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"Damage claims in competition matters: The dawn of a new era?"

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National Report of Denmark

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QUESTIONNAIRE

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. **How would you summarize in few lines the status quo of private enforcement in your jurisdiction?**

   Under Danish law, private enforcement of damage claims relating to competition law infringements is consistent with private enforcement of any other damage claim.

   Directive 2014/104/EU has not yet been implemented in Danish law. However, a draft bill proposing amendments to the Danish Competition Act, including implementation of Directive 2014/104/EU, has been under public consultation.

   The draft bill proposes that the Danish Minister for Business and Growth shall be entitled to stipulate more specific rules regarding damage claims originating from infringements of provisions under EU competition law and national competition law in EU member states. In addition, the draft bill includes a specific provision regarding time-barring of damage claims.

   According to the draft bill, the proposed provisions regarding private enforcement of damage claims relating to competition law infringements shall enter into force on 27 December 2016 and shall only apply to damage claims brought before a court after this date.

   a. ***[For Non-EU Member States]*** **Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)**

      If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

      Not relevant.

   b. **[*For EU Member States]* Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?**

      If yes, are they able to submit both stand alone and follow-on actions?

      Individuals can file an antitrust damage claim regardless of Directive 2014/104/EU (which has not yet been implemented into Danish law) and may submit stand alone as well as follow-on actions.

In both cases, the plaintiff must substantiate, inter alia, that the defendant has committed a culpable/wrongful act, that the plaintiff has suffered a certain loss, that there is a causal connection between the competition law infringement and the loss, and that the loss was foreseeable. Proof of a competition law infringement may suffice as substantiation of a culpable/wrongful act.

2. ***[For EU Member States]*** **Has your country already implemented/started implementing the private enforcement Directive?**
    - **If No: Do you believe that your country will meet the deadline?**
    - **If Yes: Please give the status quo of the implementation by highlighting in few lines what you consider the most important aspects of the implementation of the private enforcement Directive into national law in your country.**

As mentioned above, a draft bill proposing amendments to the Danish Competition Act, including implementation of Directive 2014/104/EU, has been under public consultation. Please refer to question 1 above.

CHAPTER II: COURT AND PROCEDURE

3. **What is (are) the court(s) in charge of antitrust private enforcement?**

    a) **Is there a specialized court specifically for antitrust based claims?**
    If No: are there specific chambers for antitrust claims within the civil/commercial courts?
    If Yes: is the court composed only by judges, also economic experts and/or other persons?

    Proceedings regarding antitrust damage claims can generally be instituted in District Courts. If the case may have implications for rulings in other cases or is of special interest to the public, and if a party requests so, the case may be tried by the Danish High Court as the court of first instance.

    Unless otherwise agreed between the parties, cases where application of the Danish Competition Act has significant importance may also be instituted in the Danish Maritime and Commercial Court. Here, the case is heard by one (or three) judge(s) and two (or four) expert assessors. The expert assessors are usually nominated by business organisations or appointed as expert assessors due to their special knowledge of one or more of the areas that the Danish Maritime and Commercial Court is employed with.

    b) **May the court impose interim measures?**

Both the District Courts and the Danish Maritime and Commercial Court may issue prohibitory and mandatory injunctions. The enforcement court may provide assistance towards maintaining these injunctions. The enforcement court may also levy attachments as security for monetary claims.

c) May the trial proceed in parallel and independently of a National Competition Authority investigation?
If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

A trial may proceed in parallel and independently of a National Competition Authority investigation. However, the court may suspend the case if the court finds it necessary, e.g. due to a parallel National Competition Authority investigation that may affect the result of the case. It is likely – but not a given – that the court will suspend the case up to the National Competition Authority decision.

d) Is the decision subject to appeal?
If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

Decisions of Danish courts are usually subject to appeal. Decisions issued by the Danish Maritime and Commercial Court and the High Court as the court of first instance are usually subject to appeal to the Danish Supreme Court.

District Court decisions are usually only subject to appeal to the Danish High Court. Further appeal of District Court decisions to the Danish Supreme Court requires permission by the Danish Appeals Decisions Board. Such permission is only given if the case may have implications for rulings in other cases or if the case is of special interest to the public.

Upon appeal, the appeal court assesses both the merit of the case and the case law if the parties' claims give rise to this.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?

