



Access to Documents in Judicial Proceedings

Danish Perspectives

**Seminar in Genoa
20 November 2015**

Issues

- **Quasi-judicial administrative procedures**
 - Access to documents under the Administrative Code and Public Access Code
- **Court procedure**
 - Access to documents under the Procedural Code
- **Requirements of Directive 2014/104**
 - Changes to the Danish administrative and procedural practice
- **Danish Practice**
 - Complaint Boards and Courts



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Access to Documents - Denmark

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Quasi-Judicial Administrative Procedures

Access to documents under
the Administrative Code
And Public Access Code



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Public Access Code

Act 606/2013 of 12 June 2013

- **Purpose is to ensure public access to information in public administration**
- **Exemption for internal documents that are not transferred to external parties (Section 23), unless**
 - **Required for briefing of minister and transferred between ministries, or between a ministry and its agencies, unless the documents are or will be used for an administrative decision, or merely describe facts (Section 24)**

Public Access Code

Act 606/2013 of 12 June 2013

- **Exchanged between a minister and parliament (Section 27)**
- **Exchanged between authorities, where one acts as a secretariat for the other**
- **Exchanged with experts concerning a planned or ongoing court case (Section 27)**
- **Exemption for documents concerning**
 - **Private, including economic, information concerning individuals (Section 30)**

Public Access Code

- Business secrets, of substantial economic interest, belonging to individuals or enterprises (Section 30)
- Information of substantial interest for state security or defence (Section 31)
- Information relating to of foreign policy that may be deemed secret under EU or international law, or which may impact of the international relations of the state (Section 32)
- Information relating to criminal procedures and administrative control (Section 33)

Administrative Code

Restatement Act 433/2014 of 22 April 2014

- Introduced in 1985, subsequent to the Danish accession to the European Communities
- Chapter 4 concerns the right of parties to an administrative procedure to have access to information
 - Full access to the case documents (Section 9)
 - Exemption for internal documents, that have not been transferred to other parties, unless the transfer is required by law (Section 12)

Administrative Code

- **Exemption for internal documents does not apply where they (Section 13)**
 - Only set out the final decision of a case
 - Contain information that must be recorded under Section 13 of the Public Access Code, which covers all information received orally or concerning procedural steps not set out in written documents, but does not apply to criminal procedures
 - Documents produced to constitute evidence in or restate the facts in the case

Administrative Code

- **Exemption as in the Public Access Code for documents (Section 14)**
 - Exchanged between authorities, where one acts as a secretariat for the other
 - Exchanged with experts concerning a planned or ongoing court case
- **Exemption does not apply to, documents containing (Section 14-14b)**
 - Factual information
 - Expert evaluations to be used in the case

Administrative Code

- **Exemption as in the Public Access Code for**
 - State security and defence (Section 15)
 - Foreign policy and international obligations (Section 15a)
 - Information relating to criminal procedures and administrative control (Section 15c)
- **Special rules for criminal cases (Section 18)**
 - Access to documents after end of trial, unless countervailing interests
 - Does not apply to police and prosecution documents

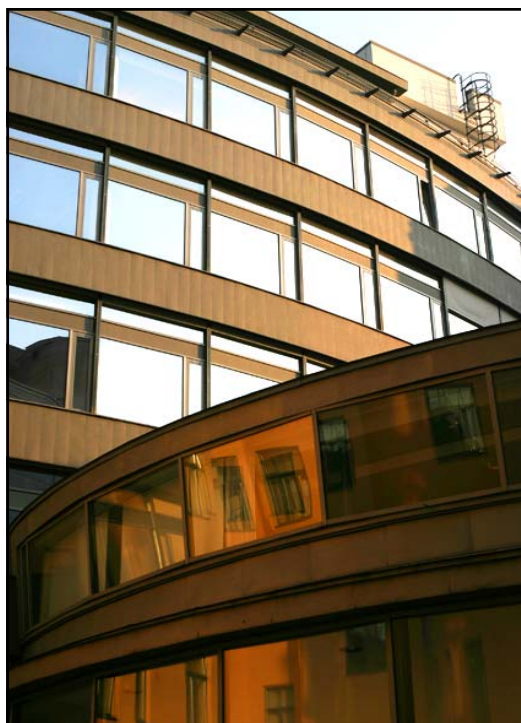
Competition Code

Restatement Act 869/2015 of 8 July 2015

- **Public Access Code does not apply, except for (Section 13.1)**
 - Adoption of executive orders to supplement to Act
 - Obligation to make notes or oral information or undocumented procedural steps
- **Obligation to publish (Section 13.2)**
 - Decisions and opinions of the competition authorities
 - Judgements on sanctions and accept of fines
 - Judgements with the competition authorities as parties
 - Judgements concerning the Act or EU competition law

