Denmark

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Mandy Chilcott (an Australian-qualified lawyer within the Competition Group) coordinated and organized the project, and rewrote parts of the text. Without her assistance the book would not have been possible.

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List of Abbreviations

Abbreviation	Full name
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
DKK	Danish Kroner
EUR	Euro
SIEC	Significant Impediment to Effective Competition
HHI	Herfindahl-Hirschman Index
ECMR	European Commission Merger Regulation
ECN	European Competition Network
TFEU	The Treaty on the Functioning of the European Union

English	Danish
The Danish Competition Authority	*Konkurrencestyrelsen*
The Danish Competition Council	*Konkurrencerådet*
The Danish Competition Appeals Tribunal	*Konkurrenceankenævnet*
The Danish Competition Act	*Konkurrenceloven*
The Danish competition authorities	*Konkurrencemyndighederne*
The Public Prosecutor for Serious Economic Crime	*Statsadvokaten for Særlig Økonomisk Kriminalitet/SØK*
The Danish Parliament	*Folketinget*
The Danish Constitution	*Grundloven*
The Danish Supreme Court	*Højesteret*
The Danish Appeals Permission Board	*Procesbevillingsnævnet*
The Eastern and Western High Courts	*Vestre Landsret and Østre Landsret*
Maritime and Commercial Court	*Sø- og Handelsretten*
The district (or civil) courts	*Byretterne*
Complaint	*Klage*
Investigation	*Undersøgelse*
Merger/the merger between	*Fusion/fusionen mellem*
Law/Act	*Lov*
Executive order	*Bekendtgørelse/Bkg.*

List of Abbreviations

General Introduction[1]

1. In this section, figures and statistics are sourced from English-language publications by Statistics Denmark, 'Denmark in Figures 2009', 'Denmark in Figures 2010' and 'Statistical Yearbook 2009', available for download from: <www.dst.dk/HomeUK/Statistics/ofs/Publications/Yearbook.aspx> (last visited 19 Mar. 2010).

§1. Denmark: A General Background

I. Geography and Climate

1. Located in Northern Europe, Denmark is a small country of 43,098 square kilometres, characterized by 407 islands and an extensive coastline stretching over 7,300 kilometres. Bordered by Germany to the south, Denmark is the most southern of the Nordic countries and forms a natural link between continental Europe and its Nordic neighbours. The Kingdom of Denmark includes Bornholm, an island in the Baltic Sea, and the essentially self-governing areas of Greenland and the Faroe Islands.

2. Danes use ferries, air transport and well-developed infrastructure to travel within the country. Bridges and motorways connect Denmark's western peninsular of Jutland to the middle island of Funen, and further east to the largest of Denmark's islands, Zealand. Denmark's capital, Copenhagen (*København*), is located on the east coast of Zealand and in 2009 had almost 670,000 residents[1] and a relatively new metro system. Since 1999, the Oresund Bridge near Copenhagen has linked Denmark to southern Sweden.

1. As on 1 Jan. 2009, 'Copenhagen City' is listed as having 667,228 residents and the 'Capital Region' (*Region Hovedstaden*) a population total of 1,662,285 people.

3. The predominantly flat Danish landscape reflects thousands of years of history as an agricultural country – around 66% of the surface area is considered man-made agricultural, while forests and nature-like areas account for another 15%, and cities, roads, motorways, bridges or other artificial surfaces total a further 10%. The temperate coastal climate is punctuated by variable weather, with a high annual number of rainy or cloudy days and minimal hours of sunshine. Temperatures can fluctuate significantly away from the winter and summer averages of 0°C in January and 16°C in August.

II. Population and Values

4. At the start of 2009, Denmark's population was 5.51 million people, with women slightly outnumbering men due to a higher male mortality rate. The ageing

population (in 2009, the average age was 40.1) faces a comparatively low but slowly increasing life expectancy, currently measured at 76.5 years for men and 80.8 years for women.[1] While couples tend to delay marriage and reproduction until after 30 years of age, Denmark has a high fertility rate in comparison to other European Union (EU) countries.

1. Despite a high life expectancy in the 1960s, in more recent times, life expectancy in Denmark has been among one of the lowest rates in Western Europe. In the last decade it has shown a gradual but steady increase.

5. Despite tough immigration laws, Denmark has more immigrants than emigrants and in recent times has seen an influx of refugees from Asian and African countries. The highest numbers of immigrants come from Turkey, Germany and Iraq.

6. The workforce is well-educated and highly motivated with a majority fluent in English as well as their native Danish. New generations are progressively more highly educated than their predecessors and the national level of education is above the Organisation for Economic and Co-operation Development (OECD) average. While workplaces are generally small (with less than ten full-time employees), in recent times workforce participation has been historically high. In 2008, Denmark had one of the highest employment rates in the EU, and the highest employment rate for women. However, the financial downturn was responsible for a decrease in employment from mid-2008 into 2009.

7. More than one-third of jobs are found in the public sector, and of these, positions within the educational sector and public administration make up almost 40%. Services, including public and private services (trade, transport, finance, business and personal services), are the most common work activity.

8. Denmark has relatively stable economic and political conditions which are reflected by conservative values. Danes generally embrace democratic ideals, national solidarity and a strong family focus. Negotiation and compromise are popular tools for avoiding conflicts and Danes are generally relaxed and informal in their approach to and interaction with public authorities.

III. Government and Politics

9. A constitutional monarchy, Denmark was originally ruled by its sovereign until a division of powers was introduced with the first Danish Constitution (*Grundloven*) in 1849. The system is preserved today: legislative power is shared by the Monarch and Parliament; executive power is officially held by the Monarch, but in practice exercised by the Danish Government; and judicial powers are independently exercised by the courts. Danish courts provide a check and balance for Acts of Parliament, which must adhere to the Constitution.

10. The Danish Parliament (*Folketinget*) is a single chamber system and has 179 members, including two members from the Faroe Islands and two from Greenland. Members are elected by proportional representation and serve a term of up to four years. In accordance with the constitutionally enshrined principle of cabinet responsibility, the Danish Government is appointed on the basis of a majority of the Members of Parliament. The Prime Minister is usually the president of the largest political party in the Parliament.

11. Traditionally, Denmark had four large political parties: Denmark Right (conservative), Left (liberal), the Social Liberals and the Social Democrats (socialist). All Danish governments have been headed by either the Social Democrats or one or more of the liberal or right wing parties. However, since the 1960s the number of parties has, on the whole, increased and at the last parliamentary election in 2007, eight out of nine nominated parties were voted into parliament. Currently, the Liberal Party (headed by Denmark's Prime Minister Lars Løkke Rasmussen) and the Social Democrats hold the most seats, followed by the Danish People's Party (renowned for its tough stance on immigration), the Socialist People Party and The Conservatives.

12. Denmark's electoral turnout is reportedly among the highest in Europe. National referendums have numbered seventeen since 1920, with five addressing Denmark's relationship with the European Economic Community (EEC)/European Union (EU) and five concerning the voting age, now set at 18 years.

§2. The Danish Economic System

I. Industries and Trade

13. Denmark is a small, free market capitalist economy. Developing away from its traditional agricultural roots, Danish business structure has transited through an industrial period to today's service-dominated society. Sustained growth means that almost 75% of Danish workers are employed in the services sector. This is reflected in Denmark's leading enterprises: financial and business services, followed by trade and hotels, then agriculture and fishing. Denmark's private sector has relatively few foreign-owned enterprises (making up only 1% of the total number of private sector enterprises), but their comparatively greater size helps account for a high percentage of the total turnover for Danish businesses. Economic growth is created by product innovation and new jobs, and 2005 figures showed a considerable increase in the number of enterprises created. Since 1997, Denmark's economic growth has been slightly below the EU average.

14. A member of the EU since 1973, Denmark is highly dependent on trade. With limited natural resources, Denmark imports raw materials in addition to many

types of consumer goods. From 1997, exports have included industrial products, and more recently, increasing amounts of oil (and some gas) extracted from the North Sea. Important industries are engineering (including shipbuilding) and farming as well as related secondary industries. A rigid economic policy has reduced national debt and provided for a low inflation rate.

15. Denmark participates fully in EU economic collaboration and is also part of the OECD and World Trade Organization (WTO). National economic policy is largely based on guidelines agreed by the EU Member States to maintain viable development and employment.

16. With foreign trade forming a sizeable portion of Gross Domestic Product (GDP), the neighbouring EU countries are Denmark's biggest trading partners. Germany, Sweden, the Netherlands and the UK are leading partners. Outside the EU, Norway and the US, as well as China (imports rather than exports), are notable trading partners.

17. Danish firms at the forefront of international markets contribute a range of products, including food enzymes, insulin, medical instruments, wind turbines and cement production machinery. Until the 1960s, Danish exports were dominated by agricultural products. Now, industrial exports such as machinery and instruments, and industrially processed agricultural products are Denmark's leading exports. Software also features on the list.

18. Imports include consumer goods (around 30%), raw materials and semi-manufactures, as well as energy, machinery and other capital equipment. Aeroplanes, cars and heavy weapons are among goods not produced in Denmark.

19. Some of Denmark's largest and most well-known enterprises are Danish Crown (the world's largest exporter of meats), Arla (dairy foods), Carlsberg Breweries (a producer of internationally renowned beer), Danfoss (mechanical and electrical components), Lego (toys), DONG Energy (oil, natural gas, power and energy), Novo Nordisk (pharmaceuticals) and the A.P. Møller – Maersk conglomerate (shipping and transport, as well as a chain of Danish supermarkets). Microsoft also has offices in Denmark and its largest development centre in Europe, Microsoft Development Centre Copenhagen, employs around 650 people.

A. The Nordic Council

20. The Nordic countries share special governmental links. In 1952, Denmark, Sweden and Norway established the 'Nordic Council' as an inter-parliamentary body. Iceland and Finland later joined. In 1972 the Council was supplemented by an inter-governmental body – the Nordic Council of Ministers.

21. While the Council has no formal power, Member States are obligated to implement decisions through the national parliaments.

22. The competition authorities in the Nordic countries have traditionally embraced solid cooperation, and the countries' competition rules are similar to – and influenced by – each other.

B. Currency

23. In 2000, Denmark chose to keep the Danish Kroner (DKK) in preference to the euro (EUR); however, many Danish businesses recognize the advantages of also trading in Euros.

24. Denmark's relatively stable economy is primarily attributed to a stable exchange rate policy that ties the national currency to the Euro: DKK 1 equates to approximately EUR 0.13.[1]

1. Denmark has adopted a narrow 2.25% band of fluctuation for the Danish Kroner. In recent years, Denmark's national bank has maintained a fairly stable rate close to the central ERMII rate of DKK 746.038 per EUR 100.

II. Economy and Competition

25. Over time, external competition in the marketplace has increased, fuelled in part by a gradual liberalization of trade over the last fifty years and the 1986 establishment of the internal European market. Domestically, Denmark has continued to tighten its competition legislation and monitoring systems since the introduction of its first price cartel laws in the 1930s and the superseding Monopoly Act (*monopolloven*) in the 1950s. The 1998 Competition Act (*konkurrenceloven*) was a significant step towards harmonizing Danish competition law with the EU rules. Other influential factors include significant growth in direct foreign investments and foreign relocation, as well as higher levels of outsourcing of manufacturing and services to countries with lower wage costs.

A. Labour Market

26. Described as a 'voluntary' system, the Danish labour market is dominated by collective bargaining and agreements, as opposed to formal legislation. The constitutionally preserved right of association facilitates union membership, and up to 85% of workers are collectively represented. Market players negotiate agreements covering several years without state involvement. It is suggested that unions are aware of the importance of maintaining Denmark's position as an export nation and therefore wage demands are held at reasonable levels to avoid jeopardizing the competitiveness of Danish goods.

27. Public sector care for the young, sick and elderly, as well as generous maternity benefits available to economically active persons contribute to a high level of participation in the labour market. In 2007, Denmark recorded its lowest unemployment rate since 1974, and was named as the country with the highest employment rate in the EU.[1] In 2008, the unemployment rate fell to 1.6%. However, unstable financial conditions put a stop to decreasing unemployment in the latter half of 2008.

1. According to Eurostat's Labour Force Survey 2007.

III. Welfare System and Taxes

28. Denmark ranks among the top three EU countries in terms of state spending on welfare in relation to GDP. The state provides generous public services including free medical and hospital services and free education. Increasing numbers of students attend vocational education and training or higher education for professional qualifications. Among the most popular university courses are social science, educational teaching and the humanities.

29. Taxes are seen as a tool for equalization of income and higher living standards for the majority and, in the past thirty years, Denmark's basic tax structure has remained relatively unchanged. Danish income is the most evenly distributed in Europe and secures a reasonable minimum standard of living, but expansion of the public sector has necessitated an increase in public expenditure – largely funded by high tax rates. In 2008, Denmark was named as having the world's highest personal income tax rate. In 2010, tax rates were reduced. Along with infrastructure and location advantages, a relatively low company tax rate (28%) makes Denmark attractive to foreign investors.

30. Figures on the consumption of goods and services show that Danes spend 22% of income on housing, and 14% on food, beverages and tobacco.

§3. The Danish Legal System

31. The fundamental concept that a society is founded on the rule of law is emblazoned on the front façade of Copenhagen's two hundred-year old City Court. The phrase *Med Lov skal man land bygge* (loosely translated as 'with law shall a country be built') is from Denmark's Code of Jutland (*Jyske Lov*) that was introduced by King Valdemar II Sejr in 1241.[1] As its name suggests, the law was to apply primarily to Denmark's southern peninsular of Jutland (*Jylland*) and the middle island of Funen. However, in practice its effects were far-reaching – including to eastern Denmark – and therefore *Jyske Lov* can arguably be said to have been Denmark's first national law.

1. *Jyske Lov* provided Danes with basic rights to own private property and use the law to protect their property from plunderers.

32. In 1683, King Christian V definitively replaced separate provincial laws, and *Jyske Lov*, with a unified legal system: the 'Danish Law' (*Danske Lov*). While few provisions of the original Danish Law remain in force, Denmark's modern legal system is based on some of its fundamental principles.

33. As a civil law system, Denmark's primary legal source is its statutory law as enacted by the Government. New bills must go through three Parliamentary readings and a vote. If passed, bills must be approved by the Government and receive royal assent or validation by Denmark's current monarch, Queen Margrethe II. Precedents set by Danish courts are influential, but not binding in the same manner as case law in a common law legal system. Danish courts must first and foremost apply the statutory law. Where the solution is not apparent solely from the law, courts may consult previous case law or create their own statutory interpretations.

34. The Danish Constitution secures fundamental civil rights, including freedoms of association and assembly, freedom of speech and liberty of the subject. Private property is guaranteed unless public policy necessitates restrictions, in which case the restrictions will be imposed by law in return for full compensation. Section 74 of the Constitution preserves free and equal access to trade, a provision that sets the scene for Denmark's competition laws.

I. The Danish Courts

35. Founded in 1661 by King Frederik III, yet with roots stretching back even further, the Supreme Court (*Højesteret*) is the highest court in the Kingdom of Denmark. Its judgments cannot be appealed to another Danish court. The Court is split into two chambers that hear all cases. At least five judges will preside over a case and the Court's usual full membership is fifteen judges and a President. Serving as a civil and criminal appellate court for decisions from subordinate courts, the Supreme Court takes cases on appeal from the two High Courts below, the Eastern and Western divisions (*Vestre Landsret* and *Østre Landsret*),[1] and the Maritime and Commercial Court (*Sø- og Handelsretten*). Below the High Courts are twenty-four district courts (*byretterne*) where legal proceedings are usually instigated.

1. The respective jurisdictions of the Eastern and Western High Courts reflect their names: the Eastern High Court (seated in Copenhagen, but also on occasion in Odense, Nykøbing Falster or Rønne) hears cases regarding the eastern part of Denmark, including the middle island of Funen, and the Western High Court (usually seated in Viborg, but also known to relocate to Aalborg, Aarhus, Kolding, Esbjerg or Sønderborg) hears cases concerning the western part of Denmark.

36. Cases of fundamental importance or serious criminal cases can be commenced directly in one of the High Courts and those decisions appealed to the Supreme Court. Generally, legal proceedings can only be appealed once: from a district court to a High Court; or from a High Court to the Supreme Court. District court cases rarely reach the Supreme Court, although on exception, leave to appeal can be granted by an independent board.

37. Separate from the courts are the administrative bodies, including the Danish Competition Authority, Danish Competition Council and the Competition Appeals Tribunal who are charged with overseeing competition law compliance.

§4. Historical Background to Danish Antitrust Law

38. The evolvement of Danish competition law began in the 1930s with Denmark's first antitrust law, the Price Agreement Act.[1] Incorporating provisions on competition restraints and excessive pricing, the Act included a duty to notify agreements capable of affecting market conditions. As such, no behaviour was designated as per se illegal, but the authorities could take up cases involving behaviour such as refusal to supply or cartels.

1. In Danish, *Prisaftaleloven*.

39. The law had little impact and in 1955 was replaced by the Monopoly Act,[1] legislation that sustained a national approach to competition law rather than following EU-based principles. Forming the core of the Danish antitrust law was the principle of control, according to which the authorities were entitled to initiate cases (e.g., for a refusal to supply, or a cartel) and determine whether particular conduct fell within the rules. No behaviour was illegal until the authorities determined it to be so. The Monopoly Act was later superseded by a 'competition law' in 1990, but its basic principles remained in place until 1 January 1998 when a new Danish Competition Act brought significant reform.

1. In Danish, *Monopolloven.*

40. Until 1998, Danish competition law was based on the 'abuse and control' principle with the effective implication that anti-competitive activities were somewhat permissible because they were perceived to be an inherent part of commercial activities. The effects of anti-competitive activities were intended to be transparent in the market and the authorities could take measures to bring any harmful effects to an end on a case-by-case basis.