Cases where the defendant has its home court in Denmark

Under Danish law, proceedings must be instituted in the defendant's home court unless otherwise provided by law. Therefore, if the defendant's home court is in Denmark, proceedings may be instituted there.

For natural persons, the home court is the court for the judicial district in which the defendant is resident. If the defendant does not reside anywhere, the home court is the court for the judicial district in which he is currently staying. If the defendant does not reside anywhere and his whereabouts are unknown, the home court is the court for the judicial district in which he was most recently resident or staying.

For companies, associations, private institutions and other collective entities capable of being a party to proceedings, the home court is the court for the judicial district in which the main office is located or, in the absence of information about such main office, one of the members of the board of directors or the executive board is resident.

For Danish nationals resident abroad and non-resident in Denmark who are not subject to the judicial authority of their host country, the home court is in Copenhagen.

Where the defendant has its home court in Denmark, proceedings may not only be instituted in the home court, but also in courts for other judicial districts in Denmark if provisions regarding additional jurisdictional venue in those courts apply.

Cases where the defendant is resident in EU/EFTA and does not have its home court in Denmark

In cases where the defendant is resident in EU and does not have its home court in Denmark, Regulation (EU) No 1215/2012 ("the Brussels Regulation") applies via a parallel agreement. If the defendant is resident in EFTA and does not have its home court in Denmark, the Lugano Convention applies. The provisions of the Lugano Convention generally correspond with the provisions of the Brussels Regulation. Therefore, the Lugano Convention will not be mentioned below.

In cases where the defendant is resident in EU/EFTA and does not have its home court in Denmark, the proceedings can be instituted in Denmark if the defendant is domiciled there according to the provisions in the Brussels Regulation or the Lugano Convention.

Proceedings may also be instituted in Denmark in the following cases:

- The defendant is a legal entity domiciled in Denmark, cf. articles 4 and 63 of the Brussels Regulation.
- The claim relates to a contract, and the place of performance of the obligation in question is in Denmark, cf. article 7(1) of the Brussels Regulation.
- The claim relates to a dispute arising out of the operations of a branch, agency or other establishment, and the defendant branch, agency or other establishment is situated in Denmark, cf. article 7(5) of the Brussels Regulation.

- The claim relates to tort, delict or quasi-delict and the place where the harmful event occurred or may occur is in Denmark, cf. article 7(2) in the Brussels Regulation.
- The case relates to a consumer's claim against the other party to a contract and either the consumer or the other party to the contract is domiciled in Denmark, cf. articles 17(1) and 18(1) of the Brussels Regulation.

Cases where the defendant is not resident in EU/EFTA and does not have its home court in Denmark

If the defendant is not resident in EU/EFTA and does not have its home court in Denmark, proceedings against natural persons or legal entities carrying on business can be instituted in Denmark if the case concerns this business. In such cases, proceedings may be instituted in Denmark regardless of the fact that the statutory office may be abroad.

Legal proceedings involving a claim for damages as a result of a legal wrong may be instituted in the Danish court for the judicial district in which the legal wrong was committed. It is uncertain whether the place "in which the legal wrong was committed" both entails the place where the act or conduct resulting in a claim for damages occurred and the place where the effects of the harmful act occurred.

A consumer with domicile in Denmark may institute proceedings against the other contract party in this country pursuant to article 17(1) and 18(1) of the Brussels Regulation.

Where no Danish court may be deemed to have jurisdiction in the matter under the provisions mentioned above, legal proceedings concerning the law of obligations and property (including acknowledgement or execution of monetary claims) may be instituted in the Danish court for the judicial district in which the defendant (only natural persons) is staying when the writ of summons is served. Legal proceedings against both natural persons and collective entities concerning the law of obligations and property may also, in the absence of Danish jurisdiction under the provisions mentioned above, be instituted in the Danish court for the judicial district in which the person or collective entity in question holds assets at the time when proceedings are instituted or in which the assets in question are located at the time when proceedings are instituted. If attachment of assets is prevented by provision of security, such security will be deemed to be an asset located in the district in which the request for an attachment order was filed or was to have been filed.

Jurisdiction agreements

Danish courts may have jurisdiction if the parties, regardless of their domicile, have agreed hereto in accordance with article 25 of the Brussels Convention. Such a jurisdiction will be exclusive (and will thus prevent forum shopping) unless the parties have agreed otherwise.

