
**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE**

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Annual Report on Competition Policy Developments in Denmark

-- 2016 --

21-23 June 2017

This report is submitted by Denmark to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 21-23 June 2017.

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Executive Summary

1. The Danish Competition and Consumer Authority's (DCCA) mission is to make markets well-functioning. In order to fulfil this mission we adopted a new strategy that focuses on strong professionalism and clear effects in the market. In this context the DCCA created a new unit which specialises in mergers, giving companies a single entry point for merger cases. This new unit is responsible for handling major merger cases.
2. Amongst the highlights of 2016 is the fact that the Danish construction bid-rigging cases, one of the largest cartel complexes in Danish history, were closed with record fines that affected 25 companies and 21 individuals. Other significant enforcement action was taken, for instance, to tackle a price coordination agreement among service providers of natural gas boilers, agreements which restricted cinemas ability to grant discounts on cinema tickets and a follow up criminal case regarding boycott among real estate agencies.
3. The number of merger notifications was stable in 2016 while the resources dedicated to merger review increased significantly, inter alia on the back of the planned merger between JP/Politiken and Dagbladet Børsen. This case involved the contemplated merger of two relevant players in the Danish media sector, and following a thorough investigation the Authority expressed serious antitrust concerns. Following this, the parties withdrew the notification.
4. In addition, new legislation which facilitates claiming damages in the context of competition infringements entered into force in 2016, implementing the damages directive. This act is expected to increase the deterrent effect of the regulation that is already in place, strengthening competition.
5. Advocacy also plays a significant role in DCCA's work. In 2016 a number of studies were published, including an analysis of public sector activities in commercial markets and a study on competition in the distribution of medicines. In parallel, the DCCA continued its efforts to raise awareness using new formats such as podcasts.

1. Changes to competition laws and policies, proposed or adopted

1.1. Summary of new legal provisions of competition law and related legislation

6. The law that implements Directive 2014/104/EU on Antitrust damages Actions has been approved by Parliament and entered into force on the 27th December 2016. This law will make it easier to seek damages in competition cases by facilitating access to evidence and introducing a rebuttable presumption that cartels cause harm and the right to full compensation by direct and indirect victims. Moreover, it extends the statute of limitations from 3 to 5 years.

1.2. Other relevant measures, including new guidelines

7. **Inspections guidelines:** In 2016 the DCCA published detailed guidelines on its inspections procedure. The guidelines explain how inspections are conducted, the powers of the competition authority, as well as the rights and obligations of inspected parties, including their right to appeal. They also explain how searches are conducted in the premises of inspected parties and the particulars of handling electronic data. Finally, the

guidelines describe how the information gathered during the inspection is analysed at a later stage at the authority's premises and the possible outcomes for inspected parties.

2. Enforcement of competition laws and policies

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

8. In Denmark, principal and major cases are decided by the Competition Council. In 2016, the Competition Council decided on 4 cases, all of which concerned anti-competitive agreements. In addition, 5 cases were referred to the Public Prosecutor, who has jurisdiction to pursue fines in competition cases.

Table 1. Decisions, judgements, acceptances of fines and cases referred in 2016

	Overall	With direct effect
Competition Council decisions	4	3
Anti-competitive agreements	4	3
Courts judgments	6	N/A
Acceptances of Fines	19	N/A
Cases referred to the Public Prosecutor	5	N/A

2.1.1. The Danish construction cartels

9. This cartel complex, one of the largest ever seen in Denmark, has finally been closed. Within this bid rigging cartel the companies involved exchanged information on prices and other terms regarding construction contracts from 2005 to 2010. In some cases companies also entered into agreements with their competitors on the allocation of calculation costs.

10. The companies had coordinated prices on construction contracts for a total value of DDK 400 to 500 million [USD 59.4-74.2 million¹]. Therefore, they were found to have infringed section 6 of the Danish Competition Act. The case was referred to the Public prosecutor by the DCCA.

11. In total 25 companies and 21 executives paid fines of 31 million DKK [USD 4.6 million]. The highest individual fine amounted to 10 million DKK [USD 1.5 million].

2.1.2. Resale price maintenance in the automobile sector

12. Opel Danmark A/S imposed binding minimum resale prices on used-cars dealers from mid-2010 to February 2014. The manufacturer chose to come forward itself as it had become aware that certain employees had imposed minimum resale prices to a number of Opel Danmark A/S's used-car dealers. DCC found this to constitute an infringement of Section 6 of the Danish Competition Act and transferred the case to the State Prosecutor.

