

## • Denmark: The Supreme Court adopts Decision in the TV2 Case regarding Dominant Position on the Market for TV Advertising

On 18 March 2011, the Danish Supreme Court decided that TV2/Danmark A/S (TV2) had abused its dominant position on the market for TV advertising in Denmark. The Supreme Court concluded that TV2's use of annual rebates in the years 2001-2005 constituted an abuse of TV2's dominant position and thereby an infringement of Article 82 EC (now Article 102 TFEU) and of Section 11(1) of the Danish Competition Act. The decision of the Supreme Court confirmed the decision of 22 June 2009 of the High Court of Eastern Denmark.

On the market for TV advertising there is an incentive for the advertisers to spread their advertisements in order to reach as many viewers as possible, which means that only few advertisers exclusively use TV2. TV 2 is an unavoidable trading partner for advertisers wanting to reach a nationwide audience.

TV2's annual rebate was offered by annual contracts and was dependent of the agreed fixed total sales. The annual rebate was progressive and retroactive (i.e. applied not only to the incremental sales) with several volume thresholds and percentage ranges from 4.7% to 19.7%. The marginal rebate for allocating extra TV advertisement on TV2 could reach 35%, which generated a significant loyalty effect and forced the competitors to offer customers significantly lower prices per contract than TV2. The rebate system had the potential to foreclose the market for competitors.

On 21 December 2005, the Danish Competition Council concluded, that the rebate, offered in the time period of 2001-2005, constituted an abuse of TV2's dominant position on the market for TV advertising in Denmark.

TV2 appealed the decision to the Competition Appeals Tribunal (CAT) which, on 1 November 2006, repealed the decision of the Council. The CAT stressed the specific market conditions on the market for TV advertisements, such as the use of annual agreements and that the market is characterized by the fact that the marginal utility of additional showings of a given TV-advertisements (is decreasing) has a decreasing trend, the reason why large advertisers almost always will choose to allocate their TV-advertisement campaign budget to more than one TV station. The CAT found that under such market conditions the annual rebate used by TV2 is not automatically an abuse of dominance.

The decision was appealed and, on 22 June 2009, the High Court of Eastern Denmark repealed the decision by the CAT and stated that TV2's annual rebate constitutes an abuse of its dominant position.