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DANISH COMPETITION AND CONSUMER AUTHORITY

Merger Guidelines

2013

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Merger Guidelines

Danish Competition and Consumer Authority
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Chapter 1
Introduction

The purpose of these guidelines is to inform companies and advisors who are about to file a notification of a merger to the Competition and Consumer Authority of the way a merger case proceeds under the rules of the Competition Act. This information should contribute to ensuring efficiency in organizing the process.

The merger control rules are provided by Part 4 of the Competition Act and the Executive Order on the Notification of Mergers as well as the Executive Order on the Calculation of Turnover in the Competition Act. Subject to the rules, mergers of a certain size must not be implemented before they have been assessed and approved by the Competition and Consumer Authority or by the Competition Council. The level of the turnover of the undertakings concerned shall determine whether a merger must be notified to and assessed by the Competition Council.

A number of amendments of the merger rules entered into force on 1 October 2010. Among other things, the turnover limits for when a merger becomes notifiable to the Competition and Consumer Authority have been lowered. In addition, a simplified procedure for uncomplicated mergers was introduced. Simultaneously, new notification forms were adopted; i.e. a simplified notification form and a full notification form for the notification of mergers. Finally, the time-limits within which the Competition and Consumer Authority must have completed its assessment of a notified merger were amended. The introduction of these changes has brought about a further approximation of the Danish merger control rules towards the EU merger control rules.

In 2013, a number of additional changes have been made to the merger rules. The most important change is that, with effect from 1 August 2013, a fee has been introduced for the notification of mergers.

These guidelines first describe the requirements for notifications of mergers to the Competition and Consumer Authority. Subsequently the guidelines describe the advantages of pre-notification contacts between the parties to a merger and the Competition and Consumer Authority. Furthermore, the guidelines describe the rules for the notification of mergers and the time-limits for the assessment of a notified merger, including the possibility of having a merger assessed according to the simplified procedure. This section is followed by a section that briefly explains the Competition and Consumer Authority's assessment of a merger, including the Authority's statement of preliminary concerns with respect to a merger and the possibility of obtaining an approval of a merger subject to remedies.

The specific provisions of the Executive Order on the Notification of Mergers are explained in a separate set of guidelines (Guidelines on the Notification of Mergers and on Merger Fees). These guidelines describe the rules on the notification of mergers, including rules on which parties who must notify the merger, the rules concerning fees, rules on when a merger may be notified according to the simplified procedure, and rules on when a notification is complete.

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Chapter 2
Mergers subject to the Competition Act

When assessing whether a merger must be notified to the Competition and Consumer Authority it must, first, be determined whether the transaction concerned constitutes a merger as defined by the Competition Act. Secondly, it must be determined whether the merger meets the turnover thresholds in the Competition Act. The obligation to notify arises once a binding merger agreement has been entered into.

A merger which is subject to the Danish thresholds may not be implemented before the merger has been approved by the Competition and Consumer Authority or by the Competition Council. A penalty will be imposed according to Section 23(1) (vii) of the Competition Act if a merger is implemented before the merger has been approved.

2.1 The merger definition

The first step in the assessment of whether a transaction must be notified is determining whether it is a merger as defined by the Competition Act.

According to Section 12a of the Competition Act the following constitutes a merger:

1. When two or more previously independent undertakings merge into one undertaking, or

2. When one or more persons who already control at least one undertaking, or one or more undertakings – by an agreement to purchase shares or assets or by any other means – acquire direct or indirect control of the entirety of or parts of one or more other undertakings.

It may for instance be a situation where two undertakings are combined into one. It may for instance also constitute a merger, if one undertaking obtains the control over another undertaking.

Fundamental to the determination of whether or not a merger constitutes a merger as defined by the Competition Act is whether or not there will be a permanent change of control or a permanent transfer of control of an undertaking. Control is defined as the possibility to gain decisive influence on the management of an undertaking. The duration of the change of control must be at least one year. Control may be in the form of exclusive or joint control and direct or indirect control. Intra-group mergers will not constitute a merger within the merger definition, as there will be no change of control.

Control over an undertaking will most frequently be achieved by the acquisition of shares. Control may, however, also be obtained in alternative ways; e.g. via acquisition of assets, provided that the assets constitute an undertaking. Control may also be derived from an agreement; i.e. where no shares or assets are transferred but where the parties agree that one party shall exercise control over the other party.

Mergers whereby a full-function joint venture is created on a permanent basis or whereby a permanent change of control of a full-function joint venture is implemented will also constitute a merger according to the Competition Act.

