DENMARK

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I. Introduction

There is no special legislation concerning damages for breach of EC or national competition law in Denmark, and as such actions for such damages reflect general practice concerning liability in tort and liability in contract.

There have been only very few court cases concerning actions for damages for breach of competition law, cf. Section V, and these court cases are of a very recent date. A few major cases are pending which will bring further clarification in the area.

The Danish Competition Act ("konkurrenceloven") §§ 6 and 11 are very similar to Article 81 and 82 of the EC Treaty and are generally interpreted in the same way.

The Danish Competition Act is administered by the Competition Agency ("Konkurrencestyrelsen")[1], an administrative body. The Agency is subordinated to the Competition Council ("Konkurrencerådet"). The Council is responsible for taking decisions in all cases of major importance based on recommendations from the Agency. Decisions taken by the Competition Agency or the Competition Council can normally be appealed to the Competition Appeal Board ("Konkurrenceankenævnet")[2]. The decisions of the Competition Council cannot be brought before the ordinary courts until the Competition Appeal Board has made its decision, upon which an appeal to the High Court is possible.

Neither the Competition Agency, the Competition Council nor the Competition Appeal Board is competent to decide on matters of compensation or damages.

The ordinary courts (the city courts, two High Courts and the Supreme Court) are all competent to hear actions for damages in competition law cases. As a rule cases can only be tried in two instances and will start in the City Court unless the value of the case exceeds DKK 1,000,000.

According to the Danish Competition Act § 23 it is a criminal offence to violate §§ 6 or 11 or Article 81 and 82 EC and undertakings doing that, intentionally or by gross negligence, can therefore be prosecuted by the public prosecutor and fined, either by the undertaking accepting a fine voluntarily or by the case being taken to court.[3]

1 The Agency handles notifications and complaints and can also investigate cases on its own initiative. The Agency has the power to request information from undertakings and to carry out unwarned inspections on site (the so-called dawn raids).

2 The Agency and the Council can issue orders that restrictive agreements and practices, abuse of dominance etc. infringing the Competition Act should be stopped, and can take decisions on the granting of individual exemptions. The Competition Appeal Board is a 3-member board, the chairman being a Supreme Court judge, and the two other members being professors in competition law and economics respectively.

3 Fines have so far been relatively modest, typically below 1- 2 million DKK and in total less than around 30 million DKK of fines have been issued under the new Competition Act. The anticipated level of fines for breach of Section 6 and 11 has however been increased by an amendment to the Competition Act in 2002. Although there have not yet to our knowledge been any such cases, there is a possibility of prosecuting and fining individuals within the undertaking who enter into or are in other ways responsible for the agreement.

The Agency cannot issue fines itself but shall transfer such cases to the public prosecutor for criminal prosecution in the courts. In practice this happens normally only in cases where there is a clear and serious infringement of the provisions of the Act.

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

In Denmark there exists no specific statutory basis for bringing action for damages to property. Actions may be brought before court by the plaintiff filing a brief with exhibits against payment of a court duty, cf. the Administration of Justice Act ("retsplejeloven") § 348 and the Act on Court Fees ("lov om retsafgifter") § 1. The defendant will be entitled to file a written reply within a reasonable deadline, and if necessary there will be further exchanges of written pleadings. In some cases an independent expert may be appointed to examine special matters and questions posed by the parties and the court. When the written preparation of the case is finished, an oral hearing is scheduled in which the case is presented to the court, the parties and any witnesses are heard, and the parties bring oral arguments. Subsequently a judgement is issued which can be appealed, normally once.

The general principles governing liability for damages are applicable wholesale to competition based damages actions and there is no distinction between claims based on EC competition law or on national competition law.

The question whether a violation of the Competition Act in itself is considered conclusive proof of fault has not yet been answered. The Competition Act has no provisions concerning actions for damages, and the Act does not mention the possibility for the injured party to initiate claims based on infringement of the Danish competition rules. However, the reason for this is according to the travaux preparatoires that violation of the competition rules typically will (according to general rules of Danish law) constitute an unlawful act for which the injured party may claim damages.[4]

The question whether a violation of the Competition Act in itself is considered conclusive proof of fault has been raised in a pending case.[5]

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

In the Danish legal system the courts are arranged in three levels: the City Courts, two High Courts and the Supreme Court. These ordinary courts are all competent to hear actions for damages and no distinction is made between the courts as regards the basis of the claim (national/EC law, contract, tort etc.) or the identity of the parties (undertaking, individual). As a rule cases can only be tried in two instances and will normally start in the City court. Cases may start in the High Court if the value of the case exceeds DKK 1,000,000[6], or the case is of general public importance or of great importance to others than the parties to the case. Furthermore, the appeal of a Competition Appeal Board decision will start in the High Court.

Maritime and commercial cases in the Greater Copenhagen area are referred to a special court, the Maritime and Commercial Court unless the economic value of the

4 Cf. Official Report of Parliamentary Records, Annex B, ("Folketingstidende 1999/2000, tillæg B"), p. 1298. Cf. further Bertelsen, E. Tribute Volume to Jørgen Nørgaard, Damages for violation of Competition Rules ("Festskrift til Jørgen Nørgaard, erstatning for overtrædelse af konkurrencereglerne") (Jurist- og Økonomforbundets Forlag, 2003), p. 367ff.

5 TVDanmark A/S vs TV2 A/S, pending before the Eastern High Court, 13th dept.

6 Cf. the Administration of Justice Act § 227. The City Court shall refer a case to the High Court upon request from one of the parties, if the value of the case exceeds DKK 1,000,000.

case is less than DKK 100.000.[7] The Maritime and Commercial Court's decisions are appealed to the Supreme Court.

None of the courts have specialised panels/chambers dealing with competition claims.

See also below Section II.H.(iv) as regards the question how many judges sit in actions for damages cases.

(ii) Are there specialised courts for bringing competition-based damage actions as opposed to other actions for damages?

No.

C. <u>Who can bring action for damages?</u>

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Standing:
Courts only allow actions that pursue a sensible and fair goal.[8] Lawsuits meant to delay or impede a case are thus not accepted. The plaintiff must have a legal interest, i.e. a concrete, specific and individual interest in the decision, to have standing before the courts.[9]

The interpretation of these conditions has in recent case law been quite flexible. In general, competitors will for example often be given the possibility to challenge a competition authority's decision also if the decision concerns other companies.[10]

It is not a requirement that the plaintiff can demonstrate the presence of substantive elements such as fault, damage or causal link for standing to be granted.

Natural or legal persons from other jurisdictions in principle have the same procedural rights as Danish citizens and the same possibilities to obtain free legal aid. A foreign plaintiff must, on request from the defendant, provide security for legal costs, unless Danish citizens in the foreign state concerned are exempted from such a duty. Plaintiffs from countries that are parties to the Hague-Convention relating to civil procedure of 1954 cannot be requested to provide security. The same applies to plaintiffs from other Member States of the European Union if the lawsuit concerns commercial rights protected by the EC Treaty.[11]

Jurisdiction:
The provisions concerning the jurisdiction of the courts are set forth in the administration of Justice Act §§ 235-248.

There are 82 judicial districts within Denmark. As a main rule cases are brought before the city court in the judicial district where the defendant is domiciled. Legal persons are domiciled where the legal person's headquarter is situated, cf. the Administration of Justice Act § 238(1). Other criteria such as "the place of performance of an obligation" (contractual matters), or "the place where a harmful act occurred" (torts) are also applicable. One High Court has jurisdiction over the eastern part of Denmark and the other over the western part of Denmark.

