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Competition Policy and SMEs: The Case of Denmark Within the European Union

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1. Introduction

The aim of the paper is to demonstrate the ways in which EU competition policy and specifically Danish competition policy[1], aim to protect the interests of not only private consumers, but also small and medium-sized enterprises (SMEs). As a point of departure it is useful to mention that the individual competition policy legislations of the member states of the EU now, after a period of adaptation stretching over many years, as an example of what might be termed voluntary harmonisation of policies, for all practical purposes although with certain noteworthy additions, consists of copies of the central competition rules of the EU. The provisions, that pertain to SMEs first and foremost, consist of articles 81 and 82 of the Treaty on the European Community (Treaty of Rome as amended by subsequent treaties, henceforth: the EC treaty).

Article 81 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading condition;
b) limit or control production, markets, technical development or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

Article 82 prohibits abuse of a dominant position in providing that "any abuse by one or more undertakings in a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:

[1] Danish Competition Act (Statute No. 384 of 10 June 1997, adopted on 1 January 1998, and amended by Statute No. 416 of 31 May 2000.

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Further, the competition rules of the EU consist of a number of group exemptions which set out provisions showing that certain types of agreement may after all, and provided they conform to certain conditions, be considered compatible with Article 81 of the EC Treaty. Important examples of group-exempted agreements are certain types of vertical agreements like franchising and exclusive distribution or exclusive purchasing agreements or horizontal agreements such as specialisation or research and development agreements.

It is important to note that the competition rules of the EU and those of the individual member states constitute a system that is based on a form of work sharing. Those anti-competitive agreements or abuses of dominance which have a union-wide dimension due to a border-transgressing effect will be dealt with under EU rules while anti-competitive behaviour in business with a purely or almost purely national effect will be dealt with under the national competition legislation of the country directly affected.

For enterprises, as well as authorities, it is highly convenient that the EU rules are now practically identical to those of the individual member states and therefore they have to operate with one set of rules only. What has been established is, in effect, a so-called one-stop-shop which means that transgression will only be dealt with by one set of authorities, as it may be, those of the state concerned or those of the EU, and business only has to learn to cope with one set of rules whether they be engaged in purely national or also EU-wide business activity. The harmonisaiton of EU law and national competition law, in this field means that businesses no longer run the risk of having to pay fines both under national and EU law.

It is also important to note that the competition rules dealt with in this paper are based on the so-called prohibition principle as opposed to the transparency and control principle formerly

used in Denmark under which anti-competitive agreements of a certain importance were not prohibited as such, but had to be reported to the authorities which would then evaluate them and only after that, conclude whether they could be upheld or should be revised on the basis of negotiations with the enterprises in question. The prohibition principle is, rightly, considered to be much more effective when it comes to precluding anti-competitive behaviour.

Both at the EU level and in the member decisions taken by anti-trust authorities can be brought before the tribunals. At the EU level this means the European Court of Justice whose jurisprudence serves as a precedent for national competition authorities as well as tribunals. Judgments by national courts can, also in competition matters, be brought before the European Court of Justice in case the anti-competitive behaviour in question has a union-wide effect.

It should be underlined at the outset that the competition policy of the EU and of Denmark generally only concerns relations among enterprises, i.e. agreements among them or abuse of a dominant position, and not, at least directly, private consumer relations.

2. The main features of the Danish Competition Act

As noted above the Danish Competition Act (CA) is practically a copy of the EU main anti-competitive provisions in articles 81 and 82 of the EC treaty quoted above. Art. 6 of the Danish Act virtually copies art. 81, prohibiting agreements restricting competition e.g. through price fixing or market sharing arrangements. Art. 11 of the CA copies art. 82 and prohibits the abuse of a dominant market position e.g. through unfair pricing (too low or too high), a refusal to deliver, price discrimination or tying.

Also, with regard to the ban on anti-competitive agreements art. 7 of the CA contains two *de minimis* clauses exempting agreements below certain threshholds set with reference to market share and/or economic importance (turnover). However, art. 7 also contains provisions outlawing, under all circumstances, agreements which fix resale prices, collusion with regard to bidding under tendering procedures and, finally, agreements which, seen in isolation, may be legal, but are not so when they form part of a wider pattern, locally, regionally or nation wide, of such agreements.

Under art. 8 of the CA an individual exemption can be sought by enterprises. Such exemptions may be given only if the agreement in case fulfills four conditions. Firstly, the agreement must serve to promote a legitimate objective such as improving economic or technological development, improving efficiency in distribution/production or improving the environment. Secondly, the agreement must give consumers a fair share of the benefits of the agreement. Thirdly, the agreement should be construed so as not to be more restrictive of competition than necessary to achieve the objective legitimately sought, and , fourthly, it should not make it possible for the enterprises concluding the agreement to eliminate competition with regard to an essential part of the goods or services in question.

