Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Denmark

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In Denmark, the Competition Council is the principal enforcer of competition law with the Competition and Consumer Authority acting as the day-to-day caretaker, including rendering decisions in (minor) cases. Decisions from either may be appeals to the Competition Tribunal or the judiciary, and after amendments in 2021 which implemented the ECN+ directive, initial appeal to the former is no longer mandatory. Instead, if considered beneficial, the parties may challenge decisions directly before the civil courts, which would usually be the Maritime and Commercial High Court with subsequent appeal possibilities. Here, private enforcement action would typically also be heard and advanced while criminal enforcement would take place before the local criminal court.

National competition law mirrors Articles 101 and 102 and the EU Merger Regulation (save from the thresholds), which makes it immaterial for the outcome if a case is advanced against EU and national competition law or only the latter. In terms of finalizing a case or investigations, different options are available, presuming the case is not closed informally. Further to ordering infringements stopped, the Competition and Consumer Authority can accept commitments, impose fines in undisputed cases, award leniency, including immunity, in exchange for cooperation, and prosecute the case before a criminal court if fines are warranted. In terms of mergers, these may be cleared, prohibited or approved subject to commitments as known under the EU Merger Regulation. Moreover, the Authority may defend decisions challenged before a civil court.

Most of these options were explored in 2021, yielding several interesting cases presented below. For the sake of brevity, only references to Articles 101 and 102 are used, but these would also cover the national equivalents unless specified.

1. Article 101 and horizontal agreements

In 2021, as usual, Danish legal practice offered a couple of notable Article 101 cases involving horizontal agreements of which three merit comments. The first by virtue of being exotic, the second for pertaining to dual distribution and the third for touching upon when to accept parallel behaviour as evidence of a concerted practice. Below, these cases are detailed further, including links to the underlying decisions.

Panic at the disco – nightclubs in a market sharing agreement

In a rather exotic case complex, fines were imposed in November and December 2021 on initially 18, but later 22 bars and nightclubs for having concluded a market sharing agreement. While not all had been part of the infringement from the beginning, since 2004, some had agreed to refrain from opening establishments in the proximity of each other, with the remaining joining in the subsequent years. This market sharing arrangement formed part of a (legitimate) corporation agreement centered on joint procurement of goods and services and merited fines between DKK 28,000 and 278,000 (EUR 3,762 to 37,356). Regardless of the severity of the violations, reductions were warranted. First and foremost, the infringements were not disputed. Second, the fines were calculated against the 2020 turnover, which had been very low due to the mandated Covid-19 shutdown.

Only short summaries are available as the bars and clubs did not dispute the infringement, but the cases raise questions about the underlying market definition. The establishments were scattered across a vast area (the peninsula of Jutland) with more than 300 km between some of them, making it debatable whether they would qualify as competitors. However, it appears that the cartel involves additional members disputing either the infringement or their involvement, which is why the matter might come to a head when the remaining cases go to court. As explained initially, the Competition and Consumer Authority only fines undertakings directly if they do not dispute the infringement. Otherwise, the Authority must prosecute them before the local criminal court.

Dual distribution and the matter of a by object infringement

Another notable Article 101 case involved information exchange and dual distribution. Dual distribution emerges when the traditional vertical relationship between a wholesaler and its retailers is given a horizontal twist, e.g. if the wholesaler engages in direct sales and thus competes downstream with its retailers. In 2020, the Competition Council reacted against HUGO BOSS, a producer of men's fashion clothes, for forwarding information on future retail campaigns, including sales and future prices, to two of its Danish retailers (Kauffmann and Ginsborg). These actions added a horizontal element to the vertical agreements. In two separate decisions, this was identified as a concerted practice entailing a horizontal exchange of sensitive information considered anti-competitive by object absolving the Competition Council from any obligation to prove anti-competitive effects.

