COUNTRY STUDIES

Denmark - The Role of Competition Policy in Regulatory Reform

1999

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Denmark. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

Related Topics

BACKGROUND REPORT ON

THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM*

* This report was principally prepared by **Michael Wise** in the Directorate for Financial and Fiscal Affairs of the OECD. It has benefited from extensive comments provided by colleagues throughout the OECD Secretariat, by the Government of Denmark, and by Member countries as part of the peer review process. This report was peer reviewed in May 1999 in the OECD's Competition Law and Policy Committee. Significant changes to the 1998 Competition Act were made in May 2000, after this report was substantially finalised. These changes responded to some of the views and recommendations in this report. The OECD was unable to conduct an assessment of these recent changes, however, and the text of this report reflects the pre-May 2000 situation.

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Is competition policy sufficiently integrated into the general policy framework for regulation? Competition policy is central to regulatory reform, because (as background report to Chapter 2 shows) its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. Moreover, as regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. A complement to competition enforcement is competition advocacy, the promotion of competitive, market principles in policy and regulatory processes. This report addresses two basic questions: First, is Denmark's conception of competition policy, which will depend on its own history and culture, adequate to support pro-competitive reform? Second, do Danish institutions have the right tools to effectively promote competition policy? That is, are the competition laws and enforcement structures sufficient to prevent or correct collusion, monopoly, and unfair practices, now and after reform? And can its competition law and policy institutions encourage reform? The answers to these questions are assessed in terms of their implications for the strategies and sequencing of regulatory reform.

[NOTE: Significant changes to the 1998 Competition Act were made in May 2000, after this report was substantially finalised. These changes responded to some of the views and recommendations in this report. The OECD was unable to conduct an assessment of these recent changes, however, and the text of this report reflects the pre-May 2000 situation.]

Denmark has moved to adapt its domestic competition policy to the European regime. But it has done so slowly, and the processes and compromises reflect adaptations to Denmark's characteristic habit of co-operation. The 1990 competition law was ineffective. The 1998 law now adopts the EU's "prohibition" principle and the basic texts of EU competition law. The opportunity for stronger competition policy is great, for many services and sheltered sectors have long-entrenched traditions of cartels and co-operative agreements. An atmosphere of non-competitive co-operation pervades the service sector and domestic markets for non-traded goods. This stands in contrast to the strongly competitive export sector. Problems due to lack of competition in these sectors have been well-known for many years. They were highlighted in the 1993 OECD survey of Denmark, for example, and they are acknowledged in the government's own 1998 progress report on structural reform. But uprooting the problems is difficult, for co-operative arrangements are often seen as supporting fairness, and not just by industry participants.

Increasingly, though, consumer interests are realising that lack of competition increases prices and reduces buyer bargaining power and choice. And measures that prevent new firms from entering or competing on equal terms contradict the commitment to fair treatment. The government's effort to give higher priority to competition policy enforcement, coinciding with adoption of the 1998 Act, responds to this changing attitude. The Danish competition authority has tested out its new powers in a co-ordinated, and now well-publicised, investigation of long-standing bid rigging practices in the electrical contracting industry, and further actions against entrenched, habitual co-operation are expected.

But sanctions to ensure compliance remain uncertain. Legislated exemptions protect sectors, such as distribution, where competition problems are likely to be found. The 1998 Competition Act's failure to levy penalties for "first offences" involving abuse of dominance weakens incentives for compliance. And the lack of merger control authority deprives the government of an important and increasingly necessary competition policy tool.

In the treatment of deregulated network industries, competition concerns are respected in principle. Implementation in different sectors varies considerably, though. Telecommunications is moving toward competition relatively quickly, but transport is moving quite slowly. Regulations still inhibit entry and innovation in professions and services. Although competition enforcement has removed many of the private agreements in these sectors, the restraints often remain because of public regulation. At the local and municipal government level, support for competitive practices is even less clear. Yet the competition act permits government officials at all levels to make critical decisions about practices and policies that affect competition.

1. COMPETITION POLICY FOUNDATIONS

Denmark's challenge is to establish competitive habits and institutions in a society that has exalted co-operation and consensus, in economic as well as political matters. For 70 years, Denmark's competition laws did not prohibit anti-competitive agreements and behaviour, trying instead to regulate the abuse of market power and the prices in horizontal agreements. The result has been industry sectors that are capable of competing internationally co-existing with a culture of non-competitive co-operation in domestic markets. Denmark has recently strengthened its competition law, most importantly by declaring that agreements restraining competition and abuses of dominance are prohibited. This represents a fundamental change from the recent past. The basic policy goal now being pursued, of efficiency achieved by "workable competition," should help competition policy institutions support reform.

Box 1. **Competition policy's roles in regulatory reform**

In addition to the threshold, general issue, whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

- Regulation can **reproduce** competition policy. Rules and regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different practical outcomes.

- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

Denmark's traditions combine economic liberalism with co-operative decision-making.

Denmark's situation suggests a likely predisposition towards economic liberalism. It is a small market, served principally by small and medium sized firms. Even in manufacturing, as well as construction and services, employment is concentrated in firms with fewer than 500 employees. The predominance of smaller firms in the economy at large masks the fact that some markets are dominated by a few producers, though. This is particularly significant for some raw materials, such as cement, and for processing food products, where consolidations have produced high concentration or even monopolies in sugar, dairy, and meat processing. Because its borders have been relatively open to trade, import competition and participation of Danish firms in international businesses should have provided competitive discipline in many goods markets, even for some products like food and beverages that face little direct import competition. The discipline of import competition may be more theoretical than real, though, for Denmark's imports are lower than would be expected, given its size and transportation costs

(OECD, 1993). There are relatively few publicly-owned major enterprises now, a fact would also tend to support a more competitive, market-based approach to the economy, by removing the incentive to distort competition to protect their interests.

The Danish political traits of co-operation, decentralisation, and representation in institutions complicate decision-making, in competition policy as well as other areas. There are many decision-makers at the national level. Important powers have also devolved to local and municipal governments. Perhaps because the process is inclusive, so that many of the bodies that might have an interest in a decision are represented in the room where the decision is made, formal transparency is not always what might be expected. Most importantly, the practice of co-operative, consensus-based problem solving, which may be admirable for political institutions, has spilled over into economic institutions too.

Non-competitive conditions in non-traded sectors were identified in previous OECD studies.

Non-competitive co-operation in domestic, non-tradable markets was tied to poor economic performance in the 1993 OECD economic survey of Denmark. This survey both identified many of these problems and called for reforms of competition policy to correct them. Indeed, this survey has been credited as a major impetus for debate and then reform of the competition law later in the 1990s (OECD CLP, 1999; Competition Authority, 1999*a*). The report came at an opportune time, for the Danish government was already concerned about the lack of dynamism in the economy and traced it to lack of competitive pressure in many sectors. Already, the government had tried to make competition policy more market oriented and to remove regulations on entry and operations, as well as introduce market mechanisms in production and provision of some government services (OECD, 1993).

High prices are frequently cited to illustrate the lack of competition in domestic markets. In the early 1990s, aggregate retail prices in Denmark were by far the highest in the EU and among the highest in the OECD. In most categories of consumer products (21 out of 28), Denmark had the highest price level in the EU; in only two categories were Denmark's prices lower than the EU average. Among OECD countries, Denmark had the highest prices for footwear, residential construction, medical products, fuel and power, and the second highest prices for tobacco and for owning and operating personal automobiles. One reason for high prices on some products, including cars, tobacco, gasoline, and power, was high indirect taxes. (Excluding taxes, Denmark's auto prices were actually relatively low). But in the aggregate, tax levels could not explain all of the high price levels. In medical products, food, footwear, and services, prices were high even after accounting for the tax level. Above-average income in Denmark was also not a complete explanation for high prices, although the unusually flat wage structure did keep prices high for labour intensive products and services. A confirmation that lack of competition kept prices high was the fact that businesses often did not pass on savings to consumers after taxes were reduced. For some products—sugar, soft drinks, low-priced toilet articles—savings were passed on in full, but for others—beer, liquor, wine, appliances, high-priced toilet articles—they were passed on only in part, or not at all (OECD, 1993).

Sectors and industries where there might be particular competition policy concerns were specifically identified in the 1993 OECD Report. Competition problems were found likely in horizontally concentrated but largely closed sectors. Some, such as fresh milk products, had consolidated into one or a few domestic firms, to compete internationally in products for which Denmark is a major exporter. Several building materials industries (mineral wool, plaster board, cement, roofing-felt, electrical equipment, quicklime, plastic tubes, and parquet flooring) were dominated by one or two producers and the major producer was a price leader. Concentration was also high in some trade sectors, such as building materials (electrical equipment and sanitary appliances) and wholesale trade in some consumer goods, such as medical products. In retail sales, concentration had increased and was high in markets for durable and semi-durable consumer goods, where chains play a major role (OECD, 1993).

Box 2. **Competition issues identified in 1993 OECD report**

Sectors where regulations increased prices and hampered efficiency included:

- Pharmacies: Regulations effectively prevented competition among retailers. Entry, based on a needs test, was impossible, resulting in geographic market division. Mandated mark-ups eliminated price competition at retail and dampened price competition upstream too. Retailers even pooled profits via a legally-imposed equalisation arrangement. Because of the lack of retail competition, changes that should have increased competition (such as allowing generic products and barring restrictive agreements among importers, producers and wholesalers) did not do so.

- Health services: Regulations eliminated competition among private practitioners, by controlling entry through needs-testing and hence establishing geographic market division. Another control was professional association membership, which was effectively mandatory as insurance firms only reimbursed members of organised service providers, under agreements that set prices. And consumers could change general practitioners only once a year. Advertising by dentists and chiropractors was regulated.

- Liberal professions and business services: For lawyers, mandatory membership in the professional association entailed adherence to its anti-competitive ethical rules. Energy consultants could not compete on price, because their fees were publicly set. Several professions, including real estate agents, auditors, accountants, and surveyors, could not operate from more than one office. Regulations ensured market segmentation and inhibited innovative ways to deliver services.

- Transportation: Although competitive tendering for local transport contracts had been introduced in principle, it was rarely used. Authorisations and concessions still controlled entry. New inter-regional bus lines were not allowed if existing rail and bus service was "sufficient." Foreign air carriers were barred from domestic service. For taxis, entry was subject to a needs test and prices were publicly regulated.

- Rental housing: Setting rent caps based on historic construction costs distorted the market, making price vary with age rather than quality. Construction subsidies and rent support made consumers insensitive to price differences and changes.

As of the early 1990s, regulations barred entry into telecommunications, letter mail, rail traffic, electric power distribution, and natural gas sale and transmission. Concessions, sometimes granted without competitive tender, controlled entry into energy and water distribution, waste disposal, transportation, and testing services. Rules to control quality also controlled entry into health care, liberal professions, food handling, repair services, and transportation; these quality-based requirements were sometimes accompanied by anti-competitive needs testing or price restrictions. Exemptions from the competition law permitted resale price maintenance for tobacco products and publications.

Public procurement was also an area where the 1993 OECD report identified problems due to insufficient competition. Because public sector services are very substantial in Denmark, greater reliance on competition in providing those services could have important economic effects. Yet despite reform efforts, most such services—social security, health care, education, utilities, transportation, communication, housing, culture—faced little competition, and little use was made of competitive methods for providing them. Private entry was inhibited by the challenge of competing against public providers who offer services for free or price below fully allocated costs.

The recent reform of the law is a partial response to these identified problems.

What may have made the 1993 Report particularly timely was that the Competition Act had just been amended, ostensibly to strengthen it. But problems with the 1990 Competition Act were already apparent, indeed had been noted from the outset. In most respects the 1990 law restated the substance and the enforcement institutions and methods of Denmark's previous law from 1955. The jurisprudential principle had been, and remained, the control of abuse rather than the prohibition of anti-competitive acts. The 1990 Competition Act's chief positive contribution was that it was presented as a move away from

trying to control monopoly power by regulating prices; instead, it was motivated by a recommendation to rely more on market forces for that purpose (Albæk, 1998).

But the method chosen was peculiar. The 1990 Competition Act relied strongly on transparency, and thus on self-regulating market responses to well-identified problems. This approach made it conceptually more "market-oriented" than its interventionist antecedents. But the approach did not work. The "transparency" focus, hoping to promote competition by attracting entry, was heavily criticised from the outset, on the grounds that it was naïve to expect significant entry in response to high profits, for incumbents would use exclusionary tactics to resist it. Moreover, transparency was not a good tool to use against collusion, regardless of its benefits, if any, concerning dominance or vertical discriminations. Rather, greater transparency was likely to help oligopolists maintain high prices by improving their information (Albæk, 1996; Competition Authority, 1999*a*). Illustrating the problem, an effort to "create fair and equal competitive conditions" through transparency in the ready-mix concrete industry failed, for in that kind of industry, which is prone to tacit collusion, greater transparency simply helped the firms detect cheating. The emphasis on transparency also may have disadvantaged Danish firms, by revealing their strategies to foreign competitors. The law was amended twice to reduce transparency of some filings, in order to shield some businesses' information from disclosure (OECD CLP, 1997*a*; OECD CLP, 1996; Competition Authority, 1999*a*).

