THE CLASS ACTIONS LAW REVIEW

SIXTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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CONTENTS

PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this sixth edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more creative and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger
Slaughter and May
London
February 2022

Chapter 14

SPAIN

Alejandro Ferreres Comella and Cristina Ayo Ferrándiz[1]

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Spain has a judicial collective redress mechanism denominated 'collective actions'. The Spanish collective actions framework was established in Spanish law as part of the Civil Procedure Law 1/2000 of 7 January (the Civil Procedure Law), which entered into force in January 2001. The framework was not included in the initial drafts of the Law prepared by the Ministry of Justice. However, it was subsequently incorporated in the draft bill at the last stage of drafting prior to the bill's submission to Parliament. For that reason, the draft collective actions regulations received scant analysis and discussion during the parliamentary proceedings for the enactment of the Civil Procedure Law. The collective actions regulations are not drafted as a systematised, consolidated and structured body of regulations but rather are limited to a few rules spread throughout the Civil Procedure Law (essentially Articles 11, 15, 220, 221 and 519).

As we further discuss below, the Spanish collective actions system is basically an opt-out system, in the sense that the Civil Procedure Law provides that a decision issued in a collective action is binding on all members of the class whether the court rules on the claim or dismisses it (i.e., the decision has res judicata effects), but with important limitations. For instance, the Civil Procedure Law does not establish any mechanism to allow represented consumers to opt out (to avoid being bound by the decision on the collective claim and, therefore, to preserve their individual action).

It is only applicable to consumer protection issues, in which procedural standing to initiate the action is not granted to a member of the class but to consumer associations and the Public Prosecutor's Office.

This regulation, however, may suffer some changes in the future due to the approval of the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the Representative Actions Directive) and the future modifications of the Spanish Procedural Act that are still being discussed.

II THE YEAR IN REVIEW

Collective actions in Spain have been used very infrequently to claim individual, normally monetary, homogeneous rights of a class (i.e., a group of consumers whose underlying individual cases have factual and legal issues in common). Furthermore, in those very limited

1 Alejandro Ferreres Comella is a partner and Cristina Ayo Ferrándiz is a counsel at Uría Menéndez.

cases in which collective actions regulations have been used to claim individual homogeneous rights, they nevertheless involved contractual issues. We are not currently aware of any collective actions brought in Spain claiming damages arising from non-contractual liability (i.e., based on tort).

Thus, the most significant collective actions in Spain are related to contractual damages in connection with the execution of financial or other types of mass-service contracts.

In particular, Spanish consumer associations have filed numerous claims in recent years on the basis of the EU Unfair Contract Terms Directive.[2] They have sought a declaration of nullity for non-negotiated contract terms found to be unfair and, therefore, contrary to consumers' rights. The relief sought in these claims is the removal of the unfair terms from the defendant's model contract. While a declaration of the nullity of unfair terms is binding for the defendant company in relation to all its clients (i.e., it is understood to have res judicata effects erga omnes), most Spanish courts take the stance that each consumer must individually claim compensation for damages arising from the execution of the unfair contract terms by the defendant.

Nevertheless, some courts take the position that the reimbursement of consumers for the amounts the defendant has collected as payments under the unfair terms is not a compensation issue. Rather, it is a direct consequence of the declaration of nullity of the terms and, therefore, no further individual action is required, and reimbursement should form part of the relief granted in the collective action.

Nevertheless, we are not aware of any decision in Spain in which a court has ordered a defendant to reimburse consumers represented in a collective action brought by a consumer association.

By contrast, very few collective actions of a monetary nature have been tried in Spain. In fact, there have been very few reported decisions in Spain in which a court has ordered a defendant to reimburse consumers represented in a collective action brought by a consumer association. However, none of them have been discussed or solved in the year in review. In fact, no new attempts to file collective redress actions have been reported in the past year; analysts understand that consumer associations may prefer to wait for the new regulation on collective redress arising from the transposition of the Directive. This may be so in the case of the planned litigation related to the cars cartel.

III PROCEDURE

i Types of action available

Traditionally, Spanish civil procedure legislation has granted consumer associations legal standing to file actions aimed at protecting consumers' general rights or interests. These are rights or interests that cannot be apportioned to each consumer, such as the right to a clean environment. Protection is usually afforded by means of injunctive relief or, in contract law, by having a clause declared contrary to consumer rights and therefore void. However, before the enactment of the Civil Procedure Law, consumer associations could not file legal actions aimed at protecting individual homogeneous rights or interests of undetermined consumers.