A jurisdiction agreement pointing to a Danish court between two parties who are both domiciled in the same country outside of Denmark is probably only valid if the case has an actual international character, i.e. an actual connection to Denmark or another foreign country.

Consolidation of claims

Generally, more than one party may sue or be sued in one action where all of the following criteria are met:

a. the Danish courts are the proper forum for all of the claims;
b. the court is the proper venue for one of the claims;
c. the court has subject-matter jurisdiction over one of the claims;
d. all claims may be heard under the same procedural rules; and
e. none of the parties object, or the claims are connected to such an extent that they should be heard in one action notwithstanding any such objections.

However, article 8(1) of the Brussels Regulation allows persons domiciled in an EU Member State to be sued where the person is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The same applies for persons domiciled within EFTA. The rule does not apply if the claimant and the co-defendant have entered into a jurisdiction agreement conferring jurisdiction to a court abroad.

Each of the parties may add claims against third parties to the proceedings where the following criteria are met:

a. the Danish courts are the proper forum for the claim against the third party;
b. the claim may be heard under the same procedural rules as the other claims; and
c. neither the other parties nor the third party object, or the claim is connected with one of the other claims to such an extent that the claim should be heard in the proceedings notwithstanding any such objections.

However, article 8(2) of the Brussels Regulation allows a person domiciled in an EU Member State to be sued as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case. The same applies for persons domiciled within EFTA. It is assumed that the provision only applies to the defendant's and not the claimant's involvement of the third party. Thus, a claimant who wishes to sue a third party after the commencement of the proceedings can presumably only do so pursuant to article 8(1) of the Brussels Regulation. Article 8(2) does not apply if the defendant and the third party have entered into a jurisdiction agreement conferring jurisdiction to a court abroad.

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

As a minimum, probably approx. two years. The length of proceedings in individual cases depends on the individual case, including whether an expert report is obtained and whether the proceedings are suspended pending a decision of a National Competition Authority.

6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?

Each party must make a provisional payment of the costs related to the procedural steps taken or requested by the party, e.g. court fees upon filing the lawsuit, own representation costs and – as a general rule – costs related to obtaining an expert report.

The court will direct the proportion in which the parties are to make provisional payments of costs related to procedural steps ordered by the court on its own initiative.

Unless otherwise agreed by the parties, the unsuccessful party must generally compensate the opposing party for the costs incurred as a result of the action.

If the unsuccessful party has offered the opposing party what is due to that party, the opposing party must compensate the unsuccessful party for the costs of the subsequent part of the process.

If each of the parties partly loses and partly wins the case, the court will generally order one of the parties to pay partial costs to the other party. The court may also direct that neither party is to pay costs to the other party. The court may order a party to pay full costs to the opposing party where the opposing party's claim or plea differs only to a less significant degree from the outcome of the case and the difference has not caused other costs to be incurred.

If an action is withdrawn, the court may order one of the parties to pay full or partial costs to the other party, or direct that neither party is to pay costs to the other party.

The costs which have been necessary for the adequate conduct of the case are deemed to constitute recoverable costs. Legal costs are recoverable by a reasonable amount, and other costs are recoverable in full. Costs cannot be awarded on a full indemnity basis or on a disbursement basis. As a result, costs awarded rarely cover the actual costs incurred.

If so requested by the defendant, a plaintiff who is not resident or does not have its registered office in the EEA must provide security for the costs which it may be ordered to pay to the defendant. The form and amount of the security will be determined by the court. If special circumstances so warrant, the court may, however, relieve the plaintiff of the duty to provide security. If no security determined by the court is provided, the case will be dismissed. The provision does not apply where the plaintiff is resident or has its registered office in a country in which a plaintiff who is resident or has its registered office in Denmark is exempt from providing security for costs.

7. **In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?**

Danish law allows for uplifts or bonuses in case of success. However, a lawyer may not enter into fee arrangements for payment of a share of any result achieved by the client upon conclusion of the case (pactum de quota litis). Likewise, a lawyer may not agree to share his fees with a person who is not a lawyer.

