Consumers' access to damages

Consumer enforcement of competition law

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ENGLISH SUMMARY
This doctoral thesis concerns consumers' access to damages for competition law infringement in Denmark. Over the last two decades, there has been significant development towards improving private enforcement of Danish and EU competition law, especially access to private damages actions. Although consumers often suffer harm – either directly or indirectly – when competition law is infringed, this development has only had a very limited effect when it comes to the awarding of damages to consumers in the EU, and there are no examples at all in Denmark. This thesis will examine *why* this is the case, and *what* can be done to improve consumers' access to damages if consumers' right to damages is to be taken seriously.

Consumers' "access to damages" is addressed from three perspectives: Firstly, *substantive access* to damages, secondly, *procedural access* to damages and thirdly *financial access* to damages. The first perspective is to a large extent determined by EU law, whereas the final two generally fall under the individual Member States' domestic rules.

In relation to consumers' substantive access to damages, it is concluded that, according to European Court of Justice case law, the right to damages is intended to fulfil two functions. On the one hand, a claim for damages caused by an infringement of competition law has a compensatory function. These claims allow individuals to seek full compensation for any harm allegedly suffered on account of an infringement of EU competition law. On the other hand, a private law claim for compensation for harm caused by a breach of competition law may also function as a deterrent, complementing public enforcement. The dual function of the right to damages in law enforcement, including specifically the deterrent function, goes further than Danish law's ordinary damages regulations, and this has consequences for the practical development of regulations on damages. This is relevant in relation to *who* can be held liable, *who* can claim damages, and *which* harm may be compensated for. The European Court of Justice's approach means that private parties – like in the US – have the function of *Private Attorney Generals,* in that they enforce competition regulation in their own and in society's interests. Actions for damages therefore constitute a significant supplement to public enforcement of competition law. This function is supported by the European Court of Justice as it has 'recruited' a wide range of injured parties, including consumers,
who can claim for a wide variety of harm against a wide range of liable parties.
In relation to consumers' procedural and financial access to damages, in Denmark this is dependent on the Consumer Ombudsman pursing consumers' damages claims in a 'gruppesøgsmål', and on this action being financed by the state. Therefore, the state has a monopoly on the enforcement of consumers' right to damages for infringement of competition law. Although the Consumer Ombudsman has had this power
for over a decade, it has never been used in practice. Indeed, based on a comparative analysis of specific *common law* and *civil law* countries*,* it is documented that the Danish model for enforcement of consumers' right to damages cannot, to a large extent, function in practice. The consequence of this legal position is that companies which infringe competition law, can completely disregard the risk of having to pay damages to consumers in Denmark. As the harm suffered by a consumer – either directly or indirectly – when competition law is infringed can and

often will be substantial, this also means that a significant and intended group of competition law enforcers, namely consumers, are not active. The function of the right to damages related to ensuring compensation and deterrence is therefore not fully implemented.

Therefore, there is an argument for "setting free" consumer enforcement of competition law so that it is instead based on a pluralistic approach which includes private and public parties. This could take place partly by expanding the existing regulation on 'gruppesøgsmål', including its funding, and partly by integrating damages into public enforcement of competition law.

It is demonstrated that it is possible to adapt consumer enforcement so that the enforcement supports both compensation and deterrence, and that the enforcement can become self-financing and therefore independent of public funding. This can be implemented by, for example, 'reusing' part of previously awarded damages to finance new damages cases via a public-private legal aid fund, or by motivating private investors to finance a concrete damages case in return for a portion of any awarded damages. In this way, the significant harm often inflicted on consumers when competition law is infringed will be transformed from a loss into an asset which can be used to finance the extensive legal costs connected to consumer enforcement. This will mean that, generally speaking, those who infringe competition law will ultimately contribute to paying for the enforcement of the law on behalf of the affected consumers. This can happen without compromising the consumers' right to full compensation and without increasing the risk of litigation abuse of the companies at risk of facing a damages case.