Kluwer Competition Law Blog

Significant Amendments to the Danish Competition Act

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In May 2024, the Danish Parliament adopted a major overhaul of the Danish Competition Act, including introducing higher fines, a new competition tool, and a merger call-in option, effective from 1 July 2024. In particular, the call-in option will have drastic consequences, and in the future all mergers involving Danish activities could potentially become notifiable.

Since 1998, the Danish Competition Act has mirrored the operative parts of Articles 101 and 102 TFEU and, from 2000, of the EU Merger Regulation. However, it also has unique aspects, as fines and thresholds are lower to account for local traditions and conditions, and enforcement was initially also different. Moreover, fines and, in certain cases, imprisonment may be imposed upon individuals playing a leading role in an infringement. The latter is not available in the EU.

The Danish Parliament has adopted three significant amendments

In May, the Danish Parliament, upon the suggestion of the government, adopted three significant amendments to the Danish Competition Act, where only one (the fining principle) reflects EU (competition law) principles. The Bill contains the following three key amendments:

1. An option for the Danish Competition and Consumer Authority to demand that certain mergers be notified even though the established turnover thresholds are not exceeded (the so-called “call-in option”).
2. A market investigation tool enabling the Danish Competition and Consumer Authority to investigate structures or behaviour that weaken competition and authorising the Authority to issue behavioural orders in this respect.
3. Amendment of the principles for imposing civil fines on undertakings, aligning them with the EU’s principles and significantly elevating the fining level.

The amendments will take effect from 1 July 2024, but to avoid reactive application of the new fining principles, they cannot lead to a higher fining level for infringement than the level predating the amendment. The Bill, including the preparatory work outlining its expected application, is available here (in Danish only).

Call-in option for mergers below the turnover thresholds

Under the current regime, the Danish Competition and Consumer Authority's powers to assess mergers are solely based on whether the combined annual Danish turnover exceeds DKK 900m (approx. EUR 12.60m), and at least two involved undertakings each have an annual Danish turnover above DKK 100m (approx. EUR 13.4m). As a secondary threshold, a merger could also be notifiable if one of the involved undertakings has a Danish turnover exceeding DKK 3.8bn (approx. EUR 509.3m) and at least one of the other undertakings has a global turnover exceeding DKK 3.8bn (approx. EUR 509.3m). Save for the thresholds, the Danish merger regime relies on that of the EU, including the principles for calculating turnover, allowing this to provide guidance.

In the future, the Authority may call in mergers in special cases

Going forward, the Danish Competition and Consumer Authority may, in special cases, demand notification of a merger even though the turnovers of the participating undertakings do not meet the turnover thresholds. This will be applicable if the following two cumulative conditions are met:

- The *combined* annual turnover of the participating undertakings in Denmark amounts to at least DKK 50m, and
- The Authority assesses that a risk exists that the merger will impede effective competition considerably, particularly as a result of the creation or strengthening of a dominant position.

It follows from the Act that the Danish Competition and Consumer Authority must exercise the call-in option within a period of 15 working days after the Authority "was made aware of the merger". From this, it must be extrapolated that consummation of the transaction does not prevent the Danish Competition and Consumer Authority from exercising its call-in option and potentially prohibiting the merger if the Authority was unaware of the merger until its completion. Moreover, the call-in option does not prevent the Danish Competition and Consumer Authority from referring a case to the European Commission under Article 22 of the EU Merger Regulation. This remains an option in parallel to the new call-in provision.

Mergers with no or limited overlap will not have to be notified

The Danish Competition and Consumer Authority will provide further guidance on how they will implement and exercise the new powers, but until such guidance is provided, principles may be extracted directly from the preparatory work of the Bill, as presented to Parliament. According to the preparatory work, transactions that could be approved under a simplified notification procedure (under the existing merger regime) will *generally* not be subject to the duty of notification. Denmark applies the same notion of simplified transactions as the EU, indicating that the call-in option will not be exercised for transactions with limited horizontal (< 15% market share) or vertical overlaps (< 25% market share). Even though this seeks to reduce some of the uncertainties associated with the "call-in option", the scheme will, from a practical perspective, likely have far-reaching consequences for transactions with Danish undertakings.

From a practical perspective, it must be assumed that the parties to a transaction will have to collect and submit extensive information to the Danish Competition and Consumer Authority to

make the Authority “aware” of the merger and prevent any subsequent risk of intervention unless the transaction qualifies as simple.

