MASS LITIGATION IN SPAIN - CLEARING THE FOG

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Legal Briefings

As the EU issues a new collective action directive, we assess the potential impact on Spain's group disputes environment

The landscape of mass litigation in Spain, as in many other European jurisdictions, is far from being clear and easy to manage.

The EU Directive 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 "**Collective Redress Directive**") could be a good opportunity to improve the current system. And although we will have to wait and see how this Collective Redress Directive is finally implemented, it seems that it will not entail any significant novelty in the Spanish system.

GENERAL OVERVIEW OF THE CURRENT MASS LITIGATION SYSTEM IN SPAIN

From a legal and practical point of view, two different approaches are possible to deal with situations where a harmful event has affected a wide range of people or parties.

a. On the one hand, parties and their lawyers may always use the classical tool of joinder of actions: a group of banking services users, or of consumers, under the guidance of the same counsel, file a single statement of claim with the court, bringing many individual actions. The law requires the existence of a factual and legal connection between the claims, but there is no specific limit as to the number of claims that may be joined. The case will be processed in an ordinary manner, resulting in a judgment where the court will rule separately on each single claim.

   Joinder of actions and claims is very frequent in practice, especially in similar cases, and lawyers usually file "internally standardised statements of claim". Joinder of actions, however, renders some cases harder to manage from the court's point of view: this

explains why courts are sometimes reluctant to consider there is a sufficient connection between the different actions.

b. Since the entry into force in 2001 of the current Code of Civil Procedure (*Ley de Enjuiciamento Civil* = LEC), there is a more sophisticated system of collective redress, available only to consumer claims. Since then, the system allows to seek both injunctions and compensation for losses and damages. The main features are the following:

   i. Legal standing to bring collective claims is limited to consumer associations, (public) legal entities entrusted with the defence and promotion of consumers' rights and interests, the public prosecutor and, under some circumstances, groups of consumers (although this last possibility has never been used in practice).

   ii. Some differences are established depending on the possibility –or not– of easily identifying the individual consumers harmed.

      Where individual consumers are identified or easily identifiable, any entity intending to bring a collective action must notify them in advance (of commencing the action), so they can join the collective action once it is brought. It must be noted that joining the collective action is not necessary in order to benefit from its outcome, but rather is a means to promote a better defence of the individual's interest in the framework of the collective action.

      In cases where it would not be easy for the entity to identify all individual consumers affected, prior individual notice will be replaced by giving public notice of the claim's initial admission by the court: proceedings will be stayed for two months, while the existence of the proceedings is publicised via appropriate media, in order to allow any affected individuals to join the action (for the same purpose described above).

   iii. In any case, the Spanish system does not rely upon a strict opt-in basis: in principle, legal standing empowers consumer associations and other entities to bring actions on behalf of any and all affected individuals, even if the individuals have not made use of the opportunity to join the proceedings. One frequent criticism, indeed, is that the law also does not establish a specific opt-out mechanism, so that the system has a rather mandatory nature.

      Article 221 LEC, for instance, establishes the court's duty to identify in its judgment all consumers benefitting from its decision and, if individual identification is not possible, to set forth the necessary details, characteristics and requirements for an

individual to be in a position to demand payment or to seek enforcement. In addition, and according to Article 222.3 LEC, which addresses the scope of res judicata, the judgment given in a collective action will have binding effects on any non-parties holding the rights and interests which were the basis of the proceedings.

The Spanish Supreme Court ruled in 2017 (judgment 123/2017, of 24 February), however, that –despite the clear legal wording– the res judicata effects of such judgments could only encompass those consumers individually identified in them, but not others. This decision, as fair as it may be, clashes with an additional legal provision, Article 519 LEC, defining the way consumers may benefit from the judgment and enforce it: where a consumer, potentially benefitting from a judgment, has not been expressly identified in it, he/she may ask for a court order establishing his/her right to be considered as such, if he/she meets the requirements established in the judgment according to Article 221.

