



The Legal 500 Country Comparative Guides

Spain

CLASS ACTIONS

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in Spain.

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SPAIN

CLASS ACTIONS



1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

Yes, Spanish law provides for a class action mechanism. However, there is not a unified regulation for this matter. The Code of Civil Procedure (Act 1/2000, of January 7) (the “CCP”) sets out different rules regarding some of the main procedural matters such as legal standing, intervention, publicity, claim preclusion, and enforcement. Special rules related to different aspects of class actions are also provided in the Consumer Protection Act (Royal Decree-Law 1/2007, of November 16) (the “CPA”), the Act on General Terms and Contractual Conditions (Act 7/1998, of April 13) (the “AGTCC”), and the Spanish Unfair Competition Act (Act 3/1991, of January 10) (the “UCA”). Due to the incohesive nature of all these rules, legal loopholes and difficulties in their implementation arise.

However, as is further explained in the answers to questions 16 and 24, in December 2022, the Spanish Council of Ministers approved the preliminary draft of a bill transposing Directive (EU) 2020/1828 of the European Parliament and of the Council, of November 25, 2020, on representative actions for the protection of the collective interests of consumers (the “Directive”), which revokes Directive (EU) 2009/22/EC (the “Preliminary Draft”), into Spanish law. This bill may be approved in 2023. The Preliminary Draft substantially modifies the current regulation and consolidates the rules on class actions into one comprehensive body.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Currently, the CCP regulates two types of consumer collective interests defended through class actions: (i) *collective interest actions*, where all the members of the harmed group are previously identified, can be identified, or can be easily identified; and (ii) *diffuse interest actions*, where the members of the harmed

group are unknown or hard to identify. The classification of a class action as collective or diffuse will affect the rules on legal standing (and on notice and *res iudicata* effects as well).

Public prosecutors and entities authorized under European Union (“EU”) law are granted general legal standing to file any type of class actions regardless of the type of interest protected. Regarding *collective interest actions*, legal standing is granted to (i) *ad hoc* groups of affected consumers (known as “platforms” in Spain), who must demonstrate that they represent the majority of the consumers affected by the alleged harmful event; (ii) the National Consumer Institute and the autonomous community and local government bodies or entities deemed competent to protect consumers and users; and (iii) consumer and user associations, as well as legally incorporated entities that defend and protect consumers and users. Regarding *diffuse interest actions*, legal standing is exclusively granted to representatives (“legally constituted associations of consumers and users”). Under the CPA, associations are considered representatives if they are accepted into the Consumers and Users Council (currently, eight associations have been accepted into the Consumers and Users Council). The most active associations include the Association of Users of Banks, Savings Banks and Insurance (ADICAE), Consumers in Action (FACUA), and the Organization of Users and Consumers (OCU).

The Preliminary Draft does not differentiate class actions based on the type of interest being protected (i.e., collective or diffuse). Instead, as it currently stands, it grants legal standing to bring class actions to qualified entities, which are (i) consumer associations authorized by the corresponding ministry, (ii) public prosecutors, (iii) the National Consumer Institute and autonomous community and local government bodies or entities competent to protect consumers and users, and (iv) qualified entities of other Member States. In contrast to the existing regime, the Preliminary Draft excludes groups of consumers.

3. Which courts deal with class actions or collective redress proceedings?

There is currently no specific jurisdiction for class actions. Depending on the nature of the claim, they can be resolved by either the (i) first instance civil courts, which deal with general contractual law, general contractual conditions, and the general protection of consumers and users; or (ii) the commercial courts, which deal with commercial matters such as competition law.

Regardless of the nature of the underlying claim, the Preliminary Draft grants exclusive judicial competence to the first instance civil courts corresponding to the defendant's domicile or, in the absence of a domicile, where the defendant is established. If the defendant is neither domiciled nor established in Spain, the competent court will be the court of the place where the defendant's conduct was carried out or where it had—or could have—produced its effects. The attribution of exclusive jurisdiction to the first instance courts, excluding commercial courts, has been controversial and different voices have advocated against it.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

The current Spanish law provides for three types of actions that may be brought as class actions (each seeking different forms of relief):

- *Cease and desist actions*, which seek to annul the general terms and conditions of contracts and prohibit their future use. These actions—which are the most common—are usually joined with claims to be compensated for damages caused by the use of these terms and conditions.
- *Retraction actions*, which request that the defendant retract any recommendation made on the use of unlawful terms and conditions and also refrain from making any future recommendations.
- *Declaratory actions*, which seek a declaration that a certain contractual term is a general condition and, when necessary, that it should be registered in the Spanish Register of General Contractual Conditions.

