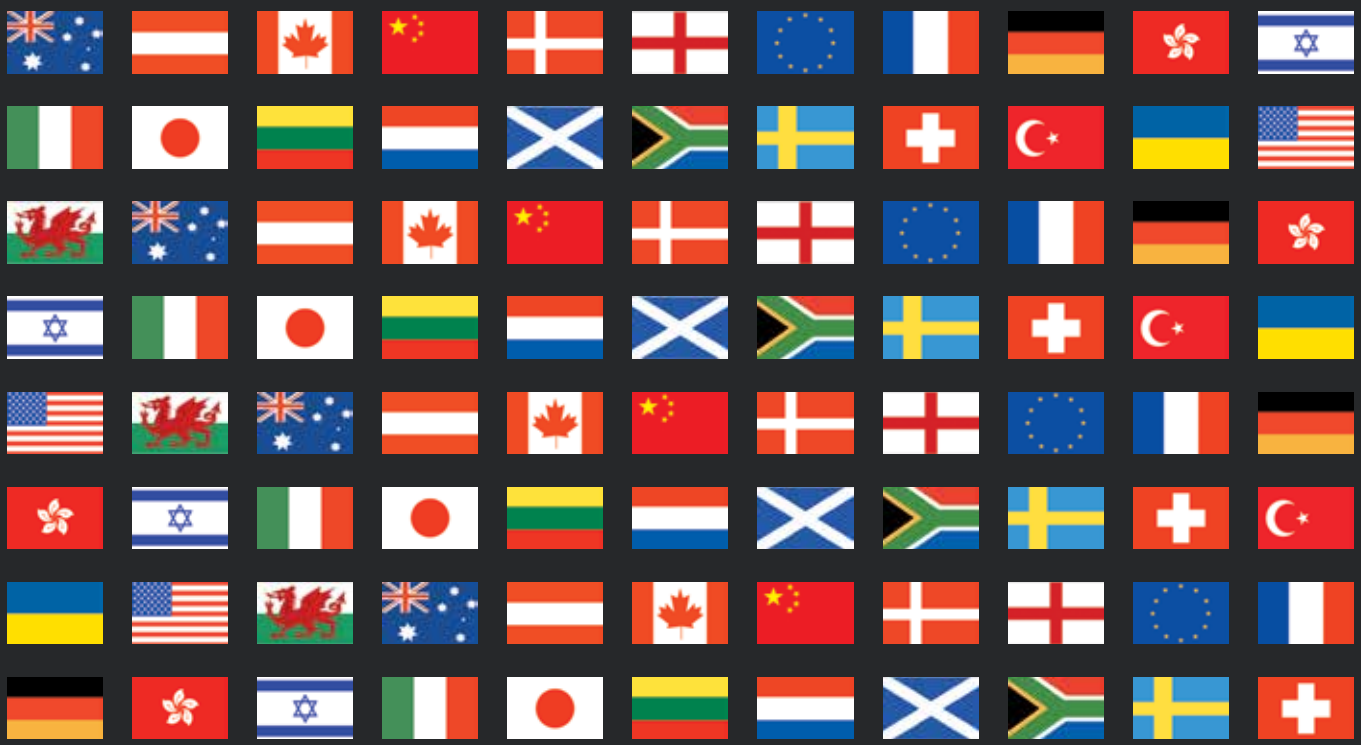
Private Antitrust Litigation

Consulting editor
Samantha Mobley



2017

GETTING THE DEAL THROUGH

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Private Antitrust Litigation 2017

Consulting editor
Samantha Mobley
Baker & McKenzie LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Private Antitrust Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Israel and Ukraine.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, Samantha Mobley of Baker & McKenzie LLP, for her continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Denmark

Henrik Peytz, Thomas Mygind and Mia Anne Gantzhorn

Nielsen Nørager Law Firm LLP

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

The area of private antitrust litigation is in its infancy in Denmark, but it is growing and a rise in the number of cases can be expected as the principles to be applied in such litigation, regarding both the procedural issues as well as the conditions for liability, are clear.

