

Developments in the implementation of the Directive on representative actions

The lower house of the Spanish parliament is processing the Bill on class actions.

Spain - Legal flash

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Key aspects

The Bill implementing Directive 2020/1828 contains a specific regulation on class actions

- > The procedure includes a certification phase to examine, among other aspects, the homogeneity of consumers' claims.
- > The Bill provides for an opt-out system (binding on all consumers, except those who request to be excluded). An opt-in system is also available where the value of the performance due to each consumer exceeds €3,000 and the court considers it more advisable to ensure a good administration of justice.
- > A **liquidator** will distribute the funds among the unidentified consumers, returning the remainder to the defendant.
- > The Bill allows for third-party funding subject to judicial controls.



Keys to the regulation of class actions

1. What does this Bill regulate? What is its origin?

In addition to regulating other matters (such as the new judicial organization or alternative dispute resolution mechanisms), this Organic Bill (the “**Bill**”) establishes a special procedure for the processing of class actions for the protection of consumer rights and interests.

The purpose of this Bill is to incorporate into Spanish law 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**”).

Although the deadline expired in December 2022, the Directive is still pending implementation in many Member States. Its incorporation into national law is giving rise to different regulatory frameworks. Despite laying down certain common rules, the Directive leaves to the discretion of national legislatures the specific integration of class actions (or representative actions, as they are called in the Directive) in each respective legal system.

The main difference between national regimes is determined by the system chosen for the definition of the “class” or group of affected parties, which may be opt-in (including only consumers expressly joining) or opt-out (including all affected consumers except those who expressly request to be excluded).

In Spain, during the previous parliamentary term, the legislature approved a draft Bill on representative actions for the protection of the collective interests of consumers (the “**Draft Bill**”). However, the dissolution of the Spanish Parliament terminated its processing. Although the current Bill presents differences with the Draft Bill, it generally maintains the same regime, particularly with regard to the choice of an opt-out mechanism—with some exceptions.

2. What is the scope of class actions under the Bill?

Similarly to the current Spanish legislation, the Bill limits the scope of class actions to conduct of traders or professionals infringing the rights and interests of consumers and users. Therefore, the Bill will only apply to those who hold this status.

On the other hand, while the Directive covers only infringements of the provisions of Union law referred to in Annex I, the Bill does not limit its scope to these provisions.



3. What type of actions may be brought collectively?

In line with the Directive, the Bill allows qualified entities to bring two types of collective actions: injunctive actions and redress actions.

One of the most relevant new features of the Bill concerns, precisely, redress actions—particularly as regards the chosen opt-out mechanism, as explained below.

On the other hand, the Bill expressly recognizes the category of crossborder actions (i.e., those brought by a qualified entity in a Member State other than that in which it was designated).

4. Which entities may bring a class action under the Bill?

The Bill generally confers standing to the Public Prosecutor's Office and to qualified entities, both national and those designated in other Member States (which may bring crossborder actions).

Qualified entities are qualified user and consumer associations, competent administrative bodies in the field of consumer affairs and designated entities in other Member States. Specific legislation such as the [Unfair Competition Act](#) and the [General Contract Terms and Conditions Act](#) reinforce this legal standing.

User and consumer associations must meet the following requirements to be designated as qualified entities:

- Fulfilling the statutory purpose of protecting and defending the rights and interests of consumers and users.
- Carrying out at least 12 months of actual public activity in the protection of consumer interests prior to its request for designation.
- Being a non-profit independent entity.
- Not being subject to insolvency proceedings or declared insolvent.
- Being transparent about the source of funding of their activities, among others.

The status of qualified entity will be subject to assessment and may be revoked. The defendant may allege non-compliance with any of the requirements.



5. Which consumers will be bound? Which cases will be subject to an opt-in or an opt-out mechanism?

As mentioned above, one of the defining elements of collective protection mechanisms is whether the system of binding consumers to the collective proceedings is opt-out (i.e., including by default all affected consumers except those who expressly exclude themselves) or opt-in (i.e., including only consumers who explicitly express their wish to be represented).

The opt-out model is typical of the United States and the United Kingdom, where collective litigation is more common. Directive 2020/1828 imposes an opt-in model for consumers residing in Member States other than the one in which the action is brought, but it allows Member States to decide on the system applicable to purely national actions. In Europe, opt-in systems predominate, with a few exceptions such as the Netherlands, Hungary, Bulgaria and Portugal.

As a rule, the Bill provides for an opt-out mechanism. However, the court may order that the action be processed under an opt-in system where the value of the performance due to each consumer exceeds €3,000 and the court considers it more advisable to ensure a good administration of justice.