Based on art. 10 of the CA the group exemptions from the ban on restrictive agreements contained in the Danish competition law system are identical to those of the EU, mentioned above by way of examples, with a few adaptations of a formal/technical nature. The substantial rules are maintained word by word, however.

Art. 9 provides for a so-called declaration of no-intervention in cases where the restriction of competition is slight or negligible or considered not to be appreciable. This declaration corresponds to what is, under EU law, called a negative clearance.

Art. 11 contains the Danish prohibition with regard to abuse of a dominant position in the market. Here no provision provides for an exemption, but it is possible to seek and, according to the circumstances, get a declaration from the competition authorities confirming that there is not, on the basis of the information they have, any grounds for alleging that an abuse is taking place.

The CA also contains, in art. 12, provisions on merger control similar to those of the EU, and, finally, there is a provision concerning state or public aid in Denmark which allows the competition authorities to rule on it and require that the state aid should be repaid. The article on state aid is, to my knowledge, very rare in national law of the EU member states. Not least for Danish SMEs it is deemed vital that the public coffers not be abused to provide some enterprises with special preferential treatment which can give rise to disabling distortions of competition. An example of such distortion could be that, inside the premises of an athletic stadium run and owned by a local municipality, a small shop selling ice, soft drinks, chocolate

and other sweets etc. is exempted from paying rent for the floorspace it uses, whereas the competitor just outside on the street receives no such benefit.

The public authorities, with regard to legislation or administrative decisions taken in their capacity as public authority, are not covered by the CA. Any distortion of competition, however, brought about by or with the participation of public enterprises, acting as enterprises in a market, are covered by the CA. If the competition authorities find that the public authorities create distortion of competition they may, under the CA, noting the distortion of competiton require that it be stopped.

3. Agreements falling outside the prohibition on anti-competitive agreements

First, it should be noted that labour market agreements are not covered by the CA.
But, also, a number of other contracts or agreements widely concluded by SMEs do not, as a point of departure, fall under the CA. That goes for the following types:

Agreements on subcontracting

Normal subcontracting agreements where e.g. an SME agrees to manufacture for a client a product component, according to the instructions of the client, will not fall under art. 6 of the C A, so long as they contain no other provisions restricting competition than those which are natural like protecting the technology of the client used to manufacture the component or not to deliver it to other clients.

Agency agreements

Contracts on agency where the trade agent can be seen as part of the provider´s business and concludes sales contracts in the name of the provider and on his account and does not himself assume any independent economic risk, fall outside art. 6. As agency contracts often involve small enterprises in the capacity of agents this exception is worth noting for SMEs.

Normal distribution contracts (selective dealership as opposed to exclusive dealership or exclusive distribution contracts)

Agreements on authorised dealership are legal as long as they are based on free access for all dealers who want to sell the product or service in question on the basis of objective and identical conditions, e.g. concerning qualitative conditions such as the nature of the sales

premises, presentation of the products or the professional qualifications of the dealers and their personnel, provision of certain sales or aftersales services and participation in a guarantee scheme. Quantitative requirements are normally, unless negligible, illegal so that the situation falls under the ban on anti-competitive agreements in art. 6 of the CA. Such requirements may concern the maximum number of dealers in a certain area, or a duty to sell the total range of a certain type of product or at least a minimum quantity. The same goes for requirements relating to marketing campaigns. Many SMEs are involved in business as authorised dealers.

Concession contracts

It may be of some interest to note that agreements or contracts concluded between public authorities and private enterprises will fall outside art. 6 of the CA, (and art. 81 of the EC treaty) as the ban on anti-competitive agreements only covers agreements between enterprises. Thus, in Denmark and probably elsewhere in the EU national public authorities can freely enter into concession contracts whereby e.g. chimney sweeps or undertakers acquire the exclusive right for some period of time to sweep chimneys or to perform funeral services in a given area. Sometimes, though, authorities have to put such contracts out to tender according to the EU rules on public procurement.

4. General exemptions concerning agreements of minor importance: Article 7

Exemptions based on market share and/or turnover

One major difference between the EU system and the Danish one and one which is of major relevance to SMEs, is that the Danish provisions contain, in art. 7, par.1, of the CA, two *de minimis* clauses, e.g. rules which exempt agreements of limited scope measured on the basis of market share and combined turnover of the enterprises involved[2].

