

ANNUAL REPORT ON COMPETITION LAW AND POLICY IN DENMARK

2001

Executive summary

1. In 2001, the Danish Competition Authority finalised the 1,070 cases, which were the agreements notified by the companies in 1998 after the transition from the control regime to the prohibition regime. Back then, the Authority set the target that decisions should be made on all the notified agreements by the end of 2001 and this target was thus fulfilled.

2. Of the 1,070 notified agreements, 58 per cent were approved without changes, while 26 per cent were approved on the condition that the agreements were changed so that they would be less anti-competitive. 16 per cent were prohibited, i.e. the parties either had to abandon the agreement or come back with a new agreement.

3. A new area for the Authority was the merger control, which began on 1 October 2000. With the relatively high threshold value – DKK 3.8 billion – the Authority only expected approximately 10 cases a year. In practice, the number has so far been approximately 15 cases a year. The largest merger case in 2001 was DONG's (the National Oil and Gas Company of Denmark) acquisition of Naturgas Sjælland, a regional gas company.

4. In 2001, the first penalty cases in the electric wiring services cartel complex reached the courts which ruled in favour of the penalty claims. Subsequently, other companies have chosen to accept penalties so the cases do not need to be tried. There are many indications that the electricity cartel existed for a number of years and the total costs for society of the cartel's operations will probably run into several billion Danish kroner over the years. By way of comparison it may be mentioned that the total penalty sum will most likely amount to some DKK 50 million. This is one of the reasons for the government's proposal to amend the Competition Act so that the penalty level is increased, cf. section I.3.

5. The beginning of 2002 also saw penalties in a number of cases regarding binding resale prices.

6. In 2001, Denmark made an agreement with Norway and Iceland regarding information exchange. The agreement enhances the possibilities of combating cartels and other illegal agreements and has already been applied to a concrete case regarding binding resale prices.

7. Finally, the Danish Competition Authority commenced a process benchmarking study in co-operation with the Swedish Competition Authority in 2001. The purpose is to benchmark the core processes of the two Authorities, i.e. the case handling in competition cases. The result of the benchmarking will be published in a report which will be available in the middle of 2002.

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Changes to competition laws and policies, proposed or adopted

Summary of new legal provisions of competition law and related legislation

8. On 1 October 2001, the new Procurement Act entered into force. It replaced the old Procurement Act, which since 1967 had regulated competition in the building industry. The cornerstone of the old Public Procurement Act was a requirement for transparency through opening of the tenders and safeguarding against "excess competition" or "bartering", i.a. by means of capping the number of informal bids for which a tenderer may ask.

9. The Act was special in that there was no similar regulation in any other industries or in other countries and the Act is together with several other circumstances responsible for making building in Denmark more expensive than in other countries.

10. The requirement for capping the number of informal bids was the alibi for the existence of notification offices in a number of building trades. This made it in at least one industry (the electricity industry) possible to co-ordinate tenders in the amount of billions of Danish kroner for many years (please see further information below).

11. Therefore, great headway was made by repealing the Act. Its successor, the new Procurement Act, is mandatory for public developers but may be followed by non-public developers as well when expedient – and in addition the new Procurement Act sets the stage for more quality-centred competition, not merely competition on price. Thus the Act is more forward-looking.

12. At the same time, the Act has been adapted to comply with the new public procurement directives, which are on the way in the EU. These directives which lay down the framework for public procurement will be simplified, i.a. by being combined in one directive comprising the three public procurement directives which exist today.

Other relevant measures, including new guidelines

13. On 1 April 2001, Denmark concluded an agreement with Norway and Iceland regarding exchange of confidential information in competition cases. The agreement has been successfully applied to one case in which information from Norway led to a control investigation of the radio and television industry. The investigation resulted in penalty claims against several of the companies involved.

Government proposals for new legislation

14. In the light of e.g. the cartel cases, 2001 saw political initiatives to tighten the Competition Act and in March 2002, the government introduced a bill to that effect. The bill increases the level of penalties to the same level as in most other countries in the EU. In practice, the bill is expected to entail a marked increase in the penalty level. At the same time, the Danish Competition Authority's possibilities of recommending SØK (the Public Prosecutor for Serious Economic Crime) and the courts to give a discount to companies which have co-operated with the Authority on the unravelling of the case will be increased. Up until now, the rules have stipulated that the discount cannot exceed 20 per cent but the bill proposes discounts in excess of 20 per cent. This will make it more attractive for the cartel participants to co-operate with the Authority.

15. In the public area, the bill entails that 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. In the future, this kind of assessment which entails putting other legislation above the Competition Act can only be made by the relevant minister who is answerable to the Danish Parliament. Governmental restrictions on competition, which are questioned by the Danish Competition Authority, must be motivated by the minister responsible and the Minister of Economic and Business Affairs.

