The International Comparative Legal Guide to:

Merger Control 2016

12th Edition

A practical cross-border insight into merger control issues

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General Chapters:

1	**To Bid or Not to Bid, That is the Question – the Assessment of Bidding Markets in Merger Control** – David Wirth, Ashurst LLP	1
2	**Remedies Under the EUMR** – Frederic Depoortere & Giorgio Motta, Skadden, Arps, Slate, Meagher & Flom	10
3	**The Economics of Retailer Mergers** – Ashley Burdett & Mat Hughes, AlixPartners UK LLP	15

Country Question and Answer Chapters:

4	**Albania**	Boga & Associates: Sokol Elmazaj & Jonida Skendaj	23
5	**Australia**	King & Wood Mallesons: Sharon Henrick & Wayne Leach	30
6	**Austria**	Schoenherr: Stefanie Stegbauer & Franz Urlesberger	39
7	**Belgium**	Linklaters LLP: Thomas Franchoo & Niels Baeten	46
8	**Bosnia & Herzegovina**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Srđana Petronijević & Danijel Stevanović	53
9	**Botswana**	Khan Corporate Law: Shakila Khan & Precious N. Hadebe	61
10	**Brazil**	GO Associados: Gesner Oliveira & Ricardo Pastore	67
11	**Bulgaria**	Schoenherr in cooperation with Advokatsko druzhestvo Stoyanov & Tsekova: Ilko Stoyanov & Mariya Papazova	75
12	**Canada**	Blake, Cassels & Graydon LLP: Debbie Salzberger & Emma Costante	82
13	**China**	King & Wood Mallesons: Susan Ning & Ting Gong	91
14	**Cyprus**	Anastasios Antoniou LLC: Anastasios A. Antoniou & Aquilina Demetriadi	98
15	**Denmark**	Accura Advokatpartnerselskab: Jesper Fabricius & Christina Heiberg-Grevy	105
16	**Estonia**	Jesse & Kalaus Attorneys: Tanel Kalaus & Mari Matjus	114
17	**European Union**	Sidley Austin LLP: Steve Spinks	122
18	**Finland**	Peltonen LMR Attorneys Ltd.: Ilkka Leppihalme & Matti J. Huhtamäki	133
19	**France**	Ashurst LLP: Christophe Lemaire & Simon Naudin	144
20	**Germany**	Beiten Burkhardt: Philipp Cotta & Uwe Wellmann	154
21	**Hong Kong**	King & Wood Mallesons: Martyn Huckerby & Edmund Wan	164
22	**Hungary**	Schoenherr: Anna Turi & Christoph Haid	170
23	**India**	Vaish Associates, Advocates: Man Mohan Sharma	178
24	**Israel**	Erdinast, Ben Nathan & Co. Advocates: Michal Rothschild	186
25	**Italy**	King & Wood Mallesons: Riccardo Croce & Elisa Baretta	192
26	**Japan**	Nagashima Ohno & Tsunematsu: Eriko Watanabe & Yoshitoshi Imoto	201
27	**Kazakhstan**	JSC Center for Development and Protection of Competition Policy: Aldash Aitzhanov & Anara Batyrbayeva	208
28	**Kosovo**	Boga & Associates: Sokol Elmazaj & Delvina Nallbani	215
29	**Macedonia**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Srđana Petronijević & Danijel Stevanović	222
30	**Mexico**	OLIVARES: Gustavo A. Alcocer & Andrés de la Cruz Pérez	230
31	**Montenegro**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Srđana Petronijević & Danijel Stevanović	236
32	**Morocco**	UGGC Avocats: Corinne Khayat & Catherine Chappellet-Rempp	243
33	**Namibia**	Koep & Partners: Hugo Meyer van den Berg & Peter Frank Koep	253
34	**New Zealand**	Matthews Law: Nicko Waymouth & Gus Stewart	260
35	**Nigeria**	PUNUKA Attorneys & Solicitors: Anthony I. Idigbe & Eberechi Ifeonu	267
36	**Norway**	Advokatfirmaet Wiersholm AS: Anders Ryssdal & Håkon Cosma Størdal	277
37	**Portugal**	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Carlos Botelho Moniz & Pedro de Gouveia e Melo	285
38	**Romania**	Schoenherr şi Asociaţii SCA: Cătălin Suliman & Silviu Vasile	296
39	**Russia**	Ivanyan & Partners: Maria Miroshnikova & Sergei Kushnarenko	304

Continued Overleaf →

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Country Question and Answer Chapters:

