DANISH CONSUMER OMBUDSMAN

Online sale of deals
Who is liable?

2016

Online sale of deals

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Background

It has become increasingly common for consumers to buy products and services online. Following the increase in online sales, the so-called deal sites have emerged. Deal sites are websites that market products and services at bargain prices (deals). The offers for the individual products or services are typically valid for only one or a couple of days.

The business concept is based on the individual deal site contacting or being contacted by suppliers of products and services. The suppliers receive an offer or request to have their goods or services offered through the deal site at a discount price. In this way, the suppliers' products and services are marketed to a large group of consumers, and the deal site attracts more users to the site through the discounts marketed. The payment to the deal site consists of a percentage share of the sale of deals. Some deal sites also retain payment for unredeemed deal vouchers.

The Consumer Ombudsman has received several enquiries about deal sites.

The enquiries especially centre on three recurring issues:

- **Who is liable towards the consumer for the performance of the agreement or, in other words, who should the consumer make a claim against in case of non-performance or defects; the deal site or the supplier of the relevant product or service?**
- **Who is criminally liable for the marketing of the individual deals; the deal site, the supplier of the relevant product or service or are they jointly liable?**
- **What is the time limit for redeeming vouchers purchased through a deal site?**

Online sale of deals

1 Liability for performance of the agreement

1.1 Liability for performance of the agreement

Generally, the person with whom a consumer physically makes an agreement (the other direct contracting party to the agreement with the consumer) is also the party against whom the consumer may make claims in relation to non-delivery of defects (the actual other party to the agreement with the consumer). However, agreements may be entered into by an intermediary on behalf of another party. In such circumstances, where there are three parties, the consumer enters into a physical agreement with the intermediary, but consumer claims may and must be made against the party on whose behalf the intermediary acted.

To consider an agreement to have been entered into by an intermediary on behalf of another party, the consumer must have been fully informed that another party, and not the intermediary, is liable for the performance of the agreement before the agreement is made. Consequently, the intermediary must fully inform the consumer that the intermediary is not acting on its own behalf but on behalf of another party and inform the consumer of the identity of that other party before the agreement is made. If the intermediary does not fully inform the consumer about this, the intermediary will be considered to be the actual contracting party to the agreement with the consumer. See the judgment U1973.870Ø1[1]. There can only be one other actual contracting party to the agreement with the consumer, and that party will be responsible for the performance of the agreement.

Purchasing and selling goods or services through deal sites involve a triangular arrangement. The three parties consist of the deal site that markets the specific product or service, the supplier of the product or service and the buyer (the consumer) of the product or service.

The deal site is the direct contracting party to the agreement with the consumer because the purchase is made through the deal site. As a general rule, therefore, the deal site is also the actual contracting party to the agreement, which means that it is liable to the consumer for the performance of the agreement. If the deal site does not want to assume such liability and wants to pass the liability to the supplier of the specific product or service, the consumer must be fully informed that the supplier is the consumer's contracting party before the agreement is made. Consequently, the deciding factor is what information the consumer must be given in order to be fully informed.

The Court of Roskilde and the Danish Consumer Complaints Board have both decided in cases on online sales in which the dispute concerned who was the consumer's actual contracting party.

In the ***Goleif case***[2], the Court of Roskilde found that the airline Cimber Sterling, and not the internet portal

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[1] Lennart Lynge Andersen and Palle Bo Madsen, *Aftaler og Mellemmænd*, 2012, 6th edition, p. 299.

[2] Unreported judgment of 2 January 2014 by the Court of Roskilde. See: http://www.forbrugerombudsmanden.dk/~/media/Forbrugerombudsmanden/presse/Dom%20afsagt%20den%202%2

Goleif.dk, through which the consumer had booked his airline ticket, was the consumer's actual contracting party. In 2012, the consumer bought airline tickets to Nice via Goleif.dk. The outbound flight was operated by SAS but he was to fly Cimber Sterling on his homebound flight. Cimber Sterling went into bankruptcy proceedings before his return. Goleif declined any reimbursement of the consumer' expenses for his return trip, stating that Goleif was merely an intermediary and that Cimber Sterling had been the consumer's actual contracting party.