The Civil Procedure Law instituted a system of collective actions whereby certain consumer associations can take legal action on behalf of either a determined or an

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

undetermined number of consumers who have sustained injuries or suffered a loss as a consequence of consuming a product or using a service. Although the Spanish system is usually compared with the US Federal Rule of Civil Procedure 23 – Class Actions (FRCP 23), Spain has in fact established a representative system.

ii Commencing proceedings

In effect, the Spanish collective action system is a representative system. Nevertheless, not all consumer associations are entitled to file legal actions on behalf of an undetermined number of consumers, only those that (1) have a nationwide and long-standing record of activity in the defence of consumer rights; (2) have been certified as 'representative' associations by the government; and (3) have been appointed as members of the national Consumers and Users Council.[3]

Having said that, the prerequisites for becoming a consumer association with standing to start collective actions are neither strict nor detailed. The standard of representation, therefore, is under-regulated in Spain.

According to the Civil Procedure Law, if the number, identity and specific circumstances of the aggrieved consumers are determined or are easily determinable at the declaratory stage of the proceedings, both the consumer associations and the groups of aggrieved consumers themselves (i.e., they do not need to be represented by a consumer association) have the capacity to sue on behalf of all the aggrieved consumers. In this regard, a group whose members comprise at least 50 per cent of all the aggrieved consumers is considered to be legally constituted as the representative plaintiff (i.e., as the plaintiff in the proceedings). For this reason, a group action is actually a sort of aggregation mechanism rather than a collective action.

Initially the Civil Procedure Law limited standing to initiate a collective action to consumer associations (and to groups of aggrieved consumers themselves where they are determined or easily determinable). However, in March 2014, Parliament passed Law 3/2014 of March 27, amending the 2007 Consumer Protection Law and adding new regulations on standing to initiate collective actions to the Civil Procedure Law. Pursuant to the new regulations, Spanish public prosecutors also have standing to initiate collective actions seeking compensation for consumers.

In contrast to class actions under other legal systems, Spanish class actions are not tightly regulated. In particular, there is no express regulation of compliance requirements for class actions, such as numerosity, commonality, typicality or the adequacy of representation. Nor is there a certification of class process prior to initiating the proceeding itself that confirms the fulfilment of these requisites. The Civil Procedure Law does not regulate the specific requirements that a collective claim must fulfil to be accepted, thus there is no specific reference to commonality as an essential prerequisite. Although it is understood that actions can only be considered class actions where the individual cases have underlying factual issues sufficiently in common, this lack of regulation is always problematic.

The Spanish collective actions system for homogeneous individual monetary rights is an opt-out system in the sense that the Civil Procedure Law provides that a decision issued in a collective action is binding on all members of the class, whether the court rules on the claim or dismisses it (i.e., the decision has res judicata effects).

3 Consejo de Consumidores y Usuarios; www.consumo-ccu.es/.

The collective actions regime also allows any represented consumer to file allegations that are supplementary to the collective action. This is not an opt-in mechanism since the consumer will be bound by the decision (whether or not the consumer appears in the proceedings in which the supplementary allegations are filed). Instead, it is a procedural mechanism, whereby represented consumers are entitled to contribute to the case by filing allegations supporting or supplementing those already made in the initial lawsuit.

In that regard, Spanish law establishes specific procedures for publicising a lawsuit to facilitate any class member's joinder to the claim on a supplementary basis.

However, and although the system is considered an opt-out system, the Civil Procedure Law surprisingly does not establish any mechanism to allow represented consumers to opt out (to avoid being bound by the decision on the collective claim and, therefore, to preserve their individual action).

While this lack of regulation casts doubts on the constitutionality of the collective actions regime, we are not aware of any attempts by consumer organisations to challenge the constitutionality of the absence of any opt-out mechanism. In any case, the lack of an opt-out system should oblige judges and courts to be very strict in their assessment of the traditional prerequisites for a class action (particularly in connection with the assessment of commonality and adequacy of representation). Consequently, if those prerequisites are applied very strictly and as a result very few collective actions are ultimately admitted, in those limited cases in which commonality is beyond question (basically, mass accidents in which causation is simple and evident, and no reliance issues need be discussed, such as the failure of the dam and resulting damage and civilian casualties in the *Presa de Tous* case), then the lack of an opt-out mechanism for the represented consumers may be constitutionally acceptable.

