

Unclassified

DAF/COMP/AR(2011)3



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

05-May-2011

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2011)3
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN DENMARK

-- 2010 --

This report is submitted by Denmark to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 29-30 June 2011.

JT03301223

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English - Or. English

TABLE OF CONTENTS

1.	Changes to competition laws and policies, proposed or adopted	3
1.1	Summary of new legal provisions of competition law and related legislation	3
1.2	Other relevant measures, including new guidelines.....	3
2.	Enforcement of competition laws and policies.....	4
2.1	Action against anticompetitive practices, including agreements and abuses of dominant positions	4
2.2	Mergers and acquisitions	7
3.	The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies	7
3.1	Merger between the Danish Competition Authority and the Danish Consumer Agency	7
3.2	Annual screening for state aid and competition distortions in the legislative programme	8
4.	Resources of competition authorities	8
4.1	Number of employees (person-years): [afventer tal fra LS. Mail er sendt]	9
5.	Summaries of or references to new reports and studies on competition policy issues.....	9
5.1	Competition Culture.....	9
5.2	Regulation in the Pharmaceutical sector	10
5.3	Competition report 2010	10
5.4	The Governments Growth Forum	11
5.5	Payment card market.....	12

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 October 2010 the Danish Competition Act was amended, with the primary aim of strengthening merger control in Denmark. 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 and Consumer Authority (DCCA) 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:

- 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 finalize the liberalisation of the Danish book market starting in 2001, an existing interim provision in the competition act regarding that it was allowed for publishers to uphold resale price maintenance on a maximum of 10 percent of the publisher's book titles was abolished as of 1st January 2011.

1.2 *Other relevant measures, including new guidelines*

4. In 2009 the government has set up a committee with a mandate to assess:

- whether there is a need to strengthen the DCCA'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 organized 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 by the end of 2011.

2. Enforcement of competition laws and policies

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

6. On behalf of the Danish Competition Council (DCC), the DCCA 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 DCCA 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 DCC, 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.

7. The DCC 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 DCC has no power to impose fines. The Director General of the DCCA may decide to hand over the case to the Public Prosecutor for criminal enforcement.

8. Decisions made by the DCC 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

9. The DCC decided 11 cases in 2010, of these 3 cases concerned abuse of dominance, 4 concerned illegal agreements, 1 decision concerned public aid, 2 decisions concerned mergers and 1 notified agreement were approved. The DCCA made 170 decisions in 2010. A large number of the cases represents rejections to go further with the case in accordance with § 17 in the Danish Competition Act.

10. 9 out of 11 decisions by the DCC were assessed to have a direct effect on the market. Decisions by the DCC are assessed to have a direct effect on the relevant market if the DCC make an order to bring the infringement to an end, approves remedies or prohibit mergers.

Table 1. Decisions by the Competition Council and Courts, 2010

	Overall	With direct effect
Competition Council decisions	11	9
Abuse of dominance	3	2
Illegal agreements	4	3
Public aid	1	1
Mergers	2	2
Approval of notified agreements	1	1
	Number of cases	
Cases handed over to the Public Prosecutor for Serious Economic Crime		5
Courts decisions on fines		1
Abuse of dominance		0
Illegal agreements		1
Fine settlements with the Public Prosecutor for Serious Economic Crime		2
Abuse of dominance		0
Illegal agreements		2

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

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

- Witt hvidevarer, Resale price maintenance and restrictions on parallel trade

On 24 November 2010 the Danish Competition Council decided on a case concerning that Witt – a company selling and importing among others household appliances, vacuum cleaners and other small electric appliances – had entered into agreements with Danish retailers on resale price maintenance and into agreements and concerted practices on restricting parallel trade of vacuum cleaning robots.

Evidence from a dawn raid showed that Witt had monitored retail prices for their vacuum cleaners and contemplated initiatives to ensure an appropriate retail price level. This included initiatives to avoid retailers reselling the products to other retailers. In some cases Witt contacted the retailers and expressed dissatisfaction with their prices. Documents from the dawn raid revealed a number of cases where this contact resulted in agreements on maintaining a specific retail price level. In a few cases Witt sanctioned retailers' with deviating price behavior. The sanctions included among others reductions in general rebates.

Furthermore, Witt entered into a standard distribution agreement with iRobot Corporation which was adapted to the Scandinavian markets. Witt was appointed as an exclusive distributor for the resale of iRobot-products to Denmark, Norway, Sweden and Finland ("the Territory"). The agreement contained provisions that prohibited distributors from active as well as passive selling to customers and purchasers outside their Territory, and thereby infringing TEUF art. 101(1) and the corresponding section 6 in the Danish competition Act.

