



**British Institute of
International and
Comparative Law**

COLLECTIVE REDRESS SPAIN



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**British Institute of
International and
Comparative Law**

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I. General Collective Redress Mechanisms - Joinder of actions and joinder of proceedings¹

Under the general rules of the CCP and from a horizontal perspective, joinder of actions and proceedings are generally available for individuals.² According to Article 72 CCP, 'actions may be joined and simultaneously brought against several or single subjects, as long as such actions have some sort of link or grounds on the basis of a title or the causes of plea'. In this regard, the title or ground must be 'identical or connected where the actions are grounded in the same facts'. Generally, Article 73 CCP establishes a series of requisites to be met in order to admit a joinder of actions: (i) the Court should deem that it enjoys jurisdictions and competence over the same action due to the matter at issue or due to its amount in order to deal with the joined action or actions; (ii) the joined actions may not, for reasons of their subject matter, be heard in trials of a different kind; and (iii) that the law does not prohibit joinder in cases where specific actions are brought due to reasons of the matter at stake or due to the kind of proceedings that have to be followed.

Furthermore, Articles 74 ff CCP regulate the joinder of proceedings. By virtue of this joinder of proceedings, these proceedings are conducted in a single procedure and brought to a close through a single judgement. This joinder may be requested by a party or parties to the proceedings whose joinder is sought or agreed upon on an *ex officio* basis by the Court, where the circumstances set forth in Article 76 CCP are met. Interestingly, this provision in its paragraph 2. (i), refers to the joinder where proceedings have been brought to protect collective or diffuse rights and interests granted by the law to consumers and users.³

¹ This report has been prepared by Marta Otero Crespo (Universidade de Santiago de Compostela). This report is based on a series of previous works: M. Requejo Isidro/ M. Otero Crespo, 'Collective redress in Spain: recognition and enforcement of class action judgments and class settlements', in D. Fairgrieve/ E. Lein (eds), *Extraterritoriality and collective redress*, Oxford University Press, 2012, 309-331; M. Otero Crespo, 'Las acciones colectivas en Europa: ¿un paso adelante? Las líneas generales propuestas en la Recomendación de la Comisión Europea sobre los principios comunes aplicables a los mecanismos de recurso colectivo de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión (2013/396/UE)', *Boletín del Centro de Documentación Europea*, USC, 2013; M. P. García Rubio/ M. Otero Crespo, 'Rebuilding the pillars of collective litigation in light of the Commission Recommendation: The Spanish approach to collective redress', in E. Lein/ D. Fairgrieve/ M. Otero Crespo/ V. Smith (eds), *Collective redress in Europe – Why and How?*, BIICL, London, 2015, 133- 152; M. Otero Crespo, 'The collective redress phenomenon in the European context: The Spanish Case', in L. Cadet/ B. Hess/ M. Requejo Isidro (eds.), *Procedural Science at the Crossroads of Three Generations*, Ed. Nomos, Baden- Baden, Germany, 2015, 193-224; M. Otero Crespo, 'Ignorancia de la ley, error y tutela jurisdiccional de los consumidores: el puzzle de las acciones colectivas en la LEC', *Teoría y Derecho*, 18/2015, 130-141.

² See Articles 71 ff CCP.

³ Article 76 CCP. Circumstances in which the joinder of proceedings may proceed.

'1. The joinder of proceedings may be agreed upon whenever:

- (i) The judgement to be issued in one of the proceedings may bring about injurious effects on the other.
- (ii) Such connection exists between the matters at issue in the proceedings whose joinder is sought, so that, if they are conducted on a separate basis, judgments containing contradictory, incompatible or mutually exclusive decisions on grounds may be issued.