As regards jurisdiction between EU Member States it is important to note that the Brussels Regulation 44/2001 does not apply in Denmark. The Convention is drafted subject to Articles 61(c) and 67(1) EC with regard to which Denmark has a

7 Maritime and commercial cases are civil cases in which special knowledge of commercial or maritime matters is of importance, cf. the Administration of Justice Act § 6(5). Commercial and maritime cases may be brought before the ordinary courts if the parties to the case so agree, cf. the Administration of Justice Act § 20.
8 Gomard, B. *Civil Litigation ("Civilprocessen")* (Forlaget Thomson, 2000), p. 327.
9 This requirement is not directly expressed in the legislation but follows from the case law of the courts.
10 Gammeltoft-Hansen, H. *Administrative Law ("Forvaltningsret")* (Jurist- og Økonomforbundets Forlag, 2002), p. 807.
11 Gomard, B. *Civil Litigation ("Civilprocessen")* (Forlaget Thomson, 2000), p. 303.

reservation, cf. Article 69 EC. If a case involves persons from Denmark and other EU Member States or EFTA States the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 1968 (the Judgments Convention) therefore applies.

As regards jurisdiction between Denmark and non EU Member States, § 246 of the Administration of Justice Act specifies in which situations Danish Courts have jurisdiction. This is the case in the following situations (1-7):

1. The defendant has a business or exercise business activity within Denmark and the legal dispute relates to the activity of that business, or where

2. The defendant has immovable property in Denmark, and the case relates to this property.

3. Cases concerning contractual matters may be brought before the courts at the place of performance of the obligation in question. This provision is not applicable to monetary claims unless the claim relates to a stay in Denmark and the claim was expected to be fulfilled before leaving the country.

4. Cases in respect of tort damages may be brought before the court where the harmful act occurred. There is no case law illustrating how this provision will be interpreted in competition law cases. From a practical viewpoint, it would be likely to be difficult to sue non-Danish Parties in Denmark for damages suffered as a consequence of competition law breaches committed abroad.

5. In cases concerning consumer contracts the consumer may, if certain conditions are fulfilled, bring a case before the court where the consumer is domiciled. The consumer must have taken the necessary steps to make the agreement in Denmark, and the defendant's marketing must have taken place in Denmark before the agreement was made.

6. If no other provision applies, a case may be brought before the court at the place where the defendant stays when the writ is served on the defendant. This provision only applies to cases concerning property law.

7. Finally, if the last mentioned possibility does not apply a case may be brought before the court where the defendant has property. This provision only applies to cases concerning property law.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

There is no possibility of class action or collective claims in Denmark.

According to Danish procedural law more plaintiffs can under certain conditions appear together in a joint case (joint action), but the claims of each party are treated individually and the outcome of the case may differ from party to party, cf. the Administration of Justice Act § 250. Joint actions may also involve claims for damages.

It is relatively easy to join cases as long as the parties to the cases do not protest. If a party opposes a joint action, it is necessary to show that there exists a certain connection between the claims.[12]

Only if a right belongs jointly to several persons, for example the common purchase by several persons of an object, the owners are obliged to file a lawsuit together and they will act as one party during the proceedings.

Indirect actions by representative bodies are accepted if the representative body demonstrates sufficient legal interest in the case. In recent case law there is a

12 An example of a joint case involving several individuals is UfR 1989 1108 H *Dansk Eternit-Fabrik A/S mod Carl Vilhelm Møller m.fl. og Knud Wagner Nielsen m.fl. mod Dansk Eternit-Fabrik A/S*, where more than 30 claimants in a joint case claimed damages from their employer for occupational diseases caused by working with asbestos.

marked tendency allowing organisations to file proceedings concerning general questions if it is of considerable significance for the members of the organisation.[13] In a High Court ruling from 1994, the environmental organisation Greenpeace was found to have sufficient legal interest in proceedings against the Ministry of Transport concerning the construction of the Øresund bridge link, cf. UfR 1994.780 Ø. There are however no examples of consumer organisations having filed proceedings on behalf of consumers who have suffered damage due to a breach of competition law.

The Danish Consumer Organisation (Forbrugerrådet) may provide economic support and counselling for consumers in cases involving legal problems, which have not been dealt with by case law. In principle the Danish Consumer organisation could also give support in cases involving alleged competition law violations but the organisation perceives the lack of any possibility of class actions as a practical barrier (such as in the SAS-Maersk cartel case).

Cases instituted by representative bodies may in principle involve claims for damages if the association or organisation has itself suffered a loss. It is also possible for individual persons to join a case instituted by a representative body, for example as regards the individual persons' claims for damages.[14]

A number of authorities, associations and organisations have statutory rights to file proceedings. It follows from the specific legislation whether organisations are provided with such a right. According to the Danish Marketing Practices Act ("markedsføringsloven") § 20 if a plurality of consumers has uniform claims for damages, the Consumer Ombudsman may, upon request, recover the claims collectively. This provision has not been used in practice and only applies to claims based on the Marketing Practices Act as opposed to other laws such as competition rules. No consumer organisations have statutory rights to file proceedings based on claims for damages based on a breach of competition law.

Finally it should be mentioned that if the prosecution has instituted proceedings under criminal law, for example because of an undertaking's alleged breach of competition law, an injured party or the prosecution on its behalf may claim damages within the same procedure. If no judgement is made because the defendant admits his guilt and pays a fine out of court, the injured party's claim for damages will not be admitted.

D. What are the procedural and substantive conditions to obtain damages?

The factors that the plaintiff needs to establish to obtain damages in both contractual and non-contractual claims are proof of fault, the size of the loss, the causation and the foreseeability/adequacy of the damages. In matters concerning contractual liability no-fault liability is however applied in certain situations. This is for example typically the case if the seller of a product has given a guarantee or if the case concerns the sale of generic goods which are defective.

(i) What forms of compensation are available?

The injured party's economic loss is in principle to be compensated in full. The plaintiff's loss includes operating losses, loss of profits, loss in connection with increased costs and other direct and indirect losses which are connected to the illegal behaviour. The loss can only be compensated in money. Moral damages require as a main rule a specific statutory basis.[15] As regards "loss of chance" unspecified or uncertain deteriorations of future chances will most often not make a basis for claims for damages.[16] [17]

13 Gammeltoft-Hansen, H. *Administrative Law ("Forvaltningsret")* (Jurist- og Økonomforbundets Forlag, 2002), p. 808.

14 Svensson, J.E. and Alsøe, C., *Collective Claims in Denmark? ("Kollektive søgsmål i Danmark?")* (2000), Ugeskrift for Retsvæsen B, p. 245.

15 In Denmark a distinction is made between damages and compensation ("godtgørelse"), the latter covering only non-economic damage. Claims for compensation are common in relation to personal injury or defamations, cf. the Damages Liability Act ("Erstatningsansvarsloven") § 1 and § 26.

16 Vinding Kruse, A., *The Law of Torts ("Erstatningsretten")* (Jurist- og Økonomforbundets Forlag, 1989), p. 345 and 352.

As regards liability in torts the victim must be restored to the situation he would have been in had the tort not taken place. In matters concerning contractual liability, damages may be awarded on the basis of the restoration of the victim to the situation he would have been in either in the absence of the contract or in the absence of the illegality, see below Section II.G.(i).

The measure of damage is furthermore based on the principle that the injured party may not obtain any enrichment and the injured party is under a duty to mitigate his loss, cf. Section II.F.(iii).

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Directors and board members may be held personally liable if they have intentionally or negligently harmed the company, cf. the Companies Act ("aktieselskabsloven") § 140. This could in principle be the case if they had participated in a breach of competition law. An action for damages is brought by the shareholders in the name of the company if such a procedure has been decided for at a shareholder meeting. In the event that a minority of shareholders, representing at least a tenth of the share capital wish to hold the responsible liable, each of these shareholders may institute proceedings claiming damages for the company.

No other form of civil liability relevant to the present study are recognised in the context of private damages actions.

According to § 79(2) of the Danish Penal Code ("straffeloven"), a person who is found guilty of a crime can by judgment (under special circumstances) be sentenced not to carry on the specific activity or not to act as director or manager of limited companies. The deprivation lasts from 1 to 5 years or "until further notice" in which case the question of continued deprivation can be brought before the court after 5 years.

