

## Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

### The Danish Competition and Consumer Authority

The following template is submitted by *the Competition and Consumer Authority in Denmark* pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

#### I. Introduction

Together with the Danish Competition Council (DCC) the Danish Competition and Consumer Authority (DCCA) constitutes an independent authority which makes administrative determinations concerning anticompetitive infringements, issues orders to cease infringements of the Danish Competition Act and conducts merger control. Decisions made by the DCCA and the DCC can as a main rule be appealed to the Danish Competition Appeals Tribunal and further on to the civil courts. The DCCA/DCC acts independently in its enforcement of competition rules. More information (in English) about the DCCA can be found on the DCCA’s website: <https://www.en.kfst.dk/>

In Denmark under the current rules, sanctions for infringement of competition rules are criminal. Infringements of competition rules may be sanctioned with fines imposed on undertakings and on individuals. In hard-core cartel cases, individuals may also be sentenced to imprisonment. If the DCC after having made a decision on substance concerning a violation of competition rules decides that criminal sanctions may be relevant, the DCCA refers the case to the State Prosecutor for Serious Economic and International Crime who decides whether to seek criminal sanctions. As the ECN+ directive<sup>1</sup> requires that national administrative competition authorities may either impose by decision in their own enforcement proceedings, or request in non-criminal judicial proceedings the imposition of fines on undertakings, the current regime will be subject to amendments. The deadline for transposition is 4 February 2021. The Danish Government is expected to propose the relevant law amendments to the Parliament in October 2020.

#### II. Laws, Regulations, and Policies relevant for the implementation of the CAP

*For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.*

*Please update your Template reflecting significant changes as they relate to the CAP, as needed.*

An [English version of the Danish Competition Act](#) is available on the DCCA’s website.

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<sup>1</sup> Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, art. 13.

The Danish Competition Act contains a prohibition against agreements between undertakings that restrict competition (Section 6) and a prohibition against undertakings' abuse of a dominant position (Section 11). These rules entered into force in 1998 and are structured on the basis of the EU Competition rules and should be interpreted in accordance with EU Competition law, including EU case law. The DCCA/DCC applies EU Competition rules (art. 101 and 102 TEUF) in addition to the provisions in the Danish Competition Act if the anticompetitive practices are likely to affect trade between the EU Member States.

Furthermore, merger control rules were introduced in 2000.

The DCCA has issued [guidelines](#) on the prohibitions in Section 6 and 11 (in Danish) and on the [merger control procedures](#). The DCCA has also issued guidelines on the [procedures that apply at dawn raids](#) (in Danish) and on [leniency procedures](#). The DCCA follows applicable procedural rules in conducting investigations and enforcement procedures.

## b) Non-Discrimination

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

The Danish competition law applies equally to all legal and natural person irrespective of nationality, residence, or origin.

The DCCA [publishes](#) its enforcement priorities. The DCCA prioritize which cases to pursue according to the following criteria:

- the seriousness of the case with respect to the violation of the Danish Competition Act;
- the expected significance of the case with respect to the market, the competition culture and the economy as a whole;
- the principal nature of the case, i.e. if the case pertains to an issue which has not previously been dealt with in case law; and
- the expected resource consumption of the case

In the years to come one of the DCCA's main areas of focus will be the digital economy, more specifically violations that occur online and on digital platforms. Another focus will be pro-active cartel detection with focus on both structural and behavioral screening.

### **c) Transparency and Predictability**

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

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| <ol style="list-style-type: none"><li><i>i. In Denmark, no law is valid unless it has been published. The DCCA makes the Danish Competition Act public on <a href="#">its website</a>, as well as the legislative history connected to the legislation. The Danish Competition Act and the executive orders connected to the Act are also available <a href="#">in English</a>.</i></li><li><i>ii. Rules that apply to investigation and enforcement proceedings are stipulated in the Danish Competition Act, the Due Process of Law Act and the Danish Public Administration Act.</i></li><li><i>iii. The above mentioned laws are all published on <a href="http://www.retsinformation.dk">www.retsinformation.dk</a>.</i></li><li><i>iv. The DCCA follows the relevant procedural rules that follow from the above mentioned laws.</i></li><li><i>v. The DCCA has published guidelines on the procedures that apply in <a href="#">competition cases</a> (in Danish) and in <a href="#">merger control cases</a> (both in Danish and in English).</i></li></ol> |
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### **d) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

