

What will the new collective actions for the protection of consumers' rights and interests involve and how will they be heard?

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The first draft bill on representative actions for the protection of consumers' collective interests provides for the creation of a special proceeding and promotes the use of tools, such as electronic platforms, as a means of enabling a smoother hearing process and direct and simple access for consumers.

In the near future, the collective protection of consumers will undergo a far-reaching transformation and enhancement process brought about by 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 its transposition, as contained in the draft bill on representative actions for the protection of consumers' collective interests. The directive requires the provisions transposing it to have been adopted by December 25, 2022 and to apply to actions brought on or after June 25, 2023. In this regard, on December 20, 2022 the government approved the draft bill and recently published its contents, which have been laid before parliament.

Although the option of bringing collective action on consumer matters already exists in Spanish law, which covers both injunction and redress actions, the projected provisions will entail a significant step forward in this area, will foreseeably resolve the difficulties and shortfalls arising from the current legislation, and will shape collective protection as a genuine form of special protection.

In particular, it sets out the creation of a special proceeding governed by rules that will be included as a new Title IV, in Book IV of the Civil Procedure Law 1/2000 (LEC). Additionally, it provides for the use of tools aligned with current times, such as electronic platforms, enabling a smoother hearing process for claims and direct and simple access for consumers and users.

Below is a preliminary analysis of the projected provisions.

1. What are the types of cases where it will apply?

Any cases where **the conduct of traders or professionals has resulted in a breach of the collective rights and interests of consumers and users** (not simply in cases involving infringement of the legislation identified in Annex I to the directive, on defective products, unfair terms, travel and tourism, sale and guarantees of consumer products, data protection, financial services, food and medical devices, misleading advertising, energy and telecommunications).

2. What types of action will consumers and users be able to bring?

The types of actions referred to as "**representative actions**", which include both injunction actions (to stop a type of conduct and prohibit conduct from reoccurring in the future) **and redress actions** (for relief consisting of an order to compensate for damage suffered by consumers or users harmed by the infringing conduct or for compensation or replacement of a good, a price reduction, termination of the contract or a refund of the paid price).

Injunction and redress actions may be joined in the same action, although the court will decide whether it will hear them together or separately. If it decides to hear them separately, the court may rule to put the redress action on hold until a decision is handed down on the injunction.

3. Who will have legal standing to bring representative actions?

Qualified entities, as follows:

- Spanish user and consumer associations, the public prosecutor's office and public consumer agencies will have legal standing to bring domestic representative actions.
- Consumer and user agencies established in another member state will have standing to bring cross-border representative actions (namely where a qualified entity brings action in a member state other than the state where it has been designated).

The draft bill removes the standing of groups of consumers and users concerned by the action, as it exists in the current legislation on protection afforded by collective actions.

4. Who will be able to act in the new special proceedings?

Only qualified entities, not individual **consumers and users**.

Consumers and users are precluded from acting individually, which is designed to secure more efficient management of the process, although a tolling effect is recognized for representative actions on the applicable statute of limitations for any potential individual actions.

5. Which courts will have jurisdiction to hear cases at first instance?

The **courts of first instance** (regardless of the subject-matter of the proceedings) for the place where the **claimant's domicile** is located (in the absence of a domicile, the place where the claimant has an establishment, and, in the absence of either a domicile or establishment in Spain, the courts for the place where the infringing conduct took place or might have taken place).

6. What specific provisions does it contain regarding injunction actions?

- Particularly notable is the requirement (even though this is optional in the directive) for a **prior claim to the trader or professional**, at least 15 days beforehand, as a necessary requirement for allowing the claim to be admitted.
- The claimant will have to set out in the claim the **consumers and users that will have to be concerned by** the representative action. **Where individual identification of every one is not possible**, the claim will have to specify the **characteristics and requirements they must meet** to be considered beneficiaries of a judgment handed down for the claimant.
- The claim will be heard in **oral proceedings with a written answer** within **20 days**, and a **hearing** will have to be **held**, in all cases.