Other problems with the Act included its continued reliance on the "control of abuse" approach to nearly all competition problems, including horizontal price fixing (though not to resale price maintenance). By dealing only with effects, rather than with the behaviour that led to them, it thus risked tolerating too many difficult-to-prove adverse effects. Maintaining a different approach from the one that increasingly applied in the rest of Europe also increased costs for Danish companies operating in international markets (Competition Authority, 1999*a*). And the law did not deal at all with mergers (OECD, 1993). The 1990 Act did take step forward, by extending competition policy's reach, at least in principle, to public sector businesses and regulated activities.

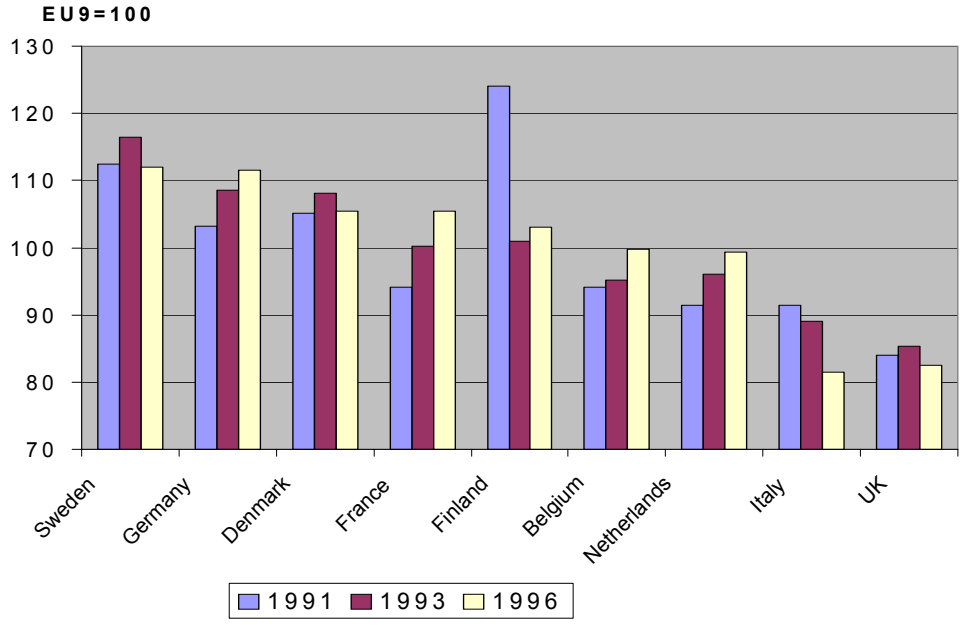
The most important problem, though, was that the absence of penalties meant there was little incentive for compliance. The OECD 1993 Report pointed out that the then-new competition law did not include effective sanctions and recommended setting fines for anti-competitive agreements. But the lack of serious sanctions accurately reflected the low priority placed on strong competition enforcement. In Denmark's legal and business culture, business competition was treated as a matter for negotiation, not for rules or punishments. Only one case was submitted for enforcement under the 1990 law, and the public prosecutor declined to pursue it. The only actual punishment levied was one fine, of less than DKr 15 000.

Against that record of disappointment, further reforms were developed. The Minister for Business and Industry appointed a committee to analyse the implications of strengthening the law by shifting to a prohibition-based regime. That committee issued its report and a draft of a new competition act in August 1995 (Competition Authority, 1999*a*). Revisions to the Competition Act were debated for several years, adopted in 1997, and became effective 1 January 1998.[1] The announced purpose of the revised Act is to strengthen Danish competition policy and to align it better with the EU legal principles that increasingly underlie the laws of most other European countries (Competition Authority, 1999*a*). Thus, the substantive basis for the law was formally changed, from administrative review and control to prohibition.

The revised 1998 Act, and the government's resolve to make competition enforcement a higher priority, face conditions that appear to have changed little since the 1993 OECD Report. Comparatively high price levels and lack of competition in sheltered sectors are still cited as grounds for concern about the strength of competition. The Competition Authority's most recent report, from April 1999, shows Denmark's price levels are still relatively high, compared to its neighbours in northern Europe. The

inference drawn is that international competition from traded goods and services has not been enough to make the Danish market competitive Among the sectors where prices seem particularly out of line, and lack of competition is a likely explanation, is construction. The report finds that several other sectors meet criteria suggesting likely concerns about competition: food and beverage production, construction materials, other raw materials, paper, printing, chemicals, electronic and medical equipment, wholesale and retail trade, transport, liberal professions, financial services, and municipal services (waste removal, heat, and electric power). High concentration in several food production lines may have promoted exports, but the lack of competition reduces consumer choice and leads to prices about 10% higher than elsewhere (Competition Authority, 1999*b*). Studies by others tend to confirm these conclusions. The Economic Council of the Labour Movement has compared Danish price levels with those elsewhere in Europe, to identify sectors where competition still appears comparatively weak. These sectors include retail, particularly for eyeglasses, drugs, clothing, and real estate brokerage. A study by the Consumer Council identifies professional services too, such as dentistry, housing sales, banking, and insurance as continuing problem areas.

Figure 1. **Aggregate price level compared to EU9**



Source: Danish Competition Authority; data from Infostat and OECD.

The government's own 1998 assessment of competitive conditions identifies private services—wholesale and retail distribution, business services, taxis, auto repair, health care, entertainment, and air transport and support services—and some concentrated manufacturing industries as sectors where Denmark still needs to strengthen competition. It also acknowledges that more competition in bus and rail services, which are still tightly controlled despite some recent changes, would benefit Danish firms and consumers (Government of Denmark, 1998).

Efficiency through workable competition is now the policy goal, but concern for fairness underlies it.

According to the official statement of purpose, the goal of competition policy is economic efficiency. The Act declares that its purpose is "to promote efficient production and resource allocation by means of workable competition." (Section 1) The agencies responsible for applying the law point out that "efficiency" must be understood in several senses, and all are relevant. The law's goals include promoting

productive efficiency, to minimise costs, and allocative efficiency, to optimise resource allocation and ensure that production responds to user and consumer preferences. And efficiency is to be understood both in the static sense, of optimisation within a set of technological and demand conditions, and the dynamic sense, of flexible adaptation to changes in tastes and technologies (Competition Authority, 1999*a*).

The criterion identified to achieve these purposes is "workable competition," based on structural and conduct elements. Two structural elements are a "sufficient" number of firms in a market, considering the efficiencies of large-scale operations, and freedom of entry and exit. Freedom of entry means the absence of quantitative restrictions and that new entrants do not face particular costs that incumbents are not subject to (Competition Authority, 1999*a*).

This concern over structure and entry, as the conditions that will produce efficiency, perhaps should be understood against the background of the Danish Constitution's provision, that "[a]ll limitations of free and equal access to trades that are not motivated by the common weal must be annulled by law." (Albæk, 1998). In implementing this mandate through the details of competition policy, much depends on defining the "common weal." But it is surely significant that assuring open and fair access to a market is treated as a matter of constitutional principle. The higher law states a principle based on fairness. It is implemented by a law that aims for efficiency.

The current statement of purpose represents a change in emphasis over time. For most of the post-war period, the competition law was concerned to regulate abuses of market power. The 1990 revision tried to move away from that approach, believing that greater transparency would encourage competition and efficiency. The change in approach was reflected in a change of label: what had been called the "Monopolies" Act was succeeded by a "Competition" Act. Under the 1990 Act, transparency was treated almost as an independent value, in addition to efficiency and removing constraints on competition. That value no longer appears.

In shifting toward a concern about competition and efficiency, rather than about monopoly, the law might be thought to attend more to the interests of producers, rather than consumers. The explicit statements of purpose do not mention consumer interests. But to the extent efficiencies reduce costs and prices, of course, consumers should be the ultimate beneficiaries. This seems to be well understood in Denmark, as consumer interests were among the most vocal proponents of the revised Competition Act.

Past reforms, embodying incremental change through consensus, tended to accept anti-competitive practices and try to regulate abuses.

Denmark's approach to competition policy has been cautious from the outset. The first proposal for a law, from 1919, recommended only provisional steps, because it was not clear that anything permanent was needed. In 1929, an Act to protect "the liberty of trade and the freedom to work" purported to prohibit agreements that barred entry, and provided strong sanctions, including even imprisonment. But it was aimed mostly at labour, not business, and was repealed in 1937. More representative of the Danish approach to business regulation was the Act on Price Agreements, which was founded on a principle of toleration, if not outright sympathy, for horizontal combinations. This law followed the recommendations of the 1930 London Interparliamentary Union, which advocated controlling cartel abuses through notification, publicity, and regulation, on the grounds that trying to prohibit them would be futile. But only six cases were ever brought, and none were decided, during the six years this law was in effect (Albæk, 1998).

In 1937, the foundation of the current regime was laid. Agreements were to be notified to the Price Control Council, whose first step, in the event of a competition problem, was to seek to negotiate a resolution before resorting to an order to cease and desist or to regulate prices and margins directly. The

Monopolies Act of 1955 built on the 1937 law, establishing a Monopolies Control Council, supported by a Directorate, as the successor to the Price Control Council. The 1955 Act gave this new Council some new enforcement powers and it also stiffened the substantive rules by prohibiting resale price maintenance (Albæk, 1996). But the Monopolies Act was still based on the "control of abuse" principle. Companies were to notify the authorities when they entered some kinds of agreements or achieved a dominant position. If there were competition problems, the authorities would negotiate with the companies to find resolutions and issue orders to cease and desist if negotiations failed (Albæk, 1998). When the 1990 Act changed the policy focus from "monopoly" to "competition," the Monopolies Control Council was transformed into the Competition Council. The new theme was transparency, but application was still premised on negotiating resolutions, and the renamed Council retained powers to regulate prices.

The 1998 Act represents the most significant change in Danish competition law since 1937, in its abandonment of the goal of promoting transparency, and instead the adoption of the principle of prohibition as well as the texts and doctrines of EU substantive law. In other respects, though, even the 1998 Act represents incremental change. The existing enforcement structure is retained, although the Council has been expanded by four members. Enforcement sanctions, though strengthened somewhat, remain uncertain. And some compromises in the legislation make the move toward the EU model incomplete.

Denmark's legislative process encourages such compromises, as it begins with consultations within *ad hoc* committees that include representatives of groups that might be affected. This degree of participation may produce longer-lasting solutions, because many participants have an investment in its success. But the process is also an avenue for parties with interests to put pressure on the system. The *ad hoc* committee's initial proposal for the Competition Act was to apply prohibition only to anti-competitive agreements and continue to use the control method for abuse of dominance. The government rejected that approach, but the final result, of applying sanctions against abuse of dominance only to a repeated violation, or to violation of an order, is nearly the same. The more lenient treatment of abuse of dominance reflects the interests of the business community, as does the continued failure to include merger control. Legislative exemptions for common retail-wholesale relationships respond to industry interests. An exemption for actions authorised by local governments, and expansion of the Council to include two local government representatives, respond to their concerns about how the law would be applied to their practices. Despite the compromises, consumer and broad-based labour groups generally supported the new legislation, and in the end, the package of revisions attracted consensus support.

The 1998 Act has put competition policy higher on the public agenda. Even though the delayed sanctions for abuse of dominance and the lack of merger control mark departures from the complete EU model, nonetheless the 1998 Act's differences from the old regime are great enough to announce that important things have changed. It has raised the consciousness of the legal community, certainly, and media coverage of competition issues, prompted by visible enforcement initiatives in 1998, is helping to reach the business community too.

2. SUBSTANTIVE ISSUES: CONTENT OF THE COMPETITION LAW

If regulatory reform is to yield its full benefits, the competition law must be effective in protecting the public interest in markets where regulatory reform enhances the scope for competition. An element of Denmark's moves toward introducing competition into formerly regulated sectors was of course the strengthening of the basic legal framework. Denmark now applies the same approach used in most EU countries. Before, practices restraining competition had been allowed unless explicitly forbidden; now, those practices are prohibited unless explicitly allowed. Whether this structure is yet strong enough may depend on the importance of the remaining differences between Denmark's approach and the emerging common practice among EU countries.

Box 3. **The competition policy toolkit**

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

The basic law about restrictive agreements is now that of the EU, both in content and in the "prohibition" basis.