Roskilde Court found that: *"The condition that the travel intermediary is not the customer's [actual] contracting party is onerous and the acceptance of the condition must be subject to the consumer being expressly informed of the condition and having expressly accepted it" [our emphasis].* On Goleif's website, in a footer in connection with payment and in the terms and conditions, it was stated that the company was not acting on its own behalf. Roskilde Court found that it had been adequately and clearly stated that the agreement relating to the return trip was not entered into with Goleif but with Cimber Sterling. Against that background, the Court found that the consumer had accepted that Cimber Sterling was the consumer's actual contracting party.[3]

The Consumer Complaints Board has made two decisions on the liability of a deal site for errors and defects in relation to a product and a service, respectively. In both cases, the Board found that: *"The party that acts as an intermediary when an agreement is entered into and that wants to claim that the agreement was not entered into on its own behalf but on behalf of a third party carries the burden of proving this."*

In the ***bicycle case***[4], the consumer had bought a men's bicycle through a deal site. The consumer complained several times to the deal site about various defects on the bicycle, and each time the bike was repaired at a bicycle repair shop, , which was a business partner of the bicycle supplier. When the consumer identified yet another defect on the bicycle, he complained to both the deal site and the supplier of the bicycle and requested that the purchase be cancelled.

The Consumer Complaints Board unanimously found that the deal site's terms of business, which the consumer had accepted, stated that the deal site was an intermediary. However, based on an overall assessment, the Board found that the consumer had in practice been given the impression that the deal site was the contracting party to the agreement entered into with the consumer. In that context, the majority of the Board's members emphasised that the name of the supplier of the bicycle was not provided until in the middle and the lower part of the deal site, where the name was stated in connection with guidance on bike size and contact details, that the layout and the text of the deal site generally gave the impression that the deal site was the seller of the men's bicycle, that the consumer received a receipt from the deal site in connection with the purchase, and that the deal site had received complaints from the consumer concerning defects on the bicycle.

0januar%202014%20af%20Retten%20i%20Roskilde.pdf. The judgment was considered on the basis of the provisions of section 12(3)(ii) of the Danish Administration of Justice Act.

[3] The Consumer Ombudsman has applied for and has been granted leave by the Danish Court of Appeal to appeal against the judgement to the High Court as an agent for the consumer, as the Consumer Ombudsman disagrees with the district court's judgment. The Consumer Ombudsman takes the view that Goleif is not exempt from contractual liability in the specific case.

[4] Decision of 22 April 2014 by the Consumer Complaints Board. See: http://www.forbrug.dk/Afgoerelser/barnevogne-cykler-knallerter-sports-og-fritidsudstyr/Dealsite-var-ansvarlig-for-fejl-paa-cykel?tc=9D4BE9430D6C413D8C0DE211F2075B47. The decision has not been brought before any court of law.

In the ***cleaning case***[5], the consumer had purchased a voucher for cleaning of a sofa through the deal site and redeemed the voucher with the cleaning business. When the cleaning business returned the sofa to the consumer, it had been stained and the cushions had shrunk and were wrinkled. The consumer complained to the deal site, which referred the consumer to the cleaning business. The cleaning business offered to clean the sofa again, but the consumer declined the offer.

The Consumer Complaints Board unanimously found that the deal site's terms of business, which the consumer had accepted, stated that the deal site was an intermediary. In addition, based on an overall assessment, the majority of the Board's members found that the consumer had also in practice been given the impression that the cleaning business was the contracting party to the agreement entered into with the consumer. In that connection, the majority of the members of the Board emphasised that it was stated on the deal site that the cleaning business would clean the sofa and that any enquiries should be directed to the cleaning business, that the name of the cleaning business was stated several times, even in the headline of the deal site, and that the name of the cleaning business was also stated on the voucher that was issued.

The different outcomes of the two cases was due, firstly, to the different layouts of the two advertisements and, secondly, the fact that, in the *bicycle case*, it was the deal site that issued a receipt to the consumer and received complaints from the consumer.

