



DANISH COMPETITION AND CONSUMER AUTHORITY

**Guidelines to the Executive Order on
Notification of Mergers and on Merger Fees**

2013

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Chapter 1

Introduction

These guidelines provide guidance on the Executive Order on Notification of Mergers and on Merger Fees.

The forms to be used for a full and respectively a simplified merger notification are attached as Annexes to the Executive Order on Notification of Mergers. The Competition and Consumer Authority's assessment of mergers will be expedited if the notifying parties submit the information on the undertaking's name, address, telephone number, e-mail address as well as the information as to contact persons of the competitors, customers and suppliers referred to in the notification, in an electronic format. Accordingly, the Competition and Consumer Authority recommends that the notifying party submits the above mentioned information in an Excel sheet. For further information about this, please refer to the last page of these guidelines.

For guidance in general about the Competition and Consumer Authority's assessment of merger notifications, please refer to the Competition and Consumer Authority's merger guidelines (Merger Guidelines). These guidelines inter alia provide information about the benefits of pre-notification contact to the Competition and Consumer Authority well in advance of the notification as well as information about the possibility that the Competition and Consumer Authority may approve a merger according to the simplified procedure; cf. Section 12 c(7) of the Competition Act.

Chapter 2

Executive order on the notification of Mergers

2.1 Sections 1 and 2 – Notifying party and type of notification

A merger where the combined turnover of the undertakings concerned exceeds the turnover thresholds set out in Section 12(1); cf. Section 12 a (1); cf. subsections (2) and (3), of the Competition Act must be notified to the Competition and Consumer Authority either when the undertakings have entered into a binding merger agreement, when a take-over bid or an exchange offer has been published, or when control has been acquired, and before the merger has been implemented.

According to Section 1, a merger must be notified by one or more of the undertakings concerned, depending on the character of the merger. Where a party acquires sole control of the entirety or of certain parts of an undertaking, the merger must be notified by the undertaking that acquires sole control. In case of acquisition of joint control the notification must be filed jointly by the undertakings which acquire control of the entirety or of parts of an undertaking. When two or more undertakings are merged into one undertaking, the notification must be filed by these merging undertakings.

It is the undertakings concerned which are subject to the obligation to notify a merger. The undertakings concerned may choose to let one (or more) of the undertakings concerned submit the merger notification. The undertakings concerned may also authorize a joint representative to send and receive documents on behalf of all the undertakings concerned. Information as to who is notifying the merger and as to the representatives of the undertakings concerned must be indicated in Section 2 of the notification form. The undertakings concerned are the undertakings that take part in the merger. The definition of undertakings concerned must be interpreted in accordance with the practice of the European Commission. Please refer to the Commission's Jurisdictional Notice.¹

There are two forms to be used to submit a merger notification: There is one form to be used for the full notification (Annex 1) and another form to be used for the simplified notification (Annex 2). In the simplified notification, undertakings are required to submit fewer details than required for the full notification.

A merger may be notified either electronically or by hard copy. If a notification is submitted by hard copy it is recommended that the notifying party also encloses the information in an electronic format; e.g. on a CD-ROM. This will facilitate the Competition and Consumer Authority's assessment of the merger.

As a general rule the notifying party must provide all the information required by the notification form. If some of the required information is not relevant in relation to the merger in question, the notifying party must indicate this specifically. If some of the required information has

¹ The Commission's Consolidated Notice on Jurisdiction under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2008/C 95/01) Official Journal 16.4.2008.

already been submitted elsewhere in the notification form, a reference must be made to that section. Failure to provide the required information, may lead to the notification being declared incomplete, cf. Section 4(1) and (2).

However, the notifying party may ask for a dispensation with respect to some of the required information, such that the notification can be declared complete without that information; cf. Section 4(3). The notifying party may *inter alia* be granted dispensation with respect to information which the Competition and Consumer Authority already has received, or if the said information is not necessary for the assessment of the merger. The notifying party must give specific reasons as to why the information is not necessary for an assessment of the merger. If the omission of information has been agreed with the Competition and Consumer Authority prior to the submission of the notification, it will be sufficient to indicate this in the notification. Since the notifying party will be interested in getting the notification declared complete as soon as possible after submitting it, notifying parties are advised to ask for dispensations well in advance of the submission of a merger notification.