41. However, transparency proved inefficient in preventing anti-competitive agreements and the abuse of dominant market positions. Moreover, the resulting high degree of public disclosure could often prejudice the ability of Danish companies to compete in international markets because foreign competitors were able to take advantage of the high level of information without any obligation to make a reciprocal disclosure. Another paradox was that Danish companies competing in European markets remained subject to the concurrent application of EU competition law.

42. Such factors provided the backdrop to a major reform of the underlying principles of Danish competition law.

43. The Competition Act (*konkurrenceloven*) introduced in 1998 reflected a first step towards harmonization with EU law. According to its accompanying preparatory works, the Act was to be interpreted and applied in accordance with the EU competition rules and case law. Modelled on the provisions of EU competition law, the Danish Competition Act introduced the principle of prohibition which proscribed certain behaviour per se, without requiring a declaration from the authorities.

44. Generally, subsequent amendments to the Danish Competition Act have brought it further in line with EU law. Provisions were introduced to prohibit anti-competitive agreements and abuse of a dominant position. An amendment in 2000 introduced Denmark's first merger control regime and also authorized the Danish competition authorities to directly apply Articles 101 and 102 Treaty on the Functioning of European Union (TFEU) (then Articles 81 and 82 EC) to Danish cases. A 2002 amendment increased fines for cartel agreements, while in 2004 the Danish Competition Act was harmonized with EC Regulation 1/2003 and the new regulation on merger control (139/2004).

45. A significant amendment occurred in 2007 with the introduction of a new leniency regime similar to the EU and US systems, and amendments passed in 2010 lower the merger notification thresholds and revise the notification process.

46. While the focus and usual practical effect of amendments is harmonization with the EU system, from time to time amendments necessarily include new substantive or procedural rules peculiar to the Danish jurisdiction. Examples include: the explicit prohibition against 'binding resale prices' or resale price maintenance in section 6(2)(vii); a power for the authorities to examine the trading terms of an undertaking (section 10a); and a provision enabling the authorities to grant an exemption for certain notified behaviour constituting abuse of a dominant position (section 11(5)).

I. Nordic Cooperation

47. In 2001, Denmark, Norway and Iceland signed the Nordic Cooperation Treaty, an agreement designed to strengthen cooperation between the Member States' competition authorities and ensure efficient national enforcement of the competition rules. The Treaty provides that national competition authorities may exchange confidential information for completed or ongoing cases. Sweden joined the Treaty in 2004.

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Selected Bibliography

Part I. The Structure of Antitrust Law and Its Enforcement

Chapter 1. Sources of Antitrust Law in Denmark

§1. Introduction

48. As an EU Member State, Denmark's laws consist of two separate legal orders that effectively run parallel to each other – EU law and Danish law. EU law always applies if the relevant conduct has an effect on trade between Member States, even if the conduct occurred in Denmark. On the other hand, Danish law applies if the conduct has an effect on Danish soil. In the event that both sets of laws are applicable, the EU law will always take precedence over national law.

49. Generally, Denmark's lawmakers strive to avoid differences between the two orders, but there is a caveat with regard to competition law: Danish legislators reserve the right to create differences where special or unique conditions in the local Danish market justify such deviations.[1]

1. For example, in the competition law area of obligation to supply, the Danish Competition Authority appears to maintain a well-developed practice that is unique to Denmark. While there is some argument that it could be considered consistent with the EU rules, the European Commission is unlikely to apply the rules in the same way.

50. In the field of competition law, the Danish legal order is modelled on the relevant EU laws. A subsisting objective is to create rules that are in conformity or in alignment with EU law (in Danish this aspect is referred to as *EU-konform*).

51. Given the hierarchy between EU and Danish law, it is logical to outline the EU sources of competition law first.

§2. International Sources

52. For Denmark, international sources of competition law are limited to EU legislation.

I. The TFEU

53. A member of the European Union, Denmark is required to adopt legal regimes that mirror the EU rules. The Danish Parliament and courts each have an obligation to ensure that EU legislation is effectively implemented in Denmark, but are given the discretion to select the best mode of implementation, depending on the type and purpose of the EU legislation. EU directives must also be implemented into Danish law. Despite being given a choice as to how they may affect such implementation, Danish legislators usually introduce directives into national law by new legislation.

54. Since 2000, the provisions of the TFEU are directly applicable in Denmark. Section 23a of the Danish Competition Act allows the Danish authorities to directly apply Articles 101 and 102 TFEU, with the exception of Article 101(3). A more direct and clear authority to apply the Articles to conduct in Denmark appears in Regulation 1/2003. EU regulations regarding competition law are also directly applicable in Denmark.

55. As is the case generally for all EU Member States, national legislation must be interpreted in accordance with EU law. Where there are inconsistencies, EU legislation takes precedence over Danish legislation and the Danish Act will be deemed invalid in relation to the relevant conduct.

II. Secondary Sources of Law

A. The Commission Regulations on Block Exemptions

56. Among the Commission regulations that are directly applicable in Denmark without formal implementation are block exemptions. Even so, Danish executive orders have been adopted for each of the six Commission block exemption regulations, implementing them into Danish legislation.

B. The Merger Regulation

57. As with other EU regulations, the Merger Regulation directly applies in Denmark. According to the European Union's 'one-stop shop' principle, the Danish competition authorities have no jurisdiction under national law to review a merger if the notification thresholds in the Merger Regulation are exceeded. The provisions in the Danish Competition Act governing merger control, mainly section 12, are based upon the same principles as the Merger Regulation, but it is notable that the Danish notification thresholds are currently significantly higher than those contained in the Merger Regulation. However, on 1 October 2010 the thresholds in section 12(1)(i) will be lowered to bring Denmark's merger rules more in line with EU merger control.

C. Guidelines and Administrative Practice

58. The Danish competition authorities often refer to the guidelines and practice of the European Commission and the European Court of Justice (ECJ) in their case administration.

D. Others

59. While not labelled a 'treaty' as such, Denmark is also part of a cooperation agreement regarding competition law between the Nordic countries. The agreement provides that national competition authorities may exchange confidential information for completed or ongoing cases.

§3. National Sources

60. The Competition Act (*konkurrenceloven*) is the primary source of competition law in Denmark, but one of its core underlying principles can be traced back to the Danish Constitution.

I. The Constitution

61. Denmark's highest law recognizes the inherent importance of unrestricted trade and free access to the market. Among selected fundamental rights preserved by the Danish Constitution (*Grundloven*) is free access to market – a condition underpinning effective competition and a well-functioning market economy. Section 74 of the Danish Constitution provides that 'any restraint on the free and equal access to trade which is not based on the public interest shall be abolished by statute.'[1]

1. In the original Danish: *§74. Alle indskrænkninger i den fri og lige adgang til erhverv, som ikke er begrundede i det almene vel, skal hæves ved lov.*

62. Even though the Danish Constitution ranks first in the hierarchy of Danish legal order, this particular provision is so general that to date it has not had any application in practice and has never been invoked with regard to competition law.

II. The Competition Act

63. The Danish Competition Act came into force on 1 January 1998, marking Denmark's first significant step towards alignment with the EU competition rules. The Act's object and purpose is stated in section 1 as the promotion of efficient resource allocation. Such efficiency implies that goods and services should be produced and distributed at the lowest possible cost and should correspond to consumer preferences for form and quantity. Efficiency is primarily to be achieved by

the promotion of workable competition, where key features of the market are a sufficient number of operators and unlimited access to (and from) the market.

64. The Danish Competition Act is inspired by the antitrust provisions in the TFEU (previously the EC Treaty), and the Merger Control Regulation. Like the EU competition rules, the Danish Act favours the principle of per se prohibition, comprehensively rejecting Denmark's previous control-based competition legislation. In addition to a merger control regime based on the same principles as the EC Merger Regulation (set out in section 12 of the Danish Competition Act), the Act includes two key prohibitions: a prohibition against anti-competitive agreements (section 6); and a prohibition against abuse of a dominant position (section 11). Given their origins in Articles 101 and 102 TFEU, these prohibitions are enforced in accordance with the case law of the European Commission, the European Court of First Instance and the ECJ. Further, the Danish Competition Act's preparatory works unequivocally state that the case law of the Commission and the ECJ are to be used as guidance in the application of the Act.

65. The scope of the Danish Competition Act is broad – as a general rule it covers all business activities, whether private or public, profit or non-profit and extends to anti-competitive practices that affect the Danish market, even where undertakings are located abroad. However, there are exceptions, such as with regard to wages and labour relations (section 3 of the Act)[1] and conduct that occurs within the same undertaking or group of undertakings (section 5(1)).[2]

1. Section 3 states:
   This Act shall not apply to pay and working conditions. For the purposes of its ongoing work the Competition Council may, however, demand information from organizations and undertakings concerning pay and working conditions.
2. Section 5(1) of the Act:
   The provisions of Part 2 of this Act shall not apply to agreements, decisions and concerted practices within the same undertaking or group of undertakings.

66. The Danish Competition Authority (*Konkurrencestyrelsen*) publishes an 'unofficial' English translation of the Danish Competition Act on its website, <www.ks.dk>. Consistent with principles of unity of law, there is no authoritative, official version of the Act available in the English language – which avoids questions of ambiguity between the original Danish text and the English translation. It is intended that the Danish version will always take precedence over any others.

§4. Secondary Sources

67. A considerable amount of secondary legislation complements the Danish Competition Act, including executive orders and guidelines.

I. Regulations: Executive Orders

68. The most important secondary sources of law are block exemptions implemented into national law as executive orders. In line with the general principles of primacy and EU conformity, block exemptions issued at EU level have been included as part of Danish competition law.

69. Section 10 of the Danish Competition Act enables Denmark's Minister for Economic and Business Affairs to create regulations that exempt certain conduct from the prohibitions in the Act. However, such exemptions must meet the strict criteria with regard to efficiencies and benefits set out in section 8(1) of the Act (corresponding to Article 101(3) of the TFEU).

70. The Minister has exercised the section 10 authority to issue six Danish executive or ministerial orders[1] for each of the EU block exemptions (as well as for a seventh and uniquely Danish block exemption that has since been repealed). The orders typically state that the relevant EU block exemption is applicable to the same type of agreements under Danish law, and a Danish language version of the EU regulation is reprinted as an annex to the statutory order.

1. The Danish term, *bekendtgørelse*, can be translated into English as any of 'ministerial order', 'statutory order', 'government order' or 'executive order'.

71. Categories of agreements covered include vertical agreements, sector-specific agreements (insurance, motor vehicles), and agreements broadly relating to innovation (R&D, specialization and technology transfers). Agreements that meet the requirements under one of the block exemptions are automatically exempted from the prohibitions contained in the Danish Competition Act. For example, a research and development agreement that is anti-competitive but fulfils the requirements under the block exemption regulation on research and development agreements will automatically be exempted from the prohibition contained in section 6 of the Act.

72. The block exemptions currently in force in Denmark are directly based on (and almost identical to) the block exemptions issued by the European Commission under Article 101(3). The turnover thresholds and maximum aggregated market shares for undertakings included in the EU block exemptions are the same for the Danish block exemptions. But in assessing thresholds and market shares, only Danish turnover and the Danish market are relevant. The Danish Executive Orders enacting the block exemptions are:

- Executive order 353/2000 implementing the block exemption regulation on vertical agreements.
- Executive order 236/2003 implementing the block exemption regulation on agreements in the insurance sector.
- Executive order 1212/2000 implementing the block exemption regulation on research and development agreements.

– Executive order 769/2002 implementing the block exemption regulation for motor vehicle distribution and servicing agreements.
– Executive order 1211/2000 implementing the block exemption regulation on specialization agreements.
– Executive order 622/2004 implementing the block exemption regulation on technology transfer agreements.
– A seventh block exemption is no longer in force. Concerning horizontal agreements on cooperative chains in the retail industry, the exemption appears to have had its origins in Swedish law, rather than an EU block exemption. It was repealed in 2005.

73. If an anti-competitive agreement does not fulfil the requirements of any of the block exemptions, it can be notified to the Competition Authority for an exemption under section 8(1). The requirements for an individual exemption correspond to those set out in Article 101(3) TFEU.

74. The Competition Act also allows the Minister for Economic and Business Affairs to issue executive orders on administrative procedure in relation to the Danish Competition Authority (and the Competition Appeals Tribunal – see below) as well as on form, content and other details concerning applications and notifications.

75. The executive orders operate as supplements to the Competition Act. Generally, they elaborate on certain complex areas of the Act or establish necessary ancillary legislation. The main executive orders cover internal agreements, turnover calculation and merger notification. They are:

– Executive order 1029/1997 on internal agreements within a company or group of companies.
– Executive order 895/2000 on the calculation of turnover.
– Executive order 480/2005 on merger notification.

76. An incomplete source of the Danish executive orders in English is the Competition Authority's website, <www.ks.dk>.

II. Guidelines

77. The Danish Competition Authority has issued guidelines on the administration of the most essential parts of the Competition Act. Some date as far back as 1998, soon after the Act came into force.

The following sets of guidelines are relevant:

– Guidelines of 27 May 1998 on the prohibition of abuse of a dominant position (Competition Act, section 11).

- Guidelines of 29 April 1998 on the prohibition of restrictive agreements (Competition Act, section 6).
- Guidelines of 23 June 2007 on merger notification. These describe the Danish notification procedure and explain the concept of undertakings and the thresholds set out in the Danish Competition Act.
- Guidelines on leniency for cartel activities. These guidelines accompanied the introduction of a leniency programme into Danish law in 2007.

78. Danish-language versions of all of the guidelines can be found on the Competition Authority's website.

§5. Role and Authority of Precedents

I. Case Law from the European Court of Justice and the Commission

79. In the event of any conflict, EU legislation takes precedence over Danish legislation, and the same principle applies for decisions. Danish courts cannot create judgments that are incompatible with either EU law or case precedents set by the ECJ.

80. The ECJ has ruled that national courts are obliged to follow its decisions.[1] Consequently, the Danish courts are bound to harmonize their decisions with ECJ case law. Furthermore, the preparatory works to the Danish Competition Act clearly state that the case law from both the Commission and the ECJ will be normative for the case administration of the Danish Competition Authorities and the courts.

1. C-465/93, *Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung und Forstwirtschaft*, European Court of Justice decision of 9 Nov. 1995.

II. Danish Cases and Decisions by the Competition Authorities

81. The Danish Competition Authorities frequently refer to EU legislation or practice in their decisions.

82. Both the Danish Competition Authorities and the courts must first and foremost make decisions based on statutory legislation. It is only where legislation leaves room for judicial interpretation or is ambiguous that the competition authorities and courts may take case precedents into consideration.

83. Established case law from the courts and decisions by the competition authorities will be influential for future decisions in the same area. Case law from the courts takes precedence over administrative practice established by the competition authorities. However, competition law decisions by the Danish courts are relatively few and far between compared with the comprehensive body of decisions from the competition authorities.

84. Decisions made by the Danish Competition Council and the Competition Appeals Tribunal are published, usually in Danish, on the Competition Authority's website, <www.ks.dk>.

§6. Sources' Relation and Hierarchy

I. Danish Sources of Law

85. The Danish sources of law are arranged into a hierarchical system. In cases of conflict between different sources of law, the highest-ranking source will apply. Not surprisingly, a source of law can only be amended by sources in the same or a higher position in the hierarchy.

86. The highest-ranking source of law in Denmark is the Constitution, adopted in 1953. In the event that the Constitution conflicts with another law, the Constitution will always prevail. The Danish Constitution cannot be amended by new bills. It may only be changed by referendum.[1]

1. The procedure for a referendum requires Parliament to first pass the bill containing the amendment. Then a general election is held. The new Parliament must then pass the bill, unchanged. Once this has happened, the bill is then put to a national vote and must clear two hurdles: (1) it must win a simple majority of cast votes; and (2) the total number of positive votes must tally to at least 40% of the Danish population that is eligible to vote.

87. Danish legal acts are placed just below the Constitution in the hierarchy. A number of new acts or amendments to pre-existing acts are passed each year by the Parliament (*Folketinget)*. New acts or amendments are promulgated by publication in the Danish Legal Gazette[1] and acts or amendments generally come into force eight days after publication.

1. See <www.lovtidende.dk/>.

88. The preparatory works to an act can provide clarification for uncertainties in the act. Where there are amendments to the act, the preparatory works to those amendments may also be relevant. If there is any conflict between the original preparatory works to the act and the preparatory works to any subsequent amendments, the most recent preparatory works will take precedence.

89. Sometimes an act will authorize the adoption of certain administrative procedures; these are known as executive orders. Executive orders are placed below legal acts in the hierarchy and are usually only enacted as supplements to such acts. Executive orders generally provide details or further elaboration on specific parts of a given legal act.[1]

1. Below the executive orders in the hierarchy are 'circular letters'. Circular letters are enacted by administrative authorities and only manage legal matters between these authorities. They are not commonly used for competition law matters.

90. Case law created by the Danish courts ranks below legal acts in the hierarchy. The courts interpret and apply the law in their decisions, and as such, decisions from the courts cannot overrule legislation unless the legislation is found to be inconsistent with the Danish Constitution.

91. Last in the hierarchy are guidelines and administrative practice created by the authorities. In theory, cases should illustrate an application of the relevant guidelines. However, where case precedents and guidelines are inconsistent with each other, the administrative guidelines will prevail.

Chapter 2. Scope of Application

§1. Territorial Reach

92. Denmark's Competition Act only applies to restrictions that have an effect on Danish territory. All restrictive actions that have an effect on the Danish market can be targeted by the Competition Act, regardless of the nationality or place of business of the parties involved.

93. If the EU competition rules apply to the conduct, these rules will take precedence over the Danish Competition Act, and the Danish competition authorities will be obliged to transfer the case to the European Commission.

