



**COUNTRY
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GUIDES 2023**

The Legal 500 Country Comparative Guides

Denmark

CLASS ACTIONS

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in Denmark.

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DENMARK

CLASS ACTIONS



1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

In Denmark, legislation on class actions was introduced in 2008. The Danish legislators introduced the legislation on class actions for the purpose of contributing to an effective enforcement of the substantive legislation, such as lowering the threshold for participating in a lawsuit. In addition, the introduction of the legislation of the class action mechanism in Danish law secured up-to-date procedural rules for handling a larger amount of similar claims especially when each single claim was of modest character.

The Danish legislation had, however, already mechanisms in place enabling that multiple pending court cases could be processed together, before the legislation on class actions was introduced. Consequently, the legislation on class actions introduced in 2008 was an expansion of the already existing mechanism regarding co-processing of similar cases.

Class action suits are regulated in chapter 23 a of the Danish Administration of Justice Act. This entails that class action suits are a separate form of legal procedure in Danish law, and class actions suits are therefore lawsuits that can be processed using the rules of chapter 23 a of the Administration of Justice Act. The legal procedure entails that several similar claims by individuals are processed during a joint trial by a group representative. The individuals are not considered parties to the trial.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Under Danish law, a group representative must bring the class action suit, since a group representative must be appointed before the court will allow a class action suit to go forward. This follows from section 254 b, subsection 1, no. 7 of the Administration of Justice Act.

According to section 254 c, subsection 1 of the Administration of Justice Act, a group representative must be:

- A regular member of the group;
- A private organisation, where the purpose of the suit falls within the purpose of the organisation; or
- A public organisation authorised by law to act as the group representative.

In Denmark, a group representative is usually a legal entity established with the sole purpose of pursuing a particular class action claim.

3. Which courts deal with class actions or collective redress proceedings?

In Denmark, the civil courts deal with class action suits. The civil courts are constituted of the Supreme Court, the High Courts including the Maritime and Commercial High Court, the District Courts and the Danish Registration Court. This follows from section 1, subsection 1 and 2 of the Administration of Justice Act.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

The types of conduct and causes of action that class action suits can be relied upon as the basis for such suits, are the same types of conduct and cases that all other civil court cases can be relied upon. The conduct can, for instance, be based on a strict liability or a fault-based liability.

5. Are there any limitations of types of claims that may be brought on a collective basis?

Under Danish law, limitations in relation to the types of

claims that can be brought as class actions exists:

Cases concerning criminal law, family law, parental rights and responsibilities, civil imprisonment, guardianship, adoption and mortification cannot be brought on a collective basis. This follows from section 254 a, subsection 2 of the Administration of Justice Act.

6. How frequently are class actions brought?

Historically speaking, class action suits have not been brought very often in Denmark. This is primarily caused by the fact that the Danish legislation on class action suits was first introduced in 2008 as mentioned above. From 2008 to 2017, 33 class action suits were brought before the Danish district courts, most of which concerned security claims.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

One of the latest developments in relation to Danish class actions is that the use of the system has increased recently, in particular, with respect to securities claims. Therefore, the risk of being met with a security class action is emerging. There are a few examples from Danish case law that illustrate this development:

The OW Bunker case from the High Court is one of them. In this case, a number of small investors opted-in on a class action to sue the former executive board for misrepresentation and non-disclosure in a prospectus published prior to the listing of OW Bunker. The company went into bankruptcy less than a year after the listing. The class action was accepted, as the High Court deemed it was the best way to deal with the claims.

The class action suit against the healthcare company Novo Nordisk is another case that illustrates the trend of securities claims. This class action suit was filed by a number of shareholders claiming that Novo Nordisk had made misleading statement and did not make appropriate disclosures regarding its sales of insulin products in the US. The original claim was for a total amount of around 11 billion DKK, and the suit was settled in the beginning of 2022. The settlement contained no admission of liability, wrongdoing or responsibility by Novo Nordisk.

The case of Danske Bank also exemplifies the trend of securities claims. In this case there were several class action suits, and among these suits were one, where 300 investors sued the bank, since their shares lost value

due to the bank's money-laundering practices.

