

Summary of the Considerations and Recommendations of the Committee

1.1 Preface

Competition is one of the fundamental driving forces behind the ongoing development of productivity and innovation within companies and is therefore of vital importance to economic growth and prosperity in Denmark. The purpose of the Danish Competition Act is to promote efficient use of economic resources through effective competition. The rules must therefore ensure that companies do not act in a way that restricts or limits competition. The Danish Competition Act applies to all companies, irrespective of their size.

There are different forms and degrees of infringement of the Competition Act. In the first instance, these may be quite clear restrictions on competition, where it is immediately apparent that there is an infringement of the Competition Act. There is also a wide range of other types of agreement and conduct that may be in contravention of the Competition Act, but where this can only be established following a more detailed examination of the agreement or the effect of the conduct on competition.

An important pre-requisite for compliance with the Competition Act, and therefore the prevention of infringements, is that companies are familiar with and understand the rules. Increasing awareness of the competition rules is therefore an important task of the Danish Competition and Consumer Authority. Awareness of the rules cannot operate in isolation, however, but must be seen in the context of the effective punishment of infringements of the law, in order to provide an incentive for companies to comply with the rules. Both the information and guidance initiatives and criminal sanctions therefore represent important tools in the effort to prevent companies from infringing the competition rules, thus restricting competition. When the Danish Competition and Consumer Authority opens a competition case as part of the enforcement process, it is important that the proceedings for the case are organised in such a way as to take into consideration both the companies involved and the interests of the market in re-establishing competition.

The above provides the framework for the work of the Competition Act Committee. Firstly, the Committee has examined whether there is a need to strengthen the general information and guidance initiatives of the Danish Competition and Consumer Authority. Secondly, the Committee has considered possible changes to the proceedings in competition cases. Thirdly, the Committee has assessed whether the introduction of prison sentences would achieve better enforcement of the competition rules in cartel cases. Finally, the Committee has examined whether increasing the level of fines for companies and natural persons, compared with the current level, would provide a greater incentive to comply with the rules. Against this background, the Committee has discussed the possibilities and need for changes in these four areas.

Other circumstances, such as different forms of regulation, are also important in terms of the ability of Danish companies to compete, but these fall outside the terms of reference.

This section reports the considerations and recommendations of the Committee in the four areas. The section also contains a summary of the Committee's investigations and the results thereof, which are described in greater detail in the sections that follow.

Each of the areas is examined individually below. It should be stressed that the areas are closely related and that it is therefore important to find a suitable balance. The Committee recommends a number of specific initiatives, some of which will be resource-intensive. When prioritising the initiatives, it is important that the

resources required for the implementation of the initiatives are used in such a way as to best support effective compliance with and enforcement of the Danish Competition Act.

1.2 Information and guidance

The Committee has assessed whether there is a need to strengthen the general information and guidance initiatives of the Danish Competition and Consumer Authority in order to prevent infringements of the Competition Act and ensure compliance with the rules.

For this purpose, the Committee has examined the information and guidance available to companies about the competition rules. The investigation has shown that the Danish Competition and Consumer Authority provides extensive general information and guidance about the competition rules. Among other things, this takes the form of information about the Danish Competition Act and practice on the Danish Competition and Consumer Authority website, the Authority's telephone hotline, issuing publications about the competition rules and information campaigns in relation to changes in the rules and presentations on the competition rules.

Companies wishing to obtain the Competition Authority's opinion on whether a particular agreement or conduct complies with the Competition Act can submit a notification. Based on this notification, the Danish Competition and Consumer Authority performs an assessment of the agreement and its effect on competition and the company is given a decision on whether the agreement is lawful under the competition rules. However, the Authority does not perform an assessment where the agreement etc. in question has an appreciable effect on trade and is therefore covered by the EU rules of competition. Where companies request informal guidance on whether a specific agreement or conduct complies with the Danish Competition Act, the Danish Competition and Consumer Authority provides guidance in certain cases on what is unlawful and on what the Authority considers to fall outside the Danish Competition Act. This is not standard practice however.

An examination of the guidance initiatives implemented by the competition authorities in Finland, France, the Netherlands, Norway, Sweden, Germany and the UK has shown that Danish companies have better opportunities for obtaining guidance from the authorities with regard to specific circumstances than the companies in the countries examined. Not only have all the countries examined removed their notification systems, but it is also the case that none of these countries provides specific guidance. This is also true of the European Commission, which does however have a system whereby companies are able to obtain guidance on unclarified issues where the European Commission itself considers it relevant to clarify the matter. The UK has introduced a trial system with Short-form Opinions. The purpose of the system is to provide guidance to a wider range of companies on issues of competition law. Through such guidance, the competition authority stipulates general guidelines for entering into agreements on the relevant market on the basis of a specific enquiry. A Short-form Opinion therefore provides guidance on how companies are to assess their agreements for themselves in terms of the competition rules.

1.2.1 Considerations of the Committee

Based on the examination of the current information and guidance available for Danish companies about the competition rules, the Committee has discussed the need and possibilities for improvements.

The Committee considers that although the Danish Competition and Consumer Authority provides extensive general guidance and information about the Danish Competition Act, many companies have difficulty understanding the importance of the competition rules. The Committee therefore finds that it would be appropriate to strengthen the general information and guidance initiatives of the Danish Competition and Consumer Authority in order to increase companies' awareness of the competition rules.

In contrast to specific, individual guidance, general guidance has the advantage of reaching more companies and therefore achieving broader coverage. On the other hand, it can be difficult for individual companies to understand the relevance of this. The effect of general guidance must also be viewed in the context of how infringements of the relevant rules are punished, so that companies are deterred from infringing the Danish Competition Act. As a result of this, broad initiatives would be particularly suitable with regard to information and guidance about infringements of the Danish Competition Act that are considered to be very severe, such as the prohibition of cartel agreements.

In addition to strengthening the general information and guidance initiatives, the Committee has discussed the possibility and need for strengthening the specific guidance initiative as a supplement to the advice provided to companies by their lawyers. The desire for specific guidance originates from the fact that when considering the implementation of new initiatives, it is difficult for companies to identify the competition law aspects of these. Against this background, the Committee finds that in relation to the strengthening of the general information and guidance initiatives, it would be sensible to extend the practice already used to a certain extent at the Danish Competition and Consumer Authority, where companies are able to obtain informal guidance on a specific initiative. In addition to being able to use such a dialogue to help prevent companies implementing unlawful initiatives, such a system could reduce the risk of companies refraining from implementing initiatives or entering into agreements that would otherwise be beneficial.

The Committee notes that the trade associations play an important role in terms of information and guidance to companies about the Danish Competition Act. Through their representation on the Competition Council, the trade associations are in a good position to be aware of practice under the Danish Competition Act and therefore have the opportunity to formulate central messages about this for their member companies.

1.2.2 Recommendations of the Committee

Based on an overall assessment, the Committee finds that there is a need to strengthen the information and guidance initiatives of the Danish Competition and Consumer Authority in order to prevent infringements of the Competition Act.

The Committee has discussed a range of possible initiatives for strengthening the information and guidance initiatives. Below are the specific recommendations of the Committee.

The Committee recommends:

- That the information and guidance initiatives of the Danish Competition and Consumer Authority be strengthened

- That the Danish Competition and Consumer Authority implement a range of specific initiatives in order to increase general awareness of the Danish Competition Act, including:
 - The creation of a network between the Danish Competition and Consumer Authority and representatives from trade associations
 - The Danish Competition and Consumer Authority holding targeted information meetings with regard to new legislation or new practice of particular relevance to individual industries
 - The Danish Competition and Consumer Authority preparing and placing industry-specific questions and answers about the Danish Competition Act on the Authority's website
 - The Danish Competition and Consumer Authority informing start-up companies about the Danish Competition Act on Startvaekst.dk
- That the Danish Competition and Consumer Authority introduce a system whereby the Authority is able to provide general statements of guidance on issues of competition law
- That the Danish Competition and Consumer Authority, as standard practice, provides the opportunity for companies to obtain the Authority's informal guidance on a specific initiative
- That the Danish Competition and Consumer Authority work out a prevention strategy. The strategy must, among other things, provide the springboard for specifically prioritising which other initiatives could be implemented and how they can be prioritised, in order to maximise compliance with the Danish Competition Act

All of the proposed initiatives will involve resource consumption. Some of the initiatives will be very resource-intensive. This is particularly true if the Authority introduces a standard practice with specific guidance and if the Authority is to provide general statements of guidance on issues of competition law.

The recommended initiatives are described in more detail below.

1.2.2.1 General information and guidance initiatives

The recommendation to implement general information and guidance initiatives originates from discussions with the trade associations represented on the Committee about how the Danish Competition and Consumer Authority, together with the associations, could increase awareness of the competition rules.

This could be, for example, in the form of creating a network between the Authority and the associations. Such a network could form the basis for an exchange of experiences, while the network could also ensure that the associations are always kept up-to-date about the latest competition law practice.

One of the other initiatives discussed was for the Danish Competition and Consumer Authority to hold targeted information meetings with regard to new legislation or new practice of particular relevance to individual industries.