94. Greenland and the Faroe Islands have their own competition laws and are not subject to the Danish Competition Act.

§2. Special Sectors

95. Several sectors of the Danish market are subject to specific rules that deviate from the general provisions of the Competition Act.

96. Some statutory barriers to entry still exist in the Danish market, a majority stemming from legal requirements to acquire state authorization before conducting certain professions, for example, lawyers, doctors and accountants. Also, some market sectors are still controlled by the state, and in those sectors only state-licensed undertakings can compete. The energy, public transport and postal service sectors have all traditionally been controlled by the state. However, it is the telecommunications and insurance sectors that have retained special legal provisions unique to their areas.

I. Telecommunication

97. The telecommunications sector is governed by the Tele Competition Act, which exists in parallel to the Competition Act but applies *lex specialis*.[1]

1. The doctrine provides that a law governing a specific subject matter (*lex specialis*) is not overridden by a law which only governs general matters (*lex generalis*).

98. Containing a specific set of rules for the telecommunication sector, Denmark's Tele Competition Act is based upon a number of EU directives. The rules differ from the provisions in the Competition Act, reflecting the traditionally monopolistic nature of this market.

99. The most notable divergences from the Competition Act are intercommunication provisions. Under the Tele Competition Act, a provider of a telecommunications network with significant market power – a provider that holds a dominant position – has an obligation to give competing providers access to its network so that consumers will be offered a wider variety of telecommunication services.

100. Compliance with the Tele Competition Act is supervised by the National IT and Telecom Agency, in some cases in cooperation with the Danish competition authorities.

II. Insurance

101. The Commission's new block exemption on agreements in the insurance sector[1] provides that certain agreements between insurance companies are exempted from Article 101 TFEU. Due to the parallel nature of the prohibitions in Article 101 TFEU and section 6 of the Danish Competition Act (the corresponding prohibition against restrictive agreements), the practical result of the block exemption is that it also operates to exempt certain agreements under Danish law.

1. Commission Regulation (EU) No. 267/2010 of 24 Mar. 2010 on the application of Article 101(3) of the TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector.

102. The block exemption sets out two categories of agreements which are exempted per se. Compared with the previous block exemption which expired on 31 March 2010, the new regulation narrows the scope of application of the exemption significantly – from four categories of agreements to two. However, the Commission has made it clear that the amendments do not intend to reflect a significant change in the substantive approach.[1] The exempted agreements include:

– where created for reference purposes, the joint creation and distribution of certain calculations regarding the average cost of covering specified risks and certain mortality tables and tables showing the frequency of illness, accident and invalidity, and the joint carrying out and distribution of studies on the risks and probable impact of general circumstances external to the interested undertakings or on the profitability of different types of investment;
– the setting up and operation of groups of insurance and reinsurance undertakings in the form of co-insurance or co-reinsurance for the common coverage of new risks or certain risks where the pools' aggregate market share is below certain thresholds.

1. The Commission still recognizes that positive effects for competition and consumers may flow from agreements regarding security devices and standard policy conductions. Since these are not necessarily insurance sector specific, they could be included in horizontal guidelines instead.

103. The Danish executive order implementing the block exemption on insurance directly into Danish law also expired on 31 March 2010. According to the

Danish Competition Authority's website, the legislation is under revision. However, it is expected that Denmark will simply follow the Commission's approach.

III. Cooperatives: Now Repealed

104. A previously applicable executive order (Executive Order 1029 of 1997) to the Danish Competition Act contained specific provisions concerning cooperatives (or co-ops). Under section 6 of the Competition Act, agreements and concerted practices that were formed or occurred internally within a group of companies were exempted from the prohibition on restrictive agreements.

105. Agreements between undertakings organized in a co-op were to be deemed internal agreements and insofar as they were necessary in order to secure the operation of the undertaking, were exempted from the prohibition in section 6.

106. The executive order on co-ops was repealed on 1 July 2005. The Commission's vertical and horizontal block exemptions (as enacted into the Danish legislation) and the Commission's guidelines cover the area.

§3. State-Owned Enterprises and Public Utilities

I. No Special Danish Provisions

107. This particular area of Danish law is largely the same as EU competition law. There are no special or unique provisions.

108. As a starting point, state-owned enterprises and public utilities are governed by the same rules as all other types of companies – the Competition Act. Section 2 of the Competition Act is widely framed to catch all types of business enterprises, including state-owned enterprises and public utilities. Even so, a few sectors are still governed by slightly different rules.

II. Postal Service

109. Denmark's postal service sector has traditionally taken the form of a monopoly. Even today the sector still retains some of the characteristics of a monopoly, and it cannot be said that competition is entirely free.

110. The state-owned company *Post Danmark* is responsible for and performs the Danish postal service.[1] Post Danmark is exclusively licensed to distribute certain categories of domestic letters. While the exclusive license previously extended to the entire postal service sector, the field of application has been reduced

significantly over time. As of 2006, the exclusive license only covers letters weighing less than 50 grams.

1. Post Danmark has now merged with the Swedish postal service and is co-owned by the Swedish and Danish Governments.

III. Energy Sector

111. The energy sector has traditionally been governed by a number of rules and regulations in order to control the dependability and the environmental aspects of distribution. As such, competition has not been as free as in other market sectors.

112. In 1999, following an EU directive from 1996,[1] Denmark began liberalizing the energy sector. The competition-related problems in the liberalization process have mirrored the telecommunication sector, with the most prominent issues relating to network access. All providers rely on access to the energy supply network of pipes. To counter this problem, a principle known as the *common carrier principle* has been introduced. Generally, it means that all providers must be granted access to the infrastructure network.

1. Directive 96/92/EC of the European Parliament and Council of 19 Dec. 1996 concerning common rules for the internal market in electricity.

IV. Water

113. A political agreement was concluded in Denmark in February 2007 to create a more effective water sector involving both waterworks and sewage treatment facilities. A legislative package implementing the agreement was introduced between 2007 and 2009.[1]

1. The legislative package included: Act No. 534 of 6 Jun. 2007 on the municipalities' renunciation of the water supplies and the waste water supplies (*Lov om kommuners afståelse af vandforsyninger og spildevandforsyninger*), Act No. 460 of 12 Jun. 2009 amending the Environmental Protection Act, Act on payment for waste water facilities etc. and various other Acts (*Lov om ændring af lov om miljøbeskyttelse, lov om vandforsyning, lov om betalingsregler for spildevandsanlæg m.v. og forskellige andre love*), and Act No. 469 of 12 Jun. 2009 on the organization and economic conditions of the water sector (*Lov om vandsektorens organisering og økonomiske forhold*).

114. In order to enhance both the efficiency and the transparency of the sector, the municipally integrated water divisions were required to become independent companies before 1 January 2010. This occurred by the municipalities hiving off the water supply into separate municipally owned companies or by selling the water divisions off to private water supply companies.

115. A special Water Unit (*Forsyningssekretariatet (vand)*) has been set up at the Danish Competition Authority to administer notifications from the water supply companies, as well as fix and adjust price ceilings using a benchmarking system.

V. Financial Aid from Public Authorities

116. Section 11a of the Competition Act authorizes the Competition Council to compel undertakings to return financial aid provided by a public authority if the aid has restriction of competition as its direct or indirect object or purpose and is contrary to public regulation. According to the preparatory works, the term 'aid' in section 11a is to be given the same meaning as 'aid' in Article 107 TFEU (formerly Article 87 EC). As such, aid means any direct or indirect financial support, and includes aid in forms other than cash.

117. Whether or not the aid is contrary to public regulation will be determined by the minister in charge of the public authority that provided the aid.

118. Section 11a was introduced by an amendment to the Competition Act in 2000, and was subsequently further amended to its current wording in 2007. The new provision expanded the scope of the Competition Act. Until then, the Act had only governed commercial enterprises, but with the amendment the Competition Council was authorized to intervene in the provision of financial aid to undertakings from public authorities as well.

119. Section 11a is inspired by the EU state aid provisions (Articles 107 to 109 TFEU) and effectively implements these into Danish legislation. Consequently, it could be expected that the provision would be of little practical relevance because the EU provisions will usually apply. However, administrative practice has shown that section 11a is relevant in connection with small-scale and local cases of unlawful state aid that Articles 107 to 109 TFEU would not have applied to. For example, see the Competition Appeals Tribunal decision of 22 May 2006.[1] In that decision, the Tribunal found that a local Danish municipality, *Morsø Kommune*, had violated section 11a by undercutting competitors in the provision of home care services. The municipality was found to have been charging citizens lower prices for home care services provided by its own service provider than the prices charged for services provided by its private competitors. The indirect aid was found to restrict competition between home service providers. The Tribunal ordered Morsø Kommune to compensate the private service providers for the losses they incurred due to the illegal aid.

1. *Morsø Kommune mod Konkurrenceankenævnet*. In English: *Morsø Municipality v. Competition Appeals Tribunal*.

§4. Appreciable Effect and *De Minimis*

I. The *De Minimis* Rule

120. The general prohibition on restrictive agreements in section 6 of the Competition Act does not apply to certain agreements of minor importance. According to section 7 of the Act, agreements are considered *de minimis* and therefore not subject to the prohibition if:

– the undertakings concerned have an aggregate annual (worldwide) turnover of less than DKK 1 billion and a combined market share of the relevant products or services (in the Danish market or any part of it) of less than 10%, or
– the undertakings concerned have an aggregate annual (worldwide) turnover of less than DKK 150 million.

121. The *de minimis* rule does not apply to pricing agreements (both vertical and horizontal) and bid rigging or coordination, see section 7(2). Further, agreements with a similar effect cannot be exempted. This means that if competition is restricted by the cumulative effect of several agreements, these agreements will be subject to the prohibition in section 6 of the Act, irrespective of whether the individual agreements could be exempted under section 7 (see section 7(3)).

122. If a restrictive agreement falls under the scope of Article 101 TFEU because it affects trade between Member States, section 7 of the Danish Act will not apply. Instead, the Commission's *de minimis* notice will govern whether the agreement is of minor importance and does not appreciably restrict competition.

II. Appreciable Effect

123. The Commission's Notice on agreements of minor importance provides that agreements that do not appreciably restrict trade will fall outside of the scope of Article 101 TFEU. The same principle has been attributed to the Danish Competition Act in administrative practice and case law; agreements will fall outside of the scope of section 6 of the Competition Act if they do not appreciably restrict trade in a given market.

124. For example, see the *Ørestad Syd* case.[1] The developer of a new urban district called 'Ørestad Syd' in Copenhagen put out for tender a ten-year exclusive right for the retail sale of convenience goods in the area. Undertakings who did not prequalify for the tender claimed that the ten-year exclusive license was a restriction of competition in violation of section 6 of the Danish Competition Act and complained to the Danish Competition Council. The Council noted that the developer was not itself active on the market for convenience goods, and as such had no incentive to restrict trade. It concluded that the ten-year exclusive license did not have the object of restricting competition. However, the exclusive license was found to restrict competition by effect in the nearby area, since competitors were excluded from the district during the ten-year period. Nevertheless, the potential restriction of competition was found to not have any appreciable effects at all and was cleared. On appeal to the Competition Appeals Tribunal, the Tribunal stated that only agreements actually restricting effective competition in the relevant market would contravene section 6 of the Competition Act. On that basis, and with due regard to the Council's arguments, the Tribunal dismissed the appeal, finding that the agreement did not have an appreciable restrictive effect under section 6.

1. *De Samvirkende Købmænd mod Konkurrencerådet,* Competition Appeals Tribunal decision of 3 Nov. 2008.

125. However, hardcore restrictions – where the purpose of an agreement is to restrict competition – will be found to appreciably restrict trade, regardless of the parties' low market shares. This was confirmed in the 2007 *Local Banks* case.[1] In that case, the Tribunal found that a number of local banks had violated section 6(1) by: (i) agreeing not to pursue each others' customers; (ii) agreeing not to establish new branches in each others' areas; and (iii) exchanging sensitive information. The aggregated market share of the banks was low – approximately 1% of the national market, which was considered to constitute the relevant geographic market, and the banks claimed that the agreements could not appreciably restrict trade.

1. Competition Appeals Tribunal decision of 26 Mar. 2008 (upholding the Competition Council's decision of 2 Oct. 2007).

126. The Tribunal confirmed that section 6 of the Act does not apply to agreements that do not appreciably restrict trade. The appreciable effect depends on the seriousness of the restrictive agreements. The Tribunal concluded that in this case, the purpose of the agreements was to restrict competition. Therefore, the basic principles behind section 6(1) provided that these types of agreements had an appreciable effect despite the minor market shares of the banks. The Tribunal held that there was an infringement of section 6, but it was not a cartel.

127. The decision confirmed that hardcore horizontal restrictions will almost always have an appreciable effect regardless of the parties' market shares. Administrative practice has shown that this principle applies to other kinds of hardcore restrictions as well. See for example, the Competition Appeals Tribunal decision in *Wewers Belægningssten A/S*[1] in which the Tribunal stated:

> a price-fixing agreement is an agreement which has the objective purpose of restricting competition. Such agreements are in violation of Section 6(1) of the Competition Act regardless of whether they in fact had an appreciable effect on the competition in the market.[2]

1. Competition Appeals Tribunal decision of 7 Nov. 2005.
2. Unofficial translation from the Danish decision.

128. The competition authorities have also upheld a strict approach to hardcore vertical restrictions. And the Competition Appeals Tribunal has stated that vertical price fixing agreements are contrary to section 6 regardless of the size and strength of the parties.[1]

1. *Bestseller A/S v. Danish Competition Council*, Competition Appeals Tribunal decision of 17 Nov. 2004.

129. This approach is consistent with the Commission's Notice on agreements of minor importance, which excludes hardcore restrictions – both horizontal and vertical, including price fixing and market or customer allocation – from the scope of the Notice. It must be expected that the Danish competition authorities and the courts will follow the Commission's Notice with regard to any interpretation of the appreciable effect criteria.

Chapter 3. Overview of Substantive Provisions

§1. Restrictive Agreements

I. Section 6 of the Act

130. Section 6 of the Act prohibits restrictive agreements. The section must be read in the context of the provisions that follow it – sections 7–10. Together, these sections provide a coherent system on restrictive agreements.

131. Section 6(1) states that it is 'prohibited for undertakings etc. to enter into agreements that have restriction on competition as their direct or indirect object or consequence.' Read together with section 6(3), the prohibition also extends to decisions made by an association of undertakings and concerted practices between undertakings.

132. Section 6(2) provides a non-exhaustive list of examples of restrictive agreements. The list largely corresponds to Article 101(1) TFEU, but also includes two unique additions that have their origins in Danish case law: joint venture coordination and resale price maintenance.[1] Agreements will fall within the prohibition if they:

(i) fix purchase or selling prices or other trading conditions;
(ii) limit or control production, sales, technical development or investments;
(iii) share markets or sources of supply;
(iv) apply dissimilar conditions to equivalent transactions with trading partners, thereby placing some trading partners at a competitive disadvantage;
(v) make the conclusion of contracts subject to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts;
(vi) coordinate 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.

1. Subsections (vi) and (vii) of Section 6(2), respectively.

133. Where a restrictive agreement falls within the section 6(2) prohibitions, and none of the exceptions or exemptions are applicable, the agreement will be void and unenforceable from the time it was created.

134. With section 6(4), the Danish Competition Council is granted broad powers to 'issue orders' to bring an infringement of section 6(1) to an end. In turn, section 6(4) refers to section 16, a non-exhaustive list of the types of enforcement tools that the Council may use. The four examples given are orders with regard to contractual obligations, prices, divestment and access to infrastructure. Specifically, the Council can terminate agreements, decisions, trading conditions, or similarly

demand that stated prices or profits may not be exceeded or that prices or profits are to be calculated in accordance with specific rules, require one or more undertakings to divest assets to specific buyers, or order parties to grant access to important infrastructure.

135. The Council can also enforce commitments made by undertakings.

II. Exceptions

136. Section 7 provides a '*de minimis* rule' and states that the prohibition set out in section 6(1) does not apply to agreements between undertakings in certain cases.

137. Those cases are where the parties have: (i) an aggregate annual turnover of less than DKK 1 billion and an aggregate share of less than 10% of the product or service market concerned; or (ii) an aggregate annual turnover of less than DKK 150 million, and the agreements do not concern price fixing or bid rigging. Subsection (3) of section 7 is a catch-all provision that overrides the exceptions if the combined effect of the agreements will restrict competition.

138. In addition to section 7(1), section 6(1) contains a qualitative lower limit for the application of the prohibition. The lower limit means that certain agreements may be exempted from the general prohibition if, for instance, they affect only a very insignificant part of the relevant market. However, the scope of this exemption is generally quite limited.

139. Section 8 outlines the second group of exceptions to the section 6(1) prohibition. In line with Article 101(3), restrictive agreements are not prohibited if they involve efficiencies or technical advancements that are passed on to consumers and any restrictions are limited to those necessary for the progress and do not allow the elimination of competition of a substantial part of the products or services. Under section 8(2) the parties can notify an agreement and the Danish Competition Council can exempt the agreement from section 6(1) with reference to efficiencies or other benefits that follow from it. In practice, however, section 8 is rarely applied.

140. Somewhat similarly, section 9 states that in certain cases, and upon notification from the parties, the Council may grant 'negative clearance' making a declaration that an agreement, decision or concerted practice is outside the scope of section 6. In practice, section 9 is also rarely applied.

141. Section 10 sets out the rules for granting block exemptions.

142. Section 5 exempts inter-group agreements from all of the prohibitions in Part 2 of the Act, including section 6. See also the commentary on the definition of an undertaking in 'Overview of Main Notions' below.