2. Joinder may also be given leave to proceed under the following circumstances:

- (i) Where proceedings have been brought to protect collective or diffuse rights and interests granted by the law to consumers and users, which may be joined in accordance with the provisions of paragraph 1.1 of this article or in Article 77 whenever the diversity of proceedings has been impossible to avoid through the joinder of actions or the intervention provided for in Article 15 of this Act.
- (ii) Where the matter at issue in the proceedings is to contest corporate resolutions adopted at the same Meeting or Assembly or at the same meeting or a collegiate body of governance. In this event, all the proceedings initiated through claims seeking a declaration that such decisions are null and void or voidable shall be joined, as long as such claims are brought within a time limit not exceeding forty days from the date the first claim was brought.
- (iii) Where proceedings have been brought in which objection to administrative resolutions regarding protection of minor is substantiated, processed in accordance with article 780, as long as none of them have started to heard.

From a sectoral perspective, Article 53 of the Revised Text 1/2007 of the General law for the Protection of Consumers and Users (GCA)⁴ also stipulates a joinder of claims. In this regard, any prohibitory action (injunction) may be joined where actions are filed for nullity and voidability, non- performance of obligations, termination or rescission of contract or the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non- transparent, and also for compensation for damages or losses caused by the application of such clauses or practices.⁵ Furthermore, any prohibitory action (injunction) brought by consumer and user associations may be joined by actions for nullity and voidability, non- performance of obligations, termination or rescission of contract or the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non- transparent, and also for compensation for damages caused by the application of such clauses or practices.⁶

At any event, in places where there is more than one Court having jurisdiction in company matters, in the cases of numbers (i) and (ii) or, in civil matters, in the case of number (iii), claims lodged after another claim will be distributed to the Court where the first should have been heard’.

⁴ *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias.*

⁵ This joined action shall be heard before the same Court that is dealing with the main prohibitory action, according to the proceedings provided for in procedural law.

⁶ See below and fn 37.



II. Sectoral Collective Redress Mechanism(s)

A Consumer Law

1. Scope/ Type

a. Horizontal/ sectoral

It should be noted that Consumer law was the first area to deal with collective litigation and, in fact, it is the most relevant in practice.⁷ In this regard, it may be stated that the general regulation on collective redress under Spanish law is designed to provide for collective redress in consumer law cases but not limited to that scenario, as far as some general rules are of application to other legal spheres.⁸

As already mentioned under Section I, there is a clear lack of harmonized and methodical treatment since the applicable rules are dispersed through the legal system, and even within the text of the relevant statutes (CCP and consumer law provisions). This heterogeneous legal landscape makes it difficult to conduct a systematic study on the topic.

b. Injunctive or compensatory or both.

On remedies, both injunctive and compensatory relief are available under the application of the CCP and specific Consumer law rules (for further details see below).

2. Procedural Framework

a. Competent Court

There is no special jurisdiction dealing with consumer collective redress cases. Civil courts are the common jurisdiction (commercial courts *ex* Article 86. *ter* b) of the Organic Law 6/1985, of the Judicial Power as amended in 2015)⁹ with the exception of potential civil liability arising from a crime, where criminal courts may have competence. Furthermore, administrative courts may also be competent in cases where the Public administration is the defendant.

Additionally, some cases may fall under the special rules on territorial jurisdiction (Article 52.1 paragraphs 14 and 16 CCP).

b. Standing

On standing, 'notwithstanding the individual standing of those aggrieved', Article 11 CCP grants standing for the protection of rights and interests of consumers and users to legally constituted consumer and user associations. These shall be empowered to defend in Court the rights and interests of their members and of the association itself, as well as the general interests of consumers and users.

When those damaged by an event are a *group of consumers or users whose components are perfectly determined or may be easily determined*, the standing to apply for the protection of these collective interests corresponds to:

- (1) associations of consumers and users, to the
- (2) entities legally constituted whose purpose is the defence or protection of these, and

⁷ Please note that the distinction between consumer law, financial law and product liability law cases remains unclear under certain circumstances. When consumers are involved, they have been classified as consumer law cases. In fact, in light of the financial crisis, collective redress actions have become popular in financial and banking services contracts (mainly, abusive clauses in banking contracts – floor clauses-, product liability and financial contracts related to service contracts).

⁸ See, for instance, T. Armenta Deu, *Acciones colectivas: reconocimiento, cosa juzgada y ejecución*, Ed. Marcial Pons, Madrid, 2013 at 99.

