

DENMARK*(1997)***Summary**

A new Competition Act was adopted in 1997 to take effect from January 1st, 1998. The new Act will imply a change of principle in Danish competition law – from control/administrative review to prohibition.

In connection with the adoption of the new Act, a committee was appointed to consider the allocation of powers between the respective authorities to be involved in the liberalisation of the previously concessionary sectors. The appointment was occasioned by specific problems relating to the telecommunications sector, but the terms of reference of the committee were extended to aim at establishing more general principles for the allocation of tasks between the Competition Authority and the sectoral authorities. The committee recommended that competition issues be administered by the Competition Authority. The recommendation was motivated by the advantages involved in 1) using the available expertise of the Competition Authority, 2) limiting the expenses of the regulatory authorities, and 3) ensuring an equal treatment of competition issues, no matter which sector it concerned.

On the basis of the committee's recommendations, the Competition Authority has made an agreement with the Ministry of Research on allocation of responsibilities in the telecommunications sector. According to the agreement the responsibility of assessing the compatibility of initiatives relating to prices and market access with competition law rests with the Competition Council.

The Competition Council made a number of important decisions in 1997.

The most commented case was the conflict between the organisation of teams playing in the Danish league and the Danish Football Association about the rights connected to tournament matches. The Competition Council's decision seems to have led to an understanding between the parties.

A case concerning a co-operation agreement between two dairy companies, which have a dominant position on the market, was temporarily brought to an end as consequence of a decision from the Competition Appeals Tribunal. But this case, as well as other cases concerning anti-competitive agreements between undertakings, which exceed the threshold values of the new Competition Act, are going to be re-assessed in pursuance of the provisions of the new Act.

A case concerning an electronic system for sale of potted plants shows that problems connected to essential facilities and third party access do not only arise when it concerns liberalised concessionary areas. It is a matter of general interest for competition policy, and high priority is therefore given to that question when the new Competition Council begins its administration of the new Competition Act.

In December 1997 the Competition Authority published its first "Competition Report". The report contains articles analysing the basis of the Competition Council's decisions. The report also contains a survey of the Competition Council's activities during 1996 and 1997, and the intention is to extend this part in future reports to include the other tasks of the Competition Authority, such as public

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procurement and energy price regulation. The Competition Authority aims at publishing its next report in the spring of 1999.

The Competition Authority has changed its organisation in 1997 by means of establishing a project-oriented unit. The change aims at improving the analytic efforts of the authority, and the unit is intended to make analyses on complex economic issues pertaining to competition policy, which will be published as part of the "Competition Report" or as separate publications.

I. Legislation

1. On June 10th, 1997, a new Competition Act was passed by the Danish Parliament (Folketinget).
2. The new Act departs from the former principles of Danish competition law, as it will be based on prohibition instead of control/administrative review. The new Act also departs from the most discussed principle of transparency, which was the underlying principle of the Competition Act in force from 1990 to 1997.

The new Competition Act is based on the so-called "one-stop-shop" principle in relation to the EU competition rules, meaning that cases will – whenever possible – be treated by one authority only. Besides, the prohibition of the Act against certain anti-competitive agreements will not apply to such agreements, which have been granted an exemption under the EU competition rules.

The passing of the new Act reflects the Danish Parliament's wish to sharpen Danish competition policy and align Danish competition law with the legislation of most other European countries. The enforcement guidelines aim at making competition on the Danish market at least as intensive as in other OECD countries.

3. The Act contains two prohibitory provisions: Prohibition against anti-competitive agreements and prohibition against abuse of dominant position. These provisions are almost identical with Article 85 and Article 86 of the EC Treaty.

Conclusion of anti-competitive agreements as well as infringement of an order to terminate abuse of dominant position can be subject to fines of a significant higher level than was the case under the previous Competition Act.

The Act lists some types of agreements which may fall under the prohibition, for instance:

- agreements on prices or other trading conditions;
- agreements on limiting or control of production; etc.
- agreements on market sharing; etc.
- agreements on dissimilar conditions to equivalent transactions;
- agreements on supplementary obligations as a contractual condition (tied selling).

