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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN DENMARK

-- 2009 --

This report is submitted by Denmark to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16-17 June 2010.

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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. In April 2010 the Danish Parliament adopted an amendment of the Competition Act, which has the primary aim of strengthening merger control in Denmark. The amendment enters into force as of 1st October 2010 and the new rules on merger control include:

- Lower turnover thresholds for merger notifications: the upper threshold is lowered from DKK 3.8 billion to DKK 900 million (from € 509.4 million to € 120.6 million), and the lower threshold from DKK 300 million to DKK 100 million (from € 40.2 million to € 13.4 million).
- A simplified procedure for notifying and handling unproblematic mergers.
- Extended time limits for the Danish Competition Authority (DCA) handling of problematic mergers.

2. The amendment on merger control is in accordance with recommendations of a government appointed merger committee. The committee presented a report in December 2008.

3. In addition, the amendment implies a number of other initiatives which serve the purpose of strengthening enforcement of the competition rules.

- The *de minimis* limits for market and customer-sharing agreements and agreements on limiting production are removed, making these types of agreements per se prohibited
- The Consumer Ombudsman is empowered to act as representative in group actions concerning compensation for harm caused by infringements of competition law, improving possibilities of consumers and small businesses to effectively bring actions for damages in these cases.
- Furthermore, in order to finalise a long lasting liberalisation of the Danish book market, an existing interim provision in the competition act regarding fixed resale prices on 10 percent of all book titles is abolished as of 1st January 2011.

1.2 Other relevant measures, including new guidelines

1.2.1 New government committee

4. The government has recently set up a committee with a mandate to assess:

- whether there is a need to strengthen the DCA's information and guidance about the competition rules in order to ensure compliance and prevent breaches of the Competition Act,
- whether the different administrative procedures in competition cases can be organised more effectively and with the least inconvenience possible for the involved undertakings, and
- whether the possibility of custodial sanctions in cartel cases will strengthen the enforcement of the Competition Act

5. The committee will submit a report including its recommendations no later than by the end of April 2011.

1.2.2 Prioritising cartel enforcement

6. The economic consequences of competition law infringements are often widespread, because both consumers and other undertakings are affected. Especially cartels have a very deleterious effect on the economy because of the fact that they restrain development of new products and working processes. Therefore, a main task for the competition authorities is to fight cartels.

7. During recent years, the DCA has given the work of revealing and intervening cartels and other serious infringements of the Competition Act high priority. The DCA established in 2008 a new unit called "Cartels and Public Law Unit", which – among others – is responsible for cartel investigation, leniency and co-operation with the Public Prosecutor for Serious Economic Crime, including methods development in the cartel area. The unit is also responsible for the co-operation between the DCA and competition authorities in other countries in cartel cases.

8. Cartels and Public Law Unit matches the organisational frame of The Public Prosecutors office and the Special Police force by having assigned both lawyers and former members of the police to investigate cartel cases. Matching the different occupational groups across the DCA and the Public Prosecutor minimises any possible cultural diversity between the occupational groups.

9. Recently, the Cartels and Public Law Unit has made a new investigation strategy, which focuses on the need of increasing the contact and co-operation with important agents on the markets in order to strengthen the DCA's information level about possible cartels. The investigation strategy also includes a new forensic IT strategy.

10. In Denmark, sanctions for infringement of the Competition Act are imposed by the court acting upon a charge brought by the Public Prosecutor for Serious Economic Crime. The DCA can impose neither administrative fines nor any other penal sanction.

11. The Director General of the DCA decides whether a case is suitable for being handed over to the Public Prosecutor for criminal enforcement. If the Public Prosecutor finds sufficient evidence against an undertaking (and possibly an individual) to prove gross negligence or intent to infringe one of the provisions in the Competition Act, the Public Prosecutor can bring charges and present a criminal case before the courts.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

12. On behalf of the Danish Competition Council, the DCA carries out the preliminary investigations in different competition cases, e.g., through dawn raids, interviews and requests for information. On the basis of the investigations, the DCA can decide either: a) to dismiss the case, b) in minor cases decide the case, c) in major cases to present the case to the Danish Competition Council, or d) to hand over the case to the Public Prosecutor for Serious Economic Crime, who decides if there is enough evidence to bring the case before the courts in order to get a fine.

13. The Danish Competition Council has the power to: a) note an infringement, b) make an order to bring the infringement to an end, or c) make a commitment decision. The Danish Competition Council has no power to impose fines. The Director General of the DCA may – after a decision by the Danish Competition Council – decide to hand over the case to the Public Prosecutor for criminal enforcement.

