

Report on the authorisation system for administrators of estates

There are approximately 56.000 deaths in Denmark every year.¹ The estate of a deceased is always settled and surrendered to potential heirs or a surviving spouse. All estates will to some extent be treated by the probate court. A large share of all estates is quickly settled –often with the heirs doing the work.

In other cases an administrator who is appointed by the probate court settles the estate. The administrator is an impartial third party who will settle the estate instead of the heirs themselves settling the estate. The estate is assigned to an administrator if the deceased has decided so in his will, one of the heirs requests it, or if the probate court assumes the estate is insolvent.

An administrator has to be authorised by the court –only under special circumstances can an unauthorised administrator settle the estate. According to the Danish Act on Division of Estates (DSL) a number of requirements have to be fulfilled in order to be authorised. For example only lawyers² can be authorised and there is only a limited number of authorisations in each court district.

At the moment there are in between 3 and 15 authorised administrators in each of the 24 Danish court districts. Some administrators have authorisations in multiple districts. There are a total of 210 authorised administrators in Denmark.

The administrator's fee is taken from the value of the estate and it is therefore indirectly the heirs who pay the fee in the end. Consequently, the heirs are consumers in matters concerning the authorised administrators.

Approximately 10 percent of all estates are settled by an administrator. Almost all of these estates are settled by one of the authorised administrators. The heirs often find the process, as it is rarely the heirs themselves who choose the administrator and they are given less influence than usual even though the heirs indirectly pay the administrator's fee.

¹ Danmarks Statistik, <http://www.statistikbanken.dk/statbank5a/default.asp?w=1280>.

² Lawyers meaning lawyers admitted as solicitors and holding the Danish title "Advokat",

ANALYSE AF AUTORISATIONSORDNINGEN FOR BOBESTYRERE

The Danish Competition and Consumer Authority has conducted a study for all estates settled by administrators in 3 of the 24 district courts. The study shows that the average fee of the authorised administrators was approximately DKK 43.000, which corresponds to about DDK 190 million in fees paid to the authorised administrators on an annual basis. The fee of the authorised administrator amounts on average to 25 percent of the value of the estates that is distributed among the heirs. It is therefore not an insignificant share of the estate that is used to pay the administrator's fee.

The object of the report

The purpose of this report is to examine if the authorisation system as set out in the Act on Division of Estates (DSL) could have an effect on competition.

The Danish Competition and Consumer Authority has consulted the Ministry of Justice, The Association of Danish Law Firms, The Danish Bar and Law Society, FSR – Danish Auditors, and The Association of Danish Estate Lawyers on the practices of the authorisation system. The Danish Competition and Consumer Authority has also conducted a study on estates settled by administrators in the first quarter of 2011 in 3 specific district probate courts with the help of The Danish Court Administration.

In the 2004 Competition Report the Danish Competition and Consumer Authority examined the administrator's authorisation system and concluded that the system had elements restricting competition. The report particular found the limitation in the number of authorisations in each court district and the requirement of being a lawyer to be problematic.

The Act on Division of Estates (DSL) was revised in 2011 by the committee on division of matrimonial property.³ Only a few changes were made as the committee found the system all in all worked satisfactory. However, the committee did not take the system's effect on competition into consideration⁴.

The committee also revised the law in division of matrimonial property. A new act on the matter went into force in March 2012. The act introduces an authorisation system similar to the system in DSL where only a limited number of qualified lawyers can be authorised.⁵ The new authorisation system is not included in this report. It is however not unlikely that the Danish Competition and Consumer Authority will find that this system has elements restricting competition.

Results

³ Jf. Betænkning nr. 1270/1994 om skifte af dødsboer (herefter Betænkning 1270/1994) udarbejdet af ægtefælleskifteudvalget

⁴ FT 2010/2011, 1. samling, Folketingets forhandlinger, møde 52, s. 2-3

⁵ Lov om ægtefælleskifte § 45.

ANALYSE AF AUTORISATIONSORDNINGEN FOR BOBESTYRERE

The administrators have a number of complex duties when settling the estate. The heirs will as consumers often find it difficult to understand the administrator's work and the quality of it. The authorisation system helps ensure a necessary degree of knowledge and quality.

However, this report shows that certain elements of the authorisation system restrict competition to an unnecessary extent. The authorisation requirements as well as the practice on how the estate is assigned to an administrator have elements that restrict competition. The following elements of the authorisation system all have an effect on competition:

- The limitation in the number of authorisations in each district probate court.
- The limited guidance to the heirs on their access to choose the administrator and make complaints to the probate court.
- The limited access to choose an administrator from another district probate court.
- The practice of the probate courts when assigning the estates to administrators.
- The requirement that only lawyers can be authorised.

The various restrictions of competition may result in the administrator's fees being too high and might cause a decrease in the administrator's incentive to be efficient. The report therefore lists a number of recommendations that will increase competition and is expected to result in lower fees and new options for the heirs as well as the other parties of the estate as for instance the creditors.