Moreover, documents from the dawn raid revealed a mail correspondence between Witt, iRobot, iRobot-distributors from other countries and Danish retailers on concerted practices on how to stop low-price parallel import into Denmark. The correspondence comprise cooperation on buying of samples of products, tracking down serial numbers in order to identify the source of supply and contacting the parallel trader and his suppliers in order to put pressure on them to stop the parallel trade.

Hence, the DCC reached the conclusion that Witt's agreements with Danish retailers on retail price maintenance, the distribution agreement with iRobot Corporation and Witt's concerted practices on hindrance of parallel imports restricted competition by object and infringed Article 101(1) TFEU and the corresponding section 6 in the Danish Competition Act.

- Post Danmark, conditional rebate scheme

On 22 December 2010 the DCC decided that the Danish incumbent postal carrier Post Danmark A/S ("Post Danmark") had abused its dominant position in the national market for magazine mail, thus infringing Section 11 in the Danish Competition Act and Article 102 TFEU. The abuse consisted in: 1) the grant of individual target rebates to four large magazine mail customers; and 2) minimum thresholds per magazine title per posting in order to qualify as magazine mail.

Individual target rebates

During the period 2007-2009 the Danish main postal provider, Post Danmark, provided substantial individual target rebates between 0-40 pct. conditional on that the customer used Post Danmark as distributor on all or most of the customer's magazine mail quantities. The rebates were given to four large and strategically important magazine mail customers. Post Danmark's turnover from the four magazine mail customers amounted to 45-65 pct. of Post Danmark's total turnover from distribution of magazine mail.

Post Danmark is the sole distributor with a nation-wide distribution of addressed magazine mail, meaning that the customers must use Post Danmark's services for at least part of its magazine mail. Because of this, the four customers that received individual target rebates risked losing a significant rebate if they let a competitor distribute parts of their magazine mail quantities. A competitor to Post Danmark should therefore offer the customer a significant lower net price to compensate the customer for the loss of rebate on the quantities which had to remain with Post Danmark.

Post Danmark was not been able to give an objective economic reason for the individual target rebates. Post Danmark submitted a "meeting the competition defense" (MCD). However, the Danish Competition Council found that individual target rebates, cannot be defended by referring to MCD, since a purchasing target corresponding to all or most of the relevant customers' magazine mail quantities is not necessary to meet price competition.

Minimum thresholds

In order to be categorized as a magazine mail product/a specific magazine mail product each magazine title had to meet a minimum threshold: Number of magazines per title per posting. This first step in Post Danmark's general pricelists for magazine mail was cumulative (retroactive).

The minimum thresholds in Post Danmark's general pricelists entail that a customer had strong incentives to select Post Danmark and subsequently deselect the competitors for the distribution of a magazine title, if the magazine title was close to a minimum threshold. At the same time the minimum thresholds were constructed in a way that a significant part of the customers' magazine mail quantities could not be moved to a competitor to Post Danmark without the risk of not meeting a threshold. In order to be able to win parts of a magazine mail customer's quantities, a competitor to Post Danmark had to offer the customer a significant lower price than Post Danmark offered the customer, inclusive the quantity rebate, hereby compensating the customer for the loss of rebate which the shift caused on the quantities remaining at Post Danmark.

Post Danmark was not able to give an objective economic reason for the minimum thresholds.

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

- Energy E2, excessive pricing

On 22 December 2010 the DCC decided that the Danish electricity production company Energy E2 A/S (hereinafter E2) did not infringe Competition law by abuse of dominance by imposing excessive prices on the wholesale market for electricity in Eastern Denmark in the period from 1 July 2003 to 31 December 2005.

The case against E2 was initiated in response to a complaint from costumers. In the case markets that are characterized by structural problems resulting in limited competition e.g. high barriers for entry – as is the case for the Danish wholesale market for electricity – there is a special need for investigating the behaviour of the dominant player (E2).

The E2-case is in many ways similar to the Elsam-cases (handled by the Danish Competition Authority in 2005 and 2007) concerning the Western Danish wholesale market for electricity. In these cases the Danish Competition Council decided (which was confirmed by the Tribunal Court) that Elsam had infringed competition law by imposing excessive prices on the wholesale

market in western Denmark in the period from 1 July 2003 to 1 July 2006. Elsam has appealed the decision and the case is now pending at the Maritime and Commercial Court.