§ 79(2) of the Danish Penal Code has not been applied in practice in competition cases. This is possibly due to the fact that criminal charges in competition cases have so far only been brought against undertakings and not against individuals within the company.[18]

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

The infringement has as a main rule to imply fault except in a number of areas specifically regulated by law and unrelated to damages for breach of competition law. In both non-contractual claims and contractual claims it is as main rule the so-called fault liability rule (culpa rule) that applies.[19]

According to the fault liability rule, the tortfeasor/contractor will be liable in damages where the act or omission in question may be attributed to him as negligent or intentional. Under the traditional culpa definition a tortfeasor/contractor commits the tort of negligence if he fails to show the degree of care and consideration, which a reasonable, prudent man (a bonus pater familias) would show in similar circumstances.

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17 In a few situations unrelated to damages for breach of competition law the court may decide that parts of the court's decision are to be published in the press. This is the case if false evidence is given with the intention to harm an innocent person or if a media has not acted in conformity with sound press ethics. Furthermore, if a media has published incorrect factual information, the person concerned can, if certain conditions are fulfilled, request that a reply is published, cf. the Danish Media Liability Act ("medieansvarsloven") § 36.

18 Levinsen, K. *Annotated Competition Act ("Kommenteret konkurrencelov")* (Jurist- og Økonomforbundets Forlag, 2001), p. 590-591, referring to the Public Prosecutor's Notice No. 5/99 and SØK's guidelines on the penal treatment of competition law violations.

19 In matters concerning contractual liability no-fault liability is however applied in certain situations. This is for example typically the case if the seller of a product has given a guarantee or if the case concerns the sale of generic goods which are defective.

Ordinary negligence (as opposed to gross negligence) is sufficient to find that a tortfeaser's conduct amounts to culpa.

As set out above (Section II.A.(i)) the question whether a violation of the Competition Act is in itself considered conclusive proof of fault has not yet been answered, but the question has been raised in a pending case.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

The Danish Competition Act has no provisions concerning actions for damages and in the travaux preparatoires it is stated that the general rules of Danish law apply.

In Denmark the courts are generally free to assess evidence. This implies that the judge has the right as well as the duty to assess the value of evidence (including e.g. public documents, deeds etc.) submitted without regard to statutory provisions, cf. the Administration of Justice Act § 344(1) and Section II.G.(a)(iii). There is thus no hierarchy of forms of evidence expressed in statutory provisions.

Accordingly, it is the judge who assesses when a party has lifted the burden of proof with the result that the burden of counter proof shifts to the other party.

Both as regard burden of proof and standard of proof it may follow from the substantive rule in question, or from generally recognized rules on whom the burden of proof rests and which standard of proof is required.

As a general rule it is for the injured party to prove his case, including the infringement, the fault, the loss, the size of the loss caused by the infringement, the causality, and the foreseeability/adequacy of that loss. In particular circumstances or with respect to particular elements of a case, the burden of proof may shift to the defendant especially as regards claims or arguments presented by the defendant. If the defendant for example claims that the plaintiff had fault on his side, the burden of proof in this respect rests on the defendant.

"The passing on defence", cf. Section II.F.(ii), has been an issue in two cases concerning competition based damages claims. In practice no clear rule of the burden of proof concerning this matter has been established.

In an Eastern High Court judgement of 28 June 2002 concerning illegal port duties the court, referring to case C-242/95 of the ECJ, stated that the plaintiff could require damages in so far as it had not been proven that the illegal port duties had been passed on to the plaintiff's customers. From this statement it seems that the burden of proof in the specific case rested on the defendants.

In a Maritime and Commercial Court judgement of 3 October 2002 concerning the defendants' imposition of an illegal extra charge for the delivery of white goods, the court on the other hand stated that the defendants were to compensate the loss of the plaintiff as the plaintiff had proven that the extra charges had not been passed on to the customers of the plaintiff. It is not clear whether the court found that the burden of proof actually rested on the plaintiff or whether the statement expressed merely that the plaintiff's documentation was undisputed and that the plaintiff therefore, whether required or not, had proven his case.

Other elements the judge may consider are for example which party had the best opportunity to secure evidence. Furthermore, if a party is claiming something unusual there is a tendency for this party to bear the onus of proof. Finally it should be mentioned that if a party fails to fulfil his obligation to give information or to follow the court's request e.g. for further and better particulars, this may be taken into account by the court as evidence against him (have a prejudicial effect), cf. the Administration of Justice Act § 344(2) and (3).

There are no existing rules as regards the shifting of the burden of proof that may be applicable in competition based damages claims.

As mentioned it is for the judges to consider when a party has lifted the burden of proof.

(ii) Standard of proof

As regards the standard of proof a high degree of probability is generally required to prove that there is a basis for liability in matters relating to torts.

As already mentioned, liability in damages normally requires that the defendant's act or omission may be attributed to him as negligent or intentional.[20]

The abovementioned Eastern High Court judgement of 28 June 2002 (mentioned under section II.E(a)(ii)) illustrates the standard of proof required, in this specific situation in order to prove loss. In determining the exact amount of port duties paid by the plaintiff, the court took into account a statement by a state-authorised public accountant showing the port duties paid by the plaintiff in the relevant period. This evidence, which was disputed by the defendants, was obtained solely on the initiative of the plaintiff, after the institution of proceedings.

The standard of proof required to prove certain facts, for example the establishment of causation or the establishment of loss, is not always the same. If, for example, in an action for damages it is established that the defendant is liable, the courts have in some cases lowered the requirements to prove causation. In a judgement passed by the Supreme Court in 2000 a registered public accountant had made such serious mistakes in the counselling of a client, that the Supreme Court expressly stated that the grossness of the defendant's mistakes lead to the standard of proof being lowered as regards the establishment of the size of the loss. The defendant had to pay damages according to the court's discretion.[21]

Referring to that case The Complaints Board for Public Procurement ("Klagenævnet for Udbud"), in a decision of 3 July 2002, applied the same principle. The case concerned a county, which in negotiating with the tenderers, had infringed public procurement law. The claimant - Judex - obtained expectation damages although it was in reality not possible to assess whether it would have been chosen as contractor, had the county not violated the rules. This decision was appealed to the Western High Court which by judgement of 16 March 2004 stated, that Judex could only claim reliance damages. Two out of three judges found that the county's fault lead to the standard of proof being lowered to a certain degree as regards the evidence that Judex would have obtained the contract in the absence of the county's faults. Judex was, however, despite this not able to lift this burden of proof.[22]

As regards injunction proceedings, the standard of proof required is generally lower than in proceeding on the merits. Only establishment of "probability" is required, cf. the Administration of Justice Act § 642.

As regards criminal proceedings, it is required that there is no reasonable doubt about the guilt of the defendant (the "in dubio pro reo"-principle). For fines to be imposed the defendant's infringement of the competition rules must be intentional or grossly negligent, while the requirement to obtain liability in tort is ordinary negligence. In actions for damages the assessment of both the alleged violation of the competition rules and of the damages in question are decided on the basis of the standard of proof applicable in civil proceedings. Therefore, in principle an absolute discharge in a criminal case and the award of damages in a connected damages case may be possible, cf. Section II.G.(a)(vii).

20 It is undecided whether a violation of the Competition Act in itself amounts to "negligent behaviour" giving grounds for liability in damages. This question is as set out above (section II.A.(i) and II.D.(iii)) raised in a current case, cf. TVDanmark A/S vs TV2 Danmark A/S, pending before the Eastern High Court, 13th dept.