Damages claims of this kind are often settled out of court without publicity.

There are only a few published court cases concerning actions for damages for breach of competition law. These include the Supreme Court's judgment of 20 June 2012, where a broadband provider Cybercity was awarded 10 million Danish kroner in damages as victim of an abuse of dominant position, and in the Maritime and Commercial High Court's judgment of 15 January 2015, where the Danish chemical company, Cheminova, as purchaser from a cartel was awarded 10.7 million Danish kroner in damages from AzkoNobel (cf the Commission decision of 19 January 2005).

Some major damages cases, also related to abuse of dominance, are currently pending and may bring further clarification in the years to come.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

In Denmark there are no specific statutory rules for private antitrust actions. These cases therefore follow the ordinary rules in the Administration of Justice Act.

The Danish Competition and Consumer Authority (DCCA) is competent to investigate and decide on matters involving violations of the Danish Competition Act, but is not competent to deal with claims for damages. The DCCA cannot issue fines but can ask the public prosecutor to prosecute infringements of the Danish Competition Act. When infringements are prosecuted before the courts, the public prosecutor may include simple damages claims on behalf of victims. However, in practice such claims are more likely to be left for ordinary civil proceedings.

Actions may be brought before the competent court by a plaintiff with the necessary standing by filing a writ with exhibits and against payment of a small court fee.

There is no special legislation concerning damages for breach of EU or national competition law, and such actions are therefore mainly based on case law concerning liability in tort.

The factors that the plaintiff needs to establish in order to obtain damages are:

- a violation of the competition law which may be attributed to the perpetrator;
- a loss caused by this violation;
- the likely size of the loss; and
- the foreseeability or adequacy of the loss.

It is occasionally argued that a violation of the Danish Competition Act is not in itself sufficient to establish a liability, which arguably requires a fault. In the preparatory works of the Competition Act, it is stated that a violation of the competition rules will 'typically' (according to general rules of Danish law) constitute an unlawful act for which the injured party may claim damages.

In damages actions based on infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the jurisprudence of the Court of Justice will also apply, such as the joint cases C-295/04 and C-298/04, *Manfredi*, as well as the rulings in Case C-453/99, *Courage v Crehan*, and most recently Case C-557/12, *Kone*, concerning umbrella pricing. The effectiveness of articles 101 and 102 TFEU may be invoked in damages cases involving infringements of EU competition law.

An indirect purchaser is not barred per se from bringing a damages action based upon an infringement of competition law. The purchaser will, however, have to demonstrate individual standing.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The relevant legislation is found in the Administration of Justice Act.

The Danish courts comprise the District Courts, a specialised Maritime and Commercial High Court, two High Courts and the Supreme Court. All of these courts are competent to hear actions for damages. As a main rule, cases can only be tried in two instances and will normally start in the district court. All courts have the right to refer questions to the Court of Justice under the procedures set out in article 267 TFEU.

The courts only allow actions that pursue a sensible and fair goal. To have standing before the courts, the plaintiff must have a legal interest, in other words, a concrete, specific and individual interest in the decision.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are possible in all antitrust matters, including cases based on cartel infringements and cases involving abuse of dominance.

A preceding finding of an infringement by the DCCA is not required, as the courts may assess directly whether competition law has been infringed. However, an infringement decision taken by the competition authorities may, in practice, establish at least a presumption that there has indeed been an infringement of competition law, and if a company that has been held to infringe the law by a decision of the DCCA does not appeal to the Competition Appeals Board or does not bring a decision of the Competition Appeals Board before the courts within the prescribed time limits, the decision becomes binding upon the company. It is undecided whether the Danish courts in such a case would be bound by the decision taken by the DCCA or the Competition Appeals Board in the case of a subsequent private action.

