

## The class-action paradigm shift is here. The process of transposing the European Directive on representative actions gets underway

A radical change in the dynamics and functioning of class actions – which will see them renamed “representative actions” – is on the horizon. Injunctive and redress actions will be able to be brought for any infringing conduct that harms the collective interests of consumers. A special process has been created for redress actions, which involves a prior certification phase that aims to verify whether the action is viable (the criteria analysed are homogeneity, standing, absence of procedural obstacles, and that it is not manifestly unfounded) and determine the conduct and consumers affected by the action’s outcome. The general rule is that representative actions will affect all consumers, unless they expressly opt out of the class action. If all the consumers affected cannot be determined, a lump sum will be ordered to be paid that, at the enforcement stage, a liquidator will distribute to consumers who can prove that they qualify as beneficiaries. Other important novelties include the redress settlements, which – after court approval – will be binding on consumers who do not express their wish to withdraw from the agreement. In short, this future regulation aims to foment the use of representative actions and ensure that consumers can benefit from them when they are upheld.

The Council of Ministers has released the approved text of the Preliminary Draft Law for the Protection of the Collective Interests of Consumers (“**Preliminary Draft**”) for public consultation until 18 January 2023. This is the first step in Spain’s transposition of Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC on injunctions for the protection of consumers’ interests (“**Directive**”).

As expected, the Preliminary Draft is a complete regulation that, as it stands, contrasts with the mere references to the litigation of supra-individual interests contained in the text currently in force. This is a thorough reform of the current legal framework governing class actions. In line with the mandate of the Directive, it aims to encourage consumers to resort to these actions (which will now be called representative actions) and seek the injunctive and redress remedies available (both together and individually), as well as provide them with their own special procedure. To this end, the Preliminary Draft foresees a single and coherent system of collective protection that will be included in Civil Procedure Law 1/2000 of 7 January (articles 828 to 885) (“**Civil Procedure Law**”). This new procedural framework will repeal the current procedural provisions that distinguish between class actions based on the type of interest protected (collective or varied interests), the rules on publicity, the summoning and participation

of consumers, the specific preliminary proceedings for individual summons, and the rules on enforcing judgments that uphold class actions. It will also reform the substantive rules relating to these types of actions.

The objective scope of representative actions is broad, since they can be brought in respect of any type of infringement that has harmed the collective interests of consumers.

We set out main aspects of the Preliminary Draft in the following sections.

## 1. TYPES OF REPRESENTATIVE ACTIONS

The Preliminary Draft establishes two types of representative actions: injunctive actions and redress actions. The former aim to stop the infringing conduct and prohibit it from happening again in the future. They may be brought against conduct that has already ended if there are sufficient grounds to believe that it will be start again. These are therefore the injunctive actions already contemplated in the current legal framework.

Redress actions are conceived broadly, as they include compensation for the damage the infringing conduct has caused the consumers and repairing or replacing the goods purchased, reimbursing or reducing the price paid for them and contract termination.

In turn, these actions may be domestic or cross-border depending on the Member State in which the claimant entity is registered.

Both actions can be brought simultaneously for the same conduct, but – subject to the court’s approval during the certification phase – they can also be brought separately if the matter is highly complex or doing otherwise may delay the process. In this scenario, the court may suspend the redress action until the injunctive action is resolved.

## 2. COMMON ASPECTS OF THE TWO TYPES OF REPRESENTATIVE ACTIONS

The Preliminary Draft establishes different procedural mechanisms for injunctive actions and redress actions. But there are also some common elements:

- (i) The current system of legal standing to bring an action has essentially been maintained. Associations registered with the State Register of Consumer Associations or with regional registers (which will be included in the list of entities entitled to bring national representative actions, also available in a public database), the Public Prosecution Service, the Directorate General for Consumer Affairs, regional and local consumer-protection bodies, and qualified entities that other Member States appoint to exercise cross-border actions and included in the European Commission’s list will all be entitled to bring such actions.
- (ii) The first instance courts of the defendant’s place of residence have jurisdiction to hear these actions. If it does not have a place of residence, jurisdiction will lie with the first instance courts of the place where it has an establishment, and if it has no a place of residence or establishment within the national territory, the first instance courts of the place where the

infringing conduct occurs or has effects. The Preliminary Draft foresees the possibility of the General Council of the Judiciary approving certain specialist courts to hear representative actions exclusively.

- (iii) Individual participation is excluded. Unlike under the current framework, consumers will not be able to participate in collective proceedings, either in their own capacity or represented by consumer associations.
- (iv) The claim must identify the consumers affected by the claim or, failing that, specify the characteristics and requirements that they must meet to qualify as beneficiaries.
- (v) Where consumers have suffered damage due to having brought representative actions, the limitation period for individual actions to obtain compensation for that damage is suspended. This provision will apply to all infringing conduct committed on or after 25 June 2023.
- (vi) Access to sources of evidence, including those necessary to identify the consumers concerned. The requested disclosure must be proportionate and will be subject to the rules on access to sources of evidence in damages claims for competition law infringements (articles 283 *bis b*, *bis b*, *bis d* to *bis h* and *bis k* of the Civil Procedure Law).
- (vii) Preferential processing throughout the proceedings, including appeals. A cassation appeal to the Supreme Court is possible in any case.
- (viii) Judgments cannot be provisionally enforced.
- (ix) Claimant entities cannot abandon (*renunciar*, which is definitive) representative actions once they have begun and, if they withdraw from the proceedings (*desistir*, which is not definitive), the court will decide how the legal costs are to be allocated based on the grounds put forward.

