

## ANNUAL REPORT ON COMPETITION LAW AND POLICY IN DENMARK

2002

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### **1. Changes to competition laws and policies, proposed or adopted**

#### ***1.1 Summary of new legal provisions of competition law and related legislation***

1. 2002 was the year of reform. During the Danish Presidency of the European Union, the most fundamental amendment of the EU competition rules ever was adopted. The reform will influence the way in which competition rules are implemented all over Europe.

2. Also the Danish Competition Act was changed in 2002. This provided Denmark with legislation that is up to international standards.

3. The new Competition Act increases the level of penalties to the same level as in most other countries in the EU. In practice, the penalty level is expected to increase significantly following the new Act. At the same time, the Danish Competition Authority is to a larger extent allowed to request the Public Prosecutor for Serious Economic Crime (SØK) and the courts to be lenient with companies that have co-operated with the Authority on the unravelling of a case. The new Act will thus make it more attractive for cartel participants to co-operate with the Authority.

4. In the public area, municipalities and counties will no longer be able to exonerate themselves when a municipality, for instance, has made political decisions restricting competition, and the municipality claims that the decision was necessary in order to comply with other legislation. Now, this kind of assessment, which in reality puts other legislation above the Competition Act, can only be made by the relevant minister who is answerable to the Danish Parliament. The responsible minister and the Minister of Economic and Business Affairs must motivate governmental restrictions on competition questioned by the Danish Competition Authority.

5. The act also fills some gaps. The Competition Appeals Tribunal (the first appeals body) had interpreted the former act to mean that the restrictions on competition "included" in a joint venture were not comprised by the Competition Act – regardless of the contents of the restrictions. According to the act joint ventures will now be assessed according to the general rules on anti-competitive agreements. Furthermore, the rules on minimum amount were changed so that also local price co-operation agreements under the current minimum amount of DKK 150 million is comprised by the act. Finally, the Authority is now permitted to take along material, including computers, when it – due to circumstances controlled by the company - is not possible for the Authority to copy the material at the company's premises in connection with a control investigation.

#### ***1.2 Other relevant measures, including new guidelines***

6. In 2002, the authority conducted a process benchmark study in co-operation with The Swedish Competition Authority. The purpose was to benchmark the core processes of the two Authorities, i.e. the case handling in competition cases. The study resulted i.a. in increased focus on how to handle tips from the public. The study was also a fruitful exercise on how to manage benchmark studies, when benchmark partners are performing their responsibilities under different legal and institutional set-ups.

### **2. Enforcement of competition law and policies**

#### ***2.1 Enforcement statistics***

7. The Competition Council, which decides major cases and test cases, held 9 meetings and decided 29 cases in 2002. The Competition Authority made 166 decisions in important cases, though not test cases,

with subsequent publication. In 2002, the Authority also concluded about 720 minor cases, mainly concerning access to documents, questions from citizens, etc.

8. In the course of the year, the Competition Appeals Tribunal decided 13 cases. 5 cases were overruled or referred back. In 2002, two cases were brought before the court system, where the cases are still pending.

	<b>01.01.02 – 31.12.02</b>
Cases appealed	13
Appeals withdrawn	2
Competition Council decisions upheld	6
Competition Council decisions overruled or referred back	5

9. On April 1<sup>st</sup> 2003, 14 cases were pending before the Appeals Tribunal.

## **2.2 Significant cases**

### *2.2.1 Punishable infringements of the Competition Act*

#### 2.2.1.1 Cartels

10. Cartels represent one of the most obstructive types of anti-competitive behaviour. Investigation and inquiry into such activities are therefore given a very high priority by the Competition Authority. Investigations into both cartels and other matters concerning punishable infringement of the Competition Act are generally based on information received by the Authority from companies and the public by way of complaints, inquiries, etc. However, the Authority also collects information as part of its general market monitoring and case administration work. In some cases, these efforts reveal illegal cartel activities, etc.

11. Up till now, the largest cartel disclosed on the Danish market, is the bid rigging cartel in the electric wiring service, mentioned in the Annual Reports of 2000 and 2001. Fines have been imposed on 256 companies. The case is expected to be finally settled during 2003.

#### 2.2.1.2 Other punishable types of infringement

12. Not only actual cartel agreements infringe the Competition Act. Also other anti-competitive agreements and behaviour, e.g. binding prices and abuse of dominant position, have a significant, harmful impact on society and the consumers. Consequently, the Competition Authority also attaches great importance to clearing up of and investigation into such violations.