A non-confidential version must be enclosed with the notification, regardless of whether a simplified or full notification is filed. If such a statement is not enclosed, the notification will not be deemed a complete notification. The non-confidential version of the notification may be made public and distributed to third parties. The Competition and Consumer Authority may grant dispensation from the requirement for a non-confidential version to be enclosed with the notification; see Section 4(3). If the notifying party wishes to obtain such dispensation, a request for dispensation should be submitted sufficiently in advance of the notification to enable the question to be clarified before the actual notification. Without formal dispensation, the notification will not be deemed complete, with the effect that the deadline of 25 working days in Section 12 d(1) of the Competition Act will not begin to run.

2.2 Section 3 – Mergers that can be notified according to the simplified procedure

Mergers that can be notified according to the simplified procedure need to meet one of the criteria for this procedure.

Section 3(1)(1) – Acquisition of joint control of a joint venture

Section 3(1)(1) applies to mergers where two or more undertakings acquire joint control of a joint venture which has no (or marginal) actual or anticipated activities in Denmark.

This will be the case when 1) the turnover of the joint venture and/or the turnover of the activities transferred to the joint venture is less than DKK 100 million in Denmark; and 2) the total value of the assets or the turnover generated by the assets transferred to the joint venture is less than DKK 100 million in Denmark. The two conditions are cumulative, meaning that the value of the joint venture's turnover and the assets and activities transferred to it must not exceed DKK 100 million.

In re the first condition:

The turnover of the joint venture must be calculated on the basis of the most recent audited financial statements of the controlling undertakings or of the joint venture, providing that separate financial statements are available with respect to the assets which the controlling undertakings have transferred to the joint venture.

The words "and/ or" refer to the different situations that may occur, e.g. if the merger involves a joint takeover of an existing undertaking, the turnover to take into account will be this undertaking's (i.e. the joint venture's) turnover. If, however, the merger concerns the creation of a joint venture to which the founding undertakings transfer their activities, the turnover of the transferred activities must be taken into account. In case of a takeover of a controlling interest in an existing joint venture, the turnover of the joint venture and the turn-

over generated by the activities which the new controlling undertaking transfers (or may transfer) to it must be taken into account.

In re the second condition:

The total value of the assets of the joint venture must be calculated on the basis of the balance sheets of the most recent financial statements of each of the controlling undertakings. The term "assets" comprise: 1) all tangible and intangible assets transferred to the joint venture (examples of tangible assets: production plant, wholesale or retail businesses and stocks; examples of intangible assets: intellectual property rights, goodwill, etc.) and 2) all loans, credits and guarantees that may have been provided by the parent undertakings to the joint venture.

If the assets transferred generate a turnover, then the value of neither the assets nor the turnover may exceed DKK 100 million.

Section 3(1)(2) – Sole control of an entity which was previously a joint venture

Section 3(1)(2) applies to mergers where one party acquires the sole control of an undertaking which it previously controlled jointly with one or more other undertakings. This provision applies to situations where the control of a joint venture is changed from joint control to sole control held by one of the undertakings which previously controlled the joint venture together with other undertakings.

Section 3(1)(3) – Horizontal overlaps or vertical connections

Section 3(1)(3) applies to mergers, where the market share, determines whether the merger may be notified under the simplified procedure.

Mergers subject to Section 3(1)(3)(a) are mergers between undertakings where there are no horizontal overlaps or vertical connections with respect to the undertakings' activities.

Mergers subject to Section 3(1)(3)(b) are mergers between undertakings which are engaged in activities in the same relevant market; i.e. horizontal mergers. The provision stipulates that horizontal mergers may be notified according to simplified procedure if the merging undertakings have a combined market share below 15 per cent.

Mergers subject to Section 3(1)(3)(c) are mergers between undertakings which are not engaged in activities in the same market, but where one or more of the undertakings concerned are engaged in activities in a product market which is connected to a product market where one of the other parties to the merger is active. This provision stipulates that mergers between vertically connected undertakings may be notified according to the simplified procedure if the merging undertakings neither separately nor together hold market shares in any of the vertically connected markets of 25 per cent or more in Denmark.

The market share thresholds in paragraphs (b) and (c) apply with respect to market shares in Denmark. It is critical that the underlying market definitions in the notification are sufficiently precise to justify that the thresholds in Section 3(1)(3) have not been reached, and that all alternative market definitions have been mentioned, including regional or even local market definitions.

Section 3(2) – Exemptions from the simplified notification

Even if a merger prima facie meets one of the criteria for simplified notification there may, however, be aspects of the merger that lead to the merger not qualifying for simplified notification and, thus, has to be notified according to the full procedure; cf. Section 3(2).

