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

March 2024

Konkurrence- og Forbrugerstyrelsen

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

Danish Competition and Consumer Authority
Carl Jacobsens Vej 35
2500 Valby
Tlf.: +45 41 71 50 00
E-mail: kfst@kfst.dk

Online ISBN 978-87-7029-541-3

These guidelines have been prepared by the Danish Competition and Consumer Authority

March 2024

Contents

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 Danish Competition and Consumer Authority's assessment of mergers will be expedited if the notifying parties submit the relevant information on the undertakings in an electronic format. For further information about this, please refer to the last page of these guidelines.

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

Chapter 2
Executive order on the notification of mergers

2.1 Notification of mergers

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

A merger must also be notified i) if the merger concerns commercial providers of electronic communication networks in Denmark and has been referred by the Danish Business Authority according to Section 12(1)(3) of the Danish Competition Act, or ii) if the merger has been referred by the Commission according to Section 12(5) of the Danish Competition Act.

Who is responsible for the notification?
According to Section 1 of the Executive Order on Notification of Mergers, a merger must be notified by one or more of the undertakings concerned, depending on the character of the merger.[1] It is the nature of the merger that determines which of the undertakings concerned that are subject to the obligation to notify a merger:

- When two or more undertakings are merged into one undertaking, the notification must be filed jointly by these merging undertakings.
- 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.
- In case of a public takeover bid, the notification must be filed by the acquirer.

If obliged to file a joint notification of a merger, the undertakings must choose a joint representative to submit the notification. The representative must be authorized to send and receive documents on behalf of all undertakings. If a joint representative is chosen, the merger notification must contain relevant information about this.

In the guidelines, reference is made to the "notifying party" as the undertaking/undertakings or representative/representatives submitting the notification.

[1] The Undertakings Concerned must be interpreted in accordance with practice from the European Commission and the Court of Justice of the European Union. For further information please see Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

2.2 Notification forms for submitting merger notifications

A merger can be notified by using either the full or the simplified notification form, cf. Section 2 of the Executive Order on Notification of Mergers. A merger must be notified by the full notification form, unless the merger is covered by one of the categories for simplified notification set out in Section 3 of the Executive Order on Notification of Mergers. For further information on the criteria for simplified notification see paragraph 2.4.

The two forms to be used to notify a merger can be found as annexes to the Executive Order on Notification of Mergers:

- Form to be used for the full notification (Annex 1)
- Form to be used for the simplified notification (Annex 2).

When notifying a merger to the Danish Competition and Consumer Authority the relevant form must be used, cf. Section 2(2-3) of the Executive Order on Notification of Mergers. The forms can be downloaded at www.en.kfst.dk/competition/merger-control/.

A merger may be notified either electronically (by e-mail) or by hard copy (address; Carl Jacobsens Vej 35, 2500 Valby, Denmark). 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 an USB key or by e-mail. This will facilitate the Danish 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. In general, more information is required by the full notification than by the simplified notification. If some of the required information is not relevant to the merger in question, the notifying party must indicate, that they wish to be exempted from submitting this information. If some of the required information has 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(1-2) of the Executive Order on Notification of Mergers.

Non-confidential version
A non-confidential version must be enclosed with the notification, regardless of whether a simplified or full notification is filed, cf. Section 2(2-3) of the Executive Order on Notification of Mergers. If a non-confidential version 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 cf. Section 15e of the Danish Competition Act, for example in order to get comments on the merger from third parties.

Request for omission of information
The notifying party may ask for a dispensation with respect to some of the required information, including a non-confidential version of the notification, such that the notification can be declared complete without that information, cf. Section 4(2) of the Executive Order on Notification of Mergers.

The notifying party may inter alia be granted dispensation with respect to information which the Danish Competition and Consumer Authority already has received, or if the concerned 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 Danish

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 is typically 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.

If the notification does not contain the required information and the notifying party has not been granted dispensation, the notification will not be considered complete.

2.3 Completeness

When a merger is notified, the Danish Competition and Consumer Authority has 10 weekdays according to Section 4(1) of the Executive Order on Notification of Mergers to decide on whether the notification is complete.

If all the required information is not included in the notification, the Danish Competition and Consumer Authority will inform the notifying party as soon as possible and no later than before the expiry of the 10-day period. The Danish Competition and Consumer Authority will make a request for the remaining required information that needs to be provided for the notification to be considered complete. The notification will only be considered complete once the Danish Competition and Consumer Authority finds that all the information required according to the relevant notification form has been submitted.

