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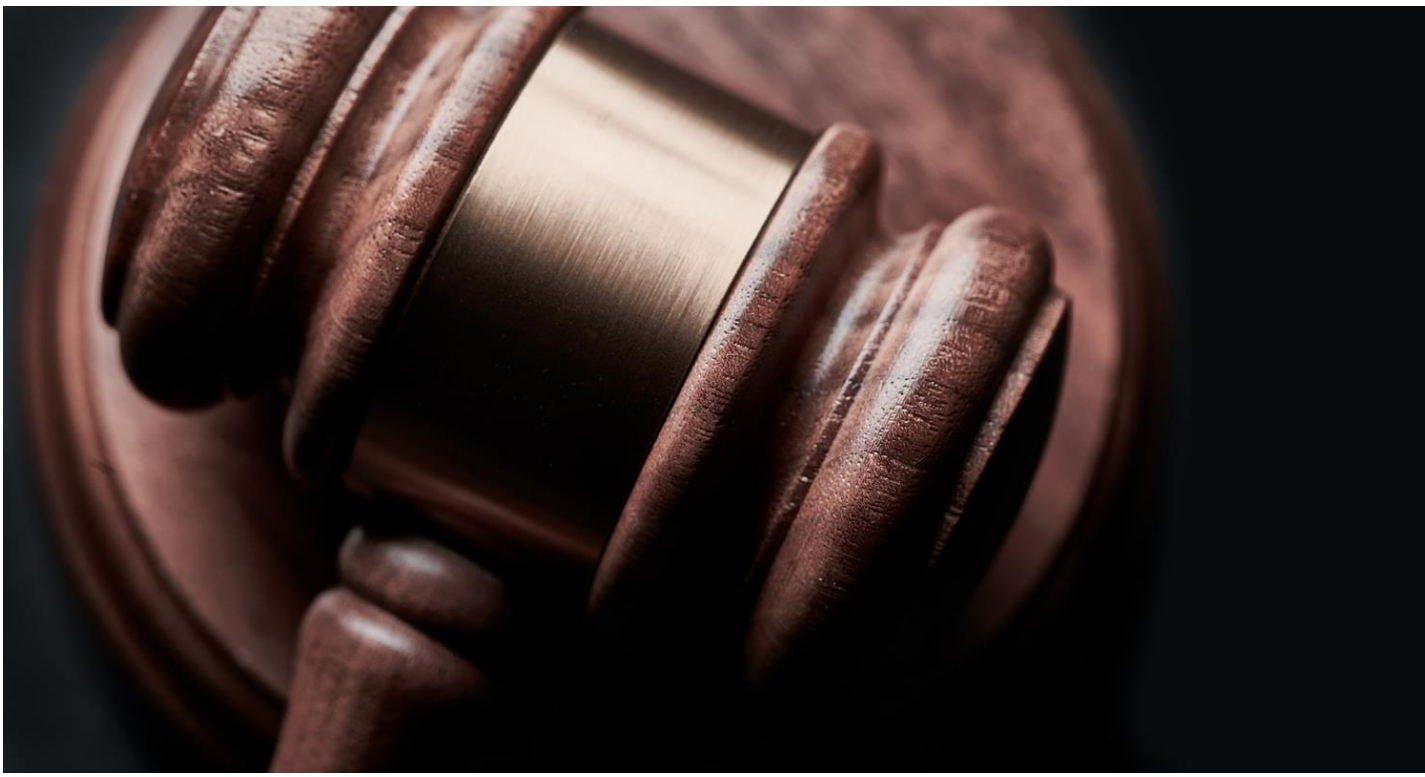

NEW DECISION BY THE DANISH HIGH COURT REGARDING RESTRICTIVE TRADE AGREEMENTS (PRICE COORDINATION)

26 March 2021

Introduction

The Danish High Court has upheld a decision originally made by the Danish Competition Council regarding a Danish Gas Distribution company's breach of the Danish Competition Law.

The Gas Distribution company was found to have been coordinating prices with two competitors and a trade association.

The Court found that the price coordination constituted a breach on the prohibition against entering into restrictive trade agreements that directly or indirectly aim to or result in a substantial restriction of the competition on the market.

The decision demonstrates that price coordination is a severe breach of the Competition Act.

The Case

A Danish company, active on the market of providing nature gas (hereinafter "the Company"), provides 1) service subscriptions and 2) spare parts for maintenance services. The company set out to reduce its prices on spare parts, as they were among the most expensive suppliers of spare parts on the market. To compensate for the profit loss resulting from a reduction in the prices on the spare parts, the Company intended to raise their prices on service subscriptions – a so-called "compensation model".

To realize this model, the Company agreed with its service partners to reduce their profits on spare parts. The service partners were providers of both spare parts to the Company and to competitors to the Company as the service partners all provided service subscriptions directly to the consumers themselves.

It was agreed between the Company and the competitors that the Company could raise their prices on service subscriptions, which enabled the service partners to also raise their prices. By implementing such an increase in prices, the service providers would be compensated for their loss due to the reduction in the prices on spare parts.

The setup included two elements: one related to the purchase of spare parts and another to the obligation to raise subscription prices. The Company argued that this "compensation model" should be seen as one combined setup and not two separate agreements.

According to the Company, the consumers would gain a reduction in the price of the service subscriptions and spare parts combined. Alternatively, it was argued, the prices would not even be affected due to a status quo in the price.

The Danish Competition Council considered the "compensation model" to be two separate agreements, and that the two agreements should be assessed individually.

The Danish Competition Council found that the agreement regarding the service subscriptions constituted an agreement, the purpose of which it was to restrict competition on the market. It was noted that it was not a requirement that the parties had not acted according to the agreement nor had they coordinated an exact price. It sufficed that an agreement was made to raise prices as it limited the parties' incentive to compete with each other.

The Danish High Court

The Company argued to the High Court that the Competition Council had used the Competition Act, Section 6 wrongly by concluding that the elements should be considered separately. It was argued that the horizontal elements perhaps did limit competition, however, seen as part of the combined "compensation model", the Company argued that the Competition Council had failed to assess the positive effects of the whole model.

The High Court stated that there is no legal obligation to assess the two elements as one combined agreement. The legal obligation, however, is to take the financial and legal context into consideration when assessing an agreement from a Competition Law perspective.

Accordingly, the assessment should take the following into account:

1. the scope of the agreement;

2. the purpose of the agreement; and

3. the financial and legal context of which the agreement was a part.

The High Court concluded that the agreement according to the content, purpose and context was to be seen as an agreement on the coordinating of prices between competitors, which is a violation of the Competition Act, Section 6.

The High Court found that the purpose of the agreement was to restrict competition on the market, as the agreement restricted the parties' incentive to set their prices independently of each other. In respect hereof, it was noted that there was in fact no actual connection between what the customer saved on the purchase of spare parts and the raised prices for subscription services.

In conclusion, the Danish High Court was aligned with the Danish Competition Council in concluding that the characteristics of the market and the type of the service did not make it necessary to coordinate the prices to secure the service providers' earnings basis.

Consequently, the Danish High Court ruled that the agreement constituted a restrictive trade agreement in violation of the Competition Act, Section 6.

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If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:

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