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Til underretning for Folketingets Europaudvalg vedlægges Økonomi- og Erhvervsministeriets høringssvar vedrørende Kommissionens forslag hvidbog om erstatningssøgsmål ved overtrædelse af EF's kartel- og monopolregler, KOM (2008) 0165.

MINISTRY OF ECONOMIC AND BUSINESS AFFAIRS
DENMARK

European Commission
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Damages actions for breach of the EC antitrust rules
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MINISTER FOR ECONOMIC
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The Commission's White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final

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In April 2008, the Commission published a White Paper on damages actions for breach of the EC antitrust rules inviting for comments. The Danish Government would like to take this opportunity to thank the Commission for the opportunity to comment on this White Paper.

The Danish Government has the following general comments to the paper:

As emphasized in its comments to the Green Paper the Danish Government, in general, agrees with the Commission that obstacles may exist for those who have suffered a loss in order to be compensated by a company, which has violated the EC antitrust rules. Hence, Denmark welcomes initiatives set out to facilitate such actions for damages.

However, the Danish Government finds it important that such initiatives are well-balanced to avoid, in connection with these initiatives, creating new rules of procedure and compensation within the scope of competition law differing substantially from what applies to general law of tort and procedure. I.e., Denmark is not in support of specific tort and procedure rules within the scope of competition law as we find that a claimant is sufficiently protected and supported by our existing national rules.

Furthermore, the legal basis for the implementation in national law of the Commission's suggestions following the White Paper is still unclear. Depending on the legal basis of the initiatives suggested by the Commission, implementation might be subject to the Danish reservation (in Danish: det danske forbehold), cf. article 1 of the protocol on the position of Denmark attached to The Treaty of Amsterdam. Hence, the Danish Government reserves the right to comment on this specific issue should it be relevant.

Below please find the Danish Government's comments to the proposed measures:

1. Indirect purchasers and collective redress

According to Danish tort law any purchaser is eligible for damages for the loss suffered, subject to proving said loss and the causal relation between the loss and the infringement. However, the general principle of foreseeability as developed in Danish case law may lead to barring damages actions brought by certain indirect purchasers for reasons of remoteness. Hence, Denmark can support the principle set out by the Commission implying that any individual, i.e. including an indirect purchaser, can claim damages for the loss suffered following an antitrust infringement given that the courts are free to consider the questions of causal relationship and foreseeability.

With regard to collective redress, a Danish law implying the possibility under certain conditions to bring a class action based on the opt-in model was effective as of 1 January 2008. According to Danish law, the group representative in an opt-in action can be either i) a member of the class, ii) an organisation, a private institution or another association if the action falls within the scope of the objects of the association, or iii) a public authority authorised by law to this effect.

Furthermore, the law provides for an opt-out action in case the damages are below DKK 2000 (equalizing € 300) and only the consumer ombudsman can be the group representative in such an opt-out action.

Denmark supports the Commission's proposal to provide for legal possibilities to bring collective actions for damages, provided the proposal will be a minimum standard. Since the representative is appointed by the court in each case, Denmark can not support the proposal that entities having standing in one Member State should automatically have standing in all other Member States without having to be certified in the latter.

Denmark would kindly request the Commission to clarify whether representative actions both can be in the form of opt-in and opt-out, cf. paragraph 52 of the staff working paper.

2. Access to evidence

The Danish Government appreciate that access to evidence is of utmost importance to the claimant in order to pursue the damage claim. However, the Danish Administration of Justice Act (in Danish: retsplejeloven) already provides a possibility for the court following a request from one of the parties to issue an order requiring the other party to the court case or any relevant third party, including but not limited to authorities (taking due account of the exercise of witness' rights (in Danish: vidnefritagelse) to provide evidence (in Danish: edition). Hence, Denmark in principle supports the Commission's proposal in relation hereto.

Furthermore, the Danish law of procedure includes a right for a claimant to gain access to documents in a pending case, provided he has an essential interest in a specific issue, cf. chapter 3a, especially article 41d. This

implies that a claimant can have access to evidence before he brings the damage case before a court.