The Committee also recommends that the Danish Competition and Consumer Authority prepare industry-specific questions and answers about the Danish Competition Act and that the Authority provide information about competition rules on Startvaekst.dk, thereby providing orientation for start-up companies with regard to the importance of the Danish Competition Act.

The benefit of these initiatives is that they will help to improve awareness of the rules at companies wishing to comply with the Danish Competition Act. The downside is that they will be resource-intensive to various extents.

1.2.2.2 General statements of guidance

The recommendation that the Danish Competition and Consumer Authority introduce a system whereby the Authority is able to provide general statements of guidance on issues of competition law is inspired by the UK's Short-form Opinions. The system will mean that a company will be able to direct a query to the Danish Competition and Consumer Authority with regard to a specific issue of competition law. On this basis, the Authority will be able to provide a statement to the extent that a statement is considered to have sufficient general relevance in relation to the resource consumption associated with the preparation thereof.

In its statement, the Danish Competition and Consumer Authority will take a general position in relation to the particular type of initiative and not to the specific market. On the basis of such a statement, the company will then be able to assess for itself the agreement or conduct in question in relation to the specific market conditions. Where the question concerns a principle of competition law, the Competition Council shall provide the statement.

Since a statement of guidance relates generally to a specific issue, it will also be relevant to other companies. As a result of this, general statements of guidance should be published on the Danish Competition and Consumer Authority's website.

The benefit of providing general statements of guidance is that they will be able to have guidance value for a broad range of companies. The downside is that providing statements of guidance will be resource-intensive. The introduction of the system could therefore result in a restriction on the resources available to the Danish Competition and Consumer Authority for actual enforcement.

1.2.2.3 Guidance on specific circumstances

In order to fulfil the wish to strengthen the specific guidance initiatives, the Committee recommends that it be standard practice to allow companies to obtain informal guidance on specific initiatives from the Danish Competition and Consumer Authority. Such a system will be primarily intended for proposed initiatives, i.e. initiatives not yet implemented.

Guidance will be given on an informal basis. Following a discussion with the Danish Competition and Consumer Authority, the company is therefore given the Authority's informal guidance on the elements contained in the initiative about which the company itself has doubts in relation to the Competition Act. As part of this, the company will be able to find out whether, in the direct opinion of the Authority, the circumstances could be punishable under law. The outline of the system is as follows:

- Companies will be able to obtain informal guidance on a proposed initiative from the Danish Competition and Consumer Authority
- Initially, this will be verbal guidance from the Authority
- The company may request a written statement of guidance following initial discussion of the circumstances with the Authority
- If the company requests a written statement of guidance, this statement may also be published on the Danish Competition and Consumer Authority's website.
- Confidential information will be excluded from any such publication
- Where the Authority itself decides to provide a written statement of guidance to a company, this shall not be published
- The Danish Competition and Consumer Authority has the option to refuse to handle a request for guidance as is the case with complaints

The assessment will be made on the basis of the information provided by the company. The Committee discussed the option of introducing an advance notice system similar to the one used by the Danish Consumer Ombudsman and SKAT (the Danish Tax Administration) for example, and decided that this would not be appropriate in relation to competition. The reason for this is that the assessment to be made to examine whether a specific agreement or conduct complies with the Danish Competition Act requires an examination of the effect of the agreement etc. on competition. Such an assessment cannot be made solely on the basis of the information that the company is able to provide to the Authority. If a company wants an actual decision on whether a specific initiative complies with the Danish Competition Act, the company has the option, as before, to submit a notification for circumstances that are not covered by EU rules of competition.

The benefit of strengthening the individual guidance initiative in the form of guidance on specific circumstances is that the companies, through a dialogue with the Danish Competition and Consumer Authority, will be able to find out what the Authority thinks about a specific initiative. The downside is that the guidance initiative will be aimed at the individual company. The system could therefore represent a serious drain on the resources of the Danish Competition and Consumer Authority, and as a result would limit the resources available to the Authority for enforcement initiatives. Similar to the general option to refuse to handle a case pursuant to Section 14, Subsection 1, Point 4 of the Danish Competition Act, it should therefore be possible to refuse to offer guidance other than that which is covered by the general rules of administrative law. In cases where guidance is provided in writing, the Committee also recommends that it be possible to publish this if the Danish Competition and Consumer Authority considers that the guidance could also be of value to other companies. In the same way as when the Danish Competition and Consumer Authority publishes decisions made under the Danish Competition Act, confidential information will not be published.

1.2.2.4 Prevention strategy

When considering how the Danish Competition and Consumer Authority's information and guidance initiatives could be strengthened, it is important to focus on initiatives that have the greatest effect in relation to the estimated resource consumption involved.

The Committee therefore recommends that the Danish Competition and Consumer Authority work out a prevention strategy and use it to determine how best to increase awareness of the competition rules, in addition to the aforementioned initiatives and taking into account the resources for this. As part of this, the

Authority will be able to specify more closely the target group for the initiative, while it will also be able to target the content and delivery method of the content.

The benefit of preparing a prevention strategy is that there will be a specific focus on prevention, just as the guidance and information initiatives can be targeted at individual companies. Besides the considerable use of resources involved in preparing a prevention strategy, such a strategy will not have any drawbacks.

1.3 Case proceedings

The Committee has evaluated whether the proceedings in a competition case can be organised more efficiently and at the same time in a way that places the least burden on the companies.

For this purpose, the Committee has reviewed the current proceedings. A case where the Danish Competition and Consumer Authority opens an investigation with the intention of intervening in an infringement of the competition rules involves a number of proceedings in the form of information gathering, consultation, inclusion of the Competition Council, etc. The process often uses a lot of time and resources. The company is included throughout the handling of the case, both in connection with obtaining information and at meetings between the parties to the case and the Authority. Based on the information obtained, the Authority prepares a draft decision, which the company receives for consultation with a period of three weeks in which to submit comments. The case is then submitted to the Competition Council, which considers the case at a meeting before making a decision. At this meeting, the company has the opportunity to supplement its written reply with an oral submission no more than ten minutes long.

1.3.1 Considerations of the Committee

When considering changing the proceedings, the consideration of the interests of the parties to the case in being involved in the case, including being heard and advised on the status of the case, must be balanced to the appropriate extent against the consideration of the interests of any complainant and other third parties in also being involved in the case. The changes must also take into account the interests of the market in re-establishing competition and therefore in the case being resolved as quickly as possible.

For the purpose of assessing the need and possibility of changing the competition proceedings, the Committee has compared the Danish proceedings with the proceedings in the EU and in other OECD countries. In addition, the trade associations represented on the Committee have provided information from their members. Furthermore, a number of expert contributors at meetings of the Committee have reported on their experiences with and views on competition law proceedings, which together led to the Committee identifying a number of focus areas.

Firstly the Committee finds that although the Danish Competition and Consumer Authority includes the parties to a case on a continual basis when gathering information and otherwise continually provides information about the status of the case in either oral or written form, there is a need for initiatives to ensure that the parties are informed about the status of the case, for example by way of state of play meetings.

Furthermore, the Committee finds that there are weaknesses in the current system, where the parties are consulted on the draft decision of the Danish Competition and Consumer Authority with a reply period of three weeks. The weakness of the system is firstly in the length of the reply period with regard to the scope

competition cases often have. Secondly, it has been stated that with the current system, companies find that they are included in the process too late to be able to have any real influence over the outcome of the case.

Finally, the Committee finds that it would be sensible to extend the oral submission time that the parties to the case have before the Competition Council prior to the Council making its decision. An oral submission time of ten minutes is thus considered too short for the companies to put across their viewpoints to a sufficient extent.

The Committee has also considered possible changes to competition cases where a decision is made first in the administrative system before the case proceeds to SØK (The State Prosecutor for Serious Economic Crime). The considerations related to the possibility of shortening case handling times for these cases and avoiding the case following two paths, i.e. going through the administrative case system and the criminal court system, by making a decision as to whether the case should be handled on an administrative or criminal basis. In this context, the Committee took as a basis the fact that cases also involve two authorities in a number of other administrative areas. It is therefore common for a case to be handled initially by a separate authority specialising in the relevant legal area, while criminal sentencing for infringements of the law takes place at the courts through the prosecution authority. Particularly for this reason and in order to ensure effective enforcement of the Competition Act, the Committee considers that it would not be appropriate to make changes. With regard to the companies, however, the Committee finds that it would be appropriate to introduce a practice whereby the Danish Competition and Consumer Authority, as soon as possible and no later than in the Statement of Objections, informs the parties whether the case is expected to be passed to SØK once the Competition Council has made its decision. It would also be appropriate to provide clarity externally in relation to the criteria on which the Danish Competition and Consumer Authority bases its decision to forward the case to SØK.

1.3.2 Recommendations of the Committee

On the basis of the focus areas identified and taking inspiration from the European Commission, among others, the Committee has examined how the proceedings could be changed. In the same way as the European Commission, the recommendations are based on competition cases under Section 6 and Section 11 of the Competition Act and the EU law counterpart in the form of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in relation to cases with an appreciable effect on trade. Below are the recommendations of the Committee.

