ANNEX I: PREVIOUS DANISH REPLIES TO HEARINGS ON COLLECTIVE REDRESS & ADR

MINISTRY OF ECONOMIC AND BUSINESS AFFAIRS
DENMARK

MINISTRY OF ECONOMIC
AND BUSINESS AFFAIRS
Slotsholmsgade 10-12
DK-1216 Copenhagen K

Tel. +45 33 92 33 50
Fax +45 33 12 37 78
CVR no. 10 09 24 85
oem@oem.dk
www.oem.dk

The Danish Governments feedback on "the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union" from DG SANCO.

Summary

- *The Danish Government supports the intention of the Commission to secure consumers and traders a cheap, simple and quick way of solving disputes, for example through ADR.*
- *The Commission should consider introducing limits to which disputes should be covered by an ADR solution (eg. upper and lower price limits).*
- *It should not be compulsory to try a dispute before an ADR board before it can be brought before the courts, and the decisions of ADR boards should not be binding.*
- *The funding of ADR solutions should be left to the Member States to decide.*

The Danish Government's feedback

The Danish Government supports the intention of the Commission to secure consumers and traders a cheap, simple and quick way of solving disputes, for example through ADR. Denmark agrees that ADR solutions may contribute to increased consumer confidence in cross-border trade, which is relevant in relation to e-commerce in particular.

The Danish Government already makes wide use of ADR in the consumer complaints field. The Danish Government has a public body called the Consumer Complaints Board (*Forbrugerklagenævnet*). Additionally, 18 private complaints boards consider cases within their respective fields. They are approved by the Minister for Economic and Business Affairs. Finally, there are various non-approved complaints boards. These private complaints boards are run by the relevant industries, and they are not covered by the principles stated below. The Danish consumer complaints system satisfies the desire of the Commission to secure consumers and traders a cheap, simple and quick dispute resolution mechanism, for example through ADR.

The Danish Government's position is that it should be possible to continue the main principles of the Danish consumer complaints system in case EU rules are introduced in this field.

Relative to the specific questions of the Commission in its consultation paper, the Danish Government wishes to make the following observations:

1. The Commission should carefully consider whether all disputes between consumers and traders should be covered by an ADR solution. In Denmark, it is possible to specify limits as to what cases are eligible for consideration. These limits may be lower or upper price limits for the product or service. The Danish Consumer Complaints Board set a fixed lower limit to obviate the need for the Board to consider all ordinary daily shopping transactions, and an upper limit to ensure that buyers of products or services characterised as luxuries cannot make use of a publicly funded complaints board.

   If no limits are laid down for the cases to be covered by ADR solutions, the consequences may be far-reaching and may imply unnecessary costs and administration for both the public authorities and businesses, particularly in the countries where ADR solutions are not yet in wide use.

   The Danish Government therefore suggests that any EU rules on ADR solutions be targeted at the products and services that may especially contribute to increased consumer confidence in cross-border trade, particularly e-commerce. Relevant products or services could be those that already constitute a large proportion of the cross-border trade today, such as air travel or products typically traded on the Internet.

2. In Denmark, the Consumer Complaints Board and the approved private complaints boards only consider individual complaints submitted by consumers. In relation to ADR systems the Danish Government has no experience or tradition of collective complaints.

3. It should not be compulsory to try a dispute before an ADR board before it can be brought before the courts. Consumers should not be restricted in their access to resolution of disputes. If consumers find that the court system is the most expedient way of settling a dispute, they should not be barred from such procedure.

   Moreover, a very large number of boards of very different types exist. The boards differ greatly by their fields of work, composition (including participation by legally trained persons and by professional and industrial bodies) and methods of work. Also, the individual cases differ. As an example, cases presenting evidential problems that

should be clarified by statements from the parties or witnesses are usually not very suited for consideration by a complaints board. Concerning the interaction between complaints boards and courts in consumer cases, reference is also made to section 361(1) of the Danish Administration of Justice Act (*retsplejeloven*). This provision prescribes that if a consumer requests that a case eligible for consideration by the Consumer Complaints Board or a complaints or appeal board approved by the Minister for Economic and Business Affairs be considered by the relevant board, the court will dismiss the case and refer it to such board. In that connection, it should be noted that Part XXXIX of the Administration of Justice Act provides rules on court consideration of small claims cases. The rules provide for an easy and cheap procedure for civil actions concerning disputed claims not exceeding DKK 50.000.

