

## THE EUROPEAN UNION DIRECTIVE ON REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS

25 December 2022 is the deadline for Spain to transpose 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 “**Directive**”). The transposition is expected to bring about the implementation of a procedural model of collective representation that will allow a group of consumers affected by the same unlawful practice to put an end to that practice and be compensated for it through a single action.

The primary objective of the Directive is to establish a harmonised procedural system in all Member States of the European Union to enable civil actions for damages to be brought on behalf of a collective of consumers for the defence and protection of their interests.

At the date of publication of this briefing, the Spanish legislator is in the process of drafting the transposition proposal. Without prejudice to the possibility of transposing the new legislation by the deadline, the provisions of the Directive will be directly applicable as from 25 June 2023, in accordance with Article 24 of the Directive.

In this Legal Briefing we address the most significant questions regarding the system of collective representative actions and the amendments proposed by the Directive.

### 1. Will the system proposed by the Directive be similar to US class actions?

Not exactly. Although the Directive is inspired by certain aspects that are present in the US model of class actions, throughout the process of drafting the Directive, the European Commission has sought to distance the new system of collective representation from the freedom of action that is found in jurisdictions such as the United States.

The main differences between the Directive and class actions are the following: (i) not every private individual will be able to bring a class action, only those entities representing consumer interests; (ii) the material scope of collective representative actions will be limited to infringements affecting consumers; (iii) strict controls will be placed on the requirements to be met by consumer representative entities and on their sources of funding; and (iv) class actions in the European Union will not involve a special process, like in the United States, where several procedural stages may be found, such as the class certification phase.

## 2. Does the current procedural system in Spain allow for actions on behalf of consumers and users?

Yes, our procedural system grants legal standing to consumer associations to bring actions on behalf of the collective or diffuse interests of consumers and users. This is established in Article 11 of the Spanish Civil Procedure Act (“SCPA”).

However, this option is limited to actions provided for in the regulations protecting consumer rights, i.e. those included in the Consolidated Text of the General Law for the Defence of Consumers and Users, in the Law on Unfair Competition, in the Law on General Contracting Conditions, and in the General Law on Advertising. Depending on whether the group of consumers affected is identifiable or not, associations representing consumers’ interests have to comply with a number of requirements throughout the proceedings, such as identifying the group affected (if identifiable) or publicising and calling upon the group affected to give them the possibility to participate in the proceedings (laid down in Article 15 SCPA).

Although the current Spanish system allows for collective representation actions, its application has been limited. For this reason, consumers have sometimes resorted to other procedural mechanisms when there are large groups of affected parties, such as seeking the joinder of proceedings or the assignment of claims, in order to enforce their rights.

## 3. What is the material scope of the Directive?

The exercise of collective representative actions proposed by the Directive will not have a generic scope. While Member States will be able to extend the areas in which actions may be brought on behalf of consumers, the Directive proposes, in Annex I, a list of EU consumer law rules to which the new procedural framework should apply.

These include regulations on defective products, personal data protection, unfair commercial practices, unfair terms in consumer contracts, financial products and investment instruments, and electronic transactions. However, civil actions arising from anti-competitive practices that affect consumers were left out of the material scope, although it is possible that they will be included by the Spanish legislator due to the increase in individual proceedings in this area (known as damages actions for infringement of competition law rules).

## 4. What procedural model does the Directive propose?

The Directive does not impose an obligation on Member States to opt for a particular procedural model in order to prove which consumers are being represented in a collective action brought by a qualified entity. On the contrary, it gives Member States the freedom to choose between the following types of mechanisms:

- (i) Opt-in mechanism: consumers who wish to be represented by the authorised entity, as well as to actively participate in the proceedings and be bound by the judgment, must expressly express their willingness to do so, and the corresponding mechanisms must be enabled for this purpose.
- (ii) Opt-out mechanism: all consumers affected by the conduct will be deemed to be represented by the qualified entity initiating the action - and therefore bound by the outcome of the judgment - unless they expressly decide to opt out of the process.

## 5. What kind of collective representative actions will be available after transposition?

Article 7 of the Directive obliges Member States to ensure that qualified entities are able to bring, at least, injunctions and actions for redress on behalf of the group of consumers affected:

- (i) Applications for injunctions must be made with a view to prohibiting or stopping an activity constituting an infringement;
- (ii) Applications for redress will be for the purpose of obtaining compensation, repair, replacement, price reduction or reimbursement of a good from the trader, or for terminating the consumer contract with them. In such cases, the decision should identify the individuals or group of individuals who will benefit from the compensatory measures that are ultimately adopted.

The Directive leaves the door open for Member States to provide for other measures that qualified entities may request, such as a declaration of infringement, publication of the decision or a declaration of rectification.

## 6. Who will have legal standing to bring these actions?

Standing for this type of action will lie with entities representing consumers that have been legally constituted and authorised for the defence of consumers and users, and provided that they comply with the requirements established by law. These requirements should be homogeneous across Member States and monitored by the European Commission, particularly in the context of cross-border actions.