The final level of fees must also be fair and reasonable. The fee, including an agreed fee, shall be set at the lawyer's discretion taking account of factors such as the significance and value of the case for the client, the outcome of the case, the nature and extent of the work the lawyer has performed and the responsibility entailed by the case. A lawyer shall make every effort to find a solution to the client's case at the lowest possible cost, taking into account the client's wishes and instructions. A lawyer may not demand payment of a deposit exceeding what by a cautious estimate would be assumed a reasonable fee.

Any commission, discounts and the like received from a third party in connection with handling the client's case shall unconditionally be credited to the client.

A lawyer may not demand or accept from any colleague or others a fee, commission or any other compensation for referring or recommending the lawyer

to a client. Similarly, a lawyer may not pay anyone a fee, commission or any other compensation for referring a client to himself.

As a general rule, claims can be transferred freely to others without the acceptance from the debtor. Thus, third parties are generally free to buy claims from cartel victims. Regarding consolidation of claims, see answer to question 4 above.

8. **Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?**

Yes.

- **If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?**

  The Danish collective redress system may apply in antitrust litigation cases, e.g. regarding claims from direct/indirect consumers, purchasers and clients.

- **Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?**

  As a general rule, the Danish collective redress system operates as an opt-in system.

  Opt-out is only an option in cases where the class action relates to claims where it is clear that the claims cannot generally be expected to be promoted by individual actions because of their small size, and it must be assumed that an opt-in class action lawsuit will not be appropriate. In such cases, the court may – at the request from the group representative – determine that the class action shall include the group members who have not opted out.

  The court decides on the scope for the class action. Persons whose claim falls within the scope of the class action shall be given information regarding the class action, the conditions and the legal consequences of signing up, respectively opting out of the class action.

  In case of opt-out, the court sets a deadline for written notice to opt out of the class action. The court decides where to the opting out must take place. The court may permit opt-out after expiry of the deadline if special reasons speak thereto.

- **How is it coordinated with the individual actions' framework?**

A judgment is binding upon all group members involved in the class action. Therefore, these cannot institute individual legal proceedings regarding the same questions as those determined in the judgment. Group members may institute individual legal proceedings regarding questions not determined in the class action judgment.

For example, if a class action judgment establishes that a company has infringed competition law but does not address whether damages can be accorded, a group member may institute legal proceedings regarding damages for the company's breach of competition law. During these individual proceedings, the class action judgment establishing the infringement of competition law will apply. Therefore, the court cannot assess the question of infringement of competition law again.

If such an individual action regarding damages is instituted before the judgment in the class action is issued, the court may suspend the case regarding damages up to the judgment in the class action if the court finds it necessary.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. **Are National Competition Authority decisions relevant for individual antitrust claims, in particular**
    - **as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)**

      The plaintiff suing for damages must substantiate, inter alia, that he/she has suffered a certain loss, that there is a causal connection between the loss and the competition law infringement, that the loss was foreseeable and that the defendant has committed a culpable/wrongful act. Normally, proof of a competition law infringement will suffice as substantiation of a culpable/wrongful act. Therefore, a National Competition Authority decision establishing a competition law infringement will usually be relevant for individual antitrust claims as proof of the infringement.

      A decision from National Competition Authorities is, however, not a prerequisite. A plaintiff may sue for damages directly without obtaining a decision from the competent competition authorities first.

    - **in terms of the *quantum* of the compensation?**

The plaintiff suing for damages must substantiate, inter alia, that he/she has suffered a certain loss. Only this loss can be compensated. Usually, a decision from a Danish Competition Authority will not establish the quantum of a loss suffered or of the compensation.

- **for the limitation period?**

  Generally, the limitation period for antitrust tort claims is 3 years and begins when the damage occurs. If the plaintiff is unaware of the claim or the debtor, the beginning of the general limitation period can be suspended until the plaintiff gains or should have gained knowledge of the claim and/or the debtor. Other specific suspension rules may also apply. However, time-barring of the claim enters no later than 10 years after the tortious act has ceased.

  If the claimant – prior to the lapse of the limitation periods – has filed a complaint with the Danish Competition and Consumer Authority regarding a defendant's infringement of article 101 or 102 TFEU or the Danish provisions corresponding hereto and the complaint forms part of the Danish Competition and Consumer Authority's consideration of the case, time-barring does not occur before 1 year after the Danish Competition and Consumer Authority's notice of their decision. Such preliminary suspension of time-barring will also apply if the decision based upon the claimant's complaint is later brought before the Danish Competition Appeals Tribunal either by the claimant or another party.