143. Section 2(2) states that if a restrictive agreement is a direct or necessary consequence of public regulation, Parts 2 and 3 of the Act will not apply. Therefore, the agreement will not contravene section 6. Whether or not an agreement directly or necessarily follows from the public regulation will, however, be investigated by the Danish Competition Authority. It is only where the Authority decides that the agreement is a consequence of the regulation that it will cease its investigation.

144. Section 6 must be read in connection with section 11 – the prohibition against abuse of a dominant position. Since both provisions seek to achieve the same goals, they must be interpreted in a consistent manner. In accordance with EU practice, there can be a simultaneous violation of both sections.

III. Basic Parallels and Differences with Article 101 TFEU

145. Subsections 6(2)(i) through (v) correspond to Article 101 TFEU, whereas 6(2)(vi) and (vii) are unique to the Danish legislation.

146. According to the preparatory works, section 6 is to be interpreted in accordance with the EU regulation. Therefore, the practices of the Commission and the ECJ are to be used as interpretative guidance for the provision, subject to the particularities of the market conditions (and importantly, only to the extent that the factual circumstances are similar).

§2. Dominant Undertakings

I. Section 11 of the Act

147. Section 11 of the Act prohibits abuse of dominance. In order to find abuse under the Act, four criteria must be fulfilled. Section 11 only applies to the acts of: (1) an undertaking; (2) where that undertaking is dominant; and (3) abuses its dominant position; and (4) the abuse impacts effective competition in Denmark.

148. Section 11(1) states broadly that any abuse of a dominant position by one or more undertakings is prohibited. Examples of 'abuse' for the purposes of subsection (1) are provided in subsection (3) as:

(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; or
(iv) making the conclusion of contracts conditional on acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

149. Subsection (4) of section 11 provides the Danish Competition Council with powers to bring infringements of subsection (1) to an end. In turn, subsection (4) refers to section 16, a non-exhaustive list of enforcement tools that can be used not only to bring an abuse of dominance to an end, but also for anti-competitive agreements and Articles 101 and 102 TFEU infringements.[1]

1. Section 16 non-exhaustively lists the types of orders that the Danish Competition Council may issue to eliminate the adverse effects of anti-competitive activity, including: termination of agreements, decisions or trading conditions; a cap on specific prices or profits, or procedures for the calculation of prices or profits; an obligation to sell on usual terms; or access to infrastructure. The Council can also order that commitments made by an undertaking are to be binding (see s. 16a(1)).

150. The preparatory works to the Act state that 'dominance' should be interpreted in accordance with the decisions of the Commission and the case law of the ECJ regarding Article 102 TFEU. Similarly, in general terms, the Danish definition of 'abuse' is in line with the corresponding term under EU rules.

151. Section 11(2) of the Danish Act states that an undertaking can request the Danish Competition Council to declare whether or not it holds a dominant position. Declarations in the negative, confirming that no dominant position is held, are binding until revoked.

152. Undertakings can also request the Council to make a declaration that certain conduct does not fall under the prohibition in subsection (1) and therefore, will not be subject to an order under subsection (4). The section's final provision, subsection (7), confers the Council with a right to refrain from making such declarations where it may have implications for abuse of a dominant position in the common market or an essential part of it, and trade between the EU Member States may be appreciably affected. However, in practice, section 11(7) is rarely invoked.

153. The scope of the Act is regulation of the Danish market. Both national and foreign companies can be subject to section 11 of the Act if they engage in activities that restrict competition and the effects of their behaviour extend to Denmark. This is mentioned explicitly in the preparatory works to the Act.[1]

1. At L 242 (Bill 242).

II. Power to Obtain a Dominant Undertaking's General Trading Terms

154. According to section 10a and Regulation 466/2005 (which was introduced with amendments to the Act in 2004 and came into effect on 1 February 2005), the Danish Competition Council has the power to order dominant undertakings to submit their general trading terms for review.

155. However, this rule only applies when either: (i) the Danish Competition Authority has received a complaint from a competitor and the Authority considers that the complaint has some foundation; or (ii) special market conditions exist and

Part II. The Application of the Prohibitions

Chapter 1. Restrictive Agreements

§1. Introduction

336. The section 6 prohibition against anti-competitive or restrictive agreements is one of two fundamental prohibitions in the Danish Competition Act.

337. Similar to EU competition law, Danish competition law distinguishes between horizontal and vertical agreements. Horizontal agreements are concluded between operators at the same level of trade, whereas vertical agreements are concluded between operators at different levels of trade.

§2. Horizontal Agreements

I. Cartels

A. Introduction

338. Like EU competition law, Danish competition law recognizes and prohibits cartels as the most detrimental form of restrictive agreements or concerted practices.

339. Relatively few cartel cases have been decided in Denmark. Despite an increase in cases over time generally, there are less than ten Danish cartel cases altogether. Unfortunately, the cases regarding these cartels are also limited with respect to legal reasoning. Most are largely devoid of in-depth legal discussion and turn on their facts – therefore the bulk of many decisions is a discussion about the facts.

340. A few cases are brought to court by Denmark's Public Prosecutor for Serious Economic Crime,[1] but most cases result in an out-of-court pleaded fine or settlement, for which few legal details are published.

1. In Danish, *Statsadvokaten for Særlig Økonomisk Kriminalitet* or *SØK*.

341. The most prominent two cartel cases in Denmark involve trade services. The first was a cartel in the electricity installation sector involving more than

200 companies (*El-kartellet*);[1] the second concerned the plumbing and heating sector and implicated over 100 companies (*vvs-kartellet*).[2] Both cartels were uncovered with the help of newspaper journalists, but the second cartel was only discovered after the five-year statutory period of limitation had expired. The expired period of limitation meant that the Danish Competition Council could not make a ruling on the case. However, in order to encourage private enforcement, the Council chose to publish the evidence that the Danish Competition Authority had retrieved during the investigation. The Council relied on section 13(3) of the Competition Act which states that it may publish information concerning its activities, as well as general reports.

1. The Danish Competition Authority reported 357 companies to the Public Prosecutor for Serious Economic Crime, of which 204 paid a fine (*Konkurrenceredegørelse 2004*, Ch. 11 available at: <www.ks.dk> (last visited 7 Nov. 2009)).
2. Report on the state of competition in the plumbing and heating sector of 30 Nov. 2005, at: <www.ks.dk> (last visited 2 Nov. 2009).

342. More recent cartel cases in Denmark involve an alleged cartel between several local banks (*Lokalbanksamarbejdet*),[1] a cartel between mobile phone retailers (*Telemobilia*[2] and *Jockerprice*[3]) and alleged price-fixing activities by a group of veterinarians. The latter involved an initial decision by the Aarhus City Court in February 2010 fining seven veterinarians DKK 75,000 each for cartel behaviour that involved agreeing on prices for services provided to customers outside of normal opening hours. However, on 19 May 2010 Denmark's Western High Court overturned the City Court's decision with a finding that the behaviour did not amount to a cartel because none of the veterinarians could have offered the after-hours services on an individual basis without the arrangement.[4]

1. *Lokalbanksamarbejdet* (in English, *Local Bank Cooperation*, also known as 'The Local Banks Case'), Danish Competition Council decision of 26 Mar. 2008, upheld by the Competition Appeals Tribunal in *Møns Bank e.a. v. The Danish Competition Council*, a decision of 2 Oct. 2007.
2. *Telemobilia Aps*, Roskilde District Court judgment of 27 Nov. 2007.
3. *Jockerprice Aps*, plea agreement of 23 Jul. 2007.
4. A press release regarding the decision (in Danish) was published on the Competition Authority's website, <www.konkurrencestyrelsen.dk/service-menu/presserum/presse-2010/vestre-landsretfrikender-dyrlaeger-i-sag-om-kartel/> (last visited 20 May 2010).

1. What Is a Cartel?

343. While cartels will implicitly be caught by section 6 of the Danish Competition Act, the provision does not expressly mention or define cartels. Similarly, in section 23 of the Act, leniency provisions refer to 'cartels' or 'cartel agreements', but do not expressly define the terms.

The Act's preparatory works provide some guidance, describing 'cartel cases' as:

> agreements or concerted practices between two or more competitors that are undertaken to coordinate their competitive behaviour in the market, e.g. through the fixing of purchase or selling prices or other trading conditions; the

allocation of production or sale quotas; the limitation of imports or exports and the sharing of markets, including bid rigging.[1]

1. LFF 2007-07-02 nr. 152, FT 2006-07, Tillæg A, 4986.

344. In its Leniency Guidelines, the Danish Competition Authority refers to the same restrictive practices as examples of cartel activities, but adds 'secrecy' as a hallmark cartel characteristic. In the Authority's view, a cartel is 'an illegal agreement between competitors that restricts competition', and 'cartel activities are characterized by the fact that they are difficult to expose because the cartel participants have a common interest in keeping their agreement secret'.[1]

1. Danish Competition Authority's *Guidelines on leniency for cartel activities*, available at: <www.ks.dk> (last visited 30 Jun. 2009).

345. The Competition Appeals Tribunal provided its own interpretation of a 'cartel' in *Møns Bank e.a. v. The Danish Competition Council,* a decision of 26 March 2008.[1] In that case the Danish Competition Council had found that the cooperation between seven local banks established in Zealand and Funen violated competition law. First, participation in the group had been made conditional upon adherence to a geographical market-sharing agreement: no participating bank was to open a branch in the same town as another bank's headquarters. Second, they had agreed to avoid actively soliciting each other's customers, and third, the banks had exchanged commercially sensitive information on prices and charges. The Council considered these violations to be hardcore violations and publicly denounced the cooperation as a 'bank cartel'.

1. Upholding *Lokalbanksamarbejdet*, Danish Competition Council decision of 2 Oct. 2007.

346. The seven banks appealed to the Competition Appeals Tribunal. The Tribunal upheld the qualification of the banks' behaviour as an infringement of competition law but did not agree with the Council's classification of the bank cooperation as a 'cartel'. According to the Tribunal, the banks' limited market shares meant that their market and customer allocation arrangements could not have had the appreciable effect on competition needed to qualify the infringement as a cartel. With regard to the information exchange, the Tribunal noted that the Danish Competition Council had failed to establish that all of the information exchanged had been confidential, that the exchanges had taken place systematically, that the banks had followed the same pricing policy, or that the exchanges had taken place with that purpose.

347. From an EU perspective, it is perhaps peculiar that a market or customer allocation agreement is not considered a per se cartel agreement. However, it should be noted that the Danish *de minimis* rules, contrary to EU *de minimis* rules, currently provide a safe haven for market or customer allocation arrangements.[1] Moreover, the Competition Appeals Tribunal handed down its judgment before the entry into force of the leniency provisions contained in section 23 of the Competition Act.

As a consequence, the Tribunal was not obliged to address the notion of a 'cartel' as defined in the Act's preparatory works and referred to in the leniency provisions.

1. However, in 2010, the Danish Ministry of Economic and Business Affairs introduced a bill proposing amendments to the Danish Competition Act, including that the current *de minimis* rules for market and customer allocation agreements be abolished to bring Danish competition law in line with EU competition law. The amendments are expected to enter into force on 1 Oct. 2010.

348. At present, it can be said that Danish competition law includes a notion of 'cartel' that is similar to the EU law concept, even though the Competition Appeals Tribunal might apply a higher threshold with regard to the gravity of the conduct concerned. The notable difference from EU law is the availability of a *de minimis* exemption for market or customer allocation arrangements, although this exception will be abolished from 1 October 2010.

B. Price Fixing

349. Section 6(2)(i) of the Danish Competition Act expressly prohibits price fixing. The scope of the prohibition includes agreements made to 'fix purchase or selling prices or other trading conditions'. The section is written in substantially the same terms as Article 101(1)(a) TFEU.

350. Price fixing is a hardcore infringement. The lack of a *de minimis* exemption for price-fixing offences is explicitly confirmed by section 7(1)(i) of the Danish Competition Act. Earlier, the Danish competition authorities took a comparatively lenient approach to pricing instructions from trade associations, but since the implementation of the EU regulations, this is no longer the case. A stricter approach is also consistent with the preparatory works to the Danish Competition Act, where it is stated that all restrictive agreements are encompassed by the section 6 prohibition, including agreements of an instructive nature. As a consequence of this stricter approach, several trade associations have received fines for recommending minimum prices to their members.[1]

1. See below at *Information Exchange Practices*.

351. The practice of the Danish Competition Authority demonstrates that it is extremely difficult to obtain an exemption for a price-fixing agreement under section 8 of the Danish Competition Act.

352. A rare example of an exempted price-fixing arrangement for purchase prices is the horizontal cooperation between twenty-seven small and medium-sized motor vehicle insurance companies.[1] The cooperation consists of a jointly established association of insurance appraisers (*Taksatorringen*) that: (1) assesses motor vehicle insurance claims; and (2) negotiates prices with repairers on behalf of the

association's twenty-seven members. The cooperation has been exempted three times, in 1999, in 2003 and most recently in April 2009.

1. *Taksatorringens vedtægter* (in English: *Bylaws of the Association of Insurance Appraisers*), Danish Competition Council decision of 29 Apr. 2009.

353. According to the Danish Competition Council, the cooperation restricts competition but can be exempted for its pro-competitive effects. The cooperation is necessary for the smaller insurance companies that cannot afford an in-house insurance appraisal department. By granting the smaller insurance companies economies of scale and buying power similar to those of the in-house appraisal departments of large insurance companies, the cooperation has clearly benefitted competition in the motor vehicle insurance market and the repair market.

1. Bid Rigging

354. Bid rigging is a hardcore infringement, for which there is no *de minimis* exemption.[1]

1. See s. 7(2)(ii) of the Danish Competition Act.

355. In *El-kartellet* (The Electricity Cartel Case), the Danish Competition Authority conducted a series of dawn raids within the domestic electrical contractor business. The Authority found that the contractors had coordinated their bids before participating in a tender, in contravention of the Act. Prior to the tender, the contractors had agreed on which contractor should make the lowest bid and at which price. The remaining contractors could therefore make a higher bid to secure the tender for the agreed contractor. Further, the contractors kept a journal detailing which party's turn it was to win the next tender. The Authority found that this concerted practice not only led to higher prices for the individual tenders concerned, but also higher prices per account rendered.

356. A somewhat similar case is the Danish Competition Appeals Tribunal's ruling in *Fælleslicitationskontoret og Varmebranchens Licitationsforening.*[1] The Tribunal found that the two trade associations involved had infringed section 6(2)(i) of the Act by adopting a mandatory 'calculation fee', which the organized tenderers should stipulate when bidding on a contract. The purpose of the fee was to cover the losing tenderers' calculation costs. The case shows that it is not only traditional bid rigging that is prohibited by section 6, but also agreements on additional charges limited to covering actual costs.

1. *Fælleslicitationskontoret og Varmebranchens Licitationsforening 'Jermer' mod Konkurrencerådet,* Danish Competition Appeals Tribunal decision of 20 Jan. 2000.

C. Market/Client Allocation

357. The Danish rules, at section 6(2)(iii) of the Act, prohibit the allocation of market segments or customers. The preparatory works to the Act state that allocation of geographical areas, quotas or customer categories are examples of horizontal agreements prohibited by section 6. Contrary to price-fixing and bid-rigging practices, customer or market allocation can nevertheless qualify for a *de minimis* exemption – at least until 1 October 2010 when new legislation abolishing the exception is expected to come into force.[1]

1. In 2010, the Danish Ministry of Economic and Business Affairs (responsible for competition policy) introduced a bill proposing amendments to the Danish Competition Act. The adjustments primarily concern merger control, but the bill also proposes that the current *de minimis* rules for market and customer allocation agreements be abolished to bring Danish competition law in line with EU competition law. It is expected that the amendments will enter into force on 1 Oct. 2010.

358. In *Lokalbanksamarbejdet*[1] (mentioned above), the Danish Competition Council found that seven local Danish banks had infringed section 6(1)(iii) of the Danish Competition Act by entering into a horizontal agreement regarding geographical and customer market sharing, and by entering into a concerted practice regarding the exchange of classified information. However, the Council accepted that the *de minimis* exemption applied for two out of five years of the infringement.

1. *Lokalbanksamarbejdet,* Danish Competition Council decision of 26 Mar. 2008.

II. Information Exchange Practices

359. Agreements to exchange information can, in certain circumstances, amount to restrictive agreements or concerted practices in violation of section 6(1) of the Act.

360. Some information exchange agreements – such as agreements that are ancillary to a cartel – clearly violate section 6(1). Information agreements that are ancillary to a cartel and relate to price-fixing or market-sharing activities are naturally covered by section 6(1) and will not be further elaborated on in this section.

361. On the other hand, other information exchange agreements can occur in the absence of a cartel. These kinds of information exchanges can fall within or outside the scope of the prohibition in section 6, depending on factors such as the nature of the information exchanged (whether it is prices, market shares, costs, etc.), the market structure (such as oligopolistic or fragmented), the frequency of the information exchanges and the age of the information.[1]

1. If it is older than one year, information is usually considered historic. There is a general assumption that Danish law applies the same standard as the EU rules, although the Danish Competition Authority has indicated that this should not be considered a hard and fast rule.

362. During the 1990s, the Danish competition authorities took a somewhat lenient approach to this issue. As a consequence, there were several cases where information exchange agreements regarding price fixing were found to be compliant with the Danish competition rules. Since 1998, the Danish Competition Authority has taken a significantly stricter line on information exchange agreements – intervening in more than fifty cases. The issue has most frequently arisen in connection with information exchanges within trade associations.

363. In *Lokalbanksamarbejdet,*[1] the question was whether or not a group of small, local Danish banks had exchanged information about their businesses in violation of the Act. In the first instance, the Danish Competition Council found that the exchanged information was confidential, individual, detailed and current, and that the purpose of the exchange was for the information to form part of the banks' pricing and fee policies. Therefore, the information exchange amounted to a cartel in violation of section 6(1).