HUGO BOSS and Kauffman (but not Ginsborg) appealed, and in 2021, the Competition Tribunal upheld the Competition Council's findings. While the Tribunal only vaguely explained why unilateral sharing of information amounted to a concerted practice under Article 101, this appears to be based on aligned interests and failure to distance themselves from the information, making it implausible that the actions were genuinely unilateral as claimed. Moreover, the parties moved beyond what would be expected within a vertical relationship, translating this into a horizontal one by sharing information on the producer's own direct sales. However, the five-member Tribunal was split in defining this as a restriction by object. Three members (two economists and a judge) relied on the information covering i.a. future prices and thus pertaining to price coordination, which is why they voted for upholding the decision. In contrast, two members (two lawyers) disagreed and voted for an overturn. While willing to accept horizontal exchange of sensitive information as detrimental to competition, the minority lacked basis in experience (or EU case law) to extend this to dual distribution where the vertical and horizontal elements cannot meaningfully be separated. The cases were decided against the majority opinion, but are now pending before the Maritime and Commercial High Court. Therefore, we should expect to revisit the matter of dual distribution and information exchange, which is also the focus of DG COMP's current review of the vertical block exemption and presumably to be expanded upon in the forthcoming horizontal guidelines.

A concerted practice is more than parallel behaviour

In 2018, the Competition Council identified and condemned an illegal price agreement between two outdoor advertising companies (Clear Channel Danmark and AFA JCDecaux). The coordination covered two periods involving September 2008 to December 2010 and January 2011 to April 2015, where an actual (written) agreement covered only the first. However, according to the Council, the parties tacitly renewed this agreement following its lapse in December 2010, thus engaging in a concerted practice for the second period. Moreover, it was immaterial that the parties had often failed to respect their mutual understanding. The Competition Tribunal concurred and added that its finding rested on the parties' failure to distance themselves from the former agreement, effectively reversing the burden of proof when claiming to have disengaged from any former illegal price coordination.

The parties challenged these findings before the Maritime and Commercial High Court, which rendered its ruling in November 2021. While the Court agreed with the Competition Council regarding the first period covered by a written agreement, the Court refused to accept that this transcended into a concerted practice for the second period. In this, the Court relied on the lack of evidence of contacts between the parties after 2009, and thereby no evidence supporting a meeting of mind apart from some example of parallel behaviour. However, as established by the European Court of Justice in *Ahlström*, parallel conduct could not be regarded as proof of concertation unless this provided the only plausible explanation. The Maritime and Commercial High Court then overturned the Competition Councils' findings regarding the second period, rebutting that a concerted practice could be established based on presumptions unless the only plausible explanation as held in *Ahlström*. Even where the parties' alleged coordination had earlier been covered by a written agreement, indicating that infringing Article 101 was not entirely unimaginable to them. The Competition Council has appealed the case.

2. Article 101 and vertical agreements

Besides horizontal cases, Article 101 was also applied to Retail Price Maintenance (RPM) cases in 2021. These remain a focus area for enforcement in Denmark and often involve substantial fines for even minor infringements. This fate was allotted to a producer of children's accessories (Konges Sløjd) in October 2021, warranting a fine of DKK 1,800,000 (EUR 241,892) for having pursued an RPM policy vis-à-vis one of its retailers over a period of two years. The company fine was topped up with an individual fine of DKK 100,000 (EUR 13,438) to a leading employee responsible for the policy. As the infringement was not disputed, only a short summary is available. However, while the policy was in force for two years, it appears to be directed at one single retailer, and there are no references to aggravating circumstances warranting a supplement, e.g. punishment for failing to adhere to the RPM policy. Consequently, it appears that the very substantial fines are bedded on a single infringement rather than a systematic and broad approach, underlining the severity of RPM infringements in Danish legal practice.

3. Abusive behaviour

2021 offered several interesting Article 102 cases, including a commitment case and when to accept prices as high or artificially low. Below, the most notable abuse cases from 2021 are detailed, including links to the underlying decisions.