The Committee recommends:

- That the proceedings be changed in a way that ensures that the companies' wishes to be included in a pending competition case are taken into account to a greater extent, including being consulted and updated about the status of the case
- That the Danish Competition and Consumer Authority introduce a Preliminary Statement of Objections as standard practice
- That the Danish Competition and Consumer Authority introduce a Statement of Objections

- That the time limit to reply to the Statement of Objections be set at six weeks
- That the Danish Competition and Consumer Authority, as soon as possible and no later than in the Statement of Objections, inform the parties whether the case is expected to be passed to SØK once the Competition Council has made its decision
- That the parties also be consulted on a draft decision if this contains new information resulting in an assessment different to the one in the Statement of Objections
- That the Danish Competition and Consumer Authority introduce two fixed State of Play meetings; one in connection with the Preliminary Statement of Objections and the other in connection with the Statement of Objections
- That the oral submission time for the parties in connection with the overall handling of the case by the Competition Council be extended from 10 to 15 minutes
- That the Danish Competition and Consumer Authority prepare a best practice for the conduct on proceedings in competition cases

The Committee considers that the recommended changes will together mean that case handling times are extended by three to six months. The changes will also mean an increase in resource consumption for each individual case.

The recommended changes are described in more detail below.

1.3.2.1 Preliminary Statement of Objections

The Danish Competition and Consumer Authority has already introduced a Preliminary Statement of Objections as a trial system. The statement is produced and sent to the parties to the case once the Danish Competition and Consumer Authority, on the basis of a preliminary investigation, has decided to consider the case.

The statement indicates the Authority's provisional views on the competition issues involved, including how the market in question should be defined. The parties will be given the opportunity to comment on the Preliminary Statement of Objections both verbally and in writing. The statement may also be sent to any complainants or any other third parties in a non-confidential version.

The benefit of a Preliminary Statement of Objections is that the companies are informed at an early stage in the process about the competition problems the Authority has identified in the case. The statement thus forms a platform for dialogue between the company and the Danish Competition and Consumer Authority about how the case will be handled, including which investigations will take place. There do not seem to be any drawbacks to the introduction of such a statement.

The Committee therefore recommends that the Danish Competition and Consumer Authority introduce a Preliminary Statement of Objections as standard practice.

1.3.2.2 Statement of Objections and six-week time limit to reply

A Statement of Objections should be prepared once the Danish Competition and Consumer Authority has concluded its investigations and on the basis thereof has made a general preliminary assessment of the case. A Statement of Objections will contain a statement of claim indicating the facts of the case and the Authority's preliminary assessment of the case in the form of the definition of the relevant markets and the identification of the competition issues. Where the Authority intends to pass a case to SØK after the decision of the Council with the intention of pursuing the case on a criminal basis, this will also be stated in the Statement of Objections.

The Statement of Objections will be sent to the parties for consultation with a period of six weeks. The time limit to reply will be followed up by a State of Play meeting between the Danish Competition and Consumer Authority and the parties. Any complainant and any other third parties will also be able to receive a non-confidential version of the Statement of Objections for consultation.

Based on the preliminary assessment of the case, as expressed by the Danish Competition and Consumer Authority in the Statement of Objections, as well as the comments made by the parties to the case, the Authority will prepare a draft decision. This also applies if the Authority, after preparing the Statement of Objections, becomes aware of new information that must be included in the assessment of the case. Where the draft decision contains new information resulting in an assessment different to the one in the Statement of Objections, a new party consultation should take place with a time limit to reply of three weeks.

The benefit of introducing a Statement of Objections is that it will satisfy the companies' desire to be included at an earlier stage of the decision-making process for the case. The extension of the time limit to reply will have the benefit of giving companies longer to prepare a reply. The downside is that it will extend the case processing time.

The Committee therefore recommends that the Danish Competition and Consumer Authority introduce a Statement of Objections with a time limit to reply of six weeks, and that as standard practice the Authority inform the parties as soon as possible whether the case is expected to be passed to SØK once the Competition Council has made its decision

1.3.2.3 Fixed State of Play meetings

Two fixed State of Play meetings could be introduced; one in connection with the submission of a Preliminary Statement of Objections and the other in connection with the submission of a Statement of Objections. Both State of Play meetings will be held once the companies have had the opportunity to comment on the statements. The offer of State of Play meetings should be compulsory for the Danish Competition and Consumer Authority, but optional for the companies.

The benefit of introducing fixed State of Play meetings at specific points in the proceedings will be that this ensures uniformity in the proceedings. Provided that alongside the fixed State of Play meetings there will continue to be the opportunity to meet with both the parties and any complainants and other third parties as required, there are not considered to be any drawbacks to introducing these fixed State of Play meetings.

The Committee therefore recommends that the Danish Competition and Consumer Authority introduce two fixed State of Play meetings.

1.3.2.4 Longer oral submission time at Competition Council hearing

The time which the parties to the case and any complainant have to make an oral submission before the Competition Council could be extended from 10 to 15 minutes. Considering that in some cases there are oral submissions from several companies, the Committee does not find it appropriate to extend the oral submission time further. Since the oral submission time for the Council is only intended for the presentation of new viewpoints in relation to those already submitted in the written reply, the Committee also finds that a 15 minute oral submission period would be sufficient.

The benefit of extending the oral submission period at the Competition Council hearing is that this will further improve the parties' ability to influence how the Council considers the case. Provided that the oral submission time is limited to 15 minutes, there are not considered to be any drawbacks.

The Committee therefore recommends that the oral submission time be extended from 10 to 15 minutes.

1.3.2.5 Best Practice on proceedings in competition cases

The proceedings in a competition case could be described in a best practice which could be published on the Danish Competition and Consumer Authority website. In order to provide clarity externally with regard to the criteria that form the basis of the Authority's decision to pass the case to SØK, the best practice could also contain a section on this.

The benefit of such a best practice will be that it will create clarity for the companies about the proceedings in a competition case. Companies that become involved in a competition case will thus be able to find out how the case in question will be handled, as well as how they will be included in the case processing. Besides the resource consumption involved in preparing the best practice, it is not considered that there will be any drawbacks.

The Committee therefore recommends that the Danish Competition and Consumer Authority prepare a best practice on proceedings in competition cases.

1.4 Sanctioning infringements of the Danish Competition Act

Restrictive agreements and other illegal restrictive conduct often have significant detrimental effects on the economy – both for consumers and other companies. The detrimental effects reflect the fact that companies can gain a great advantage by entering into illegal restrictive agreements or through other illegal conduct.

The Committee has assessed whether the introduction of prison sentences would achieve better enforcement of the competition rules in cartel cases. The Committee has also examined whether increasing the level of fines for companies and natural persons, compared with the current level, would provide a greater incentive to comply with the rules.

Both the issue of imprisonment and of fines relate to the ability to punish infringements of the Danish Competition Act. While the question of increasing the level of fines relates to all forms of infringement of

the Competition Act, the issue of imprisonment relates only to cartels. Where fines are primarily intended for companies, prison sentences are intended for individuals.

Cartels represent one of the most severe infringements of the Competition Act and the work of the Committee has had a particular focus on this type of infringement. A cartel is characterised by cooperation with the aim of restricting competition and typically involves price fixing, agreements on production or sales quotas, market or customer sharing or bid rigging, i.e. commercial arrangements which under normal circumstances the individual company would decide on themselves and compete with other companies. The sole purpose therefore of entering into and participating in a cartel is to restrict competition.

The Committee's considerations with regard to the issue of increasing the level of fines are reported first below. The Committee's considerations with regard to the issue of introducing prison sentences are then discussed. Finally, the Committee's recommendations for the two areas are summarised together.

1.4.1 Increasing the level of fines

The Committee's investigations with regard to the level of fines for companies are described first below, followed by an examination of the level of fines for natural persons.

Level of fines for infringements of the Danish Competition Act by companies

The principles applicable to fines for companies are defined in the amendment of the Danish Competition Act of 2002, whereby guidelines on the level of fines for infringements of the Danish Competition Act are provided in the notes. The background to this was a desire to increase the level of fines in relation to the level that was introduced when the law was amended in 2000, and where practice had shown that the level of fines for infringements of the Danish Competition Act would barely exceed DKK 3 million. Such a level of punishment for infringements of the competition rules was lower than the level applied in other European countries and much lower than in the EU system. If the ability to impose fines on companies for infringements of the Danish Competition Act were to have any real effect, the Danish Parliament found it necessary to increase the level. When the Danish Competition Act was amended in 2002, it was also stipulated that the level of fines for infringements of the Danish Competition Act should be increased compared to the level for infringements of commercial legislation in general.

According to the current guidelines, when calculating fines a basic amount is set for the gravity of a company's infringement of the law. The basic amount varies according to whether the infringement is considered less severe (DKK 10,000 to DKK 400,000), severe (DKK 400,000 to DKK 15 million) or very severe (DKK 15 million upwards). When calculating fines, the duration of the infringement, the company's turnover and aggravating and attenuating circumstances must be taken into consideration.

The Committee has examined the fines set by the courts since the law was amended in 2002 for companies' infringements of the Danish Competition Act. This examination is based on ten cases, of which nine relate to either vertical or horizontal restrictive agreements and one relates to abuse of a dominant position. Two of the cases have been settled by the Supreme Court of Denmark. Since 2002 there have also been ten cases which have been tried summarily. Of the total of these 20 competition cases, seven involved a trade association and in some cases its director or chairman being sentenced or issued with a fine. The sentences are discussed in more detail in section 8 of the report.

