



Competition Law and Policy in Denmark

A Peer Review



DANISH COMPETITION AND CONSUMER AUTHORITY



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-- 2015 --



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FOREWORD

This Secretariat report served as basis for a three hour peer review in the OECD Competition Committee on 18 June 2015. It assesses the development and application of competition law and policy in Denmark. The report concludes that Denmark has a competition regime well in line with internationally recognised standards and practices and with the Danish Competition and Consumer Authority (DCCA), a well-regarded enforcement agency. Many of the recent changes represent ambitious efforts by the DCCA to improve the effectiveness of the enforcement regime and its ability to make markets work better.

The main recommendations in the report focus on:

- The level of fines for cartel offences so that standards used by the district courts reflect the seriousness of cartel offenses and use uniform considerations when arriving at fine levels and jail sentences.
- The standard and procedure used to determine if there is “substantial suspicion” of an infringement, the referral procedures used by the DCCA and SEIC and the rights and obligations of undertakings and individuals in competition law administrative and criminal investigations.
- The scope and content of exemptions from competition law in Section 2 of the Competition Act: whether its provisions are warranted and if they are being appropriately applied.

This report was undertaken at the request of the Danish government. The lead reviewers were Mr Dimitris Loukas, Greece; Ms Christine Meyer, Norway; Ms Alejandra Palacios, Mexico; Mr Dong Kweon Shin, Korea; and Ms Sue Begg, New Zealand. The report was prepared by Ms Carolyn Galbreath working as a consultant for the OECD Secretariat.

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EXECUTIVE SUMMARY

Denmark is a wealthy country with a well-developed economy, a high overall standard of living, a strong system of social inclusion and universal public services. It consistently is at the top of international rankings for the satisfaction of its citizens and its business friendly environment. Over the past 15 years Denmark has moved in a steady, incremental fashion to bring its competition law and policies in line with the European Union Treaty and international best practices. That progress is as yet unfinished and the effects of significant reforms and changes to the Danish Competition Act since 2013 have yet to be tested in practice.

Unlike the majority of EU Member States, the Danish Competition and Consumer Authority (DCCA) is an agency within the Government of Denmark and it has functions that extend beyond the Danish Competition Act. They include a wide array of Ministerial secretariat functions to support other boards and authorities. Approximately one third of the DCCA's budget and personnel are dedicated to activities and enforcement of the Competition Act, which generally are carried out independently. Amendments to the Competition Act that came into effect on 1 July 2015 provide for even greater independence from the Ministry of Business and Growth and a more streamlined and expert Competition Council (the DCCA's decision-making body.)

Denmark has a small population which values transparency. Danish society and political processes are characterized by inclusive, collegial debate and decision-making by consensus. It encourages easy and informal access to all levels of government that supply universal welfare services and social programmes to Danish citizens. Public consultation and the ability to obtain opinions from government agencies are highly valued.

That is perhaps one explanation for Denmark's Competition Act retaining a legacy system of notifying agreements that was abandoned at the EU-level and all other Member States with enactment of Regulation (EC) No. 1/2003. However, it may also reflect an historic ambivalence towards robust, effective competition enforcement and policies that embrace a true culture of competition in Denmark.

The DCCA's position within the Danish government provides it access to policy-making and opportunities to shape competition policies in ways that might be less available if it was an independent statutory agency. On the other hand, the position of the DCCA as single authority within one Danish government Ministry, rather than as a fully independent authority separate from the government, affects its ability to stand as an independent voice for competition and may result in competition considerations being required to yield to other considerations within the political operations of the Government.

Nevertheless, the DCCA is viewed as a powerful, energetic and influential authority, with good access to the Government and with a strong public message and profile. Following findings by a study in 2010 that its profile and message were not widely-known or considered relevant by the Danish public and businesses, the DCCA has used media campaigns and other initiatives to increase awareness about competition law and policy within Denmark. The DCCA's efforts are part of a set of broad-based Government reforms and growth plans designed to increase productivity, reduce regulatory burdens and promote competition in Denmark.

The structure of Danish competition law and enforcement is different from that of many EU Member States. Although the DCCA is an administrative enforcement authority with powers to make administrative determinations and issue orders requiring undertakings and individuals terminate infringements, it has no power to impose fines. Denmark is one of a small number of EU Member States that make imposition of all fines (not just fines in for Competition Act infringements) criminal penalties that must be imposed by the Danish courts. As a consequence, enforcement of the Danish Competition Act is bifurcated between the DCCA and the public prosecutor who has jurisdiction to initiate criminal prosecutions for the imposition of fines for competition law infringements. All competition infringements (whether they are hard-core cartels, vertical infringements or abuses of dominance) must be proved to a criminal standard of proof beyond a reasonable doubt in order for fines to be imposed. Criminal standards of proof and bifurcated enforcement add additional layers of complexity to Danish enforcement of its own competition laws and of Articles 101 and 102 TFEU that are not present in purely administrative systems within the European Union.

Judicial review of infringement determinations and appeals of criminal fines are accomplished by an inefficient and complex dual path through the Danish courts. Appeals from infringement determinations by the DCCA's Competition Council are made to a specialized administrative Competition Appeals Tribunal (CAT). Appeals from the Tribunal may then be taken to the non-specialist (from the standpoint of competition laws), civil Danish Maritime and Commercial Court, which may take *de novo* review of the CAT determination. Final appeals are permitted to the Danish Supreme Court. Appeals from criminal district court determinations involving fines (and in the future, incarceration) must be taken separately in the criminal court systems, first to the Danish High Courts and from there to the Supreme Court. The path to finality in competition law court cases is very lengthy and appears to offer many opportunities for duplicative and potentially conflicting review of the DCCA's application of the facts and the law in a case. The system of court review has direct consequences for the development of effective means for individuals and undertakings to obtain private redress and damages for infringements of the Competition Act.

Despite these complexities, the DCCA and public prosecutor have achieved some notable successes in obtaining criminal convictions and fines for all types of infringements. In 2013, amendments to the Competition Act increased fine levels tenfold and instituted imprisonment for individuals found guilty of hard-core cartel offenses and other serious horizontal infringements. The new penalties for infringements reflect the criminal status of the offenses they punish. The 2013 amendments appear to have focused minds on the greater risks from non-compliance and engendered refreshed interest in competition law infringements. Whether the Danish Courts will apply the higher penalties remains to be seen since they as yet have not been used or tested. Denmark does, however, have a track record of jail time being imposed for other economic and "white-collar crimes."

In addition to its investigation and enforcement responsibilities, the DCCA maintains a programme of broad-based market studies and industry analysis to highlight problems that effect productivity and competitiveness in regulated sectors and within private industry. Until 1 July 2015 market studies were taken at the direction of the Minister of Business and Growth, but as of that date the authority to order market studies was transferred to the DCCA Competition Council. DCCA market study recommendations require responses by the minister in charge of the sector studied and are used by the DCCA as a tool to highlight the necessity to liberalize regulated sectors and to advocate for

increasing competition in them. The extent to which recommendations are adopted depends, however, on the views of the Minister to whom they are directed and their priority in initiatives of the Government as a whole.

There are substantial benefits from market studies to inform and influence public knowledge about the operation of industry sectors and their contributions to increasing competition and productivity. Those benefits have the potential of being overridden by political considerations and lobbying by interest groups and stakeholders who may not have competition as their primary motivation. Market studies can be a “soft-policy” means of addressing serious competition issues, but their potency and effectiveness also may be undermined if they become a convenient method for deferring or avoiding unpopular reforms within market sectors that are resistant to them. The Competition Act does not require the DCCA to publish annual lists of its recommendations or progress on them and there is some sentiment for the view that such requirements might be counterproductive.

Denmark faces substantial challenges to sustaining its high standard of living and social services and has adopted initiatives to increase productivity and competitiveness. The focus of this report is on the contributions of the DCCA to those initiatives and challenges to the DCCA’s effectiveness resulting from structural framework and procedural features of the Danish competition law. Recommendations focus on areas where the Danish Government may wish to explore further reforms to make procedures more streamlined and DCCA’s competition authority more robust as means for promoting Denmark’s wider productivity and competition goals.

1. Foundations

Denmark is the southern-most and smallest of the Nordic countries, covering 43,000 square kilometres. It is composed of the Jutland peninsula and an archipelago of more than 400 islands, seventy-two of them inhabited. The largest is Zealand. Greenland and the Faroe Islands are part of Denmark but enjoy extensive home rule. They are not included in this Peer Review. Denmark is bordered by the Germany and Sweden.¹

The population of approximately 5.65 million is divided among five regions and 98 municipalities. Approximately forty-five % of the population lives in Zealand, and over one fifth of the population are concentrated in Denmark's capital, Copenhagen. Three principal cities, Aarhus, Odense, and Alborg have populations over 100,000.² The official language is Danish and English is widely spoken.

In 1848 Denmark established one of the first Constitutional monarchies in Europe and the government today retains a Constitutional monarchy with a parliamentary democracy. The Constitution in its present form dates from 1953 and divides governance between three independent branches: a legislative branch consisting of the Parliament; an executive branch consisting of the Government; and, a judicial branch consisting of a Supreme Court and lower courts.³ Denmark is a unified government, but municipalities enjoy Constitutional guarantees of independent self-rule under State supervision.⁴ No single party has held a majority in the Parliament since 1909 and governments are often characterised by minority administrations composed of one or more supporting parties. Governance is based upon consensus politics, collegial public debate and achieving shared solutions to public issues.⁵

¹ Official web-site of Denmark, <http://denmark.dk>; EU Denmark; <http://europa.eu/about-eu/countries/membercountries/denmark>.

² The Constitution Act of Denmark, English version explanation notes to the Constitution.

³ Official web-site of Denmark, <http://denmark.dk>

⁴ The Constitution Act of Denmark, English version explanation notes to the Constitution.

⁵ Official web-site of Denmark, <http://denmark.dk/en/society/government-and-politics>.

Denmark was a founding member of the United Nations in 1945 and maintains a policy of meeting the UN targeted level of monetary contributions to development assistance and of actively supporting UN peacekeeping efforts.⁶ In 1960 Denmark was one of 19 countries that signed the Convention establishing the Organisation for Economic Co-operation and Development (OECD) and dedicated to achieving the OECD's fundamental aims. Denmark joined the EEC in 1973 and became a member European Union in 1993. A referendum to join the single EUR currency was rejected by its citizens. Its currency is the Danish krone (DKK), which is pegged to the Euro.

1.1 Economic and Business Context

Denmark consistently ranks at or near the top of international rankings on both its quality of life and the quality of its business environment. In 2013, the United Nations World Happiness Report, ranked Denmark first for the level of happiness among its citizens.⁷ Average life expectancy is over 77 years.⁸

It also receives high ratings for its open, business-friendly environment and the ease with which businesses may be established and commerce may be conducted. For the past two years Denmark has ranked 4th among countries in the World Bank *Doing Business* indicator. The Global Competitiveness Index of the World Economic Forum ranked Denmark number 13 in 2013.⁹ The country has among the lowest barriers to entrepreneurship in the world, along with a high degree of regulatory and administrative transparency and low burdens for business start-ups.¹⁰

⁶ Official web-site of Denmark, <http://denmark.dk/en/society/government-and-politics>.

⁷ <http://unsdsn.org/resources/publications/world-happiness-report-2013/>.

⁸ Official web-site of Denmark, <http://denmark.dk/>.

⁹ IMF Select Issues Report, Country Report No. 14/332, page 42; see also, World Bank. 2014. *Doing Business 2015: Going Beyond Efficiency*. Washington, DC: World Bank Group. DOI:10.1596/978-1-4648-0351-2. <http://www.doingbusiness.org/data/exploreeconomies/denmark>.

¹⁰ OECD (2015), *Economic Policy Reforms 2015: Going for Growth*, OECD Publishing, Paris. <http://dx.doi.org/10.1787/growth-2015-en>; page 113 (OECD *Going for Growth 2015*). (“The lowest barriers to entrepreneurship are found in Denmark, the Netherlands, New Zealand and the Slovak Republic.”); OECD (2014) *OECD Economic Surveys: Denmark 2013*,

Along with neighbouring countries, Denmark's social economic system is organised with common features which are often referred to as the "Nordic model." They are self-described as small, open economies characterised by a core set of values which include "ambitious welfare systems and comprehensive public sectors financed by high taxes" and shared goals of stable, sustainable economic growth.¹¹ Reflected in those core values are social and work/life balance, low levels of corruption, open and transparent government, universal welfare services such as free health care and education, high wages and benefits and opportunities for movement within the workforce. Along with high taxes, Denmark enjoys relatively high wages and earnings. Its gross domestic product per capita in 2014 was DKK 278,000 (EUR 36,600.).¹²

The Nordic Competition Authorities report, "*A Vision for Competition – Competition Policy towards 2020*" notes that there are potential distortions on competition resulting from public sector activities, that have particular relevance to the Nordic economies. Among them are potential market failures arising from laws and regulations, legal or practical exemptions from competition laws, government subsidies and distortions caused by public sector procurements.¹³

Sustaining the Nordic model presents challenges similar to those faced by a large number of OECD countries. They include: 1) slowing of the rates of productivity growth in the past four decades; 2) increasing global competition

OECD Publishing, page 17. (OECD Economic Survey 2013).
<http://dx.doi.org/10.1787/eco-surveys-dnk-2013-en>.

¹¹ Report from the Nordic competition authorities No. 1/2013, *A Vision for Competition - Competition Policy towards 2020*, page 18. (NCAs 2020 Report). (The Nordic competition authorities consist of Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden. They co-operate closely on competition issues and conduct studies and issue reports on common competition concerns. In 2011 they formed a working group to study common competition challenges and policies to address them towards the year 2020. The working group contrasted the Nordic Competition Agencies (NCAs) powers with those of the European Commission and "identified both a need and a scope for strengthening the legal instruments to make competition policy more effective in the future." (Page 5).

¹² Official web-site of Denmark, <http://denmark.dk/en/society/government-and-politics>; Facts and Figures.

¹³ NCAs 2020 Report, page 17.

from fast-growing economies in Asia, Africa and Latin America; and 3) aging populations with declining numbers of the population working and increasing demands from them on social benefits and non-wage income.¹⁴ Specific recommendations for Denmark to address these challenges include enhancing the competition framework to ease regulation in specific service sectors of the economy.¹⁵

The Nordic Competition Authorities' Competition Policy Toward 2020 aptly comments: "Admittedly, these challenges call for action on a broad front, and require various policies and instruments to be put into play. Although competition and competition policy do not constitute a solution on their own, effective competition policy implementation can contribute towards this end."¹⁶

1.2 *Denmark Before and After the Economic Crisis*

Denmark's dramatic economic expansion beginning in last half of the 20th century placed it consistently in top ten richest economies in the world. Its position fell from a ranking as the eighth richest country in the OECD in 1990 to thirteenth in 2010, with average income growth from 1995 at less than half of its Nordic neighbours Sweden, Norway and Finland.¹⁷ The country's economic growth in the period before the economic crisis was slower than that of its peers.¹⁸ Despite this slow-down and the subsequent financial crisis, Denmark's macroeconomic structure remains robust and it weathered the shocks of the financial crisis. It is viewed as a stable economy.

¹⁴ OECD, *Going for Growth 2015*, Editorial, pages 4 to 6.; Report from the Nordic competition authorities No. 1/2013, "A Vision for Competition - Competition Policy towards 2020", pages 7 and 18. Other recommendations are to shift the tax structure away from labour and corporate income to indirect taxes and taxes on immovable property and to enhance the efficiency of the education system and aligning vocational educational training (VET) to anticipated future structural changes in the economy and labour demand.

¹⁵ OECD, *Going for Growth 2015*, Denmark Country Notes, pages 175-178.

¹⁶ NCAs 2020 Report, page 18.

¹⁷ *Creating Economic Growth In Denmark Through Competition*, Report for the DCCA by McKinsey & Company, November 2010; (McKinsey Report, 2010), page 29.

¹⁸ McKinsey Report, 2010, page 19.

Danish government balances went from surpluses before the crisis into deficits which peaked at 3.9% in 2012. They were contained to 0.9 % in 2013, but in general from the 2009 to 2013 the economy was at a standstill and Denmark's recovery from the recession has been slow.¹⁹ From 1995 to 2013 the Danish productivity growth was 0.9 % per annum while the average growth in the OECD was 1.8 % per annum. Despite running fiscal deficits, Denmark reduced its gross public debt from 46.4% of GDP in 2011 to 44.5% in 2013, and the EU reported that Denmark does not seem to be experiencing long-term sustainability challenges.²⁰ In 2013 the EU reported, "After three years of economic standstill, an improvement in the Danish economy is now underway."²¹

1.2.1 Increased Productivity is Key to Growth and Sustainability

Productivity is recognised as the key to Denmark's future and that of its Nordic neighbours. From high rates of economic growth in the decade of the 1960s, growth in the Nordic countries as a group has declined significantly.²² The OECD has stated that, "reinvigorating productivity growth is a key challenge to achieve stronger growth and sustain Denmark's welfare system."²³

¹⁹ EU Commission Staff Working Document, Assessment of the 2014 national reform programme and convergence programme for DENMARK; accompanying the document, Recommendation for a Council Recommendation on Denmark's 2014 national reform programme and delivering a Council opinion on Denmark's 2014 convergence programme, {COM(2014) 405 final} Brussels, 2.6.2014 (SWD(2014) 405 final). (EU 2014 Report). EU 2014 Report, page 3. IMF Country Report No. 14/331, pages 6 and 29. ("The deficit peaked at 3.9 % of GDP in 2012, before being contained to 0.9 % of GDP in 2013 to meet the requirements for exiting the Excessive Deficit Procedure (EDP) for a consolidation of the structural deficit by 1.5 % from 2010 to 2013.")

²⁰ EU 2014 Report, page 11. ("Government debt reached 44.5% of GDP in 2013 and is well below the 60% of GDP requirement of the Stability and Growth Pact.").

²¹ EU 2014 Report, page 3. The EU predicted a positive trend of GDP growth was expected to reach 1.5% in 2014 and 1.9% in 2015.

²² NCAs 2020 Report page 22.

²³ OECD Economic Survey, Denmark 2013, page 48.

That conclusion has been widely affirmed by other organisations and commentators.²⁴

Price competitiveness has eroded relative to peer economies due to low productivity and high wage costs, although this position has moderated slightly in recent years.²⁵ Denmark's Ministry of Business and Growth reported in 2013 that: "Weak domestic competition has resulted in high prices of goods and services in Denmark. Corrected for taxes and levels of prosperity, prices are 7% higher for goods and 14% higher for services, compared to an average of OECD countries."²⁶ The Danish Competition and Consumer Authority (DCCA) reports that Danish prices when corrected for differences in taxes and wealth are approximately 12 % above the peer-average. The difference in prices is higher for services compared to products which could be due to the fact that services are less exposed to international competition.

Among the key challenges is declining labour productivity. Labour productivity in Denmark which grew on average at a rate of 3.2 % per annum in the 1970's, declined to a rate of 2.5% in the 1980's. Productivity increased in the 1990's and in 1995 reached a level comparable to that of the United States. From 1995 to 2009 productivity in Denmark grew by 0.6 % annually, 60 % below the average productivity growth of other OECD countries. In 2009, Danish productivity had declined to 80% of United States levels. In 2010, the value-add per hour to productivity in the EU-15 group of nations was higher than in Denmark.²⁷

²⁴ EU Report, page 4, ("The overarching challenge with a view to securing Denmark's future relative welfare level is boosting productivity."); McKinsey Report, 2010, page 19; ("There needs to be a 'step change' in Denmark's productivity growth going forward if significant economic growth is to continue.").

²⁵ IMF Select Issues Report, Country Report No. 14/332, page 43. ("Price competitiveness has been eroded relative to peer economies due to low productivity and high wage costs. However, the terms of trade have been improving substantially over many years, and wage growth has moderated recently.").

²⁶ OECD Economic Surveys, Denmark 2013, page 30.

²⁷ McKinsey Report, 2010, page 33.

The OECD *Going for Growth* report notes that for the whole of the OECD countries post-economic crisis jobs growth has just begun.²⁸ Unemployment rates in Denmark rose more than the average of OECD countries during the crisis, but reduced in the second quarter (Q2) of 2014 to 6.5%. Although those levels are still well above pre-crisis unemployment in Denmark, they were significantly below the EU average.²⁹ However, in 2014 re-entry into the labour force was not increasing and untapped potential labour capacity has been estimated to be between 40,000 and 80,000 persons.³⁰ Unemployment is expected to continue to decline slowly and the gap in output is expected to close gradually after 2018.³¹

Denmark has high earnings relative to levels in many other OECD countries. Although price competitiveness has been eroded by low productivity other factors helped to mitigate those trends somewhat. During the financial crisis Denmark remained among the world's wealthiest countries as a result of gains in trade and foreign income. However, as the services sector gains importance, increasing productivity and competitiveness will become even more important for Denmark's continued economic health. Further reforms are needed to sustain Denmark's position and to improve conditions for

²⁸ OECD *Going for Growth-2015*, page 32. ("For the OECD as a whole, the jobs recovery has only just begun: the OECD employment rate is currently 1.8 %age points below its level at the start of the global financial crisis down from the 2.2 %age points gap reached at the trough of the jobs recession. However, the picture differs significantly across countries. In most euro area countries as well as in Denmark, the employment rate is close to its lowest level since the start of the crisis and the jobs recovery has in many cases yet to begin.")

²⁹ EU 2014 Report, page 6. ("Unemployment has been on a downward trend since spring 2012 and stood at 6.5% in March 2014, significantly lower than the EU average. The Danish labour market has been relatively resilient despite the weak economic recovery since 2009.") See also, OECD *Denmark Employment Outlook 2014*, page 2. ("Youth employment levels in Q2 2014 were 12.3%, below the OECD average of 15%.")

³⁰ IMF Country Report No. 14/331, page 10; IMF Select Issues Report, Country Report No. 14/332, page 22 to 23. In the case of a number of OECD countries, which included Denmark, Ireland, Portugal and the United States, vigorous improvement in unemployment could be attributed to a decline in labour force participation.

³¹ IMF Country Report, No. 14/331, page 11.

competition and private companies in the future.³² Without reforms to strengthen competition Denmark's strong economic position may not be sustained.

1.2.2 Denmark's Productivity Initiatives

In October 2012, the Danish government unveiled a policy package to improve competition and enhance compliance with international standards, involving: i) strengthening competition law; ii) increasing competition in domestic-oriented sectors; and iii) improving the effectiveness of public procurement.³³ As part of its initiatives the government established a Productivity Commission.

The Productivity Commission was given the task of analysing the causes behind weak productive growth in Denmark since 1995, to study the drivers and main barriers to growth in Denmark, and to assess the links between business sector productivity, costs and competitiveness.³⁴ It was asked to formulate concrete recommendations aimed at strengthening productivity within the public sector through modernisation and better organisation and within private sector, including manufacturing, the construction sector and private services.

The Productivity Commission published seven interim analytical reports and hosted conferences and public debates. Its final report was submitted on 31 March 2014 and contained more than 100 specific recommendations. One section of the report contained an analysis of competition, internationalisation and regulation in Denmark. The report made recommendations to increase competition by: i) abolishing national regulation that protects the home market, ii) strengthening mobility of productive resources, iii) strengthening the competition regulation, and iv) limiting the use of restrictive covenants (employment clauses).

³² IMF Select Issues Report, Country Report No. 14/332, Statement by Audun Groenn, Executive Director for Denmark and Anne Marcussen, Advisor to Executive Director for Denmark (December 5, 2014) page 5.

³³ OECD Economic Surveys 2013, page 30.

³⁴ The Productivity Commission was composed of a chairman and eight independent experts and academic specialists, one of whom was the Director General of the Danish Competition and Consumer Authority (DCCA).

Following the recommendations of the Productivity Commission, the Danish government adopted a programme of reforms. Before 2020 the government plans to reach productivity gains of 14 billion DKK and 12 billion DKK in the private and public sectors respectively.

The OECD, the World Bank IMF, EU and the Nordic Competition Authorities have each reviewed and commented on the conclusions of Productivity Commission. Each organisation has noted the Productivity Commission's findings concerning Denmark's overall competitiveness and competitiveness in specific industry sectors. The international organisations focus attention on four areas where competition could be increased: 1) the services sector;³⁵ 2) the public sector;³⁶ 3) domestic industries that face limited external or foreign competition;³⁷ and, 4) non-trade sector regulation.³⁸

1.2.3 *The Culture of Competition in Denmark*

According to the DCCA, Denmark historically has had an immature culture of competition. In 2010, it published an analysis on aspects of the “culture of competition” in Denmark. The report analysed the behaviour of firms, consumers and the public sector in specific market situations and how their behaviour was affected by factors such as competition laws and

³⁵ Adalet McGowan, M. (2014), “Trade Specialisation and Policies to Foster Competition and Innovation in Denmark”, OECD Economics Department Working Papers, No. 1118, OECD Publishing. [[ECO/WKP\(2014\)14](#), 3 June 2014], page 14; see analysis pages 8-16. <http://dx.doi.org/10.1787/5jz2qt5h7m6g-en>.

³⁶ IMF Select Issues Report, Country Report No. 14/332, pages 41 to -44.

³⁷ IMF Select Issues Report, Country Report No. 14/332, page 44; Report from the Nordic competition authorities No. 1/2013, “A Vision for Competition - Competition Policy towards 2020”, page 23; OECD Economic Survey- 2013, page 11.

³⁸ IMF Select Issues Report No. 14/332, page 42. (“Weaker competition in non-trade services may limit entry into the Danish market. Examples include strict zoning laws and idiosyncratic standards which limit foreign entry into Danish markets, particularly retail markets.”).

enforcement. The competition culture was identified as a determining factor for the intensity of competition in the Danish economy.³⁹

The Competition Culture report concluded that there is a need for increased information and guidance concerning competition and Denmark's competition laws. Less than one third of the firms surveyed would contact the authorities if they became aware of a violation of the Competition Act and more than one half of them responded that the competition law had no importance for their firm. Since publication of the Competition Culture report there has been increased focus on strengthening the information and guidance provided to business and consumers in Denmark.

1.2.4 European Commission Country-Specific Recommendations for Denmark

In May, 2013 the EU Commission proposed a set of country-specific recommendations (CSRs) for Denmark. The EU Commission concluded that Denmark's competition challenges are in three areas: the structure of competition law, the operation of private services markets and activities by public sector.⁴⁰

A report that accompanied the CSRs endorsed the findings of the Danish Productivity Commission which had concluded that Denmark's competition law is not sufficiently in line with international standards. Specifically cited were the fact that that competition infringements are only subject to fines in cases of 'gross negligence', that the independence of the authority is impaired when conducting market studies and that its decision making powers are insufficient.⁴¹ The EU concluded: "Progress on competition issues has been limited."⁴²

³⁹ A copy of the report "Competition Culture", (June 2010) is available in English on the DCCA website. <http://en.kfst.dk/~media/KFST/Publikationer/Engelsk/2010/Competition%20Culture%2006012010.pdf>.

⁴⁰ EU 2014 Report, page 21.

⁴¹ EU 2014 Report, page 21.

⁴² EU 2014 Report, page 3. ("Danish enterprise behaviour is less competitive than in other countries, consumers are passive in some markets and that a number of markets are sheltered from competition. The recommendations encourage the government to review business regulation in order to remove

The Danish Growth Plan 2014 has initiated and completed a number of initiatives to enhance competition and to make markets more competitive.⁴³ Among them are additional legislative changes to the structure of the DCCA to make it more independent and efficient, which will come into effect on 1 July 2015.

2. The Structure and Development of Danish Competition Law

The 2013 Danish Competition Act (Competition Act) to a large extent mirrors EU law and practice. Articles 101 and 102 TFEU are directly applied by Denmark in cases which have a community dimension. Denmark's structure for competition enforcement and determinations is considerably different and more complex than the EU Commission's administrative enforcement model. (Those structural features and their effects are outlined below. A more complete discussion of the enforcement structure and practices is contained in Section 4.)

2.1 Policy Goals – Purposes and Approach

Part 1 of the Competition Act, 2013 addresses the purposes of the Act to “promote efficient resource allocation in society through workable competition for the benefit of undertakings and consumers.” The Act applies to “any form of

the barriers to market entry, strengthen the competition law, adapt the planning law to allow for larger outlets, remove ownership restrictions, replace national standards with international ones, speed up and harmonise building permits procedures, support free trade agreements and implement the service directive in a more ambitious way.”)

⁴³

Among the initiatives were; i) steps to stimulate efficiencies in the electricity, district heating, waste incinerations and waste water sectors; ii) analysis of the gas and energy sectors to identify regulatory reforms to improve efficiency; iii) harmonisation of regulations in construction and fire safety to comply with international standards; iv) analysis of restrictions in the building sector and among structural engineers to remove barriers to entry and address local planning restrictions; v) analysis of competition in the cable television and broadband markets; vi) modernisation of the water piloting market to remove entry barriers; vii) relaxation of the certification requirements to remove start-up and entry barriers for small businesses; and viii) analysis of competition and regulation of the legal profession. Two DCCA recommended initiatives, one to increase competition in the taxi industry and the other to provide the DCCA with statutory authority to correct competition infringements with structural remedies in markets with serve competition restriction were not include in the 2014 Growth Plan.

commercial activity as well as aid from public funds granted to commercial activity.”⁴⁴

According to the DCCA, enforcement of the Danish Competition Act places the highest priority on consumer welfare, economic efficiency (allocative, productive as well as dynamic efficiency), innovation and, consequently, growth. Priority is also assigned to securing and promoting a competitive industry structure, e.g. by focusing on barriers to entry. No special emphasis is put on fairness and protection of small and medium sized enterprises, although – in some cases – these two goals are indirectly achieved through the pursuit of goals regarding consumer welfare, efficiency, innovation and competitive industry structure.

2.1.1 Assessment and Relationship to Other Regulatory Goals

Competition policies and initiatives are important features of Danish Government programs and regulatory activities, which the DCCA participates in and supports. The Danish government’s Growth Plan 2014 included a number of initiatives to enhance competition in many sectors of the economy. The National Reform and Convergence Package (15 April 2014) initiated activities to adhere to specific recommendations by the European Council.

In 2014 the European Council recommended Denmark “continue its effort in removing barriers to competition in the building and construction sector, and improve efficiency of public services.” From 2013 to 2016, the DCCA has also adopted a strategic framework to identify goals and priorities called the *Clear Effect on the Market* strategy. It is designed to direct the DCCA’s work and to complement other regulatory and competition reforms identified by the DCCA.

2.2 The Foundation and Framework of the DCCA

The DCCA is an authority within the Ministry of Business and Growth of the Danish government. It is not an independent executive agency. The Minister of Business and Growth has direct responsibility for the DCCA, five other government authorities and a number of other agencies and departments. In respect of the enforcement of the Competition Act, the Competition Council and the DCCA are independent of the Minister. Although the DCCA is not formally independent from the Minister or government, the Director General

⁴⁴ Competition Act, 2013, Sections 1 and 2.-(1).

reports that in practice the DCCA's independence has not been challenged during her eight years in office. The DCCA makes it clear in public advocacy and debates that it operates independently from the Ministry. However, it also acknowledges that the extent to which the independence of the DCCA is respected by the government and Minister of Business and Growth is fragile. There are no formal statutory safeguards as to the level DCCA resources that shall be available for the DCCA's statutory responsibilities under the Competition Act or the extent to which the DCCA in the future could be required to divert its resources to other activities.

The Competition Act delegates jurisdiction for enforcement to DCCA and to the Competition Council which is the designated decision-making body under the Act. The DCCA is established as the secretariat to support the functions of the Competition Council contained in the Competition Act. The DCCA's operating budget is determined by the Danish government and the Minister. Rule-making to interpret and establish procedures implementing the Act is divided between the Minister and the Competition Council. Delegations of authority to the DCCA are made by the Minister and by the Competition Council.⁴⁵

The Competition Council has primary responsibility for implementing and enforcing the Act. Determinations concerning infringements of the Act, mergers and other decision making functions are assigned under the Act to the Competition Council. The Competition Council is independent from the Minister of Business and Growth and its members are not subject to instructions from the Minister.⁴⁶ The Competition Council meets 8 to 10 times per year to make determinations and conduct business.

On 1 July 2015, the Competition Council became a smaller decision making body of seven individuals with expertise in law, economics, consumer affairs and management experience from the business community. The new Competition Council no longer has specially designated members from business organizations. The Council will obtain support from an independent advisory council that will have no decision-making functions or authority under the Act.

⁴⁵ Executive Order on the Competition and Consumer Authority, (Bekendtgørelse nr 173 af 22/02/2013 om Konkurrence-og Forbrugerstyrelsens virksomhed i henhold til konkurrenceloven). Not available in English.

⁴⁶ Executive Order on Rules of Procedure for the Competition Council, (Bekendtgørelse nr. 174 af februar 2013). Not available in English.

The composition and functions of the independent advisory council are in the process of being considered and offer the opportunity to further reinforce the principle that competition laws are designed to protect effective competition rather than individual competitors or groups of competitors. The Competition Council's authority to enforce the Competition Act (set out in Part, 6, Section 14.-(1) of the Act) shall otherwise remain unchanged. It is not anticipated that the changes will substantially affect the DCCA's its structure or operations.

The DCCA handles the day-to-day operations of the administration of the Competition Act on behalf of the Competition Council. In addition to its responsibilities under the Competition Act, the DCCA also has substantial ministerial functions and serves as the secretariat to a number of independent boards. The DCCA also provides other functional support and drafts legislation for the Minister. The Competition Council has no decision-making authority concerning these additional secretariat and ministerial functions that are delegated to the DCCA. Three of these functions, the Danish Consumer Ombudsman (DCO), the Danish Consumer Complaints Board and the Council for Public-Private Co-operation are part of the DCCA's operating budget together with the Competition Council, although the DCO's budget is a line item in the DCCA budget. The Economic Regulator of the Water and Wastewater Sector, the European Consumer Centre Denmark, the Danish Storm Council, the Energy Supplies Complaint Board and the Danish Complaints Board for Providers of Short-term Loans either are funded from the Ministry or through filing fees. The DCCA also serves (until 30 September 2015) as the secretariat for the Danish Complaints Board for the Funeral Services Industry and the Veterinarians Complaint Board. After 30 September 2015 complaints concerning funeral and veterinarian services will be handled by the Consumer Complaints Board. From 1 October 2015, consumers will be referred to alternative dispute resolution (ADR) schemes based on the EU ADR Directive.