The substantive law applied to both horizontal and vertical restraints follows Art. 85 and its block and other exemptions. Anti-competitive agreements or concerted practices among undertakings, or anti-competitive decisions by an association of undertakings, are prohibited. That means they are void *ab initio* and thus unenforceable. The law contains an illustrative, non-exhaustive list of prohibited agreements, modelled on that of Art. 85 (Section 6(2)). As in the EU law, the principal means for defining its detailed reach is the identification of exceptions and exemptions from the general prohibition. Contradiction is avoided by deferring to the EU, in that any agreement subject to a general or specific exemption from Art. 85 is excepted from the Danish prohibition (Section 4).

One exemption is provided in the legislation itself. The Act exempts matters of minor significance ("*bagatelgrænser*") from its prohibitions (OECD, 1998). Other exemptions may be granted administratively, according to the same criteria used in the EU system (Act, Section 8(1)). Block, or generally applicable, exemptions are issued by the Minister for Business and Industry. Eight have been adapted from the EU's block exemptions, so essentially the same exemption applies to agreements that affect only the Danish market as to agreements with a European community dimension. Denmark has adopted one block exemption, for marketing agreements in co-operative retail chains, that is not derived from the EU set. And internal agreements within a group of companies or co-operative society are excepted by regulation (Regulation No. 1029, 12 Dec 1997). Applications for case-by-case exemptions are decided by the Council, applying the same criteria as are applied to justify block exemptions (Competition Authority, 1999*a*).

Box 4. **The EU competition law toolkit**

The Danish law follows closely the basic elements of competition law that have developed under the Treaty of Rome:

- **Agreements**: Article 85 prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 85's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.

- **Exemptions**: An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.

- **Abuse of dominance**: Article 86 prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50%, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.

A principal application of the new prohibition is to market division and price fixing agreements.

The scope for aggressive application of the new prohibition could be great. The 1993 OECD Report found that horizontal agreements about price, such as price lists, rules, and discount allowances were common. Even though they often took the form of "recommendations" rather than binding agreements, that difference did not matter much to their competitive effect. Pricing agreements were widespread in service sectors such as the liberal professions, construction, transportation, and trade. Market division agreements allocated areas to individual producers or limited rights to sell or use trademarks (OECD, 1993). Non-traded services, more than goods for which there is actual or potential foreign competition, remain a concern of national competition policy.

Cartel enforcement actions are underway now against agreements not protected by exemption (or by pending application for exemption). Denmark's first competition enforcement "dawn raid" was launched in November 1998, to investigate companies alleged to be in a cartel in electric wiring services. Firms are co-operating, and evidence is developing that appears to prove the existence of a cartel that has dominated this sector for years (Competition Authority, 1999*a*). Ensuing media coverage and debate about the significance of stronger competition enforcement, which was amplified by the European Commission's assessment of a heavy fine on Danish pipe manufacturers at about the same time, (OECD CLP, 1997*a*) has encouraged more complaints. The Competition Authority is receiving many tips now that there has been some publicity. One story reported an informal, unsuccessful attempt to fix prices for egg production several years ago, which failed. Another reported an evidently more successful pattern of bid rotation for government printing contracts. The Competition Authority is interested in finding ways to advise the buyers about how to prevent being victimised. Reportedly, the Ministry of Taxation cut its forms-printing costs in half when it stopped dealing with traditional suppliers, who were apparently rotating bids, and gave the work to a newcomer.

Trade and professional associations are often the sponsors of horizontal agreements. Here, Denmark has made significant progress in law enforcement, though anti-competitive regulations still present significant problems. These associations have been particularly common in service sectors, where membership at one time was nearly universal. Many issued price lists, and thus about half of the pricing agreements registered under the old Act were issued by branch organisations. Their "loyalty" and ethical rules compromised competition by regulating entry, standardising services, limiting advertising, and dividing markets (OECD, 1993). Anti-competitive actions by organisations in the professions were already the subject of a sustained enforcement effort, which began in 1991 under the previous Competition Act (OECD CLP, 1996). That project was finished in 1997, as essentially all of the most egregious and overt price-fixing and market-division agreements were reviewed and corrected (OECD CLP, 1997*a*). But related cases continue. For example, in 1997, the Council persuaded the nurses' organisation to change a provision in its "code of conduct" that gave its own journal a monopoly on advertising for employment openings (OECD CLP, 1997*a*). As a result of these Council efforts, Denmark may now be relatively liberal with respect to association constraints on entry, at least compared to its neighbours.

But associations that had been accustomed to controlling competition have tried to continue doing so even after liberalisation. Rear-guard actions have been necessary to prevent associations from undermining reform. In 1997, under the old Act, the Council prevailed on the truckers' trade association to eliminate a "recommended" price list. It took an appeal to the Appeals Tribunal, though, before the association finally agreed to cancel the list in May 1998 (OECD CLP, 1997*a*). And in 1996 the Council ordered the opticians association to withdraw a boycott order against one of its members who sold by mail. The association was a recidivist, having previously been warned against organising boycotts (OECD CLP, 1996) (Yet despite the repeated violation, no sanctions were actually imposed, a fact that underscores the weakness of the 1990 Act).

Poorly-focused regulation is said to be encouraging one of the most serious problems, bid rigging. The contracting law[2] that sets bidding procedures in the construction business, which dates from the 1960s, was evidently intended to promote competition, or at least to discourage overt collusion. For example, for competitive, open tenders, an organisation may not to require its members to report their intentions to tender or to confer or collaborate about tenders. Indeed, the act seems to make unlawful any agreement to that effect, whether or not the agreement is reached via a formal organisation. But the tendering law contemplates that bidders will nonetheless get together. Thus, it admonishes that when they do so, they must only discuss specifications and technical issues, and they must invite the owner who is soliciting the bids. Nevertheless, almost all organisations within the building and construction sector have rules encouraging their members to report on a "voluntary" basis their intentions to tender, and firms reportedly share information about who will bid. Furthermore, this reporting system makes a perfect tool for discussions of who will win the bid and at what price. Another source of problems is said to be the provision for non-competitive, invited "private" tenders. This provision appears to prohibit negotiating privately offered tenders, if more than one is submitted. If neither open nor invited bidding methods are used, then a negotiated bid cannot be shopped around to more than one alternative. Many observers believe the tendering law should be abolished, but some trade associations support it. The Competition Authority is responsible for enforcing this law.

The following table reports changes in regulations affecting competitive conditions. It shows that in general, the number of such constraints is declining. But some are increasing, notably those concerning advertising. As agreements or "private regulations" to refrain from advertising have been overturned, the organisations may be seeking public regulations that would requiring them to continue the constraint.

Table 1. **Barriers to entry and regulation of trade**

	1990	1997
Barriers to entry (public regulations)		
Monopoly or concessions	44	32
Limits on market participants	7	10
Regulation of trade (public regulations)		
Price regulations	9	10
Restriction on advertising	3	15
Co-operative regulations	4	4
Regulation of trade (private regulations)		
Price regulations	43	4
Restriction on advertising	8	0
Co-operative regulations	8	0
Total	126	75

Source: OECD, 1998.

Many sectors have presented problems of vertical constraints barring competitive entry.

Vertical integration, by ownership, membership, or contract, has been common in food processing and construction. Food producers belong to processing co-operatives, and construction firms have interests in makers of construction materials. These arrangements could pose competition problems, because firms that did not belong to these networks, or that left them, could have trouble finding processing outlets for their milk or obtaining necessary materials at non-discriminatory prices. Although not all of these arrangements were actually anti-competitive, the 1993 OECD Report found that vertical agreements sometimes reinforced horizontal problems. Some examples:

- Building materials: Bonuses and discounts for loyalty to dominant suppliers deterred entry into the plasterboard, mineral wool, electrical equipment, glass, and concrete businesses.
- Convenience goods: Vertically-connected "blocks" of exclusive dealing and ownership arrangements linked wholesalers to retail outlets. In this case, though, the net effect may not have been anti-competitive. (Arrangements like these are probably what Denmark's special retail group block exemption was intended to cover).
- Consumer durables and semi-durables: Wholesaler-retailer ties, mediated by discounts and bonuses, reduced transparency in the white goods business. Agreements included elements of exclusivity for audio and video products. Upstream suppliers tried to dictate retail prices for furniture, iron products, sportswear, and musical instruments.
- Personal care products: Entry in perfume and toilet articles was inhibited by wholesaler-retailer links concerning discounts, bonuses, and exclusivity.
- Services: Vertical agreements linked hauling companies and contractors. Real estate agents had franchise agreements with mortgage lenders.

Many of these arrangements persist today. Few of them are traceable directly to regulation, and thus they should be amenable to enforcement action under the 1998 Act where they in fact impair market competition.

The Competition Authority has taken action under the 1998 law against some vertical restraints. A notable example involves auto repair costs. Denmark's extremely high excise tax encourages dealers to make money on other functions, in order to keep effective purchase prices low. The insurance industry used a standardised method of estimating repairs, which virtually all repair shops used. It both set the standard times and rates, and required that shops quote the same prices to all insurance companies. It thus discouraged repair firms from competing over price. Thus standard no-fault insurance repair arrangements were reflected in agreements among repair shops and insurance companies, and with each other, about terms and prices. The result was to inhibit competition and raise prices for these services. In December 1998, the Council issued an order against the system. Another matter, with a regulatory aspect, involved manufacturers refusing to supply parts or materials to firms that lacked regulatory authorisations, such as licenses to do work affecting the public water supply system. The Council ruled that restraint on trade in the materials was an inappropriate condition.

The EU is in the process of revising its policies about vertical restraints, as the group exemptions on the issue will need to be replaced by the end of 1999. The direction of change was foreshadowed in a Green Paper in 1997 and a follow-up communication in September, 1998. The Commission intends to adopt a wide block exemption, complemented by guidelines, premised on a presumption of legality except for certain hard-core restraints. Because Denmark has adopted a general policy now of following the EU's substantive lead, if the EU changes its exemptions or criteria, Denmark is likely to follow.

To remedy abuse of dominance, access can now be ordered more easily, but sanctions remain weak.

The prohibition against abuse of dominance is modelled substantively on the EU law, Art. 86. Parties may ask the Council for a negative clearance (which is not a legal exemption) that their conduct does not fall under the prohibition (Act, Sections 11(1)-(2)).

Denmark takes from EU models its conceptions of market dominance, including a presumption of dominance at market shares over 40%. In a small country, it may be relatively easy to reach that threshold (if it is assumed that the market is no larger than the country itself, at least). Because dominance based on market share alone might be comparatively easy to demonstrate, it would also be important to determine whether there are significant barriers to entry.

If it finds a violation, the Council can order the parties to stop. But the 1998 Act does not provide for fines for first-time violations of this prohibition. Rather, financial sanctions apply only to violation of the Council's order to cease, or to a second violation within five years that is equivalent to the original one, and not to the original violation itself (Act, Section §23(1)(2)). This treatment is said to follow the principle, that any act constituting a criminal offence must be set out clearly in statute, and fines for breaching the competition law are considered penal sanctions. Despite the Act's listing of particular kinds of conduct that would constitute abuse, the Act alone is evidently not considered clear enough (Kofmann, 1998). Whatever the legal reasoning, the practical fact is that a firm faces little risk from violating the prohibition against abuse of dominance. Rather, even the threat of penalty only begins after the enforcement body has determined that the particular conduct has violated the Act.

In another respect, though, the 1998 Act adds a useful enforcement tool. If the violation involves an infrastructure facility that is essential for a party to market a product or service, the Council can order access (Section 16(4)). In the past, with only a much more limited power to order access, the Council had to rely principally on advocacy or negotiation, and getting relief was time consuming. An example of the difficulty was the drawn-out process of opening access to harbour facilities (Competition Authority, 1999*a*). Although efforts to open them to competitors began with the Danish competition authorities, it took three years of litigation at the European Commission under Art. 90 of the Treaty of Rome to force access (Albæk, 1998). An effort to open up the electric power system to competition failed, because the old law only permitted access orders on comparable terms, and where there had never been similar sales, there could be no usual terms for such sales. Not all such efforts under the old law failed, though: the Council negotiated a change in membership rules and access prices to an electronic distribution-control system for potted plants (OECD CLP, 1997*a*; Competition Authority 1999*a*).

Remedies can include trying to control prices. Price-based relief was often used in the early years of the 1955 Act, but it was almost never used by the late 1980s. One reason for the changes in the 1990 Act was to make other remedies more important, so price limits would be a last resort. Recent controversies over the appropriateness of price-based relief may be shaping how regulations develop.