1. *Lokalbanksamarbejdet* (also known as 'the local banks case'), Danish Competition Council decision of 26 Mar. 2008, upheld by the Competition Appeals Tribunal in *Møns Bank e.a. v. The Danish Competition Council*, a decision of 2 Oct. 2007.

364. On appeal, the Danish Competition Appeals Tribunal found that not all of the information exchanged was confidential, and that the exchange could not be regarded as systematic. Further, the Tribunal found that evidence that the various local banks had followed the same pricing policy, and that the intended purpose of the information exchange had been so that it could form part of the pricing and fee policies was unsubstantiated. Therefore, the Tribunal held that the information exchange did not amount to a conventional cartel agreement. Even so, the Tribunal found that the information exchange, combined with other circumstances in the case, amounted to a violation of the Act because its overall purpose was illegal.

365. If there is a natural need for the information exchange, or if there exists a general contractual duty of loyalty, the information exchange practice can be exempted from the prohibition in certain cases: see for example, *Foreningen af Filmudlejere i Danmark*.[1]

1. *Foreningen af Filmudlejere i Danmark*, Danish Competition Authority decision of 21 Dec. 2002.

A. Trade Associations

366. In a 2007 Competition Report (*Konkurrenceredegørelse 2007*), the Danish Competition Authority issued a set of guidelines expressing its views on information exchanges in trade associations, and consequently began a systematic survey of the statistics compiled by Danish trade associations. This led to a number of cases before the Danish Competition Council, some of which can only be interpreted as a general toughening of the stance taken by the authorities towards information exchanges in trade associations.

367. In the guidelines, the Authority lists a number of criteria for the assessment of information exchanges. But unfortunately the guidelines are not particularly clear and only describe the 'grey zone' without providing guidance as to what is acceptable to the Authority and what is not. Therefore, the guidelines cannot meaningfully be applied by a trade association intending to comply with the competition rules. Combined with the Authority's general attitude that it will not provide positive reassurance to parties seeking informal guidance, the general effect is that trade associations have had to seek legal counsel for interpretation of the guidelines.

368. The Danish Competition Authority states that trade organizations are forbidden to exchange information taking the form of recommended prices, rebates and the like. As a general rule, it is very clear that the publishing of maximum prices will also violate the Act. Two other types of prices are, as a general rule, not allowed to be published: future prices and actual prices (with the exception of certain price portals aimed at consumers). On the other hand, publishing historical prices can be legal if the prices are sufficiently outdated and aggregated. The fact that the Authority seems to apply an almost per se prohibition to the publication of expected future prices seems to be somewhat overzealous: a prediction of, say, future world market prices, which neither the trade association nor its members in Denmark have any capability of affecting, would certainly not be well-suited to limiting competition.

369. For sales and production information, the Danish Competition Authority suggests that publishing information which reveals the future sale prices and production levels for single companies is prohibited. However, publishing such information can be legal if the information is sufficiently outdated and aggregated. In collecting the information, trade associations must ensure strict confidentiality so that members of the trade association do not receive confidential business information about each other. Further, trade associations are not permitted to publish information regarding members' costs if the information can in any way be perceived as a price recommendation. Information about an individual company's costs may only be published if there are associated and ascertainable efficiency gains, and if the information is depersonalized.

370. As a starting point, the Danish Competition Authority takes the view that recommendations that might amount to substantial competitive parameters are not allowed. Whether or not this is the case depends on a number of factors – such as the type and age of the information exchanged, the aggregation level, the concentration in the market and how the information is published and to whom.

371. With regard to recommendations on pricing conduct, it is likely that the Danish Competition Authority's views are more restrictive than the Danish and European case law on this area. In practice, it seems that the general rules are not applied as rigidly as the Authority states. In a number of cases, the Danish Competition Council has deemed information exchanges illegal by object. Previously, the authorities had shown a tendency to assess the legitimacy of information exchange practices from an 'effect on competition' point of view. Also, the criterion

used to establish whether or not an information exchange practice has the restriction of competition as its *object*, seems to be wider than under general EU law. This shift is seen in two landmark cases, *ITD*[1] and *DTL*.[2]

1. *International Transport Danmark (ITD)*, Danish Competition Council decision of 25 Feb. 2009.
2. *Dansk Transport og Logistiks informationsudveksling,* Danish Competition Council decision of 17 Dec. 2008.

372. In *ITD*, the Competition Council found that ITD had exchanged information with its members that could unify member prices, in violation of the Act. Among other things, ITD had encouraged its members to pass on increases in costs to customers, provided its members with a calculation tool that could potentially lead to unified prices, and featured published cost prognoses of ITD's expectations for the development in costs for the coming year. The decision is in line with the views expressed by the Danish Competition Authority in its 2007 Competition Report (see above).

373. In an Eastern High Court judgment,[1] Dansk Juletræsdyrkerforening (the Danish Christmas Tree Growers' Association) and its manager were fined for the illegal exchange of information. The Court found that through its membership magazine, the association had published (among other things) a price calculation model and price statistics. It used these two tools to guide its members with regard to pricing, including minimum prices. The Court found that the tools were suitable for unifying member prices.

1. *Anklagemyndigheden mod Dansk Juletræsdyrkerforening* (in English: *The State Prosecutor v. The Danish Christmas Tree Growers' Association*), Eastern High Court decision of 24 Sep. 2009.

374. Even though the *de minimis* thresholds in section 7(1) were not met, the Court found that the association's activities were covered by section 7(2) and qualified as a hardcore restrictive agreement. (The section 6 prohibition against restrictive agreements still applies even where the *de minimis* thresholds are not met if the agreement can be classified as hardcore). Section 7(2) was amended in 2002 to extend to horizontal agreements, and the Court found that the provision also covered agreements or concerted practices with the (lesser) purpose of guiding pricing. It was held that agreements or concerted practices do not have to be binding to constitute a violation of the section 6(1) prohibition.

375. In *DTL,*[1] a 2008 decision regarding transport trade association *Dansk Transport og Logistik* (Danish Transport and Logistics), the Danish Competition Council found that DTL had exchanged information with its members in violation of section 6(1). The information exchange included the publishing of an electronic model for calculating prices, the provision of a calculation tool that contained precompleted costs, and the publishing of cost prognoses including DTL's assessment of cost developments in the coming year. Furthermore, DTL had encouraged its members to pass on their costs to their customers.

1. *Dansk Transport og Logistik (DTL)*, Danish Competition Council decision of 17 Dec. 2008.

376. It is worth noting that the Danish Competition Authority had previously declared that parts of the above-mentioned information exchange models did not violate the Danish Competition Act. Despite this finding, the Council held that it was legitimate for it to make a new assessment of the circumstances, given that – among other things – ten years have passed since the last assessment, and in the interim period there had been several new cases in the area. However, because of DTL's legitimate expectations (created by the previous legal assessment), the Authority only assessed the circumstances from the 2008 re-evaluation point forward. The Council ordered DTL to change its behaviour to comply with the Act.

377. In both *DTL* and *ITD,* the Council stated that an information exchange practice will have the restriction of competition as its object if it is 'objectively suitable' to restrict competition. Taken at face value, this implies that it would never be necessary to conduct an effects-based analysis and ascertain whether information exchange practices had any practical effect because such practices would always be caught by the other test – objectively suitable to restrict competition. However, in both cases the Council concluded that there seemed to be no other objective purpose than to restrict competition. Both cases were appealed.

378. The criterion 'objectively suitable' appears for the first time in a case regarding a cost index – *Håndværksrådets omkostningsindeks.*[1] Håndværksrådet is a Danish umbrella organization whose member organizations include car repair shops that carry out repairs for insurance companies. In the case, the organization applied for an individual exemption with regard to a cost index that weighed a number of official indices to reflect the costs of a typical car repair shop with a single percentage increase. In the organization's newsletters, the leaders of the member organizations involved had praised the index, calculated how much more money members would have made if the index had been in use in a given period, and stated that they were in 'negotiations' with the Competition Authority with the expected outcome that the index would be approved for price increases with respect to the insurance companies.

1. *Håndværksrådets orientering om autoværkstedernes procentvise omkostningsstigning* (in English: *The Danish Federation on Small and Medium-sized Enterprises' information regarding the car repair shops' increase in costs expressed as percentages*), Danish Competition Council decision of 29 Mar. 2006.

379. The Danish Competition Council declined the application for an exemption, stating that the index had the restriction of competition as its object because it was objectively suited to establish a concerted practice between the car repair shops without any further contact between them. The decisive factor seems to have been that the index was, effectively, a recommended price increase. Therefore, the case is in line with general EU law principles. However, the *Håndværksrådet* case is cited in *DTL* and *ITD* in support of a general proposition that cost indices run contrary to competition law.

III. Cooperation Agreements

380. Under the broad umbrella of horizontal agreements there are different types of cooperation agreements that are, at face value, presumed to be permissible. These agreements can be distinguished from others that are harmful and always clearly illegal, such as cartel agreements. They can also be distinguished from those activities that, depending on the circumstances, will *sometimes* be permissible, such as information exchanges.

381. Cooperation agreements tend to be of a generally different nature than cartel activities. They are usually transparent or publicized (if not their terms, at least the fact that they exist) – in contrast to the secret, concealed activities of a cartel. Such agreements are usually presumed to be legitimate and permissible, but naturally there are limits as to what can be included and agreed upon.

382. The different categories of cooperation agreements and their legal considerations are outlined in the sections that follow. Each category is addressed in the same order as it appears in the European Commission's Notice on horizontal cooperation agreements.[1]

1. Commission Notice, Horizontal Restraints Guidelines, OJ C 3/2, 6 Jan. 2001.

383. At the outset it can be noted that there are no substantial variations from the EU standards in this particular area of Danish law. There is also nothing to suggest that the Danish competition authorities or courts will take a substantially different view than that set out under EU law. Therefore, it is appropriate to examine Danish law against the background of EU competition law.

384. EU law revolves around two well-established formal block exemption regulations that have a limited application to certain types of cooperation agreements: (1) specialization agreements;[1] and (2) research and development (R&D) agreements.[2] Agreements that fulfil the criteria set out in the block exemptions will be deemed to fall outside of Article 101 TFEU and/or satisfy the requirements of Article 101(3). However, to comprehensively cover all of the areas contemplated by horizontal cooperation agreements, the Commission has produced a set of guidelines that complement the block exemptions and provide an analytical framework for assessment of any cooperation.[3] With a focus on cooperation agreements that potentially result in efficiency gains, the guidelines include specialization and R&D as two important segments. There are other segments that arguably may have merited their own 'hard law' formal block exemptions, but the European Commission has not been authorized to create any further regulations. Any assistance is limited to 'soft law' – several Commission notices that offer direction on Article 101.

1. Commission Regulation (EC) No 2658/2000, Specialization Agreements, OJ L 304/3, 5 Dec. 2000.
2. Commission Regulation (EC) No. 2659/2000, R&D Agreements, OJ L 304/7, 5 Dec. 2000.
3. Horizontal Restraints Guidelines, OJ C 3/2, 6 Jan. 2001.

385. Danish competition law incorporates two block exemption regulations that are relevant to horizontal agreements: (1) the block exemption of specialization agreements implemented by Executive Order No. 1211/2000; and (2) the block exemption of R&D agreements implemented by Executive Order No. 1212/2000. The block exemptions are adopted in the same wording and format as the EU block exemptions and take the form of brief Danish legal orders '*bekendtgørelse*' – executive orders. The instruments set out the precise conditions for applying the exemptions to the prohibition against restrictive agreements under section 8 of the Danish Competition Act. For all other types of horizontal agreements, the Danish authorities and courts will look to the Commission's administrative practice and case law.

386. A third Danish block exemption regarding horizontal agreements – the exemption for 'voluntary chains' – was repealed in 2005.

387. An important starting point is that in line with general statements made in the preparatory works to the Danish Competition Act, Danish authorities and courts are likely to adhere to the practice of the European Commission and European courts on horizontal agreements. In adopting the EU provisions, including the two formal block exemptions, the Danish Competition Authority has not redrafted any of the regulations, nor has it issued its own set of comprehensive guidelines. Inevitably, the Danish authorities will adhere to EU practice – including the Commission guidelines – on equivalent provisions.

A. Research and Development

388. Enhanced innovation and idea sharing leading to more vigorous competition are recognized as some of the benefit of agreements on research and development. Such agreements may extend through research and development to the production, commercialization and marketing of new products, results or technology, and range in form from simple outsourcing agreements to jointly controlled companies. R&D agreements are problematic, however, where they have restrictive effects, or where their true objective is not R&D.

389. Since the introduction of the Danish Competition Act, there have been no Danish decisions in which the R&D block exemption has been applied to cooperation agreements on research and development.

390. The block exemption is based on the assumption that cooperative agreements regarding the execution of research work or joint development of research results do not generally restrict competition. Instead, such agreements can promote technical and economic progress by sharing know-how and avoiding duplication of research and development work. As such, these types of agreements will often satisfy the conditions in section 8 (equivalent to Article 101(3) TFEU).

391. Three types of cooperation agreements regarding R&D are exempted from the section 6 prohibition against restrictive agreements:

– joint research and development of products or processes and joint exploitation of the results;
– joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same parties; or
– joint research and development of products or processes excluding joint exploitation of the results.

392. A few conditions are listed in the block exemption; namely that generally all parties must have access to the results of the joint R&D and each party must be free to independently exploit the results of the joint R&D.

393. Research and development is defined as 'the acquisition of know how relating to products or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual rights for the results'.

394. Where the undertakings involved in the cooperation agreement are not competitors, the block exemption will apply regardless of market shares for the duration of the R&D. If the results are jointly exploited, the block exemption will continue to apply for a period of seven years from the time the products are first released on the Danish or EU market. If the parties to the agreement are competitors, the block exemption will only apply if the combined market share of the parties did not exceed 25% at the time the agreement was entered into. Where the condition is fulfilled, the exemption will apply for the seven-year time period. After the end of this period, the exemption will apply for as long as the combined market share of the parties does not exceed 25%.

395. Similarly to all other block exemptions, R&D cooperative agreements fall outside of the scope of the exemption if they feature certain hardcore restraints, such as a restriction of the parties' freedom to carry out research and development independently or with third parties, a limitation of output or sales or price-fixing when selling products to third parties. If an R&D agreement includes such restrictions, the agreement will fall within the scope of the section 6(1) prohibition.

396. The Danish competition authorities have not yet applied the block exemptions in practice. In several decisions the authorities have refused to apply the block exemptions to cooperation agreements. Regarding R&D, see the 2002 decision *DLF-Trifolium A/S og Danisco Seed A/S*,[1] in which the parties had a combined market share in excess of 25%, and the Council decision of 29 September 1999[2] in which the agreement included an unlimited (in terms of time) market allocation clause.

1. *Samarbejdsaftale mellem DLF-Trifolium A/S og Danisco Seed A/S* (in English: *Cooperation agreement between DLF-Trifolium A/S and Danisco Seed A/S*), Danish Competition Authority decision of 30 Jan. 2002.
2. *Samarbejdsaftale mellem Tele Danmark A/S og Jenka Electronik A/S om forskning, udvikling og salg af nødkaldsapparat (*in English; *Cooperation agreement between Tele Danmark A/S and Jenka Electronik A/S regarding research, development and sale of alarms*), Danish Competition Council decision of 29 Sep. 1999.

B. Specialization

397. Specialization agreements, together with joint production and subcontracting agreements, are forms of production agreements. Specialization agreements involve decisions by one or both parties to unilaterally or reciprocally discontinue production of a particular product and instead purchase it from the other party.

398. Similarly to R&D, there is a paucity of Danish decisions on horizontal specialization agreements. In fact, there have been no decisions on this particular area since the Act was introduced. It must be expected that the Danish competition authorities will adhere to the Commission's block exemption regulation and practice in this area.

399. The basis for the block exemption on specialization agreements is that this type of agreement generally enables the undertakings concerned to concentrate on the manufacture of certain specific products, thereby improving efficiency and the production and distribution of goods. As such, specialization agreements will often meet the criteria in section 8 and be exempted from the prohibition against restrictive agreements in section 6(1).

400. Under the block exemption, three categories of specialization agreements are exempted from section 6(1) if the aggregated market share of the parties to the agreement does not exceed 20%.

401. The exempted agreements are:

– unilateral specialization agreements, where one party agrees to cease production of certain products or to refrain from producing those products and to purchase them from a competing undertaking, while the competing undertaking agrees to produce and supply those products;
– reciprocal specialization agreements, where two or more parties agree on a reciprocal basis to cease or refrain from producing certain different products and to purchase these products from the other parties, who agree to supply them; and
– joint production agreements, where two or more parties agree to jointly produce certain products.

402. The exemption also applies to marketing and purchasing agreements entered into in connection with the specialization agreement, such as exclusive purchasing/supply agreements, or joint distribution agreements.

403. The exemption from section 6(1) is conditional – the specialization agreement must not include any hardcore restraints. The block exemption lists three hardcore restraints: the fixing of resale prices, limitation of output or sales and the allocation of markets and customers.

C. Standardization

404. There are no specific Danish rules or guidelines concerning standardization agreements, and no administrative practice or case law in the area. The Danish Competition Authority refers to the Commission's guidelines regarding horizontal restraints, and will almost certainly adhere to the Commission's practice in its decisions.

405. The purpose of standardization agreements is to define technical or quality requirements for products or production processes or methods. Agreements that do not obligate the parties to comply with standards, or which are part of a wider agreement to ensure compatibility of products, and where participation is unrestricted, will generally not contravene section 6(1) of the Competition Act. However, if the standardization agreement is used to exclude competitors as part of a broader restrictive agreement, the agreement will almost always restrict competition and violate section 6(1).

406. Often an assessment as to whether a standardization agreement contravenes section 6(1) depends on whether it restricts the parties' abilities to compete on product characteristics, and to what extent the parties remain free to develop and/or market alternative standards or products that do not comply with the standards.