The Committee's investigations have firstly shown that the fines for illegal agreements that could be characterised as severe infringements of the Competition Act have been between DKK 400,000 and DKK

600,000. This applies both to so-called vertical agreements (agreements entered into between companies which are not competitors, such as an agreement between a supplier and a dealer) and to so-called horizontal agreements (agreements entered into between companies which are competitors). Fines of between DKK 400,000 and DKK 600,000 for these infringements are at the lower end of the fine scale for severe infringements, as stated in the notes to the amendment to the law in 2002 – around the line of separation between less severe and severe infringements.

Secondly, the investigations have shown that since the law was amended in 2002, there has not yet been a competition case that has been classified as very severe by the courts.

Thirdly, the investigations have shown that the highest level of fine set by the courts for a company related to abuse of a dominant position and was DKK 5 million, which was equivalent to 0.06 per cent of the company's turnover on the affected market. The courts considered the infringement to be severe, but found that there were attenuating circumstances.

Fourthly, in cases where the companies' turnover is publicly known, the investigations showed that the highest percentage fine issued by the courts to a company since the amendment to the law in 2002 was 1.1 per cent of the company's total turnover.

The Committee has also examined the fine calculation principles and the level of fines for companies' infringements of competition rules in 13 selected OECD countries (Belgium, Canada, Finland, France, Ireland, Italy, the Netherlands, Norway, Portugal, Sweden, Germany, the UK and the USA). The fine calculation principles and level of fines of the European Commission were also examined.

When comparing the information about the level of fines in other countries and of the European Commission with the Danish level of fines, it is important to note that the information about the other countries and the European Commission all relate to cartel cases. In Denmark, since the law was amended in 2002, sentence has only been passed in one case that can be classified as a cartel case, while the other Danish fines relate to other forms of severe infringement of the Danish Competition Act, such as price guidance and binding resale prices. In addition, fines for infringements of competition law in most of the comparison countries are imposed through an administrative system, while fines in Denmark are imposed through the criminal system. These circumstances make a direct comparison with Danish practice difficult, but the information does give an idea of the levels of fines in other countries.

The Committee's examination of the level of fines in other countries has shown that the largest fines imposed on a single company in a cartel case have so far been EUR 896 million (EU Commission), EUR 256 million (France), EUR 83 million (Germany) and around EUR 27 million (Italy). Among the Nordic countries, the largest fines imposed on a single company have so far been EUR 68 million (Finland), EUR 22 million (Sweden) and EUR 666,000 (Norway).

In half the cases in which the Commission has set fines in cartel cases, the fines have represented less than one per cent of the companies' turnover, while in the other half of cases, fines have ranged from one to ten per cent. In around 20 per cent of cases, the fine has represented between nine and ten per cent of the global group turnover. No information is available for the other countries on the level of fines relative to the companies' turnover.

Apart from Canada and the USA, the countries examined operate with a fine ceiling of ten per cent of turnover, which represents global turnover with some technical variations. All the countries examined calculate the fines according to the gravity and duration of the infringement, taking into account aggravating and attenuating circumstances in specific cases.

In the Danish cartel case that has been ruled on by the courts since the law was amended in 2002, the fine was DKK 500,000, which is equivalent to EUR 70,000. The case concerned a bid cartel between two companies, each of which had turnover of around DKK 45-50 million, and where one company reported having 32 employees. The prosecution authority claimed that the infringement should be classified as a very severe infringement, but the court found that the infringement could only be considered to be a severe infringement. The ruling is being appealed.

Level of fines for infringements of the Danish Competition Act by natural persons

In addition to bringing charges against a company, charges can also be brought against natural persons. As well as fines, the prosecution authority and the courts are also able to employ other sanctions against natural persons, such as disqualification from the company's management and Board according to the provisions relating to this in Section 79 of the Danish Penal Code. Such sanction options have not yet been used in Danish competition cases.

The notes to the current version of the Danish Competition Act do not contain guidelines on the setting of fines for natural persons.

The Committee has examined Danish sentencing practice for fines imposed on natural persons for infringements of the Danish Competition Act. The most recent practice from the Supreme Court of Denmark shows that the level of fines for infringement of the Danish Competition Act by a natural person in cases classified as severe infringements of the Danish Competition Act is DKK 25,000, which is equivalent to EUR 3,300. The Supreme Court made the following pronouncement in relation to this in the so-called Christmas tree and bus driver cases: *"In a case concerning the infringement of the Danish Competition Act by a company or an association, the fine imposed on the company or association may generally be considered to be the primary sanction against the infringement. When setting the fines for... in accordance with general fine calculation principles particular weight may be given to the gravity of the infringement and their portion thereof..."* The majority of fines are imposed on directors.

The Committee's investigations of the level of fines in the aforementioned 13 selected OECD countries also includes the fine calculation principles and the level of fines for infringements of the competition rules by natural persons. The European Commission was not covered by the investigation, as the European Commission is only able to impose fines on companies for infringement of the EU rules of competition. These investigations have shown, among other things, that in nine of the 13 selected countries, fines can be imposed on natural persons in cartel cases, while this is not possible in the other four countries. In cases of infringements of competition rules other than cartels, fines can be imposed on natural persons in six countries, while this is not possible in the other seven countries.

The highest fines set for natural persons in the countries that have this practice are EUR 500,000 (Germany), EUR 350,000 (the Netherlands) and EUR 80,000 (Ireland).

As is the case with fines for companies, in some of the countries, fines are imposed on natural persons through an administrative system. In addition, practice in other countries' cases relates to cartels; i.e. the type

of infringement that in Denmark would be classified as very severe infringements of the competition rules. The highest fines set in the other countries are therefore not directly comparable with the current Danish practice, but provide a picture of the level of fines for very severe infringements in these countries.

Requirement for culpability etc.

Fines for infringements of the Danish Competition Act can only be imposed if the infringement took place with wilful intent or gross negligence. This applies to companies as well as natural persons. In Denmark, infringements of the rules cannot be punished in the case of proven simple negligence.

The Committee has examined the culpability requirement in the aforementioned 13 OECD countries. A large proportion of these countries impose fines through an administrative system.

The Committee's investigations have shown that in three countries fines can be imposed on companies on the basis of an objective responsibility for infringements of competition rules; in six countries fines can be imposed when simple negligence is proven and in three countries there is a requirement for gross negligence (one country did not respond).

Among the nine countries able to impose fines on natural persons for cartel infringements, in three of those countries this can be done in cases of simple negligence, while one country requires gross negligence and three countries require wilful intent (two countries did not respond).

The culpability requirement that applies in the Danish Competition Act means that there are a number of infringements that cannot be punished in Denmark. However, the Committee has decided not to make any more detailed assessment of whether it would be appropriate to change the culpability requirement.

As indicated above, fines are imposed through an administrative system in most of the countries examined, where less evidence is required than in Denmark. In Denmark, fines are imposed through the criminal system, where the requirement is that the evidence proves beyond all reasonable doubt that the infringement has taken place and that the companies have demonstrated gross negligence or wilful intent.

1.4.1.1 Considerations of the Committee

Restrictive agreements and other illegal restrictive conduct often have significant detrimental effects on the economy – both for consumers and other companies. The detrimental effects reflect the fact that companies can gain a great advantage by entering into illegal restrictive agreements or through other illegal conduct.

The fines for infringements of the competition rules by companies and natural persons should be reasonable relative to the infringement. At the same time, the fines should be of such a size that on the one hand they deter companies – as far as possible – from actually setting out to infringe the competition rules and on the other hand intervene in relation to those who have actually infringed the rules in such a way as to ensure that the infringement is not worth it.

Fines for infringement of the competition rules by companies

From an economic perspective, a high level of fines will give companies a much greater incentive to comply with the Danish Competition Act. If the companies consider there to be a certain risk of being discovered, a high level of fines will thus reduce the anticipated benefit from infringing the rules. A high level of fines may be expected to have an effect on the incentive to seek leniency and thus strengthen the leniency rules and thereby the risk of discovery.

The Committee has established that the actual fines set for severe infringements are relatively low compared with the guidelines for calculating fines specified in the 2002 Act – both in nominal terms and in relation to the company's turnover. The current fine setting by the courts also appears to have a tendency to punish small companies to a comparatively greater extent than large companies.

As yet, no sentence has been passed in a case classified by the courts as being very severe, therefore it is not possible to assess the level of fines in such cases. According to current guidelines, the basis for calculating fines is a basic amount of at least DKK 15 million. Fines in the region of DKK 15 million will be extremely low compared with the European Commission's fines and low in relation to comparable European countries, although they will be high compared with Danish case law in general.

It is difficult to compare the level of fines in Denmark with the level of fines in other countries, since the setting of fines depends on the actual circumstances of specific cases, including the gravity and duration of the infringements. The size of fines also usually depends on the turnover of the companies involved on the affected markets, but there is no information available about this for the selected OECD countries which the Committee has used as a basis of comparison.

Although such a comparison is difficult, it can be established that the fines hitherto set in Denmark are low compared with the level of fines of the European Commission. Through a cautious attempt at a comparison with the level of fines in other countries, the Committee also considers that a fine calculated using the current fine calculation guidelines in a case relating to a very severe infringement of the Danish competition rules will probably be somewhat lower than the level of fines in Sweden, Finland and Germany, for example, where fines have been imposed of EUR 22 million, EUR 68 million and EUR 83 million respectively. The cases in question related to cartels.

