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Response of the Danish Government regarding the European Commission's public consultation: Towards a Coherent European Approach to Collective Redress (SEC(2001)173 final)

1. The Danish Government welcomes the opportunity to submit its views on the public consultation on collective redress launched by the European Commission on 4 February 2011 with a working document entitled "Towards a European Approach to Collective Redress".

According to the working document, the purpose of the consultation is, *inter alia*, to identify common legal principles on collective redress and examine how such common principles could fit into the EU legal system and into the legal order of the 27 EU Member States. The resulting set of principles should guide any possible future initiative for collective redress in EU legislation.

2. The Danish Government has consulted with relevant authorities and organisations etc. In light of the incoming answers the Danish Government would like to make the following remarks about the consultation and the questions.

First, the Danish Government notes that in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union, Denmark will not take part in the adoption of and will not be bound by any possible future EU initiative on collective redress based on Title V of Part Three of the Treaty on the Functioning of the European Union.

Secondly, the Danish Government would like to draw the Commission's attention to the previous Danish responses to the Commissions Green Paper on Consumer Collective Redress, (COM(2008)794 final), the Commission's White Paper on damages actions for breach of EC anti-trust rules (COM(2008) 165 final) and to the feedback on "the use of Al-

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ternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union".

Rules on collective actions came into force in Denmark on 1 January 2008 (Act No. 181 of 28 February 2007). The rules are found in Part 23 a of the Danish Administration of Justice Act and are the result of thorough deliberations of the Standing Committee on Procedural Law. For an outline of the rules, please refer to the attached annex.

3. Potential added value of collective redress for improving the enforcement of EU law (Q1-Q6):

In general, the Danish Government welcomes initiatives that may help enhancing the enforcement of rights of citizens and SMEs in Europe in cross-border cases. The Danish Government supports effective and easy access to justice in case of infringement of EU rules, and it is in the interest of both citizens and companies that adequate redress mechanisms exist and function well.

In order to assess the potential added value of collective redress initiatives at EU level, it must be examined whether, in the EU, many cross-border cases with uniform claims exist and whether such cases are adequately handled at national level. If this is not the case, the question is how to best strengthen the existing systems.

The purpose of private collective redress is to ensure real access to the courts and thus to facilitate the satisfaction of justified claims whereas the purpose of public enforcement is to generally ensure that legislation is observed. Thus, even though private collective redress and public enforcement may be seen as complementary in ensuring enforcement of EU legislation, the purposes are different, and the two sets of rules should therefore function independently.

Any action at EU level should be restricted to the specific cross-border dimension of collective redress, whereas there is neither a need nor a justification for seeking to harmonise civil litigation regimes across the EU. It goes without saying that any EU initiative must conform with the principles of subsidiarity and proportionality. At the same time, it is of utmost importance that new initiatives do not undermine well-functioning national systems, but leave room for such systems to continue working.

Collective redress mechanisms already exist in many Member States, though in most Member States, including Denmark, such mechanisms are still relatively new. A non-binding approach such as good practices guidance may thus be helpful for Member States as a source of inspiration to further improve national systems.

A legally binding approach would, however, touch upon the core of national civil procedural law, which is regulated very differently in the various legal systems. It thus needs to be carefully considered whether the time is yet ripe to consider binding measures.

If binding measures on cross-border collective redress mechanisms are to be considered, such measures should merely supplement the existing legal mechanisms and should be designed as minimum rules and standards, so that Member States that have already introduced collective redress mechanisms may retain procedures which provide better access to collective redress than required under such binding measures.

4. General principles to guide possible future EU initiatives on collective redress (Q7-Q10 and Q32):

As already mentioned, any action at EU level should be limited to the specific cross-border dimension of collective redress, whereas there is neither a need nor a justification for seeking to harmonise civil litigation regimes across the EU.

Since collective redress mechanisms already exist in many Member States, it would seem only natural to learn from each others experiences in this field. The various Member States have developed different ideas and approaches in this regard and any initiative at European level should benefit from this abundance of ideas.

Any EU measure needs to be based on a solid evaluation of Member States' experiences and at the same time leave sufficient room for national legal systems, cf. above.

A non-binding approach based on good practices guidance may be helpful for Member States as a source of inspiration to improve national systems. It needs to be carefully considered, however, whether the time is yet ripe to consider binding measures.

So far, only one case has been decided under the relatively new Danish rules. In this connection no inexpediencies or needs for improvement have been identified. Therefore, the planned revision of the rules has been postponed until 2013-2014 where more cases must be expected to have been decided under the new rules and there will thus be a better basis for an evaluation.

