



EU Damages Directive Implementation

Danish Perspective | 16 June 2016

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1. Timetable for implementation in Denmark

1. Plan for implementation in Denmark

The directive has to be **implemented** in the EU Member States at the latest on **27 December 2016**.

In October 2015, the Danish Competition & Consumer Authority (“DCCA”) reported a draft legislative proposal to change the Danish Competition Act for consultation.

Pursuant to this draft, most parts of the damages directive would be implemented into Danish law by way of a general reference to the directive.

As the directive may impact a number of key areas of Danish law, including the Statute of Limitations Act and the Act on Civil Procedure, this proposed “light touch” approach received much criticism.

The Danish authorities now plan to propose for Parliament a **principal act** on damages for infringements of the competition law. The act is expected to be presented this summer.

2. Key features - Danish perspective

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Current applicable law

No specific Danish legislation on actions for damages in antitrust cases.

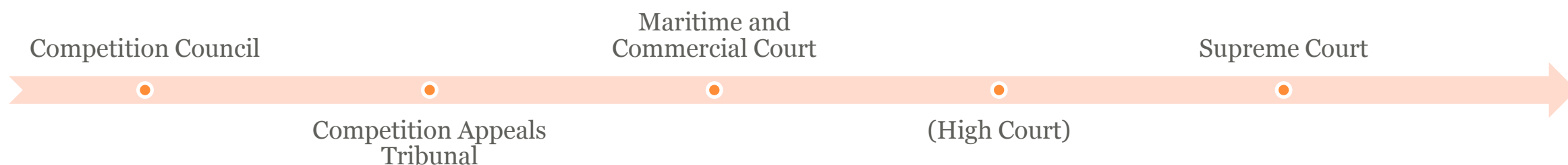
Substance is governed by non-statutory tort law. The general principle is that damages pursue a **compensatory** purpose. No punitive or exemplary element.

Procedure is governed by the Danish Act on Civil Procedure and other ordinary principles of civil procedure (e.g. burden and standard of proof).

There is a possibility of class actions (generally opt-in). The Danish Competition Act provides for the Consumer Ombudsman to initiate class action litigation as a group representative.

The current process in Danish antitrust damages cases

- Cases usually start after a decisions from the Danish Competition Council and the Danish Competition Appeals Board.
- It has become standard practice to arrange for expert economic evidence to be produced before the courts
- The process can be lengthy:



How will the directive impact Danish law?

Disclosure rules

- Danish courts have the possibility for ordering disclosure. However, Danish courts are rather **restrictive**. Often rather strict and detailed information is required in order to make a successful request for disclosure.
- The directive will likely **broaden** the possibility for ordering disclosure.
- **Leniency applicants** will obtain **certainty** that only competition authorities will have access to leniency applications and settlement agreements.

Limitation periods

- According to the directive there will be a **five year** relative limitation period; i.e. the ordinary Danish three year limitation for contractual and tort claims has to be amended.
- The limitation period will be **suspended** during investigation by competition authorities.
- The absolute limitation period of **ten years** in the Danish statute of limitations is in accordance with the directive.

How will the directive change Danish law?

Basis of **liability**; **burden** and **standard of proof**

- **Final decision** of the Danish Competition Authorities will be **binding** on the Danish courts – the **defendant** will need to **rebut** the assumption that it has infringed competition law.
- **Final decisions** of national competition authorities of a **Member State** other than Denmark where a damages action is taking place will be “**prima facie evidence**” of an infringement – this may make it easier for the claimant to obtain damages.
- Legal **presumption of harm** in cartel cases – implements a **reversed** burden of proof.
- Danish courts will be required to **estimate losses** – there are examples of Danish courts estimating loss by way of discretion; the directive will reinforce this practice.
- Damages for other undertakings’ customers’ loss that is other undertakings than the ones who have participated in the cartel – “**umbrella pricing**” (CJEU’s judgment in C-557/12, Kone).
- Recognition of damages claims from **indirect customers**, who can demonstrate **pass on** of overcharge – likely easier access for indirect customers to damages through prima facie cases.

3. Decisional practice

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Danish case law on antitrust damages is limited; however, some cases have made it to final judgment

Follow-on from prohibition on **anticompetitive agreements (Article 101/Section 6)**

- Maritime and Commercial court judgment of 3 October 2002 (UfR 2004.2600S): Chain of suppliers were liable for damages in a situation where they had imposed a specific charge on a middleman which they did not charge other purchasers.
- Maritime and Commercial Court judgment of 15 January 2015 (SH 2015.U-0004-07): Akzo Nobel was ordered to pay over DKK 10 mill. to Cheminova on the basis of Akzo's participation in the MCAA chemicals cartel.

Follow-on from **abuse of dominance** cases (Article 102/Section 11)

- Supreme Court judgment of 20 April 2005 (UfR 2005.2171H): GT Linien A/S (ferry operator) sought compensation for **rail operator DSB's** abuse of its dominant position as the owner of the port of Gedser by charging discriminatory fees for the use of the port facilities.
- Supreme Court judgment of 20 June 2012 (UfR 2012.3000 H): **Telecoms incumbent TDC** required to pay DKK 10 mill. in estimated damages for unlawful refusal of access.
- Supreme Court case in 2012: **Postal incumbent Post Danmark A/S'** alleged abuse of dominance in the form of selectively low prices. Abandoned by plaintiff due to Post Danmark's acquittal on the substantive issue following favourable ruling at CJEU (Case C-209/10 Post Danmark A/S). The High Court had awarded damages of approx. EUR 10 mill.

How to get in touch

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Education

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Candidatus Juris, University of Copenhagen 1995

LL.M., Katholieke Universiteit Leuven 1995

Work experience

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Practice areas

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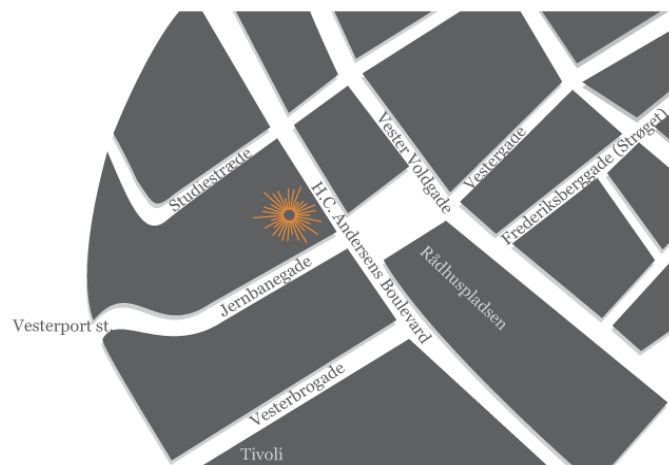
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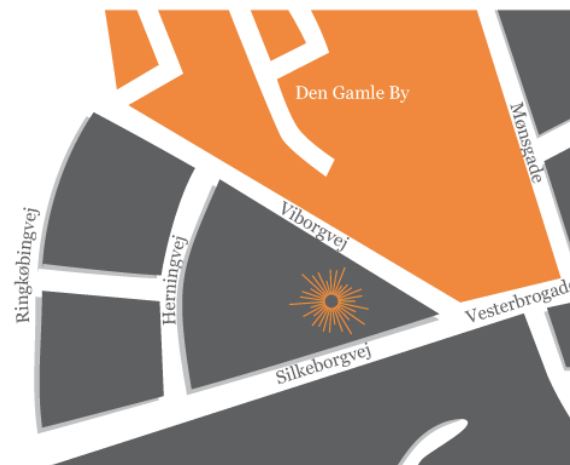
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