Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Denmark

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

National competition law mirrors Articles 101 and 102 TFEU and the EU Merger Regulation (save for the turnover thresholds that are lower in Denmark), which makes it immaterial for the outcome if a case is advanced against both EU and national competition law or only the latter. In terms of finalizing a case or investigation, different options are available, presuming the case is not closed informally. In addition to ordering infringements stopped, the Competition and Consumer Authority may accept commitments, impose fines in undisputed cases, award leniency, including immunity, in exchange for cooperation, and prosecute the case before a court if fines on companies are warranted.

However, fines (or imprisonment) of physical persons can only be advanced by the criminal prosecutor. Moreover, if the case raises concerns, but is not sufficient to warrant formal investigations, the Authority may issue a caution letter outlining its grievances, but not naming the object of these. 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 2022, yielding several interesting cases presented below. For the sake of brevity, only references to Articles 101 and 102 TFEU are used, but these would also cover the national equivalents unless specified.

Article 101 TFEU and horizontal agreements

In 2022, as usual, Danish legal practice offered a couple of notable Article 101 TFEU cases involving horizontal agreements, of which five merit comments. Below, these cases are detailed further, with links to the underlying decisions.

Non-compete clauses have to be drafted carefully to elude Article 101 TFEU

In a decision from October 2022, the Danish Competition Council reacted against two undertakings (Codeex ApS and Barcode People ApS) engaged in a customer allocation agreement. Both companies were active in data harvesting and the provision of barcode solutions for warehouse management. The owners of the two barcode companies had until 2018 operated a joint venture (QBS) active in data harvesting and bar codes and, as part of this, agreed to a non (customer) solicitation clause applicable 36 months post-termination of the JV.

Following disagreements in 2017, the owners separated, setting up new entities in the same sector. To resolve the partnership disagreements (and different grievances, including an arbitration case), a settlement was reached in 2019. As part of the settlement, the broad non-solicitation clause would continue for 24 months, and existing customers allocated between the parties. Moreover, the latter was enforced from May 2018 until June 2021 in the form of periodic discussions on "*who owned which customers*".

In its review, the Competition Council rebutted the clauses as ancillary to the JV (and the dissolution of this) as they covered any form of contact and, thus, activities beyond the JV. Citing *Telefónica* (Case T- 216/13), the Competition Council then held the clauses anti-competitive by object and a *de facto* market sharing agreement. It is indisputable that the clauses fall short of being ancillary as they are too broad.

However, the second part stands out as a rather restrictive reading of the notion of anti-competitive by object. In this case, the parties had (in contrast to *Telefónica*) allocated existing customers and carried over an older clause providing (some) legitimacy. Moreover, the parties did limit themselves to a customer clause rather than a (broader) competition clause. Neither made an impact on the Competition Council which identified an illegal market-sharing agreement.

Besides condemning the agreement, the Competition Council instructed the Danish Competition and Consumer Authority to pursue sanctions in the case, but it is unknown if this covers individuals as well as the undertakings involved. From the text of the decision, it appears that all involved only acted on the advice of their lawyers, why sanctioning might be limited to the undertakings. It is unknown whether this plan to challenge the findings or will accept a fine. Regardless of the next step, the case indicates how non-compete clauses directed at protecting a joint venture must be drafted diligently and narrowly in scope to elude Article 101 TFEU.

New Visions – horizontal cooperation or evil cartel?

From August to October, fines of DKK 10,000 (EUR 1,345) to DKK 90,000 (EUR 12,107) were handed out to five undertakings for having engaged in price and market sharing. Moreover, the fines were capped by the 10% of global turnover applicable in Danish competition law. As the infringements were not disputed, only short summaries are available, but these indicate the

undertakings to be active in providing management courses under a joint brand (Nye Visioner). By not limiting their cooperation to brand-related matters, but also colluding on prices and allocation of customers, the undertakings had crossed the fine line between legal horizontal cooperation and illegal cartels. The available summaries indicate that the undertakings helped the Danish Competition and Consumer Authority during the investigation and how this is considered mitigating circumstances. But no details are provided, making it difficult to evaluate the scope and nature of this further.

A voluntary retail chain may not assign territories

In a decision from June 2022, the Danish Competition Council condemned an agreement adopted by a voluntary retail chain (Botex) governing their engagement in advertisements outside assigned geographical areas. More specifically, the chain did not allow for this relying on a model of exclusive assignment of territories and the banning of active solicitation of customers outside these.