Appeals from decisions of the Competition Council or the DCCA are made to the Competition Appeals Tribunal (CAT), an administrative tribunal established by the Competition Act. The CAT consists of a President who is a Supreme Court Judge and four other members, two who are legal experts and two who are economics experts. The CAT is appointed by the Minister of Business and Growth. (Section 21). It operates wholly independently from the Minister.⁴⁷ The CAT reviews both the facts and the law in its review of

⁴⁷ Executive Order on the CAT, (Bekendtgørelse nr 175 af 22/02/2013 om Konkurrenceankenævnet). Not available in English.

determinations by the Competition Council and the DCCA, which is similar to the standards of review of EU Commission determinations by the European Union General Court. Since 2010, the CAT has reviewed 23 decisions made either by the Competition Council or the DCCA. In all the cases the decisions have been upheld either partly or completely by the CAT (11 decisions on material issues and 12 decisions on formality issues, e.g. access to file). This record of affirmations by the CAT has caused comments by some stakeholders and commentators about the review of Competition Council determinations performed by the CAT and the level of scrutiny applied.

The DCCA is led by a Director General and a Board consisting of three Deputy Directors. They provide strategic direction and management for all of the DCCA's functions that fall within the jurisdiction of the Competition Act and for those secretariat and ministerial functions that are governed by other statutes that the Competition Council does not enforce. DCCA activities governed by the Competition Act are generally organised under the "competition enforcement" group of functions. Activities which are not covered by the Act are designated under the "consumer protection" group of functions. The Competition Council has no "consumer protection" decision-making authority or other functions under the Competition Act. Nor does the Competition Council have any functions or authority with respect to the Danish Consumer Ombudsman. The DCCA has secretariat responsibilities involving eight different public authorities. This complex institutional arrangement is viewed by the DCCA as less than ideal and it has advocated for a more integrated framework.

The DCCA's functions under the Competition Act are directed almost entirely independently from the Minister of Business and Growth. The day-to-day operations of the DCCA in respect of the enforcement of the Competition Act are independent from Ministerial interactions. The Minister does not give binding directions to the DCCA on whether to open or close a case or to impose remedies. On 1 July 2015, authority for directing market studies was delegated to the newly constituted Competition Council (although the Minister still retains the possibility to ask the DCCA to carry out analyses and to approve the studies he has commissioned). When market studies and analyses are published it will be stated whether they were approved by the Competition Council or by the Minister.

The DCCA competition enforcement functions principally involve serving as the secretariat for the Competition Council and supporting its decision-making functions under the Competition Act. The Competition Council's

enforcement functions include investigations and determinations concerning infringements, mergers decisions and market studies and analyses. The competition group of functions are handled by seven divisions. Four of them are organised according to market sectors: 1. the Construction, Energy and Transport Division; 2. The Media, Telecommunications and Health Division; 3. the Services, IT, Finances and Payment Services Division; and 4. The Food, Retail and Industry Division. Three other divisions with competition functions are the Investigation and Cartels Division, the Legal Secretariat and the Market Studies and Economics Division. The Legal Secretariat functions are somewhat similar to the European Commission's Legal Services and the Market Studies and Economics Division's functions are somewhat similar to the European Commission's Chief Economist Team. Among other things they provide general guidance in competition cases and peer review of the cases before they are presented to the Competition Council. In addition to providing support for DCCA competition enforcement functions, the Legal Secretariat and Economics Division provide support for the rest of the DCCA.

The consumer protection functions generally encompass the functions of prior Danish Consumer Agency which instituted from a merger between the Danish Consumer Complaints Board and the Danish Consumer Ombudsman. In 2010 the Danish Consumer Agency was merged with the Danish Competition Authority to create the DCCA in order "to provide a more integrated consumer and competition policy." The rationale for the merger was widespread recognition that active and informed consumers are a precondition for effective competition in the markets and that competition and consumer policy mutually support each other. The DCCA consumer protection secretariat functions either directly or indirectly encompass most consumer protection legislation and activities in Denmark. As noted above, the Competition Council does not have any authority to make determinations concerning the consumer protection functions of the DCCA.

The DCCA's Communications Division and the Policy and Legislation Division support both the DCCA's consumer protection and competition functions. The DCCA contributes to the development of new consumer policies and regulations, analyses markets and communicates information regarding competition to consumers and businesses. It has been delegated Ministerial responsibility for drafting proposed changes to consumer and competition legislation. It also engages in advocacy and outreach to consumers and businesses.

In Denmark, the term “unfair competition” is not used in Danish legislation. However, those functions that generally fall under the designation of “unfair competition” are the responsibility of the Danish Consumer Ombudsman (DCO). The DCO, which was established in 1975, enforces the Danish Marketing Practices Act, which is the Danish implementation of Directive 2005/29/EC on Unfair Commercial Practices.⁴⁸ The Danish Marketing Practices Act was amended in December 2014 to minimise economic and administrative burdens on businesses.

The DCCA’s serves as the secretariat to the DCO. The DCO has independent authority to allocate and prioritise its functions and budget independently from the Minister and the DCCA. The DCO’s budget is part of the DCCA’s budget, but the DCO budget is a separate line item in the DCCA budget. The DCO’s expenditures in 2014 were EUR 3.4 million. The Consumer Ombudsman who heads the agency is appointed by the Minister of Business and Growth for a term of six years. In 2014, the DCO had access to twenty-four staff members of the DCCA to assist in the secretariat functions. The DCCA and the Competition Council have no decision making authority over matters within the jurisdiction of the DCO.

In addition to enforcing the Danish Marketing Practices Act, the Ombudsman supervises enforcement of other consumer protection laws including: the Sales of Goods Act, the Contracts Act, the Consumer Agreements Act, and the Danish Interest Act, the Act on Payment Services, the Act on Legal Counselling, the Act on Tobacco Advertising and the E-commerce Act. The Ombudsman may investigate practices following a complaint or on its own initiative. In 2014, the DCO received 5800 complaints. Appendix A includes statistics concerning the number of complaints, investigations and prosecutions conducted by the DCO in the past five years.

The DCCA 2014 has a staff of approximately 221 persons. Approximately one-third (74) persons are dedicated to competition enforcement and advocacy (market studies and analysis). Approximately one third (EUR 9.4 million) of the DCCA’s total 2014 budget of EUR 27.5 million is allocated to competition enforcement and advocacy. The DCCA does not keep statistics on its allocation of resources to various functions. A rough estimation of the DCCA’s allocation

⁴⁸ Danish Consumer Ombudsman website references the EU Council Directives that are the responsibility of the Ombudsman. Updates are found on www.eur-lex.europa.eu.

of resources submitted to OECD in 2011 allocated 23% to merger enforcement, 25% to anti-cartel enforcement, 19% to dominance-related enforcement and 33% to other areas, principally advocacy. The DCCA estimates that presently more resources are allocated to mergers and anti-cartel enforcement.

The DCCA has a project-based management framework which is led by the Director General and Board. Resources are designated and prioritised by the Director General and Board and are regularly evaluated. Priority is given to investigations of cartels and horizontal infringements.

A special investigation and cartels division was established in 2009 to focus on developing better strategies for inspections, handling of leniency applicants and conducting investigations. The unit is also responsible for determining when there is substantial suspicion of an infringement requiring the case to be referred to the SEIC as well as the on-going co-operation with SEIC. The unit handles international co-operation with EU Commission investigations and other bi-lateral co-operation. The cartels division has staff members with specialist skills necessary for cartel investigations, including former police officers, forensic IT technicians, lawyers and a former prosecutor.

Case prioritisation is also a strategic focus. The DCCA has developed a structured, two-phase procedure for screening complaints and identifying matters with greatest potential effects. Within three months the DCCA must determine whether a matter warrants opening an investigation. The Authority uses a project management tool to manage large case investigations and projects. Individual heads of units prepare prioritised list of cases. Larger cases are discussed at regularly strategy meetings with head of units and the general management and must be approved by management prior to an in depth investigation. Pending competition cases are reported on and prioritised with deadlines at monthly management meetings. The progress on cases and Division work plans is regularly reviewed by management.

The DCCA receives inquiries from consumers, companies and stakeholders with questions regarding competition law and the interpretation of the Danish Competition Act. In recent years, the DCCA has received between 300 and 400 inquiries annually. Some involve complaints or inquiries that are rejected or handled using general guidance at a very preliminary stage and are not registered within a specific case category in the DCCA's case management system. The DCCA handles around 100 to 200 such cases a year. Not all of the complaints received will be subjected to the two-phase preliminary review.

The organisational chart (below) reflects which deputy directors the different divisions in the DCCA refer to and the wide scope of DCCA Competition Act and Ministerial responsibilities.

Figure 1. Danish Competition and Consumer Authority organisational chart



Source: DCCA

2.3 *Development of Competition Law in Denmark*

Danish competition law and enforcement can be divided into two periods: one before 1998 and the other from 1998 to the present. Before 1998 Denmark used a “jurisprudential principle . . . for control of abuse rather than prohibition of anticompetitive acts.”⁴⁹ Although a new law was passed in 1990 that changed enforcement from the Monopolies Control Council to the Competition Council and placed a greater emphasis on transparency, it still was premised on registering agreements and negotiating resolution of abuses, with continued powers to regulate prices.

Enactment of the Danish Competition Act (DCA) in 1998 represented the most significant change to Danish competition law from 1937. Most significantly, the 1998 Act adopted the EU Treaty texts (at the time Articles 85 and 86) and prohibitions against anticompetitive conduct, along with the substantive EU law interpreting and enforcing the EU Treaty.

Certain features of the DCA 1998 represented compromises and made the move to the EU model incomplete. One notable exception is retention of an option for notifying agreements and obtaining negative clearance determinations from the DCCA that has been retained in the Danish competition laws.⁵⁰ Merger review and regulation, was not adopted as part of the DCA 1998. Additionally, in response to recommendations from the *ad hoc* legislative committee that a “control” model rather than “prohibition” model should continue to be applied to abuses of dominance, a compromise was reached whereby sanctions would not be applied to first offenses of abuse of dominance and would only be applied to repeated violations or a violation of an order.⁵¹ The law also contained exemptions for common retail-wholesale relationships in response to industry interests.

⁴⁹ Denmark - The Role of Competition Policy in Regulatory Reform 1999 (OECD 1999 Denmark Review), page 4. The 1999 OECD report contains a review of the development of competition law in Denmark from 1937 to 1999.

⁵⁰ OECD 1999 Denmark Review, page 24. (“In the run up to the 1998 Act going into effect on 1 July 1998, 1100 applications for exemption were received, most coming around the filing deadline of 30 June 1998. That rate of filings was about the number received by the Netherlands, which is more than twice the size of Denmark.”)

⁵¹ OECD 1999 Denmark Review, page 10.

In response to businesses, in 1998 the law expanded the number of members to the Competition Council to reflect business and local government interests. The 1998 law also maintained the organisation of the Competition Authority within the Ministry of Business and Growth. It retained the three-part administrative structure with the DCCA serving as the secretariat for a Competition Council, the Competition Council as the decision-making body for administrative determinations and *de novo* review of Competition Council decisions by the Competition Appeals Tribunal (CAT).

Although the 1998 legislation left significant changes in merger and abuse of dominance enforcement for another day and retained a notification option for companies, it was viewed as raising public awareness about competition issues and enabling better enforcement against infringements.

Since 1999 Denmark's competition laws have moved steadily from a "control" model where free market constraints were addressed through a combination of negotiation and regulation to a "prohibition model" that is aligned with the European Union model and OECD peers. However, until March 2013 when amendments to the Competition Act increased fines level tenfold and added the possibility of incarceration for serious cartels and horizontal infringements, the criminal framework, modest fines for infringements and high standard of proof for imposing sanctions provided low levels of risk for non-compliance.

2.3.1 Amendments to the Competition Law from 1999 to 2010

From 1999 to 2010 Denmark enacted a number of important, incremental changes to its competition law. Each of the many amendments to the law was made with two fundamental and complementary goals: to align the Denmark's competition law to developments in the EU and to increase competition law enforcement in Denmark.⁵² Changes have included direct application of the EU Treaty Articles, revised penalties to apply sanctions to first-time abuse of dominance infringements and instituting review of mergers.

⁵² Section 24 of the Competition Act, extends coverage of the law to "cases concerning infringement of Articles 81 and 82 of the EC Treaty, including cases involving parallel application of sections 6 and 11 of this Act, may be dealt with by the national competition authority if the case has ties to Denmark."

In 2000, amendments added a market definition section to the law,⁵³ and removed the “right of a first offense” in abuses of dominance. Merger control was added to the statute modelled on then-existing EU rules.⁵⁴ Turnover thresholds were adopted at a high level that coincided with those applicable in Germany.⁵⁵

Denmark implemented block exemption regulations equivalent to the EU block exemptions. The law included a special block exemption for horizontal agreements for retail chains with a market share less than 25% of total Danish retail sales, provided those block exemptions did not unduly restrict individual retailers by imposing resale price maintenance, for example.⁵⁶ This exemption was abandoned on 1 July 2005.

Denmark did not adopt an analogue provision to State Aid coverage under the Treaty but did include a specific provision in the delegated the power of the Competition Council to order termination or repayment of illegitimate aid.⁵⁷ EU State Aid matters are handled by the Ministry of Business and Growth.

In 2002, a three-level system of fines for competition infringements, based on an assessment of whether the infringement was “less serious”, “serious” or “very serious” was added to the law. In 2007 Denmark adopted a leniency programme for hard-core cartel offenses.

In 2009, the Danish government appointed a committee on competition legislation to study the additional means to strengthen the operation of Denmark’s competition law (Committee Concerning Changes to the Danish Competition Law). The Committee’s report and recommendations ultimately was submitted on 10 April 2012 and became the basis for changes in the law that were passed in December 2012 and came into effect in 2013. While the

⁵³ Section 5 a; Consolidated Competition Act no 687 of 12 July 2000.

⁵⁴ OECD Country Studies, Denmark – Updated Report 2004, page 3. (OECD 2004 Report).

⁵⁵ Ibid. (“Merger synergies included organisational economies of scale, broader agency expertise and depth of knowledge about specific industries and improved public advocacy about the linkages between competition and consumer policies and enforcement.”)

⁵⁶ Ibid. See also, Denmark Regulation No. 352 (15 May 2000).

⁵⁷ Ibid. page 4.

Committee was deliberating Parliament passed other amendments to the competition law.

2.3.2 *Danish Competition Law 2010 to the Present*

In 2010 the Danish Government made substantial changes to the Danish Competition Authority and Parliament made significant changes in Denmark's competition law. In August 2010, the Danish Competition Authority and the Danish Consumer Agency were merged into the Danish Competition and Consumer Authority (DCCA). The two authorities previously had worked closely together on several joint reports, including the *Competition Culture* report and on analyses of several consumer markets. The merger of the two agencies sought to take advantage of synergies between competition and consumer policy.⁵⁸

Following the creation of the DCCA, in October 2010 the Danish Competition Act was amended in three important areas. The new law removed the possibility of applying *de Minimis* exemptions to hard-core horizontal infringements.⁵⁹ Merger enforcement was substantially changed by lowering the thresholds for mergers, creating a simplified procedure for notifying and handling unproblematic mergers and extending the time limits for the DCCA to handle problematic mergers. The amendments also empowered the Danish Consumer Ombudsman to act as a representative for groups of consumers and businesses concerning compensation for harm caused by Competition Act infringements.

2.3.3 *Recommendations of the Committee Concerning Changes to the Danish Competition Law, 2012*

The Recommendations of the Committee Concerning Changes to the Danish Competition Law (Competition Legislation Committee Report) was published in April 2012. The Report identified three key areas where the Danish competition law should be strengthened. More information and better guidance

⁵⁸ OECD 2010 Annual Report, Denmark, page 7.

⁵⁹ Section 7 (3), "The prohibition set out in Section 6(1) shall, irrespective of subsection (1) above, apply to an agreement between undertakings, a decision made by an association of undertakings and concerted practices between undertakings if, the agreement, etc. together with other similar agreements etc. will restrict competition."

about breaches and compliance with the Competition Act was required. Administrative procedures needed to be better organised to reduce compliance burdens for undertakings. Most significantly, the Committee recommended increasing fine levels for infringements and instituting imprisonment for cartel infringements.⁶⁰

The Competition Legislation Committee Report found that Denmark, which retains a pre-2004 Regulation (EC) No. 1/2003 notification option, stood in contrast to each of the seven peer countries it studied. All of them had removed their notification systems and none of them provides case-specific infringement determinations.⁶¹ The Committee made no recommendation concerning retaining the statutory notification system.

Although the Competition Legislation Committee Report found that the DCCA received high marks and ranked above its peers in terms of the levels of public information and guidance it provides both generally and concerning specific infringements, the Committee recommended the DCCA institute an additional option for informal guidance and strengthen its general information and guidance initiatives with respect to trade associations and business start-ups in Denmark. Also recommended were increased public outreach and broad-based initiatives to raise awareness about competition laws in general and cartel prohibitions specifically.⁶² The DCCA has undertaken these recommendations and additional initiatives to improve guidance and outreach.

The Report also recommended the DCCA institute several new case procedures. They included introducing fixed “state of play” meetings with the parties during the investigation, instituting written Statements of Objections, fixed time-frames for notice and comment by the parties and additional time for consideration of cases by the Competition Council. The Committee also recommended extending the time period for oral submissions by the parties during oral hearing before the Competition Council. It recommended that parties be informed no later than when the Statement of Objections is issued as

⁶⁰ OECD Annual Report on Competition Policy Developments in Denmark, 2012.

⁶¹ Summary of the Considerations of the Committee of the Danish Competition Act, 31 March 2012, page 2. The peer countries studied were Finland, France, the Netherlands, Norway, Sweden, Germany and the United Kingdom.

⁶² *Ibid.* pages 3 to 7.

to whether the case determination will be referred to SEIC for prosecution seeking fines and prison sentences.⁶³ These recommendations have been adopted by the DCCA.

Increasing fines and instituting imprisonment for cartel infringements were far more controversial topics and the Committee's recommendations were not unanimous. The Competition Legislation Committee Report highlighted differences between Denmark and the system of fines at the EU Commission and in the majority competition agencies in the Member States. In Denmark fines for competition law infringements are imposed by the courts through the criminal system. At the time, fine levels for undertakings ranged from DKK 10,000 to DKK 400,000 for less serious infringements; DKK 400,000 to DKK 15 million, for serious offenses and from DKK 15 million upwards for very serious offenses. (DKK are approximately 7.4 to 1 EUR).

The Committee Report noted that although from 2002 to 2012 a total of 20 cases had involved court-imposed fines, none of them had been classified as very severe by the courts and consequently the full range of statutory penalties had not been used by the Danish courts. The highest fine level set by a court had been DKK 5 million which represented 0.6 % of the company's turnover.⁶⁴

The Committee Report also noted that in Denmark culpability at the level of "gross negligence" must be established in order to prove an infringement. The same standard is applied both to fines for undertakings and natural persons. The report concluded, "[t]he culpability requirement that applies in the Danish Competition Act means that there may be infringements that are not be punished in Denmark. However, the Committee has decided not to make any more detailed assessment of whether it would be appropriate to change the culpability requirement."⁶⁵

A majority of the Committee recommended increasing fines both for undertakings and natural persons, reasoning that higher fines would increase the incentives for compliance with the law. The minority disagreed, stressing "that company liability is a prime consideration under Danish law and that the stigmatisation that could result from having a fine imposed is very intrusive for

⁶³ Ibid. pages 5 to 8.

⁶⁴ Ibid. pages 12-13.

⁶⁵ Ibid. page 15.

a natural person.”⁶⁶ Based on the views of the majority, the Committee recommended a substantial increase in fine levels and including legislative notes stating that setting of fine levels should take into account the turnover of an undertaking, the gravity of the infringement and its duration.⁶⁷ Fine levels were increased tenfold in 2013.

The Committee also considered whether introducing prison sentences for cartel infringements (which are contained in Section 6 (1) subparts 1-3 of the competition law) would achieve better compliance and enforcement. (Section 23(3) subparts 1-4 of the Competition Act now allows for imposition of prison sentences.) It took note of the damaging effects of cartels and literature that overcharges from cartels range from between 10 and 50 %. It reviewed cartel behaviour in light of other economic crimes in Denmark for which prison sentences may be imposed and studied cartel punishment in a number of other OECD countries. It looked at the existing investigatory powers of the police in cartel cases in relation to their investigatory powers for other forms of economic crimes. Finally, the Committee considered existing leniency options in the competition law and whether introducing prison sentences might strengthen self-reporting of infringements using leniency and increase the risks of discovery from operating in a cartel.⁶⁸

As with increasing the fine levels, the Committee was split in its views on setting prison terms for cartel infringements. Debate centred on a comparison of whether imprisonment exists for other comparable economic crimes, the deterrent effects from the possibility of imprisonment and whether enforcement would be strengthened. Based upon the views of the majority, the Committee recommended the introduction of prison terms for four categories of horizontal agreements concerning: 1) prices, profits for the sale or resale of goods or services, 2) restrictions on production or sales, 3) division of markets or customers and 4) bid rigging. The majority also recommended adding a culpability element of “wilful intent” to establish proof of an infringement by a natural person. For cartels involving trade associations, imprisonment was to be

⁶⁶ Ibid. page 17. (“The minority also noted that disqualification was an alternative option for infringements by for natural persons.”)

⁶⁷ Ibid. page 28.

⁶⁸ Ibid. page 18.

extended “as it currently does [to] the person who encourages or otherwise contributes (cf. Section 23 of the Danish Penal Code).”⁶⁹

The Committee recommended that imprisonment of up to one year and six months for cartel agreements employed by companies operating at the same level of production or distribution, provided the infringement was intentional and of grave nature. In particularly aggravating circumstances, the Committee recommended imprisonment of up to 6 years. The possibility of leniency was extended to infringements involving prison terms, but only for the first person to self-report. Subsequent reductions in fines or lenient treatment would be considered under general rules of the Danish penal code.⁷⁰ The recommendations of the majority of the Competition Legislation Committee were adopted.

2.3.4 *The Competition Act, 2013*

In December 2012 the Parliament increased the fines levels for competition infringements ten-fold and instituted the possibility of prison terms for cartel infringements in line with the Committee’s recommendations. The December 2012 amendments to the competition act became effective in March 2013.⁷¹ According to the OECD: “Competition legislation was stiffened in December 2012, with higher fines and the possibility of imprisonment for cartel behaviour, and Denmark ranks well according to a set of new OECD indicators of competition law and policy.”⁷²

Determination of fines follows the principles in the former guidelines on the method of setting fines from the EU Commission (1998/C 9/03). Fine levels for undertakings are based upon the turnover of up to 10% of the turnover of the products and services of entire undertaking (parent and subsidiaries). Determinations as to the appropriate fine levels are based upon three factors: 1) the gravity of the infringement, 2) the duration of the infringement and 3) the

⁶⁹ Ibid. page 30.

⁷⁰ Ibid. pages 30 to 32.

⁷¹ The amendment to the Danish Competition Act, which allows imprisonment, is law number 1385 (23 December 2012), “Law on amendment on the Competition Act and the Criminal Act”. The amendments entered into force on 1 March 2013.

⁷² OECD Economic Surveys, Denmark 2013, page 17.

undertaking's turnover. Less serious infringements now may be sanctioned with fines up to EUR 537,000; serious infringements may be sanctioned with fines up to EUR 2,680,000; and very serious infringements may draw fines of over EUR 2,680,000. In June 2013, the Danish Parliament adopted Danish Competition Act. Consolidation Act No. 700 of 18 June 2013, (Competition Act, 2013). Beginning 1st August 2013 filing fees for mergers were introduced in Denmark.

In 2013, the DCCA launched a large media campaign to raise awareness about the new fines and prison sanctions for cartels which involved television, newspapers and a "road show" with a view to informing individuals and undertakings about the higher sanctions for competition law infringements. Those activities are viewed by some commentators as being "aggressive" and outside of norm of practices by Danish administrative agencies activities to encourage compliance with the law. It is the impression of the DCCA that the possibility of imprisonment has already had an appreciable deterrent effect and has intensified the awareness of the Competition Act.

The activities of the DCCA to publicise the new penalties for cartel offenses have been widely noted and legal practitioners report that compliance consultations and programmes are being widely adopted by companies. Spirited debate about the wisdom and effectiveness of the new sanctions, which continues, has important implications for the DCCA's operations and enforcement efforts. The increased fines and possibility of imprisonment were controversial and remain untested. Since the increased fines and the possibility of imprisonment can only apply to infringements that take place and have been investigated after 1 March 2013, the impact of the new sanctions on the enforcement of the Competition Act remains to be seen.

2.3.5 Latest Developments – Changes Effective on 1 July 2015

As discussed above, in December 2014, the Danish Parliament passed additional amendments to the competition law with the purpose of enhancing the efficiency and independence of the DCCA. They came into effect on 1 July 2015. The composition of the Competition Council has been reduced from 18 members (nine of whom are presently appointed by trade organisations) to a smaller Competition Council consisting of seven members with special competencies in law, economics, consumer affairs and management. The newly constituted Competition Council continues to be politically independent from the Ministry of Business and Growth and has increased overall responsibility for administration of the Competition Act. The

new advisory committee will include representatives from business organisations. It will provide input to the Competition Council but will have no supervisory or voting authority.

The independent Competition Council will have two significant new powers, first to refer cases to the State Prosecutor for Serious Economic and International Crimes (SEIC), which is presently the responsibility of the Director General of the DCCA. Second the Competition Council will be responsible for directing and approving market sector studies and analyses. Until 1 July 2015 DCCA market studies and analyses are proposed and approved by the Minister of Business and Growth, although according to the DCCA in practice they were to a large extent independent of the Minister. The new law retains the possibility for the Minister to request the DCCA to carry out analyses subject to Ministerial approval. When market studies and analyses are published they will identify whether they were approved by the Competition Council or by the Minister.

New procedures will be adopted for referrals of competition analyses to the Competition Council and procedures for the Competition Council's referral of cases to the SEIC. Necessary amendments will be made to Executive Order number 174 of 22 February 2013 on operation of the Competition Council. The DCCA does not envision that the statutory changes will necessitate changes to the organisation of the DCCA, nor will they substantially alter its staff organisation, budget and day-to-day operations.

With the latest legislative changes, the Danish Competition Act generally is aligned with laws of other EU Members States and those of peer countries. It is the view of the DCCA that the recent changes will improve the level of competition in Denmark. Additionally, new rules regarding sector specific merger control in the telecommunications markets (discussed below in Section 5) will come into effect in 2015 and in late 2015 or early 2016 new rules to implement the EU Damages Directive will be promulgated.⁷³

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Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of Member States and of the European Union; http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01. ENG. DCCA Response, Note, "Possible changes to the Danish Competition Act, 13 February 2015, page 3.

3. Substantive and Operational Features of the Danish Competition Act

Although the Danish Competition Act has adopted the EU Treaty and its substantive structure is generally aligned with those of the European Commission, there are a number of substantive and operational differences between Danish Competition law and that the EU and other Member States that set it apart. Those differences and the operation of the substantive sections of the Competition Act are discussed in this section.

3.1 *Dual Enforcement of the Competition Act*

Enforcement of the Competition Act involves dual authority of the DCCA and the State Prosecutor for Serious and International Economic Crimes (SEIC). Infringements of the Competition Act may be terminated by administrative determinations by the Competition Council to enjoin continued activities and through settlements and commitments by infringing parties.⁷⁴ In limited cases involving minor infringements the Competition Council has delegated authority to make administrative determinations to the DCCA. The DCCA has authority to conduct investigations concerning infringements and including authority to make administrative inspections, sometimes referred to as “dawn raids.” (Section 18).

Competition Act infringements may be punished by fines on undertakings or natural persons. Prison terms may also be imposed for hard core cartel infringements. The Danish district courts with jurisdiction over the undertaking or person imposes fines (and the prison terms). Investigation and prosecution of criminal cases involving fines (and prison terms) for infringements must be undertaken by the SEIC. The DCCA does not have authority to investigate or prosecute criminal cases before the Danish courts. It does have authority under Section 23.b, with the consent of the public prosecutor, to issue an administrative notice of a fine indicating that the case may be settled without a trial if the offender admits being guilty and is willing to pay a fine within a specified time limit.

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Competition Act, 2013, Section 6.-(4) and Section 16.a(1).

3.2 *Legal Standards and Principles Governing Competition Law Penalties*

In Denmark all penalties, which include monetary fines, are criminal “by nature.” Criminal penalties for fines are a matter of legal tradition in Denmark and do not flow from a specific section of the Danish constitution or a statute. These requirements apply *e.g.* to infringements of the Road Traffic Act, and the Environmental Act, among other statutes and are in no manner specific to fines under the Competition Act. Criminal fines may only be imposed by the Danish courts, following findings to a criminal standard of proof beyond a reasonable doubt. Danish courts cannot impose civil fines and the use of administrative fines is extremely limited in Denmark. In order for infringements of Section 6 (anticompetitive agreements) and Section 11 (abuses of dominance) to be enforced through the imposition of fines they must be prosecuted as criminal offenses. Section 23.-(4) of the Competition Act specifically provides that criminal liability may be imposed on legal persons (undertakings) under Part 5 of the Criminal Code.

Criminal investigations by the police may be initiated when there is a “substantial suspicion” to believe that a crime has been committed. Criminal investigations may not be undertaken by the DCCA, which may only engage in administrative investigations pursuant to its authority under the Competition Act. According to the Law of Legal Certainty (2005), investigations by the police, which may involve the use of coercive powers, may only be made by the police, if there is “probable cause” to suspect an infringement, which may lead to prosecution. Determinations about whether the results of a criminal investigation warrant filing of criminal charges in Danish court are made solely by the Danish prosecutor (for Competition Act cases by the SEIC) and follow the requirements of the Danish Criminal Procedural Regulation.

To prove a crime beyond a reasonable doubt the prosecutor must establish a link between the person or undertaking charged and the crime. Under the Danish Criminal Act, undertakings and natural persons generally may be found guilty of crimes if it is proved beyond a reasonable doubt that they acted intentionally or negligently. The terms are applied disjunctively. However, prosecution of some types of crimes in Denmark, including infringements of the Competition Act, require proof beyond a reasonable doubt that the accused acted intentionally or with gross negligence. The higher standard imposes additional challenges for proving competition infringements, particularly infringements involving complex facts and economic analysis. Criminal

culpability must be established to the satisfaction of the Danish courts, which have the sole authority to impose fines and incarceration

3.3 *Policies Relating to Exceptions and Exemptions from the Competition Law*

The Competition, Act 2013 applies to all undertakings and individuals within Denmark. The Competition Act, 2013 prohibits anticompetitive agreements (Section 6), abuses of a dominant position (Section 11) and mergers that will substantially restrict effective competition in a market (Section 12). The substantive prohibitions are analogous to Articles 101 and 102 TFEU and the European Merger Regulation. The law contains no sector specific exemptions.

Agreements among undertakings whose annual turnover is below a statutory threshold are “excepted” from the application of the prohibitions against anticompetitive agreements under a so-called *de Minimis* provision. Section 7 of the Competition Act, 2013 corresponds to a certain degree to the 2001 EU Commission Notice on agreements of minor importance.⁷⁵ It provides “exceptions” to Section 6 of the Act for some anticompetitive agreements and infringements by undertakings with turnovers or market shares below certain statutory thresholds.⁷⁶ Section 7 provides no exceptions for hard-core horizontal agreements such as price fixing, customer or market allocation, restrictions on production or bid rigging (otherwise referred to as cartels). The prohibition against anticompetitive agreements fully applies to those agreements irrespective of the involved undertakings’ turnover or market share. Nor shall

⁷⁵ The 2001 Notice is the “Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (De Minimis Notice) (2001/C 368/13). [See, also, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01); Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, 25.6.2014 [SWD(2014) 198 final.]

⁷⁶ Exceptions may be applied if: 1) the aggregate annual turnover for the undertakings involved is under 1 billion DKK and less than 10% of the product or service market and the agreements; or 2) an aggregate turnover of less than 150 million DKK. Section 7 is further explained by a *de Minimis* notice published by the Minister, which is similar to the EU Notice.

the exception apply if the effect of the agreement together with other agreements will restrict competition. Conversely, if an undertaking exceeds the aggregate turnover thresholds for two consecutive years and falls outside the *de Minimis* exception, the Minister may establish specific rules to designate them as “minor transgressions” under the Act. (Section 7.-(5)).⁷⁷

The Competition Act contains two provisions which exempt specific activities from coverage of the law. First, the Act does not extend to “pay and working conditions.”⁷⁸ (Section 3). The Competition Council may demand information from organisations and undertakings concerning pay and working conditions. As a practical matter this section applies and exempts collective bargaining by labour organisations from application of the prohibition against collective agreements. The exemption only applies to employer-employee agreements including collective bargaining by labour organisations (*i.e.* not agreements between companies). In cases when the DCCA considers if Section 3 is applicable it asks the parties to document that the agreement in question is agreed between an employer and an employee (or a labour organisation).

Second, the Act does not apply to agreements and abuses of dominance involving decisions and concerted practices within the same undertaking or group⁷⁹ (Section 5). Section 5 corresponds to the “single economic entity” doctrine in EU Commission law. A Ministerial order on agreements made within the same undertaking defines the criteria relevant to deciding whether there is a single economic entity.⁸⁰ One fundamental question in vertical relations is whether a subsidiary is truly independent from its parent company. In horizontal relations a fundamental question is whether the companies have subordinated themselves to a joint leadership.

⁷⁷ Competition Act, 2013, Section 7 (5).

⁷⁸ Competition Act, 2013, Section 3. (“This Act shall not apply to pay and working conditions. For purposes of its on-going work, the Competition Council may, however, demand information from organisations and undertakings concerning pay and working conditions.”)

⁷⁹ Competition Act, 2013, Section 5.-(1) and (2). Section 5.-(1) provides that the prohibitions against agreements that restrict competition and abuses of dominance contained in Part 2 of the Act, “shall not apply to agreements, decisions and concerted practices within the same undertaking or group of undertakings.”

⁸⁰ Ministerial decree number 1029 of 17/12/1997 (Danish).

3.3.1 *Section 2 of the Competition Act*

A more significant potential for exemptions is contained in Section 2 (2) of the Competition Act. The law specifically allows for an exemption where “the anticompetitive practice is a direct or necessary consequence of public regulation.”⁸¹ Application of an exemption for Government functions that sometimes are referred to as “State Actions” has a number of specific features under Section 2 of the Act.

Section 2, subparts 2 to 5 set out a procedure for exemption determinations. Anticompetitive practices established by a municipality or local council shall be considered to be a “direct or necessary consequence of public regulation” only if they are required for the local council to carry out tasks in accordance with current legislation. [Section 2.-(3)].