It may inter alia be necessary analyzing whether the merger may increase the market power of the undertakings concerned even if the undertakings are not engaged in activities in the

same market; e.g. when the merger involves an accumulation of technological, financial or other resources of the undertakings. It may also be that the undertakings concerned are active in neighbouring, closely related markets; i.e. markets in which the products are complementary or belong to a product category which is generally bought by the same type of buyers for the same end-use, where one or more of the undertakings have a market share of a certain size. In other cases it may be difficult to establish the parties' market share sufficiently precise to exclude that the merger will lead to competition problems. In addition, the markets involved may be characterised by high entry barriers, strong concentration or other competition problems, and consequently it will be necessary to require a full notification.

When the obligation to notify a merger has arisen from a change from joint control to sole control, such mergers are covered by category no. 2, and will therefore qualify for simplified notification. There may, however, be cases in which such mergers are not eligible for simplified notification. This may inter alia be the case if an undertaking which used to be a joint venture is subsequently controlled by only one owner and is thereby integrated into the owner's group of undertakings or its network. This may in certain situations eliminate the disciplining effects of the diverging interests that several co-owners may have, thereby reinforcing the undertaking's strategic position in the market. A full notification may also be required if the prior acquisition of joint control of the joint venture in question was not subject to any merger control. A third example may be the situations in which problems may arise in relation to concerted practices; cf. Section 12 c(3) of the Competition Act.

Mergers involving ancillary restraints, which the parties to the merger want approved concurrently, will similarly not qualify for the simplified notification.

The above mentioned examples are not exhaustive. Also other situations may lead to a preclusion of the application of the criteria set out in Section 3(1). Decisions in such cases will be made by the Competition and Consumer Authority.

2.3 Section 4 – Completeness

The notifying party must submit all the information that is required in accordance with the notification form that is used. The notifying party must also remember to enclose a non-confidential version of the notification; see Section 2 (2) and (3). If no such non-confidential version is enclosed, the notification cannot be deemed complete. The deadline of 25 working days in Section 12 d(1) of the Competition Act will not begin to run until: 1) the notification is complete, and 2) the Danish Competition and Consumer Authority has received documentation of payment of the notification fee (see the section on fees for the notification of mergers). Both conditions must be met. This means that even if the Authority considers the notification itself to be complete, the 25-day deadline will not begin to run until the Authority has received documentation that the fee has been paid in full.

The time-limits in Section 4 are based on weekdays; i.e. Monday – Friday apart from public holidays, the day of Christmas Eve and the day of New Year's Eve. Information received on weekdays before 16.00h will be considered to have been received the same day. Information received on days which are not weekdays or after 16.00h on weekdays will be considered to have been received the following weekday.

Section 4(1) – When is a full notification complete?

If a merger is notified according to the full procedure; i.e. by using the full merger notification form; cf. Annex 1, the Competition and Consumer Authority has 10 weekdays according to Section 4(1) to decide on whether the notification is complete.

If some of the required information is missing, the Authority will inform the notifying party as soon as possible and no later than before the expiry of this 10 day time-limit with respect to which information that needs to be provided for the notification to be considered complete. The notification will only be considered complete once the Competition and Consumer Authority finds that all the information required according to the form for full notification has been submitted.

Section 4(2) – When will a simplified notification be complete?

If a merger has been notified according to the simplified procedure; cf. Annex 2, the notification will be complete no later than 10 weekdays from the receipt of the notification providing that the Competition and Consumer Authority has not yet demanded a full notification.

Thus, according to this provision, if it cannot be established within these 10 weekdays that the merger qualifies for a simplified notification, the merger must be notified according to the full procedure. On the other hand if the Competition and Consumer Authority has not demanded full notification of the merger before the expiry of the 10 weekday time-limit, the simplified notification will be deemed complete no later than at the expiry of this time-limit.

The time-limit is absolute and, thus, cannot be extended or suspended. The notifying party will during this period be allowed to submit supplementary information to the notification providing this information can be submitted within the 10 weekdays. The Competition and Consumer Authority will therefore as soon as possible upon the receipt of the notification assess the notification and inform the notifying party of the information that may be missing from the notification. Providing the notifying party can complete the notification by submitting supplementary information, the notification will be considered to be complete as of the day when this information has been received. If the Competition and Consumer Authority upon the receipt of the notification finds that the notified merger does not qualify for simplified notification, the Authority will inform the notifying party about it as soon as possible.

Section 4(3) – dispensation with respect to some of the required information

However, the notifying party may ask for a dispensation with respect to some of the required information, such that the notification can be declared complete without that information; cf. Section 4(3). The notifying party may inter alia be granted dispensation with respect to information which the Competition and Consumer Authority already has received, or if the said information is not necessary for the assessment of the merger. The notifying party must give specific reasons as to why the information is not necessary for an assessment of the merger. If the omission of information has been agreed with the Competition and Consumer Authority prior to the submission of the notification, it will be sufficient to indicate this in the notification. Since the notifying party will be interested in getting the notification declared complete as soon as possible after submitting it, notifying parties are advised to ask for dispensations well in advance of the submission of a merger notification.

