Kluwer Competition Law Blog

Main Developments in Competition Law and Policy – Denmark

Christian Bergqvist (University of Copenhagen) and Mark Gall (Bech-Bruun) · Tuesday, February 13th, 2024

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 or 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. Private enforcement actions will typically also be heard and advanced here, while criminal enforcement will occur before the local courts.

National competition law mirrors Articles 101 and 102 TFEU and the EU Merger Regulation (save for the lower turnover thresholds in Denmark), making it immaterial for the outcome if a case is advanced under 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, only the criminal prosecutor may advance natural persons' fines (or imprisonment). If the case raises concerns that are 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 2023, 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. Finally, draft legislation for amendments to the Danish Competition Act was circulated in 2023. A few comments will also be offered on this.

Article 101 and horizontal agreements

In 2023, as usual, Danish legal practice offered a couple of notable Article 101 cases involving

horizontal agreements, including no less than two pertaining to the assessment of retail chain under DG COMP's updated *Horizontal Guidelines* and what looks like a hardcore (electricity) cartel. Below, these and other cases are detailed further, with links to the underlying decisions.

A voluntary retail chain cannot assign territories – and may it?

In a decision from June 2022, the Danish Competition Council condemned an agreement adopted by a voluntary retail chain (*Botex*) governing its 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. While the Competition Council viewed this as a horizontal market-sharing agreement, the Danish Competition Appeals Board took a different position, overturning and remitting the decision in October 2023.

The Competition Appeals Board's line of arguments is very promising as the board refused to apply the object designation (or cartel concept) to an otherwise legitimate horizontal joint purchasing agreement that (only) indirectly resulted in market allocation. It is understandable why enforcers gravitate to this, but case law (see, e.g., case C-28/18 – *Budapest Bank* accepting price agreements) mandates a holistic approach and not simply resorting to the by-object designation automatically. Doing this, combined with the centre of gravity principle from the *Horizontal Guidelines* (recitals 7-8), the board found that regardless of the combined operation (joint purchasing and marketing), the agreement remained a joint purchasing agreement. As the *Horizontal Guidelines,* recital 278, does not outline market partitioning as a concern dealing with voluntary retail chains, the board remanded the decision.

Several possible readings emerge from the case. It is safe to conclude that the Competition Appeals Board applied a holistic approach to horizontal agreements, seeing beyond the indirect market allocation issues. However, it is unclear if the board also accepts the assignment of exclusive territories in voluntary retail chains. This is a possible reading as this would be unproblematic under the Vertical Guidelines, provided that passive sales are permitted. The board refers to recital 285 of the *Horizontal Guidelines* where DG COMP extends the lenient treatment of joint purchasing arrangements to other markets where the participants might be competing. While not explicitly noted, this should include the downstream retail market, providing cover for our reading. The *Botex* case has been remanded, allowing the Competition Council to adopt a new decision, why the case remains open.

Murder on the dance floor – round II – now with a facilitator

Back in 2021, the Danish Competition and Consumer Authority fined 22 nightclubs for being part of a market-sharing agreement. As part of a (legitimate) cooperation agreement centred on the joint procurement of goods and services and staff training, the nightclubs had accepted not to open establishments in proximity to each other. The Danish Competition and Consumer Authority labelled this as market sharing, and thus anti-competitive by object. Originally, only short resumes were published, leaving issues open. But in October, a formal decision was rendered, directed at the consultancy firm *ECIT Account A/S*. Further to providing book-keeping and managerial services to the 22 nightclubs, the company also managed the cooperation, including the non-

establishing understanding. Regardless of being active in a different segment of the economy, *ECIT Account A/S* was included in the infringement as a cartel facilitator. This concept allows for the inclusion of undertakings playing a leading role without being a direct member.

The publication of the decision has closed some questions, but others remain. Firstly, it is not obvious that the 22 nightclubs are competitors. 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. Moreover, bar and club owners are known for preferring to cluster their establishments to allow for moving bartenders and doormen around. On the other hand, if not competitors, why the non-establishing clause? According to the decisions, many also offer transport between cities and their establishments, widening their customer area. Secondly, the case involves a joint purchasing arrangement that includes some market allocation on the downstream retail market. DG COMP's *Horizontal Guidelines*, recitals 278-284, do not provide a basis for seeing the latter as an object restriction. The *Horizontal Guidelines,* recital 285, even extend the lenient treatment of joint purchasing arrangements to other markets where the participants might be competing, but this is completely ignored in the Danish decision. The decision does not even cite the 2023 version of the *Horizontal Guidelines,* but relies on the 2011 version instead. Obviously, this is disturbing, taking into consideration how the Danish Competition Appeals Board had relied on this when overturning the *Botex* decision two weeks prior. An award ignored in the new decision accounting for the third unsolved question.

It is understood that the Danish Competition and Consumer Authority plans to seek *ECIT Account A/S* fined for its part in the infringement, and that criminal charges might be brought against the management of the 22 nightclubs and probably also *ECIT Account A/S*. Moreover, has the latter challenged the Decision before the Maritime and Commercial High Court. A third round, or rematch, is therefore expected providing for a very interesting case to look for in 2024.