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Competition Act, 2013, Section 2 (1) to (4): “**2.-(1)** This Act shall apply to any form of commercial activity as well as aid from public funds granted to a commercial activity; **2.-(2)** The provisions of Parts 2 and 3 of this Act shall not apply where an anti-competitive practice is the direct or necessary consequence of public regulation. An anti-competitive practice established by a local council shall only be considered direct or necessary to allow the local council to carry out the tasks assigned to it in accordance with current legislation; **2.-(3)** Decisions made by the executive of a local authority partnership, cf. Section 60 of the Local Government Act, shall be considered equivalent to decisions made by a local council as referred to in subsection (2) above; **2.-(4)** a decision about the extent to which an anti-competitive practice will be covered by subsection (2) above shall be made by the minister responsible for the regulation concerned. If the Competition Council requests the relevant minister to determine whether an anti-competitive practice is covered by subsection (2), the minister must reach a decision no later than 4 weeks after having received the request from the Council. The Competition Council can extend the deadline; **2.-(5)** If the Competition Council finds a public regulation or an aid scheme likely to restrain competition or otherwise likely to impede efficient allocation of society’s resources, the Council may deliver a reasoned opinion to the relevant minister and to the Minister for Business and Growth, pointing out its potentially adverse effects on competition, and present recommendations for promoting competition in the areas concerned. After negotiating with the Minister for Business and Growth, the relevant minister [shall] reply to the Competition Council no later than four months from the receipt of the Council’s statement. The Competition Council may extend the deadline.

The Competition Council cannot itself determine whether an anticompetitive practice is “a direct or necessary consequence of public regulation.” Instead, it must ask the relevant Government Minister with authority over enforcement of the regulation to decide on the matter. The Minister must reach a decision within 4 weeks. [Section 2.-(4)] If the relevant Minister reaches a decision that the anticompetitive practice is a “direct or necessary consequence of public regulation,” that determination has the effect of divesting the Competition Council from jurisdiction to directly apply the Competition Act to anticompetitive agreements or abuses of a dominant position governed by “direct and necessary” regulations. Instead, if the Competition Council then finds that the “public regulation or an aid scheme likely to restrain competition or otherwise likely to impede efficient allocation of society’s resources” it may only deliver an opinion to the relevant Minister and the Minister for Business and Growth that points out the potentially adverse effects on competition and presents recommendations for promoting competition in the area concerned. “After negotiating with the Minister of Business and Growth, the relevant minister [shall] reply to the Competition Council not later than four months from the receipt of the Council’s statement,” unless the deadline is extended by the Council. [Section 2.-(5)].

The Competition Act (Section 19) does not permit appeals of ministerial decisions under Section 2(4). The Competition Council is of the opinion that it would not have *locus standi* to appeal to the Danish courts a determination of a Minister that an anti-competitive practice is a direct or necessary consequence of public regulation to the courts. According to the Danish Administration of Justice Act *locus standi* requires that a party’s interest in a case is of an essential, individual and direct nature.

The scope of Section 2 (2) does not appear to be limited to grants of special or exclusive rights by the government or municipalities or to determinations under Article 106 TFEU.⁸² Section 2 appears to encompass a

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Article 106 TFEU states: "1) In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109; 2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular

wider scope of Government and municipal regulations for which exemptions may be granted.⁸³ Section 2 (5) has been applied to DCCA recommendations concerning changes to Danish laws to make them comply with the Competition Act. It has also been used in specific cases involving regulation of activities that otherwise could infringe the Competition Act.

The DCCA reports that Section 2 is utilised on a regular basis both with regard to national regulations and concerning regulatory regimes of sub-national and local governments that fall within the so-called *kommunalfuldmagt*, which contains unwritten rules on, among other matters, municipalities allocation of aid. Since 2010 the DCCA has opened sixteen Section 2 investigations. In two of them the Competition Council delivered opinions to the relevant Minister under Section 2(5). They are discussed below.

There are no implementing guidelines or regulations for applying Section 2. Section 2 (2) does not limit the type or scope regulations that are “direct or necessary” and may thereby, be exempted from application of the Competition Act. Section 2(2) expresses no preference for a determination by the relevant Minister that favours competition. It does not require the relevant Minister evaluate whether the regulatory objectives could be attained by alternative means that do not produce the anticompetitive effect. It does not require a balancing of interests or that competition concerns or effects even be taken into account. Section 2(2) places the determination in the Government Ministry where the regulation in question originated and which may have been the author of the practice that is causing the anticompetitive effects.

Three recent Section 2(2) investigations are illustrative of how the section has operated in practice. The first involves a referral by the Competition Council to a Government Ministry following a DCCA study. The referral recommended liberalising regulations to make a regulated industry more competitive. The other two investigations involve allegations of specific

tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union. 3) The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.” See also, *Commission v. DEI* (Case C-553/12 P) 17 July 2014.

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If the matter involves application of a municipal regulation, the Minister for Economic Affairs and the Interior will make the determination of whether it is direct or necessary.

infringements of the Competition Act, one involving an abuse of dominance and other involving activities by an association of undertakings.

2012 Referral to the Minister of Health Pursuant to Section 2

In 2010 the DCCA published a market study of the Danish pharmacies industry. Following the study, in 2012 the DCCA issued an opinion to the Minister for Health concerning the Danish enabling legislation for licensing of pharmacies and pharmacists. The Competition Council recommended a number of ways to enhance competition and efficiency in the sector.⁸⁴

The opinion resulted in establishment of a cross-ministerial working group was commissioned to describe pros and cons of possible liberalisation and modernisation initiatives. The DCCA participated in this working group along with the Ministry of Health. Changes to the legislation ultimately were proposed by the Minister of Health.⁸⁵ The Minister proposed changes to the regulations which are not as comprehensive as the recommendations contained in the DCCA's 2010 report. The matter is still pending within the Danish Government.

The first infringement investigation involved the Copenhagen Airport infrastructure.

⁸⁴ The Competition Council opinion recommended: (a) Ownership of pharmacies should be possible for non-pharmacists and corporations; (b) No limits on the total number of pharmacies; (c) Substantial raise in the number of pharmacies that can be owned by the same owner; (d) Maximum prices instead of fixed prices on prescription and pharmacy only drugs; (e) Removal of the equalisation scheme; (f) Ensuring pharmacies in less populated areas through the use of tenders; (g) More liberal rules for the assortment and the opening hours in pharmacies; and, (h) Establishing an internet pharmacy should not be conditional upon ownership of a physical pharmacy and (internet) pharmacies should be allowed to send drugs free of delivery fees.

⁸⁵ The Ministry of Health has put forward a proposed amendment to the current legislation on pharmacies. If it is approved in its current form it will give the opportunity to (a) launch and operate pure online pharmacies (limited number of concessions) and (b) for each pharmacy to launch and operate more affiliates.

Copenhagen Airport Terminal A Case

The DCCA investigated a refusal by the Copenhagen Airport to grant access to an incumbent to unused airport grounds with a view to establishing a competing, low-cost, terminal and whether the refusal constituted an infringement of Section 11 (abuse of dominance provisions of the Competition Act). The DCCA contacted the Ministry of Transportation with a view to ensuring that the refusal to give access could not be regarded as a direct or necessary consequence of public regulation under the responsibility of the Minister. At first the Minister delivered an opinion saying that the anti-competitive conduct was not a consequence of public regulation under its responsibility. However, subsequently the Minister reassessed his determination and concluded that the conduct was a direct and necessary consequence of public regulation. The Competition Council was thereby precluded from taking a decision in the Terminal A-case. Using Section 2(5) the Competition Council recommended that the Minister alter the regulations. The Minister did not reverse his determination.

Specialist Practitioners Investigation

A second investigation involving a group of specialist medical practitioners is pending with Minister of Health following a Section 2 (5) referral by the Competition Council in January 2015.⁸⁶ The allegations involved practices by a specialist practitioners trade association which had since 2012 sent out e-mails to its members that they should limit the number of treatments performed (by taking time off work or taking courses) in order to avoid a reduction in payments from the relevant public authorities. The DCCA investigated the allegations and found that the activities by the specialist practitioners to co-ordinate and restrict the number of treatments had resulted in higher prices and longer waiting times. Prior to the DCCA filing a case the Minister for Health invoked Section 2 (4) of the Act. In January 2015 the Competition Council made recommendations under Section 2 (5) that changes to the regulation of specialist practitioners should be instituted. Among them was the recommendation that responsibility for the budget for specialist practitioners should be assigned to the regions responsible for payments to them and not to private companies or to their trade association.

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DCCA web site, Press Release, 30 January 2015.

In both infringement cases the DCCA contacted the relevant Ministries early in the investigations for decisions on whether the practices under investigation were direct or necessary consequences of public regulations and thus exempted from the prohibition sections of the Danish Competition Act. The relevant Ministries gave indications that the practices were not direct or necessary consequences of public regulations. Based upon indications from the relevant Ministers the DCCA proceeded with its investigations. However, immediately prior and within days before the cases were to be decided by the Competition Council, the relevant Ministers indicated that the issues were a direct or necessary consequence of public regulation. Both cases were closed without a Competition Council decision concerning infringements after full investigations and case preparations were finalised. In both cases the Competition Council subsequently delivered only reasoned opinions with recommendations for regulatory changes under the procedures contained in Section 2.5 of the Act.

The Chairman of the Competition Council recently has contacted the Minister of Business and Growth calling for a better and clearer framework for the DCCA to investigate cases of possible anticompetitive practices in areas subject to public regulation.

Although the law contains no specific exemptions, by operation of Section 2, it is possible for individual Government Ministries and municipalities to provide *ad hoc* exemptions to the operation of the Competition Act in specific cases, for which there appears to be no recourse to the Danish courts by the DCCA. This seems to be a significant lacuna in Denmark's efforts to make competition a foremost policy tool to improve productivity and provide for the sustained high standards of living for its citizens.

3.4 Notification of Agreements, Non-Infringement Determinations and Informal Guidance

Denmark uniquely retains the possibility for notifying agreements (and abuses of dominance) to the DCCA and obtaining determinations concerning potential infringements. The possibility of notification and non-infringement determinations was abandoned by the European Commission in 2004 with the enactment of Regulation (EC) No. 1/2003.

The DCCA questions the benefits of retaining a notification system and would prefer it to be abolished. However, there appears to be a desire for retention of the formal notification system among some legal practitioners and

stakeholders, with some even expressing the wish that a broader notification and infringement determination option was available.

Section 8.-(2) of the Competition Act, 2013 essentially retains the former EC system of notification of agreements and non-infringement determinations. It provides that the Competition Council may “upon notification” of an agreement issue a determination that it meets each of the four criteria in Section 8.-(1) which are identical to Article 101(3) TFEU.⁸⁷

Section 9.-(1) is a more general provision that provides for notification of agreements to the DCCA and issuance of determinations that “according to the facts in its possession, an agreement, decision or concerted practice shall be outside the scope of the prohibition set out in Section 6.-(1) and that, accordingly, it has no specific grounds for issuing an order under Section 6.-(4). The Competition Council and the DCCA have applied Section 9 on a number of occasions and to various industry sectors – especially in the first years after the changes of the competition rules that entered into force in 1998. They include determinations concerning agreements in the energy, real estate, construction, aircraft fuels, pension agreements and animal waste sectors.⁸⁸ The most recent case applying Section 9 involved an organisation of Danish Ports. In that case the DCCA found that a lease agreement by the organisation did not distort lease prices.⁸⁹

⁸⁷ Section 8 allows the Competition Council to establish rules for the notification, including special notification forms and submission of non-confidential versions of the notification. In 2013 an Executive Order on notifications under the Act was issued. Executive Order No. 171 of 22 February 2013 on the Activities of the Danish Competition and Consumer Authority (notifications under the act). (Not available in English).

⁸⁸ The following is a non-exhaustive list of recent cases in which Section 9 has been applied: HMN Naturgas (energy); Samarbejdsaftale om udveksling af boligemner (real estate); Dansk VVS og ELFO (construction); Shell-Statoil (aircraft fuels); Danica, ABB mv. (pension agreements); and DAKA (animal waste).

⁸⁹ DCCA website, Danish Ports' Standard Lease (29 November 2006). “On 29 November 2006 the Danish Competition Council decided that two conditions in the standard lease of Danish Ports regarding the adjustment of rent and the “turnover guarantee” do not have a distorting effect on competition.” <http://en.kfst.dk/Indhold-KFST/English/Decisions/20061129-Danish-Ports-Standard-Lease?tc=9726D7CF61454E0A9B6C11D45E8240F3>

Similarly, abuses of dominance may be the subject of notifications to the DCCA for a determination of non-infringement. A party may file a notification and seek a determination by the Competition Council that “based upon the facts in its possession a certain form of conduct shall not fall under the prohibition in subsection (1) and that it has no grounds for issuing an order under subsection (4).”[(Section 11(2) and (5)].

The Act recognises that notifications would be inoperable in cases involving application of the Treaty and specifically states that the Competition Council may refrain from considering a notification if an agreement might appreciably affect trade between the Member States of the European Union.

In addition to formal notifications, since 2013 the DCCA has enacted more robust informal guidance procedures. The informal guidance system in Denmark differs in scope from the system of informal guidance used in the EU.⁹⁰ In contrast to the European Commission’s system of accepting only requests that involve novel questions concerning application of the EU Treaty, the DCCA’s informal guidance regime has no similar limiting requirements.

The system of formal notifications and informal guidance operate in parallel. Filing of a notification precludes the DCCA from investigating the subject matter of the notification while it is pending.⁹¹ There are four possible outcomes to a notification: a) a non-infringement determination may be issued; b) an infringement decision may be issued along with an order to end the infringement; c) the undertaking may receive informal guidance from the DCCA during the course of discussions concerning its formal application and

⁹⁰ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C101/06); [http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52004XC0427\(05\)&from=EN](http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52004XC0427(05)&from=EN). The EU novelty requirement is designed for prudential policy reasons, principally that Regulation 1/2003 should focus enforcement efforts on the most serious infringements and that the Commission only should provide informal guidance if the novel question involves a matter of importance to consumers, has widespread implication for the operation of a market and relates to the structure of competition in a market. Guidance will not be given if the questions raised are either hypothetical or similar to those being considered by the European Courts or the authorities in a Member State.

⁹¹ The Minister has issued rules for notifications and exemption decisions. (Order number 171 of 22 February 2013).

withdraw its application for exemption; and d) the DCCA may reject a notification if the conduct at issue may appreciably affect trade between the Member States of the EU.⁹²

Although the DCCA has not received a significant number of formal notifications, the number increased in 2014. There were 3 notifications under Sections 8 and 9 of the Act in 2012, 1 in 2013 and 7 in 2014. There were no Section 11 notifications in 2012 or 2013, and there was 1 in 2014. In 2013 the DCCA closed 20 cases with informal guidance and in 2014 it closed 25 cases in

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Two examples of recent informal guidance by the DCCA illustrate how it is used. (DCCA Statistics). (a) *Example of an informal guidance case (closed with written informal guidance): Nordjyllands Pelsdyravlereforening*. In April 2013 an association of Danish fur farmers requested informal guidance from the DCCA on the compliance with the competition rules of a planned agreement intended to combat the disease "plasmacytose". The Competition Council had examined an earlier version of the agreement in 2005 and found one of the clauses therein (a clause about pricing) to constitute an infringement of Section 6 of the Danish Competition Act. In the 2013 version of the agreement, however, this clause had been removed. This being so, the DCCA states in its informal guidance letter that on the basis of the information at hand the envisaged agreement does not appear to give rise to competition law concerns. (b) *Example of a notification case that was closed with written informal guidance: "Alufacadesektionens standardvilkår."* In November 2013 the Danish Construction Association ("Dansk Byggeri") made a notification to the DCCA under Section 8(2) of the Danish Competition Act on behalf of one of its sections (the section specialised in facade buildings). The notification concerned a clause in the draft standard terms of the section which the member companies could use voluntarily in the context of giving bids on possible assignments. The purpose of the clause was to avoid conflicts between the entrepreneur and the contractor as regards the quality-level of the works being performed. After deliberations between the DCCA and Dansk Byggeri the conclusion was reached that the issue could be dealt with by way of informal guidance as opposed to a formal reply to the notification. In the DCCA's informal guidance letter the DCCA finds that based on the information at hand the standard terms do not appear to give rise to competition law concerns. The DCCA based this preliminary conclusion on the following facts: the standard terms were non-binding for the members; the standard terms only applied where nothing else followed from the procurement material; the standard terms were merely a specification of applicable construction law; and the standard terms did not directly affect the prices which the members charged their customers.

the same manner. These statistics do not reflect other guidance that may not have progressed to the status of a formal case.

None of the notifications under Sections 8(2), 9(1), 11(2) or 11(5) have resulted in exemptions and non-infringement decisions in the years 2012-2014.

Two recent formal notifications resulted in infringement decisions against the undertakings that filed the notifications; a third case resulted in commitments being offered. One case involved notification by a co-operative of small real estate agents seeking a *de Minimis* exemption from Section 6 for a commercialisation agreement agreeing to a binding price for their services.⁹³ The other case involved resale price maintenance offences by hair salons.⁹⁴ Those two infringement decisions based upon voluntary notifications have been among those cases where the DCCA has been criticised for expending its resources on insignificant matters.

Questions might be asked as to whether the notification system may be causing confusion about what behaviour is prohibited. In December 2013, the Competition Council accepted commitments from the Danish Construction Association concerning a provision in the requirements of the Scaffolding Section of the Construction Association that was the subject of previous negative clearance by the Danish Competition Authority in 2001. The provision obliged members to report offers (bids) concerning scaffolding jobs valued at above a certain level to the Association. The Association shared the information with members, including the number of companies (limited to a maximum of three) that had bid and their identities. The information was provided to members before the contract had been awarded. Despite the elimination of notifications at the EU-level and changes to Danish Competition law to reflect those changes, until 2013 the Association did not seek to clarify whether its

⁹³ DCCA website, Press Release, 18 December 2013, Anti-Competitive Price Fixing Agreement in the Real Estate Business. <http://en.kfst.dk/Indhold-KFST/English/Decisions/20131218-AntiCompetitive-Price-Fixing-Agreement-in-the-Real-Estate-Business?tc=9726D7CF61454E0A9B6C11D45E8240F3>.

⁹⁴ DCCA website, Press Release available in Danish. <http://www.kfst.dk/Indhold-KFST/Nyheder/Pressemeddelelser/2014/20141103-Frisoerkaede-faar-paabud-for-aftalte-priser?tc=6FDAFB4F0F0249E7ABC54BB580A3A6E4>

regulation continued to benefit from a negative clearance or take steps to eliminating the market sharing provision.⁹⁵

Although it has been 10 years since enactment of Regulation (EC) No. 1/2003, there appears to be a certain amount of nostalgia for the previous system of notifications and comfort letters. Frustration is expressed over not being able to obtain a definitive answer concerning infringement of the law as part of the informal guidance process. There appears to be a desire to obtain certainty in the form of an administrative determination from the DCCA which is a procedure cited as being available within other Ministries and authorities of the Government (*e.g.* the Revenue authority).

The extent to which the legacy notification provisions have utility is a matter for discussion and determination within Denmark. It might be questioned if it is creating ambivalence or reflects an unwillingness to accept the scope of competition law and compliance. The retention of the provisions does keep Denmark a step away from being fully synonymous with the EU Commission practices.

3.5 *Horizontal Agreements*

Section 6.-(1) of the Competition Act, 2013 prohibits anticompetitive agreements “that have restriction of competition as their direct or indirect object or effect.” Section 6.-(2) sub-parts (I) to (v) mirror Article 101 (1) TFEU. Two additional subparts specifically prohibit agreements that: “(vi) co-ordinate the competitive practices of two or more undertakings through the establishment of a joint venture; or (vii) determine binding resale prices or in other ways seek to induce one or more trading partners not to deviate from recommended resale prices.”

Although bid rigging is not specifically listed in the Section 6, it falls within its coverage.

The terms “object” or “effect” are applied disjunctively. Section 6 applies to decisions by an association of undertakings and concerted practices between undertakings and infringing agreements unless they fall within *de Minimis* exemptions or are exempted by virtue of meeting each of four criteria contained in Section 8.-(1) which are identical to those contained in Article 101 (3) TFEU.

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DCCA website, Press release, 18 December 2013, Competition Council accepts commitments from The Danish Construction Association regarding exchange of information agreement.

Denmark uses the EU block exemptions as the model for Denmark-specific block exemptions (for anticompetitive agreements that do not affect trade between Member States) that have been issued by the Minister.

Denmark does not have a doctrine of *per se* prohibitions against horizontal agreements. Exceptions to operation of the law contained in Section 8.-(1) of the Act are similar to Article 101 (3) TFEU exceptions.⁹⁶ Under the Article 101 of the Treaty, co-ordination between competitors which “deliberately substitutes practical co-operation among undertakings for the risks of competition” is held to “patently conflict with the concept inherent in the Treaty.”⁹⁷ Certain types of agreements can be regarded, “by their very nature, as being injurious to the proper functioning of normal competition.”⁹⁸ Those categories of offenses are considered to have as their “object” injurious restrictions on competition and are sometimes referred hard-core restrictions. The *de Minimis* exceptions to the law do not apply to hard-core horizontal restrictions of competition.⁹⁹ There are no presumptive rules concerning market shares or thresholds.

The DCCA follows the EU Commission’s guidelines when dealing with joint ventures and co-operation agreements among competitors.¹⁰⁰ It recently issued guidelines on information exchanges within trade and professional associations.¹⁰¹ The principles in the guidelines also apply to other formal and informal associations and agreements among competitors. Thus, the Danish law and practice generally follows the EU Commission’s guidelines on horizontal agreements.

⁹⁶ Section 8.-(1).

⁹⁷ The Competition Authority v. Beef Industry Development Society, Ltd. and Barry Brothers (Carrignmore) Meats, Ltd. (“Irish Beef”), C-209/07 (20 November 2008).

⁹⁸ Case C-32/11, Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal, judgment of 14 March 2013, (“Allianz”).

⁹⁹ [Section 6.-(1) (i) to (iii)].

¹⁰⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01). [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN).

¹⁰¹ Guidelines on Information sharing in trade organisations. <http://www.kfst.dk/~media/KFST/Konkurrence/Regler/Vejledninger/20141210%20Informationsaktiviteter%20i%20brancheforeninger.pdf>.

3.5.1 *Application of the Law to Hard-Core Cartel Agreements*

Danish experience with hard-core cartels is similar to that of most other competition agencies. Cartels are difficult to uncover and hard to prove. The dual system of cartel investigations and enforcement by both the DCCA and SEIC adds complexity to anti-cartel enforcement in Denmark that is different than in most EU countries.

Denmark has enacted the full set of prohibition and sanctions for hard-core cartels which provide strong disincentives for cartel behaviour. Denmark's motivations for increasing cartel sanctions to include imprisonment included considerations about improving deterrence and detection of cartels. Prison terms for cartel offenses now place sanctions for these "white-collar" crimes in same category as other crimes that are prosecuted by the SEIC.

Imprisonment for white-collar crimes is not unheard of in Denmark. To date, district courts in Denmark have imposed prison terms in seventeen cases involving SEIC prosecutions. In five cases terms of between 2.5 and 5 years have been imposed. Six other cases imposed jail time of below 6 months and in seven cases prison terms were imposed but suspended.¹⁰² Whether courts will reflect the new sanctions contained in Competition Act when imposing fines on undertakings involved in cartels and whether they will impose jail time on individuals who are convicted of participating in cartels remains to be determined.

3.5.2 *Statutory Leniency*

In 2007, the Danish Parliament amended the competition law to add statutory leniency as option for undertakings and individuals wishing to self-report a cartel infringement and obtain lenient treatment.

¹⁰²

The SEIC reports that 11 individuals have been sentenced to imprisonment: 2 judgments imposed sentences of 5 years; 1 judgment imposed a sentence of 4 years; 1 judgment imposed a sentence of 3 years; and 1 judgment imposed a sentence of 2 years and 6 months. In 6 other cases sentencing judgments imposed jail time below 6 months. In seven cases jail time was imposed but suspended (from 14 days to 3 months). In nine other cases fines of 9 fines (total DKK 9.775.000) were imposed.

The leniency provisions contained in Section 23.a-(1) are closely aligned to the EU Model Leniency Programme and thus to the Commission leniency notice.¹⁰³ Current and former employees and board members are covered by the programme, provided they co-operate. Providing increased incentives for self-reporting and the use of leniency was one of the considerations by the Competition Legislation Committee that recommended increased fines and prison terms in 2012. The DCCA reported the first use of the leniency programme in March 2014.¹⁰⁴ It reports receiving some leniency applications and that there is indication of increased interest in using leniency by undertakings and individuals.

Leniency for the first reporting undertaking or individual consists of immunity from prosecution and “withdrawal of charges that would otherwise have led to a fine or imprisonment.” Reductions in fines are also available for the second undertaking or individual who reports (50%) and smaller reductions of up to 30% and thereafter up to 20% of fines may be given to others who report and accept responsibility. Immunity from imprisonment is extended to the first leniency applicant and is not available for subsequent leniency applicants. Self-reporting and co-operation may be taken into consideration by the court at the time of sentencing.

The law does not include a marker system such as that set out in subparagraph (15) of the Commission leniency notice. The filing position of an undertaking or individual is determined at the time the formal application for leniency is filed. The leniency applicant will then obtain a receipt and conditional assurance of whether the application has been accepted. Whether a marker system would provide greater assurances to those contemplating self-reporting is uncertain, but there are some that believe the flexibility would be beneficial to both the DCCA and applicants. The OECD has recently done a

¹⁰³ Commission notice on immunity from fines and reduction of fines in cartel cases; Official Journal C 298, 8.12.2006, p. 17.

¹⁰⁴ The first reported leniency application was announced by the DCCA in March 2014 in a case involving an alleged cartel in the cleaning industry between two undertakings and involved a tender offered by the Capital Region of Denmark. The SEIC decided not to pursue the case based upon “exceptional and personal” circumstances. DCCA website, Press Release, 7 March 2014.

study of the use of markers in leniency programmes. Of 34 OECD countries Denmark and four other countries do not have marker systems.¹⁰⁵

Some practitioners and stakeholders report that there is still a general disinclination among undertakings to avail of leniency. It appears that although requests for compliance training and internal reviews have been increasing, there may be strong inclinations among undertakings to deal internally with cartel behaviour and cease cartel activities, but not seek leniency. Whether such conscious decisions to “disregard all game theory” hoping that others will do the same proves to be advantageous in the long-run remains to be seen.

3.5.3 *Cartel Enforcement Cases*

To date the two largest cartel cases prosecuted by the SEIC under the Competition Act have involved the building trades sector. The first, from 2004 involved electrical contractors; the second case, which is on-going, involves construction companies. Both cases involved bid-rigging on contracts. The prohibitions against bid rigging are not a new phenomenon in Denmark. A significant case involving bid rigging on district heating procurements in Denmark was addressed by the European Commission in 1999.¹⁰⁶

In 2000 to 2004 the SEIC charged 360 electricians for rigging bids in more than 700 tenders that took place in 1998. Some firms were charged with participation in more than 200 tenders, others only with participation in a single tender. The firms and tenders were dispersed geographically across Denmark. The SEIC established a task force of twelve investigating policemen who carried out a large number of interrogations. Four cases went to trial will all of them resulting in convictions.

The fines of the first four trial cases were between DKK 90,450 (EUR 12 200) and DKK 1,182,800 (EUR 160 000). Subsequently, other firms settled cases and agreed to fines ranging up to DKK 3 million (EUR 400 000). Fine levels were determined according to the number of tenders the firms had been involved in and the revenues they obtained from these. Reductions in the

¹⁰⁵ OECD Use of Markers in Leniency Programmes, 16 December 2014.

¹⁰⁶ Case T-21/99 Dansk Rorindustri v Commission (A cartel agreement between producers of district heating pipes allocating individual projects to designated producers and manipulating the bidding procedure to ensure that the designated producer was awarded the assigned project.)

level of the fines of up to twenty per cent were granted for firms that co-operated with this investigation.¹⁰⁷

The SEIC has recently filed charges against 28 construction companies and 25 individuals for bid rigging on contracts between 2007 and 2009 where the participants exchanged information on prices and other terms. As of May 2015, seventeen of the undertakings have agreed to settlements. The undertakings and individuals involved agreed to pay fines totalling more than EUR 3,600,000. The SEIC has obtained the largest fine to date in a competition case in the amount of EUR 1,343,363 (approximately 3 % of the company's turnover). The remaining cases are still pending.¹⁰⁸

¹⁰⁷ OECD 2004 Report at page 25. "Bid rigging among electricians was the first criminal case to be determined according to the 1998 DCA. The Competition Authority initiated the cases in late 1998 with a large dawn raid, following revelations in the business press. A number of firms decided to co-operate with the authority early on by making full confessions. The Authority eventually notified the Public Prosecutor for Serious Economic Crime of 360 electricians for rigging bids in more than 700 tenders taking place in 1998. Some firms were charged with participation in more than 200 tenders, others only with participation in a single tender. Firms and tenders were geographically dispersed across Denmark. The Prosecutor established a task force of twelve investigating policemen who carried out a large number of interrogations. Then four cases were tried in court, and all led to convictions of the firms involved. The fines were determined according to the number of tenders the firms had been involved in and the revenues they obtained from these."

¹⁰⁸ The 17 undertakings, which have accepted fines, are: N.H. Hansen & Søn – EUR 295,036 + two individuals each fined EUR 3,352; Knud Toft Jensen ApS - EUR 5,753 + one individual fined EUR 3,352; Elindco Byggefirma A/S - EUR 1,341,075 + one individual fined EUR 3,352; BGB A/S EUR 134,107 + two individuals each fined EUR 3,352; Ason A/S - EUR 67,053 + one individual fined EUR 3,352; Enemærke & Petersen – 134,107 + one individual fined EUR 3,352; Øens Murefirma A/S - EUR 120,696 + one individual fined EUR 3,352; Karl A. Hansen Entreprise A/S – EUR 201,161 + one individual fined EUR 3,352; Kjell Pedersen Entreprise A/S - EUR 60,348 + one individual fined EUR 3,352; Jakon A/S – EUR 603,484 + one individual fined EUR 3,352; Store-Hedebygd Entreprise A/S - EUR 67,053; Hovedstadens Entreprise A/S – EUR 134,107 + one individual fined EUR 3,352; Tømrermester Jim Jensen A/S - EUR 40,232 + one individual fined EUR 3,352; Kjær & Lassen A/S - EUR 107,286; Tømrermester N.A.Nielsen & Søn A/S - EUR 40,232; Tømrer- og Snedkerfirmaet P. Winther Jespersen A/S - EUR 160,929 + one individual

These two large bid rigging prosecutions demonstrate the scope for bid rigging agreements in Denmark. Whether the Danish courts will find that bid rigging cartels are very serious offenses under the amendments to the Competition Act, has not been established. In one case tried in 2012 the High Court ruled in a case on bid rigging relating to two environmental laboratories. The two undertakings involved were each fined EUR 67,168. The SEIC argued that the bid rigging infringement should be considered “very serious” under the fining provisions of the Competition Act. The High Court ruled that the infringement was only “serious”. This affected the size of the fines.

In light of the substantial amount of public procurement at both the national and municipal levels in Denmark and the scope of public services covered, bid rigging investigations and the DCCA’s other activities to discover and discourage bid rigging are particularly important for the success of its overall cartel enforcement efforts. The DCCA has established a task force which travels around the country doing presentations on the subject on fighting bid rigging and has prepared a number of pamphlets and handouts identifying activities that constitute bid rigging and how to spot bid rigging. The DCCA referenced the 2012 OECD Bid Rigging Recommendation and Guidance when preparing its materials.¹⁰⁹ It has also entered into two strategic partnerships with public procurement contactors to help them better identify potential bid rigging and bring it to the attention of the DCCA.

3.5.4 *Infringements by Associations of Undertakings*

Section 6 (1) specifically applies to “decisions made by an association of undertaking and concerted practices between undertakings.” [Section 6(3)]. The Competition Council has since 2005 referred eight separate cases involving associations of undertakings to the SEIC for prosecution. Fines totalling EUR 409,772 have been imposed.¹¹⁰

fined EUR 3,352; Murerfirmaet P. Winther Jespersen A/S - EUR 77,782 + one individual fined EUR 3,352. In addition one individual from the undertaking PPE Entreprise A/S has accepted a fine of EUR 3,352. The rest of the cases are still pending.

¹⁰⁹ 2012 OECD *Recommendation of the Council on Fighting Bid Rigging in Public Procurement*, (17 July 2012 - C (2012)115 - [C\(2012\)115/CORR1](#)).

¹¹⁰ Fines were imposed on the following: -DAG – Dansk Autogenbrug (fined in 2005 - EUR 6,716); Danske Kroer og Hoteller (fined in 2007 - EUR 53,734);

In other instances, the Competition Council has used administrative orders to enjoin anticompetitive agreements by undertakings and by associations of undertakings. The power to issue administrative orders and enjoin infringements without imposing fines provides the DCCA and Competition Council with the capacity to evaluate and apply standards of proportionality to determine the most effective means to enforce the statute. A recent case by the DCCA illustrates the use of its powers to issue administrative orders in a case involving an infringement of Section 6 of the Act.

On 30 April 2014, the Competition Council issued an order finding that an association of undertakings (Skive og Omegns Vognmandsforening) and its 40 members had restricted competition by co-ordinating tenders regarding winter road maintenance in the municipality of Skive Kommune in Jutland, Denmark. In 2010, Skive Kommune called for tenders regarding winter road maintenance of 11 individual routes for the period 1 October 2010 to 30 April 2014. The association of undertakings made offers on all 11 routes and won 9 routes. The association of undertakings hereafter allocated the routes between 10 of their members. The allocation was done by lot. The individual routes are mainly handled by two carriers. The Competition Council enjoined association activities and forbid the use of such terms in any future extensions to the contract.¹¹¹

3.6 *Vertical Agreements*

The prohibitions in Section 6.-(1) also apply to vertical infringements which include: (i) limiting or controlling the sales; (ii) sharing markets or sources of supply; (iii) applying dissimilar condition to equivalent transactions; (iv) so-called tying arrangements; and, (v) resale price maintenance. Also prohibited are co-ordinating competitive practices through a joint venture. Vertical infringements may be handled administratively by the DCCA. Where fines are sought by the Competition Council, the cases must be referred to the

Danske Busvognmænd (fined in 2010 - EUR 67,168); Dansk Juletræsdyrkerforening (fined in 2010 - EUR 67,168); Dansk Kartoffelproducentforening (fined in 2011 - EUR 67,168); Dansk Transport og Logistik (fined in 2011 - EUR 53,734); International Transport Danmark (fined in 2010 - EUR 40,300); Danske Bedemænd (fined in 2011 - EUR 53,734).