Firstly, there is a *de minimis* rule under which anti-competitive agreements involving enterprises the combined turnover of which is less than 1 billion Danish Crowns (DCR -

[2] The EC rules also contain a *de minimis* clause, but there is only one, and it no longer uses a turnover parameter, but only market shares with a higher permissible share in case of vertical agreements (10%) than with regard to horizontal ones (5%). Also, the EC *de minimis* rule makes provision with regard to SMEs in that it is said that agreements involving only SMEs will generally not be the subject of an infringement procedure initiated by the European Commission which is the anti-trust executive body of the Union.

approximately R1 billion), equal to about 120 million USD, and a combined market share of less than 10 % of the relevant market[3], are legal under the CA.

Secondly, there is a *de minimis* clause which exempts anti-competitive agreements concluded by enterprises with a combined turnover of less than 150 million DCR.

Together, the two *de minimis* clauses mentioned go a long way to exempt agreements concluded among SMEs.

Exceptions to the exemptions based on market share and or turnover

There is , however, a very important exception to be noted here. Under art. 7, par. 2, of the C A the *de minimis* clauses cannot be not be relied on with regard to situations where agreements fix resale prices, involve co-operation among bidders under tendering procedures, or where there is a network or system of similar or identical agreements which would, seen in isolation, come under the *de minimis* clauses and therefore be exempt from the ban contained in art. 7.

In Denmark, such a situation has occurred with regard to, e.g., a considerable number of driving schools which had on a city-wide or regional basis, and apparently all over the country, concluded pricing agreements totally eliminating price competition. The same has been seen in the field of real estate agents.

With regard to the rule which prohibits co-operation among enterprises with regard to bidding for contracts put out to tender we have, in Denmark, but also at the EU-level, seen astonishing examples of such anti-competitive behaviour which has been condemned and seriously fined.

So, what all this amounts to is that the present competition rules of Denmark, and partly also the EU, on the basis of the *de minimis* rules allow for limited and individual anti-competitive agreements among enterprises as long as they are not part of a systematic and generalised system of agreements or a any form of co-operation with regard to tendering or resale price fixing.

[3] The relevant market to be understood as the market for products of the same kind or products which can be considered a normal and natural substitute for the product in case, i.e. the relevant product market, and the relevant geographical market, i.e. the geographical area in which the product in question generally competes.

Exemptions based on market share and/or turnover provide ample scope for local co-operation among SMEs

Under the *de minimis* rules it would, then, be possible for two or more small otherwise competing enterprises to join in or to set up a common sales office or to engage in joint purchasing. It would also be possible for them to fix prices at a common level or to share the regional or local market between them in spite of the fact that, as a point of departure, such behaviour is strictly illegal under art. 7 of the CA just like under art. 81 of the EC treaty and is generally not compatible with the group exemption regulations of the Danish as well as the EU legislation (which are as mentioned above practically identical).

5. The co-operation notice

Having highlighted the *de minimis* rules of the CA it is relevant also to mention that under ECU legislation, and as a consequence also under Danish legislation which is intended by the Danish legislator to be in conformity with the EU law in this field, there are, cf. a European Commission notice from 1968, a number of agreements which are thought not to be in contravention of the ban on anti-competitive agreements. The communication is generally destined to be of use, above all, to SMEs.

Such legal agreements, in most cases among competitors, include agreements to make joint market research, exchange of information, elaborate joint statistics or joint calculation schemes, to employ common tax or business consultants, accountants or IT-services, use common credit facilities and debt collection facilities, and to engage in joint advertising, to undertake joint R&D, make use of common production facilities, common transportation equipment and storage facilities. As to joint sales and after sales and repair services such agreements, but only those among **non-competitors,** are also legal under the EU co-operation notice and thus also the CA.

It should be borne in mind, though, that the exchange of information is not always legal. Such exchange of information, for instance with regard to sales or prices obtained or joint statistics should under current court practice at EU level, be limited to information of a historical nature, i.e. at least one year old, or be anonymous so that individual enterprises cannot be identified.

The co-operation notice is useful in particular for SMEs as it serves as a particular reference point with regard to the kinds of agreements which SMEs are more prone to use than bigger business. That is so not least concerning consultancy services, but in practice in Denmark it is in particular the setting up of common accounting systems which have attracted attention. Many small businesses in Denmark and elsewhere quite simply do not have the requisite knowledge about management and economics needed to run a business today, and, clearly, it is of much more relevance for SMEs to employ jointly elaborated accounting systems than for big enterprises.