A majority consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – considers the Danish level of fines to be low and that a significant increase in the level of fines could give companies a greater incentive to comply with the Danish Competition Act.

This majority, as well as **Karen Dyekjær**, appointed by The Danish Bar and Law Society and The Association of Danish Law Firms, adds that it is considered appropriate that when setting fines, more weight be given to both the company's total turnover and the turnover affected by the infringement than is currently the case.

A minority, consisting of six **members** – **Karen Dyekjær** appointed by The Danish Bar and Law Society and The Association of Danish Law Firms, **Sven Petersen** appointed by the Danish Chamber of Commerce, **Henrik Schultz** appointed by the Confederation of Danish Industry, **Susanne Dolberg** appointed by the Danish Bankers Association (who also represents the Danish Insurance Association, the Danish Mortgage Banks Federation and the Association of Danish Mortgage Banks), **Peter Andersen** appointed by the Danish

Federation of Small and Medium-Sized Enterprises (who also represents the Danish Construction Association and the Danish Mechanical and Electrical Contractors' Association) and **Charlotte Bigum Lynæs** appointed by the Danish Agriculture and Food Council – stresses that there have not yet been fines imposed for very severe infringements by companies and that the level of the highest fines has therefore not been tested by the courts. Since there is no maximum size of fine specified in the current guidelines, the minority also finds that there is no need to increase the level of fines for companies' infringements of the Danish Competition Act for this reason.

Fines for infringements of the Danish Competition Act by natural persons

For the same reasons as stated above for companies, an increase in the level of fines for natural persons will also provide these with a greater incentive to comply with the Danish Competition Act.

There are no current guidelines for setting fines for infringements of the Danish Competition Act by natural persons. According to current practice, the courts have not issued a fine in excess of DKK 25,000 to a person in cases relating to severe infringements.

As for company fines, it is difficult to compare the level of fines for natural persons in Denmark with the level of fines for natural persons in other countries, since the setting of fines depends on the actual circumstances of the specific cases. It can be established, however, that the fines imposed on natural persons in cases of severe infringements of competition rules are considerably lower than the fines imposed on natural persons in Germany and the Netherlands, for example.

A majority consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – considers that a significant increase in the level of fines for natural persons could provide a greater incentive to comply with the Danish Competition Act.

A minority, consisting of **six members** – **Karen Dyekjær** appointed by The Danish Bar and Law Society and The Association of Danish Law Firms, **Sven Petersen** appointed by the Danish Chamber of Commerce, **Henrik Schultz** appointed by the Confederation of Danish Industry, **Susanne Dolberg** appointed by the Danish Bankers Association (who also represents the Danish Insurance Association, the Danish Mortgage Banks Federation and the Association of Danish Mortgage Banks), **Peter Andersen** appointed by the Danish Federation of Small and Medium-Sized Enterprises (who also represents the Danish Construction Association and the Danish Mechanical and Electrical Contractors' Association) and **Charlotte Bigum Lynæs** appointed by the Danish Agriculture and Food Council – stresses that company liability is a prime consideration under Danish law and that the stigmatisation that could result from having a fine imposed is very intrusive for a natural person. This element of the Committee does not consider that an increase in the level of fines will provide a greater incentive for natural persons to comply with the Danish Competition Act. They also add that as well as fines, there are other types of sanctions for natural persons, such as in the form of disqualification.

1.4.2 Imprisonment

The Committee has assessed whether the introduction of powers to impose prison sentences would achieve better enforcement of the competition rules in cartel cases.

As part of the assessment of this, the Committee has discussed the characteristics of cartels and has also examined the damaging effects of cartels.

When considering the sanctions placed on cartels from an enforcement perspective, the Committee discussed the general preventive effects of the severity of the punishment as well as legal right aspects in relation to the consideration of the possible introduction of imprisonment.

This was considered in relation to how cartels are punished under current competition rules in Denmark. A comparison has also been made with sanctions for other forms of criminality committed for the gain of natural persons within otherwise legal commercial activity and which has significant characteristics in common with cartels.

The Committee has also examined how cartels are punished in a number of other OECD countries.

The Committee has reviewed the existing regulations on leniency in cartel cases and in connection therewith has discussed how the introduction of prison sentences could strengthen the leniency rules and increase the risk of discovery.

Finally, the Committee has examined the existing investigatory powers of the police in cartel cases and considered them in relation to the powers which the police have in cases of other forms of economic crime and would have if prison sentences were introduced in cartel cases.

The characteristics and damaging effects of cartels

Agreements and collaboration between companies at the same turnover level can have beneficial effects. This may include collaboration on research and development, for example, where the companies collaborate on the performance of certain functions or consortium agreements, where the companies are unable to perform the task individually and are therefore not actually in competition with one another. In contrast to such collaborations, there are no beneficial effects from the form of collaboration represented by a cartel, where the purpose is to restrict competition; see above.

Cartels typically have significant damaging effects on the economy both for consumers and for other companies. The damaging effects of cartels can be seen in the fact that they can restrict supply volumes, result in overcharges and restrict product and process innovation. Research in this area has shown that the average overcharges of a cartel are between 10 and 50 per cent. Cartels that represent an input to the production chain of other companies will further weaken the competitiveness of these companies.

The overcharges also result in a so-called deadweight loss, since the higher prices reduce demand. This means that as well as disadvantaging those consumers who have to pay a higher price, a cartel also disadvantages those consumers who would have purchased the product at the price the product would have been in the absence of the cartel, but who will not buy it at the cartel price. The products that are not manufactured under the cartel as a result of this lower demand therefore represent a further loss to the economy, as a result of the difference in production costs and prices in the absence of the cartel.

Cartels are very difficult to uncover and the injured parties are often unaware that the high prices or limited supply are the result of a cartel.

Some cartels are short-lived, while others can last for decades. The typical average lifetime of a cartel is between four and six years.

Cartels also vary in size. Some cartels can be large, while others can be of a more insignificant size. They can also include a large proportion of the operators in the market or only a smaller proportion. The damaging effects of a cartel are typically greatest with cartels of a certain size, but there can also be significant damaging effects of a cartel with only a few members on smaller markets.

A special form of cartel involves bid rigging. The damage of such a cartel directly affects the buyer, who is misled about the nature of the bid received. This form of conduct has been illegal since long before the introduction of the prohibition principle in Danish competition rules.

Since cartels carry out illegal conduct, they often do so secretly. The scope of actual cartel activity in Denmark – and in other countries – cannot therefore be determined, but there is nothing to suggest that the scope of cartel activity in Denmark is significantly different to that of other countries. Over the last ten years, European competition authorities have dealt with a number of cartel cases involving Danish businesses. There have also been a number of purely Danish cartels, including an electricity cartel and a plumbing cartel. The Danish State Prosecutor for Serious Economic Crime and the Danish Competition and Consumer Authority are currently investigating a construction cartel with regard to bid rigging.

General preventive effect

It is generally assumed that there is a certain general preventive effect of punishment. This particularly applies to crimes that are not committed spontaneously, but are organised and subject to systematic planning, which is the case with economic crime.

For the purpose of the Committee's assessment of whether the introduction of prison sentences could achieve better enforcement of the competition rules in cartel cases, the Research Office of the Danish Ministry of Justice has conducted a criminology investigation for the Committee. The investigation was based on existing literature on the preventive effect of the severity of the punishment for this type of economic crime. The conclusions that the investigation has been able to draw are that there is certain evidence that an increased risk of discovery has a general preventive effect, while there is no sufficiently reliable empirical basis on which to draw criminal policy conclusions relating to the general preventive effect of the severity of the punishment. The report emphasises that the lack of empirical proof of a general preventive effect of the severity of the punishment cannot be taken as proof that there is *no* such effect. It only means that it is impossible to know *whether* or not there is such an effect. The report does not provide grounds to assume that the general preventive effect of punishment in the area of competition is different from the effect thereof for other forms of economic crime.

Sanction options for other forms of economic crime

The forms of crime considered to constitute economic crime are infringements of law committed by natural persons who are members of company management where the infringements of law are committed for the gain of natural persons within otherwise legal commercial activity and have significant consequences for the economy. Cartels have these characteristics and can therefore be said to constitute economic crime.

A number of other forms of infringements of the law may also fall under this description. This applies for example to fraud, VAT and tax fraud, piracy, insider dealing, price manipulation, the ban contained in the Danish Marketing Practices Act on the illegal acquisition and disclosure of business secrets, as well as some forms of infringement of environmental legislation.

Common to current Danish legislation governing these other forms of economic crime is the fact that there is the option of both a fine and imprisonment. The maximum penalty varies between four and eight years' imprisonment, depending on the severity of the specific infringement. Experience shows that imprisonment is used in practice in the event of infringements of the rules in the aforementioned areas.

As can be seen in section 2.4.1, infringements of the Danish Competition Act are punished by fines. This applies to all types of infringement of the Danish Competition Act and thus also to cartels.