Section 4(4) – Exemptions in respect of the simplified notification after expiry of the 10 day time-limit

The assessment of mergers which meet the requirements for simplified notification will be concluded on the basis of a simplified assessment of the case; cf. Section 12 c (7) of the Competition Act. However, it is only possible to conclude a merger assessment based on a simplified assessment if it is not necessary for the Competition and Consumer Authority to initiate closer investigations of the merger's anti-competitive effects. For further information about the simplified approval procedure, please refer to the Competition and Consumer Authority's merger guidelines.

It will in certain cases also be possible to demand full notification of a merger which has been notified according to the simplified procedure after the expiry of the 10 weekday time-limit; i.e. after the notification is complete; cf. Section 4(2) of the Executive Order. This provision may be applied in cases, where during the Phase I investigation, information emerges which

indicates that the merger cannot be approved without further investigations. Accordingly, it will not be possible to apply the simplified approval procedure.

If a merger has been notified by means of the simplified notification form and the Competition and Consumer Authority has demanded a full notification of the merger after the notification is deemed complete, the days which have already passed in Phase I will be deducted from the 'new' Phase I, when the time-limits start to run in connection with the submission of a complete full notification.

2.4. Section 5 – Assessment of the notification in case the merger is not subject to Section 12 a; cf. Section 12(1) of the Competition Act

In case the Competition Council's investigation of a notified merger leads to the conclusion that the notified merger is not subject to Section 12 a; cf. Section 12(1) of the Competition Act, the notifying party may request the Competition Council to consider the notification as a notification according to Section 8(2), Section 9(1) first sentence, Section 11(2) first sentence, or Section 11(5) of the Competition Act; i.e. a notification which must generally be filed on a K1 notification form which is to be found at the Competition and Consumer Authority's website.

Chapter 3

Fees for notification of mergers

With effect from 1 August 2013, a fee has been introduced for the notification of mergers (Section 12 h of the Competition Act).

The fee for a simplified notification is DKK 50,000 (see Section 12 h(2)), while the fee for a full notification amounts to 0.015 per cent of the combined annual turnover in Denmark of the undertakings concerned, subject to a maximum of DKK 1.5 million (see Section 12 h(3)). Regarding calculation of the turnover of the undertakings concerned, see Executive Order No. 808 of 14 August 2009 on calculation of turnover in the Competition Act.

The fee must be paid to the Competition and Consumer Authority no later than upon filing of the notification and documentation of payment of the notification fee must be enclosed with the notification. It is important that documentation of payment of the fee is filed together with/enclosed with the notification. If the Authority has not received documentation of payment of the fee, the 25-weekday deadline in Section 12 d (1) will not begin to run, even if the Authority considers the notification to otherwise be complete.

If during processing of a simplified notification, the Competition and Consumer Authority concludes that processing of the merger requires a full notification, a full notification must be submitted to the Authority together with documentation of payment of the fee for a full notification. In such a situation, the fee must be calculated as the fee for a full notification minus the fee of DKK 50,000 that has already been paid for the simplified notification; see Section 12 h(4).

In this situation, the deadlines for processing the merger will not commence until the date on which the Authority receives both a complete notification and documentation that the fee has been paid. The requirement for a full notification will therefore mean that the deadlines are suspended, as only the fee for a simplified notification will have been paid at this point in time. In such a case, the days of the 25-weekday deadline (phase I) that have already elapsed will be offset in the “new” phase I, when the deadlines begin to run again upon filing of a full notification together with documentation of payment of the fee.

If, in accordance with the EU Merger Control Regulation², the European Commission decides to refer a merger for processing in Denmark, a notification must also be filed to the Competition and Consumer Authority and the fee for the notification must also be paid.

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The EC Merger Regulation) – Official Journal L 024, 29/01/2004 P. 0001-0022.

Example calculations of fees in accordance with Section 12 h(2)-(4):

In the example, the undertakings concerned have a combined annual turnover of DKK 1 billion in Denmark.

- » Simplified notification (Section 12 h(2))
DKK 50,000
- » Full notification (Section 12 h(3))
0.15 per cent of DKK 1 billion = DKK 150,000
- » Full notification following simplified notification (Section 12 h(4))
(payment of outstanding amount) DKK 150,000 – DKK 50,000 = DKK 100,000

Fees for merger notifications must be paid through a deposit/transfer to the Competition and Consumer Authority's account with Danske Bank, reg. no. 0216, account number 4069045960. Furthermore, foreign undertakings must use the following information in relation to transfer the fee to the Competition and Consumer Authority: SWIFT: DABADKKK and IBAN: DK6902164069045960.