Costing systems

Costing systems, as referred to in the co-operation notice and used by SMEs, have in several cases been brought before the competition authorities in Denmark with a view to getting an individual exemption under art. 7 of the C.A. The authorities have, in accepting some such systems, provided guidelines which have proven very useful for associations of SMEs which have been able to establish fine-tuned costing schemes which serve as most helpful tools in the daily life of, e.g, auto repair shops or auto painters. Such schemes cannot, of course, be allowed to work in a way that gives rise to common pricing. The individual business must insert its own price per hour, but can, as input, base the calculation on publically available recommended or suggested prices for spare parts (like for Ford, Opel, and other makes of car) or lacquer as well as an input based on scientific studies showing the time it will normally take to insert a window shield of certain type of car, for example.

Other acceptable costing systems include a system by which road transport companies calculate their prices based on their own conditions. This includes a folder containing indexed selected costs pertaining to the road transport activity and information provided by the relevant branch association of the kind of costing parameters the individual enterprise should use when calculating its prices. The system, which is based on electronic data treatment, makes it possible for the enterprises to calculate a sales price per hour or per kilometre by keying in the costs relating to each lorry, how much it is used per year, based on time and kilometers, interest rate, scrap value etc. and those capacity and variable costs which the selling price must cover. Moreover, the calculation system is also divided in suitable cost based groups, which makes it possible to follow and apply price development shown in statistical indexes elaborated by the Danish official statistical bureau which can be legally used to update the costing system.

Also, a costing system for enterprises computing the price per hour for the work of craftsmen in enterprises has been accepted by the authorities. This includes, by way of example, the effect of labour market agreements, any supplements based on legislation (holiday pay, pensions etc.) Also, the system accepted includes a component based on the cost of ensuring against the employer´s mandatory payment of salary in case of the illness of an employee as well as the payment of fees to branch organisations of the enterprises.

6. Group exemptions and their relevance for SMEs

While it is always possible to seek, and in some cases also to receive, an individual exemption from the ban on anti-competitive agreements in art. 6, cf. above under 2 for the four conditions, such individual exemptions are mostly not very relevant to SMEs or at least to small enterprises, as the agreements concerned would normally be covered by the exemptions based on market share and/or turnover, cf. also above under 2.

Thus, it is more relevant to look at the group exemption provisions to see to which extent they are of relevance to SMEs and may suit their particular needs.

Group exemption on vertical agreements

This exemption typically covers the following types of agreements: franchising agreements, exclusive dealership, and exclusive purchasing.

The exemption regulation exempts agreements among enterprises when the provider or the buyer, as the case may be, does not hold more than 30% of the relevant market. The regulation contains provisions that some so-called hard-core elements cannot be exempted, i.e. agreements concerning resale prices – except a binding maximum price agreed between the provider and the buyer provided it does not, in fact, amount to a fixed price or a minimum sales price or suggested resale prices and, to a certain degree, market restrictions for the buyer.

The regulation covers types of franchising agreements which involve typically small enterprises like fast food and other retail outlets (eg Burger King). It also covers exclusive dealing agreements which are also very important for small enterprises. Exclusive dealing with regard to cars is dealt with in a separate group exemption regulation concerning sales and service agreements in the car business. This particular regulation has been very important for

many small or medium-sized enterprises selling cars, but recently there has been a clear tendency for car manufactures, at least in Europe, to drop such agreements and to set up their own sales offices. This allows car manufacturers to control car and not least spare part sales totally. Controlling the sale of spare parts makes it possible to avoid the practice, now common among dealers, to use non-original spare parts which are far cheaper than the original ones sold by the car manufacturers.

Exclusive purchasing contracts play an important role in business, and the exemption regulation on vertical agreements serves to make it easier, in particular for small and medium-sized enterprises, to introduce their products to new markets.

Generally, it can be said, thus, that the group exemption for vertical agreements provides an important exemption in favour of SMEs whose interests are well protected by the regulation which seeks to avoid the conclusion of agreements working to the detriment of the "weak" party, typically an SME. In effect, the regulation, like other group exemption regulations, tries to strike a fine and fair balance between the interests of the parties concluding the agreement while prohibting clauses which will generally be against the interest of the consumers and society in general.

Within the last couple of years the EU has contemplated not to renew the car sales regulation. But it has not yet been decided to abandon it and let car dealer agreements be governed by the exemption on vertical restraints only. In the Danish Federation of SMEs and in UEAPME, the European Federation for Craft and SMEs, the current point of view is that it is in the interest of SMEs to maintain a separate regulation for cars as it has, generally, provided a rather precise framework for dealer agreements. They recognize, however, that a certain revision would be helpful not least in order to protect the dealers against the manufacturers who often attempt to circumvent the regulation with regard to guarantees and spare parts and the freedom of car dealers to use non-original parts and, not least for independent garages, to be able to service cars of different makes.