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The Competition Act exempts certain types of transactions from the merger definition, for example transactions that would prima facie fall under the merger concept as described above, but which are nevertheless not typical mergers. Therefore, such mergers need not be notified to the Competition and Consumer Authority.

Exemptions from the merger definition:

- The acquisition of securities for resale by financial institutions, where the securities are sold within one year from their acquisition and are where they are acquired as part of the institutions' normal activities.

- Transactions by which a trustee of an insolvent undertaking acquires control of an undertaking.

- The transfer of control to financial holding companies where the holding company only exercises the voting rights in order to preserve the full value of its investment.

2.2 Turnover thresholds

The next step in the assessment of whether a merger must be notified to the Competition and Consumer Authority is checking whether the merger meets the turnover thresholds in the Competition Act. It is the turnover of the undertakings concerned which needs to be taken into account when assessing whether the turnover thresholds are met.

Turnover thresholds:
A merger must be notified to the Competition and Consumer Authority if

1. The undertakings concerned have a total aggregate annual turnover in Denmark of at least DKK 900 million and at least two of the undertakings concerned have a total annual turnover in Denmark of at least DKK 100 million each, or

2. At least one of the undertakings concerned has a total annual turnover in Denmark of at least DKK 3.8 billion and at least one of the other undertakings concerned has a total worldwide annual turnover of at least DKK 3.8 billion.

When assessing whether the merger meets the turnover thresholds, it shall first be assessed which undertakings constitute "the undertakings concerned" with respect to the merger. Undertakings concerned are those which are involved directly in the merger. The turnover of an undertaking concerned comprises the turnover of the group of the undertaking to which an undertaking belongs; i.e. the parent company, the affiliates and the subsidiaries. A non-exhaustive list of examples is given below.

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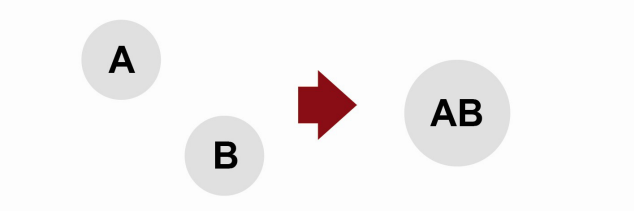
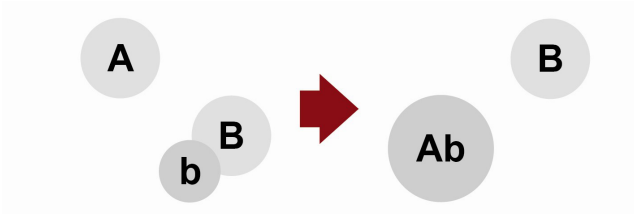
Undertakings concerned:

Before the merger **After the merger**

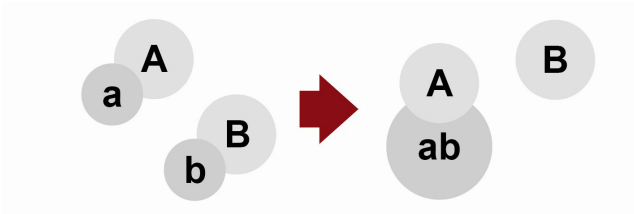
In a merger the undertakings concerned are each of the merging undertakings in the form they had at the time of the merger. Thus, **A and B** are the undertakings concerned.



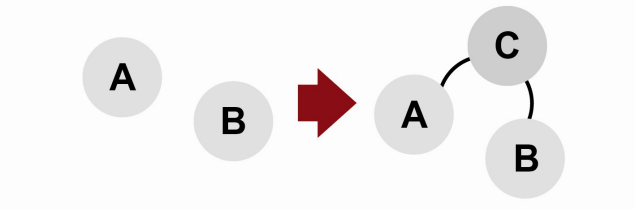
In case of an acquisition of control the undertakings concerned are the entity acquiring control and the target. B sells part of its business, b, to A. Thus, **A and b** are the undertakings concerned. Accordingly, the turnover of A and b must be included in the calculation. However, the seller B is not an undertaking concerned, so its turnover should not be included.



