

SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

I- Information on the judgment

Danish Competition Council ("Konkurrencerådet"), 27.9.2006, 4/0120-0100-0002SEK/DRP, Portal Fyn.dk

II- Brief description of the facts and legal issues

The internet portal, www.fyn.dk, was developed in 2003 in order to promote the island of Funen as an attractive place to live, work and visit. The portal contains all kinds of information, of both commercial and non-commercial nature (information on education, housing, entertainment, games, how to contact the relevant authorities etc). The portal was created and operated by the company Portal Fyn Ltd ("*Portal Fyn*"). Portal Fyn was selected by the competent authority, the county of Funen, following direct negotiations between the two parties. No public tender procedure was held. It was agreed that Portal Fyn would be guaranteed an annual subsidy of DKK 1.5 m (some EUR 200,000) for the period 2003-2005 for the development of the non-commercial parts of the website.

The Danish Competition Authority (DCA) investigated the matter following a complaint lodged on 16 December 2003. The DCA approached the administrative supervisory body which held that the subsidy granted to Portal Fyn was illegal under Danish law. This caused the county of Funen to cease payment of the annual subsidy in 2005. Instead, the country entered into a contract with Portal Fyn which provided for the delivery of services to a value of some DKK 1.7 m (approximately EUR 225,000). Again, no tender procedure was held. Again, the DCA consulted the supervisory body, which found that the 2005 payment was partly illegal under Danish law.

In its decision of 27 September 2006, the DCA established that the public authority, Funen County, had granted aid, which was inconsistent with Section 11a of the Danish Competition Act. This provision enables the DCA to take measures against any State aid that is harmful to competition, but which falls outside the scope of European rules.

According to the DCA, three conditions must be met before the DCA can issue an order for the termination and/or repayment of the aid. Firstly, the aid must be financed by public resources which benefit a specific business activity. Secondly, the aid must directly or indirectly cause or have as its object the distortion of competition. Thirdly, the aid must not be legitimate under public regulation: Danish competition law cannot take precedence over a political decision made under a public regulation.

III- Summary of the Court's findings

The DCA found that all three conditions contained in Section 11a of the Danish Competition Act were satisfied.

Firstly, Funen County had granted aid to Portal Fyn in the period 2003-2005 through public resources, both directly, in the form of direct subsidies, and indirectly by (a) giving Portal Fyn the right to use the domain, www.fyn.dk free of charge and (b) by marketing the internet portal free of charge. Following lengthy calculations the DCA found that the total value of the public funds transferred to Portal Fyn was some DKK 4.7 mio. (some EUR 620,000) (paras 153-198).

Secondly, it was established that Portal Fyn had received an advantage in the form of overcompensation. The DCA applied the advantage aid test laid down in the *Altmark* judgment of the ECJ (C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] ECR I-7747), to conclude that the public compensation exceeded Portal Fyn's net cost including a reasonable profit by DKK 213,356 (some EUR 28,000) (paras 199-294). Moreover, the aid was found to be selective (paras 295-297).

Thirdly, the supervisory authority had found that parts of the said aid were unlawful, because Funen County had not ensured that a clear delineation between commercial and non-commercial activities was made. Accordingly, the county had not made sufficient effort to ensure that aid was not used to establish and develop commercial parts of the portal. On the basis of the decision made by the supervisory authority, the DCA concluded that parts of the aid (DKK 46,542, corresponding to some EUR 6,000) constituted unlawful State aid under Section 11a of the Danish Competition Act (paras 335-356).

On that basis, the DCA issued an order for a repayment by Portal Fyn to Funen County of the unlawful State aid, which including a 9.40 % interest amounted to DKK 49,628 (ca EUR 6,500) (paras 357-374).

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgement

The Danish Competition Authority ("Konkurrencestyrelsen"), 26.5.2005, 3/1120-0100-1201PR/FI, Klage over Teknologisk Institut, Tribologencentret

II- Brief description of the facts and legal issues

The Centre of Tribology, which is part of the Technological Institute, is active in the field of tribology (comprising advanced surface treatment of tools and machine parts). It receives public funding from both the European Union and from the Danish State.

The Danish Competition Authority (DCA) investigated the matter following a complaint by a competitor of the Centre of Tribology, which alleged that the Centre had abused its dominant position on the market for certain tribology services and was possibly in receipt of unlawful State aid.