21 UfR 2000.521H, Dan Skoubo mod Revisionsfirmaet Teddie Thulstrup A/S.

22 Judgement of the Western High Court of 16 March 2004, Århus Amt against Judex A/S.

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

The parties' options to produce evidence are in principle unlimited, cf. the Administration of Justice Act § 341. The parties can in principle present any item and any witness that is suited to confirm or deny the probability of information as long as it is relevant for the case, and as long as the witness does not fall within the provisions excluding or exempting witnesses, see below. Hearsay evidence is also admissible.

Certain categories of people are exempt or excluded from the duty to act as witnesses. Certain professions (doctors, lawyers, public servants etc.) have a duty of confidentiality, which to a certain extent must be respected. A defendant's close relatives (including cohabiters) are exempted from the duty if they so wish, cf. the Administration of Justice Act §§ 169-172, 298, 299 and 305.[23] Further, if the testimony would harm the witness itself or his close relatives by giving rise to punishment, loss of welfare or other considerable harm, the witness is exempt from the duty to act as witness. Considerable harm could be the economic harm arising by disclosing business secrets.[24]

It follows from the abovementioned that both the CEO of a company and evidence/witnesses from other jurisdictions can be admitted as long as the evidence is relevant for the case, i.e. for the parties' claims and submissions.

Denmark is not bound by Regulation 1206/2001/EC. Denmark is a party to the Hague Convention relating to civil procedure from 1954 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded in 1970.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-avis:

- **Defendants**
- **Third parties**
- **Competition authorities (national, foreign, Commission)**

The court may on request from a party order disclosure by a party or by a third person of the documents in his possession or custody relating to matters in question in the action, cf. the Administration of Justice Act §§ 298(1) and 299(1). The court may ex officio call on a party to disclose documents, cf. the Administrations of Justice Act § 339(3).

Information which the party or third person would be exempted or excluded from providing as a witness, cf. the abovementioned provisions regarding the exclusion or exemption of witnesses, Section II.E.(a)(iii), are not covered by the disclosure rules.[25]

An employee of the Danish Competition Authority is thus normally excluded from providing information, which because of public interest falls under a duty of confidentiality, cf. the Administration of Justice Act § 169(1).

The requesting party must specify the facts that he wishes to prove via the requested documents and the disputed fact must be of relevance for the case, cf. the Administration of Justice Act § 300.[26] There must be a probability that the

23 If testimony is decisive for the outcome of a case, the court may to a certain extent anyway order the mentioned exempted/excluded witnesses to give testimony.

24 Gomard, B. *Civil Litigation ("Civilprocessen")* (Forlaget Thomson, 2000), p. 529.

25 There are in principle no stricter limits on discovery production by third parties than by the parties themselves, but in practice special consideration, however, can be made to third parties causing stricter limits.

26 For these reasons the requesting party normally has to specify the documents, e.g. by mentioning the type or category of documents. However, there are no specific provisions concerning clarification demands.

requested document will entail the necessary information. The courts enjoy a wide discretion as to whether to grant disclosure of documents.

If a party fails to comply with the order of disclosure, this may be taken into account by the court as evidence against him. The court does not have any further possibility to force the requested party to comply with its order.

As regards third persons the court may compel the third persons to deliver the documents by imposing fines, or by committing the third person to custody, however, not for longer than six months, cf. the Administration of Justice Act §§ 299(2) and 178(1).

In a case pending before the Western High Court the court has upon request from the plaintiffs ordered the defendant to produce documentary evidence, which could be helpful to the plaintiffs in order to prove their loss.[27]

As regards information from foreign competition authorities, the court may request the competent authority of the state concerned, by means of letter of request, to obtain evidence, cf. the Administration of Justice Act § 342. The court may ask the party requesting this information to provide security for the costs. How the foreign court proceeds depends on the laws of the requested state and applicable conventions.

The Competition Council may request any information, including accounts, accounting records, copies from the books, other business records and electronic data, which are considered necessary for its activities or for deciding whether the provisions of the Danish Competition Act shall apply to a certain matter, cf. the Danish Competition Act § 17.

Subject to reciprocity, the Competition Authority may divulge information covered by the rules of professional secrecy to other countries' competition authorities, if such information is necessary to improve the enforcement of the competition rules of those countries, cf. the Danish Competition Act § 18a.

Denmark is a party to the Hague Convention relating to civil procedure from 1954 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded in 1970. The Nordic countries have furthermore entered into an agreement concerning reciprocal legal aid.

(b) Proving the infringement

(i) Is expert evidence admissible?

The Administration of Justice Act contains provisions which regulate the use of surveyor experts ("syns- og skønsmand").[28] A surveyor expert may reply to specific questions posed by parties with the permission of the court.

A survey can only be held at the request of the parties, but the court may also call on the parties to request a survey. The court decides whether the request is to be allowed and the court appoints the surveyor.[29]

In the abovementioned pending case concerning damages incurred due to the pre-insulated pipes cartel, cf. Section II.E.(a)(iv), an independent expert surveyor was appointed by the court to investigate and answer specific questions. The parties

27 Cf. case B-331-01, Western High Court. The case concerns an action for damages which is a follow up to the Commission's decision of 21 October 1998 (the Pre-Insulated Pipes decision) and the judgement of the Court of First Instance of 20 March 2002, Case T-23/99, *LR af 1998 A/S (formerly Løgstør Rør) v. Commission of the European Communities.* The Commission and the Court of First Instance found that several undertakings had violated article 81 of the EC Treaty by participating in a cartel with the aim of dividing the market for district pre-insulated pipes between them.

28 The Administration of Justice Act §§ 196-212. A surveyor expert inspects a matter physically (for example in a case concerning an alleged defect he inspects the conditions of the property in question) and gives his expert opinion on the matter.

29 Only experts who have an unblemished reputation and can be assumed to be impartial may be appointed as surveyor. It varies from the judicial districts whether official lists of experts are used.

may alternatively obtain a declaration from an expert such as an organisation or institution acting within the relevant area.

Another possibility for the parties is to ask for an expert opinion or to summon expert witnesses. The Administration of Justice Act does not contain specific rules concerning expert witnesses or opinions.

It is not advisable for the parties to obtain such opinions/declarations unilaterally as their evidential value will be reduced. Unilateral reports may furthermore be refused evidential value in some cases.

Expert evidence on the law, such as legal opinions from professors etc., is normally not admissible, except for legal opinions about foreign law.[30]

The courts may admit evidence obtained through discovery in other countries. The courts are free to assess the evidential value of such evidence.

(ii) To what extent, if any, is cross-examination permissible?

Cross-examination is permissible both of parties and witnesses. This follows from the Administration of Justice Act, § 302(1) and § 183(1).

In general, questions are put directly to the party or the witness. However, the court may take over the examination if the lawyers' examination is improper or does not seek to evoke a clear and true explanation.

Certain categories of people are exempted or excluded from the duty to act as witnesses, cf. Section II.E.(a)(iii).

The court may impose fines upon witnesses that do not show up after having been subpoenaed to the court and can also let the police bring the witness to the court, cf. the Administration of Justice Act § 178. Further, the court may commit the witness to custody until the witness can be brought before court to testify or until the witness is willing to testify, however, not for longer than six months.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU member State have evidential value?

The court assesses the evidential value of the statement/decision. Generally speaking Danish courts will give full consideration to such statements and decisions. Such statements and decisions are not binding upon the court and do not deprive the court of making an individual assessment of the facts etc. within the limits imposed by Community law, and the principles of *res judicata* and *ne bis in idem*. It follows from the EC Treaty that the courts to a certain extent must give "full faith and credit" to administrative acts and official documents from other member states.[31]

(c) Proving damages

(i) Are there any specific rules for evidence of damage?

There are no specific rules for evidence of damages or calculation of future losses in competition cases.

The courts will often determine the size of the damages on a discretionary basis, taking into account all relevant evidence presented to it and in some situations lowering the standard of proof required if gross violations have been established, see above Section II.E.(a)(ii).