Based on the general principles of the law of obligations and the cases discussed above, the Consumer Ombudsman finds that the following applies in relation to the liability for the performance of the agreement when making purchases through deal sites:

- **As a general rule, the deal site from which the consumer makes a purchase is the actual legal contracting party to the agreement with the consumer (the seller), i.e. the party liable for the performance of the agreement**
- **The deal site bears the burden of proving any deviation from the general rule in the specific situation. The deal site must prove:**
  - **that the consumer was fully informed that:**
    - **the deal site is only an intermediary and not the seller,**
    - **the supplier of the specific product or service is the actual contracting party to the agreement with the consumer (the seller),**
    - **the supplier and not the deal site is liable for the performance of the agreement,**
  - **that the consumer accepted the above.**

- **Also, the deal site must clearly and expressly act as an intermediary and not a seller in its interaction with the consumer**

[5] Decision of 22 April 2014 by the Consumer Complaints Board. See: http://www.forbrug.dk/Afgoerelser/moebler-og- boligudstyr/Dealsite-var-ikke-ansvarlig-for-fejl-ved-rensning-af-sofa?tc=9D4BE9430D6C413D8C0DE211F2075B47. The decision has not been brought before any court of law.

2 Section 2
Criminal liabilty for marketing

2.1 Criminal liability for marketing

A trader must not use “misleading or incorrect statements or omit material information” (in the following collectively referred to as ”misleading statements”) for marketing purposes. See section 3(1) of the Danish Marketing Practices Act (in the following the “ban on misleading marketing practices”). Violation of the ban on misleading marketing practices is punishable by fine. See section 30(3) of the Marketing Practices Act.

Violation of the ban attracts criminal liability if two conditions are met: Firstly, the trader must have realised the elements of the crime, that is, used a misleading statement for marketing purposes or participated in the practice. See section 23 of the Danish Penal Code[6]. Secondly, the trader must have had the necessary *mens rea* (a guilty mind), that is, it must have acted deliberately or negligently.

If several traders were involved in the marketing process (an advertising agency and the supplier of the specific product or service, for example), it must be established if one or both of the traders can be punished for directly violating the ban on misleading marketing or for participating in the violation.

The marketing process relating to purchasing and selling goods or services through deal sites involve two traders. The two traders are the deal site that markets the specific product or service and the supplier of the specific product or service.

According to the information provided to the Consumer Ombudsman, the marketing process may consist of the following events: The deal site contacts or receives an enquiry from the supplier of a product or service with a view to marketing the supplier’s product or service at the deal site. The supplier provides the basic information for the text to be used in the advertisement of the product or service, including information about the price and discount. The deal site then edits and prepares the layout of the advertisement, which is finally approved by the supplier. In some circumstances, the deal site is more involved in the preparation of the marketing material; for example, in connection with adaptation to the deal site’s standard layout or in connection with delivery of photo material. Generally, the supplier determines the discount and the offer period, but the deal site usually reserves the right to reject or change the discount or the offer period.

If, at a later stage, the marketing of a product or a service via a deal site turns out to be misleading, the party that is criminally liable for the marketing must be identified. Typically, this concerns a misstatement of the before price (the basis for the calculation of the discount) in the marketing material.

The courts of law have several times considered who is criminally liable in the marketing of a product or service if an advertising agency participated in the marketing. In that connection, the courts have assessed who

[6] Pursuant to section 23 of the Penal Code, the elements of the crime are extended to the effect that any person who has aided or abetted, counselled or procured the commission of an offence may also be criminally liable.

realised the elements of the offence according to the relevant provision of law, whether the requirement for *mens rea* was satisfied and the amount of the fine.

In two cases concerning violation of the ban on misleading marketing, the outcome was different for the advertising agencies involved. In the ***sheet feeder case***[7], the Maritime and Commercial High Court found that the seller of a printer had used misleading statements in its marketing of a printer, because the picture of the printer in the advertisement showed a sheet feeder which was not included in the price of the printer that was stated. The seller was consequently fined DKK 50,000. The Court found, however, that the seller's advertising agency did not have and ought not have such product knowledge that it was able to realise that the picture of the printer used in the advertisement was not consistent with the other designations set out in the advertisement.