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| <ol style="list-style-type: none"><li><i>i. The DCCA always informs the undertaking that is subject of an investigation as soon as it is practical and legally permissible in respect of the status of the investigation in question and includes information regarding the legal basis of the investigation and the conduct that is under investigation. Often the undertaking will be informed by a request for information. In cases where the DCCA plans to conduct a dawn-raid, the DCCA will not inform the undertaking about the case until after the dawn-raid.</i></li></ol> |
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ii. When the DCCA has investigated the case and formed an opinion about the focus of the case, the DCCA sends the undertaking (the party) a preliminary statement of objections. The preliminary statement of objections contains the provisional hypothesis and the DCCA's immediate concerns in relation to competition rules. The obligation to issue a preliminary statement of objections is stipulated in Sect. 15 a, 2, in the Danish Competition Act. The undertaking has a minimum of two weeks to comment on the preliminary statement of objections and is also offered a state of play meeting to discuss the case.

In regards to merger control, the Danish competition rules require notification of a merger before implementation. Thus, a merger case will be initiated by the undertakings concerned. As merger cases are subject to strict time deadlines, the undertakings often contact the DCCA before they file a formal notification, i.e. in the pre-notification phase, which allows the undertakings and the DCCA to discuss the merger and possible competition concerns. Once the undertakings have filed a complete formal notification of the merger, the DCCA is obliged to inform the undertakings within 25 weekdays whether the merger can be approved or whether the DCCA will initiate further investigations. In the latter case, the DCCA issues a preliminary statement of objections.

iii. When the DCCA sends a request for information to the party or to other Persons that can provide information related to the case they will be given reasonable time - depending on the extent of the questions - to prepare their answer and to collect the required information. The DCCA only asks questions that are pertaining to the case and its investigation and with respect of the principle of proportionality. The DCCA's investigation procedures are further explained in the guidelines on the procedures that apply in [competition cases](#).

#### **e) Timing of Investigations and Enforcement Proceedings**

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

It is a priority for the DCCA to conclude investigations and enforcement proceeding within a reasonable time period. The timing will depend on the complexity and the nature of each case.

Merger control cases are subject to specific deadlines which are stipulated in Section 12 d of the Danish Competition Act. When the DCCA receives a full notification, the Authority will assess whether it contains all the information required according to the notification form. Once the notification is complete, the DCCA has 25 weekdays (Phase I) to determine whether the merger can be approved or whether it is necessary to initiate further investigations of the merger. If the DCCA's investigations in Phase I warrants further in-depth investigations of the market, including assessments of any remedy commitments proposed by the parties, and these investigations cannot be concluded in Phase I, then the merger will be subject to a Phase II investigation. The investigation and assessment in phase II is subject to a 90-weekday time limit. Under certain conditions, this deadline of 90 weekdays can be extended by up to 20 weekdays.

## **f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

i. Rules on identification and treatment of confidential information are stipulated in the Danish Public Administration Act. The DCCA treats confidential information in accordance with the Danish Public Administration Act when it comes to case handling.

ii. All members of the DCC are bound by confidentiality rules. This includes all information received orally and in writing as well as the agenda. This does not cover information that has already been published. The above-mentioned also applies to the employees of the DCCA. All employees are bound by the duty of non-disclosure pertaining to the Danish Public Administration Act as well as the Danish Criminal Code. The duty of non-disclosure comprises both during and after employment.

iii. The main rule in the Danish Competition Act is that only the investigated parties or merging parties (the addressees of a possible infringement or merger decision) are considered parties and thereby entitled to access to file. Others do not have a right to access to file, except for information directly related to themselves and with respect to business secrets etc.

As a main rule, the parties have right of access to all documents in the DCCA's file regarding this possible decision. As an exception, the parties' right of access to file may be restricted to protect confidential information as for example confidential information regarding competitors, trading partners and competitive conditions on the market in question. However, this is only possible if the following criteria are fulfilled:

- i) The information consists of confidential business secrets or confidential information about the market in question (i.e. confidentiality due to *competitors* or to the *competition*).
- ii) The investigated or merging parties should be able to protect their interests without the confidential information.
- iii) The need to protect confidential information must be balanced against and outweigh the parties' right of access to file.