13. In 2002, criminal prosecution of a number of cases of this type earlier reported to the Public Prosecutor for Serious Economic Crime by the Competition Authority was finalised. Several companies were fined for infringement of the Competition Act involving fixing of binding prices, illegal exclusive clauses and non-competition clauses.

14. As regards fixing of *binding resale prices*, two penalties of DKK 500,000 and DKK 670,000, respectively, were imposed for fixing of binding resale prices of sports equipment/clothes and spectacle frames. A penalty of DKK 200,000 was also imposed by the City Court of Copenhagen for fixing of

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binding resale prices of clothes; however, this judgement was appealed to the High Court where the case is currently pending.

15. As regards *illegal* non-competition clauses, a penalty of DKK 50,000 was imposed; a penalty of DKK 360,000 owing to *illegal exclusive agreements* was imposed in connection with housing advertising.

### 2.2.1.3 Higher penalties in the future

16. As mentioned, penalties for infringement of the Competition Act will be increased significantly in the future. According to the rules applied so far, the maximum penalty amounted to approx. DKK 3 million as the penalties were to be fixed pursuant to Danish legal usage in connection with infringement of the general commercial law. In future, the principles applied by the European Commission will be applied, though at a lower level.

17. In connection with future fixing of penalties, the seriousness and duration of the infringement will be considered. Instances of infringement of the Competition Act are divided into three groups with the following basic amounts:

- Less serious infringement: from DKK 10,000 to DKK 400,000
- Serious infringement: from DKK 400,000 to DKK 15 million
- Very serious infringement: from DKK 15 million

18. The penalty levels are indicative to the courts. When fixing the penalties, the courts are also to consider the companies' ability to pay. Besides, the courts must take a position on aggravating or extenuating circumstances that may influence the penalty, for example, if a charged or accused party has played a particularly active role in a cartel, or a company has made and still makes an active effort to get all relevant employees to comply with the legislation through a so-called compliance program.

### 2.2.2 Decisions

19. The Competition Council decides on major cases and test cases. The Competition Authority manages the day-to-day administration of the Act and the preparation of cases to be submitted to the Council. On behalf of the Council, it decides cases in accordance with practice or in accordance with guidelines set out by the Council.

#### 2.2.2.1 Anti-competitive agreements

20. Under the Danish Competition Act, companies must prove that anti-competitive agreements imply such advantages that they should be exempted. To obtain exemption, an agreement must

1. improve the efficiency of production or distribution of goods or services, etc., or promote technical or economic progress;
2. allow the consumers a fair share of the resulting benefits;
3. not impose unnecessary restrictions on the companies; and
4. not eliminate competition in significant parts of the market.

#### 2.2.2.2 The building fairs of the timber merchants

21. The Competition Council ordered the Federation of Timber Merchants (TUN) to stop making anti-competitive demands of the exhibitors at the building fairs of the federation.

22. In connection with the trade fair "Byggeri 2002" and earlier fairs in 2000 and 1998, only suppliers that sold their products through the timber merchants and only to a limited extent dealt directly with contractors and builders were allowed to participate.

23. Almost all timber merchants in Denmark are members of TUN. All builders and contractors deal with the timber merchants. This means that the trade fairs of TUN represent an important opportunity for the building material suppliers to meet their final customers.

24. The Competition Council found that making the suppliers' possibility to participate in the trade fairs dependent on the extent to which they were dealing directly with contractors and builders constituted harmful anti-competitive behaviour.

#### 2.2.2.3 Agreement between DR/TV2 and Team Danmark/DHF

25. The Competition Council approved the agreement between DR/TV2 on one side and Team Danmark/Dansk Håndboldforbund (DHF) on the other side concerning television, radio and Internet rights to handball matches played in Denmark. The agreement awarded DR and TV2 the exclusive rights to broadcast from most handball matches in Denmark until 1 May 2006.

26. Such long-lasting exclusive rights may impose competitive problems on other TV stations. However, the agreement did not include the rights to the European championship, the world championship and Champions League. Therefore, all TV stations were still able to tender for these attractive rights. Besides, the broadcasting rights to other sports competing with handball for TV viewers are currently distributed on the various TV stations in Denmark. It was therefore concluded that the agreement did not distort the competition for TV viewers among the TV stations.

27. Finally, the Council found that - in the specific case - DR's and TV2's agreement concerning joint acquisition of the rights did not put the stations in such a powerful position that they were able to get the rights at a lower price than if they had negotiated individually. The agreement did not prevent DR and TV2 from competing for viewers for the Danish handball matches.