  Likewise, if the claimant has brought the case regarding infringement of article 101 or 102 TFEU or the Danish provisions corresponding hereto before the Danish Competition Appeals Tribunal or has intervened in the proceedings before the Danish Competition Appeals as a non-party, time-barring does not occur before 1 year after the Danish Competition Appeals Tribunal's notice of their decision.

  If a competition law infringement leads to criminal proceedings and the defendant is found guilty, the claimant can claim damages during those criminal proceedings regardless of whether time-barring has occured according to the provisions mentioned above. The claimant may also claim damages during separate legal proceedings instituted within 1 year after the final judgment in the criminal proceedings where the defendant is found guilty or within 1 year after the defendant's acceptance of a fine or another criminal sanction.

- **else?**

Danish courts are generally reluctant to conduct a thorough review of decisions from the Danish Competition and Consumer Authority and the Danish Competition Appeals Tribunal.

Furthermore, if a decision from the Danish competition authorities has not been contested within the relevant deadline, Danish case law has established that the decision will be regarded as final and will not be reviewed by the court under a lawsuit for damages.

10. What are the relevant limitation periods (taking into account question 9 above)?

As mentioned under question 9 above, the general limitation period for antitrust tort claims is 3 years and begins when the damage occurs. If the plaintiff is unaware of the claim or the debtor, the beginning of the general limitation period can be suspended until the plaintiff gains or should have gained knowledge of the claim and/or the debtor. Other specific suspension rules, including the one mentioned under question 9 above, may also apply. However, time-barring of the claim enters no later than 10 years after the tortious act has ceased.

If a competition law infringement leads to criminal proceedings and the defendant is found guilty, the claimant can claim damages during those criminal proceedings regardless of whether time-barring has occured according to the provisions mentioned above. The claimant may also claim damages during separate legal proceedings instituted within 1 year after the final judgment in the criminal proceedings where the defendant is found guilty or within 1 year after the defendant's acceptance of a fine or another criminal sanction.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

It is uncertain if parent companies can be held liable for infringements committed by their subsidiaries under Danish law. If a parent company has interfered with the management of a subsidiary, e.g. through instructions to the management of the subsidiary, and these interferences are related to a competition law infringement, it is likely that the parent company can be held liable for the infringement committed through the subsidiary. On the other hand, it is probably unlikely that a parent company will be held liable for infringements committed by subsidiaries if the parent company was unaware of and had nothing to do with the infringements.

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

If two or more persons are responsible for the same damage occurred in relation to a competition law infringement, they are jointly and severally liable. Therefore, the plaintiff may direct its total claim towards either person responsible.

The distribution of liability between persons subject to joint and several liability must be based on an assessment of what is deemed to be reasonable, taking into account the nature of the liability and any other circumstances.

Where one or more of the liable persons are covered by a liability insurance, section 19(1) and (2) of the Danish Act on the Liability to Pay Damages will apply.

Section 19(1) prescribes that where a loss is covered by a property insurance or a business interruption insurance, no person will be liable to pay compensation.

Section 19(2) prescribes that the provision of section 19(1) does not apply where (i) the person liable has caused the loss intentionally or by gross negligence; or (ii) the loss has been caused in the performance of public sector activities or commercial activities or any activities that may be compared to such activities.

In the situations set out in section 19(2)(i) and (ii), existing liability insurances may be taken into account in the distribution of liability between the persons having caused the damage or injury.

Liability vis-à-vis the authorities, i.e. liability to pay fines, is not joint and several. Danish authorities may issue a fine to one or several undertakings who have infringed competition law. However, Danish authorities can only require payment of a fine issued to a specific undertaking from this undertaking.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

As a main rule, the parties are free to adduce any evidence that can have significance to the case, e.g. documents, recordings, party and witness statements, expert reports, expert witness statements etc. There are exceptions to this main rule. For instance, settlement negotiations cannot constitute evidence if a party protests thereto. Rules on exclusion of witnesses and right of exemption from the duty to give evidence may also set boundaries.

- **Is there any pre-trial discovery procedure available?**

  Generally, submission of evidence takes place during the hearing. However, the court may allow taking of evidence prior to the hearing if failure to do so would render the party in risk of losing the evidence or the party has another special interest in the taking of evidence prior to the hearing.