Section 11a of the Danish Competition Act enables the DCA to take measures against State aid that is harmful to competition, but which falls outside the scope of EC rules.

III- Summary of the Court's findings

The DCA investigated the matter and found that the Centre was unlikely to occupy a dominant position, having regard to the relevant geographic market which would seem to include more countries than Denmark (including Sweden and Germany).

As regards the alleged violation of State aid rules, the DCA held that a possible State aid was likely to affect trade between Member States and that it therefore lacked competence under Section 11a of the Danish Competition Act. As such, it would be for the European Commission to investigate the matter pursuant to Article 87 EC.

As a result, the DCA dismissed the complaint in its entirety.

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I- Information on the judgment

Danish Competition Council ("Konkurrencerådet"), 23.2.2005, 3/1120-0100-0865/SEK/CF, Transporterhvervets Uddannelsesråd (TUR)

II- Brief description of the facts and legal issues

The 'Transport business' Education Council (Transporterhvervets Uddannelsesråd, "TUR") is a sector-specific education committee that, according to Danish law on work related training, is tasked with assessing the need for relevant training courses, including the development of materials necessary for such education with respect to adults in the transportation sector. The secretariat and the publishing business of TUR are commonly owned by employers and unions in the transportation sector. The publishing business of TUR is an integrated part of TUR and therefore has no separate accounts.

TUR receives direct public aid in order to fulfil two tasks: 1) Aid to cover the administrative tasks undertaken as an education committee, and 2) aid to develop new education courses and fund the materials to be used in various courses, including driver's licence courses. Both types of aid are mandated by national law. The Ministry of Education holds the property rights for the educational material which TUR develops with aid from the ministry, but in practice TUR has had the exclusive right to publish the said material.

The case started as a result of complaints from competitors to TUR on the market for publications used for driver license training. They held that TUR had channelled State aid received to cover its legal administrative duties to cover expenses incurred in their publishing business. Moreover, they claimed that TUR received an undue advantage by holding, de facto, the exclusive right to publish driver's licence course material developed by TUR but financed and owned by the State.

Section 11a of the Danish Competition Act enables the DCA to take measures against State aid that is harmful to competition, but which falls outside the scope of EC rules. Under Section 11a, three conditions must be met before the Danish Competition Authority can issue an order for the termination and/or repayment of aid. Firstly, the aid must be financed by public resources which benefit a specific business activity. Secondly, the aid must directly or indirectly cause or have as its object the distortion of competition. Thirdly, the aid must not be legitimate under public regulation: Danish competition law cannot take precedence over a political decision made under public regulation.

III- Summary of the Court's findings

In its decision of 23 February 2005, the DCA found no evidence of TUR having used the aid to cover its administrative task as education committee to cross-subsidize its publishing activities.

Part of this conclusion was also due to the fact that the public contribution covering TUR's administrative obligations as education committee was able to stop at the end of 2006. However, the DCA encountered a lack of transparency when it came to the commercial activities of TUR. This caused uncertainty as to whether TUR was using public aid to cover its commercial activities as a publisher to gain an unjustified advantage compared to its competitors. The DCA therefore recommended the Ministry of Education to demand such transparency became evident in the accounts of TUR. Furthermore the DCA also recommended that the publishing of the material belonging to the ministry should be submitted to a public tender. This would give publishers other

than TUR the opportunity to enter the market, which would otherwise be hard to access because of TUR's tight links to many of the schools buying the published material (paragraphs 53-60).

As regards TUR's publishing activities, the DCA found that TUR's exclusive right to publish educational material financed by public resources constituted "*de facto indirect selective State aid*" under Section 11a of the Competition Act since none of TUR's competitors were allowed to publish the said material (paragraph 72).

The DCA then approached the Ministry of Education in order to examine whether the aid was "*legitimate under public regulation*". The Ministry, in a response to the DCA, was unable to point to an exact legal basis to justify TUR's exclusive right of publication. As a result, the DCA ruled that the exclusive right violated Section 11a of the Competition Act (paragraph 74).

The DCA also established that out of the total aid received by TUR in the relevant period (DKK 633,137, corresponding to some EUR 85,000) only DKK 102,182 (corresponding to some EUR 13,500) was granted after the entry into force of the Danish Competition Act on 1 October 2000 and thus susceptible to recovery (paragraph 79).

The DCA decided that it would not order the recovery of this sum, provided that all interested parties were given access to the material on equal grounds within a period of 3 months (paragraphs 77-83).

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