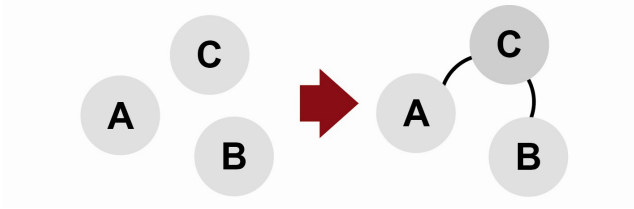
This is an alternative example of acquisition of control. B sells part of its business, b, to a, which is part of the group A. Thus, **A, including a, and b**, are the undertakings concerned. The turnover of the entire group A and undertaking b are included in the turnover calculation. The turnover of the whole of the group A must be included since b, after the merger with a, will become part of the group A.



In case of a creation of a new joint venture the undertakings concerned are solely those which obtain the joint control. Thus, **A and B** are the undertakings concerned. C will not exist before the transaction has been implemented.



In case of an acquisition of joint control of an existing undertaking, the undertakings concerned are the undertakings acquiring joint control and the entity over which control is being acquired. Thus, **A, B and C** are undertakings concerned.



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When it has been determined which undertakings are the undertakings concerned then the turnover of these undertakings can be calculated. The turnover of the undertakings concerned in relation to the Danish thresholds must be calculated on the basis of the calculation rules of the Executive Order on the Calculation of Turnover in the Competition Act.[1] Please refer to the separate guidelines to that Order.

If the merger has a European Community dimension, it must be notified to the European Commission. In that case the merger must not be notified to the Competition and Consumer Authority. A merger may have a Community dimension if the turnover of the undertakings concerned exceed EUR 2.5 billion and the undertakings have activity in several member states. For further details reference is made to the EU Merger Regulation.

Some mergers with a Community dimension may be referred to a national competition authority for its assessment. This may be the case, for example, if the merger may be capable of significantly affecting competition in a market in one member state which, in all respects, appears to be an independent market and the entire merger or e part of the merger therefore should be assessed by the member state concerned. The parties to the merger can request that the merger be referred to that particular member state. The Commission may also refer a merger to a member state for national assessment in case the merger will significantly affect competition in a certain member state. The referral rules are set out in Articles 4(4) and 9 of the EU Merger Regulation.

On the other hand, the Commission may also have to assess a merger even if it is not subject to the EU turnover thresholds. This will be the case, for example, if a merger has to be notified in three or more member states but not to the Commission. In such cases the parties may ask the Commission to assess the proposed merger. The rules on such assessments are set out in Article 4(5) and Article 22 of the EU Merger Regulation.

2.3 Merger agreements

The last requirement which brings about the obligation to notify a merger to the Competition and Consumer Authority is a binding agreement to merge. The parties may freely contact the Competition and Consumer Authority before entering into the agreement to merge. However, the parties are not obliged to notify according to Section 12 b (1) of the Competition Act before the parties have entered into a binding agreement to merge.

[1] Executive Order No. 808 of 14 August 2009 on the Calculation of Turnover in the Competition Act

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Chapter 3
Pre-notification contact to the Competition and Consumer Authority

This section deals with the importance of contact between the parties to a merger and the Competition and Consumer Authority before the merger is notified. This phase is referred to as the pre-notification phase.

The assessment of notified mergers is subject to short time-limits. The time-limits start to run as soon as the merger notification is complete. It will be possible to clarify several issues in relation to not only the notification requirements, but also the merger assessment before the merger is notified. These clarifications expedite the assessment of the merger.

The Competition and Consumer Authority therefore recommends that parties to a merger contact the Authority well in advance of their submission of a merger notification. Pre-notification discussions between the Competition and Consumer Authority and the parties to the merger are not mandatory. Although the undertakings and their advisors find that a merger will not lead to a restriction of competition it is still recommended that they contact the Competition and Consumer Authority.

The discussions taking place in this phase are confidential. Unless the parties to a merger specifically grant their permission or the proposed merger is already known to the public, the Competition and Consumer Authority will not initiate market investigations or the like before the merger is notified.

Issues which it may be relevant to discuss may inter alia be the definition of the relevant markets that will be affected by the merger. Often it will also already at this stage be possible to identify which competition problems the merger may lead to. The earlier the parties and the Competition and Consumer Authority identify the potential competition problems, the more time there will be to discuss possible remedies to these problems.

In this phase it will also be relevant to discuss the possible alternative market definitions. The Competition and Consumer Authority will, thus, at an early stage be able to reflect on and examine this issue. If not, there is the risk that, at a later stage in the process, some third party may present information advocating for such alternative market definitions which the Competition and Consumer Authority is bound to examine. This may prolong the assessment of the merger.