In short, the lack of an opt-out system either renders the entire collective actions regime inconsistent with the constitutional rights of represented consumers or justified because of the extremely narrow circumstances in which collective actions would be admitted.

Because the configuration of the class is not specifically regulated, there is no minimum threshold or number of claims required. However, as noted above, the group is considered to be legally constituted as the representative plaintiff (i.e., in cases where the consumers claiming are determined or easily determinable) when its members comprise at least 50 per cent of all the aggrieved consumers.

Having said that, and as will be noted below, both European and Spanish legislators are in the course of enacting new legislation regarding collective redress and related mechanisms, and this may change the currently applicable system in the coming months.

iii Procedural rules

According to the Civil Procedure Law, when consumers act as the plaintiff, they will be entitled to choose between filing the lawsuit with the court of first instance in their own domicile, the court in the defendant's domicile or the court linked to the underlying factual or legal relationship relevant to or affected by the litigation, provided the defendant has an establishment open to the public in that location or a representative who is authorised to act on its behalf. The various alternatives available to the consumer to file a lawsuit make it difficult to identify the most likely forum.

However, collective actions have different rules. In a collective action of an injunctive nature (i.e., cessation actions), the Spanish Civil Procedure Law sets forth that a plaintiff may bring the action before the courts of the place where the defendant company has any premises, or before the court of the place where the defendant has its registered domicile. If

the defendant company does not have a registered domicile or any premises in Spain, the plaintiff will be able to bring the injunction action before the courts of the place in which it has its registered domicile.

In turn, in collective actions of a monetary nature (i.e., compensation or reimbursement actions), the defendant's domicile is the primary basis for jurisdiction. Alternatively, this may be before the courts holding jurisdiction over the place where the underlying legal relationship to which the litigation relates was executed or should have effect, provided that the defendant has an establishment in that location that is open to the public or a representative who is authorised to act on the entity's behalf. However, it may appear complex for consumer associations to determine the place. Therefore, the defendant's domicile is the primary basis for jurisdiction in collective actions.

These rules are also applicable in collective actions for damages related to non-contractual liability.

In general terms, first instance civil courts have jurisdiction to hear damages claims filed by either a single consumer or a consumer association. However, following recent modifications of Spanish procedural laws, the commercial courts hear collective claims based on general contractual conditions or consumer regulations, such as cessation actions. As their name implies, commercial courts are specialised courts with a high level of expertise. Commercial courts also have experience in dealing with individual consumers' cases related to regulations on general terms and conditions, corporate matters, and unfair competition law and advertising, among other issues.

In these cases, the competent court will be that of the place where the defendant has an establishment or, failing that, has an address. If the defendant has no address in Spain, the court will be that of the place of the plaintiff's address.

In principle, only cessation actions (or pure class actions) are considered collective actions. However, the courts may consider claims that are merely aggregated to have been wrongly filed as class actions, and these may be accepted as collective claims and be referred to be dealt with by the commercial courts.

In Spain, there are two basic types of declarative procedure for seeking compensation: verbal proceedings and ordinary proceedings. The type of procedure will depend on the amount claimed, as follows:

a for amounts of up to €6,000, claims are dealt with in verbal proceedings; and

b where the amount is more than €6,000, the claim is dealt with in ordinary proceedings.

Collective actions of an injunctive nature (i.e., cessation actions) filed by consumer associations are tried in accordance with the regulations on verbal proceedings, whereas collective actions filed by consumer associations in which homogeneous individual monetary rights are disputed are tried in accordance with the regulations governing ordinary proceedings or verbal proceedings, depending on the amount claimed.

In both cases, civil proceedings start with the filing of the claim. The claim must include all factual allegations on which it is based, in as much detail as possible, as well as the legal grounds on which it is based. However, under the principle of jura novit curia, (1) the plaintiff is not required to set out the legal grounds in thorough detail, and (2) the legal grounds claimed are not binding upon the judge, who may uphold the action on the basis of alternative legal grounds.

If verbal proceedings are initiated, once the claim has been filed and leave has been given to proceed, the defendant is notified so that a defence (or a counterclaim) can be

presented within 10 working days (excluding Saturdays, Sundays, the month of August, national holidays, and non-working days in the autonomous region or the city where the proceedings take place). This period cannot be extended except when both parties agree to stay the proceedings.

Subsequently, the court will call the parties to a hearing in which they set out the evidence they are going to submit, produce that evidence and present their final conclusions, all at the same hearing.

