

Legal 500

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Denmark

Cartels

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Denmark.

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Denmark: Cartels

1. What is the relevant legislative framework?

The Danish rules on cartels are set out in sections 6 and 8 of the Danish Competition Act (the "DCA") which generally correspond to Article 101 of the Treaty on the Functioning of the European Union (the "TFEU"). Furthermore, with respect to agreements and anti-competitive conduct which might affect trade between EU member states, Article 101 TFEU applies in parallel with the DCA.

Section 6 of the DCA contains a provision equivalent to Article 101(1) of the TFEU which prohibits undertakings from entering into agreements that have as their direct or indirect object or effect the restriction, distortion or prevention of competition.

Section 8 of the DCA contains an exemption from the prohibition on anti-competitive agreements corresponding to Article 101(3) of the TFEU. However, as a very clear main rule, cartel agreements will not benefit from this exemption. Furthermore, specific exemptions apply to certain categories of agreements in accordance with Danish rules which correspond to and implement relevant EU block exemption regulations.

In addition, the prohibition in the DCA does not apply to anti-competitive agreements that are a direct or necessary result of public regulation, see section 2 of the DCA.

Finally, in accordance with section 23(1) of the DCA, anti-competitive conduct can be sanctioned by civil fines, and in accordance with section 23(4) of the DCA, individuals involved in anti-competitive conduct can be sanctioned by personal fines, and in cases of cartel violations of a grave nature, sanctioned by imprisonment of up to 1 year and six months. In case of particularly aggravating circumstances, imprisonment for up to six years can be imposed, cf. section 299 c of the Danish Criminal Code.

2. To establish an infringement, does there need to have been an effect on the market?

This depends on whether the agreement is considered to have as its object or effect the restriction of competition. Cartel agreements are generally considered by object restrictions which are assumed to harm competition so that there is no need to examine their effects on the

market. Therefore, there does not need to have been an effect on the market to establish an infringement by a cartel agreement.

3. Does the law apply to conduct that occurs outside the jurisdiction?

The decisive criteria for applying the DCA is whether the conduct has an effect on competition in Denmark. This applies regardless of whether the undertaking in question is located in Denmark or not.

4. Which authorities can investigate cartels?

In Denmark, the relevant competition authorities are the Danish Competition and Consumer Authority (the "DCCA"), the Danish Competition Council (the "Council") and the Danish Competition Appeals Tribunal (the "Tribunal").

The DCCA investigates and prepares competition cases, including cases concerning cartels. The DCCA then presents the case before the Council which in turn decides whether an infringement has been made.

The Council's decisions can be appealed to the Tribunal or directly to the national courts.

In case of prosecution against individuals, cases are reported to the Danish Special Crime Unit (the NSK), which investigates the case against individuals and prosecutes the case before the national courts.

5. What are the key steps in a cartel investigation?

The DCCA may investigate a case on its own initiative, on notification/leniency application, on the basis of a complaint or as a result of a referral from the EU Commission or other competition authorities within the EU, see section 15 of the DCA.

In cartel cases, the DCCA most often initiates its investigations based on either a complaint from a customer or a competitor or based on a leniency application. The DCCA has a whistleblowing portal on which anyone may submit tips or complaints

anonymously which may also lead to the DCCA initiating investigations.

On receipt of a complaint or a leniency application, the DCCA will, in the preliminary investigation phase, gather more information on the matter to assess whether there is cause for initiating formal proceedings. Such additional information may be obtained by means of public sources and through conversations with the complainant, the undertaking under investigation or from its competitors or customers. Furthermore, the DCCA may gather information by carrying out a dawn raid (after having obtained a court order). During the initial phase, the DCCA's investigation is often kept confidential until it has been decided whether to carry out a dawn raid or not.

Formal proceedings are initiated when the DCCA issues a notification of concerns (in Danish: meddelelse om betænkeligheder") to the undertaking(s) under investigation. In some investigations, receipt of the notification is the first time the undertaking(s) under investigation will become aware of the investigation.