13. The State Prosecutor presented the company with a fine notice of 8.25 million DKK [USD 1.2 million], which the company accepted.

¹ Unless otherwise stated DKK have been converted into USD using the average 2016 exchange rate (1USD=6.7327 DKK).

2.1.3. Real estate website boycott

14. In 2012 the DCC found that the six real estate agencies that controlled a Danish property search portal (Boligsiden.dk) had colluded to boycott a competing website, Boliga.dk, by denying it access to photos of properties for sale on the internet. Therefore they were found to have breached Section 6 of the Danish Competition Act.

15. Prior to the boycott, Boliga.dk had begun publishing information that increased market transparency regarding price development and final sales prices. To counter the increased competition from Boliga.dk between 2009 and 2010 the real state agencies that controlled Boligsiden.dk denied access to the photos of properties for sale to which they have intellectual property rights. This way, the competing website would be less attractive to potential customers.

16. The case was referred to the Public Prosecutor [who then issued a fine notice to the real state agencies (Danbolig A/S, Nykredit Mægler A/S, EDC-gruppen A/S, RealMæglerne A/S and Danske Selvstændige Ejendomsmæglere), their trade association (Dansk Ejendomsmæglerforening) and certain employees (each imposed a personal fine of DKK 25,000 [USD 3,713]).

17. Three of the real estate agencies that were each imposed a fine of DKK 3,750,000 [USD 556,983] accepted them. However, one of the agencies that faced a DKK 500,000 [USD 74,264] fine and the trade association fined with DKK 80,000 [USD 11,882] chose not to accept the fines, therefore the Public Prosecutor will pursue the cases in court.

2.1.4. Agreement restricting cinema's ability to grant discounts

18. The DCC issued a decision ordering the Association of Danish Film Distributors and the Association of Danish Cinemas to terminate certain anticompetitive agreements which restricted cinemas' ability to grant discounts on cinema tickets.

19. Following a complaint, the DCCA conducted a number of dawn raids where evidence of the anticompetitive agreements was gathered. According to the general terms and conditions on distribution of films to cinemas agreed between the two associations, cinemas may only grant discounts on cinema tickets with prior approval from the relevant film distributor. The agreement was found to constitute a horizontal agreement between the members of the Association of Danish Film Distributors, and a vertical agreement between the two associations.

20. Moreover, cinema discounts exceeding 20% required approval by the Association of Danish Film Distributors, as was evidenced by a reprimand sent by the distributor association to the cinemas. This constituted a horizontal agreement between the members of the association and a vertical agreement between the association and the cinemas.

21. The agreements created transparency on how competing film distributors calculated their payments and limited the ability of cinemas to determine their admission prices. As such, they were considered by object infringements of §6 of the Danish Competition Act and Article 101 of the TFEU.

2.1.5. Price fixing and market sharing in the milking robot market

22. In June 2014 the DCC decided on a Section 6 of the Danish Competition Act and Article 101 of the TFEU case in the milking robot sector. The franchisor and four Danish franchisees of milk robots agreed not to make passive sales of milking robots, spare parts and service provision outside of the assigned territory for over four years.

23. The case was then transferred to the Public Prosecutor. In April 2016 the franchisor (Lely Nordic A/S) accepted a fine of DKK 750,000 [USD 111,397] and the three franchisees (B.F. Malketeknik A/S, Sydjysk Malke-og Staldteknik ApS and Vestjysk Staldteknik ApS) accepted fines of DKK 100,000 each [USD 14,853]. In addition, a franchisor manager accepted a fine of DKK 25,000 [USD 3,713].

2.1.6. Court upholds decision on excessive electricity prices case

24. In June 2007 the DCC found Elsam (today part of DONG-Energy) had abused its dominant position in the market for wholesale physical electricity in western Denmark by charging excessive electricity prices from January 2005 to December 2006. Thereby Elsam had infringed Section 11 of the Danish Competition Act and Article 102 of the TFEU.

25. On appeal, the Maritime and Commercial High Court (judicial first instance) confirmed in its August 2016 ruling that Elsam's prices during a significant number of specific hours in the investigated period had been excessively high and disproportionate to its costs. This ruling has been appealed to the Supreme Court.