When a party requests access to file, the DCCA will consider whether the external documents in the file contain confidential information regarding others. As a main rule, confidentiality is identified through hearing of the Persons, which the information concerns. If the DCCA decides that the information in a document should be exempted, the information in question will be blanked out and access to file will be given in the rest of the document.

The public in general does not have a right of access to file but will have to await the publication of a possible decision of the DCCA.

### **g) Conflicts of Interest**

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

Both the members of the DCC and the employees of the DCCA are bound by rules regarding conflict of interest under the Danish Public Administration Act.

### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

i. The Danish Competition Act contains procedural rules to allow for parties' preparation of an adequate defense. When the DCCA has decided to initiate an antitrust case or to initiate further investigations in a merger case, the DCCA issues a preliminary statement of objections that it sends to the undertaking concerned. The preliminary statement of objections contains the provisional hypothesis' and the DCCA's immediate concerns in relation to competition rules. The undertaking has the possibility to comment on the preliminary statement of objections within two weeks. The undertaking is also offered a state of play meeting with the DCCA to discuss the content of the preliminary statement of objections and future handling of the case.

ii. The party will have access to file according to the Danish Public Administration Act with the exception of confidential information about other undertakings to enable them the effective exercise of the rights of defense.

iii. Besides the fixed state of play meetings that the DCCA offers the party the undertaking can throughout the investigation of the case request meetings or telephone calls with the DCCA to discuss the case including the possibility of a commitment solution. The DCCA aims at contacting undertakings that are being investigated at least every two months in order to keep them informed about the status of the case.

When the DCCA has terminated its investigation of the case, the DCCA issues a statement of objections that is sends to the undertaking. The statement of objections contains a full presentation of the case and the DCCA's legal assessment. The undertaking has at least

six weeks to comment on the statement of objections and is also offered another state of play meeting with the DCCA. In merger cases the time given to the undertakings to comment on the statement of objections can be shorter due to the strict deadlines that apply to merger cases.

The undertaking also has the right to present its views orally to the members of the DCC before the DCC decides on the case. Based on the statement of objections and the written and oral comments from the undertaking the DCCA prepares a draft decision. The DCC decides the case on behalf of the draft decision.

#### **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

i. The undertakings have a right to legal representation throughout the entire proceedings. When conducting dawn-raids according to a court-ordered search warrant, the investigators do, however, not have to await the arrival of the undertaking's lawyer.

ii. The DCCA provides the undertakings with the opportunity to present their views through counsel. Throughout the investigation procedure undertakings concerned are offered ample opportunity to meet with the DCCA to explain its views, present evidence, and engage with the DCCA on substantive and procedural issues. In most cases, the undertakings are represented by counsel.

iii. The DCCA recognizes the Legal Professional Privilege. The principle implies that correspondence between the undertaking and its lawyer concerning the undertaking's rights of defense will not be part of a competition case. The DCCA also recognizes the principle of self-incrimination, i.e. the undertakings' right not to incriminate themselves when providing the DCCA with information.

#### **j) Decisions in Writing**

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant*

*will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

- i. The DCCA/DCC's decisions are always in writing and are made public in a non-confidential version on the DCCA's website. Decisions set out the finding of facts and conclusions of law on which they are based. If the DCC decides that competition concerns can be resolved with commitments, the decision whereby the DCC accepts the commitments will also be published on the DCCA website.
- ii. Decisions whereby the DCC accepts commitments will contain the commitments offered by the undertakings and include the basis for the DCC's acceptance.

#### **k) Independent Review**

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

It is possible for the parties to bring the case before the Danish Competition Appeals Tribunal which is an administrative appeals body with specific expertise to assess competition cases. Decisions from the Competition Appeals Tribunal can be appealed to the Danish Maritime and Commercial High Court. The Danish Maritime and Commercial High Court's decisions can be appealed to a High Court. If the case is of a principle nature, the case may be directly appealed to the Danish 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.