Children are wonderful, but can be very expensive – the Ønskebørn decision

"*Ønskebørn"* is a voluntary retail chain with 26 independent shops and 20 owners specializing in toddler accessories. Based on evidence collected under an inspection in November 2020, the Competition Council did, in March 2023, find that the members had coordinated prices and the marketing of its prices, not across all products, but for specific brands either owned by the chain or exclusively distributed by it. This was attained through a closed mail group and direct contact between the CEO and members failing to adhere to the policy. In its defence, the chain argued, in vain, that its shops were not competitors as each shop catered to a limited geographical area, and how the decisions had been directed at marketing-related issues and not prices. Finally, the chain argued that evidence indicating anything to the contrary was used out of its context.

The Competition Council rejected all these submissions, starting with saying how Article 101 did not require all members of the infringements to be direct competitors, provided that some of these qualified and others aided. With respect to the nature of the discussions, it was also rebutted that these did not involve problematic price discussions. In this, the Council could refer to several incriminating emails where members expressed dissatisfaction with other members "dropping" their prices and motivated the CEO to contact these, as indicated above.

It is understood that the Danish Competition and Consumer Authority plans to seek a fine imposed

on the retail chain. Perhaps also on leading individuals of this.

Procurement of reserve capacities and the forming of an electricity cartel

In October, the Competition Council rendered a decision involving collusion between 49 electricity generators and a trading company directed at inflating the price for reserve capacity in Western Denmark. Reserve capacity is procured by the Transmission System Operator (TSO) when confronted with unexpected imbalances between supply and demand in the electricity system. The Danish TSO occasionally observed identical bids when inviting possible providers to submit bids for reserving capacities, leading the Danish Competition and Consumer Authority to undertake inspections at six undertakings in May 2021. Here, evidence was uncovered of an arrangement where a single company, *Effekthandel,* would handle the auction process for 49 power generators and then distribute the revenue. Not based on tenders won, but on capacity made available, making it irrelevant if the generator's offer was accepted. For this, *Effekthandel* would receive a commission from the power generator. It was even uncovered how *Effekthandel,* on a regular basis, informed the power generators of the purpose and effect of the arrangement, including how it allowed for higher prices.

Regardless of an arrangement that did not entail direct coordination of prices, the Competition Council held that it was akin to this and, thus, a restriction by object. Moreover, it has been indicated that the case will continue before the courts for the purpose of imposing fines on *Effekthandel* and the 49 energy producers. It also appears plausible that the case will continue as a criminal case against several of the involved persons. An interesting fact might play a role here as it appears that *Effekthandel* had consulted a competition law lawyer before setting up the arrangement. This lawyer had incorrectly concluded that the arrangement did not infringe Article 101, and it will be interesting to see how this will play into the criminal evaluation of the arrangement.

Two IT cases on what constitutes a reasonable termination period

The Danish Competition and Consumer Authority also used 2023 to outline principles for the assessment of long termination notices under a horizontal corporation. This happened in *BEC Financial Technologies* and *Bankdata*, two cases involving non-full-function joint ventures between banks. In both, several smaller banks had joined forces when it came to procuring IT services, forming their own IT service providers. To secure viability and recoupment of the (initial) investments, members had to cover all their IT requirements exclusively with the JV and could only terminate this subject to payment. This payment would be an amount corresponding approximately to 5 years' membership payment.

After having expressed concern through Statements of Objections in both cases, the Competition and Consumer Authority accepted to close *Bankdata* subject to commitments and accepted that *BEC Financial Technologies* voluntarily adjusted its policy in accordance with these. Pursuant to the accepted commitments, members could terminate their affiliation subject to the payment of what amounted to 2.5 years' payment and an upfront fee of 6 months' payment. The relatively long termination period reflected that substantial investment had been endured to make the JV operative and how this had to be balanced against a vertical foreclosure risk if no adjustments were made. As

the cases were closed against commitments, no formal evaluation was undertaken, which is why the cases mostly speak to the pragmatism of the Danish Competition and Consumer Authority in finding an amicable solution.

The Autobutler decision – when online shopping turns into a cartel

Autobutler is an online platform that connects car owners with auto workshops, allowing car owners to get quotes for all types of auto repairs and service checks. Based on collected evidence, the Danish Competition Council concluded in June that prices had been coordinated between the participating workshops, not in general, but for nine services, including different standard service checks. According to *Autobutler,* as part of short-term campaigns, but the Danish Competition Council did not accept this. Neither did it accept, as suggested by *Autobutler,* that the alleged price coordination only entailed a maximum price that the workshop could go under, but not exceed. Finally, the Council rebutted that the policy had resulted in lower retail pricing, making an exemption under Article 101(3) available.

Only the platform, aka *Autobutler,* was included as the Council found that this had been instrumental in bringing the coordination about. In reaching its conclusion, the Council found that the platform had concluded bilateral agreements with the auto workshops, allowing these to offer services using the platform. The platform then used this arrangement to secure a coordinated minimum price in a manner that, as a minimum, qualified as a consorted practice.

It is understood that the Danish Competition and Consumer Authority plans to seek *Autobutler* fined for its part in the infringement and that *Autobutler*, in contrast, will dispute most of the facts as presented in the decision.

Article 101 and vertical agreements

Somewhat unusually, 2023 did not offer any new cases about vertical arrangements under Article 101, but it did put an end to one originally decided in 2013.