2.1.7. Information exchange within the trade association in the hotel sector

26. A Danish hotel and restaurant trade organization, Horesta, notified the DCCA a modification of its benchmarking policy. Horesta collects and aggregates information from the hotels in order to produce benchmarking reports. The updated report would contain aggregate information on average room prices, turnover and occupancy rates. In order to produce the report, an exchange of information on competitive parameters such as price, turnover and occupancy rates would take place.

27. The DCC considered that the risk of coordinated or unilateral effects was limited in this case given the characteristics of the hotel market (large number of actors, differentiation, prices generally set in advance), the aggregated nature of the information that would be accessible in the report and the scarce strategic value of information on past occupancy rates and peak times. As a consequence, it found the information exchange did not restrict competition neither by object nor by effect.

2.1.8. Price coordination agreement between service providers of natural gas boilers

28. The DCC found that a number of natural gas boiler service providers (HMN Naturgas I/S, Gastech-Energi A/S and Kiertner ApS) and a trade association (DEBRA-Energibranchen) had entered into a restrictive agreement whereby they coordinated end users subscription prices. Therefore, DCC ordered the undertakings to terminate the infringement and to refrain from any action having a similar object or effect in the future.

29. Following a complaint, the DCCA conducted a number of dawn raids where it gathered evidence that the undertakings had negotiated a standard contract regulating the terms under which HMN Naturgas I/S would subcontract individual system partners. HMN is a vertically integrated company active in the natural gas market that subcontracts independent partners to service boilers.

30. Under this contract HMN also agreed to increase its subscription prices to end users. Given HMN and the sub-suppliers (Gastech and Kiertner) also compete with each other as regards service to end users, the agreement reduced price competition between

them as it coordinated a price increase or a possible price increase. Therefore, the agreement infringed Section 6 of the Danish Competition Act.

2.2. Mergers and Acquisitions

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

31. In 2016, the DCCA received 39 merger notifications, which were approved. 29 of the mergers filed were treated under the simplified approval procedure. Of the remaining mergers, 6 were approved in phase 1 and 3 after a phase 2 investigation. One merger notification was withdrawn in 2017.

2.2.2. Summary of significant merger cases

Proposed merger between JP/Politiken Hus A/S and Dagbladet Børsen

32. This case involved the merger of two significant players in the Danish media sector, JP/Politiken Hus A/S and Dagbladet Børsen. DCCA conducted one of its most comprehensive investigations to date.

33. The Authority expressed serious antitrust concerns, as the merger would strengthen JP/Politiken's position in a number of markets, particularly in the market for national online and paper newspapers and certain advertising markets. This position could in turn be used to increase prices or reduce supply to the detriment of subscribers and advertisers.

34. However, the commitments submitted by the parties did not adequately address these concerns and in 2017 the parties chose to withdraw the notification before a decision was made.

Approval of JYSK's acquisition of Actona

35. In January 2016 the DCC approved JYSK's acquisition of Actona. Actona is a designer, producer and wholesaler of furniture and interior objects, while JYSK is active in the retail sale of such products.

36. The merger was subject to a comprehensive investigation as a number of retailers expressed concerns. However, the investigation showed that even if Actona chose to raise prices, retailers could easily switch supplier. Furthermore, in general Actona's products represented a relatively small percentage of retailers' total purchases.

37. As the investigation showed there was no risk that the operation would significantly harm competition, the merger was cleared.

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

3.1. Advocacy

38. Advocacy plays an important role in DCCA's effort to make markets well-functioning. In 2016, the DCCA focused on public sector activities in commercial markets and on the distribution of medicines and recommended regulatory changes to

strengthen competition in these areas. On the back of these studies certain amendments to regulation are currently being considered.

39. In addition, the DCCA published a study on payment services and contributed to the joint Nordic report on waste management. A summary of these studies can be found in section 5.

3.2. Communication and knowledge

40. A number of actions have been taken in order to raise awareness and share knowledge on competition related aspects.

3.2.1. Podcasts

41. Beyond the traditional communication tools, the DCCA launched in 2016 a new strategy based on podcasts that can be downloaded at DCCA's website. Two podcasts were prepared in 2016. The first one looks at what well-functioning markets are, what they mean for consumers and companies and the challenges posed by technological developments. The second one focuses on why competition is important and the role of competition enforcement.