40	**Serbia**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Srđana Petronijević & Danijel Stevanović	312
41	**Singapore**	Drew & Napier LLC: Lim Chong Kin & Dr. Corinne Chew	321
42	**Slovakia**	Schoenherr: Jitka Linhartová & Claudia Bock	331
43	**Slovenia**	Schoenherr: Eva Škufca & Christoph Haid	337
44	**Spain**	King & Wood Mallesons: Ramón García-Gallardo & Manuel Bermúdez Caballero	347
45	**Sweden**	Kastell Advokatbyrå AB: Pamela Hansson & Christina Mailund	358
46	**Switzerland**	Schellenberg Wittmer Ltd: David Mamane & Dr. Jürg Borer	366
47	**Taiwan**	Lee and Li, Attorneys-at-Law: Stephen Wu & Yvonne Hsieh	374
48	**Turkey**	ELIG, Attorneys-at-Law: Gönenç Gürkaynak & Ayşe Güner	381
49	**Ukraine**	Asters: Igor Svechkar & Tetiana Vovk	388
50	**United Kingdom**	Ashurst LLP: Nigel Parr & Duncan Liddell	395
51	**USA**	Sidley Austin LLP: William Blumenthal & Marc E. Raven	409
52	**Uruguay**	Bergstein Abogados: Leonardo Melos & Jonás Bergstein	417
53	**Uzbekistan**	Karimov and Partners Ltd.: Bobir Karimov	424

EDITORIAL

Welcome to the twelfth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The competent authorities in respect of merger control in Denmark are the Danish Competition and Consumer Authority ("the DCCA") and the Danish Competition Council ("the DCC"). The DCC has primary responsibility for the enforcement of the Danish Competition Act, while the DCCA is the secretariat of the DCC and is responsible for the day-to-day administration. In practice, the DCC primarily makes decisions in major cases and cases of fundamental importance, while the DCCA, on behalf of the DCC, makes most of the decisions.

The DCCA is divided into four main units: competition; consumer matters; publicly-provided services procurement; and water. The competition unit is divided into various sectors which focus on specific branches and deals with mergers within these branches.

The DCC consists of seven members appointed by the Minister for Business and Growth and is composed of four members with insight into competition matters or another appropriate academic background, two members with experience of business management, and one with specialised knowledge of consumer affairs. Among the members the Minister for Business and Growth appoints one President and one Vice-president. A consul group composed of up to 10 members who as a group possess a broad knowledge of private and public undertakings as well as legal, economic, financial and consumer affairs is set up. The members are appointed on proposal from socio-professional organisations. There is no government involvement in the decision-making process of the DCC and the DCCA.

The DCC's decisions may be appealed to the Competition Appeals Tribunal, and the decisions of the Competition Appeals Tribunal may be appealed to the ordinary courts.

1.2 What is the merger legislation?

The merger control rules are set out in Part 4 of the Consolidated Competition Act No. 869 of 8 July 2015. The Competition Act is accompanied by Executive Order No. 1005 of 15 August 2013 on the Notification of Mergers, as well as Executive Order No. 808 of 14 August 2009 on the Calculation of Turnover in the Competition Act.

The DCCA issued Merger Guidelines in September 2013, as well as Guidelines to the Executive Order on Notification of Mergers and filing fees in October 2014.

The Danish Merger legislation is heavily influenced by EU legislation. The Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings ("the EC Merger Regulation") may thus also serve as a guideline in respect of Danish merger control.

1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation for foreign mergers. Denmark does not have any foreign investment control legislation.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Financial institutions:

According to section 204 of the Financial Business Act (Act No. 182 of 18 February 2015), financial undertakings such as banks, mortgage-credit institutions, stockbrokers, investment management companies and insurance companies may not merge with another financial undertaking or parts thereof without permission from the Ministry of Business and Growth.

According to section 61 of the Financial Business Act, the acquisition of 10% or more of the share capital or voting rights of a financial undertaking or a financial holding company requires permission from the Financial Supervisory Authority.

According to section 19 of the Danish Act on the European Company (the SE Act) (Act No. 654 of 15 June 2006), with reference to articles 8 and 19 of the Council Regulation (EC) No. 2157/2001 of 8 October 2001, the formation of an SE with the participation of an undertaking who is subject to supervision by the Financial Supervisory Authority may be objected to by the Minister for Business and Growth.

According to section 31(1) of the Danish Securities Trading Act (Act No. 831 of 12 June 2014), the acquirer of a controlling interest in a company listed on a stock exchange or on another authorised market shall offer the remaining shareholders in the acquired company to buy their shares on identical terms.

Telecommunication:

As of 1 July 2015, a new set of merger control rules governing the telecommunication sector has entered into force.

According to Section 51a of the Danish Act to amend the Danish Act on digging rights and compulsory sale, etc. for telecommunications purposes, the Danish Act on electronic communications networks

and services and the Danish Competition Act, a transaction, as defined in Section 12a of the Danish Competition Act (please refer to question 2.1), between two or more commercial operators of electronic communication network in Denmark will have to be notified to the Danish Business Authority if the undertakings concerned have a combined annual turnover exceeding DKK 900 million (EUR: 120 million) in Denmark and the transaction involves a public electronic communication network. If the criteria set out in Section 51 are met, the Danish Business Authority will then refer the transaction to the DCCA.

If the turnover thresholds in the Danish Competition Act are fulfilled, there is regardless of the sector specific rules for the telecommunication sector an obligation to notify in accordance with the rules on merger control in the Danish Competition Act.

