



DANISH COMPETITION AUTHORITY

A large steel truss bridge spans across a body of water. The bridge has a complex lattice of steel beams. In the foreground, the water is turbulent, with white foam from a dam or weir. The sky is clear and blue. The overall scene is bright and clear.

Annual Report 2006



DANISH COMPETITION AUTHORITY

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Preface

The Annual Report 2006 gives an outline of the Authority's activities and cases in the past year.

2006 has been a very exciting year for The Danish Competition Authority. An amendment to the Competition Act has been finalised during 2006 and was put forward in February 2007.

The proposed amendment includes legislation on cartel activities by way of introducing a leniency programme and a number of enhanced enforcement tools. There is also a possibility for administrative fines under certain circumstances.

2006 also saw the creation of a governmental advisory committee on state aid. The Danish Competition Authority works as the committee's secretariat and conducts initial evaluations and assessments of initiatives. Procedural steps have been taken to ensure that the secretariat receives all new legislation for evaluation and assessment.

The Danish Competition Authority is secretariat for The Danish Regulatory Authority (DERA). One of the important tasks in the energy field is to enhance and support competitive development in the Energy sector. As something new in 2006 grid companies (electricity and gas) are required to prepare and make public monitoring programmes that demonstrate that they do not take advantage of their monopoly on grid to distort competition in the liberalised markets. DERA monitors these programmes to ensure equal competition.

Finally, I was appointed as new director general taking over from Finn Lauritzen. I took office 1 August 2007.

Agnete Gersing
Copenhagen, April 2007



Content

1	Company profile	7
1.1	Strategy.....	7
1.2	Organization	8
1.3	The Competition Council.....	8
2	Promotion of competition	11
2.1	Amendments to the Danish Competition Act	11
2.2	Infringements of the Competition Act	12
2.3	Decisions	12
2.4	Anticompetitive agreements.....	13
2.5	Abuse of dominance.....	14
2.6	Mergers and acquisitions.....	15
2.7	Other decisions.....	15
3	Public procurement and state aid	19
3.1	Public procurement in 2006.....	19
3.2	Public procurement and thresholds.....	19
3.3	The remedies directives	20
3.4	Stand still period in Denmark.....	20
3.5	Complaint cases and informative statements.....	20
3.6	Two cases on public procurement.....	22
3.7	State aid	23
4	Energy regulation.....	25
4.1	Tasks within individual sectors	26
4.2	New legislation.....	27
4.3	Internal monitoring programmes.....	27
5	Facts and Figures.....	31
5.1	User satisfaction	31
5.2	Projects	32
5.3	Key figures.....	33



1 Company profile

The Danish Competition Authority is an independent authority responsible for matters related to competition, energy regulation, public procurement and state aid. The Authority is the secretariat of the Danish Competition Council and the Danish Energy Regulatory Authority. The Danish Competition Authority performs a number of tasks in co-operation with the Directorate General for Competition of the European Commission.

1.1 Strategy

The Danish Competition Authority strives to create an effective market through competition in both the public and private sector.

Our mission statement is:

The Danish Competition Authority encourages prosperity and innovation through effective competition and effective, transparent markets

Our vision is:

Consumers should have access to a wide range of goods and services at the lowest possible prices in relation to quality

The Authority aims at being one of the most effective, competent and service-minded competition authorities among the OECD countries.

In its Globalisation Strategy the Danish Government has set a specific objective for competition in Denmark:

Competition in Denmark must converge to the level of the best OECD countries in 2010

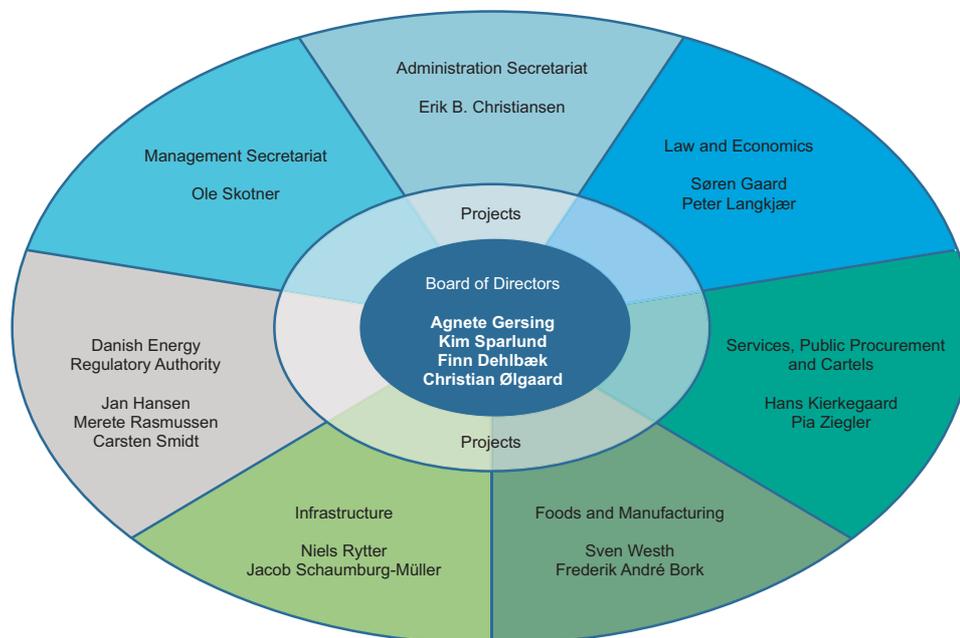
The Globalisation Strategy is an ambitious strategy for Denmark to advance in a multitude of fields. The strategy is called “prosperity, innovation and security” and consists of several elements to ensure a higher degree of competition and better access to Danish markets.

Among other things the strategy introduces a leniency-programme and focuses on public procurement. As a part of this, Danish local and regional authorities are required to explore the possibilities of public procurement to an even further extended degree than currently. The aim is to increase the number of public procurements carried through by Danish authorities and by this increase the general competitiveness of the Danish markets.

As in many other countries and in the EU, the Danish Competition Act is based on the principle of prohibition and includes merger control. The Authority publishes an annual Competition Report (Konkurrenceredegørelse), which measures competition in Denmark. The Competition Report also includes a number of indepth analyses on competitive conditions within different sectors and branches – public as well as private.

1.2 Organization

The Authority comprises three competition units, a unit dealing with legal affairs and economics, a unit dealing with energy regulation, an administration secretariat, and a management secretariat.