### 3. PROCEDURE FOR INJUNCTIVE ACTIONS

The procedure for injunctive actions is the following:

- (i) The claimant entity must first address the complaint to the company or professional or the claim will not be admitted.
- (ii) The rules for oral trials apply, but with a period of 20 days to respond to the claim and in all cases there will be a hearing and the possibility for an appeal.
- (iii) Precautionary measure flexibility: the claimant can ask for the infringing conduct to stop temporarily, if it proves that the conduct is ongoing. The obligation to provide security may be waived depending on the circumstances of the case, the amounts involved and the social repercussions of the interests at hand.
- (iv) The affected consumers are not required to express their willingness to join the injunctive action or benefit from the judgment.

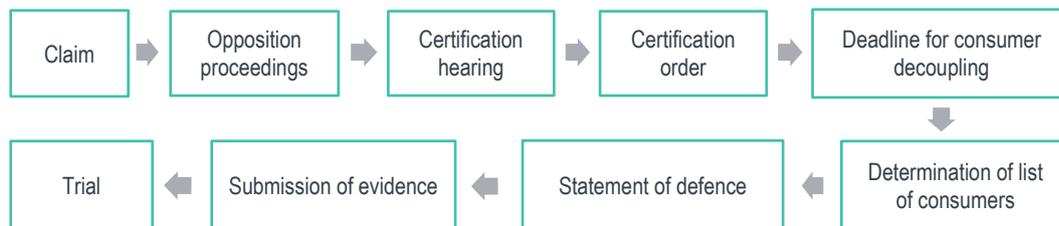
#### 4. REDRESS ACTIONS AFFECT ALL CONSUMERS CONCERNED

As a general rule, redress actions will affect all consumers concerned. But an opt-out mechanism has been introduced under which all consumers are bound by the outcome of the process unless they expressly request to be excluded.

Exceptionally, the court may decide to apply an opt-in system – i.e. the outcome of the proceedings will only be binding on consumers who expressly agree to be bound. This will only be agreed where the sound administration of justice requires it, and provided the amount claimed for each beneficiary exceeds EUR 5,000.

#### 5. REDRESS ACTION PROCEDURE

The following graph depicts the redress action procedure more clearly:



We explain the most important phases in the following sections.

##### 5.1 THE CERTIFICATION HEARING

The certification hearing must be convened after the claim has been admitted. It must resolve the issues the defendant raises (lack of jurisdiction, lack of competence or lack of standing, or an obstacle preventing the proceedings from being validly pursued) and will discuss whether the conditions for the legitimacy of the action are met: the necessary homogeneity and that the action is not manifestly unfounded.

Homogeneity is deemed to exist where the infringing conduct, the collective damage and the causal link between them are apparent without needing to consider factual or legal aspects that are particular to each of the consumers concerned.

This initial stage also involves checking that there is no conflict of interest in relation to third parties funding the proceedings (which must be indicated in the claim). There will be a conflict of interest if the defendant is a competitor of the funder or an entrepreneur on whom the funder depends, or if the court notices that the decisions in the proceedings are unduly influenced by the funder in a way that may be detrimental to the interests of the consumers.

##### 5.2 THE CERTIFICATION ORDER

The certification order must determine the conduct (objective scope) and the consumers affected by the process (subjective scope). If the consumers cannot be identified, the order will establish the characteristics and requirements that must be met to qualify as a beneficiary.

Regardless of whether the certification order is approved or not, it can be appealed. If a final decision is issued denying the certification, no further representative actions for redress remedies can be brought in relation to the same subject matter. But the process may continue in order to resolve an injunctive action if one has been filed simultaneously.

The certification order will be communicated individually, if possible, or publicised in the media, and consumers will be given a time limit (of between two and four months) to express their wish to be excluded (or included, if an opt-in system applies) from the representative action through an electronic platform.

### **5.3 EFFECTS OF CERTIFICATION OF THE REDRESS ACTION ON INDIVIDUAL ACTIONS**

Certification of the redress action has the following effects on individual actions:

- (i) A consumer filing an individual action during the period given to consumers to express their wish to be excluded from the representative action, is equivalent to him or her expressing a wish to be excluded from the representative action.
- (ii) After this period expires, individual actions for damages will no longer be admissible.
- (iii) In individual actions that are pending, the claimant consumer must state whether or not they wish to be bound by the representative action.

