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New rules on class actions under Danish law¹

1. Introduction

Entirely new rules on class actions enter into force on 1 January 2008 (Act No. 181 of 28 February 2007). The rules on class actions in Part 23 a of the Danish Administration of Justice Act build on Report No. 1468/2005 of the Standing Committee on Procedural Law (*Retsplejerådet*) on a reform of civil justice IV (Class actions, etc.) and are also described in more detail in the explanatory notes to the Bill (Bill No. L41 – 2006-07, which can be found at www.ft.dk).

Class actions are a special type of procedure prepared with a view to join several, and especially a large number, of uniform claims in the same proceedings. The term ‘class action’ implies that the action relates to the claims of a class of persons, a representative of this class (not the individual members of the class) being regarded as a party to the action.

The purpose of the new rules on class actions is to introduce a new procedure that provides extended possibilities of handling disputes concerning a large number of uniform claims more effectively. In practice, rules on class actions will allow a better (procedural) examination of uniform claims, and a large number of uniform claims in particular, than the examination provided in practice under the current

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¹ This is an English version of the article ”Nye regler om gruppesøgsmål i dansk ret” (Juristen 2007, p. 141)

rules on the joinder of causes of action etc. Rules on class actions would also facilitate access to the courts and thereby support the enforcement of justified claims, including claims that are abandoned today due to a lack of resources.

The issue of introducing rules on class actions in Danish law has been much discussed during the last couple of years, and a pivotal question in that connection is the choice between the so-called opt-in or opt-out model. These more general matters are discussed in paragraphs 2 and 3 below, and the individual elements of the new rules are described in paragraphs 4 to 9 below.

The new rules on class actions contain the following main points:

- The fundamental conditions for bringing a class action are that it concerns uniform claims from several persons, that the class action is deemed to be the best way of examining the claims, that the class members can be identified and notified about the proceedings in an appropriate manner and that a class representative can be appointed.
- The court must approve the case as being suited for examination according to the rules on class actions.
- As a main rule, a class action will comprise the class members who opt for the class action (the opt-in model). If a class action according to the opt-in model is not an appropriate way of examining the claims, the court may, however, decide that the class action is to comprise the class members who do not opt out of the class action if it is evident that the claims cannot be expected to be brought through individual actions due to their limited size (the opt-out model).
- In a class action according to the opt-in model, the court may appoint a class representative among the class members, *i.e.* persons on behalf of whom claims are made, associations, etc., if the action falls within the scope of the objects of the association, and public authorities so authorised by law (the Consumer Ombudsman). In opt-out class actions only public authorities may be appointed as class representatives. The court may decide that the representative must provide security for legal costs.

In connection with the examination of the Bill by the Danish Parliament a revision clause was inserted according to which the Minister of Justice must introduce a Bill on the revision of the rules on class actions when the Act has been effective for three years (*i.e.* in the parliamentary year 2010-11).

2. Class actions under Danish law in general

The Standing Committee on Procedural Law has thoroughly considered the need for and the advantages and disadvantages of introducing rules on class actions in Danish law, see p. 212 ff of the Report and paragraph 3.1 of the explanatory notes to the Bill.

The Standing Committee on Procedural Law states that the purpose of the rules on class actions, if any, should be to strengthen the practical impact of the existing substantive legislation. The assessment of the Standing Committee on Procedural Law of whether to introduce rules on class actions thus builds on existing substantive rules and principles regarding individual calculation of compensation for the loss suffered and of excess consideration paid, and on the unchanged continuation of applicable rules and principles concerning the burden of proof and standard of evidence.

Following a detailed review of the multiple relevant considerations which should be taken into account when assessing whether to introduce rules on class actions in Danish law, according to the Standing Committee on Procedural Law, the Committee finds it difficult to assess the need for introducing any access to bring class actions. However, the Committee finds that the procedural ‘tools’ for enforcement of justified claims pursuant to the substantial legislation should be improved if it is possible to do so without disproportionate costs for the parties and society and without other material harmful effects.

The Standing Committee on Procedural Law finds that a strengthening of the rules on joinder (i.e. the rules on joinder of causes of action) of the Administration of Justice Act would have a major effect, but it also finds that introducing rules on class actions would have an even greater effect in a number of cases, and that the introduction of such rules would emphasise more clearly the desire of society to safeguard the most effective and expedient procedural rules for examining a large number of uniform claims, particularly in cases where the individual claims are of a modest size. Access to the courts is a procedural guarantee for the individual and, according to the Committee, such access should as a general rule also be a real possibility in connection with claims which, due to their limited size, cannot generally be expected to be brought through individual actions (so-called individual claims ineligible for

action) if it is possible to plan an effective and proper examination of the claims.