The Danish Competition and Consumer Authority applied the same economic framework as in the Elsam-cases (herein after: the Elsam-abuse-test) following the United Brands test.¹ Yet in the E2-case – opposite that of the Elsam-cases – the Elsam-abuse-test came out inconclusive. Hence on the one hand side the test showed that E2 did not obtain a high overall yield rate. Yet, on the other hand, the test identified a number of hours in which E2 obtained extreme profit-rates which could potentially indicate that E2 – in some hours manipulated the prices upward.

In light of this a supplementary analysis of the bid curves of E2 was carried out in order to identify the strategic behaviour of E2 in hours with extreme profit-rates.

The bid-curve-analysis compares – hour by hour – E2's production costs to the company's actual bid-curve. The analysis found that E2 did in fact cause very high prices in 67-84 hours during the period 1 July 2003 through 31 December 2005, yet in most of the identified hours E2s was able to present objective and documented cost-related reasons for the behaviour.

The overall assessment of abuse relied on a general assessment taking all relevant factors into account. In this light the Danish Competition Council concluded that E2 did not abuse its dominant position by operating a price strategy on Nord Pool that resulted in excessive pricing during the period 1 July 2003 till 31 December 2005.

2.2 Mergers and acquisitions

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

11. The DCCA received 9 merger notifications in 2010. 4 of the notifications were notified under the new merger regime, while 5 were notified under the old merger regime.

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

3.1 Merger between the Danish Competition Authority and the Danish Consumer Agency

12. On August 19, 2010 the Danish Competition Authority and the Danish Consumer Agency merged into the Danish Competition and Consumer Authority.

13. The overall objective of the merger is to take advantage of the synergies between the two areas of competition and consumer policy.

14. The purpose of the competition and consumer laws is closely connected, and both competition policy and consumer policy seek to improve consumer welfare, broadly defined. The intensity of competition in a market depends on active and informed consumers, and both competition policy and consumer policy may improve the conditions for well functioning markets.

15. With the new integrated authority it is possible to take both consumer and competition perspectives into account in advocacy work and when the Authority recommends changes to e.g. regulation.

¹ 27/76 R, United brands v Commission, 05.04.1976

16. Further the merger is expected to improve the quality of the DCCA's market surveillance and market studies, by integrating different working methods from the two former authorities. But the merger is also expected to increase our basic understanding of different markets. The merger is also expected to create synergies within the new authority by:

- Improving the possibilities for employees to change jobs within our organization
- Giving significant economies of scale
- Increasing the quality and work of our team of leaders

17. The two authorities have previously been working closely together on several reports. Recent examples of joint work are the publication of a report called "Competition culture" and an analysis of consumer conduct in a number of selected markets.

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

18. In an effort to identify competition distortions inherent in new legislation at an early stage, the DCCA performs a screening of the government's entire legislative program 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 involve state aid in the meaning of article 107 (1) of the Treaty on the functioning of the European Union.

19. 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

20. 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 potentially distortive parts of the proposal in order to make the necessary adjustments. The authority or agency will typically discuss the bill with the DCCA, and the DCCA 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.

21. Furthermore, the DCCA regularly contributes to inter-departmental working parties and other forums charged with analysing existing policy and making recommendations on new policy.

4. Resources of competition authorities

22. In 2010 the DCCA used DKK 67.0 million on competition enforcement (€ 9.0 million). In 2009 the DCCA used DKK 60.4 million (€ 8.1 million). The increase is among others due to the strengthening of merger control in Denmark and the merger between the Danish Competition Authority and the Danish Consumer Agency.

4.1 Number of employees (person-years): [afventer tal fra LS. Mail er sendt]

23. In 2010 74 employees were occupied with enforcing competition law in the DCCA. In 2009 the number was 68. The increase in employees is primarily a consequence of the new merger guidelines.

Table 2. Employees occupied with competition law in 2010

Total	74
Economists	27
Lawyers	28
Other professionals	14
Support staff	5

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

5.1 Competition Culture

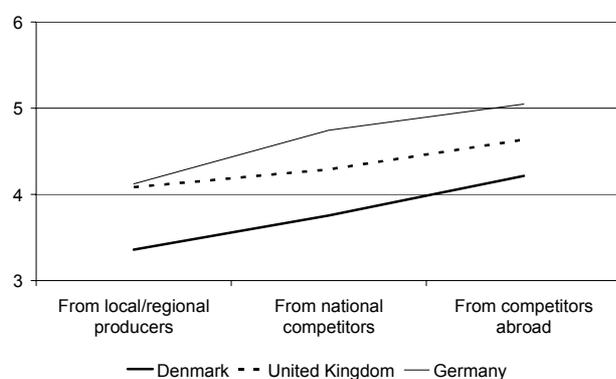
24. In 2010, the DCCA published a first attempt to identify and describe aspects of the *competition culture* in Denmark.

