
How to achieve compliance:
The Danish regulatory system and the use of soft and hard law in the
enforcement of consumer protection legislation



Building effective markets
– the role of an integrated legal system
Zürich, 29-30 January 2013

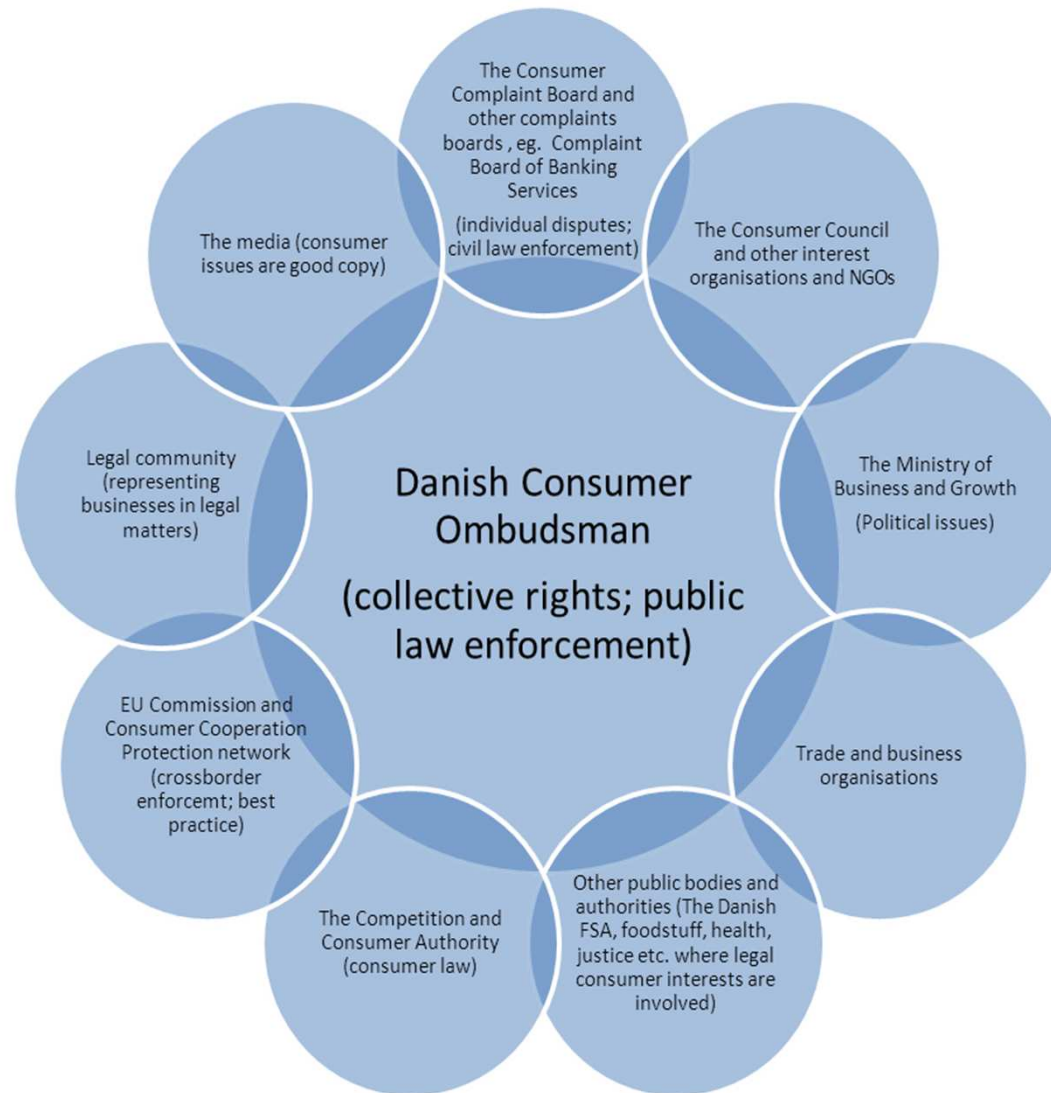
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Agenda

- Consumer protection landscape
- The national setup
- Enforcement of consumer protection at national level
- ADR: Advantages and disadvantages
- The role of the Consumer Ombudsman
- Enforcement instruments
- Advantages of effective collective redress schemes
- Negotiations
- Settlements and guidelines
- Summing up
- Questions