The damaging effects of cartels can be at least as great as for these other forms of economic crime. Since cartel activities are only punishable by fines, it can be established that the level of punishment in cartel cases is considerably lower than for other forms of economic crime with comparable damaging effects.

Sanction options in other countries for cartel members

The Committee has, for the purpose of its assessment of the issue of introducing prison sentences, examined the various systems of selected OECD countries with regard to the sanctions placed on cartels.

The investigation conducted showed that a number of other OECD countries are able to hand down prison sentences to natural persons who have been involved in cartels. Of the 13 countries covered by the investigation, Belgium, Canada, France, Ireland, Italy, Norway, the UK and the USA are able to hand down prison sentences in cartel cases. In Germany, imprisonment is possible in the case of cartels conducting bid rigging. Finland, the Netherlands, Portugal and Sweden do not have prison sentences in cartel cases. Prison sentences have been considered in Sweden, but instead the option of a so-called trading ban was introduced, which is a special form of revoking the right of a natural person to be a director of a company.

There is a considerable difference between the legal systems of the various countries, which makes it difficult to make a more detailed comparison. In any case, the investigation shows that in nine of the thirteen selected OECD countries, the possible punishment for cartel agreements includes imprisonment. The other four countries have, for various reasons, chosen not to introduce prison sentences at this time.

Leniency rules

Since 2007, it has been possible for natural persons and companies to apply for leniency in cartel cases in relation to the punishment for infringements of the Danish Competition Act. The conditions for leniency include a natural person or company not forcing others to be part of a cartel and ceasing to be a member of the cartel. In such a case, the natural person or company can reduce their punishment or avoid it altogether, provided that they assist the authorities in clearing up the cartel. The purpose of the leniency rules is to facilitate the exposure of cartels and to a certain extent also prevent cartels even being formed.

The ability to apply for leniency has been used comparatively rarely in Denmark up until now, however. Unlike in many other countries, there has not yet been a cartel case with an application for leniency. There may be many reasons for this. For example, this may be because of a fear of exclusion from future cooperation with other operators in the industry, if it becomes known that a person has cooperated with the authorities. Another possibility is that the risk of being discovered is thought to be low, as a result of the

limited investigatory options in cartel cases. A third possible reason could be that the sanctions on cartels under the current rules and practice do not provide an adequate deterrent. When those involved in a cartel are considering whether to apply for leniency, an important element is without doubt an assessment of what the consequences of discovery will be. If the leniency rules are to work in practice, the consequences of not applying for leniency must have a real deterrent effect. In principle, there is also the possibility that the rare application of leniency rules is the result of there being few active cartels in Denmark. This possibility does not seem likely, however, given that there are no indications of less cartel activity in Denmark than in other countries.

The fines imposed by the Commission on companies participating in cartels, in breach of the EU rules of competition, are typically very high. The level of fines is considerably higher than the fines imposed in Denmark for infringements of the Danish Competition Act. The maximum fines under the EU rules of competition are 10 per cent of a company's turnover and in practice fines are imposed across the entire range of 0-10 per cent. In terms of the ten highest fines so far imposed on individual companies in cartel cases by the European Commission, these fines have been between EUR 310 million and EUR 896 million, with some of these fines representing ten per cent of the company's turnover. Under the EU rules of competition, it has been possible for companies to apply for leniency since 1996. Companies have applied for and obtained leniency from the European Commission to a large extent. Under the EU rules of competition, the European Commission only has the ability to impose fines on companies and the system does not include sanction options for the natural persons responsible for the cartel activities. For the same reason, a natural person cannot apply for leniency for cartel activities that are in breach of the EU rules of competition. The EU rules do not prevent a Member State punishing a natural person with a fine or imprisonment.

Investigatory powers

An important element in the risk of discovery is the opportunities the police have to investigate cartels. In cartel cases, the police do not have the same investigatory powers as in cases of other forms of economic crime, where punishment includes the possibility of imprisonment. For example, in the area of competition, it is not possible to perform telephone tapping, property searches of non-suspects, surveillance, data reading, room bugging and provisional detention.

SØK's representative on the Committee stated that the lack of investigatory powers severely restricts the police's ability to discover and clear up cartels, because cartel agreements are often entered into verbally and because cartel activities by their nature typically take place in secret. By introducing prison sentences as a possible punishment, greater investigatory powers may be obtained as a side benefit, which may considerably increase the risk of discovery. The scope of improved investigatory powers and thus increasing of the risk of discovery depends on the length of the punishment on the introduction of prison sentences.

Extradition to and from other countries

The introduction of the possibility of prison sentences in the Danish Competition Act could mean the possible extradition of a natural person for prosecution or enforcement of a sentence to or from other countries which employ imprisonment as a possible punishment for cartels. This is not specific to natural persons who have been involved in cartels, but applies to a large number of infringements that are punishable with imprisonment. Extradition requires, however, that a number of more detailed conditions are fulfilled, including a general requirement for double criminality, in other words, the infringement must be a criminal offence in both countries.

1.4.2.1 Considerations of the Committee

Since cartels are entered into in order to restrict the competition that would otherwise have existed between those involved and with the intention of creating a higher price for the goods or services of the companies involved, and since cartels typically mean that the buyer pays a higher price for the goods or services while at the same time the quantities sold are typically reduced, the Committee unanimously agrees that cartels typically have significant damaging effects on the economy both for other companies and for consumers.

Since cartel activities by their nature typically take place in secret, the Committee also unanimously agrees that cartels are often very difficult to discover.

With regard to the punishment for infringements of the Danish Competition Act, the Committee also unanimously agrees that the company liability shall continue to be a prime consideration. There are, however, different views among the members of the Committee with regard to whether, in addition to the possibility of imposing fines on companies and natural persons, prison sentences should be introduced, thus increasing personal responsibility and whether this would strengthen the enforcement of competition rules in cartel cases. This is reported below.

A majority consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – finds that prison sentences should be introduced in cartel cases.

Part of this majority, consisting of **nine members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and **Peter Møllgaard** – finds, on the basis of an overall assessment, that the introduction of prison sentences could strengthen the enforcement of competition rules in cartel cases.

Three members – **Sysette Vinding Kruse**, **Claus Haagen Jensen** and **Michael Elmer** appointed by the Danish Judges' Association – find, based among other things on the criminology investigation, that there is no evidence that the introduction of prison sentences in isolation may be assumed to strengthen the enforcement of competition rules in cartel cases. **These members and the other nine members of the majority** believe, however, that it does not seem logical or consistent for there not to be prison sentences for infringements of the Danish Competition Act. It is possible in other areas, where there is generally damaging economic criminality thus allowing comparison with the Danish Competition Act – such as tax and the environment, as well as certain infringements of the Danish Marketing Practices Act. This in itself reinforces the introduction of prison sentences in cartel cases.

The majority has had similar views throughout with regard to the conclusions that can be drawn from the circumstances covered by the work of the Committee. In specific areas, individual views have been expressed. Those views of the Committee relating to the different areas are reported below.

Legal rights considerations

- **The majority** consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – does not believe that there will be any legal right issues with the introduction of prison sentences in cartel cases. This majority thereby requires the constituent elements of a legal classification to be described with the same precision as the description of the constituent elements of other types of severe infringements of the law. In relation to indictment according to a legal classification where imprisonment is a possible punishment, the prosecution authority is bound by the principle of objectivity. Conviction will – as in all other legal proceedings – depend on whether it is proven beyond a reasonable doubt that the accused has committed the alleged infringement, and that this has been done with the required culpability stipulated for the infringement of the law.
- The majority furthermore believes that there is nothing to prevent the pursuit of personal criminal liability at national level for natural persons involved in cartels, where the companies involved have had fines imposed at EU level.
- The majority of the Committee furthermore finds that no particular legal right issues result from the introduction of prison sentences for cartels possibly meaning that other countries may require the extradition of Danish citizens for prosecution. It is a general principle applicable to all serious economic crime, where imprisonment is a possible punishment, and a number of conditions must be met before an application for extradition can be fulfilled.

General preventive effect

- **Some of the Committee**, consisting of **nine members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and **Peter Møllgaard** – find it likely that prison sentences will have a certain general preventive effect. The effect depends partly on the risk of discovery and partly on whether the person possibly committing an infringement of the rules considers there to be a real risk of imprisonment. The introduction of prison sentences combined with an increased risk of discovery and targeted information about the risk of punishment may be considered to have a general preventive effect. There is therefore no basis on which to assume that the general preventive effect of punishment in this area will be different from the effect of punishment for other forms of economic crime.

- The introduction of prison sentences in cartel cases could increase companies' awareness of the importance of complying with the Danish Competition Act's prohibition of cartels and will indicate that cartels represent serious economic crime.
- Although company liability is a prime consideration, according to these members it is important that company liability is supplemented with personal criminal liability with regard to effective overall punishment of cartel infringement and in line with other serious crime committed by company management.
- Calculations have been made which show that to make it not worth carrying out cartel activity from an economic perspective, the fines should represent a significant portion of the companies' turnover and therefore be very high. More recent analyses show that fines at EU level, which can be up to ten per cent of a company's turnover, will probably not be sufficiently high to act as a deterrent. In cases of such severe infringements of the law as cartels, it is therefore important that in addition to fines, there is the possibility of imprisonment.
- These members furthermore find that the introduction of prison sentences for those involved in cartel activities could probably make it easier for the companies to ensure compliance with the Danish Competition Act among their employees. Prison sentences may therefore be considered to have a deterrent effect at all levels of companies, while large company fines may be considered to primarily have a deterrent effect in relation to the senior management of companies.