The list above of relevant legislation is not exhaustive and other legislation may also be of importance, e.g. in sectors where permits or licences are required to operate a business.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The merger control rules apply to "concentrations". The definitions of "concentrations" and "control" in the Danish Competition Act correspond to the definitions in the EC Merger Regulation (Council Regulation (EC) No. 139/2004).

The types of transactions caught by the Competition Act are set out in Section 12a(1)–(2), in which a concentration means:

- two or more previously independent undertakings amalgamating into one undertaking;
- 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 – acquiring direct or indirect control of the entirety of, or parts of, one or more other undertakings; or
- a joint venture that will perform all of the functions of an independent business entity on a permanent basis.

It is fundamental to the determination of whether a concentration constitutes a merger, as defined by the Competition Act, as to whether there is a permanent change of control or a permanent transfer of control of an undertaking. The duration of the change of control must be at least one year.

Control is defined in section 12a(3) of the Competition Act, in which it is stated that control of an undertaking is obtained through rights or agreements or in other ways which will, either separately or in combination, make it possible to exert decisive influence on the operations of the undertaking.

Therefore, a concentration may occur on a legal or a *de facto* basis, and may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings. However, intra-group mergers do 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 is to exercise control over the other party.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

As defined above in question 2.1, the acquisition of a minority shareholding may be deemed to constitute a merger if the acquisition leads to a situation in which it is possible for the minority shareholder to determine the strategic commercial behaviour of an undertaking, e.g. due to veto rights related to the strategic decisions on the business policy of an undertaking or if several minority shareholders agree to carry out a common conduct when exercising their shareholder rights.

2.3 Are joint ventures subject to merger control?

Transactions 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 are subject to merger control. The concept of "full-function" corresponds to the definition in the EC Merger Regulation.

A joint venture which will supply goods and/or services only to the parent businesses and has no "presence" on the wider market or dealings with third parties may nevertheless be deemed to be a full-function joint venture subject to merger control, e.g. if the exclusive supply is only for a start-up period of approximately two-three years.

A joint venture which is a brand new start-up business that has not previously traded and is not acquiring an existing business from its parents (or an independent seller) may also be subject to merger control.

A joint venture which is purely contractual with no creation of a new legal entity as the vehicle for the joint venture activities is, however, not subject to merger control. Instead, the cooperation is subject to appraisal under section 6 of the Competition Act (corresponding to article 101 TFEU).

The merger control thresholds for joint ventures are the same as for other concentrations. See question 2.4.

2.4 What are the jurisdictional thresholds for application of merger control?

A merger must be notified to the DCCA if:

- the undertakings concerned have a total annual turnover in Denmark of at least DKK 900 million (approximately USD 137 million and EUR 121 million) and at least two of the undertakings concerned have a total annual turnover in Denmark of at least DKK 100 million (approximately USD 15 million and EUR 13.4 million) each; or
- at least one of the undertakings concerned has a total annual turnover in Denmark of at least DKK 3.8 billion (approximately USD 580 million and EUR 510 million) and at least one of the other undertakings concerned has a total worldwide annual turnover of at least DKK 3.8 billion (approximately USD 580 million and EUR 510 million).

The "undertakings concerned" are those which are involved directly in the concentration. In a merger, the "undertakings concerned" are each of the merging undertakings. In an acquisition, the "undertakings concerned" are the target company and the buyer. The seller is not included. In the creation of a new joint venture, the "undertakings concerned" are solely those which obtain joint control. In an acquisition of an existing undertaking, the "undertakings concerned" are those which obtain joint control and the entity over which control is being acquired.

The turnover of an "undertaking concerned" comprises the turnover of the entire group to which the undertaking belongs; i.e. the parent company, the sister companies and the subsidiaries. Intra-group turnover must be deducted. If a group includes a joint venture with joint control, only a part of the turnover of the joint venture corresponding to the ownership of the undertaking concerned is to be included. However, any turnover between the joint venture and the undertaking concerned must be deducted.

The turnover of the target includes the turnover relating to the parts which are the subject of the transaction.

If the acquisition of parts of an undertaking takes place within a two-year period between the same persons or undertakings, it must be treated as one and the same merger.

"Turnover in Denmark" includes turnover generated from sales to customers located in Denmark, excluding any intra-group turnover.

2.5 Does merger control apply in the absence of a substantive overlap?

The merger control rules apply even if there is no increase in market shares (i.e. no "horizontal" overlap).

2.6 In what circumstances is it likely that transactions between parties outside Denmark ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

The merger control rules apply even if there is no increase in market shares (i.e. no "horizontal" overlap). Local presence in Denmark is not necessary for a transaction to be subject to the Danish merger control rules. "Foreign-to-foreign" transactions are caught by the merger control rules if the undertakings concerned have turnovers in Denmark and the thresholds are met. See question 2.4 above.