The Competition Council did not object to the forming of a voluntary chain, nor most of the embedded elements in this. However, as the chain consisted of members (24 across the territory of Denmark) engaged in the same activities, the agreement was horizontal in scope and the allocation of geographical territories, thus, a market-sharing agreement. In this, it was immaterial that the chain represented less than 5% of the relevant market.

The case has been brought before the Maritime and Commercial Court for the purpose of imposing fines and underlines the hard stand taken by the Competition Council when it comes to any form of agreement indirectly resulting in market partitioning. Even when representing low market shares and participants separated by distance and only indirectly in competition.

Information exchange under the umbrella of a trade organization

Trade organizations can provide valuable help to their members, e.g. with production benchmarks or impact assessment of new legislation, including influencing this in a more favourable direction (lobbying), why most companies in Denmark are members of such. However, if the members belong to the same trade or line of business activities, they would often qualify as competitors under Article 101 TFEU, which requires some prudent balancing.

In April 2022, the Danish Competition and Consumer Authority issued a caution letter warning an unspecified trade organization about this matter. The detail is only very scarcely outlined in the letter, but it appears that the trade organization had coordinated or acted on behalf of its member vis-à-vis a governmental regulator undertaking a sector inquiry.

According to the letter, it was important that this did not involve the sharing of sensitive information or other actions resulting in uniformizing the members' commercial terms. While difficult to extract anything meaningful with respect to the specific actions, the case does indicate the Competition and Consumer Authority's interest in and focus on trade organizations and potential anti-competitive coordination within these. Over the years, several articles and guidelines have been released on this, and the Competition and Consumer Authority retains its posture.

Organized boycott is a hardcore cartel

In February 2022, the Danish Competition Council condemned a horizontal boycott initiated by the Danish association of authorized Peugeot retailers and in force between 2012 and 2014. The members of the organization had agreed not to use a specific independent online database (Bilbasen.dk) and associated software (Bilinfo) when advertising used cars for sale. Instead, they should rely on competing services (Biltorvet.dk and AutoDesktop) controlled by the sector.

However, as the sector's own offerings had lower market shares than the independent database, implementing the decision had proven difficult as many retailers felt they could not rely on the former. Often, the association had to caution members by emails to fall in line, providing a treasury of evidence during a dawn raid in 2018. In its defence, the association unsuccessfully invoked different arguments, inter alia, that its preferred online database had much lower market shares in a market characterized by economies of scale and network effects.

The boycott served to counter this and ensure the long-term survivability of an alternative to the dominant offering, bringing competition to the market. The Competition and Consumer Authority did undertake a study of this (and other submitted defences) but concluded that it had neither been sufficiently established by the association nor linked directly to the boycott. Consequently, it could not be accommodated under Article 101(3). Following the administrative decision in February 2022, a fine of DKK 500,000 (EUR 67,264) was levied in April 2022, closing the case.

Article 101 TFEU and vertical agreements

Besides horizontal cases, Article 101 TFEU was also applied to Retail Price Maintenance (RPM) cases in 2022. These remain a focus area for enforcement in Denmark, and two undertakings were fined for RPM policies in 2022. In the first case, a producer of high-end home accessories (Rosendahl) was fined DKK 7,500,000 (EUR 1,008,916) in august 2022 for having pursued a policy of RPM and restricting cross-sales between retailers over a period of four years (2017-2021). As the infringement was not disputed, only a short summary is available. However, from this follows that both mitigating and aggravating circumstances were identified. As aggravating circumstances, references are made to the severity of the infringement and how retaliatory actions had been initiated against retailers failing to follow the policy. As mitigating circumstances, references are made to an internal compliance program and how the company admitted the infringement. The latter warranted a reduction from DKK 10,000,000 to DKK 7,500,000.

In the second RPM case, a manufacturer of auto chairs for kids (HTS Besafe) was fined DKK 8,000,000 (EUR 1,076,177) in February 2022 for having pursued a policy of RPM and restricting sales of its products online over a period of five years (2015-2020). From the short summary, it appears to have been accepted as mitigating circumstances that internal compliance attempts had been made, even if clearly inadequately, as infringements had passed.

Abusive behaviour

Somewhat unusual, 2022 did not offer any cases of abusive behaviour under Article 102 TFEU.