Other countries

- **Some of the Committee**, consisting of **nine members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and **Peter Møllgaard** – find that weight is added to this argument by the fact that in a number of other countries (including Belgium, Canada, France, Ireland, Iceland, Norway, Germany (for bid rigging), the UK, the USA and Austria) there is the possibility of prison sentences in cartel cases.

Leniency rules

- **The majority** consisting of **ten members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and two of the experts **Claus Haagen Jensen** and **Peter Møllgaard** – believes that the introduction of prison could strengthen the leniency rules and thus reduce cartel activity and increase the risk of discovery. The risk of imprisonment will increase the personal incentive to seek leniency – not least for those who have left the company in question, as well as new members of the management or Board of Directors. The incentive to avoid a prison sentence must be considered to be greater than the incentive to avoid incurring other risks by applying for leniency. The reason why the Danish leniency rules have so far not proved to be an effective method of exposing cartels is probably largely because the expected punishment has not been a deterrent.

- Two members (**Michael Elmer** appointed by the Danish Judges' Association and **Sysette Vinding Kruse**) are of the opinion that the current leniency provision in the Danish Competition Act increases the risk of discovery. However, these members do not find that the rule should also apply to imprisonment, but that the general leniency rules of the Danish Penal Code should apply.

Investigatory powers

- **The majority** consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – finds that a consequential effect of the introduction of prison sentences will be to give the police greater investigatory powers, depending on the length of the punishment. Such investigatory powers will increase the risk of discovery and strengthen enforcement and increase the general preventive effect of the legislation.

Other circumstances

- **The majority** consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – believes that the risk of companies refraining from entering into beneficial collaboration or agreements as a result of imprisonment being a possible punishment will be minimal. This is particularly true if the prison sentence is combined with an information initiative.
- **Some of the Committee**, consisting of **nine members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and **Peter Møllgaard** – believe that cartels restrict competition and thus innovation, productivity and growth. Stricter sanctions and better enforcement will therefore increase innovation and growth in Denmark.

A minority consisting of **five members** – **Sven Petersen** appointed by the Danish Chamber of Commerce, **Henrik Schultz** appointed by the Confederation of Danish Industry, **Susanne Dolberg** appointed by the Danish Bankers Association (who also represents the Danish Insurance Association, the Danish Mortgage Banks Federation and the Association of Danish Mortgage Banks), **Peter Andersen** appointed by the Danish Federation of Small and Medium-Sized Enterprises (who also represents the Danish Construction Association and the Danish Mechanical and Electrical Contractors' Association) and **Charlotte Bigum**

Lynæs appointed by the Danish Agriculture and Food Council – has the basic view that free competition is important in promoting innovation and growth among Danish companies. This naturally includes effective competition legislation that is widely known and consistently enforced. The minority finds, however, that there is no evidence that the introduction of prison sentences will strengthen the enforcement of competition legislation in cartel cases. Instead of scaring people with imprisonment, emphasis should be placed on avoiding infringements of competition rules by increasing the information and guidance initiatives for companies.

The minority has particularly emphasised the following:

There is no documentation that the introduction of prison sentences will strengthen the enforcement of the Danish Competition Act:

- The criminology investigation produced by the Danish Ministry of Justice has not documented that the introduction of prison sentences will have any general preventive effect at all. Neither is it documented here that the introduction of prison sentences will in itself be significant in terms of any incidence of cartel activity.
- There are no examples of cases of cartel activity where the framework for setting fines has been utilised fully, let alone inadequately. There is therefore no “sanction deficit”. Against this background, there is not considered to be a need to tighten the instruments of sanctions.
- No documentation has been produced that the introduction of prison sentences will strengthen the leniency system that was introduced in 2007. In contrast, it may be considered that the introduction of imprisonment as a sanction option will mean a considerable risk of weakening the leniency system, since it is far from certain that those involved in cartels or others, who under other circumstances would have reported the cartel and those involved in it, would do so if the consequences for the others could include imprisonment.
- Since both the Supreme Court of Denmark and the Director of Public Prosecutions, Denmark, have established that company liability is a prime consideration in cases relating to infringements of the Danish Competition Act, it is not reasonable or appropriate to introduce more severe punishments for individuals.
- The Danish Competition Act must interact with EU competition law. Since imprisonment is not a sanction option under EU competition law, the introduction thereof in the Danish Competition Act would be inexpedient.
- In two Nordic countries, with which Denmark normally compares itself, it has been decided in recent years – Sweden in 2008 and Finland in 2011 – not to introduce prison sentences in competition legislation. In Germany, imprisonment is only possible in the case of cartels conducting bid rigging.

Legal right issues:

- It is a concern from a legal right perspective to introduce stricter sanctions, if the aim of these is primarily to create new investigatory powers.
- It is a concern from a legal right perspective that the definition of cartel activity is not described with adequate precision.
- It is a concern from a legal right perspective that the category of potential criminal subjects is not precisely defined. This includes a lack of clarity in terms of who is affected by the sanction of imprisonment if the infringement is committed by an employee.
- It is a concern from a legal right perspective that the introduction of imprisonment as a sanction option could result in an obligation to extradite Danish citizens for prosecution in the USA, for example, and possible serving of a sentence in an American prison. There is no guarantee that

extradited Danish citizens will be treated in accordance with what is considered to be reasonable and correct in this context in Denmark.

Restricts innovation and growth:

- The introduction of prison sentences as a sanction option involves a significant risk of law-abiding innovative companies being scared away from entering into beneficial, growth-promoting, necessary and entirely legal agreements with other companies. This consequence will be intensified by the lack of opportunity to obtain an anonymous and binding advance notice from the Danish Competition and Consumer Authority.
- It is important that the Danish authorities stimulate and provide guidance on lawful innovation-promoting collaboration in a competitive market rather than scaring people with imprisonment.

One member – Karen Dyekjær appointed by The Danish Bar and Law Society and The Association of Danish Law Firms – believes that it is essentially a political question as to whether prison sentences should be introduced for cartel infringements, and finds herself unable to declare either for or against introducing the option of imprisonment in this area.

This member believes that the most important element in ensuring compliance with the Danish Competition Act is establishing and maintaining a competition culture, and with particular reference to the formulation of the terms of reference, stated that:

- there is insufficient documentation that prison sentences will increase the general preventive effect of the severity of the punishment in this area.
- the current leniency provision in the Danish Competition Act is intended to increase the risk of discovery and that there is no reason to expect that any introduction of prison sentences would further strengthen this rule.
- there is no documentation that the existing investigatory powers are inadequate for exposing possible cartels. The fact that the introduction of prison sentences will result in additional investigatory initiatives is not considered by this member in principle to be reason enough to introduce prison sentences and that
- there is no documentation that the introduction of prison sentences in those countries with such powers today has had a noticeable impact on improving the competition culture.

This member also stresses that:

- There are legal right issues with introducing prison sentences for an infringement that lacks a sufficiently precise description of the constituent elements and that completely lacks an analysis based on criminal law of the type and “fixpoint” of the constituent elements, for instance in relation to wilful intent and point of execution. There are no directly comparable forms of infringement where economic factors play an equivalent role, since the Danish Competition and Consumer Authority, in contrast to SKAT (The Danish Tax Administration) for example, is unable to provide a binding advance notice for a planned horizontal collaboration.
- It is also a concern that there is a lack of clarity with regard to who could be subject to a prison sentence in a given case; it is therefore the opinion of this member that the statement of the Director of Public Prosecutions, Denmark, of 1999 is not aimed at this kind of infringement. This member believes that prison sentences will primarily affect small and medium-sized companies that do not have real market power, while the effect in relation to larger companies can primarily be seen in, for example, difficult to handle extradition requests being submitted against Danish citizens. It is also

the opinion of this member that the lack of precision could entail a risk of preventing good, growth-promoting collaboration between small and medium-sized companies.

1.4.3 Recommendations of the Committee with regard to sanctions

A majority consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – recommends that the sanctions for infringement of the Danish Competition Act be tightened by significantly increasing the level of fines and by introducing powers to impose prison sentences in cartel cases.

This majority has found it appropriate to draw up recommendations on how the tightening of sanctions could take place in practice. The Committee's recommendations with regard to fines are given first, followed by the Committee's recommendations with regard to imprisonment.

1.4.3.1 Recommendations with regard to fines

For fines imposed on companies, it is recommended that the general principles currently applied to the setting of fines, under which fines imposed on companies are calculated taking into account the gravity and duration of the infringement as well as the company's turnover, be maintained. It is recommended that these principles for calculating fines be based, as they are today, on the notes to the Danish Competition Act.

With regard to the gravity of the infringement, it is recommended that the current division into less severe, severe and very severe infringements be maintained. It is recommended that specific examples of the type of infringements that can be classified as less severe, severe and very severe be given in the notes.