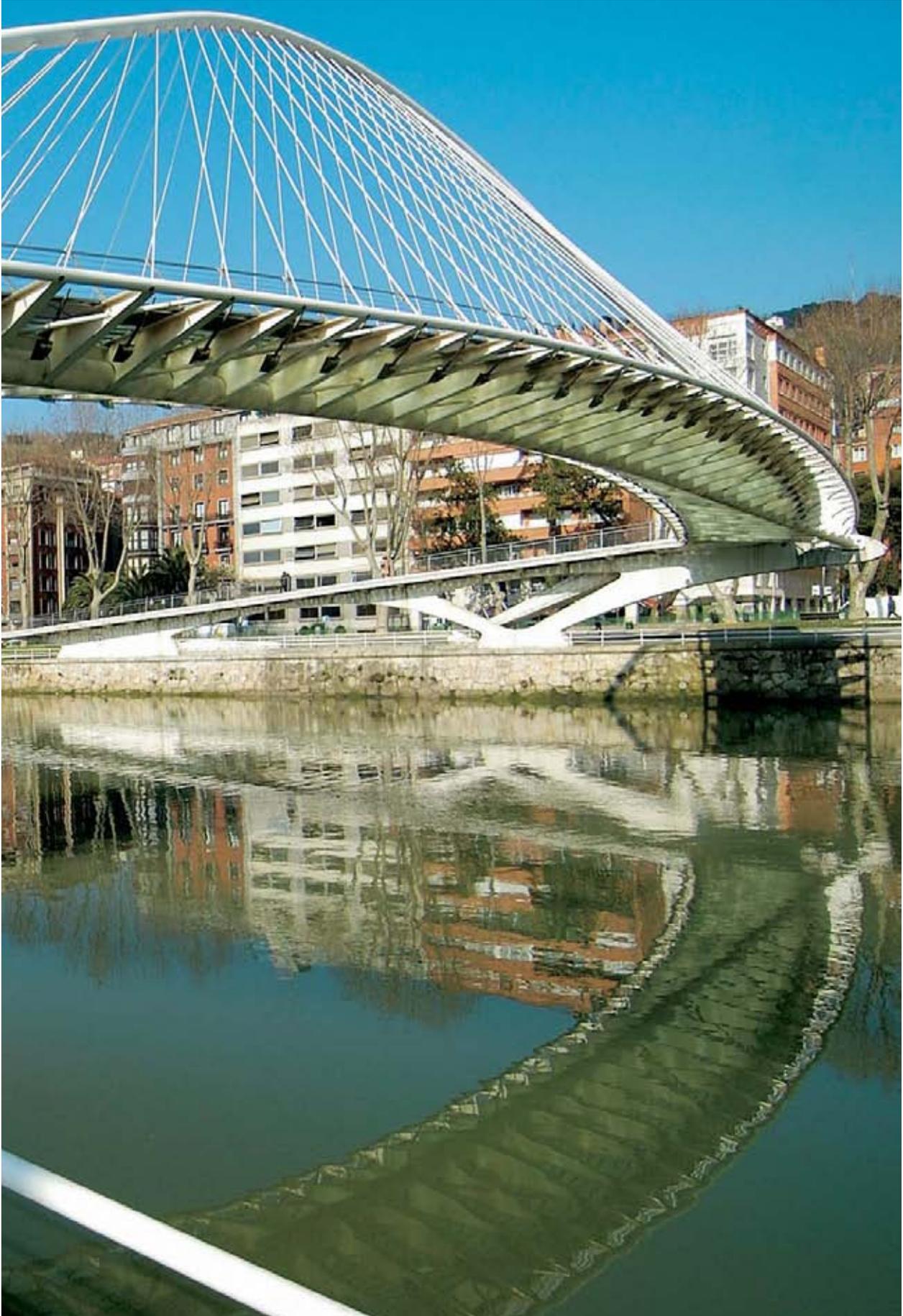
By year-end 2006 the Authority employed 143 persons. 66 worked with competition cases, 37 with energy regulation, 14 with public procurement, state aid and payment card regulation, and 22 worked with administrative tasks, management support and ministry affairs. The board of directors is made up of 4 persons.

1.3 The Competition Council

The Danish Competition Council has 18 members including a chairman and a deputy chairman. The Council represents a broad composition of knowledge of public and private enterprise, including legal, economic, financial and consumer-related issues.

The Competition Council decides on major cases on the basis of submissions made by the Competition Authority. The Council meets once a month. The Authority is responsible for the day-to-day management on behalf of the Council. The decisions and case administration of the Council and the Authority are not influenced by the Ministry or the Minister and are subject to appeal before the Competition Appeals Tribunal and subsequently to the ordinary courts.





2 Promotion of competition

2.1 Amendments to the Danish Competition Act

A number of proposed amendments to the Danish Competition Act have been well underway during 2006.

The proposed amendments contain a leniency programme for cartel cases. The programme introduces the possibility to grant participants in a cartel withdrawal of the charge or reduction of the fine that would otherwise have been imposed provided that the leniency applicants submit evidence of which the competition authorities were not already in possession. The first applicant has the possibility to be granted withdrawal of charge. Subsequent applicants fulfilling the conditions can be granted respectively 50 per cent for the first applicant, 30 per cent for the second applicant, and for the subsequent applicants up to 20 per cent reduction of their fines.

In order to qualify for leniency, the applicants must fulfil various additional criteria. Applicants must cooperate fully and loyally with the authorities during the investigation of the alleged cartel. Applicants must end their activities in the cartel immediately following their application and must not have forced others to participate in the cartel.

The proposed leniency programme will be administered jointly by the Competition Authority and the Public Prosecutor for Serious Economic Crime. In most cases it will be the Competition Authority who will grant a reduction of fines but only the Public Prosecutor can grant withdrawal of the charge. The handling of each leniency case will be done in close co-operation between the Competition Authority and the Public Prosecutor and no decision will be made prior to submitting the matter to the other party.

New investigative tools for the authorities are proposed. When on inspection, the Competition Authority is given access to inspect the content of bags, pockets and the like of relevant members of staff and of board of directors. It is also proposed that the Competition Authority can remove identical electronic copies of computers and other electronic media from the premises of the undertaking for further investigation.

The amendments also entail that the Competition Authority can end a case by issuing administrative fines. In cases concerning violation of the Competition Act, legal members of staff of the Competition Authority will by appointment by the Director of Public Prosecutions be able to institute criminal proceedings and conduct certain trials in which the accused pleads guilty.

The independence and impartiality of the members of the Competition Council are made statutory and thereby clarified.

Several amendments are aimed at the public sector and at strengthening the competition on public assignments.

In certain areas, recipients of services can choose between a public and a private supplier. The Competition Council can examine the conditions of payment laid down by the relevant public authority regarding the settling with a private supplier in order to ensure equal and fair competition between public and private suppliers.

An obligation to publish a notice on public contracts not covered by the EU procurement rules, i.e. contracts on goods and services below the thresholds and on annex II B-services, is also proposed as well as a general access for the Competition Authority to obtain information on public purchases.

Furthermore, it is proposed that complaints before the Complaints Board for Public Procurement are given a short suspensive effect as a supplement to the newly introduced “stand-still system”. During this period of



automatic suspension the Complaints Board is given the opportunity to decide whether the contract can be signed or the suspensive effect should continue until a decision on substance has been reached.

The proposed amendments have been put forward in February 2007 and are expected to come into force by 1 July 2007.

2.2 Infringements of the Competition Act

Cartels represent one of the most obstructive types of anti-competitive behaviour. Investigation and inquiry into such activities are therefore given top priority by the Competition Authority. Investigations into both cartels and other matters concerning infringement of the Competition Act are generally based on information received by the Authority from companies and the public by way of complaints, inquiries, etc. However, the Authority also collects information as part of its general market monitoring and case administration work.

By means of a court order the Competition Authority can conduct dawn raids (unannounced inspections) and gain access to the premises of an undertaking or association with the purpose of becoming acquainted with any information on the site that could reveal infringements of the Competition Act. In 2006 the Competition Authority conducted a number of dawn raids.

Not only actual cartel agreements infringe the Competition Act. Other anti-competitive agreements and behaviour, e.g. resale price maintenance/fixing and abuse of dominant position, have a significantly harmful impact on the relevant market and the consumers. Consequently, the Competition Authority also attaches great importance to the disclosure of and the investigation into such violations.

2.3 Decisions

The Competition Council decided 15 cases in 2006. The Competition Authority made 186 decisions. There has been a decrease in the number of decisions since 2004. However, the workload has not been reduced since cases are getting more complicated.