  Taking of evidence prior to the hearing may even take place before legal proceedings have been initiated if a court finds it appropriate.

Taking of evidence prior to the hearing may also take place for the use in legal or arbitral proceedings initiated abroad.

- **Is there any evidence protected by legal privilege?**

  As a main rule, anybody is under a duty to give evidence in court as a witness.

  However, where the giving of evidence would be against the wishes of a person having a right to confidentiality, persons bound by professional secrecy, such as defence counsels and lawyers, must not be demanded to give evidence about matters having come to their knowledge in the course of the exercise of their functions.

  The court may order lawyers, excluding defence counsels in criminal proceedings, to give evidence where such evidence is deemed to be essential to the outcome of the case and the merits of the case and its importance to the party concerned or to society are found to justify the giving of such order. In civil proceedings, such order may not be extended to include information which a lawyer has obtained during legal proceedings the conduct of which has been entrusted to him or in which his advice has been sought.

  These provisions also apply to the assistants of such persons.

  The duty to give evidence as a witness or a party does not apply where the giving of evidence is deemed likely to (i) expose the witness to the penalty of the law or harm to his safety or welfare, (ii) expose the witness's related parties to the penalty of the law or harm to their safety or welfare; or (iii) otherwise inflict significant harm on the witness or his related parties.

  However, in the circumstances referred to in paras (ii) and (iii), the court may order the witness to give evidence where such evidence is deemed to be essential to the outcome of the case, and the merits of the case and its importance to the party concerned or to society are found to justify the giving of such order. The court may not order a witness or party to give evidence if the giving of evidence is likely to expose the witness or party to the penalty of the law or harm to his safety or welfare.

  The court cannot order a witness, party or a lawyer to disclose documents which contain information that the party or lawyer could not be required or entitled to disclose during a party or witness statement.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

If a party wants to invoke documents in the other party's possession, the party can request the other party to disclose these. If the other party does not disclose the documents, the party wishing to invoke the documents may request that the court shall order the other party to disclose them. The party requesting such document disclosure must describe (i) the facts that he/she wants to prove with the requested documents and (ii) the reasons why he/she believes that the other party is in possession of the documents. Before the court decides on the request, the party in possession of the documents will get a chance to make a statement regarding disclosure of the documents. The court cannot order a party to disclose documents regarding circumstances that the party could not be required or entitled to disclose during a party statement. If the court orders the party in possession of the documents to disclose these and the party does not comply with the court's order, the court may draw adverse interferences from this when deciding on the case.

If a party wants to invoke documents in a third party's possession, the party may request that the court shall order the third party to present or hand over the documents if these are of significance to the case. The party requesting such document disclosure must describe (i) the facts that he/she wants to prove with the requested documents and (ii) the reasons why he/she believes that the third party is in possession of the documents. Before the court decides on the request, the third party in possession of the documents will get a chance to make a statement regarding disclosure of the documents. The court cannot order a third party to disclose documents regarding circumstances that he/she could not be required or entitled to disclose during a witness statement. The third party can demand that his/her expenses related to the document disclosure are covered for in advance by the requesting party or that the requesting party provides security for payment of the expenses. If the court orders the third party in possession of the documents to disclose these and the third party does not comply with the court's order, the court may (i) fine the third party, (ii) order the police to bring the third party to court, (iii) order the third party to pay the costs occasioned by the third party, (iv) impose a continuous fine on the third party for up to a maximum period of six months, consecutively or in the aggregate, in the same proceedings, (v) order the police to take the third party into custody or subject the third party to other specific arrangements, until such time when the third party may be brought before the court to disclose the documents, for a maximum period of six months in the same proceedings, consecutively or in the aggregate.

The court itself may also encourage a party to disclose evidence necessary to enlighten the case adequately.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

The court does not have access to the Danish competition authorities' files unless a party has disclosed these as evidence during the legal proceedings.

As a general rule, only parties to a competition case handled by the Danish competition authorities can gain access to case documents and thus disclose these as evidence in legal proceedings. The definition of a party is narrow. Complainants are rarely considered parties. Thus, claimants in damages proceedings who are not parties to the competition case handled by the Danish competition authorities will rarely have access to case documents. Under certain circumstances, they might, however, gain access to information about their personal matters mentioned in a document in the competition case handled by the Danish competition authorities.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

Indirect purchasers can claim compensation for a loss suffered by them. This requires, however, that they can substantiate, inter alia, that they have suffered a certain loss, that there is a causal connection between the loss and the competition law infringement, that the loss was foreseeable and that the defendant has committed a culpable/wrongful act. It can be difficult for indirect purchasers to substantiate their loss and hence claim damages.

17. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

Theoretically, victims of umbrella damages are entitled to protection against antitrust infringements and could be entitled to damages in court. In order to be awarded damages, however, such victims would have to prove, inter alia, that he/she has suffered a certain loss, that there is a causal connection between the loss and the competition law infringement, that the loss was foreseeable and that the defendant has committed a culpable/wrongful act. In practice, it is probably very difficult for a victim of umbrella damages to prove that there is a causal connection between the loss and the competition law infringement and that the loss was foreseeable.

In case C-557/12, *Kone*, the European Court of Justice held that article 101 TFEU must be interpreted as meaning that it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions. In damages cases regarding umbrella pricing and article 101 TFEU, Danish courts are expected to rule in accordance herewith.

18. Is the passing-on defence allowed?

Yes. If a defendant can substantiate that overcharges have been passed on from the claimant to the claimant's buyers, the defendant may state that the claimant has suffered a smaller loss or no loss at all, depending on how much has been passed on to the claimant's buyers. It may, however, be difficult to substantiate the extent of the passing-on and thus difficult to employ the passing-on defence in practice.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations?
In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

Under Danish law, damages can only be accorded as compensation for a certain loss suffered by a party. Neither punitive damages nor treble damages can be accorded.

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

Individuals claiming damages will have to substantiate, inter alia, that they have suffered a certain loss, that there is a causal connection between the loss and the competition law infringement, that the loss was foreseeable and that the defendant has committed a culpable/wrongful act. Normally, proof that the defendant has infringed competition law will suffice as proof of a culpable/wrongful act.

Generally, the party claiming damages has the burden of proof. However, the burden of proof may be reversed or eased if the culpable/wrongful act is very grave. Normally, the proof of a causal link between the loss and the culpable/wrongful act requires more than a proof of the fact that it is more likely than not that a causal link exists. Since it will often be difficult to prove a loss of a certain amount, damages can be awarded as a round number based on an estimate if the balance of evidence suggests that a certain loss-making consequence has occurred. The burden of proof regarding the size of the loss suffered may thus be eased.

21. Is there a difference between stand alone and follow-on actions?

In both stand alone and follow-on actions, the claimant will generally have to substantiate the same conditions. However, a decision from a competition authority establishing a competition law infringement will usually ease the claimant's burden of proof.

22. How is damage quantified?

In quantifying the damages, a party having suffered a loss due to the competition law infringement may usually claim damages in an amount corresponding to the loss suffered by him/her due to the competition law infringements. Thus, the injured party shall be compensated so that he/she will be placed in a position corresponding to the position that he/she would have been in had the competition law infringement not occurred. This implies a comparison between the actual course of events and a hypothetical course of events, where the latter is the likely course of events absent the competition law infringement (a "but-for analysis"). The damage is quantified as the economic difference between these two courses of events.

The methods and techniques described in the European Commission's practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 TFEU may be applied to determine the likely counterfactual scenario and thus quantify the loss.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

The defendant may try to convince the court that a culpable/wrongful act has not been committed, that there is no causal link between an alleged culpable/wrongful act, that an alleged loss was not foreseeable, that no loss has been suffered or that an alleged loss is too big, that the claimant has exercised contributory negligence, that the claimant has not mitigated his/her loss and that the alleged claim is time-barred.

24. What is the role of economic experts, if any?

Economic experts can operate as expert assessors and expert witnesses. They can also answer the parties' questions in an expert report or give their opinion in an expert statement. Expert statements are usually obtained from relevant institutions or organisations. Expert statements that are obtained by only one party after the legal proceedings have been instituted can generally not be submitted as evidence.

25. What other types of experts are typically engaged in your jurisdiction?

Cases before the Danish Maritime and Commercial Court are judged by expert assessors and legal judges. Cases before other Danish courts except the Danish Supreme Court may also be judged by expert assessors. The expert assessors are appointed as such by different business organisations. The expert assessors are chosen for each specific case in order to ensure that the court has the necessary expertise. Thus, experts within many different areas may be engaged.