#### 2.2.2.4 Abuse of dominance

28. According to the Danish competition Act, it is prohibited to abuse a dominant position. The question of whether an undertaking is dominant is of course contingent upon the definition of the relevant market. Consequently, in some cases it might be difficult for an undertaking to assess whether or not the undertaking is dominant on the relevant market. Therefore a special provision has been included in the competition Act, whereby the Competition Council upon request must declare, whether one or more undertakings have a dominant position. If the Competition Council declares that an undertaking does not have a dominant position, this decision is binding, until revoked by the Competition Council.

29. According to the Danish competition Act, abuse may, for instance, consist in

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;

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- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

### 2.2.2.5 Urban vs. MetroXpress

30. The Competition Council admitted to MetroXpress, a free newspaper, that Berlingske Gratisavisen abused its dominant position in the advertising market by selling advertisements in Urban, another free newspaper, at prices that did not cover the variable costs.

31. When a dominating company pursues such a price policy (predatory pricing), it indicates that it wants to eliminate competitors and then raise the prices. Under normal circumstances, the Competition Council would therefore have ordered the dominant company to sell at prices that reflect the real costs.

32. However, in this particular case, MetroXpress, which is owned by the Kinnevik Group, also sold advertisements at unnaturally low prices. Consequently, the Council found that Urban was to be allowed to “defend” its customer base and sell advertisements at prices that enabled the newspaper to compete with MetroXpress. Urban was, however, not allowed to undercut the advertisement prices of MetroXpress.

### 2.2.2.6 Mergers and acquisitions

33. Merger control was incorporated in the Danish Competition Act in 2000. It is thus a relatively new area. In 2002, the Competition Authority treated 13 merger cases. The largest merger case in 2002 was the merger between Danish Crown and Steff-Houlberg.

34. The threshold value for mergers in Denmark is DKK 3.8 billion. The Competition Act includes a special provision on mergers not found in any other countries. According to this provision, the parties may obtain a preliminary approval, which is not published until at a later agreed time. This provision may in some negotiations be expedient for the parties – and is naturally only applied in cases where it is completely clear that the merger will have no impact on competition.

### 2.2.2.7 Merger between Danish Crown and Steff-Houlberg

35. The European Commission referred the merger between the Danish Crown and Steff-Houlberg slaughterhouses to The Competition Council. The Competition Council approved the merger. According to the agreement, the slaughterhouses had to undertake a number of commitments. If these commitments were not complied with, competition would be reduced significantly. The prices might then increase by 5-10 per cent and the range of products might decrease leading to fewer quality products on the Danish domestic market.

36. The commitments were grouped into four. Firstly, the individual supplier was given more options in that the co-operative members’ possibility of supplying part of their pig production to competitive slaughterhouses was extended. Also, an obligation to purchase from all Danish farmers, including non-members, was imposed on the slaughterhouses. At the same time, the minority protection was strengthened in the Danish Bacon & Meat Council (Danske Slagterier) and in the Pig Production Levy Fund (Svineafgiftsfonden).

37. Secondly, the parties had accepted to sell a production unit with a weekly slaughtering capacity of 10,000 pigs. This is twice the capacity that the European Commission made Danish Crown sell after the

1999 merger with Vestjyske Slagterier. It has now turned out that the divested slaughterhouse was unable to compete in the market; accordingly, the Competition Council requested that the new buyer was to be put in an especially favourable position. Competition in slaughtering was also ensured by requiring the slaughterhouses to slaughter under contract for others. Besides, if the slaughterhouses close down a production unit, they are no longer allowed to impose a restriction on the property preventing the buyers from running a slaughterhouse.

38. Thirdly, competition in the food-processing link was guaranteed. For a period of ten years, the food-processing industry will be guaranteed supplies at prices that cannot exceed the average export prices. Besides, the parties agreed to sell a food-processing company with a yearly capacity of 12,000 tons.

39. Fourthly, competition in the retail trade was guaranteed in that the slaughterhouses agreed to allow competitors access to their distribution system. This made it easier for competitors to reach the consumers with fresh pork. Besides, the slaughterhouses were to guarantee that the hot-dog stands would continue to enjoy at least the same good terms as previously.

40. When combined, these four groups of commitments ensured that the position of the consumers and competitors was just as good as before the merger, in the opinion of the Competition Council.