The Commission suggests adequate protection be given to confidential information as well as to corporate statements of leniency applicants and the investigations of competition authorities. According to the Danish Administration of Justice Act, the court can decide if only a part of the documents requested should be accessed. The Danish Government trusts that the courts pay specific attention to confidential information, including but not limited to information contained in leniency documents, when operating within this provision, hence, Denmark can support this suggestion.

Furthermore, the Commission suggests that except for cases of particular urgency, the addressees of a disclosure order would have the right to be heard. The Danish Government does not find any basis for deviating from the statutory right to be heard, even in the case of urgency.

Regarding the prevention of destruction of evidence the Danish law of procedure allows the failure of a party to produce documents to have prejudicial effect (in Danish: processuel skadevirkning). Hence, the Danish law already provides for deterrent sanctions.

3. Binding effect of NCA decisions
Denmark agrees that binding effect of NCA decisions would increase the effectiveness and procedural efficiency of actions for antitrust damages. However, binding effect of NCA decisions also raises some fundamental questions regarding binding effect of administrative decisions from other national competition authorities, which must be considered carefully:

Firstly, it may be mentioned that court decisions from other EC countries have binding effect, cf. the Bruxelles I regulation, which lays down detailed rules on jurisdiction and recognition and enforcement of judgements. Likewise, binding effect of administrative decisions calls for detailed rules regarding the same sort of questions as in the Bruxelles I regulation.

Secondly, as a general rule of Danish law administrative decisions do not have binding effect for the courts as the casehandling of the administrative authorities normally do not, and should not, meet the same high standards of procedural guaranties as the proceedings of the courts. However, the decisions of the Danish Competition Appeals Tribunal may under certain circumstances have binding effect because the administrative proceedings and the appeals body meet certain procedural guaranties. Thus, it may be mentioned that the system is two-tried, the Danish Competition Appeals Tribunal is a quasi-judicial body, the chairman of the tribunal is a member of the Supreme Court, the other members of the tribunal are independent legal or economic experts and the addressee of

the decision can bring the decision before the courts within 8 weeks. The binding effect of decisions of other national competition authorities would require that the proceedings and bodies of the Member States all meet the same or similar procedural guaranties.

On this basis, the Danish Government will not at present be able to support a general rule implying binding effect of a decision from another national competition authority.

4. Fault requirement

The Danish Government supports the Commission's view, that it is not necessary for ensuring effective damages actions to introduce across the EU a harmonised notion of fault or a strict liability.

However, the Danish Government finds that the Commission with the proposal on fault requirement nonetheless strongly seems to approximate the introduction of strict liability.

According to the Commission's suggestion once a victim has shown a breach of Art. 81 or 82, the infringer should be liable for damages caused unless he demonstrates that the infringement was a result of a genuinely excusable error.

In Denmark the fault requirement follows from Danish case law and is based on the principle of culpa. Said principle of culpa is well incorporated and any deviation will be a contradiction to Danish case law. The Danish Government finds no reason to deviate from the general requirements of tort law, as developed in case law, by setting up special rules on liability when dealing with competition law infringement. Hence, the Danish Government cannot support a common EU standard for fault requirement. Moreover, the Danish Government fears that the introduction of the concept of "genuinely excusable error" may lead to legal uncertainty.

5. Damages

The Danish Government is in agreement with the principle of full compensation for the loss suffered, as developed in Danish case law, i.e. the actual loss, the loss of profit and a right to interest. However the Danish Government does not share the Commission's view that for reasons of legal certainty the definition of damages should be codified in a Community legislative instrument.

Denmark notes that the suggestion in the Green Paper regarding "punitive damages" and "double damages", which includes an element of punishment, and thus in our opinion is not in coherence with the objective of private damages actions, has been deleted.

Furthermore, the Danish Government supports the Commission's issuing of non-binding guidelines on the calculation of damages.

6. Passing-on overcharges
The Danish Government appreciates the difficulties in relation to the passing-on of overcharge to the next line of purchasers.

In Danish case law the question of passing-on of overcharge has been invoked and assessed in all 3 competition law damages cases up till now, cf. GT-Link (published in the Danish weekly law report "Ugeskrift for Retsvæsen" (U) 2005 page 217), and EKKO I (U2004 page 2600) and EKKO II (U2005 page 388). In all 3 cases the issue of passing-on has been discussed in connection with the calculation of damages. Hence, the passing-on-defence is a mere discussion issue when calculating the damages in order to prevent an unjust enrichment.