[7] U93.346S

Accordingly, the advertising agency had not acted deliberately or grossly negligently. In the **IKEA case**[8], IKEA had inserted an advertisement in daily newspapers stating: "Unfortunately, our competitors almost never test their furniture", and "And why risk being conned when you can visit IKEA and get Furniture Facts." The advertisement was created jointly by IKEA and the advertising agency. The Maritime and Commercial High Court found that the advertising text violated the ban on misleading marketing practices. IKEA and the advertising agency were jointly fined for violation of the ban. IKEA received a fine of DKK 100,000, while the advertising agency received a fine of DKK 25,000. In determining the fine, the Court emphasised the costs of advertising, the fee of the advertising agency and the severity of the violation.

In both cases, the advertising agency had realised the elements of the crime set out in the provision on misleading advertising in the Marketing Practices Act. The outcomes were different in the two cases because the Court in the *sheet feeder case* did not find that the advertising agency had the necessary non-objective *mens rea*.

Additional guidance in relation to the liability of advertising agencies is available in two cases on violation of the previous provision of the Marketing Practices Act concerning a ban on gifts with purchases[9]. In the ***Valentines dinner case***[10], the Maritime and Commercial High Court imposed a fine of DKK 15,000 on Hotel d'Angleterre for an unlawful gift with purchase, while the advertising agency was fined DKK 5,000 for advertising an unlawful gift with purchase. In determining the fine, the Court emphasised that the initiative to offer a gift with purchase originated from the hotel and that, in all material respects, the hotel decided the content of the advertisement, the advertisement expenses, the fee paid to the advertiser and the value of the gift with purchase. In the ***coupon book case***[11], the Supreme Court found that the mere publication of a coupon book could not constitute direct violation of the ban on gifts with purchases. However, the publication of the coupon book had to be decided under the provisions on contributory liability. See section 23 of the Danish Penal Code. The Supreme Court found that the publisher of the coupon book ought to have realised, through a quick review of the advertisements, that they undoubtedly contained advertisements for unlawful gifts with purchases. The publisher of the advertisement book was consequently held liable for participating in the offence. The penalty was fixed at a fine of DKK 25,000.

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[8] Judgment by the Maritime and Commercial High Court of 13 January 1993 in case no. P-3/92 (*Fup eller Møbelfakta*).

[9] *"When selling goods or property to consumers, or when performing work or providing services to consumers, traders may not offer any gifts with purchases, or any similar offer, unless the gift with purchase has an insignificant value. Advertising unlawful gifts with purchases is also prohibited."* See section 6(1) of Act no. 428 of 1 June 1994.

[10] U93.348S

[11] U96.209/2H

In the *Valentines dinner case*, the advertising agency had realised the elements of the crime and was fined for directly violating the ban on advertising gifts with purchases. The publisher of the coupon book in the *coupon book case* was found not to have realised all elements of the crime and was therefore only held liable for participation.

Most recently, in the ***chocolate case***[12], in which a deal site marketed an offer for a box of chocolates, the Consumer Ombudsman ordered both the deal site and the chocolate manufacturer to observe the ban on misleading marketing. The box of chocolates was marketed at a price of DKK 200 at the deal site with a designated before price of DKK 400, i.e. a saving of 50%. However, the box of chocolates could be purchased for DKK 220 at the chocolate manufacturer's own website. The Consumer Ombudsman assessed that the marketing on the deal site was misleading. The Consumer Ombudsman also found that the deal site had an independent responsibility for checking whether the advertiser's information about the normal price was correct, which it had not. The Consumer Ombudsman therefore ordered the deal site and the advertiser to observe the rules.

Based on the general principles of criminal law and the cases discussed above, the Consumer Ombudsman finds that the following applies in relation to criminal liability for marketing of deals:

- **If the marketing contains misleading statements, both the deal site and the supplier of the specific product or service will generally be deemed to have realised the elements of the crime pursuant to section 3(1) of the Marketing Practices Act[13].**
- **If the supplier provided the misleading information to be used in the marketing, for example an incorrect before price, the supplier generally had the necessary non-objective *mens rea*.**
- **Whether or not the deal site had the required non-objective *mens rea* depends on whether the deal site knew or ought to have known that the statements were misleading; for example that the before price was incorrect. In that context, it must be deemed an important factor:**
  - **If, in the specific situation, the deal site took the necessary measures to examine the correctness of the information received from the supplier.**
    - **The deal site has a duty of inspection.**
    - **Such duty of inspection may be fulfilled, for example by requesting documentation of before prices from the supplier.**

[12] "Order requesting deal site and chocolate manufacturer to comply with ban due to misleading statement of normal price". See http://www.forbrugerombudsmanden.dk/Sager-og-praksis/Markedsfoeringsloven/Sager-efter-markedsfoeringsloven/prismarkedsfoering/Indskaerpelse-til-dealsite.