The virtue of a proper market definition – The Deutz case

In 2013, the Danish Competition Council decided that *Deutz AG*, a German train manufacturer, had infringed Article 101 by preventing passive sales and parallel import of spare parts for Deutz train engines. Moreover, Article 102 had been infringed by virtue of a de facto refusal to supply spare parts. Initially, this was upheld by the Competition Appeals Board (2013) and the Maritime and Commercial High Court (2021), but the Eastern High Court ruled differently in February 2023.

The High Court identified two flaws in the original decision. Firstly, the Competition Council failed to provide a proper market definition, limiting this to Deutz engines and not considering if unoriginal spare parts should or could be included nor how potential competition played into the analysis. Moreover, the Council had failed to adequately account for how it had reached its conclusion, making this rather theoretical. Finding *Deutz* dominant was therefore unsupported by

the underlying analysis. Secondly, it had not been properly considered whether the Vertical Block Exemption (Regulation 330/10) was applicable to the agreement. In its original decision, the Competition Council refused this by referring to restricting passive sales as a hardcore restriction under this, but before the court, the Council also argued that the 30% market share threshold was exceeded. As the court had already overturned the rendered market definition, the court rebutted the latter. Regarding restricting passive sales, the court did not accept that a mutual understanding or agreement regarding this had been concluded. Rather, it found that *Deutz AG* had unilaterally decided to waive its right to supply directly. As this did not infringe Article 101 nor the Vertical Block Exemption, it was flawed that the Competition Council had refused to apply the latter.

The High Court overturned and remitted the case back to the Competition Council for renewed review. In October, it was announced that special permits had been granted for bringing the case before the Danish Supreme Court. In Denmark, rulings may only be appealed once, making such a permit relevant for a second appeal.

Abusive behaviour

2023 offered one new case about (alleged) abusive behaviour under Article 102 in the form of a commitment case. Not to close the formal investigation but as an interim solution while this continued. Moreover, the Deutz case, as outlined above, involves an Article 102 matter, but as this has already been outlined no comment will be offered on this.

Interim commitments in abuse investigations – the Coloplast decision

In June, the Danish Competition and Consumer Authority accepted interim commitments in a pending Article 102 investigation into *Coloplast. Coloplast* manufactures and sells, i.e., ostomy products, including ostomy bags, to people with ostomy and had potentially engaged in a margin squeeze. A margin squeeze emerges when a dominant supplier, active upstream and downstream in a supply stream, takes advantage of this and creates an insufficient margin between the pricing on these two markets, typically by raising the upstream wholesale prices, lowering the downstream retail price or a combination of both.

Coloplast sells its products to wholesale providers of healthcare products but is from 2019 engaged in direct sales to the local municipalities through a partnership with the wholesaler *Abena*. Following an ostomy operation, the patients will be introduced to ostomy products, including ostomy bags, at the hospital, but then supplied with products by the local municipalities. The municipalities will procure ostomy products from several wholesalers, including *Coloplast/Abena,* but in practice, most patients prefer the product originally introduced to them at the hospital. As this often was a *Coloplast* solution, the Danish Competition and Consumer Authority gravitated to see *Coloplast* as dominant.

Based on complaints, the Danish Competition and Consumer Authority had opened an investigation into *Coloplast*, but was concerned about the ability to finalize this in time to prevent the alleged margin squeeze from taking effect. To prevent the authority from making an interim decision, *Coloplast* offered a set of commitments that would preserve competition and govern *Coloplast's* pricing until June 2024. Under these commitments, *Coloplast* will 1) sell to all

interested in buying products from *Coloplast* for the purpose of supplying the local municipalities, 2) on identical terms, and 3) either abstain from selling downstream or 4) ensure that an As Efficient Competitor do not fall victim to a margin squeeze. To make commitment 4) more operative, it was also stated that:

1. The retail prices applied by *Coloplast* (regardless of how it bids) have to cover *Coloplast's* wholesale prices (the prices offered to the competitors) plus *Coloplast*'s long-run incremental costs and a profit. The level of the latter has not been disclosed.
2. All wholesalers must be offered identical terms and discounts, and *Coloplast* may not offer better terms to retail customers (the municipalities).
3. No later than 10 working days before submitting a tender to a municipality, Coloplast must inform (competing) wholesalers about expected wholesale prices, allowing these to calculate their own bids. If required, the information must outline price adjustment mechanisms.
4. If bidding through a consortium, *Coloplast* must furnish the Danish Competition and Consumer Authority with information regarding i) the retail price, including discounts and conditions, ii) the wholesale prices and Coloplast's long-term long-run-incremental costs and, finally, iii) documentation on its compliance with commitments 4a and 4b.

Margin squeeze is one of the most complex forms of abuse, and many issues remain open, including the relevant upstream benchmark prices. However, by virtue of commitment 4a, the wholesale price has been applied. An alternative could have been the price offered to *Coloplast/Abena,* followed by testing if the downstream retail price secured coverage for this, but this was waived. The reason for this is obvious. Besides eliminating the risk of a margin squeeze, the use of the wholesale price offered to third parties simplifies the Danish Competition and Consumer Authority's monitoring process, but it might represent a more stringent application than would follow from case law.

As the case is an interim commitment case, linked to the underlying investigation, it is expected that the matter will be revisited in 2024. Here, the Danish Competition Council can either identify an infringement of Article 102, close the case without any such finding or close the case against commitments inspired by the interim ones. The latter naturally requires that *Coloplast* accepts this.