So far, no fines have been imposed for failure to notify "foreign-to-foreign" transactions – perhaps because such failure has not been discovered yet.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

If the transaction is caught by the EU Merger Control Regulation, the Danish merger rules will not apply. If the EU Commission refers a transaction to the DCC, it will be examined by the DCC, regardless of whether the Danish thresholds are met or not.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Series of transactions taking place within a two-year period between the same parties will be assessed as a single transaction, taking place on the date of the last transaction in the series, according to section 12(3) of the Competition Act. The transaction will have to be notified to the DCCA at the time when the transaction – alone or combined with the previous transactions – constitute a concentration which meets the thresholds. Furthermore, transactions taking place in various stages involving a single acquirer (or acquiring group) will be assessed as a single transaction, if there is a legal or economic connection linking the different stages (e.g. if the transactions are linked by condition upon each other). In any case, it should be determined on the basis of a specific assessment of the circumstances whether a series of transactions constitutes a single transaction subject to merger control.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Where the jurisdictional thresholds are met, notification is compulsory. There is no deadline for notification but it is prohibited to implement the transaction before a clearance has been obtained. See question 3.7 below.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There are no "small market" exceptions or any exceptions applying to "foreign-to-foreign" transactions.

Section 12a(4) of the Competition Act exempts only the following types of transactions:

- the acquisition of securities for resale by financial institutions, where the securities are sold within one year from their acquisition and the acquisition is part of the institutions' normal activities;
- transactions by which a trustee of an insolvent undertaking acquires control of an undertaking; or
- 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 and not in order to determine the competitive conduct of the undertaking.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Criminal sanctions in the form of fines may be imposed if a party, intentionally or due to gross negligence, fails to file a merger. Fines may be issued to either individuals or companies.

The courts will determine the amount of the fines by taking into consideration the size of the undertakings concerned, based on turnover, whether the merger has had anticompetitive effects, and the duration of the violation. The comments to the Competition Act include guidelines for determining the basic amount of the fines. According to the guidelines, the amount of the fines depends on whether the offence is (1) less serious, (2) serious, or (3) very serious. The fine for a less serious offence is between DKK 10,000 – 4 million (in USD between 1,780 – 700,000 and in EUR between 1,300 – 540,000), a serious offence is between DKK 4 million – 20 million (in USD between 700,000 – 3.5 million and in EUR between 540,000 – 2.7 million) and a very serious offence is above DKK 20 million (in USD 3.5 million and in EUR 2.7 million). However, according to the guidelines to the Competition Act, the fines should not exceed 10% of the worldwide group turnover of the undertaking concerned.

In cases where a merger requires notification and clearance, but no filing has been made, the offence is deemed to be a serious offence. However, if a merger has anticompetitive effects, this will be viewed as an aggravating circumstance.

No fines have so far been imposed for a failure to file a merger – perhaps because such failure has not been discovered yet.

The DCC does not render a transaction invalid of which it has not been notified. However, the DCC may issue an order that requires separation of the undertakings or assets that have been taken over if the DCC finds that the transaction significantly impedes effective competition.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

There are neither rules nor case law supporting the possibility of carving out Danish completion of a merger to avoid delaying global completion.

3.5 At what stage in the transaction timetable can the notification be filed?

A merger which meets the turnover thresholds must be notified to the DCCA after the conclusion of a merger agreement, the announcement of a public offer or the acquisition of a controlling interest and before the merger is implemented. In practice, it is wise to contact the DCCA before the transaction is notified. The DCCA does not require that a legally binding agreement has been signed in advance or that a public offer has already been announced. In this pre-notification period, all discussions taking place with the DCCA are confidential.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The timeframe for the scrutiny of the merger by the DCC does not begin until a complete notification has been submitted.

Within 10 working days after the receipt of a notification, the DCC must inform the notifying parties whether the notification is deemed to be complete or whether further information is required.

Within 25 working days from the receipt of a complete notification, the DCC must decide whether to approve the transaction (phase 1 decision) or whether to initiate a phase 2 investigation. If the parties offer remedies within 25 working days, the timeframe may be extended to 35 working days in order for the DCC to assess the remedies offered.

If a phase 2 investigation is initiated, the DCC must within 90 working days from the expiry of the deadline for a phase 1 decision decide whether to approve or prohibit the transaction.

The deadline for a phase 2 decision may be suspended if new or revised remedies are offered by the notifying parties less than 20 working days before the expiry of the deadline, to the effect that 20 working days always remain for the DCC to take such remedies into consideration. The DCC may also decide to suspend the deadline for the phase 2 decision with 20 working days, upon the request or acceptance of the notifying parties.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

It is prohibited to complete the transaction before clearance is obtained from the DCCA/DCC. However, the DCC may exempt a merger from the prohibition to complete the merger before clearance is obtained if the DCC assesses that the effective competition will not be impeded.

One of the exemptions to the above is the implementation of a public takeover bid or a series of transactions in securities, including securities that may be converted to other securities which may be traded in a market such as a stock exchange, whereby control is acquired from different sellers. This exemption may only be used if the DCCA is notified of the merger immediately, and the acquirer does not exercise the voting rights attached to the securities in question or only does so to maintain the full value of the investment and on the basis of an exemption granted by the DCC.