Experts operating as expert witnesses or giving expert reports or statements may also be experts within many different areas.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

No.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction?
If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Two forms of alternative dispute resolutions within the judicial system are available in Denmark:

- The court's conciliation procedure during the proceedings and
- Judicial mediation.

The court will normally try to mediate during the court proceedings, unless this seems pointless in advance. Mediation will usually take place during a preliminary hearing or after the pleadings. In the latter case, the court may issue a proposed settlement based on the legal matter. If the parties settle the case further to the court's conciliation procedure, the settlement is entered in the court records and is thus enforceable.

Judicial mediation is an optional alternative to traditional legal proceedings initiated. If the parties agree hereto, they can request that the court appoints a judicial mediator. The court will normally grant such request. If judicial mediation is initiated, the court will postpone the traditional legal proceedings. The judicial mediator is an unbiased third party who will lead a structured, facilitating process where the parties themselves (and their lawyers) can negotiate a settlement. Contrary to a settlement based on the court's conciliation procedure, a settlement further to judicial mediation is not necessarily based on the legal matter. The parties' settlement can – but will not necessarily – be entered in the court records. If so, the settlement will be enforceable.

The parties may also carry out extrajudicial settlement negotiations at any time during the trial. If the parties agree on a settlement, they can request that the settlement is entered in the court records. If this is done, the settlement is enforceable.

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:

- **settlements requiring court approval;**

  Settlements do not require court approval.

- **settlements outside of proceedings;**

  As mentioned under question 27 above, the parties may carry out extrajudicial settlement negotiations before or during the trial. If the parties agree on a settlement during the trial, they can request that the settlement is entered in the court records. If this is done, the settlement is enforceable.

- **timing of settlement;**

  The parties may settle their case at any time.

- **etc.**

  N/A.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

E-takeaway ApS vs. Just-Eat.dk ApS

e-takeaway ApS and pizza.dk sued Just-Eat.dk ApS for damages before the Danish Maritime and Commercial Court. e-takeaway claimed that Just-Eat was liable to pay DKK 20,000,000 in damages. Pizza.dk claimed that Just-Eat was liable to pay DKK 1,800,000 in damages.

The claimants claimed, inter alia, that Just-Eat.dk ApS had abused its dominant position on the relevant market in violation of section 11 of the Danish Competition Act by forcing pizzerias to accept unreasonable terms and conditions that precluded the pizzerias from doing business with other actors on the market. The claimants also claimed that Just-Eat had abused its dominant position by forcing pizzerias to terminate existing agreements with other market players.

The claimants furthermore claimed that Just-Eat.dk's standard competition clause constituted an anti-competitive agreement within the meaning of section 6 of the Danish Competition Act.

The Danish Maritime and Commercial Court found that the claimants had failed to define the relevant market. Hence, the court held that it could not assess whether Just-Eat had breached section 6 or 11 of the Danish Competition Act.

Cheminova A/S vs. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB

On 19 January 2005, the European Commission imposed a fine on Akzo for its participation in a cartel in breach of article 101 TFEU.

After the Commission's decision, Cheminova, who was a customer of Akzo, sued Akzo for damages claiming that Cheminova had suffered a loss as a consequence of overcharges due to the cartel and that Akzo was liable to pay damages covering this loss. The case was decided by the Danish Maritime and Commercial Court.

Akzo did not deny their participation in the cartel or the basis of liability. Akzo did, however, contest the claim that Cheminova had suffered a loss as a consequence of the cartel and that Cheminova was thus entitled to claim damages.

The court found that Cheminova had suffered a loss and was thus entitled to claim damages. The court was of the opinion that the loss was to be estimated in accordance with the recommendation of an expert witness who had estimated the loss as the sum of a calculated loss for each year during the cartel period. The loss was estimated on the basis of competitive economics theory. Like the expert witness, the court found that the passing-on degree in relation to calculation of the loss suffered by Cheminova was 50 pct.

The court rejected an estimation of the loss suffered based on an American settlement signed between Akzo and a number of American customers. This was due to the differences between both substantive and procedural rules in American and Danish law.

Akzo was found liable to pay damages to Cheminova in the amount of DKK 10,710,000 plus interest from when the damage occurred.