In order to avoid abuses of this type of action, the Directive excludes any private representative of consumers, such as law firms, litigation funds or other vehicles created *ad hoc* to conduct collective actions, from standing to bring an action. Therefore, only entities which are legally established for the purpose of protecting consumers' interests and which comply with a number of requirements set out in Article 4 of the Directive may act on behalf of the affected group of consumers.

**7. Will qualifying entities from other Member States be able to bring collective representative actions in Spain? What about entities that are qualified to represent the interests of nationals of other Member States?**

Yes. Article 6 of the Directive obliges Member States to ensure that entities legally incorporated in other Member States can bring collective representative actions before any administrative or judicial body of any Member State of the European Union. To this end, Article 4(3) of the Directive requires that stricter legal standing criteria be imposed for qualified entities that can bring cross-border actions.

Qualified entities will also be able to bring actions before the courts where they are legally constituted on behalf of consumers from several Member States. In these cases, consumers residing in another Member State will have to join the collective representative action by means of an opt-in mechanism in order to be linked to the collective proceedings.

**8. Will qualified entities be able to use external sources of funding to cover the costs of the proceedings?**

Third-party funding is permitted within the limits established by each Member State and those set out in Article 10 of the Directive. The Directive gives the courts the duty to exercise strict control over the sources of funding submitted by qualified entities, in order to ensure that they are not abusing the collective proceedings and using them for purposes other than the protection of consumers' interests.

If it is considered that there may be conflicts of interest between the funding sources and any of the parties to the proceedings, or that there may be economic interests in the proceedings that undermine the protection of consumers' interests, the court will refuse the funding, oblige the qualified entity to propose an alternative, and may even deny it legal standing.

**9. Will courts be able to require defendants to produce documentary evidence for use in the proceedings?**

Yes. Article 18 of the Directive obliges Member States to ensure that qualified entities can request access to evidence in the defendant's possession, although this request will be assessed by the judge on the basis of: (i) how reasonably available the evidence is to the claimant; (ii) the appropriateness and proportionality of the requested measure; and (iii) respect for the duty of confidentiality in relation to the documentation to which access is requested. The defendant trader will have the same right to request documentary evidence.

It is not yet known whether the Spanish legislator will choose to transpose this duty of disclosure in a similar way to the system for access to sources of evidence under Article 283 bis SCPA (as occurs in proceedings for damages actions arising from infringements of competition law), or as a request for documentary evidence during civil proceedings under Article 328 SCPA.

## **10. What types of interim measures can the claimant qualified entity apply for?**

Claimant qualified entities may request an injunction against the activity allegedly constituting an infringement on a preventive basis. Article 17 of the Directive requires such interim measures to be adopted by means of an accelerated procedure. In addition, the filing of an application for interim measures will have an interruptive or suspensive effect on the limitation period of the action that the qualified entity decides to bring.

This possibility of applying for injunctive measures is already provided for in our procedural regulation, specifically in Article 727 SCPA. Therefore, the transposition of this measure should not entail major changes in the model for the adoption of interim measures in Spain.

## **11. How will judgments resulting from collective representative proceedings be enforced?**

The Directive does not provide much detail on the enforcement of judgments resulting from collective representative proceedings awarding redress from which affected consumers can benefit. Article 9(7) of the Directive only requires Member States to lay down rules on the time limits within which consumers may seek recovery of the compensation due to them. It is therefore foreseeable that the enforcement of judgments arising from collective representative proceedings will follow the general rules of enforcement provided for in domestic procedural law.

The main problem will lie in the enforcement of judgments where the number of affected consumers has not been determined; in such cases, Article 221.1.1 SCPA provides for the possibility of the court establishing the requirements for enforcement under Article 519 SCPA.

## **12. If the defendant has reached a settlement agreement with the qualified entity, is it possible for individual consumers to bring further claims against the defendant with the same subject matter?**

Article 11 of the Directive stipulates that settlement agreements reached between the qualified entity and the defendant must be approved by the competent judicial body. Once approved, the settlement will be binding, both for the defendant, the authorised entity and the individually affected consumers. However, the Directive leaves open the possibility for Member States to set rules allowing consumers to decide whether to accept or refuse to be bound by the redress out-of-court settlements that are reached. Therefore, it is possible that those consumers who refused to be bound by the settlement agreement could initiate new proceedings against this defendant with the same subject matter.

## **13. How will the costs of collective representative proceedings be awarded?**

The Directive follows a system of imposing costs on the losing party, as is the case in Spain. However, Article 12 prohibits an individual consumer who has participated in the collective proceedings from being ordered to pay the costs, unless there has been intentional or

negligent conduct on their part. In addition, Article 20(1) of the Directive provides for the possibility of the court adjusting the costs to be imposed on the qualified entity.

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The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 26 May 2022 and Pérez-Llorca does not assume any commitment to update or revise its contents.

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