The fundamental conditions for bringing a collective action in Denmark are that it concerns uniform claims from several persons, that the collective action is deemed to be the best way of examining the claims, that the members of the action can be identified and notified about the proceedings in an appropriate manner and that a group representative can be appointed. The court must approve the case as being suited for examination according to the rules on collective actions. As a main rule, a collective action will comprise the group members who opt for the collective action (the opt-in model). If a collective action according to the opt-in model is not an appropriate way of examining the claims, the court may, however, decide that the collective action is to comprise the members who do not opt out of the collective 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 collective action according to the opt-in model, the court may appoint a group representative among the group members, *i.e.* persons on behalf of whom claims are made, associations 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 collective actions only public authorities may be appointed as group representatives. The court may decide that the representative must provide security for legal costs.

It is of vital importance that the courts play a prominent role in examining whether a collective action would be the most suitable solution. This helps avoiding unfounded claims.

5. The need for effective and efficient redress (Q11-Q12):

The Danish Government agrees with the Commission that an effective and efficient collective redress system is one that is capable of delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved.

In the view of the Danish Government, it cannot necessarily be avoided that collective redress actions may be costly. When setting up a system of

collective redress, the most important thing is to create good and efficient procedural rules for the handling of multiple claims which safeguards the interests of all involved parties. If cheap solutions are the primary object, ADR could be a good, quick and cheap tool in certain cases, *i.e.* small simple claims. On the other hand, judicial collective actions may be better suited for complicated (and more costly) cases.

The Danish Government is of the opinion that the possibility of bringing a collective action should generally be the same regardless of the "category" of plaintiffs. Any collective redress mechanism should thus also be open to SMEs.

6. The importance of information and of the role of representative bodies (Q13-Q14):

According to the Danish rules, it is a condition for bringing a collective action that victims can be identified and informed about the case in an appropriate manner. The court will thus have to assess 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 collective action. It is therefore essential that the notice is adequate, but also that it is easily accessible and clear.

If a collective action is approved by the court, the group members must be notified thereof to give them a real possibility to opt in or opt out of the collective 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.

It is for the courts to decide whether a notification should be given by individual notice to the group members or by advertisements or other public announcement. If the notification is to be given by advertisement or other public announcement in full or in part, the court also decides 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 group members are made aware of the action and their possibility of opting in or out. The actual notification of group members is carried out by the group representative.

Individual notice to each of the group members will be the best form of notification, and this form should therefore be preferred when it is possi-

ble and does not entail disproportionate expenses. If the identities of the group members are not known and cannot be provided directly, notification may be given, e.g., through an advertisement in a newspaper or on television.

Advertising a collective action in a cross-border situation may be facilitated through networks of sister organisations.

As to the question who may be appointed as a group representative, please refer to item 8 below.

7. The need to take account of collective consensual resolution as alternative dispute resolution (Q15-Q19):

While the Danish Government supports the use of ADR as a voluntary means of dispute resolution suited for resolving complaints quickly and at minimal cost, it should not be compulsory to try a dispute (collective or individual) before an ADR board before it can be brought before the courts. Neither should collective consensual dispute resolution be mandatory. Citizens should not be restricted in their access to resolution of disputes. If they find that the court system is the most expedient way of settling a dispute, they should not be barred from such procedure.

ADR may be used in situations of multiple claims. This could for instance be the case where several people want their money back because of bad sound at a concert. However, ADR-systems are generally not well suited for large and complicated claims. Such claims should be left for judicial action. If both collective redress and ADR exist, consumers will still have incentive to use ADR that may provide a faster and cheaper procedure for cases suitable for ADR.

The Danish Government does not see merits in the invention of a new system where the courts would have to exercise fairness control of a collective consensual dispute resolution. Such a system would not be time and cost saving.

Reference is also made to the Danish Government's feedback on "the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union".

8. Strong safeguards against abusive litigation (Q20-Q24):

When developing the Danish rules on collective actions, emphasis was put on avoiding that collective actions are used to pressure companies etc. to accept unjustified claims. Abuse may occur in the sense that actions are brought even with a very limited chance of success, if the group members do not run any financial risk while the consequences for the defendant of losing the case are so serious that the defendant might be forced to enter into an (unjustified) agreement.

Therefore, a number of conditions for bringing collective actions have been laid down, including that the court must approve the case as being suited for a collective action as well as a number of 'control mechanisms', which include that the court must approve the group representative and may decide that the representative must provide security for the legal costs that he/she may have to pay to the other party if he/she loses the case.