In cement, the Council rejected Competition Authority moves for price control. The cement problem is a long-standing one, with both domestic and European aspects. There has been only one producer in Denmark since 1975. Its prices were controlled directly, under agreements with the Monopolies Commission pursuant to the Monopolies Act of 1955. When the new Act came into effect in 1990, the Council tried to apply its new, "transparency" methods, by requesting access to the cement firm's books to determine appropriate prices. During the same period, though, the European Commission uncovered a continent-wide market allocation and price fixing conspiracy, founded on agreement not to export to each others' domestic markets. Thus even if transparency had been achieved, it would not have attracted pro-competitive entry (Albæk, 1998). In 1998, the Council refused to issue an order to reduce domestic prices, despite arguments that the price levels demonstrated the exercise of market power since

they were higher than export prices and production capacity exceeded domestic demand. The Council noted instead that the price levels were about the same as in the rest of Europe and there were no evident legal or technical barriers to import competition, so the price levels could not be evidence of dominance (OECD CLP, 1997*a*).

Since the 1990 Act, Denmark's competition policy has moved away from reliance on price-based remedies. Now, the issue seems to have reduced to disagreement about whether they should ever be used at all. A test of this principle is coming in the draft legislation on payment systems. This has become a monopoly, because the present law requires setting charges for this service in a way that discourages creating a second system. The 1998 law is likely to leave competition issues for this service, including monitoring access pricing, up to the Authority alone, without involving the Council, which has recently appeared reluctant to use price-based relief.

The lack of meaningful merger control is a substantial weakness.

Mergers over a threshold size must be reported to the Authority after they occur (Section 12(1)). The notification obligation depends on the size and status of the "participating undertakings" directly affected by the merger, typically the parent firms. At least one of them must be located in Denmark, and the aggregate turnover of all the associated firms must exceed DKr 50 million; however, if only one of the "participating undertakings" has turnover above DKr 10 million, notification is not necessary. The deal must be notified within four weeks after consummation.[3]

But the law contains no provision for enforcement or remedial action against anti-competitive mergers. A rationalisation for this omission, shared by some other small EU countries, is that the domestic economy is dominated by small and medium-sized enterprises, and so presumably combinations among them would be of no competitive concern (OECD, 1998). It is hard to understand why a post-hoc reporting requirement, without power to dissolve an anti-competitive transaction, is thought to be a sufficient approach to the issue, though.

Five reasons were asserted in the political debate for the omission of merger control. First, important (that is, large) mergers would be covered by the EU merger regulation. Second, regulation could impede necessary, efficient mergers, which are particularly likely in Denmark because so many of its firms are relatively small, and particularly necessary in order for those firms to compete effectively in European or global markets. Third, regulation imposes costs on the regulatory body yet typically results in few prohibitions, and even then resources are probably wasted since final decisions are often taken by ministers for political reasons. Fourth, actual abuse of dominance would be remediable under the Act's prohibition. And finally, a national merger that affected competition in Denmark could be referred to the European Commission for action, under Article 22 of the EU Merger Regulation (Competition Authority, 1999).

Each of these reasons is weak. Comparatively small mergers can still be competitively significant in small markets such as local retailing. Economically informed merger enforcement can expeditiously distinguish the majority of mergers that are efficient, or at worst neutral, from the small number that threaten competition. Whether that is done without undue expenditure of enforcement resources depends on the quality of management, not on the principle of having merger control. If decisions in other jurisdictions are sometimes driven by politics rather than economic or legal analysis, that does not mean they must be, or that careful application of legal and economic analysis is a waste of resources. Even if other considerations are factors in the decision, it is important that the decision-maker clearly understand the likely competitive consequences of alternative courses of action.

Most importantly, controlling abuse of dominance, for example by controlling a merged firm's prices, is very difficult at best. But the lack of power over mergers means the power over prices will have to be used, despite the difficulty, or else market power will have to be tolerated, if small and medium sized firms consolidate into larger firms that can dominate the domestic market. This may well happen, if the new prohibition-based approach to agreements encourages firms to combine formally rather than continue to co-operate informally, and now illegally. A case at the European Commission illustrates this risk. As of early 1999, the EU is looking at a combination of Danish meatpackers. In 1995, four slaughterhouses, accounting for 70-80% of the Danish pork market, shared a recommended price list. The Council found that this eliminated price competition and negotiated the termination of this agreement (OECD CLP, 1996). The slaughterhouses' subsequent proposal to merge was reviewed under the EU merger regulation. But no Community dimension applied to the recent merger of the major dairy processors, whose complex of marketing and supply agreements have been the target of competition policy inquiry for years. The dairy and the Competition Authority negotiated an agreement, whose terms corresponded to the undertakings in the EU case about the slaughterhouses, and as a result, the Minister of Business and Industry decided not to refer the dairy case to the Commission.

Whether the European Commission can handle a merger referred to it may depend on other resource commitments there. The EU handles about one merger a year involving Danish firms, when such a transaction falls under the EU's merger regulation. In the past, no Danish merger has ever been referred to the EU for investigation and action under Art. 22. Referral decisions would be up to the government, not the Council.

Merger control is said to be "against Danish tradition". Even though the only legal obligation is that companies advise the Authority after a merger happens, parties complain that the reporting rules are still burdensome and wonder why they should be put to this trouble, just to collect statistics. But despite this resistance, there are signs of change. Merger control is supported by small business and academic members of the Council, and adding this power to the law has now been endorsed by the Ministry.[4]

In the meantime, sectoral regulators may have some authority about mergers under their jurisdictions. Certain transfers of telecommunications concessions must be approved by the sectoral regulatory agency, for example. In banking, the Ministry of Business and Industry dealt with several big mergers in the early 1990s (and consulted with the Authority in doing so). The criteria for sectoral agency review may be based on other regulatory goals, though, that would not necessarily put a high priority on protecting competition, and sectoral agencies would not necessarily apply a comprehensive market and competitive analysis.

Principles and institutions concerned with fairness and consumer protection both support and contrast with those of competition policy.

Rules about the traditional subjects of unfair competition were excluded from the Competition Act deliberately. The legislative intention was that the Competition Act deal only with efficiency and resource allocation, not with fairness (Competition Authority, 1999*a*). There are no rules about false advertising or trademark abuse under the Act. Some of those principles are covered by the Marketing Practices Act, which contains a general prohibition against improper conduct and prohibits unauthorised or confusing use of trademarks.[5] That act includes a number of provisions that amount to consumer protections, and its rules are administered by the Consumer Ombudsman, in the Consumer Agency (Competition Authority, 1999*a*). But rules ostensibly about fairness may have an effect on competition. A typical example, to which the Competition Act has been applied, is "codes of conduct" of business or professional associations, if they set quality standards that are unnecessarily high, or set high prices under the guise of assuring quality (Competition Authority, 1999*a*).

The social value of fairness is embodied in the pattern of broad representation on decision-making institutions, whether or not it is incorporated in the letter of the substantive law. It also appears in the history of competition law, which had generally tolerated agreements among parties in an industry establishing fair practices and even prices, subject only to control of abuse. The Competitive Tendering Act (discussed above), which may encourage bid rotation, is motivated at least in part by concern over fairness among bidders. And the futile enforcement efforts against price discrimination in concrete were said to be motivated by concerns that customers did not know whether the prices they were paying were fair. (In 1997, the Council ordered ready-mix concrete companies, which had 80% of the market, to roll back their prices, because efforts to promote competition through transparency had not worked (OECD CLP, 1997*a*). The concern was that actual prices diverged significantly from list prices, because of discounting, so customers could not identify possible price discrimination (OECD CLP, 1996). The principle of fair treatment may not be an element of the explicit policy goals any more, but it is never far below the surface.

Consumer groups in Denmark have been involved in debates about competition policy, generally supporting stronger laws and enforcement. The Consumer Council, which has a seat on the Competition Council, had long lobbied for a stricter competition policy, feeling that the sanctions under the law were too few and that the thrust of the law was not really toward hard competition.

The theme of Danish consumer policy has shifted some since the late 1970s, from protecting consumers because they are weak, to supporting consumers' own resourcefulness. The new consumer protection approach, which implies complementarity with an efficiency-based competition policy, is set out in the Government's *Consumer Policy Strategy*, presented in April 1997. This strategy recognises the need for market-based solutions, such as correcting for asymmetries in information and market power, and for co-ordination among competition policy, business policy, and consumer policy. The three identified elements of the strategy are stronger enforcement of consumer protection rules, which is said to enhance fair competition; better consumer information, which contributes to transparency and to demand pressures based on quality; and better knowledge of the effects of regulation and political decisions, to avoid regulatory failure and better use "dynamic competitive effects" in consumer policy. Government studies and surveys of Danish business tend to show that stronger consumer policy improves business performance and makes Danish firms more internationally competitive. These encourage the government to move to enhance market-oriented consumer policy, in part by trying to help the more "progressive" companies. But despite the potential mutual support between the policies, the consumer offices noted that the Authority seem to focus on larger-scale issues involving businesses, more than the consumer impact of competition problems (Competition Authority, 1999*a*).

Enforcement of consumer protection policy and unfair competition laws provides an instructive contrast to the enforcement of competition policy. The Marketing Practices Act is enforceable in the Commercial and Maritime Court in Copenhagen. This court, rather than courts of general jurisdiction, was chosen because it was familiar to business, and its members include business representatives. Much of the policy content appears in twenty sets of (voluntary) guidelines, issued by the consumer Ombudsman. Some administrative co-ordination among these policies is promoted by the fact that the Authority and the National Consumer Agency are both within the Ministry for Business and Industry. The two agencies co-operate informally when necessary. The Authority also consults occasionally about consumer regulation with the Consumer Ombudsman (Competition Authority, 1999*a*). The National Consumer Agency provides the secretariat to the independent Ombudsman, supports the public consumer complaints board, and supervises the chartering of private complaints boards.

3. INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

Reform of economic regulation can be less beneficial, or even harmful, if the competition agencies do not act vigorously to prevent abuses as competitive markets replace regulated ones. Denmark's institutions for applying competition policy embody representativeness, but their complexity can lead to uncertainty and make them less effective.

The Council, which is responsible for taking action, may be an unwieldy decision-maker.

The basic decisions and actions under the Competition Act are taken by the Competition Council. It has the power to issue orders against infringements, (Sections. 6(4), 11(3)) to grant and revoke individual exemptions, (Sections 8(1), 8(5)) and to certify that conduct (duly notified) is not covered by the prohibition on restrictive agreements (Section 9). It may issue orders to terminate or correct agreements, decisions, and trading conditions, to limit, for up to one year, prices or profits (or specify rules for calculating them), to require a business to deal with another, or to require an essential infrastructure facility to grant access (Section 16).

The Council has 19 members, nine of whom (including the chair) are to be independent of commercial or consumer interests. The others, amounting to a majority, represent interest groups. Seven are appointed on the recommendation of professional or industrial organisations, one on recommendation of consumer organisations, and two on recommendation of municipal government organisations, one from counties, the other from municipalities (Section 15(1); Competition Authority, 1999*a*). Groups represented on the Council include the Consumer Council, the Economic Council of the Labour Movement, Danish Industry, and other business organisations representing agriculture, finance, services-distribution, construction, and small businesses and trades. Other members include several university professors, two competition lawyers, and the director of the Copenhagen harbour.

The Council's formal representativeness has strengths and weaknesses. The Council is a corporatist survival of the institutions created in the late 1930's (Blomgren-Hansen, 1999). Councils like this one are commonly used in Denmark. Other boards or councils, often with overlapping membership, handle competition-related issues, such as utility pricing. Representation mandated by law announces to interests that they are formal participants, and it thus provides some assurance that their concerns are heard. But it makes the body appear to be a political one. On the other hand, official designation as a representative may make the individual representatives careful not to act as such, in a society like Denmark where the mores frown on interest group horse-trading. And although making all members formally independent, that is, eliminating the law's provision for representation, might eliminate the appearance of politically-motivated decision, appointments might still reflect representation of interests *de facto*.

The Council's organisation has been criticised as leading to inefficiency. The Council is surprisingly large. The provision for deputies or substitutes (appointed by the Minister for Business and Industry) further dilutes the attention of the members, as more than 30 different people may be potentially involved in deliberations and decisions. Such diffusion of attention and responsibility may support a tendency to vagueness and compromise. And it might mean that effective leadership is ceded to parties with interests in particular cases.

The Council's roles are complex. Its members are not necessarily technical experts in competition policy, law or economics. It appears to act in part as a permanent "jury" deciding both the facts and the policies underlying the competition law. Because of its representative construction, it is also an arena for debating and resolving policy questions. And because the Council must follow EU law and policy, its members have to analyse EU law so that its decisions are consistent with it. This means that its members must either become expert about that doctrine and policy or defer to those members who are.

The Authority serves as the Council's secretariat.

The Authority, in the Ministry of Industry, is the Council's secretariat. It has delegated authority from the Council to deal with cases that are similar to ones where the Council has reached a decision. In acting on cases, the Authority is formally independent from the Ministry, that is, the Minister cannot instruct the Director how to decide. (The Minister cannot overrule decisions by the Council, either). The Authority also serves as the secretariat to the Electricity Price Committee and the Gas and Heat Price Committee, which have duties under the Electricity Supply Act and the Act on Heat Supply (Competition Authority, 1999*a*).

