

IN-DEPTH

# Class Actions

SPAIN



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# Class Actions

EDITION 8

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In-Depth: Class Actions (formerly The Class Actions Law Review) provides practitioners and clients with a guide to class and collective actions regimes worldwide, with a particular focus on key procedures and recent developments. It offers crucial insights into the law and practice in each jurisdiction, from preliminary filing considerations to settlement, costs and funding, cross-border issues and much more.

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**Generated: June 13, 2024**

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# Spain

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## Introduction

Spain has a judicial collective redress mechanism denominated as a 'collective action'. 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 final 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 is discussed 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). However, this opt-out system has important limitations; for instance, the Civil Procedure Law lacks a 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 applicable only 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.

However, this regime will undergo major changes in the future following implementation of Directive (EU) 2020/1828 (the Representative Actions Directive)<sup>[2]</sup> in Spanish legislation and the future modifications of the Spanish Procedural Act, which are still under discussion.

In fact, early in January 2023, a draft law implementing the Directive was approved and the text was published to public consultation and comments. The text already implied major modifications to the current Spanish procedural rules, with great impact on the way mass tort actions will be handled in the future.

Due to national elections proceedings that occurred in Spain during 2023, the transposition proceeding was stayed until the end of 2023. Once the Spanish government has been finally elected, the proceedings will be restarted again, although there is no indication on when that will happen.

## Year in review

Collective actions in Spain have been used only 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, the very limited number of cases in which collective actions have been used to claim individual homogeneous rights involved contractual issues. There is currently no public record 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 relate 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.<sup>[3]</sup> 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 damage 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. Instead, they hold that it is a direct consequence of the declaration of nullity of the terms; 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 pure 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, and none has been discussed or resolved in the year in review. Furthermore, 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 legislation on collective redress arising from the transposition of the Directive. Although this appeared to be the case for the planned litigation regarding the Spanish car dealers cartel sanctioned by the competition authority in 2015, some collective and mass claims appear to have been filed.

## 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 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 to the US Federal Rule of Civil Procedure 23 – Class Actions (FRCP 23), Spain has, in fact, established a representative system.

## ii Commencing proceedings

As noted, 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.<sup>[4]</sup>

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 is therefore 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 27 March, 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 number, commonality, typicality or adequacy of representation. Nor is there a certification of class process prior to initiating the proceeding itself that confirms the fulfilment of these requirements. 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 be considered class actions only 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).

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 this 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 surprisingly, although the system is considered an opt-out system, the Civil Procedure Law lacks a mechanism to allow represented consumers to opt out (to avoid being bound by the decision on the collective claim and therefore to preserve their right to individual action).

While this lack of legal provision casts doubts on the constitutionality of the collective actions regime, there is no record of any attempts by consumer organisations to challenge the constitutionality of the absence of an opt-out mechanism. In any case, the lack of an opt-out system should constrain 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 observed 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), the lack of an opt-out mechanism for represented consumers may be constitutionally acceptable.

In short, the lack of an opt-out system renders the entire collective action regime either 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 noted below, both European and Spanish legislators are in the process of enacting new legislation regarding collective redress and related mechanisms, and this may change the existing 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 that 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 out that a plaintiff may bring the action before the courts of the place where the defendant company has 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 heard before the courts with 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, the issue of determining the place may become complex for consumer associations; therefore, the defendant's domicile is the primary basis for jurisdiction in collective actions.

These rules are also applicable in collective actions for damages relating 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 relating 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:

1. for amounts of up to €6,000, claims are dealt with in verbal proceedings; and
2. where the amount is more than €6,000, the claim is dealt with in ordinary proceedings.



In March 2024, a procedural modification will enter into force by virtue of which the threshold will be €15,000 (among other modifications of the Spanish Procedural Act).

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 city where the proceedings take place). This period cannot be extended unless 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 unless 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 Procedure 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, number, 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 by 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 does provide 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 that commonality is a fundamental prerequisite for collective actions.