The prohibition applies to agreements as well as concerted practices between undertakings, and to decisions made by an association of undertakings. But agreements within the same undertaking or group do not fall under the prohibition.

According to two *de minimis* rules in the Act, the prohibition does not apply to anti-competitive agreements, provided that the undertakings concerned have:

- an aggregated annual turnover less than DKK 1 billion combined with an aggregated market share less than 10 per cent; or
- an aggregated annual turnover less than DKK 150 million, irrespective of their market share.

Exemption from the prohibition against anti-competitive agreements as well as negative clearance can be granted, and the conditions of obtaining exemption correspond to the EU rules in that respect.

4. The Act also lists some examples of unfair practices, which may involve abuse of dominant position. Such practice may, for instance, consist in:

- imposing unfair purchase or selling prices or other unfair trading conditions (including resale price maintenance);
- refusal to supply;
- applying dissimilar conditions to equivalent transaction (for instance price discrimination);
- imposing supplementary obligations as a contractual condition (tied selling).

An undertaking may obtain negative clearance to a certain practice, but exemption cannot be granted from the prohibition against abuse of dominant position and there are no *de minimis* rules connected to the prohibition. The crucial point is, whether the undertaking has a dominant position on the relevant market.

5. Finally, it should be mentioned that the Act aims at the greatest possible equality between private and public business activity.

This means that, in principle, the two prohibitions of the Act apply to any anti-competitive business activity – private as well as public.

There is one exception, however, in case the anti-competitive practice is a direct or necessary consequence of public regulation, as such regulation may well be justified by other considerations than considerations of effective competition.

In such cases, the prohibitory provisions do not apply but, instead, the Competition Council can approach the competent authority, point to potentially detrimental effects on competition and make recommendations for promotion of competition in the area concerned. The authority is under an obligation to respond to such approach within 3 months, and the approach as well as the response may be published.

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6. There are no rules on merger control in the new Competition Act, but mergers exceeding certain threshold values are subject to notification to the Competition Authority.

7. The responsibility of enforcing the new Act rests with the Competition Council and its secretariat, the Competition Authority.

II. Enforcement

a) *Enforcement statistics*

8. The **Competition Council** held 10 meetings in 1997 and settled 48 cases.

9. From January 1st, 1990, to December 31st, 1997, 196 cases have been brought before the **Competition Appeals Tribunal** (31 cases in 1990, 28 cases in 1991, 28 cases in 1992, 32 cases in 1993, 16 cases in 1994, 19 cases in 1995, 16 cases in 1996, and 26 cases in 1997).

	01.01.1990 - 31.12.1997	01.01.1997 - 31.12.1997
Cases appealed	196	26
Appeals dismissed	102	11
Cases withdrawn	45	10
Competition Council's decision overruled	43	10

As on January 1st, 1998, 6 cases were still pending before the Appeals Tribunal.

b) *Significant cases*

Horizontal agreements

10. The Competition Council has finished its assessment of anti-competitive decisions made by organisations of the professional services. The last cases concerned a number of minor organisations, and in two cases the Council found no reason to take action. In one case – concerning recommended fees for architectural services – because the buyers of these services (the local authorities) had a corresponding price agreement. In the other case, which concerned recommended lecturing fees etc. from the Association of University Graduates, the Council found that the fees were only followed by the members to a minor extent, and did not significantly affect competition.

11. In 1992 the Competition Council found no reason to take measures against a far-reaching co-operation agreement between the two largest co-operative dairies on the Danish market. The two dairies had an aggregated market share of 90 per cent for milk, 90 per cent for butter, including mixed products,

and 75 per cent for yellow cheese. The co-operation agreement between the dairies included the establishing of joint venture companies to manage the organisation, production and marketing of the products.