Provided that a more severe penalty is not applicable under other legislation, the parties involved in a merger may be punished with a fine if the parties fail to notify a merger or implement a merger, whether intentionally or with gross negligence, despite the prohibition against implementation; see section 23(1)(vi-vii) of the Competition Act.

On 17 December 2014, the first case on pre-implementation of a merger, before the parties received clearance from the DCCA, was decided. DCC concluded that the parties to the take-over of KPMG Denmark by Ernst & Young Europe LLP ("E&Y") had begun implementation of the take-over before the DCCA had issued a clearance decision. The decision concerns KPMG Denmark's termination of the cooperation with the international KPMG network ("KPMG International") which was a condition according to the agreement of the take-over between KPMG Denmark and E&Y. KPMG Denmark's cooperation with the KPMG International was terminated according to the agreement between E&Y and KMPG Denmark. The termination of the cooperation should take place immediately and not await DCCA's clearance. The DCC concluded that the termination by KPMG Denmark of the cooperation with KPMG International was made as a part of the merger between E&Y and KPMG Denmark. DCCA's decision has been appealed by the parties and is now pending before the ordinary Danish courts. At the same time, the DCCA has handed-over the case to the Danish State Persecutor for Serious Economic and International Crime in order for them to assess whether or not to initiate criminal prosecution against E&Y and KPMG Denmark. Please also see question 3.3 above.

3.8 Where notification is required, is there a prescribed format?

Merger notifications must be made either as a simplified or full notification containing the information and documents specified in the forms attached as Annex 1 (full) or Annex 2 (simplified) to the Executive Order No. 1005 of 18 February 2015 on the Notification of Mergers. Furthermore a non-confidential version of the notification must be enclosed. The following link may be used to access Annex 1 and 2, as well as the Guidelines to the Notification of Mergers:

http://www.kfst.dk/en/konkurrenceomraadet/merger-control/.

According to the DCCA Guidelines to the Executive Order on Notification of Mergers, a merger may be notified either electronically or by hard copy. The information stated in the notifications must be submitted in Danish. The DCCA may grant permission to submit some or all of the required information in English. However, such submissions should be agreed with the DCCA before a notification is submitted.

As a general rule, the notifying party must provide all of the information required in the notification form. If some of the required information is not relevant in relation to the relevant merger, the notifying party must indicate this specifically. 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 any of the required information may lead to the notification being declared incomplete.

This is especially important as the time-limits set out in section 12 d(1) of the Competition Act will not start to run before the notification is complete. If some of the required information is missing, the DCCA will inform the notifying party as soon as possible and no later than before the expiry of a time-limit of 10 working days.

In general, it is advisable to initiate pre-notification discussions with the DCCA and to submit the draft notification to the DCCA for the purpose of submitting a final notification that the DCCA will deem to be complete.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

As mentioned in question 3.8 above, there is a simplified form for the notification of mergers, which is enclosed as Annex 2 to the Executive Order No. 1005 of 18 February 2015 on the Notification of Mergers. In the simplified notification form, undertakings are required to submit less information and documentation than required when using the full notification form.

According to section 3 of the Executive Order No. 1005 of 18 February 2015 on the Notification of Mergers, only mergers falling within one of the following categories of mergers may use the simplified notification form:

Mergers in which two or more undertakings acquire joint control of a joint venture which has no, or negligible, actual or foreseen activities in Denmark. Such cases occur where:

- the turnover of the joint venture and/or the turnover of the transferred activities is less than DKK 100 million (approximately USD 15 million and EUR 13.4 million) in Denmark; and
- the total value of the assets or the turnover generated by the assets transferred to the joint venture is less than DKK 100 million (approximately USD 15 million and EUR 13.4 million) in Denmark.

Mergers in which one undertaking acquires sole control of another undertaking over which it already has joint control with one or more other undertakings.

Mergers in which two or more undertakings are merged or one or more undertakings acquire sole or joint control of another undertaking and in which:

- none of the parties to the merger are engaged in business activities in the same product and in the same geographical market or in a product market which is downstream or upstream from a product market in which another party to the merger is engaged;
- two or more of the parties to the merger are engaged in business activities in the same product and geographic market, but where they will have a combined market share of less than 15% in Denmark; or
- one or more of the parties to the merger are engaged in business activities in a product market which is downstream or upstream from a product market in which another party to the merger operates, provided that the parties neither separately nor together hold market shares in any of the vertically connected markets of 25% or more in Denmark.

Though the EU Commission has revised the threshold under 3 b) and c) according to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (2013/C 366/04), the DCCA has maintained the previous thresholds applied by the EU Commission.

Even though a merger may be covered by one of the above categories 1-3, the DCCA may at its discretion require a full notification of a merger.

If a merger has been notified by submission of a simplified notification form, the notification will be deemed to be complete no later than 10 working days after receipt of the notification, unless the DCCA before that date has informed the notifying party that the merger must be notified by submission of a full notification form.