Additionally, another one of the latest developments is that it now seems that the Danish class actions rules are beginning to have wider use, and that more cases that does not involve securities claims are tried using the class action system.

One example of this is the case against Tesla pending before the District Court of Hillerød. In this case, a group of Tesla owners brought a suit against Tesla claiming that an update of the software in the cars meant that the car batteries took longer to charge and this generally decreased the functionality of the cars. The District Court of Hillerød allowed the class action suit to go forward before the court, and therefore the suit is currently pending.

Another example is the class action suit against the Danish Ministry of Taxation and the Danish Broadcasting Corporation (DR). In this case, a group of licence fee payers claimed repayment of licence VAT which – allegedly – had been collected illegally. The class action suit, which is an opt-in suit, has been allowed by the court to go forward, and the group has been provided free legal aid from the Danish Government.

Finally, the wider use of the class action system might develop even further and constitute a risk in the coming years seeing that class action suits for instance regarding climate change and the covid-19 pandemic are not unlikely to appear. Further contributing to the wider use of the class action system is that more Danish law firms have begun to consider class action suits as a business area with potential.

8. Is your jurisdiction an “opt in” or “opt out” jurisdiction?

Both opt in and opt out class action suits are allowed under Danish law, and the court decides whether a specific class action suit should be opt in or opt out. The opt in-model is the main rule, but if the court finds the opt out-model more beneficial to a specific class action suit, the opt out-model will be used.

If the class action suit is opt out, the group representative must be a public organisation.

If the class action suit is opt in, it is binding for a group member to opt into the suit. Therefore, any potential group member must be informed of the legal impacts of opting in to a certain class action suit.

Additionally, it follows from section 254 e, subsection 7 of the Administration of Justice Act that if the class

action suit is opt in, the court can decide that opting in is conditional on the group members providing security for legal costs of the case in case the court passes judgment in favour of the defendant. The security amount is decided by the court, and if the group loses the case, the liability of the group members is limited to this amount, cf. section 254 f, subsection 3, of the Administration of Justice Act.

In relation to the requirement for security for legal costs, the Danish Supreme Court lowered the security for such legal costs in its decision in UfR.2012.2938H. The Court stated that the security amount must be determined at the discretion of the Court taking into account the value, the scope and nature of the case, and the work associated with it.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

The procedure for bringing a class action suit to court is the same as in every other court case, wherefore a class action suit begins like any other court case with the submission of a Statement of Claim. The only difference in class action suits is that the plaintiff, in its Statement of Claim, must request that the court will process the claim in accordance with the rules of class actions.

In addition to the request, it follows from section 254 d, subsection 1, of the Administration of Justice Act, that the Statement of Claim must contain:

- A description of the group;
- Information about how the members of the group can be identified and informed about the suit; and
- A suggestion as to who can and wants to be a group representative.

If the Statement of Claim fails to fulfil these requirements of section 254 d, subsection 1, it is unsuitable to serve as a basis for the proceedings and the court will dismiss the case. Before the court dismisses the case, the court can, however, grant the claimant a time limit before which the claimants has to remedy the defects of the Statement of Claim.

Procedurally, once the group has been identified, there is no difference between bringing forth a normal court case and bringing forth a class action suit, and the class action suit therefore proceed as any other court case.

A class action suit is, however, required to meet the criteria set out in section 254 b, subsection 1 of the Administration of Justice Act, before the court will allow

the suit to go forward:

1. The claims must be similar in essence.
2. The legal venue for all claims must be in Denmark.
3. The court must have jurisdiction over at least one of the claims.
4. The court must have subject-matter jurisdiction over all claims.
5. Class action must be the best processual option.
6. The group members can be identified and are notified about the class action suit.
7. A group representative can be appointed.

These criteria are strict. The condition that a class action suit must be the best processual option to address a certain claim entails that the court will only issue a group certificate if no other option for addressing the claim is better suited. Therefore, this condition is difficult to fulfil.

If the court does not allow the class action suit to go forward, the participants of the suit must bring their claims individually.

