The International Comparative Legal Guide to:

Competition Litigation 2016

8th Edition

A practical cross-border insight into competition litigation work

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Competition Litigation.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 36 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Euan Burrows and Mark Clarke of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 General

1.1 Please identify the scope of claims that may be brought in Denmark for breach of competition law.

The following types of civil claims are possible:

1. an action for reversal or remittal of a decision by the Competition Appeals Tribunal (*Konkurrenceankenævnet*);
2. an action for declaration (this may, for instance, be brought by either party in a refusal-to-supply conflict);
3. an action for injunction before the ordinary courts or the enforcement court (this may, for instance, be brought by customers and/or competitors in cases concerning discriminatory pricing or by competitors in cases concerning predatory pricing); and
4. a claim for damages suffered as a consequence of breach of competition law (this may, for instance, be brought by the customers of cartel participants).

Claims may be brought before the courts in the form of appeals against decisions made by the Competition Appeals Tribunal (an administrative body handling appeals against decisions by the Danish Competition Authority (*Konkurrencestyrelsen*) and the Danish Competition Council (*Konkurrencerådet*)); see claim type 1 above.

However, claim types 2-4 above may also be brought before the courts even if neither the Danish Competition Authority nor the Danish Competition Council has made a decision.

In addition to the civil claims stated above, the Public Prosecutor for Serious Economic and International Crime (*Statsadvokaten for Særlig Økonomisk og International Kriminalitet*) may bring criminal actions for breach of competition law.

1.2 What is the legal basis for bringing an action for breach of competition law?

Under section 20(3) of the Danish Competition Act (*konkurrenceloven*), it is possible to bring a decision by the Danish Competition Appeals Tribunal before the courts within eight weeks after receiving the decision of the Tribunal.

With respect to claim types 2-4 stated under question 1.1 above, the Danish Competition Act does not provide any explicit legal basis for bringing an action for breach of competition law. The legal basis for bringing such claims must be derived from general principles of Danish law.

Under Danish law, private persons or companies are not generally entitled to invoke legislation passed in the general interest of the public (*actio popularis*). However, in relation to a breach of competition law, it is generally accepted that any person/company with a specific legal interest in the breach may bring an action. In addition, the Competition Act presumes the existence of a right to claim damages as section 25 of the Act contains specific provisions on time-barring of claims for damages for breach of competition law.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from national law principles. It is possible to bring a claim before the courts based on national competition law and/or EU competition law.

1.4 Are there specialist courts in Denmark to which competition law cases are assigned?

As a general rule, all actions must be brought before the relevant city court. However, in cases where the provisions of the Competition Act are of material importance, the case may be brought before the Maritime and Commercial Court in Copenhagen instead of the relevant city court. Furthermore, if an action is brought before a city court and the provisions of the Competition Act are of material importance for deciding the case, the city court must refer the action to the Maritime and Commercial Court if requested by a party.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

In Denmark, the basic principle is that only parties with a legal interest in a case have standing to bring an action for breach of competition law. In practice, a competitor or a customer who is individually affected by the breach in question may bring an action.

Under the Danish Administration of Justice Act (*retsplejeloven*), collective claims (similar claims from different parties raised against the same party or similar claims raised by one or more parties against several parties) are allowed if the following conditions are satisfied:

a. the Danish courts have jurisdiction to hear all claims;
b. the relevant court has jurisdiction to hear at least one of the claims;

c. all claims are subject to the same rules of procedure; and

d. neither party objects, or if as a result of the connection between the claims they should be treated as one case irrespective of any objections.

It is also possible to make class actions. A class action may be initiated provided that:

a. the claims are similar;

b. the Danish courts have jurisdiction to hear all the claims;

c. the relevant court has jurisdiction to hear at least one of the claims;

d. a class action is considered the best way to handle the claims;

e. the members of the group in question can be identified and informed about the case in a practical manner; and

f. it is possible to appoint a group representative.

