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The Draft Bill on representative actions for the protection of the collective interests of consumers is published

On 9 January 2023, the Ministry of Justice published the Draft Bill on representative actions for the protection of the collective interests of consumers (the “**Draft Bill**”) (available via the following [link](#)). The purpose of the Preliminary Draft is to advance with the process of transposition in Spain of 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 (the “**Directive**”), whose deadline for transposition into the internal legislation of the different Member States of the European Union expired on 25 December 2022.

The Draft Bill has been drafted following a public consultation process, which received comments from several organisations and entities that will potentially be affected by the future legislation (the public consultation is available via the following [link](#)). Prior to becoming a draft law, the Ministry of Justice must obtain the necessary reports and opinions from public institutions, such as the Council of State, as well as conducting any studies or consultations deemed appropriate to guarantee the correctness and legality of the text. In addition, the Draft Bill must be submitted to a public consultation procedure. Once approved, it will be put to a vote by both Houses for approval.

Although the Draft Bill entails the reform of several bodies of law that affect, from different perspectives, the regulation of consumers’ and users’ rights, the main development introduced by the Draft Bill is a special procedural regime for the exercise of representative actions, in both its two forms - actions for injunctions and redress measures. This procedural structure will be articulated through the addition of a Title IV, within Book IV, of Law 1/2000, of 7 January, on Civil Procedure (using the Spanish acronym, “**LEC**”). The system of actions for the representation of consumers and users provided for in Spanish procedural law until now has therefore been fundamentally reformed.

1. Provisions common to actions for injunctions and actions for redress measures

The new procedural system ensures that entities entitled to bring actions for injunctive and redress measures on behalf of consumers and users whose rights have been affected by an infringement have standing to sue.

An action for injunctive relief may seek the cessation of conduct that is harmful to the interests of the affected consumers or users, as well as the prohibition of such conduct in the future. Actions for injunctions may also be brought if this harmful conduct has ended at the time of bringing the injunctive action, but there are sufficient indications that it may be repeated in the future.

The action for redress measures may seek compensation for the loss and damage caused to consumers or users harmed as a result of the infringing conduct. This remedy may consist, inter alia, in the payment of compensation, replacement of goods, reimbursement of the price paid or termination of the contracts in which the prohibited conduct has materialised.

Both actions can be brought together, although it is possible for the court to agree to suspend the action for redress measures pending the resolution of the action for injunctive relief if there is good

reason to do so (for example, if the combined proceedings generate excessive complexity or delay in the proceedings). In addition, proceedings in which representative actions are brought may be both domestic (where the representative action is brought by a qualified entity in Spain, before a Spanish court) and cross-border (where the representative action is brought by a qualified entity in another Member State of the European Union, in accordance with the provisions of the Directive, before a Spanish court). In any case, consumers are not able to participate in the proceedings, except to determine the subjective scope of the proceedings where appropriate (Article 848 of the LEC).

The main procedural milestones brought about by the Draft Bill will be outlined below.

A. The material scope of application

The Explanatory Memorandum of the Draft Bill states that the substantive scope of application of the new legislation is broad, in that representative actions may be brought in respect of any type of infringement in which the collective rights and interests of consumers and users have been affected. Therefore, according to the Explanatory Memorandum, the scope of application of the Draft Bill seems to go beyond the provisions of Annex I of the Directive, also including “*any other case of infringement of consumer rights not included in the said Annex*”.

B. The legal standing of the qualified entities

Without prejudice to the provisions of special laws, legal standing to bring representative actions will be attributed to: (i) associations representing national consumers and users that have been legally constituted, registered in the corresponding state or regional registers and authorised in Spain for the defence of consumers and users; (ii) entities designated in other Member States of the European Union for the exercise of cross-border actions, provided that they have been designated prior to the infringing conduct and that they appear on the list published by the European Commission for this purpose; (iii) the Public Prosecutor’s Office; (iv) the Directorate General for Consumer Affairs; and (v) other regional and local bodies responsible for consumer protection.

In the case of Spain, the requirements for authorising consumer representative entities, for the exercise of both national and cross-border actions, are set out in Articles 54 and 55 of Royal Legislative Decree 1/2007, of 16 November, approving the consolidated text of the General Law for the Defence of Consumers and Users, which have also been amended by the Draft Bill. The new requirements are reflected in the conditions set out in the Directive; among others, that the entity has shown that it has effectively and publicly carried out the activity aimed at protecting consumers for a minimum period of 12 months prior to the date of application for designation as a qualified entity, that it is a non-profit entity, that it is not in a situation of insolvency and that it is not in a situation of conflict of interest with regard to those it represents.

C. The objective and territorial jurisdiction of the courts

Objective jurisdiction will lie with the courts of first instance, irrespective of the subject matter of the proceedings. The Draft Bill empowers the General Council of the Judiciary to allow certain specialised courts to assume exclusive jurisdiction over representative actions. Territorial jurisdiction will correspond to the Court of First Instance of the place where the defendant is domiciled or, in the absence thereof, where the defendant has their commercial establishment; and, alternatively, in the event that the defendant does not have an establishment or domicile in Spanish territory, that of the place where the infringing act has been carried out or has had an effect.