3.2.2. Articles, seminars and conferences

42. In 2016 the DCCA decided to prepare short articles on current competition topics. These articles aim at sharing the DCCA's knowledge on relevant competition issues in an accessible format.

43. The DCCA also held a press seminar on well-functioning markets as well as the conference "Well functioning markets: challenges and perspectives", which focused on how effective competition contributes to growth.

3.3. International work

44. Within the framework of the European Competition Network (ECN), the DCCA works closely with the European Commission and other Member States. This includes assisting other Member States with their investigations on an *ad hoc* basis.

45. The Nordic competition Authorities also cooperate closely both formally and informally, in enforcement cases as well as in advocacy projects. An example of the latter is the study about waste management that is summarised in section 5. A review of the Nordic Co-operation Agreement, which is currently underway, is expected to reinforce co-operation.

46. The DCCA also takes active part in a number of OECD and ICN initiatives.

4. Resources of competition authorities

4.1. Resources overall

4.1.1. Annual budget

47. In 2016 the DCCA's competition related budget was approximately DKK 80 million, including overhead [USD 11.8 million]. In 2015 DKK 86.9 million, [USD 12.2 million²].

4.1.2. Number of employees

Employees occupied with competition law in 2015 and 2016	2015	2016
Total	87	84
Economists	27	29
Lawyers	43	39
Other professionals	14	13
Support Staff	3	3
Applied to:		
Enforcement against anticompetitive practices	42	37
Merger review and enforcement	12	13
Advocacy efforts	33	34
*Including staff servicing the Ministry of Business and Growth		

4.2. Period covered by the above information:

48. The information above covers the period 2015 and 2016.

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

5.1. Analysis of public activities on commercial markets³

49. The purpose of the study is to assess whether the current regulatory framework ensures that public sector commercial activities, particularly revenue-funded ones, do not needlessly distort competition.

50. First, the study focuses on pricing of revenue funded activities of governmental institutions and on municipal commercial activities. When setting prices for these activities Danish public entities are not legally required to reflect commercial profit. The study concludes that there is no consistent adjustment for the advantages associated with public ownership and that there are significant differences in the amount of profit reflected in prices. As a consequence, the DCC recommends that the rules to prevent distortion of competition in this regard be clarified. It also recommends adopting rules that reflect OECD's recommendations on competitive neutrality.

51. Second, the study addresses the enforcement of rules on revenue funded activities and municipal commercial activities. These rules are complex and their enforcement

² 2015 exchange rate

³ Available also <http://en.kfst.dk/~media/KFST/Publikationer/Engelsk/2016/20160526%20public%20activities%20on%20commercial%20markets.pdf>

involves a large number of public entities and authorities. As a result, it can be challenging to effectively enforce the rules. In addition, the complaint system is often perceived as opaque and inefficient. Therefore, the DCC recommends simplifying the complaints procedure (by for example including single entry points) and strengthening and harmonizing enforcement.

52. Third, the study assesses the right to carry out revenue funded activities and municipal commercial activities. Generally these rights stem from legislation. However, as far as municipalities are concerned, the applicable rules are developed based on the practice of supervisory authorities. Justifications may include avoidance of asset wasting or co-production advantages. These activities may have negative effects on effective competition if prices are not set correctly. Therefore, the study recommends that clearer criteria for the activities that public actors should have the right to carry out as revenue funded activities are defined.

5.2. Price competition between hotel booking portals⁴

53. In 2015 the DCCA decided to close its investigation into the use of price parity (or most favoured nation) clauses by hotel booking platforms in the context of the agreed commitments with other EU competition authorities, joining the agreed standstill period. Under the commitments the price parity clauses that prevented hotels from offering better room rates on competing sites was substituted by a “narrow parity clauses” under which the hotel is only restricted from setting a better rate in its own website. These changes extended to the entire European Economic Area.

54. In this context, in 2016 the DCCA made a random survey of the prices charged in three large reservation platforms to assess if the new clause had had the desired effect. The survey was carried out over a 2 month period through daily net-scraping. Prices of a specific type of room at 12 different hotels were collected.

55. The survey shows that four hotels charged the same price on all three platforms, two hotels had almost the same price, but the remaining 6 hotels had different prices on one or more platforms during most of the period.

56. In the opinion of the DCCA, this at least indicates that the commitments have generally improved conditions for competition and led to more choice for consumers, as the broad parity clause, which was earlier used in the contracts between reservation platforms and hotels, would have prevented any price variation on the platforms.