The Authority occupies a central, dual position. On the one hand, the Authority acts on behalf of the Council pursuant to delegated authority. On the other hand, it also participates in and promotes policies from its position as part of a ministry. The Act implies, though, that the Council is the principal competition policy institution. Differences in approaches and priorities between the Authority and the Council appear when the Council rejects the Authority's recommendations and initiatives, which happens about in about 20% of cases. Recent examples are the Council's rejections of Authority recommendations in the milk and concrete industries. The Authority's position and roles may present some problems of appearances, at least, to the extent that an administrative body formally assigned to the Ministry of Business and Industry, which generally promotes business interests and concerns, is responsible for the "prosecution" function against violations by business and industry. There has been no suggestion of any actual exercise of improper influence, though.

The relative workloads of these two bodies are illustrated by the 1997 statistics: in that year, the Council held 10 sessions and reached decisions in 45 cases (the executive committee of the Council made decisions in 27 cases). The Authority made decisions in 597 (Competition Authority, 1997).

The Appeals Tribunal is a third administrative body whose policy input is difficult to define.

A third institution, the Competition Appeals Tribunal, is the first avenue of appeal from decisions of the Council—and usually the last, too. This Tribunal served the same function under the previous competition laws. It is headed by a jurist, from the Danish Supreme Court. Its other two members are a law professor and economics professor; it is supported by one professional staff person. It hears about 20 appeals per year from Council decisions concerning the Competition Act, and about the same number of appeals from other councils about utility pricing decisions. The Tribunal is technically an administrative institution, not a court. But further appeals from its decisions are rarely taken (and never by the Council or the Authority). One reason may be that the head of the Tribunal also sits on the court that would hear any final judicial appeal, suggesting that the outcome after further appeal is likely to be the same.

The Competition Act does not state a criterion for appeals or standards for the Tribunal's decisions. The Tribunal considers its approach to be pragmatic. It does not believe that it is promoting any particular policy principles. But one of its concerns in reviewing a matter appears to be whether the decision and the remedy make sense. The Tribunal has thus read into the law a "competitive effects" test. In several recent cases, the Tribunal has reversed Council decisions because there did not appear to be any actual net anti-competitive effect. One case involved the sale of a capital asset, a container crane. The Council had found the parties' non-compete clause objectionable, but the Tribunal noted that the crane was moved to another port to create a competing location; that it was no longer used to compete at the first port was not determinative. The Tribunal reversed another, similar decision concerning a lease covenant. It refused to uphold an access order that would have required a "niche" market magazine to carry advertising for its competitor. And it disagreed with an order finding illegal tying of rail and ferry tickets, deciding that despite the tie there was in fact competition, as a practical matter, for service between the end points.

The Tribunal has also felt it necessary to provide some more pointed oversight of enforcement activity. In one recent case, the Tribunal reversed the Council's dismissal, in effect sending it back for further investigation, when the complainant presented evidence that the Authority and the Council had either overlooked or had not obtained.

This level of control over the Authority and the Council may be greater than was intended. The Council cannot appeal the Tribunal's decisions, so it is difficult to obtain a judicial resolution of disagreement between them. Some on the Council are concerned about the Tribunal's evident practice of overruling the Council about non-legal issues of judgement, about the difficulty of participating effectively in the appeal process (which generally does not involve a hearing), and about the Tribunal's short, conclusory rulings.

New enforcement tools are valuable, but effectiveness will ultimately depend on the courts' willingness to impose significant fines.

The Act now authorises more effective means to secure evidence and conclude investigations. The Authority may request documentary evidence, and with the aid of a court order, may enter premises to obtain it. This "dawn raid" power, which had not been used much under the previous law, is proving useful. In the cartel investigations, the Authority is succeeding in getting confessions. To encourage that kind of co-operation, another option for consideration could be to reward firms that come forward with evidence, on the model of the EU's practice of "leniency rebates" on fines.

Sanctions are untested, and courts may be wary of imposing them. The fines that may be imposed under the 1998 Act are said to be significantly higher than those available previously (which were virtually never actually imposed) (OECD CLP, 1997*a*). But the Council and the Authority have no power to impose fines themselves. Under Danish law generally, these sanctions can only be imposed by the courts. Introducing another level of decision, discretion, and appeal increases uncertainty. The courts' long record of unwillingness to impose significant fines also reduces incentives for compliance. Formal incentives seem to be disfavoured generally. Designing, or even identifying, effective enforcement tools is difficult in a consensus society in which regulation through non-legalistic means is seen as a strength, and broad participation and sectoral responsibilities are thought to reduce the need for specific regulatory intervention.

The problem of applying effective sanctions may be even greater for competition policy than for other forms of business regulation, for cases under the Competition Act are heard by the courts of general jurisdiction, not by a court with expertise in economic or commercial matters such as the Commercial and Maritime Court, which hears cases involving consumer protection and unfair competition issues, among other things. In the government's original proposal for the 1998 Act, competition cases would have gone to the Commercial and Maritime court. Another idea that had been considered in earlier discussions, but which was not included in the proposal, was administrative fines. The latter would have been unusual, as ministries in Denmark do not typically have the power to impose fines. Both ideas were dropped.

The Authority is working with the prosecutor's office to develop ways to make fines under Danish law follow principles like the EU applies, such as making the fines proportionate to turnover. Danish firms are not unfamiliar with stiff penalties for competition violations: the Commission imposed a large fine on Danish firms in a pipe cartel, (OECD CLP, 1997*a*) and Maersk was fined DKr 205 million by the EU for abuse of dominance in ocean shipping. The latter amount struck the Danish public as a very high number.

Direct application of EU law is not provided in the law. That is, the Authority does not have the power to apply the articles themselves, and importantly, to seek the sanctions they provide.

Decisions and policies are transparent.

The Authority publishes its decisions on its web-site.[6] Council decisions are also usually published the day they are issued. Important decisions are accompanied by a press release and summarised in the Authority's monthly newsletter. The Authority has set itself internal deadlines for responses, decisions and appeals. Parties in major cases have an opportunity to comment on the Authority's draft decision before that decision is passed on to the Council for action. In 1998, the Authority issued several sets of guidelines. These included both guides about the Act's new general prohibitions and about some particular subjects: price discrimination, application of the Competition Act to co-operative societies and to the public sector, and price setting for natural monopolies (Competition Authority, 1999).

Publicity about competition policy is increasing. The Authority issued its first *Competition Report* in December 1997, surveying its then-recent activities. The most recent one appeared in April 1999. The Authority established a project unit in 1997 to analyse economic issues. Its studies will appear in future editions of the *Competition Report* or separately (Competition Authority, 1999*a*).

Private actions for damages are now possible, but are not expected.

Private lawsuits are now possible under the Civil Code, for damages caused by conduct prohibited by the Competition Act. It is evidently not necessary to base such an action on a prior, final decision by the Authority or the Council. There have been no civil cases yet to recover Competition Act damages, though. Getting relief by complaining to the Authority may be expected to be faster and cheaper. The City Courts have general jurisdiction; a party can bring a case initially in the High Court if the claim exceeds DKr 500 000. Appeals go to the Supreme Court (Competition Authority, 1999*a*).

A party's right to insist on administrative relief is limited. If the Council rejects a complaint, the complainant cannot appeal that decision to the Appeals Tribunal. If the Authority decides not to take action about a complaint, that decision must be accompanied by an explanation, because the Public Administration Act requires agencies to state their reasons for rejecting complaints (Competition Authority, 1999*a*).

As Danish law conforms to the content of EU law, which also applies in Denmark where the necessary jurisdictional tests are met, it will become easier to co-ordinate them, and business responsibilities will be more consistent. One motivation for the 1998 Act is to give Danish businesses the lower-cost option of "one-stop shopping," so an issue will be handled, whenever possible, by a single authority (either in Copenhagen or in Brussels), and consistent rules will apply to it (Competition Authority, 1999*a*). The EU has announced a plan for devolution of enforcement responsibility to national institutions, where the national competition laws are consistent with the EU law. It will be important for Danish procedures and penalties, as well as substantive rules, to parallel those of the EU, for similarity will discourage "forum shopping." The Authority is active in EU advisory committee meetings about competition cases, in part to get guidance in applying its the 1998 national law.

International issues and co-ordination usually involve the EU and Nordic neighbours.

The principal avenue for international co-operation in competition enforcement is with the EU. Both formal and informal co-operation with the EU and with other European country agencies have increased. The Authority participates in annual meetings of the Nordic competition authorities, to share experiences and co-ordinate actions. Nordic co-operation dates from a 1961 recommendation of the Nordic Council. A concrete demonstration of its value was the informal co-operation between the national competition authorities in two cases about joint bidding on the Denmark-Sweden bridge-tunnel. But the Authority has not entered any formal international co-operation agreements. It believes its existing

arrangements meet the requirements of co-operation with its main trading partners. Moreover, more detailed arrangements or obligations would raise unresolved issues about companies' rights in the exchange of information (Competition Authority, 1999*a*).

Actual and potential foreign-source competition is an important factor in analysis, and relevant geographic markets may be defined as larger than the Danish territory. The Competition Act incorporates an "effects" test, so actions by firms outside the country may be prohibited if they have an effect in the Danish market. Firms outside Denmark may need to comply with the newly-mandatory merger notification requirement, when they are involved in a reportable transaction with a Danish firm. In general, though, there is no basis in the law for treating foreign firms differently from domestic ones, and the Authority has not been approached with concerns about different treatment (Competition Authority, 1999*a*). Looking at the issue from the other direction, the Authority's legal office is starting a project to help Danish companies running into competition-market access problems abroad, mostly to facilitate contacts with the foreign authorities.

The top priorities are horizontal cartels and precedent-setting exemption applications; however, resources may not be keeping pace with the new workload.

The 1998 Act increased the Authority's powers, and new leadership, installed at the time the new Act went into effect, has stimulated increased activity. But this greater attention and seriousness did not appear in the resource statistics until very recently. Person-years devoted to competition policy remained unchanged from 1994 to 1998, although budget expenditures have increased somewhat, to pay for better data processing and facilities for the project-unit working on economic analysis. The following table indicates only the personnel occupied with the administration of the Competition Act. In 1997, for example, there were a total of 102 persons on the Authority's staff, but a third of them were working on regulation of energy and gas pricing (22 persons) and on procurement and state aid (10 persons) (Competition Authority, 1999*a*). The resource commitment has been essentially constant for several years, and indeed in 1998 it appeared significantly lower, in personnel terms, than five years before. (The table includes only the Authority, and does not include the members of the Competition Council).

Table 2. **Trends in competition authority resources**

	Person-years	Budget (DKr M)
1999 (forecast)	76	44
1998	67	40
1997	70	38
1996	72	35
1995	79	36
1994	83	37

Source: Competition Authority 1999.

Yet the workload may be increasing significantly. The 1998 Act sparked about 1 100 applications for exemption, most coming around the filing deadline of 30 June 1998, which will take time to process. This rate is somewhat more than filings in other countries going through the same process (OECD CLP, 1997*a*). About the same total was received in the Netherlands, which is more than twice the size of Denmark. The comparatively high number may be some evidence that Danish firms were more habituated to agreements than others; or, it could indicate that Danish businesses are more willing to bring their agreements into the open. The Council is working through them, with top priority being given to test cases that could set important precedents. The Authority has agreed with the Minister on a deadline of three and

a half years, or 31 December 2001, to complete the review (OECD CLP, 1997*a*). This period is shorter than Sweden is taking, but significantly longer than the Dutch target, of wrapping them up in a year to 18 months. The Authority is looking at the most important cases first, to reduce interim harm or unfair competition. Only about a hundred cases have been finished as of early 1999, though. This is probably a one-time phenomenon; after this huge backlog is worked off, this function should become less important.

Table 3. **Trends in enforcement activity**

	1995	1996	1997	1998
Council decisions	57	48	48	74
Agreements				53
Abuse of dominance				21
Decisions appealed	19	16	26	
Decisions overruled	11	6	10	

Source: Competition Authority 1999; Annual Reports to OECD Competition Law and Policy Committee.

Cartel enforcement has been surprisingly fruitful. Although it had been believed that there were few cartels in Denmark, they are turning up in building and construction. The Authority's first "dawn raid" was aimed at an extensive system of bid rigging in electrical contracting, which appears to have involved about half of the 1 800 firms in the industry. The Authority anticipates that this matter will result in fines, which will be a first in Danish history. Success in the first use of this tactic encourages the Authority to use it more in the future (Competition Authority, 1999*a*).

4. LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES

4.1. Economy-wide exemptions or special treatments

The goal statements about competition policy recognise that competition may need to be balanced against other policies. The Danish constitution itself implies a process of balancing the benefits of competition against the "common weal". Unfortunately, that vague standard offers little guidance about how to make a decision, or even assign the burden of persuasion, in the event of conflict among policy goals. This could be particularly troubling when competition policy and enforcement confront other regulatory programs with different priorities and requirements. Within the competition law itself, balancing is contemplated. As in most OECD countries, the competition law generally yields to other policies in the event of conflict. And as in other systems that use the principles of the EU competition law, otherwise anti-competitive practices may be permitted if they contribute to other policy goals, which can be as vague as improving efficiency or promoting progress (Section 8(1)(1)).

The Act applies broadly, to all "business activity," that is, economic activity in a market for goods or services, whether or not it is engaged in for-profit and regardless of the actors' form of organisation. The Act's only explicit exemption is the common one for wages and labour relations.[7] Business activity of central or local government administrations is also covered, in theory, if the activity affects competitive conditions; however, the Act evidently does not apply to in-house production by government authorities (Section 3; Competition Authority, 1999*a*).

General provisions confer broad exemptions on conduct covered by other regulation, both national and local.

Although the Act itself states virtually no particular exemptions, it provides for many *de facto* exemptions for conduct authorised by other authority or regulation. The Act's basic prohibitions, against anti-competitive agreements and abuses of dominance, do not apply if the practice is "a direct or necessary consequence of public regulation" (Section 2(2)). Where the practice is determined by a local government, such as a municipal council, the test is phrased differently and perhaps more stringently: the practice must be "indispensable for fulfilling the statutory responsibilities assigned to the local government." (Section 2(2)) That is, conduct that is a "direct," but perhaps not a "necessary," consequence of national-level regulation is exempt; where it is a local authority at issue, the conduct must be "indispensable". Determining whether the exemption applies appears to be entirely within the discretion of the officials whose regulation confer the exemption: the authority that issued the regulation or made the decision determines a practice's "compatibility" with it (Section 2(4)). For practices that are arguably pursuant to statutes or EU regulations, that authority has to be the competent minister.

Although the Council cannot intervene against anti-competitive practices that are undertaken by a government authority if those are necessary to tasks it is assigned by law, a municipal authority is obliged to choose solutions with the least anti-competitive effects. And a municipality cannot impair competition in areas that are not subject to its legal authority to act, or condone anti-competitive conduct where that is not necessary for fulfilling its legal obligations (Competition Authority, 1999*a*). The difficulty in applying this principle, of course, is that the "competent authority", whether the ministry or the local council, decides whether its action is necessary or otherwise properly overrides competition policy. There is no evident means of judicial appeal and decision.

Reporting is required where exercise of government authority affects business undertakings of a government body. The obligation applies to an authority that regulates or makes a decision about its own business activity, or the activity of some undertaking on whose governing body the authority has a representative, such as a municipally managed power company. If such actions or decisions affect competition, they are to be reported to the Authority, pursuant to rules defining, and perhaps limiting, the reporting obligation (Section 2(6); Competition Authority, 1999*a*). The Council has seen very few matters so far—only three or four—under this notification requirement, although at first there had been concern about having to review thousands of local government acts and decisions.

The two government-authorisation exemptions were one of the few items of controversy in the legislative deliberation about the 1998 Act. Clearly, they embody political compromise. Parliament was aware of complaints about how regulation or dominance by public companies hampered competition in energy, transport, telecommunications, waste disposal, harbours, and even education. In trying to strike a balance between competition and other goals, one element was to aim toward equal treatment of private and public business activities, by making the Act's two basic prohibitions apply, in principle, to activity of both private and public bodies. But the Parliament also made clear that the Authority and the Council are not competent to overrule a political balance decided by the national government or Parliament (Competition Authority, 1999*a*).

The net effect of the public regulation exemption, though, is that there is no clear presumption in favour of competition policy, and a multitude of other bodies have power to derogate from it. It is of particular concern that local government authorities may have latitude, despite the seemingly stricter standard, to authorise business action that is contrary to national competition policy goals. They have a general authorisation to enforce such regulations as they deem necessary to fulfil the tasks allocated to them by law. Not only is there evidently an exemption for in-house deliveries, but some observers believe there may still be some scope for preferential treatment of providers with municipal ownership or board

representation (OECD, 1998). It is not encouraging, that these exemptions were accompanied by the expansion of the Council specifically to add representatives from the local governments themselves.

The legislated* de minimis *exemption may have anomalous effects.

Two exceptions from the prohibition against anti-competitive agreements, intended to reduce administrative burdens on small businesses, are quite generous. One depends on a combination of size and market share: the prohibition does not apply if the agreement is among firms that, taken together, have annual turnover under DKr 1 billion and an aggregate market share under 10% (Section 7(1)(1)). The other is determined only by size; the prohibition does not apply if the firms' aggregated annual turnover is under DKr 150 million, regardless of market share (Section 7(1)(2)); however, their agreement might still be found in violation, if the total effect of similar agreements in the sector is anti-competitive. Regulations specify how to calculate turnover.[8]

Somewhat oddly, the first exemption does not contain the proviso about the combined effects of similar agreements, and thus it applies even if the market-wide impact is anti-competitive. And the second exemption does not apply to agreements about minimum resale prices (or reseller profits) (Section 7(2)(2)). The perhaps anomalous effect of these two, taken together, is to permit resale price maintenance agreements among a group of firms with aggregate turnover between DKr 150 million and DKr 1 billion, as long as the parties have less than 10% of a market, even if the combined effect of similar agreements in the market as a whole is anti-competitive. These *de minimis* rules do not correspond to the European Commission's market-share based *bagatelle* notice of agreements of minor competitive importance (Competition Authority, 1999*a*). Because of these rules, the law may not cover anti-competitive practices in small markets that could be dominated.

4.2. Sector-specific exclusions, rules and exemptions

There appears to be an emerging consensus in Denmark about the wisdom of avoiding conflict between general competition law and sectoral regulation, and efforts are underway to co-ordinate actions and share information to minimise the risk of conflict. The Ministry of Business and Industry supports separating competition policy questions from other sectoral regulatory responsibilities, which should themselves be minimised. The Council too disfavours industry-specific regulator involvement in competition issues.

Means are being developed to accommodate the general interests of competition policy with regulation aimed at specific problems within a sector. An inter-agency group worked out processes for reference to the competition policy authorities of problems in transport and telecom. This group was appointed after problems came up in telecommunications. The group's assignment was to make recommendations about the appropriate division of work between the Authority and sectoral regulators. It recommended that competition issues generally be administered by the Authority, to use its expertise, to save resources at the sectoral agencies, and to ensure consistency. Those recommendations had some influence on the wording of the telecommunications and railway legislation (Competition Authority, 1999*a*).

The principle underlying the working group's recommendation is that a "general competition rule" should be supervised by the competition agency. Rules about technical issues, quality, and safety, that have only indirect effects on competition, should be administered by a sectoral authority. Issues of distribution, such as universal service and public service obligations, should also be handled by the sectoral authority, but in co-operation with the competition agency, particularly concerning pricing, where the competition agency should normally oversee compliance with sectoral agency pricing decisions and

monitor potential problems of cross-subsidisation. The issue of access has significant effects on efficiency, so the principal responsibility should be with the competition agency. Whether this division of responsibility will succeed depends on acceptance by other ministries. It is only an agreement among ministries, and it does not cover the local governments. Subtle differences in how it is applied in different sectors disclose the differences in policy priorities and perhaps in political interests: the Council has more powers of oversight and of providing binding opinions concerning telecommunications than it does concerning railroads, for example, (OECD CLP 1998), and in electric power, the new Electricity Act, effective in 2000, assigns the "monopoly" issues—networks, system operators, captive customers, and third party access—to the Energy Regulatory Board, with other competition issues, such as those involving "non-eligible customers) and production, remaining regulated by the Competition Act.

No complete survey of the extent of exemptions and special treatments is available. That can be a difficult undertaking, but it can also be valuable. In Australia, a complete survey of exemptions and special treatments was done in 1996-97, and that served as the foundation for the comprehensive reform program that followed.

Publications

Prices for Danish publications may be fixed by resale price maintenance agreement. This results from an individual dispensation granted under the previous competition act, maintained under the new one (Section 27(2)). The grounds to support the dispensation are the protection of culture and promotion of media diversity. These goals are not among the Act's criteria for granting either individual or block exemption. The Council will be reassessing this matter soon (Competition Authority, 1999*a*).

Tobacco products

Parliament overruled the Council and authorised maintaining resale price maintenance for cigarettes. The rationale for this treatment is related to the rationale for the publications exemption. Newspaper kiosks are said to need the assured income from high-priced cigarette sales to keep them in business to distribute publications.

Distribution

Co-operation in marketing and pricing is permitted under a special block exemption from the Competition Act, which applies to agreements among co-operative retail chains. These agreements are widespread in the Danish market; indeed, most retail shops are members of one of the approximately 130 such groups. In addition, there are about 300 more integrated retail firms. The groups consist of retailers co-operating on a lasting basis under a common name or other common designation. They often engage in joint marketing and use the same systems for accounting and stocking. Most of their supplies are often obtained through a wholesaler set up as a limited company owned by the retailers as shareholders (Kofmann, 1998). It was argued that small, independent retailers should be permitted to join together in such co-operatives to gain advantages in dealing with wholesalers, though they should not be allowed to obtain too much buying power. The groups are permitted to reach horizontal agreements on marketing issues, but not on prices, although firms can jointly advertise "maximum" prices. The exemption is subject to market-share thresholds (Competition Authority, 1999*a*). It is evidently presumed, though, that the "market" is the entire country, at least for food retailing. That indicates that the concern is with market power between the wholesale and retail levels, and not with market power in the consumer market. This special, legislated block exemption was arranged in order to exempt some chains that did not otherwise fit

the general "bagatelle" exemptions. In the Netherlands, a similar exemption was adopted along with its new competition act. The Netherlands block exemption does not contain a market share threshold, but it sets out more detailed limitations on the firms' conduct than the Denmark exemption does. For example, the Netherlands exemption limits the duration of joint marketing campaigns, limits the proportion of goods that can be subject to an exclusive supply arrangement, and prohibits discrimination. The purpose of both exemptions is to enable chains of independent retailers to compete effectively with integrated chains, by allowing them to co-ordinate some of their marketing and to establish long-term supply relationships within franchise-like or co-operative structures. Provided that the retailers do not actually have market power in local markets, the actions that the exemption permits may indeed lead to stronger, more effective competition with integrated operations. But in both countries, a history of retail-level competition problems calls for careful monitoring of these exemptions' actual use and effect.

Regulations affecting operation and entry also inhibit competition, to some extent. Reform of shop opening hours has had some impact on industry structure. The 1995 Opening Hours Act permitted opening hours to be free between Monday at 0600 and Saturday at 1700. Small shops (those with turnover under DKr 13 million) may open on Sunday. Maintaining some limits, and providing this special opportunity for smaller shops free of large-store competition, is said to serve the desirable goals of sustaining the remaining shops in the rural areas and limiting night-time and evening work. The special protections may have preserved some small retail companies, as their exclusive period may encourage shoppers not to travel to the big stores elsewhere. The Authority was not consulted about this reform, and so had no opportunity to comment on this protectionist, and potentially anti-competitive, feature of it.

Entry is inhibited by land use controls. The Planning Act promotes concentration, by preventing new shopping centres outside of town. Concentration in food retailing is already high; the top two firms have about two-thirds of the large-store market. Other retail sectors, notably electronics and toys, are also dominated by a few (3-4) firms. The prohibition against new large stores will last three more years. Then, the largest possible new food store will be 3000 square meters. There are a few larger ones already which will thus have an inherited advantage among large stores. The Council criticised this law when it was proposed. The Council was concerned that the result would be to freeze existing market structure and protect existing local monopolies against new entry. It would also result in the loss of dynamic competition, as new marketing concepts could not be introduced and firms could not respond to new consumer habits (OECD CLP, 1996). The Council lost that argument.

Economic evidence documenting the extent of competition problems in retail, such as relative prices or profits, is not available. The 1999 Competition Report benchmark study about retail competition is inconclusive. But the government admits that shop hours and planning controls "create unfortunate economic distortions, especially by limiting shop sizes," and notes that firms have responded by threatening to move to Sweden and compete by luring Danish consumers to shop there, taking advantage of the new bridge (Government of Denmark, 1998).

Pharmaceuticals

Regulation severely limits competition in pharmaceuticals. Prices are uniform nation-wide. Mark-ups from importers' and suppliers' prices are regulated, and there are no discounts. Profits of pharmacies are also controlled. The number of pharmacies is limited, and consumers have no possibility of buying elsewhere. A few years ago, the Authority had made a rough estimate that higher pharmaceutical prices in Denmark amounted to about DKr 1 billion annually; since then, though, prices among the north European countries have converged. According to the Ministry of Business and Industry, prices at Danish pharmacies exceeded the average EU level by 22% in the early 1990s (Albæk, 1998). One of Denmark's

few large companies is a drug manufacturer, which may have an interest in maintaining high domestic prices because those might be a benchmark to justify charging high, regulated prices in other countries.