⁹ *Ley Orgánica 1/1985, de 1 de julio, del Poder Judicial*.

(3) the groups affected¹⁰ (Article 11.2 CCP).

In cases of *collective and diffuse interests*, when the identity of the injured parties is not easy to ascertain, only associations that are representative (see below Article 24 GCA) in accordance with the law may file a claim (Article 11.3 CCP).

Furthermore, authorized public entities (Article 6.1.8 CCP)¹¹ may also start proceedings to defend collective and diffuse interests of consumers and users. However, these entities can only file actions asking for injunctive relief.

Finally, the Public Prosecution Service may also file any type of claim to defend consumer and user rights, including either injunctive or compensatory relief (Article 11.5 CCP).¹²

It should be highlighted that, leaving aside the CCP, some consumer law rules include particular provisions on legal standing. For instance, Articles of the 54 GCA, Article 12 ACGC or Article 33 UCA.¹³

c. Availability of Cross Border collective redress

There is no special regulation covering cross border collective redress. Participation of foreign claimants is possible according to the general rules of private international law, but so far there have not been any collective actions with a cross boarder element in Spain.

d. Opt In/ Opt Out

There is no express rule in Spain specifically applying either of these mechanisms. In fact both options may be available depending on the interpretation provided. Leaving aside the intervention of the Public Prosecution Service, when an individual plaintiff, an association, legal entity or group, has brought proceedings the remaining aggrieved parties can join the claim, thus assuming the personal defence of their interest in court. However, it is not clear what happens if an aggrieved individual does not take part in the proceedings. In this context some scholars have asserted that the Spanish system advocates an opt-out *sui generis* regime under those circumstances.¹⁴ Nevertheless, this solution has been heavily criticised as putting fundamental procedural rights at stake (for example the right of access to justice, due process, etc.).¹⁵ Taking into account the fundamental procedural rights granted by the Spanish Constitution, it might not be stated that a non- party to a process is bound by its final outcome, irrespectively of the interpretation provided.¹⁶

Article 15 CCP allows for injured parties – other than the plaintiff- to choose between joining the proceedings and delegating their defence to the current plaintiff. The issue is whether or not those injured parties may successfully file a separate claim, that is, whether the new action would be ‘neutralized’ by the stay of proceedings, *lis pendens* or *res judicata* replies. This question has been recently addressed by the CJEU in 2016. The CJEU in its judgment of the First Chamber of 14 April 2016 (*Jorge Sales Sinués v. Caixabank SA (C-381/14)*, and *Youssef Drame Ba v Catalunya Caixa SA (Catalunya Banc SA) (C-385/14) joined cases C-381/14 and C-*

¹⁰ Article 6.1.7 CCP recognises capacity to be a party in civil proceedings to the groups of consumers or users affected by a damaging event, when the parties are determined or may be easily determined. To lodge a claim it is required that the group is constituted by the majority of those affected.

¹¹ Article 6.1.8 CCP refers to ‘the entities authorised pursuant to European Community Regulations to exercise cessation in defence of collective interest and the diffuse interest of consumers and users’.

¹² As mentioned earlier, this paragraph was amended in 2014 and prior to this amendment the Public Prosecution Service was only entitled to file actions looking for injunctive relief. The Preamble of Act 3/2014 does not provide details on this procedural change. See F. Cordón Moreno, ‘Reformas procesales introducidas por la Ley 3/2014, de 27 de marzo. En especial, la legitimación del Ministerio Fiscal para el ejercicio de las acciones en defensa de los consumidores’, *Revista CESCO de Derecho de Consumo*, Nº 9/2014, 1-6 (available at <https://www.revista.uclm.es/index.php/cesco>).

¹³ Please note that this provision will be analysed under the relevant section.

¹⁴ F. Gascón Inchausti, *Tutela judicial de los consumidores y transacciones colectivas*, Ed. Civitas, Madrid, 2010, at 26, where the author asserted that the Spanish system is based on an opt- out model (however, the legal design is not complete).

¹⁵ See Article 24 of the Spanish Constitution and also Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights.

¹⁶ See J. Otero Crespo, ‘The collective redress phenomenon in the European Context: the Spanish case’, at 213.

