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Client briefing

25 March 2024

Major changes to Spanish class actions and to make the civil courts more efficient

The Draft Basic Law on civil procedure efficiency measures and consumer collective actions was approved on 12 March and makes major changes to Spanish civil procedure. It enshrines the paradigm shift announced in the earlier preliminary draft that is designed to encourage consumers to bring this type of action and to enable the greatest possible number of consumers to benefit from successful actions. In terms of making civil proceedings more efficient, it introduces a series of important measures, most notably the requirements that parties attempt to resolve their disputes by alternative or appropriate conflict resolution methods before they can file a lawsuit in civil and commercial matters, and the possibility of judges issuing oral judgments in oral trials. New courts of first instance will also be created. The full text (in Spanish) can be found at the following link.

On 12 March the Council of Ministers approved the text of the Draft Basic Law on civil procedure efficiency measures and consumer collective actions ("**Draft Law**"). It was published on 22 March and has been sent to parliament for urgent approval. The Draft Law has three main pillars.

The first pillar is an **entirely new and comprehensive regulation of collective actions**. It overhauls the current regulation of class actions with the stated aim of encouraging consumers to bring this type of action. To this end, it creates a special procedure that is designed to ensure consumers get a swift outcome to collective actions. These provisions transpose Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of consumers' collective interests into Spanish law.

The second pillar concerns **procedural efficiency measures** that are designed to reduce litigation and streamline proceedings. The Draft Law picks up several of the measures that were left out of Royal Decree-Law 6/2023 of 19 December, and which come from draft legislation that was in the process of being approved when parliament was dissolved in May 2023 before the last general election. The main change will see parties required to go through **ADR** in an attempt to resolve their dispute before they can file a lawsuit in civil and commercial matters. Special rules on costs to encourage out-of-court settlements have also been introduced.

The third pillar relates to the **court reform** and will see new collegiate courts of first instance created.

1. PARADIGM SHIFT IN COLLECTIVE ACTIONS

The Draft Law maintains the essence of what was foreseen in the Preliminary Draft approved in January 2023, but with some modifications to reflect the feedback obtained during the public consultation phase, such as changing the name of this type of action from representative actions (which is the term used in Directive 2020/1828) to collective actions. For a detailed analysis of the Preliminary Draft, click in the following link.

The key aspects of the new provisions on collective actions are as follows:

(i) **Two types of collective actions** have been created: injunctions action and redress actions (which include compensation for damage caused by infringing conduct; repair and replacement of goods; price reimbursement or reduction; and contract resolution).

These actions may be brought in respect of any type of infringement that has harmed the collective interests of consumers and may be domestic or cross-border depending on the country where the claimant is registered.

(ii) Associations registered in the national or regional Registers of Associations and Users, the Public Prosecutor's Office, the Directorate General for Consumer Affairs, regional and local consumer protection bodies and designated authorised entities in other Member States have **standing to bring collective actions.**

(iii) The **courts of first instance** of the defendant's registered address or, failing that, of one of its establishments, have **jurisdiction** to hear collective actions.

(iv) The Draft Law maintains the **opt-out mechanism** as a general rule to determine the effects of redress actions on consumers. Under this system, these actions will bind all consumers, unless they expressly opt out of the action within the term for doing so set by the judge.

Exceptionally, a court may use the opt-in system, in which case the results of a collective action will only bind those consumers who have expressly opted into the action. This system may only be used when it is advisable for the sound administration of justice and when the amount being claimed for each consumer is more than EUR 3,000. Under the Preliminary Draft, it would only have been possible to use the opt-in system when the amount claimed per consumer was more than EUR 5,000.

(v) The key part of the special procedure for redress actions will be the **certification phase**, in which the court will determine if the standing requirements are met (i.e. sufficient homogeneity and that the action is not manifestly unfounded) and verify that there is no conflict of interest created by a third party financing the collective action.

In relation to financing, the Draft Law is stricter than the Preliminary Draft in that it requires that the claim contain a **full declaration of all sources of financing** and that it **allows the judge to demand disclosure of the financing contract** to verify whether its terms affect consumers, in which case a **hearing** will be held that the parties and the financier must attend.

(vi) The **certification order** must determine the conduct and the consumers affected by the process. The Draft Law extends the period (between two and six months) that consumers have to opt-in or opt-out of the collective action (using an online platform). After this period, individual redress actions will not be admissible.

(vii) **The procedural time limits** set out in the Preliminary Draft have, as a general rule**, been extended.** For example, in redress actions, the term to respond to a claim will be two months and the term to propose written evidence will be 20 days. In actions for injunctive relief (which will be handled in oral proceedings), the term to respond to a claim will be one month.

(viii) The Draft Law maintains the possibility of requesting **access to sources of evidence**, which, in essence, will be governed by the rules applicable to proceedings for damages claims for competition law infringements.

(ix) Once a **redress settlement** has been approved by the court it will be binding on consumers who have not opted-out of the collective action. A settlement cannot be approved if it unduly harms consumers' rights, violates mandatory rules or is made subject to conditions that cannot be met.