Even if the DCCA has deemed the simplified notification to be complete, the DCCA may still require the submission of a full notification form if the merger has not yet been approved.

It is advisable to initiate pre-notification discussions and to keep close contact with the DCCA during the approval process as this will generally facilitate a faster and more efficient process.

In general, the DCCA prioritises received merger filings and will try to accommodate parties who are in need of a speedy clearance, if the parties to a transaction make valid arguments for their case. However, the DCCA has limited resources and will not always be able to accommodate the parties' wishes. In any case, it is always recommendable to keep a close dialogue with the DCCA as this will usually facilitate a smoother and faster clearance process.

3.10 Who is responsible for making the notification and are there any filing fees?

A merger must be notified by one or more of the undertakings concerned, depending on the character of the merger. The undertakings concerned are the undertakings that take part in the merger.

According to the Guidelines to the Notification on Mergers, the following applies:

- Where a party acquires sole control of an undertaking 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 undertaking 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 also possible for the undertakings concerned to let one (or more) of the undertakings concerned submit the merger notification or to authorise a joint representative to send and receive documents on behalf of all the undertakings concerned.

The following filing fees apply for merger notifications submitted to the DCCA, according to Section 12h of the Competition Act:

- The filing fee for a simplified notification is DKK 50,000 (approximately USD 7,600 and EUR 6,700).
- The filing fee for a full notification is 0.015% of the aggregate annual turnover in Denmark of the undertakings involved up to a maximum cap of DKK 1.5 million (approximately USD 229,000 and EUR 201,000).

If the merger has already been notified through a simplified notification and the payment of DKK 50,000, but the DCCA has required a full notification, a full notification must be submitted together with an additional fee amounting to 0.015% of the aggregate annual turnover in Denmark of the undertakings involved, and less than DKK 50,000, however up to a maximum of DKK 1.5 million.

In a standard acquisition scenario, the fee is calculated on the basis of the aggregate of the Danish turnovers of the target, the buyer as

well as the Danish turnovers of the group/group entities to which the buyer belongs. The definition of group and calculation of group turnover is in line with the principles of the EU Jurisdictional Notice.

Private equity funds will, in many cases, be able to file using the simplified procedure and therefore only pay the flat-fee of DKK 50,000 (approximately USD 7,600 and EUR 6,700). However, some private equity transactions (e.g. certain add-on transactions, transactions creating a material vertical overlap as well as the establishment of certain joint ventures or the acquisition of joint control of existing companies) are likely to require a full notification procedure. Such full notifications will be subject to significant fees as the fee calculation is made on the basis of the Danish turnovers of all entities which are part of the fund. For example, a private equity fund with a total Danish turnover at the fund level of DKK 4.5bn (approximately USD 687 million/EUR 603 million) will be required to pay a fee around DKK 675,000 (approximately USD 103,000/EUR 90,500) in connection with a full notification to the DCCA.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

There is no impact on the clearance process. However, please also see question 3.7 concerning the implementation of a public takeover bid or a series of transactions in securities.

3.12 Will the notification be published?

Once a formal notification has been filed, the DCCA will publish a brief statement on the DCCA's homepage (www.kfst.dk). The statement includes a description of the parties, the nature of the transaction and the market affected by the transaction, and the DCCA invites third parties to comment on the transaction.

The DCCA does not publish the notification in itself. However, the DCCA may use the enclosed non-confidential version of the notification in connection with targeted third parties' hearings (see question 4.4 below).

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The DCCA uses the same test as the EU Commission, which is a test that makes a prospective analysis of whether a concentration would Significantly Impede Effective Competition (the "SIEC–test") in the relevant market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

Only concentrations that significantly impede effective competition or result in the creation or strengthening of a dominant position will be prohibited. However, it is more likely that remedies that counteract the above effects will be agreed upon, so that the concentration may still be approved.

Traditionally, the creation or strengthening of a dominant position has been viewed as the most common reason for competition concerns by the DCCA. Although establishment of a dominant position is not decisive under the SIEC-test, a dominant position remains a significant indicator for the probability of a notified merger impeding effective competition.

As the DCCA uses the same test as the EU Commission, the DCCA uses the judicial decisions of the EU Commission and the Court of Justice of the European Union as guidance when making its assessments. The EU Commission's guidelines on the assessment of horizontal mergers, as well as non-horizontal mergers, also provide an important contribution to the DCCA's merger assessments.

In 2012, the DCCA for the first time used the Upward Pricing Pressure (UPP)/Illustrative Price Rise (IPR) method as a supplement to the analysis of the unilateral effects of a merger (Arcus-Gruppen Holding A/S' acquisition of Pernod Ricard Denmark A/S, decision of 26 September 2012 and decision of 27 May 2013). An important parameter in the IPR method is diversion ratios, which can help to predict the incentive to raise prices after a merger. In the mentioned case, the DCCA concluded that the diversion ratios indicated that the buyer's commitment to sell off a part of target would remedy the competition concerns that the merger raised.