In practice, injured undertakings normally seek to have the DCCA investigate and decide on a case prior to bringing actions for damages or other infringement actions before the courts. The DCCA is not competent to deal with claims for damages.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The provisions concerning the jurisdiction of the courts are set out in the Administration of Justice Act, sections 235–248.

There are 24 judicial districts within Denmark. As a rule, cases shall be brought before the district court in the judicial district where the defendant is domiciled.

Legal persons are domiciled where the legal person's headquarters are situated (see the Administration of Justice Act, section 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.

The Brussels I Regulation 44/2001 did not originally apply in Denmark, but has subsequently been extended to apply in Denmark by agreement between Denmark and the EU (19 October 2005). The agreement has been approved by Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2006/325/EC), and has been incorporated into Danish law by Act No. 1563 of 20 December 2006 on the Brussels I Regulation, etc.

As regards jurisdiction between Denmark and non-EU member states, section 246 of the Administration of Justice Act specifies in which situations Danish courts have jurisdiction. This is, among others, the case in the following situations:

- where the defendant has a business or exercises business activity within Denmark and the legal dispute relates to the activity of that business;
- in cases concerning contractual matters which 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 the defendant left the country; and
- in cases in respect of tort damages which may be brought before the court where the harmful act occurred. The case law seems to suggest that this provision may also be applied to damages actions based on competition law infringements (see the judgment of the Maritime and Commercial High Court in *Cheminova*, UfR 2009.1265 S).

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions, including damages actions, may be brought against the undertaking liable for the infringement of competition law. In practice, it is the absolute main rule that damages actions are directed against the undertaking and not the individuals, but that individuals who are responsible for a violation may be liable to fines and, in serious cartel cases, to prison sentences.

Directors and board members may be held personally liable if they have intentionally or negligently harmed the company (see the Companies Act, section 361). This could, in principle, be the case if these individuals had participated in a breach of competition law.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties.

According to the current ethical rules applying to lawyers, lawyers may represent parties on a 'no win no fee' basis as long as the fees are not calculated in function of the size of the award. However, contingency fee agreements are, in principle prohibited, and lawyers may not require a higher salary than what is deemed 'reasonable' (see the Administration of Justice Act, section 126).

8 Are jury trials available?

No, jury trials are not available in damages cases.

9 What pretrial discovery procedures are available?

The Administration of Justice Act does not include any rules on pretrial discovery procedures.

Pursuant to the Administration of Justice Act, section 343, the court may – if so requested by a party having sufficient legal interest – allow for the pretrial taking or recording of evidence. This procedure does not allow for discovery as such, but it does allow for the court to serve a disclosure order ('edition') to the extent that the general disclosure order conditions under the Administration of Justice Act are met.

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

The requesting party must specify the facts that he or she wishes to prove via the requested documents, and the disputed fact must be of relevance for the case (see the Administration of Justice Act, section 300). There must be a probability that the requested document will contain the necessary information.

Requests for disclosure of this kind are, however, rarely made and rarely accommodated as the courts enjoy a wide discretion as to whether to grant disclosure of documents.

Further, information which the party or third person would be exempted or excluded from providing as a witness are not covered by these rules.

10 What evidence is admissible?

The parties' options to produce evidence are, in principle, unlimited (see the Administration of Justice Act, section 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.

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 (see the Administration of Justice Act, sections 169–172). Further, if the testimony would harm the witness or his or her 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.

Moreover, the Administration of Justice Act contains provisions which regulate the use of surveyor experts. 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.

The survey and the testimony of the surveyor are generally accorded high evidential value by the courts.

Instead of a court-appointed survey, parties may seek to invoke or rely on unilaterally obtained expert opinions. Normally, it is not advisable for the parties to rely solely on such opinions to the extent that they have been unilaterally obtained, as their evidential value will be reduced to the extent they are not considered inadmissible. Unilateral reports may also be refused evidential value in some cases.

