



Class action in Norway



Ørjan Salvesen Haukaas
Partner



Lars Albert Jøstensen
Senioradvokat



Marie Bjørk Myklebust
Fast advokat



Stian Ohm Netland
Advokatfullmektig

1. Introduction

Certain disputes may involve multiple parties having either identical or substantially similar claims and/or identical or substantially similar obligations. Where the factual and legal basis is the same, it may be inefficient in terms of both time and costs to handle each case separately. Separate decisions may also result in incompatible rulings on similar issues.

If a series of claims arise from e.g. the sale of a new housing project, mass produced goods, investment products, medicines or breaches of antitrust laws, it could thus be beneficial that all claims are handled in the same hearing. For these reasons, the Norwegian Dispute Act section 35-1 provides for an option of class action, where an action is brought by or directed against a group or "class".

The class act option was introduced in the Disputes Act in 2008, and is thus still a relatively new option to pursue under the Norwegian procedural system. However, class actions have grown increasingly common in Norway and in the following sections we explore some the necessary prerequisites in order to bring a class action. We also discuss positives and negatives in relation to class actions.

2. Who can initiate a class action?

A class action must be brought by a claimant by submitting a writ of summons. The claimant may be a professional party or non-professional party e.g. a consumer, and must fulfil the conditions for class membership, cf. The Dispute Act section 35-3 (1) letter a.

The requirement for class membership (in addition to having a claim that falls within the scope of the action) is that the person could have brought or joined an ordinary action before the Norwegian courts. This means (i) that the claimant must have the legal capacity to act as a party in a court case as stipulated in section 2-1 of the

Act and (ii) that Norwegian courts are the correct legal venue for the individual class member, pursuant to the Dispute Act section 4-3 and 4-8.

A common form of class action is where multiple consumers bring an action against a company that provides consumer goods or services. Class actions may also be brought by one or more legal persons against multiple defendants, however this is not as common.

Organisations and associations, and public bodies charged with promoting a specific interest, may also bring a class action, provided that the action falls within its purpose and normal scope pursuant to Section 1-4 of The Dispute Act. An example where this has been attempted is a case brought by an association for customers of home security systems (Alarmkundeforeningen) against two companies offering home security systems (Verisure AS and Sector Alarm AS). Alarmkundeforeningen maintains, on behalf of approximately 400,000 customers, that the companies have overcharged its customers and that the claim may amount to more than NOK 1 billion.

As discussed below, the class action has been rejected by the District Court and the Court of Appeal, and it is increasingly unlikely that it will be accepted.



3. Which disputes may be handled as a class action?

3.1 Overview of the prerequisites for a class action lawsuit

The term class action is defined in the Dispute Act Section 35-1 (2) as an action that is brought by or directed against a class on an "*identical or substantially similar factual and legal basis*", and which is "*approved by the court as a class action*".

Hence, class actions in Norway require court approval. In order for the court to give its approval, the following conditions in the Dispute Act Section 35-2 (1) letters a-d must be met:

"a. several legal persons have claims or obligations for which the factual and legal basis is identical or substantially similar,

b. the claims can be heard by a court with the same composition and principally in accordance with the same procedural rules,

c. class procedure is the most appropriate method of hearing the claims, and

d. it is possible to nominate a class representative pursuant to Section 35-9."

3.2 Factual and legal basis must be identical or substantially similar

The first condition is that "*several legal persons have claims or obligations for which the factual and legal basis is identical or substantially similar*". The requirement is not alternative, both the factual *and* legal basis must be identical or substantially similar in order for a class action to be accepted. This must be construed in light of letter c, which requires that "*class procedure is the most appropriate method of hearing the claims*".

It is difficult to specify in general when the factual and legal basis for the claims or obligations would be sufficiently similar and the requirement must be assessed on an individual basis.

In Rt-2010-267, the Norwegian Supreme Court considered whether the requirements in section 35-2 (1) letter a were fulfilled. A housing association representing 89 members had filed an action against the contractor, claiming damages and price reductions for defects in bathroom floors. However, some of the members had bought the apartments from the contractor directly, whilst others had bought them on the secondary market.

This meant that the factual basis was identical, but the legal basis was different since some members or the group founded their claim on the contract with the contractor while others founded their claim on the contract with the relevant seller. However, both groups were also relying on the Property Sales Act (Norw. *avhendingslova*) and a person who buys an apartment in the secondary market is also entitled under the act to claim compensation directly from the previous seller - which in this case meant the contractor.