Merger control

The Danish Competition Council has primary responsibility for the Danish control of mergers exceeding the turnover thresholds, i.e. approval (in some cases with commitments to solve competition concerns identified by the Authority) or prohibition. The Competition Council is supported by the Competition and Consumer Authority handling cases and approving mergers processed under the simplified procedure.

In 2022, 72 mergers were screened and approved by the Competition Council (one merger was notified to the Competition and Consumer Authority, but later withdrawn). This number represents a further increase from 2021 where 65 mergers were screened and approved. The number also represents a further augmentation of the significant increase in mergers in 2021 from 2020 where only 32 mergers were screened and approved, indicating continuous high activity among undertakings with activities in Denmark.

10 mergers notified to the Competition and Consumer Authority in 2022 were still being processed by the Authority at the end of the year. 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 ahead of handing in the final notification) is somewhat affected by the high caseload leading to longer overall case handling.

Four of the mergers approved in 2022 are particularly interesting. These will be further described below, with links to the relevant decisions.

Volvo Danmark A/S' acquisition of assets and rights from Titan Lastvogne A/S

Volvo Danmark is a subsidiary of the Swedish-based Volvo Group whose main activities consist of the import of trucks and busses manufactured by Volvo and Renault as well as wholesale and retail sales of such vehicles. Further, Volvo Danmark distributes original spare parts for Volvo and Renault trucks and buses to authorized dealers in the Volvo Group's distribution network. Prior to the merger, Titan Lastvogne was one of Volvo Group's authorized dealers of Volvo and Renault trucks. Titan Lastvogne also offered repairs of Volvo and Renault trucks as well as Volvo busses and, to an extent, trucks and busses of other brands. Finally, Titan Lastvogne had activities in the retail sale of spare parts for Volvo and Renault trucks and Volvo buses.

Prior to the notification of its acquisition of Titan Lastvogne, Volvo Danmark had terminated its distribution agreement with Titan Lastvogne. Accordingly, Titan Lastvogne would no longer be authorised as a dealer and repairer of Volvo and Renault trucks and Volvo buses even if the notified transaction was not consummated.

The parties initially submitted a draft notification to the Competition and Consumer Authority on 12 May 2021. Following approximately 12 months of pre-notification, the notification was declared complete on 27 April 2022. The Competition and Consumer Authority initiated a Phase II investigation on 3 June 2022, and the merger was finally approved on 28 September 2022. This

case may very well be the longest merger assessment in Denmark with the total case handling exceeding one year and five months. The exceptionally long case handling indicates that the Competition and Consumer Authority had initially serious concerns that the merger would significantly impede effective competition in the affected markets.

In its assessment, the Competition and Consumer Authority considered whether a relevant market for Volvo and Renault trucks (primary product) should be defined separately from the spare parts intended for these vehicles (secondary product) or whether it would be relevant to define a "*system market*" comprising the retail sale of trucks and after-sales services as one combined bundle of products and services, having in mind that new vehicles are often sold in combination with a contract for the provision of spare parts and maintenance services. Following a detailed assessment, the Competition and Consumer Authority concluded that due to a lack of documentation, it was not relevant to define a system market for retail sales and related after-sales for trucks and buses, respectively.

When assessing the substance of the transaction, the Competition and Consumer Authority concluded that the contrafactual scenario of the transaction would not be status quo. Instead, the Competition and Consumer Authority was convinced that it was highly likely that Volvo Danmark A/S would terminate its authorisation of Titan as an authorised dealer and repair shop of Volvo trucks and busses. This was central to the Competition and Consumer Authority's approval of the transaction without remedies. Despite concluding that the transaction was likely to lead to high combined market shares and the risk of price increases in some affected markets, the Competition and Consumer Authority's quantitative analysis showed that especially the risk of price increases was likely to be similar whether or not the transaction was allowed to be consummated.

Against this background, the transaction was ultimately approved by the Danish Competition Council despite the apparent negative effects on competition initially identified as the notifying parties managed to convince the Competition Council that these effects would occur even if the transaction was not consummated.

Knorr-Bremse für Schienenfahrzeuge GmbH's acquisition of DSB Component Workshop

In June 2022, Knorr-Bremse's acquisition of the DSB Component Workshop was approved. Knorr-Bremse is a German manufacturer of components and spare parts for braking systems, doors as well as HVAC systems for trains. The parts are used both in the manufacturing of new trains and as spare parts in the aftermarket for repair and maintenance.