A class action is conducted by a group representative on behalf of the group. Furthermore, the Danish Consumer Ombudsman may act as a group representative. The class action comprises all claimants registered as members of the relevant group, unless the court decides that the class action comprises all claimants who have not opted out.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

An appeal against a decision by the Competition Appeals Tribunal may be brought before the city court at the place where the party bringing the action lives or has its registered office. However, the majority of such cases will probably be brought before or referred to the Maritime and Commercial Court in Copenhagen instead of the relevant city court; see question 1.4 above.

For other types of actions, a court will be entitled to take on a competition law claim if:

a. the defendant lives or has its registered office within the jurisdiction;

b. the claim relates to business conducted by the defendant within the jurisdiction;

c. the claim relates to real estate and such real estate is situated in the jurisdiction;

d. the claim relates to a contractual obligation which has been or must be performed within the jurisdiction (does not apply to payment obligations);

e. the claim relates to a breach of competition law committed within the jurisdiction; or

f. the parties have agreed to submit their dispute to the relevant city court.

Therefore, the fact that the breach of competition law has been committed within the jurisdiction will entitle a court to take on a competition law claim. However, if one of the other situations a.-d. or f. applies, it is not imperative that the breach has been committed within the jurisdiction, or even that it has had effects within the jurisdiction.

1.7 Does Denmark have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

Denmark does not have a reputation for attracting claimants. In recent years, there have been a number of defendant applications to seize jurisdiction in Denmark, mainly due to discovery rules being more favourable to defendants in Denmark than in many other countries and due to the fact that Danish courts are generally quite conservative when awarding damages to claimants.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process in Denmark for civil claims is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, the provisions of the Administration of Justice Act on prohibitory injunctions apply to competition law cases just as they do to any other matters.

2.2 What interim remedies are available and under what conditions will a court grant them?

In accordance with the Administration of Justice Act, the enforcement court may grant a prohibitory injunction ordering a person or a legal entity to refrain from certain acts which are in conflict with the claimant's rights.

In connection with a prohibitory injunction, the defendant may be ordered to undertake specific acts to ensure compliance with the injunction. The enforcement court may also ensure compliance with the prohibitory injunction, for instance by seizing objects used in connection with a breach of the injunction.

The enforcement court will grant a prohibitory injunction if the court considers it likely that each of the following conditions are satisfied:

a. the acts in question are in conflict with the claimant's rights;

b. the defendant will carry out the acts in question; and

c. it is not possible to wait for normal court proceedings.

The enforcement court will not grant a prohibitory injunction if it finds that the general rules on damages and criminal liability of Danish law or any security provided by the defendant offer adequate protection. Furthermore, even if the above conditions a.-c. are satisfied, the enforcement court may refuse to grant a prohibitory injunction if the damage suffered by the defendant as a consequence of a prohibitory injunction is disproportionate to the claimant's interests.

If the enforcement court grants a prohibitory injunction, it may demand that the claimant provide security for any damage that the defendant may suffer as a consequence of the prohibitory injunction.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

A decision by the Competition Appeals Tribunal may be (1) affirmed, (2) reversed, or (3) remitted by the courts.

The courts may also:

a. declare that an agreement should be interpreted in a certain way;

b. declare an agreement or any part thereof void;

c. declare that certain acts or omissions by a person or a legal entity are in breach of competition law;

d. impose an injunction prohibiting a person or legal entity from carrying out certain acts; and/or

e. award damages.

No particular tests apply in relation to remedies a.-d.

A court will award damages only if the following conditions are satisfied:

a. the defendant's liability is established;

b. loss and amount of loss are proved;

c. a cause-and-effect relationship is established; and

d. the loss was a reasonably foreseeable consequence of the act or omission resulting in liability.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In principle, damages will only be awarded if the claimant is able to prove a loss.