It must be ensured that effective mechanisms are available to prevent abuse of collective redress mechanisms. For example, proven principles such as "loser pays" should be retained for this reason as the main rule (with a possibility of exceptions decided on a case-by-case basis) and under no circumstances should collective actions envisage punitive damages or success fees. Further, it may be necessary with specific rules on costs that have to be paid by the group members if they lose the case.

The Danish Parliament has opted for a model that – as a starting point – is based on "opt in", *i.e.*, that the individual claimants must expressly ask to be included in the collective action. However, in addition, it is possible, exceptionally, to base a collective action on "opt out", *i.e.*, that the individual claimants are included in the collective action (and consequently bound by the decision) unless they expressly ask to be excluded from the collective action.

The group representative must be able to safeguard the interests of the group members during the proceedings. This implies in particular that the group representative has such financial or moral interest in the case that he/she can be expected to have the motivation necessary to further the interests of the group members during the proceedings.

In collective actions according to the *opt-in model* the group representative may be appointed from (1) the members of the group; (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 collective actions it has been decided that the Consumer Ombudsman may be appointed as a group representative (*i.e.* in cases that fall within the scope of his powers)).

As for associations, there are no specific requirements as to age, number of members, financial situation, etc., but in order to be appointed as group representative, the association must have sufficient financial means, including *e.g.* by virtue of insurance cover, to carry through the proceedings in an adequate manner, and it may be met with a requirement to provide security for the legal costs that it may have to pay if it loses the case.

"Opt out" is only a possibility if the individual claim is so small that it would not normally be brought in an individual action. The requirements for the group representative are higher in "opt out" situations, restricting group representatives in such cases to public authorities. The reason for this is mainly 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 collective action according to the opt-out model.

The judge plays a very important role in striking the right balance in specific cases. Thus, as already mentioned, an important condition for bringing a collective action under Danish law is that a collective action is deemed to be the best way of examining the claim.

9. Finding appropriate mechanisms for financing collective redress, notably for citizens and SMEs (Q25-Q28):

The Danish Government does not support the creation of financial incentives to litigation and does not support the idea of public funding of collective actions to a wider extent than of other cases. Thus, the general rules on legal costs, fees and legal aid which apply in other cases should as far as possible also apply to collective redress actions, incl. the "loser pays"-principle. Collective actions should not be exempted from court fees or legal fees.

In order to avoid abusive litigation, the court should be allowed to order group representatives to provide security for the legal costs which he or

she may be ordered to pay to the opposing party. If there is a risk of very high legal costs, security should generally be required. Moreover, the group representative should possess 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.

In addition, in collective actions according to the opt-in model, the court should be allowed to decide that the group members must provide security for the legal costs as determined by the court in order to join the collective action (which security will then resemble an 'opt-in fee'), unless they are covered by a legal expenses insurance or satisfies the conditions for free legal aid in the Member State. A group member who has not opted out of a collective action according to the *opt-out model* should only be ordered to provide security for legal costs within the limits of the amount which becomes payable to the group member as a result of the proceedings.

In general, the Danish Government supports non-public solutions of financing. A proper financial regime plays an important role in avoiding abusive litigation.

10. Effective enforcement in the EU (Q29-Q31):

The Danish Government is not aware of any specific cross-border problems in this field. In principle, the general rules on jurisdiction, recognition and enforcement of judgments could apply to judgments resulting from collective actions. However, it should be carefully examined whether – given the considerable differences in national legislation in this field – the time is yet ripe.

Furthermore, the Danish Government does not see a strong need for special rules with regard to collective redress in cross border situations, for example for collective consensual dispute resolution or for infringement of EU legislation by online providers for goods and services. However, if an initiative is put forward on online dispute resolution, such an initiative should to the extent possible be aligned with the ongoing initiative on online dispute resolution in the context of UNCITRAL.

11. Scope of a coherent European approach to collective redress (Q33-Q34):

In the interests of a "better legislation" policy the Danish Government is in favour of a horizontal approach to civil procedural law issues, including collective means of redress. Thus, the Danish Government is of the opinion that the possibility of bringing a collective action should be the same regardless of the subject matter of the action. A sector-specific approach may result in fragmentation and is detrimental to the internal cohesion of the national systems of civil procedural law embedded in national legal culture. The greater the fragmentation, the more difficult it becomes in the context of judicial practice to apply the various instruments alongside each other and in conjunction with the national laws of the Member States.

In addition, fragmentation may have a counterproductive effect on European citizens' access to justice. A system based on many different options may become unnecessarily complicated and citizens may find it difficult and confusing to find out which type of dispute resolution can be used in a particular case. The lack of clarity can thwart their efforts to achieve justice in a specific dispute. For these reasons, the Danish Government prefers a horizontal approach.