16. In the third place, the bill fills some gaps. The Competition Appeals Tribunal (the first appeals body) has interpreted the current Act to mean that the restrictions on competition "included" in a joint venture are not comprised by the Competition Act – regardless of the contents of the restrictions. According to the bill joint ventures will in the future be assessed according to the general rules on anti-competitive agreements. Furthermore, the rules on minimum amount will be changed so that also local price co-operation agreements under the current minimum amount of DKK 150 million will be comprised by the Act. Finally, the Authority will be 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.

Enforcement of competition law and policies

Actions against agreements and abuse of dominant position

Enforcement statistics

17. The Competition Council, which decides major cases and test cases, held 9 meetings and decided 22 cases in 2001. The Competition Authority made 233 decisions in important cases, though not test cases, with subsequent publication.

18. In the course of the year, the Competition Appeals Tribunal decided 23 cases. 11 cases were overruled or referred back. No cases were brought before the court system.

	01.01.01 – 31.12.01
Cases appealed	23
Appeals withdrawn	4
Competition Council decisions upheld	8
Competition Council decisions overruled or referred back	11

19. On May 1st 2002, 15 cases were pending before the Appeals Tribunal.

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Significant cases

Anti-competitive agreements

19. 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.

Agreement between DBU and TV2/DR regarding the television and radio rights to Denmark's international football matches

20. The Danish Competition Authority considered DBU's (the Danish Football Association) exclusive agreement with the two Danish public service stations DR (Radio Denmark) and TV2 regarding broadcasting on television of Denmark's international football matches. The agreement, which was concluded in 1996, gave DR (which is exclusively financed by licence fees) and TV2 (which is partly financed by licence fees and partly financed by commercials) an exclusive right for eight years to broadcast all Denmark's international football matches played in Denmark. The distribution of the rights between DR and TV2 is agreed between the television stations from year to year.

21. DR and TV2 are public service stations with a privileged position compared with the other television stations whose viewing area does not comprise the entire Danish population.

22. The problem was the long period of the agreement. The Danish Competition Authority is obliged to follow the EU practice which generally requires that exclusive rights to important sports events must have a significantly shorter period. Therefore, the agreement had to be shortened, i.e. terminated (as the agreement as mentioned was concluded in 1996). However, the Authority did not wish to prevent the conclusion of a new, two-year agreement, which covered the remaining period of the current agreement.

General conditions for agreements between cinemas and film distributors

23. The Danish Competition Authority decided that an agreement concluded by the FAFID (the Association of Danish Film Distributors) and DB (Danish Cinemas) had to be changed. The agreement comprised almost all film distributors and cinemas in Denmark.

24. According to the agreement, the cinemas were not allowed to lower the ticket prices, nor were they allowed to use free tickets or any other types of discounts without consulting the film distributors first. If a cinema competed on price against the wishes of the film distributor, the film distributor could e.g. refuse to deliver new films to the cinema. These provisions were revoked because they restricted the cinemas' possibilities of deciding themselves how they wished to compete for the customers.

25. In addition, the agreement included provisions, which made it possible for the film distributors to collectively punish the individual cinema, for instance, by stopping delivery of films if the cinema had financial difficulties. This possibility was also eliminated. It must be up to the individual film distributor to decide whether he wants to distribute films to a given cinema. However, FAFID will continue to be permitted to inform the individual film distributors about cinemas' failure to pay etc.

The cartel in electric wiring services

26. A major step forward in 2001 was the first court judgements in competition cases. In the electricity cartel (the cartel comprised more than 800 electricians and was discovered in 1998) SØK (the Public Prosecutor for Serious Economic Crime) had in co-operation with the Authority selected four test cases with companies of different sizes. A memorandum prepared by SØK in co-operation with the Authority and the Chief Public Prosecutor was the basis for the penalty claims. This memorandum states that in pursuance of the 2000 Act, the penalties for a very serious breach of the law, which cartels are, will be from below DKK 100,000 (app. 13,300 EURO) for the smallest companies to well over DKK 3 million (app. 400,000 EURO) for the biggest.

27. These amounts are negligible compared with the amounts which the electricity cartel has cost the customers and society. It is difficult to assess the extent of the harmful effects. But the Authority believes that the electricity cartel has led to increased prices for electricity work in the amount of an average of 20 per cent for co-ordinated tender work and 10 per cent for other electricity work because of a certain "rub-off effect". The average price effect is thus 12 per cent.