4. The Danish Government is not to supportive of a rule making decisions of ADR boards binding as that could give rise to significant due process concerns. One reason is that, when making their decisions, ADR boards do not offer the same procedural guarantees as the courts. Consideration by the courts implies various procedural guarantees following from the Danish Constitution, the European Convention on Human Rights and otherwise provided by law. Similar guarantees are not offered in case of consideration by a board.

   In 2009, Denmark made efforts to make complaints board decisions binding on traders. However, this was not implemented as it clearly appeared from the consultation responses to the relevant bill, including the response from the Supreme Court that such scheme would give rise to significant procedural concerns. Moreover, a consumer would risk being forced into court proceedings even against the consumer's desire. Instead, a two-pronged scheme was introduced to ensure the enforceability of board decisions. One prong of the scheme means that a trader must notify the board in writing within 30 days of a decision delivered by the board if the trader does not want to be bound by such decision. It is then up to the consumer to choose whether to bring an action before the court. If the trader remains passive, the consumer can have the decision enforced with the help of the enforcement court. The other prong of the scheme implies that consumers may have their expenses for a legal action based on a board decision covered by the Competition and Consumer Authority. This two-pronged scheme applies to complaints submitted after 1 January 2010.

5. EU legislation in the field should be based on Commission Recommendations 98/257/EC and 2001/310/EC. These Recommendations are well-known and provide the important principles guaranteeing due process protection of consumers and

traders. The recommendations thus form the basis of the Danish Consumer Complaints Board and the approved private complaints boards.

6. The funding of ADR solutions should be left to the Member States to decide. In connection with ADR solutions, it should be possible to charge a fee for consumers wanting to complain and to order the traders to pay the costs.

   ADR solutions should be based on the principle that public authorities should not become involved in disputes which can be settled between the parties concerned. Traders and consumers should take responsibility for their own complaints to a wide extent, also in terms of funding. That is the reason why consumers have to pay a fee to submit a complaint and traders have to pay the costs if they lose the case. This is a vital prerequisite for building a well-functioning consumer complaints system based on dialogue and cooperation.

   On the one hand, the consumer fee is to urge consumers to consider their complaints once more, thereby contributing to make sure that the complaints are substantive. On the other hand, the fee should not be so large as to keep consumers from complaining.

ØKONOMI- OG ERHVERVSMINISTERIET

Europa-Kommissionen
Generaldirektoratet for Sundhed og Forbrugere
Rue de la Loi 200
1049 Bruxelles
Belgien

ØKONOMI- OG
ERHVERVSMINISTEREN

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ØKONOMI- OG
ERHVERVSMINISTERIET
Slotsholmsgade 10-12
1216 København K

Tlf. 33 92 33 50
Fax 33 12 37 78
CVR-nr. 10 09 24 85
oem@oem.dk
www.oem.dk

Høringssvar fra den danske regering vedrørende grønbog om kollektivt søgsmål for forbrugere (KOM (2009) 794 endelig)

Den danske regering takker for modtagelsen af Kommissionens grønbog om kollektivt søgsmål for forbrugere, som har været sendt i høring hos en bred kreds af berørte myndigheder og organisationer.

Det fremgår af grønbogen, at Kommissionens strategi for forbrugerpolitikken sigter mod at fremme det indre detailmarked ved at gøre forbrugere og detailhandlere lige så trygge ved at handle på tværs af grænser som i deres hjemland inden udgangen af 2013.

Kommissionen har i forbindelse med udarbejdelse af grønbogen fået foretaget forskellige undersøgelser, der bl.a. viser, at forbrugere, der lider skade som følge af uredelig praksis og derfor ønsker at anlægge sag, for øjeblikket støder på store hindringer med hensyn til adgang, effektivitet og økonomisk overkommelighed.

