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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN DENMARK

- 2004 -

This report is submitted by the Danish Delegation to the Competition Committee FOR INFORMATION at its forthcoming meeting (1-2 June 2005).

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ANNUAL REPORT ON COMPETITION LAW AND POLICY IN DENMARK

- 2004 -

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I. CHANGES TO COMPETITION LAWS AND POLICIES, PROPOSED OR ADOPTED

Summary of new legal provisions of competition law and related legislation

1. On 16 December 2004 the Folketing (Danish Parliament) adopted a number of amendments to the Danish Competition Act. Among other things, this was a result of new provisions for the application of EU competition rules that entered into force on 1 May 2004. Although its provisions are immediately applicable in Denmark, the revision provided a basis for amending the Competition Act to ensure that the rules were transparent and that the Danish rules did not differ materially from EU rules.

2. In addition, the Danish Competition Council was given a wider scope to take action against dominant enterprises whose behaviour impedes effective competition. Finally, the Act was amended in a number of areas in order to define and clarify the legal situation as much as possible.

3. The Act entered into force on 1st February 2005.

4. Highlights of the new Competition Act:

- In special cases, the Competition Council will be empowered to order dominant enterprises to prepare and submit written trading conditions.
- The prohibition against binding resale prices is emphasised to make it clear that it also applies in single cases of price control where the management is unaware of the issue. Discounts to retailers who agree to observe fixed prices are also prohibited.
- The merger criterion is amended to give the authorities a wider scope to impose requirements in connection with mergers that threaten to impede effective competition, even though the mergers do not comprise the largest enterprise in the market (i.e. the so called SIEC criteria).
- Like the European Commission, the Competition Council will be empowered to settle competition issues by accepting binding commitments from the enterprises.
- Moreover, the competition authorities will be empowered to issue orders to ensure that an enterprise observes the commitments made to the competition authorities in a timely and proper manner.
- The existing notification system is modernised so that enterprises may claim exemption from the Competition Act without prior application.
- It is emphasised that the Act warrants publication of judgments and fixed-penalty notices for infringement of the Competition Act.
- The Competition Appeal Tribunal will be enlarged from 3 to 5 members.
- It will be possible to handle cases in English, wholly or partly.

II. ENFORCEMENT OF COMPETITION LAW AND POLICIES

a) Enforcement statistics

5. The Competition Council decided 13 major cases in 2004. The Competition Authority made 68 decisions in important cases with subsequent publication. In 2004, the authority also concluded about 629 minor cases, mainly concerning access to documents, questions from citizens, etc.

6. Decisions of the council and the authority can be appealed to the Competition Appeal Tribunal. 9 cases were decided in 2004. Of these, 2 were overruled or referred back. Decisions of the Appeal Tribunal can be brought before the courts. However, in 2004 the court system did not make any rulings in relation to competition.

	01.01.04 – 31.12.04
Cases appealed	9
Competition Council decisions upheld or appeals withdrawn	7
Competition Council decisions overruled or referred back	2

On May 1st 2005, 6 cases were pending before the Appeals Tribunal.

b) Significant cases

Decisions

7. 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.

Anti-competitive agreements

Illegal price coordination between Wewers Belægningsten and Ikast Betonvarefabrik

8. The Competition Council ordered Wewers Belægningsten A/S and A/S Ikast Betonvarefabrik to terminate their illegal price coordination.

9. The irregularities were disclosed by the Danish Competition Authority following unannounced inspections of both enterprises in May 2003. During its inspections the Authority found evidence that the two companies were exchanging price lists with a view to raising the prices of products manufactured by both enterprises.

10. Wewers Belægningsten was a joint venture controlled by Ikast Betonvarefabrik and Wewers Teglværker. The circumstance that one enterprise partly owned another enterprise did not make it legal to harmonise prices.

Abuse of dominance

Abuse of dominance by TDC

11. The Competition Council found that TDC had abused its dominance. TDC had applied discriminatory and loyalty-enhancing discounts when selling traffic minutes to resellers and had squeezed margins. Both practices are comprised by the prohibition in section 11 of the Competition Act.

12. Song Networks A/S, which provided fixed-line telephony to business customers, had filed a complaint about TDC and SONOFON to the Competition Authority.

13. The Competition Council did not find that SONOFON had infringed the Competition Act. The Council did, however, find that TDC had sold its PlusNet Mobil product at retail prices that did not cover the total costs including a risk premium and a normal profit margin. This was an illegal margin squeeze. TDC had maintained a high wholesale price for several of the services that are part of its competitors' end products. At the same time, the retail price – e.g. for termination in the mobile network – was lower than the wholesale price. The wholesale price exceeded DKK 1.00 per minute for termination in TDC's mobile network, while the corresponding retail price was DKK 0.50-0.60.

14. The Council also found that TDC's bonus system in relation to its mobile resale agreements was discriminatory and loyalty-enhancing. The bonuses could not be explained by costs. The existing bonus system meant that small and medium-sized providers were discriminated against and that TDC gave preferential treatment to itself.