For some mergers it may be difficult to determine who the undertakings concerned are. For some mergers it may be difficult to determine whether that merger is a merger according to the merger definition. The parties will be able to discuss such issues with the Competition and Consumer Authority before notifying the merger. In some cases it may also be relevant to discuss whether the merger should be notified to the Competition and Consumer Authority or to the Commission.

If parties to a merger want to use the simplified procedure, it is important that they discuss this with the Competition and Consumer Authority before notifying the merger. Once the parties have submitted a simplified notification form the Competition and Consumer Authority will have 10 weekdays to decide whether or not the merger meets the requirements for a simplified notification. If parties to a merger submit a simplified notification form without prior discussions, there is the risk that the Competition and Consumer Authority may not agree that the merger is unproblematic. Thus, the merger cannot be notified using the simpli-

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fied procedure. The assessment of the merger will accordingly be of a longer duration than would otherwise have been necessary.

When exactly the parties to a merger should contact the Competition and Consumer Authority, will depend on the complexity of the merger. The more time spent at this stage to discuss the merger, the greater is the probability of getting a more straightforward and more smooth assessment of the merger, once the merger is notified. Parties to a merger should, however, contact the Competition and Consumer Authority at least two weeks before they intend to notify the merger.

The Competition and Consumer Authority recommends that the discussions be initiated by the parties' or their advisors' informal contact to the Authority. This informal contact may be initiated either by telephone or by e-mail to kfst@kfst.dk. If for reasons of confidentiality the parties do not wish to disclose the names of the merging undertakings, they may, in the e-mail or over the telephone, state which sector the merger concerns. Hence, a case handler from the Competition and Consumer Authority will contact the relevant party.

At a later stage of the pre-notification, discussions may be based on the parties' draft notification of the merger. Pre-notification contacts will reduce the risk that information required according to the notification rules - and which must be provided before it can be declared complete - is missing in the notification. If the parties wish to be granted an exemption from disclosing or providing some of the required information, the possibility of getting such exemptions may most expediently be discussed with the Competition and Consumer Authority before the merger is notified.

The statements which the Competition and Consumer Authority will be able to issue at this stage of its assessment of a merger will be based on the Authority's preliminary assessment of the merger. The inquiries into a merger which the Competition and Consumer Authority initiates once the merger has been notified may result in a different assessment of the merger.

The Competition and Consumer Authority recommends that both the representatives of undertakings and their advisors attend the meetings held with the Competition and Consumer Authority. The presence of representatives from the undertakings is important because they are most qualified to answer the Authority's questions with respect to inter alia the undertakings' products and services, the undertakings' competitors and customers, etc. This will also apply to meetings once the merger has been notified.

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Chapter 4
Notification of a Merger

A merger may be notified according to the full notification procedure or according to the simplified procedure. The forms to be used for the full notification and for the simplified notification, respectively, list the information which must be given. The forms may be downloaded from the Competition and Consumer Authority's website. The undertakings are responsible for ensuring that their notification is complete and correct. A non-confidential version of the notification must be enclosed with the notification. If no such version is enclosed, the notification will not be deemed a complete notification.

In the notification form, the notifying party must give contact details for the contact persons at a number of customers, competitors and suppliers. In order to facilitate an expedient merger assessment it is recommended that the notifying party fills in these contact details in the Excel sheet elaborated the Competition and Consumer Authority for that purpose. This Excel sheet may be downloaded from the Competition and Consumer Authority's website.

A fee must be paid for the notification of mergers which from 1 August 2013 is filed to the Competition and Consumer Authority. The fee for a simplified notification is DKK 50,000, 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. The fee must be paid to the Competition and Consumer Council no later than upon filing of the notification, and documentation of payment must be 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) of the Competition Act will not begin to run, even if the notification is otherwise complete. For further details on the procedures relating to the payment of fees and the formal conditions linked to the payment, please refer to the Competition and Consumer Authority's Guidelines on the Notification of Mergers and on Merger Fees.

The following section describes the mergers that may be notified under the simplified procedure.

4.1 Simplified notification

The simplified notification is reserved for mergers which may be characterised unproblematic. When notifying mergers according to the simplified procedure, undertakings are required to provide less information than they are according to the full notification procedure. The assessment of mergers notified according to the simplified procedure will be concluded according to the simplified case handling procedures, which provide a more expedient assessment of unproblematic mergers.