The Competition Council's decision was made on the condition that the dairies did not accumulate the surplus from all activities in order to allocate the surplus equally between the members of both co-operatives. This would exclude competition between the companies, because the farmers would have no reason to prefer one company to the other. Besides, any competitive gains on the Danish market – for instance from price reductions – would also be to the prejudice of the other party and, accordingly, to the joint result.

The Council's approval of the agreements was also due to the efficiency gains, which the dairies argued could be obtained by the co-operation. In the autumn of 1996 it appeared, however, that the planned rationalisations had not been implemented, and, apparently, the dairies also took advantage of their market position, increasing the prices of those products which were protected against competition, while products exposed to competition were not subject to any price rises. Prices of non-industrial milk and butter were raised in the autumn of 1996, at a time when the world market prices of these products were decreasing.

Consequently, the Competition Council decided to order the dairies to cancel a clause in their agreement, which excluded third party from getting supplies of milk and cheese direct from the production company. The decision aimed at opening the possibility for third party access, but the Competition Council did not take an attitude to the specific conditions which should be connected to the access, as it suspended its decision in that respect till the question might arise.

The Competition Appeals Tribunal overruled this decision, stating that even though the Competition Council in this case had the powers to take measures under Sections 11 and 12 of the Competition Act, it did not have the powers under section 12(1) to grant third party access to primary produce and production facilities.

12. The Competition Council initiated negotiations with the Association of Danish Road Freight Carriers for termination of a horizontal price arrangement. The arrangement was based on one of the rules of the Association, and as the Association was found to exert a dominant influence on the road freight market, the Competition Council considered the rule in question to entail harmful effects on competition.

The Competition Council found it of no importance that the prices were only recommended, because even recommended prices affect free competition, as such arrangement gives the actors on the market a fair certainty of predicting the price policy of their competitors. The decision is in line with other decisions made in the past years on horizontal price recommendations. It reflects the opinion of the Competition Council, that horizontal price arrangements – whether they are recommended or not – lead to a uniform price formation, and that they entail or may entail harmful effects on competition, unless they can be justified by other overmastering reasons.

The Competition Appeals Tribunal subsequently confirmed the decision, and the Association then decided to cancel the rule with effect from May 1998.

13. After negotiations, Danish Nurses' Organisation changed a rule in the nurses' professional code of conduct, which prevented the members from accepting employment in jobs that had not been advertised in the nurses' professional journal.

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The case was occasioned by several public hospital owners, who complained that, in the light of a very high organisational ratio, the collegiate rule entailed that the nurses' professional journal obtained a monopolistic position on the market for advertising vacancies in that profession. This had as result that the hospital owners were put to substantially higher expenses than would have been the case if they were free to advertise in other papers, such as local or regional dailies.

The Competition Council attached importance to the fact that the collegiate rule was a restriction of the complainants' free choice of media, and that other media were exposed to unfair competition as regards the access to advertise nurses' vacancies. The case was not found to concern wages and labour relations, which are exempted from the provisions of the Competition Act.

Unfair practices

14. The organisation of teams playing in the Danish league lodged a complaint with the Competition Council, arguing that the Danish Football Association abused its dominant position to impose restraints on the freedom of trade of the individual football clubs.

The organisation's statements of objection i.a. concerned:

- sale of broadcasting rights to Danish football matches;
- rights to arrange Danish league tournament matches;
- conclusion of sponsor agreements; and
- conclusion of agreements on referees' fees.

According to the rules of the Football Association, the local clubs of the individual teams were not allowed to sell the broadcasting rights to their matches without obtaining the Association's consent.

The board of the Association was empowered to monitor and overrule all decisions made by the clubs and third party, whether they concerned sports conditions, organisational matters or commercial activities.

The Competition Council initiated negotiations with the Football Association, which led to a change of the Association's rules. The change means that – with due respect to its obligations to UEFA and FIFA – the Association can no longer totally exclude the clubs from selling their own rights to the matches. For instance, the clubs will be free to sell their rights to matches outside the Association's tournaments, and the board of the Association can no longer interfere or overrule any decisions, which only concern the commercial potentialities of the clubs or third party. But the Association may still interfere in non-commercial activities, such as matters concerning sports conditions. In matters involving commercial conditions, where the rights are allotted to the Association as well as the clubs, both parties have endorsed that utilisation of the rights and changes in that respect will be subject to agreement.