¹¹¹ DCCA web-site, Press Release , 30 April 2014.

SEIC for criminal investigation and prosecution, unless one of the alternative routes discussed above is applicable.

3.6.1 Resale Price Maintenance

In Denmark resale price maintenance (RPM) is an offense. The DCCA applies substantive and procedural rules concerning RPM infringements contained in the EU Notices and has not issued separate regulations or guidance concerning RPM.¹¹² According to the European Commission notice on vertical restraints minimum RPM is considered to be a “hard-core” agreement by object that is not exempted by the block exemption.¹¹³ Similarly, there is no *de Minimis* exception under Section 7 of the Competition Act for RPM.

The Competition Act includes a specific section concerning RPM on prices for retail books in Denmark, which were in the past subject to fixed resale prices. The legislation explicitly extends the prohibition against RPM to any agreements concerning resale prices of books that may have existed prior to 1998.¹¹⁴

In recent years, the Competition Council has delegated authority for administrative determinations in RPM cases that are the subject of clear and established practice to the DCCA for determination.

The DCCA at times has been criticised for spending resources on RPM cases which are viewed by some as being cases of less significance in terms of both their scope and their anticompetitive consequences than other “hard-core” offenses.

¹¹² Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>. Guidelines on Vertical Restraints (Text with EEA relevance) (2010/C 130/01); <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>. Denmark applied the Commission Regulation. <https://www.retsinformation.dk/Forms/R0710.aspx?id=132524>.

¹¹³ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. (Article 4, Restrictions that remove the benefit of the block exemption hard core restrictions).

¹¹⁴ Section 27.-(6).

Since 2010, the DCCA and Competition Council have issued fourteen RPM determinations, eleven cases resulted in imposition of fines, one resulted both in a termination order and fines and one was the subject of a termination order.¹¹⁵

In 2013, seven RPM cases were subject of criminal fines and in 2014 one case was the subject of criminal fines on undertakings and individual managers. Three of the cases involved sales of white goods by large brand name firms. The three undertakings paid a total of DKK 3.8 million in fines. Six managers in the firms paid a total of DKK 120,000. In five cases administrative fines were accepted by the DCCA with approval of the fine levels by the SEIC.¹¹⁶ One of those cases involved large branded luxury goods firm that is a household name in Denmark. Another involved a clothing retailer who agreed to pay fines of DKK 1.6 million and two individuals who agreed to fines of DKK 20,000 each.¹¹⁷ The total value of the fines in those cases was approximately EUR 1,100,000. In 2014 the DCCA referred three additional RPM cases to the SEIC, all of which are still pending. There were no fines imposed for other types of vertical infringements in 2013 and 2014. The DCCA notes that some of the RPM cases also involved other (horizontal) infringement issues, such as the risk of horizontal effects on the market, and/or obstruction of parallel imports and that several cases were initiated years ago when the DCCA reports that it applied different prioritisation criteria to cases. Today, according to the DCCA, “RPM cases are still a priority but will only be investigated if

¹¹⁵ RPM cases since 2010 in which fines have been imposed: Louis Poulsen Lighting A/S (DKK 1,300,00 – 2010); Lise Aagaard Copenhagen A/S (DKK 600,000 – 2010); Ticket to Heaven / Bambino (DKK 300,000 + 25,000 – 2010); Erik Jørgensen Møbelfabrik (DKK 400,000 – 2012); BSH Hvidevarer A/S (DKK 1,500,000 – 2013); Miele A/S (DKK 1,200,000 – 2013); Georg Jensen A/S (DKK 1,000,000 – 2013); Unilever Danmark A/S (DKK 1,500,000 – 2013); The owner of HG Agencies (DKK 40,000 – 2013); Vila A/S (DKK 1,600,000 – 2013); Coss ApS (DKK 100,000 – 2013) ; Witt Hvidevarer A/S (DKK 1,100,000 – 2014). Since 2010, there has been two RPM cases which resulted in orders: Witt Hvidevarer A/S - 2010 (which was also imposed a fine – see above) and Stender – 2014.

¹¹⁶ Those cases involving referrals to the Public Prosecutor, administrative fines in lieu of criminal sanctions were accepted for RPM infringements under the Article 23.-(b) settlement procedures following approval of the fine levels by the Public Prosecutor.

¹¹⁷ DCCA Press Release, 31 October 2013. “Vila pays fine in settlement for resale price maintenance.”

intervention from DCCA is assessed to have significant impact on the market and/or there is very clear evidence of illegal conduct.”

3.7 *Dominance - Monopolisation*

Abuses of dominance are prohibited by Section 11.-(1) and (3) of the Competition Act, which mirrors Article 102 TFEU.¹¹⁸ The statute covers both individual and collective abuses of dominance.” [Section 11.-(1)]. The Competition Act does not permit the Competition Council to issue orders for structural remedies in abuse of dominance cases. Abuses of dominance may be the subject of notifications to the DCCA for a determination of non-infringement, as discussed above.

3.7.1 *Application and Issues*

Infringements of the prohibition against abuse of dominance can be the subject of a Competition Council termination order and fines issued by the Danish courts. It can be difficult to prove intention or gross negligence beyond a reasonable doubt in abuse of dominance cases which is a prerequisite for fines to be imposed by the courts. Questions of market definition, whether a firm is dominant and what activities constitute abuse often are the subject of complex factual determinations and economic analysis based upon the facts.

There has only been one abuse of dominance case in Denmark where criminal fines have been imposed – the *Arla* case. In that case the fine imposed was DKK 5 million. Cases involving buses of a dominant position typically involve complex facts and economics that make them particularly susceptible to challenges and appeals. Private causes of action to obtain damages for abuse of dominance may be difficult to prove in the absence of DCCA and SEIC actions because civil procedure in Denmark allows for only limited discovery of evidence by private parties.

¹¹⁸

Abuses of dominance specifically prohibited by Section 11.-(3) include: (i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (ii) limiting production, sales or technical development to the prejudice of consumers; (iii) applying dissimilar conditions to equivalent transactions with trading partners, thereby placing them at a competitive disadvantage; and (iv) making the conclusion of contracts subject to acceptance by the other contracting party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Nonetheless, the DCCA regularly investigates abuse of dominance cases. In 2013 the DCCA opened twelve abuse of dominance cases and the in 2014 it opened ten cases. In 2010 the Competition Council received two abuse of dominance recommendations from the DCCA. In one case they found an abuse and in the other they did not. In 2011 and 2012 the Competition Council each year decided one abuse of dominance case, in 2013 it decided two cases, and in 2014 it decided one.

3.7.2 *Alternative Approaches to Complaints of Abuse of Dominance in the Act*

Section 10-a. of the Act provides the Competition Council with additional powers and a separate means to address complaints of abuse of dominance. It may order a firm to submit “trading terms” and may issue orders altering those terms and requiring other terms be substituted.

During 2004 and 2005, there was a public debate about dominant companies’ competition behaviour. This was the background for Section 10a which was introduced in the Competition Act in 2005. Section 10a applies to dominant companies. The purpose for Section 10 a is to allow the Competition Council to control a dominant company’s general trading terms and thereby facilitate the enforcement of the prohibition in Section 11 against abuse of dominance if the general trading terms violate Section 11. If an undertaking does not have their general trading terms in writing the DCC may – according to Section 10 a – enjoin it to draw a set of terms and submit them to the DCCA. The provision has never been used, and according to Section 10 a (1) it requires a complaint from a competitor to start a Section 10 a case. It is mentioned in the preparatory works (legislative history) to this provision that is only expected to be applied on very rare occasions.

If the Competition Council finds that a “competitor has filed a not unfounded complaint” and that “special conditions prevail on the market” which presents “a special need to acquire insight into the ways in which the dominant undertaking fixes its prices, discounts, etc.” the Competition Council can order the dominant undertaking to submit its general terms [Section 10a.]. Once an undertaking has submitted its trading terms the Competition Council has six months to make a determination as to whether the trading terms constitute an abuse of dominance contrary to Section 11.-(1). The Competition Council “may order revocation or alteration of one or more of the provisions in the trading terms.” [Section 10a.-(6)]. The order will apply “exclusively to the trading terms for markets contained in the complaint” and shall be effective for two years from the final Competition Council decision. (Section 10a.-(1) and (2)). The

Competition Council may refrain from applying Section 10 to complaints where the decision may have implications for the common market or might appreciably affect trade between the Member States.

3.7.3 *Exploitation and Exclusive Dealing*

Exclusivity may also constitute an abuse under Section 11 of the Competition Act. The interpretation of the Competition Act, including Section 11, generally follows the EU-competition law and principles as interpreted by the European Commission and Courts. As under EU-competition law, Section 11 may therefore also apply to a purchase obligation for *e.g.* less than all purchases. Exclusive dealing obligations may constitute an abuse even if requested by *e.g.* the non-dominant customer.

3.7.4 *Predation*

Section 11.-(3) (i) of the Competition Act covers “imposing unfair purchase or selling prices” which extends to predatory pricing. The interpretation of that section also follows the EU-competition law and principles as interpreted by the European Commission and Courts.

Depending on the specificities of the case, the appraisal of predation may take into account one or more calculation methodologies for instance average variable costs, average avoidable costs, long run average incremental costs, and average total costs. A defence to predatory pricing is the meeting competition defence and it is the dominant firm which bears the burden of proof.

3.7.5 *Refusal to Supply, Access and Restructuring of Network Monopolies*

The abuse of dominance prohibitions have been applied to problems of access, pricing and restructuring of network monopolies. The Competition Act specifically allows for imposition of remedies that require access to an essential facility. [Section 16.-(4)]. In 2012 the Competition Council issued a decision involving a refusal to supply spare parts in a case that had an EU community dimension.

Box 1. Abuse of a dominant position by the German manufacturer Deutz

In 2010, the Danish State Railways (DSB) attempted to reach an agreement with Deutz and its Danish distributor, Diesel Motor Nordic A/S (DMN) regarding the renovation of the engines in DSB's 404 trains. Deutz had originally produced the engines used in the trains. DSB could not reach an agreement with Deutz/DMN concerning the price for spare parts and instead entered into an agreement with a consortium of four smaller companies.

Deutz/DMN refused to supply spare parts to the consortium and prevented parallel imports of spare parts by the consortium. Ultimately DSB was unable to source the spare parts from the consortium and was required to obtain the spare parts as a higher price from Deutz/DMN.

On June 12, 2013, the Danish Competition Council found that Deutz had infringed the prohibition against abuse of a dominant position in the Danish Competition Act and the EU Treaty by refusing to deliver the spare parts and by preventing its distributors from fulfilling orders to the Danish market. Furthermore, Deutz and DMN had infringed the prohibition against anti-competitive agreements in the Danish Competition Act and the EU Treaty by entering into an agreement with the purpose of preventing parallel imports of spare parts. Deutz and DMN were ordered to cease the anti-competitive practices.

Upon appeal, in December 2013, the Competition Appeals Tribunal upheld the Competition Council's decision. Deutz has appealed the Competition Appeals Tribunal to the Maritime and Commercial Court, and the DCCA has referred the case to the Public Prosecutor for the purpose of instituting criminal proceedings against Deutz and DMN.¹¹⁹ The case is pending with the SEIC.

3.8 Mergers

Merger review became a part of Danish competition law in 2000. Denmark's merger enforcement procedures are substantially synonymous with those of the European Commission. Denmark has a flexible and fast merger control system and the merger review process is viewed by stakeholders in Denmark as generally working well. The transition to the new system of filing fees for merger notifications has generally worked smoothly.

¹¹⁹ OECD 2013 Annual Report – Denmark.

Mergers are assessed by applying competition principles and the EU standard for mergers: whether the merger will significantly impede effective competition (the so-called SIEC test). Other policy considerations are not taken into account. Mergers that will significantly impede effective competition, in particular by creating or strengthening a dominant position in a market are prohibited. Those mergers that will not significantly impede effective competition or which may be remedied by the commitments to remove competitive concerns will be cleared. The Minister has established rules on the calculation of turnover and notification of mergers and the DCCA has also issued guidelines on mergers.¹²⁰

Since 2012 the DCCA issued a total of 111 merger decisions approving mergers, two of which have been approved subject to commitments to clear competitive concerns. (Section 12e.)

Table 1. Merger decisions by DCCA since 2012

	2012	2013	2014
Merger decisions, total	35	41	35
Commitment decisions	0	1	1

Source: DCCA

No merger cases have been appealed to the CAT or the Danish courts.

¹²⁰

Section 12.-(4) Merger control – Calculation of the turnover in the competition act; Ministerial order number 808 of 14/08/2009, <https://www.retsinformation.dk/Forms/R0710.aspx?id=125810>;
 Section 12.b-(3) Notification of mergers; Ministerial order number 1005 of 15/08/2013, <https://www.retsinformation.dk/Forms/R0710.aspx?id=158053>;
 Guidelines to the Executive Order on notification of Mergers and on Merger Fees, <http://en.kfst.dk/~media/KFST/English%20kfstdk/Competition/Merger%20control/okt%202014%20Guidelines%20to%20the%20executive%20Order%20on%20Notification%20of%20Mergers%20and%20on%20Merger%20Fees.pdf>;
 Merger Guidelines, <http://en.kfst.dk/~media/KFST/Publikationer/Engelsk/2013/Merger%20guidelines%202013.pdf>.

The Competition Act applies to mergers, acquisitions and permanent joint ventures.¹²¹ [(Section 12.a-(1) to (3)]. Acquisition of shares by a trustee in bankruptcy proceedings and certain specified types transactions by financial institutions are exempted from merger coverage under the Act. [Section 12a.-(4)]. Control is defined by whether it is possible for the acquiring party to exercise decisive influence on the management operations of the acquired undertaking.

Mergers are subject to mandatory notifications if statutory turnover thresholds are met. Merger notifications must be filed when a merger agreement has been concluded and prior to the merger being carried out. Notifications are made public by the DCCA. (Section 12.-b).

In 2010, the turnover thresholds for filing a merger notification were reduced. The DCCA instituted a two-tiered merger filing option which allows for filing a simplified merger notification for transactions that are characterised as unproblematic based upon certain criteria (e.g. combined horizontal overlap under 15%). On 1 August 2013 Denmark for the first time instituted filing fees for merger notifications. The fees vary for simplified and full notifications, with the latter being more expensive for the parties. The lowering of the filing thresholds has resulted in a significant increase in the number of merger filings since 2010.

Table 2. Overview of merger notifications where investigations were opened

	2010	2011	2012	2013	2014
Merger notifications	9	34	36	41	36
-of which withdrawn	0	1	1	0	1

Source: DCCA

¹²¹

Mergers involving permanent joint ventures shall also be evaluated to determine if by either their object or effect they will enable the co-ordination of competitive conduct by undertakings that remain independent of the merger. The Competition Council will assess whether the founding undertakings have retained significant activities in the same market or associated markets and as a consequence the joint venture will enable the undertakings to eliminate competition in respect of a substantial part of the goods or services in question. [Section 12.c-(1)-(4)].

The DCCA does not have authority to review mergers that do not meet the statutory thresholds for notification. A merger with an EU Community dimension must be notified to the European Commission. The DCCA co-operates with the Commission and ECN concerning EU mergers.

Under the previous filing thresholds potentially problematic mergers were not subject to review because they fell below the turnover levels triggering a requirement of file a notification. This legacy continues to manifest itself in some instances. It is considered by the DCCA to be particularly problematic in telecommunications mergers where the dominant firm has purchased a number of small companies that do not meet the new filing thresholds. As a result notifications were not required to be filed with the DCCA.

The Government has proposed additional changes to the filing thresholds to allow it to review these types of mergers. An alternative used by some other jurisdictions is to grant the competition agency the authority to review mergers regardless of whether they are subject to notifications and to provide sufficient powers for the authority to obtain information and to enjoin closure of a non-notified merger while an inquiry is being conducted so as to avoid piecemeal legislation.

3.8.1 The Merger Review Process

Pre-notification discussions of a merger with DCCA are not mandatory but are strongly encouraged. The DCCA recommends that parties to a merger contact the Authority well in advance of the submission of a merger notification. In a simplified merger the DCCA has 10 weekdays from date of filing to determine if the notification meets the requirements for simplified treatment. If it finds that the merger does not meet the requirements or alternatively if it receives information from a third party that calls into question the filing for simplified treatment, it may reject the filing before the 10 weekday period expires and requires that a full merger notification be filed. The introduction of the simplified procedures has made it possible for the Authority to focus its resources on the mergers which might substantially impede effective competition.

Phase 2 investigations require the DCCA to issue a written preliminary statement of concerns to the parties between 25-30 days after the notification is complete. The purpose of the preliminary statement of concerns is to inform the parties at an early date about the competitive concerns that it views are likely to arise from the merger and allow sufficient time for the parties to consider

offering commitments that might eliminate the DCCA's concerns. It is felt that sometimes the DCCA's statement does not go far enough in pinpointing or narrowing the issues to allow parties to focus on the most significant anticompetitive concerns that are being considered by the DCCA.

Approximately one week after issuing the statement of concerns the DCCA holds "state of play" meetings with the parties to allow them to comment on the preliminary statement of concerns. During the investigation the DCCA will contact competitors, customers and suppliers of the merging parties concerning their views on the definition of the relevant market and the effects on competition that may arise from the merger.

Commitments to solve competitive problems arising from the merger may be offered at any time. It is suggested that they be offered in writing, preferably prior to the state-of-play meeting. If commitments are proposed at a late stage of the assessment process when less than 20 workdays remain in the time for review, the time for decision will be extended by 20 additional workdays. [Section 12.d-(3)]. At the request of the parties, the time may be extended 20 weekdays upon the decision of the Competition Council in order to permit consideration of commitments. [Section 12.d-(4)].

The DCCA will normally market test the commitments offered by the parties though publication on its website and discussions with relevant third parties, but it is not obligated to do so. The Competition Council may attach conditions to ensure that the commitments are met and may revoke approval of the merger. If a merger has been carried out prior to a determination by the Competition Council, it may require that the merger be unwound and that effective competition be restored to the market. (Section 12.g).

Mergers that are implemented prior to approval by the DCCA or activities that are sometimes referred to a "gun-jumping" will be subject to penalties. Providing incorrect or misleading information to the DCCA in relation to a merger review is subject to sanctions under the Act, which may include revocation of approval of a merger. (Section 12f.).

Three cases involving procedural sanctions have been recently decided by the Competition Council. The first involved gun-jumping in a proposed merger between KPMG Denmark and Ernst& Young where the Competition Council found that KPMG Denmark had effectively changed its relationship with its parent company, KPMG International, in a manner that could not be effectively

reversed if the merger was not approved by Competition Council. The merger was eventually cleared.¹²²

In the second case fines of DKK 50,000 were imposed on Danish Agro in connection with a merger notification where the company intentionally or with gross negligence had failed to inform the DCCA of information relevant to the competitive assessment of the market, *i.e.* failing to disclose its knowledge that one of its competitors in the market was in the process of bankruptcy. Agro was referred to the SEIC for the imposition of fines. Subsequently the merger was approved.

In the third case, a 2015 merger involving Metro, the DCCA found that relevant information on competing bidders was purposefully withheld by and constituted a breach of the obligation to provide all relevant information regarding the merger. The matter has been referred and is pending with the SEIC.

3.8.2 *Competitive Effects Analysis in Mergers*

The DCCA's merger assessment evaluates market shares and other aspects which may affect the effective competition, such as the presence of actual or potential competitors, buyer power and the ease of entry into the market post-merger.

The DCCA is increasingly applying a more economics-based analysis to mergers which goes substantially beyond merely evaluating market shares to assess the competitive effects of a merger. The use of a variety of economic tools beyond mere market share is viewed positively by stakeholders, who generally have praised for the DCCA's merger analysis and techniques.

Use of diversion ratios is one of the tools being used by the DCCA to access potential anticompetitive effects from the merger. Using these methods has enabled it to better apply an objective evaluation concerning the potential unilateral effects of a merger. By analysing direct competition between the merging parties that will be internalised after the merger and the share of one merging party's sales that would be diverted to the other merging party, the potential price can be estimated using a diversion ratio. This ratio can be obtained by means of elasticity analysis or consumer survey data that reveal the

¹²²

Case citation, DCCA web-site, en.kfst.dk, Press Release, "Danish audit firms breached merger stand-still obligation", 17 December 2014.

consumers' first and second choices. With information on turnover, the proportion of the diverted sales may be calculated. New methods used by the DCCA also include use of upward pricing pressure analysis (UPP) and calculation of illustrative price rises.

The use of diversion ratios was first introduced by the Danish Competition and Consumer Authority in 2012 in the merger between Arcus-Gruppen and Pernod Ricard Denmark A/S. In order to gather information on diversion ratios, a consumer survey was carried out. The survey covered 1,007 respondents who had bought an aquavit within the last year. The respondents were asked about their second choice. The new methods were applied in the assessment of unilateral effect, market definition and the assessment of remedies. The diversion ratios were a key factor in determining the market definition and assessing whether the commitments were expected to be effective.¹²³

On 3 May 2013, JYSK notified the acquisition of sole control of IDdesign to the DCCA. Diversion ratios, UPP and IPR were all applied in the assessment of the transaction and a more sophisticated modelling of the counterfactual scenario to the merger was also used. The merger was found to have unilateral effects in both the merger scenario and the counterfactual scenario but the expected price increase was greater in the counterfactual scenario. The merger was approved.

3.9 *State Aids and Subsidies*

EU State Aid filings in Denmark are handled by the Division for Law and State Aid within the Ministry of Business and Growth. The Division provides State Aid advice to Danish Ministries and agencies concerning application of the EU Treaty and State Aid procedures. It handles contacts with the European Commission, notifications and reporting. A State Aid Committee consisting of the Ministry of Business and Growth (chair), the Ministry of Justice, the Foreign Office and the Finance Ministry has also been established to give advice on principle State Aid matters. The legal responsibility to comply with the State Aid provisions and procedures is held at the Ministry responsible for providing the specific aid scheme or *ad hoc* aid. The DCCA does not take part

¹²³

The commitments included selling of one of Arcus brands, Brøndums, and the diversion ratios showed that Brøndums was a strong brand. IPR calculations were used in the assessment that the merger, without the commitments, was expected to have unilateral price effects.

in State Aid notifications involving application of the State Aid provisions of the EU Treaty or notifications to the EU Commission.

Unusually the Danish Competition Act has specific rules applying to Danish grants of public and State Aid, which do not have an EU community dimension. [Section 11.-(a) to (c)].¹²⁴ Section 11.-a. of the Competition Act covers grants that support commercial activities (“State Aid”) by the Danish government and municipalities.¹²⁵

In 2002, the DCCA published an economic analysis of State Aid and Competition.¹²⁶ The report highlighted both the distortive and sometimes positive effects of State Aid. The report highlighted the use of State Aid in three sectors: shipbuilding, transport aid on the island of Samsøe and subsidies to firms’ investment in energy saving technology. Since then the DCCA has conducted analyses of State Aid in market studies and analyses it has performed.

3.9.1 *Rules and Procedures*

The Competition Council may issue order for termination or repayment of aid from public funds to support “certain forms of commercial activity” if: (i) the direct or indirect object or effect of the aid is distortion of competition; and (ii) the aid is not lawful according to public regulation.” [Section 11.a-(2)]. Repayment may be required from aid issued to private undertakings, self-governing institutions and corporate undertakings owned fully or partly by public authorities. Specific rules allow repayment of aid issued to a quasi-corporate undertaking fully or partly owned by the public authorities. [Section 11a-(4)]. The Competition Council may refrain from dealing with a case if the

¹²⁴ The DCCA has published Guidelines on public aid that distorts competition (art. 11a). <http://www.kfst.dk/~media/KFST/Publikationer/Dansk/2000/Vejledning%20om%20konkurrenceforvridende%20stoette%202000.pdf>.

¹²⁵ Section 11.b authorises the Competition Council to investigate whether options for social services (personal care, practical help and food services) to Danish citizens under the Freedom of Choice program are being provided at a rate that has a distortive effect on competition. The freedom of choice requires that at least two options for services be provided to citizens, one of which may be services provided by a municipality.

¹²⁶ Economic analyses of state aid - State aid and competition - economic analyses, 07/06/2013. (English Abstract)

aid scheme may affect trade between Member States and the European Union. [Section 11.a-(7)].

The Act provides for notifications concerning grants of public aid to the Competition Council that requests a determination by the Council that there are no grounds for issuing an order requiring repayment of the aid. [Section 11.a-(6)] Section 11.a (3) delegates the determination of whether the aid granted was lawful to the relevant Minister or relevant municipal supervisory authority unless otherwise provided in legislation.¹²⁷

Determinations shall be made by the relevant Minister or municipal authority within four weeks of an order by the Competition Council unless it extends the deadline. Orders requiring repayment of aid are limited to five years after the aid has been paid out. (Section 11.a (5). Orders that aid be terminated (without repayment) may be issued “regardless of when the decision granting the aid was made.” [Section 11.a (8)].

3.9.2 *Applications and Experience*

The DCCA has opened investigations and issued orders to repay aid. Since 2010, it has opened 33 investigations into unlawful payments of aid. Of those 33 investigations, five have resulted in Competition Council or DCCA orders. In 2010, the Competition Council issued one order. In 2011 it issued three orders and one order was issued by the DCCA. No orders were issued from 2012 to 2014. In 2010, there was one notification seeking a non-infringement order filed under Section 11; no notifications have been filed since then.

One of the orders issued in 2011 involved unlawful aid to a supermarket by virtue of a lease arrangement between a municipality and a private company that dated from 1979 and expires in 2015.

Fureso (Centre of Vaerlose) Lease to Irma Supermarket

In December 2011, the Competition Council ordered the municipality of Fureso (Centre of Vaerlose) to terminate use of provisions of a lease arrangement with the Irma Supermarket. The lease by the Irma Supermarket for

¹²⁷

In its 2004 Report, the OECD noted that, “The effective scope of this power is undermined, though, because it is the relevant minister or supervisory board that decide whether aid is legitimate or not.” (OECD 2004 Report, page 4).

a piece of land from the municipality had terms that associated the lease payments to the annual turnover of the supermarket. The lease permitted the supermarket to get an annual refund if it met turnover thresholds contained in the lease. With the exception of a single year, from 1979 to 2010 the operation of the clause had resulted in a zero-cost lease to the supermarket. The lease did not allow for revisions. The DCCA order to terminate the unlawful aid in the form of the leasing terms could not be accompanied by a repayment order because the contract came into effect prior to provisions in the Danish Competition Act concerning State Aid, which entered into force in 2000.¹²⁸

3.10 Subsidies and Anticompetitive Legislation

The DCCA has not conducted a comprehensive review of existing legacy regulations that may involve potentially unlawful State Aid or distortive regulations. The DCCA does however perform reviews of prospective legislation.

In order to identify potential distortions of competition inherent in legislative proposals, the DCCA performs a screening of the Danish Government's entire legislation programme for the upcoming parliamentary year. The authority or agency responsible for the proposed legislation supplies a brief description of the law and conducts an initial evaluation of the bill's possible risk of distorting competition.¹²⁹

The DCCA conducts its own evaluation of the possible distortive effects on competition of a piece of legislation. Legislation is divided into three categories: those that do not contain competition distortions or State Aid; those that may distort competition or include unlawful aid; and those where the legislation will likely distort competition or grant unlawful aid. Bills falling into the latter two categories will receive a description from the DCCA concerning their potentially unlawful or anticompetitive features.

The DCCA and relevant authority of Government will discuss alternatives to the legislation that would not be anticompetitive. The responsible authority or agency has the option of submitting the proposal to the State Aid Committee.

¹²⁸ OECD 2011 Annual Report, page 6.

¹²⁹ OECD Annual Report, page 8; OECD 2009 Annual Report, pages 7-8; OECD 2011 Annual Report at PAGES 8-9.

The Committee comprises the Ministries of Justice, Foreign Affairs, Finance and is chaired by the Ministry of Business and Growth.¹³⁰

3.11 Guidance on Inappropriate Suggestions by Public Authorities Encouraging Unlawful Conduct and Activities Involving Trade Associations

As a result of Denmark's relatively small size and its preference for transparency, open dialogue and consultation between members of the public, public authorities and politicians is conducted in an open and collegial fashion. The goal is to arrive at common, agreed-upon solutions to issues that enhance government services to the public at large. Consultations by politicians and public authorities take place with trade associations, labour organisations and informal interest groups. Many of the topics discussed concern commercial activity and potentially touch on agreements that might infringe the Competition Act.

The DCCA became aware of suggestions by public authorities and politicians to encourage co-operative solutions to perceived problems that if implemented would have placed organisations and their members at jeopardy under the Act. In early 2015, the DCCA issued guidance concerning *Public Authorities Encouraging Unlawful Conduct*. The Director General personally sent a letter and copy of the guidance to each of the government Ministries, regional and local municipalities in Denmark.¹³¹ The DCCA is available on an *ad hoc* basis to discuss competition issues with parties through its informal guidance procedures.

The DCCA also recently issued comprehensive guidelines on information exchanges within trade associations. The Authority held several events giving trade associations, individual companies and their legal representatives the opportunity to obtain further clarification.

¹³⁰ OECD 2009 Annual Report, pages 7-8; OECD 2011 Annual Report at pages 8-9.

¹³¹ Public regulation –Public authority encouraging to unlawful conduct; <http://www.kfst.dk/~media/KFST/Publikationer/Dansk/2015/20150129%20Opfordrer%20din%20myndighed%20til%20ulovlig%20adfaerd.pdf>.

3.12 *Public Procurement*

In 2013, the value of the public procurement by the Danish public authorities amounted to almost 40 billion EUR, which was approximately 15 per cent of Danish GDP. That figure does not include public procurement for construction, which in 2013 amounted to of approximately 10 billion EUR. Figures for the value of public procurements in 2014 are not yet available, but they are expected to be similar to 2013 levels.

Public procurement was highlighted by both the Danish Productivity Commission and in Denmark's National Reform Programme 2014 as a priority for increasing productivity and enhancing competition in Denmark. Along with new legislation designed to comply with EU Commission Procurement Package, Denmark has embarked on initiatives to enhance public private co-operation.¹³²

The DCCA Public Procurement Division serves as secretariat to the Council for Public Private Co-operation. In support of the National Reform Package initiatives, the DCCA has served a secretariat to the committee drafting the new procurement law. It has also conducted an analysis of the state of public competition, public-private partnerships and participation by small and medium enterprises in public procurement.

3.12.1 *The State of Competition in Public Procurement in Denmark*

The state of competition for public contracts varies substantially in Denmark among municipalities. In 2008, the Ministry of Finance reported that the use of competitive procurement by municipalities increased by 1.1 %, with 24.8 % of municipal procurements being “exposed” to competition.¹³³

In 2012 the DCCA produced an *Account of Competition in Publicly Provided Services*. It concluded that there is “remarkably [large] potential for more competition and more efficient procurements” in publicly provided services in Denmark.¹³⁴ The *Account* found that in 2011 with public expenditures totalling DKK 377 billion only about one quarter of the publicly-

¹³² National Reform Package, April 2014, pages 26 and 27.

¹³³ OECD Annual Report for Denmark, 2010, page 11.

¹³⁴ DCCA Account of Competition in Publicly Provided Services – 2012, pages 1-2.

provided services the subject of public contracts. (The central government contracted 27.5%, regional authorities contracted only 20.9%, and municipalities contracted approximately 25%. The report found there was a significant variance between the rate of competitive procurements by the ten municipalities with the largest public procurement expenditures (32 %) and the ten municipalities with the lowest procurement spending (20 % on average).

The *Account* found that among the reasons why public authorities were not contracting out was uncertainty about public procurement law rules and rules in the procurement directive concerning the complaints system are a barrier to contracting out.¹³⁵

In 2012, the DCCA launched a campaign for contacting authorities with the aim of creating awareness about the potential risk of cartels in public procurements. It included suggestions on how to structure and implement a tender procedure in a monopolised market. In 2015, the DCCA launched a similar campaign focused exclusively on providing contracting authorities with tools to better identify whether public procurement have been the subject of cartel activities.

In order to combat cartels in public procurement, the DCCA also initiated a partnership with a contracting authority in connection with an extensive renewal of the existing healthcare infrastructure amounting to DKK 40 billion (around EUR 5.4 billion). The partnership includes a method of analysing the data from the incoming tenders in order to identify possible anti-competitive practices.

On 16 April 2015, the DCCA issued a new study on public procurement involving central framework agreements. The study did not examine individual framework agreements, but rather analysed all markets with central framework agreements. It found that although there would be a basis for a competitive contract to be awarded in most tenders involving framework agreements, in one of every six of them all tenderers were eventually awarded contracts.¹³⁶

¹³⁵

Ibid.

¹³⁶

DCCA website, (en.KSFT.dk.) Press Release, 16 April 2015, Executive Summary and Chapter 1. More than half of the purchasers of the survey have “experienced that procurement through framework agreements either ensures a low price (60 %), a less resource-intensive procurement process (60 %) or a good match of supply and end user demands (50 %). One of every four purchasers experiences a low price, a less resource-intensive procurement

The study did not provide a direct indication of the long-term effects of framework agreements on the markets where they are being used.

The DCCA obtained questionnaire responses which indicate that purchasers find that the central framework agreements often make it easy to purchase products that meet end user demands at a low price. The DCCA believes that framework agreements would contribute to supporting well-functioning markets to a much higher extent if competition for contracts under the framework agreements became more effective (*e.g.* by providing a greater certainty of revenue).

3.12.2 Procurement Legislation and Guidance

Several amendments to Danish procurement laws were implemented on 1 June 2013 in a new law covering procurement disputes. Changes were made to ensure a more efficient and simple judicial system for complaints regarding public procurements. The legal costs arising from disputed procurement awards in the past often exceeded the economic gains to the public from the award of a competitive procurement contract.

The Government also established a committee to amend the Danish procurement legislation to make it compliant with the EU Directive on Public Procurement. The committee was tasked with drafting a consolidated and clear set of legislation and rules to extend procurement “best practices” to Danish public procurements. The DCCA acted as the secretariat of the committee. On 18 March 2015, the proposed legislation was placed before the Parliament.

In 2014, the DCCA issued *Guidelines on Consortia in Relation to the Competition Act*.¹³⁷ The Guidelines were issued in parallel with guidelines in relation to the procurement issues of consortia agreements and list the criteria that the DCCA will make use of in an assessment of whether an agreement between companies concerning joint bidding on a tender constitute an infringement of the competition rules. The DCCA has given talks at meetings with different trade organisations and their members about the guidelines

process, and a good match of supply and end user demands when making purchases under central framework agreements.”