The Standing Committee on Procedural Law finds that rules on class action will ensure that more people will have real access to the courts and that that form of action will thus facilitate the satisfaction of justified claims. Against this background, the Standing Committee on Procedural Law recommends that rules on class actions be introduced in Danish law.

The Standing Committee on Procedural Law is aware that there may be a certain risk that access to class actions is “abused” to pressure enterprises and others to accept unjustified claims. When drafting the detailed rules on class actions, the Standing Committee on Procedural Law has therefore emphasised the importance of avoiding this risk by laying down a number of conditions for bringing class actions, including that the court must approve the case as being suited for a class action as well as a number of ‘control mechanisms’, which include that the court must approve the class representative and rules on the court’s procedural management, so that the risk of invalid claims being enforced has been countered to a material extent.

In the explanatory notes to the Bill, the Ministry of Justice supports the views of the Standing Committee on Procedural Law and sums up that the proposal of the Standing Committee on Procedural Law has been drafted based on an overall balancing of several relevant considerations which must be included in the assessment of whether rules on class actions should be introduced in Danish Law, and that the Ministry of Justice finds that the proposal of the Standing Committee on Procedural Law provides a model which implies a strengthened examination of uniform claims and also counters the possible risk of abuse to a very large extent.

3. Opt in or opt out

There is substantial difference between class actions based on the opt-in model and class actions based on automatic inclusion with or without the possibility of opting out (opt out or mandatory).

The major advantages of the opt-in model are that, during the proceedings and when deciding the merits of the case, the court knows exactly on whom the judgment will have a binding effect (legal force)

and that the right of the individual to dispose of his or her own contractual relations is not restricted. Moreover, an opt-in model accords best with the safeguarding of the defendant's need for predictability, seeing that the defendant will have an overview of the members of the class from a certain time in the proceedings (expiry of the opt-in time limit) and will thereby be able to predict the consequences of a judgment. At the same time, the opt-in requirement provides a clear overview of who will be covered by the binding effect (legal force) of the judgment, which will facilitate the execution of the judgment.

The major advantage of the opt-out model is that a class action of this type could on average include more persons than class actions according to the opt-in model, and it could therefore be a more effective and a more economical procedure from an overall point of view, but on the other hand, the disadvantage of it is that, during the proceedings and when deciding the merits of the case, the court will normally have no exact knowledge of who will be covered by the binding effect of the judgment (legal force).

In accordance with the recommendations of the Standing Committee on Procedural Law, the new rules on class actions are based on a main rule that the members of the class must opt for the action (the opt-in model). Opt-in class actions will accommodate the need to change the procedural rules as regards cases of several uniform claims that are individually 'eligible for action' (*i.e.* claims that are large enough to be brought through individual actions).

At the request of the class representative, the court may also decide that a class action must comprise the class members who do not opt out of the class action (the opt-out model) as under Norwegian law. This is however subject to two additional conditions being satisfied, the purpose of which is to emphasise that opt-out class actions are of an exceptional nature.

First of all, the case must concern claims that are so small that it is evident that they cannot generally be expected to be brought through individual actions, not because the persons concerned do not think that they have justified claims, but merely because the inconvenience and financial risk of individual litigation are deemed to be disproportionate to the outcome of the individual action (individual claims 'ineligible for action'). Whether this condition is satisfied will depend on the size of the

individual claim, in particular. According to the explanatory notes to the Bill, the condition should normally only be deemed to be satisfied if the individual claim does not exceed an amount of approximately DKK 2,000.

Secondly, a class action according to the opt-in model must be deemed to be an inappropriate method of examining the claims. This will be the case particularly if the case includes a very large number of persons so that the practical administration of opt-in notices will require a disproportionate amount of resources.

Examples of cases where the conditions for hearing the case as a class action according to the opt-out model would be satisfied include cases concerning claims from a large number of subscribers of a telecommunications company claiming that, for a period, the company collected rates that were higher than authorised by the standard terms and conditions and legislation and in which the individual subscriber's claim for repayment only amounts to a few hundred kroner.

Class actions based on opt out would include class members who have not become aware of a notice of the class action, even though the notice was given in such a way that the great majority of the class members have become aware of the class action. However, as stated by the Standing Committee on Procedural Law, the limited possibility of pursuing a class action according to an opt-out model cannot be deemed to be a major interference with the freedom of action, etc., of the persons concerned, and taking part in such class action does not imply any financial risk for the individual class member, see paragraph 7 below.