Consequence of completeness
The completeness of the notification is relevant for the deadline of 25 weekdays set in Section 12 d(1) of the Danish Competition Act. The deadline will not start until:

- the notification is complete, and
- the Danish Competition and Consumer Authority has received documentation of payment of the notification fee (see chapter 3 below regarding notification fees).

Both conditions must be met. This means that even if the Danish Competition and Consumer Authority considers the notification itself to be complete, the 25-day deadline will not start until the Danish Competition and Consumer Authority has received documentation that the fee has been paid in full.

Calculation of the 10-day deadline
The 10-day deadline in Section 4 of the Executive Order on Notification of Mergers is based on weekdays; i.e. Monday - Friday apart from public holidays, the day of Christmas Eve and the day of New Year's Eve. The public holidays are the official public holidays in Denmark, i.e.: New Year's day, "Maundy Thursday", "Good Friday", "Easter Monday", "Ascension Day", "Whit Monday", "Christmas Day" and "Boxing Day".

2.4 Mergers that can be notified according to the simplified procedure

A merger must be notified by the full notification form unless the merger is covered by one of the criteria for simplified notification set out in Section 3 of the Executive Order on Notification of Mergers.

The following paragraph refers to sections of the Executive Order on Notification of Mergers.

2.4.1 Acquisition of joint control of a joint venture, cf. Section 3(1)(1)

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

i) 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, cf. Section 3(1)(1a); and
ii) 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, cf. Section 3(1)(1b).

The second condition is only relevant in cases where the assets are transferred to the joint venture in connection to the merger.

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 Denmark.

In re the first condition, cf. Section 3(1)(1a)
In assessing the first condition, it is either the turnover of the joint venture or the turnover relating to the activities transferred to the joint venture that must be considered. The question of which of the two turnovers is to be considered depends on the nature of the merger. The following are examples of three different situations:

- If the merger involves a joint takeover of an existing undertaking, the turnover to consider will be this undertaking's (i.e. the new established joint venture's) turnover.
- In case of a takeover of a controlling interest in an existing joint venture, the turnover of the joint venture and the turnover generated by the activities which the new controlling undertaking transfers (or may transfer) to it must be considered.
- 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 considered.

The turnover of the joint venture must be calculated based on the most recent audited financial statements of the controlling undertakings or of the joint venture, provided that separate financial statements are available with respect to the assets, which the controlling undertakings have transferred to the joint venture. If there are no audited accounts, it may be necessary, depending on the circumstances, to have an audited statement of net revenue.

In re the second condition, cf. Section 3(1)(1b)
The second condition implies a calculation of the total value of any assets that may be transferred from the controlling parent companies to the joint venture.

The term "assets" comprise:

- all tangible and intangible assets transferred to the joint venture and
- all loans, credits and guarantees that may have been provided by the parent undertakings to the joint venture.

Examples of tangible assets: production plant, wholesale or retail businesses and inventory; examples of intangible assets: intellectual property rights, goodwill, etc.

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.

2.4.2 Sole control of an entity which was previously a joint venture, cf. Section 3(1)(2)
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.

2.4.3 Horizontal overlaps or vertical relationships, cf. Section 3(1)(3-4)

No horizontal overlaps or vertical relationships
Mergers subject to Section 3(1)(3) are mergers between undertakings where there are no horizontal overlaps or vertical relationships with respect to the undertakings' activities. This applies to the relevant market consisting of both the product and the geographic market.

Minor horizontal overlaps and/or vertical relationships
Mergers subject to Section 3(1)(4a) are mergers between undertakings which are engaged in activities in the same relevant market; both product and geographic market, i.e. horizontal mergers. The provision stipulates that horizontal mergers may be notified according to the simplified procedure if the merging undertakings have a combined market share below 15 per cent in any relevant market.

Mergers subject to Section 3(1)(4b) are mergers between undertakings which are not necessarily engaged in activities in the same relevant market, but where one or more of the undertakings concerned are engaged in activities on a product market upstream or downstream which is connected to another product market where one or more of the other parties to the merger is active in Denmark or a part of Denmark. 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 related markets of 25 per cent or more.

A merger can only be notified according to the simplified procedure after Section 3(1)(4) if both of these conditions are met.

The market share thresholds in Section 3(1)(3-4) apply with respect to market shares in relevant geographic market(s) comprising Denmark or a part of Denmark. The market shares of the undertakings concerned should be calculated on the basis of the relevant geographic market(s) in Denmark or the relevant geographic market(s) that includes Denmark (and can be extended to a larger area than Denmark) or only a part of Denmark.