385/14)¹⁷ examined the requests for a preliminary ruling concerning the interpretation of Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The requests had been made in proceedings between two individual claimants and a financial institution, both relating to the annulment of contractual terms in mortgage loan agreements. Prior to those actions, a consumer association (*ADICAE*) had brought a collective action against 72 banking institutions seeking, *inter alia*, an injunction prohibiting the continued use of ‘floor’ clauses in loan agreements. Basing themselves on the CCP, the defendants in the main proceedings required the suspension of the individual actions brought before the court until such time as a final judgment on the collective action had been delivered. The question was whether the individual action was subordinated to the collective action, as regards both the course of the proceedings and the outcome. In those circumstances the Commercial Court Number 9 of Barcelona decided to stay the proceedings. The CJEU decided that ‘Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action before the court being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action’.¹⁸

The interpretation provided by the CJEU has been followed by the Spanish Constitutional Court (Decision 148/2016, of 19 September)¹⁹. In a ‘*recurso de amparo*’ where the fundamental right of access to justice (*tutela judicial efectiva* ex Article 24 of the Spanish Constitution) was at stake, the Constitutional Court has considered that the existence of a collective action does not prevent individual actions as both actions are independent of each other, they have a different nature and content and that the control exercised by the judge in the context of a collective action and that exercised in the context of an individual action diverge.

Until the CJEU decision of April 2016, the Spanish Courts had issued contradictory decisions regarding the application of the *lis pendens*, stay of proceedings or *res judicata*. Regarding the latter, Article 222.3 CCP extends the *res judicata* effect to any non-litigants holding rights upon which the parties’ capacity to act is grounded in accordance with Article 11 CCP. This material *res judicata* effect is still controversial and may conflict with the recent case law on the compatibility of collective and individual actions.

¹⁷ ECLI:EU:C:2016:252. Official Journal of the European Union 13.6.2016. Decision available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0381&from=ES>.

¹⁸ See also the order of the Court of 26 October 2016. In its decision in joined cases C-568/14 to C-570/14, the Court (Fifth Chamber) considered that ‘Article 7 (1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which does not permit a court seized of an individual action brought by a consumer seeking a declaration that a term of a contract binding him to a seller or supplier is unfair to adopt interim relief of its own motion, for as long as it considers appropriate, pending a final judgment in an ongoing collective action, the outcome of which may be applied to the individual action, when such relief is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed by the consumer under Directive 93/13’. The requests for a preliminary ruling concerned (again) the interpretation of Article 7 of Directive 93/13/EEC on unfair terms in consumer contracts. The applicants in the main proceedings before a Commercial Court in Barcelona have brought individual actions claiming that the ‘floor’ clauses at issue were unfair within the meaning of the Directive 93/13; the defendants in the main proceedings (financial institutions), indicated that a collective action with the same subject matter was pending before a Commercial court in Madrid. As a consequence, they sought to have the actions in the main proceedings suspended pending a final judgement disposing of the collective action. This decision is available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CO0568\(01\)&from=ES](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CO0568(01)&from=ES)

¹⁹ See F. Córdón Moreno, ‘Acción colectiva y acción individual para la tutela de los derechos de los consumidores: relación entre ambos procesos’, *Centro de Estudios de Consumo*, 1-4. Available at: <http://blog.uclm.es/cesco/files/2016/12/Accion-colectiva-y-accion-individual-para-la-tutela-de-los-derechos-de-los-consumidores.pdf>. On the same topic, see also Decisions 207/2016, 207/2016 and 208/2016, of 12 December. The Constitutional Court decisions are available at: <https://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencias.aspx> (in Spanish).