The Competition Council may review cases on its own initiative, upon notification or complaint, or cases, which are referred to it by the European Commission or other EU competition authorities. The Competition Council decides whether a complaint gives sufficient grounds for investigation and decisions including whether the investigation of a case shall be suspended temporarily or finally, that is, the Competition Council can dismiss to investigate complaints any further if it so wishes.

Competition cases 2004 - 2006*

	2004	2005	2006
Council decisions	12	16	15
Authority decisions	297	261	186
Concluded cases, total	309	287	201

* The basis of calculation has been changed as of 1 January 2007. Therefore, figures cannot be compared to previous years' annual reports.

Council decisions can be based upon both section 6 of the Danish Competition Act and Article 81 of the EC treaty or section 11 of the Danish Competition and Article 82 of the EC treaty. If a case decision is based upon Articles 81 or 82 the case decision will be submitted to ECN (European Competition Network Interactive Case Handling System). Submissions have been made since 1 May 2004.

Council decisions by application of Articles 81 or 82*

	2004	2005	2006
Article 81	1	3	1
Article 82	-	5	2
Article 81 and 82	-	2	2
Concluded cases, total	1	10	5

* Based on case submissions to ECN.

Decisions of the Council and the Authority can be appealed to the Competition Appeals Tribunal. 12 cases were decided by the Tribunal in 2006. Of these, seven were overruled or remitted for retrial. Decisions of the Appeal Tribunal can be brought before the courts. In 2006 the court system decided one case in relation to decisions by the Competition Council appealed to the Appeals Tribunal – the case was decided in favour of the Competition Council.

Average duration of case handling, Competition 2003 - 2006 (months)*

Council decisions			
2003	2004	2005	2006
10.2	13.1	15.6	11.6
Authority decisions			
2003	2004	2005	2006
5.6	4.1	4.2	5.7

* Figures are exclusive of cases submitted to the Public Prosecutor for Serious Economic Crime.

Some of the major cases decided by the Council, the Appeals Tribunal or the courts in 2006 are described below.

2.4 Anti-competitive agreements

The Danish High Court affirmed the ban on reporting of prices and profits

In November 2006 the High Court of Western Denmark affirmed the Competition Council's decision in a case concerning the clothing company Bestseller A/S' agreements with independent shops. The Court also held that Bestseller was to pay more than DKK 100,000 in legal costs. Bestseller is the owner of the clothing brands Vero Moda, ONLY, JACK & JONES and EXIT, among others.

The case began in 2003 when the Competition Council ordered Bestseller to change its agreements. The agreements required that the shops follow the recommended prices fixed by Bestseller (maintenance/fixing resale price). Bestseller complied with this order and the provisions were subsequently removed from Bestseller's agreements with the shops.

In addition, the Competition Council ordered Bestseller to change its IT system so that the independent shops do not report their sales prices of and profits on the individual products to Bestseller. This order was initially appealed to the Competition Appeals Tribunal which affirmed the Council's decision. Subsequently, the decision was appealed to the High Court, which also affirmed the Council's decision.

The High Court found that the connection between the terminated provisions regarding fixed resale price and the fact that Bestseller continued to require that the shops report their sales prices and profits for every single product was of such a nature that the reporting scheme was contrary to the provisions of the Danish Competition Act regarding anticompetitive agreements.

The Competition Authority was very satisfied with the judgment as it demonstrated that it is illegal for manufacturers to dictate the prices for their products in independent shops. In addition, the judgment demonstrated that manufacturers, which have previously recommended fixed prices, cannot implement systems that can be used to check if the shops follow the recommended prices.

2.5 Abuse of dominance

Elsam's sale of electricity

In 2006 the Competition Appeals Tribunal decided that the energy company Elsam A/S (today a part of DONG Energy) had abused its dominant position on the market for wholesale of electricity in Denmark west of the Great Belt by selling electricity at unreasonably high prices on the spot market at the power exchange Nord Pool.

This case was an indirect consequence of the Competition Council's decision of 30 November 2005 that Elsam A/S had sold electricity at unreasonably high prices for 900 hours during the period from 1 July 2003 to 31 December 2004. The Competition Authority found that Elsam A/S' conduct caused the electricity consumers (corporate and non-corporate) a loss of DKK 187 million during that period. Due to the nature of the case, a number of enterprises have supported the decision of the Competition Council in connection with the Competition Appeals Tribunal's review of the case.

Elsam A/S abused its position i.a. by entering bids in Nord Pool, which for some hours created bottle necks in the transmission cables between the western part of Denmark and Norway and Sweden. Elsam A/S' strategy entailed that for some hours Elsam A/S was able to charge unreasonably high prices because competition from Norway and Sweden on the electricity market west of the Great Belt was partly cut off.

At the same time the Competition Appeals Tribunal revoked the order regarding prices issued by the Competition Council on 30 November 2005 to Elsam A/S. The purpose of the order was to prevent Elsam from entering bids in Nord Pool which lead to unreasonably high prices in the western part of Denmark in the future.

The Competition Authority will now be reopening two cases regarding high electricity prices in 2005. The reason for reopening the cases is the fact that the Competition Authority has received a number of complaints regarding Elsam A/S' conduct in 2005 and the conduct of the largest eastern Danish electricity producer Energi E2 in 2005. Both companies are a part of DONG Energy today.

In order to ensure a well-functioning electricity market, the Competition Authority will also be discussing the future market conduct on the electricity market with DONG Energy.

Arla Foods stopped illegal trade with competitor

In February 2006 the Court in Århus fined Arla Foods A.m.b.A. DKK 5 million for abuse of its dominant position. The nature of the abuse was Arla's having paid one of its customers – Metro – a sum of money to discontinue trade with one of Arla's small competitors, the coop dairy Hirtshals Andelsmejeri.

The case began in October 2003 when Hirtshals Andelsmejeri contacted the Competition Authority. The coop dairy had just concluded an agreement with Metro which was cancelled again after only a few days of deliveries. Hirtshals Andelsmejeri suspected that Arla was behind the cancellation.

Consequently, the Competition Authority made some unannounced inspection visits where documents were found which i.a. proved that Arla had paid Metro a so-called anniversary contribution on the condition that Metro removed Hirtshals Andelsmejeri's products from its product range.

Following further investigation, the Competition Authority filed a report against Arla in March 2004 with the Public Prosecutor for Serious Economic Crime, which in the spring of 2005 decided to bring charges against Arla.

The judgment which has now been handed down is interesting for several reasons. For one, it is the first judgment concerning violation of the prohibition against abuse of dominance. It is also the first judgment handed down after the Danish Competition Act was amended in 2002. The amendment had the purpose of providing more rigorous provisions as to the penalty for violations of the Danish Competition Act.

2.6 Mergers and acquisitions

Merger control was incorporated in the Danish Competition Act in 2000. In 2006, the Competition Authority handled eight merger cases.

The threshold value for mergers in Denmark is DKK 3.8 billion. The Competition Act includes a special provision on mergers not to be found in any other country. According to this provision, the parties may obtain a preliminary approval, which is not published until later, at an agreed time. This provision may in some negotiations be expedient for the parties – and is naturally only applied in cases where it is quite evident that the merger shall have no impact on competition.

Establishment of distribution company for free newspapers

In August 2006 the Competition Council approved the establishment of a joint venture between Post Danmark and 365 Media Scandinavia. The collaboration between Post Danmark and 365 Media Scandinavia concerned a distribution company for distribution of direct mail before 7 a.m.