Prior to the merger, DSB Component Workshop was an entity under DSB Vedligehold, a subsidiary of the incumbent Danish train operator DSB. DSB Component Workshop provided "*heavy maintenance*" of trains, mostly belonging to DSB. To this end, DSB Component Workshop acquired spare parts for trains from, among others, Knorr-Bremse. DSB Component Workshop was one of Knorr-Bremse's largest customers in Denmark. DSB Component Workshop had also limited activities in the manufacturing of spare parts itself, including spare parts no longer manufactured by the original manufacturers.

The transaction was notified to the Competition and Consumer Authority on 2 September 2021 and the notification was considered complete on 17 September 2021. Following a number of critical inputs from competitors and customers, the Competition and Consumer Authority opened a Phase

II investigation on 22 October 2021. Following a failure to provide the requested information, the Competition and Consumer Authority decided to temporarily "*stop the clock*" three times, leading to a prolongation of the case handling by a total of 114 weekdays.

While assessing the Transaction, the Competition and Consumer Authority considered that the merger did not give rise to horizontal unilateral effects in relation to "*heavy maintenance*" as the parties' activities did not significantly overlap and as efficient competitors remained available after consummation of the transaction.

The Competition and Consumer Authority did initially find that the transaction was likely to lead to input foreclosure of Knorr-Bremse's competitors in the downstream market for heavy maintenance as (i) Knorr-Bremse's spare parts were an important and unique input pertaining to heavy maintenance of trains, (ii) as Knorr-Bremse was found to have a significant market share in the upstream market for the supply of spare parts, and (iii) as customers in the downstream market would not be able to react to input foreclosure by replacing entire train systems or by turning to internal production of spare parts. Against this background, the Competition and Consumer Authority found that Knorr-Bremse would have the ability to foreclose access to its spare parts.

Moreover, the Competition and Consumer Authority found that Knorr-Bremse would have the incentive to engage in input foreclosure of spare parts to smaller train operators and smaller competitors within the supply of heavy maintenance.

To address the concerns raised by the Competition and Consumer Authority, Knorr-Bremse proposed a number of commitments which were found to mitigate these concerns. According to the commitments, Knorr-Bremse has undertaken to continue to supply spare parts to existing and new customers on fair, reasonable and non-discriminatory prices and terms, and only to refuse to supply if due to limited capacity. Additionally, written complaints from small customers were to be forwarded to the Authority, and any disputes with customers were to be subject to mediation and arbitration. The commitments have been put in place for 10 years.

Alm. Brand's acquisition of Codan Forsikring

In April 2022, Alm Brand's acquisition of Codan was approved. Alm. Brand and Codan are Danish insurance companies, both active in the markets for non-life insurance to private and commercial customers. The transaction was found to give rise to modest overlaps leading to combined market shares of [10-20]% in the overall market for non-life insurance to private customers and [20-30]% in the overall market for non-life insurance to commercial customers.

Despite giving rise to only modest overlaps, the Competition and Consumer Authority decided to closely scrutinize the transaction in Phase II investigation, which involved sending out questionnaires to approx. 18,500 commercial insurance customers, 22 competitors, and 16 insurance brokers in addition to collecting a large amount of data from Alm. Brand and Codan on switching behaviour of customers, etc. Although Alm. Brand and Codan both offer non-life insurance to commercial customers, Alm. Brand was found to focus specifically on SMEs and agricultural businesses, whereas Codan focused on larger businesses including large international shipping and renewable energy companies.

In its assessment of the transaction, the Competition and Consumer Authority found that despite

the companies being active in the same relevant markets, neither horizontal unilateral effects nor horizontal coordinated effects could be identified in the market for non-life insurance to private customers as the parties' combined market share did not exceed 25% and as the parties were found not to be close competitors.

In relation to the market for non-life insurance to commercial customers, the Competition and Consumer Authority also concluded that the transaction would not give rise to horizontal concerns, placing emphasis on the fact that inter alia professional customers were more price sensitive than consumers and were likely to utilize insurance brokers, which was found to add a certain dynamic to the market. The transaction shows that the Competition and Consumer Authority is inclined to closely scrutinize mergers in the Danish insurance market, which may be due to the fact that especially private customers have very low switching rates, as more than 50% of private customers have had the same insurance provider for the past eight years.