Affected consumers will join or exclude themselves, as the case may be, through an electronic platform within a period determined by the court (which may not be less than two months or more than six months). The filing within that period of an individual action (or a complaint before the Independent Administrative Authority for the Protection of Financial Customers) with the same subject matter as the class action will be construed as the expression of the will not to be bound.

If, as provided in the Bill, the opt-out system is generally applied, individual litigation is expected to be significantly reduced. The reason for this is that no new individual actions may be brought after issuance of the certification order and expiration of the period to opt out of the class action. In addition, ongoing individual proceedings in which the consumer joins the class action will be discontinued.

6. What will the procedure be like and what are its main new features? Will there be a certification procedure?

Under the current system, the rules governing ordinary or oral proceedings apply, depending on the type of action, with certain particularities established in different provisions of the Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil* or “LEC”). On the other hand, the Bill refers to a special procedure set forth in an independent Title of the LEC. Its main characteristics are as follows:

- Injunctive actions require a prior claim to the trader at least one month in advance.



- If the injunctive action is not filed together with a redress action, the rules governing oral proceedings will apply—with some particularities such as the one-month deadline to respond to the claim.
- A special procedure will apply if the injunctive action is filed together with a redress action or if only the latter is filed. Its main novelty is an action certification procedure.
- The purpose of the certification procedure is to remedy procedural defects at the initial phase (even before responding to the claim) and to determine the target and subjective scope of the action, including the analysis of whether the matter is suitable to be tried on a class basis. To this end, consumer claims must be sufficiently homogeneous—i.e., the court should be able to rule on the action without considering factual or legal aspects unique to each individual consumer affected.
- The certification procedure will be conducted through a hearing on (i) the jurisdiction of the court (the general procedure for disputing the court's jurisdiction is eliminated); (ii) procedural exceptions preventing continuation of the proceedings (the prior hearing is eliminated); and (iii) compliance by the qualified entity with the relevant requirements. These three issues will be assessed at the certification hearing but must be made known in writing within 10 days from notification of admission.
- Moreover, the certification procedure will assess whether (i) the claims are sufficiently homogeneous (an essential requirement for the case to be tried on a class basis); (ii) the action is manifestly unfounded; and (iii) any of the conditions preventing third-party funding are met.
- The system of publicity and prior communication under article 15 LEC is eliminated. Under the new system, if the action is certified, the claimant entity will submit to the court a list of the consumers who have opted out or in—depending on the applicable mechanism.
- The deadline to respond to the claim will be two months once the list of affected consumers has been approved.
- Another relevant novelty is that the submission of evidence other than documentary evidence will be made in writing within 20 days of admission of the response. In particular, the parties may provide final decisions of other national courts or administrative authorities or of any Member State of the European Union declaring the existence of the infringement—as long as the claim refers to the same conduct and to the same trader.
- Also, the Bill provides that the proceedings may be conducted with successive rulings when so requested by all the parties or deemed advisable by the court to ensure a good administration of justice. In this case, the response to the claim, the trial and the judgment will be limited exclusively to the pleadings and evidence on the defendant's



liability. Only in the event of a finding of liability, written adversarial proceedings and a new hearing will be held to determine the compensation.

7. Does the Bill allow these entities to have external funding to file the class action?

As a relevant novelty, the Bill allows third-party funding of the proceedings.

This possibility is excluded where there is a conflict of interest—i.e., where the defendant is a competitor of the funder, where the funder depends on the defendant trader, or where the decisions of the claimant entity are influenced by the funder in a way detrimental to the interests of consumers.

External funding is also excluded where it is driven by an economic interest in the bringing or the outcome of the action, diverting it from the protection of the collective interests of consumers.

The Bill requires qualified entities to disclose a financial overview of the sources of funds and to identify third-party funders. The court may also require the provision of the financing contract to assess its potential consequences on the affected consumers. The Bill also establishes that the submission and review of the financing contract will take place at a hearing, subject to confidentiality restrictions if the court deems it necessary.

If the court considers that any of the circumstances precluding third-party funding of the proceedings are met, it will ask the claimant to modify or waive this funding. If it fails to do so, the court will discontinue the proceedings.

8. What will the judgment enforcement procedure be like?

The Bill incorporates a special enforcement procedure for class actions based on voluntary compliance by the trader, under penalty payments.

In the case of injunctive actions, the judgment must establish a term for the trader to voluntarily comply, imposing a penalty payment from €600 to €60,000 per day of delay depending on issues such as the number of affected parties or the economic capacity of the defendant and its conduct.