It is recommended that the amount used as a basis in the calculation of fines (basic amount), which is specified for the gravity of an infringement, be increased considerably. The basic amount for a less severe infringement can be, for example, up to DKK 4 million, while the basic amount for a severe infringement can be, for example, from DKK 4 million to DKK 20 million, and the basic amount for a very severe infringement can be, for example, DKK 20 million upwards.

It is recommended that it be specified in the notes that a significant increase in the level of fines is intended here. It is recommended that at the same time it is stipulated that the actual setting of fines should take into account a company's turnover, so that the fine for severe and very severe infringements represents a significant cost for the company relative to its turnover. The basic amount for a large company must therefore be larger than the basic amount for a smaller company committing an infringement of the same gravity and duration. The objective is for fines for the same type of infringement to have the same financial impact on both small and large companies. Turnover shall be the company's total turnover, in accordance with current guidelines. When setting an actual fine, the courts may also take into consideration the turnover of the goods or services to which the infringement relates.

The European Commission operates with a fine ceiling, whereby a fine can represent a maximum of ten per cent of a company's turnover. In Denmark, there is no tradition of setting a maximum level of fine in legislation, and the Committee has found no reason to recommend that an actual maximum penalty be specified in the Danish Competition Act. In order to ensure uniformity between the Danish and EU rules, it would be appropriate, however, for it to be defined more precisely in the notes to the rules that a company should not in principle have a fine imposed that exceeds ten per cent of the company's total annual turnover, taken as an average over the last three years, for example, prior to the date of the ruling. The courts shall nevertheless have the option to set fines in excess of ten per cent of a company's annual turnover where they consider there to be reason to do so in specific cases. The option of confiscation shall not be affected by this.

It is recommended that fines for natural persons be set in a way that reflects the gravity and duration of the infringement and at the same time is suitably severe for the person in question, who will typically be a high-ranking senior employee.

Fines for natural persons who have committed a less severe infringement may, for example, be at least DKK 50,000. Fines for a severe infringement may, for example, be at least DKK 100,000, while fines for a very severe infringement may, for example, be at least DKK 200,000.

Recommendations on the principles for increasing the level of fines for infringements of the Danish Competition Act

A **majority** consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Michael Elmer** appointed by the Danish Judges' Association, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – recommends that a significant increase in the level of fines for infringements of the Danish Competition Act take place according to the following principles:

- The basic amount specified for the gravity of the company's infringement is increased considerably. The basic amount for a less severe infringement can be, for example, up to DKK 4 million, while the basic amount for a severe infringement can be, for example, from DKK 4 million to DKK 20 million, and the basic amount for a very severe infringement can be, for example, DKK 20 million upwards.
- At the same time it is stipulated that the actual setting of fines should take into account a company's turnover, so that the fine for severe and very severe infringements represents a significant cost for the company relative to its turnover.
- That fines for natural persons are set in a way that reflects the gravity and duration of the infringement. Fines for natural persons who have committed a less severe infringement may, for example, be at least DKK 50,000. Fines for a severe infringement may, for example, be at least DKK 100,000, while fines for a very severe infringement may, for example, be at least DKK 200,000.

1.4.3.2 Recommendations with regard to imprisonment

A majority consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Michael Elmer** appointed by the Danish Judges' Association, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen**, **Peter Møllgaard** and **Sysette Vinding Kruse** – recommends that prison sentences be introduced for involvement in cartels.

This majority has found it appropriate to draw up specific recommendations for how prison sentences in cartel cases can be incorporated into legislation.

Constituent elements of a legal classification in the Danish Competition Act

The constituent elements of a legal classification in the Danish Competition Act can be formulated as that which forms part of a cartel agreement, which shall relate to the following:

- 1) prices, profits etc. for the sale or resale of goods or services,
- 2) restrictions on production or sales,
- 3) division of markets or customers or
- 4) bid rigging.

Culpability

It is recommended that it should only be possible to sentence a natural person to imprisonment if the infringement was committed with wilful intent.

Criminal subject

It is recommended that the criminal subject in a legal classification in the Danish Competition Act with imprisonment as a possible punishment should be the person involved in a cartel, i.e. the one who enters into an agreement etc. on the aforementioned severe restrictions on competition with companies at the same turnover level.

Since a cartel infringement can also arise through a trade association, for example, which encourages or otherwise helps companies at the same turnover level to enter into a cartel, it is recommended that the criminal subject also includes, as it currently does, the person who encourages or otherwise contributes (cf. Section 23 of the Danish Penal Code) to companies at the same turnover level entering into agreements on severe restrictions of competition.

Court proceedings only

It is recommended that it be defined precisely in the notes to the Danish Competition Act that cartel cases of such a nature that they could result in a prison sentence will always be dealt with through the court system without a previous hearing at the Competition Council, provided the prosecution authority considers that there are grounds on which to bring charges.

Possible punishment

Some of the Committee, consisting of **nine members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed

by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and **Peter Møllgaard** – recommend that the punishment for cartels of a grave nature, particularly as a result of the scope of the infringement or the damaging effects likely to result, may increase from a fine to imprisonment of up to one year and six months under a provision of the Danish Competition Act. Where there are particularly aggravating circumstances, especially as a result of the significant scope or damaging effects of the infringement, these members recommend that a prison sentence of up to six years be specified under a provision in the Danish Penal Code.

Sysette Vinding Kruse, Claus Haagen Jensen and **Michael Elmer**, appointed by the Danish Judges' Association, do not find at the present time any documentation for a need for a stricter possible punishment of up to six years' imprisonment in the Danish Penal Code. On the other hand, it cannot be denied that there is a need for a stricter possible punishment in the Danish Competition Act with imprisonment for up to one year and six months.

Leniency in relation to prison sentences

A majority consisting of **ten members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and two of the experts **Claus Haagen Jensen** and **Peter Møllgaard** – recommends that the current leniency rules of the Danish Competition Act be amended so as to also include prison sentences.

It is recommended that leniency only automatically include the first person to fulfil the relevant conditions in the Danish Competition Act. It is recommended that any leniency for subsequent applicants (no. 2, 3, 4 etc.) be determined by the courts in accordance with the general rules of the Danish Penal Code on the reduction of sentences.

Two members – **Sysette Vinding Kruse** and **Michael Elmer** appointed by the Danish Judges' Association – recommend that the leniency rules in Section 23a of the Danish Competition Act do not also apply to prison sentences, but that leniency should be subject to the rules on sentence reduction of the Danish Penal Code, specifically Section 82, nos. 9 and 10.

Recommendations with regard to possible punishments and leniency in cartel cases

A majority consisting of **12 members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Michael Elmer** appointed by the Danish Judges' Association, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and the three experts **Claus Haagen Jensen, Peter Møllgaard** and **Sysette Vinding Kruse** – recommends:

- That a legal classification in the Danish Competition Act with imprisonment of up to one year and

six months be formulated on the basis of the following model:

“Section 23...

Subsection. 2. The punishment for those who, in breach of Section 6, Subsection 1, or Article 101, Subsection 1, cf. Section 24, Subsection 1 of the Treaty on the Functioning of the European Union (TFEU), enter into cartel agreements, cf. Point 2, may be sent to prison for up to one year and six months, if the infringement is intentional and of a grave nature, particularly as a result of the scope of the infringement or the damaging effects likely to result. Punishment under Point 1 covers agreements, coordinated practice and agreements between companies at the same turnover level on:

- 1) prices, profits etc. for the sale or resale of goods or services,
- 2) restrictions on production or sales,
- 3) division of markets or customers, or
- 4) bid rigging.

Subsection 3...”

- That it is made clear in the notes to the provision that the word “scope” is intended to mean both the market extent of the infringement and the duration of the infringement, etc.

A **majority** consisting of **ten members** – **Michael Kistrup**, Chairman of the Committee, **Lisbet Dyerberg** appointed by the Ministry of Business and Growth Denmark, **Agnete Gersing** appointed by the Danish Competition and Consumer Authority, **Lennart Houmann** appointed by the Danish Ministry of Justice, **Eva Rønne** appointed by the Director of Public Prosecutions, Denmark, **Hans Jakob Folker** appointed by the Danish State Prosecutor for Serious Economic Crime, **Anita Vium** appointed by the Danish Economic Council of the Labour Movement, **Martin Salamon** appointed by the Danish Consumer Council and two of the three experts **Claus Haagen Jensen** and **Peter Møllgaard** – also recommends:

- That a provision in the Danish Competition Act with imprisonment of up to six years be formulated on the basis of the following model:

“Section XXX. Imprisonment of up to six years is the penalty for those who under particularly aggravating circumstances, especially as a result of the significant scope or damaging effects of the infringement, are guilty of infringement of Section 6, Subsection 1, cf. Section 23, Subsection 2 of the Danish Competition Act, or Article 101, Subsection 1 of the Treaty on the Functioning of the European Union (TFEU), cf. Section 24, Subsection 1 of the Danish Competition Act, cf. Section 23, Subsection 2.”

- That the current leniency rules of the Danish Competition Act be amended so as to also include prison sentences and that the wording of the provision be adapted to the final wording of the legal classification.
- That leniency only automatically include the first person to fulfil the relevant conditions in the Danish Competition Act, and that any leniency for subsequent applicants (nos. 2, 3, 4 etc.) be determined by the courts in accordance with the general rules of the Danish Penal Code on the reduction of sentences