Conversely, the Preliminary Draft outlines two types of class actions:

- *Injunctive measures*, which seek an order for the defendant to cease its conduct and to be prohibited from repeating it in the future.
- *Redress measures*, which seek specific remedies for the damage the defendants caused to consumers' collective rights and interests, such as compensation, reparations, replacements, reimbursements, or the termination of contracts.

Both actions may be exercised in the same proceedings and under the same claim. However, if the first instance civil court considers them to be particularly complex, it may separate them. In this case, the court may suspend the redress measure until the injunctive measure has been resolved.

5. Are there any limitations of types of claims that may be brought on a collective basis?

Both the current regime and the Preliminary Draft restrict the types of collective claims that may be brought to those described above, without any limitations on the nature or amount of the claim.

6. How frequently are class actions brought?

Up to now, the lack of a unified and comprehensive regime in Spain applicable to class actions has hindered the country from becoming a significant hub for class-action litigation. However, the number of class actions has grown over the past few years, albeit focused on particular industries (mainly, the banking sector). The unitary system introduced by the Preliminary Draft is expected to provide an appropriate legal framework for the development and growth of class actions in Spain and the emergence of new pieces of legislation, such as Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022, on contestable and fair markets in the digital sector (the "Digital Markets Act"), may increase the number of class actions in the years to come.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

To date, class actions have been primarily focused on banking litigation related to the protection of consumers and users, such as preference shares and derivatives. Recently, there has been an increase in threatened class

actions in the automotive, digital, communications, and healthcare sectors as well.

Other cases concern: private enforcement, such as *Ausbanc v. Telefónica* (due to an anticompetitive margin-squeeze conduct); unfair commercial practices, such as the Spanish Consumer and Users Organization v. VW-Audi Spain Group; and defective product liability and power outages, such as *Endesa v. OCU*.

Going forward, two relevant business risks or focal points of class action litigation may be the breach of rules protecting the rights of consumers and users and the breach of competition law (giving rise to private enforcement).

8. Is your jurisdiction an “opt in” or “opt out” jurisdiction?

Due to its current class action legislation, Spain cannot be considered an “opt-in” or “opt-out” jurisdiction. However, there is a procedure for publicizing the proceedings and for calling possible affected consumers to participate in the proceedings and defend their individual rights or interests.

For the time being, notice requirements depend on the type of action (i.e., collective or diffuse). For *collective interest actions*, before filing them, claimants must inform each potentially affected consumer about their intention to bring the action. For *diffuse interest actions*, potentially affected consumers are notified by the court clerk; for example, through publications in widely distributed newspapers. After being notified (either by the claimant or the court clerk), consumers have the option to join the proceedings, or to defend their interests individually through separate proceedings. For diffuse interest actions, consumers can only join the proceedings when summoned by the court clerk and not at a later stage. However, even if the consumers do not join the proceedings, they will be able to enforce their rights if the class action is successful. Concerning cease and desist actions, the CCP does not require notice to consumers.

The Preliminary Draft provides that consumers affected by infringing conduct do not need to join the action for *injunctive measures*. Regarding *redress measures*, an opt-out scheme has been implemented. However, if the amount claimed exceeds €5,000, the court may decide to apply an opt-in scheme for “reasons of good administration of justice.” An opt-in scheme has been implemented for consumers affected who do not usually reside in Spain as well.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

The CPC does not provide for any specific requirements to initiate a class action claim. As with any other civil proceedings, it can be initiated by filing a claim before the competent court. As advanced, in collective interest actions, the claimant must inform the potentially affected consumers of its intention to bring a class action. To this end, the claimant may request pre-action discovery from the defendants. However, the Spanish Constitutional Court has established that such requests should only be admitted if they are essential for the class action.

The Preliminary Draft establishes that, regarding *injunctive measures*, claims will only be admitted if the claimant requested the defendant to cease the conduct 15 days before filing the claim. Regarding *redress measures*, the Preliminary Draft introduces a new procedure with strict timelines for each stage. To be admitted, the claim must include information about the conduct in question, the consumers affected, the petition, and a summary of the financial sources. Importantly, the Preliminary Draft requires the class to be certified for redress measures claims to go forward.

10. What remedies are available to claimants in class action or collective redress proceedings?

The specific remedies include both injunctive and redress relief and will depend on the type of action brought by the claimant.