25. The focus of the report and of the supporting analyses was on describing and identifying key aspects of competition cultures in Denmark, Germany and the United Kingdom. The results were based on empirical data from a qualitative survey among more than two thousands firms and several thousands consumers. The report concluded that Danish firms have a potential to increase their competitive focus and thereby strengthen the competition culture relative to firms in Germany and the UK.

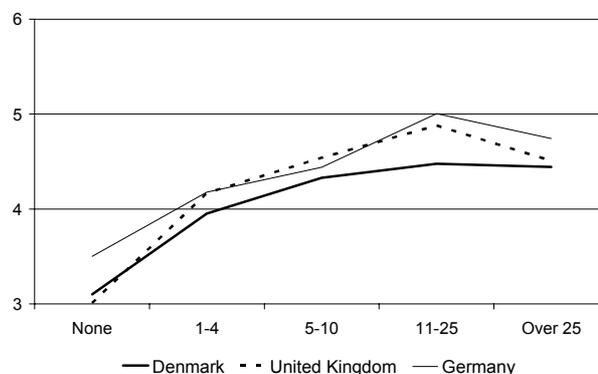
26. The competition culture refers to the behaviour of firms, consumers and the public sector in specific market situations and how their behaviour is affected by factors such as legislation and its enforcement, as well as norms and values.

27. The report identified the competition culture among firms to be characterized by the firms' focus on expansion, rivalry, cooperation, earnings, quality and sustainability. The report found clear signs that firms' competition culture is stronger among firms that operate in a competitive environments. For example, firms' focus on expansion seems to be stronger in firms that operate in markets with international competition than in firms operating in national or local markets, supposedly because the former meets more vigorous competition. Furthermore, firms' focus on rivalry seems to be more intense among firms with a larger number of competitors. These results hold for all three countries.

Expansion Focus and Competitor Localization



Rivalry and Number of Competitors



Source: Danish Competition and Consumer Agency (www.ks.dk)

28. The competition culture of consumers plays an important role for competition. The report identified that consumers may save money by seeking information, negotiating on price and changing supplier. The report found that around 90% of those consumers who negotiate over the purchase achieve a reduction in price or better terms on the purchase.

29. The report is available in English at the homepage of the Danish Competition and Consumer Authority (www.ks.dk).

5.2 Regulation in the Pharmaceutical sector

30. In 2010 the DCCA published a report regarding regulation of pharmacies. The report concludes that the pharmacy sector, like other parts of the health care sector, is subject to a comprehensive public regulation. The pharmacy regulation is designed to protect public safety, quality regarding medicine distribution and to ensure easy access to medicine for citizens nationwide.

31. The main factors of the Danish pharmacy regulation are entry regulation, ownership restrictions, an equalization scheme between the pharmacies and control of the pharmacies' overall profit and retail prices. In the report it is found that the regulation is anti-competitive by restraining the entrance to the market, by excluding price competition and by not providing incentives for the pharmacies to compete on service(s).

32. The lack of competition is reflected in relatively long waiting times for consumers, especially in urban areas. Additionally there is a large dispersion of profits between pharmacies. In 2007 many pharmacies in urban areas generated an annual profit of more than 1.5 million DKK or approximately 200,000 EUR per pharmacy which is considerably higher than the average net profit of about 900,000 DKK or approximately 120,000 EUR. This is mirrored by many inefficient pharmacies with earnings below average in rural areas. In Denmark the number of inhabitants per pharmacy is 16,900, and significantly higher than in comparable European countries. This indicates a suboptimal number of pharmacies in population dense areas.

33. In the report it is assessed that it is possible to deregulate the pharmacy sector and thereby enhance competition and efficiency without compromising quality, safety and accessibility. The main elements of such a deregulation is an elimination of the equalization scheme and a freer entry to the market, obtained e.g. by repealing the ownership restrictions and the requirement that the manager must be a qualified pharmacist.

34. It is further concluded in the report that the complexity of the pharmacy regulation requires a careful assessment of the consequences of adjusting the regulation. The assessment must take into account both competition and considerations on health-policy and effects on public expenditures.

35. Therefore, the report recommends further investigations with a view to deregulate the pharmacy sector in order to create social benefits by incentives to enhance competition between pharmacies especially by cessation of the equalization scheme and a freer access to the market.