407. Standardization agreements may fall within section 8 and thereby be exempted from section 6(1) if they generate significant economic benefits, are applied in a non-discriminatory manner and do not otherwise restrict competition.

D. Joint Production

408. For joint production and joint distribution, the application of Danish law is basically consistent with EU competition law.

409. In certain market sectors it can be beneficial for competitors to cooperate on production. Production agreements can be beneficial for consumers where they lead to greater efficiency and lower costs for the producers, but cooperation and coordination between competing producers can also result in restrictions on competition. Cooperation agreements between non-competitors will usually not lead to a restriction of competition in the market, since there was no competition between the parties to begin with.

410. Where a cooperation agreement is the only way to enter a new market or to produce a specific product, such an agreement will most likely not contravene section 6 of the Competition Act, even where the parties are competitors. Also, the same generally applies where the commonality of total costs between the cooperating parties is low, for example, because only a minor part of the final product was produced in cooperation, or because the cooperation only concerned a minor part of the parties' total output of the final product.

411. Agreements between competitors that fix prices for market supplies, limit output or share markets or customer groups will fall within the scope of section 6. However, if the agreement regarding output is limited to the output covered by the production agreement, this will not contravene section 6. The same follows where a production joint venture also carries out the distribution of the products covered by the production agreement and sets the sales price for the produced goods.

412. To test whether a production agreement restricts competition, the authorities will analyse the effects of the agreement and examine the parties' market shares, the number of competitors in the market and other relevant factors.

413. An agreement concerning both specialization and joint production will be exempted under the block exemption concerning specialization agreements as long as the parties' combined market share does not exceed 20%.

414. The Danish Competition Authority's decision in *Asphalt*[1] illustrates the similarities in application. The case concerned a joint production agreement between producers of asphalt. The Authority found that a number of joint production agreements between the producers, in the form of the establishment of several non-full-function joint ventures, could not be exempted from section 6 of the Danish Competition Act, as the agreements led to a restriction of the competition between the producers. The Authority stressed that the producers would each have been able to perform the tasks covered by the joint production agreements on their own, and that the costs relating to the joint production agreements accounted for a significant part of the parties' total costs relating to the production of asphalt. As such, there was an appreciable risk of a restriction of the competition on price between the parties.

1. *Samarbejdsaftaler i asfaltbranchen* (in English: *Cooperation agreements in the asphalt industry*), Danish Competition Council decision of 27 Oct. 1999.

415. The decision was later appealed to the Competition Appeals Tribunal, who found that the establishment of a joint venture, full function or not, was not within the scope of section 6.[1] As such, competitors had 'free access' to coordinate market efforts through a joint venture without regard to section 6. Following the Tribunal's decision, the Danish Competition Act was amended to include an express provision stating that coordination between competitors through a joint venture is contrary to section 6. However, full-function joint ventures are still classed as mergers, and as such will fall outside of the scope of section 6.

1. *Viborg Asfaltfabrik I/S m.fl. mod Konkurrencerådet* (in English: *Viborg Asfaltfabrik I/S and others v. The Competition Council*), Competition Appeals Tribunal decision of 25 Apr. 2001.

416. In a case concerning *GDC A/S*,[1] various provisions of a joint distribution agreement were cleared. The case involved a joint distribution agreement setting up a cooperative joint venture for distribution activities regarding different types of media-related products. The structure of the joint distribution prevented the parent companies from gaining access to confidential information from each other. As

such, the parent companies only had access to basic data concerning customers. Furthermore, the board of directors in which the parent companies were directly involved had only strictly executive powers and thus had no involvement in the day-to-day business of the joint venture. Consequently, the joint distribution was approved by the Danish Competition Authority.

1. *Distributionssamarbejdet GDC A/S* (in English: *The joint distribution GDC A/S*), Danish Competition Authority Decision of 28 Aug. 2002.

E. Joint Purchasing

417. Joint purchasing agreements are often created to achieve discounts or economies of scale. As such, joint purchasing agreements will often be beneficial for both the companies involved and competition in the market.

418. Joint purchasing agreements may affect two different markets: the purchasing market in which the agreement will have its direct effect, and the downstream selling market where the parties will sell the purchased goods.

419. Agreements regarding joint purchasing will almost always be concluded between competitors, at least in the purchasing market. If the parties are not active in the same downstream market, the agreement will generally fall outside the scope of section 6 unless the parties have particularly strong market positions in the purchasing market.

420. As a general rule, joint production agreements only contravene section 6 of the Competition Act per se if the agreement in effect not only concerns joint purchasing, but also serves as a method for maintaining a cartel between the parties, for example, with regard to price fixing, market or customer allocation, or the limitation of output.

421. The assessment of whether a joint purchasing agreement is contrary to section 6 of the Competition Act will first and foremost take into account the buying power of the parties. If the parties have significant buying power (e.g., where they account for a significant part of the total volume of the purchasing market), the agreement can lead to a foreclosure of the market and therefore run contrary to section 6.

422. Significant buying power can also have the result that lower prices are not passed on to downstream customers, which in turn can lead to cost increases for other competitors, or to supplier inefficiencies. This will often be the case where the parties have significant combined market power in both the purchasing and selling markets. If the parties have a combined market share of below 15% in both the purchasing and the selling markets, it is unlikely that a joint purchasing agreement will lead to a restriction of competition.

F. Joint Selling

423. Parties that cooperate to jointly sell their products tread a fine line between permissible and illegal activities. Joint selling is an area that, on some levels, approaches cartel activity. Since it can involve revenue sharing, and in some instances market sharing, it is often given harsh treatment by the authorities, or even directly condemned.

424. Joint selling agreements between non-competitors cannot create any horizontal restraints and will generally not infringe section 6. Any vertical issues will usually be assessed under the block exemption for distribution agreements. Where creating a joint selling agreement is, objectively, the only way for a competitor to enter a new market, the agreement will not create any restrictions as the parties are not actual or potential competitors.

425. If, on the other hand, the joint selling agreement has as its object or effect to fix or otherwise coordinate prices between the competitors, the agreement will contravene section 6 because it eliminates price competition between the parties. The same goes for restrictions on the parties' production volume and for the allocation of markets and/or customer groups. Price fixing and volume restrictions will infringe section 6 even where the joint selling agreement is not exclusive and the parties are free to sell to others outside of the agreement.

426. Even if a joint selling agreement does not aim to fix prices, limit output or allocate markets or customer groups, it may infringe section 6 if it allows the competing parties to exchange sensitive commercial information or if it influences a significant part of the parties' total costs. However, where the parties' combined market share does not exceed 15% the agreement is unlikely to cause any competitive restraints.

427. Joint selling is an area where activities are generally presumed to be permissible, providing parties with no reason to approach the authorities. While in practice the authorities can give informal approval to cooperative activities, there is often no need for a formal decision. In any event, the authorities do not seem to allocate a significant amount of resources to law enforcement in this particular area – they tend to focus on more significant and harmful cooperative activities, such as cartels. For joint selling, there are no substantive differences between EU law and Danish national law.

§3. Vertical Agreements

428. As a matter of principle, whether or not a vertical agreement is made in violation of the law will be assessed under section 6 of the Danish Competition Act. The authorities will have to establish that the agreement is: (i) restrictive by object – and can therefore be classified as a hardcore competition law infringement; or (ii) restrictive by effect – where it will have to be shown that the agreement has

appreciable effects on competition, often determined in practice by reference to market shares.[1]

1. The notion of 'appreciable effects' has been discussed at length in two Danish cases: *Lokalbanksagen* ('the local banks case'), Competition Appeals Tribunal decision of 2 Oct. 2007; and *Apotekerforeningen* (in English: *The Association of Chemists*), Competition Appeals Tribunal decision of 8 Jun. 2007. A detailed examination of 'appreciable effects' appears in Part II, Ch. 1 under the heading 'Restrictive Agreements,' together with a discussion of the object or effect of an agreement.

429. Similarly to the European Commission's practice with regard to Article 101 TFEU, the Danish authorities have generally treated vertical restraints as less problematic under section 6 than other types of agreements.

430. In Denmark, one focal point has always existed: resale price maintenance. This type of behaviour has been the subject of a specific prohibition since 1955 under Denmark's previous competition laws. And Danish case law includes a comparatively high number of decisions dealing with resale price maintenance; around eight out of every ten cases that result in the imposition of a fine involve resale price maintenance.

431. Another feature of the domestic law reflects the fact that historically, Denmark's retail industry has typically been characterized by a high number of voluntary chains. Many of the smaller, independent shops have viewed it as beneficial to become part of a larger branded chain. In the past, Denmark had its own block exemption to cover voluntary chains. However, the exemption has now been abolished. Older cases addressing voluntary chains under the prior block exemption should be considered carefully with regard to their precedent value.

I. Distribution

A. Introduction

432. In Denmark, for vertical agreements affecting trade between Member States, the EU's vertical block exemption regulation (Commission Regulation 2790/1999) ('VBER') is directly applicable. For vertical agreements not affecting trade between Member States, the vertical block exemption is made applicable in Denmark by Executive Order No. 353 of 15 May 2000, so that the same provisions apply under the national rules. Accordingly, 'VBER' in this text is used to indicate both Commission Regulation 2790/1999 and Denmark's Executive Order No. 353.

433. The VBER exempts distribution systems from the scope of the prohibition in section 6 where the market share of the supplier is below 30% and where the system does not contain any hardcore restrictions or other restrictions falling outside of the VBER exemption.[1] Restrictions that are not considered hardcore restrictions will not automatically be considered a violation of the law. The authorities will have to examine the conduct and evaluate whether there is any infringement of section 6.

1. For mergers, the block exemption can be applied to ancillary agreements. In one merger case – *Tryg Nordea*, a Danish Competition Authority decision of 25 Sep. 2002 – there were some ancillary restraints to the agreement that went beyond the Commission's notice on ancillary restraints. It was successfully argued, however, that the block exemption should apply and thereby operate to permit the ancillary agreements.

434. The Danish Competition Authority has generally administrated the provisions of the VBER in a similar manner to the Commission's practice under EU law.

435. In Denmark, the competition authorities have – at least formally – dealt with comparatively few cases regarding distribution systems (except for the motor vehicle sector, see below) unless cases included other elements of the restraint of competition such as resale price maintenance. Section 8 of the Danish Competition Act was amended on 1 February 2005 to align it with the modernized EU rules – and the amendment greatly reduced the need for individual exemption applications under the VBER.

436. Suppliers who use these provisions are often smaller businesses whose distribution systems will almost certainly never give rise to any real competition concerns but who nevertheless want certainty that their agreements do not infringe competition law. But the Danish Competition Authority's resources are effectively wasted on an examination if the conditions for non-intervention or exemption are met. Therefore, the Authority informally discourages such notifications and prefers to provide informal guidance to potential applicants as to whether an agreement can give rise to competition concerns. If the Authority finds that the agreements may affect trade between Member States, it will decline a formal notification under sections 9(2) and 8(5).

437. The following parts will consider exclusive distribution, exclusive distributorship, selective distribution and franchising from a Danish point of view. First, however, we address a more general restraint which can occur with all types of distribution systems: resale price maintenance.

B. The Prohibition against Resale Price Maintenance

438. Unique to the Danish rules is a specific legislative provision addressing resale price maintenance. Subsection (2)(vii) of section 6 was inserted into the Act in 2004 after the Eastern High Court's narrow reading of the section 6 prohibition in *Levi Strauss*[1] (see below). Expressly designed to preserve uniformity with EU case precedents relating to Article 101, the subsection explicitly extends the scope of section 6 to cover agreements made to 'determine binding resale prices or in other ways seek to induce one or more trading partners not to deviate from recommended resale prices' – effectively, resale price maintenance.

1. *Levi Strauss & Co*, Eastern High Court decision of 23 Oct. 2003.

Part III. Administrative Procedure

Chapter 1. Administrative Investigations before the Antitrust Authority

§1. INITIATIVE

787. The Danish Competition Council has the competence to conduct general sector inquiries and initiate specific investigations if a violation of the competition rules is suspected. In practice, however, the Council delegates its powers to its secretariat – the Danish Competition Authority – who acts as the driving force behind inquiries and investigations on behalf of the Council.

788. Investigations can be initiated ex officio, on the basis of complaints from competitors, or via a reference from the European Commission or other competition authorities.[1] The Danish Competition Council makes the final decision as to whether or not it will initiate an investigation.

1. See s. 14(1) of the Danish Competition Act.

I. General Sector Inquiries

789. The Danish Competition Authority frequently conducts general sector inquiries to evaluate competition and identify potential problems. Inquiries can be triggered by a range of sources, including a complaint or media commentary, or even a request from the Danish Parliament. After gathering comprehensive information from the business Community, it is often the case that the Authority initiates investigations against specific companies.

790. The most recent general sector inquiries undertaken in 2009 and 2010 involved the markets for milk, butter and bread, the market for auto repairs, the real estate market, regulation of the pharmacy sector and competition in the retail market for electricity. At least for the dairy industry, the inquiries followed unusually high price increases for some products. However, no grounds for further investigation were uncovered.

791. As part of initiating a general sector inquiry, the Danish Competition Authority often exercises its powers under section 17 of the Danish Competition Act

to gather relevant information.[1] Moreover, a hearing request can be sent to market participants inviting them to contribute their views on the sector.

1. See also below, with regard to information requests.

792. In Denmark, public authorities are encouraged to maintain a high level of transparency. In line with that expectation, the Danish Competition Authority publishes its general sector inquiry results.[1] The results can be downloaded directly from the Authority's home page, or a hard copy can be ordered. Only selected reports are translated from Danish into English.[2]

1. The competence to publish inquiry results follows from s. 4 of *Bkg. nr. 671 af 19.06.2007 om Konkurrencestyrelsens virksomhed i henhold til konkurrenceloven* (in English: s. 4 of *Administrative Act No. 671 of 2007*).
2. For English-language publications and reports, see <www.konkurrencestyrelsen.dk/en/service-menu/publications/publication-file/> and <www.konkurrencestyrelsen.dk/en/service-menu/publications/> (last visited 19 Apr. 2010).

II. Ex Officio Investigations

793. On its own initiative, where the Danish Competition Authority suspects an infringement of the competition rules, it may commence an investigation against an undertaking and its activities in the market. The basis for suspected infringements could be provided by informal complaints, market analyses, sudden price changes, information from the media or other indicators of market irregularity. The Authority's first step in relation to the company could be to issue a request for information,[1] or carry out an inspection (a 'dawn raid').[2]

1. See s. 17 of the Danish Competition Act.
2. See s. 18 of the Danish Competition Act.

III. Complaints

794. Investigations may also be based on complaints from competitors. All such complaints must be recorded by the Danish Competition Authority, regardless of whether they are made in writing or orally.[1] When a complaint is received, the Authority will determine if it is sufficiently founded to warrant an investigation.[2] Any decision not to initiate an investigation cannot be appealed administratively by the complainant.[3] However, it is always possible to have the alleged violation reviewed by the courts through a direct application. Even if no complaint has been filed to the Authority, a competitor still has the option of going directly to the courts and claiming damages.

1. See s. 4 of *Lov nr. 442 af 6. juni 2004 om retssikkerhed ved forvaltningens anvendelse af tvangsindgreb og oplysningspligter* (in English: The Act on Legal Protection in Relation to Coercive Measures).
2. See s. 14(1) of the Danish Competition Act.
3. See s. 19(3) of the Danish Competition Act.

795. If the Danish Competition Council decides to initiate an investigation, the procedure is the same as for ex officio investigations. The Council has the competence to request information from the parties involved or initiate an inspection (a dawn raid).

§2. Powers

796. Prior to making its decision, the Danish Competition Council needs to collect and assess relevant information. In practice, it is the Danish Competition Authority that gathers information and prepares the case for the Council.[1] Information can either be collected through information requests under section 17 of the Danish Competition Act or by way of inspections (dawn raids) under section 18 of the Act.

1. See ss 9 and 10 of *Bkg. nr. 671 af 19.06.2007 om Konkurrencestyrelsens virksomhed i henhold til konkurrenceloven* (in English: *Administrative Act No. 671 of 2007*).

797. Historically, dawn raids could only be initiated as a last resort where information had been requested and fines (usually fines accruing on a daily basis) had been imposed, all without result. This was changed with the reform of the competition rules and introduction of the Danish Competition Act in 1998, and today there is no hierarchy between information requests and dawn raids. The Danish Competition Authority is free to select the most efficient way of gathering the information it needs.

I. Requests for Information

798. The Danish Competition Council may request any and all information necessary to determine whether a breach of the rules has occurred.[1]

1. See s. 17 of the Danish Competition Act. The Competition Authority is also authorized to demand information in its capacity as secretariat for the Competition Council or as manager of the day-to-day administration of the Act on behalf of the Competition Council.

799. Section 17 does not explicitly state who is subject to the duty to disclose information but the preparatory works to the Act state that the Council is authorized to collect information from private and public companies, public authorities and associations of undertakings. It is likely that public authorities will only be subject to the duty if their activities bring them within the ambit of the competition law generally.

800. Subject to legal privilege, natural persons will be obligated to disclose information if they perform business activities or represent an undertaking. Section 17 requests can be used to gather information from board members and employees in management positions, but not from lower-level employees.[1] Further, the duty of disclosure can extend to legal entities or natural persons that act as advisers for an

undertaking. This will typically be the case where advisers have provided information on behalf of the undertaking.[2]

1. K. Levinsen et al., *Konkurrenceloven med kommentarer*, 3rd edn (Copenhagen: Jurist- og Økonomforbundets Forlag, 2009), 1286.
2. K. Levinsen et al., *Konkurrenceloven med kommentarer*, 3rd edn (Copenhagen: Jurist- og Økonomforbundets Forlag, 2009), 1286.