- **A provisional order to stop the conduct may be delivered as injunctive relief;** and reasons of urgency or necessity will be considered to exist if evidence is provided of the existence of the infringing conduct. Additionally, the court may dispense with the requirement for the entity to provide security.
- **A decision for the claimant will impose a fine between €600 and €60,000, for each day of delay to enforcement** of the court judgment within the time period stipulated in the judgment and the court may order **publication of the decision in the media**, or of a corrective statement.

7. What specific features will redress action involve?

- **Broadly speaking, the process will be binding for all parties affected by the illegal conduct, unless they expressly elect the opt-out mechanism.** Therefore, as a general rule, the consumers and users concerned by the representative action for redress will be bound by the effects of a judgment that is handed down or a sanctioned agreement, unless they elect to opt out.
- **As an exception, (i)** it may be determined that the process **will only be binding for those who expressly opt in using the opt-in mechanism** where the sum claimed for each beneficiary is higher than €5,000; and **(ii)** the opt-in mechanism will apply where the **parties concerned** by a redress action have their **principal residence outside Spain**.
- Creation of an **electronic platform for each process** to supply information to the parties concerned, so that they can opt out (or opt in for the exceptional cases in which this mechanism applies) and to ensure that the obtained information is authentic and able to be used by the court or by the qualified entities when enforcing the judgment. Notably, the costs of creating and maintaining this platform are required to be treated as legal costs of the proceedings.
- Structure of the **proceedings**:
 - **Claim:**
 - The claimant has to mention the **consumers and users that will be concerned** by the representative action.

Where it is not possible to identify each of these individually, the claimant will have to specify the **characteristics** and the **requirements** that they must meet to be considered beneficiaries if a judgment for the claimant is handed down. Uniformity among the claims of the consumers and users concerned by the action is required, in all cases.
 - The claim must also contain a **financial overview of the sources of funds** used to support the representative action. Where a third party has provided funds, the overview must state the existence of those funds and the third party must be properly identified.
 - **Admission for consideration of the claim and the calling of a certification hearing.** After the claim has been admitted for consideration, the parties will be called to a certification hearing, which will have to be held between 20 days and two months after the call notice for the hearing.

The respondent will have 10 days, following admission of the claim, in which to plead absence of jurisdiction, absence of any obstacle that will prevent the process from continuing or that the claimant does not meet the requirements to be a qualified entity. And the claimant, for its part, will have a further 5 days to file submissions on these matters.

- Holding of a certification hearing **so as to**:
 - Resolve **potential** procedural issues;
 - Verify whether the necessary uniformity of claims exists and that the action does not appear to be clearly baseless.
 - Confirm **that any** funds for the process **provided by third parties are not the source of a conflict of interest that may harm consumers and users.**
- **Certification decision**: On completion of the hearing, depending on whether the necessary requirements have been met, the court will issue a decision for or against the claimant.
 - A **decision for the claimant** will need to have the following **contents**:
 - Determine the **objective scope** (infringing conduct) and **personal scope** (consumers and users who will have to be concerned by the process, each identified individually, if possible, otherwise, it will have to identify the requirements to be beneficiaries of the decision to be handed down).
 - State **the time period** within which the consumers concerned by the action have to **submit their express decision to opt out** of the action and of the outcome of the process. This period will have to be between 2 and 4 months.
 - Specify **whether the opt-in mechanism applies either because, (i)** it has been elected, in cases where the claimed sum for each beneficiary is higher than €5,000; or **(ii)** there are consumers or users concerned by the action who have their principal residence outside Spain.
 - Rule, where applicable, on the funds provided for **the process by a third party**, rejecting the financing if a conflict of interest is considered to exist.
 - In the case of a **decision against the claimant**:
 - The process **must be dismissed**. This is unless injunction action had been filed alongside the redress action, in which case the proceedings will continue in relation to the injunction action.
 - After the decision denying certification of the action becomes final, **no other representative redress action will be admissible** in relation to the same subject-matter, **even if it is brought by a different claimant**.
 - An appeal may be filed against the decision which will be heard as a matter of priority.
- **Public disclosure and effects of the certification decision**:
 - **Public disclosure**:

- All certification decisions, both for and against, will have to be published in the **Register of Representative Actions**.
- Additionally, in the event of a **decision for the claimant**:
 - The draft bill requires, if possible, **individual notices** to all the consumers and users concerned, by any means providing proof of delivery to the intended recipient.
 - **Where it is not possible to send individual notices** to all the consumers and users concerned, the court will order publication in the media or equivalent widely used information sources.
 - Individual notices and the published information **will have to specify** , clearly and comprehensibly, **whether the consumers and users concerned have to expressly opt out of the action (if the general opt-out mechanism was established in the decision for the claimant) or whether, by contrast, they have to expressly opt in to the action** (if the exceptional opt-in mechanism was established in the decision for the claimant), stating in both cases the **time period and how to access the electronic platform** to do so.
 - **The costs of individual notices and of publications will be paid initially by the claimant** and will be considered **legal costs of the proceedings**.
- In the event of a decision for the claimant:
 - In addition to the decision being published on the Register of Representative Actions, the court may order the claimant entity to inform the consumers and users concerned by the action.
- **Effects on individual actions:**
 - With respect to any **individual actions in progress (brought before the representative action)**: the claimants in those individual actions will be allowed to **opt in to the representative action**.

In particular, the certification decision will have to be notified to the claimants in these individual actions in progress to give them the chance, if they so choose, to opt in to the representative action, and they will be called upon to do so within 10 days. If they opt in, the court will dismiss the individual proceedings. If they refuse to opt in or fail to reply to the request, the individual proceedings will continue.
 - Regarding **new actions: No individual actions will be admissible following the end of the time period** granted for consumers and users concerned **to opt out of the action**.

An exception is made for cases where the opt-in mechanism applies; namely, where the claimed sums are higher than €5,000 per beneficiary and it has been elected, and additionally in cases involving users and consumers concerned having their principal residences outside Spain who had not opted in to the representative action.

- **Expression of the will of those concerned** not to be bound (in the general cases of the opt-out mechanism) or to be bound (in the exceptional cases of the opt-in mechanism) **through the electronic platform**: they will have to be registered on the platform and the express their will through a clear, simple and accessible procedure, which does not need the participation of a lawyer or court procedural representative.
- **Suspension of the proceedings**: The proceedings have to be suspended for the time period that will be determined by the court to allow the consumers and users concerned to state their decision to opt out, or, if need be, opt in.
- **Answer to the claim**: after the end of that time, the respondent will have to answer the claim in writing **within 30 days**.
- **Proposal of evidence**: both parties will propose their evidence **in writing in a common time period of 10 days**. The reason is that, after the certification hearing has been held, the equivalent step of holding a pre-trial hearing is considered to be unnecessary.

It expressly mentions, notably, that the court may assess, as **evidence** of the existence of the infringing conduct, the **final decisions of other judicial courts or administrative authorities** of any member state of the European Union, in relation to the same conduct and the same trader or professional.

- **Trial**: It has to be held in every case and will follow the procedure in the rules on ordinary proceedings.
- **Judgment**. In the event of a judgment for the claimant:
 - **Monetary award**:
 - **Where possible, it will have to determine the individual consumers and users concerned** by it, the amount relating to each of them and by categories, the **time period** in which the respondent will have to make **direct payment** and the **fine between €600 and €60,000 per day of delay**, depending on the number of beneficiaries and the respondent's ability to pay.
 - **Where individual determination of every user and consumer is not possible**, it will have to specify the necessary **characteristics and requirements to be able to benefit from its rulings**, determine a **lump sum** which, according to its calculations, reflects the **maximum sums that have to be paid to the consumers and users concerned**, the **time period** within which the respondent **will have to pay the sums** into court and the fine, as in the previous case, **amounting to between €600 and €60,000 per day of delay** depending on the respondent's ability to pay.
 - The **lump sum may be changed** if, in fulfillment of the judgment, it is found to be insufficient.
 - **Nonmonetary award**:
 - The decision will have to state the **time period and manner of fulfillment** and the steps that consumers and users have to carry out to obtain the redress relief to which they are entitled and the time period for doing so. As in the foregoing cases, a **fine between €600 and €60,000 per day of delay will have**