The establishment of the joint venture was approved after Post Danmark and 365 Media Scandinavia had both entered into material commitments which eliminated the competition concerns to which the collaboration would otherwise give rise. Without the commitments the collaboration would enhance Post Danmark's dominant position on the market for distribution of direct mail and thus restrict competition considerably.

The commitments ensured that Post Danmark and the joint venture would be kept separate from each other and that Post Danmark would not give the joint venture special advantages or exchange services with it on terms that would restrict competition on the market. This was i.a. realised by ensuring that Post Danmark would not be able to transfer special resources such as keys and customer databases to the joint venture.

The commitments also ensured that Post Danmark would not be able to use the joint venture to carry out activities which by virtue of Post Danmark's dominant position would be contrary to the Danish Competition Act. This was i.a. done by ensuring that the joint venture would comply with certain minimum prices and would only be able to conclude short-term agreements with customers.

2.7 Other decisions

The Competition Council may issue orders for the termination or repayment of aid granted from public funds, which has been granted to the benefit of specific forms of business activities, and which is not legitimate according to public regulation. This provision should be considered a supplement to the EC state aid rules. As a result, the Competition Council can intervene if the aid is not legal pursuant to statutory regulation and if it distorts competition. This also applies if public authorities sell or let land, commercial tenancies, etc. below market prices.



In principle, the Danish Competition Act strives to achieve the greatest equality possible between private and public business activities. If anti-competitive practice is a direct or necessary consequence of public regulation, the provisions of the Act do not apply. The assessment of this - which entails putting alternative legislation above the Competition Act - can only be made by the relevant minister answerable to the Danish Parliament. The minister responsible and the Minister of Economic and Business Affairs must motivate governmental restrictions on competition questioned by the Competition Authority.

The county of Funen granted anti-competitive aid to Internet portal

In September 2006 the Competition Council decided that the county of Funen had granted anti-competitive aid to Portal Fyn ApS in contravention of section 11a of the Danish Competition Act. The aid was granted for the establishment and development of the regional portal, fyn.dk, which is an Internet portal holding all information, public as well as commercial, about Funen.

This was the first time the Council issued an order for repayment of illegal aid.

The Council found that the aid was illegal because the county of Funen did not make sure that the aid was only used for the non-commercial portal pages to which the county of Funen could grant legal aid.

The fact that the aid granted by the county of Funen exceeded Portal Fyn's costs for developing the non-commercial pages of the portal meant that Portal Fyn was overpaid for the task and thereby, the county of Funen indirectly paid for the development of a part of the commercial pages of the portal. Consequently, the county of Funen granted anti-competitive aid to Portal Fyn which obtained an illegal financial advantage of DKK 46,542. On that basis the Competition Council decided that Portal Fyn was to repay the illegal and anti-competitive aid of DKK 46,542 to the county of Funen.

Several facts were of decisive importance to the Council's conclusion. First, the project was not subject to sufficient competition. Consequently, the county of Funen chose Portal Fyn for the job without inviting tenders for it. Second, the county of Funen did not ensure that the aid was used only for establishing and developing the non-commercial portal pages. That fact previously led the state county of Southern Jutland, which is the supervisory authority of the county of Funen, to conclude that the county's aid to Portal Fyn was illegal.

The Competition Council wants competition on maps and geodata on equal terms

In June 2006 the Competition Council contacted the Minister for the Environment in connection with the anti-competitive effects of the pricing of the products of the National Survey and Cadastre.

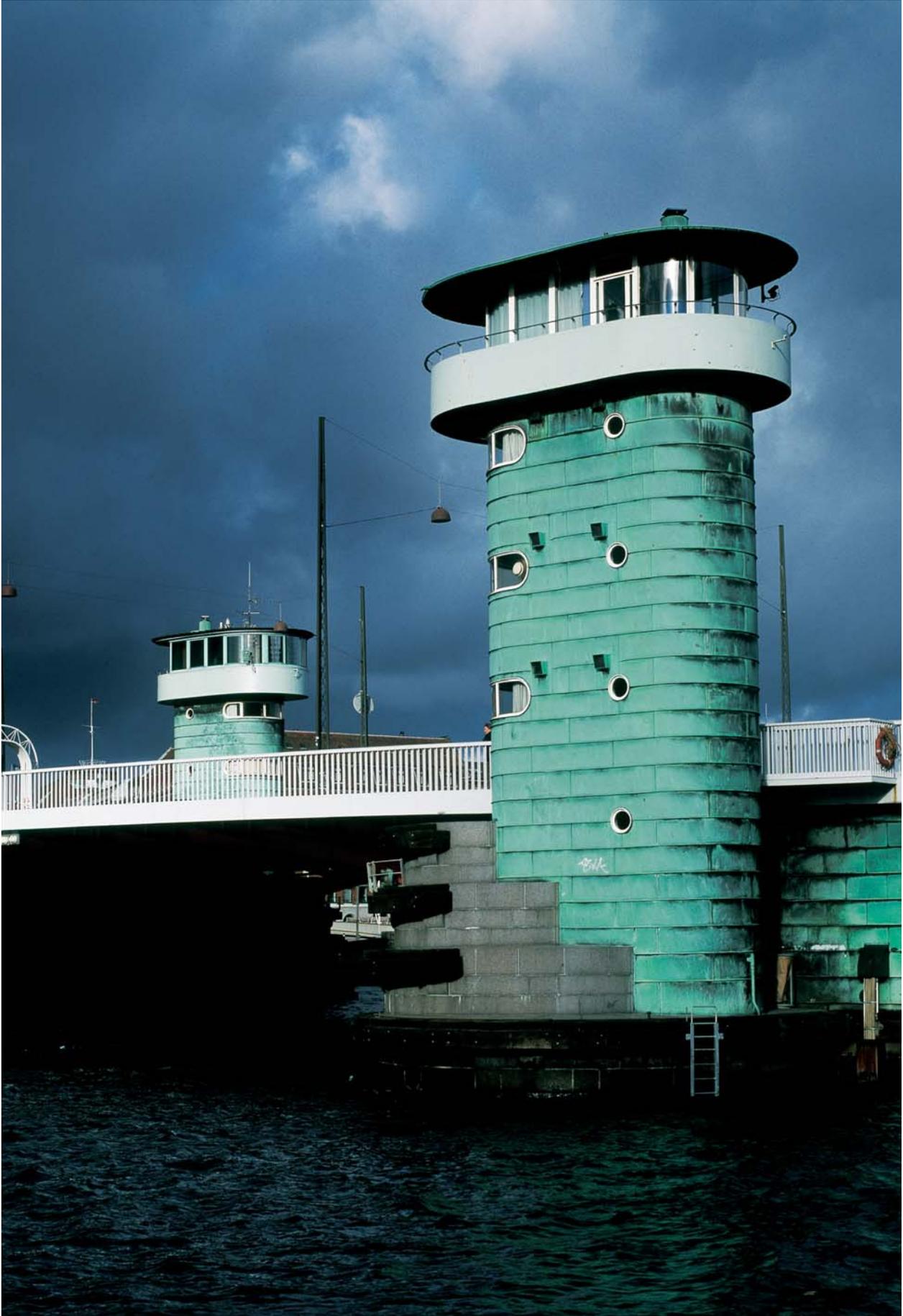
The National Survey and Cadastre is an important player on the market for maps and geodata. The National Survey and Cadastre is in charge of surveying, mapping and the sale of maps and geodata. The rules governing the pricing of the National Survey and Cadastre are anti-competitive as a number of the products receive aid granted from public funds, thus distorting competition in relation to the private players on the market.