However, the courts have a margin of appreciation when assessing evidence, and where the claimant has given a plausible explanation of how the breach of competition law has affected the claimant, the courts may award damages based on an estimate, even if it is very difficult to prove a specific loss with certainty.

Exemplary damages are not available. The level of damages is generally quite low in Denmark.

On more occasions, the Danish courts have heard and rendered judgment in competition law-based claim cases. In a recent reported case of January 2015, the Maritime and Commercial Court considered a claim by Danish pesticides producer Cheminova against Akzo Nobel for the latter's involvement in the Monochloroacetic Acid cartel. The Commissions 2005 cartel decision formed the basis of the claim. The onus of the case was the calculation and the documentation of the loss incurred by Cheminova. Cheminova had claimed an amount of DKK 47m/EUR 6m but was awarded an amount of DKK 10m/EUR 1.5m.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Fines are not taken into account by the court when calculating the award. The issue as to whether a redress scheme will be taken into account has not been decided. It is assumed that in so far as a redress scheme has actually compensated a claimant, this must be taken into account by the court when calculating the award.

4 Evidence

4.1 What is the standard of proof?

The courts have a margin of appreciation when assessing evidence, and there are no specific rules on the standard of proof.

4.2 Who bears the evidential burden of proof?

The claimant generally bears the evidential burden of proof of an alleged breach of competition law and, in case of an action for damages, the existence and amount of the loss.

If a breach of competition law has been established by an administrative decision which has not been appealed, or by a final ruling of a court of law, this will serve as proof of the breach.

As a general rule, the defendant bears the evidential burden of proof of the existence of justifications/defences for the conduct in question. For instance, the defendant will have to prove that the conduct is subject to a block exemption if the defendant claims that this is the case. If the defendant claims to have acted due to an emergency (*jus necessitatis*), which hardly ever constitutes a relevant defence in a competition law case, the defendant will have to prove that there was an emergency situation and that such an emergency forced the defendant to conduct its business in breach of the normal requirements of competition law.

Furthermore, if the defendant claims that the claimant has passed on the loss to its customers ("*passing on defence*"), the defendant will as a point of departure bear the burden of proving that this is the case.

Generally, the courts exercise some discretion when deciding who bears the burden of proof and what it takes to discharge the burden of proof.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in Denmark?

As mentioned in question 4.1, the Danish courts have a margin of appreciation which also applies in competition law cases. There are no evidential presumptions as such, including presumptions of loss in cartel cases, but as a matter of practice it would appear very difficult to rebut the significant evidential weight which an EU or national Danish competition authority decision would carry.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Any evidence of importance to the case may be produced by the parties.

The general rule with respect to expert evidence is that it must be obtained in a process controlled by the court. In this process, each party may affect the choice of the expert and the questions to be answered by the expert. Expert evidence obtained unilaterally by one party is not *per se* excluded as evidence, but the courts may not give such evidence the same weight as would have been the case if the evidence had been obtained in a process controlled by the court, and such evidence may be excluded from the process if contested by one of the parties.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The general rule is that each party must produce the evidence deemed necessary by such party, and that the court only considers the evidence produced by the parties.

It is possible to seek access to the files of public authorities. However, in relation to the files of the Danish Competition Authority, only a person considered a party to the case in question is entitled to access such files.

It is not possible to obtain documents from the other party or any third parties before proceedings begin.

During proceedings, each party may request that the court orders the other party or any third party to produce any evidence in its possession. Refusal by either party to comply with a court order in this respect will be taken into account when the court considers the evidence. If the refusal is made by a third party, the court may impose a fine or take the third party into custody, etc. to secure compliance with the order.

Neither a party to the case nor a third party may be ordered to produce evidence disclosing information about issues that the party/third party in question would not be obliged to give oral testimony about (confidential information, information that could expose the party or his family to criminal sanctions or serious loss, etc.).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, everyone who is not explicitly excluded (ministers of religion, medical doctors and lawyers) is obliged to give evidence as a witness and may, if necessary, be forced to appear.