to be imposed, depending on the number of beneficiaries, the type of obligation owed and the liable party's ability to pay.

- **Publication of the judgment:**

- Complete or partial publication of the final judgment is required by adequate means to inform the consumers and users concerned of it.
- Individual notices to the consumers and users concerned may be ordered, if possible, in particular to any in vulnerable situations.
- The individual notices will need to state clearly and comprehensibly the steps that consumers and users have to carry out to obtain the redress relief and the time period for doing so.
- In the event of a final judgment against the claimant, the claimant will have to publicly disclose it in an adequate manner to inform the consumers and users concerned of its contents.

- **Res judicata. This will affect:**

- Generally:
 - The **consumers and users referred to in the certification decision, even if they have not been identified individually** in the decision or in the judgment.
 - In the **exceptional cases** where the **opt-in mechanism** has been applied **and in cases involving consumers and users resident outside Spain, it will only concern consumers and users who have expressly opted** in to the outcome of the action.
 - A **later claim** bringing representative redress action will not be admissible if it has the same subject-matter as that settled by the final judgment, even if it was brought by a different claimant.

- **Appeals.** The judgment will be appealable in an **appeal to a superior court or a cassation appeal**, and appeals are required to be heard as a matter of priority.

- **Alternative proceedings:** it is stated that there may be, **first, a debate and adjudication in relation to the respondent's liability**, which will finish with a **judgment** confined to this matter only, **followed if necessary by a new debate** and proceeding **in relation to the specific sums that have to be paid** to the beneficiaries of the earlier ruling.

In these cases, the answer to the claim and the proceeding will relate exclusively to the pleadings and evidence on the respondent's liability with regard to the infringing conduct, and **a judgment will be delivered ruling exclusively on that liability**, upholding or rejecting it. This judgment will be appealable in an appeal to a superior court or cassation appeal, heard as a matter of priority.

If the judgment declares the claimant's liability, the claimant will receive a request to determine, within 15 days following the judgment, the sums to which the beneficiaries are entitled, and the respondent, in turn, will have 15 days to file submissions and produce any documents and expert reports they may have. Later, a hearing will be held in which the court will hand down a **new judgment determining the sums to which the beneficiaries of the**

representative action are entitled. The judgment is appealable here also in an appeal to a superior court or a cassation appeal, heard as a matter of priority.

The public disclosure rules described above will apply to both judgments.

8. Can an agreement bring the court proceeding to an end?

Yes it can, and it will need to be **sanctioned by the court.**

A high level of control is required before the court sanctions such an agreement, meaning that it may be rejected if it is considered to result in undue harm to the rights and interests of the users and consumers concerned; especially since, as a general rule, the effects of the agreement will be binding for all the consumers and users concerned.

The following distinction is made:

- **If the action has already been certified, the sanctioning decision will determine that its effects are binding** for the consumers and users included in the certification decision, without offering them a **new chance to opt out.**
- **If the action has not yet been certified, the sanctioning process requires verification at the same time that the requirements for certification** are met, from the standpoint that the users and consumers concerned are going to be bound by the agreement signed by the qualified entity.

Once the agreement has been sanctioned it will be **publicly disclosed** in the same way as the certification decision, and the users and consumers concerned have the burden of expressly opting out, unless it has been provided otherwise in the specific case concerned.