5.3. Competition in the waste management sector - Preparing for the circular economy-Joint study by the Nordic Competition Authorities⁵

57. This is the eleventh joint report by the Danish, Faroese, Finnish, Greenland, Icelandic, Norwegian and Swedish Competition Authorities. It focuses on the possible restraints on competition that may arise from regulation and the different ways waste management is organised. It also explores the way Extended Producer Responsibility (EPR) is organised in the Nordic countries and its effect on competition.

⁴ http://en.kfst.dk/Indhold-KFST/English/News/~/_media/790F0217295F498F9B088B0C826A065A.ashx

⁵ http://www.kfst.dk/~/_media/KFST/Publikationer/Dansk/2016/20160223%20Nordic%20Report%202016%20Waste%20Management%20Sector.pdf

58. The main conclusion is that there is considerable scope for increased competition within the waste management sector in the region. The legal framework in most Nordic countries limits competition in waste management as it imposes obligations on municipalities but at the same time grants them extensive rights to waste and autonomy to choose how to manage local waste markets.

59. Some short term changes within the current framework may enhance competition, such as making better use of procurement procedures (particularly regarding collection) and enhancing competition neutrality. The study also recommends clarifying public roles and goals, as they may in some cases be conflicting. However, in the long term more ambitious set up changes may be needed to improve material recovery and increase trade in valuable waste material. In this regard it may be necessary to adjust the current business model based on profits increasing the more waste that is received.

60. As to EPR, the study points out how they have successfully contributed to increase recyclability, reduce waste and enhance overall efficiency in the recycling process. However, they also raise competition concerns. Typically new EPR involve a monopolistic producer responsibility organization (joint collective structure) that could abuse its dominant position by setting excessive prices or restricting market access. In this aspect the study recommends lowering entry barriers where needed and ensuring competitive neutrality.

5.4. Study on Payment Services 2016⁶

61. The biannual study reflects that Danes continue to be amongst the most intensive users of payment services in Europe. The number of cards issued has risen since the 2014 report, particularly the number of international cards. However, Dankort continues to be the most popular card, and in fact the number of Dankort exceeds the number of inhabitants in Denmark. Moreover, for every time an international card is used, Dankort is used three times.

62. The survey also shows that users have improved their knowledge of the applicable fees and that the cost of operating the Dankort system in physical trade fell.

5.5. Competition in the distribution of medicines⁷

63. The purpose of the study is to look into the wholesale distribution of prescription and over the counter medicines from suppliers to pharmacies and hospitals.

64. The study concludes that there is scope for more effective competition in the distribution to pharmacies, as it is currently being weakened by market structure and regulation. Two wholesalers account for almost all medicine sales to pharmacies, and their total average earnings from 2005-2014 are above those of wholesalers in comparable countries. Moreover, new wholesalers have failed to establish a foothold in the market.

65. Current regulation limits the scope for price competition as wholesalers cannot compete on prices charged to pharmacies, and wholesalers 'discounts must be cost based

⁶ <http://www.kfst.dk/~media/KFST/Publikationer/Dansk/2016/20160427%20Betalingkortmarkedet%202016.pdf>

⁷ <http://en.kfst.dk/~media/KFST/Publikationer/Engelsk/2016/141016%20Competition%20in%20the%20distribution%20of%20medicines.pdf>

and displayed publicly. Furthermore, pharmacies have an obligation to offer all approved medicines to their customers, and all suppliers must report prices to an auction system every 14 days, so that pharmacies offer their customers the least expensive product in a group of substitutable products. Consequently, pharmacies prefer to deal with just one full line wholesaler. It also means that access to exchange data with the pharmacies' IT systems (currently subject to the leading wholesalers' terms and conditions) is key in order to enter the market. As a result, there are significant barriers to entry.

66. Finally, regulation also limits pharmacies' incentive to be active customers. For instance, under the current compensation system pharmacies with high revenues must pay compensation to those with low revenues. All in all, this entails higher prices and increased public healthcare expenditures.

67. Against this backdrop, the study makes the following recommendations. First, the existing barriers that prevent new players from entering the market should be substantially reduced. Second, wholesalers should have the ability to compete in the prices they charge pharmacies and have greater incentive to compete on delivery capabilities. Third, for pharmacies to have an incentive to become active customers and purchase medicines where they get the best value for money solution, the appropriate changes in regulation should be made.