4. Fundamental conditions for class actions

According to section 254a of the Administration of Justice Act, the absolutely fundamental condition for allowing a class action is that the action concerns uniform claims that are brought on behalf of several persons (*i.e.* a class action can only be brought by the plaintiff). The claims need not be identical, as it will suffice that they are uniform in terms of fact and law. It will be of particular importance that the claims arise from the same factual circumstances and that they have the same legal basis.

Examples of cases where this condition will often be satisfied are claims from participants of a package tour concerning alleged defects in, *e.g.*, accommodation, excursions, facilities, etc., or claims from investors concerning alleged defects in the prospectus which formed the basis of their investment.

In some cases it will be possible to sever uniform issues from the claims in question and bring a class action concerning those issues. In such class action it will be possible to claim a declaratory judgment regarding the severed issues. Examples of this are claims that a trader who has concluded standard subscription agreements with a large number of consumers must admit that specified contractual terms are invalid, or claims that companies which, according to the plaintiffs, have participated in an illegal cartel must admit that they are liable to pay compensation for the losses suffered by the customers and/or competitors as a result of the anti-competitive activities of the cartel. In such cases it may be necessary to clarify the amounts to be paid as compensation to the individual class members, etc., if the class succeeds in its claim.

In addition to the condition that the action must concern uniform claims, section 254b of the Administration of Justice Act sets out a number of additional conditions for class actions, for example that the legal venue of all the claims must be in Denmark and that a class representative can be appointed.

It is also a condition that a class action is deemed to be the best way of examining the claims, *i.e.* that the class action is subsidiary to other ways of examining the claims. In each case, the court must therefore compare a class action with realistic alternatives in the specific situation and on this basis make an assessment of whether the class action must be deemed to be the best way of examining the claims. For example, it will not be possible to bring a class action concerning the claims if the court finds that they can be examined equally well or better through individual actions, which may be examined collectively, if relevant, according to the rules on joinder (joinder of causes of action) of the Administration of Justice Act. This assessment also takes into consideration, for example, whether the group of cases is of such nature that it must be expected that common issues can be clarified in a lead case.

It is also a condition for bringing a class action that the class members, *i.e.* the persons to whom the claims are owed, can be identified and

notified about the proceedings in an appropriate manner. The court will have to make an assessment of whether the notification can be effected in such manner as to provide a high degree of certainty that the persons affected are made aware of the case to such extent that they have the requisite basis for deciding whether they wish to opt in or opt out of the class action.

5. The class representative

In a class action the class members do not participate as parties to the proceedings in the traditional sense, but are instead represented by the class representative who is appointed by the court. Thus, it is the class representative and not the class members who makes claims, raises allegations and adduces evidence, and the individual class members are not entitled to give evidence in person during the proceedings. Correspondingly, the class members have no formal authority to instruct the class representative on how to conduct the proceedings (but they may, of course, make proposals as to how the proceedings ought to be conducted and they may request that the court appoint a new representative, if relevant).

Section 254c of the Administration of Justice Act governs who may be appointed as a class representative. In class actions according to the *opt-in model* the class representative may be appointed from (1) the members of the class; (2) an organisation, a private institution or another association if the action falls within the scope of the objects of the association (e.g. the Danish Consumer Council in a case concerning consumer matters); or (3) a public authority authorised by law to this effect (in connection with the new rules on class actions it has been decided that the Consumer Ombudsman may be appointed as a class representative (*i.e.* in cases that fall within the scope of his powers)).

In class actions according to the *opt-out model* only a public authority (*i.e.* the Consumer Ombudsman until further notice) may be appointed as the class representative. The reason for this is particularly that public authorities, as opposed to, *e.g.*, private associations etc., are subject to a general objectivity requirement which applies when the relevant authority is to decide whether there is a basis for bringing the class action according to the opt-out model.

The class representative must be able to safeguard the interests of the class members during the proceedings. This implies in particular that the class representative has such financial or moral interest in the case that the representative can be expected to have the motivation necessary to further the interests of the class members during the proceedings. Moreover, the class representative must dispose of sufficient financial means, including by virtue of insurance cover for legal expenses or free legal aid, if relevant, to carry through the proceedings in an adequate manner.

The court may decide that the class representative must provide security for the legal costs which he or she may be ordered to pay to the opposing party. When deciding if security is to be provided, special regard should be had as to whether the legal costs must be expected to be significantly higher than in an individual action. If there is a risk of very high legal costs, security should therefore generally be required. However, security will be unnecessary if the class representative is manifestly capable of paying the legal costs ordered (*e.g.* if it is a public authority).