Abuse of dominance by Post Danmark

15. The Competition Council found that Post Danmark had abused its dominance in the market for distribution of unaddressed items. This market comprises advertisements and local newspapers.

16. Post Danmark had quoted different prices to its own and its competitors' customers. In a few cases Post Danmark had quoted more favourable prices to its competitor's customers than to its own customers. Post Danmark had also applied discriminatory prices towards its own customers. Finally, Post Danmark had on six occasions applied loyalty-enhancing target discounts whereby customers were offered higher discounts if the actual number of items sent exceeded an agreed target. Some of these discounts could not be explained by costs, but were chiefly aimed at gaining market shares from Forbruger-Kontakt.

17. The Competition Council ordered Post Danmark to amend its prices and discounts.

Mergers and acquisitions

18. Merger control was incorporated in the Danish Competition Act in 2000. In 2004, the Competition Authority treated 12 merger cases. The largest merger case in 2004 was the merger between Elsam and NESAs.

19. 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.

The merger between Elsam and NESAs

20. The Competition Council approved the merger between Elsam and NESAs subject to Elsam's acceptance of a number of commitments. Without these commitments, the merger would have cost electricity users DKK 150-200 million a year.

21. Firstly, Elsam must sell a significant volume of centralised power capacity (600 MW) by auction. The sale of this capacity was not limited in time. The Competition Authority was to determine the auction conditions. In addition, Elsam must sell all its own and NESAs's decentralised gas-fuelled combined heat and power (CHP) stations. The CHP stations had a total capacity of 230 MW. At the same time, Elsam will abstain from purchasing and operating decentralised power stations for the next 12 years. These commitments meant that Elsam would still meet competition in the wholesale market.

22. Secondly, Elsam made a commitment to transfer NESAs's ownership interests in Elkraft System and Transmission to an independent enterprise. This was to prevent Elsam from gaining influence on the system responsibility or infrastructure. In addition, Elsam must ensure that a 600 MW Great Belt cable be established between Funen and Zealand. Consequently, the capacity sold by Elsam would boost competition in both Eastern and Western Denmark.

23. Thirdly, conditions in the retail market were improved. New suppliers were given easier access to NESAs customers' consumption profiles. NESAs would also allow other suppliers to establish full customer relations, including settlement with the grid company.

24. The positive effects of the commitments offset the negative impacts of the merger. The negative impacts were mainly attributable to the fact that Elsam acquired 36 per cent of the shares in the Eastern Danish company, Energi E2, which had a total centralised CHP capacity of almost 3,500 MW.

III. THE ROLE OF COMPETITION AUTHORITIES IN THE FORMULATION AND IMPLEMENTATION OF OTHER POLICIES

25. 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 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 land, commercial tenancies, etc. below market prices.

26. 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.

27. The Competition Council recommended that the free choice rules be amended

28. The Competition Council recommended that the Minister for Social Affairs amend the rules for free choice of supplier (service provider) of home care. The Council recommended that the local authorities compensate private providers of home care services if the payment they received was lower than the local authority's costs.

29. Users have a free choice between private and public service providers. The hourly rate paid to the private service provider is equal to the cost at which the local authority would be able to provide the service. Legislation permits local authorities to include future efficiency gains in their hourly rates, i.e. to operate with such gains at a time when efficiency has not yet been improved. This allows local authorities to fix a lower hourly rate than their actual costs at the time of calculation. Competition is distorted in regard to private service providers if the efficiency gains are not realised.

30. Consequently, the Competition Council recommended that this rule be amended so that private service providers receive supplementary payment if the planned efficiency improvements on which the reduced settlement price was based are not implemented.

IV. RESOURCES OF THE COMPETITION AUTHORITY

1. Total resources

Annual budget 2004: DKK 88 million = EURO 11.7 million

	Competition Authority (in total)	Employees occupied with competition law
<i>Economists</i>	43	26
Lawyers	39	21
Other professionals	21	11
Support staff	27	13
Total	130	71

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

15 person-years: public procurement, state aid and credit card regulation

36 person-years: energy price regulation

8 person years: ministerial affairs

2. Period

The employee information is as of may 1st 2005.

V. REFERENCES TO NEW REPORTS ON COMPETITION POLICY

31. A major part of the development work of the Authority takes place in projects that analyse fundamental problems in the various fields of the Authority. 12–14 full-time equivalents are currently set aside for projects. This approach to the cases has led to a more efficient utilisation of resources, as the project results provide the Authority with a better basis for its day-to-day case work. The project results are published in separate reports or in the annual Competition Report.

32. In 2004, 7 projects were concluded:

- Competition Report 2004
- Annual Report 2003
- Telecompetition - Towards a single Nordic market for telecommunication services?
- Competition policy strategy
- Report from the ECA working group concerning air transport
- Real estate agents
- The merger between Elsam and NESAs

33. The Competition Report, which is published annually, describes relevant competition/political problems illustrated by both Danish and international examples. Subjects selected are those of significance to the quality and understanding of the work of the Competition Authority, plus theoretical and practical circles of problems for the framework conditions of trade and industry. The first Competition Report was published in December 1997. The Competition Report 2004 is the seventh report published.