The Authority has some responsibilities under the Pharmaceuticals Act and the Act on Pharmacies to ensure that some competition is nonetheless possible, despite the circumstances that result from a high degree of public regulation (Competition Authority, 1997). And the Council has had some limited success in stopping some anti-competitive practices in pharmaceutical distribution. Under the previous Act, the Council ordered the pharmacists association to end its rules limiting competition: fixing prices, controlling marketing, preventing distribution through other shops, and prohibiting resale. The association agreed to drop some of the advertising restrictions (OECD CLP, 1996). Of course, the Act could not reach similar constraints imposed by law or regulation.

Advocacy to promote competition in this sector has had only limited effect, at least until recently. The Council has made at least three formal proposals to the Minister for Health about the need to introduce more competition in this sector. One recommended a general market-oriented liberalisation to deal with the lack of price competition and entry; in response, the Minister appointed a special committee, whose conclusions led to legislation that made some improvements. Another dealt with competition between private and public sources of pharmaceuticals, the latter typically pharmacies in hospitals owned and operated by county councils. The Council again recommended repeal or liberalisation of the rules, and the authorities made some changes in response. And a recommendation to the Minister for Health and the Minister for Agriculture, to repeal the profit-fixing rules for veterinary sera and vaccines and assign the National Veterinary Serum Laboratory's distribution functions to an independent company, was complied with only in part (Competition Council, 1996).

The Authority has continued its advocacy effort in this sector, with a report in December 1998, making recommendations about promoting competition. A committee was set up by the Minister of Health. In November 1999 the committee endorsed initiatives such as using competitive tendering in selecting drugs for reimbursement and liberalising entry regulations for pharmacies. Some of the proposals are now being implemented. But the larger project is to complete the single European market in pharmaceuticals, which will require overcoming or accommodating national differences in regulation of price and sale and even in consumption patterns. The Authority's suggested approach is to continue parallel trade, consider liberalising prices on over-the-counter and out-of-patent products, and eliminate detailed price controls.

Government procurement

The lack of competition and market discipline in government services is a major inefficiency in the Danish economy. At the local level, contracting out is not prohibited, but it has not been required, either, except for a 1989 law requiring the Copenhagen bus system to contract out a part of its service. As a result, there has been little contracting-out despite efforts to promote it. The national government has used public tenders more, for construction and civil engineering. As of 1992, public tendering for national government projects has been required wherever competition from external suppliers is possible (OECD, 1993).

Postal services

Denmark has been moving to liberalise postal services for several years. The Council in 1995 contributed to the Ministry for Transport's rules guarding against distortions of competition through cross-subsidisation (OECD CLP, 1996). After receiving a complaint, the Council submitted a report showing that the competitive part of the Danish Mail Services was characterised by lack of transparency, and that the structure of the activities of the Danish Mail Services implied a considerable risk of cross-subsidising

which could distort competition and expose private companies to unequal terms of business. The Council approached the Minister for Communications and recommended that the balance sheets relating to the competitive activities of the Danish Mail Services be made accessible to the public, and that the competitive activities ought to be separated from the (regulated) exclusive-right activities by establishing a separate company. Eight months later the government passed a new law, and the competitive activities of the Danish Mail Services were transferred to an independent public company based on normal business conditions (Competition Council, 1996). The Authority has some competition-enforcing responsibilities under the postal services legislation (Competition Authority, 1997).

The statutory monopoly is for letters up to 250 gr. About 90% of the postal service's operation is in the protected monopoly sector. Competition is developing in the remaining value added services.

Transport

The surface transport sector presents significant reform issues. It is substantially less deregulated than, for example, telecommunications.

There have been very few authorisations for long distance buses, in order to protect the railroads. A critical issue is bus access to the Great Belt crossing to the island, Zealand, where Copenhagen is located. The Minister for Transport is drafting a bill that would permit five routes over the crossing, with three daily buses per route. This authorisation would last until 2003. This small step would nonetheless constitute a significant reform. The new bridge to Sweden may also encourage development of long-distance bus services. Local bus service may be subject to public tendering at the municipal level. There have been some outsourcing successes, but some major cities have not used the option.

The rail system has been restructured some, but the changes are recent and so far there has been little entry or competition. In 1996, the Danish State Railways (DSB) was separated into an infrastructure section and an operations section. The infrastructure section became an independent government undertaking, the Danish National Railway Agency, as of 1 January 1997. It owns the main and shunting tracks, some depot facilities, and the information and telecommunications systems. It manages access to track, setting prices and terms. The operating section, DSB, retains stations, engine sheds, and other assets. The Authority monitors prices and other terms concerning stations and DSB's obligation to lease rolling stock. Prices and terms for access to operate "public utility services" are administered by the Minister of Transport (Competition Authority, 1999*a*). As of 1 Jan 2000, and until 2003, 15% of the public-service passenger traffic is in theory to be subject to tender. Subsidies to the DSB freight division are being phased out, to be replaced by a general subsidy to all freight users. Open access for all shippers is now scheduled for 1 Jan 2000. The Authority has power to set rates for track access, under a new law effective at the beginning of 1999. DSB no longer has an exclusive right to operate freight trains. Shipping and hauling firms thus have an opportunity to compete. In theory, the tracks are open to all, now, with some charge for access. But the system, still largely in public hands, is still not thinking like a business, and there has been no competition yet.

Advocacy in this sector has had little effect. The Council recommended that a public transport authority grant a license to a private bus company to run an inter-city bus line. The authority rejected the recommendation, relying on representation by the Danish State Railways which already served the route concerned (Competition Council, 1996). The Council recommended that the Minister for Transport repeal rules preventing competition for taxi services, by regulating prices, limiting the number of taxi licences according to an estimate of likely demand, setting non-objective and inconsistent criteria for granting these licences, and requiring access to a reservation office. The Council argued that entry should be based instead on relevant, reasonable, and objective terms, so anyone meeting them could enter (OECD CLP,

1997*b*). The Minister sent the recommendation to a special committee appointed to consider amendments, and there it died (Competition Council, 1996). Recently, the Authority has studied possible cost improvements in the transport sector and published the results in the Competition Report 1999.

Telecommunications

Denmark liberalised telecommunications relatively quickly. To allocate regulatory responsibilities between the Authority and the National Telecom Agency, an inter-agency agreement was reached. The telecommunications legislation requires that the sectoral regulator, NTA, obtain a binding opinion from the Council when the NTA approves maximum prices for universal service obligations or supervises interconnection agreements and service-provider agreements (Competition Authority, 1999*a*). To avoid overlapping measures or conditions, or "dropped balls", the two agencies are committed to continual exchange of information under formalised procedures. The agencies have agreed on principles and guidelines for practical co-ordination.

The Council relies on the sector agency's expertise when it decides issues in this sector. When Tele Denmark tried to set subscription charges at the same level across geographical regions in 1998, in order to rebalance, the Council said that the move would be an abuse of dominance to disadvantage competitors. The Council agreed with the general decision about the structure of the interconnection charge. The competition bodies have nothing to do with interconnection prices, though, as those are set by Tele Denmark and approved by the sectoral regulator under rules that derive from the EU directive. But the Council has made decisions about the terms of contracts, limiting the maximum duration of retail service commitments to six months and of interconnection agreements to one year. Concerning access to the cable system, for example, for internet service, a rule of equal treatment would apply if Tele Denmark were also using its cable system for internet service. The Council would then have the power to order Tele Denmark to afford access to the cable system, if there was an abuse of dominance. The issue has not come up, though; no such request has been made. The Council has asked for accounting separation of the cable network, but the sectoral regulator, NTA, has the final authority to order it.

Electric power, heat, gas

The Competition Act applies to electric power. The Authority has received 150 notifications about agreements in electric power and cleared about 30 of them. A no-resale prohibition in Copenhagen was found illegal; exclusive supply requirements were found to violate both the Competition Act and the electric power law (OECD CLP, 1997*a*). The Council tried to require third-party access to the transmission grid in Jutland-Funen in a 1996 decision, finding that it would end generator monopoly and benefit Danish industry. But the Appeals Tribunal rejected the order, on the legal grounds that the Council did not have the authority under the then-current competition act to issue a third-party access order "on usual terms for similar sales," because there had never been any such similar sales, as the grid had never been opened to anyone else, either. The episode is an illustration of "success through failure." The controversy led to the amendment of the Electricity Supply Act, permitting heavy users to get grid access and choose suppliers (OECD CLP, 1996).

Conflicts of jurisdiction between competition authorities and the sectoral regulator have not presented substantial problems in this sector. As an administrative matter, determining jurisdiction is simplified somewhat because the Authority is the secretariat both for the Competition Act and for aspects of electric power regulation. By contrast, in telecoms, where authority over the two applicable acts is separated, that decision has sometimes been more confusing. That the jurisdiction is clearer does not mean

there are no disagreements about electric power, though, for the competition authorities have been dissatisfied with the limited scope of reforms that the energy ministry has proposed.

Financial sector

The card payment system has become a monopoly, because of how it is regulated. By law, only the cardholder can be charged a fee; the result is that it is uneconomical to establish more than one system. The difference between this approach and systems used elsewhere in Europe, and the limited ability of any others to achieve economies of scale, have given the Danish system a big domestic advantage. Banks have entered agreements to administer the system, and access by other cards to the retail-level system is limited, also by agreement.

The government is now moving away from this monopoly situation, but it believes that some regulation will still be needed, at least to ensure access until the monopoly is fully overcome. To promote competition, restriction on terminal access has to be removed and other clearance systems must be admitted, leading to a greater possibility of charging shops for using a payments system. The new payment card act contemplates more extensive application of specific control rules than would normally be the case under the general competition law, in order to make possible more rapid intervention in this transition situation. These rules are to be administered by the Authority. According to some on the Council, putting this responsibility in the Ministry and bypassing the Council reflects an effort to control the outcome and assure that the rules will include direct price regulation, which the Council might balk at.

The Council recommended that the Minister for Justice allow credit rating institutions to have the same on-line access to registers of mortgages, titles, and debts that other financial institutions have (Competition Authority, 1999*a*). It is not clear whether this resulted in any action (OECD CLP, 1996).

Professional services

Agreements to control fees have been challenged, with some success. But controls on entry and practice remain, and little progress has been made in removing them.

Under the previous competition act, the Authority and the Council successfully challenged the lawyers' recommended fee schedule. The Danish Law Society was ordered to cancel its recommended fee schedule and its ban on advertising. The Society tried to negotiate a partial order, while the matter was on appeal to the Competition Appeals Tribunal, but the Council rejected the suggestions, and the Tribunal then upheld the order in 1996 (OECD CLP, 1996). But lawyers still do not advertise their fees yet, and there are some reports that fees have increased. Other efforts to improve competition in legal services have faltered. The Council recommended that the Minister for Justice liberalise the rules that prevent lawyers from practising together with non-legal professionals, so they could multi-disciplinary partnerships. The Council also recommended ending compulsory membership in the Danish Law Society. The Minister for Justice rejected these recommendations (Competition Council, 1996).

Real estate agents have broken the legal monopoly over conveyancing. The Council successfully recommended that the Minister for Industry and the Minister for Justice end the statutory prohibition against estate-agents' access to deliver deeds, and that estate agents and others be allowed to advertise these services. But debt collection agencies still cannot appear in court without going through the lawyers' monopoly, although several years ago the Council recommended repeal of the lawyers' exclusive right to judicial debt-collection (Competition Council, 1996). The proposal, that bill collectors be able to appear in court through employees who are trained in law but not admitted to the bar, is now in a committee proposal, as part of a set of recommendations to speed up the legal process.

Entry into health care professions is tightly controlled, in ways that may inhibit competition as much as ensure competence. Agreements between the National Health Service and the health sector professions limit the absolute number of practitioners allowed. Access to the national health insurance system depends on compulsory membership in the relevant professional group. And medical paraprofessionals are denied reimbursement under private health insurance. The Authority has recommended that these restraints be lifted; the National Health Service has rejected the recommendation. But there has been some progress in permitting advertising in some of these professions. By law, chiropractors, dentists and dental technicians could advertise only their name, profession, address, office hours, and, if applicable, their access to national health insurance. The Council recommended repeal or at least modification of the rules. The Minister of Health appointed a committee to consider liberalisation, which reported measures that go some way toward complying with these recommendations (Competition Council, 1996).

Efforts to lift restrictions on innovative forms of practice have also generally failed. The recommendation to let lawyers and accountants form multi-disciplinary partnerships was rejected by the Minister for Industry, on behalf of the accountants, as well as by the Minister for Justice on behalf of the lawyers. A recommendation to the Minister for Housing and Building to let surveyors establish branch offices and multi-disciplinary partnerships with other professions was also rejected (Competition Council, 1996).