In *cease and desist actions*, the remedy includes a declaration annulling the general terms and conditions of a contract, and prohibiting their future use. This is usually joined with claims for compensation for damages caused by the use of those terms and conditions. In *retraction actions*, the remedy involves the defendant retracting any recommendation made concerning the use of unlawful terms and conditions, and prohibiting their future use. In *declaratory actions*, the remedy consists of a declaration that a certain contractual term is a general condition and, when necessary, that it should be registered in the Spanish Register of General Contractual Conditions.

Under the Preliminary Draft, the remedy sought in case of *injunctive measures* is the order for the defendant to cease the conduct and to prohibit its repetition in the future. The action may also be brought to prohibit the commission of conduct, even if the conduct has ceased

at the time the action is brought or before the proceedings are terminated, if there is sufficient evidence to fear its commission or repetition. Claimants may also request that (i) a conduct is declared contrary to the rules of protection of the rights of consumers and users or that (ii) all or part of the judgment be published in the media or that a declaration of rectification be made.

Regarding *redress measures*, the Preliminary Draft provides that consumers will receive specific remedies for damages caused by traders or professionals to their collective rights and interests in the form of compensation, the repair or replacement of goods, or a reimbursement of the price among others. Claimants may also demand the termination of contracts under which the infringing conduct occurred, or a reduction of the price of goods or services affected by the infringing conduct.

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

No. Under Spanish law, which is based on the compensatory principle, punitive damages (overcompensation) are not allowed. In fact, the Directive states that the award of punitive damages should be avoided. Claims for restitution of damages (compensatory in nature) may include direct damages, lost profits, and interest.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

No. Under Spanish law (regulated by Act 5/1995, of May 22, of the Jury Court) juries are exclusively competent to prosecute specifically attributed criminal offenses.

13. What is the measure of damages for class actions or collective redress proceedings?

Neither the current Spanish law nor the Preliminary Draft provides for a specific method for quantifying damages. Therefore, the parties involved in a legal dispute typically produce expert reports containing assessment of the damages caused. During the trial, the court will evaluate the report and the experts' arguments before coming to a decision.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

Given the existence of legal loopholes and the incoherent nature of the rules on class actions under current Spanish law, most class actions are suspended or dismissed on different procedural grounds. Regarding jurisdiction, defendants may challenge the court's international, objective and territorial jurisdiction (*declinatoria*). It should be noted that the court may also appreciate *ex officio* the lack of international or objective jurisdiction.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

There are no nationality or domicile limitations for claimants under current Spanish law. However, to date, no cross border collective actions have been brought before Spanish courts.

In accordance with the Directive, the Preliminary Draft has introduced cross border representative actions, which allow consumer and user associations established in one Member State to bring cross border representative actions in another Member State.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

As indicated in question 1, the current Spanish regime of class actions is regulated by various provisions of the CCP instead of a specific class action procedure, as well as by sectorial substantive rules. The Preliminary Draft transposing the Directive substantially changes this by creating a unified and coherent system of collective protection in Book IV CPC (articles 828 to 885). This will replace the current procedural and substantive rules, with the aim of creating an adequate, coherent, and specific regulatory framework for the protection of consumers and users.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

The current wording of the CPC does not provide any provisions on class action settlements. This gives rise to uncertainty surrounding the mechanism for collective

settlements. Neither case law nor scholarly publications have addressed this issue, nor does the CPC provide a procedural mechanism for claimants and defendants to seek certification of a settlement agreement before litigation starts. Therefore, class action settlements are rare (although the general rules on the settlement of civil claims still apply) and there is no public information available on the percentage of class actions settled.

The Directive mandates Member States to establish a framework to encourage agreements on redress measures within the scope of representative actions. To this end, the Preliminary Draft foresees a specific section on settlement agreements (fifth section) in Book IV CPC according to which redress settlements can be entered (even before the certification of the class), subject to the review of the court.

Redress settlements reached after certification will be binding on the parties and consumers affected unless they have refused to be bound by them (except for consumers and users who reside abroad, who shall only be bound if they have expressed their willingness to be bound). If a redress agreement is submitted to the court for approval before the action has been certified, the application must specify the consumers and users who are to be affected by it, either individually or by setting out the characteristics and requirements for eligibility.

Redress settlements will not entail any admission of guilt or responsibility by the defendant, and they will exclude any other redress action for the same purposes.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

Due to the current lack of specific regulations, the general rule for settling individual claims applies. Therefore, the settlement agreement should be filed with the court to receive approval. Generally, the court will certify the settlement agreement, unless it is contrary to the law or affects the general interest or rights of third parties.