Norlys's acquisition of Verdo Tele

In May 2022, Nordlys's acquisition of Verdo Tele was approved. Norlys is an undertaking with activities in telecommunications, television and broadband solutions, as well as other areas. Norlys owns fibre-optic cable infrastructure in large portions of Jutland. Additionally, Norlys owns the wholesale platform OpenNet, acting as a broker between owners of fibre-optic infrastructure and service providers of television and broadband products. Verdo Tele owned and operated fibre-optic cables in Randers and Hobro, covering 27,000 households. Verdo Tele had entered into an agreement to sell internet access to service providers through OpenNet. Prior to the merger, one of Norlys's subsidiaries was the sole service provider in Verdo Tele's network. However, Verdo Tele had entered into negotiations with other undertakings regarding access to its network.

The Competition and Consumer Authority considered that Norlys's acquisition of Verdo Tele could affect three relevant markets: (i) the market for wholesale of internet access through optic fibres and coax cables in the footprint of the network owner, (ii) the market for the retail sale of broadband internet connection through optic fibres and coax cables to consumers and small businesses in the footprint of the network owner, and (iii) the market for the retail sale of television packages in Denmark.

More specifically, there was a risk that the merger would result in the foreclosure of downstream competitors from the fibre-optic network due to the vertical connection between Verdo Tele's activities in the wholesale of internet access (upstream) and Norlys's activities in the retail sale of television and broadband products (downstream). This access constituted an indispensable input, and there were no alternatives and no circumstances preventing Norlys from discriminating against downstream competitors. Further, the Authority considered that Norlys, being vertically integrated, would have a further incentive to foreclose downstream competitors.

Norlys proposed several commitments that the Competition and Consumer Authority considered sufficient to mitigate the identified concerns, and consequently these commitments were made binding. According to the commitments, Norlys will be obliged not to discriminate between service providers in Verdo Tele's network. Norlys will also be obliged to continue Verdo Tele's announced prices until the end of 2023.

However, Norlys is not prohibited from offering service providers alternative pricing models

allowing service providers to choose between the alternative price models and prices available in the Verdo Tele price models. Norlys is obliged to not unduly prolong negotiations with service providers and not to deteriorate the value of Verdo Tele's products to service providers choosing Verdo Tele's pricing model. Apart from an obligation not to offer agreements on access to the network to service providers on terms that are unreasonable or discriminatory compared to what Norlys offers to its own service providers operating in the network, which will be in force indefinitely, the commitments will generally be in force for three years. The decision is an interesting example of the interplay between the Danish merger control rules and the special legislation applicable to telecommunication activities.

Public enforcement, including punishment for infringements

In 2022, in respect of public enforcement, the prosecutor tried twice, unsuccessfully, to argue for the imprisonment of individuals guilty of cartel infringements. While available as a punishment for aggravated cartels since 2013, imprisonment has never been used in Denmark, and this could potentially have been the first time, but in neither case did the courts follow suit. Below, these developments are detailed further, with links to the underlying decisions.

Joint tendering as an indirect market partitioning agreement

The forming of a consortium and submitting a joint tender under Article 101 TFEU have caused substantial uncertainty, even forcing DG COMP to offer considerations in its draft horizontal guidelines. In 2015, the Danish Competition Council concluded that a consortium formed for the purpose of submitting such a joint tender essentially served to secure a market partitioning in defiance of Article 101 TFEU. While initially overturned on appeal in 2018, the Danish Supreme Court reinstalled the initial findings in 2019, subject to some qualifications narrowing the scope of this. Subsequently, fines and punishment for the involved undertakings and individuals could be considered.

For the former, the prosecutor argued a fine of no less than DKK 25,000,000 (EUR 3,360,000), and for the latter imprisonment for a minimum of three months, but the City Court of Copenhagen did not follow suit. Rather did the Court in January 2022 acquit all the defendants. While accepting the forming of the consortium as a market partition agreement and, thus, a cartel, the actions did not meet the subjective requirement for punishment. Due to the complexity of the case and its many embedded assessments, the Court obviously felt uncomfortable accepting the required level of negligence, in particular as the parties had acted on the advice of a specialized anti-trust lawyer, greenlighting their actions. Moreover, when reviewing the case, the Court considered the implications emerging from the individuals having given testimony in an earlier case deciding if an infringement had taken place. Potentially, this could have resulted in self-incrimination, but the court rebutted this matter in the specific case. The ruling acquitting all the defendants has been appealed by the prosecutor, but will not be advanced before 2024.