5. COMPETITION ADVOCACY FOR REGULATORY REFORM

The Council has been an active, though not always successful, advocate.

The Council has been authorised to make recommendations about policy to other public authorities since the 1990 Competition Act.[9] The 1998 Act extends this authority and makes it more specific. The Competition Council "may approach the competent authority" whose actions have led to an anti-competitive practice that enjoys regulatory-authorisation exemption from the Competition Act prohibition. The Council may "point to potentially detrimental effects on competition and make recommendations for promotion of competition." The competent authority is obliged to respond to that approach within 3 months, and the exchange may be made public (Section 2(5)). In 1996, about 15 person-years were devoted to advocacy effort (Competition Authority, 1999*a*). The organisation of Denmark's government, and the devolution of powers to regional and municipal governments, mean that advocacy is a never-ending task. Because decision-makers must be persuaded in every case about the usefulness of market methods, change tends to be incremental.

Under the authority of the 1990 Act, the Council made some 40 recommendations to other public authorities about competition issues. This work was compiled in a summary report in 1998.[10] The recommendations covered restrictions on market access, prices, business conditions, advertising, trade restrictions, and other distortions of competition. Sectors commonly addressed included telecommunications, transport, health care, pharmaceuticals, professional services, and environmental policy (Competition Authority, 1999*a*). The Council has estimated that about 60-70% of its recommendations under this process resulted in some action or amendment consistent with them, and about 30% of its recommendations have been neglected or rejected (Competition Council, 1996).

Many Council recommendations addressed anti-competitive consequences of regulations setting qualifications or certification requirements that control entry into professions or trades (Competition Authority, 1999*a*). Few of these have been notably successful, though. The Council has made several recommendations about reform in health care, and published a report in 1997 on competitive conditions there. Competition law action had succeeded in removing most anti-competitive constraints imposed by

professional associations' codes of conduct. But regulation of market access and performance achieve the same non-competitive outcome as the agreements. Recommendations for further reform have produced no appreciable results (Competition Authority, 1999*a*; OECD CLP, 1997*a*).

Advocacy combined with some enforcement threat, but from the EU, to open up harbour facilities for ferry service. Access to ferry terminals has been controlled by the Ministry of Transport. The state railroad, DSB owned and operated the ports of Elsinore, serving Sweden, and Rødby, serving Germany, and the ministry limited access to those ports to ferries run by the state railroads of Sweden and Germany. The Elsinore-Helsinborg connection was monopolised by a joint Danish-Swedish public company. The Council approached the Minister for Transport in 1993 to recommend opening harbour facilities for competitors. The Minister took no action, but the European Commission began a proceeding under Art. 90 of the Treaty of Rome. The remedy granted was weak, though; the Swedish complainant was given access to build its own facility at Elsinore, rather than to use the existing one. After more than two more years of litigation, access was finally granted to the existing terminal, and prices fell substantially (Competition Authority, 1999*a*).

Council studies and statements have addressed the important infrastructure deregulation issues in telecommunications and electric power. The Council recommended to the Ministry for Research some guidelines for fair competition in telecommunications, when liberalisation of that sector was under debate. Three conditions were particularly important: operators or dealers should not tie other products or services to supply of the basic network service (speech, data, or video); prices and terms for the basic network service should be the same, whether or not bundled with other products or services; and subscription commitments for network service should not exceed three months. An earlier comment had called attention to risks of cross-subsidisation in common operation of then-monopoly services and newly-competitive mobile GSM services. Because accounting separation alone was considered unlikely to ensure sufficient transparency, the Council recommended structural separation of the GSM business (OECD CLP, 1996). More recently, in 1998 the Council issued studies about competition issues in electric power and public utilities.

Other recent Council advice has addressed waste disposal, hearing aids, and printing competition from the postal service. The Council has recommended that the Minister for Environment and Energy create fair competitive conditions between public and private enterprises in the markets for waste collection, transport, and recycling, including separating these business activities from local government executive powers and setting fees to reflect actual costs rather than subsidise local enterprises (Competition Authority, 1999*a*; OECD CLP, 1996). In 1998, the Council published an analysis of the hearing aid business and made a recommendation about it to the Minister for Social Affairs (Competition Authority, 1999*a*). Hearing aids are provided free (or with a subsidy, at private clinics); the Council recommended that the subsidy go directly to the users, who could then choose themselves. The Minister evidently rejected that advice, resting on the desirability of a system in which the service appears to come for free (OECD CLP, 1997*a*). And the Council recommended to the Ministry of Communication and Tourism that the postal service's lettershop operation be separated from its other operations and that the lettershop's accounts should be made public, so that they could be compared with those of its private competitors. There was concern both that this operation was receiving an unfair subsidy and that its connection with the postal service gave it access to information about its competitors (OECD CLP, 1997*b*).

6. CONCLUSIONS AND POLICY OPTIONS

The adoption of an updated competition law signals a stronger approach. The 1998 law, accompanied by new leadership at the Authority stressing the importance of efficiency in the context of "workable competition", together send a message of commitment, and more importantly, of change. Already, the new powers are being applied in unprecedented ways, to seek out and sanction unregistered, anti-competitive agreements. The general success of ending professional association's overt agreements about price had already showed what can be done through persuasion and enforcement even when a law is relatively difficult to apply. On regulatory issues, the Council has a strong record of serious attention and involvement.

But the 1998 law is still lacking important elements, notably credible sanctions and merger control. The decision-making structure, dispersed among three administrative institutions in addition to the courts, may lead to lack of direction. The lack of merger control authority means the Council may have to rely more on the generally undesirable fall-back of direct regulation to control abuses of dominance. The substance of the law is moving toward efficiency, but Denmark's characteristic concern about fair treatment, both in the representative nature of decision structures as well as the content and application of rules, inhibits clear commitment to a goal that might sometimes call for results that appear inconsistent with that concern. Thus, changes appear to be slow, cautious, and incremental.

It is not clear how important competition principles are in the national regulatory system. Comparing current conditions with the sectoral and other problems identified in the 1993 OECD Report, it is difficult to see progress. The law has changed, but most of the problems remain. Prices remain unusually high in Denmark in non-traded sectors. Consolidation in the dairy industry, a concern in 1993, has now become a virtual monopoly. Competition problems persist in construction and building materials sectors, although the new, stronger legal tools are being brought to bear on them. Retail concentration remains high where large-store chains play major roles, and incumbent large-store operations are even protected now by land use controls from competitive entry, while some co-operative chains enjoy a new block exemption from the Competition Act. There is no effective competition for pharmaceuticals, health care professionals' competition is still tightly regulated, liberalisation of other professional services has stalled despite removing some anti-competitive agreements, and liberalisation of surface transport is still embryonic. Only telecommunications and, to a lesser extent, electric power have shown clear progress toward greater competition. In both of those sectors, Denmark has been spurred by EU directives.

Public procurement, identified six years ago as a significant competition issue, still shows little progress. As of 1998, the OECD's EDRC report finds continued grounds for concern. In-house deliveries provided by and to central and local government are, in principle, exempted from the Competition Act, so the rules guiding public tenders and outsourcing are critical in determining the overall competitive framework. For services provided by the central government, strict guidelines issued by the Ministry of Finance require public tenders at regular intervals to ensure that costs are minimised. But the constitutional independence of local authorities gives them the choice between relying exclusively on in-house production or tendering, and only in the latter case do public procurement rules apply. So far, local authorities are reportedly making little use of the competitive alternative.

The balance of costs and benefits from further reform is difficult to draw precisely and comprehensively. Some sectoral experiences are instructive, though. Danish experience already points to substantial gains from tenders leading to outsourcing. A survey covering 20 municipalities and counties showed an average cost reduction of 14%. In public transport, the municipality of Copenhagen realised cost reductions of 24% from using public tenders since 1990, and its costs are 55 and 30% below those of two other metropolitan areas (Århus and Odense) that are providing the services in-house (OECD, 1998).

Copenhagen's total savings amounted to DKr 400-500 million; by comparison, Århus lost about DKr 100 million.

5.1. Policy options for consideration

Ensure that effective sanctions are available, and applied, against anti-competitive horizontal agreements. Efforts are now underway, and the courts' reactions are still untested, so it is too early to say whether the law needs changing in this respect. But because this is one of Denmark's principal competition policy problems, it is most important to address it firmly and effectively. The Competition Authority is treating this as a top priority now.

Complete the task of bringing Danish domestic law into line with the EU model: provide for fines for first-time abuses of dominance, merger control, and direct application of Articles 85 and 86, and perhaps for powers of supervision over "public services" analogous to Article 90. The option of assessing a fine for abuse of dominance would not only provide a deterrent, but it would also obviate the need, or temptation, to resort to intrusive price control orders as a first remedy. Debate is already underway about adding merger control, which will be necessary to prevent establishing dominant positions which cannot be regulated well after-the-fact. Direct application of Articles 85 and 86 would increase the competition bodies' powers, options, and credibility. And powers analogous to Article 90 would help deal more coherently with the serious issue of anti-competitive action accomplished or sponsored by government action, especially at the local level. Permitting the regulators themselves to decide whether their action creates an exemption from the Competition Act is an invitation to widespread disregard for competition policy.

The Competition Council could be made more workable. One way would simply be reducing its size. Another would be to reduce or eliminate the "representation" ties to other institutions. The Council's broad basis might be good for consensus building about policy, but it is not clear that it has made the Council more effective in law enforcement and application. Rather, the explicit designation of interest group representatives makes it appear that decisions are reached by balancing of interests and even bargaining about case outcomes. Even if that is not the case—and members of the Council report that it is not—the appearance and the possibility may undermine the Council's reputation for impartiality and expertise. The addition of representatives of local government to the Council does not inspire confidence that the law will be applied more aggressively to protect and promote competition in local government procurement and to resist expansive exemptions from local government action. For the Energy Regulatory Board, it was recently decided there would be no representative members, making all of its members officially "independent"; it will be instructive to see how the change of status affects that board's decision-making.

More fundamental streamlining of the competition policy institutions might also be considered. One simplifying option would be to eliminate the additional step of the Competition Appeals Tribunal. To have a matter considered by three separate bodies, even before it might be taken to a court, is cumbersome and uncertain. Eliminating at least one of these steps could encourage the remaining bodies to do a better job in the first place. The Tribunal may represent a particular level of expertise, but it is unclear why more expertise is needed after a matter has already been through two other presumably expert bodies. A function similar to the Tribunal's, of specialised law-based review in these cases, could be accomplished by sending appeals in competition cases to a specialist court, such as the Commercial and Maritime Court. That would obviate the need for a further judicial step, too. Another measure to improve the coherence of competition policy could be to move the Council's secretariat out of the Ministry of Business and Industry to someplace more neutral and responsive only to the Council. Or, the functions of the Authority and the

Council might be combined in a single administrative body. That body would prepare cases for presentation to a court, which is the only entity empowered to apply sanctions in Denmark.

Accelerate the introduction of competition into network industries, particularly transport and electric power. Reform is well underway in telecommunications, but the steps taken so far in electric power and transport are not as ambitious. Substantial gains remain to be achieved in those sectors.

5.2. Managing regulatory reform

A tradition of consensus building makes reform time-consuming, but the widespread pattern of non-competitive agreements suggests that it also makes reform necessary. A parliamentarian observed that there is an art to making changes in a society, like Denmark, that is so highly organised to resist change: some shock may be necessary. A change that is discussed too thoroughly is a change that does not happen. Recent experiences with remaining weaknesses in competition policy institutions may provide that necessary shock. Consolidation of major processing industries into monopolies may catalyse change. The likely, visible victims are other businesses, who might now see advantages they had not seen before in having real merger control and effective sanctions for abuse of dominance. Discussion is underway about the international competitiveness of Danish industry. The single market continues to develop, and the EU is now calling on member state agencies to shoulder more responsibility for applying competition policies. Danes may understand better now that stronger domestic competition policy may be necessary for Danish industry's own future success in international trade.

NOTES

1. Statute No. 384, 10 June 1997; unless otherwise noted, all citations to the "Competition Act" or "Act" are to this statute.

2. Competitive Tendering Act 1966, no. 216, 8 June 1996, amended by Act no. 818, 19 December 1989.

3. Regulation No. 461, 23 Jun 1998.

4. Dagblad Børsen, online edition www.borsen.dk, 11 Feb 99.

5. Marketing Practices Act, Sections 2(2), 5.

6. *www.ks.dk*.

7. Competition Act, §3

8. Regulation No. 1030, 12 Dec 1997.

9. Competition Act of 1990, §15.

10. *Konkurrencerådets henvendelser og udtalelser til ofentlige mindigheder* (1998).

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