Kommissionen anfører, at formålet med grønbogen er at vurdere de nuværende klagemuligheder, navnlig i tilfælde, hvor der er sandsynlighed for, at mange forbrugere vil blive påvirket af en og samme overtrædelse af bestemmelserne, samt at skabe mulighed for at fjerne eventuelle huller og sikre reel erstatning i sådanne tilfælde. Da overtrædelser af forbrugerrettigheder, som påvirker et meget stort antal borgere, kan skabe markedsfordrejninger, fokuserer grønbogen på at løse problemet med massekrav og sigter på at tilvejebringe effektive midler til at opnå kollektiv erstatning for borgere i hele EU.

Kommissionen har i den forbindelse peget på en række løsningsforslag i forhold til, hvordan man kunne fjerne disse hindringer.

Den danske regering har følgende bemærkninger til grønbogen:

Fælles regler i EU:
Europæiske forbrugere er kritiske og stiller stadig større krav til de varer og ydelser, de køber. Det stiller konstant krav til virksomhederne. Det stiller krav til forbrugerpolitikken. Dette gælder også, når der handles på tværs af grænserne i EU. Forbrugerpolitikken skal skabe klare rammer,

der gør det muligt for forbrugerne at handle i tillid til, at de får de varer og tjenester, de har betalt for, også selvom de er købt eller produceret i et andet land.

Den danske regering kan generelt tilslutte sig holdningen om, at der er et behov for bedre muligheder for forbrugerne for at forfølge deres rettigheder, også når det gælder krav, som kan være grænseoverskridende.

Harmoniseringsgrad:
Såfremt det indre marked skal udvikles til gavn for forbrugerne og virksomhederne, må der på fællesskabsplan etableres ensartede regler, der dels sikrer et højt forbrugerbeskyttelsesniveau, dels giver erhvervslivet en bedre og enklere adgang til at foretage grænseoverskridende markedsføring og handel.

Det er imidlertid ikke entydigt, om en totalharmonisering af det omhandlede område vil bidrage til den ønskede styrkelse af det indre marked for forbrugerne, herunder om det er muligt at fastholde et ensartet og samtidig højt beskyttelsesniveau.

Totalharmonisering vil i givet fald forudsætte, at harmoniseringen sker på et samlet set tilstrækkeligt højt forbrugerbeskyttelsesniveau. I modsat fald vil en række medlemsstater være nødsaget til at sænke niveauet for forbrugerbeskyttelsen i forhold til i dag.

Det vil derfor bero på den konkrete udformning af de løsninger, der vælges, om der er et så højt beskyttelsesniveau, at totalharmonisering vil være den foretrukne løsning.

Gruppesøgsmål:
Kommissionen kommer i grønbogen med en række forslag til, hvordan problemet angående forbrugernes manglende tillid til grænseoverskridende handel kan løses. Bl.a. foreslås muligheden for kollektive søgsmål/gruppesøgsmål.

Regeringen støtter generelt idéen om at benytte sig af gruppesøgsmål på tværs af landegrænserne.

Det kan dog være vanskeligt at diskutere behov samt fordele og ulemper i relation til gruppesøgsmål ud fra et overordnet synspunkt, eftersom den nærmere udformning af eventuelle regler om gruppesøgsmål kan have stor betydning for vurderingen af sådanne regler. Fx er der stor forskel på gruppesøgsmål, der bygger på tilmelding (opt in), og gruppesøgsmål, der bygger på automatisk medlemskab med eller uden mulighed for framelding (opt out eller obligatorisk). Gruppesøgsmål kan således udformes på mange måder, herunder med hensyn til omfang og detaljeringsgrad.

Løsning 1 – uden tiltag fra Fællesskabets side:
Kommissionen foreslår i grønbogen en løsning, som ikke omfatter nye tiltag fra Fællesskabets side, og som benytter eksisterende foranstaltninger på nationalt plan og i Fællesskabets regi til at sikre forbrugerne passende erstatning.

Som anført af Kommissionen er der både fordele og ulemper forbundet med denne løsning. Ifølge Kommissionen er det en fordel, at løsningen ikke påfører medlemsstaterne og erhvervslivet yderligere omkostninger til gennemførelse. Løsningen har dog ifølge Kommissionen den ulempe, at forbrugerne fortsat vil have forskellige klagemuligheder til rådighed alt efter bopæl og den medlemsstat, hvor transaktionen har fundet sted eller skaden er opstået.