Furthermore, the DCCA primarily focuses on national or regional competition in the sense that it tends to define the markets rather narrowly as national or even regional or local markets. In line with this practice, the DCCA defined the market as a national market in the majority of its decisions made in 2012 and in the first half of 2013.

So far, the only prohibition of a notified merger in Denmark was primarily motivated by the risk of coordinated effects (Lemwigh-Müller's attempt to acquire Brdr. A&O Johansen, decision of 14 August 2008). The merger concerned would result in the four largest nationwide wholesale dealers on the heating and sanitation market being reduced to three. As a result, they would hold a common market share of 80% of the relevant market. On the market for powered appliances, the merger would reduce the number of wholesale dealers with a nationwide distribution net from three to two, with even higher market shares. In the DCCA's opinion, the remaining companies would most likely increase their prices and compete less vigorously on both markets as a result of the market power. The merger was therefore found to be significantly impeding competition on both markets and was prohibited.

4.2 To what extent are efficiency considerations taken into account?

There are examples where efficiency considerations have been taken into account in horizontal mergers. In the prohibition decision referred to in question 4.1 above (Lemwigh-Müller's attempt to acquire Brdr. A&O Johansen, decision of 14 August 2008), the DCC considered whether efficiency gains could make up for the identified competition concerns, however, without being convinced that this was the case.

4.3 Are non-competition issues taken into account in assessing the merger?

When assessing the potential effect of the transactions on competition, the DCCA will look at the risk that the transactions significantly impede effective competition by eliminating important competitive constraints on one or more businesses, which consequently would increase their market power without resorting to coordinated behaviour (non-coordinated effects); or by changing the nature of competition in such a way that businesses which previously were not coordinating their behaviour are now significantly more likely to coordinate and increase prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for businesses which were coordinating prices prior to the merger (coordinated effects).

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

When the DCCA has received a submission of a merger notification, the DCCA will publish this on its website and call on interested parties to give comments within a short time-limit of typically one – two weeks. In case of mergers dealt with according to the simplified procedure, the DCCA will generally not initiate or pursue its own independent investigations of the merger's effect on competition. Instead, the DCCA will mainly rely on the submitted information by the notifying party.

To make sure that relevant third parties are informed about a merger and have an opportunity to submit objections before the merger is approved, the DCCA will separately inform third parties whom the notifying party has identified as its largest competitors, customers and suppliers.

If third parties have objections to a specific merger, the third parties may contact the DCCA to hear their view on that merger. The DCCA may also involve third parties in their investigations with respect to defining the relevant markets and identifying the competition problems which a merger may lead to.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

According to section 17 of the Competition Act, the DCC may demand all the information that it deems necessary for its activity or for deciding whether the provisions of the Competition Act will apply to a certain situation. This includes accounts, accounting records, transcripts of books, other business documents and electronic data.

The DCC has the authority to impose daily or weekly default fines to a party that is subject to an injunction, for not complying with the DCC's request for the above information. There is no provision concerning the amount of the default fines, but historically the default fines have been weekly and between DKK 5,000 – 10,000 (in USD 760 – 1,525 and EUR 670 – 1,350). If a party does not comply with an injunction from the DCC, and the default fine has an insufficient effect on the party in question, e.g. because of the amount of the turnover of the party in question, the DCC may increase the amount of the default fine to an amount that will have an actual effect.

Furthermore, on its website, the DCCA will publish any decision to impose default fines on a company, just as the DCCA will make an announcement on the website once an injunction has been complied with.

If a party gives incorrect, incomplete or misleading information or suppresses essential factors relating to a merger to the DCCA, a fine may be imposed on that party by the ordinary courts. This applies to both individual persons and legal entities. The courts may impose a fine on a party, in addition to the default fine imposed by the DCC. The courts may even interpret the default fine imposed by the DCC as an aggravating circumstance.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Pre-merger notification discussions may be kept confidential. However, once the DCCA receives a notification, it will post a press release on its website in which the parties to a merger are named. Furthermore, a non-confidential version of the decision of the DCCA or DCC will be made publicly available on the DCCA's website.

The parties are not permitted to withhold confidential commercial information from the DCCA as the DCCA must have access to all relevant information. However, it is possible to inform the DCCA of which parts of the submitted information must be deemed to be confidential. The DCCA is obligated to keep sensitive information confidential if the information is of major importance to private interests, e.g. a company's interest in protecting sensitive financial information relating to the company (prices, sensitive market data, etc.).

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process ends with the DCCA/DCC making a decision concerning the merger. The timeframe for the DCCA/DCC's decisions is described in question 3.6 above. The full decisions of the DCCA/DCC are published on the DCCA's website (excluding any confidential information).

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

In practice, when remedies are agreed upon, they are generally the result of long negotiations between the merging parties and the DCCA. The DCCA will usually not initiate such a negotiation. This means that if there is a risk that the DCCA will deem the concentration to be problematic, the parties involved in the concentration must enter into a dialogue with the DCCA concerning the necessity of remedies, including a suggestion as to which remedies that may be agreed upon. It is generally advisable to initiate the dialogue with the DCCA as early in the process as possible.