It should be noted that, prior to issuing the notification, the DCCA considers that there is not yet a "pending case in which a decision will be made" under Danish administrative law. This has the effect that the DCCA can deny access to documents in the investigation to a significant degree, even to the undertaking(s) under investigation, and even if a dawn raid has been conducted.

The notification of concerns sets out the DCCA's initial concerns and the reasons for its investigation. The undertaking will be given two weeks to provide its written comments to the allegations, but in practice, the undertaking can provide general comments at any stage of the proceedings up until the final deadline to provide comments on the statement of objections (see below). Formal deadlines will usually be extended at the undertaking's request, and the undertaking is not obligated to provide general comments.

Furthermore, the undertaking will be invited to a state of play-meeting, usually 3-4 weeks after receipt of the notification of concerns. The undertaking will also be encouraged to enter into dialogue with the DCCA regarding the possibility of ending the case by way of offering commitments or accepting a settlement fine.

After issuing the notification of concerns, the formal investigation phase will begin, in which the DCCA will gather more information and documentation by sending more formal requests for information ("RFI") to the undertaking(s) under investigation, and to other relevant

market players. Usually, the DCCA will send several RFI's and request significant amounts of information (unless a dawn raid has been conducted, which limits the DCCA's need for further information). The DCCA may also interview employees of the undertakings under investigation and initiate broader market investigations.

The DCCA usually keeps the undertaking under investigation informed of the status of the case and its investigations, and it will also be possible to obtain access to documents at any time during the formal cartel investigation.

If the DCCA decides not to close the matter after the formal investigation phase, the DCCA will issue a statement of objections. The statement of objections is in essence a draft decision, and the undertaking under investigation is given a six-week deadline to provide its written comments. In addition, the undertaking will be given an opportunity to present its arguments in a 20-minute oral submission before the Council. Based on this, the DCCA will prepare the infringement decision, which will be presented to the Council for its approval when the undertaking's comments, if any, have been received and implemented.

The Danish competition authorities do not currently have the power to impose fines but may bring the case before the Danish courts to be heard under the civil procedure rules, see sections 23-24 of the DCA. However, individuals infringing Danish competition law, are prosecuted by the Danish Special Crime Unit and sanctioned under the criminal procedure rules.

There is no specific time frame for a cartel investigation, and the duration will generally depend on the scope and complexity of the markets and the specific conduct.

6. What are the key investigative powers that are available to the relevant authorities?

The DCCA has wide-reaching investigative powers.

As part of its investigation, and following a court order, the DCCA may conduct an unannounced on-site inspection (dawn raid) at the premises of an undertaking suspected of having infringed competition rules, the private homes or cars of leading employees, and at the premises of other undertakings which are presumed to hold evidence relevant to an investigation, regardless of whether such undertakings are suspected of infringements.

The undertaking is obligated to give the DCCA access to

any information which falls inside the scope of the investigation, and the DCCA may take copies of all documents, information etc. that the undertaking has access to, regardless of media, including information located on a server outside the undertaking's premises, e.g. in another country.

The undertaking and its employees are obligated to answer questions from the DCCA regarding the facts and documents concerning the investigation, but not if this entails self-incrimination. Undertakings may receive daily fines if they fail to comply with a request for information.

Failure to cooperate with the DCCA during a dawn raid may be sanctioned by fines.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

During an investigation, the DCCA will be bound to follow the principle of legal privilege. Consequently, the DCCA will not be entitled to review correspondence between an undertaking and its external legal counsel if the correspondence regards the undertaking's compliance with the competition rules and is connected to the investigation. This also includes preparatory documents prepared by the undertaking solely for the purpose of obtaining legal advice from an external lawyer. No legal privilege applies to advice of in-house counsel.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

It is possible to be granted full immunity if the applicant is the first of the cartel participants to contact the DCCA with information about the cartel. However, only if the following conditions are met:

- i. The information provided by the applicant either leads to the DCCA being able to carry out an inspection (dawn raid) in connection with the cartel or provides a basis for the DCCA establishing a violation of the prohibition against cartels.
- ii. The applicant discloses its participation in the cartel.
- iii. The applicant ceases to participate in the cartel no later than immediately after the submission of the leniency application.
- iv. The applicant has not destroyed, falsified or concealed evidence relating to the cartel.