Furthermore, the courts will generally only admit expert opinions that have been procured unilaterally prior to the commencement of the court proceedings. If an expert opinion has been procured subsequent to the initiation of the court proceedings, it will normally not be admissible if the counterparty objects.

11 What evidence is protected by legal privilege?

The Administration of Justice Act, section 170, governs the taking of testimony of the external legal counsel to the party in question. The main rule is that the external legal counsel cannot be asked to give testimony with respect to information gained in his or her capacity as external legal counsel to the party, as opposed to information gained in another capacity, such as in his or her capacity as a board member.

Save from defence counsels in criminal proceedings, the court may nevertheless order the external legal counsel to testify when such testimony is deemed to be decisive to the outcome of the proceedings, and further provided that its importance to the other party or to society as such warrants its taking. This procedure is rarely used. No similar exception applies to in-house lawyers.

The same exemption principle applies with regard to written evidence, such as legal opinions from external legal counsel. As a general rule, this is also privileged.

As concerns trade secrets, the main rule is that trade secrets are privileged or exempted from disclosure pursuant to the Administration of Justice Act, sections 298–299, to the extent warranted by the application of the exemption principle in the Administration of Justice Act, section 171(2).

In such situations, it is also important to note how far back the requested data dates, whether it can be provided easily or not, and whether or not disclosure of the data is likely to impair the competitive position of the disclosing party.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions are also available after the defendant has been convicted. A fine paid by an infringing undertaking is paid to the state and does not serve to compensate any victims.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

A finding of an infringement in a criminal proceeding may, of course, serve as very strong evidence of liability, and can in practice be viewed as res judicata.

Leniency applicants are not protected from follow-on claims for damages, but neither the Competition and Consumer Authority nor the public prosecutor will normally disclose documents obtained in an investigation to private litigants. A judgment in a criminal case will normally be made available to private litigants.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

A defendant may petition the court for a stay of the proceedings pursuant to the Administration of Justice Act, section 345, for the purposes of awaiting an administrative decision or a court decision which may affect the outcome of the proceedings. This could include a stay for a referral of preliminary questions to the Court of Justice in the proceedings, for a pending referral to the Court of Justice in another case which is relevant to the outcome of the proceedings, or for a judgment from the Supreme Court in another case relevant to the outcome of the proceedings.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

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 public documents, deeds, etc) submitted without regard to statutory provisions (see the Administration of Justice Act, section 344(1)). There is no hierarchy of forms of evidence expressed in statutory provisions.

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

As a general rule, it is for the injured party to prove his or her case, including the infringement, the fault, the loss, the size of the loss caused by the infringement, the causality, and the foreseeability or 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.

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. If a party fails to give information when requested by the other party or fails to follow the court's request, for example, for further and better particulars, this may be taken into account by the court as evidence against him or her and have a prejudicial effect (see the Administration of Justice Act, section 344(2)(3)).

The 'passing-on defence' is accepted as a matter of Danish law. In practice, no clear rule of the burden of proof has been established concerning this matter.

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.

The standard of proof required to prove certain facts, for example the establishment of causation or the establishment of loss, is not always likely to be 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.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

A court case in first instance will normally take between eight months and two years, depending upon whether a surveyor expert statement is needed or not, while a court case through two instances will normally take around two to three years. It is, however, not uncommon that court cases through two instances last longer.

In general, it is not possible to accelerate proceedings (for example, summary judgments are not available).

17 What are the relevant limitation periods?

Claims for damages based on competition law infringements are subject to the standard limitation periods for liability in tort claims pursuant to the Danish Act on Limitations.

Claims for liability in tort are hence statute-barred after three years (to be counted 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 for the first time).

Further, there is a general objective or absolute long-stop date – 10 years – after which no action can be brought irrespective of the knowledge of the plaintiff. This latter limitation period is to be counted from the completion of the harmful action giving rise to the damages claim.