28. However, only a very small part of this amount ended up as extra earnings in the companies – hardly more than an estimated 2-3 percentage units out of the 12 per cent. Another modest approximate 2 percentage units are increased wages and salaries which the industry would otherwise not have been able to afford, while the majority, i.e. at least 7 of the 12 per cent were "spent" on a lower productivity than the electricity industry would otherwise have had. In this connection, it is a striking fact that building as a whole in Denmark only has experienced minor productivity increases during the last 30-40 years, while the productivity in other industries has increased markedly. At the same time, there are indications that the electricity cartel existed for many years. This means that the total costs for society of the cartel's activities is just below DKK 2 billion (app. 270 million EURO) in 1998 alone and will amount to several billion Danish kroner over the years. The additional earnings for the companies involved have amounted to considerably less, but still presumably several hundreds of millions Danish kroner in 1998 alone and probably not less than DKK 1 billion through all the years. By way of comparison it may be mentioned that the total penalty sum will probably amount to approximately DKK 50 million. This is one of the reasons for the government's proposal to amend the Competition Act so that the penalty level is increased, cf. section I.3.

Abuse of dominant position

Ruko's market behaviour

29. The Danish Competition Authority decided that the lock manufacturer Ruko A/S has abused its dominant position on the Danish market for locks.

30. The investigations of the Danish Competition Authority were i.a. based on materials gathered in connection with a dawn raid in February 2001. The material showed that it is difficult for foreign

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companies to gain a foothold on the Danish market for locks. This is i.a. due to the fact that developers and architects have a strong tradition of using a special Scandinavian standard for lock cases. Thus the use of locks not manufactured in Scandinavia is practically excluded.

31. Ruko has with a market share of more than 80 per cent a clearly dominant position on the Danish market for locks. Ruko has abused this position in three ways:

32. In the first place, the company's general discount system led to unequal treatment of the distributors. Particularly one distributor suffered. During recent years he had also sold a rival brand of locks. This distributor was granted lower discounts than the other distributors because the distributor did not also buy fittings, door handles etc. from Ruko.

33. In the second place, Ruko discriminated certain of its distributors. This was done by granting different discounts to distributors in the same situation in connection with major building projects. This provided the distributors with unequal opportunities in the competition.

34. Finally, Ruko prevented resale of the locks, which Ruko sells at special industry prices. The purpose was to segment the market. Thus the company's industrial customers could not resell the locks to other groups of customers.

Mergers and acquisitions

35. A new area for the Danish Competition Authority was the merger control, which began on 1 October 2000. With the relatively high threshold value - DKK 3.8 billion - the Authority only expected approximately 10 cases a year. In practice, in the first full year with merger control (2001), 15 mergers were notified. The largest merger case in 2001 was DONG's acquisition of Naturgas Sjælland, cf. below.

36. The Danish Competition Act has a special provision in so far as mergers are concerned which is not found in other countries. This is the provision to the effect that 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 effect on the competition. So far, the provision has only been applied five times.

DONG's acquisition of Naturgas Sjælland

37. In February, the Competition Council approved the merger between the state-owned natural gas Company DONG and the regional natural gas company Naturgas Sjælland. The approval was conditioned upon DONG's compliance with three remedies. Without these remedies, the merger would impair the competition in this sector.

38. In the first place, DONG offered the electricity generators to reduce the period of a number of agreements, which commit the generators to DONG. The agreements are reduced by almost 10 years so that they expire on 31 December 2009.

39. In the second place, DONG offered transportation services in the transmission network at published standard prices and terms. This would increase transparency and thus be an advantage – both to the customers allowed to buy gas abroad and the to foreign suppliers.

40. Finally, DONG gave customers and competitors the opportunity of "buying space" in the two natural gas storages, which DONG has in Denmark. This will provide increased flexibility in the trade in natural gas. At the same time, the customers would be able to buy gas from other suppliers than DONG during times with favourable prices.

41. It was the assessment of the Competition Council that the commitments in the long run would be able to increase the possibilities of a certain degree of competition in the natural gas sector. Correspondingly, DONG's acquisition of Naturgas Sjælland also had consequences in the long run. Without the merger, there would have been a certain degree of competition for the so-called "free customers", i.e. customers who are free to choose supplier. Therefore, there was a balance between the effects of the merger and the commitments.

42. Furthermore, the Competition Council recommended to the Minister of the Environment and Energy that the Danish market be opened to foreign suppliers (please see below under Influence on administration and legislation).

Other decisions

43. The Competition Council may issue orders for the termination or repayment of aid granted from the 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 now 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 out land, commercial tenancies, etc. below market prices. The Competition Council considered in 2001 one case in relation to this provision.

Notification of public subsidies – the Municipality of Herning

44. The Danish Competition Authority decided that the Municipality of Herning's subsidy to Herning County Library in connection with the operation of the service ErhvervsService (business service) may distort competition.