In the case of redress actions, the defendant must also comply voluntarily within the time limit set by the court, in accordance with the following special rules:

- If the beneficiary consumers are identified, the defendant must request from them the information or the specific steps, as the case may be, to make the payment or otherwise enforce the judgment.



- If beneficiary consumers are not identified, the defendant must deposit the lump sum set in the judgment into the court's deposit and consignment account, together with a provision for the legal costs. In that case, a liquidator must distribute the amounts among the beneficiaries and, if applicable, return the remainder to the defendant (there are no punitive damages in our legal system).

If the deadline expires without voluntary compliance, the penalty payment established in the judgment will be applicable.

The Bill excludes the possibility of requesting the provisional enforcement of class actions, although provisional injunctions may be ordered as a precautionary measure.

9. Does the Bill provide for settlement agreements?

The Bill expressly provides for the possibility of reaching settlement agreements and establishes specific rules depending on whether the agreements are reached after the certification of the action or even before that procedural stage.

To be valid, settlement agreements require judicial approval. Before granting approval, the court will review that the agreement is not unduly detrimental to consumers' interests, contrary to mandatory rules or subject to conditions that cannot be complied with.

To analyze whether the agreement unduly harms the interests of consumers, the court will take into consideration the amount of the indemnities, the degree of difficulty for consumers to access them and, where appropriate, the amount of the sums to be paid to the third-party funder and to the claimant's counsel.

10. What is the relationship between the projected regulation and witness proceedings?

The figure of witness proceedings has been recently incorporated into our legal system through [Royal Decree-Law 6/2023](#) (see [post](#)), with the same purpose as class actions: to reduce mass litigation, to reduce the burden on the judiciary, and to ensure procedural efficiency.

The scope of witness proceedings overlaps only partially with that of class actions. Witness proceedings apply regardless of whether or not the claimant is a consumer. They are limited to "*lawsuits in which individual actions are brought in relation to general contract terms,*" provided that the cause of action does not involve a control of material transparency or determining the existence of defects in consent. Therefore, its subjective scope is broader, despite being much narrower from a material perspective.



The new regulation of class actions based on a general opt-out system under the Bill will further limit the scope of witness proceedings, since the processing of a class action will suspend the exercise of individual claims potentially subject to witness proceedings.

11. Which proceedings will be subject to the new regulation?

According to the tenth transitory provision of the Bill, proceedings for the protection of the collective and diffuse rights and interests of consumers pending at the date of entry into force of the Act will continue to be heard, in all instances and including extraordinary appeals, in accordance with the previous procedural legislation—which will also apply to the eventual enforcement of the judgments.

Therefore, the Bill will not apply retroactively to class proceedings initiated before its entry into force.

12. What new features does the Bill incorporate with respect to the Draft Bill?

Besides recovering the term “class action” (*acción colectiva*) instead of “representative action” (*acción de representación*), the new Bill introduces the following main modifications:

- Reduction of the threshold for the exceptional application of the opt-in system (from €5,000 to €3,000).
- Reinforcement of judicial control over third-party funding of the proceedings.
- Application of the general class action waiver rules, as opposed to the previous prohibition to waive the action.
- Incorporation of a liquidator at the enforcement stage. In the Draft Bill, the distribution of amounts was not carried out by the liquidator, but by the qualified entity itself—a matter that received much criticism.
- Extension of the procedural deadlines applicable to the defendant. Although they have been lengthened with respect to the Draft Bill, they may still be insufficient.
- Establishment of the General Contract Terms Registry as a public registry in charge of the publicity of class actions (as in Portugal).
- Modification of the class action decoupling mechanism for consumers and its effects on the reactivation of the statute of limitations for redress actions.



The Bill maintains other relevant measures already included in the Draft Bill, such as access to sources of evidence, the preferential handling of this type of proceedings and the possibility of reaching settlement agreements affecting the class.

13. What are the next stages of this Bill?

The Bill has to undergo parliamentary processing. As a result, its current wording could change.

The Bill is being processed under the urgency procedure. It is currently in the lower house, where the initial deadline for the presentation of amendments has been extended several times.

To be enacted, the Bill must be approved by the lower house. It would then be sent to the upper house (the Senate) for further processing. If the Senate does not introduce any changes to the Bill or veto it, it will be published in the Official Gazette of the Spanish State. If the Senate includes any changes, the Bill would be sent back to the lower house, which could ratify them or not (or, if necessary, lift the Senate's veto). After this stage, it would be published in the Official Gazette.

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