[13] The question of who is criminally liable in connection with the sale of products and services through deal sites may also arise in relation to other provisions, including section 12 a of the Marketing Practices Act on the duty to provide information in connection with invitations to purchase.

Section 3
Redemption period

3.1 Criminal liability for marketing

A consumer who buys a product or a service through a deal site receives a receipt or a voucher. A receipt is issued when the consumer buys a product via the deal site which is sent to the consumer immediately after the purchase. A voucher is issued when the consumer buys a claim for a product or a service via the deal site to be redeemed with a specified dealer at a later date. Only vouchers are discussed below.

The period of validity of vouchers is generally agreed in advance, which means that it appears from the voucher. The period of validity of a voucher is governed by the Danish Act on Limitation if no period of validity appears from the voucher.

Generally, a voucher becomes invalid after three years (see section 3 of the Act on Limitation), but it may be issued with a reduced period of validity (see section 26(4) of the Act on Limitation). The period of validity must, however, not be unreasonably short (see section 38 c of the Danish Contracts Act, cf. section 36 of the Act (prohibition against unfair contract terms), and section 1 of the Marketing Practices Act (good marketing practice). There is no fixed rule stipulating how long the minimum period of validity for vouchers must be in order not to be deemed unreasonably short, and the courts have not had any opportunity to make a decision on this.

Generally, the Consumer Ombudsman takes the view that a period of validity of one year or more is not unreasonably short, whereas a period of validity of less than one year may only be applied in special circumstances. In assessing how long the period of validity ought to be, the Consumer Ombudsman will take into account the nature of the product or service; for example, is it a special event, a seasonal event, is there a booking requirement, are there only few or many seats? In that connection, it is relevant how long a period of validity the consumers would expect in relation to the specific product or service. The Consumer Ombudsman further assesses if it is possible to get a refund when the period of validity has expired. In a case concerning a voucher purchased through a deal site, the Consumer Ombudsman accepted a period of validity of three months on the basis of an individual assessment. In the assessment, the Consumer Ombudsman also took into account that a significant discount was offered compared to the normal price, and that the consumer was informed about the limited period of validity several times, including about three weeks before the expiry of the period of validity.

If a voucher constitutes a payment substitute, the above rules are supplemented by the rules on the right to redemption for cash under the Danish Payment Services

Act. Under the rules of the Payment Services Act, a consumer holding an unredeemed payment substitute may, during the period of validity of the payment substitute and for a period of up to one year after the expiry thereof, request that the payment substitute be redeemed at its nominal value (redemption for cash). See section 106(1) of the Payment Services Act, cf. section 39 s(2), first sentence, of the Act. If no period of validity has been agreed, the right to have the voucher redeemed for cash will apply at any time[14].

A definition of payment substitutes is found in section 102(1) of the Payment Services Act. The provision reads as follows:

"Payment substitutes" in this part shall mean the following electronic systems to the extent that they can be used to acquire goods or services without this constituting a payment service:

1) Cards and other physical means of proof of identity which are linked to specific users and which are intended for electronic reading.
2) Codes and biometric values intended as proof of identity of the user.
3) Electronically registered claims which the issuer is obliged to pay at the request of the user.