Merger control

The Danish Competition Council has the 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 2023, 75 mergers were screened by the Danish competition authorities. Of the 75 mergers, 66 were notified in 2023, nine of the mergers were notified in 2022, but considered final in 2023 (two of which were notified to the Danish Competition and Consumer Authority, but later withdrawn). 68 mergers were approved by the Danish Competition Council or the Danish Competition and Consumer Authority in 2023, three of the mergers were approved in Phase II, and five of the notified mergers were still being processed by the authorities at the end of the year, one of which is in Phase II. This number represents a small but further increase from 2022 where 72 mergers were

screened and approved. The number still represents an augmentation of the significant increase in mergers in the previous years, indicating continuous high activity among undertakings with activities in Denmark.

Moreover, the general impression is still 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. However, it has been the Danish Competition and Consumer Authority's practice to do a lot of the case handling in the pre-notification phase, leading to a longer pre-notification phase, but a shorter phase after the final notification.

Five of the mergers approved in 2023 are particularly interesting. These will be further described below with links to the relevant decisions. The three mergers regarding supermarket chains will be addressed and commented on collectively. A fourth decision regarding Dagrofa ApS and Rema 1000 was notified in November 2023, but is still pending.

Supermarket chains

The Danish competition authorities have not reviewed the grocery retail market since 2013. In previous cases, the Danish Competition Council had consistently delineated the grocery retail market as a national market. In 2023, three transactions regarding supermarket chains were notified to and approved by the Danish competition authorities. These decisions, *Rema 1000's acquisition of parts of ALDI Danmark ApS*, *Salling Group A/S's acquisition of parts of ALDI Danmark ApS* and *Lidl's acquisition of 11 store properties from Rema 1000*, show that the Danish competition authorities have departed from previous Danish case law when assessing supermarket mergers. Instead of assessing the transactions on a national market, the competition authorities applied a narrow geographical market definition with focus largely put on local effects on the grocery retail market. The very narrow market definition is in clear contrast to the fact that supermarkets consistently set national maximum prices, product range and opening hours and prepare overall marketing material etc. at a national level. These decisions therefore follow the tendency of both the National Competition Authorities and the European Commission to assess the effects of mergers in retail sales of groceries on local markets.

The three supermarket decisions all revolve around acquisitions of stores and properties previously owned by ALDI Danmark ApS ("ALDI") after ALDI announced its intention to end its activities in Denmark. ALDI's decision was made prior to and independently from the transactions.

Prior to the said transactions, ALDI, Salling Group A/S ("Salling"), Lidl Danmark K/S ("Lidl") and REMA 1000 Danmark A/S ("Rema 1000") were all active on the market for retail sales of groceries in Denmark. ALDI was a grocery chain that had approximately 187 active stores in Denmark and was part of ALDI Nord, which is ultimately owned by ALDI Einkauf GmbH & Co.

The Danish Competition and Consumer Authority assessed the local effects based on an assessment of how long the customers are willing to travel to purchase groceries. The Danish Competition and Consumer Authority applied a narrow geographical market definition based on a 10-minute drive by car around each of the parties' stores in areas where the parties had overlapping activities, depending on whether the relevant store was located in an urban or rural area. The Danish Competition and Consumer Authority applied the following screening method to identify

areas where it was unlikely that the transactions would restrict the effective competition significantly:

In local areas limited to a 10-minute drive by car around the parties' stores where:

- the parties' combined market share did not exceed 25% in the local area;
- where the parties' combined market share did not exceed 40% and the transaction would not increase the combined market share by more than 5%; or
- in areas where the parties' combined market share did not exceed 40%, but where the combined market share would increase more than 5% while at the same time, at least two out of three conceptually close competitors were present in the relevant local area and at least three of the overall competing retail grocery groups were present.

In addition, the Danish Competition and Consumer Authority applied an additional screening based on smaller catchment areas of inter alia 5-minute driving time around the parties' stores.

The Danish Competition and Consumer Authority was concerned about, among other things, the opportunity for some local grocery stores to adopt local prices, reduce product and/or quality, set local promotional campaigns and enable differences in opening hours and product range in different local areas. In other words, the Danish Competition and Consumer Authority was concerned that the transactions would significantly impede effective competition in a number of local markets.

Rema 1000's acquisition of parts of ALDI

The first of the three transactions was REMA 1000's acquisition of parts of ALDI.

The transaction was notified to the Danish Competition and Consumer Authority on 7 March 2023 and the notification was considered complete on 31 March 2023. On 11 May 2023, the Danish Competition and Consumer Authority opened a Phase II investigation as a separate investigation of the transaction was required.

In August 2023, the Danish Competition Council approved REMA 1000's acquisition of 114 stores, seven store projects, three distribution centres, five properties, employees and operational equipment from ALDI. The Danish Competition Council's approval was conditional on REMA 1000 divesting three stores in Bjerringbro, Hadsund and Væggerløse, respectively, as the Danish Competition Council, during its investigation, had found that the transaction would significantly impede the effective competition without the divestment of the relevant stores. To remedy the Competition Council's concerns, REMA 1000 committed to divest the three stores to a "suitable buyer". The commitments ensure that i) the competition in local areas was upheld, ii) that customers have actual alternatives to REMA 1000 and iii) that the variation in supply, product range, the freshness of the products etc. is not reduced or compromised.

