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COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Denmark

-- 2020 --

This report is submitted by Denmark to the Competition Committee FOR INFORMATION.

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Table of contents

Denmark.....	3
1. Changes to competition laws and policies, proposed or adopted	3
1.1. Summary of new legal provisions of competition law	3
1.2. Other relevant measures, including new guidelines	3
2. Enforcement of competition law and policies	4
2.1. Action against anti-competitive practices, including agreements and abuses of dominant position	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.	8
3.1. Advocacy.....	8
3.2. Communication and knowledge	8
4. Resources of competition authorities.....	10
4.1. Resources overall	10
4.2. Human resources (person-years) applied to.....	11
4.3. Period covered by the above information	11
5. Summaries of or references to new reports and studies on competition policy issues.....	11
5.1. Market analysis: The competition on the market for lawyers.....	11

Tables

Table 1. Number of employees* in person-years occupied with competition law in 2020	11
Table 2. Human resources (persons-years) applied to:	11

Denmark

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

1.1. Summary of new legal provisions of competition law

1. In March 2021, a number of amendments to the Danish Competition Law transposing the ECN+-Directive came in to force in Denmark. The amendments bring Danish procedures for antitrust enforcement in line with the European Commission's procedures in a most areas. The amended law introduces a new civil fining system wherein Danish courts can impose fines to undertakings under a civil procedure instead of under a criminal procedure. Until now, competition fines to undertakings as well as to natural persons have been a criminal matter in Denmark, and the infringements have had to meet a criminal standard of proof. Therefore, the Danish Competition and Consumer Authority (DCCA) has referred its administrative decisions to the State Prosecutor for Serious Economic and International Crime (SEIC) that has assessed criminal liability and initiated proceedings by the courts. With the amended law, the DCCA will bring cases against undertakings before a civil court if a fine is to be imposed. The SEIC will still handle cases against natural, as cases against natural persons will remain in the criminal court system.

2. Furthermore, the amended law provides the DCCA wider powers to conduct interviews, order structural remedies, to hold parent companies liable for infringements committed by subsidiaries and carry out court-ordered inspections in private homes.

1.2. Other relevant measures, including new guidelines

3. In 2020, the DCCA published new guidelines regarding commitments in merger cases. In the guidelines, the DCCA describes the basic requirements, principles and deadlines that applies regarding commitments and the guidelines contain examples of different types of commitments. Furthermore the guidelines provide a number of recommendations on how merger parties and for example their advisers can manage the commitment process in order to optimize the process when they consider offering commitments or when they are about to offer commitments in a merger case. The guidelines are based on the European Commission's notice on remedies and on relevant case law from Denmark, the European Commission and other jurisdictions and experience with commitment procedures from Denmark and other jurisdictions.

4. In 2020, the DCCA furthermore updated its guidelines regarding calculation of turnover in the Danish Competition Act and its guidelines regarding merger notification and merger fees. Both guidelines have been updated with new regulation regarding calculation of turnover and regarding merger notification that came in to force in 2019 and 2020.

5. Finally, the DCCA has published new guidelines in 2020 that describe how the DCCA assesses consortia agreements/joint bidding under the competition rules. The guidelines are i.a. based on a judgement from the Danish High Court from 2019 regarding a road marking consortia. The judgement upheld previous decisions in the case from the Danish Competition Council and the Danish Competition Appeal Tribunal (DCAT).

2. Enforcement of competition law and policies

2.1. Action against anti-competitive practices, including agreements and abuses of dominant position

2.1.1. Summary of significant cases before the Danish Competition Council

Anti-competitive exchange of information between retailers of clothing items

6. In June 2020, the Danish Competition Council (DCC) adopted two separate decisions concerning (i) HUGO BOSS NORDIC ApS (HUGO BOSS) and Axel Kaufmann ApS (Kaufmann) and (ii) HUGO BOSS, Ginsborg ApS and Ginsborg Frederiksberg Centret ApS (Ginsborg) respectively. The DCC decided in both decisions that the parties' exchange of information on prices, discounts and quantities in relation to future sales constituted a violation of Section 6 of the Danish Competition Act and TFEU article 101.