Group exemption on specialisation

The regulatory framework in the field of competition, in Denmark and in the EU, also comprises two regulations on agreements of a horizontal character. They are the exemption on specialisation and the one on research and development.

The exemption on specialisation helps SMEs to co-operate as they may agree for instance that one of them agrees not to produce a certain type of product and to buy it from a competitor, who, for its part, agrees to produce and deliver it to the first party (one-sided specialisation), or that two or more parties agree, on a basis of reciprocity, not to produce certain, but different products, and instead to buy them from one another (reciprocal specialisation) or that two or more parties accept to produce certain products jointly. In the latter case products produced jointly may be sold jointly as part of the agreement. There is a maximum combined market share threshhold of 20% for the parties to the agreement.

Group exemption on research and development (R&D)

This regulation is practical, but, probably, most relevant to bigger enterprises or certain small high-tech development enterprises.

Group exemption on technology transfer

This regulation plays an important role when it comes to assessing the possibilities, under Danish as well as EU law, of conferring patent and other intellectual property rights to enterprises wanting to make use of such rights in their production. The regulation is important to big enterprises as well as SMEs. But the regulation does not as such aim to promote SME interests in particular. It benefits all sizes of enterprises. But in many cases it will, of course, be SMEs which benefit from a license to manufacture products under a patent developed by a bigger enterprise. The regulation makes use of so-called white and black lists, the white ones showing automatically exempted restrictions in license agreements and the black one those provision in license agreements which are not automatically exempted and can, if at all, only be exempted on the basis of an individual exemption by the European Commission.

Special group exemption under Danish competition law concerning joint purchasing and marketing among groups of retailers

Under present Danish competition law a particular group exemption covers joint purchasing. It deals with co-operation agreements concluded by retail chains. This kind of group exemption is not found at the EU level, but does exist also in Sweden. The group exemption covers retail chains which have as a maximum 25% of the relevant market. It is particularly interesting to, e.g., groups of butchers in Denmark, who do make use of it with considerable success, and employ a common marketing concept. It is, under the exemption, legal to apply common

recommended maximum prices (but **only** maximum) within a retail chain covered by the group exemption.

Joint purchasing among competitors is otherwise, at the main rule, prohibited at the EU level as well as in Danish competition law with the exception of the field of co-operatives where a certain possibility of joint purchasing is upheld.

7. Other types of agreement particularly relevant to SMEs

Joint selling

This is normally incompatible with art. 6 of the CA, and generally no individual exemption for price fixing can be given under the CA, but, in some cases Danish competition authorities have, regardless of art. 6, accepted by way of an individual exemption agreements among small enterprises, notably in the production of Christmas trees and branches of spruce (which is the typical kind of Christmas tree in Europe), which grow such trees as a part of another business, typically farming, in competition with big producers in the industry.

Standard agreements on terms of sale

SMEs, as opposed to bigger enterprises, find it particularly useful to establish common rules concerning business conditions regarding sales, delivery, service, guarantees and so on. The Danish competition authorities have ruled that as long as such terms of sale do not include elements regarding the fixing of sales prices, interest rates, to the detriment of the buyer from generally recognised or law based clauses on the right of rescinding a contract, the duty to repair or compensate for defects in products sold etc., and so long as the terms are voluntary and not sanctioned in case of non-use, such common business terms can be lawfully used.

Membership of professional organisations

It is of particular relevance for SMEs to be members of a branch organisation which can in many ways help them to compensate for the lack of capacity or specialised knowledge which big enterprises have. Under current competition law in EU and in Denmark such membership must be open to any enterprise which fulfils certain objective criteria. And branch organisations may not be used to boycot competing or other businesses outside the organisation or to make agreements which are anti-competitive, e.g. an agreement stating that if you are a member of a

particular real state agents organisation you should not be allowed to work for a lawyer or a bank which may engage in similar activity.

Branch associations may not prevent their members from participating in competing exhibitions and fairs. They may, though, have rules which prevent members from arranging fairs more than at certain intervals. They may also have rules which prevent members from outside the association from participating in the fairs of the association. If non-members are admitted it will, as a point of departure, be legal to make them pay a participation fee higher than that of members, but only if the participation of non-members give rise to added costs.

Also, certain requirements regarding, eg, a duty for the individual member of an organisation like an architects' association to take out an insurance contract covering professional defects may be going too far and violate competition rules.