Annex: Danish rules on collective actions

New rules on collective actions entered into force on 1 January 2008 (Act No. 181 of 28 February 2007).

Collective 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 'collective action' implies that the action relates to the claims of a group of persons, a representative of this group (not the individual members of the group) being regarded as a party to the action.

The rules introduced a new procedure that provides extended possibilities of handling disputes concerning a large number of uniform claims more effectively. In practice, rules on collective actions allow a better (procedural) examination of uniform claims, and a large number of uniform claims in particular, than the examination provided in practise under the rules on the joinder of causes of action etc. Rules on collective actions also facilitate access to the courts and thereby support the enforcement of justified claims that could otherwise be abandoned due to a lack of resources.

The issue of introducing rules on collective actions in Danish law was much discussed, and a pivotal question in that connection was 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 rules are described in paragraphs 4 to 9 below.

2. Collective actions under Danish law in general

The Standing Committee on Procedural Law thoroughly considered the need for and the advantages and disadvantages of introducing rules on collective actions in Danish law.

The Standing Committee stated that the purpose of the rules on collective actions should be to strengthen the practical impact of the existing substantive legislation. The assessment of the Standing Committee of whether to introduce rules on collective actions thus built 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 collective actions in Danish law, according to the Standing Committee on Procedural Law, the Committee found it difficult to assess the need for introducing any possibility to bring collective actions. However, the Committee found that the procedural 'tools' for enforcement of justified claims pursuant to the substantial legislation should be improved if it was possible to do so without disproportionate costs for the parties and society and without other material harmful effects.

The Standing Committee found 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 found that introducing rules on collective 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 was possible to plan an effective and proper examination of the claims.

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

The Standing Committee on Procedural Law was aware that there may be a certain risk that access to collective actions is "abused" to pressure enterprises and others to accept unjustified claims. When drafting the detailed rules on collective actions, the Standing Committee on Procedural Law therefore emphasised the importance of avoiding this risk by laying down a number of conditions for bringing collective actions, including that the court must approve the case as being suited for a collective action as well as a number of 'control mechanisms', which include that the

court must approve the group representative and rules on the court's procedural management, so that the risk of invalid claims being enforced was countered to a material extent.

In the explanatory notes to the Bill, the Ministry of Justice supported the views of the Standing Committee on Procedural Law and summed up that the proposal of the Standing Committee on Procedural Law was drafted based on an overall balancing of several relevant considerations which must be included in the assessment of whether rules on collective actions should be introduced in Danish Law, and that the Ministry of Justice found that the proposal of the Standing Committee on Procedural Law provided a model which implied a strengthened examination of uniform claims and also countered the possible risk of abuse to a very large extent.

3. Opt in or opt out

There is substantial difference between collective actions based on the opt-in model and collective 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 group 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 collective action of this type could on average include more persons than collective 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 rules on collective actions are based on a main rule that the members of the group must opt for the action (the opt-in model). Opt-in collective 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 group representative, the court may also decide that a collective action must comprise the group members who do not opt out of the collective 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 collective 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 collective 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 collective 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.

Collective actions based on opt out would include group members who have not become aware of a notice of the collective action, even though the notice was given in such a way that the great majority of the group members have become aware of the collective action. However, as stated by the Standing Committee on Procedural Law, the limited possibility of pursuing a collective 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 collective action does not imply any financial risk for the individual group member, see paragraph 7 below.

4. Fundamental conditions for collective actions

According to section 254a of the Administration of Justice Act, the absolutely fundamental condition for allowing a collective action is that the action concerns uniform claims that are brought on behalf of several persons. 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 collective action concerning those issues. In such collective 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 group members, etc., if the group 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 collective actions, for example that the legal venue of all the claims must be in Denmark and that a group representative can be appointed.

It is also a condition that a collective action is deemed to be the best way of examining the claims, *i.e.* that the collective action is subsidiary to other ways of examining the claims. In each case, the court must therefore compare a collective action with realistic alternatives in the specific situation and on this basis make an assessment of whether the collective action must be deemed to be the best way of examining the claims. For example, it will not be possible to bring a collective 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 collective action that the group 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 collective action.

5. The group representative

In a collective action the group members do not participate as parties to the proceedings in the traditional sense, but are instead represented by the group representative who is appointed by the court. Thus, it is the group representative and not the group members who makes claims, raises allegations and adduces evidence, and the individual group members are not entitled to give evidence in person during the proceedings. Correspondingly, the group members have no formal authority to instruct the group 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 group representative. In collective actions according to the *opt-in model* the group representative may be appointed from (1) the members of the group; (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 collective actions it has been decided that the Consumer Ombudsman may be appointed as a group representative (*i.e.* in cases that fall within the scope of his powers)).