The call-in must be exercised within three/six months

In contrast to the original draft bill (in Danish only), a time limit applies as to when the Danish Competition and Consumer Authority may exercise its call-in option, as this must be done no later than three months after a merger agreement has been entered into, a takeover bid has been published, or a controlling interest has been acquired (calculated from the earliest of these dates). The three months may be extended by up to six months under special circumstances. According to the preparatory work, this could be attempts to hide the transaction from the Danish Competition and Consumer Authority or failures to reply diligently to the request for information.

The call-in options come into effect on 1 July but will not be applied retroactively

The call-in option comes into effect on 1 July 2024 but will not apply to transactions that have already been agreed, takeover bids that have been published, or controlling interests that have been acquired.

New market investigation tool

According to the current rules, the Danish Competition and Consumer Authority may only intervene against behaviour where the Authority identifies a (serious) impediment to competition infringing Article 101/102 TFEU and the Danish equivalent provisions.

In the future, the Authority may act against any impediments to competition

The second amendments introduce a new market investigation tool that will empower the Danish Competition and Consumer Authority to investigate structures or behaviour in business sectors where there is evidence of weak or ineffective competition. If the Danish Competition and Consumer Authority finds such evidence, it will subsequently be able to order behavioural remedies as detailed below.

The Competition Council must approve the market investigation

To initiate a market investigation, the Danish Competition and Consumer Authority must seek approval from the Danish Competition Council, which acts as the Authority’s board. Moreover, a public consultation must be conducted on the merits of the request. After approval by the Competition Council, the investigation must be concluded within two years, but an extension of six months is possible.

Sanctions cannot be imposed, but behavioural remedies can

The new tool empowers the Danish Competition and Consumer Authority to intervene against an undertaking's behaviour regardless of anything indicating an infringement of Article 101/102 TFEU and the Danish equivalent provisions. However, as no decision is made on this, sanctions may not be imposed unless the situation involves non-compliance with ordered remedies. Examples of behavioural orders in connection with a market investigation include (i) orders to increase information access and quality (e.g., increased or improved consumer information), (ii) orders to set up a specific user interface, (iii) orders to facilitate access to switch providers, (iv) orders to reduce barriers to entry in order to facilitate new undertakings' access to the market, etc. According to the Bill, the Danish Competition and Consumer Authority will not be able to impose structural orders as part of a market investigation.

The Bill does not provide examples of how the new tool may be applied

Neither the Bill nor other circumstances provide specific examples of situations where the Danish Competition and Consumer Authority is expected to exercise its new powers. Save for references to (good) experience gained from market investigation tools in other countries, very little (if any) justification for the new tool has been provided, making it difficult to assess how it will be deployed. Currently, special legislation applies in several markets where it has been decided politically that a need for such special legislation exists, such as the payments market and the telecommunications sector, making it somewhat unclear what purpose the new tool serves. The law mandates the use of inspections and mandatory interviews, as under a traditional investigation, for which reason it must be assumed that in most aspects, the exercise of the new powers will mirror how Article 101/102 TFEU and the Danish equivalent provisions are enforced.

Amendment of the principles for setting fines

When calculating fines for competition infringement, fixed fine intervals are currently used based on an assessment of the seriousness of the violation. The basic amount for *a less serious violation* is up to DKK 4m (EUR 0.54m), the basic amount for *a serious violation* is between DKK 4m (EUR 0.54m) and DKK 20m (EUR 2.68m), whereas the basic amount for *a very serious violation* is DKK 20m (EUR 2.68m) and upwards. In addition, the undertaking's turnover and the duration of the violation are also considered. For individuals, the courts will assess the gravity of the infringement and the individual's role in this, and this could, for cartels, include imprisonment.

In the future, fines will be calculated using the same principle as that of the EU

The third amendment changes these principles to ensure that the fine levels, to a higher degree, reflect the economic harm caused by the infringement and the individual undertaking's specific involvement. More specifically, the fines will in the future follow the EU's Guidelines on the method of setting fines, dislodging the use of fixed fine intervals in favour of the undertaking's

turnover of goods and services from the involved infringement in relevant geographical area(s). For individuals, the courts are still to assess the gravity of the infringement and the role played by the individual, but a higher level is intended, and imprisonment remains an option.

Initially, the new principles were intended to be applied retroactively for infringement that remained in effect on 1 July 2024. As this raised serious legal questions, the adopted act specified that for violations that had not been terminated before 1 July 2024, the new principles for setting fines may not lead to a higher fine level than under the previous rules.

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