15. The Competition Council decided to initiate negotiations with the formerly state-owned shipping company in order to terminate a discriminatory granting of discounts connected to the selling of combined tickets. The combined tickets were issued for transfer of lorries in transit between Sweden and Germany, and only for transfer by the company's own ferries across the Sound as well as the Baltic.

The case was occasioned by a complaint from a competing shipping company, arguing that the formerly state-owned company exploited its strong position within ferry services across the Baltic to profit on its services in Elsinore, where the two companies were competitors.

The Competition Council concurred in the complainant's opinion. The Council found that, due to its high share of the market in general and to its actual monopoly on most ferry services, the formerly state-owned company had a dominant position on the market. The Competition Council also found that the company's issuing of combined tickets, making a discount dependent on transfer by the company's own ferries across the Sound, had as effect the distortion of competition as well as potential restraints of the freedom of trade.

16. The Competition Council negotiated with a supplier of an electronic sales system for potted plants in order to make the company change its rules, so that new affiliating sales companies were not discriminated in favour of companies that were already admitted to the system.

The negotiations were occasioned by a complaint against the supplier's price policy. The complainants represented a number of companies, selling potted plants on the Danish market and for export. Twelve of these companies had joined the system during 1996.

The supplier is the only company in Denmark, who has marketed an electronic system, where the gardeners' supplies of potted plants are communicated to the sales companies, and where the sales companies can place their orders to the gardeners. The price of communicating through the system with companies that had recently joined the system was substantially higher than the price of communicating with companies, which had joined the system from the beginning.

The dissimilar price conditions had as result that only few gardeners wanted to communicate their supplies to the twelve companies involved in the complaint.

The reasons adduced by the supplier for this price policy were that the admission of the complainants as partly affiliated had led to a quite new and separate system. The gardeners had been informed of the introduction of this new system when the agreements with the complainants were made.

The Competition Council found the agreements to entail harmful effects on competition, and accordingly on the efficiency of production and distribution of goods and services. After negotiations the supplier changed the conditions of joining the system, so that now:

- the conditions of admitting new sales companies are based on reasonable and consistent criteria;
- the future price policy will ensure that differences in the individual gardeners' and sales companies' conditions are based on objective criteria. For instance, the fees charged from the gardeners for communicating their supplies will be the same whoever the recipient is, unless it can be proved that the communication involves additional services or performance.

17. The Competition Council has ordered the two largest Danish producers of ready-mixed concrete to reduce their list prices by 10 per cent in Zealand and by 5 per cent in the rest of the country. The reasons for taking these measures were that the price policy of the producers, which included substantial

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discounts, was considered to lead to dissimilar competitive conditions in the subsequent stage of trade. The difference of the ordered reductions was due to the fact that the producers' prices and discounts are not the same all over the country. Concrete is unsuitable for long-distance transports and, therefore, the prices and discounts often reflect the competitive conditions on the local markets. The two producers operate in most of the Danish market, and together they have a market share of more than 80 per cent.

Before taking these measures, the Competition Council had already tried to create fair and equal competitive conditions on this market, applying the transparency provisions of the Competition Act. But it did not produce the desired results.

Vertical agreements and resale price maintenance

18. The two largest suppliers of burnt lime had concluded a ten-year agreement, according to which one party transferred to the other party all activities concerning production, distribution and marketing of mortar. The agreement also contained an obligation for the transferor to get all supplies of burnt lime and carbide products from the transferee.

The Competition Council found the agreement to entail harmful effects on competition. The Council i.a. considered the price provisions of the supply agreement to distort the price structure on the mortar market, and found that the ten-year exclusive buying obligation would restrict competition and be a barrier to competing suppliers of burnt lime. Negotiations led to a change of the agreement. The revised agreement will expire at the end of 1998, meaning that the transferee's exclusive right to deliver burnt lime to the transferor has been reduced from 10 to 3 years.