In collective actions according to the *opt-out model* only a public authority (*i.e.* the Consumer Ombudsman until further notice) may be appointed as the group 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 collective action according to the opt-out model.

The group representative must be able to safeguard the interests of the group members during the proceedings. This implies in particular that the group 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 group members during the proceedings. Moreover, the group 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 group 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 group representative is manifestly capable of paying the legal costs ordered (*e.g.* if it is a public authority).

The court may appoint a new group 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 group representative and a significant part of the group members have conflicting interests. The

court may appoint a new group representative upon request and on its own initiative. In an opt-in collective action the court *must* decide whether it is necessary to appoint a new group representative if requested by at least half of the group members who have registered as members of the collective action.

6. Institution of proceedings etc.

According to section 254d of the Administration of Justice Act, a collective 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 group representative and, in addition to the usual requirements to a writ, it must contain a description of the group, information on how the group members can be identified and notified about the case and a proposal for a group representative who is willing to undertake the task. When deciding whether to approve the collective 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 collective action, which means that it decides what claims are to be covered by the collective action. The court need not determine the scope of the collective action at the same time as appointing the group representative. However, the scope of the collective action must be determined before allowing group members to opt in or opt out of the collective action.

If the court approves the collective action, the group members must be notified thereof to give them a real possibility to opt in or opt out of the collective 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 group representative to give the notice, and the group 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 collective action a proper basis for making a well-considered decision as to whether they want to opt in or opt out of the collective 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 group members or by advertisements or other public announcement. Individual notice to known group 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 group members are made aware of the collective action and their possibility of opting in or opting out of such action. Individual notice to each of the group 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 group 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 group 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 group members must be assumed to become aware of the collective 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 collective actions on its website with the information (or links to the information) which the notification to the group members must contain, including information on the time limit for opting in or opting out and information on where the group members are to register their notice of opting in or opting out.

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

When the time limit for opting in or opting out of the collective action has expired, it has then been determined who are covered by the collective action, *i.e.* which group members are covered by the binding effect (legal force) of the court's decisions in the case, and who the group 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 group 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 collective actions, however, certain special rules apply to legal costs in this type of cases.

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

Moreover, in collective actions according to the opt-in model the court may decide that the group member must provide security for the legal costs as determined by the court in order to join the collective action (which security will then resemble an 'opt-in fee'). However, the group 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 collective action satisfies the conditions for free legal aid pursuant to sections 327-329 of the Administration of Justice Act and the group member satisfies the general financial conditions for free legal aid pursuant to section 325.

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

In a collective action according to the *opt-in model* a group member who has registered as a member of the collective action may be ordered to pay legal costs within an overall amount which may be divided in two. Firstly, the group 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 collective action, see above. Secondly, the group member may be ordered to pay legal costs by an amount not exceeding the amount which will be payable to the group member as a result of the proceedings, *i.e.* amounts which are payable in

cash to the group member according to the judgment and which are in fact paid. The group member may be ordered to pay legal costs by an amount not exceeding the sum of the two amounts.

A group member who has not opted out of a collective 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 group 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 collective actions.

8. The position of the group members during the proceedings

As stated above, the group members are not parties to the proceedings in the traditional sense, but are represented by the group representative, who is considered a party to the case. However, in a number of respects the group 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 collective actions have a binding effect on the group members who are covered by the collective action.

The group 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 collective action arise, group members covered by the collective 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 group members have received notice and had the time to react to this notice. The court also has discretionary power to decide that the group 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 collective action is withdrawn or dismissed, a group member who is covered by the collective 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 group member takes over the case as it was before it was withdrawn or dismissed.

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

9. Appeal

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

The group representative may appeal the entire judgment or parts thereof. The appeal made by the group representative may thus cover all group members, some group members or one group member. If the group representative appeals, a number of the rules on collective 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 collective action was brought according to the opt-in or the opt-out model in the first instance) and may decide that the group 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 group member satisfies the financial conditions for free legal aid. Moreover, the group 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 group members who have opted in or who have not opted out of the appeal and is heard according to the rules on collective actions.

If the group representative does not appeal, an appeal may be initiated by any person who can be appointed as a group representative, see para-

graph 5 above. In that case, the court will have to decide whether the appeal may be approved as a collective action according to rules corresponding to the rules for approval of collective actions in the first instance.

If a collective action judgment is appealed by the opposing party, the appeal will be heard according to the rules on collective actions. This implies, *inter alia*, that the group 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 group members, some group members or only one group member.

If a collective action judgment is not appealed collectively by either party, each group 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.