



18 DANISH NIGHTCLUBS FOUND TO HAVE BEEN PARTICIPATING IN CARTEL ACTIVITIES

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Introduction

It is well-known that agreements between undertakings, decisions made by associations of undertakings, or concerted practices affecting trade that could prevent, restrict or distort competition will most likely be considered as a violation of the antitrust regulation. A recent decision from the Danish Competition and Consumer Agency has again confirmed, that agreements between competitors are considered to be a severe violation of the Danish Competition Act § 6, subsection 2, No 3.

Background and Assessment from the Competition and Consumer Agency

Since 2005 several Danish provincial nightclubs had been co-owners of the company NOX Network ApS, which serves as commercial cooperation between the participating undertakings. The purpose of the company was - among other things - to work on establishing supply agreements, PR, and a responsibility program. The participating undertakings were all individual legal entities.

After having investigated the cooperation, the Danish Competition and Consumer Authority found, that the participating undertakings – in addition to being owners of the company also had a horizontal gentleman's agreement, agreeing that no member will open a new club/bar in another members municipality or within 20 kilometers of each other.

The investigation also revealed that some of the participants had been part of the agreement for more than 15 years.

Such concerted practice of market segregation certainly has the possibility of affecting competition and in line with established practice, The Danish Competition and Consumer Authority did therefore find that the gentleman's agreement did constitute a concerted practice in serious violation of the Danish Competition Act.

The fined undertakings were found to have been helpful in the investigation, which together with the acknowledgement of the gentleman's agreement, helped the investigation's progress.

The size of the fines imposed has considered the degree of violation, the length of the agreement and, in accordance with § 23b of the Danish Competition Law and the European Commission's policy, the annual turnover of the undertaking the previous year. The previous year being 2020, a year that saw large parts of the Danish nightlife sector being closed or operating under abnormal harsh restrictions due to the presence of COVID-19. This has had a substantial impact on the size of the fines which is ranging from only DKK 28,000 to DKK 278,000 (EUR 3,765 to EUR 37,385).

In the press release of 17 December 2021 from the Danish Competition and Consumer Authority the fines are described as being lower than those of comparable violations.

The decisions are the first example of the Danish Competition Council itself imposing fines, after being authorized to do so by the amendment to the Competition Act from 4 March 2021.

Our Comments

The decisions are not surprising. An agreement by competitors to geographically segregate markets have both in Danish and European law and case practice, been deemed a concerted practice that severely violates competition regulation. The severity of such concerted practice is underlined by the practice being deemed illegal in TFEU, leaving the decisions of the Danish Competition and Consumer Authority with no other plausible outcome, then deeming the gentleman's agreement to be a violation of the Competition Act.

It is however interesting, that the Competition Authority – apparently without any further discussions – concludes, that the nightclubs are active within the same geographical market, even though the nightclubs presumably have a very local focus, and it could be argued whether nightclubs from different regions in Denmark do serve as potential competitors.

It is also interesting, that the Competition Authority based the fines on the previous year's turnover. The authority did not take into consideration, that substantial and abnormal deviations in the annual turnover of an undertaking that had been realized in the year, that the fine should be calculated upon. This indicates that calculation based on the previous year's turnover is a general rule.

The decisions do underline that it is not only multinational conglomerates that can form distorted practices in violation of the competition rules but also that small-town pubs and clubs can form and take part in such distorted practices in serious violation of the competition regulation. As such, all undertakings participating in market cooperation, no matter size or occupation, should be aware of the possible effect on competition that their agreements could have.

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



Pernille Nørkær
Partner
Pernille.noerkaer@moalemweitemeyer.com



Henrik Ringgaard Diget
Associate
Henrik.diget@moalemweitemeyer.com

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