### **5.4 THE LIST OF CONSUMERS AFFECTED BY THE REPRESENTATIVE ACTION**

The claimant must provide the court with a list of consumers who wished to opt out of the representative action (or to be bound by it, if an opt-in system applies), which the court will approve after the defendant has been heard.

### **5.5 FURTHER PROCESSING**

The defendant must answer the claim within 30 days of being notified of the order approving the list of affected consumers. The new framework does away with the prior hearing that takes place in an ordinary trial and the parties are given ten days to submit evidence in writing, the admissibility of which the court will rule on.

The ruling admitting the evidence (or not) will summon the parties to trial according to ordinary trial rules.

### **5.6 PROCEDURAL ALTERNATIVE**

If requested by all parties or if the court deems it appropriate, the proceedings may alternatively be conducted by successive court decisions: first ruling on the defendant's liability in relation to the conduct in question, and then determining the specific amounts to be paid.

### **5.7 CONTENT AND EFFECTS OF A JUDGMENT UPHOLDING A REDRESS ACTION**

If a court upholds a redress action, the judgment should determine in as much detail as possible the beneficiaries and the specific compensation to which they are entitled. If all the beneficiaries cannot be identified, the judgment should set a lump sum amount that should be paid to each of the consumers affected. This amount must be deposited with the court within the time indicated in the judgment.

The judgment will affect the consumers listed in the certification order, even if they have not been identified individually. It will also have *res judicata* effect on a redress representative action regarding the same subject matter.

## 6. REDRESS SETTLEMENTS

For them to be binding, redress settlements need to be court approved. A settlement cannot be approved if it unduly harms consumer rights, violates mandatory rules or is subject to conditions that cannot be fulfilled. The approval system varies depending on whether the settlement is reached before or after the action's certification. Once a settlement has been approved, no representative action over the same subject matter can be brought. A redress settlement does not mean that the defendant has acknowledged liability or guilt.

## 7. COMPLIANCE WITH AND ENFORCEMENT OF THE JUDGMENT UPHOLDING THE REDRESS ACTION AND REDRESS SETTLEMENTS. CLAIMANT ENTITY APPOINTED LIQUIDATOR

Consumers do not need a lawyer or court agent (*procurador*) to have judgments or redress settlements enforced. All they need to do is submit the relevant forms electronically.

If all the beneficiaries are identified, they must all be paid the corresponding amount. But if they are not, the defendant must deposit the lump sum set in the judgment into the court's deposit and consignment account. In these cases, the claimant entity will be appointed as liquidator to distribute this amount among the beneficiaries within the deadline set by the judge after verifying whether they meet the requirements indicated in the judgment. The liquidator may request this amount to be increased if it proves insufficient and the court will rule on this matter after listening to the defendant and holding a hearing.

The first instance judge who heard the representative action will hear disputes regarding the amounts to be distributed. If the liquidator does not pay a particular beneficiary, he or she may seek payment from the court (which again can be done without a lawyer and court agent).

After the deadline set by the judge for distributing the amounts (and, as the case may be, after the extension of the deadline), the claimant entity appointed liquidator must submit an accounting statement with a list of beneficiaries and the payments they have each received. The defendant entity may challenge certain payments and items, which the court will resolve after a hearing which the claimant entity (as liquidator), the defendant, and the beneficiaries of the challenged payments will all attend. If the court rules that the payment should not have been made and the liquidator is found guilty of fraud or gross negligence, he or she will be jointly and severally liable for reimbursing the amount.

After the liquidator's accounts are approved, the remaining funds will be returned to the defendant.

Non-monetary rulings can be enforced without a lawyer and court agent by filing a form. If appropriate, the court will order enforcement *ex officio* and it is supported by a system of coercive fines.

## **8. THE PUBLIC REGISTRY OF REPRESENTATIVE ACTIONS**

The public registry of representative actions publicises online the decisions issued in proceedings over representative actions, as well as information on affected consumers, how to find and access the electronic platform, how to request compliance with the judgment or the redress settlement and the deadlines for doing so.

## **9. TEMPORAL SCOPE**

Proceedings for the protection of collective and varied interests of consumers that are pending on the date the new law enters into force will proceed through all instances and extraordinary appeals – including enforcement proceedings– according to the procedural legislation that applied prior to the reform.

## **10. OTHER REGULATIONS SUBJECT TO REFORM**

The Preliminary Draft adapts the General Consumer Protection Law and other complementary regulations to this new procedural framework, and introduces the requirements that entities authorised to bring representative actions in other Member States of the European Union need to meet. It also foresees the reform of, among other legislation, the Unfair Competition Law (an action for damages may only be brought if the agent acts fraudulently or negligently) and the Law on General Contracting Conditions. In particular, representative actions that the adhering professional may bring under the latter law will be processed according to the rules for consumer representative actions.

## **11. NEXT STEPS**

The Government has approved the Preliminary Draft's urgent processing. We will keep you informed of any new developments regarding its processing and final approval, which will presumably take place in 2023, since the deadline for transposing the Directive ended on 25 December 2022 and its provisions apply as from 25 June 2023 (Article 24 of the Directive).

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