7. HUGO BOSS is an international manufacturer, supplier and retailer of clothing items of the brand Hugo Boss. Kaufmann and Ginsborg are Danish retailers of clothing items from different brands, including the brand Hugo Boss. HUGO BOSS is vertically related to Kaufmann and Ginsborg as a supplier as well as horizontally as a competitor at the retail level.

8. Often, there are no competitive concerns associated with exchange of information in a vertical relationship. However, when the manufacturer/supplier is also a retailer of clothing items competing with its downstream customers then exchange of information on prices, discounts and quantities may restrict competition between them at the horizontal level. In these two cases, the exchange of information on prices, discounts and quantities gave HUGO BOSS, Kaufmann and Ginsborg the ability to coordinate their future sales in accordance with the information exchanged which may have led to a more uniform and reduced range of products on sale as well as lower discounts, equal to higher prices for the consumers.

9. Based on the evidence in these cases, the DCC found that HUGO BOSS/Kaufmann and HUGO BOSS/Ginsborg infringed Section 6 of the Danish Competition Act and TFEU article 101. The DCC obliged HUGO BOSS, Kaufmann and Ginsborg to cease the illegal behavior and to refrain from similar activities in the future.

10. Both decisions of the DCC have been appealed to the DCAT where the cases were pending by the end of 2020.

Commitment decision regarding online platforms

11. In August 2020, the Danish Competition Council accepted commitments in two separate cases regarding the digital platforms "Hilfr" (www.hilfr.dk) and "HappyHelper" respectively (www.happyhelper.dk). The DCC found that the commitments offered by Hilfr ApS and Happy Helper A/S respectively resolved the DCC's competition concerns.

12. Both Happy Helper and Hilfr are intermediary digital platforms that provide a match between providers of regular cleaning services and potential customers of this service. The platforms do not themselves provide cleaning service but solely provide digital matchmaking between providers and potential customers. Both platforms charge the service providers a percentage of the service provider's fee for this service. This means that if the service providers set a higher price – then the platforms also receive a higher fee per service rendered.

13. The platforms set fixed minimum hourly fees for their respective providers of cleaning services on the platforms. The DCC found that the minimum hourly fees could create a “price floor”, which may have limited the competition between the providers of cleaning services on the platforms.

14. The decisions from the DCC provide guidance about when platforms and the service providers using the platforms are to be considered as “undertakings” (and not employees) under competition law.

Abuse of dominant position by exclusivity obligations

15. In April 2020, the DCC decided that Godik – a supplier renting out equipment to events – had abused its dominant position by applying a formal standard exclusivity obligation to customers renting portable toilets on long-term rental agreements.

16. The DCC found that Godik had abused its dominant position in a period from 2014 and 2018. Consequently, the DCC obliged Godik to cease the illegal conduct and abstain from similar conduct in the future.

17. The exclusivity obligation formally obliged the customers to cover their full demand of portable toilets from Godik. The exclusivity obligation had a minimum duration of three years, which exacerbated the likely foreclosure effects of Godik’s behaviour. During the contractual period, the contract was further non-terminable to the customers and in case of non-compliance, customers were contractually obliged to return the rebate received and to pay an additional penalty to Godik. The DCC found that Godik’s exclusivity obligation was capable of leading to foreclosure of both actual and potential competitors on the relevant market.

18. Due to particular facts of the case, the DCC decided did not refer the case to the SEIC.

19. Godik did not appeal the decision to the DCAT.

Abuse of dominant position by tying

20. In June 2020, the DCC decided that the largest distributor of print circulars in Denmark, FK Distribution, had abused its dominant position in a period from January 2018 until October 2019 by tying its sale of distribution of print circulars with its sale of viewing of circulars on its digital platform. FK Distribution had obliged its customers of print circulars to also advertise and pay for said advertising through FK Distribution’s digital platform “minetilbud”. “minetilbud” is a digital platform that allows end users/consumers to search, browse and read circulars from a large range of retailers in a digital format.