Even investigations of exclusionary practices can be closed against commitments

In December 2021, the Competition Council closed an investigation, against commitments, into Wolters Kluwer's software licences. The case related to software used by professionals when offering tax assistance to individuals and came about after complaints from a competitor feeling foreclosed. After reviewing some 50 agreements, the Council was inclined to identify Wolters Kluwer as dominant and the rendered terms as abusive. The said terms pertained to the agreements being irrevocable for up to three years and four months and discounts only available for arrangements concluded for longer than a year. While disagreeing with these findings, Wolters Kluwer nevertheless offered to change its policy, henceforth accepting termination with three months' notice to the end of a calendar year and making discounts available also for short-term agreements. The commitments were made legally binding until 2027.

Rønne Havn and when to consider a price to be excessive

Bornholm, a Danish island in the Baltic Sea, is served by several ferries under contracts with the Danish Ministry of Transport. While these ferries connect Bornholm with different ports in Denmark, Sweden and Germany, they all departure from the port of Rønne, Bornholm's biggest city. Before renewing its contract with the Danish Ministry of Transport, one of the ferry operators, Danske Færger, approached the port owner to ensure that the operation terms would remain materially unchanged as this translated into the price that the operator had to request from the Ministry of Transport. This was confirmed, and the operator submitted a bid, but subsequently, the port added extra costs and increased the payment by more than 100 %. The ferry operator refused to pay this and was sued by the port of Rønne.

Before the Maritime and Commercial High Court, the ferry operator's principle submission was breach of contract when the port owner changed the operating terms materially. Alternatively, that it was excessive pricing in defiance of Article 102 when the price was increased signifcantly. Moreover, in support of the latter, the operator relied on EU cases, such as *United Brands* and *AKKA/LAA*, providing different options when checking against excessive pricing, including price v. costs and price comparisons. Moreover, according to the operator, it follows from *Tournier* that the burden of proof should be reversed when the terms differed from what was levied comparable places. As the prices were lower in other ports, the operator submitted having established this. In its defence, the port referred to i.a. **i**) substantial investment in better facilities that should be recouped, that **ii**) adequate notices had been served and what **iii**) was levied in comparable ports. Moreover, it follows from *Scandlines Sverige AB v. Port of Helsingborg* that it also mattered how an operator valued the services (access to the port), making it too narrow only to focus on the direct costs. Finally, the ferry operator had initially complained to the Competition and Consumer Authority, and in 2019, the Authority decided not to pursue the matter. A fact that according to the port indicated the absence of abuse.

The Maritime and Commercial High Court agreed to the principle submission making it redundant to decide on the matter of abuse. Nevertheless, the Court contemplated the matter. First, by concluding that the port had a dominant position and then by noting how the new price appeared abusive considering the 100 % price increase. However, due to the lack of further material along with the operator's decision not to call for an expert valuation, nothing conclusive could be made on the matter. The ruling has not been appealed and provides several important lessons. First and foremost, the Maritime and Commercial High Court is more willing to review claims of abuse, including excessive pricing, if the facts support this. However, to secure a favourable ruling, an expert valuation should be requested. Second, it does not disqualify review by the courts that the Competition and Consumer Authority has refused to investigate the matter.

Cash management and when to consider a price to be predatory

In 2017, the Competition Council had closed an investigation into a cash management company, Loomis, for anti-competitive foreclosure. Not without finding issues but against commitments on termination of long-term exclusivity agreements, that potential could lead to foreclosure. The agreements were initially concluded as part of acquiring the cash management activities from 61 banks in 2016 and now tying up 50 of these. As the 50 banks represented the bulk of the bank customers, the foreclosure risk was, at a minimum, plausible, which made it relevant to investigate the matter. By virtue of the commitment, no infringements of Articles 101 or 102 were identified, but a potential victim challenged this in a separate lawsuit against the cash management company and claimed compensation.