The Supreme Court emphasised that the buyer's right in the secondary market to claim compensation from previous sellers, was limited. However, the Supreme Court stated that this limitation was minimal and, therefore, that the legal basis was substantially similar, cf. the Dispute Act Section 35-2 (1) letter a. As a result, the class action was approved.

3.3 Court composition and procedural rules

Letter b sets out a requirement that the *"claims can be heard by a court with the same composition and principally in accordance with the same procedural rules"*. The same requirement also applies for cases where the claimant brings multiple claims (joinder of claims), cf. the Dispute Act Section 15-1 (1) letter c.

It is not required that the claims must be able to be heard in the exact same form of proceedings, as it is sufficient that they can be heard *"principally"* in accordance with the same procedural rules. However, the condition presumably has limited practical significance, as the claims must be based on *"substantially the same factual and legal basis"*, which would presumably mean that they are likely to fall under the same procedural rules.

3.4 Most appropriate method of hearing the claims

Another prerequisite is that *"class procedure is the most appropriate method of hearing the claims"*. Whether class action is the most appropriate method must be determined based on a specific assessment of the relevant case, in which several elements will be relevant.

The court must determine whether class action is *more beneficial* than other forms of proceedings. This means that the court must compare this form of proceedings with the other alternatives, such as individual lawsuits and consolidating separate cases for joint hearing.

As mentioned above, letter a and letter c must be viewed in light of one another. In a judgement by the Norwegian Court of Appeal (LB-2017-163624), the court stated that the fact that individual circumstances have a prominent role for several of the questions raised in the case, indicates that the disadvantages of approving class actions could easily outweigh the advantages. In other words, the level of similarity between factual and legal basis, as set out in letter a, may be relevant for the assessment of whether class action is the most appropriate method of hearing the claim. The more individual elements, the more likely it is that separate lawsuits would be more beneficial. Since the individual elements were consistently prominent in the above mentioned case, the court of Appeal did not approve the class action.

The preparatory works sets out that another relevant factor is whether it is possible to define the relevant group/class in a clear and unambiguous way and whether class action, in practice, is the claimants' only way to pursue their claims, cf. Ot. prp. nr. 51 (2004-2005) page 492. If class action is the only way for the class members to pursue their claims, this will be a strong argument for allowing the action.

The Court of Appeal case RG-2009-974 is an example where the court concluded that class action was not the most appropriate method, cf. section 35-2 (1) letter c. The court emphasised that only one of the members in the class had stated that she would pursue the case. A class action would then result in significantly higher costs than other forms of proceedings. Approval was therefore not granted.

3.5 Nomination of a class representative

Letter d requires that there is basis for nominating a class representative, which is the legal person who will act on behalf of the class.

A class representative shall secure the rights and obligations of the class in the class action, and ensure that the members are kept properly informed, cf. the Dispute Act Section 35-9 (1). The class representative is appointed by the court, and it is required that the relevant legal person is capable of acting in this role, which involves being able to secure the interests of the class in a satisfactory manner and to bear any potential liability for costs on behalf of the class, cf. third paragraph. The latter is also explicitly stated in the Dispute Act Section 35-11 (1).

In the case mentioned above regarding home security systems, the class representative had requested, as a prerequisite for being nominated as class representative, that the court approved certain costs related to third party funding of the case. The Norwegian Court of Appeal found that it was not possible to approve the class action on those terms, and therefore rejected the class action. The decision has been appealed and is due to be heard by the Supreme Court during 2023 (cf. HR-2022-2272-U).

4. Opt-in or opt-out

Class actions can be arranged in two different formats: opt-in or opt-out. The two alternatives are set out in, Section 35-6 and 35-7 respectively. The two formats are different in terms of both the necessary preconditions and legal effects of the class action.

The main rule is that class actions, if approved by the court, are organised according to the "opt-in" format, cf. the Dispute Act Section 35-6 (1). Under this format, class actions include only those who registered as class members. Persons who have claims that fall within the scope of the class action may register as class members, and registration must be done within a time limit set by the court.

However, in some cases, the court may decide that the class action should be organised as an "opt-out" process instead, cf. the Dispute Act Section 35-7 (1). This means that persons who have claims within the scope of the class action, shall be class members without registering for the action. Persons who do not wish to participate in the class action, must therefore actively withdraw from the proceedings.

Given that the opt-out format may cause liabilities for persons who have not done anything actively to participate, the format is only available in specific situations. According to Section 35-7 (1), the court can only decide that the action shall be organised as an "opt-out" process if the claims:

"a. individually involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions, and

b. are not deemed to raise issues that need to be heard individually"

In other words, the opt-out format is only available in a limited range of cases that only involve small amounts or interests for each member.