Cross-examination of witnesses is possible.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Danish courts are obliged not to make any decisions contrary to a decision taken or to be taken by the European Commission. Danish courts are not bound by decisions by other national competition authorities, but if a decision from a national competition authority exists it may create a presumption which it will be up to the defendant to repudiate.

A decision by the Danish Competition Authority which has not been appealed is considered to be binding, at least on the unsuccessful party.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a consequence of the adversarial principle, all parties must have access to all documents. But a party may produce documents as evidence in a non-confidential version where confidential information without importance to the case has been deleted.

The public is entitled to attend court hearings, but upon the request of one of the parties, the court may decide to deny access to the public (closing of doors) if it is necessary to protect confidential information. Conditions are relatively strict.

4.9 Is there provision for the national competition authority in Denmark (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

There is no specific legal basis in national Danish law allowing the Danish Competition Authority or the European Commission to express its views or analysis in relation to a lawsuit in which the authority is not a party. Nor is there any specific legal basis in national Danish law for a court to decide to hear the views or analysis of the Danish Competition Authority or the European Commission in a lawsuit in which the authority is not a party.

If the Danish Competition Authority or the European Commission, unrelated to a specific lawsuit, has published a decision or analysis which is of relevance to the lawsuit, such decision or analysis may be invoked by a party.

In theory, the Danish Competition Authority or the European Commission might possibly intervene in support of a party in a law suit and may thereby indirectly express its views and analysis, but this option has not been used.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

The Danish Competition Act does not apply to restrictions on competition which are a direct or necessary consequence of public regulation.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Yes, the "passing on defence" is available.

A general principle applies according to which only the directly injured person may claim damages. It remains to be established who can be considered directly injured by a breach of competition law.

If the party purchasing from a business breaching competition law has passed on the loss to its own customers, the court may recognise these customers as directly injured. Before the introduction into Danish law of class actions on 1 January 2008, it was often impractical to actually pursue a claim for damages that had been passed on to indirect purchasers because the losses of the individual indirect customers were often too insignificant to justify the legal costs. However, now a defendant claiming that the loss has been passed on to the claimant's own customers may face a class action on behalf of those customers.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

A cartel participant could intervene in an ongoing law suit in support of a participant to the same cartel. Such intervention would be subject to applicable standards of legal interest and standing and require acceptance by the court. A cartel participant could also launch a declaratory claim against the claimant (in a matter against another participant to the same cartel) and subsequently ask for the cases to be joined. A cartel participant who has been sued for damages by a claimant, may also raise a contribution claim against another cartel participant and request that this claim is joined with the damages proceedings.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The general rules on inactivity and time-barring as modified by the Danish Competition Act apply.

A decision by the Danish Competition Authority or the Danish Competition Council will stand if it has not been appealed to the

Competition Appeals Tribunal within four weeks. (In special circumstances, the Competition Appeals Tribunal may admit appeals received later than four weeks after the decision of the Danish Competition Authority or the Danish Competition Council.) Decisions by the Competition Appeals Tribunal will stand if the decision has not been brought before the courts within eight weeks.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Given the typical complexity of a competition law case, it is likely to take one to three years from an action which has been filed with a court of first instance (the city court or the Maritime and Commercial Court in Copenhagen) until a judgment is rendered.

If the decision is appealed, it may take another one to three years before a final judgment is delivered.

Criminal proceedings tend to be somewhat faster than civil proceedings.