A standard agreement as a clouded cartel

In 2016, the Danish Competition Council condemned a standard agreement between gas companies on the service of installed natural gas boilers. According to the parties, the agreement set out standard terms and principles for this and was vertical in scope. The Council disagreed and held the agreement to be horizontal and by touching upon prices anti-competitive by object.

After having the decision upheld on appeal in 2021, the case was handed over for criminal prosecution. By virtue of the severity of the infringement, the prosecutor suggested a fine of no less than DKK 25,000,000 (EUR 3,360,000) to the involved undertakings and imprisonment for a minimum of 60 days for four individuals. However, the Court only handed out fines of DKK 8,000,000 (EUR 1,076,000) to the undertakings and fines between DKK 50,000 (EUR 6,730) and 100,000 (EUR 13,450) to the individuals.

In the decision not to accommodate the prosecutor's request for imprisonment, the Court provided two observations. Firstly, the agreement had only lasted for less than a year, making it short in duration. Secondly, the infringement did not qualify as sufficiently aggravated. I.e. the agreements had been concluded as part of a rebalancing of tariffs and resulted in lower retail prices. While immaterial for identifying an infringement of Article 101 TFEU, this should be vectored into the decision on the punishment. Also, this case raised concerns about potential self-incrimination as some of the individuals had given testimony in an earlier case deciding if an infringement had taken place. However, the court rebutted this matter in the specific case. The case has been appealed.

Private enforcement, including compensation

In 2022, in respect of private enforcement, a claim for compensation was advanced, but not accepted, and an attempt to overturn an arbitration award was also rejected. Below, these developments are detailed further, with links to the underlying decisions.

Private enforcement and claim for compensation

In 2017, the Danish Competition Council held that the Danish producers of asphalt roofing had infringed Article 101 TFEU by adopting a technical standard designed to foreclose the Danish market for third parties. However, this was overturned on appeal in 2018 as the Competition Tribunal did not accept the agreements as anti-competitive by object, as assumed by the Competition Council, without rebutting that this might follow by effect. As the latter had not been considered, the case was remitted back to the Competition Council, which in 2020 decided to close the case without further issues.

A Swedish competitor (Eurotag), potentially excluded from the Danish market, decided to pursue the matter directly before the Maritime and Commercial High Court, claiming Article 101 TFEU infringed, but not specifying any monetary loss. In its submission, the claimant largely tried to rely on the content and arguments in the overturned decision from the Competition Council rather than separately specifying the anti-competitive actions and how these could be attributed to the Danish roofing companies. By virtue of these unprecise submissions, the Maritime and Commercial High Court ruled in favour of the defendants.

Overturning an arbitration award – The Eco-Swiss doctrine

By an arbitration award (in 2018), an undertaking (Haarslev Invest) and its principal owner (Mr Nielsen) were forced to accept a non-compete clause outside Article 101 TFEU as Mr Nielsen did not engage in any economic activities. The non-compete clause was adopted as part of a transaction where Mr Nielsen divested an undertaking in 2012 and was initially appointed as CEO. However, in 2016, Mr Nielsen was dismissed, and he then wanted to free himself from the non-compete clause preventing him from engaging in any competing activities in principle into perpetuity. Mr Nielsen's position was that while technically correct that he did not engage in any economic activities, this only followed from the non-compete clause, making it circular and self-serving not applying Article 101 TFEU to his case. Moreover, Mr Nielsen submitted that case law indicated that the assessment under Article 101(1) TFEU had to make but for any non-compete clause as any other position would allow parties to circumvent Article 101 TFEU by cleverly structuring their agreements.

The Arbitration Tribunal did not concur with Mr Nielsen, ruling against him and refusing to apply Article 101 to his case by virtue of Mr Nielsen not being engaged in any economic activities. Mr Nielsen then moved on to challenge this award before the judiciary on the ground of its (alleged) failure to respect fundamental legal principles. In competition law, this is often referred to as the *Eco Swiss Doctrine* (named after case C-126/97), where the European Court of Justice identified an obligation (and right) to challenge arbitration awards if arbitration tribunals fail to take EU Competition Law into consideration in their deliberations.

On balance, it should be noticed that the award challenged by Mr Nielsen did carefully consider the availability of Article 101, but reached a conclusion somewhat unexpected to Mr Nielsen. First, Mr Nielsen challenged the award before the Maritime and Commercial High Court (2020) and, subsequently, before the High Court (2022). Neither sided with Mr Nielsen. For full disclosure, one of the authors of this article had initially advised Mr Nielsen and his legal team on the case.

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