In an interim ruling from August 2021, the Maritime and Commercial High Court held that the exclusivity agreements had infringed both Articles 101 and 102. Article 101 since the agreement fell short of being ancillary to the original acquisition and now anti-competitive by effect, and Article 102 since it followed from i.a. *Hoffmann-La Roche* that a dominant undertaking could not tie up a significant portion of the market through exclusivity arrangements. However, four of the five judges also held that Article 102 had been violated when Loomis offered eight (strategic) customers prices below Loomis's Average Total Cost (ATC) and one below its Average Variable Cost (AVC). This is notable as the Maritime and Commercial High Court did not identify predatory (elimination) intent as required by the European Court of Justice in *AKZO* to condemn pricing below ATC. Under this AKZO doctrine, only pricing below AVC would be abusive in itself, but DG COMP has suggested to switch to Long-run Average Incremental Cost (LRAIC) as the relevant benchmark, e.g. in the *Enforcement Paper*. Unfortunately, the four judges do not provide advanced reasoning for their finding, instead they refer to i.a. *Post Danmark I* and *Post Danmark II* and the special responsibility of the dominant undertaking. In contrast, the dissenting judge specifically relied on the AKZO doctrine in her vote, rebutting abuse unless customers were offered prices below AVC. Therefore, it remains unknown if the Court tacitly adopted LRAIC as the relevant cost benchmark, as suggested by DG COMP, when checking for predatory pricing. The interim ruling was appealed, and it will be most interesting to see the case move forward.

4. Merger control

In Denmark, the Competition Council – in close cooperation with the Competition and Consumer Authority – is responsible for merger control, i.e. for approving (in some cases with commitments to solve competition challenges identified by the Authority) or prohibiting any merger exceeding the defined thresholds.

In 2021, 65 mergers were screened and approved by the Council (another two mergers were notified to the Competition and Consumer Authority, but were later withdrawn). This number represents a significant increase from 2020 where only 32 mergers were screened and approved, indicating high activity among undertakings with activities in Denmark.

Four mergers that were notified to the Competition and Consumer Authority in June, September and November 2021 are still being processed by the Authority, which indicates that the case processing time is longer than usual (those four merger notifications regard agreements between **i**) Volvo Danmark A/S and Titan Lastvogne A/S, between **ii**) Knorr-Bremse für Schienenfahrzeuge GmbH and DSB Component Workshop, between **iii**) Alm. Brand A/S and Codan Forsikring A/S and between **iv**) CHR Denmark A/S and Confac Holding A/S). Moreover, the general impression is that the pre-notification phase of the merger control (the phase of communication between the representatives of the undertakings and the Authority that goes ahead of handing in the final notification) is somewhat affected by the high case load leading to longer overall case handling.

Two of the mergers approved in 2021 are particularly interesting as they were approved with commitments from the involved undertakings. These will be further described below, including links to the relevant decisions.

Orifarm's purchase of pharmaceuticals from Takeda

Orifarm is a Danish pharmaceutical company with activities in the business area of parallel imported pharmaceuticals and generic pharmaceuticals. Takeda is a subsidiary of the multinational and biopharmaceutical company Takeda Pharmaceutical Company Limited.

When assessing *Orifarm's purchase of pharmaceuticals from Takeda*, the Competition and Consumer Authority found that the merger would significantly restrict the effective competition on 11 of the identified markets due to unilateral and/or coordinated effects. Based on the identified competition challenges, Orifarm offered commitments that eliminate the identified challenges according to the Competition and Consumer Authority's assessment. The commitments are referred to as "fix-it-first" solutions, which means that the commitments must be implemented prior to the merger. With the commitments, Orifarm undertakes to divest seven generic pharmaceuticals, five marketing authorizations for parallel imported pharmaceuticals and one over-the-counter product. Furthermore, Orifarm commits itself to comply with the price ceiling agreements that The Danish Association of the Pharmaceutical Industry has entered into with the

Ministry of Health and the Danish Regions.

JP/Politikens Hus A/S's acquisition of sole control over Dansk Avis Omdeling A/S (DAO) and A/S Bladkompagniet

JP/Politikens Hus, a Danish media company publishing newspapers and selling books among other things, acquired sole control over DAO, a Danish distributor of daily newspapers in Jutland and parcels throughout Denmark, and Bladkompagniet, a Danish distributor of newspapers on Zealand and surrounding islands and magazines and letters throughout Denmark.