In its assessment, the Danish competition authorities emphasized, among other things, that REMA 1000 and ALDI's market shares in the local areas showed i) that the transaction would affect a large proportion of customers, ii) that customers would lose a significant alternative player in the local areas and thus have fewer options for grocery shopping, iii) that the geography of the areas in question meant that the variety of grocery stores was already limited, and iv) that customers'

limited willingness to travel did not support significant competitive pressure from stores in other local areas.

REMA 1000 is a franchise chain where the individual stores are operated by independent franchisees. In its assessment of the transaction, the Danish Competition and Consumer Authority considered whether competitive pressure existed between the individual Rema 1000 franchisees, which could affect the overall assessment of the transaction. The Danish Competition and Consumer Authority concluded that the individual REMA 1000 franchisees to a certain degree have the ability to control or partially control a number of local competitive parameters, including certain parts of pricing, the selection of products and the composition of staff. At the same time, the Danish Competition and Consumer Authority concluded that the competitive pressure between the individual REMA 1000 franchisees could not be considered as disciplining as the competitive pressure from grocery stores which are not part of REMA 1000. Accordingly, for the purpose of its assessment of the transaction, the Danish Competition and Consumer Authority did not consider the individual REMA 1000 franchisees as independent competitors. This obviously had a significant influence on the Danish Competition and Consumer Authority's assessment of the impact of the transaction in the relevant local markets.

Lidl's acquisition of 11 retail store properties from REMA 1000

On 29 November 2023, Lidl was approved as a "suitable buyer", and in December 2023, Lidl acquired the three stores as well as nine other ALDI stores from REMA 1000. The approval of *Lidl's acquisition of 11 retail store properties from REMA 1000* was completed, in accordance with the relevant commitments in the REMA 1000 decision and after a simplified procedure, cf. section 12c(7) of the Danish Competition Act. The acquisition did not give rise to any competition concern due to Lidl's limited presence in Denmark and in the relevant local areas. On the contrary, the transaction was found to contribute to the creation of a sustainable structural change in the relevant markets as Lidl was not currently present within a 10-minute car ride from the relevant locations and therefore did not have overlapping activities with the target stores.

As initially noted, the assessments of mergers in the grocery retail market have previously been based on a national or regional market. But in these cases, the final geographical market definition was left open due to the commitments made by REMA 1000, obligating REMA 1000 to divest three stores in the relevant local areas and the commitments made by Salling to both sell and sublease one store in relevant local areas. Subsequently, the Danish Competition Council referred to recent practices from the Commission, which had considered the geographical market for retail sales of groceries to be local. In its assessment, the Danish Competition Council deviates from previous Danish practices when assessing supermarket mergers and applies a relatively narrow geographical market definition based on a 10-minute car ride around each of the parties' stores in areas where the parties had overlapping activities. In these cases, the local competition parameters, such as transportation time, local price reduction, local marketing campaigns, changes in the number of products and product range, change of quality of the products or store service, local opening hours, limited range of alternatives etc., were emphasized and given substantial weight in the assessment of local effects.

Salling's acquisition of parts of ALDI

The approach and method, regarding local effects, were also applied in the decision regarding *Salling's acquisition of parts of ALDI.* The transaction involves Salling's acquisition of sole control over seven of ALDI's currently open stores, six of ALDI's currently closed stores and eight of ALDI's store projects.

The transaction was notified to the Danish Competition and Consumer Authority on 26 April 2023, and the notification was considered complete on 3 July 2023. On 7 August 2023, the Danish competition authorities opened a Phase II investigation as a separate investigation of the transaction was required. On 29 November 2023, the Danish Competition Council approved the transaction after having accepted the commitments made by Salling to sell one retail store in Rødbyhavn to Lidl and to sublease one of its own stores in Stubbekøbing to Dagrofa for a period of six years, whereafter Salling was to resign from the lease.

The reasoning behind the commitments was inter alia that the investigation showed that the selection of independent stores would be significantly limited and that the transaction would increase the incentive for local price increases or deterioration of alternative competitive parameters, such as quality, service, product selection, opening hours etc. The selection of independent grocery stores was already limited in the relevant local areas. The Danish Competition and Consumer Authority came to this conclusion despite the fact that Salling could show that Salling had not raised local prices or reduced alternative competitive parameters such as opening hours, staffing, breath or depth in the range of product assortment in a previous period where local competitors such as Coop and ALDI had closed their stores in the local area leading Salling to be the only player operating an open store in the relevant local area.

It is interesting that although Salling was able to provide hard evidence showing that it had not raised prices or reduced alternative competitive parameters in a local area, despite being the only player operating an open store there, the Danish Competition and Consumer Authority concluded that even if stores before the transaction would not react to local conditions of competition, this would not preclude the risk that Salling would react to changes in local conditions for competition after the consummation of the transaction. This shows that the Danish Competition and Consumer Authority is prepared to disregard previous documented behaviour and emphasize theoretical risks, which implies that it may be extremely difficult to convince the Danish Competition and Consumer Authority that a transaction will not significantly reduce competition locally, despite being able to prove the contrary.