If the merger concerns activities on a geographic market, which can be delineated to Europe (which include Denmark), the merging parties' market shares on this European market are relevant in the assessment of the threshold values. If the merger on the other hand concerns activities on a geographic market, which can be delineated to the Øresund region, then it is the market shares on this market (which includes a part of Denmark) that is relevant in the assessment of the threshold values.

The thresholds in Section 3(1)(3-4) apply to any plausible definition of the product market as well as the geographic market. It is critical that the underlying market definitions in the notification are sufficiently precise to justify that the thresholds in Section 3(1)(3-4) are not met. It is also important that all plausible alternative market definitions are mentioned, including plausible regional or local geographic markets.

In the assessment of plausible market definitions, it is relevant to consult previous case law, including Commission decisions and decisions from the Danish and other relevant national competition authorities. If a specific delineation of a market has been considered in earlier decisions, it will generally constitute a plausible market.

2.5 Exemptions to the simplified notification

Even if a merger prima facie meets one of the criteria for the simplified notification, cf. Section 3(1), there may be aspects of the merger that lead to the merger not qualifying for the simplified notification and, thus, has to be notified using the full notification form; cf. Section 3(2).

The Danish Competition and Consumer Authority can request that a merger must be notified according to the full notification even if the notification has already been notified according to the simplified notification. The Danish Competition and Consumer Authority can make this request at any time in the assessment of the merger, cf. Section 4(3).

If a merger has been notified according to the simplified notification and the Danish Competition and Consumer Authority requests that the merger should be notified according to the full notification after the merger has been deemed complete, the days that have already passed in phase 1 will be deducted from the "new" phase 1 when the notification according to the full notification is considered complete.

The following are examples of different factors, which, after a specific assessment, can give reason to require a full notification of the merger

- In the case of markets that are characterized by significant barriers to entry, a high degree of concentration or other competition concerns that make it necessary to investigate the merger further.
- If the merging parties are active in adjacent, closely related markets, i.e. markets where the products complement each other or belong to a product group that is generally purchased by the same group of buyers for the same end-use and one or more of the companies has a market share of a certain size.
- 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.
- If the merger cannot be assessed solely on the basis of the notifying party's information, and it is necessary, for example, to carry out market research or obtain information from market participants or other third parties.
- If the geographic market is larger than Denmark and the merging parties' market shares are below the thresholds, but the merging parties hold a very strong position in Denmark or parts of Denmark.
- If it is difficult to determine the parties' market shares sufficiently to rule out the possibility that the merger will give rise to any competition concerns.
- If a transition from joint control to sole control of a joint venture means that the acquirer will be able to strengthen the joint venture because the previous disciplinary effects of the opposing interests of several controllers are removed.
- If the prior acquisition of joint control of a joint venture transferring to sole control has not been subject to merger control.
- If the acquisition of joint control with a joint venture entails coordination problems, cf. Section 12c(3) of the Danish 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. Other situations may also 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 Danish Competition and Consumer Authority.

Chapter 3
Fees for notification of mergers

When a merger is notified to the Danish Competition and Consumer Authority, a fee must be payed, cf. Section 12h of the Competition Act. The fee is due regardless of whether the merger is notifiable according to the revenue threshold, cf. Section 12(1)(1) of the Danish Competition Act, or if the merger is referred to the Danish Competition and Consumer Authority by the Danish Business Authority, cf. Section 12(1)(3) of the Danish Competition Act, or by the Commission, cf. Section 12(5) of the Danish Competition Act.

The size of the fee
The size of the fee depends on whether the merger is notified by the simplified or the full notification form. The fee for a simplified notification is DKK 50,000, cf. Section 12 h(2) of the Danish Competition Act, 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, cf. Section 12 h(3) of the Danish Competition Act.

Regarding calculation of the turnover of the undertakings concerned, see Executive Order No. 1286 of November 2019 on calculation of turnover in the Danish Competition Act as well as the Commissions Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

Time of payment
The fee must be paid to the Danish Competition and Consumer Authority no later than upon filing 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 Danish Competition and Consumer Authority has not received documentation of payment of the fee, the 25-weekday deadline in Section 12 d(1) will not start, even if the Danish Competition and Consumer Authority considers the notification to otherwise be complete.