Competition Code

- **Administrative Code**
 - Access to correspondence with EU Commission limited to important factual information (Section 15a)
- **Competition authorities**
 - **Competition and Consumer Authority (Section 15)**
 - Administration, application and legislation
 - **Competition Council (Section 14)**
 - Supervision
 - **Competition Appeal Board (Section 19)**
 - Appeal of application decisions (may be in English)
 - Mandatory before access to Courts



Court Procedure

Access to documents under
the Procedural Code

Procedural Code

Restatement Act 1308/2014 of 9 December 2014

- **Access to information for parties in civil cases, including administrative cases (Section 255a)**
 - All documents in the case, except internal documents
 - Not passed to third parties
 - Deliberation protocols
- **A party may be obliged by Court to produce documents (Section 298)**
 - At request from other party
 - Exemption for information that would not be subject to witness obligations

Procedural Code

- **A third party may be obliged by Court to produce documents (Section 299)**
 - At request from a party
 - Exemption for information that would not be subject to witness obligations
- **Requests for production of documents must indicate**
 - Issues to be demonstrated by the documents
 - Reasons for expecting the other party to possess the documents



Requirements of Directive 2014/104

Changes to the Danish
administrative and
procedural practice

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Council and Parliament Directive 2014/104 of 26 November 2014

- **Supplements competition measures**
 - Regulation No. 1/2003 on Commission procedures
 - Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union
- **Deadline for implementation**
 - 27 December 2016 (Article 21)
 - Denmark as yet undecided
 - Implementation by legislative amendment
 - Implementation by adjusted application of current legislation

Council and Parliament Directive

- **Areas of concern**

- **Directive grants broad right to request documents from other parties by indicating categories**
 - Danish courts currently have restrictive practice for requesting specific documents
- **Directive requires minimum of 5 year statute of limitations for damages in competition cases**
 - Danish legislation in general applies 3 year limitation
 - Preamble of directive indicates that absolute limitations, in Denmark 10 years, may apply

Council and Parliament Directive

- **Recognition**

- **Directive requires courts to recognise own country competition authority decisions**
 - No current basis in Danish procedural code
- **Directive requires courts to consider other country competition authority decisions**
 - Originally proposed obligation to recognise

Council and Parliament Directive

- **Joint liability**

- Directive requires joint liability towards customers, but enterprises with leniency immunity have only secondary liability for customers of others

- No current basis in Danish competition code or in general legislation on damages
- Recent case C-557/12 Kone from CJEU also imposes liability towards customers on non-cartel enterprises, due to general price increase

Council and Parliament Directive

- **Burden of evidence**

- Directive requires presumption of serious cartel violations causing damage

- No basis in Danish competition or procedural code, which is based on a neutral burden of evidence, allowing the courts to freely assess how to evaluate the available evidence

- **Passing-on defence**

- Directive imposes burden of evidence on party claiming passing-on

- Passing-on accepted in Danish practice as defence in cases concerning reclaiming of illegal taxes



Danish Practice


Complaint Boards and Courts



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Danish Practice

- **KfU.1995.09.21, Semco**
 - Procurement Complaint Board: Access denied to opposing party documents because of business secrets
 - Based on the administrative code, but would not be possible for a court under the procedural code
- **U.2005.2171H, GT Linien**
 - Supreme Court: Illegal harbour fees to be refunded, as the burden of evidence for passing-on had not been lifted
 - Based on principle of law that is not codified



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Danish Practice

- **U.2011.507H, TeliaSonera Danmark**
 - **Supreme Court: Claims for damages for competition law violations refused for both parties, as legal interest had been lost through passivity**
 - Based on principle of law that is not codified
- **U.2013.1342H, PostDanmark**
 - **Supreme Court: Decision of competition authorities, finding abuse of dominant position, was overturned after preliminary reference to CJEU**
 - Would still be possible under the new directive, as the case concerned an appeal against the competition authority

Danish Practice

- **SH2009.U 10-07, DONG Energy Power**
 - **Maritime and Mercantile Court: Claim by 1,110 applicants for damages for abuse of dominant position, where an expert opinion was refused, as it had unilaterally been procured by the applicants**
 - Procedural code requires court to request expert opinions
- **U.2011.151H**
 - **Supreme Court: Overruled the Maritime and Mercantile Court, as the expert opinion was of a technical nature and had been procured prior to the case**
 - Exemption in the procedural code

Danish Practice

- **U.2013.3314H**
 - **Supreme Court: Statute of limitations calculated not from the abuse of dominant position, but from the press statement of the European Commission 7 years later that the abuser would be fined**
 - The application was still a few months too late



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