

BILL TO CHANGE THE DANISH COMPETITION ACT

On 26 October 2012, the Danish government put forward a bill to change the Competition Act. The purpose of the bill is to generally increase the competition in Denmark by imposing stricter penalties for competition infringement.

The background for the bill is that infringements of the Competition Act pursuant to the current Competition Act are sanctioned relatively mildly in comparison to other forms of white collar crimes in spite of the typically serious socio economic adverse effects of infringements on competition law. According to the Government's political proposal regarding competition from October 2012, studies show that on average, cartels charge a premium of 10 to 50%, a premium that is ultimately paid by the consumer.

Against this background, the bill contains a provision that imposes a significant increase in the penalties for infringements of the Competition Act as well as a more effective enforcement of the provisions.

Increase of the Penalty Level

Pursuant to the bill, the current basic amount for any legal person's less serious infringements of the Competition Act is raised from the current DKK 400,000 to DKK 4,000,000. For aggravated infringements of the Competition Act, the current basic amount of minimum DKK 400,000 and a maximum DKK 15,000,000 are raised to a minimum of DKK 4,000,000 and maximum 20,000,000. For the extremely aggravated infringements, the level is raised from DKK 15,000,000 with no cap to DKK 20,000,000 with no cap.

For the first time, permanent guidelines are imposed in regards to penalty levels for physical persons. The basic amount is set at DKK 50,000 for less serious infringements, DKK 100,000 for aggravated infringements and at a minimum of DKK 200,000 for extremely aggravated infringements.

It is still the intention that the penalties are determined without regard to the infringements severity and duration.

The proposed raises of the penalty level are to generally apply to infringements of the Competitive Act, including for instance a dominating company's abuse of their market position or by entering into vertical contracts concerning binding resale prices.

The explanatory memorandum to the bill gives as an example of the significance of the new guidelines that one of the largest cases in the "El-cartel" ended with a penalty of DKK 3,000,000. As the infringements in that case would fall under the "extremely aggravated" category, according to the new guidelines, the penalty imposed would be based on the basic amount alone, a minimum of DKK 20,000,000. Similarly, the DKK 5,000,000 penalty imposed on Arla in 2006 for aggravated abuse of a dominating market position would, pursuant to the new guidelines and the severity of the infringement, probably be in the region of DKK 15,000,000 to 20,000,000.

Prison Sentence for Cartel Agreements

It is a declared purpose of the bill to get rid of cartelization and to impose penalties on participation in cartel operations that match the penalties imposed on other forms of white collar crime. On that background, the bill imposes an opportunity to sentence people to prison for up to six years for entering into a cartel agreement.

Pursuant to the current Competition Act, participation in cartel operations is sanctioned by a penalty determined according to the basic amounts mentioned above. However, when the bill enters into force, the minimum and maximum penalties are raised, thus providing the possibility to sentence a person deliberately participating in cartel operations with up to six years imprisonment.

The increase will be relevant exclusively to physical persons, and it must be expected that basically, the provision will be applied only to the senior management, as it is most common that the decision to participate in cartel operations is made by the senior management, thus meeting the required qualification of intent.

Execution of preliminary Enforcement Orders and clarifying Enforcement Orders

The Competition Act in its current form does not contain the option for the Competition Council to use preliminary measures against presumed infringements of the Competition Act. It is therefore a definite strengthening of the Competition Council's options for effective enforcement when the bill warrants the Competition Council the option to execute a preliminary enforcement order. According to the explanatory memorandum, a preliminary enforcement order may be executed as, for instance, an enforcement order to supply where a domination company has taken advantage of its position by denying to supply.

A preliminary enforcement order will be in force until a decision has been made regarding the substance of a given case. Prior to the execution of a preliminary enforcement order, the Competition

Council must have decided that a given conduct constitutes an infringement of the provisions in the Competition Act, and that there is a risk of inflicting serious damage to the competition if no action is taken. A preliminary enforcement order must be brought before the Competition Appeals Tribunal within 10 weekdays to be upheld in order for it to have consequences for the recipient.

With the introduction of the option to execute a preliminary enforcement order, the Competitive Council gains a power already possessed by the European Commission and the majority of the other EU countries' Competition Authorities.

Furthermore, the bill contains provisions that enable the Competition Council to execute Enforcement orders to make sure that the recipient is in full compliance with a previously executed enforcement order. The purpose with a clarifying enforcement order is to state how the original enforcement order must be met, thus providing the opportunity to make sure that the law is respected and the enforcement order is properly complied with.

The authority hereby granted to the Competition Council is wider than the previous, according to which the Competition Council in connection with an inspection case, in which it is established that an injunction has been infringed upon, may execute an enforcement order to cease the business. After the passing of the bill, the Competition Council will be able to intervene as early as when it is apparent that the way in which a company is planning to comply with an enforcement order is not correct.

The most significant changes can be compiled thus:

Theme	Existing regulation	Bill
Penalty level for legal persons	The penalty is issued on the basis of a basic amount of DKK 400,000 for less serious infringements, between DKK 400,000 and DKK 4,000,000 for aggravated infringements and a minimum of DKK 15,000,000 for extremely aggravated infringements	The penalty is issued on the base of a basic amount of DKK. 4,000,000 for less serious infringements, between DKK 4,000,000 and DKK 20,000,000 for aggravated infringements, and a minimum of DKK 20,000,000 for extremely aggravated infringements
Penalty level for physical persons	There are no guidelines for the penalty size. In the legal practise nu penalties above DKK 25,000 have been imposed	The size of the penalty is determined on the base of a basic amount of DKK 50,000 for less serious infringements, DKK 100,000 for aggravated infringements, and a minimum of DKK 200,000 for extremely ag-
Penalty for cartel agreements	penalty	The sentence can be raised from a penalty to prison up to 1 year and 6 months
Execution of preliminary enforcement order by the Competition Council		The Competitive Council can order an agreement or a conduct ceased, if the Competitive Council following a preliminary assessment is of the opinion that there is a high risk of inflicting damage on the competi-
Clarifying enforcement orders		The Competitive Council can execute an enforcement order necessary to secure that the existing enforcement order is met correctly and in due time

It is expected that the bill will enter into force on 1. March 2013.

If you have any questions or require additional information on above, please contact Partner Nicolai Hesgaard (nhe@mwblaw.dk) or Senior Associate Pernille Nørkær (pno@mwblaw.dk).

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