5.3 Competition report 2010

36. Every year, in its *Competition Report*, the DCCA measures the competitive situation in Denmark. The 2010 Competition Report dealt with: the competitive situation in Denmark, competition for public assignments and the market for books.

5.3.1 *The Competitive Situation in Denmark*

37. 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 DCCA uses a series of different indicators that gives an overall picture of the competitive situation in Denmark and comparable countries.

38. Overall, the analyses indicate that competition in Denmark has improved slightly from 2000 to 2007. The improvements are largest in the sectors where the initial problems are the highest.

39. However relative prices in Denmark are still high. In 2008 Danish prices were approximately 9 per cent higher than the EU7 average, adjusted for indirect taxes and real per capita income. It is especially service prices that are relatively high in Denmark. The higher Danish prices may partly relate to the fact that competition in Denmark is not as intensive as in the other EU7 countries.

5.3.2 *Competition for Public Assignments*

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

41. The chapter concludes that in recent years, competition for public assignments has increased somewhat. Today, the public sector is exposing more assignments to competition than before. In 2009 the municipalities' exposed 24.8 per cent of their assignments to competition according to calculations by the Danish Ministry of Finance.

42. There is a lot of variation in how much the municipalities expose their assignments to competition. In 2008 leading municipalities exposed 35 per cent of their assignments to competition while in other municipalities the number was less than 20 per cent.

5.3.3 *The market for books*

43. In the chapter the competitive situation in the market for books is evaluated. It is concluded that the Danish book market during the last decade has gone through radical changes. Booksellers have lost their exclusive right to sell books, and prices are no longer regulated.

44. In the chapter it is concluded, that book sales has increased slightly during the period. This increase may be due to new market concepts and sales channels, with internet book sellers and supermarkets as the most important new players.

45. Further consumer surveys indicate that there has been an increase of 4 per cent in the total number of people buying books. This new group of book shoppers has an income and educational level below average.

46. Finally, consumer surveys indicate that consumers perceive that book prices have fallen. It is perceived by 51 per cent of the consumers that the prices of bestsellers have fallen, and by 40 per cent that book prices in general has fallen. A robust official book price index does not exist.

5.4 *The Governments Growth Forum*

47. In late 2009 the Government established a discussion forum called the *Growth Forum*. The Growth Forum was established to advice the Government on how to improve economic growth in Denmark, as especially productivity growth has been very sluggish over the past decade. Growth Forum

was composed of leading business executives, researchers and others with broad experience in matters of importance to Denmark's growth potential and competitiveness. The Growth Forum completed its work in spring 2011.

48. In November 2010 the Growth Forum met to discuss how competition may increase economic growth and productivity in Denmark. Prior to the meeting in November a discussion paper about the subject was prepared. In the discussion paper a number of initiatives in the service sector and the public sector were listed. The listed initiatives all seek to increase competition and subsequently productivity in the affected sectors. The initiatives in the discussion paper were further described in a separate note that in detail described the background for the initiative and the substance of the different initiatives.

49. In addition to the discussion paper a report prepared by McKinsey & Company, "Creating Economic Growth In Denmark Through Competition" were published.²

50. In the McKinsey report it is concluded that: "Competition is one of the key drivers of productivity. Competition drives productivity through encouraging managers to reduce inefficiencies, by reallocating resources towards the most productive firms, and by exposing firms to new ideas and providing incentives for firms to innovate". Further in the report a number of recommendations aimed at increasing competition and productivity in specific sectors are listed. The recommendations are based on detailed analysis in the following four selected sectors: Construction, retail, business services, regulated advisory and healthcare.

51. In April 2011 the Government and a number of political parties reached an agreement on a "competition package" with a number of initiatives that aims at increasing competition and productivity in the construction sector, the service sector and the public sector. Among others the agreement focuses on increased competition in the construction sector, the taxi industry and pharmacies.

5.5 Payment card market

52. The DCCA regularly monitors the development at the Danish Payment card market, and every second year the DCCA publish a report regarding the Payment card market.

53. In the report it is, among others, concluded that:

- The Danish debit card "dankort" is one of the most popular credit cards in EU, with respect to the number of transactions per inhabitant in the relevant country
- The Danish debit card "dankort" is one of the cheapest in EU
- The presence of international debit cards have increased from 2004 to 2011
- The number of business that accept debit cards are increasing
- The use of chips on "dankort" has removed problems with fake "dankort".

² The report from McKinsey & Company is available in English at the home of the Prime Minister's Office, http://www.stm.dk/a_2968.html.