If ordinary proceedings are initiated, once notified of the lawsuit, the defendant will have 20 working days to file a brief in response. This period cannot be extended except when both parties agree to stay the proceedings. Any allegation on which the defence is based, and any documentary evidence and expert reports on the facts or events on which the defence is based, must be attached to the allegations. It is unlikely that any other documents will be accepted subsequently (with very specific exceptions, such as expert reports).

The court will then call the parties to a preliminary hearing in which they set out the evidence they are going to submit and, ultimately, the court calls the parties to trial, at which the evidence and final conclusions are presented. Although the Civil Procedural Law requires the trial to be held within one month of the preliminary hearing, it is very common for the trial to be scheduled for between two and 12 months after the preliminary hearing, depending on the court's agenda and workload. When there are a lot of witness and experts, the court may schedule more than one day for the trial.

Unfortunately, there is no procedure to determine at an early stage whether a claim is admissible and passes the applicable minimum criteria (and which would allow manifestly unmeritorious cases to be discontinued). In fact, the collective actions framework does not establish any preliminary proceedings similar to those under FRCP 23, which aim at clarifying whether or not the traditional prerequisites of a collective action are met (i.e., commonality, numerosity, typicality and adequacy of representation). This is clearly one of the major failings of the Spanish collective actions system.

In general (i.e., for both individual cases and collective actions), the admission of a lawsuit is a highly bureaucratic procedural step, managed by court officials and not the judge, and procedural defences challenging the suitability of collective actions must be filed simultaneously with the statement of defence of the case on the merits (i.e., procedural motions such as misjoinder of actions or lack of standing must be filed together with the defence).

Nevertheless, the Judiciary Law of 1985 allows courts to reject legal actions that are 'clearly flawed' or that have been filed with 'procedural fraud'. In the limited day-to-day practice of collective claims, this provision has allowed defendants to file motions challenging the admissibility of claims on the basis that the lack of commonality in the represented consumers' underlying cases impedes the plaintiff consumer association's standing to file a collective action. Although the Civil Procedure Law does not expressly state that commonality is a prerequisite for collective actions, it nevertheless establishes that collective actions can be filed when a 'damaging act' affects several consumers. As noted above, the reference to a single, damaging act potentially suggests commonality is a fundamental prerequisite for collective actions.

However, since there are no specific regulations on the admissibility of collective actions, defendants do not have any guarantee that they will be entitled to challenge the admissibility of the legal action for lack of commonality (i.e., the consumer association's lack of procedural standing to file the action).

Defendants may challenge commonality by (1) disputing the lawsuit's admissibility (although it does not stay the proceedings); and (2) filing a procedural motion as part of their defence on the merits once the collective action has been admitted (i.e., following admission and simultaneously with the statement of the defence).

iv Damages and costs

Trials heard within the civil jurisdiction are held before a judge, therefore there is no jury.

The Spanish civil liability system is based on compensation. Consequently, indemnifiable damages should match the impairment or loss suffered by a person as a result of a given event or fact, whether the impairment or loss affects the person's vital physical attributes or his or her property or assets.

Indemnifiable damages include strictly economic damages and 'non-material damages' (including, for instance, damages for suffering or pain).

The Spanish legal system does not provide punitive damages.

The 'loser-pays' rule applies in Spain, except when the losing party has been granted legal aid benefits. In that case, even if the judgment orders the loser to pay the legal fees incurred by the counterparty, the order cannot be enforced against the loser.

On 4 November 2008, the Spanish Supreme Court issued a decision declaring null Article 16 of the Code of Ethics of the National Bar Association, which had banned quota litis agreements (contingency fees). As a consequence, contingency fees are now completely valid in Spain.

v Settlement

Although there is no specific legislation relating to the settlement of collective actions cases, and no judicial experience on class settlement has been reported to date, it may be understood that court approval is required for collective actions to be settled. However, a court can only reject a settlement if it affects (1) the fundamental individual rights of any of the parties that cannot be waived, or (2) the interests of third parties.

There is no specific provision either that provides for a mechanism by which class members can object and refuse to be bound by the settlement. Taking into consideration the lack of judicial experience, it cannot be set out how a court would manage a petition by a class member not to be bound by the settlement. In principle, and owing to the lack of any specific regulation, Spanish courts may be inclined to allow those individuals who are members of the class to keep their individual rights to claim if they expressly solicit so before the court before which the settlement was enforced.

