

DENMARK

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Abstract

The Competition Council, which decides major cases and test cases, made 58 decisions in 1999. The Competition Authority made 117 decisions in important cases, though not test cases, with subsequent publication. In 1999, the Authority also concluded about 1000 minor cases, mainly concerning access to documents, questions from citizens, etc.

The Danish Government introduced a new competition bill in 2000. This bill will align the Danish Competition Act with the legislation of most other EU states.

The Competition Authority's investigation of the cartel case disclosed within the Danish electricity wiring services sector in 1998 progressed. The case made the press focus intensively on this gross violation of the Competition Act. In 1999, the Authority generally intensified its efforts against cartels, and several unannounced control inspections were carried out.

In the course of the year, the Council decided a number of large test cases.

One of the most important decisions concerned the building and construction sectors' agreements on notification of bids. The Council decided that these agreements were to be abolished, but later approved new agreements that had been changed in several key areas.

Besides, the Competition Council decided on a number of co-operative agreements in the asphalt industry. The co-operative agreements meant that the industry was only exposed to generally weak competition. The Council therefore decided that some of the agreements were to be annulled.

In another case, the Competition Council found that various sales and marketing co-operative agreements entered into by nine independent tile manufacturers were to be annulled.

Finally, the Competition Authority enjoined the prohibition in the Competition Act against pricing agreements on the travel business. The travel agencies had introduced almost uniform price increases when the duty-free sale was abolished in the EU.

I. Legislation

1. On 10 June 1997, the current Danish Competition Act (Act no. 384) was passed by the Danish Parliament (Folketinget), and the Act entered into force on 1 January 1998.

2. The new Act is based on the prohibition principle and departs from the former system of control/administrative review.

3. The Act contains two prohibitions: Prohibition against anti-competitive agreements and prohibition against abuse of dominant position.

4. During the first two years with the Act, the Competition Council and the Competition Authority succeeded in finalising the assessment of 399 of the 1070 cases notified during the transition period of the Act. The Council and the Authority gave top priority to decisions on strongly anti-competitive agreements. Besides, test cases setting precedents were awarded high priority. This has ensured that important precedents with the new Competition Act have already been set.

5. The 1999 Competition Report singled out certain competition problems in the Danish economy. On the basis of various indicators, a comparison with other countries identified a number of industries with insufficient competition.

6. Problems with lack of competition may be caused by the fact that the Danish Competition Act is not at level with the rest of the EU.

7. Therefore, the Danish Government has introduced a new competition bill which to a higher degree aligns Danish competition legislation with the legislation in the rest of the EU.

8. The bill introduces merger control and fines for first-time abuse of a dominant position. This is in line with the rules of the other EU states.

9. Besides, Denmark must be able to use the EU competition rules directly. This will ensure that only one set of competition rules applies, no matter in which European market a company is operating. Depending on the scope of a case, some cases will be decided in Brussels, others in Copenhagen.

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II. Enforcement

I. *Actions against agreements and abuse of dominant position*

a) *Enforcement statistics*

10. The Competition Council held eleven meetings and decided 58 cases in 1999.
11. In the course of the year, 24 cases were decided by the Competition Appeals Tribunal.

	01.01.99 – 31.12.00
Cases appealed	24
Appeals dismissed	1
Appeals withdrawn	7
Competition Council decisions upheld	9
Competition Council decisions overruled or referred back	7

On 1 January 2000, 15 cases were pending before the Appeals Tribunal.

b) *Significant cases*

Anti-competitive agreements

12. 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

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

As a result, some agreements which would have been acceptable under the provisions of the former Act are now prohibited.

13. The Competition Authority received notifications of 1070 agreements. The objective of the Authority is that assessment of these agreements must be finalised by the end of 2001. The work with assessing this multitude of cases is organised so that large test cases setting precedents will be decided first.

14. In 1999, the Competition Council decided on the building and construction industry's agreements on notification of bids. According to the notification system of the industry, the members had to notify the various notification offices in advance if they intended to tender for a certain contract. This information, including the name of the tenderers, was submitted to all members tendering for the same contract.

15. According to the industry, the purpose of the agreements was to support the tenderers' right to hold preliminary meetings where the client or his advisor can be asked questions about technicalities in the tender material.

16. However, the problem of the agreements on notification of bids is that the members notify before they submit their tenders. This means that the tenderers can also use the system for preliminary meetings with a completely different purpose, i.e. to agree on who is to win the contract in question and at what price. Therefore, the Council decided to abolish the notification system of the industry. At the same time, it was emphasised that nothing prevented the industry from submitting notification of new agreements on notification of bids.

17. The decision was upheld by the Competition Appeals Tribunal on 20 January 2000.

18. Subsequently, the Competition Council approved the new tender rules of ELFO (Danish Association of Electrical Contractors). However, the approval was subject to certain conditions.