Derudover er det på EU-plan ifølge grønbogen ikke alle de retlige midler, som kan medvirke til at løse problemer med grænseoverskridende massekrav, der er trådt i kraft endnu.

Den danske regering er ikke afvisende overfor idéen om, at man i første omgang fokuserer på mulighederne i de allerede eksisterende EU-regler og regler, som gennemføres i nærmeste fremtid.

Dette kræver dog, at der over en periode indhentes erfaringer fra brugen af disse EU-regler, således at det på den baggrund vil kunne vurderes, om der er et behov for supplerende foranstaltninger.

Den danske regering ser frem til, at det i den videre proces kan drøftes, hvorledes denne model kunne være en løsning.

Løsning 2 – samarbejde mellem medlemsstaterne:
Kommissionen foreslår et samarbejde imellem medlemsstaterne om at udvide nationale kollektive søgsmålsordninger til at omfatte forbrugere i andre medlemsstater uden kollektive søgsmålsordninger.

Ved denne løsningsmodel finder den danske regering, at det kunne være nyttigt at se på, hvorledes der sikres en retlig kollektiv søgsmålsordning i alle medlemsstater. Man kunne eventuelt se på muligheden for udvidelse af forordningen om forbrugerbeskyttelsessamarbejdet, så den kompetente myndighed i en medlemsstat enten selv kan anlægge et søgsmål på vegne af forbrugere fra flere medlemsstater eller kan anmode en kompetent myndighed i en anden medlemsstat om dette.

Den danske regering finder endvidere, som Kommissionen også anfører, at det er vigtigt at få klarlagt problemstillingen vedrørende jurisdiktion og lovvalg for kontraktretlige og ikke kontraktretlige forpligtelser.

Løsning 3 – blanding af instrumenter:
En løsning kunne ifølge Kommissionen være at benytte sig af en blanding af politiske instrumenter for at forbedre forbrugernes klagemuligheder – herunder alternative kollektive tvistbilæggelsesordninger for forbrugere, nationale håndhævelsesmyndigheder, som har beføjelse til at kræve af erhvervsdrivende, at de betaler erstatning til forbrugere, samt udvidelse af småkravsproceduren til at omfatte massekrav.

Alternative tvistbilæggelsesordninger for forbrugere kan ifølge den danske regering være en god idé i visse henseender. Dog skal man være opmærksom på, at det kan være et problem, hvis disse alternative tvistbilæggelsesnævn kommer til at stå alene.

Den danske regering finder, at det ved denne løsning er vigtigt at få klarlagt, om forskellene ved medlemsstaternes alternative tvistbilæggelsesordninger får betydning for forbrugernes muligheder for erstatning i de omhandlede situationer i de forskellige lande.

Løsning 4 – retlig kollektiv søgsmålsprocedure:
En sidste løsning, som Kommissionen foreslår, er at indføre bindende eller ikke-bindende foranstaltninger med henblik på at sikre, at der findes en retlig kollektiv søgsmålsordning i alle medlemsstater. En kombination af forskellige aspekter ved disse løsninger kan også komme på tale.

Som allerede anført, kan den danske regering generelt støtte, at der indføres gruppesøgsmål på tværs af landegrænserne. Indføres der bindende foranstaltninger, bør disse udformes som minimumskrav, således af de medlemsstater, der allerede har indført nationale kollektive søgsmålsordninger, vil kunne bibeholde søgsmålsordninger, som giver bedre muligheder for kollektive søgsmål, end eventuelle bindende foranstaltninger på EU-plan måtte stille krav om.

Den danske regering mener som udgangspunkt, at mulighederne for at anlægge kollektive søgsmål bør være de samme, uafhængigt af hvad et eventuelt søgsmål omfatter. Derfor bør det overlades til medlemsstaterne at indpasse eventuelle bindende EU-foranstaltninger i national lovgivning. Der henvises i den anledning til regeringens høringssvar af 29. oktober 2008 vedrørende Hvidbog om erstatningssøgsmål ved overtrædelse af EF's kartel- og monopolregler KOM(2008) 165 endelig.