If during the processing of a simplified notification, the Danish Competition and Consumer Authority concludes that the merger requires a full notification, a full notification must be submitted to the Danish Competition and Consumer 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). Also, see an example of such scenario below.

In this situation, the deadlines for processing the merger will not commence until the date on which the Danish Competition and Consumer Authority receives both a complete notification and documentation that the (remaining part of the) notification fee has been paid. The requirement for a full notification will therefore mean that the deadlines are suspended. 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 (remaining part of the) notification fee.

Example of calculations of notification fees in accordance with Section 12 h(2-4):
In the examples below, the undertakings concerned have a combined annual turnover of DKK 1 billion in Denmark.

» Simplified notification (Section 12h(2))
DKK 50,000

» Full notification (Section 12h(3))
0.015 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

Merger notification fees must be paid through a deposit/transfer to the Danish Competition and Consumer Authority's account with Danske Bank, reg. no. 0216, account number 4069045960.
In all communication with the account-holder, the notifying party must quote "FU" and the case number assigned to the merger by the Danish Competition and Consumer Authority. If the merger has not been assigned a case number the notifying party must quote "FU" and state the names of the undertakings concerned or the name used to identify the merger (e.g. Project Ultra) if the merger is still confidential. Proof of payment must be enclosed with the notification (e.g. a copy of the bank transfer)

Furthermore, foreign undertakings must use the following information in relation to transfer of the fee to the Danish Competition and Consumer Authority: SWIFT: DABADKKK and IBAN: DK6902164069045960.

Consequences for not paying the fee
Non-payment of a notification fee will result in the merger not being deemed as having been notified; see Section 12h(6). This is the case when the fee has not been paid at all or when a smaller amount than necessary has been paid.

In cases where, during processing of a simplified notification, it becomes apparent that the merger requires a full notification (see Section 12h(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 Danish Competition and Consumer Authority has presented a demand for payment.

The notification will also be deemed to have lapsed if, despite reminders from the Danish Competition and Consumer Authority, the notifying party fails to file a full notification to replace the simplified notification; see Section 12h(6).

Fees that have already been paid cannot be refunded, cf. Section 12h(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 to the Executive Order on Notification of Mergers)

The information in the notification must be submitted in Danish. The Danish 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 Danish Competition and Consumer Authority before the notification is submitted.

Financial information
According to Section 5 of both of 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. 1286 of 26 November 2019 on the Calculation of Turnover in the Danish Competition Act. As regards the principles for calculating turnover in general, please refer to the Commissions Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

Group information
According to Section 6 of both of 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, chapter B II-VII.

Information about competitors, customers and suppliers
According to Sections 8.1, 9.1, 9.7, 9.9, 9.10, and 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 Danish Competition and Consumer Authority will to the necessary and relevant extent contact these competitors, customers or suppliers. It will facilitate and, thus, expedite the Danish Competition and Consumer Authority's assessment of the notified merger if the Danish Competition and Consumer 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 Danish Competition and Consumer Authority. This Excel sheet may be downloaded from www.en.kfst.dk/competition/merger-control/.

Additionally, it is important that the notifying party state their sources for calculation of the aggregated market and the stated/estimated market shares. The notifying party must clearly distinguish between information based on discretion, estimates, and factual information (e.g. from a trade association). The notifying party can advantageously enclose the underlying data used in the calculation of market shares.

Furthermore, the notifying party must remember to include data, which can shed light on demand and supply side substitution during the past three years, given the undertakings are in possession of such.

Fees
When submitting the notification, the notifying party must transfer the fee to the Danish 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 Danish 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.

Annexes
According to Section 13 in the full notification form; cf. Annex 1, and Section 11 in the simplified notification form; cf. Annex 2, the notifying party must enclose a number of annexes in the notification, including a non-confidential version of the notification.

The notifying party must include internal documents about the merger, cf. Section 13(b-c) and 11(b). This includes all documents regarding the merger, including the signed agreement/Share Purchase Agreement (SPA)/Asset Purchase Agreement (APA) and other relevant associated agreements, e.g. cooperation agreements. Relevant appendices to these agreements must also be enclosed.

For mergers notified according to the full notification form the notifying party must also enclose minutes from board meetings, analyses, reports, surveys and similar documents, which can be used to assess the rationale for the merger, the market shares, competitors etc. When enclosing information according to section 13c(3) the notifying party should provide documents for the last two years.

The submitted annexes must be enclosed in their entirety, unless the notifying party has obtained a dispensation from the Danish Competition and Consumer Authority.