According to the Preliminary Draft, the court must certify the settlement agreement, which it shall do unless the court considers it unduly prejudicial to the rights and interests of the consumers and users involved or contrary to applicable rules

19. How do class actions or collective redress proceedings typically interact with

regulatory enforcement findings? e.g. competition or financial regulators?

Once Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the “Damages Directive”) was transposed into Spanish law, the UCA established that the findings of a competition law infringement in a final decision of a national competition authority or a Spanish court is binding in civil proceedings, while final decisions of competition authorities and courts of other EU Member States create a rebuttable presumption. This having been said, stand-alone actions (i.e. those which do not rely on a previous administrative finding) are also possible both in relation to competition matters and generally.

When ruling on damages claims arising from competition infringements, administrative decisions have generally been given significant consideration by Spanish courts, even before the Damages Directive was transposed into Spanish law.

Under the Preliminary Draft, the exercise of a representative action for damages does not require a prior declaration in a final judgment or administrative decision that the conduct of the defendant trader or professional is contrary to the collective interests of consumers.

20. Are class actions or collective redress proceedings being brought for ‘ESG’ matters? If so, how are those claims being framed?

There are no precedents in Spain regarding ESG matters. However, their importance in recent Spanish legislation is well-known. The European Commission has published two relevant proposals for directives in this field: (i) the Proposal for a Directive on substantiation and communication of explicit environmental claims, and (ii) the Proposal for a Directive on corporate sustainability due diligence. Although these directives have not yet been passed by the European Parliament, they will soon create obligations of transparency and due diligence for multinational companies, which could lead to class actions. It is important to note, however, that the Preliminary Draft limits its scope of application to users and consumers only, which could make it difficult for class actions related to ESG issues where the claimants are not consumers or users.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Currently, third-party funding is not regulated under Spanish law and there is no case law on the matter, albeit it is generally permitted.

In line with the Directive, the Preliminary Draft expressly allows for third-party funding within the framework of class actions. The Preliminary Draft requires that potential conflicts of interest that may be detrimental to consumers and users be controlled. In fact, the claim must include a financial summary of the sources of funding used to support the class action, properly identifying third-party fundings. The court will analyze the summary and will reject the third-party funding if it considers that it gives rise to a conflict of interest, e.g., if the third party has an economic interest in the outcome of the class action or the defendant is a competitor of the third party. The court will also consider that there is a conflict of interest if it finds that the decisions of the claimant entity, including those relating to redress agreements, are influenced by a third party who is funding the proceedings, in a way that may be detrimental to the collective interests of the consumers and users concerned.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Under Spanish law, contingency fees are permitted, but they are not regulated. The General Statute of the Spanish Bar Association states that the amount of the fees must be freely agreed upon between the client and the professional, always adhering to the deontological and unfair competition rules.

Contingency fees arrangements are neither generally prohibited under the Preliminary Draft, without prejudice to the rules on conflict of interests.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress

proceedings?

Under Spanish law, the general rule is that unless the court considers that the case posed serious *de facto* or *de jure* doubts, the party whose pleas were rejected must bear the legal costs. However, according to Act 1/1996 of January 10, on free legal assistance, consumer and user associations are entitled to free legal assistance. Therefore, even though their pleas are rejected, they shall not bear legal costs.

The Directive states that the Member States will ensure that the unsuccessful party bears the legal costs, in accordance with the applicable national law. However, it specifies that the individual consumers affected by redress measures will not bear the legal costs, unless they have acted grossly negligently or wilfully.

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

Yes. The Preliminary Draft, approved by the Council of Ministers in December 2022, is the first step Spain has taken to transpose the Directive. The transposition period for the Directive ended on December 25, 2022, and its provisions should be fully applicable from June 25, 2023. The final approval of the Preliminary Draft should take place in 2023. However, because the current Spanish legislature will end in November 2023, this timeframe is uncertain. The Preliminary Draft may also be approved through a royal-decree law due to the lack of time.

As indicated in previous responses, the Preliminary Draft makes significant changes to the Spanish class action regime creating a single and comprehensive body of rules for class actions governed by the CPC which will replace the current dispersed rules. It should be noted that, due to its preliminary nature, the regulation in the Preliminary Draft and the indications in the previous responses may still be subject to changes. References to the Preliminary Draft will be updated when it is approved.

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