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

In addition, there is no provision for a mechanism whereby class members can object to and refuse to be bound by the settlement. In view of the absence of jurisprudence on this matter, a question remains as to how a court would manage a class member's petition not to be bound by the settlement. In principle, and in the absence of specific legal provision, Spanish courts may be inclined to allow those individuals who are members of the class to retain their individual rights to claim upon an express request to the court enforcing the settlement.

Finally, because of the lack of specific legislation on class action settlements, there is no legal provision regarding publication of 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 finally be accepted by courts.

## Cross-border issues

There is no specific legislation that considers cross-border issues under Spanish procedural law, and there have been no cases in which Spanish courts have asserted jurisdiction over any foreign or global claims. However, EU law allows any Member State authority or entity 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-<sup>[5]</sup> and the Lugano Convention, where Spain is the jurisdiction competent to hear claims filed by consumers and users residing in Spain, the exclusion of overseas claimants from opting into a Spanish class action is also precluded.

## Outlook and conclusions

As noted above, on 25 November 2020, Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers repeals Directive 2009/22/EC (the Representative Actions Directive). Although it should have been approved before 25 December 2022, this has not happened at the time of writing.

A draft law implementing the Directive was made public in January 2023; this included important modifications to the current regime that intended to change the way in which representative actions are litigated. However, due to national elections that lasted until autumn 2023, the approval proceeding appears to be stuck.

Although it is subject to discussion and approval by the Spanish Parliament and therefore may be subject to changes, if the text is approved as such it will include major modifications to the current regime, including:

1. the extension of representative actions to any infringement of legislation referring to consumer interests (which goes beyond the Directive regime). This means that, for the moment, the draft law appears to be applicable to any regulation affecting consumers;
2. preference for the opt-out system, while the opt-in system is limited to specific situations;
3. specific provisions on national and cross-border representative actions;
4. a certification phase;
5. limitation of legal standing to consumer associations and certain public entities;
6. settlement agreements, which must be approved by the court to be binding. Once a settlement agreement has been approved, no representative action on the same subject matter can be filed. To promote settlement agreements, the draft law states that a redress settlement does not mean that the defendant has acknowledged liability or guilt;
7. provision for enforcement: if all the beneficiaries have been identified, the defendant must pay them the corresponding damages as stipulated by the court. If they have not been identified, the defendant must deposit a lump sum in a court deposit account and the claimant entity will be appointed as a liquidator to distribute this sum among the beneficiaries; and
8. provision for disputes regarding the amounts to be distributed to be heard by the court of first instance that heard the original case.

The certification phase will involve a hearing after the claim has been submitted, discussing whether the conditions for the action are met, in particular the necessary homogeneity (which exists, in essence, when there is no need to consider factual or legal aspects that are particular to each of the consumers concerned) and that the action is not manifestly unfounded. In this phase, the existence of a conflict of interest (as defined in the draft law) in relation to third parties funding the proceedings will also be analysed.

The certification order must determine the conduct (objective scope) and the specific consumers affected by the process (subjective scope). When the latter is impossible, the characteristics and requirements that must be met to qualify as a beneficiary should be identified; this must be communicated separately (for each consumer) if possible, or publicised in the media, and consumers will be given a set period (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.

The certification order addressing all these issues can be appealed, regardless of whether it has been approved. If it is denied by final decision, no further representative actions for redress can be brought for the same subject matter.

If this is accepted, the certification order has the following effects on individual actions:

1. a consumer filing an individual action during the period in which consumers may exclude themselves from the action is equivalent to expressing a wish to be excluded from the action;
2. once the period expires, individual actions for damages will no longer be admissible; and
3. in pending individual actions, the claimant consumer must state whether they wish to be bound by the representative action.

As can be seen, although a draft law, it is a very extensive and comprehensive text and implies major modifications of the current Spanish procedural rules, which will have a great impact on the way mass torts will be handled in the future. Also note, however, that it is a draft law and so is subject to change.

## Endnotes

- 1 Cristina Ayo Ferrándiz is a counsel at Uría Menéndez. [^ Back to section](#)
- 2 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. [^ Back to section](#)
- 3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [^ Back to section](#)
- 4 Spanish Consumers and Users Council: <http://www.consumo-ccu.consumo.gob.es>. [^ Back to section](#)
- 5 Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [^ Back to section](#)

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