21. The customers of FK Distribution were mainly retailers in Denmark, such as national supermarket chains. The DCCA’s investigation showed that advertising in print circulars was an important marketing tool for many retailers in Denmark, and many of the retailers advertised in digital circulars as well. Therefore, many retailers were dependent on distribution of unaddressed mail (circulars) by FK Distribution.

22. Nevertheless, the market for distribution of unaddressed mail (circulars) to households in Denmark has been decreasing over the last decade, whereas the market for digital platforms for such circulars in Denmark has been growing.

23. The DCC found that FK Distribution had abused its dominant position on the market for distribution of unaddressed mail (circulars) in Denmark to obtain an advantage, not based on its own merits, on the relatively new, but growing market for digital platforms for circulars in Denmark. FK Distribution had a special responsibility not to restrict

competition as the only national distributor of printed circulars. FK Distribution had been the only large distributor of unaddressed mail in Denmark since January 2018, when PostNord withdrew from the market.

24. The DCC obliged FK Distribution to cease the illegal conduct and abstain from similar conduct in the future.

25. The DCC referred the case to the SEIC where it awaits the outcome of the appeal of the DCC's decision.

26. FK Distribution appealed the decision to the DCAT where the case was pending by the end of 2020.

2.1.2. Summary of significant cases before the Danish Courts

Excessive pricing

27. In 2020, the Danish Maritime and Commercial High Court confirmed that CD Pharma (a pharmaceutical distributor) had abused its dominant position by increasing the price of the drug Syntocinon from EUR 6 to EUR 127 corresponding to a price increase of 2,000 pct. The Court thereby upheld previous decisions in the case by the DCC and the DCAT.

28. Syntocinon contains Oxytocin, an active substance given to pregnant women during childbirth. The drug has been marketed since the 1950's and the patent expired several years ago. From 2007-2014, the price of Syntocinon in Denmark was stable at approximately DKK 44 (EUR 5.9). Amgros (a wholesale buyer for public hospitals) carried out a tender for Syntocinon for the period of 1 April 2014 to 31 March 2015, which Orifarm (a parallel importer and competitor to CD Pharma) won. During the contract period, Orifarm tried to supply Syntocinon in accordance with the contract, but could not procure a sufficient amount of Syntocinon in the relevant dosage from other EU-countries to cover Amgros' full demand. Hence it was necessary for Amgros to buy the residual amount from CD Pharma, the only other approved supplier of Syntocinon on the Danish market. From 28 April 2014 to 27 October 2014, during the period when CD Pharma acted as a residual supplier to Amgros, CD Pharma increased its price on Syntocinon from DKK 45 (approx. EUR 6) to DKK 945 (approx. EUR 127). Contrary to the parallel importer, Orifarm, CD Pharma was guaranteed supply due to an exclusive distribution agreement with the producer of Syntocinon, Sigma-Tau.

29. The Court agreed that CD Pharma held a dominant position on the Danish market for the sale of oxytocin during at least the period from 1 April 2014 to 31 March 2015, but also in the subsequent period from 1 April 2015 to 31 March 2016 where Amgros carried out a new tender. The Court also agreed that CD Pharma had imposed an excessive and unfair price for the drug Syntocinon and that CD Pharma thereby had abused its dominant position. As CD Pharma has not further appealed the case the decision from the Maritime and Commercial High Court is final.