Section 3(1) of the Executive Order on Notification of Mergers lists the categories of mergers to which the simplified notification may be applied. It may be applied in the following cases:

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Categories of mergers to which the simplified notification procedure may be applied:

1. Mergers that does not involve horizontal overlaps[2] or vertical connections[3] between the parties to the merger.
2. Mergers in which the parties are active in the same market, i.e. with horizontal overlaps, but their aggregate market share does not exceed 15 per cent.
3. Mergers in which the parties are connected vertically, but where their market share is below 25 per cent in their respective markets.
4. Mergers in which two or more undertakings acquire joint control of a joint venture, which will have limited business activity in Denmark; i.e. the assets transferred to the joint venture do not exceed DKK 100 million or the turnover of the joint venture do not exceed DKK 100 million.
5. Transfer of control by which a joint venture ceases to be subject to joint control and becomes subject to the sole control of one of the undertakings that previously took part in joint control.

The specific categories of mergers which may be subject to the simplified notification are described in greater detail in the guidelines to the Executive Order on Notification of Mergers and on Merger Fees. In addition, the Executive Order includes a description of the situations where a full notification may be required, even if the merger prima facie falls under the simplified rules.

To file a simplified notification of a merger, the notifying party must submit the information required by the simplified notification form. A non-confidential version of the notification must be enclosed with the notification. The form may be downloaded from the Competition and Consumer Authority's website. For further details on the notification procedure, including the payment of fees and the formal conditions linked to the payment, please refer to the Competition and Consumer Authority's Guidelines on the Notification of Mergers and on Merger Fees.

Mergers that do not fall under one of the simplified notification categories must be notified by means of the full notification form.

The simplified procedure is based on the assumption that the notified merger is unproblematic. Thus, the Competition and Consumer Authority need not carry out any in-depth investigations. It is necessary for the assumption to apply the simplified procedure that the Authority receives ample information in the simplified notification which adequately documents that the merger will not lead to any competition problems.

When a notifying party has filed a simplified notification form the Authority has 10 weekdays to assess whether the merger qualifies for the simplified notification. The Authority must assess within this absolute time-limit whether the notification includes the information necessary for the Authority to assess if the merger falls within one of the simplified notification categories. The time-limit has been put in place to ensure an expedient clarification of this issue. During these 10 weekdays the parties may submit supplementary information to persuade the Authority. If the Competition and Consumer Authority finds that the merger must be notified under the full notification procedure, the Authority must both reject the simplified

[2] The existence of horizontal overlaps means that the undertakings are active in the same market. Thus, it is a merger between competing undertakings.

[3] The existence of vertical connections means that the undertakings operate at different production or distribution levels which are connected. An example of a vertical merger is a manufacturer's acquisition of a supplier.

notification before the expiry of the 10 weekday time-limit and demand that the notifying party submit at full notification of the merger.

It is therefore important that it may quickly be determined that the merger will not lead to any competition problems. This will in many cases require that the definition of the market is uncomplicated or that regardless definition of the market the merger remains unproblematic. As the parties hold the burden of proof it will be beneficial to the parties to discuss the merger, including the market definition, with the Competition and Consumer Authority prior to the submission of the notification.

Once it has been determined that a merger falls within one of the simplified notification categories the Competition and Consumer Authority will as a general rule only demand a full notification of such a merger, if the Authority receives information from a third party in connection with publication of the merger. The assessment to the merger will be concluded quickly if the Authority does not receive any relevant objections from third parties; cf. Section 12 c(7) of the Competition Act.

In case of mergers notified according to the simplified procedure, the Competition and Consumer Authority will, as a general rule, not initiate or pursue its own independent investigations of the merger's the effect on competition. Rather, the Competition and Consumer Authority will issue its decision solely on the basis of the notifying party's information. It is therefore imperative that the notifying party ensures that the information in the notification is correct. Information which is incorrect, incomplete or misleading when submitted by the parties in a simplified notification may lead to the Competition Council withdrawing the approval of the merger based on the simplified notification. This applies both in the case that the notifying party has provided the incorrect, incomplete or misleading in the notification or if the notifying party has provided incorrect, incomplete or misleading information during the assessment of the merger. If the parties have already implemented or are in the process of implementing the merger when the Competition Council withdraws the simplified approval, the parties must file a full notification of the merger within two weeks. Submission of incorrect, incomplete or misleading information and the suppression of essential factors relating to the merger may also be subject to fines.

4.2 Full notification

Mergers that do not fall within one of the categories that qualify for simplified notification must be notified according to the full notification procedure. A non-confidential version of the notification must be enclosed with the notification. The form to be used for a full notification may be downloaded from the Competition and Consumer Authority's website. For further details on the notification procedure, including the payment of fees and the formal conditions linked to the payment, please refer to the Competition and Consumer Authority's Guidelines on the Notification of Mergers and on Merger Fees.

