



## **ANTI-COMPETITIVE CONDITIONS IN SUPPLIER AGREEMENTS**

In a recent decision by the Danish Competition Council<sup>1</sup> where a Danish company was under suspicion for having misused its dominant position, the Competition Council acknowledged the measures suggested by the company to avoid the provisions from being seen as a misuse of a dominant position.

The Danish company was a software supplier (for calculation of tax). The company had inserted clauses regarding irrevocability for up to three years and four months and/or discounts conditional upon the agreement lasting several years in its agreements with the customers in the standard supplier agreement.

A customer had filed a complaint to the Danish Competition and Consumer Authority (the “Authority”) claiming that the company held a dominant position on the market and that the provisions on length of irrevocability and discount both limited the freedom of the customers

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<sup>1</sup>[Wolters Kluwers aftaler om levering af software til personlig skatteberegning \(kfst.dk\)](#)

to choose between suppliers and hindered the entrance of new competitors. Thus, it was claimed that the dominant position was misused.

Based on the complaint, the Authority investigated the length of the irrevocability and discount dependent on the acceptance of such length.

During the process, it was found that there in the majority of the supply agreements were conditions of non-cancellation of up to 3 years and 4 months and / or conditions that a discount was conditional on a multi-annual agreement. The Authority found that the agreements could lead to customers not purchasing from other providers during the lock-in periods, or at least such alternative purchase would be very unfruitful. It was also found that other providers could be barred from competing for the customers' demand during the period in which the customers were bound by the agreement with the dominant company.

Long irrevocable periods may itself constitute a violation of the Danish Competition Law section 11 subsection 1 and TEUF 102. In this case, the Authority found that the long periods combined with the discount structure implied that customers were either prevented from or disincentive to work with competitors. The competition was consequently not developing in a natural way.

The damaging effect of the anti-competitive clauses is a limitation of the competition on the relevant market where current and potential competitors either in all or partly are hindered from providing their products or services on the market. Such hindering of competition may result in higher prices or less options for the customers and ultimately the consumers.

The company did not agree with the analysis of the Authority. However, they undertook to change the provision in both current and future agreements in order to avoid any further sanction. Further, the company undertook to notify any affected customers by the provisions.

The Danish Competition Council found, that changing the provision would meet the competitive concerns, as this ensures these terms do not bind customers. Without this provision, competition would be opened. Further, the Danish Competition Council found that agreeing to change the provision would be as effective as completing a possible injunction decision for the same result. The acceptance of the offer from the company would lead to a quicker solution, which the market would benefit from. The Danish Competition Council then agreed to close the matter based on the offer from the company.

### **Our comments**

The ban on dominant companies abusing the market position remains an important focus area for the Competition Authorities.

A dominant position usually exists if a company has a market share of at least 50%. However, depending on the competitive landscape on the relevant market, a lower market share may constitute a dominant position.

Dominant companies are, in principle, still free to act and enter into relevant commercial agreements. However, due to the dominant position, some terms may affect the entire market if the customers and consumers are not able to replace their supply.

The case once again underlines that a dominant company must be particularly cautious in setting up provisions with the purpose of binding customers to the dominant company. Such provision may easily constitute an abuse of the dominant position as the effect of such provisions will be completely different than for those holding a non-dominant position.

The violation of the ban on abuse of a dominant position can result in high fines and liability.

**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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