2.1.3. Cases with criminal charges

30. In 2020, the DCC referred a total of 3 cases (groups of cases) to the SEIC, which had jurisdiction to pursue sanctions in competition cases until March 2021. Two of the cases were referred to the SEIC without a previous administrative decision, whereas one case was referred to the SEIC after a previous administrative decision from the DCC. Seven companies and five natural persons were fined in 2020. The fines amounted to a total of DKK 14,450,000 (€ 1,942,922) for the companies and DKK 375,000 (€ 50,421) for the

individuals. There can be a time span between the referral to the SEIC and the fining decision. Thus, not all cases which were referred to the SEIC in 2020 were settled in 2020, and not all the fining decisions in 2020 concerned cases which were referred in 2020.

31. In 2020, the COVID-19 situation has been a challenge and a contributing reason for both the relatively low number of referrals to the SEIC and of fines. For instance, the Danish courts were closed for a long period and therefore a number of cases have been postponed.

2.2. Mergers and acquisitions

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

32. In 2020, the DCCA approved a total of 32 notified mergers. 29 of the mergers were processed under the simplified procedure. All of the remaining mergers were approved in phase I; including one merger approved with commitments offered by the merging parties. In addition, one merger notification was withdrawn by the parties in phase 2 in 2020 and one merger was referred to the European Commission.

2.2.2. Summary of significant cases

Approval of SEAS-NVE A/S' acquisition of several companies from Ørsted A/S subject to commitments

33. In May 2018, the DCC approved SEAS-NVE A/S' acquisition of sole control of Radius Forsyningsnet A/S, Ørsted City Light A/S, Ørsted Privatsalg El & Gas A/S, and Ørsted Varmeservice A/S from Ørsted A/S subject to commitments.

34. SEAS-NVE is a cooperatively owned energy and fibre-optic group. SEAS-NVE owns the electricity grid in Western and Southern Zealand in Denmark and on the islands in those areas and sells electricity, natural gas and service on gas boilers to private and corporate customers. Furthermore, SEAS-NVE operates and maintains streetlights and has activities within production of renewable energy, e-mobility solutions for electric cars and fibre-optic broadband.

35. Radius owned the electricity grid in the Copenhagen area, Northern Zealand and parts of Central Zealand. Ørsted Privatsalg El & Gas sold electricity and natural gas, and Ørsted Varmeservice offered service on gas boilers to primarily private customers. Ørsted City Light operated and maintained streetlights.

36. The DCC found that the merger would give rise to unilateral effects in the market for retail supply of natural gas to consumers (and small and medium-sized businesses). This would in particular be in the form of risk of higher prices on natural gas to consumers, because the transaction would unite the two largest providers of natural gas to consumers in Denmark.

37. However, SEAS-NVE offered commitments. SEAS-NVE committed to divest all of the 107.000 private natural gas customer agreements in Ørsted Privatsalg El & Gas. The divestment of the gas customer agreements would ensure that competition in the market for retail supply of natural gas to consumers (and small and medium-sized businesses) would not be reduced significantly as a result of the merger. The DCC found that the commitments were sufficient to address the unilateral effects and approved the merger subject to the offered commitments.

Referral of the merger between Mastercard and Nets

38. In April 2020, The DCCA referred the proposed merger between Mastercard and parts of Nets to the European Commission.

39. The European Commission assumed jurisdiction pursuant to Article 22 of the EC Merger Regulation and later approved the acquisition subject to remedies.

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

3.1. Advocacy

40. The DCCA's mission is to support well-functioning markets. One of the tools to achieve this goal is advocacy.

41. In 2020, the DCCA conducted a large-scale analysis on competition in the Danish market for lawyers where competition in the market for legal services supplied by lawyers is reviewed. The analysis was published in the beginning of 2021 and comprises both large and small law companies. In addition, the analysis focuses on the information asymmetry and the challenges that consumers face when navigating in the market. The analysis resulted in 16 recommendations on how to improve competition in the Danish market for lawyers. A summary of the report is included in section 5.

42. In 2017, an agreement between political parties stipulated that the DCCA each year should draft an analysis on the visibility and mobility on the Danish mortgage market and in February 2020, the DCCA published its third report of the market development of mortgage loans in Denmark. Among others, this report showed that the prices for mortgage loans are generally stable on a high level.