¹³⁷ Guidelines for consortia in relation to the competition act; <http://www.kfst.dk/~media/KFST/Publikationer/Dansk/2014/20140617%20Konsortiesamarbejde%20i%20forhold%20til%20konkurrenceloven.pdf>.

several times. The Guidelines are a relatively short document that has prompted considerable comment among stakeholders. Particularly controversial is the advice that companies should refrain from consortia bidding when they are capable of bidding on a project alone unless there are efficiency gains that outweigh the anticompetitive effects of the consortia agreement.

Some concerns have been expressed over analysis contained in the Guidelines regarding joint procurement and suggestions have been made that the Guidelines might be beneficially supplemented and expanded to provide better analysis and guidance to stakeholders. A new consultative process concerning these changes has been advocated.

3.12.3 *Public Private Partnerships*

In 2013, the DCCA conducted an analysis of public-private partnerships (PPPs).¹³⁸ The DCCA documented twenty Danish PPP projects and five others that were in the preliminary stages of tendering. It found that although the number of PPP projects has grown rapidly in the last few years, municipalities and regions experience a number of barriers when entering into PPP projects. The barriers contribute to municipalities and regions opting out of the PPP model in public work contracts. The disincentives which municipalities and regions experience include time and resource requirements necessary to establish a successful PPP, the high cost of private financing and structural competition issues of lax or insufficient competition in the market where the PPP might be established. Additionally, external barriers in the construction services market were identified as impediments to capital construction project using PPPs.

The report found that while 72 % of Danish municipalities and regions consider using the PPP model for public works contracts, only 20 % of the municipalities and regions have established a PPP. The study noted that for the experience for authorities that have adopted PPPs has been positive. Authorities achieved cost savings and benefited from innovation. In a previous study conducted in 2012, of thirteen public private partnerships the DCCA found that in 75% of the cases authorities found the quality of construction projects to be of higher or much higher quality compared to traditional contracts and with none of the projects resulting in diminished quality. The Danish government has provided incentives for municipalities to encourage the use of PPPs. Monetary

¹³⁸ OECD 2013 Annual Report, page 9.

incentives in 2015 will allow for public authorities to apply for an exemption from an obligation to deposit funds equal to the investment of the private partner, which is designed to further encourage use of public-private partnerships.¹³⁹

3.12.4 *Small and Medium Enterprises*

In 2013, the DCCA conducted a study focusing on the participation of small and medium enterprises in public procurements.¹⁴⁰ Danish public authorities purchase about DKK 290 billion of goods and services annually from Danish private-sector companies. More than 97 % of companies are SME's according to the Danish definition (companies with less than 50 employees and a yearly turnover or balance sheet of no more than EUR 10 million). Under a broader definition of SME's used by the EU Commission, 99.7 % of all Danish companies qualify as SMEs. The report found, "Today SMEs participate in the competition for two thirds of the tasks that the public sector contracts out. . . . In comparison, the SMEs account for about one third of the turnover on the private market."¹⁴¹

The report found three principal barriers to public procurement for SMEs: 1) the high documentation requirements and short deadlines make entering the public procurements costly; 2) the presence of complex and inflexible requirements that limit innovation; and 3) the lack of knowledge by SMEs

¹³⁹

In Denmark, the PPP private supplier is responsible for the funding and construction as well as the subsequent maintenance and operational tasks. Municipalities and regions are under an obligation to deposit an amount equal to the investment of a private partner in a public-private partnership. The motivation for this deposit obligation is to avoid an accumulation of unsustainable debt levels at the local authorities, transfer of wealth between generations as well as to enable the central government to give priority to certain types of productive investments. The public authorities can apply for exemption from this obligation, and the government has in 2015 allocated DKK 150 million to be used on projects where a public authority wishes to be exempted from the obligation to deposit. As a further incentive the government has exempted five large infrastructure projects starting in 2015 from the obligation to deposit. The exemptions are adding up to DKK 400 million. Furthermore, the DCCA is currently drawing up a value for money analysis in PPP.

¹⁴⁰

DCCA Study, *SME Participation in Public Procurement*, page 4-7.

¹⁴¹

Ibid., page 5.

about public procurements that may cause their submissions to be rejected by the authority.¹⁴² The report recommended increased guidance from public authorities about compliance with the public procurement rules, initiatives to increase the use of e-procurement, creation of an informal feedback area on the Danish procurement portal (udbud.dk) where SMEs could provide information about their experiences.

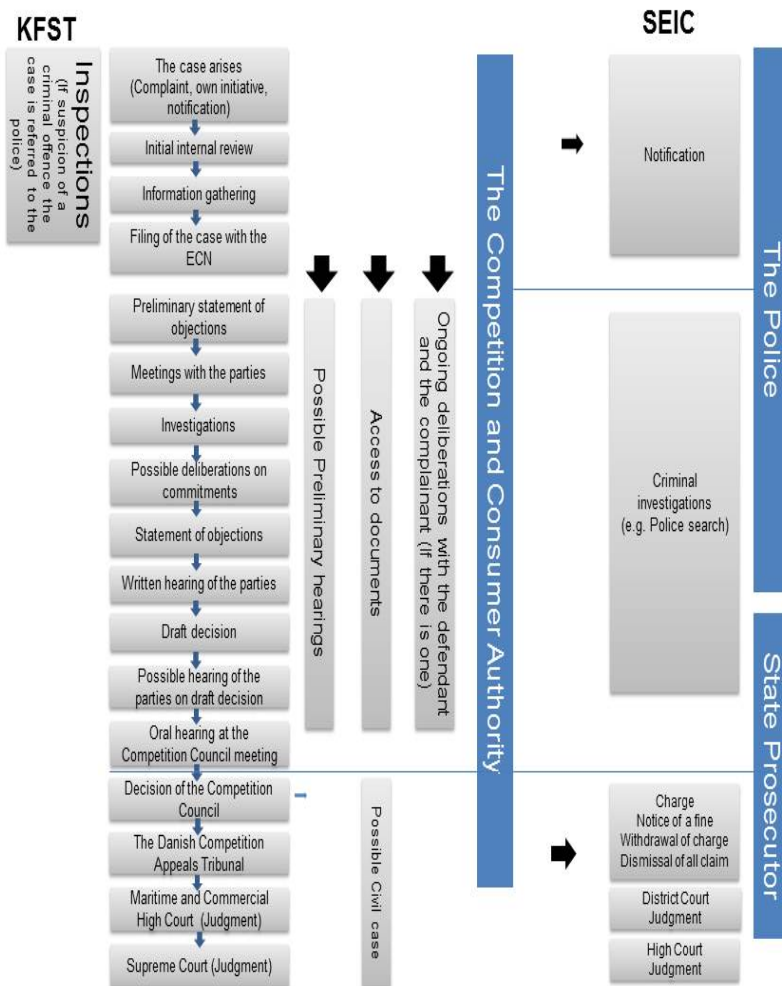
4. Procedural Issues and Sanctions

Enforcement of the Competition Act is bifurcated between the DCCA and Competition Council and the public prosecutor and the Danish courts. As a result, investigations and determinations concerning infringements under Sections 6(1) and 11 and application of Articles 101 and 102 TFEU in Denmark contain complexities which directly affect the enforcement of the Act. Criminal enforcement and standards of proof apply to anticompetitive horizontal cartel agreements, vertical agreements and abuses of dominance where fines are imposed. Bifurcated enforcement between the Competition Council and the courts results in a complex, and sometimes lengthy process to obtain finality in Competition Act cases. The recent enactment of increased fine levels and the possibility of imprisonment for individuals have additional consequences for investigations by the DCCA and criminal prosecutions by the SEIC that as yet have not been tested. The unusual features of Denmark's system affect enforcement from the first indication of an infringement to the final appeal in a case.

¹⁴²

Ibid.

Figure 2. Investigation flow chart



Source: DCCA

4.1 *Decision Making Authority of the Competition Council*

The Competition Council may consider cases on its own initiative, upon a complaint or notification or as a result of a referral from the European Commission or other competition authorities of the European Union. It decides if there are not sufficient grounds to initiate an investigation or to take a decision in a case and it may determine that a case should be suspended or discontinued. [Section 14.-(1)]. Those determinations by the Competition Council are not subject to appeal to the CAT. [Section 19.-(3)]. They may, however, be appealed to a district/city court.

The Competition Council may make determinations concerning mergers and issue orders to cease anticompetitive infringements of the Competition Act which are concluded without the imposition of fines. Administrative determinations by the Competition Council concerning infringements, mergers and a number of specific administrative functions set out in the Act may be appealed directly to the CAT.¹⁴³

4.2 *Enforcement Processes-Procedural Paths to Infringement Decisions*

There are five procedural paths for infringement determinations under the Competition Act. First, as discussed above in Section 3, notifications to the DCCA made under Sections 8, 9 and 11 of the Act may result in a determination by the Competition Council of an infringement and an order to terminate the infringing conduct which constitutes a final determination in the case. (They also may result in non-infringement determinations.)

Second, self-initiated investigations or ones based upon complaints may lead the Competition Council to issue an order to enjoin the infringement [Section 6.-(4), Section 11.-(4) and 16.a-(1)]. The Competition Council may accept binding commitments by the infringing party and institute necessary steps to make certain that they are fulfilled. [Section 16.a-(2)]. In addition to orders terminating infringing agreements the Competition Council may also issue orders that: i) stated prices or profits not be exceeded or the calculation of prices or profits shall be subject to specific calculation rules; ii) may obligate

¹⁴³

The Competition Council's authority is specifically subordinated by Section 14.-(1) with regard to anticompetitive practices and infringements of the Competition Act that are the direct or necessary consequence of public regulation under Sections 2(4) and 11.a-(3).

one or more undertakings to sell to specified buyers; iii) that grants access to an infrastructure facility that is necessary for the marketing of a product or service. [Section 16.-(1)(i) to (iv)].

Third, in DCCA self-initiated investigations or those based upon a complaint to the DCCA, the Competition Council is obliged to refer the investigation of a case to the SEIC at the point when the DCCA has “substantial suspicion” or “probable cause” to believe an infringement has occurred if it intends for a criminal prosecution to be pursued by the SEIC and for fines and/or jail time to be imposed by the Danish courts. Referrals to the SEIC based upon “substantial suspicion” may be made at different stages of an investigation depending upon the evidence. When the DCCA refers a matter to the SEIC, the public prosecutor alone has jurisdiction to investigate the allegations and to determine whether to prosecute the infringement and seek imposition of criminal fines and jail sentences.

Fourth, in a case where the maximum penalty would be a fine, the DCCA with the consent of the SEIC may accept the settlement of a case with an administrative fine if the offender admits to being guilty and is willing to pay the fine within a specified time period. [Section 23.b-(1) to (3)]. In such cases the DCCA will consult with the SEIC concerning the level of the fine. Although such settlements are referred to as “an administrative notice of a fine,” the fines imposed under this procedure are criminal penalties. The DCCA in these situations handles the case instead of (by delegation from) the SEIC and the courts. An offender cannot make the decision to settle a case but may suggest this course to the DCCA or the SEIC. The offender can on the other hand demand the case to be brought before the court. An administrative notice of a fine must meet the requirements of a bill of indictment (information on name, infringement etc.).

Finally, in certain cases of a minor infringement the DCCA may make a determination where there is clear and established practice in a case involving a minor infringement, the Competition Council may delegate authority to the DCCA to issue administrative decisions.¹⁴⁴ Decisions involving novel issues or issues of fundamental importance decisions are reserved to the Competition Council.

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This authority follows from the rules of procedure for the Competition Council (Order no. 174 of 22 Feb 2013) as well as from Order no. 173 of 22 Feb 2013 on the activities of the DCCA.

4.3 *Initiation and Hearing*

The DCCA may self-initiate investigations or may accept information concerning possible infringements from outside sources. Generally it relies upon complaints (and may rely upon self-reporting through the system of statutory leniency) as the basis for its enforcement initiatives.

The DCCA accepts anonymous complaints. The DCCA maintains confidentiality regarding complaints and inquires to the extent possible under the Public Administration Act and legal frameworks concerning access to file, disclosure and the duty to write down and file any relevant information, *i.e.* the name of the complainant, if known. Anonymous complaints may be more difficult to verify and assess which may diminish their usefulness. Information about how to lodge a complaint to the DCCA is contained on the agency website homepage and is encouraged through outreach by the DCCA. It does not maintain a “hotline” for complaints. Complainants may call or write to the Authority via ordinary post or via an encrypted portal connection listed on the website which is linked to the DCCA’s external data processor. The DCCA reports that anonymity provides it with the opportunity to get in touch with those who are close to an offense, and who fear that they or their business may be harmed by coming forward. In addition, the ability to remain anonymous also takes into account the safety of the company or the people that the information is disclosed.

The DCCA receives far more complaints than it has the resources to deal with. It has established a set of criteria to screen cases, assign them a priority and allocate staff resources. Criteria are used to assess whether the allegations concern hard-core cartel activity or other horizontal restraints, have economic importance, concern important competition policy principles or involve an industry of strategic importance. The DCCA also considers whether the case might have a significant preventive effect or a significant impact on business culture in a particular industry or society in general.

If the DCCA decides not to prioritise a complaint the matter will be closed. The DCCA can determine whether there is sufficient cause to investigate or adjudicate in a case, including whether the proceedings should be suspended or discontinued (Section 14.). The decision may be made at any time during the process, but is in most cases made in connection with the initial assessment. In 2012, the DCCA acting on behalf of the Competition Council closed 23 cases

under the Section 14 procedures, in 2013 it closed 38 cases and in 2014 it closed 51 cases.¹⁴⁵

4.4 *Investigative Powers*

Section 14 (2) of the Competition Act specifies that the DCCA shall act as the secretariat to the Competition Council and “in respect of cases under this Act handles the day-to-day administration of the Act on behalf of the Competition Council.” The DCCA’s investigative powers include the right to conduct administrative inspections, to demand persons answer questions during an administrative inspection and demand undertakings produce business records and documents. The DCCA does not have the power to subpoena individuals to provide statements or testimony. During administrative investigations individuals are obliged to answer questions involving both procedural and substantive matters. When the DCCA has formed a substantial suspicion that an infringement has occurred, it may not oblige individuals to answer questions that would place them at risk of self-incrimination.

4.4.1 *Documentary Evidence*

The Competition Council may “demand all the information, including accounts, accounting records, transcripts of books, other business documents and accounting data that it believes necessary for its activity or for deciding whether the provisions of this Act shall apply to a certain situation.” (Section 17.) This authority extends to demands for information to assist the European Commission under Articles 101 and 102 TFEU and Articles 53 and 54 of the EEA Agreement. Sanctions of daily or weekly penalty payments may be imposed for failure to submit documents or information, to comply with conditions imposed by an order under the Act or fulfil a commitment. [Section 22.-(1)].

¹⁴⁵ The registration of section 14-rejections has only been in full use from 1 January 2014. Hence, comparisons across years are not possible. The DCCA started using a new case management system in 2012. Therefore, exact comparisons between the period up to and including 2012 and the period after 2012 may only be done with caution. Among other things, case registrations have been changed.

The right of the parties to documents is governed by the Danish Public Administration Act (“Forvaltningsloven”). As a general rule parties have access to all information concerning their case except confidential and internal information. Parties have a right to access to information on the file regarding themselves (“egenaces”). Where the request involves correspondence between the DCCA and the EU Commission or Member States, the parties shall only have access to information about factual circumstances of a case that is of substantial importance for its decision. [Section 15.a-(1)]. The Danish Public Administration Act covers both DCCA cases and cases involving European Commission or competition authorities of the Member states.¹⁴⁶ At some stages of an investigation and case proceeding access to information may be limited with enforcement considerations outweighing transparency requirements concerning requests for access to information.

Third-party access to the files in competition cases is limited. Competition cases (according to Section 13 of the Competition Act) are exempted from the Danish Act on Public Access to Documents in Public Files (“Offentlighedsloven”). Third-parties have a right to access to information in the file regarding themselves (“egenaces”). A party who is required to submit information may file an application to the Chairman of the Council requesting that information that may not be disclosed or made available to the public or disclosed to the members of the Competition Council. [Section 13 (5)]. The decision of the Chairman shall be final. An appeal from the decision of the Chairman to the Danish courts shall automatically stay the proceedings.

The extent to which investigation files, internal working papers and documents provided to the DCCA and other materials will be provided or are accessible for use in private actions or ancillary competition law cases will depend on the particular case in question. The Ministry of Justice has issued guidelines on the interpretation of the Danish Public Administration Act, including the rules on access to file.

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15 a.-(1) Under the Public Administration Act, the right to access to information for the parties to a case shall only comprise the part of the correspondence and exchange of documents between the European Commission and the competition authorities of the Member States, or between the competition authorities of the Member States, which contains information about factual circumstances of a case that are of substantial importance for its decision.

4.4.2 *Inspections by the DCCA*

The DCCA has authority to conduct administrative inspections on the basis of a previously obtained court order, which is separate from the criminal powers of the SEIC to conduct searches. [Section 18 (4)]. The DCCA also may assist the European Commission to conduct inspections pursuant to Articles 101 and 102 TFEU. [Section 18(9)].

The DCCA's inspection authority is limited to business premises and "means of transport." The DCCA may not inspect private premises or residences as part of an administrative inspection and must refer the case to the police for such searches to take place.

During the inspection the DCCA may make copies of information kept on site, regardless of the medium used to maintain the information. [Section 18(1)]. The DCCA may also "request oral statements and demand that persons disclose the contents of their pockets and personal items so the DCCA may "obtain knowledge of the contents and, if necessary, take copies thereof." [Section 18 (1)]. During Danish administrative inspections individuals are required to answer questions posed by the DCCA.

Copies of documents contained on electronic media may be made during the inspection and reviewed by the DCCA off-site at a later date. The statute sets out the procedures for sealing the electronic media and protecting data on the media that is not subject to the inspection from being accessed. [Section 18 (4)]. The procedures permit the undertaking to be present when the electronic media is searched and data are obtained after the inspection. The DCCA has 40 days to analyse the electronic evidence and representatives of the undertaking have the right to be present while the retrieval and review of the evidence is done.

The DCCA reports that this slows the process of review and limits it to searching data from one source at a time, whereas they could do a forensic search of data from multiple undertakings at the same time.

The Competition Act also permits the DCCA to demand access to information of a third-party undertakings or associations that stored or processed by an external data processor and to make copies of that information. "It shall be a precondition for such access that it is not possible for the Competition and Consumer Authority to obtain information concerned directly from the undertaking or association that is the target of the inspection." [Section 18(2)]. Section 18 (2) has only been used in a very few cases when the

company and the external data provider have not voluntarily provided access to the stored data. An action under Section 18(2) requires that the server be located inside Denmark. If the DCCA is able (during an inspection) to access documents at the parent company located outside Denmark from the network at a location inside the jurisdiction, it will seize relevant documents regardless of the location of the server. According to the DCCA, this practice follows the practice of DG Competition and has not been challenged. The same practice is applied to third-party documents as long as they are within scope of the investigation and for third-party companies that are the subject of administrative inspections regardless of the location of their servers.

If the DCCA is unable to obtain access to premises of an undertaking or association or is unable to make copies of all relevant information on the day of the inspection, it may seal the premises and information for up to 3 weekdays. [Section 18(5)]. It may also remove the information or media for copying, in which instance it must return the documents, along with a set of copies of the information that the DCCA has extracted for further examination, no later than three weekdays after the inspection. [Section 18(6)]. In special cases the time limits may be extended.

The DCCA may obtain assistance from the police to exercise its powers of inspection and the Minister of Business and Growth may, by agreement of the Minister of Justice, lay down specific rules on such assistance. According to the Section 18 (8) in the Danish Competition Act, the police shall provide assistance to inspections performed by the DCCA. The assistance is, however generally limited to practical assistance to gain to access the premises of the undertaking. Police investigations concerning infringements of the Competition Act are always handled by the SEIC.

The Danish police have additional powers to inspect private residences and use electronic surveillance. The DCCA's powers are limited to conducting searches in companies, but in conjunction with the police the combined investigatory powers cover all advanced investigation tools such as wiretapping and secret searches.

4.5 *Referrals to the SEIC Based Upon Probable Suspicion*

Determinations to refer a case to the SEIC or to issue an administrative order to enjoin an infringement were made by the Director General of the DCCA until 1 July 2015. Referrals will now be made by the Competition Council. As discussed above, the DCCA investigates alleged infringements.

If the DCCA intends for criminal fines and/or jail time to be prosecuted by the SEIC in the Danish courts, it may not take (further) coercive measures, such as conducting administrative inspections or issuing requests for information, when it has a “substantial suspicion” or “probable cause” to believe an infringement has occurred. Investigations and prosecutions of competition infringements subject to potential criminal fines and jail time are conducted by the SEIC under the provisions of the Danish Law of Legal Certainty. The SEIC’s decision to prosecute criminal charges of alleged competition law infringements and to seek criminal fines (and jail sentences) are within the its sole prosecutorial discretion. In some investigations, however, the DCCA will determine not to pursue criminal penalties after it has substantial suspicion of an infringement. In those circumstances the DCCA may decide to continue an administrative investigation and issue a prohibition decision based upon its investigation. In those cases the DCCA is not obliged to refer the case to the SEIC.

“Substantial suspicion” involves a fact-specific assessment of whether the DCCA has probable cause of an infringement. Assessing the state of suspicion or probable cause is an on-going requirement that must be re-evaluated as evidence is developed and creates the necessity for strong working relationships between the DCCA and the SEIC. In 2007, the Director General of the DCCA and the SEIC entered into an agreement on co-operation and referral procedures in cases. The agreement was not subject of public disclosure and consultation. When referring a case to the SEIC, the DCCA makes an assessment of both the criminal standard of proof in the case and of the scope of intent/gross negligence.

Informal consultation between the DCCA and SEIC operates often on a daily-basis and involves contact on both specific cases and common matters of interest. As a matter of practice the DCCA would not refer a case to the SEIC for filing of formal charges without first discussing the matter with the SEIC.¹⁴⁷ The determination of whether there is substantial suspicion of an infringement, however, is made solely by the DCCA. It may also refer a case to the SEIC and

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The Special Police force and the State Prosecutors office are split into separate independent divisions, but are nevertheless gathered within the same organizational frame, with the same director general / chief public prosecutor. But even though the State Prosecutor and the police act independently of course there is a close co-operation between the two in cases concerning economic crime. This is further explained on p.102 in the 2012-report from the Danish Government Committee on competition law. (Danish).

police for investigation if it believes that it would be better investigated as a criminal case.

The DCCA notes the use of investigatory powers relies on the co-operation between the DCCA and the SEIC when cases move from one regime to another. In the very early stages of an investigation the DCCA must pay close attention to the type of documentation and “human source information” (statements and information from individuals) that may trigger criminal law protections. As a practical matter this requires evaluations at each stage of a DCCA investigation particularly those involving cartel allegations if the evidence has progressed to a “substantial suspicion” that an infringement has occurred.

In addition to the construction cartel referral (which resulted in the SEIC filing charges against 28 undertakings and 25 individuals, paragraph 142), since 2010 the DCCA has made 36 additional referrals to the SEIC. Nineteen involved cartels and illegal horizontal activities by trade associations, thirteen involved vertical infringements (including RPM), one involved an abuse of dominance, and three involved other infringements (including violation of injunctions and supplying incorrect information in relation to mergers). Those DCCA referrals have resulted in six cartel prosecution cases against three undertakings and eight individuals and total fines of EUR 174,382.

Of the thirteen vertical infringement referrals from the DCCA, nine prosecution cases have been brought resulting in EUR 1,143,409 in fines against undertakings and individuals. One of the three “other” referrals has resulted in a fine of EUR 6,707. A total of thirteen DCCA referrals are presently pending with SEIC. Seven other referrals by the DCCA have resulted in no criminal charges being filed by the SEIC.

In addition to competition case referrals, the SEIC investigates cases involving fraud, embezzlement, insider trading and stock exchange crimes, tax fraud and evasion, money laundering, corruption, crimes involving intellectual property right and other crimes. Competition Act referrals to the SEIC become part of the group of serious criminal and international cases handled by the SEIC and which may, from the point of view of the DCCA, sometimes result in additional time for a case to be investigated.

In abuse of dominance cases, determinations of whether there is substantial suspicion to believe an infringement has occurred may in many cases not be finally reached until a Competition Council decision has been made. At that stage the Competition Council may refer a case to the SEIC. Only then will the SEIC decide whether to initiate a criminal investigation and prosecution to seek fines for the

infringement. At this juncture, the SEIC may also decide to stay further criminal court proceedings until an appeal decision has been made by the CAT. Appeals from a determination of the CAT are made to the Maritime and Commercial Court. It is possible that a party might appeal the infringement decision of the CAT while at the same time a case to recover fines is being pursued in a district criminal court by the SEIC. In such instances, the SEIC typically will stay the district court case pending determination by the appeals court.

Similarly, determinations involving complex vertical agreements may not be determined until after substantial investigatory activities have been taken by the DCCA. Alternatively where the facts present a straight-forward case of vertical infringements the DCCA, the Competition Council and the SEIC have devised other methods for addressing the infringements and disposing of cases. This can result in a fine issued in accordance with Section 23 (b) or in an administrative decision by the DCCA on behalf of the Competition Council. (See 4.2, above).

Since 2013 with enactment of higher fines and the possibility of imprisonment considerations about the timing and procedures for referring hard-core cartel abuses to the SEIC have become more complex. Individual rights against self-incrimination and events triggering substantial suspicion of an infringement and probable cause to open a criminal investigation may require more prescience by the DCCA and SEIC. Increased scrutiny may be expected from the parties and the courts. Individual rights may come into consideration earlier and with different consequences for investigations than in the past. Criminal standards and policies may be more closely examined.

Transparency, well-defined internal processes and consistently applied standards and procedures become even more critically important. Fundamental understandings about procedures to be used require clear understandings between the DCCA and SEIC. Transparency about how the procedures will be used and public information and consultation about them has proved to be important in jurisdictions with a bifurcated system of case referrals and enforcement. In light of the broad scope of criminal enforcement in Denmark, which goes beyond hard-core cartels, transparency is all the more important.

4.6 *Decisions*

A decision concerning whether there has been an infringement of Sections 6(1) and 11 of the Competition Act, may be either based upon an administrative determination by the Competition Council or based upon a criminal verdict issued by a district court judge following charges filed by the SEIC or both.

4.6.1. *Administrative Decisions by the Competition Council*

The Competition Council may issue administrative infringement decisions. Following an initial administrative investigation by the DCCA, a preliminary statement of objections, outlining the main competition concerns, will be sent to the parties with a response deadline of two weeks. After a full administrative investigation, a statement of objections, containing the relevant facts and a preliminary legal assessment, will be sent to the parties with a response deadline of six weeks. If the draft decision contains new essential facts, detriment to the parties, a third written hearing of the parties will take place. [Section 15.a- (2)]. Prior to an administrative determination by the Competition Council, it will conduct an oral hearing at which the parties may present arguments to counter the findings of infringement. Following the hearing the Competition Council will issue its decision.

The Competition Council may issue administrative decisions that require an undertaking or an association to terminate agreements, decisions, trading conditions and other commercial practices in full or part in order to stop infringements of the Act. [Section 16(1)].

In particularly egregious circumstances where there is a risk of serious restrictions of competition unless a quick administrative action is taken, the Competition Council has the authority to issue an interim order requiring the restrictions be terminated prior to a final decision concerning the infringement. [Section 18.b-(1)]. Within 10 days of issuing an interim order the Competition Council must file the order with the CAT seeking approval for it. If approved the interim order remains applicable until the Competition Council issues its infringement decision in the case. [Section 18.b- (2) and (3)].

Section 18.b interim measures were introduced in 2013 and have not yet been used. The purpose of the section is to enable the Competition Council on a temporary basis to bring an infringement to an end until the investigations of the infringement are finished and the Competition Council makes a decision in the case. The reasons for introducing interim measures were that investigations in

e.g. abuse of dominance cases often take very long time and during the investigation it is important to keep status quo of the market. With the introduction of this provision the Danish Competition Act was brought in line with the EU Commission rules on this point as well as the competition rules in most of the other member states that already have interim measures.

Decisions by the DCCA are public. Competition Council and DCCA's decisions or summaries of such decisions, judgments, settlements and imposition of fines, decisions of the CAT and the Courts are required to be published and are available on the DCCA web-site. Confidential competitive information will not be published and parties who submit information to the DCCA may file an application that confidential documents are not disclosed. [Section 13.-(4) and (5)].

Decisions by the Competition Council and the DCCA generally may be appealed to the CAT.¹⁴⁸ Appeals from decisions of the Tribunal must be lodged with the courts no later than 8 weeks following the notification of a decision. [Section 20.-(3)]. The time for lodging an appeal may not be extended.

4.7 *Criminal Prosecutions by the SEIC and Court Verdicts*

The SEIC alone determines whether to seek criminal fines (and imprisonment) for Competition Act infringements. The SEIC and police are required to conduct a separate criminal investigation prior to filing criminal charges. Determinations by the SEIC to file criminal charges are subject to the criminal laws and procedures of Denmark and rules from the Minister of Justice. Criminal cases are heard by district courts. Cases are tried to judges without juries. District court verdicts may be appealed to the Danish high courts. There is a final right of appeal to the Supreme Court of Denmark.

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Section 19 (1) explicitly lists the decisions that can be appealed to the CAT. Decisions that cannot be appealed to the CAT can for instance be decisions concerning Section 8 (5) (where a notified agreement can affect trade between member states) or decisions according to Section 16 a (commitment decisions).

Table 3. Overview of criminal cases

	2010	2011	2012	2013	2014
Number of referrals to the SEIC	5	5	8	11	8
Number of cases concluded with fines	6	3	3	8	14
Fines paid by enterprises (D.kr.)	3.500.000	1.300.000	1.450.000	6.900.000	23.692.900†
Fines paid by individuals (D.kr.)	125.000	25.000	90.000	239.000	465.000

Note: †2014-figures are highly influenced by fines accepted by several participants in a large cartel in the construction sector.

Source: DCCA

In 2014, 13 cases were settled with fines by the SEIC of which 12 cases involved cartels and 1 case involved RPM.

4.8 *Consent Settlements*

Consent settlements may be accepted by the DCCA in lieu of other remedies. The Competition Council may accept commitments concerning infringements of Article 6(1) or Section 11(1) of Competition Act, or Articles 101 and 102 TFEU and may revoke commitment decisions. [Section 16a.-(1)]. The DCCA settlement procedure is closely aligned to that used by the EU Commission.¹⁴⁹

Policy goals of remedying consumer harm, punishing infringements, general deterrence and creating a culture of competition in Denmark are all considerations which are taken into account before accepting commitments. In specific cases expeditious finality in a case is balanced with the level of punishment, deterrence and precedent value of prosecuting a case in court.

¹⁴⁹ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), Official Journal L 171, 1.7.2008, p. 3–5; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2.7.2008, p. 1–6.

Commitment decisions are therefore found more suitable in cases where a quick solution is required in order to ensure competition in the market, for instance in fast moving markets.

As a general rule the DCCA accepts commitment only in cases that do not involve infringements of a serious nature subject to criminal investigation and prosecution by the SEIC.

Commitments must be offered by the parties, preferably early in the process, prior to an investigation being completed. The commitments must be sufficient to eliminate all of the competition concerns and be simple to implement and monitor after the settlement. Commitments are market tested by the DCCA and subjected to internal quality checks prior to being submitted to the Competition Council for approval. The commitment procedure is generally viewed as a flexible and resource efficient way to solve competition problems. Parties obtain an early end to an investigation and finality concerning liability and penalties. The DCCA conserves resources.

4.9 *Sanctions*

In 2013, fines levels for competition law infringements were increased ten-fold and imprisonment for cartel infringements was added to the law. The Competition Act 2013 sets out factors that should be considered by the courts (and SEIC) when imposing fines for competition infringements. They include the gravity of the infringement and its duration. In addition, fines on undertakings take into consideration the turnover of the undertaking. Explanatory notes accompanying the Competition Act designate three categories of fines based on the gravity of the infringement (less serious, serious and very serious) and the duration of the infringement (less than one year, 1 to 5 years and more than 5 years).

The Danish Director of Public Prosecutions has issued a charging notice addressing the relative priority between charging an individual and an undertaking in cases where an undertaking may be charged. According to this notice the main rule in competition cases is that charges should be brought against the undertaking instead of an individual. However, charges can also be brought against an individual who is a member of management or the Board of Directors.

For purposes arriving at fining levels, the turnover of the undertaking as a whole or of that part of the undertaking responsible for the products or services

covered by the infringement is used. Fines should be a substantial cost to the undertaking relative to its turnover, but as a general rule should not exceed 10 % of the turnover of the group. Explanatory notes designate the fine ranges for each offense level or undertakings and individuals. Less serious infringements should result in fines for undertakings up to DKK 4,000.000 (EUR 537,000); serious infringements should result in fines in the range of DKK 4,000.000 to 20,000.000 (EUR 537,000 to EUR 2,680,000). Very serious fines for undertakings should be above DKK 20,000.000 (EUR 2,680,000). For natural persons the fines should be: at least DKK 50,000 (EUR 6,700) (less serious), DKK, 100.000 (EUR 13,400) (serious) and at least DKK 200,000 (EUR 26,800) (very serious).

Imprisonment may be ordered by a court for cartel activity. [Section 23(3)]. In circumstances where the breach of the Act is “intentional and of a grave nature, especially due to the extent of the infringement or it potentially damaging effects,” the court may increase imprisonment for up to one year and six months. Under particularly aggravating circumstances, a sanction of up to 6 years imprisonment may be imposed. The possibility of imprisonment up to 6 years follows from Section 299.-(c) of the Danish Criminal Act. According to the section, imprisonment up to 6 years may be imposed in cases which involve a cartel agreement which have been conducted under very aggravating circumstances. Very aggravating circumstances include cases with a wide scope or the possibility of great harm.

4.10 Judicial Review

Judicial review of competition cases in Denmark is complex. There are many paths for competition cases in the Danish court system. These are equally applicable to infringements involving the Danish Competition Act and direct application of Articles 101 and 102 TFEU in Denmark.