9. How are redress judgments and agreements enforced?

- In the case of **monetary awards:**
 - **Where the consumers or users are identified, mandatory enforcement will be required if the liable party fails to pay** the owed amount **within the time period** determined in the judgment. **Access to enforcement is simplified through the use of forms and the procedure is automatic** so as to avoid expenses for the consumers or users concerned.
 - **Where not all the beneficiaries are identified,** the judgment will determine the sum which, in the court's opinion, **ought to be sufficient to meet the whole amount owed by the liable party.** This party **will be able to fulfill** the judgment **by paying the owed amount** into court (that amount may be increased if it is not sufficient). **If they fail to do so, enforcement will take place and may even be done of the court's own initiative.**

Once the owed amount has been made available to the court, **distribution of that sum among the beneficiaries needs to be organized. This is done by the qualified entity that is the claimant.** It is therefore stipulated that the qualified entity must **submit accounts** to the court, stating the beneficiaries and payments made to each.

The **liable party is allowed to challenge the distribution and payments made by the qualified entity,** in which case a hearing will be held to decide on the challenge with the

qualified entity and the beneficiaries whose payments were challenged. After this hearing, a judgment will be handed down.

If it is held that any payments were not required or their amounts were incorrect, the beneficiary will be ordered to make a refund. If serious willful misconduct or fault is found to exist on the part of the claimant, that claimant may be held jointly and severally liable with the beneficiary for the refund.

The judgment will be appealable in an appeal to a superior court or in a cassation appeal, heard as a matter of priority.

- **In cases involving non-monetary awards**, it will be necessary for the court to act where the liable party does not accept an applicant's beneficiary status under the judgment or where the liable party does not fulfill their obligation under the judgment. Affected parties may use forms to apply for enforcement. Additionally, it is provided that the subsequent enforcement steps will be set in motion by the court of its own initiative.

10. Will the judgments delivered in representative action proceedings be enforceable on a provisional basis?

No, they will not. Provisional enforcement is precluded for them.

11. What else do we need to know about the draft bill?

- It contains a **mechanism for access to information and sources of evidence** held by the other side or by third parties for the disclosure of relevant evidence in their possession, including any required to determine the identity of the consumers and users concerned.
- Any **entity that has filed a claim** to bring a representative action **cannot waive that claim**, although it can discontinue it.
- The **creation of a Public Register of Representative Actions by the Ministry of Justice**, on which to enter any claims filed in representative actions, so as to make information available on those in progress; any certification decisions or decisions denying certification; any final judgments that are handed down or other final decisions bringing the process to an end; any decisions relating to, amending, or lifting injunctive remedies; or court-sanctioned redress agreements, among other decisions.

12. Which provisions would be amended by the draft bill?

The provisions in the draft bill would result in **amendments** to the following articles in the **Civil Procedure Law**: Article 6 (capacity to be a party), article 7 (appearance and representation in proceedings), 52 (territorial jurisdiction in special cases), 76 (cases requiring a joinder of proceedings), 222 (material res judicata), 250 (scope of oral proceedings), 256 (preliminary proceedings), 257 (jurisdiction preliminary proceedings), 261 (refusal to carry out the proceedings), 477 (decisions appealable in cassation), 521 (simply declaratory judgments and judgments with orders), 525 (non-provisionally enforceable judgments), 711 (penalty payment amounts) and 728 (risk arising from delay in proceedings, appearance of a good right and security); and they would make the following articles **void of content**: Article 11 (standing to defend consumers' and users' rights), article 15 (public disclosure and acting in proceedings to protect consumers' and users' collective and diffuse rights and interests), article 221 (judgments delivered in proceedings brought

by consumer and user associations) and article 519 (enforcement action by consumers and users) in the Civil Procedure Law.

Additionally, as a result of the new legislation on collective actions the draft bill provides for the amendment of various laws such as the **General User and Consumer Protection Law**, approved by Legislative Royal Decree 1/2007; **Unfair Competition Law 3/1991**; **Law 7/1998 on standard business terms and conditions and other industry-specific legislation**.

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