A recent Supreme Court decision of 24 February 2017²⁰ has established that a joint interpretation of Articles 15, 222.2 and 221 CCP leads to the conclusion that, when a collective action (*acción colectiva*) is filed, the *res judicata* effect of the corresponding judgment upholding the claim only affects those absent consumers (*consumidores no personados*) who are individually determined in the text of the judgment *ex* Article 221.1.1 CCP. This decision has adapted the Supreme Court doctrine to the CJEU ruling of 21 December 2016. In this judgment, the CJEU declared that 'national case-law, such as that following from the judgment of 9 May 2013 [*collective claim*- emphasis added], concerning the temporal limitation of the legal effects resulting, in accordance with Article 6(1) of Directive 93/13, from the finding that a contractual term is unfair, ensures only limited protection for consumers who have concluded a mortgage loan contract containing a 'floor clause' before the date of the judgment in which the finding of unfairness was made. Such protection is, therefore, incomplete and insufficient and does not constitute either an adequate or effective means of preventing the continued use of that type of term, contrary to Article 7(1) of Directive 93/13'.

On the *res judicata* effect, the recent *Auto* case in the Supreme Court (Civil Chamber) of 19 of April 2017²¹ has dismissed an appeal, rejecting a review of a case on floor clauses ruled before the judgment of the CJEU of 21 December 2016 recognizing the total retroactivity of the nullity of the floor clauses. The Supreme Court states that it is not possible to obtain a review of a final judgment on the grounds that a subsequent judgment establishes jurisprudence incompatible with the reasoning of the previous one. The latter judgment is therefore not considered a 'document' for the purposes of Article 510 CCP.²²

Specific measures related to the fact that affected persons are not identifiable

Finally, it should be noted that Article 15 CCP establishes a series of measures aiming at identifying the aggrieved parties (For further details see below e. Main procedural rules). Furthermore, Article 256.1.6 CCP provides for a preliminary investigation with the aim of identifying the aggrieved parties when they may be easily singled out (i.e., when collective interests are at stake). The Court shall take the appropriate measures to verify the members of the group in accordance with the circumstances of the case and the details provided by the applicant, including a request to the defendant to cooperate in order to determine the aggrieved parties.²³

e. Main procedural rules

Admissibility and certification criteria.

Under Spanish law certain requisites must be met in order to file a claim to protect consumer and user interests. For instance, consumer associations entitled to issue a representative claim are defined in Article 23 GCA. In this regard, they must have legal ability, be not-for-profit and have as one of their objectives the protection of consumer interests. On standing, under Article 24 GCA, in cases of collective and diffuse interests, if the identity of the injured parties is not easy to ascertain, only associations that are representative in accordance with the law may file a claim (adequacy of representation). For the purposes of Article 11.3 CCP, associations which are members of the Consumers and Users' Council hold the legal status of representative associations as requested by Article 23 GCA – except where the geographical scope of the dispute basically affects an Autonomous Community, in which case they will be subject to its specific legislation. To become a member of that Council is necessary to fulfil certain requirements. It should be noted that the Spanish legislation clarifies that those associations that do not meet the requirements described in the GCA or applicable regional legislation shall only be able to represent the interests of their members or of the association, but not the general, collective and diffuse interests of consumers (Article 24.1 GCA). Furthermore, when these associations breach any of the legal prohibitions, they lose their status as a consumer and user association for a period of not less than five years following the cessation of such circumstances (Article 26 GCA).

²⁰ STS 477/2017 (ECLI:ES:TS:2017:477). See also the Supreme Court Decision (Civil Chamber) of 9 March 2017 (STS 788/2017. ECLI:ES:TS:2017:788).

²¹ ATS 3444/2017. ECLI:ES:TS:2017:3444A.

²² See Articles 519 ff CCP on the review of final judgments.

²³ See, for instance, the Constitutional Court decision of 7 May 2012 (STC 96/2012) where the Court analyses the compatibility between this preliminary measure and the protection of personal data. In the case, a consumer association (*Asobanc*) filed a request before a Court in Madrid addressed to a bank (BBVA) in order to identify the clients who had acquired a specific financial product.

In order to prevent conflict of interests, Article 27 GCA imposes on consumer and user associations some independence requirements. For instance, consumer and user associations shall not include profit-making legal persons as members, receive economic or financial assistance from companies or group of companies that supply goods or services to consumers or users, engage in commercial communications in respect of goods and services, act with manifest recklessness, from a legal perspective, as an organisation or through its legal representatives, etc.

