

Class actions in Denmark – from 2008

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Following recommendation no. 1468/2005 by the Standing Committee on Procedural Law (Retsplejerådet), the possibility of class actions with effect for cases brought on or after 1 January 2008 was introduced into Danish law.

A rather long debate in the press as well as in legal gazettes had preceded the new act. Especially consumer lawyers advocated for an act on some kind of class action, whereas some commercial and industrial lawyers argued that the introduction of class actions would be a dangerous path towards an “American” state of law – although it was rightfully pointed out that also companies and other businesses might benefit from a Danish act on class actions. E.g. a huge number of cases where businesses sued the government in order to reimburse what that had contributed under a Danish law on special taxes (the so-called ambi-tax), which was later held contrary to EU law (the 6th VAT Directive) by the ECJ. Such cases would be far easier to deal with under a new regime of class actions. The same could be said about a large number of cases where limited and public companies were claiming back the taxes which they had paid to the Danish Companies’ and Commerce Register (Erhvervs- og Selskabsstyrelsen) for capital increase in companies, a tax that was later held contrary to EU law (Directive on capital contributions).

Other examples where Danish provisions of class actions would be relevant have been mentioned, e.g. a huge Danish case about roof materials that crumbled (the Eternit case, reported in *Ugeskrift for Retsvæsen* (UfR) 1989:1108 H); the tragic cases for the Danish haemophiliacs that had been treated with HIV infected blood on public hospitals (UfR 1996:1554 Ø); compensation claims for flight tickets (no printed case law); unlawful fees collected by banks (the Laan-&-Spar case, UfR 2003:1581 H); cases on unlawful price trusts (the Løgstør case; no printed case on the question of compensation); cases on uncomplete prospectus on stock emission (the Hafnia case, cf. below). Other examples could be mentioned – and common for these are that the case will either be dropped if no provisions on class actions exist, or the case will be more expensive and/or conducted in a less

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“powerful” and efficient manner if the individual consumer etc. has to initiate and conduct his or her own case.

The author of this national report to the Oxford conference was, together with some other members of the Standing Committee on Procedural Law (Retsplejerådet), a strong advocate for the introduction of class actions in Denmark. The final recommendation by the *Retsplejerådet* was unanimous. The Committee agreed that the already existing provisions on cumulation of more parties on the same side in a court case are insufficient to treat cases like those mentioned above.

So, as from January 1st, 2008, class actions are a new and powerful option under Danish procedural law.

The provisions about the courts, evidence, discovery, expert witnesses, etc. etc. are exactly the same under the new class action provisions, as in other cases. There is no “Court of class actions”, and no separate provisions on evidence, discovery etc. The parties in a class action must settle for the already existing provisions.

The provisions on class actions in Denmark are as follows:

Common claims submitted on behalf of a number of persons can be considered under a class action under Section 254a(1) of the Administration of Justice Act. The rules do not, however, apply to cases treated under Chapters 42, 42a, 43, 43a, 43b, 44 and 88 of the Act, i.e. matrimonial cases, paternity cases and other indispositive cases, including cases leading to status judgments under family law.

Under Section 254b(1) of the Administration of Justice Act, class actions can be brought when (1) there is a common claim as specified in Section 254a, (2) there is a venue for all of the claims in Denmark, (3) the court is the venue for one of the claims, (4) the court possesses the requisite expertise to deal with one of the claims, (5) class actions are judged to be the best manner of handling the claims, (6) the members of the class can be identified and informed of the case in an appropriate manner, and (7) a class representative as per Section 254c of the Act can be appointed.

Condition number 5 in particular – that the *class action is judged to be the best manner of handling the claims* – is intended as an “estoppel” against wild and groundless actions. The court must accept in each individual case that a class action is more appropriate than traditional rules on subjective cumulation.

If the court does not possess the expertise to handle all claims under an independent case, it can refer the case for decision in a court with the expertise to handle at least one claim under Section 254b(2) of the Act.

Under Section 254c of the Act, class actions are conducted by a *class representative* on behalf of the class. The class representative is appointed by the court. The representative may be (1) a member of the class, (2) an association, private institution or other organisation when the action falls within the framework of the organisation's object, or (3) a public authority authorised for the purpose by law, e.g. the consumer ombudsman.

In class actions under Section 254e(8) of the Act, i.e. actions under the *opt-out* arrangement, the only eligible class representative is a public authority authorised for the purpose by law.