Finally, due to the lack of regulation on class action settlements, there are no provisions on the need to publish the settlement agreement. This may make it more difficult for class members to exercise their right not to be bound by the settlement agreement, should this right be finally accepted by courts.

IV CROSS-BORDER ISSUES

There is no specific legislation that considers cross-border issues under Spanish procedural law. We are not aware of any case in which Spanish courts have asserted jurisdiction over any 'foreign' or global claims. However, EU law allows any authority or entity of any other Member State with procedural standing for cessation actions to file such actions to protect general consumers' rights in any Member State.

In accordance with the international rules of jurisdiction set out in the Brussels Regulation[4] and the Lugano Convention, if Spain were the jurisdiction competent to hear claims filed by consumers and users residing in Spain, this would also preclude excluding overseas claimants from opting into a Spanish class action.

V OUTLOOK AND CONCLUSIONS

On 13 September 2017, the European Commission announced the 'New Deal for Consumers', aimed at strengthening enforcement of European Union consumer law in the face of an increasing risk of EU-wide infringements.

Delivering on this commitment, on 11 April 2018, the Commission adopted the New Deal for Consumers package composed of a Communication on the New Deal for Consumers and two proposals for directives: one on representative actions for the protection of the collective interests of consumers (the Representative Actions Proposal);[5] and a second proposal on better enforcement and modernisation for the benefit of consumers.[6]

As noted above, the Representative Actions Directive was finally approved, incorporating important interesting changes at a European level by requiring the European Member States to implement a collective action mechanism through which specific entities are entitled to seek a compensation remedy on behalf of affected consumers, either by joining it to an injunction action or separately. Although this Directive does not imply significant changes in Spanish procedural regulation, since it already foresaw the possibility of joining the compensation remedy action to an injunction action, it may oblige Spanish regulation to take important decisions on specific matters such as the standing of the entities enabled to file this type of action, the confirmation (or not) of the effects of the decision issued within this type of action and the publicity of the action before its being filed, among other things.

In fact, in parallel to the discussion and approval of this Directive, the Spanish authorities are working on a modification of the Spanish Procedural Act that may incorporate some of these decisions and may also affect the existing collective actions system. A first draft of the regulation for the transposition of the Representative Actions Directive is expected for the end of March. The draft will have to be approved by the government at first instance and will then be sent to the Parliament for enactment. It is not clear whether Spain will meet the 25 December 2022 deadline for the transposition of the Directive.

4 Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

5 A proposal on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC.

6 A proposal to amend Directive 93/13/EEC on unfair terms in consumer contracts, Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, and Directive 2011/83/EU on consumer rights.

In our view, any amendment of the current Spanish collective actions regime should include at least (1) regulation of a pre-certification stage, similar to that provided by FRCP 23; (2) accurate regulation of commonality and the other prerequisites for certifying collective actions; and (3) the introduction and regulation of an opt-out mechanism that can be easily used by consumers represented in collective claims. Additionally, Parliament should seriously consider mass dispute resolution systems as an alternative to litigation. The European Ombudsman's compensation mechanism provides a clear alternative to the current judicial collective redress system, which is ineffective and, in many cases, unfair.

Appendix 1

ABOUT THE AUTHORS

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Alejandro Ferreres Comella is a partner at Uría Menéndez and head of the litigation and arbitration practice areas in the firm's Barcelona office. He is a practising litigator in the jurisdictions of Madrid and Barcelona, among others, and concentrates his practice in the areas of contractual liability and tort. In particular, he has taken part in the defence of car manufacturers, pharmaceutical companies, tobacco companies and the chemical industry in some of the most important product liability cases in Spain, including several collective claims.

He is considered a leading lawyer by the main international legal directories, including *Chambers and Partners* and *Who's Who Legal*.

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Cristina Ayo Ferrándiz is a member of the litigation practice in Uría Menéndez's Barcelona office. She joined the firm in September 2000, and became a counsel in January 2013. She focuses her practice on advising on contentious and pre-contentious civil and commercial issues. Ms Ayo specialises in judicial proceedings before the Spanish courts and tribunals dealing with contractual liability, non-contractual liability and product liability matters, as well as contractual, corporate, lease agreement, banking, financial and private party disputes. She has also taken part in the defence of car manufacturers, pharmaceutical companies, tobacco companies and the chemical industry in some of the most important product liability cases in Spain, including several collective claims. She has been recognised as a leading litigation lawyer by a number of notable international legal directories, including *Best Lawyers*.

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