As an example, the criteria set out in section 254 b, subsection 1, were not met in one of the class action suits against Danske Bank. This class action suit was brought by the Association Shareholder in Danske Bank against Danske Bank and a former director of the Bank. Both the District Court and the High Court found that the claims included in the suit were not similar in essence seeing that an assessment of each claim would involve an individual assessment of each group member's affairs. Furthermore, both the District Court and the High Court found that the claims could just as well be processed as individual lawsuits rather than as included in a class action suit.

10. What remedies are available to claimants in class action or collective redress proceedings?

The remedies available to claimants in class action suits are the same as in any other civil court case. The remedies can therefore be declaratory remedies, damages or restitution.

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

Neither punitive nor exemplary damages are available for class actions under Danish law.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

Under Danish law, civil cases, including class actions, are heard by judges rather than juries.

In general, a civil trial is heard by one judge. In some cases the trial can, however, be handled by three judges, for instance if the case is of fundamental importance. These principles follow from section 12, subsection 1 and 3 of the Administration of Justice Act.

Specialist judges can be appointed as assessors in special circumstances, and this is especially in cases concerning maritime law. This follows from section 20, subsection 1 of the Administration of Justice Act.

13. What is the measure of damages for class actions or collective redress proceedings?

The measure of the damages for class actions is based on the actual losses suffered by the group members of the class action seeing that these members are entitled to the full and actual losses they each have suffered as long as this can be proven during the proceedings. The claimant bears the burden of proof for the actual loss suffered.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

International claimants can participate in class actions in Denmark, since the Danish class action system is not reserved to Danish citizens only. The requirements set out in section 254 b, subsection 1 of the Administration of Justice Act still have to be met, and the condition set out in no. 2 of the provision is central in this relation, since it follows from the condition that the legal venue for all claims included in the class action must be in Denmark.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

Please see the answer to question 14 above.

16. Do any international laws (e.g. EU

Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

The rules regarding class actions currently in force in chapter 23 a of the Administration of Justice Act are not directly based on or impacted by international laws.

However, before the introduction of this legislation on class actions, the Danish legislators looked at the experience with class action suits in many other jurisdictions, but the class action regimes from the other jurisdictions could not be copied due to differences in the legal systems. However, from the Swedish class action system, the Danish legislators found some inspiration from the strict legislation about group representatives ensuring that no unnecessary class action suits are brought before the courts.

Please see the answer to question 24 below for the future international impact on the Danish class action rules.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

Under Danish law, no specific mechanism for the collective settlement of class action proceedings exists, except from the rule in section 254 h of the Administration of Justice Act:

Section 254 h of the Administration of Justice Act determines that the group representative cannot enter into settlement regarding claims included in the class action suit, before the court approves of the settlement. The court will approve the settlement, unless the settlement unfairly discriminates against class action members or if the settlement is obviously unfair.

Beyond the rule in section 254 h, the general rules on settlement of civil cases apply to class action suits. This, for instance, means that a group member of a class action suit can settle its own claim dependent on the class action suit even though the claim is included in the class action suit.

Additionally, there are several out-of-court dispute resolutions available before litigation. These mechanisms are not available for class actions, but the mechanisms seek to settle a high number of small individual claims before they progress to the courts. The Consumer Ombudsman may take the question to court on behalf of the consumer or group of consumers, if the defendant does not comply with the alternative dispute

resolution-ruling.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

Please see the answer to question 17 above.

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

The class action suits that we have seen in public in Denmark so far are often between a group of individuals, often consumers, as claimants against a non-governmental company and/or directors of this company as defendants. In these class action suits the group often claims compensation from the company and/or directors often on the basis of either a strict or fault-based liability. Therefore, in Denmark, the public has not really seen how class actions typically interact with regulatory enforcement findings.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

The class action suits that we have seen in public in Denmark so far are often between a group of individuals, often consumers, as claimants against a non-governmental company and/or directors of this company as defendants. In these class action suits the group often claims compensation from the company and/or directors often on the basis of either a strict or fault-based liability. Therefore, in Denmark, the public has not really seen how class actions typically interact with regulatory enforcement findings.

21. Is litigation funding for class actions or collective redress proceedings permitted?

In 2017, the Danish Supreme Court accepted the use of third party-funding on a group level. This happened when OW Bunker's bankrupt estate entered into an agreement with a third-party funder. The Supreme Court found that third-party funding was not in conflict with the Danish legal procedure.