Consumer protection landscape



The national setup



Enforcement of consumer protection law at national level

Remedies available to the consumers (individual or collective redress)

- Complaint boards (ADR) – if the claim exceeds 800 DKK (EUR 120)
- Individual civil action in courts (small claims procedure)
- Complaint to the Consumer Ombudsman
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- The Consumer Council gives a voice to consumers
- The media



ADR: Advantages and disadvantages

Advantages:

- Informal, quick and inexpensive (maybe not for companies)
- Most decisions are followed

Disadvantages:

- Decisions are not directly enforceable
- Often not possible to produce evidence (e.g. witness statements) – subsequent court procedure may be necessary

Possible solutions:

1. The decision is enforceable *by default* if the trader does not inform the ADR board that the decision will not be followed
2. Free legal aid to consumers to continue in courts
3. 'Name and shame'
4. Decision could be binding according to prior agreement



However: Case by case solutions only

The role of the Consumer Ombudsman as a public enforcer

‘Hard’ law enforcement in cases of more general interest:

- Administrative orders
- Injunction or court orders
- Civil lawsuit for *i.a.* compensation to consumers
- Collective redress (*opt in* or *opt out* model)
- Supplement to ADRs

A more ‘soft’ law approach:

Negotiations with the company or industry in general can resolve in:

- Settlements
- Guidelines or guidance papers (gives industry ‘ownership’ to the interpretation of the law)



Benefits from effective collective redress schemes

Small and founded claims are not necessarily left unpursued

- Improvement of consumer confidence
- More equal and fair competition

Sufficient safeguards in the Danish legislation to avoid unfounded claims

- Court approval
- ‘Loser pay’ principle
- No punitive damages

Two models are necessary:

- Traditional *opt in* model (group representative)
- *Opt out* model (if individual claim is less than EUR 270) reserved for Public Authority (DCO)
- Although not yet used in courts it is an effective tool in negotiations for settlements
- The threshold should, however, be increased



Negotiation



Dialogue: The principle of negotiation

Legal base – section 23 of the Danish Marketing Practices Act

'The Consumer Ombudsman shall seek by negotiation to influence traders to act in accordance with the principles of good marketing practices and to observe this Act in other respects'



Individual negotiations

Warning

- The company must be aware that non-compliance in spite of a warning will be considered an aggravating circumstance

Undertaking

- To ensure changes and compliance on changes in the company's commercial practices
- If a trader disregards an undertaking given to the Consumer Ombudsman after negotiation, the Consumer Ombudsman may impose such injunctions on the trader as may be considered necessary to ensure compliance with the undertaking
- Possible to include compensation for unfair commercial practise



Guidelines and guidance papers



Sectoral negotiation: Guidelines and guidance papers

Legal base - section 24 of the Marketing Practices Act:

‘Upon negotiation the DCO will seek to influence the conduct of traders by the preparation and issue of guidelines for marketing in specified areas that must be considered essential, especially in the interests of the consumer’



Guidelines: Advantages and challenges

Advantages:

- Negotiated in consensus with consumer and business organisations
- The parties have 'ownership' to the interpretations followed by DCO
- Creates legal certainty for traders
- High degree of compliance
- Makes it easier to combat unfair commercial practices

Challenges:

- Negotiations can take a very long time
- Need to compromise
- Contents must be in accordance with the UCP Directive (individual assessment)
- Business and the public must be informed of its contents

**Guidelines are efficient because the Consumer Ombudsman
has the remedies to enforce compliance**



To sum up

- Unfair commercial practises should not pay off - or be supported by ineffective legislation
- The Consumer Ombudsman, the ADRs and small claims procedure can form a consistent setup to counter these practises

How to ensure that the Consumer Ombudsman has the right impact

- Dialogue and negotiation are efficient tools when enhanced by enforcement remedies
- Guidelines and guidance papers contribute to building effective markets because they create a level ground for fair competition – and because business knows that enforcement may be used in case of non-compliance
- Collective redress ensures that founded small claims are not left unpursued – and facilitates settlement



Questions and comments

Thank you for your attention!

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