### **3. The role of competition authorities in the formulation and implementation of other policies**

41. In principle, the Danish Competition Act seeks to achieve the greatest possible equality between private and public business activities. If anti-competitive practice is a direct or necessary consequence of a public regulation, the provisions of the Act do not apply. The assessment of this - which entails putting other legislation above the Competition Act - can only be made by the relevant minister who is answerable to the Danish Parliament. The minister responsible and the Minister of Economic and Business Affairs must motivate governmental restrictions on competition questioned by the Competition Authority.

42. A special feature of the Danish competition act is, that The Competition Council may issue orders for the termination or repayment of aid granted from public funds, which has been granted to the benefit of specific forms of business activities, and which is not legitimate according to public regulation. This provision should be seen as a supplement to the EC state aid rules. This means that the Competition Council can intervene if the aid is not legal pursuant to statutory regulation and if it distorts competition. This also applies if public authorities sell or let land, commercial tenancies, etc. below market prices.

#### ***3.1 Financial support from the Danish Labour Market Holiday Fund***

43. In Denmark, the employers pay the employees' holiday allowance into an account managed by the Danish Labour Market Holiday Fund (AFF). Holiday allowance that is not withdrawn is allocated by the Fund to activities for the employees. In 2002, the Competition Council recommended to the Minister of Employment that the rules on payment of support from AFF should be changed to ensure that the support to holiday activities would not damage rental firms and restaurant keepers.

44. The Association of the Hotel, Restaurant and Tourism Industry in Denmark (HORESTA) had complained to the Competition Authority arguing that support from AFF to, for example, holiday centres had forced private holiday centres to close. AFF only supported funds, private foundations or similar, not least including Dansk Folkeferie, whereas private companies never received any support.

45. A large part of the support from AFF did not affect competition to any significant extent. This applied to support to adventure and activity projects without overnight accommodation, which generally attracts tourists and therefore benefits the entire local tourist industry. Support to setting up holiday facilities for disabled persons and other groups at risk did not cause any competitive problems either.

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46. However, operational support to holiday centres with overnight accommodation distorts competition in relation to the private companies. Operational support is the most harmful type of support because it in a way protects the beneficiary against loss-making and thus reduces the beneficiary's incentive to improve operations in order to be competitive. On this basis, the Competition Council recommended that AFF should no longer provide operational support to holiday centres with overnight accommodation. Besides, the Competition Council recommended that so-called secondary activities (e.g. restaurants, cafeterias, accommodation, etc. for non-holiday purposes) should be separated financially and run on market terms.

47. AFF's support policy was legal pursuant to the Danish Holiday Act. Therefore, the Competition Council could not intervene directly in pursuance of the Competition Act. Instead, the Competition Council approached the Minister directly through a letter and presented a solution to the competition problems. The approach has resulted in new legislation that is in accordance with the recommendations of the Council.

### 4. Resources of the Competition Authority

#### 4.1 Total resources

Annual budget 2002: DKK 93 million = EURO 12.4 million; (2001: 84,5 = EURO 11.3 million)

	<b>Competition Authority (in total) in 2002</b>	<b>Employees occupied with competition law in 2002</b>
Economists	44	28
Lawyers	46	30
Other professionals	9	7
Support staff	43	28
Total	133	93

- 40 person-years, which are not allocated to administration of the Competition Act, are allocated to the following:
  - 10 person-years: public procurement and state aid
  - 30 person-years: energy price regulation

#### 4.2 Period

48. The information is as of the 1<sup>st</sup> of December the year in question.

### 5. References to new reports on competition policy

49. In May 2003, the Competition Authority publishes its sixth Competition Report.

50. The report analyses important and current political competition problems. In 2003, the report deals with the competition intensity in the Danish Economy, competition in the Danish port industry, competition in water supply, competition in trade with securities, in hospital services, on the holiday markets etc.

51. The report also contains an annual section. Firstly, it describes the most significant decisions made by the Competition Council in 2002. Secondly, it describes the Competition Authority's assignments concerning state aid, procurement and regulation of energy prices.

52. The Competition Authority also published "Competition in Denmark (Annual Report)", which reports on the objectives, results and organisation of the Authority. Besides, it contains an analysis of the results, which the Authority has achieved in the field of competition, energy, procurement, state aid, etc.

53. In 2002, the Authority also published reports on:

- The DLG-KFK merger (seeds and fertilisers).
- The news database merger.
- Advertising.
- Competitive Airlines - Towards a more vigorous competition policy in relation to the air travel market. A joint Nordic study.
- Well functioning markets - A measurement of competition and consumer affairs in OECD countries.
- Competition on the debit card market.
- The Danish Crown and Steff-Houlberg merger (slaughterhouses).
- Competition in the optician industry.
- Competition in the building materials trade.