- v. The applicant has not disclosed the leniency application to others.
- vi. The applicant has not forced others to participate in the cartel.
- vii. The applicant cooperates fully and loyally with the DCCA throughout the case.

Admission of a formal leniency application is required, in which the applicant must provide all relevant information and documentation relating to the cartel, including information on all parties involved and a detailed description of the cartel conduct.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

If the applicant is not the first applicant to apply for leniency, the undertaking cannot be granted full immunity. However, the sanction may be reduced.

With respect to the reduction of fines, the applicant's information must represent significant and additional value for the DCCA in its investigations compared to the information already available to it. In addition, the conditions set out above in paragraph 3.1 (ii)-(vii) must be met. An applicant second in line is eligible for a 50 per cent reduction of the fine while an applicant third in line is eligible for a 30 per cent reduction of the fine. Subsequent applicants may have the fine reduced by up to 20 per cent.

With respect to imprisonment sanctions, it is up to the courts to decide whether a prison sentence for individuals should be reduced based on the subsequent applicant's contribution to the investigation. This is not relevant for the first applicant that is granted full immunity.

10. Are markers available and, if so, in what circumstances?

An amendment to the DCA entered into force on 1 January 2018 permitting markers, following a recommendation from the OECD. The amendment allows a cartel participant to approach the DCCA with some initial information about its participation in a cartel in exchange for a commitment by the DCCA that it will "reserve" the cartel participant's place in line while finalising the final leniency application.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

A leniency applicant must cooperate continuously and fully with the DCCA throughout the case. The obligation to cooperate begins at the time of the submission of the application and will end when the case is finally concluded against all the parties covered by the investigation or the case is otherwise closed.

The cooperation requirement entails that the applicant must make itself available to the DCCA at any time to provide any information needed on the factual matters and make available its directors and employees for interviews. Furthermore, the applicant must keep its leniency application confidential until the DCCA has issued a statement of objection to other cartel participants.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Executives and board members may be sanctioned with fines and imprisonment for up to 6 years. However, it is possible to be granted full immunity if the applicant is the first of the cartel participants to contact the DCCA with information about the cartel. If an undertaking is granted immunity, this also includes its employees and directors.

13. Is there an 'amnesty plus' programme?

There is no amnesty plus programme in Denmark.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The DCCA may close the case by imposing administrative fines (i.e. out-of-court settlements) on undertakings at any time during its investigation process, provided that the undertaking pleads guilty and that the facts of the infringement and fine level are relatively clear. With respect to individuals, the ability to enter into a settlement agreement lies with the police, more specifically the Danish Special Crime Unit, and any settlement agreement will also require an admission of guilt.

The DCCA may also close the case by accepting

(behavioural) commitments from the undertakings under investigation. If the DCCA accepts commitments, it is possible to avoid fines altogether. However, commitments are usually reserved for less clear-cut cases and/or less serious infringements of competition law and will thus very rarely be accepted for cartel-like agreements.

If the case is brought before the courts based on an infringement decision by the competition authorities, it will not be possible to agree on a plea bargaining as such under Danish law.

15. What are the key pros and cons for a party that is considering entering into settlement?

There are several elements to consider before entering into a settlement. The key advantages are that a settlement often results in a reduction in fine compared to what would be the starting point in a case before the courts and saves time and resources for the undertaking involved, as legal proceedings are avoided. When entering into a settlement, the undertaking often helps the DCCA in clarifying the case which may give the undertaking a better reputation. On the other hand, the main disadvantage is the undertaking's admission of guilt and, thereby, a competition law infringement which may also damage the undertaking's reputation and pave the way for third-party damages claims.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

Denmark is a part of the European Competition Network (ECN). This entails a cross-border cooperation between the European Commission and the national competition authorities of the EU member states. Thereby, the DCCA may conduct dawn raids to assist the European Commission and other competition authorities in connection with these authorities' application of Articles 101 and 102 of the TFEU. This is codified in section 18(9) of the DCA.

