

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Cancels & replaces the same document of 29 May 2019**

**Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Denmark**

**4 June 2019**

This document reproduces a written contribution from Denmark submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

Please contact Ms. Despina Pachnou if you have any questions about this document.  
Email: [Despina.pachnou@oecd.org](mailto:Despina.pachnou@oecd.org).

**JT03448163**

## Denmark

1. Enforcement of the Danish Competition Act is divided between the Danish Competition and Consumer Authority (the DCCA)/the Competition Council and the public prosecutor (The State Prosecutor for Serious Economic and International Crime – SEIC) who has jurisdiction to initiate criminal prosecutions for the imposition of fines or imprisonment for competition law infringements. Together with the Competition Council the DCCA makes administrative determinations concerning anticompetitive infringements and issues orders to cease the infringement of the Competition Act.

### 1. The enforcement processes in the administrative system

2. When the DCCA has decided to initiate a case, the DCCA sends the company a preliminary statement of objections to which the company can reply. As part of the case preparation, the DCCA collects information from the parties directly involved, as well as other players on the market and conducts a market survey if relevant. When the DCCA has ended its investigation, the DCCA draws up a statement of objections. As part of the DCCA's internal checks and balances, the statement of objections is subject to an internal peer-review. Unless the DCCA decides to close the case, the company receives the statement of objections with a deadline of six weeks to comment on the statement. The company is entitled to make an oral plea before the Competition Council.

3. When the DCCA has ended the investigation and consultation procedure, the DCCA outlines a proposal for a ruling. The proposal is submitted to the Competition Council, which will then decide on the case. The Competition Council can issue injunctions (cease and desist order) or adopt a commitment decision.

### 2. Administrative review of decisions in competition cases

4. Administrative decisions by the Competition Council may as a general rule be appealed to the Competition Appeals Tribunal.

5. The Competition Appeals Tribunal is an administrative appeals body with specific expertise to assess competition cases. The Competition Appeals Tribunal consists of a chairman - a Supreme Court judge - and four other members (two members with judicial expertise and two members with economic expertise). The Competition Appeals Tribunal's review is based on written correspondence and an oral procedure. The deadline for referral is four weeks after the Competition Council's decision.

6. The Competition Appeals Tribunal can handle cases regarding anti-competitive agreements and abuse of dominant position, as well as injunctions issued by the Competition Council relevant to such cases. Commitments made by the companies in order to accommodate the Competition Council's concerns cannot be appealed to the Competition Appeals Tribunal, and have to be appealed directly to the courts. The DCCA's requests to the companies for information during the investigation of the case are also only eligible for appeal to the courts. Access to file issues in competition cases are also handled by the Competition Appeals Tribunal.

7. The scope of the Competition Appeals Tribunal's review is not specified in the Danish Competition Act. In principle, the Competition Appeals Tribunal can make a full review of the facts, the law and the discretion made by the Competition Council.

8. The Competition Appeals Tribunal can confirm, repeal (in all or partially), remit or change the Competition Council's decision.

### 3. The judicial review of the Competition Appeal Tribunal's decision

9. The Competition Appeals Tribunal's decision can be appealed to the ordinary Courts under the rules of the civil procedure system. The appeal must be submitted within eight weeks of the decision. Decisions not appealed within the deadline are final.

10. Since 2007, the Danish Maritime and Commercial High Court has been assigned jurisdictional responsibility over cases where the application of the Danish Competition Act is of significant importance. The Danish Maritime and Commercial High Court's main area is cases regarding commerce. Furthermore, the Court also handles cases regarding i.e. the Danish Marketing Act, intellectual property law and bankruptcy cases.

11. As part of the proceedings at the Maritime and Commercial High Court, appointed assessors will participate during the trial proceedings. Assessors are primarily nominated by business organizations.

12. The adversarial principle applies in cases before the Maritime and Commercial High Court. It is possible to bring new evidence in the form of e.g. witness examination and the commissioning of expert if e.g. the parties disagree on the market definition or in respect of the economical assessment. Preliminary reference to the Court of Justice may also occur.

13. The standard of review is often subject to discussion in cases concerning the review of competition authorities' decisions. In 2014, the Danish Supreme Court stated in the case regarding the Competition Council against Nykredit Realkredit A/S that: *“The Council's assessment of [...] is basically based on a discretion on competition aspects, and the Supreme Court finds that there is no adequate basis for disregarding this discretion. Nor have factual errors or legal deficiencies been found in regards to the basis of the decision that may lead to the decision being sidelined.”* In 2016, in the case DONG Energy A/S against the Competition Council, the Danish Maritime and Commercial High Court stated in line with the above mentioned that: *“Provided the correct application of competition law, and on the basis of correct factual information, including the application of valid economic theory, a certain professional discretion has been assigned to the competition authorities [...] Both the DCC and the DCAT have, because of their composition, special prerequisites for making these professional discretions, and the Maritime and Commercial High Court must therefore generally exercise reticence in reviewing these elements in the competition authorities' decision.”*

14. The Danish Maritime and Commercial High Court's decision can be appealed to a High Court. If the case is of a principle nature, the case may be directly appealed to the Supreme Court as a second instance, alternatively to the Supreme Court as a third instance, if a third instance review is granted by the Appeals Permission Board.

#### 4. Criminal proceedings in competition cases

15. Due to the criminal regime neither the DCCA, nor the Competition Council or the Competition Appeals Tribunal can impose fines. If a fine should be imposed, the case must therefore be referred to the SEIC (either directly or after an administrative decision). In order for fines to be imposed an infringement must be proved to a criminal standard of proof beyond a reasonable doubt. In hard-core cartel cases, individuals may also be sentenced to imprisonment.

16. The decision to refer a case to the SEIC is made by the Competition Council. Referral takes place after the Competition Council has made its decision. If the decision is appealed to the Competition Appeals Tribunal referral normally awaits this decision. If the administrative decision is appealed further referral will not await the civil court's decision. As a result, some cases have parallel procedures in the civil and the criminal court systems.

17. The SEIC determines whether to seek criminal fines (and imprisonment) for Competition Act infringements. Based on the case referred from the DCCA the SEIC will conduct a criminal investigation.

18. Criminal cases are handled by one of the District Courts. Verdicts made by District Courts can be appealed to the High Court where renewed evidence can be introduced, and ultimately the Supreme Court, if granted by the Appeals Permission Board.

19. The enforcement system described above is an expression of the current set-up in Denmark. The EU directive on strengthening the national competition authorities' enforcement of the competition rules (the "ECN + directive"), will imply that certain amendments will have to be introduced. The directive must be implemented in Danish law at the beginning of 2021.