Whether or not a voucher is a payment substitute thus depends on whether it falls under one of the electronic system categories defined in paras (1), (2) or (3) of section 102(1) of the Payment Services Act. A voucher is usually not linked to a specific user, but may be redeemed by the holder and thus falls outside (1) and (2). The deciding factor is therefore whether a voucher satisfies the requirement set out in (3)[15]. For the purpose of determining if a voucher satisfies the requirement in (3), guidance is available in the legislative material for both paras (1) and (3):

"(1) concerns cards and other physical means of proof of identity which are linked to specific users and which are intended for electronic reading. Examples of these are SIM cards, multiple-ride cards for public transport and e-tickets that give the holder a claim for a specific trip, as well as bonus cards. If such types of card etc. are not linked to specific users, they are typically covered by

[14] Bill no. 20 tabled on 6 October 2010 by the Danish Minister for Economic and Business Affairs, explanatory notes to section 1(1)(xii) of the Bill, section 39 s, which formed the basis of the introduction of section 39 s of the Payment Services Act.

[15] If a voucher is linked to a specific user, it must be determined if the voucher satisfies the requirement in para (1). Except from the condition set out in para (1) that the voucher must be linked to a specific user and the express requirement concerning electronic reading, such assessment will be same as in relation to para (3).

(3), i.e. electronically registered claims which the issuer is obliged to pay at the request of the user."[16]

"So-called electronic claims which are not linked to any individualised account are included under (3). They typically consist of pre-paid cards, such as phone cards. They may also be electronic claims stored on a computer. Due to the requirement for the claim to registered electronically, a number of pre-paid products, e.g. bottle deposits and multiple-ride cards, do not fall under the scope of the Act. Until the electronic claims are used, the payer can store the claims on his or her computer, on a chip or elsewhere. The chip may be embedded in a card, a watch or any other physical object."[17] (our emphasis)

Considerable doubt may arise as to whether or when a voucher purchased through a deal site constitutes a payment substitute. However, based on the wording of the Payment Services Act and its legislative material, a voucher must be registered electronically/intended for electronic reading in order to be deemed a payment substitute. The Act and the legislative material do not state what is meant by electronic registration or what additional conditions must be met for a voucher to constitute a payment substitute. However, one may deduce from the legislative material that an additional condition for a voucher to be deemed a payment substitute is that the redemption of the voucher is linked to a write-down/settlement of the value of the electronic claim.

Only some types of voucher are intended for electronic reading. The vouchers typically contain a code consisting of numbers and letters. The voucher code is used to identify the individual voucher and may in some instances be read electronically. Some vouchers also contain a QR code[18] and/or a bar code. Such codes are used for electronic reading when the consumer redeems the voucher, but far from all suppliers of products and services have a system for reading the electronic codes. Finally, a few deal sites offer to redeem vouchers through an application (app) or an online solution.

Whether or not a voucher constitutes a payment substitute ultimately depends on an individual assessment. If a voucher constitutes a payment substitute, the special rules on the right to redemption for cash under the Payment Services Act apply. In that situation, the consumer may demand that the voucher be redeemed for cash during the period of validity and for a period of up to one year after expiry of the period of validity. See section 106(1), cf. section 39 s, of the Payment Services Act. If no period of validity appears from the voucher, the consumer may demand that

[16] Bill no. 119 of 28 January 2010.
[17] ibid.
[18] QR code (quick response code) is a form of two-dimensional "bar" code.

the voucher be redeemed for cash at any time.

On the basis of the Act on Limitation and the Payment Services Act, the Consumer Ombudsman finds that plies in relation to the length of the period in which a consumer may redeem a voucher purchased through a

- **Unless otherwise agreed, a voucher expires after three years.**
- **A voucher may always be issued with a period of validity of three years, corresponding to the limitatio**
- **However, a voucher may also be issued with a period of validity that is shorter than three years:**
  - **A period of validity of more than one year is usually deemed reasonable.**
  - **A period of validity of less than one year may only be issued in special circumstances.**
    - **The length of the minimum period of validity is subject to an individual assessment based on, tors, the nature of the specific product or service and whether or not it is possible to get a refu riod of validity has expired.**
- **If an unredeemed voucher constitutes a payment substitute, the consumer is entitled to have the vouch its nominal value (redemption for cash):**
  - **If a period of validity appears from the voucher, the consumer is entitled to demand that the vouch for cash during the period of validity and for a period of up to one year after expiry of the period of**
  - **If no period of validity appears from the voucher, the consumer is entitled to demand that the vou deemed for cash at any time.**