When the Competition and Consumer Authority receives a full notification, the Authority will assess whether it contains all the information required according to the notification form. The notification is complete if it contains all the required information. If information is missing in the notification the Competition and Consumer Authority shall notify the notifying party within 10 weekdays after the submission of the notification. When the Authority notifies the notifying party that further information is required before the notification can be declared complete, the Authority must specify what information is missing. The notification will not be complete before it contains all the required information. Only once the notification is complete the time-limits for the assessment of mergers will start to run, provided that the Competition and Consumer Authority has also received documentation of payment of the notification fee.

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It is important that the notifying party carefully ensures that the information provided in the notification is correct. If during the assessment of the merger it turns out that some of the information provided by the notifying party is erroneous, the duration of the assessment may be prolonged as the notifying party will have to correct this information. If there are aspects of the merger which change during the assessment of the merger, the notifying party must inform the Competition and Consumer Authority about this. If after a merger has been approved it appears that the approval to significant extent was based on incorrect or misleading information, which originates from the undertakings concerned, the Competition Council may withdraw the approval of the merger. Submission of incorrect, incomplete or misleading information and the omission of essential factors relating to the merger may also be subject to fines.

4.3 Publication of the merger notification

When the Competition and Consumer Authority has received a submission of a merger notification, the Authority will publish this on its website and call on interested parties to give comments within a short time-limit of typically 1-2 weeks.

In case of mergers dealt with according to the simplified procedure, the Competition and Consumer Authority will, as a general rule, not initiate or pursue its own independent investigations of the merger's effect on competition. Rather, the Competition and Consumer Authority will mainly rely on the notifying party's information. To make sure that relevant third parties are informed about the merger and have an opportunity to submit objections before the merger is approved the Competition and Consumer Authority will separately inform the third parties whom the notifying party has identified as its largest competitors, customers and suppliers.

4.4 Time-limits for the assessment of mergers

The assessment of a merger notification is divided into two phases: Phase I and phase II. Phase I is 25 weekdays and begins to run when 1) the notification is complete, and 2) the Competition and Consumer Authority has received documentation of payment of the notification fee. Both conditions must be met. This means that even if the Authority considers the notification itself to be complete, the deadline of 25 weekdays will not begin to run until the Authority has received documentation that the fee has been paid in full.

If the investigations carried out by the Competition and Consumer Authority in phase I indicate that the merger would not significantly hinder effective competition, the merger will be approved in phase I. An approval may be both an approval in accordance with the full procedure, with any remedy commitments where appropriate, and an approval based on a simplified procedure.

If the Competition and Consumer Authority's investigations in Phase I warrants further in-depth investigations of the market, including assessments of any remedy commitments proposed by the parties, and these investigations cannot be concluded in Phase I, then the merger will be subject to a Phase II investigation. The investigation and assessment in phase II is subject to a 90 weekday time-limit. This deadline of 90 weekdays may be extended by up to 20 weekdays if at the time the remedy commitments are submitted there are less than 20 weekdays remaining until a decision must be taken and so that there is a total of 20 weekdays to assess the merger in light of the new or revised remedy commitments.

If no decision is reached before the relevant deadlines, the merger will be considered as having been approved. These deadlines will however be suspended if an undertaking concerned files a complaint to the Competition Appeals Tribunal concerning the procedure in a merger case for which no decision has yet been reached (i.e. a decision as to whether the merger can be approved or should be prohibited). A complaint against "the procedure" means a complaint

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that the general rules and procedures of administrative law - e.g. decisions concerning right of access to documents - have been ignored which has been submitted by one of the undertakings concerned to the Competition Appeals Tribunal, as well as other objections to formalities which the Competition Appeals Tribunal has the competence to consider. This could for example be a complaint from an undertaking involved that the Competition Council will, as part of a market survey or similar, disclose information to third parties which the undertaking concerned considers to be confidential. Only complaints from the undertakings concerned – as opposed to a complaint from a third party – may result in the deadlines being suspended.

If one of the undertakings concerned complains to the Competition Appeals Tribunal over the requirement to file a full notification of the merger instead of a simplified notification, the deadlines for assessing the merger in Section 12 d(1)-(4) will be suspended until the Competition Appeals Tribunal has reached a decision on the matter.