Generally, civil proceedings may be expedited by making the writ of summons as complete as possible so that the need for further pleadings will be limited as much as possible. Proceedings commenced on the basis of a final decision by the competition authorities establishing the breach of competition law are, in principle, easier to expedite as the breach has already been established. However, it remains to be seen if such proceedings will actually pass through the court system more quickly than proceedings commenced without any prior decision from the competition authorities. The Maritime and Commercial Court in Copenhagen offers a fast track procedure in which the date for the final hearing and deadlines for submitting pleadings are fixed at an early stage in order to expedite proceedings. The fast track procedure presupposes that each party only needs to submit two pleadings and that the final hearing of the case may be held in only one day.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No, the parties do not need permission from the court to discontinue proceedings.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/ settlement by the representative body on behalf of the claimants also permitted and if so on what basis?

A collective settlement by the representative body is permitted, but must be accepted by the court to be valid. The court must accept the settlement unless it discriminates between the claimants represented by the representative body or is *prima facie* unreasonable.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Unless special circumstances apply, the court will award an amount to cover legal costs to the successful party. The awarded costs rarely cover the actual legal costs incurred.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are generally obliged to take into consideration the outcome reached as one of several factors when calculating their fees. "No cure – no pay" agreements are legal, but it is illegal for attorneys to agree their fees as a certain share of the damages awarded.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition law claims is permitted.

There is no obligation for the funded party or the entity providing the funding to disclose any such funding arrangements to the court, and consequently it is not transparent to the extent this option is used.

It is well known that industry organisations and interest groups occasionally provide funding to their members in law suits which are of general interest to their members.

9 Appeal

9.1 Can decisions of the court be appealed?

A judgment by a city court or by the Maritime and Commercial Court in Copenhagen may be appealed to the High Court within four weeks of the judgment. A judgment by the Maritime and Commercial Court may in certain principled cases be appealed directly to the Supreme Court as the court of the second instance.

First instance judgments by the High Court may be appealed to the Supreme Court within four weeks of the judgment. The High Court's judgment in an appeals case may be appealed to the Supreme Court as the third instance only if permission is granted to that effect by the Danish Appeals Permission Board (*Procesbevillingsnævnet*).

10 Leniency

10.1 Is leniency offered by a national competition authority in Denmark? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, a leniency programme applies to cartel activities.

There is no immunity from civil claims irrespective of whether leniency has been successfully applied for or not.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An applicant for leniency – whether successful in obtaining leniency or not – may be ordered by the court to submit documents in its possession as evidence, unless the applicant in question would be exempt from the duty to give evidence as a witness with respect to the facts contained in the documents (for instance because of a duty of confidentiality, or because the disclosure of the documents would expose the applicant or parties closely related to the applicant to criminal sanctions or loss). Sanctions may be imposed if the documents are not submitted.

However, if the applicant in question is a party to the proceedings, the court cannot force the leniency applicant to disclose the relevant documents or impose sanctions on the leniency applicant for not disclosing the documents, but if the leniency applicant refuses to comply with a court order to disclose certain documents, the court may decide to take this refusal into account when considering the evidence and may hold it against the leniency applicant.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Due to a recent change of government there has been a slight delay in the tabling of the bill for the implementation of the EU Directive on Antitrust Damages. The bill is expected to be presented to Parliament early 2016. Different implementation models are being considered including amending the Danish Competition Act, the Danish Administration of Justice Act and/or other laws affected by the Directive, or, alternatively, introducing a specific law on competition law-based damages. As the bill has not been tabled, it is too early to identify the likely ramifications hereof. Likely ramifications will extend to the key areas covered by the Directive as regards both substantive and procedural issues including changing applicable time bars.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in Denmark?

Please refer to question 11.1

11.3 Are there any other proposed reforms in Denmark relating to competition litigation?

Please refer to question 11.1.

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Laurits also has considerable experience in reviewing, drafting and negotiating commercial contracts as well as contracts with government institutions.

Laurits teaches professional training courses in competition law to private practice and in-house lawyers, most recently on the specialised subjects of vertical agreements and industry organisations competition law compliance.

Prior to joining Accura, Laurits worked among others for Norton Rose Fulbright and international roof window manufacturer VELUX. Laurits holds an LL.M. from the European University Institute in Florence.

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