According to section 12e(2) of the Competition Act, the DCC may attach one or more conditions to its approval of a merger. Such conditions may require that the undertakings involved:

- dispose of an undertaking, parts of an undertaking, assets or other proprietary interests;
- grant third party access; or
- take other measures capable of promoting effective competition.

Structural remedies such as the sale of assets are usually preferred. However, behavioural remedies are also used.

The remedies accepted by the parties will form part of the decision made by the DCC.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Although it is rare that remedies are imposed in foreign-to-foreign transactions, there are few examples hereof. In 2005, the Swedish company Svenska Lantmännen notified the acquisition of control over the Swedish Spira Group to the DCCA. The acquisition was cleared by the DCC on 27 April 2005, but only after Svenska Lantmännen accepted a remedy that eliminated the competition concerns identified by the DCCA.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Generally, it is advisable to propose remedies early during the dialogue with the DCCA if the notified merger is expected to lead to second stage investigations and serious concerns on the part of the DCCA. This may be as early as in the pre-notification discussions with the DCCA.

In respect of the only prohibition of a notified merger in Denmark so far, the DCCA stated that the parties introduced possible remedies too late.

As mentioned in question 3.6 above, the timeframe under phase 1 can be extended 10 working days if the parties offer remedies.

As also mentioned in question 3.6 above, the deadline for a phase 2 decision may be suspended if new or revised remedies are offered by the notifying parties less than 20 working days before the expiry of the deadline, to the effect that 20 working days always remain for the DCC to take such remedies into consideration.

If the potential effects of a transaction are hard to assess, pre-closing remedies may be made conditional, i.e. the remedies will only come into force if suspected negative effects on competition are in fact identified after closing.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There are no standard terms and conditions to be applied to divestments. However, in its decision, the DCC/DCCA will state fixed time-limits within which the divestment(s) must be made. The DCC usually uses trustees to manage the divestment(s).

5.6 Can the parties complete the merger before the remedies have been complied with?

This depends on the conditions in the clearance decision. Generally, the remedies may be complied with after the completion of a merger if such compliance takes place within the time-limit fixed by the DCC.

5.7 How are any negotiated remedies enforced?

Remedies may be enforced either: by default fines issued by the DCC, e.g. if the terms and conditions of the remedies are not met, see section 22(1)(ii) of the Competition Act; or by fines issued by the ordinary courts, e.g. if the parties do not comply with the accepted remedies, whether intentionally or with gross negligence, see section 23(1)(vii) of the Competition Act.

5.8 Will a clearance decision cover ancillary restrictions?

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 will involve ancillary restraints. The practice in previous Danish merger decisions, as well as decisions made by the Commission, may serve as guidance to the undertakings in their assessment of ancillary restraints associated with a merger.

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 on ancillary restraints and if it is still uncertain whether the merger involves ancillary restraints, the DCCA/DCC may, upon request from the parties, assess the ancillary restraints at the same time as it assesses the merger itself.

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

5.9 Can a decision on merger clearance be appealed?

Decisions made by the DCCA/DCC may be appealed to the Competition Appeals Tribunal by the parties involved in the merger. Third parties may not appeal a decision made by the DCCA/DCC.

An appeal has to be lodged within four weeks of the notification of the decision to the parties involved in the merger and the Competition Appeals Tribunal may only deviate from the lodging of an appeal in special circumstances. In general, the process of an appeal with the Competition Appeals Tribunal takes between six and 12 months.

The Competition Appeals Tribunal decisions may be appealed to the ordinary courts. The appeal of the decision of the Competition Appeals Tribunal must be brought before the ordinary courts within eight weeks after the parties involved in a merger have been notified of the decision. If this time-limit is exceeded, the decision of the Competition Appeals Tribunal is final. In general, the process of an appeal with the ordinary courts takes between 12 and 24 months.

The decision on a merger clearance may be appealed by the parties involved in a merger, in whole or in part.

So far only one decision concerning a merger has been appealed to the Competition Appeals Tribunal (*Nykredit Realkredit* A/S, decision of 2 December 2010). The appeal concerned the interpretation of a behavioural remedy and whether it was limited in time or not.

5.10 What is the time limit for any appeal?

Please see question 5.9 above.

5.11 Is there a time limit for enforcement of merger control legislation?

If a decision has not been made within the deadlines set out in question 3.6 above, the merger will be deemed to have been approved.

6 Miscellaneous

6.1 To what extent does the merger authority in Denmark liaise with those in other jurisdictions?

The DCCA participates in the European Competition Network (ECN) and the European Competition Authorities Association. Through these networks, the DCCA regularly consults and contacts other European competition authorities.

Furthermore, Denmark, Iceland, Norway and Sweden have entered into a privileged relationship, which facilitates the exchange of confidential information between the competition authorities with regard to merger control.

6.2 Are there any proposals for reform of the merger control regime in Denmark?

There is currently no publicly available information regarding new legislation, proposed amendments or reforms of the merger control regime in Denmark.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of August 2015.

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