Therefore, the Competition Council recommended that the prices of the National Survey and Cadastre should cover its costs so as to ensure equal competition compared with the other suppliers on the market. At the same time the National Survey and Cadastre was to sell its products on the same terms to all its customers. No combination discounts were allowed on products subject to competition and products not subject to competition. If special areas were to receive aid from public funds, such aid was to be granted on the basis of analyses documenting the necessity of the aid.

The Council recognised the advantages of a common standard for the maps produced and noted that effective data capture could be secured by ensuring that public bodies were required to report all changes in geographical basic data to common public databases. All players, public as well as private, should be granted easy access to such databases.

As the rules governing the National Survey and Cadastre are subject to public regulation, the Competition Council could not intervene directly. Instead the Council made use of the possibility to contact the Minister for the Environment.





3 Public procurement and state aid

3.1 Public procurement in 2006

2006 has proven to be an interesting year in terms of public procurement. In the next sections a few of the important events and challenges the Danish Competition Authority has dealt with during the year are described.

Firstly, as mentioned previously in chapter 1 the Danish Government has envisioned its ambitious Globalisation Strategy for increased competition in Denmark. One of the aims is to increase the volume of public procurements, regardless of the EU thresholds, as the public sector is a major player on Danish markets.

Secondly, the remedies directives have been on the agenda.

Thirdly, the practice as laid down by the European Court of Justice regarding a stand still period after the execution of a public procurement procedure has been implemented in Denmark.

Fourth and finally, the Danish Competition Authority has finished 42 complaint cases concerning possible infringement of the public procurement legislation. In addition to this a total of 96 informative statements have been issued from the Danish Competition Authority.

Denmark has implemented directives 2004/17 and 18 EC completely. In addition to the requirements in the directives, contacting authorities are required

- To ask for a solemn declaration on the size of public debts the tenderer has. As a main rule a contracting authority cannot sign contracts with a tenderer that has a debt of more than 100.000 DKK to the public.
- To inform the tenderers where to obtain information regarding taxes, environmental issues and working environment.

3.2 Public procurement and thresholds

The Government's Globalisation Strategy focuses on increasing the competition on the Danish markets. One of the initiatives in this strategy is to introduce a set of thresholds for when public entities are required to publish planned acquisitions be it goods or services. The threshold equals approximately 67,000 EUR. Whenever the contract value of the acquisition reaches the EU thresholds the EU rules engage. A major adjustment to the current rules is that the obligation to publish a planned acquisition applies to both Annex II A and B services. Since the strict procedural rules in the EU directive only apply to Annex II A services, the new rules requires publication of the Annex II B services as well, as soon as the 67,000 EUR threshold is reached.

The new rules – as part of the amendments to the Danish Competition Act mentioned previously in chapter 2 – have been put forward in Parliament in February 2007 and are expected to come into force by 1 July 2007.



3.3 The remedies directives

In May 2006 the EU Commission proposed a revision of the remedies directives. The aim of the proposition is to strengthen the national complaint bodies in terms of remedies for possible infringements of the public procurement rules.

One of the initiatives discussed – and agreed upon – was the introduction of a stand still period. The stand still period refers to the period from when the winning tenderer has been identified until the time when the contract can be signed.

Another initiative is to combat illegal direct award of contracts.

The EU Council has considered the proposal since May 2006, and the proposition is currently being debated in the EU Parliament. The EU Parliament is expected to present a position in April 2007 and the German chairmanship is expected to work towards an agreement before it steps back by mid 2007.

3.4 Stand still period in Denmark

From 1 October 2006 a governmental order has introduced a formal set of rules that will secure that practices from the European Court of Justice in terms of stand still are implemented in Denmark.

The order consists of two elements. First of all Danish official bodies is required to ensure a simultaneous notification to bidders and interested parties whenever a decision on contract awards are made.

Secondly, a stand still period has been introduced that requires the contracting authority and the winner of the tender to postpone the signing of the contract for limited period of time.

The stand still period is defined as 10 days calculated from the time of the notification to all of the bidders.

To ensure the knowledge of this clarifying set of rules the Danish Competition Authority has issued a brochure that explains why and how the contracting authorities must handle the stand still period.

3.5 Complaint cases and informative statements

Whenever a tenderer has reason to believe that a contracting authority has violated public procurement legislation, a complaint can be submitted to the Danish Competition Authority.

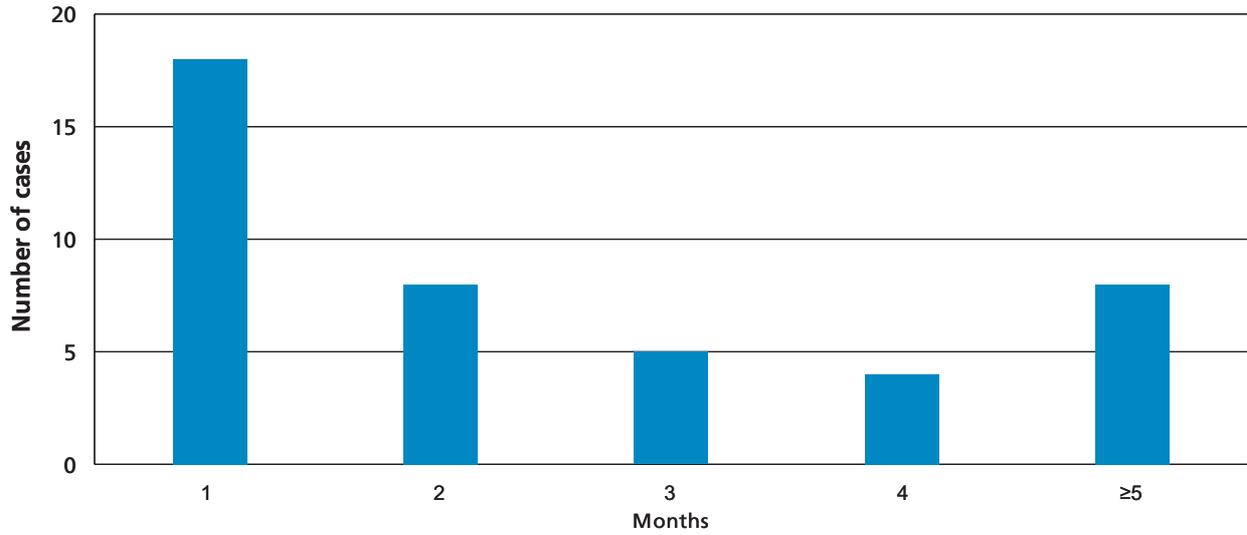
The complaint system offers the plaintiff an easily accessible, rapid and inexpensive way of dealing with the procurement problems. On receipt of a complaint, the Danish Competition Authority contacts the contracting authority in question, examines the case and presents solutions for potential violations. In the majority of the cases, this results in the infringements being remedied and the contracting authority complying with the rules.

The statements made by the Danish Competition Authority have no judicially binding effects. They cannot be appealed and the party the statement goes against is not obliged to obey the statement. As such this informal complaint setup is very different from the courts. If the violation is big enough the Danish Competition Authority may consider bringing the case to the Complaints Board for Public Procurement which is the formal court-like complaint body. A plaintiff may decide to bring a case before the Complaints Board without the support of the Danish Competition Authority if he so wishes.

The Danish Competition Authority rarely deals with cases where a contract has already been signed and it never deals with claims for damages.

In 2006, the Danish Competition Authority issued recommendations in 42 complaint cases. The average handling time from reception of the case to closing the case was 72 days.