Documentation of payment of the fee must be enclosed with the notification (e.g. in the form of a copy of a bank transfer). In all communication with the account-holder, the notifying party must quote "FU" and the case number assigned to the merger by the Competition and Consumer Authority. If the undertakings have been in contact with the Authority in advance as part of pre-notification, a case number will normally be assigned, which they can quote in any communication with the account-holder. If the undertakings do not already have a case number, they must quote "FU" and state the names of the merging undertakings in any communication with the account-holder. If at the time of the notification the merger is still confidential, the undertaking must in any communication with the account-holder, quote "FU" and state a name which they use to refer to the merger, e.g. "Project Ultra" or similar.

In the case of a full notification, the fee that has been calculated must also be stated in the notification.

Non-payment of a fee for a simplified or full merger will result in the merger not being deemed as having been notified; see Section 12 h (6). It may be that the fee has not been paid at all or that a smaller amount has been paid. It is a requirement in both cases that the Competition and Consumer Authority has presented a demand for payment to be made within five weekdays and that payment has not been made.

In cases where, during processing of a simplified notification, it becomes apparent that the merger requires a full notification (see Section 12 h(4)), the notification of the merger will be deemed to have lapsed if a fee for a full notification is not paid within five weekdays after the Competition and Consumer Authority has presented a demand for the fee to be paid. The notification will also be deemed to have lapsed if, despite reminders from the Authority, the notifying party fails to file a full notification to replace the simplified notification; see Section 12 h(6).

Fees that have already been paid cannot be refunded (see Section 12 h(7)) unless it becomes apparent that the notified transaction is not notifiable, the notification is withdrawn before the notification is complete, or the notification is withdrawn before the merger has been approved or prohibited because another Danish authority has declined to grant permission for the merger of undertakings that are included in the notified merger.

Chapter 4

Guidelines on the notification forms (Annex 1 and Annex 2)

The information in the notification must be submitted in Danish. The Competition and Consumer Authority may grant permission to some or all of the required information being submitted in English. Such submissions should be agreed with the Authority before the notification is submitted.

Non-confidential version of the notification

A non-confidential version must be enclosed with the notification, regardless of whether a simplified or full notification is filed.

Financial information

According to Section 5 of both the notification forms the notifying party must provide financial details for each of the undertakings concerned. The turnover must be calculated in accordance with Executive Order No. 808 of 14 August 2009 on the Calculation of Turnover in the Competition Act. Please refer to the guidelines to that Order. As regards the principles for calculating turnover in general, please refer to the Commission's Consolidated Jurisdictional Notice.

Group information

According to Section 6 of both the notification forms the notifying party must provide information about ownership and control. For the determination of control please refer to the Commission's Consolidated Jurisdictional Notice.

Information about competitors, customers and suppliers

According to Sections 8.1, 9.1, 9.7, 9.9, 9.10, 9.12 in the full notification form; cf. Annex 1, and Sections 8.1 and 8.2. in the simplified notification form; cf. Annex 2, the notifying party must provide information about competitors, customers and suppliers. In this respect the notifying party must submit information on each of these undertakings; i.e. name, address, e-mail address, telephone number and contact person. This information must be provided for each of the markets defined by the notifying party in Section 7.1 (incl. Section 7.2, in the case of a full notification). Accordingly, the notifying party must specify whether the listed undertakings are competitors, customers or suppliers to the undertakings concerned and with respect to which markets.

During the assessment of a merger the Competition and Consumer Authority will to the necessary and relevant extent contact these competitors, customers or suppliers. It will facilitate and, thus, expedite the Competition and Consumer Authority's assessment of the notified merger if the Authority has received the contact information for these undertakings in an electronic format. It is accordingly recommended that notifying parties attach an Excel sheet with this information to the notification form. A standard Excel sheet which may be used for this purpose has been elaborated by the Competition and Consumer Authority. This Excel sheet may be downloaded from the Competition and Consumer Authority's website.

Fees

When submitting the notification, the notifying party must transfer the fee to the Competition and Consumer Authority's account with Danske Bank, reg. no. 0216, account number 4069045960 and enclose documentation verifying that the fee has been paid (e.g. a copy of a bank transfer to the Competition and Consumer Authority's account). In the case of a full notification, the fee that has been calculated must also be stated in the notification.