4.10.1 Administrative Appeals and Judicial Review

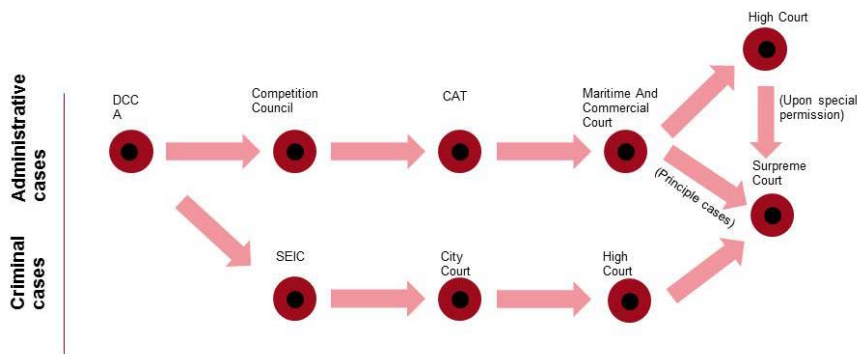
Appeals against most of the administrative decisions of the Competition Council and the DCCA can be made to the CAT. Following an administrative decision by the CAT judicial review may be obtained by the Maritime and Commercial Court.

The Maritime and Commercial Court is not a specialised competition law court. It has five judges who sit in panels from one to three judges depending on the case. In competition law appeals the Court regularly relies upon its

authority to appoint economics and other experts to assist it in cases. The Court operates as a court of first instance and considers both the evidence and application of law *de novo*.

Although there is in principle a margin of appreciation that may be accorded to the decisions of the CAT, the Court has wide latitude concerning the extent to which it will apply the principle. Discovery is available to the parties before the Maritime and Commercial Court. It may designate the issues to be reviewed and may interact with the Court appointed expert through written questions. Appeals and decisions by the court may take years. Appeals of decisions of the Maritime and Commercial Court in competition cases may be taken directly to the Supreme Court, if the case *inter alia* is of general public importance. If not, the decision of the Maritime and Commercial Court may be appealed to a High Court. Thereafter, there remains the possibility of a further appeal to the Supreme Court based upon special committee permission as set forth in the Administration of Justice Act.

Figure 3. Danish appeal system for competition cases



Source: DCCA

4.10.2 Prosecutions by the SEIC

A criminal investigation by the SEIC is governed by rules established by the Minister of Justice and the Danish National Prosecutor applicable in all Danish criminal cases. SEIC prosecutions are filed in the district (municipal) court where the undertaking or natural person is resident. Verdicts from the district courts may be appealed to the high courts (which have jurisdiction over both civil and criminal appeals) and thereafter, to the Supreme Court.

In cases where the DCCA does not reach a conclusion that it has “substantial suspicion” of an infringement until very late in the investigation, perhaps not until the Competition Council reaches a decision that an infringement has occurred, judicial review becomes more complex. (This may occur fairly regularly in abuse of dominance cases which involve complex economic considerations and analysis.) In some cases involving vertical agreements and abuses of dominance “substantial suspicion” and a determination about infringement are closely related. The decision of the Competition Council may coincide with the referral to the SEIC for investigation and prosecution of criminal fines. In such cases although the SEIC will review, investigate and file a case in district court, for practical reasons of judicial economy the proceeding will generally be stayed until the Competition Council’s decision has been reviewed administratively by the CAT.

Decisions of the Competition Council typically are not subject to judicial review prior to a determination by the CAT [Section 19 (1)]. There are notable exceptions to this rule. DCCA administrative inspections may be challenged in district/city court, although to date no DCCA inspections have been challenged. Also subject to judicial challenge are decisions by the Competition Council to initiate, suspend or discontinue a case. Appeals of determinations by the Council pursuant to its authority under Section 14(1) are specifically not allowed to be brought to the CAT [Section 19 (3)] and must be filed in district court.

The complex procedural requirements placed on competition cases in Denmark are to a large extent a direct result of the Danish system of jurisprudence which requires that cases involving coercion and imposition of fines are crimes that must be investigated by the police and prosecuted in the courts. The use of administrative termination orders without imposition of fines does provide the Competition Council with the means to deal with infringements that do not warrant fines. The system is far from ideal. The DCCA and SEIC appear to have developed policies and protocols that have allowed them to resolve a number of hard-core infringements, vertical cases and abuses of dominance expeditiously. The effect of the new penalties on DCCA and SEIC enforcement remains to be seen.

Of greater concern is the difficult and of lengthy plan to obtaining finality in a case involving the Competition Act and the long-term effects that issues arising from the judicial review process may have on effective competition law enforcement in Denmark.

4.11 *Private Actions*

Under present Danish law, individuals may bring private actions for damages from competition law infringements to the Danish courts. They are heard in the district courts. No central registry of competition law damage cases is maintained and the numbers of individual damages cases that have been filed is not known. There is no requirement for the parties or the courts to inform the DCCA when private competition law damages cases are filed.

The Competition Act also allows for class actions. (Part 9b, Section 26). It provides that in a case where several persons have raised claims for infringements of the Act or of Articles 101 and 102 TFEU, the Consumer Ombudsman may be appointed as a representative for a class for the purpose of the class action to recover damages pursuant to Part 23a of the Administration of Justice Act.

To date there have been no cases designating the Consumer Ombudsman as the representative. Nor have there been any class action cases have been filed using Section 23 in the Competition Act. The DONG case discussed below is not a class action but a cumulative case according to the Administration of Justice Act. It was started in 2008, and Section 23 was introduced in the Danish Competition Act in 2010. Denmark is in the process of considering changes that will be necessary to implement the EU Damages Directive.¹⁵⁰

¹⁵⁰ Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union; <http://eur-lex.europa.eu/legalcontent/en/TXT/PDF/?uri=CELEX:32014L104&from=EN>.

Box 2. DONG Energy Case and Damages Action

One notable action for damages involves alleged overcharges on wholesale electricity purchases in Denmark. The history of the litigation, summarized below, illustrates the lengthy process faced by complainants seeking damages for alleged competition law infringements in Denmark.

The Danish Competition Council (DCC) issued two decisions (in 2005 and 2007) finding that Elsam Kraft A/S had abused its dominant position by imposing excessive prices in the wholesale market for electricity in the western part of Denmark from 1 January 2003 to 31 December 2004 and from 1 July 2005 to 31 December 2005. Elsam Kraft A/S was purchased in 2006 by DONG Energy.

In 2007 DONG Energy appealed the DCC's decisions to the Danish Competition Appeals Tribunal (CAT). In 2008 the CAT upheld the Competition Council's determination and DONG Energy appealed the Danish CAT's decisions regarding the Elsam to the Danish Maritime and Commercial Court.

In 2007 a group of private plaintiffs filed individual damages cases in the Danish courts based upon the CAT's decision. Over 1100 companies and municipalities have now sued DONG Energy for compensation for losses they allegedly suffered due to Elsam Kraft A/S' abuse of dominance and overcharges for electricity. These law suits are being co-ordinated by three organisations. The damages cases have been stayed pending the outcome of the 2008 appeal which is still awaiting hearing before Maritime and Commercial Court.

DONG Energy first requested the Maritime and Commercial Court to refer the case to the European Court of Justice for a preliminary ruling. The request was denied in April 2009. Subsequently, DONG Energy requested that an expert appraisal should be performed regarding DCCA's assessment of Elsam's production costs and profits from selling electricity on the wholesale market. In November 2010, the Danish Maritime and Commercial Court decided to start an expert appraisal. The DCCA appealed the decision to start an expert appraisal to the Danish Supreme Court. In November 2011, the Danish Supreme Court affirmed the Danish Maritime and Commercial Court's decision to undertake an expert appraisal.

Between 2008 and 2011, DONG Energy and DCCA each delivered several statements of the case to the Court. The expert appraisal began in 2012 and was completed in 2014. In December 2014, DONG Energy provided a statement of the case to the Court. Early April 2015 the DCCA provided its statement of the case. DONG Energy has a right of reply.

The matter is currently scheduled on the Maritime and Commercial Court's docket for a hearing in 2016. DONG Energy has requested 15.5 days to present its case and it is expected that DONG will call a number of witnesses. The DCCA has requested 2.5 days to present its case. In the interim the individual damages cases have been stayed.

When the decision of the Maritime and Commercial Court is finally issued, the losing party may seek to appeal the decision to the Danish Supreme Court. In the event the Supreme Court were to uphold the CAT decision that Elsam abused its dominant position, imposition of fines for the infringement would require a separate criminal prosecution by the SEIC in the district criminal court. The 1100 individual damages cases could then proceed in Danish civil courts.

4.12 *International Issues*

As a Member of the EU, Denmark's is bound by requirements of co-operation both with the EU Commission and other Member States. These include duties of notification on matters involving a community dimension and assistance with EU Commission inspections in Denmark. Denmark is actively involved in the European Competition Network (ECN) including the working group on co-operation issues and due process. Denmark is also part of the Nordic Competition Authorities' working group and is a signatory to an information exchange agreement among the seven members of the Nordic Competition Authorities of which four countries have acceded to the agreement.

The Competition Act provides specific authorisation for the DCCA to exchange information with other countries, based upon reciprocity and similar confidentiality protections in order to fulfil bilateral or multilateral obligations [Section 18a.-(1)].

Denmark is also a member of the OECD, the International Competition Network (ICN) and UNCTAD. Denmark and other Nordic countries have applied the OECD's 2014 *Recommendation concerning International Co-operation on Competition Investigations and Proceedings* in discussions concerning a potential new Nordic Co-operation Agreement. The DCCA recently applied co-operation principles in an investigation which concerned fixed selling prices and shared markets of supply with respect to milking robots. In that case the DCCA was assisted by the Dutch and German competition authorities that went on dawn raids in their countries in parallel with the DCCA's Danish dawn raid.

5. Limits of Competition Policy: Exclusions and Sectorial Regimes

In Denmark sectorial regulation and oversight is accomplished by a combination of independent regulatory bodies and regulators which housed are within the various Ministries of the Government. The Minister of Business and Growth, for example, has responsibility for the Danish Financial Supervisory Authority, the Danish Patent and Trademark Office, the Danish Maritime Authority, and the Danish Safety Technology Authority. The DCCA and Competition Council have no sectorial regulatory authority. The DCCA does, however, “house” the regulator for the water and waste water sector.

Liberalisation of State-owned enterprises and removing competition distorting provisions of sectorial regulation and oversight is a key feature of Danish Government productivity initiatives, its National Reform Package and annual Growth Plans. Regulation of so-called “essential facilities” and market liberalisation away from State monopolies and state-owned entities is a concerted focus of Denmark’s competition and productivity activities. Some of those efforts have been necessitated by EU initiatives. Others have been internally generated and have benefited from joint studies and efforts undertaken by the Nordic Competition Authorities (NCAs) (assisted and supported by technical contributions from the DCCA).¹⁵¹

The Competition Act contains statutory authority for the DCCA to carry out industry-specific sector investigations and inquiries and to publish analysis and recommendations concerning competition in those sectors. (Section 15.d). DCCA review of competition infringements and studies involving State-owned enterprises comprise a substantial portion of its market studies and advocacy activities for increased competition.

From 2010 to April 2014 the DCCA published 44 studies and analyses. The table below shows the resources in terms of hours and full-time employees (FTE) spend on studies and analysis from 2010-2014. The data includes not only market studies and competition issues but also studies and analysis with a broader scope including public and consumer issues.

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Among the studies undertaken by the NCAs are: A Vision for Competition, Competition Policy Towards 2020 , Report 1/2013; Competitive Airlines, Report 1/2002; Nordic Food Markets, A Taste for Competition, November 2005; Competition in Nordic Retail Banking, August 2006; Competition Policy and the Financial Crisis, Report 1/2009; Competition Policy and Green Growth, Report 1/2010.

Table 4. Resources spent on studies and analysis (2010-2014)

Year	2014	2013	2012	2011*	2010*
Hours	14.314	13.657	18.569	6.353	5.823
FTE	11,5	10,9	14,9	5,1	4,7

(*Note that the Danish Competition Authority and Danish Consumer Authority merged in 2010 but continued to register separate hours in 2011 which explains the large differences between 2011 and 2012.)

Source: DCCA

The DCCA has made broad use of its authority to conduct both case investigations and market studies involving regulated sectors. Those initiatives illustrate both the range of competitive issues in these markets and the DCCA's capacity and limitations to affect pro-competitive changes in them. (Appendix B contains a chart entitled *On-going and recent market studies and analyses by the DCCA, recommendations, effects and status* from 2010 to 2014.)

The DCCA's general activities and those regarding specific market sectors are addressed in this section. Recent and on-going initiatives involving market studies, cases, participation in government working groups and legislative drafting are highlighted. The sectors are: 1) the Postal Services; 2) Electricity; 3) Natural Gas; 4) the Central Heating Sector; 5) Waste Management; 6) Water and Wastewater; 7) Transport and Rail Services; 8) Telecommunications; 9) Financial Services and Payment Cards, 10) Construction; and 11) Retail Services. The latter two and other DCCA market analysis, competition advocacy and policy studies are addressed in Section 6.

5.1 Competitive Neutrality

A common issue in markets with government ownership is the question of competitive neutrality. The DCCA has made it a high priority to ensure competitive neutrality between government entities and private firms. In 2000, the Authority in cooperation with several other Ministries carried out an analysis of competitive neutrality that led to the implementation of new legislation.

In January 2015, there were several press reports concerning allegations by private companies that they face undue competition from government owned entities. The Danish Chamber of Commerce also identified a number of markets (primarily involving research and education) where they identified competition

concerns. The Authority has been asked to carry out a new analysis of competition neutrality in Denmark and it is in the process of compiling information from stakeholders. It will analyse Danish, EU and Member States laws and practices on competitive neutrality and will recommend specific initiatives to foster greater market neutrality. The DCCA competition neutrality study is to be completed by the end of 2015.

5.2 *Postal Services*

The Danish Ministry of Transport, that has responsibility for roads, vehicles, railways, fixed links, harbours, ferry operations, aviation, airports, also has oversight of postal services in Denmark. Universal postal services are provided by Post Danmark A/S.

The Postal Services Act passed by the Danish Parliament in December 2010 regulates postal services in Denmark and implemented the final phase of liberalisation of the Danish postal market from 1 January 2011. The Postal Services Act allows for free competition and ensures Post Danmark fulfils its obligation to provide universal postal services within Denmark.¹⁵² On 1 January 2011, Post Danmark's exclusive right to distribute letters with a weight below 50 grams ended.

5.2.1 *Post Danmark Cases*

Liberalisation of postal services involving Post Danmark has been the subject of two lengthy cases by the DCCA. Both of them have involved questions with EU community dimensions that have been referred to the Court of Justice of the European Union (CJEU). The issues in the cases and the lengthy legal proceedings are instructive of broader competitive issues facing Denmark with regard to liberalisation and State-owned or funded industries.

Case C-209/10, Post Danmark A/S v Konkurrencerådet

The CJEU issued a judgment on 27 March 2012 (Case C-209/10) arising from a case begun by the DCCA in 2004. The case concerned the prices Post Danmark charged to three former customers of its competitor, Forbrug-Kontakt. At the time, Post Danmark and Forbrug-Kontakt were the

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Post Danmark website;
<http://www.postdanmark.dk/en/Om%20os/Virksomheden/Pages/home.aspx>.

two largest undertakings in the unaddressed mail sector (brochures, telephone directories, guides, local and regional newspapers, etc.). This sector is entirely liberalised and is not covered by the Danish legislation on postal services. The relevant market was considered to be that of the distribution of unaddressed mail in Denmark.

Post Danmark enjoyed a monopoly in the delivery of addressed letters and parcels not exceeding a certain weight, which, on account of the sole right of distribution, was allied with a universal service obligation to deliver addressed mail under that weight. For that purpose, Post Danmark had a network that covered the national territory in its entirety and that was also used for the distribution of unaddressed mail.

The principal activity of Forbruger-Kontakt was the distribution of unaddressed mail. It had created a distribution network covering almost the entire national territory, chiefly through the acquisition of smaller distribution undertakings. Until 2004, the SuperBest, Spar and Coop groups, undertakings in the supermarket sector, were major customers of Forbruger-Kontakt. Towards the end of 2003, Post Danmark concluded contracts with those three groups for the distribution of their unaddressed mail from 1 January 2004.

Following a complaint made by Forbruger-Kontakt, by a decision issued on 29 September 2004 the Competition Council held that Post Danmark had abused its dominant position in the Danish market for the distribution of unaddressed mail by pursuing (in 2003 and 2004) a pricing policy for former customers of Forbruger-Kontakt different from its policy for its pre-existing customers, without being able to justify that difference on cost-related grounds. By decision of 1 July 2005, the Danish CAT upheld the decision of the Competition Council. The decisions of the Competition Council, affirmed by the CAT became final administrative decisions subject to appeal to the Danish courts. They were challenged by Post Danmark before the High Court of Eastern Denmark.

By decision of 21 December 2007, the High Court of Eastern Denmark upheld the decisions of the Competition Council and CAT.

Post Danmark appealed the decision of the High Court to the Danish Supreme Court. The Supreme Court decided to stay proceedings and to refer the following questions to the CJEU for a preliminary ruling over selective pricing reductions by the universal service provider and what circumstances would constitute exclusionary abuse. The CJEU ruled in its 27 March 2012 decision:

“Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers’ interests.”

The Danish Supreme Court assessed the case in the light of the preliminary ruling from CJEU. In a judgment of 15 February 2013 it annulled the decision of the Competition Council of 29 September 2004.¹⁵³

C-23/14, Post Danmark v Konkurrencerådet

The second Post Danmark case, which is pending before the European Court of Justice (Case C-23/14) concerns Post Danmark’s rebate system for the distribution of direct mail. By decision of 24 June 2009 the Danish Competition Council held that Post Danmark had abused its dominant position on the Danish market for mass mailings. The decision was upheld by the CAT by decision of 10 May 2010. Post Danmark appealed the decision to the Danish Maritime and Commercial Court where the case is currently pending.

One important question in the case is whether the Competition Council should have applied the “as efficient competitor test” (AEC) in order to

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The Supreme Court based its assessment on the figures in the decision of the Competition Council of 24 November 2004 regarding predatory pricing according to which the prices Post Danmark charged Coop were lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity. The Supreme Court found that there could be an exclusionary abuse if Post Danmark’s price conduct had been likely to lead to the elimination of Forbrugerkontakt to the detriment of competition. The Supreme Court, however, concluded that the Competition Council had not established the likelihood that Forbrugerkontakt would have been eliminated from the market.

establish the abuse. The Maritime and Commercial Court decided to stay proceedings and to refer the following questions to the CJEU for a preliminary ruling. The issues presented to the Court involve questions concerning rebate schemes and the guidelines that should be applied to them.¹⁵⁴

5.2.2 *DCCA 2013 Market Study of Competition in Parcel Services*

In addition to case investigations, the DCCA has addressed competitive concerns in the postal services market in a comprehensive study. In 2013, the DCCA published a market study of competition in the parcel services sector.

The DCCA examined the state of competition in Denmark and found generally there is less robust competition in the Danish market than those of France, Germany and Sweden. Even though the competition for parcel

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The questions presented to the CJEU are: "What guidelines should be used to decide whether the application by a dominant undertaking of a rebate scheme with a standardised volume threshold having the characteristics referred to in points 10 and 11 of the order for reference constitutes an abuse of a dominant position contrary to Article 82 of the EC Treaty? In its answer the Court is requested to clarify what relevance it has to the assessment whether the rebate scheme's thresholds are set in such a way that the rebate scheme applies to the majority of customers on the market. In its answer the Court is further requested to clarify what relevance, if any, the dominant undertaking's prices and costs have to the evaluation pursuant to Article 82 of the EC Treaty of such a rebate scheme (relevance of a 'competitor as efficient' test). At the same time the Court is requested to clarify what relevance the characteristics of the market have in this connection, including whether the characteristics of the market can justify the foreclosure effect being demonstrated by examinations and analyses other than a 'competitor as efficient' test (see, in that regard, paragraph 24 of the Commission's communication on the application of Article 82). How probable and serious must the anti-competitive effect of a rebate scheme having the characteristics referred to in points 10 and 11 of the order for reference be for Article 82 of the EC Treaty to apply? Having regard to the answers given to Questions 1 and 2, what specific circumstances must the national court take into account in assessing whether a rebate scheme, in circumstances such as those described in the order for reference (characteristics of the market and the rebate scheme), has or is capable of having such a foreclosure effect in the specific case that it constitutes an abuse covered by Article 82 of the EC Treaty? In this connection, is it a requirement that the foreclosure effect is appreciable? "

distribution has increased in recent years, Denmark (with two large and several small providers) has relatively fewer businesses offering parcel distribution compared with France (8-10 large providers), Germany (five large and several small providers) and Sweden (four large and several small providers).

The report raised issues about the present structure of the market, particularly in light of competitive advantages accorded to Post Danmark. The study found that the average parcel services are substantially higher in Denmark than in neighbouring countries. It also concluded that the exclusion of Post Danmark from the VAT gives it a competitive advantage over its competitors. The report concluded that competition could be improved for the benefit of consumers.

The DCCA study provided Considerations of the Competition and Consumer Authority on improved competition and consumer conditions, which raised three questions to be addressed:

1. Can the VAT exemption for parcel distribution be restricted by limiting the universal service obligation?
2. Can the universal service obligation for B2C parcels be limited to apply only to parcels sent individually on terms that are uniform for everyone?
3. Can the universal service obligation for parcels be limited to doorstep delivery only?¹⁵⁵

The questions and issues addressed in the study were discussed with the Ministry of Transport and the Ministry for Business and Growth. It was politically decided to maintain Post Danmark's universal service obligation (USO) and VAT exemption in its current form at least until late 2015 when the parties to the political agreement on ensuring the universal service obligation in

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Press Release DCCA Website, 27 September 2013. "*Expensive to Send Small Consignments in Denmark.*" See also, "Parcel distribution to consumers Competition and Consumer Analysis 02." <http://en.kfst.dk/Indhold-KFST/English/News/~media/D4D1A061DBC44270854E14624B81D220.pdf>.

a liberalised postal services market in Denmark meet again to reconsider the question.¹⁵⁶

5.3 *Electricity*

The Danish Ministry of Climate, Energy and Building includes, among others, the Danish Energy Agency, the Energy Board of Appeals, the Danish Energy Regulatory Authority and Energinet.dk. Regulation of electricity, gas and district heating is the responsibility of the independent Danish Energy Regulatory Authority (DERA). The Minister of Climate and Energy formally appoints the members of the board of DERA, but has no powers of instruction in relation to the board members.

The Transmission System Operator (Energinet.dk) and the Distribution System Operators are natural monopolies. Consequently, DERA concentrates on making sure that TSO and DSOs are run cost-efficiently and with a high degree of consumer protection.¹⁵⁷ DERA regulates the economies of the DSOs' with a revenue cap regulation. Energinet.dk's economy is regulated with a cost of service regulation. DERA also regulates the terms of conditions that the DSOs grant thirds parties access to their distribution networks.

DERA also has some regulatory tasks in the retail market and wholesale market for electricity which are very limited compared to the regulation of the markets for transmission and distribution of electricity. For example, DERA monitors the wholesale market for electricity, monitors the retail price for electricity and for some parts of Denmark sets the default price for electricity. In other parts of Denmark, the default price is sets by a public tender and DERA only monitors that the default price does not exceed the price that has been set by the public tender. The price regulation in the retail market will be abolished during the next couple of years.

¹⁵⁶ The political agreement is available at <http://www.trm.dk/da/politiske-aftaler/2013/politisk-aftale-om-postservice-i-danmark>. (In Danish only.)

¹⁵⁷ Energitilsynet website - <http://energitilsynet.dk/tool-menu/english>.

5.3.1 *EU 2013 Report – Electricity and Gas*

The EU 2013 Report noted that on competitiveness in Denmark noted, “The long-term goal of Denmark’s energy policy is to cover the entire supply of energy (electricity, heating, industry and transport) with renewable energy by 2050.”¹⁵⁸ The report found that: “Consumers in Denmark still do not benefit from genuinely competitive prices for electricity and gas. Though the electricity and gas markets have been liberalised few consumers have exercised their right to change supplier and thus remain on default contracts with regulated prices. . . .Denmark’s markets for electricity and gas are functioning well at the wholesale level, but there is scope for improving competition at the retail level.”

The report recommended that Danish technical standards should be replaced by international ones and that the standard for voltage and lighting should be simplified in order to increase competition. The report also set efficiency goals for 2020 which included DKK 1.3 billion for electricity services.¹⁵⁹

The Danish Growth Plan 2014 included steps “to stimulate higher efficiency in the electricity sector through improved sector regulation in order to obtain up to 1.3 billion DKK in efficiency gains by 2020. The DCCA recently completed an analysis and model for wholesaling in the electricity market to increase competition. It is also in the process of preparing an analysis of increased competition in the market for electricity. The DCCA reports that this initiative has been completed and no further steps will be taken regarding it in the Growth Plan for 2015. The Danish Parliament has decided to implement a functional separation between distribution and retail sales within the electricity sector and abolish price regulation in 2016. It will install smart meters among all customers in Denmark in 2020.

5.3.2 *DCCA Electricity Cases*

In addition to the DONG Energy case discussed above in Section 4, the DCCA has considered other allegations of abuses of dominance and pricing in the electricity industry. On 22 December 2010, the Competition Council decided that Energy E2 did not engage in excessive pricing in the wholesale market for electricity from 1 July 2003 to 31 December 2005. The case against

¹⁵⁸ EU Report at pages 22 to 24.

¹⁵⁹ EU Report at page 49.

E2 was initiated in response to a complaint from a retail customer. The case, which involved pricing in the spot market for electricity raises similar issues to the DONG Energy case. The DCCA used the same economic framework to analyse the market as it used in the DONG Energy case. The economic analysis did not conclusively show that Energy E2 had engaged in excessive pricing. E2 presented objective and documented cost-related reasons for the behaviour. The Competition Council concluded that E2 had not engaged in excessive pricing.¹⁶⁰

5.3.3 DCCA Initiatives in the Electricity Market

Since 2007, DCCA developed a number of guidelines for pricing behaviour in the wholesale market for electricity. It is DCCA's assessment that the relevant companies in the market have followed the guidelines and transmission capacity within Denmark and between Denmark and neighbouring countries has been expanded significantly since 2007.

Today, a very large share of electricity generated and consumed in Denmark is traded on the Nordic Wholesale market for electricity Nord Pool. Consequently, the DCCA concludes that the Danish wholesale price is highly correlated with the wholesale price for electricity in neighbouring countries and DONG Energy has to a large extent lost the company's ability to affect the wholesale electricity prices in Denmark. Thus, the increased market integration has provided a significant horizontal restructuring of the market and thereby increased competition within generation of electricity.

From 2012 to 2014 DCCA participated in a working group with the DERA, the Danish Energy Agency and the Danish Ministry of Finance. Some of the main goals for the working group were to evaluate whether the TSO and DSOs performed activities that could be deregulated and thus subject to competition. The working group also developed recommendations for a new economic regulation to increase cost-effectiveness for transmission and distribution of electricity in Denmark.

In accordance with *The OECD Recommendation of the Council concerning Structural Separation in Regulated Industries* it is the relevant agencies and DCCA's assessment that the benefits from functional separation outweigh the

¹⁶⁰ OECD Annual Report, 2010, pages 6-7.

costs of implementing a functional separation.¹⁶¹ The working group also developed recommendations for a new economic regulation that could increase cost-effectiveness within transmissions and distribution of electricity in Denmark. The working group published its recommendation towards the end of 2014. The DCCA supports the working group's recommendation regarding the economic regulation of the TSO and DSOs. The Danish Parliament is expected to evaluate the recommendations during the next couple of years.

In 2011, the DCCA also found in a study that the Danish retail market for electricity is characterised by weak competition and inactive consumers. There are currently more than fifty DSOs in Denmark. They are typically vertically integrated companies that are also active on the retail market for electricity. Although customers are allowed to switch among retail suppliers, each vertically integrated company typically holds a very large share of the retail customers within the geographical area that corresponds to the vertically integrated DSO's distribution network. The DCCA concluded that DSOs perform potentially competitive activities that should instead be performed by competitive companies in the retail market. It recommended functional separation of the vertically integrated companies that have both distribution and retail market activities. It also stressed that economic regulation of the DSOs should be scrutinised in order to ensure that the economic regulation provides the DSOs with a strong economic incentive to increase their cost-effectiveness.¹⁶²

The Danish Energy Regulatory Authority generally monitors DSOs' grants of third-party access to their networks and whether they provide availability to consumption data in a non-discriminatory manner. The DCCA believes that the lack of functional separation continues to favour vertically integrated companies within their own distribution area.

It is also DCCA's assessment that retail price regulation and lack of smart meters in households to allow consumers to monitor their consumption restricts competition and makes consumers inactive. The DCCA concluded that the use of smart meters by all Danish customers, functional separation in vertically integrated companies and abolishment of retail price regulation could create a

¹⁶¹ 26 April 2001 - [C\(2001\)78/FINAL](#), Amended on 13 December 2011 - [C\(2011\)135](#) - [C\(2011\)135/CORR1](#).

¹⁶² DCCA Supplemental Note, Questions Regarding Regulatory Restrictions on Competition, pages 2-4.

net social benefit of DKK 440 million per year. The Danish Parliament has decided to implement a functional separation between distribution and retail sales within the electricity sector and abolish price regulation in 2016. It will install smart meters among all customers in Denmark by 2020.

The Danish Transmission System Operator is developing a DataHub which will collect and store data regarding electric consumption from all end customers in Denmark. All retail electricity companies must collect information regarding end customers from the DataHub. Thus, the DataHub will give retail companies equal access to data regarding end customers' consumption profiles. The DCCA believes and with installation of smart meters and the DataHub it will be easier for customers to switch retail electricity suppliers.

5.4 *Natural Gas*

Energinet.dk is an independent, state-owned company that owns Denmark's electrical and natural gas grid. It also maintains a supply of natural gas. Energinet.dk's primary responsibility is to control and maintain the national electrical transmission grid and the national gas distribution grid.¹⁶³ The DCCA has been active in both market studies and merger cases in the natural gas market. The merger, which was approved by the DCCA, involved the purchase of a natural gas storage facility by Energinet.dk from DONG Energy. The Danish sector for natural gas is currently being evaluated by the Danish Energy Agency. The DCCA's believes that functional separation of natural gas distribution and retail companies (which in certain instances involves vertically integrated companies in both distribution of natural gas and retail sales and may provide them a competitive advantage) should be analysed.

The Danish TSO Energinet.dk has developed a spot market for natural gas in Denmark called Gas Point Nordic. An increasing share of the natural gas consumed in Denmark is traded on Gas Point Nordic. Energinet.dk has also expanded import and export capacity on the transmission connections to Germany. It is the objective that Denmark will become part of the same wholesale market for natural gas as Germany and the Netherlands as soon as

¹⁶³ In 2011, DCCA published an analysis of the Danish retail market for electricity called: "Detailmarkedet for elektricitet til forbrugerne – konkurrence- og forbrugeranalyse". <http://www.kebmin.dk/en/the-ministry/danish-ministry-of-climate-energy-and-building-ministerial-institutions>.

possible. Thus, the increased integration of the markets is expected to lead to a horizontal restructuring of the wholesale market for natural gas.

Recently, the DCCA approved the purchase by Energinet.dk of a natural gas storage facility from DONG Energy. The issues in the acquisition involved functional separation of activities by DONG Energy and vertical integration. DONG Energy is the largest company within the natural gas sector in Denmark. DONG Energy is active in the wholesale and the retail markets for natural gas in Denmark and it also owns a part of the distribution network for natural gas. Gas storages are considered to be an essential facility. Consequently, the transaction will reduce the market power that DONG Energy obtains from being a vertically integrated company. DONG Energy will no longer own a natural gas-storage in Denmark and thus has to gain access to the gas storages in competition with the other companies in the market.

5.5 *District Heating*

Many Danish cities have their own heating network. It is generally not economically favourable to transport heat between cities due to very high costs of preserving the temperature of the hot water in the networks. Consequently, the heating networks are not connected nationally. The district heating companies are vertically integrated companies performing both distribution and retail sales of district heating. A relatively large share of the companies also own heat generation plants. Due to the structure of the Danish district heating sector, the total cost of promoting competition for generation of heat across regions would outweigh the potential benefits from competition in the market. Both generation and distribution of district central heating is regulated with a “cost of service” regulation. Third parties generally do not have access to the market. In some areas costumers are obliged to buy heat from the district heating company. In other areas, customers can choose to buy heat from an alternative heat source e.g. a heat pump.

DCCA participated in working group with (among others) DERA, the Danish Energy Agency and the Danish Ministry of Finance. The working group evaluated ways to increase cost-effectiveness within the sector and is benchmarking the companies operating within the sector. The DCCA supports initiatives that aim to reduce costs in the district heating sector by increasing the level of public procurement within the sector. It also is involved in initiatives to lower costs by reducing the share of activities that the regulated district heating monopolies perform in-house. Additionally, the Government has completed initiatives identified in the EU 2014 growth package concerning district heating:

to stimulate higher efficiency in the district heating sector (improved sector regulation in order to obtain up to DKK 0.5 billion in efficiency gains by 2020).

5.6 *Waste Management*

In Denmark, collection and incineration of waste is organised by the municipalities. Municipal waste management is characterised by low amounts of landfilling (4%) and high use of incineration (54%) (2010). Approximately 50 % of all waste is recycled.¹⁶⁴ Households and most commercial entities are obliged to use the waste collection system that their local municipality has developed. Municipalities typically contract with a private company by means of a public tender to provide all waste collection services. Each municipality has the right to assign all combustible waste to an incineration plant in which the municipality has either sole or part ownership. As a result 79 out of the 98 municipalities have ownership or part ownership in an incineration plant. Only a few incineration plants are privately owned. The incineration plants are regulated with a cost of service regulation.

The DCCA is active in efforts to encourage horizontal competition between incineration facilities and to encourage greater access among waster services providers to incineration services in other municipalities. It is generally hard for privately owned incinerators to gain access to the market. Similarly, it is generally difficult for an incineration plant from one municipality to gain access to another municipality's waste that has to be incinerated. Each municipality generally tends to favour its own local incineration plant.

Currently, the DCCA participates in a working group with (among others) the Danish Ministry for the Environment. The working group's main objective is to increase cost effectiveness within incineration of waste in Denmark. The working group has developed several models that could increase cost effectiveness within incineration of waste. The DCCA supports a model that creates competition between the incineration plans and thus could reduce the total costs within the sector and municipalities would be required to hold public tenders for incineration of household and small business waste. Whether the DCCA's views will be adopted is a matter currently under consideration.

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Municipal Waste Management in Denmark, Prepared by Birgitte Kjær. ETC/SCP (February 2013) for the European Environment, page 4.

Initiatives identified in the EU 2014 Growth Plan regarding waste management have been completed. The working group completed an analysis of ways to encourage more effective and efficient use of refuse incineration in order to stimulate higher efficiency in waste incineration (improved sector regulation) in order to obtain up to DKK 0.2 billion in efficiency gains by 2020.