14. Decisions made by the Danish Competition Council are administrative sanctions, while fines imposed by courts on behalf of the Public Prosecutor are criminal sanctions.

2.1.1 *Summary of activities of competition authorities and courts*

15. The DCA made 137 decisions in 2009. The Competition Council decided 10 cases in 2009, of these one case concerned abuse of dominance, five concerned illegal agreements, one decision concerned public aid, two mergers were approved without remedies and one notified agreement were approved.

16. Six out of 10 decisions by the Competition Council were assessed to have a direct effect on the market. Decisions by the Competition Council are assessed to have a direct effect on the relevant market if the Competition Council make an order to bring the infringement to an end, approves remedies or prohibit mergers.

Table 1. Decisions by the Competition Council and Courts

	Overall	With direct effect
Competition Council decisions	10	6
Abuse of dominance	1	1
Illegal agreements	5	5
Public aid	1	0
Mergers	2	0
Approval of notified agreements	1	0
Cases handed over to the Public Prosecutor for Serious Economic Crime	5	-
Courts decisions on fines	2	-
Abuse of dominance	0	-
Illegal agreements	2	-

Note: Decisions by the Competition Council are assessed to have a direct effect on the relevant market if the Competition Council make an order to bring the infringement to an end, approves remedies or prohibit mergers.

17. In 2009, Danish courts imposed fines in 2 cases both of these concerned illegal agreements. Both decisions have been appealed to the Supreme Court.

2.1.2 *Description of significant cases, including those with international implications.*

- **“International Transport Danmark”, exchange of information**

On 25 February 2009, the Danish Competition Council decided on a case concerning exchange of information by an association of undertakings which had as object to restrict competition.

The case regards the Danish Freight Transport Association, International Transport Danmark (ITD), which had created and published a cost calculating program for freight transport by road pre-fulfilled with all relevant expenses, a cost forecast for freight transport by road, a specific rate for waiting hours and has continuously recommended the transportation companies pass on specific oil-related costs to the members' customers.

The Danish Competition Council decided that the exchange of information by ITD had as its object to restrict competition by co-ordinating the conduct of the members and thereby unifying member's prices. In continuation hereof, the Danish Competition Council found that the information provided by ITD to its members conflicts with section 6 of the Danish Competition Act and Article 81 in the EC-Treaty.

The decision has been confirmed in four out of five conditions by the Competition Appeal Tribunal. The case has been handed over to the Public Prosecutor for Serious Economic Crime.

- **Post Danmark, conditional rebate scheme**

On 24 June 2009 the Danish Competition Council decided on a case concerning conditional rebates granted on a specific product called direct mail by the Danish national postal service Post Danmark. The conditional rebate scale was general and standardised with equal thresholds and criteria for all costumers. The scale ranged from 0 to 16 pct.

The Danish Competition Council found that Post Danmark had a dominant position in the market for direct mail with market shares above 90 percent. Further Post Danmark was an unavoidable trading partner due to exclusive rights on certain products and the fact that Post Danmark was the only distributor with at distribution covering the entire geographical area. Thus on the relevant market, competitors to Post Danmark could not supply costumers' full purchase.

The Competition Council found that the likelihood of anticompetitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer.

The Competition Council found, that Post Danmark had abused its dominant position in that the conditional, rebate scheme for direct mail that was loyalty binding and had the potential of foreclosing the market - and thereby infringe section 11 of the Danish Competition Act and Article 102 of the EC Treaty.

The decision of the Danish Competition Council is appealed by Post Danmark to the Danish Competition Appeal Tribunal.

- **Viasat's business terms regarding the distribution of TV 3 and TV 3+**

On 30 September 2009, the Danish Competition Council decided on a case concerning a commercial TV channels business terms regarding the location of TV channels into different program packages.

The case regards the Danish subsidiary of the international broadcaster Modern Times Group Viasat A/S's (Viasat) business terms. Viasat's business terms stipulated that the commercial TV-channels TV 3 and TV 3+ had to be placed in the cable networks most advantageous program package.

The Danish Competition Council reached the conclusion that Viasat's business terms had an anticompetitive objective as well as anticompetitive effects - and thereby infringed section 6 of the Danish Competition Act and Article 81 of the EC Treaty.

The decision of the Danish Competition Council is appealed by Viasat to the Danish Competition Appeal Tribunal.

- **Danish Passenger Transport Operators, exchange of information**

On September 3 2009 the Eastern High Court decided on a case concerning exchange of information.