Consequently, third-party funding is permitted under Danish law, and there is complete freedom of contract

regarding third-party funding, as long as the governing contract for the third-party funder lives up to the general requirements for contracts in Danish law.

Since third-party was allowed by the Danish Supreme Court in 2017, this funding method has been used in especially large damages suits and in bankruptcy cases.

This funding method has, however, given rise to concern in the Danish legal community seeing that some legal professionals find third-party funding beneficial, while others are more reluctant in this relation. Some find third-party funding beneficial, since it makes it easier to bring a case before the courts if one would not normally have the economic means to pursue a claim. Others believe that an increased use of third-party funding will lead to more speculative and commercial lawsuits, and that third-party funders only have profit in view.

The concerns regarding third-party funding also exist in the Danish business section. For instance, the chairman of the board of Vestas has stated to the press that he was of the opinion that third-party funding's reason to exist was to put undue pressure on the defendants, thereby forcing them to enter into settlement. This statement was made after a group of investors that had sued the former management of Vestas withdrew the lawsuit. The withdrawal happened after the parties of the class action suit had spent millions of Danish kroner on legal costs during the seven years that the lawsuit had taken up to this point.

Besides third-party funding, a class action suit can be funded by other methods open to the individual group members; by legal expenses insurance and by legal aid:

Regarding legal expenses insurance, if a group member of a class action suit is covered by such an insurance, the group member might be able to obtain insurance cover for the expenses related to participating in the class action suit. Insurance cover will depend on the specific terms and conditions of the individual insurance policy.

In relation to legal aid, the Danish government can provide free legal aid and thereby accept to cover a person's expenses in connection with a lawsuit, if certain conditions are met. This follows from the sections 325-329 of the Administration of Justice Act.

The government will provide such free legal aid if either the person or the case qualifies:

A person can qualify for legal aid if their income is below the appointed minimum appearing from sections 325 and 326 of the Administration of Justice Act. The income limits in 2023 for singles are DKK 358,000 (app.

£42,200/€48,000) and for married couples/couples living in marriage-like relationships DKK 455,000 (app. £53,700/€61,000). For each child living in the household below the age of 18, the income-limit will be raised with DKK 62,000 (app. £7,300/€8,300). The income-limits are regulated annually.

The case has to either fall within the types of cases listed in section 327 of the Administration of Justice Act, or be of such nature that it is essential for the applicant to take it to court, cf. section 328 of the Act in question.

Free legal aid can also be provided if the case is of benefit to society or will such an effect on the applicant that it is necessary that legal aid is provided, cf. section 329 of the Act, or if legal action is taken by a consumer who has been successful in an action before the Consumers Complaints Board or in certain taxation cases.

The rules regarding legal aid are secondary to a private legal expenses insurance. The Government will, therefore, not provide free legal aid to a person whose expenses in a lawsuit are covered by such an insurance.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Under Danish law, no specific rules exists in relation to whether contingency fee arrangements can be used for the funding of class action suits.

Rules for lawyers do, however, exist in this relation seeing that lawyers can only enter into result based fee agreements if certain conditions are met, cf. the code of legal ethics.

23. Can a court make an 'adverse costs'

order against the unsuccessful party in class actions or collective redress proceedings?

The presiding court decides who, if anyone, should pay the costs of the case. This follows from the general rules regarding legal costs in civil cases in sections 311-322 of the Administration of Justice Act.

Seeing that the 'loser pays' rule therefore applies in class action suits as well as in any other civil court case, the court can make an 'adverse costs' order against the unsuccessful party of a class action suit.

If the court decides in favour of the defendant, the group representative and the members of the group are jointly and severally liable. In the interrelationship among the group representative and the group members, the group members will bear the costs of the defendant to the extent of their liability (the security provided).

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

By 25 June 2023, the EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing will be implemented into Danish law.

The implementation of the Directive is not expected to impact Danish law significantly seeing that Danish law already shares many similarities with the Directive.

The Danish legislators expect to implement the Directive in a way where the existing Danish class action rules are maintained, and where a new act is also introduced to regulate the areas of the Directive that are not already regulated in Danish law.

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