30 Lindencrone & Werlauff *Danish Administration of Justice ("Dansk Retspleje")* (Forlaget Thomson, 2000), p. 256.
31 Werlauff, E, *European Law of Litigation ("Fælleseuropæisk Procesret")* (Jurist- og Økonomforbundets Forlag, 2000), p.156.

The courts may render partial judgement on all aspects or questions of the case, cf. the Administration of Justice Act § 253. Partial judgments concerning counterclaims or claims in regard to which there are counterclaims cannot be appealed until the final judgment is made, unless the court permits so, cf. the Administration of Justice Act § 253 (4). Furthermore, the plaintiff can chose to bring a declaratory action for the courts concerning e.g. all aspects except the size of the damages.

(d) Proving causation

(i) Which level of causation must be proven direct or indirect?

There is no statutory provision listing the requirements to prove causation and foreseeability/adequacy. Danish law does not distinguish clearly between direct and indirect causation. A very remote causation connection could be insufficient due to the condition that any damages shall be foreseeable.

In general more than just a preponderance of evidence (i.e "more than 51 % probability") is required to prove causation but no specific probability can be given. Further, according to case law under certain circumstances the standard of proof may vary according to the character and the level of the tortfeasor's guilt. There are also - in general torts law - examples of cases where the gross negligence of the defendant led the court to shift the burden of proof, as regards causation, to the defendant.

In situations where there are multiple causes, foreseeability is in practice an important element in the assessment of damages as the direct connection between the negligent act and the damage can be weak. If there are multiple tortfeasors and they are all liable, the tortfeasors under torts law are as main rule jointly and severally liable.[32]

F. Grounds of justification

(i) Are there grounds of justification?

In general, there are no grounds for justification as long as the undertaking causing the losses acts negligently. It is undecided whether an infringement of competition law will always constitute negligence, cf. Section II.A.(i), II.D.(iii), and II.E.(a)(iii). This will, however, at least typically be the case.

There is no case law concerning matters which could serve as potential justification to exculpate the defendant in damage cases.

In principle a liability could be excluded due to very particular circumstances (e.g. as force majeure or consent) but normally an infringement caused negligently or deliberately would be sufficient to serve as basis for liability.

According to the Danish Competition Act, §§ 6 and 11 (corresponding to Article 81 and 82) do not apply if an anti-competitive practice is a direct or necessary consequence of public regulation. In this case there will be no infringement of competition law and there will typically not be any basis for liability for the undertaking.

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

The 'passing on' doctrine is applied by the Danish courts, also in competition cases, and the defendant can argue that the plaintiff was not injured because it passed on any overcharges attributed to abusive or anti-competitive behaviour to a subsequent purchaser. While the burden of proof for such statement initially would normally lie with the defendant, as stated above (Section II.E.(a)(i)), no clear rule of the burden of proof has been established in practice.

32 Gomard, B. *Civil Litigation ("Civilprocessen")* (Forlaget Thomson, 2000), p. 493.

As mentioned above, cf. Section II.E.(a)(i), the courts are basically free to assess evidence. Therefore, the courts may take into account as evidence that the plaintiff increased its prices, but on the basis of case law it cannot be concluded that there is a presumption that higher prices in themselves is evidence of any costs being passed on.

There are no court cases concerning the 'indirect purchaser' principle. However, in our view, in principle, if an undertaking passes on e.g. a duty, the 'indirect purchaser' may claim tort damages (as a secondary claim) if it proves a loss[33] and the loss is caused by a negligent act by a third party. The courts are free to assess the evidence concerning the 'indirect purchaser's' loss.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

There is no case law concerning matters where the plaintiff itself was a party to the infringement. In principle a claim for damages would also be possible in these cases, cf. the ECJ's judgement in Courage vs. Crehan.

It is indeed relevant if the plaintiff is (partly) responsible for the infringement, has benefited from the infringement or has failed to mitigate.[34]

If the plaintiff is wholly or partly responsible for an infringement, the courts may reduce the plaintiff's damages proportionately. In general, the size of the plaintiff's contributory negligence will be the most important criteria. According to ordinary damages case law the courts as a principal rule operates with fractions of 1/3, 1/2 and 2/3; if the contributory negligence is less than 1/3 the plaintiff will get damages without any reduction, if the contributory negligence is above 2/3 the plaintiff will not get any damages.[35]

If the plaintiff has benefited from the infringement, it will not have suffered any loss (or only a smaller loss), and the plaintiff will not be entitled to any damages (or only damages reduced with the benefited amount), cf. Section II.G.(a)(i).

Concerning mitigation, please cf. Section II.G.(a)(v).

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury to the plaintiff?

Under Danish law damages are calculated on the basis of injury to the plaintiff.

As regards liability in tort, it is a fundamental principle for the assessment of damages that the plaintiff's financial position shall be the same as before the occurrence of the damage.

The plaintiff's loss includes operating losses, loss of profits, loss in connection with increased costs and other direct and indirect losses which are connected to the illegal behaviour.

In cases of contractual liability, the plaintiff may in principle demand reliance damages ("negativ kontraktsinteresse") or expectation damages ("positiv opfyldelsesinteresse").

33 In this situation the direct purchaser would typically have passed on the loss and as such have difficulties in obtaining damages itself.

34 Andersen, M. B., and Lookofsky, J., *Textbook on the Law of Obligations ("Lærebog i Obligationsret")* (Forlaget Thomsen, 2000), page 263ff.

35 von Eyben, B., and Isager, H., *Textbook on the Law of Torts ("Lærebog i Erstatningsret")* (Jurist- og Økonomforbundets Forlag, 2003), page 323.

Reliance damages restore the plaintiff's financial position to his original pre-contractual position by compensating the plaintiff of the costs of entering into and operating the agreement. Expectation damages would put the plaintiff in a position as if the contract had been fulfilled. A plaintiff would normally not be able to demand expectation damages in a situation where an agreement is void.[36] To the extent the claim is based on a part of an agreement prohibited under the Danish Competition Act § 6 and/or Article 81(1) EC which is held to be void, the plaintiff would from the outset have difficulties in claiming reliance damages.[37] This result should however probably be modified in cases similar to Courage vs. Crehan.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

There is no territorial restriction concerning damages, and damages may in principle be awarded for injury suffered worldwide.

(iii) What economic or other models are used by courts to calculate damage?[38]

The courts do not use any specific economic or other models to calculate damage.

There have only been a very limited number of damages cases based on breach of competition law and in the reported judgements issued so far, no economic models have been used.

In recent years economists and economic consultants have been introduced in a few competition cases and with them also sporadically the use of different economic models. These matters have not been analysed in any detail in Danish legal literature.

The most relevant cases in the area which are pending and of which we are aware involve damages litigation conducted by local municipalities against the participants in the pre-insulated pipes cartel comprised by the Commission's decision of 21 October 1998.

In these cases both parties have presented economic models or arguments to the court, but no legal assessment hereof has yet been made.

Generally, on the basis of the parties' statements and evidence, the court decides how the actual context of the case must be seen, and considers well-known facts and undisputed information without any further proof, cf. Section II.E.(a)(i).

A decision on disputed points in the parties' statements requires a judgment of proof or weighing of evidence, i.e. a finding in general by judging intuitively the probability, which exists after the presention of the evidence, of the correctness of one or the other party's view, cf. Section II.E.(a)(ii). The finding, which is to be based on the evidence, is not regulated by rules of law.

It is the intention that the court shall freely judge the parties' and the witnesses' credibility and the weight (the value of probability) of the exhibits in the case and not be bound by rules according to the legal (regular) judgment of proof or by economic or other models.

In practice the courts' calculation of damages depends on the parties' claims, and often on a rough estimate of the loss incurred by the plaintiff.

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36 It is in general only those aspects of the agreement which are prohibited by § 6/Article 81(1) EC that are void. The agreement as a whole is void only if those parts do not appear to be severable from the agreement itself, cf. case C-234/89, Delimitis. The consequences of such nullity of the agreement are not a matter for community law as those consequences are to be determined by the court according to national law, cf. case C-319/82, Société Technique.