19. The Competition Council found that the new notification rules were a step in the right direction. But the agreement suggested still entailed a risk of information about contracts being exchanged. This increased the risk of the system being used for other purposes by the tenderers, e.g. to agree on who was to win a certain contract and at what price.

20. Consequently, the Competition Council made two further requirements: 1) Bids for tenders were not to be notified to the notification office until the call for tenders had taken place. 2) When informal bids are notified to the notification office in advance, this may not take place until two days before the informal bid is submitted. The brief span reduces the risk of information being abused.

21. ELFO appealed the condition stating that bids for tenders were not to be notified to the notification office until the call for tenders had taken place. The Competition Appeals Tribunal overruled this condition on 20 January 2000. The other condition was not appealed.

22. The Competition Council prohibited the co-operative agreements entered into by nine independent tile manufacturers and the sales office "De Forenede Teglværker" concerning sale and marketing of the tile manufacturers' products.

23. De Forenede Teglværker had the right to sell and the sole right to market the brick production of the participating tile manufacturers. The participating tile manufacturers handled the production of tiles, but had left all marketing tasks to the sales office. De Forenede Teglværker is owned (directly or indirectly) by eight of the tile manufacturers participating in the co-operation.

24. The Council found that the advantages achieved by the tile manufacturers through the co-operation were not neutralised by the negative impacts of the co-operation on the competition among the participating tile manufacturers.

25. The Competition Council decided that the asphalt industry was to be restructured to increase competition among the individual companies. Consequently, several of the current co-operative agreements among companies in the asphalt industry were to be discontinued.

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26. The case concerned nine co-operative agreements on common asphalt production plants involving NCC Danmark (formerly Superfos Construction), Phønix Contractors, Colas Danmark, Icopal, Pankas, Ove Arkil and Colas-Novejfa.

27. The asphalt companies, which together cover more than 80 per cent of the asphalt production, all participate in several agreements with different agreement parties. As a whole, the agreements limit competition between companies that would otherwise be competitors.

28. The companies appealed the decisions.

29. The co-operation in four partnerships – ARCO Asphalt, Lolland-Falster Vejmateriel, Nordisk Vejmarkering and Dansk Overfladebehandling – which carry out asphalt work, was allowed to continue. However, the parties must terminate a number of anti-competitive provisions in three of the agreements.

30. The decisions were made on the basis of the Competition Authority's investigation of the co-operative and competitive situation in the asphalt industry.

31. The investigation concluded that competition in the asphalt industry is generally weak. One important explanation to this is the many co-operative agreements among many of the industry's companies. The investigation also showed that Danish asphalt is more expensive than in several other countries.

32. According to the investigation, purchasers of asphalt are also partly responsible for the lack of competition. The Danish municipalities are the biggest purchasers of asphalt works. In the investigation report, the Competition Authority therefore recommends that the municipalities should be more price conscious.

33. The Competition Authority's investigation of the cartel cases within the Danish electricity wiring services sector progressed. A fair share of the companies involved chose to co-operate with the Authority (please refer to the 1998 Report). The first cases were referred to the Public Prosecutor for Serious Economic Crime conducting prosecutions in Danish courts. In the course of the year, the Authority generally intensified its efforts against illegal cartels, and more unannounced control inspections were carried out. In 1999, unannounced control inspections were carried out within the fields of roofing, orthopaedic shoes, certain brand suppliers' enforcement of resale prices and the advertisement market in the Aarhus region.

Abuse of dominant position

34. Two cases of abuse of dominant position attracted special public attention in 1999. The first case concerned a combined product range requirement imposed upon a supermarket chain by two magazine publishers. The other case concerned a trade association which had threatened a member with expulsion if the member retracted a price increase. The price increase had been introduced almost uniformly in the trade.

35. In the first case, the Competition Council decided that the Aller and Egmont magazine publishers were not allowed to demand that Netto (a Danish supermarket chain) buy the "Kig Ind" magazine to get the "Her og Nu" magazine.

36. Netto had filed a complaint with the Council because Egmont would not deliver "Her og Nu" to the supermarkets, unless they also bought "Kig Ind" from Aller. At the same time, both Aller and Egmont had threatened to stop delivery of all weekly magazines to Netto.

37. The Competition Council found that the newspaper publishers' co-ordinated requirement concerning which magazines Netto were to buy was in contravention of the Competition Act. The Council therefore ordered the magazine publishers to stop making such conditions and to stop threatening Netto to cut off the supplies.

38. 16. In the other case, the Competition Authority enjoined the prohibition in the Competition Act against pricing agreements on the Association of Travel Agencies in Denmark (RiD).