Based on an overall assessment, the Competition and Consumer Authority concluded that the merger would restrict the effective competition on the market for newpaper publishing as JP/Politikens Hus becomes the owner of the only two daily newspaper distributors in parts of Jutland and on Zealand and the surrounding islands. The Competition and Consumer Authority was concerned that the merger would enable JP/Politikens Hus to engage in input foreclosure via DAO and Bladkompagniet by offering less favourable terms and prices or simply by refusing to provide distribution services to competing newspaper publishers.

To eliminate the Competition and Consumer Authority's concerns, i.e. to ensure that DAO and Bladkompagniet provide newspaper distribution on fair terms to third party news publishers, JP/Politikens Hus has submitted five commitments. According to these commitments, DAO and Bladkompagniet commit themselves to sell newpaper distribution on reasonable, non-discriminatory and transparent terms and prices to all customers, to only refuse newspaper distribution if it can be justified by documented capacity constraints and to publish current price lists and terms for newspaper distribution. Furthermore, to ensure that artificially high costs at DAO and/or Bladkompagniet do not affect the price of newspaper distribution, JP/Politikens Hus commits itself to sell services to DAO and/or Bladkompagniet on market terms. If any disputes regarding the commitments turn up between DAO and/or Bladkompagniet and their customers, these disputes must be solved by mediation and then arbitration.

5. Enforcement, including compensation

In 2021, in respect of enforcement, new powers were given to the enforcers, which demanded an update of the issued guidelines. Moreover, leniency was granted, and a claim for compensation resurrected. Below, these developments are detailed further, including links to the underlying decisions.

Leniency remained available and was used to close a case complex

As already indicated, leniency is available to undertakings cooperating with the Competition and Consumer Authority to end an infringement. This can even be in the form of immunity. In 2017, *FinDan El-Anlæg*, active in the market for refrigeration services, reported itself to the Competition and Consumer Authority under the leniency rules, vesting immunity to the first undertaking to report an infringement and reductions to the subsequent undertaking(s). In December 2020, this was used to impose a fine of DKK 400,000 (EUR 53,753) on a co-conspirator for having taken part in a market-sharing agreement. In October 2021, the cases were finally closed with *FinDan El-Anlæg* benefitting from immunity and by this escaped any fining.

New enforcement powers and guidelines

As part of Denmark's implementation of the ECN+ directive, new powers were vested in the Competition and Consumer Authority in 2021, including the right to summon individuals to an interview and prosecute cases before a criminal court if fines are warranted. Previously, only the criminal prosecutor could pursue fines, and the Competition and Consumer Authority was in principle barred from investigating infringements that could potentially warrant fines. Henceforth, the Competition and Consumer Authority may pursue the case from start to end, provided that charges are not filed against an individual. Such cases must still be handed over to the criminal prosecutor, and fundamental rights must be respected.

While no cases have been pursued under this new streamlined system, the Competition and Consumer Authority prepares for this, e.g. by updating its guidelines on self-incrimination when requested to provide information as part of an investigation by the Authority. The guidelines outline the fundamental principles as established in EU case law and by practice from the European Court of Human Rights. The former applies to undertakings while the latter applies to individuals.

Private enforcement and claim for compensation

In 2007, the Competition Council held that Elsam (now Orsted) had infringed Article 102 through excessive (wholesale electricity) prices in Western Denmark. A group of victims (totalling 1,054 undertakings) decided to file a follow-on claim and demanded compensation for their losses, which at that time exceeded DKK 4.4b (EUR 591m), but today probably in the range of DKK 10b (EUR 1.34b) due to compounded interests. Unfortunately for the plaintiffs, the underlying decision was overturned on appeal in 2018, which is why the Maritime and Commercial High Court ruled that the follow-on claim could not advance. However, this was appealed, and in 2021, the High Court ruled in their favour, allowing the claim for compensation to advance regardless of the fate of the original infringement decision, provided that the plaintiffs separately established an infringement. The case was then remitted back for review by the Maritime and Commercial High Court.

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