The Competition and Consumer Authority will during all phases of the assessment hold state of play meetings with the relevant parties. The purpose of these meetings is to keep the Authority and the parties mutually informed of the course of events, and, if necessary, to discuss relevant remedies.

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Chapter 5
Assessment of a merger

The purpose of merger control is to ensure that mergers will not restrict the effective competition significantly. The assessment of a merger entails an assessment of the future. The Competition and Consumer Authority must therefore evaluate how the competition is expected to develop in the relevant or affected markets if the merger is implemented.

If the Competition and Consumer Authority finds that the merger will restrict effective competition significantly the Competition Council must prohibit the merger. If, however, the merging parties offer commitments which solve the problems identified by the Competition and Consumer Authority, the Competition Council must approve the merger.

When assessing a merger, the Competition and Consumer Authority will apply the same tests as the European Commission. Thus, the Commission's merger practice and the merger relevant case law from the Court of Justice of the European Union will therefore be applied. The Commission's guidelines on the assessment of horizontal mergers as well as non-horizontal mergers will also provide an important contribution to the interpretation of the Competition and Consumer Authority's merger assessments.

When the Competition and Consumer Authority assesses whether a merger will restrict the effective competition significantly, the Authority will inter alia consider whether the merger will create or strengthen a dominant position. As part of the Competition and Consumer Authority's assessment of the creation or strengthening of a dominant position the Authority will inter alia look at market shares and other aspects which may affect the effective competition, such as the presence of actual or potential competitors as well as buyer power.

A merger may restrict the effective competition even if it does not create or strengthen a dominant position. A merger between undertakings that are connected vertically may inter alia, restrict the competition from actual and potential competitors.

Another way in which a merger may restrict competition without creating a dominant position is the situation where the merger takes place in an oligopolistic market. The characteristic feature of the oligopolistic market is the presence of a small number of undertakings which together control a large part of the market. A part from the fact that mergers on such markets eliminate the competition between the merging parties, the merger will also create or strengthen the likelihood of the undertakings tacitly coordinating their competitive behavior.

In practice, the first step in the assessment of a merger notification will be the Competition and Consumer Authority's definition of the relevant market and estimation of the market shares held by the undertakings concerned. This will be the first indicator of whether a proposed merger will restrict competition. In addition to the market shares the Competition and Consumer Authority will also have to take in to account the strength of both actual and potential competitors and barriers to entry.

The in-depth investigations of mergers will depend on the outcome of the Competition and Consumer Authority's preliminary assessment. If the Competition and Consumer Authority via its preliminary assessment finds that the merger will not lead to a restriction of competition, it will in most cases be possible to conclude the merger assessment in Phase I. If, however, it is not possible conclude that the merger will not lead to a significant restriction of the

effective competition, it will in most cases be necessary to initiate further investigations. These further investigations will be carried out in phase II. However, no further investigations will be necessary if the parties offer remedy commitment at a sufficiently early stage to be assessed within phase I.

The Competition and Consumer Authority will often engage the relevant market players; e.g. the competitors, customers of and suppliers to the parties to the merger, in its merger assessments. In addition to enabling the relevant market players to express their views on the effects of the merger with respect the effective competition, the Competition and Consumer Authority will also involve the market players in the Authority's investigations with respect to defining the relevant markets and identifying the competition problems which the merger may lead to.

5.1 Preliminary statement of concerns

Merger notifications which require in-depth analysis and where the Phase II investigation is initiated, also require the Competition and Consumer Authority to issue a preliminary statement of concerns. This statement will be issued 25–30 weekdays after the day when the notification was deemed complete.

The preliminary statement of concerns shall state which competition problems arising from the merger which the Competition and Consumer Authority foresee based on its preliminary assessment. The purpose of the preliminary statement of concerns is not only to inform the notifying parties of the Authority's preliminary concerns; the purpose is also to enable the notifying parties to contemplate commitments.

The preliminary statement of concerns will be followed by a state of play meeting between the Competition and Consumer Authority. This meeting will take place about 1 week after the parties have received the Authority's preliminary statement of concerns. At this state of play meeting the parties will have an opportunity to comment on the concerns stated by the Competition and Consumer Authority in its preliminary statement of concerns.

In view of the fact that the preliminary statement of concerns will be issued already 25-30 weekdays after the Competition and Consumer Authority has received a complete notification, the Authority will in most cases not have concluded its investigations of the merger. A preliminary statement of concerns will therefore be based on the Authority's preliminary assessment of the relevant markets and the identified problems for competition.