19. The Competition Council did not acknowledge a complaint from a shipping company against the fees charged for using the harbour facilities in a Danish ferry port.

The complainant had claimed that the ferry-port owners abused their dominant position, exposing the complainant to unfair competitive conditions in favour of a competing shipping company, and overcharging cargo vessels. But the Competition Council did not find the price differentials to distort competition between the ferry services involved to any significant extent, because the two shipping companies were operating on different markets, one being mainly involved in freight services and the other in passenger transport only. Nor did the Council find the fees to be unfair, as the return on investments did not exceed what would be obtainable on a competitive market.

Mergers and take-overs

20. There are no rules on merger control in Danish competition law, but mergers are subject to notification to the Competition Authority, and an annual report on mergers and take-overs is published on the basis of these notifications. The report can also be found on the Competition Authority's home page, where it is quarterly updated. The report on mergers and take-overs in 1997 showed an increase of acquisitions during the last two years. This marked a changed tendency compared to the general weakening of merger activities in the beginning of the 90'es. From 1996 to 1997 there has been a rise in turnover by 51 per cent and a rise in the number of employees by 55 per cent in the involved enterprises.

The vast majority, namely 78 per cent of the mergers, were horizontal. 3 per cent were vertical, while 12 per cent were diversifications. There is no available information as to the remaining 7 per cent of the mergers.

III. Influence on other policies and legislation

21. The Competition Council has published a report on the competitive conditions of the health sector. The report sums up the attitudes that the Council has taken in its treatment of cases concerning this sector. The report points to the efforts, which the Council has made during recent years, to improve the competitive conditions and the efficiency of the health sector, including the pharmaceutical sector. Anti-competitive decisions in the codes of conduct of the respective organisations have to a great extent been brought to an end. But access to the market as well as the professional performance is still heavily regulated by various kinds of public control systems.

The Competition Council has on several occasions approached the competent authorities and recommended a regulatory reform of the health sector, but without any appreciable results. The purpose of the report was to publish an updated statement of the competitive conditions in these professions.

22. The Competition Council took a positive attitude to the plans of a local authority concerning the waste disposal area. The local authority intended to wind up its engagement in the sanitation company, which had for a long time been granted a concession to collect household waste within the municipality. The local authority also intended to phase out the concession by means of inviting tenders for the assignment, and in that connection to divide the municipality into several waste collection districts, which would allow minor companies to bid for the assignment as well. The plans should be carried into effect over the years 2000 – 2005.

However, the Competition Council recommended that this period be shortened considerably. The Council found that, until the local authority had invited tenders for the assignment, the concessionary company would still be given a competitive advantage. The company was in a position to combine its sole right to collect household waste with a concurrent collection of industrial waste, meaning that competitors on the competitive market of industrial waste disposal would be exposed to unequal conditions.

The case was occasioned by an association of carriers, who argued that the concessionary company's sole right to collect household waste entailed an unfair competitive advantage on the market of waste disposal in the municipality concerned. The local authority has subsequently made an agreement with the concessionary company to the effect that the period of the company's sole right will be shortened, and that the company's activities on the competitive markets will be separated and handled by an independent company.

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IV. Resources of competition authorities

1. Resources overall

- a) Annual budget 1997: DKK 55.7 mill. = USD 8.4 mill;
- b) Number of employees (person-years)¹

	Competition Authority in total	Employees occupied with competition law
Economists	39	26
Lawyers	26	17
Other professionals	2	2
Support staff	35	25
All staff combined	102	70

2. Human resources (person-years) applied to

- a) Enforcement against anti-competitive practices 53
- b) Merger review and enforcement 2
- c) advocacy efforts 15

3. Period covered by the above information

As on January 1st, 1998.

NOTES

1. The 32 person-years, which make the difference between the total number of employees and the number of employees occupied with competition law, are allocated in the following fields of responsibility;

10 person-years: public procurement and state aid.

22 person-years: special regulation on energy prices, etc.