18 What appeals are available? Is appeal available on the facts or on the law?

Appeals are available both on the facts and on the law.

A judgment by a Danish court in first instance is, with rare exceptions, appealable to a higher instance.

The Danish court system is based on a 'one appeal only' main principle.

This implies that the judgments of the district courts and the Maritime and Commercial High Court may, as a rule, be appealed only to the relevant High Court.

A second appeal from the High Court to the Supreme Court can only be granted following an appeal permission given by the Appeals Permission Board, which will only be given if the case is deemed to be of general public importance.

Moreover, instead of being appealed to the relevant High Court, a judgment of the Maritime and Commercial High Court may be appealed directly to the Supreme Court if the case is deemed to be of general public importance or if other special reasons speak in favour of the Supreme Court processing the appeal.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings or class actions are, in principle, available to antitrust actions claims subject to the same conditions governing (other) collective proceedings pursuant to Chapter 23a of the Administration of Justice Act.

20 Are collective proceedings mandated by legislation?

Collective proceedings are mandated and governed by Chapter 23a of the Administration of Justice Act.

A class action can be filed if the following requirements are met (see the Administration of Justice Act, section 254(b)):

- the claims are uniform;
- the legal venue for all the claims is in Denmark;
- the court has jurisdiction to try at least one of the claims;
- the court has substantial jurisdiction to try at least one of the claims;
- a class action is the best way to handle the claims;
- the group members can be identified and informed about the case in an appropriate matter; and
- a group representative who can represent all the plaintiffs can be appointed by the court.

In the claim form, the plaintiff must describe the group filing the claim. The court reviews whether the conditions for a class action are fulfilled.

Update and trends

The implementation of Directive 2014/104/EU – the Damages Directive – is still an open matter that may have an impact on the amount of litigation.

The court appoints a group representative who attends to the group's interests in the case. The different group members are not parties to the case.

Under section 26 of the Competition Act, the consumer ombudsman may be appointed as a group representative in a class action concerning claims for damages following an infringement of the Competition Act or of articles 101 and 102 TFEU. However, this has not yet happened in practice.

The normal regulation of court cases in the Administration of Justice Act otherwise applies to class actions.

Once the court has approved the class action and set down the framework for the case, the group members will be informed about the case as mandated by the court, for example, by public advertising.

The court will set a deadline for the persons covered by the group to opt in (or opt out) of the class action. A judgment in the case will be binding for all group members who have opted in.

In special circumstances where there is basis for an opt-out class action, all persons covered by the description and who have not opted out in due time will be bound by the judgment (see the Administration of Justice Act, section 254e(8)). Such cases are, for example, where there is a large number of claims of smaller value, where the claims cannot be expected to be tried individually before the courts.

Further, Chapter 23 of the Administration of Justice Act provides that multiple plaintiffs can join their cases – with each case being tried as an individual case – against the same defendant if similar conditions are met.

21 If collective proceedings are allowed, is there a certification process? What is the test?

As mentioned above, the court decides whether a class action is permissible as a class action or if the claims should be filed individually.

22 Have courts certified collective proceedings in antitrust matters?

There are not yet any examples of collective proceedings in antitrust matters.

23 Can plaintiffs opt out or opt in?

Both options are available (see above).

24 Do collective settlements require judicial authorisation?

Pursuant to Chapter 23a of the Administration of Justice Act, settlements of approved class actions undertaken by the group representative must be approved by the court in accordance with the Administration of Justice Act, section 254h.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

There are 24 jurisdictional districts in Denmark.

Private actions relating to the same defendant and the same subject-matter cannot and will not in practice be brought simultaneously in more than one jurisdictional district, implying in turn that it is possible to have a national collective proceeding against a defendant based on the same subject matter.

26 Has a plaintiffs' collective-proceeding bar developed?

No, and so far there have been few class actions in Denmark.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

Compensation in the form of either damages or restitution constitute possible compensation remedies.