It must further be recalled that nothing similar to *cy-près* funds exists under Spanish law. The outcome of a successful collective action to pay damages, therefore, will consist in establishing the amount of money each affected consumer is entitled to receive from the defendant: the real economic impact for the defendant, hence, depends on how active consumers are in seeking payment or enforcement. This (i.e. the choice each member of the affected group has to enforce or not enforce the favourable ruling) is the specific feature of the Spanish system that places it closer to "orthodox" opt-in systems.

iv. Proceedings to deal with collective actions are conducted in the same way as other types of case: there are no specific case-management provisions, nor anything similar to a preliminary class-certification order. This lack of specific regulation has given rise to criticism, since additional managerial powers from the court could be of use.

The practical impact of this "Spanish way to collective redress" has been limited. Only a small number of cases have been processed under the collective actions system during the last 20 years, dealing, among other things, with damages suffered by consumers due to an electrical black-out in Barcelona, or by drivers stuck in a highway during a snow storm. More recently there has been an increase in the exercise of this type of actions related to the misselling of certain financial products, but the number of cases is still low.

This is for a number of reasons including that the entities that have the legal standing to bring collective actions do not always have the resources to fund them appropriately. In recent years there have been quite a few number "niche areas" for collective litigation in Spain, very often related to unfair contract terms with consumers or data protection. But the use of collective redress mechanisms has not been able to resist the tough competition from some law firms, very proactive in this field, who encourage consumers to pursue their cases individually –quite frequently, making joinder of a small number of claims– and under a success fees basis. Too many consumers bringing individual cases do not leave much room for associations and other legal entities to bring a collective action, where they must bear the costs

of that action, and additionally the risk of paying the defendant's costs in case the claim is not finally upheld by the court. This situation is not comfortable either for defendants, who need to react to a huge number of individual claims and face the risks of constant orders to reimburse costs. The lack of a clear regulation on governing the impact of collective actions upon individual proceedings is also an issue: it is common practice that collective proceedings do not have the potential to force staying or dismissal of individual claims, based on the same harmful event.

THE NEW EUROPEAN DIRECTIVE ON COLLECTIVE REDRESS

It is not clear to what extent the Collective Redress Directive will lead to significant changes in the current Spanish landscape of mass litigation. It shall be recalled that the purpose of the Directive is forcing Member States to establish some system of collective redress which, beyond the pre-existing injunctions, allows also the granting of specific relief for individual consumers. The Directive, further, insists in the need to restrict legal standing to bring these actions for representation to entities meeting relevant requirements. Adapting to the Collective Redress Directive, in many ways, will not require too many changes: the Spanish system is already used to the "short list" of entities with legal standing –only minor changes may need to be put into place in this area. Collective actions for compensation –the main "European" goal of the Collective Redress Directive– were already possible under Spanish law, so there will not be any revolution from that side either. From a different perspective, the Collective Redress Directive has not put a special focus on procedural requirements, which means there is not a mandate to introduce better rules for the case management of collective claims.

Implementing the Collective Redress Directive, however, could be a good opportunity to rethink the system as a whole, for the benefit of both consumers and potential defendants. The Collective Redress Directive, for instance, seems to endorse a preference for redress funds: the outcome of a successful compensation claim should be an order to pay a specific amount of money, to be later distributed among consumers; this, in turn, would help avoiding the need for consumers to engage into judicial proceedings –neither to enforce the judgment, nor to be officially declared as a beneficiary of the judgment or settlement, as is the case under current Spanish law. In addition, the need to develop the provisions on collective redress settlements should also be a good nudge to establish a clearer link between collective litigation and ADR mechanisms.

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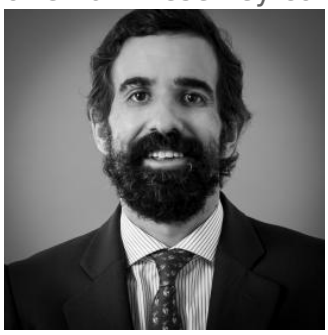

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