



MINISTERIET FOR FAMILIE-
OG FORBRUGERANLIGGENDER

Forbrugerstyrelsen

Collective Redress

The Danish Consumer Ombudsman
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redress – 29 June 2007

Forbrugerstyrelsen

The Danish system of redress

Enforcement of violations of consumer protection law



Public actions:

- Enforcement instruments available to the Consumer Ombudsman
 - (interim) injunction, order and penalty

Disadvantages:

- The instruments do not recover consumer losses
- The size of the penalty is often disproportional to the profit made by the business

Private/civil actions:

- Individual redress can be sought through complaint boards or at court

Disadvantage:

- Small claims are often left unpursued due to lack of resources

The Danish system of redress



- There is a need for a procedural form which can effectively handle disputes concerning large numbers of uniform claims – especially where the claim is so small that individual redress is abandoned due to lack of resources
- The Standing Committee on Procedural Law (Retsplejerådet) submitted a report on proposals for the introduction of collective redress mechanisms into Danish law (Report No. 1468/2005)
- Act No. 181 of 28 February 2007 on collective redress
- The Act takes effect 1 January 2008

Redress: General observations



- Only procedural rules
- The substantive legislation is not changed, including e.g. the law of tort
- The court must approve the case as being suited for examination according to the rules on collective redress

Two types of collective redress

1. Opt in. Affected consumers must actively opt for the redress action

2. Out opt. This redress action is based on automatic inclusion with the possibility of opting out



Only the Consumer Ombudsman has access to bring collective redress actions pursuant to the opt out model

Why?

This owes to the fact that public authorities in some respects are bound by obligations of professional secrecy and impartiality

The conditions underlying collective redress

1. Uniform claims
2. Claims are subject to Danish jurisdiction
3. Collective redress is considered the best way to examine the aggregate claims
4. Members of the action must be identifiable
5. The members should be notified about the proceedings in an appropriate manner
6. A group representative may be appointed. The court appoints a representative to that effect



(1) Uniform claims

The claims need not be *identical*; yet they must arise from the same factual circumstances and the same legal basis



An example: Participants in a package tour may rise a claim concerning alleged defects in, e.g., accomodation

(2) Claims are subject to Danish jurisdiction



Collective redress action brought against a Danish trader:

- Article 2 of the Brussels I Regulation (domiciled legal and physical persons)
- Redress actions may comprise claims raised by both Danish consumers and consumers domiciled in other Member States

Collective redress action brought against a trader located in another Member State:

- Articles 15-17 of the Brussels I Regulation (jurisdiction in regard to consumer contracts)
- Redress actions may – possibly – include claims raised by Danish consumers, but not consumers domiciled in other Member States (it is potentially in conflict with the *opt out* model)

(3) The best way to examine the claims

Collective redress actions can only be initiated if other ways of examining the claim procedurally are deemed insufficient



Other procedural forms:

- Joinder of individual actions
- Declaratory actions
- Test case where a public authority acts on behalf of the affected group

(4) Identification

The claim should be formulated in a way which provides for easy identification of the affected consumers. Hence a list of contact information is not a direct requirement.



An example: The defendant X is sentenced to pay EUR 50 to each customer who subscribed to X's program package in the period from January – June 2004

(5) Notification

- The court determines the form and substance of the notification
- The court will order the plaintiff to give the notice



Examples:

- Lists of contact information stating the names and addresses of the affected consumers
- A public announcement in the media, possibly in combination with information posted on a website
- The Consumer Ombudsman may demand that the trader hand over customer and subscriber lists

(6) Group representative

1. A member of the group that brings the collective redress action
2. An organisation, private institution or another association if the action falls within the scope of the objects of the association.
3. A public authority authorized by law to this effect



The opt out model: Certain conditions apply



1. Smaller claims which cannot be expected to be brought through individual redress
 - DKK 2,000 (EUR 264) is the limit
2. It is secondary to the *opt in* model
3. The group representative must be a public authority appointed to this effect (at the moment, only the Consumer Ombudsman has access to bring collective redress actions)

Legal costs and the provision of security



- The losing party pays the legal costs
- Members of an *opt out* collective redress action can only be ordered to pay the amount of money which they stood to recover had the proceedings been successful
- The group representative may be required to provide security for the legal costs
- Possibility of free legal aid

Appeal

- The group representative may appeal the entire judgment or parts thereof
- If the group representative does not appeal, an appeal may be initiated by any person who can be appointed as a group representative
- The defendant can appeal against the judgment
- If a redress action is not appealed collectively, each member may appeal the judgment as regards his or her own claim



Future application

Examples of potential collective redress actions initiated by the Consumer Ombudsman:



- Collection of an unlawful fee
- Contract concluded on the basis of misleading marketing activities (e.g. the UCP Directive)
- Unfair terms of contract (e.g. the Directive on unfair terms in consumer contracts)

Possible amendments and future revision



- Should it be possible to order the defendant to participate in the identification of affected consumers (the Standing Committee advised against this aspect)
- The DKK 2,000 limit (EUR 264) should either be increased or removed
- *Opt out* redress actions should not necessarily be secondary to *opt in* redress actions

National systems and the internal market

- Danish collective redress actions against a Danish trader can as a basis also include claims from consumers domiciled in other Member States
- Danish collective redress actions against a business located in another Member State can as a basis only comprise claims raised by Danish consumers



National systems and the internal market

Consequences of the CPC Regulation ?

- It does not establish rules concerning civil law claims
- The Regulation can bring about the cessation of a breach if it infringes Community law. CPC may therefore constitute an appropriate legal basis
- Example:
 - An internet-based business located in France uses unfair terms of contract or unfair marketing activities in Denmark and elsewhere in the Community
 - The Danish Consumer Ombudsman can request the French authorities to intervene
 - He can thereby bring a collective redress action in Denmark on behalf of the affected Danish consumers (Rome I)



Consequences of the Directive on electronic commerce ?

- The country of origin principle does not apply to civil law claims, cf. Article 1(4)

Need for community rules on collective redress ?

- Increasing cross-border transactions within the EU

Substantive Community law on civil claims:

- Increasing harmonisation of substantive legislation (e.g. Directive on sale of consumer goods, Directive on unfair terms of contract, distance selling directives)

Tools available today:

- Jurisdictional matters (Brussels I Regulation)
- Applicable law (Rome I and Rome II)
- Cessation of infringements (the CCP Regulation)
- Individual civil law claims (ICC-network)

Which tools do we lack:

More effective civil law claims in cross-border transactions



Public enforcement of civil rights in cross-border transactions?

Proposal for the Rome I Regulation

- The law applicable will in the future probably be the legislation of the home country of the consumer
- Strengthens civil law protection

The CPC Regulation

- Community-level enforcement is, however, conducted on the basis of the law applicable in the country from which the marketing activity emanates

In sum: The inconsistency between the protection and rights granted by civil law and the enforcement mechanisms available is undesirable

Solution: There is a need to strengthen public enforcement by:

- Increasing the scope (and level) of harmonisation of civil law consumer protection directives which ensures a sufficiently high level of protection, and/or
- Introducing a general clause in the UCP Directive which requires business and trade to comply with the civil law rules applicable to contractual obligations – the basis of an order



Do we need Community rules on collective redress ?

- The CPC Regulation and the ICC-network do not, however, help or solve the problems encountered by consumers from different Member States who wish to pursue civil law claims that are individually ineligible for action

Conclusion:

Like in Denmark, the implementation of collective redress mechanisms under Community law is needed to enhance consumer protection