801. The duty of disclosure is broad and requires all information to be provided to the Competition Council, the only limitation being that the information is necessary for the Council to perform its activities. In practice, the Danish Competition Authority can request anything it deems necessary; the Council exercises a very wide discretion in assessing what information it is authorized to request and in determining whether or not the information is necessary. And while Denmark's Public Administration Act[1] suggests an overarching check and balance (the requested information must be relevant and proportional to the purpose of the request), precisely what this requirement means remains unclear and ultimately, subject to the Danish Competition Authority's margin of discretion. Judicial review by the courts is limited too – while the information must be 'necessary', it is unlikely that an undertaking who challenges the authorities' discretion in court will be successful.

1. *Lovbekendtgørelse nr. 1365 af 7. december 2007, Forvaltningsloven* (in English: The Public Administration Act).

802. There are no formal requirements as to how the Competition Council may obtain the information – it can be requested in writing or orally. Similarly, there are no formal requirements as to how the information should be provided to the Council.

803. The right to request information is limited by the privilege against self-incrimination,[1] and it must be applied in accordance with EU law.[2] Also, if a criminal offence is suspected then the special requirements in the Danish Criminal Act[3] must be adhered to.[4]

1. See s. 10 of *Lov nr. 442 af 6. juni 2004 om retssikkerhed ved forvaltningens anvendelse af tvangsindgreb og oplysningspligter* (in English: *The Act on Legal Protection in Relation to Coercive Measures*).
2. *Folketingstidende 2003/2004 tillæg A 3076* (the Danish Parliamentary Gazettes).
3. *Lovbekendtgørelse nr. 1068 af 6. november 2008, Straffeloven* (in English: *The Criminal Act*).
4. See s. 9 of The Act on Legal Protection in Relation to Coercive Measures.

804. Information requests under section 17 may be used to gather information for the European Commission or national competition authorities in other EU and EEA countries if a breach of Articles 101 and 102 of the TFEU is suspected.[1]

1. Section 17(2) of the Danish Competition Act.

805. If the necessary information is denied, the Danish authorities can impose penalties that accrue on a daily or weekly basis.[1] An intentional or grossly negligent failure to comply with a request for information will also be penalized. Similarly, a party who provides incorrect or misleading information to the Danish Competition

Council or Authority can be penalized with fines where that party's conduct is intentional or amounts to gross negligence.[2]

1. See s. 22 of the Danish Competition Act.
2. See s. 23(1) of the Danish Competition Act.

806. Disputes regarding the legality of the Council's information request cannot be brought before the Competition Appeals Tribunal.[1] However, such requests are subject to judicial review by the courts.

1. See s. 19(1) of the Danish Competition Act.

II. Investigating and Search Powers

807. The Danish Competition Authority may conduct inspections (dawn raids) under section 18 to gather information about a suspected infringement. In order to execute a dawn raid, a court warrant is required. The final decision to apply for a court warrant is made by the Director of the Danish Competition Authority. According to the principle of proportionality, a dawn raid cannot be executed if the information can be gathered in a less invasive way, but in practice the Danish Authority's discretion is wide, and the checks and balances purported to be provided by the courts in assessing whether or not to grant a warrant are without substance and confined to basic formalities.

808. Section 18(1) of the Danish Competition Act grants the Competition Authority power to conduct unannounced inspections. The provision allows the Authority access to an undertaking's premises and any means of transport used by that undertaking or association for the purpose of reviewing and making copies of relevant information. The power extends to all information, regardless of the medium in which it is stored. It may include accounts and accounting records, paper files, books, correspondence and other business documents. Also searchable are private bags, pockets, electronic calendars, mobile telephones and similar items, but the investigation does not extend to documents covered by legal privilege – such as purely private correspondence, or legal advice given by external lawyers.

809. Further, relevant employees and board members may be required to provide oral statements explaining document content, incidents or events.

810. If the information is stored or processed by an external data processor, the Authority is entitled to demand access to that entity's premises. However, a precondition to access is that it is not possible for the Authority to obtain the information concerned directly from the undertaking subject to the control investigation.[1]

1. See s. 18(2) of the Danish Competition Act.

811. At the beginning of an inspection, the Danish Competition Authority must present formal documentation that authorizes the search and sets out the scope of

the investigation. Specifically, it must present for verification: (1) the court warrant; (2) a statement providing information about the alleged infringement and the decision to carry out the investigation; and (3) some form of personal identification for employees carrying out the investigation on behalf of the Authority. As part of the investigation, the Authority is only permitted to take copies of material covered by the court warrant and its decision, which may be limited to certain employees or members of the board, or particular locations. However, in practice, the authorization to carry out the investigation is often framed in broad terms with little specific information describing the suspected violation and therefore it can be impossible to place any real limitations on the scope of the investigation. Undertakings may only be vaguely aware of what it is the authorities are looking for. Therefore, the 'scope' of the dawn raid rarely provides any protection against fishing expeditions.

812. Privileged material – such as correspondence with external legal advisors – is excluded from the investigation. However, legal professional privilege does not extend to internal material written by in-house lawyers or counsel. Legal professional privilege is not explicitly and comprehensively addressed by Danish legislation, but is a principle developed by the case precedents of the Community Courts.[1] The Danish Competition Authority respects legal privilege.

1. See C-155/79 *AM & S Europe Limited v. The Commission* and T-125/03 *Akzo Nobel Chemicals v. The Commission*.

813. If it is not possible to take copies of the required information, the Danish Competition Authority may seal off parts of the business premises and affected information for up to three working days after the initial inspection.[1] Alternatively, the Authority may take relevant information away for copying and return it within three working days after the day of the inspection.[2] In the latter case the company must be provided with copies of the information that the Authority has extracted for further examination.

1. See s. 18(5) of the Danish Competition Act.
2. See s. 18(6) of the Danish Competition Act.

814. The Authority may take identical electronic copies (mirror images) of the electronically stored data covered by the investigation, and is permitted to take the copied material away for further examination.[1] The mirrored material must be sealed when it leaves the premises and the undertaking (or a representative of the undertaking) has the right to be present when the seal is broken and the mirrored material is reviewed. As a general rule, the review must be finished within twenty-five working days after the dawn raid. It is within this same time limit that the undertaking must be given copies of the information that the Authority has extracted from the mirrored material.[2]

1. See s. 18(4) of the Danish Competition Act.
2. In special cases, the time limits in subss (4), (5) and (6) of s. 18 may be extended in accordance with s. 18(7) of the Danish Competition Act.

815. If there is any dispute about whether materials should be classified as legally privileged and excluded from the investigation, the documents in question will be placed in a sealed container for later review before the ordinary courts.

816. When the review of the mirrored material is complete, the material must be resealed. If there is no evidence of an infringement of the competition rules, the mirrored material must be deleted. But if the Authority decides to proceed further in the matter, the mirrored material will be stored and only deleted when the case is finally decided.

817. An undertaking has the right to seek legal assistance during the inspection. However, it is not a prerequisite to carrying out the dawn raid that the company is represented by legal advisors, and the Danish Competition Authority does not have to wait for legal advisors to arrive before they begin their inspection.

818. At the end of the investigation, the Authority and the undertaking's legal advisers will briefly review the seized materials. The Authority will store all of the seized materials as hard copies or electronically. In the period following the dawn raid, it will scrutinize the material, but due to the volume of information that is often collected, this can take up to several months. If irregularities are found, the seized information will be passed on to the Danish Competition Council who will issue an enforcement notice. The State Prosecutor for Serious Economic Crime[1] may also initiate criminal proceedings.

1. In Danish, *Statsadvokaten for Særlig Økonomisk Kriminalitet* or *SØK*.

819. Just as information requests under section 17 can be used to gather information for other national competition authorities or for the European Commission, the same applies to inspections carried out under section 18.[1]

1. See s. 18(9) of the Danish Competition Act.

III. Cooperation with Other State Institutions

820. Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU creates a system of parallel competences in which both the European Commission and the national competition authorities have the power to apply Articles 101 and 102. Accordingly, it follows from section 24 of the Danish Competition Act that cases involving an infringement of Articles 101 and 102 of the TFEU – including cases involving a parallel application of sections 6 and 11 of the Danish Competition Act – may be handled by the Danish Competition Authority if the case has ties to Denmark.[1] For cases concerning Articles 101 and 102 of the TFEU and the provisions of the Danish Competition Act, the Danish Competition Council retains full discretion in deciding whether to investigate a case.[2] However, if there is any effect

on trade between Member States, the Council must consult with the European Commission and authorities within the ECN during the process and prior to making a decision.[3]

1. According to s. 24(1), ties to Denmark exist if agreements between undertakings, decisions within an association, concerted practices between undertakings or the conduct shown by an undertaking have anti-competitive effects within the Danish market, or if an undertaking located in Denmark is involved in an agreement which has anti-competitive effects within the European Union.
2. Section 14(1) of the Danish Competition Act.
3. The Danish Competition Council is subject to the EU procedural rules requiring consultation with the Commission, particularly Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 EC Treaty (now Arts 101 and 102 TFEU).

821. Cooperation between the Danish Competition Authority, the European Commission and national competition authorities in the other EU Member States is governed by the Council Regulation[1] and takes place within the ECN. The ECN was established as a forum for discussion and cooperation between European competition authorities in instances where Articles 101 and 102 of the TFEU are applied.

1. Council Regulation No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 EC Treaty (now Arts 101 and 102 TFEU).

822. It is clear from section 17(2) of the Danish Competition Act that the information described in section 17(1) can be requested by the Danish Competition Authority to assist the European Commission or other EU or EEA competition authorities.

823. The level of cooperation within the ECN includes each of the parties informing each other about new cases and envisaged enforcement decisions, coordinating and helping each other with investigations, and exchanging evidence and other information. The ECN's foundations and procedures are set out in the Commission Notice on cooperation within the Network of Competition Authorities.[1]

1. Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/3).

824. Read together with the Council Regulation, the effect of section 18(9) of the Danish Competition Act is that the Danish Competition Authority can conduct inspections to assist the European Commission and other EU competition authorities in connection with their application of Articles 101 and 102 of the TFEU.[1]

1. It follows from s. 18(9) that the provisions of s. 18(1) through to (8) correspondingly apply to such inspections.

825. According to section 18a of the Danish Competition Act, the Danish Competition Authority is able to exchange information covered by its professional duty of secrecy with other foreign competition authorities. However, information exchanges are contingent on reciprocity; the Danish Competition Authority may only divulge information to a foreign competition authority if a reciprocal agreement on information exchange is entered into. A number of other conditions must

also be fulfilled before the exchange of information is possible, and these ensure that the foreign authority is under a corresponding requirement with regard to secrecy and will only make particular authorized use of that information in accordance with consent given by the Danish body.[1]

1. See s. 18a(2).

826. The Danish Competition Authority cooperates with competition authorities in the other Nordic countries: Finland, The Faroe Islands, Greenland, Iceland, Norway and Sweden. Representatives meet annually to exchange information and discuss cases that affect multiple national markets. Cross-border working groups have been established to target specific sectors.[1]

1. For a more thorough description, see <www.ks.dk/en/competition/international-cooperation/>.

827. In 2001, Denmark, Norway and Iceland entered into a formal agreement for the purpose of exchanging information in competition cases.[1] Sweden also joined the cooperation in 2003. The agreement between the countries seeks to 'strengthen and formalise cooperation' between the competition authorities to 'achieve more effective enforcement of the countries' national competition legislation'. Information can be provided where one authority becomes aware that its enforcement measures 'could have a bearing on significant competitive interests that come under the competence of another authority'.[2] Where necessary to enforce national competition legislation, the authorities can exchange information that is subject to a duty of confidentiality.

1. *Agreement between Denmark, Iceland and Norway on co-operation in competition cases*, 16 Mar. 2001, can be found at <www.ks.dk/en/competition/international-cooperation/agreement-between-denmark-iceland-and-norway-on-co-operation-in-competition-cases/>.
2. See Art. II(1) of the Agreement.

§3. Right of Defence

I. Content and Notification of Opening Decisions

828. Following a dawn raid or request for information, if the Danish Competition Authority decides to carry out further investigations with a view to adopting a decision, it may send a request for further information that includes a description of the subject matter of the case. However, there are no formal requirements for opening an investigation and undertakings can be left unaware of the Authority's investigation or its focus until relatively late in the process.

829. If the Authority pursues an investigation which could lead to a criminal indictment, the Authority must inform the undertakings involved that they are not obliged to provide answers that could be self-incriminating.

II. The Proceedings: Hearings, Access to File, Briefs

830. In Denmark, the Public Administration Act[1] applies to cases involving decisions by administrative bodies.[2] In relation to competition law, this includes all cases before the Danish Competition Council, including pending cases. The Public Administration Act also applies to cases where clearance is given by way of a declaration from the authorities that certain behaviour does not constitute a breach of the competition rules.[3]

1. *Lovbekendtgørelse nr. 1365 af 7. december 2007, Forvaltningsloven* (in English: The Public Administration Act).
2. See s. 2(1) in particular.
3. Declarations are made under s. 9 of the Act. See also P.B. Madsen, *Markedsret 1. del*, 5th edn (Copenhagen: Jurist- og Økonomforbundets Forlag, 2006), 206.

831. If the Public Administration Act applies, all 'parties' within the meaning of the law are furnished with special rights in relation to hearings and access to file. The term 'party' is not defined by the law but case precedents and statements from the Danish Parliament's Ombudsman (*Folketingets Ombudsman*) suggest that addressees to any of the authorities' decisions are always considered 'parties'. Others may gain the status of a 'party' if they have a significant interest in the outcome of the matter. In competition cases the primary question of interest will be whether a competitor can be considered a 'party' within the meaning of the law. In this respect, the Danish Competition Authority takes a very narrow or strict reading of the notion of party and in principle, even a complainant does not fall within the definition of party.

832. In *Svenn Dræbel*,[1] a seller of beer glasses, Svenn Dræbel, complained that he could no longer supply Carlsberg-branded beer glasses because of an exclusivity agreement between Carlsberg A/S and beer glass supplier Bent Brandt A/S. The Danish Competition Authority initiated an investigation on the basis of the complaint. However, when Svenn Dræbel applied for access to the file, the Competition Appeals Tribunal found that he was not to be considered as a party despite the fact that he submitted the complaint.[2]

1. *Svenn Dræbel mod Konkurrencerådet*, Competition Appeals Tribunal decision of 8 Jan. 2003.
2. See also *De Samvirkende Købmænd v. the Danish Competition Authority*, Competition Appeals Tribunal decision of 3 Mar. 2008, where a complainant was denied status as 'party'.

833. In some cases competitors can be granted party status where they have a direct economic interest in the outcome. In *Forbruger-Kontakt Distribution*,[1] a company that distributed magazines, advertising circulars and newspapers complained that a competitor had used unfair loyalty rebates, predatory pricing and exclusivity agreements. The Tribunal found that due to the oligopolistic market structure, the complainant, Forbruger-Kontakt Distribution, had such a direct economic interest in the outcome that it could be considered a party within the meaning of the Public Administration Act.

1. Competition Appeals Tribunal decision of 12 Aug. 2004.

834. According to the Public Administration Act, an administrative body must give a party the opportunity to comment on the facts of the case.[1] In competition cases, this right is extended to legal opinions.[2] As little as three weeks before adopting a decision, the Council may send the affected undertaking a draft decision that reveals the facts central to the investigation and its focus. Parties must be allowed three weeks to submit their views, except for merger cases or where parties have already had the opportunity to present their position before the Danish Competition Council (see section 15a(2)).

1. See s. 19(1), but the rule is not absolute; s. 19(2) contains six derogations.
2. See s. 15a(2) of the Danish Competition Act.

835. As a general rule, parties to a case have access to all documents concerning the case,[1] but internal administrative documents are exempted.[2] However, the competition authorities may not withhold documents that are necessary for the parties to exercise their right of defence. In such cases, the authorities may be obliged to grant access to internal documents.[3]

1. Section 10 of the Public Administration Act.
2. Sections 12 to 14 of the Public Administration Act.
3. See Case U 08/07, *FC Nordsjælland A/S v. The Danish Competition Authority*, Maritime and Commercial Court judgment of 17 Apr. 2009.

836. Furthermore, a document can be exempted where it is necessary to protect significant public interests.[1] In *Forbruger-Kontakt Distribution*,[2] section 15 was used to safeguard business secrets. The Competition Appeals Tribunal found that delivery of the information could significantly impede effective competition which was in the public interest within the meaning of section 15.

1. Section 15 of the Public Administration Act.
2. Competition Appeals Tribunal decision of 12 Aug. 2004.

837. A party will not receive access to correspondence or information exchanges between the Danish Competition Authority and the European Commission or national competition authorities in other EU Member States unless the information contains questions of fact that are of decisive importance.[1]

1. Section 15a(1) of the Public Administration Act.

838. According to the Act on Access to Administrative Files (*Offentlighedsloven*),[1] the general public has the right to access certain documents in the possession of an administrative body. However, this particular legislation is generally not applicable to competition cases.[2]

1. *Lov nr. 572 af 19. december 1985, Offentlighedsloven* (in English: *The Act on Access to Administrative Files*).
2. See s. 13(1) of the Danish Competition Act.

839. It should be underlined that from an undertaking's point of view, both the hearing process and access to file could be described as poor and reflects an imbalance in the system that allows the authorities to retain full flexibility. Since the Council is not required to provide a detailed Statement of Objections, and in practice, the investigation can proceed almost through to a decision before an undertaking is informed about the investigation, undertakings are limited in their ability to exercise their rights of defence.

Section 13(2) of the Danish Competition Act provides that decisions made by the competition authorities must be published unless they are not of interest to the general public. Similarly, decisions or judgments that involve the imposition of a fine must be published. Decisions and judgments are published on the Danish Competition Authority's webpage, <www.ks.dk>. It is common that the documents are only available in Danish-language versions.