The court may appoint a new class representative later, if required, for example, if the relevant representative cannot conduct the case in an adequate manner or if it becomes apparent that the class representative and a significant part of the class members have conflicting interests. The court may appoint a new class representative upon request and on its own initiative. In an opt-in class action the court *must* decide whether it is necessary to appoint a new class representative if requested by at least half of the class members who have registered as members of the class action.

6. Institution of proceedings etc.

According to section 254d of the Administration of Justice Act, a class action is brought in the same way as other actions by lodging a writ of summons with the court. The writ may be lodged by any person who can be appointed as a class representative and, in addition to the usual requirements to a writ, it must contain a description of the class, information on how the class members can be identified and notified about the case and a proposal for a class representative who is willing to undertake the task. When deciding whether to approve the class action, the court also decides on these three issues and is not bound by the plaintiff's proposal in this connection.

The court determines the scope of the class action, which means that it decides what claims are to be covered by the class action. The court need not determine the scope of the class action at the same time as appointing the class representative. However, the scope of the class action must be determined before allowing class members to opt in or opt out of the class action.

If the court approves the class action, the class members must be notified thereof to give them a real possibility to opt in or opt out of the class action. The court determines the form and substance of the notification. The form of notification should be adapted to the specific circumstances of the case. The court may order the class representative to give the notice, and the class representative must pay the expenses related to the notification until further notice.

The purpose of the notification is to give persons whose claims are covered by the class action a proper basis for making a well-considered decision as to whether they want to opt in or opt out of the class action. It is therefore essential that the notice is adequate, but also that it is easily accessible and clear. Among other things, the court decides whether a notification should be given by individual notice to the class members or by advertisements or other public announcement. Individual notice to known class members may be coupled with advertising or other public announcement. If the notification is to be given by advertisement or other public announcement in full or in part, the court will decide on the form of the announcement.

It is a condition that the notification is given in such a way that it must be assumed that by far the majority of the class members are made aware of the class action and their possibility of opting in or opting out of such action. Individual notice to each of the class members will be the best form of notification, and this form is therefore preferred when it is possible and does not entail disproportionate expenses. If the identities of the class members are not known and cannot be provided directly, notification given, *e.g.*, through an advertisement in a local paper distributed to every household will probably be a suitable form of notification if the class members reside in a specific local area.

It cannot be excluded beforehand that a more general, *i.e.* a less targeted, advertisement or other public announcement will in some situations

satisfy the condition that by far the majority of the class members must be assumed to become aware of the class action, *e.g.* press coverage in a consumer programme on national television.

The Danish Court Administration expects to prepare an overview of all approved pending class actions on its website with the information (or links to the information) which the notification to the class members must contain, including information on the time limit for opting in or opting out and information on where the class members are to register their notice of opting in or opting out.

The court fixes a time limit by which the class members must opt in or opt out of the class action. In class actions according to the opt-in model the court may decide that the class member must provide security for the legal costs in order to join the class action, see paragraph 7 below.

When the time limit for opting in or opting out of the class action has expired, it has then been determined who are covered by the class action, *i.e.* which class members are covered by the binding effect (legal force) of the court's decisions in the case, and who the class representative is. Then the actual hearing of the case may begin according to the general rules of the Administration of Justice Act, starting with the defendant being ordered to submit a defence. However, the court may allow class members to opt in or opt out after the expiry of the time limit if particular reasons make it appropriate, *e.g.*, in connection with minor failures to observe the time limit if it is excusable that the notice of opt-in or opt-out did not arrive before the expiry of the time limit.

7. Legal costs, security and free legal aid

In principle, the general rules on legal costs (Part 30) of the Administration of Justice Act also apply to class actions, however, certain special rules apply to legal costs in this type of cases.

As stated above, the court may decide that the class representative must provide security for the legal costs which he or she may be ordered to pay to the opposing party.

Moreover, in class actions according to the opt-in model the court may decide that the class member must provide security for the legal costs as determined by the court in order to join the class action (which security

will then resemble an ‘opt-in fee’). However, the class member need not provide such security if he or she has a legal expenses insurance, etc., that covers the costs of the proceedings, or if the class action satisfies the conditions for free legal aid pursuant to sections 327-329 of the Administration of Justice Act and the class member satisfies the general financial conditions for free legal aid pursuant to section 325.

