

Class and Collective Actions in Denmark

Denmark's class action regime went into effect on 1 January 2008, constituting the largest reform to the Danish judicial system since 1919. Chapter 23a of the Danish Administration of Justice Act (DAJA) permits class actions under Danish law and has not undergone any major amendments since its introduction.

Opt-In and Opt-Out Models

Class actions in Denmark are essentially mass claims which, as a general rule, require claimants to 'opt-in' to the class, rather than 'opt-out'. Technically, both models are available under Danish law, but only a designated public authority, the consumer ombudsman, is permitted to bring an opt-out class action. Opt-out class actions are exclusively available for public initiatives where it is clear the claims cannot realistically be pursued through individual actions and an opt-in model is assumed to be an inappropriate way of dealing with the claims under the circumstances. The consumer ombudsman has been authorized to act as a group representative in opt-out class actions in only a narrow subset of areas, including advertising, competition, and financial regulation. He is also legally permitted to bring opt-in class actions, though, to date, neither has occurred. This means that, as a practical matter, class actions in Denmark are strictly opt-in.

For either type of class action, procedure dictates that the court set a deadline for potential class members to opt-in or out of the group, though exceptions may be made under certain extenuating circumstances. In such cases, the court must weigh the strength of the

potential class member's request to join against the potential harm to the defendant. At present, however, there is no case law on this issue.

Standing to Bring Class and Collective Actions

Class actions can be commenced by any private individual or legal entity with a civil claim by submitting a writ to the ordinary courts. There is no special court of class actions in Denmark. The initiating party must make a request for approval of both the class action itself and the representative appointed to be the formal party to the court case. The writ for either an opt-in or opt-out class action must include a description of the group and how to identify and contact group members.

In class actions brought by private groups of individuals, the representative may be an individual member of the class. Actions brought by legal, as opposed to natural persons, on the other hand, are often brought by organizations, such as workers unions, where the organization itself acts as the representative in a test case on behalf of one or more of its members. There is no limitation on the nationality of the group members or the group representative in cross border cases, however, if the action was brought under the opt-out model, the court's decision only has a binding effect on class members who themselves could have been sued in Denmark for the claim in question when the case was originally brought. In all cases, if conditions change and the class representative can no longer claim legal interest in the case, that representative entity loses its status.

In addition to his role in bringing opt-out class actions, the consumer ombudsman may act as a representative for the consumer in consumer-to-business disputes outside of the class

action framework. For reasons discussed below, in Denmark, this procedure is more common than private class actions in dealing with large groups of similar claims pending at the same time against one defendant.

Under Danish collective action law, it is also possible for multiple claimants to commence legal proceedings outside the class action framework. This usually happens in one of two ways: 1) multiple claimants sue under the same statement of claim and, through an agreement with the defendant, settle upon one or more test cases to move forward with concerning one or a few individual claimants, or 2) multiple claimants bring individual lawsuits which are then joined by the court into one proceeding. As with the first method, joinder may result in the selection of test cases, depending on the circumstances.

Class/Collective Action versus Individual/Representative Litigation

Though pursuing class actions may provide claimants with some advantages over pursuing individual litigation, there are several features of the Danish regime which may explain why they are avoided in some instances. Unlike under U.S. law, the Danish regime does not include a standardized method for computing losses. This means that the alleged losses of the class members must be individually calculated and documented, so when doing so would be impossible or unwieldy, class actions are not the preferred approach.

The Danish regime also does not permit attorneys to charge contingency fees in class actions. This means that attorneys may not arrange to earn a predetermined share of the damages awarded in a case. Class action contingency fees allow the attorney to share the procedural risk—and potential reward—with the client, so with this type of fee arrangement prohibited

under Danish law, clients bear all the financial risk in pursuing class actions. To avoid that risk, many claimants in Denmark opt to, instead of initiating a class action, await the outcome of a potential test case or, for those with the largest potential losses to claim, initiate individual litigation.

In practice, individual cases and class actions regarding the same issues have been brought both simultaneously and consecutively, though individual cases are often the precursor for class actions. Where multiple individual claimants bring identical cases, sometimes the parties choose a test case, but often a test case emerges naturally when one case is processed while the others are stayed. None of the procedural mechanisms for bringing actions prevent others from initiating separate lawsuits.

Permissibility of Class Actions

Under Danish law, class actions may be pursued under seven conditions: 1) there must be a common claim, 2) there must be a venue in Denmark for all of the claims, 3) the court in which the claim has been brought must be the venue for one of the claims, 4) the court must possess the requisite expertise to deal with one of the claims, 5) a class action, as opposed to individual litigation, must be determined to be the best manner to handle the claim, 6) the members of the class must be identified and informed of the case in an appropriate manner, and 7) a class representative must be appointed in accordance with the conditions discussed above.

Danish case law has emphasized that the decisive criteria in determining whether a class action may commence is often whether there are “similar claims” and whether a class action is

“the best manner of handling the claims”. This preliminary procedural stage, including approval of the action and identification of the class group, is often a very long one.

The court is responsible for determining how to best inform class members of the action and to make sure they understand the terms and legal effects of opting in or out. To make this determination, courts are likely to consider a) the particular circumstances of the mass harm situation, b) freedom of expression, c) right to information, d) right to protection of reputation, and/or e) the company value of the defendant prior to the alleged violation or harm being established by the court’s final judgment.

The court may decide to notify the class through public announcement or may require the class representative to carry out the notification, in which case the representative is responsible for the associated costs.

Settlement and Compensation

Class actions under Danish law allow for both injunctive and compensatory relief, sometimes within a single class action. Relief is treated according to the same general rules as all other civil claims in Denmark under the Third Book of the DAJA. Both punitive and extra-compensatory damages are prohibited.

Since there is no national legislation requiring expediency in cases where orders have been made for injunctive relief, interim measures and sanctions for non-compliance are available. Anyone who deliberately violates a prohibition or injunction may be fined or sentenced to imprisonment for up to four months and ordered to pay compensatory fees.

Although the law does not define a maximum sanction for non-compliance with injunctive orders in class actions, case law reflects an average of between 2000–3500 EUR.

Allocation of costs at the conclusion of a class action is determined according to the ‘loser pays’ principle. The court does, however, retain considerable discretion to determine what is reasonable in this regard. For example, if the conduct of the winning party during the case makes it unreasonable for the losing party to pay all or part of the winning party’s costs, the court may alter the award.

As a general rule, the representative is liable for costs owed by the class, though in some instances, a class member may be ordered to pay legal costs to the other party and/or the class representative if, at the time of class approval, the court determined that joining the class should only be permitted on the condition that members put up security. In those cases, the maximum cost of litigation for the class is set at the amount put up in initial security, so class members know the maximum litigation risk before joining. Representatives may apply for free process for the entire group in the class action with the Department of Civil Affairs or, alternatively, some insurance companies offer private legal aid to class action groups. There is no specific regulation regarding third-party funding of class actions, so it is permissible, but it is not a widespread practice in Denmark.

In addition to resolution in the courts, class actions in Denmark can be resolved through collective alternative dispute resolution and settlements. Judicial approval is, however, required for any out of court settlement agreement. In practice, courts approve settlements in these cases unless they are discriminatory against some members of the class or are in some other way patently unfair.

Sources

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