(x) In contrast to the Preliminary Draft, the Draft Law expressly provides that the judgment must include a ruling on **costs** per article 394 of the Civil Procedure Law.

(xi) In terms of **compliance with and enforcement of a judgment** upholding a redress action, the Draft Law **differs significantly** from what had been proposed in the Preliminary Draft in that it tasks the distribution to the consumers of the lump sum awarded in the judgment to a **liquidator** (as opposed to the claimant entity, as was the case in the Preliminary Draft). The liquidator must be an accounting expert with at least ten years' experience and will be chosen by the parties or, if they cannot reach an agreement, by the corresponding professional association (*colegio profesional*). Liquidators must have civil liability insurance and the legislation applicable to insolvency administrators will apply to them in the absence of more specific provisions on their role.

All the other provisions on compliance with and enforcement of judgments are essentially the same, including the requirement that any excess funds be returned to the defendant after the consumers have been paid their compensation.

(xii) The Draft Law clarifies that the limitation period for individual actions that is suspended when a collective action is filed will begin to run again from the moment the consumer expresses his or her intention to opt-out of the collective action.

(xiii) The Draft Law will not create the new public register of collective actions foreseen in the Preliminary Draft, and it will instead form part of the existing public register of general contracting conditions.

2. PROCEDURAL EFFICIENCY MEASURES IN CIVIL PROCEEDINGS

2.1. ADR methods

The Draft Law seeks to encourage the use of alternative or appropriate our-of-court dispute resolution methods in order to address the “exceptional increase in litigation” in recent years.

The main features of the regulation of these ADR methods are the following:

(i) **Concept of ADR**: any type of negotiation referred to in the Draft Law (private conciliation, confidential binding offer or independent expert opinion) or in other legislation (mediation, judicial conciliation or conciliation before a notary or registrar).

(ii) **Scope of application**: civil and commercial cases, including cross-border cases but excluding employment, criminal and insolvency matters, and any cases in which one of the parties is a public sector entity.

(iii) **Procedural requirement**: for a claim to be admissible in the civil courts, the parties must first try appropriate means of dispute resolution, except when the claim relates to the protection of fundamental rights, summary possessory actions or ex parte proceedings, among others.

(iv) **Proof of attempt to resolve**: the parties must document their negotiations and may evidence the same by filing with the court any document signed by the parties (or a neutral third party) stating who they are, the date(s) of the negotiations, what is at dispute and the name of the party or parties who made the initial proposal to negotiate.

Negotiations will be deemed to have ended if **(i)** 30 days after the other party receives the proposal to negotiate, no meeting or contact aimed at resolving the dispute has taken place or no written reply has been received from the other party; **(ii)** three months pass since the first meeting without a resolution having been found; or **(iii)** either party informs the other party that they consider that the negotiations have ended, provided that there is a written record of this.

(v) **Legal representation**: only necessary when the ADR method chosen is a confidential binding offer (except in cases involving an amount of less than EUR 2,000).

(vi) **Effects**: a party’s request to initiate ADR negotiations will interrupt limitation periods until the negotiation process ends without a settlement. The parties will have one year to file their claim from the date the proposal to negotiate is received or, if applicable, from the date the negotiations end without a settlement.

(vii) **Confidentiality**: the negotiation process and the documentation shared during the process must be kept confidential and may not be filed in judicial or arbitration proceedings, unless **(i)** the parties agree to the same in writing; **(ii)** the costs assessment is challenged; **(iii)** a criminal judge makes a justified request for disclosure; or **(iv)** when necessary for public order reasons.

(viii) **Rules on the awarding of costs**: a successful party in a dispute who expressly refused, without just cause, to participate in ADR negotiations will not be awarded its costs (meaning that the party that requested ADR will not have to pay them). When ADR is requested but refused, a costs order will be made if a claim is upheld, partially dismissed or accepted.

2.2. Other important changes in civil procedure

(i) It will now be possible for a judge to issue an **oral judgment in an oral trial**. In these cases the judgment will be recorded and the term for appealing it will begin when the party receives the audiovisual medium on which the judgment is recorded, together with the written version of the judgement prepared after the hearing. These rules will apply to oral proceedings that have already begun but no hearings have been held when the new law enters into force.

(ii) In relation to **auctions in enforcement proceedings**, enforcing creditors may no longer request that they be awarded the seized property if the highest bid is less than 70% of the auction price (article 670, Civil Procedure Law) or if there are no bids (article 671, Civil Procedure Law).

3. COURT REFORM: COURTS OF FIRST INSTANCE (*Tribunales de Instancia*)

The Draft Law modifies the organisational structure of the courts to simplify access to the justice system. The main change it introduces is to create new collegiate **courts of first instance (*Tribunal de Instancia*)**, in such a way that all the courts of each judicial district will fall under a single structure, based in its capital city, which will have a single first instance civil and criminal section (in some cases the civil section will be separate, and a commercial and a family section may be added), and will have a combined back office (the Judicial Office).

The judges of the current civil, criminal and commercial courts of first instance will be assigned to the new collegiate courts of first instance and will sit in three-judge courts (instead of single-judge courts).

This major restructuring of the first instance courts will be phased in over 2025.