The case regards Danish Passenger Transport Operators, which in its member magazine had encouraged members to raise customer prices with an oil surcharge of 4 percent.

Danish Passenger Transport Operators was fined DKK 400.000, and the director was fined DKK 15.000. The decision is appealed to the Supreme Court.

- **Danish Christmas tree Growers Association, exchange of information**

On September 24 2009 the Eastern High Court decided on a case concerning exchange of information.

The case regards Danish Christmas tree Growers Association, which had published a calculation guide, held meetings with regard to prices and guided its members on how prices were to look in the future.

Danish Christmas tree Growers Association was fined DKK 400.000, and the director was fined DKK 15.000. The decision is appealed to the Supreme Court.

2.2 Mergers and acquisitions

2.2.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws;

18. The DCA received 11 merger notifications in 2009. All were approved without remedies. Two of the notifications were decided by the Danish Competition Council as the initial investigations raised some concerns.

2.2.2 Summary of significant cases.

19. During 2009 the DCA received a number of merger notifications from firms situated in the financial sector. All mergers were approved without remedies.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

20. The Danish Competition Authority participates in various committees to represent views on competition issues, see section 3.1 for a list of current committees, and all new legislation is sent to the DCA for comments before the legislation is introduced before the parliament. Furthermore, the DCA advises other ministries on the application of the EC state aid regulations and screens the government's legislative programme for possible competition distortion and state aid, see below.

3.1 Annual screening for state aid and competition distortions in the legislative programme

21. In an effort to identify competition distortions inherent in new legislation at an early stage, the DCA performs a screening of the government's entire legislative programme for the coming parliamentary year. The authority or agency responsible for the individual bills of proposal supplies the Competition Authority with a brief description of the bills and conducts an initial evaluation of the bills possible risk of distorting competition, including whether or not the bills constitute state aid in the meaning of article 107 (1) of the Treaty on the functioning of the European Union.

22. The Competition Authority conducts its own evaluation of the bills' possible distortive effects on competition. The bills are divided into three sections:

1. bills that **do not** contain competition distortions or limitations including state aid
2. bills that **may** contain competition distortions or limitations including state aid
3. bills that **do** most likely contain competition distortions or limitations including state aid

23. If a bill falls into category 2 or 3 the authority or agency responsible for the bills of proposal is supplied with the Competition Authority's description of the distortive parts of the proposal in order to make the necessary adjustments. The authority or agency will typically discuss the bill with the DCA, and the DCA will be asked for its opinion on the bill before submission before the parliament. In the case of state aid, the responsible authority is also informed of the obligation to notify the state aid to the European Commission before the aid is awarded.

24. The responsible authority or agency has the option of submitting the proposal to the State Aid Committee. The committee comprises the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Finance and is chaired by the Ministry of Business and Economic Affairs and is appointed with the aim of advising the central government on the competition rules concerning state aid.

25. Furthermore, the DCA regularly contributes to inter-departmental working parties and other forums charged with analysing existing policy and making recommendations on new policy. In 2009 the DCA took part in work on policy in for instance the following areas: Waste management, Airports and the above mentioned committee that among other things has a mandate to assess whether custodial sanctions in cartel cases will strengthen the enforcement of the Competition Act.

4. Resources of competition authorities

26. In 2009 the DCA used DKK 60.4 million on competition enforcement (€ 8.1 million). In 2008 the DCA used DKK 58 million (€ 7.8 million).

4.1.2 Number of employees (person-years):

27. In 2009 68 employees were occupied with enforcing competition law in the DCA. In 2008 the number was 62. The increase in employees is partly a consequence of an increased focus on revealing cartels and other serious infringements of the Competition Act.

Table 2. Employees occupied with competition law in 2008 and 2009

	2008	2009
Total	62	68
Economists	23	23
Lawyers	26	29
Other professionals	8	11
Support staff	5	5
Applied to:		
Enforcement against anticompetitive practices		29
Merger review and enforcement		15
Advocacy efforts		19

5. Summaries of or references to new reports and studies on competition policy issues

5.1 Real estate agents

28. In 2009, the DCA published an investigation regarding the services and prices offered by real estate agents in 2007. The investigation was a follow-up on a previous investigation from 2002 published in 2004.