39. The travel agencies had introduced almost uniform price increases when the duty-free sale was abolished in the EU. Besides, RiD's chairman threatened Apollo Rejser with expulsion when the company retracted its price increase. This appears to be an attempt to enforce a price agreement and thus force unreasonable sales prices upon a company. Both are prohibited by the Competition Act.

40. One day after being contacted by the Competition Authority, RiD withdrew the expulsion threat. On the same day, the large travel agencies announced that they also retracted their price increases because of dissatisfied customers.

41. The Authority also examined the price increases of the charter operators. The charter operators were able to document that their price increases had been calculated individually and were based on the individual operator's loss in connection with the termination of the duty-free sale. The operators had given notice of this price increase to the travel agencies during the negotiations of the 1999 summer journeys. These negotiations were conducted in the autumn of 1998.

Other decisions

42. Following talks with the Competition Authority, MD Foods promised to change the merger with Kløver Mælk to enhance the possibilities of competition. The Competition Authority therefore recommended to Ms Pia Gjellerup, Minister for Trade and Industry, that the merger should not be referred to the EU Commission for assessment.

43. In March, the Minister for Trade and Industry asked the Competition Authority to examine how the merger between MD Foods and Kløver Mælk would affect the Danish dairy product market. On the basis of this investigation, the Minister for Business and Industry would decide whether Denmark should refer the merger to the EU Commission.

44. The Authority's investigation showed that the merger - without compensating measures - might damage competition. This might affect consumers, competitors and the retail trade. Consequently, MD Foods made a number of promises to counter the negative effects of the merger.

45. The Competition Council assessed the value of the right to broadcast two football matches qualifying for the European Championship.

46. DR and TV2 (both public service channels of which the latter is partly financed by commercials) had asked for this assessment according to the rules laid down by the Ministry of Culture concerning broadcast of television and events of general interest to the public. These rules are based on the "Television without frontiers" EU directive. The rights to the matches are owned by TV3/3+ (commercial channels that can only be viewed by 71 per cent of the Danish population), which bought them in September 1998 in competition with DR and TV2.

47. The right to broadcast the Wales-Denmark match was valued at DKK 2.8 million.

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48. The valuation was based on TV3/3+'s purchase price. However, the value of the match had dropped following Denmark's results in the European Championship qualification tournament in the autumn of 1998 and spring of 1999. This meant that the viewer interest and thus the expected income from commercials had declined compared with expectations. This development in itself resulted in a loss for TV3/3+; however, if interest in the match had increased, TV3/3+ would have obtained a profit.

49. Besides, the valuation implied that TV3/3+ were to have a certain profit. But the fact that TV3/3+ had the possibility of broadcasting the match - live or delayed - and of showing clips and highlights in their programmes should also be taken into account.

50. The exclusive rights to the Israel-Denmark match were valued at DKK 3.7 million. If TV3 had also been able to broadcast the match live or delayed, the price would have been DKK 2.6 million.

51. The valuation was based on the general price level applicable to purchase of exclusive rights to Denmark's football matches in recent years, i.e. just over DKK three million.

52. The match was the first of two play-off matches qualifying for the European Championship 2000 and was therefore of great sports value. The All-Denmark team had played well in the latest matches, which had increased interest in the match and accordingly the expected viewing figures. Consequently, the commercial value had increased.

53. However, the fact that the qualification for the European Championship was not expected to be settled until the second match was played on 17 November 1999 was also taken into account. The fact that the match was played on a Saturday at 7 p.m. was also considered. Experience shows that viewers are less interested in games played on Saturdays than in games played on weekdays.

54. At the same time, TV3 had stated that the value of simulcast or delayed broadcast was significantly higher to TV3 in connection with this match because the match was played at a late hour on a Saturday and because of its great sports value. Therefore, the simulcast rights were valued far higher than the rights to the Wales match.

55. The two public service channels were not under obligation to buy the matches at the prices laid down by the Council.

2. Mergers and take-overs

56. There are no rules on merger control in the Danish Competition Act. However, mergers and take-overs must be reported to the Competition Authority according to Section 12 of the Competition Act. Besides, an annual report on mergers and take-overs is published. This can also be found at the Competition Authority's Web site, and is updated quarterly.

57. As of 1 January 1998 the report only includes mergers and take-overs if the total global turnover of the participating companies and associated companies exceeds DKK 50 million per year. At the same time, mergers are only included if at least two of the companies participating in the merger or take-over each have a yearly turnover of more than DKK ten million.

58. According to the report, mergers and take-overs involving a total of 177 companies with a total annual turnover of just over DKK 148 billion and 82,000 employees took place in 1999. The majority of the mergers and take-overs reported were horizontal (90 per cent). four per cent were vertical, while six percent were diversificational. The industry sector accounted for almost half of all take-overs during the period.