If, however, a branch association the membership of which is voluntary and not of vital importance to a particular profession, like accountants, compels members to participate in a quality assurance scheme and pay for its maintance such arrangement can be considered legal.

It is legal for branch associations to set up their own standards with regard to certain types of products manufactured by the members. However, any product, also produced by non-members, which fulfils the standard should have the right to bear the mark relating to the standard in question. Further, standards may not be used to eliminate or try to eliminate competition from other producers or prevent members of the association from manufacturing products which do not comply with the standard. The use by members of the standards in question must be voluntary, not prevent innovation and should promote efficiency for consumers, and information about the standard should be accessible for all producers.

Also, agreements promoting environmental protection concluded in the framework of branch association, and which can generally be beneficial to the members as they may help them promote their products or services, may often be considered compatible with competition legislation in Denmark, at least as long as the intent is seriously to protect the enviroment and does not serve abject purposes like trying to eliminate competition or other forms of illicit purpose under competition law.

As it will be seen from the above Danish competition law, based as it is almost totally on copying EU competition law, leaves ample scope for agreements to be concluded among SMEs or among SMEs and bigger enterprises. However, certain types of agreements are considered so obnoxious that they are not permitted under any circumstances. That, under Danish law, goes in particular for agreements to fix resale prices, networks of anti-competitive agreements even among SMEs and agreements to fix bids under tendering procedures. The group exemption regulations, for their part, never exempt price agreements, with the exception of recommended maximum prices or suggested sales prices, or market sharing agreements. Agreements among SMEs cannot, in such cases, be considered as exempted from the ban of art. 6 on anti-competitive agreements by virtue of group exemption, but some kinds of price or market sharing agreements may still be so on the basis of one of the two de minimis exemptions mentioned above.

8. Abuse of a dominant position: relevance for SMEs

SMEs can also abuse a dominant position

Art. 11 of the CA which prohibits the abuse of a dominant position in the market, and does in effect virtually copy art. 82 of the EC treaty, is generally not very relevant for SMEs as perpetrators. For they are normally not in a position which can be called dominant. There are some examples which may be considered, however. A small or medium-sized enterprise may manufacture a product which is, for instance, a so-called niche-product which places it in a dominant position with regard to that type of product. One such example from Denmark could be a type of mobile crane with a particularly high lifting point. Some years back one Danish, rather small, enterprise actually enjoyed such a position with regard to just that type of product and held about 80 % of the entire market of the EU! If such an enterprise for no acceptable or justifiable reason refuses to deliver to a customer that will amount to an illegal abuse, and fines may be imposed.

It should also be borne in mind that the definition of a dominant position involves an evaluation of the relevant market. And such markets can be small ones, so that an abuse may be of an entirely local character! And when it comes to abuse of dominant positions there is no *de minimis* clause exempting enterprises from the ban. So in Denmark, and at the EU level for that matter, an abuse may have a relatively local or regional character. It could for example be an abuse consisting in charging unfairly high prices in an area where no one else can deliver

within reasonable time and at reasonable cost the product or service in question. No one will, under competition law, be prevented from charging a price which reflects a certain scarcity, but if the price at which the product is offered for sale becomes outrageous it would be illegal and an abuse in Denmark or the EU.

Even the charging of very low prices may constitute an abuse and could, according to circumstances and dependent on the definition of the relevant market involved, be fined. Such predatory pricing, e.g. charging less than the average variable cost of production within the enterprise of a given product or service is illegal under EU and Danish competition law as there can be no other aim than to eliminate a competitor or several.

It is obvious that under national competition law of a small country like Denmark, what is happening in a municipality at the local level may come to be considered under the CA, but would not be a matter for EU competition law which deals only with matters of a transboundary relevance. But if a public enterprise, working in competition at the local market for a given type of product or service, makes an agreement with another enterprise or several others, be it private or public ones, to boycot a third enterprise such conduct may be illegal as an illicit anti-competitive accord, if it does not come under the *de minimis* rules, or as a collective abuse of a dominant position.

That kind of situation is new in Denmark, and often enterprises, including public ones, do not seem to pay heed to it. But the CA created that kind of more stringent regulation of competitive behaviour even when it comes to local business transactions!

SMEs as victims of abuse

It goes without saying that SMEs can become victims of abuse by dominant enterprises which for instance refuse to deliver. While refusal to deliver may under certain cirmcumstances be legal, it may in many cases constitute a breach of the CA art. 11 (and ECT art. 82).