5.7 *Water Distribution and Sales in Denmark*

Many of the Danish municipalities have their own facilities to produce and deliver drinking water to households and companies. Some municipalities, however, purchase drinking water from other municipalities and thus only own a distribution network. Water distribution networks are not connected on a national level.

In 2003, the DCCA conducted an analysis of the Danish water sector and concluded that due to the structure of the Danish water sector, the total costs of promoting competition within generation of water across regions would outweigh the potential benefits from competition in the market. The analysis identified a large potential to increase the cost-effectiveness within the Danish water sector. In 2005, the DCCA participated in a working group with the Danish Ministry of Finance and the Danish Ministry for the Environment. The working group developed recommendations for a new economic regulation that could utilise the potential for increased cost-effectiveness within extraction and distribution of water. In 2007, the Danish Parliament passed the law “*Vandsektorloven*” which imposed a new economic regulation on activities regarding extraction and distribution of water and treatment of wastewater. Due to *Vandsektorloven*, the water companies are currently regulated with a maximum price “prisloft” and a revenue cap.

As part of the DCCA’s secretariat functions to the Water Board it performs a benchmarking of the companies within the sector and serves as the so-called “economic regulator” for water and wastewater rates in Denmark. The Water Board functions are within an independent unit of the DCCA. There is no actual Water Board that sets the price levels determined by the DCCA secretariat. Annually the DCCA demands that relatively cost-inefficient companies reduce their costs related to extracting and/or distributing water to consumers and companies. The annual benchmarking is prepared by the DCCA secretariat and is the foundation for the efficiency-improvements embedded in the annual price ceiling decisions made by the secretariat. Appeals from Water Board pricing may be filed with the Competition Appeals Tribunal.

In the Danish government's response to the EU 2014 Growth Package, one of the initiatives was: "[T]o modernize the approval procedure for construction projects involving drinking water contracts and to streamline the procedure for technical construction permits."¹⁶⁵ The DCCA Reports that it has completed steps to stimulate higher efficiency in the water and wastewater sector (improved sector regulation in order to obtain up to DKK 0.7 billion in efficiency gains by 2020).

5.8 *Telecommunications*

The Danish Business Authority (DBA) is an authority within the Ministry of Business and Growth. Its mandate is to create growth through effective regulation, strong digital solutions, and access to business data, modern communication technologies, and international co-operation. The DBA is organised into five major departments, covering different policy areas involving digital access, information technology and telecommunications. It also serves as an independent regulatory authority for telecommunications.¹⁶⁶

There is single incumbent provider of land-line copper wire and coaxial cable network in Denmark, TDC. The DBA regulates the prices that TDC can charge third parties to access to TDC's infrastructure in order to sell broadband services to end customers. The DBA also monitors TDC grants to of access by third parties operating in the retail market for broadband services access to the company's infrastructure in a non-discriminatory manner.

In 2004, the Competition Council decided an abuse of dominance case against TDC involving allegations of a margin squeeze. In 2011 it received and investigated a similar complaint. The second case is discussed, below.

In 2011, the DCCA received a complaint that TDC had abused the company's dominant position by imposing a margin squeeze on the retail market for broadband and related services. The DCCA investigated whether TDC's behaviour and price/cost structure could significantly restrict competition in the retail broadband market. The DCCA focused on third-party access charges versus those TDC charged its own vertically integrated retail companies. TDC offered commitments to promote transparency and improve the DCCA's ability to examine TDC's behaviour in future cases. The

¹⁶⁵ EU Report 2013, Government's response at page 49.

¹⁶⁶ DBA website, <http://danishbusinessauthority.dk>.

commitments were sufficient enough so the DCCA decided not to specifically assess whether TDC had abused its dominant position in the market.

However, the DCCA still had concerns that TDC through the organisation of the market received a substantial competitive advantage which could restrict competition and harm end customers. DCCA's analysis of TDC's prices revealed that TDC has significant economies of scale and economies of scope due to the organisation of the Danish telecommunications sector. From 2013 to 2014, DCCA and the DBA performed an analysis of the Danish market for telecommunications. Among other topics analysed were whether it would be economically favourable to implement a functional separation of the incumbent TDC's activities related to grant third parties access to the company's infrastructure. The DCCA and DBA determined that the conditions warranting structural separation had not been met.

The DCCA conducted two other market studies in the telecommunications sector. The first involved costs to consumers for switching mobile services provider, which was estimated by the DCCA to be a DKK 17.5 billion market. The study recommended that the mobile providers make it easier for consumers to get access to information concerning their spending on mobile services and for operators to clarify consumers' usage levels for services. It also recommended that consideration be given to establishing agents or on-line methods for consumers to switch licenses between providers. The recommendations are pending.

The second market study concerned price comparison tools on the Internet. It was recommended that information on Internet sites concerning pricing be made clear and accessible in a manner that would allow customers to make price comparisons and that additional charges (that might be added at the end of a transaction in complex pricing models) be placed where they were readily apparent and accessible by consumers.

As part of the DCCA's activities in support of the Danish Growth Plan 2014, it has completed two studies in the market for television and broadband services, one concerning the option to purchase single TV channels rather than bundled packages of channels and the other concerning the option of multiple unit dwellers to choose the option of their own TV distributors. The DCCA's guidance paper on competitive activities by Trade and Industry Associations has a section devoted to pricing and price comparisons on websites that is designed to alert associations to potential competitive issues.

5.9 *Transport and Rail Services*

The Danish Transport Authority (DTA) is an agency within the Danish Ministry of Transport.¹⁶⁷ The Minister of Transport Minister has both administrative (managerial) and parliamentary (political) responsibility for transport policy and practices in Denmark.¹⁶⁸ The DTA's function include responsibility for the Danish railway authority, the Civil Aviation Authority, road safety and environmental regulations, oversight regarding market access for railway and aviation (along with postal services discussed above). The DTA is also responsible for licensing and training transport personnel in the railway, road and aviation sectors.

Denmark has implemented structural separation within the rail road sector. The company Banedanmark maintains the Danish rail road tracks. DSB was structurally separated from Banedanmark and operates the trains on the railroad tracks. The Danish Ministry for Transport regulates the terms and conditions for companies' access to the Danish rail roads. The Danish Government has only held public tenders for a limited share of the train routes in Denmark. Most routes have not yet been subject to a public tendering process and are thus still operated by DSB. Consequently, DSB still operates a very large share of the train routes in Denmark.

The Danish Productivity Commission recommended that a larger share of the train routes should be procured through a public tendering. To date that recommendation has not been implemented.

5.10 *Financial Services*

The Danish Financial Services Authority (FSA) is an authority within the Ministry of Business and Growth. The FSA has primary responsibility for supervision of financial undertakings – banks, mortgage-credit institutions, pension and insurance companies in Denmark. It also supervises the Danish securities markets and monitors them for market abuses including insider dealing and price manipulation. Effective 1 January 2015, the Danish Complaints Board for Providers of Short-term Loans was established and the DCCA was delegated secretariat functions to the Board.

¹⁶⁷ Danish Transport Authority website; www.trafikstyrelsen.dk/en.aspx.

¹⁶⁸ Danish Ministry of Transport website, <http://www.trm.dk/en/the-ministry>.

In 2013, the DCCA published a report on competition within the Danish retail banking market. In preparing the Retail Banking Market Study the DCCA made use of the OECD 2011 Report on *Competition Issues in the Financial Services Sector* and used key findings contained in the OECD to assist it in drafting the Danish report. The DCCA concluded that there is room for improvement of price competition on the Danish retail banking market. Although there are approximately 110 banks that are active on the Danish retail banking market, Danske Bank and Nordea Bank have significantly larger shares of the market than other banks. Only eight banks operate enough branches to cover the national retail banking market. All other banks are located in the local or regional areas only.

The report found that the market structure results in consumers having only a limited number of different banks within a shorter distance from their home or work. It concluded that Danish banks are not sufficiently challenged on prices by either competitors or customers. The report recommended that consumers should enhance their level of activity on the retail banking market and challenge the banks to offer better prices and terms. It found that switch banking services can be a worthwhile effort. “A typical family including two adults, two children, with minor loans and a gross income between DKR 500.000 and DKR 700.000 (approximately EUR 67.000 to EUR 94.000) can save up to DKR 4.000 (approximately EUR 3.200) per year by switching from the most expensive bank to the cheapest bank.”¹⁶⁹

In 2014, the DCCA participated in the working group report on barriers for consumers on the market for mortgage lending. It found that one of the major problems in the service sector is limited consumer mobility which hampers the incentives of firms to compete. This is particularly prevalent in the retail banking and insurance sectors. The report recommended establishing a web-based tool that consumers can use to compare prices on mortgage loans in mortgage banks and ordinary banks. That tool is to be launched in 2015. It was also recommended to issue new rules that would enhance transparency on the prices of mortgage banks and to introduce common principles for loan documents.

¹⁶⁹

DCCA 2013 Market Study on Retail Banking, page 5.

The DCCA also is required bi-annually to monitor and report on the use of payments cards in Denmark. The next Report will be published in the beginning of 2016.¹⁷⁰ The purpose of the reporting requirement is to observe whether the revenue of the parties involved in payment card schemes (i.e. issuers and acquirers) reflect the costs of operating the card scheme and to ensure the Minister and Parliament are regularly informed of developments on the payment card market and their affects.

Danish consumers are among consumers in Europe most frequently using payment cards (direct debit) as means of payment for shopping. This applies both to shopping in a physical shop (physical trade) and in shopping involving E-commerce (Internet shopping).¹⁷¹ The Danish direct debit product, Betalingsservice was launched in 1974 by PBS [now Nets Holdings A/S (Nets)] and 95 % of households are using the product. In 2012, more than 16,500 businesses, public authorities and associations (creditors) carried out 195 billion payments using Betalingsservice. Several of Nets' card-based products such as the domestic debit card, the Dankort, and the acquiring of international payment cards transactions are subject to the Danish Payment Service Act and prohibitions against setting unreasonably high prices, which the DCCA supervises.¹⁷²

Nets is owned by two international equity funds and ATP.¹⁷³

Access to Nets is a necessity for issuers, acquirers and merchants and other who wants to use payment cards. In its 2014 Betalingsservices report the DCCA noted Nets is the key provider of direct debit in Denmark and its

¹⁷⁰ The obligation for the DCCA to produce the Report is located in section 98 (9) of the Danish Payment Service Act (PSA). The current wording of Section 98 (9) is relatively new but the obligation to produce a Report has existed since 1999.

¹⁷¹ DCCA 2011 Payment Card Report.

¹⁷² June 2014 Betalingsservices Report, DCCA website.

¹⁷³ Two international equity funds and ATP bought the shares in Nets in 2014. Until then the Danish National Bank had a smaller part of the shareholding. The Danish National Bank bought their shares back in 2003 from Danske Bank as a result of a merger between Dansk Bank and RealDanmark which DCCA only approved provided that Danske Bank committed them self to reduce their shareholding in Nets.

Betalingservice has market power.”¹⁷⁴ Entry into the payment card market is difficult and competition from new payment solutions (such as Mobile Pay, a well-known mobile payment service in Denmark) although developing have only limited applicability for recurrent payments. The DCCA found that “these solutions currently exert only limited competitive pressure on Betalingservice.” Nets’ earnings between 2003 and 2012 more than doubled before taxes. Profits in 2012 amounted to between DKK 150 and 350 million. The number of Nets transactions grew by 40% and per transaction profit increased as well, leading to a profit margin of between 10% and 30%.

The 2014 report noted that although interchange fees (which are regulated at the EU level and will eventually prohibit interchange fees on direct debits) the EU regulations will have no appreciable impact in Denmark, where direct debits are principally in DKKs. The 2014 report concluded that: “Tighter regulation of direct debit can entail both advantages and disadvantages and this analysis does not contain a thorough assessment of these issues.” The DCCA recommended an assessment of the competitive results from tighter regulation and how it might be designed.

In December 2012, the DCCA conducted an inspection at Nets, based on a complaint of anticompetitive conducted by the company. Nets is active on the upstream market for processing services and Teller (a Nets subsidiary) is active on a downstream for acquiring international payment cards. The DCCA investigation centred on allegations of an illegal margin squeeze by Nets through pricing on the upstream market for processing of payment card transactions through Nets’ infrastructure (upstream) and Teller’s pricing in the acquiring market (downstream). The DCCA also investigated alleged excessive pricing by Nets on upstream processing services to a number of the acquirers that are downstream competitors to Teller. Commitments were offered by Nets to introduce a new wholesale pricing model for front-end (acquiring) processing services which significantly reduce the average prices charged for such services for competitors of Nets subsidiary Teller. The commitments also provided all of Teller’s customers with an extraordinary termination right from Nets services. The DCCA accepted the commitments to address concerns about violations of Section 11 of the Competition Act and of Article 102 TFEU.

¹⁷⁴

DCCA website, Press Release, 24 June 2014 Betalingservice Report.

6. Competition Advocacy and Policy Studies

It is an axiom that competition law and policy is designed to protect competition not competitors. When governments provide a high degree of social benefits and a wide-range of services that effectively shield consumers from market forces in those services sectors, competition advocacy and demonstration of the benefits of competition for individual consumers and society as a whole become a more important function for competition agencies.

The DCCA 2010 *Competition Culture* report benchmarked the views of Danish firms about effective competition to firms in Germany and the United Kingdom. The report found that although firms in all three countries accorded less importance to low prices (which likely reflected a reluctance to match price reductions of competitors), both German and UK firms accorded a higher importance to competitive strategies than did Danish firms. Danish firms place lower priority on nearly all the competition parameters investigated by the report, with quality being the notable exception. “Danish firms assess rivalry 7% lower than firms in Germany and 3% lower than firms in the UK.”¹⁷⁵

The Nordic Competition Authorities in its *2020 Vision for Competition Report*, identified four main channels where competition policy may stimulate economic growth: 1) through enforcement; 2) through advocacy to remove distortive regulatory frameworks; 3) by strengthening the competitive culture; and 4) by promoting effective competition in public services through effective public procurement procedures.”¹⁷⁶

In addition to enforcement and sectorial activities, the DCCA has a range of other advocacy and policy making functions which are designed to strengthen competition and improve productivity in Denmark. Those activities are discussed in this Section.

¹⁷⁵ Competition Culture Report, pages 22 to 31. The six factors benchmarked by the report were: ““Six factors - The firms’ ‘expansion focus’, ‘rivalry’, ‘earnings focus’, ‘quality and stability focus’, ‘participation in co-operation’, ‘assessment of co-operation’. The expansion focus of Danish firms is lower than that of the German and British firms.”

¹⁷⁶ Report from the Nordic competition authorities No. 1/2013, “A Vision for Competition - Competition Policy towards 2020”, page 10.

6.1 *Scope of Advocacy Initiatives and Methods*

Competition advocacy and policy studies form a large portion of the DCCA's activities, which is in addition to its work on sectorial market studies. Authority for DCCA policy and advocacy functions is contained in the Competition Act and as a result of its position within the Government. As part of the Ministry for Business and Growth, the DCCA has ministerial functions in addition to its statutory functions which involve outreach and advocacy.

Advocacy and outreach activities are part of the strategic planning efforts of the Director General and the Board. DCCA divisions organised under both the consumer protection and competition enforcement functions are actively involved in producing policy studies and analyses. The DCCA's Divisions for Market Analysis and Economic and Policy and Legislation are primarily responsible for policy studies. They are supported by the communications division and as required, by specific divisions with direct responsibility for the topic that is the focus of the outreach or policy. The DCCA has additional governmental functions that are staffed with the appropriate persons with expertise within the Authority.

The DCCA has approximately ten staff members assigned to advocacy, including staff from the communications unit, which is approximately 11 %age of the total staff time and agency budget devoted to competition enforcement and competition advocacy. Additionally, the Danish Ministry of Business and Growth has two staff members assigned to advocacy.

Ministerial advocacy functions by the DCCA include legislative drafting and offering expert competition policy advice to other Government departments. The DCCA has a principal role in legislation drafting for the Ministry. In addition to the annual review of proposed legislation the DCCA takes an active part in developing competition policy for the Government, including competition policies in Growth Plans. It is actively involved in identifying goals to improve competitiveness and formulating initiatives to meet them. These included a 2012 – Competition policy programme *Strengthened competition to the benefit of Denmark*. The programme was divided into three main areas: a stronger competition act, increasing competition in domestically oriented business and increased competition in the public sector.

In the past year, the DCCA has worked on a model to implement the alternative dispute resolution (ADR) directive in to the Danish Complaint System which will be implemented in 2015. The DCCA plans to initiate information and outreach campaign when the new rules are introduced. It recently conducted a review of the Danish Marketing Act in order to achieve compliance with EU rules and the requirements of consumer protection and efficient markets.

It is also involved in the committee preparing legislation to implement the new European Commission Directive on Damages. As the agency designated to implement the competition provisions of EU Treaty and competition legislation, the DCCA is responsible for the implementation of the Directive on Damages into Danish law. The rules governing damages in competition cases are currently regulated in the Danish Administration of Justice Act, which is the responsibility of the Ministry of Justice. The DCCA and Ministry are in the process of clarifying what needs to be implemented into Danish law. Implementation of the Directive and its incorporation into new Danish rules is expected to be completed early in 2016.

The Director General of the DCCA is regularly appointed to Government legislative committees and special committees whose terms of reference concern competition and productivity. She was a member of both the Productivity Commission and the 2009 Competition Legislation Committee discussed above. She most recently served as the chairperson of the Government's public procurement legislation committee and the committee on children, adolescents and marketing. As a governmental authority the DCCA actively contributes to the public debate by participating in discussion groups, presentations, relevant press releases and other activities.

6.2 *DCCA Clear Effects on the Market Strategy – 2013 to 2016*

In order to better focus its activities, prioritise its work and measure its accomplishments, the DCCA has developed strategies and a framework for its work from 2013 to 2016, which it calls the *Clear Effects on the Market* strategy. It is based on four DCCA strategic goals: to work smarter, have a good dialogue with the outside world, successfully develop its employees and produce clear effects in the markets. The DCCA has identified three factors critical to its success: First, that its work has effect in the markets; second that the DCCA develops a strong public profile with visible results that are *setting the agenda*; and, third that the Minister is satisfied with the DCCA's work. To meet its strategic goals the DCCA identifies and prioritises the key competition and

consumer problems in Denmark, seeks to identify and to prevent competition problems before they occur. To be successful the DCCA recognises that it must have a strong profile with the public in Denmark, be able to actively contribute to policy-making and solve competition problems.

As part of the *Clear Effects* strategy, the DCCA identified those market sectors with the most severe competition problems and is developing strategies for each of them. It has also initiated the two-phase case screening and prioritisation process discussed above. The result has allowed the DCCA to identify those investigations and cases which it believes if pursued will yield direct and positive competitive effects for consumers and in the markets. According to the Director General, it is the policy of the DCCA to investigate and seek sanctions for all severe infringements and other policy considerations are not weighed into the determination about whether to pursue an investigation.

The DCCA reports that the *Clear Effects on the Market* initiative has allowed a more systematic and coherent prioritisation and allocation of resources both within individual divisions and for the organisation as a whole. The number of cases that it prioritised as cases with *direct effects* in which decisions have been taken has increased since it established the new case management procedures. According to the DCCA, in 2011 there were 5 decisions with direct effects, in 2012 there were 7 decisions, but in 2013 there were a total of 10.

6.3 *Advocacy and Outreach*

DCCA outreach and media advocacy activities have increased dramatically in recent years with an aim to both address the finding contained in the *Competition Culture* report and to make law makers and the public aware of the need for stronger competition laws in Denmark. An important part of the DCCA advocacy effort has been to raise awareness of the fact that the Danish Competition Act was not at level with peer countries and that this fact partly explains why the level of competition in Denmark is lower relative to the countries to which Denmark usually compares itself.

Consumer and business outreach takes many forms: large awareness-raising and media efforts to publicise the changes to the Competition Act in 2013, targeted outreach on specific competition issues, outreach and consultation with large business organisations and trade associations about complying with the Competition Act and increasing private sector competitiveness. With the passage of the 2013 amendments, the DCCA initiated

a large multi-media competition awareness raising campaign particularly directed at the increased penalties for infringements and the possibility of imprisonment for hard-core cartel activities and the availability of leniency for self-reporting.¹⁷⁷

The DCCA publishes leaflets and guidance brochures that address certain conditions or concerns in specific markets or sectors and more general leaflets aimed at making public authorities, business organisations and companies aware of illegal practices.¹⁷⁸ A recent example is a guide about how to detect market sharing or price co-ordination activities among competitors.¹⁷⁹ When a guidance brochure is published, the DCCA makes an effort to communicate the brochure. This includes a ‘road show’ where the relevant organisations can book a meeting or presentation of the guidance brochure from the DCCA. Through press releases, and recently also through Twitter, the DCCA is actively engaged in promoting competition and the benefits to consumers from effective markets.

6.4 Growth Plan Initiatives in Specific Industries

Two specific DCCA initiatives were undertaken to support the 2014 Growth Plan. They are discussed below. One involved the construction industry and the other involved the retail trade.

¹⁷⁷ See the ‘stop cartels’ campaign: <http://www.kfst.dk/Konkurrenceforhold/Stopkarteller>.

¹⁷⁸ For instance see, “Does your authority advise illegal behaviour?” (Danish: *Opfordrer din myndighed til ulovlig adfærd?*).

¹⁷⁹ *Profile brochure about DCCA:* <http://en.kfst.dk/~media/KFST/Om%20os/Profilbrochure/Engelsk/2014/KFST%20profilbrochure%202014%20ENG%202.pdf>;
A vision for competition policy towards 2020: <http://en.kfst.dk/Indhold-KFST/Publikationer/Engelsk/2013/20130305-A-Vision-for-Competition--Competition-Policy-towards-2020?tc=B10A07342F5943399256154316415B58>;
Guide (only in Danish) about how to look for market sharing or price co-ordination activities: <http://www.kfst.dk/Indhold-KFST/Publikationer/Dansk/2015/20150318-Bliver-din-kommune-snydt?tc=E538038EB1E04A96B9964BE4C0F85F46>

6.4.1 Construction Industry

The construction industry is a large and important sector of the Danish economy. The 2010 McKinsey Report found that 7% of Danish employment was involved in the construction sector. Productivity was lower than in other service sectors in Denmark and price levels were around 50% higher than for the EU15 (including VAT).¹⁸⁰ The Danish construction sector is characterised by small businesses and that the presence of foreign companies in the market is generally low.¹⁸¹

In 2012, the Danish Productivity Commission Report made specific recommendations for improving productivity in the construction industry sector. It recommended that national standards should be replaced by international standards and procedures for municipal building certificates should be harmonised and streamlined. It also recommended restructuring building permits processes, with faster ‘one-stop-shop’ procedures, mutual recognition of permits between municipalities and revision to eliminate entry barriers and restrictive authorisation schemes for the building trades.¹⁸²

The Danish Growth Package for 2014 included specific initiatives concerning the construction industry with the aim of achieving lower prices to benefit households and companies in Denmark. The *Growth Plan* initiatives included: harmonisation of standards (*i.e.* fire code requirements and materials standards) to meet international standards, encouraging cross-border participation in the construction industry and harmonising municipal building

¹⁸⁰ McKinsey Report, pages 52-54. (“Construction is one of the largest service sectors in Denmark: 7 % of Danish total employment (around 170.000 full time employees) is in construction and 27 % of household expenditure goes to housing and utilities. Productivity of the construction sector is significantly lower than for other service sectors. In addition price levels are significantly higher than in other countries (around 50 % higher than EU15 average incl. VAT). This is driven both by higher labour cost as result of lower productivity and by high material prices.” It found that the cost of building materials, which typically represent 60 % of the overall cost of construction were higher across almost all categories than averages in other Western European countries.”)

¹⁸¹ McKinsey Report, pages 52-54. (Construction prices were higher and productivity lower than comparable countries such as Sweden and Germany.

¹⁸² OECD 2013 Report, page 21.

approval processes and placing them in larger trans-municipal units to make them more efficient. It also recommended an analysis of the rules governing structural engineers and surveyors to remove unnecessary burdens or restrictions that could act as entry barriers or otherwise restrict competition. The DCCA reports that harmonisation of the fire requirements, increased use of international standards, adjustment of planning approvals from local to multi-municipal level and an analysis of structural engineers and surveyors each have been completed.

In addition to Growth Plan initiative, the DCCA has an on-going study of the market for construction materials. The purpose of the study is to provide a basis for increased competition on the market for construction materials while taking account of supporting the quality of construction. The DCCA will analyse the extent of direct trade between the producers of construction materials and operating businesses. It will quantify potential savings of direct trade between producers and operating businesses and provide recommendations to strengthen competition on the market that will outline the consequences and effects for competition, productivity and quality in the sector are estimated for each recommendation.

6.4.2 *Retail Trade*

In Denmark the retail trade sector amounted to DKK 307 billion in 2012. The 2010 McKinsey Report focused on retail trade in the groceries sector and commented on the state of competition. The McKinsey Report found that, “Retail trade is a large service sector dominated by the grocery subsector. 160,000 FTEs are employed in retail (6 % of Danish total employment. Grocery retail is by far the largest sub-sector (25 % of retail GVA) and accounts for 11 % of household spend. . . . Compared to other retail subsectors, Danish grocery retail has gone from the second most productive subsector in 2000 to the least productive in 2006. Denmark also has the highest food and beverage price index in the EU. . . .Zoning regulation inhibits growth of the productive hypermarket segment. The lack of scale relates directly to Denmark’s small hypermarket segment compared to peer countries (7 % by revenue compared to 15 % for peers). Evidence from international best practice shows that larger hypermarkets are up to 50 % more productive than small formats.”¹⁸³

¹⁸³

McKinsey Report, page 48.

The Productivity Commission's 2012 report included recommendations to remove size and other planning and zoning restrictions for large retail outlets in order to boost competition on the market and thus reduce the productivity gap. The proposed measures include a significant relaxation of the rules governing the location of shops, allowing substantially larger stores to be built and promoting competition at municipal level through planning. In 2012 the regulation of shop opening hours was liberalised.

In its 2013 Report on Denmark the EU noted that, "Competition problems in domestic services sectors seem linked to regulation and business practices. The retail sector is often given as an example. Retail trade is highly concentrated in Denmark (the five main retailers account for nearly 90 % of the market) and characterised by a lack of large surface retail establishments, a low proportion of foreign owned companies and high prices. The productivity of the retail sector is lower than the EU average both in terms of levels and growth."¹⁸⁴

On 10 April 2014, the DCCA issued its report on the future of the retail trade. The report made the following recommendations: Recommendations include: 1) relaxing zoning laws; 2) adopting initiatives targeted to smaller suppliers to the market for convenience goods; 3) increasing the extension of e-commerce with convenience goods by "click-and-collect-solutions"; 4) providing easier access to relevant information regarding Danish regulations for foreign retail companies; and, 5) that consideration be given to reforming legislation regarding business leases and rent.¹⁸⁵

The zoning law recommendation was not adopted by the Government. At present shops selling *bulky items* are exempt from the zoning regulations limiting the location and size of retail shops. There are eleven items that are considered *bulky* items including like boats and furniture. A task force presently is examining the possibility of changing the zoning laws so that it will either include more items that will qualify for exemption or by providing individual municipalities with the option of introducing exemptions for specific items they may consider to be *bulky*.

¹⁸⁴ EU Report, page 21.

¹⁸⁵ Appendix B, "*Recent market studies and analyses by the DCCA, recommendations, effects and status.*"

The recommendation regarding e-commerce is currently being undertaken by the Danish Association of Convenience Goods Suppliers (DLF) to support smaller suppliers. Recommendations concerning methods to increase so-called, “*click and collect*” solutions to e-commerce are pending. The Ministry of Business and Growth is currently working on a strategy to support an increase in e-commerce. The recommendation to alter the Business Lease Act is currently be studied by a task force which is considering the effect of relaxing the lease act on both lessors and tenants.

7. Elements of Effectiveness and Recommendations

The DCCA is a well-managed and strategically focused competition authority with a broad statutory remit covering a range of competition and consumer protection functions that are in some regards less comprehensive than peer agencies with similar functions and in others more comprehensive. The DCCA’s ministerial and secretariat functions go beyond those typical of independent competition agencies. Its consumer protection functions, however, do not include decision-making or enforcement of consumer protection legislation. Consequently, the focus of the DCCA is enforcing on prohibitions against anticompetitive infringements, merger review, competition advocacy and market studies to identify competitive problems and promote actions by the Danish Government to address and eliminate those problems.

The effectiveness of every competition agency to considerable extent is based upon the laws and policies that form the foundation and structure of competition policy and enforcement within the jurisdiction. The dual nature of competition law coverage in EU Member States, where enforcement of both domestic laws and Articles 101 and 102 TFEU are within the jurisdiction of the competition agencies, adds an additional set of considerations when evaluating agency effectiveness. Denmark’s jurisprudential tradition that applies criminal standards to the imposition of all fines on natural persons and undertakings and requires crimes to be prosecuted by the public prosecutor, adjudicated by courts, and proved beyond a reasonable doubt has significant implications for effective enforcement of both domestic and EU competition laws in Denmark.

The Danish Competition Act provides a variety of administrative enforcement powers to the DCCA that apply to enforcement of Danish law and direct application of the EU Treaty. The DCCA may issue administrative orders to terminate anticompetitive conduct. (Section 16.). The Competition Council’s authority to issue administrative orders is an important power. It does not, however, have authority to issue orders for structural remedies concerning

abuses of dominance. The DCCA may accept commitments by undertakings and remedies to enjoin conduct without making a referral to the SEIC for imposition of fines. (Section 16.-a). Where the maximum penalty is a fine, the DCCA (with the concurrence of the SEIC) may consent to the administrative notice of a fine indicating that the case will be settled without a trial if the offender admits to being guilty and agrees to pay the fine within a specified period of time (Section 23.b). But where an undertaking does not admit being guilty and agree to accept an administrative fine, a fine may be imposed only after an investigation and a separate determination by the SEIC) that the infringement was done intentionally or with gross negligence and warrants criminal prosecution for the imposition of fines. The SEIC alone makes the determination to exercise its prosecutorial discretion and file a criminal case seeking fines in the district/city criminal court that has personal jurisdiction over the undertaking.

The DCCA and the SEIC appear to be working together effectively to address infringements where fines (or jail time) might be imposed. Denmark's system, while creatively addressing domestic law mandates and applying EU Treaty provisions to Danish cases with a community dimension, has limitations that appear to have direct effects on enforcement.

7.1 *Danish Competition Act Infringements and Fines*

In markets with highly concentrated industries and a legacy of State ownership the capacity to effectively address unilateral anticompetitive conduct may be equally important to eradicating cartel conduct. Abuses of dominance and some (non-RPM) vertical restraints infringements typically require use of economic analysis to establish the object and effect of the anticompetitive conduct. Cases involving complex economic facts, theories and analysis do not lend themselves naturally to determinations of proof to a criminal standard beyond a reasonable doubt. The application of criminal standards of proof to cases involving complex facts and requiring economic interpretations makes enforcement of those cases all the more difficult. This may be exacerbated by the heightened standard of proving the accused acted intentionally or with *gross* negligence, which is required standard of proof for competition law infringements in Denmark. Only one abuse of dominance case has resulted in the imposition of fines. The requirement of proving beyond a reasonable doubt that an undertaking or individual acted intentionally or with *gross* negligence could potentially undermine the imposition of monetary sanctions in most cases involving substantial abuses of dominance. The DCCA's administrative powers

to enjoin abuses of dominance may not be sufficient to send a clear message of deterrence to firms. Private damages actions based solely upon DCCA administrative determinations and injunctions may face greater evidentiary challenges which may diminish their effectiveness.

A second challenge to effective enforcement of competition law infringements in Denmark is the complex dual track appeals system. Civil appeals from administrative infringement determinations by the Competition Council and CAT are taken within the Danish civil court system. The imposition of fines for competition infringements are determined by the Danish criminal courts. As discussed above at paragraph 256, in abuse of dominance cases, determinations of whether there is substantial suspicion to believe an infringement has occurred in many cases may not be finally reached until the Competition Council has issued its determination. The Competition Council's administrative determination and order provides a right of appeal to the Competition Appeals Tribunal (CAT). The Competition Council may at the same time make a referral to the SEIC seeking a determination that intentional and gross negligence involving the infringement warrants criminal prosecution and the imposition of criminal fines by the district court. The SEIC typically will stay its case (and perhaps its investigation) pending a decision by the CAT.

An appeal from the CAT may be made to the Maritime and Commercial Court which reviews the Competition Council decision *de novo*. Thereafter, an appeal may be taken either to the high court, or in cases involving matters of "general public importance," an appeal may be filed directly with the Supreme Court. (Following an appeal to the high court, permission for a further right of appeal to the Supreme Court may be granted by a special committee, under the Administration of Justice Act). Consequently, there is the possibility for four levels of review of an infringement decision by the Competition Council: one administrative and three judicial. Those four levels of review do not address the imposition of fines or set fining levels and are limited solely to reviewing whether there was an infringement of the Competition Act.

If a party does not agree to commitments and fines under Section 23.b of the Competition Act, the Competition Council may not impose administrative fines. The CAT has no authority to impose fines. Prosecutions seeking fines (following an infringement determination by the Competition Council that is affirmed by the CAT) are within the sole jurisdiction and discretion of the SEIC. Prosecutions seeking fines must be filed in the Danish district/city criminal courts and are tried before a judge. Thereafter, appeals may be taken to

the High Courts and Supreme Court. Appeals from Competition Council and CAT infringement decisions (particularly abuse of dominance cases) may be on two parallel but separate tracks within the Danish Court system (one with civil jurisdiction over appeals from infringement determinations and the other with criminal jurisdiction over fines and sanctions).

This complex system which separates judicial determinations (by the Maritime and Commercial Court) and appeals (high courts and/or Supreme Court) concerning determinations of infringements from judicial imposition of fines and prison terms seems to have the potential for different and conflicting determinations involving the same underlying infringements, parties and facts. The potential for conflicting rulings may be increased by the criminal proofs required for finding an infringement and may be particularly problematic in infringement cases where economic analysis is important to a determination of whether an infringement has occurred. The parallel and lengthy process to a final determination concerning infringements and fines may have the unintended consequences that many if not all Competition Act cases are ultimately appealed to the Danish Supreme Court. Such a path to finality, if it becomes common-place, may effectively make competition infringement cases too costly and time consuming and diminish effective enforcement of the Competition Act. Moreover, it has been noted that one case it decided by the DCCA in 2003 is still pending before the Maritime and Commercial Court, the first level of appeal of the CAT infringement decision.