840. The publication of information under section 13(2) does not include information on technical matters such as research, production methods, products and operating and business secrets where such information is of substantial importance to the person or undertaking concerned.[1]

1. See s. 13(4) of the Danish Competition Act.

III. Statement of Objections

841. The Danish Competition Act does not set out any requirements for the Danish Competition Authority to issue a Statement of Objections.[1]

1. At present, the Danish Competition Authority does not issue a Statement of Objections in Phase II merger investigations, only a 'hearing note' – often a draft decision – that the undertakings concerned receive before the hearing. However, to bring the Danish merger control procedure in line with procedures in other European countries and the EU merger control procedure, the Danish Competition Authority is considering introducing a Statement of Objections in 2010, that will be issued at an earlier stage of the Phase II investigation. The Authority will also introduce a set of 'Best Practice Guidelines' for handling merger cases in the pre-notification stage.

IV. Final Hearing and Decision

842. If the Danish Competition Authority finds that there has been a violation of the competition rules, it will issue a draft decision. The draft decision will be provided to the undertaking at least three weeks before the Danish Competition Council meets to make its final decision on the matter. The undertaking said to have committed the infringement has the right to appear at the beginning of the Council meeting and briefly present its views and answer any questions asked by the Council. If a party intends to exercise this right, a written overview of its presentation must be provided to the Danish Competition Authority by noon of the last Thursday before the meeting.[1]

1. Section 11 of Administrative Act No. 672 of 19 Jun. 2007.

§4. APPEALS TO THE COMPETITION APPEALS TRIBUNAL

843. Administrative decisions made by the Competition Council can be appealed to the Competition Appeals Tribunal, constituted by a Supreme Court judge (as the Chairman), two economists and two lawyers. The process before the Tribunal is relatively similar to a court proceeding where writs are exchanged and there is typically an oral hearing. Parties can bring cases of both a substantive and procedural nature (to the extent listed in section 19 of the Act, which is very specific), but they must have standing – a substantial or vested interest in the decision – in order to appeal.

844. There are two kinds of decisions that are not subject to appeal: (1) if the Danish Competition Council has closed its investigation in accordance with section 14(1) due to a lack of sufficient grounds, insufficient resources or rejection of a complaint;[1] and (2) for a third-party complainant, where there has been a merger clearance decision.[2]

1. See s. 19(4) of the Act.
2. See s. 19(2)(ii) of the Act.

845. Regarding procedural issues, there have been a substantial number of cases reviewing decisions involving questions of access to file. The Tribunal has generally endorsed a restrictive approach to granting access to file and 'party' status in a case. The general rule under the Danish system is that access to file will only be granted to parties to a case.

I. Interim Relief

846. If parties bring an appeal before the Competition Appeals Tribunal, it is also possible for them to obtain an order from the courts suspending the original administrative decision. To be granted interim relief, parties must be able to show that irreparable damage will occur if the decision stands pending the appeal. However, they face a tough burden of proof.

847. Section 19(4) of the Competition Act suggests that as a general rule, parties will not be entitled to interim relief. However, there are at least some decisions where the Tribunal has considered that interim relief is necessary to prevent serious damage to the applicant.

848. In a decision dated 27 January 2006,[1] the Tribunal found that the price intervention imposed by the Competition Council on electricity supplier Elsam would lead to significant damages to the electricity market. Interim relief was granted.

1. *Elsam A/S ctr. Konkurrencerådet*, Competition Appeals Tribunal decision of 27 Jan. 2006.

849–852

Chapter 2. Voluntary Notifications and Clearance Decisions Merger Control

§1. Pre-merger Filing Obligations

I. Introduction

849. The Danish merger rules include Part 4 of the Danish Competition Act[1] and two executive orders that particularize the calculation of turnover and the filing of mergers, respectively.

1. In Danish entitled 'Fusioner', or in English: 'Mergers'.

850. The enforcement of the merger control rules falls within the jurisdiction of the Danish Competition Council. However, the secretariat of the Council, the Danish Competition Authority, is in charge of the current enforcement of the rules.[1] The Authority is an agency under the Ministry of Economic and Business Affairs, but it is independent with regard to the enforcement of the Danish Competition Act.

1. See s. 14(2).

851. The purpose of the Danish filing system is not to prevent the concentration of businesses, but to ensure that mergers occur in such a way that the benefits gained by the entities involved (such as a stronger position in the export market) are not outweighed by disadvantages arising in the domestic market, such as consumers being penalized with higher prices or smaller competitors being pushed out of the market.[1] Binding remedies, conditions or commitments attaching to the merger approvals can be used as safeguards. However, in deciding whether to approve or prohibit a notified merger, the Council must determine whether effective competition would be significantly impeded, including by way of creating or strengthening a dominant position.[2]

1. See the preparatory works to the Danish Competition Act, FT 1999–2000, A. Tillæg, 6805. In the original Danish:

> Formålet med fusionskontrol er imidlertid ikke i sig selv at hindre sammenslutninger af virksomheder. Formålet er derimod at sikre, at fusionerne tilrettelægges på en sådan måde, at de fordele for de fusionerende virksomheder, der f.eks. kan ligge i en større styrke på eksportmarkederne, ikke betales af danske forbrugere i form af højere priser eller af mindre konkurrenter, som risikerer at blive presset ud af markedet. Dette kan ske ved at knytte vilkår eller udstede påbud til en godkendelse af en fusion.

2. Section 12c(2).

852. The Danish merger control rules are, to a large extent, based on the same substantive rules as the EU merger control rules. Even the procedural rules follow the same principles as the ECMR,[1] with Phase I and Phase II procedures. The preparatory documents accompanying the Danish Competition Act explicitly state that the national rules are to be interpreted in accordance with the EU rules.

Consequently, the Danish rules on merger control are enforced in accordance with case law of the European Commission, the European Court of First Instance and the ECJ.

1. The European Community Merger Regulation, Council Regulation (EC) 139/2004.

853. Section 12(5) provides that the Danish provisions on merger control do not apply to a merger that is being considered by the European Commission in accordance with the Merger Control Regulation, even if that merger has an effect in Denmark, unless the Commission specifically refers the merger to the Competition Council for consideration. This provision reflects the idea of a 'one-stop-shop', according to which a merger will only be dealt with in one place by one authority and according to one set of rules.

II. Criteria and Thresholds

854. The Danish merger control rules require that a concentration must be notified to the Danish Competition Authority where the relevant turnover thresholds are met, unless it has a Community dimension.

855. Mergers falling within the rules cannot be implemented until they have been notified to and approved by the Danish Competition Council.[1] However, this provision does not prevent the implementation of a public takeover bid or a series of transactions in securities – including securities that can be converted and traded on a market such as a stock exchange, where control is acquired from different sellers. Generally, an acquirer of securities cannot exercise any voting rights attached to them, but the Council does have the power to grant an exemption where voting rights are to be exercised solely to preserve the full value of the investment.[2]

1. Section 12c(5) states:

   > A merger that is subject to the provisions of this Act shall not be carried through until it has been notified to and approved by the Competition Council under subsection (1). This shall not prevent the implementation of a public takeover bid or a series of transactions in securities, including securities that can be converted to other securities which can be traded in a market such as a stock exchange, whereby control is acquired from different sellers, see section 12a, provided that the merger is notified immediately to the Competition Authority and the acquirer does not exercise the voting rights attached to the securities in question or only does so to maintain the full value of his investment and on the basis of an exemption granted by the Competition Council according to subsection (6).

   The provision is rarely applied.
2. According to s. 12c(6), the Competition Council may grant an exemption from s. 12c(5). The exemption can be made subject to certain conditions or the Commission may issue an order for the purpose of protecting effective competition.

856. The filing of a merger notification in Denmark is mandatory if the turnover thresholds are met. The Competition Authority must be notified after a merger agreement has been concluded, a takeover bid has been published or a controlling

interest has been acquired.[1] A special form (Form K2) is to be used for notifications.[2] Fines may be imposed for a failure to notify and unlawful implementation. However, to date no notifying parties have been fined for late filings or unlawful implementation. Therefore, the level of any fines that might be applied is unknown.

1. Section 12b.
2. Form K2 (in Danish, also entitled *Anmeldelse af fusioner*) was originally created as an annex to *Executive Order No. 480 of 15 June 2005 on the Notification of Mergers*. It is available in a readily useable format from: <www.ks.dk/konkurrenceomraadet/anmeldelsesskemaer> (last visited 31 May 2010). The form requires information about the parties, the markets, customers, suppliers and competitors, among other things, and is only slightly less detailed than the Form CO used under the EC Merger Regulation.

857. The merger control provisions in the Danish Competition Act apply to 'concentrations'. In accordance with the ECMR, a merger or concentration is defined by notions of ownership and control. Section 12a(1) provides that a merger will be deemed to arise where either: (1) two or more previously independent undertakings merge; or where (2) one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.[1]

1. The preparatory documents accompanying the Competition Act explicitly refer to the Commission's notices for further guidance, including the notice on the concept of a 'concentration'.

858. The creation of a 'full-function' joint venture also constitutes a concentration.[1]

1. Section 12a(2).

859. The Competition Act includes a precise definition of control which is consistent with the law and practice under the ECMR. 'Control' is constituted by rights, contracts or any other means which, either separately or jointly, confer the ability to exercise decisive influence over an undertaking.[1]

1. Section 12a(3).

860. In cases where outright legal control is not acquired, the authorities will consider rights attaching to shares or contained in shareholder agreements, board representation, ownership and use of assets, and related commercial issues. Where minority shareholdings are acquired, the Competition Council will assess the strength of voting rights and other factors such as board representation. Such considerations may lead to the conclusion that the ability to exercise control as defined exists. It is not important whether control has actually been exercised – rather, it is the ability or capacity to control that is decisive. The European Commission's practice relating to its jurisdictional notice will be followed.

Turnover Thresholds

861. The Competition Act provides that the turnover levels of the parties involved in the merger will determine whether the merger must be notified to the Danish Competition Council. Section 12(1) of the Act expressly sets out the turnover thresholds. Where companies do not reach the turnover thresholds, the requirement to notify is not triggered. In such cases the Council can only challenge restrictions that are not ancillary to the concentration.[1]

1. There has been some debate as to whether the Council could refer mergers falling within the Danish thresholds to the European Commission for scrutiny under Art. 22 of the ECMR. It is most likely that the answer would be in the negative.

862. The turnover thresholds for notifying a merger in Denmark are relatively high. However, this will change – and the thresholds will be lowered – with legislation that comes into force on 1 October 2010. A significant increase in the number of merger notifications is expected to follow.

863. Subsections (i) and (ii) of section 12(1) set out two alternative (rather than cumulative) threshold tests. If either test is met, the merger must be notified or the parties will risk fines.

864. Under the first subsection, a merger must be notified if the parties have an aggregate annual turnover of at least DKK 3.8 billion (approximately EUR 500 million) in Denmark, and at least two parties each have an annual turnover in Denmark of at least DKK 300 million (approximately EUR 40 million). However, on 1 October 2010, these turnover thresholds will be substantially lowered from DKK 3.8 billion to DKK 900 million (approximately EUR 120 million), and from DKK 300 million to DKK 100 million (approximately EUR 13.3 million).[1]

1. See *Lov om ændring af konkurrenceloven og lov om benzinforhandlerkontrakter (Lov nr. 495 af 12. maj 2010)*, the law dated 12 May 2010 that amends the Danish Competition Act.

865. The first threshold of subsection (i) measures the joint financial power of the undertakings, while the second threshold is designed to ensure that more than one undertaking has a minimum level of activities in Denmark.

866. According to subsection (ii), a merger must be notified where at least one of the parties has an aggregate turnover of at least DKK 3.8 billion (approximately EUR 500 million) in Denmark, and at least one of the other parties has an aggregate worldwide turnover of at least DKK 3.8 billion (approximately EUR 500 million).

867. Subsection (ii) is intended to apply to situations where a large company active in the Danish market merges with another large company. This type of merger has the potential to impede competition in Denmark where it involves a dominant undertaking already operative within the Danish market acquiring a foreign company that is in the process of breaking into the Danish market, that is, an actual or potential competitor to the dominant undertaking. In some cases, the merger

threshold test could trigger merger notification requirements despite the absence of any direct effect on the Danish market from the concentration.

868. As a general rule, the undertakings concerned are the buyer and the target (or in the case of joint control, also the seller). However, since they can vary according to the specific type of transaction, a case-by-case analysis is necessary. The Commission's jurisdictional notice provides guidance in this respect.

869. Where there is an acquisition of 'parts' (defined as legal entities such as subsidiaries or divisions), the undertakings concerned are the buyer and the part or parts of the company being taken over. The seller will not be considered an undertaking concerned because its role ends as soon as the transaction is complete.

III. Turnover Calculation

870. In accordance with section 12(4) of the Act, the Minister for Economic and Business Affairs has enacted specific rules for the calculation of turnover for the undertakings concerned. These rules are set out in the Danish executive order *Bkg. nr. 808 af 14.08.2009 om beregning af omsætning i konkurrenceloven*.[1]

1. In English: *Executive Order No. 808 of 14 August 2009 on the calculation of turnover in the Competition Act*.

A. Turnover

871. In section 1 of the executive order, the concept of 'turnover' has been defined as 'the net turnover derived from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of value-added tax and other taxes directly related to sales'.

872. Therefore, it is net sales derived from the sale of goods and provision of services that has to be taken into consideration when calculating the relevant turnover for section 12(1) of the Danish Competition Act.

873. The aggregate turnover of an undertaking concerned is calculated as the turnover derived in the preceding accounting year. However, an exception applies to financial and credit institutions and central, local and regional authorities. For these, special methods for calculation of turnover apply.[1]

1. Section 1(2) of *Bkg. nr. 808 af 14.08.2009 om beregning af omsætning i konkurrenceloven* (in English: *Executive Order No. 808 of 14 August 2009 on the calculation of turnover in the Competition Act*) refers the reader to ss 7 and 8 for financial and credit institutions, and s. 9 for central, local and regional authorities.

874. If a part of one of the undertakings concerned has been sold after the preceding accounting year, the portion of turnover generated by a sale of the business must be deducted from the total turnover of the undertaking concerned.

Correspondingly, where an undertaking has acquired control of assets after the close of the preceding accounting year, the turnover generated by such assets must be added to the total turnover of the undertaking concerned.

B. Associated Undertakings

875. The turnover of an undertaking concerned includes the turnover of its associated undertakings. An undertaking concerned or an associated undertaking may also be a central local or regional authority, or a municipal partnership.

876. The Danish executive order on the calculation of turnover defines 'associated undertakings'[1] as:

- subsidiaries: meaning undertakings over which an undertaking concerned, directly or indirectly, has the power to exercise a controlling interest pursuant to section 2 of the Danish Companies Act (*Selskabsloven*);
- parent companies: undertakings which have the power to exercise a controlling interest over an undertaking concerned;
- other undertakings over which a parent company has the power to exercise a controlling interest;
- undertakings over which several undertakings jointly have the power to exercise a controlling interest; or
- undertakings other than those referred to above that are subject to joint management as defined by section 4 of a Danish executive order regarding agreements made within the same undertaking or group: *Bkg. nr. 1029 af 17.12.1997 om aftaler mv. inden for samme virksomhed eller koncern*.[2]

1. See ss 3 and 4 of *Bkg. nr. 808 af 14.08.2009 om beregning af omsætning i konkurrenceloven* (in English: *Executive Order No. 808 of 14 August 2009 on the calculation of turnover in the Competition Act*).
2. In English: *Executive Order No. 1029 of 17 December 1997 on agreements made within the same undertaking or group*.

C. Joint Ventures

877. Where two or more undertakings concerned, or one or more of the undertakings concerned together with a third party jointly exercises a controlling interest in another undertaking (a joint venture),[1] a proportion of the joint venture's turnover must be included in the turnover of each of the undertakings concerned. The proportion of turnover included must reflect the relative interest or share in the joint venture of the undertaking concerned.

1. In accordance with s. 12a(1)(ii) of the Competition Act.

D. 'Intra-group' Turnover

878. As defined, 'intra-group' turnover is exempted from the turnover calculation.

879. The turnover of an undertaking concerned does not include the turnover derived from the sale of products and the provision of services between the undertaking concerned and its associated undertakings, or the sale of products and services between the associated undertakings.

880. These rules also apply for joint ventures; turnover does not include the turnover derived from the sale of products and the provision of services between the joint venture and each of the undertakings concerned or an undertaking associated with any one of them.

E. Financial and Credit Institutions

881. For insurance companies, turnover will be replaced by the value of gross premiums written. This is defined in section 7(1) of the executive order on the calculation of turnover as 'all amounts received and receivable in respect of insurance contracts issued by or on behalf of these companies, including outgoing reinsurance premiums, and after deduction of taxes or parafiscal levies charged by reference to the amount of individual premiums or the total insurance amount.'

882. Furthermore, it follows from the executive order that for credit institutions and other financial undertakings, the turnover is the sum of the following income items (after deduction of value-added tax and other directly related taxes):

– gross interest income;
– income from shares and other participating interests;
– fees and commissions receivable and similar;
– the aggregate positive income from value adjustments; and
– other ordinary operating income.[1]

1. Section 8 of *Bkg. nr. 808 af 14.08.2009 om beregning af omsætning i konkurrenceloven* (in English: *Executive Order No. 808 of 14 August 2009 on the calculation of turnover in the Competition Act).*

F. Central, Local and Regional Authorities

883. According to section 9 of the executive order on the calculation of turnover, the turnover of central authorities is to be replaced by the aggregate gross operational and investment expenditure in the preceding accounting year of the ministerial province concerned. Reference is made to investment expenditures in the Central Government Chart of Accounts.

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