J SAINSBURY / DANSK SUPERMARKED / NEW EDLINGTON / HEDON / ROUNDHAY ROAD

### ➤ Water supply:

- Cases M.8464 - ANGLIAN WATER GROUP / NORTHUMBRIAN WATER GROUP / CK HUTCHISON HOLDINGS / WAVE, M.8350 - SOUTH STAFFORDSHIRE / PENNON / JV

### ➤ Hospitals

- Cases M.8326 - ELSAN / MEDIPOLE PARTENAIRES, M.8224 - HELIOS / QUIRON SALUD, M.8282 - PAI / SARq



## Cases referred under Art. 4(4) – partial referral

- Cinemas:
  - Case M.8177 - AMC UK / ODEON AND UCI CINEMAS
  
- Sale of hardware, paints and glass:
  - Case M.7677 - OBI / BAUMAX CERTAIN ASSETS
  
- Fitness facilities:
  - Case M.6982 - ALTOR FUND III / TRYGHEDSGRUPPEN / ELIXIA / HFN GROUP

## Cases referred under Article 4(5) EUMR – Recent cases

- M.8348 – RAG STIFTUNG / EVONIK INDUSTRIES / HUBER SILICA - Art. 6(1)(b), 6(2) decision 2017
- M. 8286 – RHI / MAGNESITA REFRATARIOS - Art. 6(1)(b), 6(2) decision 2017
- M. 8222 – KNORR BREMSE / HALDEX – abandonment in phase II
- M.8130 – IMERYS / ALTEO CERTAIN ASSETS - Art. 6(1)(b), 6(2) decision 2016
- M. 8087 – SMITHS GROUP / MORPHO DETECTION - Art. 6(1)(b), 6(2) decision 2016
- M.8055 – COHERENT / ROFIN-SINAR TECHNOLOGIES - Art. 6(1)(b), 6(2) decision 2016

## Cases referred under Article 4(5) EUMR – Digital sector

- M.4942 NOKIA / NAVTEQ - Art. 8(1) decision 2008
- M.4854 TOMTOM / TELE ATLAS - Art. 8(1) decision 2008
- M.4731 GOOGLE / DOUBLECLICK - Art. 8(1) decision 2008
- M.5669 CISCO / TANDBERG - Art. 6(1)(b), 6(2) decision 2010
- M.7217 FACEBOOK / WHATSAPP - Art. 6(1)(b) decision 2014
- M.7202 LENOVO / MOTOROLA MOBILITY – Art. 6(1)(b) decision 2014

## Cases referred under Art. 9

### ➤ Referred cases:

- Case M.7818 (2016) - MCKESSON / UDG HEALTHCARE - pharmaceutical wholesale and associated businesses
- Case M.7565 (2015) - DANISH CROWN / TICAN – meat products
- Case M.6525 (2012) - SESA / DISA / SAE / JV – local storage and logistics services in relation to refined oil, petroleum and airplane fuel supplies

### ➤ Referral request rejected:

- Case M.7978 (2017) - VODAFONE / LIBERTY GLOBAL / DUTCH JV
- Case M.7612 (2016) - HUTCHISON 3G UK / TELEFONICA UK
- Case M.7499 (2015) - ALTICE / PT PORTUGAL
- Case M.7421 (2015) - ORANGE / JAZZTEL

## Cases referred under Art.22

### ➤ Full referral:

- Case M.7802 (2016) – AMADEUS / NAVITAIRE
- Case M.7297 (2015) - DOLBY/ DOREMI/ HIGHLANDS
- Case M.7054 (2014) - CEMEX / HOLCIM ASSETS
- Case M.6796 (2013) – AEGEAN/ OLYMPIC II
- Case M.6773 (2013) – CANON/ IRIS

### ➤ Refusal:

- Case M.6502 (2013) - LONDON STOCK EXCHANGE GROUP PLC / LCH CLEARNET GROUP LIMITED

## Proposals made in the 2014 White Paper

- Article 4(4) EUMR:
  - rephrase test in order to avoid the impression that parties requesting referral have to "self-incriminate"
- Article 4(5) EUMR:
  - abolishment of the two-step procedure (Form RS + notification)
- Article 22 EUMR:
  - if COM accepts a referral request, it obtains jurisdiction for the entire EEA
  - if one (or more) competent Member State(s) oppose the referral, COM would renounce jurisdiction for the entire EEA

Thank you!