There also may be implications (and unintended consequences) for collective actions for damages by individuals and undertakings who have suffered monetary damages as a result of Competition Act infringements. Such actions will likely be stayed pending final determinations by the court concerning culpability. Effective damages enforcement may be dampened by the lengthy process. These considerations are particularly timely as Denmark undertakes the drafting of legislation to implement the EU Directive on Damages. The DCCA acknowledges that effective private enforcement and implementation of the EU Directive on Damages face potential problems because of the complex dual track judicial scheme and the lengthy process to achieving a final outcome in Competition Act cases.

The DCCA has advocated for greater authority to impose administrative fines, beyond the authority that presently exists under Section 23.b of the Competition Act, where the DCCA and a party may agree to imposition of administrative fines. The DCCA's suggestion that it be authorized to impose

administrative fines has been raised during other legislative reviews and rejected quite firmly by the Government and other Ministries based on the long-standing Danish legal tradition that criminal fines are imposed solely by the Courts. The DCCA has also advocated the authority to prosecute cases directly before the Courts, which has not been favourably endorsed by the Minister of Justice or the Public Prosecutor. The effective enforcement of competition laws in Denmark is placed in sharp relief before the backdrop of deeply entrenched legal traditions (which are not codified in the Danish Constitution or statutes) concerning criminal standards of proof and the necessity for fines to be imposed by the Danish criminal courts.

Recommendation:

It is recommended that consideration be given to whether the present framework and procedures adequately provide for full and effective application and enforcement of the Danish Competition Act. It is recommended that consideration be given to potential changes to the Competition Act to address the issues outlined above. As part of the review it is recommended that:

- Overall consideration be given to the complexity of the institutional setup and procedural system and whether it allows for effective enforcement of all of the provisions of the Competition Act and the EU Treaty within Denmark.
- Consideration be given to amendments to the law that would provide more streamlined procedures for adjudicating culpability for infringements and imposing sanctions in Danish Competition Act and EU Treaty cases in Denmark.
- Consideration be given to whether there are examples of exceptions to the general prohibitions against administrative fines in Denmark that might be applied to the Competition Act as a whole or to a subset of prohibitions.
- Consideration be given to whether additional powers, such as the power to impose structural remedies should be given to the Competition Council.
- Consideration be given to designating a single Danish High court, (having jurisdiction over both criminal and civil appeals) with jurisdiction over all appeals from Competition Act determinations by the CAT and the district/city criminal courts.
- Consideration be given to designating a judge in each district court and judges within the high courts with responsibility for cases involving the Competition Act and providing them with special training and expertise in handling competition law cases and applying criminal fines and damages.

7.2 *Sanctions and Sentences for Cartel Infringements Should Reflect Their Status as the Most Serious Types of Anticompetitive Conduct*

Prior to 2013 cartel infringements were punished by fines that were considerably lower than EU and peer fining levels. Fines were increased tenfold in 2013 and the possibility of incarceration for hard-core cartel offenses was added to the law. Fining levels (which apply to horizontal, vertical and abuse of dominance infringements) are imposed by the courts taking into consideration the turnover of the undertaking, the duration of the infringement, the severity of the infringement and other mitigating factors such as co-operation with the SEIC.

The Committee on Legislative Changes to the Competition Act highlighted and endorsed international experience that hard-core cartel offenses are serious infringements that have costly consequences for consumers, be they individuals, undertakings or governments that purchase cartelised goods and services. These blatantly anticompetitive agreements that produce no pro-competitive consumer benefits are singled out by jurisdictions worldwide for heightened sanctions. There is international consensus that such offenses are the most serious forms of anticompetitive agreements and conduct.

Sanctions and sentences for cartel infringements should reflect their status as the most serious forms of anticompetitive conduct. With the 2013 changes to the law and the possibility of jail time for individual cartelists there is now no question that cartel infringements are the most serious types of offenses under the Danish Competition Act. They should be considered as such by courts when they impose monetary sanctions and prison terms.

Fines and jail sentence will be imposed by the district courts throughout Denmark, which are courts of general jurisdiction having no special expertise or experience with competition law infringements and international best practices concerning cartels. In light of wide judicial discretion and to remove of all doubt about the status of cartel offenses when applying the sentencing factors to arrive at fine levels or a determination concerning incarceration, additional clarifications and sentencing guidance may be useful. There should be no question that cartel infringements are the most serious types of anticompetitive conduct.

Recommendation:

It is recommended that consideration be given to whether additional statutory clarifications and judicial guidance are necessary and would be useful concerning sanctions and sentences for cartel offenses (and all competition law infringements) so that standards used by the district courts reflect the seriousness of cartel offenses and use uniform considerations when arriving at fine levels and jail sentences.

7.3 *Cartel Referrals to the SEIC for Investigation Based Upon Substantial Suspicion*

While it would not be at all accurate to suggest that hard-core cartel infringements were not taken seriously in Denmark prior to 2013, there are anecdotal indications that the 2013 amendments have increased both awareness of hard-core cartels and the incentives of those charged with cartel infringements to more vigorously exercise their rights of defence against them. As a consequence there is potential for increased challenges to procedures used by the DCCA prior to making a determination of a “substantial suspicion” of an infringement and a referral of a case to the SEIC. Some jurisdictions that have adopted criminal standards for cartel infringements requiring prosecution by national prosecutors have found it beneficial to provide guidance and a period of consultation and comment concerning the standards that will be used for such referrals.

In Denmark the procedural standards used by the DCCA to determine there is a “substantial suspicion” of an infringement and the considerations it weighs before making a criminal referral to the SEIC are not new practices. Inasmuch as the increased fines and possibility of jail time has changed the stakes for individuals and increased the potential effects on both undertakings and individuals, it would be prudent for the DCCA and SEIC to seriously should consider providing additional guidance concerning the operation of their dual jurisdiction and how it will be exercised in hard-core cartel cases. Particular attention might be given to the rights of individuals against self-incrimination and how those rights are safe-guarded at all stages of DCCA and SEIC investigations. It would be good practice to engage in a process of clarification and comment by stakeholders.

Recommendation:

It is recommended that the DCCA and SEIC consider providing additional guidance and explanations concerning its investigations involving allegations of hard-core cartels, the standards and procedures that will be used to determine if there is “substantial suspicion” of an infringement, the referral procedures used by the DCCA and SEIC and the rights and obligations of undertakings and individuals in competition law administrative and criminal investigations.

7.4 *Statutory Leniency*

In 2007 Denmark adopted a statutory leniency programme. [Section 23a.-(1)]. It is administered by the DCCA. Grants of leniency are made by the SEIC. The programme does not include the possibility for a leniency applicant to obtain a marker while it is in the process of perfecting its leniency application and the DCCA and SEIC are determining whether it qualifies for leniency. The question of a marker system was considered at the time the leniency programme was adopted and a determination was made in favour of requiring applicants to have fully completed applications. Consequently the Danish leniency programmes does not include markers.

The first leniency application was reported by the DCCA in March 2014. International experience and best practices suggest that marker systems are useful tools to encourage the use of leniency and provide potential leniency applicants with increased certainty concerning their application or place in line for a grant of leniency. International practice also shows that jurisdictions with strong cartel enforcement are typically jurisdictions where leniency applications are common-place and leniency is widely used. Based upon more recent experience with leniency applications, the DCCA and SEIC may find it useful to revisit the question of whether a marker system would be appropriate and what requirements might be included.

Recommendation:

It is recommended that the DCCA and SEIC consider whether, based upon recent experience with leniency applications, instituting a marker system as part of statutory leniency contained in the Danish Competition Act would make the programme more effective and encourage leniency applications.

7.5 *System of Formal Notifications and Informal Guidance*

Denmark (uniquely in the European Union) retains a system of formal notifications and non-infringement determinations for matters concerning agreements (both horizontal and vertical) under Section 6 and abuses of dominance under section 11 of the Competition Act. The notification system provides the ability to obtain a formal determination by the DCCA that a notified agreement meets the four criteria for exception to application of Section 6. It also allows for notification of an agreement seeking a determination by the Competition Council that the notified activities fall “outside the scope of the prohibitions” set out in Section 6 (horizontal and vertical agreements) and Section 11 (abuses of dominance) and that there are no grounds for issuing an infringement order. (Section 9 and Section 11.). The legacy system of notifications is endorsed by Danish business and attempts abolish the statutory notification scheme have met staunch opposition. Some organizations have advocated for expanding the system of notifications. As a practical matter relatively few notifications are filed annually with the DCCA, but they do divert DCCA resources that could be devoted to other enforcement activities. As addressed in the body of the report (Section 3.4) questions may be raised about whether the system of notifications is creating confusion about what is prohibited. The system of formal notifications is in addition to the DCCA’s robust system of informal guidance concerning prohibitions and infringements under the Competition Act.

As a result of recommendations from the Committee on Legislative Changes to the Competition Act, the DCCA expanded its already substantial informal consultation and guidance practices. The Authority is credited with having robust and effective consultation practices that permit easy access to DCCA staff and managers and provide ample opportunities for informal consultation. In light of the DCCA’s increased informal consultation and guidance and more than a decade of experience with Regulation (EC)

No. 1/2003, the justifications and utility of maintaining a system of formal notifications is worthy of being reconsidered.

Recommendation:

It is recommended that:

- Consideration be given to whether it is desirable to abolish the options for formal notifications and negative determinations contained in the Competition Act to bring the Act in line with practices by EU Commission and other EU Member States.
- Consideration also be given to tailoring the Danish system of informal guidance to more closely align it with the EU Commission notice on informal guidance (which limits that guidance to unique questions involving interpretation of novel issues).

7.6 *Exemption of the Competition Act to Matters That Are the “Direct or Necessary” Consequence of Public Regulation.*

Denmark is also unusual in having a specific provision in its laws that permits individual Ministers (and local authorities) to make determinations that the Competition Act shall not apply to specific matters that are the within the coverage of Act where anticompetitive practices are the “direct or necessary consequence of public regulation.” [Section 2.-(1) and (3)]. As discussed above, Section 2 has been applied both to recommendations contained in market and sector studies (Section 15.d-) and in infringement cases involving allegations of abuses of dominance and cartel infringements where the Competition Council would otherwise have had the authority to order an infringement be terminated and seek appropriate remedies.

Section 2 does not delegate determinations concerning whether the activity is a “direct and necessary consequence of public regulation” to the Danish courts. Rather, it reserves the determination to the Minister under whose jurisdiction the regulation occurs. Moreover, the Minister of Business and Growth is accorded no authority beyond making a request to the relevant Minister its determination. The result is that on an *ad hoc* basis, and without review by a separate branch of Government, potential exists for individual, *ad hoc* exemptions to the Competition Act. Section 2 appears to provide ineffective recourse for the

Minister and Authority responsible for enforcing the Act from determinations by other Ministers of Government. Section 2 creates the substantial risk of industry-specific exemptions to the Danish competition law for which there is no recourse or higher-level review. Expansion of industry-specific exemptions without review by the judiciary or public could have the effect of undermining the principles of cohesion and respect for the rule of law that is highly valued in Denmark.

Among the issues meriting serious consideration is whether a determination by a Minister that an activity is a “direct and necessary consequence of public regulation” automatically must divest the DCCA’s authority to apply the Competition Act to the activities that are the subject to the regulation. Also worthy of consideration is the possibility of permitting the DCCA and Competition Council to take a provisional decision that an activity which has been designated by the responsible Minister as a direct and necessary consequence of public regulation infringes the Competition Act. A stay of the DCCA’s provisional decision and an immediate appeal might be permitted to a designated Court with the appropriate level of authority to adjudicate the issues involved

The DCCA is in the process of doing an analysis of competitive neutrality and activities of governmental entities within Denmark (See above, Section 5). Section 2 of the Competition Act appears to be substantially broader than Article 106 TFEU and to operate differently than provisions falling within what is sometimes called the *political action or State action doctrine*. While there arguably may be circumscribed scope for applying Section 2 to recommendations made during the course of market and sectorial inquiries pursuant to Section 15d, the application of Section 2 to allow Ministers to override and have the final say concerning activities that would otherwise infringe Section 6 and 11 of the Competition Act appears to be substantially more problematic for effective enforcement of the law.

Recommendation:

It is recommended that an evaluation be made of the scope and content of Section 2 of the Competition Act: whether its provisions are warranted and if they are being appropriately applied. In that regard it is recommended that:

- Consideration be given to amending Section 2 to include competition considerations that would provide clear standards for evaluating: 1) whether activities are a “direct and necessary consequence of public regulation”; 2) if so, whether they warrant overriding prohibitions in the Competition Act; and 3) setting out an analytical framework and standards to justify applying Section 2 to activities that otherwise would constitute anticompetitive infringements prohibited by the Competition Act.

- Consideration be given to whether it is appropriate for the Minister with responsibility for the regulated activities to be the sole decision maker concerning whether the activities should be exempted from application of the Competition Act.
- Consideration be given to requiring written justifications be supplied to the DCCA by the relevant Minister that an activity is a “direct and necessary consequence of public regulation” according to the standards outlined above and setting a time frame for such justifications which if not timely-supplied would constitute a waiver from the application of Section 2.
- Consideration be given to providing the DCCA with greater role and authority in the determination of whether an activity is a “direct or necessary consequence of a regulation” which might include *locus standi* to challenge the determination of the relevant Minister before the Competition Appeals Tribunal or a designated court with the appropriate level of authority.

7.7 *Recommendations Contained in Market Studies and Analysis*

The DCCA expends significant resources on an annual basis conducting market studies to identify competitive issues and evaluating proposed legislation for provisions that might infringe the Competition Act, distort competitive markets or have other anti-competitive consequences. Adoption of DCCA recommendations is part of the political considerations of the Parliament and Ministerial interactions within the Danish Government.

Recommendations contained in market studies and analyses range from aspirational suggestions to improve competition and the functions of markets to advice concerning potentially serious anticompetitive practices that may abridge the Competition Act. Review of DCCA recommendations is undertaken collegially within the Government and there is no requirement that recommendations followed or that recommendations that are not adopted be reconsidered as part of the annual legislative review or at any time in the future. As noted above, there is strong sentiment by the DCCA that review of its recommendation not be undertaken as part of its annual legislative review. The DCCA also questions whether an annual reporting on the state of its market study recommendations may be counterproductive. On the other hand, the DCCA spends significant resources on market studies and other analyses based on its own agenda and requests by its ministry and other government ministries.

It is important that DCCA studies have demonstrable benefits for competitiveness and productivity in Denmark.

The 1 July 2015 amendments to the Competition Act will give the Competition Council more independence from the Government and provide it with authority to order market sector studies and analysis and make recommendations. As part of the implementing procedures and regulations, consideration might be given to whether it would be beneficial to require annual review of the status of recommendations contained in DCCA market studies and that consideration of those recommendations is mandated on an annual basis as part of the DCCA's legislative review of proposed legislation.

Recommendation:

It is recommended that consideration be given to publishing an annual update of the status of DCCA recommendations contained in market studies to inform the public about the process and effect of DCCA recommendations and promote effective competition.

APPENDIX A. DANISH CONSUMER OMBUDSMAN - STATISTICS

The table below presents the number of investigations related to unfair competition. The figures in the table are based on statistics received from the Consumer Ombudsman – the DCCA serves as secretariat for the Consumer Ombudsman. The Consumer Ombudsman is the Danish enforcement authority of the Marketing Practices Act, which is the Danish implementation of Directive 2005/29/EC on Unfair Commercial Practices. The table include a few cases which fall outside the scope of the directive (e.g. taste and decency). However, these cases have no statistical significance.

Overview of investigations in relation to "unfair competition"

	2010	2011	2012	2013	2014
Investigations, cf. the Marketing Practices Act	826	1230	1535	2257	3256
Advance clearance of marketing practice	180	154	152	49	130
Guidance for involved parties	3180	2642	3021	0	0
Number of cases that are not opened	630	865	968	2714	1881
Cases referred to another authority	0	0	0	876	462
Investigations on financial matters	54	100	106	191	505
<i>Total number of investigations</i>	4870	4991	5782	6087	6234

Civil cases in court	2010	2011	2012	2013	2014
Judgments	0	1	5	3	2
Writs	0	38	1	2	2
Ongoing cases (end of year)	8	52	48	25	5
<i>Total number of civil cases</i>	8	91	54	30	9

Criminal cases in court	2010	2011	2012	2013	2014
Judgments, including administrative notices of fines	25	24	36	20	26
Dismissal of claim	1	1	1	0	0
Others	1	0	0	2	0
Referrals to the police	28	10	28	20	31
Ongoing cases (end of year)	44	16	30	22	28
<i>Total number of criminal cases</i>	99	51	95	64	85

Note: The registration practice with respect to investigations by the Consumer Ombudsman has changed. Consequently, information on investigations within some of the categories may only be available in certain years.

Data in the table are from the 2014-version from the annual report 2014 from the Danish Consumer Ombudsman. The report is available (Danish only) from: <http://www.forbrugerombudsmanden.dk/Om-Forbrugerombudsmanden/rapporterpublikationer/Aarsberetning-2014>.

APPENDIX B. ON-GOING STUDIES AND ANALYSES BY THE DCCA

Title	Danish title	Public reference/ origin	Summary of competitive issues
Public activities on commercial markets	Offentlige aktiviteter på kommercielle markeder	Press release	<p>The purpose of the study is to ensure competitive neutrality between government entities and private firms.</p> <p>The DCCA expect the analysis to include the following:</p> <p>The analysis will examine the rules that ensure competition neutrality in Denmark. This will partly be a number of general rules, such as the Competition Act, the EU Treaty Articles 107 and 108 on state aid and a number of sector specific rules which can affect the area. Furthermore the analysis will examine rules that ensure competition neutrality in foreign countries.</p> <p>The analysis will examine existing work regarding competition neutrality both in Denmark and in other countries.</p> <p>Based on the information received from the stakeholders, specific areas and markets will be analyzed in more detail. This could include analyzing the market structure, public funding, pricing by public entities etc.</p>
Study on the market for construction materials	Undersøgelse af markedet for byggematerialer	Building Policy Strategy 2014	<p>The purpose of the study is to provide a basis for increased competition on the market for construction materials while taking account of supporting the quality of construction.</p>

Title	Danish title	Public reference/ origin	Summary of competitive issues
			<p>The DCCA expect the analysis to include the following:</p> <p>The extent of direct trade between the producers of construction materials and operating businesses</p> <p>A quantification of the potential savings of direct trade between producers and operating businesses</p> <p>Recommendations that will strengthen competition on the market. The consequences and effects for competition, productivity and quality in the sector are estimated for each recommendation.</p>
Study on competition and regulation in the legal industry	Analyse af konkurrencen og reguleringen i advokatbranchen	Growth plan 2014	<p>The purpose of the study is to provide the analytical basis for a modernisation of the regulation of the law industry focusing on increasing competition.</p> <p>The DCCA expect the analysis to include the following:</p> <p>The consequences of the existing regulation</p> <p>Proposals for adjusting existing regulation</p> <p>Recommendations that will strengthen competition in the industry. The consequences and effects for competition, productivity and quality in the sector are estimated for each recommendation.</p>
Study on the Business Lease Act	Analyse af erhvervslejeloven	Originated from the study ‘the future of retail’	<p>Originating from ‘the future of retail’-study the purpose of this analysis is to examine the possibilities of adjusting the provisions in the Business Lease Act regarding notice of business leases and time limitations in contracts taking account of the rights of the tenants.</p>

Title	Danish title	Public reference/ origin	Summary of competitive issues
			<p>The DCCA expect the analysis to include the following:</p> <p>Proposals for specific adjustments of existing regulation concerning notice of business leases and time limitations in contracts</p> <p>Estimate the consequences and effects for competition and productivity focusing on the tenants, letter and consumer welfare</p>
<p>The legislation of the Public Tenders Act concerning public purchases of construction and planning services</p>	<p>Tilbudslovens regler vedr. indkøb af bygge- og anlægsydelse</p>	<p>Building Policy Strategy 2014</p>	<p>The purpose of the analysis is to identify if and how better competition for public construction assignments can be reached through an adjustment of the Public Tenders Act.</p> <p>The DCCA expect the analysis to include the following:</p> <p>An examination of the current provisions in the Public Tenders Act and their effect on competition.</p> <p>Proposals for adjusting existing regulation</p> <p>Recommendations that will strengthen competition in the industry. The consequences and effects for competition, productivity and quality in the sector are estimated for each recommendation.</p>
<p>Study on the economic benefits of Public Private Partnerships (PPP)</p>	<p>Analyse af økonomisk fordelagtighed ved OPP</p>	<p>Building Policy Strategy 2014</p>	<p>The purpose of the analysis is to strengthen the knowledge base on when public construction and planning projects are especially suitable or unsuitable as a public private partnership (PPP) from a Life Cycle Costing (LCC) perspective.</p> <p>The DCCA expect the analysis to include the following:</p>

Title	Danish title	Public reference/ origin	Summary of competitive issues
			<p><i>Financing</i></p> <p>What are the pros and cons of respectively public and private financing and under which circumstances can the two different sources of financing contribute to advantageous LCC?</p> <p><i>Risk sharing</i></p> <p>What is the significance of risk and where should it be placed to secure advantageous LCC?</p> <p><i>Project size and distribution between planning and operation</i></p> <p>What significance does the size of contract sum total and the distribution of this between planning and operation have for the suitability of the PPP-model</p> <p><i>Technology, complexity and innovation</i></p> <p>What significance does technology, complexity and innovation in projects have for PPP-projects advantageous LCC</p> <p><i>Competition conditions</i></p> <p>What influence does the contracting entity have on the competition achieved for the project through the structuring of the specific project and what significance does the competitive situation have regards the PPP being economically advantageous?</p>

Recent market studies and analyses by the DCCA, recommendations, effects and status

Table 5. Recent market studies and analyses with recommendations 2010-2014

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
Study on centralised spending	Centraliserede offentlige indkøb	16 Apr. 2015	DKK 13.7 billion. (2014)	<p>1) Ensure that suppliers will generate a certain revenue from the contract under the agreement</p> <p>2) Create standardisation at the level which creates volume-based economies of scale and makes it attractive to tender for a contract and at the same time with an assortment width and volume which do not prevent enterprises from submitting tenders (on their own). This may lead to the use of lots.</p>	Increase the probability that central framework agreements contribute to effective public procurement and support well-functioning markets	Pending

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
Study on the market for short term credit	Markedet for kviklån	20 May 2015	DKK 430 million. (2014)	<p>And make standardisation across a group of end users with uniform demands, e.g. a sector-specific or an institution-specific group of end users.</p> <p>3) Use mini-competitions with prudence and make it easier for purchasers to purchase through mini-competitions.</p> <p>The purpose of the study is to provide an overview of the market including the supply and demand side.</p> <p>The study includes an analysis of the competitive conditions on the market for short term credit.</p>	Recommendations will increase consumer welfare and secure a well-functioning market for short term credit	To be implemented

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
				The study recommends a 48-hour cool-off period after which consumers have to confirm the loan again before receiving the loan.		
The future of retail	Fremtidens detailhandel	10 Apr. 2014	DKK 307 billion. (2012)	Recommendations are 1) relaxation of the zoning law, 2) support initiatives for smaller suppliers to the market for convenience goods, 3) increase the extension of e-commerce with convenience goods by “click-and-collect-solutions”, 4) ease the access to all relevant information regarding regulations for foreign retail companies, 5) consider relaxation of legislation regarding the Business Lease Act	Increasing competition and productivity in the retail sector	1) Shops selling <i>bulky items</i> are exempt from the regulation of location and size in the zoning law. Today, the zoning law contains an exhaustive list of eleven items that are considered to be bulky, i.e. boats and furniture. There is currently a task force examining the possibility of changing the zoning law, e.g. by adding more items to the list or by giving municipalities the option to introduce exemptions to specific items so that they may be considered bulky.

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
						<p>2) The Danish Association of Convenience Goods Suppliers (DLF) is currently developing a web platform supporting smaller suppliers. The platform is spending implementation.</p> <p>3) Pending</p> <p>4) The Ministry of Business and Growth is currently working out a strategy on how to increase e-commerce.</p> <p>5) There is currently a task force analysing the effect of relaxing the provisions regarding notice of business leases and time limitations in contracts taking account of the rights of the tenants.</p>

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
Analysis regarding 21 'green' labels	Analyse af 21 'grønne' mærker	19 Dec. 2013	N/A	<p>Four proposals:</p> <p>1) Adequate information regarding label types/owners</p> <p>2) Allocate resources for awareness and information regarding labels</p> <p>3) Problems with overlap should be discussed on a European level</p> <p>4) An overview and explanation for each label should be available in stores</p>	<p>The four proposals are expected to create more transparency and trustworthiness as well as more knowledge for each of the different brands.</p>	<p>1) Implemented</p> <p>2) Implemented</p> <p>3) Implemented</p> <p>4) Pending</p>
The markets regarding private chiropractors and physiotherapists	Markederne for private kiropraktorer og fysioterapeuter	5 Dec. 013	DKK 5.4 billion.	<p>More appropriate regulation which in a broader perspective focuses more on the goals of health policies and control of the public budgets.</p>	<p>Extra treatments for around 1 mil patients and yearly consumer and public savings for respectively</p>	<p>Minor recommendations form a part of the new settlement for physiotherapists</p> <p>Pending.</p>

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
Enhanced competitive conditions regarding extraction of raw materials at sea	Forbedrede konkurrencevilkår ved råstofindvinding på havet	27 Sep. 2013	The market is characterised by a few large players – at the moment 15	Among other things the board recommends: 1) The period of exclusivity is extended, 2) The extractors are to report a specific field/area instead of a sea area, 3) The extractors are obliged to bid on the specific areas in which they have applied,	DKK 41 and 8 million. in the market for chiropractors as well DKK 72 million in yearly savings for consumers and DKK 176 million in yearly savings for the public in the market for physiotherapists	Nov. 2014 a proposed law was introduced regarding the law on raw materials. The proposal includes the following: The period of exclusivity is proposed extended to 10 years The extractors are to report a specific field/area instead of a sea area

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
				4) The production remunerations are reduced from 50 to 30 %	2) by letting small and medium sized companies improve their options to participate in the auction	The extractors are obliged to bid on the specific areas in which they have applied The production remunerations are proposed reduced from 50 to 30 %.
Freight to the consumers	Fragt til forbrugerne	27 Sep. 2013	51 mil Danish transactions with physical goods on the internet	1) Restrictions on the universal service obligation 2) Refrain to pre check the boxes regarding delivery services	1) Increased consumer welfare -> a small amount of DKK 221 million which comes from Post Danmarks VAT exemption. 2) More active consumers	The negotiations concerning the postal agreement 2017-2019 will start in 2015. The DCCA will deliver a presentation concerning competitive Implemented

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The participation of SME's in public procurement	Små- og mellemstore virksomheders deltagelse i udbud	27 May 2013	SME's participate in 63 pct. Of the public procurements in the analysis	1) Guidance paper on dialog for businesses, 2) Promote e-commerce, 3) Feedback function implemented on udbud.dk, 4) Addition to udbud.dk	The recommendations will create better framework conditions for SME's participating in public procurement and thus make it easier to compete for public assignments.	The guidance paper was published November 2013 The analysis on e-commerce was published January 2014 The feedback function was implemented January 2014 The new SME-function was implemented January 2014
Study on the competition in the banking sector regarding private consumers	Konkurrencen på bankmarkedet for privatkunde	10 Apr. 2013	Loans for DKK 870 million. in the detail banking market (2011)	1) Customers should compare and negotiate with the banks much more 2) Initiatives that make it easier to be an active consumer	The recommendations are expected to help on the asymmetric information in the banking sector by increasing the transparency and by making it easier to choose another bank.	The DCCA published a campaign about comparing suppliers at the same time as the publication of the study. The campaign aired in the electrified railways of greater Copenhagen Pending

Title	Danish title	Published	Market size	The boards recommendations	Expected effects	Status of recommendations
Switching of mobile service and insurance provider by consumers	Forbrugernes skift af mobil- og forsikringsudbydere	22 Nov. 2012	DKK 17.5 billion (mobile market) and DKK 4.1billion (Insurance market)	<p>3) Develop a periodic and standardised overview with the most important information about customer's business in the bank</p> <p>4) To clear the role of the financial advisor for the customers, 5) Send out periodical overviews to costumers containing central information</p>	<p>The effect depends whether both the consumers and the banks are willing to take the necessary responsibility.</p>	<p>The DCCA published a theme focusing on the banking sector on forbrug.dk which is a website providing consumers with information and guidance on a range of complex markets.</p> <p>Implemented as a part of the 'good practice'-rules</p> <p>Directive was approved in 2014 and will be implemented in 2016</p>
				<p>Recommendations in the mobile sector: 1) The sector makes it easier for consumers to get access to information about their own spending on mobile services, 2) The sector clarifies consumers actually use of data,</p>	<p>The expected effects in the mobile and insurance markets are increased transparency and to make it easier for consumers to realise their own needs.</p>	<p>Pending</p> <p>Pending</p> <p>Pending</p> <p>Implemented in 2014</p> <p>Pending</p>

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Consumer conditions in the sector for real estate	Forbruger forhold på markedet for ejendomsmægling	26 Oct. 2012	DKK 82 billion (2010)	<p>It is recommended that:</p> <p>1) Standard documents are easier to understand,</p> <p>2) The law is revised - among other regarding the real estate agents duty of disclosure</p>	The recommendations are expected to increase the transparency in the real estate market and in general to make the conditions for consumers better.	The DCCA published a theme focusing on the real estate sector on forbrug.dk which is a website providing consumers with information and guidance on a range of complex markets.

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Price comparison on the internet	Prissammenligninger på internettet	11 Oct. 2012	Not relevant	It is recommended that relevant information for consumers are available in a clear and accessible way on sites of price comparison, and that the sites aim at being transparent as possible, when comparing products.	The expected effects are that active consumers will get a better overview in a specific market and in the end save money.	<p>The law was revised in May 2014 and implemented from 2015.</p> <p>The changes include clarification of the role of the real estate agent, more standardised information to prevent information overload by consumers.</p> <p>The DCCA has published a guidance paper on 'information regarding activities in industry associations' which handles the issue on price comparison websites (PCW).</p>

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				For complex markets it is recommended, that all relevant costs beside the price are included as well as periods of commitment.		Furthermore the DCCA is currently keeping up with an evaluation on PCW's in the telecommunication industry. The evaluation is expected to be completed in 2015.
The market for additional insurances	Markedet for tillægssikringer	Jun. 28 2012	DKK 230 million (2010)	It is recommended to take further steps to ensure compliance with rules. The consumer should receive the compulsory material before the sale is completed.	Expected effects are more transparency for the consumer.	The Danish Chamber of Commerce has committed to informing their members on their commitment to informing consumers of additional insurances.
The authorisation of executors of estate	Autorisationsordningen for bobestyrere	6 Jun. 2012	Approx. DKK 190 million.	It is recommended that 1) the limitations of numbers of administrators are removed, 2) authorisations are nationwide,	The recommendations can be executed within the current law and will improve the competitive conditions	The recommendation was a part of the competitive policy initiatives in 2012 but was rejected by the Danish Court Authority

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The detail market for electricity	Detailmarkedet for elektricitet	15 Dec. 2011	DKK 63 billion (2011)	<p>Among other things recommendations are</p> <p>1) installation of meters that can be remotely monitored at all smaller consumers,</p>	<p>Effects will be more competition and a greater realisation of the economic potential, if all recommendations are implemented.</p>	<p>SMART meters are part of the Smart Grid-strategy from Apr. 2013 and are to be installed in Danish households by 2020</p>
				<p>3) inheritors get e.g. 14 days to choose an administrator, 4) estates are assigned to executors by specific assessment, 5) if the authorised administrators can consist of other professions than lawyers.</p>	<p>in the market by responding to the restraints of competition as mentioned in the analysis.</p>	<p>The recommendation was rejected by the Ministry of Justice</p> <p>The initiative was implemented Dec. 2013</p> <p>The recommendation was rejected by the Ministry of Justice and the Danish Court Authority</p> <p>The recommendation was rejected by the Ministry of Justice and the Danish Court Authority</p>

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				<p>2) template for settlement is implemented in 2015,</p> <p>3) grid companies are converted to gross suppliers of transport capacity, 4) establishment of a temporary price regulation which will be phased out, when the competition has improved.</p>	The effects of the recommendations are interconnected.	<p>The Danish Parliament has decided to implement the template for settlement in 2015</p> <p>The Danish Parliament has decided to implement a functional separation between distribution and retail sales within the electricity sector in 2016</p> <p>The Danish Parliament has decided to abolish price regulation in 2016</p>
E-commerce across nations in EU	Tværnational e-handel i EU	Nov. 22 2011	Not relevant	<p>Recommendations are</p> <p>1) results of the analysis regarding barriers are passed on to the Commission as well as participating in the further discussion, 2) work for initiatives that in particular focus on the linguistic differences among countries.</p>	Hopefully the initiatives will lead to optimal conditions for online trading for consumers and that they will use the new system for resolving disputes.	<p>Implemented</p> <p>Implemented</p>

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Distribution of TV channels	Distribution af tv-kanaler	3 Nov. 2011	DKK 11.5 billion (2011) → total consumer costs for receiving channels	Recommendations are 1) new legislations in the area are made, 2) establishment of a committee, which will prepare a proposal for legislation to enable the possibility for choosing single TV channels. 3) the committee will work for more detailed principles.	The effects of new legislation will be tightened competition between distributors of TV channels and between TV channels. Also the consumers will experience a higher degree of security and have more options.	The recommendations were a part of the competitive policy initiatives in 2012 focusing on the possibility of choosing single TV channels. Furthermore a range of TV-suppliers have incorporated free choice for consumers e.g. Boxer. Finally, the DCCA is currently carrying out a study on liberty of choice on the TV-market.
The market for convenience goods	Dagligvaremarkedet	8 Jun. 2011	DKK 105 billion (2010)	Relaxation of the zoning law	N/A	Relaxation of the zoning law was recommended again in 'the future of retail in 2014 and a task force is currently examining the possibility of changing this setup,

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						e.g. by adding more items to the list or by giving municipalities the option to introduce exemptions to specific items so that they may be considered bulky.
Regulation of the pharmacy sector	Regulering af apotekssektoren	23 Feb. 2010	DKK 12 billion (2008)	Recommendations are fewer barriers to enter the market and to end the revenue based equalisation.	The effects are to strengthen the competition in services and development of distribution.	Initially the recommendations didn't receive political support. However, a revised Danish Pharmacy Act was passed in 2014.
The competition in the detail market for electricity	Konkurrencen på detailmarkedet for el	22 Feb. 2010	N/A	The study recommends an analysis on consumer conditions on the market with the view to identify and reduce barriers	Fewer barriers to enter the market for new no-integrated electricity companies.	A new study on the detail market for electricity was initiated and completed in 2011