Hvis det overvejes at lade forbrugerorganisationer få søgsmålskompetence, bør det imidlertid vurderes, om forbrugerorganisationerne i medlemsstaterne har en sådan organisering, uafhængighed og kompetence, at de vil være i stand til at løfte denne opgave.

Mht. spørgsmålet om anvendelse af en opt in eller opt out-model skal den danske regering bemærke følgende:

Ved en opt in-model gøres der ikke indgreb i den enkeltes ret til at råde over egne retsforhold, og en dom, hvor opt in har været anvendt, får kun bindende virkning for forbrugere, der har tilmeldt sig et givent søgsmål.

Opt in-modellen er derudover bedst stemmende med hensynet til den sagsøgtes behov for forudberegnelighed, idet sagsøgte fra et bestemt tidspunkt i sagen (tilmeldingsfristens udløb) vil have overblik over, hvem der er med i gruppen, og dermed vil kunne forudse konsekvenserne af en dom. Samtidig giver kravet om tilmelding i opt in-modellen et klart overblik over, hvem der bliver omfattet af dommens bindende virkning, hvilket bl.a. letter fuldbyrdelsen af dommen.

Ved anvendelse af opt out-modellen vil et gruppesøgsmål gennemsnitligt kunne omfatte flere personer end opt in-gruppesøgsmål, og således vil denne model kunne være en mere effektiv og samlet set mere økonomisk ordning. Omvendt vil man under retssagen eller ved afgørelsen af sagens realitet normalt ikke have et præcist kendskab til, hvem dommen vil have bindende virkning overfor.

Den danske regering foreslår, at man ser på mulighederne i at kombinere opt in og opt out-modellerne, således at reglerne for gruppesøgsmål er baseret på en hovedregel, hvorefter gruppens medlemmer skal tilmelde sig et eventuelt søgsmål (opt in). Selve tilbuddet om at tilmelde sig et gruppesøgsmål vil bidrage til at sænke tærsklen for deltagelse i en retssag i forhold til den situation, hvor initiativet ligger hos den enkelte sagsøger.

Udover hovedreglen om opt in kunne man se på muligheden for at anvende en opt out-model for individuelt "uprocesbare" krav, det vil sige krav, som på grund af deres ringe størrelse almindeligvis ikke kan forventes fremmet ved individuelle søgsmål. For krav af ringe størrelse kunne man således eventuelt overveje kollektive søgsmål baseret på, at berørte forbrugere er omfattet af søgsmålet, medmindre de framelder sig det (opt out). Kravene til en grupperepræsentant vil i sådanne tilfælde være særligt høje, og man kunne overveje, om det skulle være et krav, at det var en offentlig myndighed, der førte den type sager.

Den danske regering ser derudover frem til at drøfte spørgsmålet om de forskellige finansieringsløsninger.

For så vidt angår spørgsmålet om lovvalg i tværnationale sager, er den danske regering enig med Kommissionen i, at der vil være praktiske problemer forbundet med at skulle anvende artikel 6 i Rom I-forordningen, idet de respektive forbrugeres forskellige nationale lovgivninger i så fald skal benyttes. Dette kan synes uhensigtsmæssigt i sager med forbrugere fra mange forskellige medlemsstater.

Den danske regering ser frem til de videre drøftelser, herunder om de nuværende EU-regler er tilstrækkelige, eller om der er behov for ændringer, hvori man tilgodeser såvel forbrugeres som erhvervslivets behov.

Med venlig hilsen

Lene Espersen

MINISTRY OF ECONOMIC AND BUSINESS AFFAIRS
DENMARK

European Commission
Directorate-General for Competition, Unit A 5
Damages actions for breach of the EC antitrust rules
B-1049 Brussels

MINISTER FOR ECONOMIC
AND BUSINESS AFFAIRS

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MINISTRY OF ECONOMIC
AND BUSINESS AFFAIRS
Slotsholmsgade 10-12
DK-1216 Copenhagen K

Tel. +45 33 92 33 50
Fax +45 33 12 37 78
CVR no. 10 09 24 85
oem@oem.dk
www.oem.dk

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

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,

Lene Espersen
Minister for Economic and Business Affairs