Consequently, Denmark supports the Commission's suggestion that defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge, and that the burden of proof in this respect lies with the defendant. This will be in accordance with the Danish principle of assessment of damages, where the claimant has a right to full compensation corresponding to the actual loss experienced, but not the right to gain an unjust enrichment following a damage action. As to the question on the burden of proof, Denmark would like to express concern as to the stipulation on rules in this regard. It should be a matter for the courts to decide – in respect to the given circumstances in a case – where the burden of proof lies, also when it comes to the issue on the passing-on of overcharge.

The proposal on the rebuttable presumption, that the illegal overcharge was passed on in its entirety, which can be invoked by an indirect purchaser, will only be in accordance with Danish law, if it is still subject to the principle of freedom to consider evidence. Denmark finds no reason to deviate from this general principle of procedure law.

7. Limitation periods
The Danish Government agrees with the Commission that a limitation periode cannot be such that it renders the right to seek compensation practically impossible or excessively difficult.

In June 2007 the Danish parliament passed a new law on limitations. The new law came into effect on 1 January 2008. The law implies a suspension of the limitation period while a case is being considered by the authority. Further to the suspension of limitation, the new law implies that a claimant will be provided a period of 1 year from the date of the authority decision in order to bring a claim for damages before the civil court.

The suspension of limitation and granting of the further 1-year period to bring a claim for damages are implemented in the Danish competition act, cf. article 25.

The Danish Government is of the opinion that damage claims are sufficiently supported by this new rule in national Danish legislation on limitation and, thus, cannot support the Commission's suggestion of a new limitation period of 2 years effective as of the date of the final infringement decision by an authority.

Furthermore, with regard to the Commission's suggestion that in the cases of a continuous or repeated infringement the limitation period should not start to run before the day on which the infringement ceases, this is contrary to Danish law. According to Danish law each single claim of damages resulting from a case of infringement will be evaluated separately, and thus be subject to limitation separately. Further, the limitation period as a general rule runs from the occurrence of the infringement. Hence, the Danish Government cannot support the Commission's suggestion in relation to limitation periods.

8. Costs of damages actions
The Commission's suggestion regarding the fostering of settlements, as a way to reduce costs, can be supported by Denmark. In Denmark there are two types of Court Mediation systems. As for the first type (in Danish: Forligsmægling), the judge of the case mediates between the parties. As for the second type (in Danish: Retsmægling), another judge than the judge of the case or a barrister specialised in mediation mediates between the parties. The latter type is an alternative mediation system, which is effective as of 1 April 2008, and which allows the mediator to settle the dispute on the basis of the interests, needs and future of the parties.

The looser-pays principle is statutory in the Danish Administration of Justice Act. It is however, possible for judges in special circumstances to rule that the looser does not pay any costs or only pays a part of the costs, but it is not possible for the judges to issue an - up front - cost protection order. This will require an amendment to the Danish Administration of Justice Act.

The Danish Government cannot support the proposed possibility to issue an - up front - cost protection order.

9. Interaction between leniency programmes and actions for damages
In general, the Danish Government supports the Commission's suggestion to protect leniency applicants against disclosure unless it follows otherwise from a court order.

As stated above under "2. Access to evidence" it follows from the Danish Administration of Justice Act that the court can decide if only a part of

the documents requested should be disclosed. The Danish Government trusts that the courts pay specific attention to confidential information, including but not limited to information contained in leniency documents, when operating within this provision.

The question was raised in connection with the implementation of the leniency programme, effective in Denmark as of 1 July 2007. The working committee discussed if the existing rules on access to (leniency) documents following the Danish Administration of Justice Act (in Danish: edition) would have impact on the efficiency of the leniency programme. The committee, however, found no current need to limit the present access to documents.

The Danish Government has noted that the Commission considers it appropriate to give further reflection to a possible limitation of the immunity recipient's civil liability to his direct and indirect contractual partners. In this respect, the Danish Government would like the Commission to note that the removal or limitation of joint liability for leniency applicants (successful immunity applicants) will be contrary to Danish tort law tradition and, thus, cannot be expected to be supported.

Yours sincerely,

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Minister for Economic and Business Affairs