5. The responsibilities of the court

Regardless of whether the class action is organised as an “opt-in” or “opt-out” process, the court is obliged to maintain a class register. How the register shall be maintained is further regulated in the Regulation on Class Actions. The court cannot leave this assignment to the parties or the counsels, cf. Supreme Court judgement Rt-2014-193 (section 15).

Further, the court shall by notice, announcement or other method, ensure that the class action is made known to those who may join it, or for those who are automatically class members in case of an "opt-out" process, cf. the Dispute Act Section 35-5. The court may delegate this responsibility to the class representative. The notice or announcement shall, among other things, clearly state what the class action and proceedings entail, including the consequences of registering or deregistering as a class member, the potential liability for costs that may incur and the authority of the class representative to settle the case.

The court's decision in the class action is binding for every person who is a members of the class at the time the decision is passed, cf. the Dispute Act Section 35-11 (1). The members are then bound by the common issues that the court has concluded on in the decision. However, it is not unlikely that the members' claims also raise other questions beyond the decision in the class action. These questions must then be determined in a separate lawsuit.

6. Costs

As already mentioned, a requirement in order to be appointed as the class representative is that the relevant person is able to bear any potential liability for costs on behalf of the class, cf. the Dispute Act section 35-9 (3). The representative's liability for potential costs is explicitly stated in the Dispute Act Section 35-12 (1). The intent with this obligation is to avoid that class actions are brought without necessary funding.

However, the class representative and the person who has brought the class action, may in opt-in class actions request the court to decide that class members shall be liable for a specified amount of the potential costs, cf. the Dispute Act Section 35-6 (3). The court can also decide that all or part of the amount shall be paid to the counsel before registration. This may be a practical and reasonable arrangement to ensure that expenses may be covered as they are incurred. The court cannot, however, make these decisions on its own initiative. The court must be requested by either the class representative or the person who brought the class action in order to decide that members shall be liable for a specified amount, or that the amount shall be paid before registration.

The members' potential liability for costs is further regulated in the Dispute Act Section 35-14 (1). The provision states that the class members are, among other things, liable towards the class representative for costs imposed on him/her pursuant Section 35-12, provided that the *court has decided* that each member shall be liable for a specified amount of the potential costs in accordance with Section 35-6 (3).

Further, the class action must be as an “opt-in” process in accordance with Section 35-6. If the class action is organised as an “opt-out” process, the class representative is responsible for all the costs. The class action mentioned above concerning home security systems was raised as an opt-out class action, which is the reason why the costs are at issue in that particular case when determining the class representative.

7. Summary

Class actions may only be brought if the conditions in the Dispute Act Section 35-2 (1) letter a-d are fulfilled, and the court approves the action as a class action. If the court does give approval and concludes on the issues in the case, the conclusion will be binding for all the members of the class.

Although there have not been many class actions in Norway since the Dispute Act entered into force, class action will in many cases be a practical way of conducting the case. One of the benefits with class action is that it makes it possible to handle a large amount of claims and parties in one case, and hence it is efficient for the class viewed as a whole when there are multiple claims or parties. However, as class action cases typically are extensive in terms of scope and complexity, it may be less efficient for each class member viewed in isolation when compared to the option of bringing an individual claim. Therefore, if the aim for the individual party is to get a decision as fast as possible, it may be more beneficial to bring an individual claim. Nevertheless, in many cases, there may be reasons why the parties are not able to, or do not want to, bring their case on their own, which may make class action a preferable option.

Further, the total amount of litigation expenses will often be significantly lower if common issues are reviewed by the court in one set of proceedings, rather than several independent proceedings. Hence, class members may be able to save a considerable amount of litigation costs by bringing their case as a class action. For this reason, combined with the fact that costs related to court cases in general continue to increase, we expect the number of class actions to increase in future years.

However, class action is not the only procedural option for cases with multiple claims and/or parties. A different option may be to request the court to consolidate cases for a joint hearing. Another option is where multiple claimants or defendants join, or are joined into, the same action, either by an initial joinder of claims, or by a subsequent joinder of new claims against third parties into an ongoing action. A third option is a so-called pilot case.

The Litigation & Arbitration team at DLA Piper Norway has considerable experience with handling disputes both for and against multiple parties, and the practical and legal considerations that should be made in each case with respect to the different procedural options.