Single or Multi-stage process

There is no specific regulation on the stages of the process. According to Article 11 CCP, procedural steps may vary depending on the type of action brought before the Courts (to protect collective or diffuse interests or compensatory or injunctive relief). Ordinary procedural rules are applied here.

Case-management and deadlines

Article 15 CCP stipulates rules regarding the publication of proceedings and to make the intervention of the affected persons in the collective proceedings possible. In this regard, when proceedings are brought by associations or entities constituted for the protection of the rights and interests of consumers and users or by groups affected, aggrieved parties will be summoned to the hearing in order to claim their individual interests. This general announcement or call shall be made by the Court Clerk (*Letrado de la Administración de Justicia*), publishing the admission of the claim in the local media where the damage has occurred. The wording does not expressly mention the requisites to be met when publicizing the admission of the claim, who should pay for it, which media should be used – TV, internet, newspapers, official journals, etc.-, or what information should be communicated.

In addition to this general call, the CCP establishes some specific rules depending on whether the aggrieved parties are known (determined) or easily determined, or whether they are an indeterminate number of persons or a number which is difficult to determine. If the aggrieved parties are determined or easily determined, the CCP places an additional informative burden upon the claimant, who is required to communicate their intention to file the claim to the other aggrieved persons who are known prior to the general announcement. After this call, the consumer or user may join the proceedings any time but will only be allowed to undertake those procedural steps that have not yet been precluded. The CCP does not specify the type of notification (a personal notice or not) nor the content to be communicated. If the damage is caused to an indeterminate number of persons or a number which is difficult to ascertain, the court shall suspend the proceedings for a period of up to two months, depending on the relevant circumstances of the case. The Court Clerk shall decide the exact timing taking into account the complexity of the event and the difficulties in finding those damaged. The proceedings shall resume with the intervention of all the consumers who have obeyed the call, and the individual appearance of consumers and users shall not be allowed subsequently – notwithstanding the fact that these may assert their rights or interests in accordance with the provisions of Articles 221 and 519 CCP herein.

Expediency (particularly in injunctive cases)

Injunctions may be requested together with the main claim. Nevertheless, they may also be sought prior to the claim if the applicant alleges and evidences reasons of urgency or necessity (730 CCP). Generally, the Court makes an order after hearing the defendant. However, if the applicant requests and evidences the existence of reasons of urgency or that the hearing may jeopardize the efficiency of the injunction, the Court may order the injunction without further hearing within a time limit of 5 days (Art. 733 CCP)

Evidence/discovery rules

There are no specific evidential rules in respect of collective proceedings. However, Articles 217.6 and 7 CCP include special rules about the burden of proof that can be used in collective proceedings. It should be noted that under Spanish law there is no obligation to disclose documents to claimants through ‘discovery’ as this institution is mostly unknown. However, as stated above, according to Article 256.1.6 CCP, the Court may order a request to the defendant to cooperate in order to determine the aggrieved parties. Furthermore, Articles 293 ff CCP allow for an advanced examination and seizure of evidence.



Interim measures

The general rules on interim measures apply, the Code of civil procedure (CCP) states that any claimant may seek an injunction from the Court for precautionary measures he may deem necessary to ensure the effective protection of the courts. Furthermore, Article 727.7 CCP provides for a specific injunction (“The court order to provisionally cease an activity, that of temporarily abstaining from performing a certain conduct or the temporary prohibition to suspend or to cease carrying out a performance that was being carried out”).

Settlements

There are no special rules on settlements in collective redress cases so the general rules of civil procedure apply (Civil code and CCP). In this regard, Courts do not control out-of-court settlements. However, a Court may approve certain settlements. According to Article 19 CCP, a settlement may be reached at any time during the proceedings and even after judgment. Then the parties may bring the settlement contract before the competent court. In these cases, the Court will not validate/ approve that settlement if the law prohibits the right to dispose of the subject matter of the proceedings, or sets forth limitations for reasons of general interest or to the benefit of a third party. Court rulings that approve or validate court settlements are considered enforcement orders (res judicata effect). See also below Article 415 CCP.