The limitation in the number of authorisations in each district probate court restricts competition between lawyers and authorised administrators in the different courts district because it prevents eligible applicants from being authorised. The objective behind the limitation was that the authorised administrators need a certain amount of estates assigned to them in order to ensure the necessary degree of knowledge and experience. However, this reasoning can be met with the argument, that a limited number of authorisations means less competition among the authorised administrators which leads to less incentive to be efficient. In the opinion of the Danish Competition and Consumer Authority the objective can be met by stipulating a number of requirements to the administrator's qualifications.

The Danish Competition and Consumer Authority recommends that the limitation in the number of authorisations is revoked and access to authorisation is instead only subject to predetermined and specific requirements to the administrator's qualifications. Furthermore, it is recommended that an authorisation shall apply in every district and not only in one probate court. An administrator who is eligible to authorisation in one court, should be able to settle estates in other parts of the country seeing that the legislation and duties concerning the estates are the same throughout the country. The administration of a nationwide authorisation could be

ANALYSE AF AUTORISATIONSORDNINGEN FOR BOBESTYRERE

centralised at for example the Danish Court Administration. Alternatively, the authorisations could stay in the different individual probate courts. The courts could change their practice so that the courts mutually recognize each other's authorisations and allow heirs to choose any authorised administrator regardless of where in the country the administrators reside.

The Act on Division of Estates (DSL) gives the *heirs a number of ways influence the choice of administrator* and the probate courts have a responsibility to give the heirs guidance on the matter. The practice of the probate courts on giving guidance is limited and differs in the various districts. The courts usually give guidance at the initial meeting with the heirs, but it is only some of the heirs who are given notice of this meeting. The webpages of the courts also contain very limited information on the different ways the heirs have access to influence.

The Danish Competition and Consumer Authority therefore recommends that all the various probate courts have adequate and accessible information on their webpages. That would give the heirs the possibility to be better informed about their choices before the initial meeting. It would have a positive influence on competition between the different authorised administrators, if the heirs are given better guidance on their access to influence the choice of administrator. The heirs will often have a greater interest in getting the most efficient settlement of the estate than the courts, as it is the heirs paying the fees.

The combination of lack of guidance and the fact that an administrator only can be replaced on the basis of *an official complaint to the probate court* is problematic from a competition perspective. The heirs have to submit an official complaint to the courts if they find the administrator's work unsatisfying or if they find the fee is set too high. The administrators are obliged to give a price estimate, but only after the estate has been assigned to the administrator and replacement only can take place through a complaint.

It is recommended to introduce a deadline of for instance two weeks, where the heirs can investigate the market and collect offers from different administrators. In doing so the heirs have the possibility to request the administrator who has given the most favourable offer. The focus on the access for the heirs to request a specific administrator can increase competition in this area.

It is problematic that *the courts assign the estates evenly between the authorised administrators* in the cases where the heirs do not request a specific administrator or there are no heirs to do so. This practise leads to the authorised administrators losing the incentive to compete on factors such as price and quality as they are ensured having more estates signed to them regardless of their prior work.

The Danish Competition and Consumer Authority therefore recommends, that the probate courts instead of distributing the estates evenly between the administrators change their practice, so that the administrator is assigned on the basis of the con-

ANALYSE AF AUTORISATIONSORDNINGEN FOR BOBESTYRERE

tent of the specific estate and experience with the specific administrator including for instance special skills and price estimate.

The requirement that an administrator has to be a lawyer to be authorised is restricting competition because individuals who are not lawyers are without any assessment of their skills automatically prevented from being authorised. It should be examined if this requirement is proportionate with underlying intention of the authorisation system; Ensuring that the work of the administrators is performed with the necessary skills in an effective manner. It is however possible that this can be ensured by letting others than lawyers settle the estates, for instance individuals from the legal profession who are not qualified lawyers or accountants. This is particularly due to the fact that the administrators have access to expert assistance in special matters and access to let their office personals do a large part of the tasks connected to the settlement. However, in an evaluation of the requirement there are a number of other aspects that need to be taken into consideration, including how the probate courts would evaluate other applicants than lawyers.

The Danish Competition and Consumer Authority therefore recommends that the possibility of expanding access to be authorised for other applicants than lawyers. The requirements could be based on a more detailed description of the needed qualifications for example completion of a course in estate administration.

The current limitation in the number of authorisations in each district probate court and the requirement that an authorised administrator has to be a lawyer are both elements of the authorisations system that restricts competition. Along with the practice of the probate courts when assigning the estates to the administrators and the limited possibility for the heirs to replace the administrator, it reduces the administrator's incentive to compete on important factors as price and quality. This creates a risk of the heirs are paying more than necessary for the estate settlement. If the recommendations are followed competition will improve and the risk of too high fees will be reduced. In the view of the Danish Competition and Consumer Authority there is no need for further regulation of the administrator's fee as an increase in competition by following the recommendations is a better way to ensure lower fees.

Boks 0.1: Main Conclusions

- **The limitation in the number of authorisations in each district probate court is an unnecessary limitation in the access to authorisation:** The limitation in the number of authorised administrators within each probate court creates a restraint on competition among lawyers and among the authorised administrators in the different court districts. The limitation excludes possible administrators who actually meet the requirements, and it leads to reduced competition amongst the authorised administrators causing the loss of incentive to increase efficiency and reduce price.