D. The creation of the Public Register of Representative Actions

The Draft Bill provides for the creation of an electronic Public Register of Representative Actions, which will be entrusted to the Ministry of Justice and will be subject to regulatory development. The aim of this institution will be to promote transparency and awareness of ongoing representative actions and those affected by them, so that all consumers and users can be aware of the progress of collective injunctions and redress proceedings and thus exercise their rights.

E. Requesting access to sources of evidence

The Draft Bill introduces a new article in the LEC, Article 838, which provides for a mechanism for requesting access to sources of evidence that is inspired by - and, to a large extent, is based on - the current Article 283 bis of the LEC, introduced by Royal Decree-law 9/2017, on actions for damages arising from infringements of competition law.

The content of and requirements to be met by the request for access to sources of evidence in the exercise of a representative action coincide with the current requirements for requesting access to sources of evidence, although the Draft Bill has adapted them to the particularities of representative actions; for example, it includes among the data that may be requested from the defendant or third parties, the data necessary to determine the identity of the consumers and users affected by the action. The court will assess the relevance of the disclosure of the evidence requested in accordance with the principle of proportionality and respecting, in any case, the confidentiality of the information. As a general rule, costs incurred by the defendant as a result of the production of the requested documents will not be reimbursed. For the rest, the request procedure refers to the provisions of Article 283 bis of the LEC.

F. Suspension of the limitation period for individual actions

The Draft Bill provides that the exercise of a representative action will suspend the running of the limitation period for individual actions that may be brought by affected consumers and users to obtain redress for infringements committed on or after 25 June 2023.

However, the Draft Bill does not clarify whether this limitation period is suspended with respect to all consumers potentially affected by the representative action, or whether, on the contrary, the suspension only extends to those consumers who have decided not to opt out of the representative action and who are therefore bound by the outcome of the collective representative proceedings.

2. Procedural specialities in the exercise of actions for injunctive measures

The main specialities provided for in the Draft Bill for the exercise of actions for injunctive measures are:

- (i) The requirement for the qualified entity to make an out-of-court complaint to the infringing trader, prior to the filing of the claim, when the cessation of the conduct being carried out is sought.
- (ii) The proceedings will be processed through the channels for oral proceedings, although with certain special features, such as the fact that the claim must include the consumers and users who will be affected by the representative action (or, if it is not possible to identify them, at least the requirements that must be met by those who would benefit from an eventual favourable judgment), the time limit for submitting the statement of defence will be 20 days and a hearing must be held to resolve the issues that prevent the effective continuation of the proceedings and in which the evidence that the parties intend to use will be proposed and examined.

- (iii) Interim measures relating to the cessation of the conduct may be sought, even prior to the filing of the claim, provided that it is established that the conduct is ongoing. In addition, depending on the economic importance and social impact of the interests concerned, it is possible to exempt the applicant entity from the obligation to provide security as a condition for the adoption of the measure.

3. Procedural specialities in the exercise of actions for redress measures

In relation to the exercise of actions for redress measures, on the other hand, specialities have been included that are, without doubt, the main procedural developments introduced by the Draft Bill.

A. Opt-out system as preferred system in the event of representative actions other than cross-border actions

The mechanism chosen by the Spanish legislature to link the affected consumers to the representative action (and thus to the outcome of the proceedings) is an opt-out system. Generally speaking, consumers potentially affected by the subject matter of the representative action will be bound by the proceedings, unless they expressly opt out.

In exceptional cases, and provided that the value of the amount requested as redress for each beneficiary exceeds 5,000 euros, or in those cases in which it is necessary for the proper administration of justice, the Draft Bill allows the court to agree on the use of an opt-in system, whereby consumers must expressly join the representative action. In any case, if the consumers concerned are domiciled abroad, it will be necessary for them to expressly state their willingness to be bound by the proceedings (i.e. an opt-in system).

B. The introduction of a certification phase of the representative action

The main procedural development introduced by the Draft Bill is the regulation of a certification phase of the representative action, by means of a hearing. The purpose of the certification hearing will be, in addition to resolving procedural issues that may prevent the proceedings from advancing properly, to verify whether the claimant is a qualified entity, whether the claims of the various consumers and users included in the action are homogeneous, whether the group of consumers affected by the proceedings has been defined, that the action is not manifestly unfounded, as well as a judicial scrutiny of the sources of financing of the claimant qualified entity - in particular, whether it has been financed by third parties with a potential interest in the outcome of the claim that could create a situation of conflict of interest with the qualified entity or with the consumers and users affected by the proceedings.

Once the certification hearing has been completed, the court must issue an order, either granting or refusing certification. In either case, an appeal may be lodged, which will be dealt with on a preferential basis.

In the event that certification is refused, a further representative action for redress measures with the same subject matter as the one that has been refused is not admissible, even if the claimant representative entity is different.