This has already been mentioned above. Unfairly high prices as well as very low prices which amount to predatory pricing may constitute an illegal abuse of dominant position. But moreover, some less obvious forms of action by dominant enterprises constitute illegal abuse. This has to do with certain forms of rebates which not least big enterprises are prone to make

use of. What is at play in such rebate cases is unlawful discrimination under art. 11 of the CA and art. 82 ECT.

Quite naturally, rebates based exclusively on big deliveries which give rise to saved costs for the provider are legal under competition law. It is otherwise, however, with such rebates by which dominant companies seek to tie the buyer to the provider and which may not at all reflect any element of saving of cost for the provider.

While it may, of course, be nice for a purchasing enterprise to enjoy a refund at the end of the year when its sales of a particular type of product can be calculated, it is not so nice if the product depends on how much of total sales of that type of product is made up of sales of the particular brand of the provider who has promised the refund. Such a rebate is not a quantity rebate, but it will tend to make the buying enterprise sell more of that particular brand than of other brands which do not use such tying or fidelity rebates. That type of rebate does not necessarily reflect saved costs, as the amount of sale may be very small, though the sale through the outlet in question of the brand for which the rebate is offered may be higher than that of competing brands sold by the enterprise offered the fidelity rebate.

That kind of rebate tends to create unfair barriers to entry for new or competing products thereby stifling competition. At the EU level enormous fines have been imposed on dominant firms in such cases.

One particularly obnoxious type of sales promotion system is the so-called English clause. This implies that a seller or provider, often a big (dominant) enterprise like certain globally operating phamaceutical or vitamin manufacturers, agrees with the buying enterprise that it should report to the provider if it gets offers to obtain a better price or rebate than that offered by the provider in the first place, and that the buyer shall only be free to buy from a third party if the provider does not decide to match a competing offer. That system allows the provider to keep himself informed, at all times, of the competition and to match competing offers. This form of system also runs counter to the aim of free competition as it creates barriers to entry for new or competing products and if practised by dominant firms it will be illegal.

The reason for mentioning theses examples of rebates and the English clause is that the use of such systems will often be something that SMEs will be faced with and, as the case may be,

find dificult to turn down. It is not necessarily convenient for, eg, an enterprise selling automobile tyres to face concluding a contract with a major tyre manufacturer based on a rebate system which presupposes that the enterprise only obtains the optimal rebate if, at the end of the year, it has sold practically only that particular brand of tyre. In reality, such a rebate makes it harder for the enterprise to engage in holding stock of and selling competing makes of tyre although customers might prefer to have a certain range of car tyres of various brands to choose among at the store.

SMEs should know their rights with regard to rebate and selling systems like the ones here mentioned. They should protest when faced with such methods of tying and inform the provider that they are willing to accept their use as it would contravene competition law.

In fact, it would be helpful for SMEs to make themselves familiar with just what form of rebates and selling systems are permitted under competition law. Many forms of rebate other than quantity based ones are typically legal also when used by dominant firms. That goes for introduction rebates, brief campaign rebates, functional rebates (depending on the buyer assuming certain functions like marketing, stocking, shelf display or positioning of the products), self-fetch rebates, and cash rebates.

Top-slice rebates are illegal when applied by a dominant firm. Under such system the top-slice rebate constitutes an extraordinarily high rebate on top of the quantity based rebate offered the purchaser when he sells a base quantity corresponding to the major part of his consumption of that type of product. Such a rebate aims to keep other providers from selling to the purchasing enterprise which has accepted the rebate system.

One form of abuse which has been seen in the EU is cases where a dominant enterprise attempts to make the sale of certain products, like filling machines, dependent on the buyer also accepting to buy supplementary products, e.g. containers to be filled by the filling machines mentioned. For SMEs, at least as far as EU and Danish competition legislation are concerned, it is important to note that such cases should be resisted and brought before the authorities if the dominant sellers press their point even faced with the objection that the practice is not in conformity with current competition legislation. Incidentally, some years ago such abuse gave rise to the, at that point in time, highest fine ever from the EU Commission imposed on an

enterprise (Tetra-pak). Similarly, the nail producer Hilti got a big fine for obliging customers who wanted to buy its automatic nail guns also to buy its unpatented nails

Public authorities and abuse of their position

It seems relevant to note, at this point, that when public authorities decide, for instance, to allocate a certain space on the city square to a particular enterprise, and in so doing may create an unfair situation for other enterprises which may not receive such a favour though they could equally well get a place on the square from which to sell their products, that kind of decision is not covered by the ban in art. 11 of CA concerning abuse of a dominant position. In Denmark the ban on such abuse can only be applied to public enterprises, not to the authorities. However, it is, on the basis of art. 2 of the CA, expressly foreseen that the competition authorities can address the authority involved and let it know that by its decision it does abuse its position to create unfair distortion of competition. The authorities, for instance the authorities of a city, are free not to pay heed to such an address. But, normally, they would seek to comply.