3.2. Communication and knowledge

3.2.1. General communication and press releases

43. In 2020, the DCCA sent out 50 press releases and 15 opinion pieces regarding competition law, public procurement and other cases related to competition. The DCCA frequently appeared in the media in the form of articles and interviews.

3.2.2. Podcasts

44. In 2020, the DCCA released three new podcast episodes¹. The first of these episodes is a talk about regulation of the water sector in Denmark with head of DCCA's Water Division (the Danish Water Regulatory Authority), Tone Madsen.

45. The second of these episodes² goes through the new Platform to Business Regulations. Chief consultant Kirstine Rødsgaard Madsen talks about the intention of the regulation and how it will affect businesses.

¹<https://www.kfst.dk/menu/presse/podcasts/okonomisk-regulering-af-vandsektoren/>

²<https://www.kfst.dk/menu/presse/podcasts/p2b-forordningen-et-overblik-over-de-nye-regler/>

46. The third episode³ is about digital platforms and their global impact and influence. Guests in the podcast are the two heads of the Digital Platforms Division Claus Galbo-Jørgensen and Michael Høg Riis.

47. Moreover, the DCCA has recorded six of our publication articles and published them as podcasts.

3.2.3. *Articles and publications*

48. Continuing on the initiative taken in 2016 to release short articles on current competition topics, the DCCA released 10 articles in 2020.

49. The first article⁴, published in March 2020, describes how exchange of information about competition can damage effective competition and thereby harm consumers.

50. The second article⁵, published in July 2020, describes how competition in the construction industry can be harmed by minimum wage schedules. Piecework wages normally benefit productiveness because it encourages workers to work more effectively. However, an analysis carried out on behalf of the DCCA indicates that the use of minimum wage schedules agreed on industry level can harm price competition among companies in the construction industry and harm innovation and productivity. In the end, this can potentially harm consumers.

51. The third article⁶, published in July 2020, is based on an analysis that shows that behavioral research has revealed that voluminous and complex information may be counter-productive. The analysis demonstrates that consumers benefit from less information in advertisement material, if it still provides the consumer with key financial aspects of the credit.

52. The fourth article⁷, published in August 2020, reports on the Danish water sector and how consumers by their choice of supplier tighten competition and promote the goods that are of most value to them.

53. The fifth article⁸, published in September 2020, describes how active consumers benefit from negotiating with providers of various kinds. The article also treats the subject of why some consumers are active and some stay inactive. The investigation behind this article also shows that consumers are more interested in buying sustainable products and services.

³ <https://www.kfst.dk/menu/presse/podcasts/digitale-platformes-betydning-for-markederne/>

⁴ <https://www.kfst.dk/publikationer/kfst/2020/20200305-adgang-til-konkurrencefolsomme-oplysninger-via-offentlige-kilder/>

⁵ <https://www.kfst.dk/publikationer/kfst/2020/20200703-priskuranter-i-bygge-og-anlaegssektoren-kan-svaekke-konkurrencen-mellem-virksomheder/>

⁶ <https://www.kfst.dk/publikationer/kfst/2020/20200619-consumers-benefit-from-simplified-information-disclosure/>

⁷ <https://www.kfst.dk/publikationer/kfst/2020/20200817-potentiale-for-en-mere-effektiv-forsyningssektor-gennem-bedre-regulering/>

⁸ <https://www.kfst.dk/publikationer/kfst/2020/20200923-forbrugeradfaerd-pa-13-markeder/>

54. In the sixth article⁹, published in November 2020, explains how many digital platforms collect great amounts of data about the consumers. Knowledge is very valuable for the companies.

55. The seventh article¹⁰, published in November 2020, concerns how the digital transformation affects consumer behavior. The article outlines central insights from a new analysis carried out by the DCCA titled “Consumer behavior in digital markets”, where the DCCA explored how the digital transformation of markets effects consumer behavior.