The consumer ombudsman can be appointed class representative in a class action under Section 28(2) of the Danish Marketing Practices Act, Section 348(1) of the Danish Act on Financial Activities, Section 120(1) of the Danish Investment Association Act and Section 3(3) of the Danish Securities Trading Act. The consumer ombudsman already has the power to supervise the market and to ensure that the various provisions on consumer protection, including all the EU consumer directives as implemented in Danish law, are respected by the businesses, but under the new act the Ombudsman gets the authority to sue a business on behalf of hundreds or even thousands of consumers, hereby even implementing the opt-out model where the consumer is member of the group unless he or she chooses to opt out of the claim.

The class representative must be able to look after the interests of the class members during the case.

Under Sections 254d and 348 of the Administration of Justice Act, class actions are brought by *submitting a writ* to the court. The writ can be submitted by anyone who can be appointed class representative under Section 254c(1).

Apart from the normal requirements for writs under Section 348 of the Act, the writ in a class action must also contain (1) a description of the class, (2) information on how the class members can be identified and informed of the case, and (3) a proposed class representative who is willing to assume the task.

The court appoints a class representative, provided that there is compliance with the terms in Sections 254b and c for bringing the case as a class action under Section 254e. The court can decide in connection with the appointment of the class representative, or after expiration of the deadline for

joining or withdrawing from the class action, that the class representative must provide security for the legal costs which the representative may be required to pay the opposite party. The nature and extent of such security are decided by the court. If the security is not provided and another class representative is not appointed, the case is rejected.

The court can subsequently *appoint a new class representative* if required. In class actions under the opt-in procedure under subparagraph 6, the court must decide whether it is necessary to appoint a new class representative if at least half of the class members who have joined the class action so request, and the request is accompanied by a proposed new representative who is willing to undertake the task.

The court *sets the framework for the class action*. The court can subsequently alter the framework if so required.

The class action covers the *class members who have joined the action*, i.e., an *opt-in* procedure, unless the court decides that the class action must cover those members of the class who *have not withdrawn from* the action, i.e. an *opt-out* procedure. It has generally been found that an opt-out is foreign to Danish legal thinking, and an opt-out therefore requires the presence of quite special circumstances and, as noted, only a public authority can serve as class representative in opt-out actions, e.g. the consumer ombudsman as already mentioned.

Opt-in: the court specifies a deadline for joining the class action by written submission. The court decides to whom notice of joining is to be given. In exceptional cases the court can permit joining after the deadline if there are extenuating circumstances.

The court can decide that joining the class action is conditional upon the member's providing *security for legal costs* specified by the court unless the member has legal aid insurance or other insurance which covers the costs of the case, or the class action fulfils the terms for free legal aid under Sections 327-329 of the Administration of Justice Act and the member fulfils the financial conditions under Section 325 of the Act. The Minister of Justice advises on application from the class representative whether the class action fulfils the terms for free legal aid under Sections 328 and 329. If security is demanded from each member of the class, this security amount is at the same time the maximum cost that will have to be carried by the class member (however, plus such amounts that are collected to the member through the case). *This connection between the security amount and the maximum litigation risk is one of the very strong features attached to the new concept of class action. One can simply promise the person who considers joining the group what his or her maximum litigation risk will be.*

Besides this new provision, the normal provisions on legal aid covered by the public, legal aid covered by insurance companies (normally through the family insurance which almost every family has) also apply for class actions.

Opt-out: if the class action concerns claims where it is clear that *the claims cannot be expected to be made in individual actions because of their small size* and it can be assumed that a class action with opt-in would not be an appropriate manner of handling the claims, the court can decide on application by the class representative that the class action will cover those members of the class who have not opted out of the action.

In this event, the court specifies a deadline for opting out of the class action by written notification. The court decides to whom the notification should be given. In exceptional circumstances the court can permit opting out after the deadline if there are special reasons for doing so.

Common features of *opt-in* and *opt-out*: Those persons whose claims fall within the framework of the class action must be informed of the above terms and the legal effects of opting in or opting out of the action. This information is provided in a form specified by the court – see below on the probable significance of contact over the internet. The court can specify that the notification be made in whole or in part via public announcement. The court can require the class representative to carry out the notification. The costs of the notification are paid in the first instance by the class representative.

The class representative and the class's opposite party are considered *parties to the class action* under Section 254f of the Administration of Justice Act. In particular, this entirely new concept of "party" in procedural law has required a lot of consideration before Denmark was in a position to introduce rules on class actions.