The Competition and Consumer Authority's subsequent market investigations may enable the Competition and Consumer Authority to identify further competition problems that may arise from the merger. In some cases it may, therefore, be necessary for the Competition and Consumer Authority to issue a supplementary statement of concerns.

The Competition and Consumer Authority will also send its preliminary draft decision to the parties to the merger. The parties have the right to be heard on this draft.

5.2 Remedies

If the Competition and Consumer Authority finds that a merger will restrict the effective competition significantly, the Competition Council will not be able to approve it unless the parties offer commitments that can remedy the identified problems.

Elaborating commitments may be a difficult and time consuming exercise. If a merger may lead to competition problems it is recommended that the parties consider possible commitments at the earliest stage possible. It will facilitate a more expedited assessment process.

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If commitments are proposed at a late stage of the assessment process the assessment of the merger may very well be prolonged. Commitments, new as well as revised ones, that are offered when less than 20 weekdays of Phase II remain triggers an extension of the time-limit in phase II by up to 20 weekdays; cf. Section 12 d(3) of the Competition Act. This provision is put in place to ensure that the Competition Council will always have at least 20 weekdays to assess and test a commitment.

There is no specific procedure for submitting commitments. The procedure will be determined on a case by case basis; i.e. depending on the particular case and which stage in the process the case has reached. There will often be a need for in-depth discussions between the parties and the Competition and Consumer Authority, before the Authority finds that the elaborated commitments will remedy the identified competition problems. The Competition and Consumer Authority will be as flexible as is necessary with respect to participants from the Competition and Consumer Authority and with respect to the time of such meetings.

The most expedient approach will often be for the parties to submit their proposed commitments in writing to the Competition and Consumer Authority before a meeting is held. This will enable the Authority to review the commitments before the meeting. It is important that the commitments are phrased precisely and as detailed as possible, that the parties to the merger explain how the commitments may be implemented and that the parties to the merger explain how the commitments will remedy the competition problems. The parties may find inspiration to the elaboration of commitments in the Commission's Commitments Notice.

The Competition and Consumer Authority will normally market tests the commitments offered by the parties. However, the Authority will not market test commitments if the Authority finds that it is unnecessary in a particular case. The Competition and Consumer Authority may either market test the offered commitments directly on relevant third parties or via publication on the Authority's website, whereby the Authority encourages third parties to submit their comments on the commitments offered.

5.3 Ancillary restraints

If a merger involves ancillary restraints, i.e. restrictions related directly to and necessary for the completion of a merger, it is for the undertakings concerned to assess whether the individual terms of the merger agreement are to be categorized as ancillary restraints. The practice in previous Danish merger decisions as well as decisions made by the Commission may serve as the guidance to the undertakings in their assessment of ancillary restraints associated with a merger. Please refer to the Commission's Notice on restrictions directly related and necessary to concentrations for further guidance.

If a merger involves restraints of a nature which is not covered by prior practice or which has not been dealt with by the Commission in its notice, and if it is still uncertain whether the merger involves ancillary restraints the Competition Council may upon request from the parties to the merger assess the ancillary restrains at the same time as assesses the merger itself.

Merger notifications in which the undertakings concerned request an assessment of ancillary restraints cannot be processed by the simplified procedure.

Under revision

Chapter 6
Reference to relevant links etc.

Further information of relevance to notification and assessment of mergers between undertakings can be found in the following documents:

Part 4 of the Competition Act, Consolidated Act No. 700 of 18 June 2013

Executive Order No. 1005 of 15 August 2013 on the Notification of Mergers between Undertakings

The Competition and Consumer Authority's Guidelines to the Executive Order on Notification of Mergers and on Merger Fees

Executive Order No. 808 of 14 August 2009 on the Calculation of Turnover in the Competition Act [Only available in Danish. English translation forthcoming]

The Competition and Consumer Authority's Guidelines to Executive Order No. 808 of 14 August 2009 on the Calculation of Turnover in the Competition Act

Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation)

Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings as amended by Commission Regulation (EC) No. 1033/2008 of 20 October 2008 – consolidated version 23 October 2008

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), 16 April 2008

Commission Notice on case referral in respect of concentrations (2005/C 56/02), 5 March 2005

Commission Notice on the definition of relevant market for the purposes of Community competition law, (97/C 372/05), 9 December 1997

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/05), 5 February 2004

Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/06), 18 October 2008

Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Council Regulation (EC) No. 802/2004, (2008/C 267/01)

Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/24), 5 March 2005