III. Influence on administration and legislation

59. In principle the Danish Competition Act attempts 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. According to the Act, the public authority laying down the anti-competitive practice must itself assess whether the practice is a direct or necessary consequence of a public regulation. The Competition Council may then approach the authority in question to point out the damaging effects of public regulations to competition.

60. 1999 saw a number of cases concerning public anti-competitive practice where the authority that had implemented an anti-competitive practice was itself to decide whether the practice was a direct or necessary consequence of a public regulation.

61. In May, the Competition Council decided that Dansk Naturgas (Dangas – a government-owned natural gas company) was to shorten its agreements concerning supply of natural gas to ELKRAFT and ELSAM, the two main electric utilities in Denmark.

62. Some of the agreements had a term of more than 20 years. The Council ordered Dansk Naturgas to shorten the term to ten years. This would mean that the power companies would be able to freely purchase natural gas from 2004 or earlier. The Council found that the long terms of the agreements forced the power companies to use Dansk Naturgas as supplier for an unreasonably long period. This prevented the power companies from exploiting the future liberalisation of the energy markets to buy gas from other suppliers at more favourable terms.

63. On 10 May 1999, the Danish Energy Agency (an agency under the Ministry of Energy) stated that the agreements were long-term and interminable as a direct and necessary consequence of a public regulation. The Energy Agency at the same time expressed that the specific terms of 26, 23 and ten years were not a direct or necessary consequence of a public regulation. The Competition Council agreed on this.

64. Dangas appealed the decision to the Competition Appeals Tribunal. The Appeals Tribunal asked the Competition Authority to approach the Ministry of Energy to get an unambiguous decision as to whether the anti-competitive practice was covered by the Competition Act or not.

65. The Energy Agency then decided that a term until 8 June 2012 is a direct or necessary consequence of a public regulation. Such a term is longer than ordered by the Competition Council, but shorter than the original agreements.

66. The telecommunications field was liberalised earlier in Denmark than in most other countries. The Competition Authority has many cases in this field. This shows the necessity of monitoring a previously monopolistic field in a transition period. Many cases are solved in close co-operation with the National Telecom Agency. In 1999, a political balance was struck by Parliament concerning revision of the telecommunications legislation. One of the goals is to create a solid regulation basis with future expandability, and one of the means is to ensure that the sector will be regulated by the general Competition Act in the long term. One step forward is an extension of the fields subject to decisions made by the Telecom Agency on the basis of binding opinions from the Competition Council.

67. Efficient competition in the telecommunications field is probably only realistic if large sections of the Danish households have several possibilities of buying access to the telecommunications network – preferably offered by different owners. In other words, the goal is not just competition within the various networks, but also between, for example, fixed network, mobile network, cable network, etc.

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68. As secretariat to the energy price committees, now Danish Energy Regulatory Board, the Competition Authority contributed to the making and implementation of the new Electricity Act, which entered into force on 1 January 2000. The electricity market is undergoing gradual liberalisation, and as at 1 January 2003 all customers will be free to select their supplier. The aim of the reform is to achieve more efficient, environmentally sound power production and lower electricity prices.

IV. Resources of competition authorities

1. Total resources

- a) Annual budget 1999: DKK 67.8 million = USD 8.7 million; (1998: DKK 64.8 million = USD 9.3 million)

	Competition Authority (in total) in 1999	Employees occupied with competition law in 1999	Competition Authority (in total) in 1998	Employees occupied with competition law in 1998
Economists	42	33	38	24
Lawyers	30	20	35	23
Other professionals	5	5	2	2
Support staff	33	19	33	20
Total	110	77	108	69

33 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

23 person-years: energy price regulation

2. Human resources (person-years) spent on:

- | | |
|---|----|
| a) Enforcement against anti-competitive practices | 58 |
| b) Mergers | 2 |
| c) Influence on other legislation | 17 |

3. Period

The information is as at 1 December in the year in question.

V. References to new reports on competition policy

69. In the spring of 2000, the Competition Authority will publish its third Competition Report.

70. The report analyses important and current political competition problems. In 2000, the report deals with the competition intensity in the Danish Economy, competition within retail trade, the Commission's White Paper, state aid, etc.

71. The report also contains an annual section. Firstly, it describes the most significant decisions made by the Competition Council in 1999. Secondly, it describes the Competition Authority's assignments concerning state aid, procurement and regulation of energy prices.

72. 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. The English version can be found in the English section of the Authority's Web site www.ks.dk.

73. In 1999, the Authority also published reports on:

- the competitive situation in the asphalt industry;
- the fees of estate agents;
- rules on fixing the price of sports rights;
- state aid;
- measuring of competition intensity; and
- the book trade.