If relevant, it is the class representative who must request the court to determine whether the class action satisfies the substantive conditions for free legal aid. If the class representative’s request is granted, this must appear from the notice to the class members of the class action. The court may then release from the security requirement those class members who satisfy the financial conditions for free legal aid.

In a class action according to the *opt-in model* a class member who has registered as a member of the class action may be ordered to pay legal costs within an overall amount which may be divided in two. Firstly, the class member may be ordered to pay legal costs up to the amount for which provision of security was required from the individual in connection with registering as a member of the class action, see above. Secondly, the class member may be ordered to pay legal costs by an amount not exceeding the amount which will be payable to the class member as a result of the proceedings, *i.e.* amounts which are payable in cash to the class member according to the judgment and which are in fact paid. The class member may be ordered to pay legal costs by an amount not exceeding the sum of the two amounts.

A class member who has not opted out of a class action according to the *opt-out model* cannot be ordered to provide security for legal costs and may thus only be ordered to pay legal costs within the limits of the amount which becomes payable to the class member as a result of the proceedings, *i.e.* the factual cash amount payable to the relevant person as a result of the proceedings.

The explanatory notes to the Bill (the explanatory notes to section 254f of the Administration of Justice Act) include a number of examples which illustrate the practical use of the special rules on legal costs for class actions.

8. The position of the class members during the proceedings

As stated above, the class members are not parties to the proceedings in the traditional sense, but are represented by the class representative, who is considered a party to the case. However, in a number of respects the class members are equal to parties. First and foremost, this applies to the binding effects of judgments (legal force) in that (by their very nature) the court's decisions in class actions have a binding effect on the class members who are covered by the class action.

The class members are also subject to the rules on parties when they give statements and in relation to discovery.

If questions of withdrawal or dismissal of the class action arise, class members covered by the class action must in principle be notified thereof. In relation to the general rules of the Administration of Justice Act, the possibility of withdrawal or dismissal of the case is therefore in fact suspended until the class members have received notice and had the time to react to this notice. The court also has discretionary power to decide that the class members must be notified about essential matters other than the withdrawal or dismissal of the case, including if questions of the approval of a settlement arise, see below.

If the class action is withdrawn or dismissed, a class member who is covered by the class action may join as a party in respect of his or her own claim and proceed with the case under the rules on individual action within four weeks. This is a special statutory procedural succession where the joining class member takes over the case as it was before it was withdrawn or dismissed.

The class representative's statutory representation of the class members does not authorise the class representative to make a settlement, in court or out of court, regarding the claims of the class members on his or her own initiative. According to section 254h of the Administration of Justice Act, any settlements made by the class representative regarding claims covered by the class action become valid when approved by the court. The court will approve the settlement unless the settlement involves non-objective differential treatment of class members or the settlement is otherwise obviously unreasonable.

9. Appeal

Section 254j of the Administration of Justice Act includes rules on appeals of class action judgments, according to which such appeals are also considered according to the rules on class actions. Section 254k provides for alternative access to individual appeal if a class member's claim is not covered by an appeal under section 254j.

The class representative may appeal the entire judgment or parts thereof. The appeal made by the class representative may thus cover all class members, some class members or one class member. If the class representative appeals, a number of the rules on class actions in the first instance also apply to the appeal proceedings. This implies that the court fixes a time limit for opting in or opting out of the appeal (depending on whether the class action was brought according to the opt-in or the opt-out model in the first instance) and may decide that the class member must provide security in order to join the appeal unless he or she has a legal expenses insurance, etc., that covers the costs of the proceedings, or the appeal satisfies the substantive conditions for free legal aid and the class member satisfies the financial conditions for free legal aid. Moreover, the class members who are covered by the appeal must be notified about the appeal, the time limit for opting in or opting out, and any security required for opting in. The appeal will then cover the class members who have opted in or who have not opted out of the appeal and is heard according to the rules on class actions.

If the class representative does not appeal, an appeal may be initiated by any person who can be appointed as a class representative, see paragraph 5 above. In that case, the court will have to decide whether the appeal may be approved as a class action according to rules corresponding to the rules for approval of class actions in the first instance.

If a class action judgment is appealed by the opposing party to the class, the appeal will be heard according to the rules on class actions. This implies, *inter alia*, that the class representative from the first instance will become the opposing party in the appeal proceedings (the respondent). This applies regardless of whether the appeal concerns all class members, some class members or only one class member.

If a class action judgment is not appealed collectively by either party, each class member may appeal the judgment as regards his or her own

claim according to the rules on individual action, see section 254k of the Administration of Justice Act.