The court's decisions in a class action have *binding effect (is res judicata) on the class members covered by the action*. With respect to decisions on counterclaims, this applies, however, only to claims arising from the same contract or the same facts on which the class members' claim is based. In class actions under Section 254e(8) of the Act, the court's decisions only have binding effect on class members who could have been sued in Denmark for the claim in question when the case was first brought.

A class member can be *ordered to pay legal costs* to the opposite party and/or the class representative, but such that the opposite party's claim takes precedence over that of the class

representative. As already mentioned, the class member cannot, however, be ordered to pay legal costs over and above the amount specified under Section 254e(7) of the Act, i.e. the security provided plus any sum owing to the class member as a result of the case.

To the extent to which legal costs awarded against a class member who complies with the financial terms under Section 325 of the Act are not covered by legal aid or other insurance, *the costs are paid by the state* if the class action fulfils the terms for free legal aid under Sections 327-329, but at a maximum calculated according to Section 254e(7).

This is intended to avoid an outcome like that described in UfR 1996:271 H, Scan Detectronic Production, where 254 private persons attempted via a class action to gain release from their participation in a limited partnership which had been offered to the public, but which proved to follow a course entirely different from that which had been expected. Both the Maritime and Commercial Court in Copenhagen and the Supreme Court of Denmark to which the case was appealed upheld the limited partners' liability, and they were ordered to pay costs to the opposite party (a bank which had had the limited partnership's claim to the remaining liability transferred to it from each individual limited partner). For the individual partner, one or more 50,000 kroner shares were involved – but the 254 losing partners were ordered to pay legal costs of DKK 600,000 in the first instance and DKK 800,000 in the second instance – i.e. a total joint liability of DKK 1,400,000 – to test whether they were liable for the remainder of the subscribed sum of DKK 50,000 in court. Irrespective of the material result of the case, such an outcome – and such a gigantic risk for the individual limited partner in the legal action – is obviously totally unsatisfactory.

Other Danish cases also indicate that the ordinary rules of procedure, including those on subjective cumulation and legal costs, must often capitulate in face of the facts. A large number of shareholders who had suffered losses after the collapse of Hafnia Forsikring thus attempted to claim against the failed insurance company's management, auditors and issue bank via two associations created for the purpose, but the associations' action was denied by the courts because the formation of associations without personal liability is deemed to constitute a circumvention of the rules on legal costs under Danish law (cf. UfR 2000:575 H).

If the question of *cancelling or dismissing the class action* arises, the class members who are parties to the action must be notified unless notification is clearly superfluous under Section 254g of the Administration of Justice Act.

The court may decide on notification in other situations, including in the event that a settlement proposal comes up for approval.

If a class action is cancelled or dismissed, a class member who is party to the action can *intervene* by written notification to the court within four weeks *and continue the case under the rules for individual actions insofar as the member's own claim is concerned*. The same applies if the court decides pursuant to Section 254e(4:2) that a particular claim is not covered by the class action.

Any settlement entered into by the class representative on claims covered by the class action becomes valid when the settlement is approved by the court under Section 254h of the Administration of Justice Act. The court will approve the settlement unless the settlement discriminates against some class members or is otherwise patently unfair. Class members who are parties to the action must be advised of the court's approval of a settlement.

The court advises the class members who are parties to the action of the result of the case under Section 254i of the Administration of Justice Act. On request, the court sends a transcript of the proceedings to class members who are parties to the action.

If a judgment in a class action is appealed by the class representative, Section 254e(5-9) similarly applies as per Section 254j, i.e. the rules on party status etc. also apply in the appeals case.

If the class representative does not appeal, any person who is eligible for appointment as class representative under Section 254c(1-2) can commence an appeal. If the class representative appeals part of a judgment, the same rule applies to those parts of the judgment which were not appealed.

If the opposite party appeals a judgment in a class action, the appeal is heard in accordance with the rules on class actions.

A class member who is party to the action and whose claim is not covered by an appeal under Section 254j can appeal a judgment in a class action under Section 254k insofar as it relates to the member's own claim. Any appeal or petition to appeal is deemed to be made in time if the notice of or petition to appeal is submitted within four weeks of the expiration of the normal deadline.

Leading Danish lawyers with considerable court experience are already preparing to handle class action cases. The large legal chain Ret & Råd, which comprises more than 70 legal firms throughout Denmark, has registered the domain names www.enfaellessag.dk ("a common case") and www.viermange.dk, ("we are many"), and the big legal firm Nielsen & Nørager has registered

the name www.gruppesøgsmål.dk (“class action”). It would appear that contact with clients via the internet will be a crucial factor in the practical handling of class actions. The role of the media in informing about contemplated and pending class actions will also be of importance.