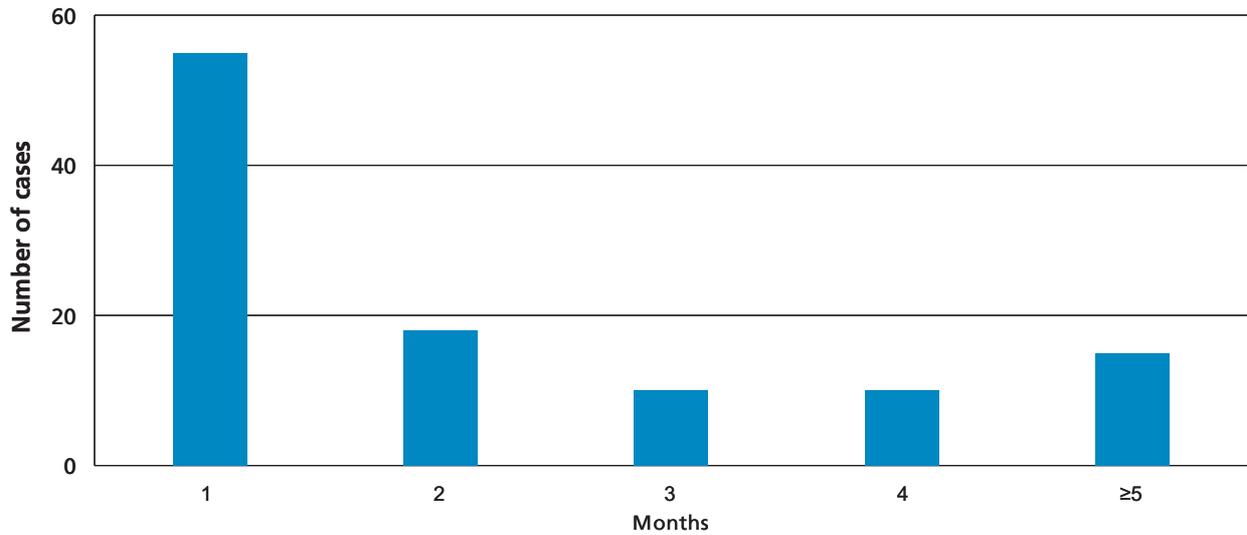
Number of complaint cases sorted by handling time



Written informative statements are limited to questions of general interest concerning law interpretation. The Danish Competition Authority has finished 96 statements in 2006.

Average duration of case handling 2002–2006, Procurement (days)

Informative statements sorted by cases handling time



Complaint cases				
2002	2003	2004	2005	2006
81	51	123	60	72
Informative statements				
2002	2003	2004	2005	2006
72	27	33	33	63



In addition to the informal problem solving system, the Competition Authority is responding promptly to procurement questions submitted by the contracting authorities, tenderers and advisors via a telephone hotline service.

3.6 Two cases on public procurement

Pre-procurement counseling

In one case the Danish Competition Authority received a complaint over a regional municipality, M, after the completion of a public procurement procedure. The plaintiff argued that a specific tenderer, A, should be excluded from tending, since A had helped M specifying the requirements for the procurement.

A had prior to the public procurement procedure produced a number of sketches as a part of the documentation for the procurement. In order to produce the sketches, A had devised a hydraulic model for the calculation and projecting. The model was not available to the other tenderes since it was made by and for A itself.

The rule in question was therefore the principle of equal treatment.

The Danish Competition Authority initially stated that the contracting authority must uphold the principle of equality. When a contracting authority prior to a public procurement procedure has received counsel from an entity that later on is a tenderer, this entity must be disqualified if the initial counsel has resulted in a competitive advantage that preclude equal treatment of the other tenderers.

After deliberating the facts in the case the Danish Competition Authority stated, that the description of the procurement was not designed for A alone. Secondly A had not been a part of the determination of the selection or award criteria. Thirdly the contracting authority had issued a prior information notice and by this informed all interested parties of the public procurement as early as possible.

Regardless of this the Danish Competition Authority concluded that the projecting models must be considered part of the project as a whole. For this reason A had achieved a competitive advantage over the other tenderes that constituted an infringement of the principle of equality.

In the case a question was also raised concerning the assessment model used by M. The assignment should be awarded to the tenderer with the economical most advantageous tender. In addition to “price” M had decided to assess the tenders in relation to three qualitative criteria. The relative weighting was however only stated for the three qualitative criteria – not the price.

This assessment model was considered dubious as the directive art. 53(2) states that the contracting authority must specify the relative weighting between the criteria applied for finding the economically most advantageous tender. The Danish Competition Authority therefore recommended that M refrained from using this assessment model in the future.

Informative statement on possibility to request samples from tenderers

In another case the Danish Competition Authority was asked for an informative statement on to what extent the contracting authority can demand samples in a public procurement of medical equipment.

The request was submitted by the industrial organization MedicoIndustrien. MedicoIndustrien could tell of cases where tenderers were asked to deliver samples valued at EUR 19,000. Despite these high costs the tenderers could not expect to reuse the samples or to be compensated for the cost after the public procurement procedure was finished.

The Danish Competition Authority stated initially that according to the directive art. 48(2)(j)(i) samples can be requested when the contract concerns product supply and for the assessment of the technical abilities of the operators.

It was furthermore stated by the Danish Competition Authority that although it does not appear explicitly in the directive the contracting authority must be able to ask for samples for the purpose of awarding the contract as well.

When a contracting authority makes a request for samples it must conform to the general principles that derive from the EC Treaty. In this situation it is the principle of proportionality in particular that is in question.

When assessing if this principle is upheld the contracting authority must consider the suitability, the necessity and the width of the request for samples for the purpose of awarding the contract.

For this reason the Danish Competition Authority stated that whether a request for samples is in accordance with public procurement law is a specific assessment, and a request for very expensive samples could well infringe the principle of proportionality.

3.7 State aid

In line with the Commission's increased focus on state aid, Denmark has in 2006 made preparations for the establishment of a governmental advisory committee on state aid – the State Aid Committee. The committee consists of the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Finance and the Ministry of Economic and Business Affairs as well as the ministry seeking advice from the committee. From the beginning of 2007 the Danish Competition Authority works as the committee's secretariat and performs the initial evaluations and assessments of the initiatives.

In connection with the committee, procedural steps have been taken to ensure that all new legislation will be sent to the Danish Competition Authority. Thus, all new legislative steps that might encompass state aid have to be presented to the committee which gives its opinion and advice on the legislation. The set up obliges all ministries to consult the secretariat before adopting new legislation that could involve state aid. The ministry responsible for the legislation remains responsible for the correct application of state aid rules and procedures.

Not only are ministries obliged to consult the committee they also receive substantial benefits from the setup. All levels of the central administration can obtain advice and service on state aid assessment, they can have all new legal drafts screened and assessed, advice and service in relation to contacting the Commission services can be obtained, and ministries can obtain advice and service on notification through SANI and the herewith related procedures. The secretariat has also produced a manual on state aid for case handlers.

As the set up requires early considerations on state aid, even in the design stage, the structure should prevent the emergence of cases regarding unlawful and not notified state aid in Denmark in the future.

The work of the State Aid Committee has in the first three meetings consisted of giving advice on 8 cases of a certain volume on state aid, and the committee has discussed state aid policy initiatives and caselaw from the European Court of Justice. In addition to this the secretariat has informed the committee on a number of smaller cases that the secretariat has assisted ministries with within the first four months of 2007.