37 The Danish Competition Act § 11 (Article 82 EC) contains no provision concerning invalidity. However, if the abuse is carried out through an agreement, it may be assumed that those provisions in the said agreement, which violate § 11 or Article 82 EC will be void and, therefore, cannot be enforced, cf. Bertelsen, E. Tribute Volume to Jørgen Nørgaard, Damages for violation of Competition Rules ("Festskrift til Jørgen Nørgaard, Erstatning for overtrædelse af konkurrencereglerne") (Jurist- og Økonomforbundets Forlag, 2003), p. 370.

38 Gomard, B., *Civil Litigation ("Civilprocessen")* (Forlaget Thomson,2000), page 488.

In general, compared to other countries it is the general opinion that Danish courts' estimate of plaintiffs' losses typically results in relatively small damages to the plaintiffs.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?[39]

This distinction does not appear practical in damages cases based on breaches of competition law but the answer is probably ex-post estimates. Damages become due when the damage takes place, or at the time at which the damage can be estimated. It would be normal to claim such damages, which can be established at the time of filing the lawsuit, and it would be possible to reserve the right to increase the claim later. There are no particular provisions for inflation. The legal interest rate is related to the Danish National Bank's official lending rate.

(v) Are there maximum limits to damages?

As regards property damages, there are no maximum limits to damages as the assessment of damages to the plaintiff is based on the injury suffered by the plaintiff.

However, the plaintiff has a duty to mitigate damages, cf. Section II.F.(iii) and cannot be awarded damages, which he or she could avoid by taking fair and usual steps.

It is not uncommon that undertakings by contract limit their contractual liability. The courts will respect such contractual obligations unless the waivers are clearly unfair and unreasonable, or if they include waivers of liability for deliberately damaging actions or gross negligence.

(vi) Are punitive or exemplary damages available?

No.

(vii) Are fines imposed by competition authorities taken into account when settling damages?

Fines are not imposed by the competition authorities but by the courts.[40] Fines are not taken into account by the courts when damages are settled.

In criminal cases the authorities have the burden of proof, while in damages cases the plaintiffs have the burden of proof. In criminal cases stronger evidence for conviction is required compared to damages cases, and in principle an absolute discharge in a criminal case and the award in a connected damages case may be possible, cf. Section II.E.(a)(ii).

Danish law accepts ancillary proceedings, cf. the Administration of Justice Act § 991ff, cf. Section II.C.(ii).

***(b) Interest*[41]**

(i) Is interest awarded from the date

- **the infringement occurred; or**
- **of the judgement, or**
- **the date of decision by competition authority?**

Interest is awarded in accordance with the provisions in The Danish Act of Interest, statute no. 743 of 4 September 2002 ("renteloven").

39 Kruse, A. V., *The Law of Torts ("Erstatningsretten")* (Jurist- og Økonomforbundets Forlag, 1989), page 498.

40 Cf. Section I. Unless subject to higher penalty by other law, fines are imposed on any party, who intentionally or by gross negligence among others infringes § 6(1) and § 11 of the Danish Competition Act (corresponding to Article 81 and 82 EC), or Article 81 or 82 EC, cf. the Danish Competition Act § 23(1) and (10).

41 Andersen, M. B., and Lookofsky, J., *Textbook on the Law of Obligations ("Lærebog i Obligationsret")* (Forlaget Thomsen, 2000), page 377ff.

In general, the plaintiff may claim interest from the day he institutes legal proceedings, for example, by handing in a writ to the court. Interest may, however, be awarded earlier as interest according to the Interest Act is awarded 30 days after the day the plaintiff forwards a request of payment of the principal (on condition that the request provides the debtor with information that makes it possible for the debtor to evaluate the justification and size of the principal).

As regards damages proceedings, however, it is rare that the plaintiff forwards a request of payment of the principal, and in this area of practice the most common situation is therefore that interest is awarded from the date the plaintiff institutes legal proceedings.

(ii) What are the criteria to determine the levels of interest?

According to the Act of Interest, interest is determined to be equal to the Danish National Bank's official lending rate plus 7 %, unless the undertakings have agreed upon another interest rate.

For the time being, the Danish National Bank's official lending rate is 2.15 %, corresponding to a total interest rate of 9.15 %. Similarly, the pre-judgement interest ("procesrente") is 9.15 % of the principal, unless the undertakings have agreed upon another interest rate.

(iii) Is compound interest included?

Undertakings may not claim compound interest unless this has been agreed between the parties or follows from trade usage.

Pre-judgement interest does not include compound interest.

H. Timing

(i) What is the time limit in which to institute proceedings?

The time limit in which to institute proceedings for damages cases is not regulated by rules of law. The legal proceedings may, however, be refused due to passivity by the plaintiff or due to the statute of limitations.

There are no common guidelines for when passivity commences. It will depend on a specific estimate over the adverse effect for the parties, the need for clarification of the relationship between the parties, and the reasonableness of creditor's (the plaintiff's) conduct.

Claims for liability in tort are statute-barred after 5 years (from the occurrence of the damages or, if the damage is not demonstrable, from the time where damages were detected or ought to have been detected). Further, there is a general objective long stop date (20 years) after which no action can be brought irrespective of the knowledge of the plaintiff. If the liability claims are related to relatively serious crimes for which a penalty has been imposed claims may be statute-barred after 20 years. It is undecided whether a breach of Danish or EU competition rules under Danish law would qualify as such crime and also whether a distinction could apply between sanctions for breaches of Danish and EU competition law or between Danish and Commission fines taking into consideration that EU fines are not of a criminal nature. Contractual liability claims related to contracts concerning for example sale of goods and chattels are statute-barred after 5 years, while claims related to other contracts are statute-barred after 20 years.

If one of the parties appeals a first instance judgement, the party must observe the time limit for appeal. The time limit for appeal from the City Court to the High Court is four weeks, and eight weeks from the High Court or the Maritime and Commercial Court to the Supreme Court.

Decisions made by the Competition Council under the Danish Competition Act cannot be brought before any other administrative authority than the Competition Appeals Tribunal and cannot be brought before a court of law until the Appeals Tribunal has made a decision. Appeal can be lodged with the Competition Appeals Tribunal within four weeks after the decision has been communicated to the party concerned. Decisions made by the Competition Appeals Tribunal can be brought before a court of law within eight weeks after the decision has been communicated to the party concerned. If the time limit is exceeded, the decision of the Appeals Tribunal becomes final and binding.

The provisions concerning administrative procedures for the competition authorities do not - as such - limit the rights of individuals to bring actions for damages before the courts. However, if a plaintiff has complained to the competition authorities and the authorities deal with the case, the courts may postpone the court case until the authorities have taken a decision (concerning infringement of the competition rules). In this way the provisions concerning administrative procedure may have an effect on proceedings in damages actions.

(ii) On average, how long do proceedings take?

No definite time schedule can be given. However, as a rough estimate, a court case in first instance takes between 9 months and 2 years, while a court case through two instances takes between 2 and 3 years. It is, however, not uncommon that court cases through two instances last longer.

(iii) Is it possible to accelerate proceedings?

In general, it is not possible to accelerate proceedings (e.g. summary judgments are not available). However, in practice the time schedule for the proceedings will of course depend on the parties, for example whether they demand expert statements, move for an adjournment etc.

Under some conditions it is possible to grant an injunction (and hereby stop acts which infringe national or EC competition law), cf. Section II.E.(a)(ii).

(iv) How many judges sit in actions for damages cases?

The number of judges for damages cases depends on the jurisdiction. In the City Court one judge sits, while the number of judges is three in the High Court and typically 5 - 7 in the Supreme Court (but it can vary depending on the case). In the Maritime and Commercial Court 1 judge and 2 - 4 expert judges sit in actions.

(v) How transparent is the procedure?