Furthermore, Denmark participates in an annual meeting with the other Nordic countries, i.e. Iceland, Finland, Sweden, Norway, Greenland and the Faroe Islands, with the purpose of exchanging legislative experiences and discussing cases and subjects of common interest. The DCCA may conduct dawn raids to assist these countries' competition authorities, see section 18(10) of the DCA.

Under section 18c(3) of the DCA and subject to an

agreement on reciprocity, the DCCA may disclose confidential information to other European competition authorities if such information is necessary to assist the authorities in their enforcement of national competition rules. Denmark has entered into a formal agreement regarding this with Norway, Sweden, Finland and Iceland.

Finally, as a result of the implementation of the ECN+ directive (Directive (EU) 2019/1), section 18b of the DCA allows for the DCCA to request information and carry out dawn raids and interviews on behalf of and for the account of other national competition authorities within the EU.

17. What are the potential civil and criminal sanctions if cartel activity is established?

Cartel participation constitutes a serious infringement of the DCA, and undertakings who participate are subject to fines and individuals who participate are subject to fines or possible imprisonment. Sanctions on undertakings are brought before the national courts by the DCCA under the civil procedure rules.

Furthermore, executives and board members risk being sanctioned with fines of up to several hundred thousand DKK as well as possible imprisonment. Serious cartel agreements are sanctionable by 1.5 years of imprisonment if the prosecutor is able to establish intent or gross negligence. In particularly aggravating circumstances, the imprisonment sentence may be increased to 6 years. However, so far there has been no imprisonment sanctions in practice. Cases regarding sanctions on individuals are carried out in court under the criminal procedure rules.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

In general, the DCCA operates with three basic fine levels based on the severity of the conduct in question: (i) less serious: the basis for the fine level is up to DKK 4m/approx. EUR 0.54m; (ii) serious: the basis for the fine level is DKK 4-20m/approx. EUR 0.54-2.7m; and (iii) very serious: the basis for the fine level is more than DKK 20m/approx. EUR 2.7m. When calculating the fine, these amounts are adjusted based on the duration of the infringement and the global group turnover of the relevant undertakings as well as possible mitigating circumstances such as cooperation with the DCCA or limited effect of the conduct or aggravating

circumstances such as clear intent or many participants and thereby wide anti-competitive effect of the cartel. Cartel infringements are generally considered to be either "serious" or "very serious" infringements.

The fine level is capped at 10 per cent of the undertaking's worldwide turnover on a group basis in the year prior to the infringement decision.

In a recent domestic cartel case from April 2023 regarding price coordination, the fine was DKK 6 million. However, this was a settlement agreement, and it was considered to be a mitigating circumstance that the undertaking Broste Copenhagen had made an active effort to ensure that all relevant employees cooperated with the DCCA. The fine proposed by the DCCA was DKK 7.5 million but due to the mitigating circumstances, the Council reduced the fine.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

As another consequence of the implementation of the ECN+ directive, a parent company may be held jointly liable for the fine of a subsidiary which is found to have infringed the DCA, see section 23a of the DCA.

20. Are private actions and/or class actions available for infringement of the cartel rules?

In December 2016, the Danish Act on the Processing of Actions for Damages for Competition Law Infringements (*lov om behandling af erstatningssager vedrørende overtrædelser af konkurrenceretten*) which implements the Damages Directive (EU Directive 2014/104/EU) entered into force.

The act applies to compensation claims regarding infringement of, *inter alia*, section 6 of the DCA. The act improved the possibilities for consumers, undertakings, and public authorities to claim compensation for an infringement of competition law before a national court.

Furthermore, the act also, *inter alia*, changed the limitation period for compensation claims. The general limitation period is now five years instead of three years which is the general limitation period in Denmark.

21. What type of damages can be recovered by claimants and how are they quantified?

The Danish Act on the Processing of Actions for Damages for Competition Law Infringements applies to

compensation claims regarding infringement of sections 6 and 11 of the DCA which corresponds to articles 101 and 102 of the TFEU.