Compensation in the form of damages is subject to the general practice on liability in tort, implying inter alia that the injured party have to prove that said party has incurred a loss.

Restitution may be relevant, for example, with respect to the repayment of overcharged fees as a result of the defendant's abuse of dominance (see, for example, the Supreme Court judgment reflected in UfR 2005.2171 H).

In principle, it may also be possible to obtain relief from abusive contractual provisions or to obtain injunctions and court orders to secure certain legal positions.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Interim remedies, such as injunctions, are available provided the conditions set out in Chapter 40 of the Administration of Justice Act are met.

The main conditions for the imposition of an injunction are according to the Administration of Justice Act, sections 413–414:

- the plaintiff holds the legal right subject to the petition for the injunction or the order;
- the actions of the defendant necessitate the imposition of the injunction or court order; and
- the plaintiff will incur 'irreparable harm' if no injunction or court order is served and the ordinary remedies and deterrents provided for under the law, such as damages and penalty, do not suffice adequately.

29 Are punitive or exemplary damages available?

No.

30 Is there provision for interest on damages awards and from when does it accrue?

Interest is awarded in accordance with the provisions in the Danish Act on Interest.

In general, the plaintiff may claim interest from the day the plaintiff 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). Under special circumstances, interest can be awarded from an even earlier date, the time of the damage. This happened in the above-mentioned *Cheminova* case.

31 Are the fines imposed by competition authorities taken into account when setting damages?

The DCCA does not issue fines. Fines are as main rule issued by the courts, but can also be voluntarily accepted by a perpetrator without a court case on the initiative of the Public Prosecutor.

Fines are not taken into account when setting damages.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In general, the party who loses the case bears the legal costs (see the Administration of Justice Act, section 312).

The courts decide which party shall bear the legal costs and award a certain amount of costs, which are often insufficient to cover the real size of the costs. The successful party can recover the costs awarded according to the court's decision.

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 (the courts can, for example, take into account specific costs related to surveyor experts), 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 – often significantly – lower legal fees than those collected in practice.

33 Is liability imposed on a joint and several basis?

Liability may be imposed jointly and severally depending on the merits.

34 Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Defendants may claim to be indemnified from one or more other defendants, who are also party or parties to the damages proceedings. This may be done by way of submitting a separate indemnification claim against the other defendant in the same proceedings but can also be pursued after a judgment or settlement.

35 Is the 'passing on' defence allowed?

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 anticompetitive behaviour to a subsequent purchaser. While the burden of proof for such statement initially would normally lie with the defendant, no clear rule of the burden of proof has been established in practice. In principle, final users or consumers affected by a violation may also file a claim directly against the perpetrator.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There are other lines of defence similar to those invoked in other areas of actions for damages based on liability in tort.

This could be contentions for lack of causation, lack of proximate cause, no incurred liability, failure to mitigate the loss, limitation (time-barring) of the damages claim or forfeiture of the damages claim due to non-action from the plaintiff.

37 Is alternative dispute resolution available?

The parties may agree on arbitration or meditation, or simply negotiate a settlement out of court or agree on a pretrial settlement. In the first instance, the courts are obliged to seek to mediate a settlement (see the Administration of Justice Act, section 268).

There are no available statistics concerning alternative means of dispute resolution, but there are examples of successful settlements of claims out of court, for example, an undertaking having suffered damages caused by abuse of dominance obtained financial compensation without having to introduce litigation.

NIELSEN NØRAGER

Henrik Peytz **hp@nnlaw.dk**
Thomas Mygind **tm@nnlaw.dk**
Mia Anne Gantzhorn **mg@nnlaw.dk**

Frederiksberggade 16
1459 Copenhagen K
Denmark

Tel: +45 33 11 45 45
Fax: +45 33 11 80 81
nn@nnlaw.dk
www.nnlaw.dk

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