Semler Mobility Retail A/S's acquisition of sole control over Car Holding A/S

On 28 June 2023, the Danish Competition Council approved Semler Mobility Retail A/S's acquisition of Car Holding A/S, including the companies Autohuset Glostrup A/S, Autohuset Glostrup-Valby A/S, Autohuset Frederikssund A/S, Autohuset Ringsted A/S and Kronborg A/S ("Car Holding"). Semler Mobility Retail A/S ("Semler") is part of the Danish automotive group Semler Group. Both Semler and Car Holding sell passenger cars and light commercial vehicles through their sales outlets. In addition, the parties operate authorized workshops under car brands such as Volkswagen, Audi, Skoda and Seat as well as conduct sales of original spare parts for the said car brands.

The transaction was notified to the Danish Competition and Consumer Authority on 11 November 2022 and was considered complete on 1 February 2023. On 13 March 2023, a Phase II investigation was opened as the Danish Competition and Consumer Authority had initially identified competition concerns, specifically potential effects on competition in the local areas surrounding Helsingør (Elsinore). The Danish Competition and Consumer Authority was concerned about the possibility that the transaction would lead to higher prices for repair and maintenance for the affected car brands. However, the in-depth investigation in Phase II showed that the transaction would not appreciably harm the affected competition as, inter alia, i) customers would have the option to choose several other authorized workshops as well as a wide range of independent workshops, ii) customers were found to be willing to drive further for repair and maintenance if prices increased, iii) other authorized workshops, along with independent workshops, were able to perform the same repair and maintenance services, and iv) the large corporate customers with framework agreements, which are typically not brand-specific, would also have several alternatives after the transaction has been consummated.

The final definition of the relevant geographical market for the repair and maintenance was left open as the transaction would not appreciably harm competition, regardless of whether the market was defined as a national market or a narrower market for Zealand or local areas. In order to assess the transaction, the Danish Competition and Consumer Authority based its assessment on the brand-specific market for repair and maintenance, geographically defined to local effects around the catchment areas of the parties' overlapping activities based on a 30-minute car ride around each of the parties' locations. The focus on local effects and the definition of a relatively narrow geographical market follows the recent tendency by the Danish Competition and Consumer Authority to focus on local effects in transactions involving physical retail sales outlets.

The transaction was approved without remedies as the Danish Competition and Consumer Authority concluded that the transaction would not appreciably harm competition, even on the relevant local market. This was due to the fact that the customers were willing to drive longer in the event of a price increase, the parties were part of an objective and non-discrimination selective distribution system and the number of other independent competitors on the market and in the nearby areas would still be sufficient to ensure competition.

NDI Group A/S's and Euromaster Danmark A/S' case against the Competition and Consumer Authority (calculation of deadlines)

In August 2023, NDI Group A/S ("NDI") withdrew its notification of its acquisition of Euromaster Danmark A/S ("Euromaster") after the Danish Competition and Consumer Authority had raised significant concerns regarding the transaction's potential harm to competition. The withdrawal followed a ruling from the Danish Competition Appeals Board, which was issued in May 2023.

The transaction was notified to the Danish Competition and Consumer Authority on 22 April 2022 and was considered complete on 11 November 2022.

Following the submission of the first draft notification in March 2022, an extensive correspondence between the NDI and the Danish Competition and Consumer Authority led to the submission of the final notification on 11 November 2022 at 19.18 pm. On 25 November 2022, the Danish Competition and Consumer Authority informed the parties that the notification was

considered final from 14 November 2022. At the same time, the Danish Competition and Consumer Authority stated that it would either approve the transaction or open a Phase II investigation on 19 December 2022 at the latest. On 19 December 2022, the Danish Competition and Consumer Authority notified the parties of its decision to open a Phase II investigation, followed by a Statement of Objection from the Danish Competition and Consumer Authority identifying a number of competition concerns on 20 December 2022.

According to section 12d(1) of the Danish Competition Act, the decision on whether a merger shall be approved must follow no later than 25 working days after a complete notification has been received. If no decision has been made within this time limit of 25 working days, this shall be considered to be a decision to approve the merger, cf. section 12d(6).

The parties claimed that the decision to open a Phase II investigation on 19 December 2022 was made too late, exceeding the 25 working days deadline and that the merger should therefore be considered approved as in accordance with section 12d(6) of the Danish Competition Act.

On 23 January 2023, the Danish Competition and Consumer Authority decided that the deadline of 25 working days, in the opinion of the Danish Competition and Consumer Authority, had not been exceeded and that the merger could therefore not be considered automatically approved. On 6 March 2023, this decision was appealed by the parties to the Danish Competition Appeals Board.

The appeal case concerned the calculation of the deadline for the Danish Competition and Consumer Authority's decision to open a separate investigation of the merger. As the Danish Competition and Consumer Authority received the complete notification of the merger after office hours (after 16:00 pm) on Friday 11 November 2023, the Danish Competition and Consumer Authority informed the parties that the notification was considered to have been received on the next business day (Monday 14 November 2023) and that the Danish Competition and Consumer Authority had calculated the deadline for a decision on a separate investigation accordingly, which was in accordance with the Danish Competition and Consumer Authority's practice.

After having assessed the matter, the Danish Competition Appeals Board concluded that the notification should be deemed to have been received on the day of accessibility (i.e. 11 November 2023) and that the Danish Competition and Consumer Authority had calculated the deadline incorrectly and notified the parties regarding the Phase II investigation after the deadline had expired. However, the Danish Competition Appeals Board found, after an overall assessment, that the failure to meet the deadline could be disregarded when taking into account the overall purpose of the merger control rules, that the deadline had only been slightly exceeded and the fact that the parties had been informed of the calculation of the deadline and could adjust accordingly. Under these very specific circumstances, the Danish Competition Appeals Board found that the merger could not be considered automatically approved. The Danish Competition and Consumer Authority has since changed its practice for calculating the relevant deadlines for the transition to a Phase II investigation in merger cases.