29. In the former investigation in 2004, the DCA concluded that competition on the market for real estate agent services was weak. There was little variation in concepts and price systems. Almost all real estate agents calculated the price of their service as a percentage of the achieved price of the real estate. From 1995 to 2002 the price of real estate services increased by 50-100 percent. It was the opinion of the DCA that weak competition in part was caused by the regulation of real estate agents. The DCA therefore recommended revisions in the regulation, which was adopted in 2005 and 2006. The revisions included a liberalisation of ownership, fewer mandatory services and more transparency for the consumer.

30. In the latest investigation in 2009, it is concluded that competition in the market for real estate agent services has improved. The previous increase in prices for real estate services has stopped, although there has been a very significant increase in prices for real estate from 2002 to 2007. It is also found, that a larger part of real estate agents now supply special concepts with lower prices and supply normal concepts with a fixed price not depending on the price of the real estate. Still, the majority of real estate agents only supply traditional concepts, but it is often possible for the consumer to negotiate rebates

5.2 Competition – growth and prosperity

31. *Competition – growth and prosperity* was the first publication in a new series of separate analysis to be published by the DCA on an ad hoc basis. The report summarises the current research on how competition works and the effects of competition on companies, consumers, and overall welfare.

32. The main effects of competition that are highlighted in the report are:

- Competition encourages firms to use internal resources more efficiently and encourages the management to increase performance thereby increasing static efficiency in firms.
- Competition ensures dynamic efficiency in that new efficient firms enter the market, while inefficient firms exit the market. This increases the competitive pressure on incumbents and encourages them to increase productivity. In Denmark, for example, around one in ten firms either enters or exits the market each year.
- Competition encourages firms to innovate. Firms innovate to diversify themselves from competitors and to increase profits or to improve the production process. This put a competitive pressure on the competing firms and leads to even more innovation. In Denmark a product or a process innovation was introduced in 37 percent of the firms during 2004-2006.

5.3 Competition report 2009

33. Every year, in its *Competition Report*, the DCA seeks to measure the competitive situation in Denmark. The 2009 Competition Report dealt with: The Competitive Situation in Denmark, Competition for Public Assignments, Competition in the Market for Car Repairs and Car Service.

5.3.1 The competitive situation in Denmark

34. The chapter seeks to measure the intensity of competition in the private sector in Denmark compared with other European Countries. It is difficult to measure competition by an overall indicator, however. Therefore, the DCA uses a series of different indicators that gives an overall picture of the competitive situation in Denmark and comparable countries.

35. Overall, the analyses indicate that competition in Denmark has improved slightly from 2000 to 2006. However in 2007 Danish prices were approximately 7 per cent higher than the EU9 average, adjusted for indirect taxes and real per capita income. The high Danish prices may partly relate to the fact that competition in Denmark is not as intensive as in the other EU9 countries.

5.3.2 *Competition for public assignments*

36. The Chapter seeks to measure the degree of competition for public assignments, both assignments within the state and the municipalities.

37. The chapter concludes that in recent years, competition for public assignments has increased. Today, the public sector is exposing more assignments to competition than before. In 2008, the municipalities' assignments being exposed to competition rose by 1.1 percentage point to 24.8 per cent, according to calculations by the Danish Ministry of Finance.

38. The report finds that political will and backing are crucial factors for an increased scope of assignments being exposed to competition as the majority of the municipalities do not experience internal, market-related or information-related barriers.

39. Enhanced competition for public assignments is also reflected in the citizens' growing use of the option of free choice of supplier. This applies especially to home care where, the share of users of private suppliers rose from approximately 10 per cent to 28 percent during the past 4 years.

40. As a whole, the analyses show a significant saving potential if the municipalities increase the number of assignments being exposed to competition.

5.3.3 *Competition in the market for car repairs and car service*

41. In the chapter the competitive situation in the market for Car Repairs and Car Service is evaluated. In the survey cost of Car Repairs and Car service in Denmark and comparable countries are analyzed, and the prices of independent repairers are compared to the prices of authorised repairers.

42. The chapter concludes that it is more expensive to maintain a car in Denmark than in comparable countries. Repair costs are approximately 20 per cent higher, service is approximately 50 per cent higher for selected car models in Denmark compared to Sweden and Germany and prices on spare parts are 10 to 25 per cent higher.

43. On an average, consumers save 20 to 30 per cent on service and typical repairs by using independent repairers compared to an authorised repairer.

44. The high Danish prices and great price differences indicate that competition is inefficient. One of the reasons appears to be the structures in the industry. This relates to the fact that the importers determine who can become authorised dealers and set the criteria for what it takes to become an authorised repairer.

