

# Abstract

This thesis explores when Danish courts can, should, or must act *ex officio* in dispositive, civil lawsuits, where the parties attend, and which concerns private law matters, to avoid establishing a substantive legal position, which involves a criminal act or is otherwise contrary to mandatory law. Such *ex officio* conduct can, in particular, consist of 1) dismissal of the case *ex officio*, 2) inclusion of (claims and) arguments, which cannot be renounced, *ex officio*, 3) application of rules that have not been invoked, 4) *materielle prozessleitung*, and 5) guidance. The thesis distinguishes between the court's direct and indirect intervention. Direct intervention encompasses the first three types of intervention, where the court influences the arguments etc. independently of the parties. Indirect intervention encompasses the two latter types of intervention, where the court influences the arguments etc. via the parties. Direct intervention is examined in chapter 4, whereas indirect intervention is examined in chapter 5.

Part of the analysis in the two chapters (chapter 4, section 2-4, and chapter 5, section 2-3) concerns what can be deduced from the traditional legal sources (such as legislation and case law) about when the courts can, should or must exercise such *ex officio* conduct. As the rules are either unclear or discretionary and as the traditional legal sources do not in all circumstances provide a complete picture, it has been necessary to also look at other legal arguments (such as relevant considerations and theory).

The *ex officio* powers and obligations that the Court of Justice of the European Union (CJEU) have developed in the area of consumer protection has been included as one of such legal arguments. The analysis of the EU rules are included in the analysis of the Danish rules on *ex officio* conduct and they are thus examined in chapter 3 prior to the analysis of the national Danish rules on *ex officio* conduct. Chapter 3 analyses which *ex officio* powers and obligations in relation to the arguments etc. the CJEU imposes in the consumer protection area on national courts in individual civil lawsuits where the parties attend, and identifies the reasoning behind these rules.

In addition to the above mentioned EU *ex officio* powers and obligations, the thesis examines, for identifying legal arguments, which purposes, considerations and legal principles are relevant. Further, the thesis assess whether legal theory has given suggestions for how the role of the courts could be exercised and shaped, and how it is possible to build upon such theoretical ideas. These legal arguments are included in the analysis in chapter 4, section 5, and chapter 5, section 4. I am of the opinion that the thesis' most substantial contribution to the legal theory, in particular, lies in these sections, despite some aspects of the matter naturally having previously been dealt with in the literature.

*Chapter 1* contains an introduction to the subject of the thesis, remarks on the need for research in this area, research questions, delimitation and considerations about the methods used. *Chapter 2* explains some fundamental notions and principles.

The analysis in *chapter 3* (on the EU rules on *ex officio* conduct in consumer cases) shows that there seems to be a model for *ex officio* conduct with a number of common characteristics. Here, it is necessary in relation to both the *ex officio* powers and obligations to distinguish between whether they follow from the principle of equivalence or considerations of effectiveness. For the content of the *ex officio* powers and obligations, see in particular section

3.1.9. For the reasoning behind the *ex officio* powers and obligations, see in particular section 3.2.7.

In *chapter 4* it is found that the courts can perform all the types of *ex officio* conduct examined but that the conditions for when they can do so are not completely clear. Generally, however, the courts can apply rules which have not been invoked. The analysis shows that it must in particular be the characteristics and strength of the underlying (societal or third party) interests that allows the court to dismiss a case, and that it must in particular be the parties' lack of disposal over the substantive matter that allows the court to include arguments which cannot be renounced. Direct intervention should, however, not be performed in relation to claims that are not put forward in the case by the parties. There does not seem to be a duty for the court to initiate a consideration of a matter that potentially can be dealt with *ex officio*, e.g. by initiating investigations, or to *ex officio* decide on a matter that can be dealt with *ex officio*. To the contrary, it seems that the courts can do so at their discretion. In the analysis, several considerations that can be of importance in that context are identified and it is appropriate that the courts assess whether there is proportionality between the direct intervention and the disadvantages of this. It could be considered to operate with an approach of »the least first« so indirect intervention, which is least interfering for the parties and the court, is first attempted and that direct intervention is only exercised if the indirect intervention has been attempted without luck or is found inappropriate.

*Chapter 5* finds that the courts seem to have a broad discretion to exercise *materielle prozessleitung* or guidance with the above mentioned purpose but no obligation to do this. As the courts have discretion, it has been relevant to examine which considerations etc. that can influence the discretion. As this is not clear from the traditional legal sources, the examination has also included other legal arguments. The examination has pointed to a number of considerations etc. that can influence the discretion. The relevance of a few of these are dependent on whether the matter at hand concerns mandatory law or not. Overall, there seems to be sound reasons to exercise *materielle prozessleitung* or guidance to a higher degree in relation to questions related to mandatory law than in relation to other questions. This must, depending on the strength of the relevant societal considerations and (contingent on the recognition hereof) the social-/promotion-of-equality-consideration in favor of weaker parties, influence the discretion. There also seems to be sound reasons to exercise indirect intervention in relation to matters that in reality could be dealt with directly but where it e.g. is unclear whether the parties can settle it. Depending on the strength of the relevant societal considerations, this may also influence the discretion.

*Chapter 6* takes a broader view and reflects on the findings. In addition, the chapter presents some *de lege ferenda* considerations in light of the findings.