The appeal case is interesting as the Danish Competition Appeals Board clarifies that a notification is to be considered received and accessible when it is available to the addressee, regardless of whether it arrives outside office hours, as long as it is before midnight. This rule is provided by law. The Danish Competition and Consumer Authority's decision on 19 December 2022 to open a Phase II investigation was made after the deadline, and, as a starting point, the merger should have been considered approved in accordance with section 12d(6) of the Danish Competition Act. It

appears as if the pragmatic approach by the Danish Competition Appeals Board was chosen instead of a strict textual approach, which would likely have had implications for a number of earlier transactions where Phase II investigations had been opened under similar circumstances.

Public enforcement, including punishment for infringements

In 2023, in respect of public enforcement, three cases merited comments involving the legal assessment of joint tendering, the fine for horizontal price coordination and the requirement for initiating inspections (dawn raids). Below, these are detailed, with links to the underlying decisions.

Joint tendering as an indirect market partitioning agreement

Forming a consortium and submitting a joint tender under Article 101 have caused substantial uncertainty, even forcing DG COMP to offer considerations in its updated *Horizontal Guidelines*, recitals 347-365. Unsurprisingly, the matter has also generated cases in Denmark, including a criminal case against the company *PKA Pension* and two leading individuals.

PKA Pension administrates pension schemes. Mostly for people in non-managerial positions and as part of the collective agreements governing their jobs. In 2018, *PKA Pension*, jointly with *Danica*, submitted a joint bid for the management of the pension schemes of some 18,500 employees at *Dansk Supermarked*. The pension scheme would cover people in both managerial and non-managerial positions. As *Dansk Supermarket* wanted one (and only one) manager, *Dansk Supermarket* had invited bidders to join forces if relevant. In contrast to *PKA Pension, Danica* had experience in the administration of pensions for people in managerial positions, why they decided to submit a joint bid. Subsequently, *Danica* requested and was granted immunity under the Danish leniency program, which is why only *PKA Pension* became the subject of the subsequent criminal investigation.

According to the criminal prosecutor, the joint bid qualified as a market-sharing cartel as it had reduced the number of bids. Under Danish law, cartel infringements carry imprisonment, but the prosecutor only opted for a (substantial) fine on *PKA Pension* and two leading individuals. Embedded in this, the prosecutor assumed that *Danica* and *PKA Pension* operated in the same market and could qualify as competitors. However, considering that they had specialized in managerial and non-managerial employees, very little evidence was presented to substantiate this assumption.

In its ruling from December, the criminal court acquitted *PKA Pension* and the two leading individuals. Essentially as the court did not accept *Danica and PKA Pension* as actual competitors, considering their specializations and lack of evidence suggesting otherwise. The ruling has not been appealed by the prosecutor.

Fines are getting hefty – the Broste decision

Broste Copenhagen, active in the supply of home decorations such as candle lights and tableware, had in January and July 2021 coordinated the introduction of certain COVID-19-motivated freight price adjustments with a competitor. This warranted a fine in April 2023, but as *Broste Copenhagen* admitted the infringement and took active steps to make employees aware of Article 101, the Danish Competition Council agreed to reduce this from DKK 7.5 million to DKK 6 million. The DKK 7.5 million was calculated by considering the gravity of the infringement and *Broste Copenhagen's* global turnover.

Compared to the level applied by, e.g., DG COMP, it remains "cheap" to commit infringements in Denmark, but it is also obvious that much has changed. Going back a decade, it would be unusual to see fines exceeding DKK 1 million, and even this would be the exception.

What happened to the other infringer remains unknown, but as the case against *Broste Copenhagen* was closed in April, it appears that the Danish Competition and Consumer Authority has decided not to pursue the case.

Out of scope during a dawn raid – the ØnskeBørn inspection ruling

In November 2020, the Danish Competition and Consumer Authority initiated an inspection at the volunteer retail chain *ØnskeBørn*, leading to the finding of an infringement in 2023 (see above), not of an illegal vertical price steering politics as outlined in the request for a warrant and as authorized in this, but of horizontal price coordination. *ØnskeBørns's* position was that the collected evidence was out of scope and had to be excluded from the case, but the Competition and Consumer Authority disagreed. A case on the matter was lodged before the Maritime and Commercial High Court.

In its ruling from September, the Maritime and Commercial High Court rejected *ØnskeBørns* claim, and prior to this, the court had also rejected to suspend the case pending clarification of the out-of-scope issue. In its ruling, the court found that sufficient evidence had been available to warrant an inspection. In this, it was immaterial that this indicated an illegal vertical RPM policy, and not the horizontal price coordination uncovered later. An inspection was initiated at an early stage where the available evidence per definition was limited and fragmented, but the court did find it had the power to review the matter. *ØnskeBørn* had not challenged the original warrant authorizing the inspection, why the Danish Competition and Consumer Authority argued that the matter could not be reviewed.