45. The consumers only exert little pressure on prices. It may be, *inter alia*, because many customers wrongly believe that the car guarantee only applies when using an authorised repairer

46. The DCA puts forward two options to improve competition. Firstly, the DCA suggests that for instance technical information regarding the car follows on a CD or DVD when purchasing the car. The Authority has proposed to the Commission that it works to achieve this. Secondly, the Authority suggests, that the repair shops, when offering repair services, inform the customers of the price on spare parts and work hours separately. This will help the consumers figure out how prices are determined, including whether the authorised repairers charge higher prices on spare parts.

5.4 *Investigation of milk, butter & bread price development from august 2007 till March 2009*

47. In autumn of 2007, world commodity prices increased substantially. Food prices in Denmark rose more than world prices. That raised concerns about the intensity of competition in the Danish dairy sector. In October 2008, the DCA published an analysis of the prices on selected food products from August 2007 to February 2008. The conclusion was that the boom in world commodity prices in the autumn of 2007 could not explain the increase in consumer prices. The manufacturers and the supermarkets had increased their prices additionally on top of the increase in commodity prices.

48. In the spring of 2009, the Danish commodity prices for milling grain and milk were back at roughly level before the boom in commodity prices in late 2007. In spite of that, consumer prices on bread, milk and butter in March 2009 were still well above the price level of the summer of 2007. The consumer prices on bread, milk and butter also increased significantly more than the overall Consumer Price Index (HICP).

49. The Competition Authority initiated a second investigation with the purpose to explain this. The investigation looked into which level in the food supply chain that contributed mostly to the higher consumer prices in the period August 2007 – March 2009.

50. The main conclusions were the following:

Concerning milk and butter:

- The dairies are responsible for most of the price increases. For butter products and daily fresh milk, the dairies are responsible for 85 per cent of the price increases. The dairies have also contributed significantly to the price increase on private label milk, but their price increase levelled out as the supermarkets reduced their profit.
- The supermarkets have increased their profit on daily fresh milk, organic milk and butter blends.
- The consumers have reacted to the higher consumer prices by buying cheaper private label milk in favour of daily fresh milk.

Concerning bread:

- In particular, mills and supermarkets have contributed to the price increases. Supermarkets are responsible for approximately half of the price increase on wheat bread and rye bread. The mills are responsible for nearly half of the price increase on rye bread and a quarter of the price increase on wheat bread.
- The supermarkets have increased their gross margin during the period.

5.5 *Competition in the market for office software*

51. The DCA conducted a study into the competition in the market for office software, i.e. word processing, spreadsheet and presentations. The study formed part of the basis of the Government's resolution of February 2 2010 whether ODF, OOXML, or both standards in the future must be obligatory standards by public purchases of office software.

52. The DCA recommended carrying out the resolution that public purchases must be based upon both the present open standards so that solutions may support either OOXML or ODF as well as accept text documents in both formats. There were several different reasons for this recommendation.

53. Firstly, the DCA found that the market for office software is an international market where the Danish decision only had a direct impact on a very modest share of sales. Secondly, the standards are new and immature, and the direction taken by the market is uncertain. If the standard chosen does not become market standard, there will be a risk of significant unsuccessful investments. Thirdly, choosing OOXML will exclude all suppliers other than Microsoft. If ODF is chosen, competition will take place between exactly the same office suites as in a situation where both standards are chosen. Moreover, choosing ODF does not ensure the necessary interoperability, according to an evaluation made by a Danish consulting firm.

5.6 *Joint report by the Nordic competition authorities: “Competition Policy and Financial Crises – Lessons Learned and the Way Forward.”*

54. On 10 September 2009, the Nordic Competition Authorities published their joint report “Competition Policy and Financial Crisis – Lessons Learned and the Way Forward.”

55. The report reviewed, among other things, how the crisis had affected the economies of the Nordic countries and how competition policy had been challenged so far during the crisis in the Nordic countries. In this context, the Icelandic experience was particularly relevant and important. The report also took a historical perspective on previous crisis, and briefly reviewed the lessons learned from a competition point of view.

56. The report concluded with a number of recommendations. First of all, the report emphasised the importance of continued, vigorous competition enforcement and to stand firm on competition policy also in times of global economic crisis. Further the report concluded that measures implemented to deal with the crisis must not distort or weaken competition; for instance by reducing the companies’ ability or incentives to compete, or by raising barriers to entry. Conclusions were, among others, drawn from past experience that show that measures imposed often are irreversible in nature (e.g. forced mergers) or tend to become permanent. Thus, temporary measures and government involvement must be truly temporary and include a clear exit strategy.