45. ErhvervsService offers a broad selection of information to private companies, primarily by means of the Internet and advanced databases.

46. The municipal subsidies may distort competition in relation to other suppliers of similar services as the users of ErhvervsService only pay one third of the costs. However, the Municipality of Herning was not ordered to cease subsidising ErhvervsService. The Authority decided that no private companies were on the point of introducing a similar service. Therefore, there is a great risk that an order to cease subsidising the service would mean that ErhvervsService would be discontinued to the prejudice of the companies that use the service. But if a private company sometime in the future offers a rival service, the case will be re-opened in order to stop the subsidies.

The role of competition authorities in the formulation and implementation of other policies

47. 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

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public authority laying down the anti-competitive practice must itself assess whether the practice is a direct or necessary consequence of a public regulation.

48. The Competition Council may then approach the authority in question to point out the damaging effects of public regulations to competition.

49. As mentioned above under I.3, the government has introduced a bill to tighten these rules.

50. In connection with the decision regarding DONG's acquisition of Naturgas Sjælland (please see above under Mergers and acquisitions), the Competition Council approached the Minister of the Environment and Energy.

51. The Council pointed out that a precondition for the existence of effective competition on the market for natural gas is that the part of the market for natural gas exposed to competition has a certain size. This is due to the fact that there are considerable establishment and transaction costs involved when a potential foreign competitor wants to enter the Danish market. A number of European countries have gone farther than Denmark in their liberalisation of the market for natural gas. Denmark is one of the few countries in the EU that has chosen only to comply with the minimum requirements of the EU. Therefore, the Competition Council recommended to the Minister of the Environment and Energy that the Danish market for natural gas be opened more than the 30-43 per cent which were a consequence of section 8 of the Danish Act on the Supply of Natural Gas.

52. It has now been announced that all gas purchasers must be able to choose their supplier freely from 2004. The big purchasers already have this right today but so far, no competitors of the state-owned natural gas Company DONG have accessed the Danish market.

53. Initiatives were also taken in other areas in which the Competition Council has previously made recommendations. For instance in connection with access to long distance bus services, including the access to receiving social contributions to transport of e.g. persons doing military service. In the tax area, a committee has been set up to consider a proposal for a more pro-competitive beer tax.

54. In the environmental area, there is no doubt that the almost 30-year old prohibition against cans which has now been revoked has restricted competition and contributed to the fact that e.g. soft drinks are more expensive in Denmark than in other countries. Even though foreign producers have had free access to selling bottled beer using Danish bottles, it was in practice a barrier that the producers had to tap beer and soft drinks using a kind of packaging which was normally not used.

55. In connection with the hearing of the amendment of the Danish Act on Packaging which formed the basis for the Dansk Retur System (DRS) (Danish deposit system), the Council pointed out a number of problems. The DRS was intended a monopoly, which could easily go beyond the initial 6-year period. The fees might be an unfair burden on small producers and importers, there was a risk of abuse of information about competitors' sale and marketing and finally DRS would in terms of finances have to be a so-called "self-financing" company as known from e.g. the electricity industry.

56. The objections led to an amendment of the bill so that new legislation will now be required to prolong DRS's exclusive right thus making the burden on the small producers and importers as lenient as possible. In addition to this certain restrictions were imposed with regard to the exchange of information regarding i.a. sales figures for the individual beer and soft drink brands.

Resources of the Competition Authority

Total resources

Annual budget 2001: 84,5 = EURO 11.3 million; (2000: DKK 83.3 million = EURO 11.2 million)

	Competition Authority (in total) in 2001	Employees occupied with competition law in 2001	Competition Authority (in total) in 2000	Employees occupied with competition law in 2000
Economists	55	41	55	41
Lawyers	35	26	33	26
Other professionals	6	5	6	5
Support staff	34	17	38	18
Total	130	89	132	90

57. 41 person-years, which are not allocated to administration of the Competition Act, are allocated to the following:

- 11 person-years: public procurement and state aid
- 30 person-years: energy price regulation

Period

The information is as of the 1st of December the year in question.

References to new reports on competition policy

In May 2002, the Competition Authority published its fifth Competition Report.

The report analyses important and current political competition problems. In 2002, the report deals with the competition intensity in the Danish Economy, competition within the financial sector, air transport, television, retail, E-commerce etc.

The report also contains an annual section. Firstly, it describes the most significant decisions made by the Competition Council in 2001. Secondly, it describes the Competition Authority's assignments concerning state aid, procurement and regulation of energy prices.

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.

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In 2001, the Authority also published reports on:

- Building materials;
- Cross-frontier shopping;
- The Automobile sector.