In the event that the court grants certification, the order must identify the conduct that is the subject of the proceedings (objective scope of the proceedings) and the consumers concerned (subjective scope of the proceedings). The court must also set a time limit within which the consumers affected by the representative action must express their willingness to be linked (or

not linked, depending on whether the system is opt-in or opt-out) to the action and, consequently, to be bound by the outcome of the proceedings. Likewise, the order granting the certification must entrust the claimant entity with the implementation of an electronic platform through which consumers and users can express their wishes in this respect. The cost of implementing this electronic platform will be borne by the qualified entity (and will be included in the legal costs).

In relation to individual actions, the Draft Bill provides that, once the period granted to consumers to express their will has elapsed, no new individual actions may be brought with a subject matter that is covered by the certification order. It is not made clear, however, whether this prohibition on the exercise of individual actions refers only to those that could be exercised by consumers who are linked to the representative action, or whether, on the contrary, it could be extended to any individual action. In any event, if parallel processing of representative actions and individual actions were allowed, this could in practice lead to problems of *lis pendens* and prejudiciality of proceedings with the same subject matter, which could therefore result in contradictory rulings.

C. Determination and enforcement of the amount of redress

Finally, the means of enforcing the collective judgment and the payment of the amount of the judgment proposed in the Draft Bill are of interest.

The proposed wording of Article 860 of the LEC provides that the court must specify the redress due to each consumer who is a beneficiary of the judgment. In such a case, when enforcing the judgment, Article 873 of the LEC provides that consumers must provide the necessary information to enable the defendant to make the payment.

However, in proceedings where it is not possible to identify the beneficiaries of the action, Article 860.4 of the LEC would empower the court to set a lump sum amount which it deems sufficient, and which may be subject to subsequent modification if it proves to be insufficient. In this case, the court will include in the judgment a time limit for the defendant to pay the amount. In the event of non-compliance, the court will order *ex officio* enforcement.

Once the amount of the judgment has been deposited in the Court's account (either as a result of the defendant paying it voluntarily or as a result of enforcement proceedings), Article 877 of the LEC provides that the settlement of the redress amounts is entrusted to the claimant qualified entity, which must distribute the amounts among the beneficiaries within the period granted by the Court, through the electronic platform provided for in the certification order. In those cases in which the suitability of an alternative mechanism to carry out the settlement is justified, the Court may agree that the settlement be carried out through this other channel, provided that it is guaranteed that consumers and users will be able to access it.

Consumers who are able to prove that they qualify for the amount of redress should then apply through the electronic platform, without the need for the intervention of a lawyer or court agent.

Once the redress amounts have been settled, if a balance remains, Article 881 of the LEC provides that it must be returned to the defendant.

After the distribution of the amount of the judgment has been completed, the qualified entity must submit an account of its work to the court.

In cases where the qualified entity does not recognise a consumer as a beneficiary of the judgment, or where the consumer does not agree with the amount paid by the entity, the consumer may apply to the court which heard the case at first instance.

D. Redress Agreements

Once the action has been certified, the Draft Bill provides for the possibility for the qualified entity and the defendant trader to reach redress agreements. The agreement should contain the amounts to be paid to each beneficiary, if possible, or the maximum amount of redress and the criteria for distributing it among the affected consumers.

In order to be binding, the agreement must be approved by the court, which may refuse approval if it considers the agreement to be detrimental to the rights of the consumers and users concerned.

In order to facilitate an agreement being reached, the court may suspend the proceedings for a maximum period of three months.

Once approved, the agreement will be binding on the affected consumers and users who have not expressed their wish to not be bound by it. If the affected consumers reside outside the national territory, they will only be bound by the agreement if they have expressed their willingness to be bound by the representative action.

After the approval, a new representative action may not be brought with the same subject matter, even if the representative entity is different.

4. Conclusion

In general terms, the Draft Bill aims to provide an effective solution to the objective set out in the Directive: that the Member States should have an articulated system of actions for the representation of the interests of consumers.

However, and insofar as its material scope of application seems to exceed the material scope of application initially envisaged in Annex I of the Directive, some issues raised by the Draft Bill could give rise to problems in practice, such as the objective jurisdiction of the courts in the event that actions for the representation of consumers and users in relation to the defence of competition are understood to be covered, the combination of the processing of representative and individual actions, and the procedure for the enforcement of the compensatory judgment.

In fact, some of these problems had already been highlighted prior to the publication of the Draft Law discussed in this Legal Briefing. In this regard, it is worth highlighting the request for a preliminary ruling submitted by the Supreme Court to the Court of Justice of the European Union (Case C-450/22), which is currently pending, which questions the possibility of bringing collective actions in consumer matters when the analysis of the unfairness of the clauses challenged on behalf of consumers requires an individualised examination of the circumstances of each particular contract (examination of transparency), as well as the relationship between collective actions and individual actions and the possible harm that may be caused to consumers depending on the relationship between the two types of action.

In any case, it will be necessary to wait for the draft legislation to be processed and approved by Congress and the Senate before the final result of what will be the new Spanish system for collective representative actions in defence of the interests of consumers and users will become apparent. Despite the comprehensiveness of the Draft Bill, it is likely that there are still issues that need to be further defined or clarified by the Spanish legislature.

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