Traditionally, the parties as well as anyone who can demonstrate a sufficient legal interest therein, may obtain a transcript of the judgment and the documents submitted in a case. In practice, access to pleadings and documents is very limited.

However, by Act No 215 of 31 March 2004, amending the Administration of Justice Act with effect from 1 July 2004 the right of access to documents in the courts is extended. The rules on publicity in civil and criminal cases are modernised with a view to securing the highest possible openness and insight in the work of the courts, cf. below.

In a civil case, the court may decide to hold a hearing behind closed doors if it is necessary for orderly conduct of court room proceedings, if it is necessary for the country's relationship to other States, or if a public hearing will imply unnecessary insult or harm, the latter including if explanations are to be given about business secrets, cf. the Administration of Justice Act § 29(1). Further, in civil proceedings, the parties may request a hearing behind close doors if it is of special importance to the parties to avoid publicity about the case and no decisive public interest contradict this, cf. the Administration of Justice Act § 29(2).

Judgments shall always be delivered in open court, even if the procedure has been held behind closed doors, cf. the Administration of Justice Act § 28a. It is therefore always possible to be present during the delivery of a judgment.

According to the abovementioned new rules, anybody can as main rule obtain a copy of a judgement without demonstrating a particular interest.[42]

Further, a person, who has an individual, important interest in a specific legal matter, may request access to documents concerning a civil or criminal case, including entries in the court records to the extent that the documents are of importance to the assessment of the legal matter in question, cf. the Administration of Justice Act § 41d(1).[43]

A person requesting access to documents shall indicate the document or the case to which access is requested. Requests for access to documents in a large number of cases may be refused unless the request is reasonably justified, such as when access to documents is requested by a mass media for journalistic or editorial work, cf. the Administration of Justice Act § 41e(1).[44]

I. Costs

(i) Are court fees paid up front?

Court fees are paid up front. The initial court fee is roughly 2 % of the "value of the case", which in damages cases corresponds to 2 % of the plaintiff's claim. When the case is setting down for trial, the plaintiff must further pay 1/5 of the court fee already paid.

(ii) Who bears the legal costs?

The courts decide which party shall bear the legal costs. However, in general the party who loses the case bears the legal costs, cf. the Administration of Justice Act § 312.

(iii) Are contingency fees permissible. Are they generally available for private enforcement of EC competition rules?

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42 Anybody may request access to review the conclusion of a judgment if the request is made within one week after delivery of the judgment, cf. the Administration of Justice Act § 41a.
Anybody may request copies of judgments and decisions, cf. the Administration of Justice Act § 41(b). However, the right of access to judgements and decisions does not include, among others, representations made at hearings behind closed doors unless the hearing was only closed due to peace in the courtroom, or representations that are subject to reporting restrictions, cf. the Administration of Justice Act § 41b(2).
Further, the right of access to judgments and decisions may be limited (i) to the extent that it is necessary for the protection of matters vital to national security or the relationship with foreign powers or international institutions, (ii) when it for very special reasons is required to prevent, investigate and prosecute crimes, or (iii) to the extent that the judgment or decision contains information on individuals' private affairs or companies' trade secrets and it is found that the public's insight into legal actions should give way to important considerations for the persons in question who cannot be protected by anonymity, cf. the Administrative of Justice Act § 41b(3).

43 However, this right of access to documents does not include internal working papers, and may further be limited, among others, to the extent that (i) it is found that the applicant's interest in being able to exploit his knowledge of the documents of the case for the protection of his interests should gives way to important considerations for the national security or the relationship with foreign powers or international institutions, or (ii) the document contains information on individuals' purely private affairs or companies' trade secrets and it is found that the applicant's interest in being able to exploit his knowledge of the documents of the case for the protection of his interests should give way to important considerations for the persons in question who may not be protected by anonymity, cf. the Administration of Justice Act § 41d(3).
Finally, if the document contains information on individuals' purely private affairs or companies' trade secrets, the authority dealing with the request for access to documents may decide that the document should be made anonymous prior to the review or copying so that the identity of the persons in question is not revealed, cf. the Administration of Justice Act § 41e(4). A request for access to documents may not be denied if making the documents anonymous can protect the person or company in question.

44 On a request, the mass media have access to review all judgments delivered by the court within the latest four weeks. The mass media are thereby in a position, also after the trial, to familiarise themselves with all pending court cases and, pursuant to the Administration of Justice Act § 41(b), to request copies of judgments that are of public interest.
The documents and copies that a mass media gets access to review or that are handed out or lent shall not be accessible to others than the journalists and editorial staff of the mass medium and shall only be used in support of journalistic and editorial work, cf. the Administration of Justice Act § 41e(6).
However, also after four weeks, the press has the right of access to documents but then merely pursuant to the Administration of Justice Act § 41(b) on the right of access to documents applying to anybody.

According to current ethical rules applying to lawyers, lawyers may represent parties on a "no win no fee" basis[45]. Pactum de quota litis (contingency fee) agreements are in principle prohibited, and lawyers may in general not require higher salary than what is reasonable, cf. the Administration of Justice Act § 126.

Whether a fee is reasonable depends on an assessment of the case, including, among others, (a) the value of the case for the client, (b) the size of the case and difficulties, (c) the result of the case, (d) the time spent by the lawyer, and (e) the nature of the case (is it an urgent case etc.).

In practice, the fee is often solely depending upon the hours spent which are billed at the lawyer's hourly rate. Such a billing is also lawful as long as the total salary is reasonable.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

The successful party can recover its costs according to the court's decision, cf. Section II.I.(i).

The courts have published guidelines for recovery of costs. These guidelines are based on the value of the case, the court fee, and an average fee to the lawyers. Even though the courts are not bound by the guidelines (as the courts e.g. can take into account specific costs related to surveyor experts etc.), the courts' guidelines will in general constitute a good estimate of the costs that can be recovered.

In general, the successful party will not recover all its costs as the guidelines published by the courts are based on lower legal fees than those collected in practice, cf. Section II.I.(viii).

(v) What are the different types of litigation costs?

The different types of litigation costs are for example court fees, legal fees, fees to economic experts, fees to surveyor experts etc.

(vi) Are there national rules for taxation of costs?

The courts generally use standard guidelines and tables for calculating costs based on the value of the case. In individual cases the tables may be deviated from where the circumstances make this appropriate. If a party is dissatisfied with a decision on costs, this decision may, if the costs exceed DKK 10,000, be appealed separately and be litigated in the appeal court

(vii) Is any form of legal aid insurance available?

Legal insurance provided by private insurance companies is available. Public legal insurance is not available in commercial cases.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard core violation of competition law?

No definite cost table can be given as the average costs will depend on various factors, for example, the value, size, and complexity of the case, and as the collected lawyer fee may also depend on various factors, for example how urgently the case has been handled. A rough estimate of one instance costs could be anything from around DKK 50,000 to more than DKK 300,000. However, if the value of the case is, say DKK 1,000,000, and if the complexity does not exceed what on average may be expected, undertakings can probably carry through a

45 Conditional fee agreements and uplift fees are permissible as long as the fees are reasonable, cf. the Administration of Justice Act § 126.

court case in one instance for a fee of DKK 50,000 - 100,000 excluding court fees (also as a rough estimate).[46]

J General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

In general, the answers to the previous questions are not specific to the private enforcement of competition rules. Section II.H.(i) concerning complaints to the competition authorities are of course specific to the enforcement of competition rules.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No, claims for damages for infringement of competition rules are treated in same manner as private law infringements.

(iii) Are there any differences according to whether defendant is public authority or natural legal person?

Not according to current practice.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

No case has been brought in Denmark concerning interaction between leniency programmes and actions for claims for damages under the competition rules.

However, if for example, an undertaking during a leniency programme pleads guilty, this may influence the damages case as afterwards the undertaking can only with difficulty retract the confession. Also, other materials presented during a leniency programme may in general be used later on during a damages case, provided the plaintiff has access to these by way of disclosure.