Other cases, where authorities give not just a favour, like the one mentioned immediately above, to an enterprise, but directly give financial support to an enterprise will normally constitute illegal state aid under art. 11a of the CA which should be paid back unless the aid in question is based on law.

9. The doctrine on essential facilities

Through recent years the EU, and consequently also Denmark, has understood current competition law to imply that certain so-called essential facilities should not be permitted to stand in the way of competition. Whoever, public or private natural or legal person, owns an essential facility like a port, a bridge or a railway junction is, in fact, in a dominant position enabling the potential abuse of such a position to the detriment of others.

The doctrine on essential facilities has been established in the EU and its member states in cases concerning the access of transport enterprises (cf. ferries) to certain ports where state owned companies have formerly had a monopoly. Also, the access in airports for all oil companies to the oil ducts and storage tanks in airports have been protected by competition authorities in Denmark.

As mentioned it is only in recent years that the essential facility doctrine has been the focus of discussion in legal circles. Now it may be expected that enterprises, also SMEs, will be likely to challenge any restriction with regard to access to such facilities, be they privately or publicly owned. Access does not have to be free of reasonable charge, and technological or environmental objections may have to be taken into account, but access in such cases, eg to an important bridge, should, as a matter of principle and to prevent unwanted monopolies, be open to all enterprises.

10. Public aid

Art. 11 a of the CA provides for the possibility that Danish competition authorities can order that aid provided by public coffers be stopped, and that it must be paid back. This is a new provision which can hardly be found in the legislation of any other member state within the EU. It is true, however, that state aid of any appreciable effect will come to be judged under EU law, so that the new Danish provision of public aid will only make an impact on less important state or public aid which may give rise to distortion of competition.

As an example of such aid which has already come to the attention of the competititon authority one may mention a case where a city supports a youth hostel at the rate of 60.000 USD per year. Such subsidy may be to the detriment of hotels and inns which also let out rooms, and, given the size of the subsidy and the lack of any appreciable effect on intra-EU trade, it will not be a matter for the EU to rule on it.

11. Conclusion

The paragraphs above have, it is hoped, served to demonstrate that competiiton policy is not only policy aiming to protect consumers. It also, and it does so to an important extent, serves to protect SMEs against abuse from other enterprises.

But, of course, current competition policy also serves to help SMEs to avoid committing certain acts which are detrimental to consumers, like fixing bids in tendering procedures, something which has been widespread in Denmark and Holland to mention two known such cases. In

Denmark it was about, approximately 1.000 electricians´ enterprises and in Holland about construction enterprises.

It is vital to operate an efficient competition policy not only in order to protect consumers or SMEs. Denmark, in adopting three years ago a completely new Competition Act almost totally copying the competition law of the EU, embarked on a new course of legislation in this field which has brought to the fore numerous cases of malpractice and anti-competitive abuse.

There has been quite an effort to convey information about this situation to the SMEs and others. It has been a matter for the press, but also for business associations which have through publications sought to keep their members alert and to protect them against abuse as well as trying to make them aware of the risk of receiving big fines.

Certainly, the efforts have helped, but, nevertheless, in Denmark in July of this year the big air carrier Scandinavian Airlines and another carrier, Maersk Air, saw fines for an illegal, hidden market sharing agreement imposed by the European Commission to the order of about 50 million USD for infringing competition law.

At the EU level there is an effort to decentralise the administration of the competition rules of the EU itself so that national competition authorities will also handle cases of a border transgressing character and not just the purely, or predominantly purely, national ones. At the end of the day that should make it possible for the European Commission to more effectively unveil and combat the big cases of which so many have been seen throughout the years of the operation of the Common market and the EU.

The continued perfecting of work sharing between the EU on the one side and the authorities of the Member States on the other should, ideally, lead to a situation where víolation of vital principles of competition becomes more seldom as both control and insight increases in society. It should be borne in mind that many cases of distortion of competition are essentially about stealing. An airline which, based on monopoly of a route agreed with a competitor or pressed upon him, extracts prices above those which would be seen under conditions of effective competition is actually stealing from passengers or consumers. That seems to be taken more seriously in the USA than in Europe. For in Europe, while fines have been sizable and are rising, managers and company lawyers violating anti-trust legislation are not jailed like in the

USA and forced to pay big personal fines. One would hope that in Europe, competition violations become so rare that it will not be judged necessary by legislators to apply the USA practice!

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