4 Energy regulation

The Danish Energy Regulatory Authority (DERA) is an authority independent of any sector interests and makes decisions independent of the Minister. The seven members of DERA are appointed by the Danish Minister for Transport and Energy for a term of four years - the present term expires end 2007. The members represent expertise in legal, technical, economic, environmental and consumer matters. The Danish Competition Authority (DCA) is secretariat for DERA.

The overall work of DERA involves supervising the monopoly companies in the energy sector. The Authority must help to ensure that consumers - households and enterprises - are charged with reasonable and transparent prices within reasonable, uniform and transparent terms of supply.

DERA regulates the district heating sector (prices etc.) and the infrastructure of the electricity and gas sectors as well as access to this infrastructure. For supply obligation electricity companies, the Authority is also responsible for price control, partly on the basis of requirements for security of supply. Furthermore, the Authority carries out benchmarking of the regulated grid enterprises.

If it is a matter of transparency, DERA regulations can also apply for areas subject to competition, e.g. publication of prices and terms.

Average duration of case handling, Energy 2003 - 2006 (months)

DERA decisions			
2003	2004	2005	2006
5.8	7.7	7.8	10,2
Secretariat decisions			
2003	2004	2005	2006
3.7	4.3	4.2	3,5

DERA's competence is laid down in the three energy supply acts - the Electricity Supply Act, the Natural Gas Supply Act and the District Heating Supply Act - as well as the energinet.dk Act.

The DCA prepares cases for decision by the Authority and makes decisions in accordance with the practices and guidelines stipulated by DERA.

Production figures, Energy 2003 - 2006

	2003	2004	2005	2006
DERA decisions	57	57	54	41
DERA informations	24	24	21	17
Concluded cases (DERA and Secretariat)	714	873	797	877



4.1 Tasks within individual sectors

The electricity sector

The Electricity Supply Act is the foundation for regulation of the electricity sector. The Act lays down the framework of how to achieve consumer protection, environmental concerns and security of supply in the liberalised electricity market. The key focus of the Act is to promote efficiency in the electricity sector, by partly using benchmarking. The sector comprises about 130 enterprises.

Liberalisation of the sector has necessitated a new company structure in the sector. Today, therefore, enterprises are divided into companies for power generation, grid, system operation, transmission, and trade. At the same time, a number of new players have appeared on the market.

DERA's responsibilities are limited to the parts of the sector where electricity supply companies have been granted a monopoly. These are grid and transmission companies. Grid companies are subject to special regulations. If a company is part of a larger group, the company must be separated as an independent unit in order to apply appropriately to regulation. Regulation covers regulation of the companies' prices and thus their income, control of their new investments and measures to ensure open access of generator companies to the grid. The regulation covers both the distribution grids and the regional transmission grids.

Finally, DERA's responsibilities also include suppliers of electricity with a supply obligation to deliver electricity to customers not using the open market, households and smaller enterprises. These suppliers are subject to maximum prices, calculated on the basis of the market prices. The regulation is described in greater detail under activities in 2005.

The natural gas sector

The Natural Gas Supply Act is the foundation for regulation of the natural gas sector. Regulation covers transmission, storage and the distribution companies. There are only few companies in the individual sub-markets. The sector accounts for a total of ten companies.

DERA supervises that the companies supply gas at reasonable prices and on reasonable terms. This applies for enterprises which have been granted a supply obligation to supply customers who do not want to change to a new supplier of gas. The Authority also supervises access to the transmission grid and sees that access to gas storage facilities is granted at reasonable prices and on reasonable terms.

Finally, the natural gas distribution companies are regulated. Since early 2005, the companies have been subject to revenue framework regulation, which puts a ceiling on the companies' income. The companies are also subject to efficiency requirements encouraging the companies to be more efficient through consequentially lower distribution prices.

The district heating sector

The district heating sector is separate from the other two sectors. The liberalisation which has taken place in the natural gas and the electricity sectors has not taken place in the heating area. It is uneconomical to transport district heating over long distances. Since most of the transmission grid is not interconnected, it is difficult to create a market. Thus, the district heating sector is comprised by a large number of local monopolies. The sector comprises about 600 enterprises.

DERA ensures that supplies are provided at reasonable and transparent prices and on reasonable terms. According to the District Heating Supply Act, district heating must be sold at the cost of production and distribution, the "non-profit" principle. In this context, DERA decides the necessary costs to be included in heating prices.

Energinet.dk

In 2005 the state-owned company energinet.dk was formed as a result of the energy-policy agreement in 2004 by the merging of Eltra, Elkraft System, Elkraft Transmission and Gastra. At the same time, two subsidiary companies were established: Eltransmission.dk A/S and Gastransmission.dk A/S. The merger took place retrospectively from 1 January 2005.

Energinet.dk has an overall responsibility for the electricity and gas system in Denmark. The company is supposed to contribute to organising the energy market to intensify competition to the benefit of society and the consumers. The company owns the overall gas transmission grid and the electricity grid. Some of the foreign activities of the company are subject to supervision by authorities in countries out-side of Denmark.

In accordance with the special regulations for energinet.dk, DERA supervises some of the company's activities.

4.2 New legislation

In 2006 the Danish Energy Regulatory Authority (DERA) issued two executive orders:

- Executive Order no. 144 of 2 March 2006 on regulations for notification of prices and terms for supply of electricity as well as terms for the use of the transmission and distribution grid.
- Executive Order no. 937 of 26 September 2006 on invoicing and specification of costs by natural gas companies to recipients of transport and energy services. The regulations entered into force on 1 January 2007. Corresponding regulations for electricity companies are being prepared and are expected to enter into force during 2007.

The legislation on the energy sector was amended by Act no. 520 of 7 June 2006. The amendment of the legislation was carried out as a general follow-up to the energy policy agreement of 10 June 2005 on energy-savings efforts and the necessary amendments for carrying out the agreed licensing terms for the tender process on the offshore wind farm at Horns Rev.

The amendment to the legislation authorises DERA to impose daily or weekly fines as a coercive measure, for more details on this see page 16 of the Authority's Annual Report for 2004.

In addition the Authority's responsibilities were extended in relation to checking distributions and remuneration from municipalities' electricity supply or heating companies in order to help the Ministry of the Interior and Health in its calculations of set-off against the State's block grant to municipalities.

For the gas area, the amendment to the legislation resulted in a new task of administering the EU Regulation on access to gas transmission networks.

4.3 Internal monitoring programmes

The Danish transmission grid for electricity and natural gas has been totally unbundled whereas the distribution grid companies have both monopoly and commercial activities.

A new task for DERA is to supervise that the distribution grid companies in the electricity and natural gas areas establish programmes for internal monitoring that are to prevent discriminatory behaviour that distorts competition. The regulations are to ensure a clear division between the monopoly activities and commercial activities of the distribution companies. The Executive Order on internal monitoring is based on an EU Directive.

The monitoring programme must describe the companies' initiatives to prevent behaviour that is discriminatory and that distorts competition. This can be in relation to discrimination on access to the grid and discriminatory fixing of prices for the company's services. As a minimum, the programme must describe how



the company ensures that commercially sensitive information is treated confidentially and that information about the company's own activities is not passed on to other parties in a discriminatory manner. The programme must also describe how the company ensures that it does not give preferential treatment to specific companies in its contact with customers.

Finally the company must describe how it carries out adequate checks of the programme.

The companies must publish and submit their annual reports to DERA with a description of the programme, how it is carried out and what checks have been made on the execution of the programme. The calendar year of 2005 was the first year for which the annual reports had to be published. Notification and submission of the reports had to be carried out by 1 June 2006 at the latest.