(v) Are there differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules?

In general, there are no differences from region to region as the national and EC competition rules apply all over Denmark (not including Faroe Islands and Greenland), and as damages actions for breach of competition law are similar to other national damages claims.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction.

It shall be noticed that the Danish administrative system is cheap and very effective. Any undertaking may handle in complaints over other undertakings, and procedures for the Competition Council are free, while an appeal to the Competition Appeals Tribunal costs DKK 5,000.

It is a strength in the Danish system that a potential plaintiff upfront may - through intervention of the Competition Agency - solve the material competition issues, before instituting legal proceedings as regards payment of damages. Thereby it may be possible for example to solve complicated competition matters, and afterwards negotiate a settlement concerning damages without paying legal fees.

46 The guidelines from the courts, cf. Section II.I.(iv), authorise a recovery amount of DKK 70,000 (excluding VAT) to the winning part in a situation where the value of the case is between DKK 900,000 and 1,000,000. The court fee amounts to approximately DKK 22,000 out of the DKK 70,000. If the value of the case exceeds DKK 1,000,000 the recovery amount (excluding court fee and VAT) will be DKK 46.340 plus 3 % of the amount exceeding DKK 1,000,000.

Danish courts apply Danish rules of private international law to claims concerning non-contractual obligations. These rules are not codified but based on public policy and practice from the courts.

In general, as regards non-contractual claims, the Danish courts apply the principle of lex loci delicti commissi (the law where the tortious act is carried out), but, the courts, however, also apply (i) the "individualized method" (the law to which the case has its strongest connection) and (ii) the law where the damages occurred, when deciding the choice of law.

So far no Danish decisions have been made concerning choice of law in connection with non-contractual liability claims for breaches of competition law.

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon.

We are only aware of three court cases concerning damages for infringement of national competition law, cf. Section V. Damages were awarded in two cases and refused in one case. The court rulings were preceded by a decision of the competition authorities in one of the cases.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under Sections II) provide scope for facilitating the private enforcement of Article 81 and 82 EC? How could that be achieved?

There are several possible options to facilitate actions claiming damages: Court fees could be reduced, cf. Section II.I.(i) and (ii). Moreover, the Competition Appeal Board or a similar body could be made competent to settle damages claims. The Appeals Board for Public Procurement has been given such competence. In addition, the authorities could facilitate private enforcement by publishing guidelines and introduce a system of legal aid or some kind of public support. In general, enforcement may be hampered by a degree of ignorance of this area of competition rules and the possibility to claim damages for losses incurred in connection with breaches of competition law. Private enforcement could also be facilitated by allowing class actions or by extending the Consumer Ombudsman's authority, cf. section II.C(ii). Finally, a European regulation could be adopted, stipulating into alia that an undertaking which infringes Articles 81/82 EC shall hold harmless any undertaking or consumer suffering damages caused by the infringement eventually with double or triple damage as well as setting out principles of application of the passing on defence as well as providing a legal basis for collective claims for consumers.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

The parties may agree on arbitration or meditation or simply negotiate a settlement out of court or agree on a pre-trial settlement. The courts in first instance are obliged to seek to mediate a settlement, cf. § 268 of the Administration of Justice Act.

Disputes which by agreement between the parties are to be settled on the basis of the Rules of Procedure of the Danish Institute of Arbitration (DIA) shall be brought before an arbitration tribunal appointed by the Institute for the individual dispute.

Any dispute which DIA considers to be appropriate for settlement by mediation can be subject to settlement by mediation under the auspices of one or more mediators to be appointed by the DIA if accepted by both parties.

There are no available statistics concerning alternative means of dispute resolution, but there are examples of successful settlements of claims out of court such as

whereby an undertaking having suffered damages caused by abuse of dominance obtained financial compensation without having to introduce litigation.

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(iii) Case law

Judgement of the Eastern High Court of 1 July 1994, *The Environmental Organisation Greenpeace Denmark against the Ministry of Transport ("Miljøorganisationen Greenpeace Danmark against Trafikministeriet"),* Ugeskrift for Retsvæsen, 1994, page 780.

Judgement of the Maritime and Commercial Court of 3 October 2002, *Ekko A/S against Brandt Group Norden A/S Blomberg A/S, AM Hvidevarer A/S and GRAM A/S.*

Judgement of the Eastern High Court of 22 March 2002, GT-Linien A/S (ltd.) under konkurs against De Danske Statsbaner DSB and DSB Rederier A/S.

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Judgement of the Weastern High Court of 16 March 2004, *Århus Amt against Judex A/S*.

V. National case law summaries

1) The Maritime and Commercial Court's judgement of 21 December 1998

Poul Iversen against Carlsberg A/S

Facts and legal issues
The plaintiff, Poul Iversen, worked as an independent distributor of beer etc. for Carlsberg breweries and had been given the responsibility for at certain region of Denmark. As part of the distribution agreement, the plaintiff was not allowed to sell the products outside the geographical area assigned to him, and he was obliged to follow the prices set by Carlsberg.

The plaintiff claimed damages for lost activities caused by the restrictions entailed in the distribution agreement.

Held
The court found that the plaintiff had not rendered probable that he had suffered a loss by following the distribution agreement. Therefore the court did not find it necessary to determine whether the distribution agreement violated the competition rules.

2) Eastern High Court's judgement of 28 June 2002

GT-Linien under konkurs against De Danske Statsbaner DSB and DSB Rederi A/S

Facts and legal issues
The case concerned whether the defendant's collection of port duties from the plaintiff constituted a violation of article 90 (1) EC, cf. article 86 (2) EC (now article 86 (1), cf. article 82 (2) EC).

Pursuing to a regulation from 1985, vessels using Gedser Port should pay duties. However, according to the regulation vessels of the defendant, a public company owning the port in Gedser, were exempted from this duty to pay duties for its own ferries.

Held
The court found that the defendant had abused the dominant position it had on the market for port services for ferry transportation across the Baltic See between Denmark and Germany by applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, cf. article 90, (1) EC cf. article 86 EC (now article 86(1) cf. article 82 EC).

Referring to the ECJ judgement C-242/95 the court stated that the plaintiff could require the paid port duties returned to the extent that it was not proven that the duties had been passed on to the customers.

Due to the lack of more specific information from the plaintiff, the court took into consideration different factors such as the competitive situation between the plaintiff and the defendants' ferry service at that time, the duration of the practice, the fact that the port duties figured in the accounts of the plaintiff and that comparable duties were collected in other ports.

As a result the court held, that the plaintiff had not had basis for fully passing on the duties to its consumers. On the basis of an overall assessment and because of the lack of specific information the court determined the size of the damages on a discretionary basis and awarded the plaintiff a payment of DKK 6 million.

The decision has been appealed to the Supreme Court where it is still pending.

3) The Maritime and Commercial Court's judgement of 3 October 2002

Ekko A/S against Brandt Group Norden A/S, AM Hvidevarer A/S and GRAM A/S

Facts and legal issues
The case concerned whether a plaintiff could claim damages because of an extra transportation charge which the defendants had collected from the plaintiff per unit of white-goods delivered to the customers of the plaintiff in the years 1998-1999.

The extra charge of DKK 100 per unit delivered was only imposed on purchasers which did not belong to certain chains.

Held
The court held that the defendants' imposition of an extra charge only on purchasers, which did not belong to chains, constituted an infringement of the Danish Competition Act § 6 (similar to article 81 EC). The court found that the defendants had not proved that the extra charge reflected costs.

The court found furthermore that the defendants' actions gave rise to liability and that the defendants were to compensate the loss of the plaintiff as the plaintiff had proven that the extra charges had not been passed on to the customers of the plaintiff.

When determining the size of the compensation the statement of loss of the plaintiff (DKK 235,735) was taken into account.