56. The eighth article¹¹, published in December 2020, is based on data and analysis from the DCCA’s analysis of competition in the Danish market for pensions from 2019. The article describes how the Danish pension companies impair competition on the market and at the same time make it difficult for other actors to join the market.

57. The ninth article¹², published in December 2020, concerns the supply sector and asks the question “Does the efficiency requirement effect the quality of the drinking water?” The article’s main conclusion is that price ceilings and efficiency requirements which leads to lower water prices has not had a negative effect on the quality of the drinking water, perhaps rather the reverse.

58. Cross ownership is the topic of the tenth article¹³, published in December 2020. The article describes the challenges it can cause when a company is fully or partially owned by a competitor. Cross ownership can limit the incentive to compete about customers e.g. by lowering prices.

3.2.4. Social media

59. In 2020, the DCCA was present on different social media platforms. The DCCA and a number of the authority’s employees are active on Twitter as spokes persons. Furthermore, the DCCA has profiles on Facebook and LinkedIn in order to meet and communicate with stakeholders, companies and consumers.

4. Resources of competition authorities

4.1. Resources overall

4.1.1. Annual budget

60. In 2020, the DCCA’s competition related budget was approximately DKK 94.19 million [USD 15.3 million], whereas the budget for 2019 was approximately DKK 89.91 million [USD 13.27 million]. It is an increase of DKK 4.28 million for 2020.

⁹ <https://www.kfst.dk/publikationer/kfst/2020/20201122-digitale-platformes-indsamling-af-brugerdata/>

¹⁰ <https://www.kfst.dk/publikationer/kfst/2020/20201126-new-opportunities-and-challenges-for-consumers-in-digital-markets/>

¹¹ <https://www.kfst.dk/publikationer/kfst/2020/20201212-pensionsselskabernes-indtjening-pa-kapitalforvaltning/>

¹² <https://www.kfst.dk/publikationer/kfst/2020/20201218-pavirker-effektiviseringskrav-kvaliteten-af-drikkevandet/>

¹³ <https://www.kfst.dk/publikationer/kfst/2020/20201230-krydsejerskab/>

4.1.2. Number of employees

Table 1. Number of employees* in person-years occupied with competition law in 2020

Total	98
Economist	30
Lawyers	50
Other professionals	11
Support Staff	7

4.2. Human resources (person-years) applied to

Table 2. Human resources (persons-years) applied to:

Enforcement against anticompetitive practices	50
Merger review and enforcement	13
Advocacy efforts*	28

Note: Support staff is included

4.3. Period covered by the above information

61. The information above covers the year of 2020

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

5.1. Market analysis: The competition on the market for lawyers

62. In 2020, the DCC conducted a large-scale analysis on the competition of the Danish market for lawyers. The analysis focused on both large and small law companies and it is based on a thorough examination of the market for lawyers in Denmark. The market for lawyers plays an important role in society and to the economy. However, the analysis shows that competition on the market is challenged. According to the analysis, there are clear indications that competition in the market can be improved to the advance of undertakings, consumers and society as a whole. Profit margins and financial returns are relatively high and has increased since the 00's, especially for the big law firms that primarily has business clients and public clients. At the same time, the turnover is concentrated on a few areas of specialization that these customers request. Legal assistance is often based on trust and customers are generally very loyal to a law firm that they have used in the past. It weakens competition in the market that customers are relatively passive when searching the market. Hence most business customers and private customers do not compare providers before they buy legal assistance. Furthermore a large part of services provided by law firms can be provided by other than law firms, for example by accountants. However the DCCA find in the report that competition pressure from other providers of legal service is very limited.

63. The analysis was published in January 2021 and comprises 16 recommendations on how to improve the competition on the Danish market for lawyers. These recommendations aim to:

1. Lower the market barriers for new players to enter the market and for existing players to expand
2. Strengthen competition in regard to legal service to public customers
3. Strengthen competition in regard to legal service concerning bankruptcy and liquidators.