The monitoring programmes are aimed at grid companies that are parts of companies with a range of other activities. These other activities can be related to energy (e.g. production or trading), but can also be related to activities in other sectors. The programmes must ensure that the grid companies do not use their monopoly position on the grid side to distort competition in the liberalised electricity and natural gas markets.

The regulations came into force 1 October 2005. This means that the annual report for 2005 only includes descriptions of the companies' monitoring programmes, execution and checks for the last three months of the year.

The material submitted

In 2006, DERA received a large number of submissions (four for the natural gas area and 99 for the electricity area). Only a few grid companies have published their annual reports in a manner that is in complete accordance with the formal rules. That means to say that the material varies in character and in some cases is of a preliminary nature. However, the material shows that all companies are aware of the regulations, including the regulations on treatment of information and non-discriminatory practices. The reports also show that the companies have approached the task in a serious manner and have made an effort to give the task a good start.

The DERA secretariat has accepted that the smallest transformer associations can "make do with" submitting a form of management statement which states that the regulations on non-discriminatory behaviour are known and adhered to.

Future regulation

In the future, DERA will place importance on the following when checking the monitoring programmes:

- treatment of commercially sensitive information as well as non-discriminatory customer contact - especially in group companies with shared customer centres
- fully implemented separation of companies
- consumers ought to be fully aware of which company they are in contact with. DERA places great importance on the fact that a group company's supply services are not marketed or mixed up with services from a fellow group grid company.

Furthermore, DERA believes that the scope of the Executive Order is too broad. DERA believes that it is not appropriate that small grid companies with no ownership relationship or shared interests with commercial companies have to establish a monitoring programme.

Therefore DERA will ask the legislature to exempt this type of company from the duty to establish monitoring programmes and annual reports. This is in line with the Directive that these regulations are based on.

The internal monitoring programmes and the DERA guidelines are described in more detail on the DERA website.





5 Facts and Figures

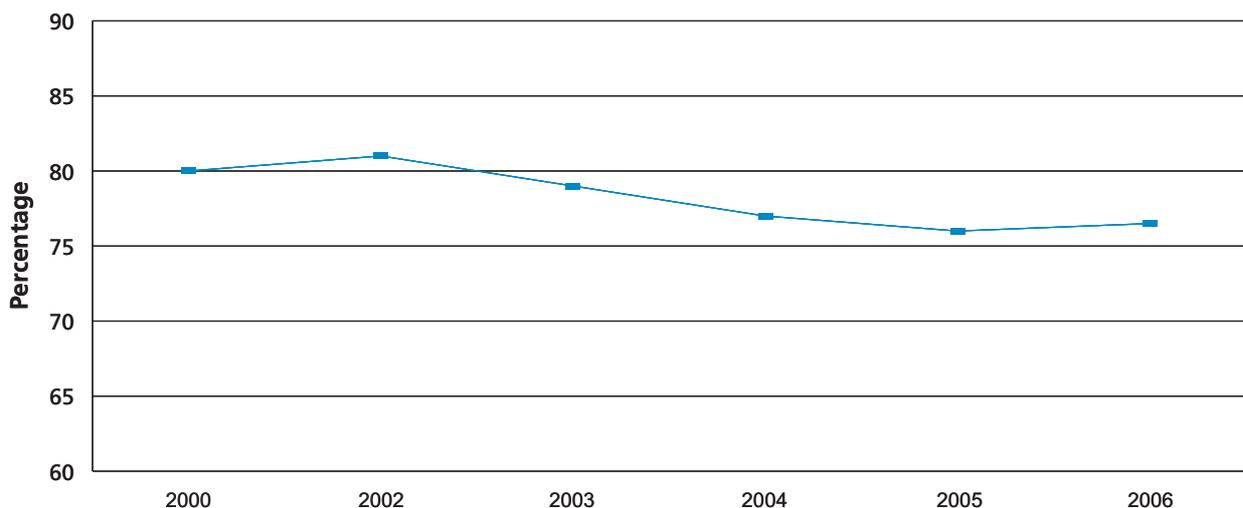
5.1 User satisfaction

The Competition Authority has a wide range of tasks. Regulatory tasks include some not directly requested by the customers, e.g. cases of the Authority or the Council making decisions entailing obligations or conducting unannounced inspections of selected enterprises. Thus, the competition cases do not always favour customers. However, this does not prevent the Authority from aiming at a high degree of customer satisfaction.

Via interviews with most of its customers, the Competition Authority has measured customer satisfaction since 1998 within the fields of competition, energy, procurement, and state aid. Customers include enterprises, lawyers and other authorities whose cases have been handled by the Authority.

Average user satisfaction in general in 2006 was 77 percent. That is satisfactory, although not quite as good as compared to some previous years.

Average user satisfaction, 2000 - 2006*



* The Danish Ministry of Economic and Business Affairs conducted a common user satisfaction survey in 2001 covering all its institutions. This survey cannot be compared to surveys conducted by the Authority and the result from 2001 is therefore left out.

According to the table below satisfaction in the competition area has been quite stable since 2004 with only minor variations. The Authority scores high on returning calls (92 percent), intelligibility of letters (91 percent), and getting in touch by phone (90 percent). Service level in general is also quite high (89 percent).

The low scores are sector knowledge (61 percent), duration of case handling (67 percent – although there has been an improvement of 7 percentage points since 2005), and reasoning sufficient (68 percent).

When it comes to sector knowledge improvements are quite difficult to gain, as the Authority covers a wide field of sectors. It's unlikely that the Authority can have the same sector knowledge as the businesses and companies within the sectors.

When it comes to sufficient reasoning it is also difficult to increase user satisfaction, as case decisions often go against parties involved.



User survey, competition 2004 - 2006

Positive/very positive replies – per cent			
Year	2004	2005	2006
Duration of case handling	61	60	67
Reasoning sufficient	71	68	68
Information before decision	78	72	76
Getting in touch by phone	92	91	90
Returning Calls	92	94	92
Service level in general	92	88	89
Intelligibility of letters	90	93	91
Legal competence	75	81	78
Economic competence	77	75	79
Sector knowledge	64	58	61
Explaining the competition act	76	84	87
Presentation of facts	74	76	79

5.2 Projects

A major part of the development work of the Authority takes place in projects that analyse problems in the various fields of the Authority. 10-12 full-time equivalents are currently set aside for projects. The project results are published in separate reports or in the Annual Competition Report.

Projects, 2006

In 2006, 14 projects were concluded:

- Competition Report 2006
- Competition in Nordic Retail Banking
- Trade on the internet
- Competition on debit card markets 2006
- Procurement rules
- Financial services and unit trusts
- Insurance
- Health care
- Gardeners and gardening
- Television broadcast
- The use of pesticides
- The increase in new businesses
- Fines in international competition cases
- Facts on threshold values and calculations on contracts

The Competition Report, which is published annually, describes relevant competition and political problems illustrated by both Danish and international examples. The subjects chosen are those of significance to the quality and understanding of the work of the Competition Authority, as well as theoretical and practical problems for the framework conditions of trade and industry. The first Competition Report was published in December 1997. The Competition Report 2006 is the ninth report published in a series.

5.3 Key figures

Number of employees, 2006

Staff	Year-end 2006
Board of Directors	4
Competition	66
Public procurement, state aid and payment cards	14
Energy regulation	37
Administration, management support and ministry affairs	22
Total	143

Expenditure, 2006

Financial Statement	DKK million
Competition	35.2
Public procurement and state aid	7.0
Energy	19.4
Assistance	17.3
General management and administration	11.4
Total	90.3

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