Any legal or physical person who has suffered harm due to an infringement of these sections will be entitled to full compensation for the harm suffered. The injured party must be compensated as if the infringement had not been committed, including compensation for any loss suffered, e.g. loss of profit. Punitive damages cannot be recovered.

According to section 7 of the act, if a final Danish decision states that a violation of competition law has taken place, this factum is deemed to be irrefutably established for the purpose of an action for damages. If a final decision by another EU member state states that a violation of competition law has taken place, there is a presumption that a violation of competition law has taken places in a following case regarding action for damages. As a result, the number of claims brought as a result of competition law infringements has been increasing in recent years and will likely continue to do so.

22. On what grounds can a decision of the relevant authority be appealed?

Any decision by the Council may be appealed in two ways; either by way of an administrative appeal to the Tribunal or directly to the Danish Maritime and Commercial High Court.

If appealed to the Tribunal, the Tribunal will conduct a full and thorough review of the case and may uphold or reverse the Council's decision or remit the decision to the Council. The Tribunal's decisions may be appealed and brought before the courts.

Any court decisions may be further appealed to the Danish High Courts.

23. What is the process for filing an appeal?

The deadline for appealing a decision made by the Council is eight weeks regardless of whether the appeal is brought before the Tribunal or the courts.

When submitting an appeal to the Tribunal, the appeal must contain the appealed decision as well as a description of claims and further justification for the appeal and information to support this. Otherwise, the appeal will be rejected. A complaint fee of DKK 5,000 must be paid. As a main rule, there is no suspensive effect, but, on request, the chairman may decide that a complaint must be given suspensive effect. All this may

be done online.

An appeal directly to the courts must be submitted in accordance with the Danish civil procedure rules.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

The Council's decision of 24 March 2024.

The interior company Hübsch, which among other things produces kitchen accessories, products for table setting, furniture and other home accessories, has coordinated prices and exchanged price information with a competing company. The coordination resulted in the introduction of a Covid-19 fee which was imposed on all orders as well as general price increases on the majority of Hübsch's goods.

On this basis, the Competition Council decided that Hübsch has breached the competition rules. The coordination took place in the period between at least January 2021 to July 2021 in connection with the launch of the companies' spring/summer collections and again in connection with the launch of their autumn/winter collections for 2021.

The competitor with whom Hübsch coordinated prices and exchanged price information was the company Broste Copenhagen which in April 2023 admitted to having infringed the competition rules and agreed to an administrative fine of DKK 6 million.

The case has been submitted for the court claiming that Hübsch must be fined.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, any novel areas of investigation, applications for leniency, approach to settlement, number of appeals, impact of hybrid working in enforcement practice – e.g. dawn raids of domestic premises, 'hybrid' in-person/virtual dawn raids, access to personal devices, etc.)??

- Digital platforms are to an increasing extent subject to review by the DCCA, and this is an announced focus area for the DCCA.
- As a result of employees to a larger extent working from home, we generally experience

an increase in dawn raids on employees' domestic premises and in requests for access to personal devices, social media accounts etc.

- The DCCA also has an increased focus on communication by other means than e-mail, and we see more and more often that the DCCA includes information shared by e.g. text messages, Microsoft Teams chats or social media (Messenger or WhatsApp) in its investigations.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

In February 2024, the Danish Parliament presented a new bill amending the DCA.

One of the proposed amendments is the introduction of a new tool giving the DCCA the possibility of initiating a so-called market investigation on suspicion that the behaviour of relevant market players or the structures in one or more markets may weaken effective competition with harmful effects for consumers or other companies.

Furthermore, the bill proposes an amendment to the principles for calculating fines in order to ensure that fines for competition law infringements to a greater extent reflect the financial damage of the infringement in question by basing the fine level on the revenue associated with the infringement, for example from the products sold under a price cartel, in alignment with the guidelines from the European Commission. This will generally allow for higher fine levels than historically.

The proposed bill is expected to enter into force on 1 July 2024.

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