ANALYSE AF AUTORISATIONSORDNINGEN FOR BOBESTYRERE

- **Limited guidance on the heirs' access to influence the choice of administrator that differs in the various probate courts and also limited access to complain, limit competition among administrators:** The practice of the probate courts is limited and differs when advising the heirs on access to complain and the possibilities to request a particular administrator. It means that the heirs do not take notice of the possibilities of influence that the law provides which leads to fewer administrators being assigned on the basis of the choice of the heirs.
- **The limited possibilities of the heirs to choose an administrator from different probate courts reduce the competition among the administrators:** It is only in special circumstances that the heirs can choose an administrator who is authorised in a different probate court, than where the estate belongs. In this way, competition between authorised administrators in different districts is reduced to an unnecessary extent, as it must be assumed that an administrator, who is authorised in one district, is able to settle estates from other districts, seeing that the legislation and duties are the same in the various districts.
- **The practice of the probate courts to assign the estates evenly among the authorised administrators in the district reduces competition among the authorised administrators:** An even distribution of estates means that price, quality etc. are not taken into consideration thus decreasing the administrator's incentive to compete on these factors and damaging competition and efficiency in the market.
- **There is a risk of the requirement that an administrator has to be a lawyer, is an unnecessary restriction of competition:** The requirement that an administrator has to be a lawyer limits the access to become an administrator, because individuals, who are not lawyers, are automatically excluded from obtaining authorisation without taking any consideration to their skills and qualifications. There is a risk that this requirement is not proportional to the underlying intention of the authorisation system of ensuring, that the work of the administrators is performed with the necessary skills in an effective manner.
- **The various restraints on competition of the administration system and the practice of the probate courts reduce the incentives of the authorised administrators to compete on price, quality, etc. and may therefore lead to the heirs paying too high fees:** The Danish Competition and Consumer Authority acknowledges the need for an authorisation system, as the heirs and other parties of the estates often will find it difficult to understand the quality of the administrator's work. The various elements of the system that cause restraints on competition and a risk of the heirs paying too high fees for the administrator's work. The study on the fees of the authorised administrators' fees in three districts conducted by the Danish Competition and Consumer Authority shows that the average fee was DKK 43.000 and made up about 25 percent of the value of the estate which was divided among the heirs. The report's different recommendations will be able to reduce the risk of the

ANALYSE AF AUTORISATIONSORDNINGEN FOR BOBESTYRERE

fees being too high.

In the view of the Danish Competition and Consumer Authority the restraints on competition listed above can be relieved by following the recommendations set out below. A large part of the recommendations can be carried out within the scope of the current legislation by changing the practice of the probate courts and the Ministry of Justice and by initiating an information campaign on the various ways of influence which the heirs are provided by law.

Boks 0.2: Recommendations

- **The limitation in the number of authorisations in each district probate court should be revoked:** It is recommended that the limitation in the number of authorisations in each probate court is revoked allowing authorisation to all applicants who meet the requirements.
- **The authorisations are made national:** It is recommended that the authorisations are made national, so they no longer are bound to one specific probate court. This can be accomplished by changing the system, so that the authorisations are issued from a central authority for instance The Danish Court Administration, or by keeping the authorisations in the different probate courts, but ensuring that the courts always mutually recognise each other's authorisations. The important thing is that the heirs – as well as the probate courts – are able to choose freely among all authorised administrators in the country.
- **The probate courts should improve the guidance on access to influence for the heirs:** Adequate and easy accessible information on the webpages of the courts will enable the heirs to familiarize themselves with the different possibilities before the initial meeting at the court. It would have a positive influence on the competition among the authorised administrators, if the probate courts improved their guidance to the heirs, because the heirs have a greater interest than the probate courts in ensuring a low price and efficiency.
- **All probate courts should offer a period of time in which the heirs can choose a particular authorised administrator:** It is recommended to introduce a period of time, for instance, two weeks where the heirs have a chance to explore the market and collect offers from the different authorised administrators. In doing so the heirs have a chance to affect the choice of administrator and choose among the offers, which they find most desirable. A focus on the choices of the heirs will create more competition.
- **The probate courts should change their practice when assigning the estates to the administrators to an evaluation based on the specific estate:** It is recommended in the case where the heirs do not wish to request a particular administrator

ANALYSE AF AUTORISATIONSORDNINGEN FOR BOBESTYRERE

or there are no heirs to do so, the probate courts should change the practice of evenly assigning the estates among the authorised administrators and instead assign the estates based on an evaluation of the specific estate and previous experience with the particular administrator.

- **It should be examined whether it is possible to expand the access to obtain authorisation, letting other applicants than lawyers be authorised.** It is recommended that The Ministry of Justice examine whether or not the circumstances have changed since the authorisation system was introduced and whether it today is possible to find other capable administrators than lawyers who possess the necessary skills and qualifications. The requirement could be replaced with a more detailed description of the needed qualifications for example having completed a course in estate administration. It could be considered pre-approving certain professions such as people with legal background (including lawyers) or accountants in order to ease an administrative burden which a change in the system might give the probate courts.