

## COMPETITION LAW

In all material aspects, Danish competition law is similar to the corresponding EU legislation. The Danish system contains four core subject matters regulated by the Danish Competition Act: (i) prohibition on anti-competitive agreements, (ii) prohibition on the abuse of a dominant position, (iii) merger control regime, and (iv) state aid. However, the Danish regime does operate with its own defined de minimis exemptions in relation to both anti-competitive agreements and merger control.

### **What kinds of agreements are prohibited from an anti-competitive perspective?**

It is prohibited to enter into agreements, regardless of the form, which to some notable extent directly or indirectly have as object or effect to prevent, restrict or distort competition. Although the rule is of a restrictive character, it is interpreted very broadly. The Danish Competition Act ("the Act") lists the following as examples of prohibited behaviour, cf. Section 6 of the Act:

- price fixing,
- limiting or controlling production, sales, technical development or investments,
- dividing markets or supply chains,
- applying unequal conditions or service to equivalent transactions,
- attaching sale of one product or service to the sale of an unrelated product or service,
- coordination of competitive behaviour between undertakings through a joint venture, or
- controlling resale prices.

The prohibition applies to both horizontal agreements and vertical agreements but not to agreements between companies of the same corporate group.

### **Are there any exemptions to the prohibition on anti-competitive agreements?**

The prohibition is subject to the following two de minimis requirements, cf. Section 7 of the Act:

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- annual turnover on a world-wide basis of less than DKK 1 billion and a combined market share below 10 per cent of the particular product or service, or
- annual turnover of less than DKK 150 million.

However, these exemptions do not apply to certain “hardcore” measures such as coordination of prices, profits etc. for the sale or resale of products or services (i.e. horizontal “cartels” and re-sale price maintenance), or predeterminations or other coordination of tenders in relation to procurement proceedings. Even though the undertakings in question meet the de minimis requirements, the exemptions do not also apply to any anti-competitive agreements if other undertakings have entered into similar agreements or other behaviour affecting the same relevant market.

In addition to the specific de minimis exemptions above, the prohibition against anti-competitive agreements does not apply to agreements or other behaviour that, cf. Section 8 of the Act:

- contribute to the efficiency of production or distribution of products or services or promote the technical or economic development, including environmental improvements,
- ensure consumers a fair share of the advantages thereby,
- do not inflict restrictions on the undertakings which are unnecessary to achieve these objectives, and
- do not give the undertakings the possibility of barring competition for a significant share of the relevant products or services.

#### **How do you determine whether an undertaking has a dominant position?**

The following guidelines may be used in determining whether dominance exists:

- A market share of 25% or less is rarely considered dominant.
- A market share between 25% and 40% cannot establish a dominant position alone, additional criteria must be involved in the assessment, such as the actual or potential competition or structural or behavioural circumstances in the market.
- A market share above 40% creates a rebuttable presumption of dominance.

- A market share above 50% may itself constitute evidence of a dominant position.

The abuse of a dominant position is prohibited. When determining whether an undertaking has a dominant position, an important criterion is the undertaking's market share of the relevant market, as distinguished by differentiation of products and geography.

Possibly due to the global trend towards concentration, coupled with the fact that Denmark is a relatively small country, we have lately seen an increasing focus from the authorities on cases concerning abuse of a dominant position.

### **When having a dominant position, what measures are considered abusive and thus prohibited?**

The Act mentions the following examples of abuse, cf. Section 11 of the Act:

- enforcement of unfair prices or other unfair business terms,
- restriction of production, distribution or technical development harming consumers,
- use of unequal terms for products or services of equal value against business partners, which are thereby weakened in their ability to compete,
- conditioning agreements on the other contracting party's approval of attachment to a sale of one product or service to the sale of an unrelated product or service.

### **What are the thresholds in the merger control regime?**

Mergers, acquisitions or joint ventures with a permanent function of an independent undertaking must be notified to the Competition Council when the below thresholds are met, cf. Section 12 of the Act:

- the combined aggregate turnover of the participating undertakings in Denmark is a minimum of DKK 900 million and at least two of the participating undertakings separately generate an annual turnover in Denmark of a minimum of DKK 100 million or
- at least one of the participating undertakings generate an annual turnover in Denmark of a minimum of DKK 3.8 billion, and at least one of the other

participating undertakings generate an annual turnover on a worldwide basis of a minimum of DKK 3.8 billion.

**What is the procedure when the participating parties exceed the thresholds?**

Before executing the planned corporate actions, the parties must notify the Competition Council. The notifying parties must await the Competition Council's decision, which must be issued 25 working days from receiving final notification, provided that the Competition Council decides not to conduct more detailed investigations. If more detailed investigations are conducted, the decision must be rendered no later than 90 working days after the final notification.

Uncomplicated transactions may be approved quickly by using a simplified procedure. The procedure may only be used if the Competition Authority finds it evident that the merger can be approved.

**What kind of state aid is illegal?**

The Competition Council may issue decisions that require private undertakings to pay back state aid or make the state aid desist. It is a requirement that the effect of the state aid is given for the advantage of an undertaking, meaning that the aid would not have been given by a private investor acting in accordance with common market economics. Additionally, the following two requirements must also be met, cf. Section 11a of the Act:

- the state aid has the objective or effect to distort competition, and
- it is not lawful according to public regulation.

**Which authorities are competent in competition matters?**

The Competition Council ("Konkurrencerådet") and the Competition Authority ("Konkurrencestyrelsen") are the relevant competent authorities in Denmark.

Decisions from the Competition Council may be appealed to the Competition Appeals Tribunal ("Konkurrenceankenævnet"). A prerequisite for litigating a decision made by the Competition Council in a Danish civil court is that the Competition Appeals Tribunal has reviewed the decision.

**What powers do the competent authorities have?**

The Competition Council may at their own initiative issue orders directing undertakings to end prohibited behaviour, dissolve agreements and so forth.

Also, undertakings may ask the Competition Council for a binding order ("negative

clearance”). Such order ensures that a particular agreement or commercial behaviour is in compliance with the Act.

Any gross negligence or intentional infringement of the Act may be subject to criminal liability and result in significant fines.

A special “whistleblower” exemption applies for undertakings entering into a cartel agreement in violation of the Act, provided that the whistleblower discloses new and not already known information to the authorities. The first violating undertaking in a cartel that contacts the relevant competition authorities, discloses information about the cartel and fulfils certain additional, specific conditions, may avoid penalties or have its fines reduced.

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