The ruling indicated that Danish courts take a pragmatic approach to requests for inspection by the Danish Competition and Consumer Authority. If the available evidence indicates an infringement, an inspection will be permitted even when the suspicion later appears unsupported. Or, in this case, pertaining to a different infringement. This position appears correct, provided that the evidence looked solid and was reviewed (critically) by the court when initially presented. It is understood that the ruling has been appealed by *ØnskeBørn.*

Private enforcement, including compensation

In 2023, in respect of private enforcement, competition law was unsuccessfully relied on to rebut a

claim. Below, this is detailed with links to the underlying decisions.

Private enforcement – no success unless substantiated by hard evidence

Protect is a Danish company manufacturing and selling fog cannons (used to prevent burglaries). Between 2003 and 2021, *Innov Securite* had been the exclusive distributor for France, but in the course of 2021, the relationship between the parties turned sour, making *Protect* terminate the affiliation with notice. However, subsequently, *Protect* advanced that it was entitled to terminate the distribution agreement without notice as *Innov Securite* had breached its terms, including a non-competition clause. At the same time, *Innov Securite,* in contrast, argued that *Protect* infringed Article 101 and that *Protect* had tried to impose and maintain an illegal RPM policy. Unable to reach a compromise, *Innov Securite* brought the case before the Maritime and Commercial High Court. The non-compete clause was not compatible with the vertical block exemption. Moreover, the possible anti-competitive effect pertained to the French market, commanding the Maritime and Commercial High Court to rely exclusively on Article 101 for its evaluation.

In its ruling from November, the court rebutted any infringements and, thus, the *Innov Securite* case. In reaching this conclusion, the court stated that exclusive distribution generally did not restrict competition by object. An infringement of Article 101 would thus require an anti-competitive effect, but no evidence supporting this, nor the RPM claim, has been presented. The case has not been appealed.

Legislative reforms on the horizon

In November, a draft bill was circulated for comments. In this, several radical overhauls of the existing rules are suggested to take effect from 1st of July 2024. Below are the three main reforms outlined.

First and foremost, this bill involves empowering the Danish Competition and Consumer Authority to call in mergers not meeting the thresholds for the purpose of carrying out a full review. As detailed above in chapter 4, only mergers with a combined Danish turnover exceeding DKK 900 million and two parties both having a minimum of DKK 100 Danish turnover are normally subject to a notification obligation. The bill suggests introducing a discretionary call-in option that can be used against transactions not meeting the thresholds, provided that the Danish turnover exceeds DKK 50 million. This threshold can be met combined or by the buyer alone. The option is directed at preventing so-called "killer acquisitions", where an incumbent, typically in the tech or pharma industry, acquires nascent competitors pre-emptively. Such rules already exist in the telecommunication sector and are now suggested extended to the entire economy. According to the preparatory work, the Danish Competition and Consumer Authority expects to use the option once or twice per year as a maximum.

Secondly, the bill introduces a new market investigation tool inspired by the powers vested in enforcers in the UK and Germany. Under these, enforcers may open an investigation. Not for the purpose of identifying infringements of Article 101 or 102, as normally, but to identify structural or behavioural impediments to competition that can then be ordered remedied. Essentially, the

suggested provision allows the Danish Competition and Consumer Authority to pursue cases without identifying an anti-competitive agreement covered by Article 101 or a dominant position covered by Article 102. The authority needs to seek prior approval from the Competition Council, which is why the tool is not intended to replace a traditional infringement case. Here, the Council would not be involved until much later, and it must be assumed that only persistent and well-documented competition problems in a sector can warrant the opening of a case under the proposed tool. Regardless, the new tool does appear to vest very far-reaching powers in the Danish Competition and Consumer Authority, and it will be interesting to see how it will be administrated.

Thirdly, the bill suggests increasing the level of fines significantly. Under the current system, fines are calculated using standard principles linked to the infringement with a maximum of 10% of global turnover. Henceforth, fines are to be calculated using the same principle as DG COMP. This involves estimating the turnover in the market where the infringement occurs and then levying a basic fine between 0 and 30% of this. This is then to be multiplied by the number of years of the infringement with adjustments. If pertaining to hardcore restriction, the adjustment may, e.g., involve 15-25%, and a further adjustment may be warranted if the turnover of the undertaking outside the affected market is very high or if the infringement was very profitable. However, the 10% maximum would still apply. Moreover, the suggested reformed principle does not apply to procedural infringements or to natural individuals. In Denmark, in contrast to the EU, the latter can be punished with fines or imprisonment.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

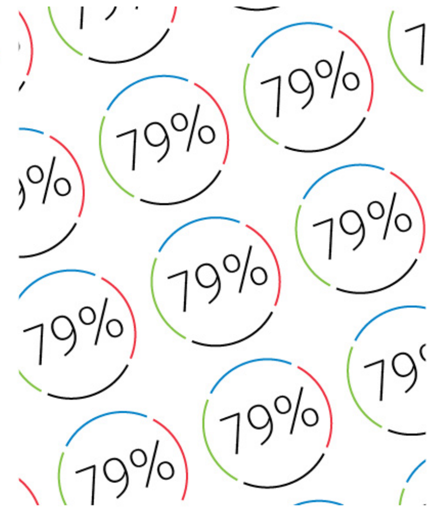
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Tuesday, February 13th, 2024 at 9:00 am and is filed under Competition Law 2023, Denmark
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.