Additionally, the CCP states that during the preliminary hearing before the trial “if they had not been informed beforehand, the parties shall be informed in the summons of the possibility of engaging in negotiations in an effort to resolve the dispute, including the recourse to mediation (...)” (Article 414.1 paragraph 2 CCP); “the hearing shall be conducted in accordance with the provisions set forth in the following articles in order to attempt to reach an agreement or settlement between the parties which brings the proceedings to an end (...)” (Article 414.1 paragraph 3 CCP); and finally, depending on the matter at stake in the proceeding, the Court may invite the parties to attempt to reach an agreement which brings the proceedings to an end, where appropriate through a mediation procedure, urging them attend an informative session (Article 414.1 paragraph 4 CCP). Article 415 CCP regulates the “Attempt at conciliation or settlement. Dismissal due to abandonment by the parties. Validation and effectiveness of the agreement”. In summary, the parties may declare that they have reached an agreement, or show they are ready to do so immediately. If so, they may abandon the proceedings and seek the Court’s validation on the matters agreed upon. This agreement validated by the Court “shall have the effects granted by the law to court settlements and may be put into effect through the procedures laid down to execute judgments and court-approved agreements (...)”. Furthermore, Article 428 CCP establishes that (under certain circumstances) “in the view of the matter at issue, the court may urge the parties or their representatives and attorneys to come to an agreement to bring the dispute to an end. Should it be the case, the agreement set forth in Article 415 herein shall apply”.

Available Remedies

a. Type of damages

From a general perspective, and according to the prevailing function of tort law in Civil law countries, only compensatory damages (including a broad approach to moral damages) are available.

b. Allocation of damages between claimants for compensatory claims/ distribution methods.

According to Article 221 CCP, in claims for a monetary award (or personal services), the judgment upholding the claim shall determine the conditions to be met in order to be eligible for payment. Nevertheless, Article 519 CCP establishes that in those cases where consumers who are to benefit from the judgment cannot be identified, the enforcement court will issue an order on whether the requirements established in the judgment are satisfied. It should be highlighted that the Public Prosecution Service also has standing to seek enforcement on behalf of the consumers and users affected.



c. Availability of punitive or extra-compensatory damages and their conditions

Punitive or extra- compensatory damages are not available in collective redress cases as these are (still) considered an alien institution to our system.²⁴

d. Skimming-off/ restitution of profits

There are specific rules allowing the recovery of sums unduly paid by the aggrieved parties. For instance, Article 12.2 SFCA or Article 36 of the Consumer Credit Contracts Act (CCCA)²⁵ expressly recognises that possibility to the affected parties, and furthermore, Article 53 GCA permits a joinder of actions to claim, inter alia, the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non- transparent. The UCA is drafted in similar terms (see below Section III.2.).

e. Injunctions

As set out above, injunctive relief is also available in consumer redress cases. Injunctions are aimed at obtaining a judgement ordering the defendant to cease from conduct and to prohibit the future repetition thereof (see above Article 53 GCA).

f. Possibility to seek an injunction and compensation within one single action

Joinder of claims (joinder of actions) is available under Article 53 GCA. In this regard, ‘any prohibitory action brought by consumer and user associations may be joined by actions for nullity and voidability, non-performance of obligations, termination or rescission of contract or the return of amounts charged in relation to the conduct or clauses or general terms found to be unfair or non- transparent, and also for the compensation for damages caused by the application of such clauses or practices’.²⁶

g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions

Follow-on actions initiated by consumer associations have been rarely used in practice. The first ‘public attempt’ was in 2007 (*Ausbanc* filed a follow- on action against *Telefónica*), but the action was dismissed by the Commercial Court No. 4 of Madrid in October 2012. In 2015, *OCU* (*‘Organización de consumidores y usuarios’*) announced its intention to bring a collective damage claim representing consumers against the different car dealers of different car brands having being fined by different CNMC²⁷ decisions (see below for further details).

h. Limitation periods

General limitation periods apply to claims asking for compensatory collective redress. According to the general rules of the Civil code: 5 years in contractual claims (Article 1964 CC) or 1 year for tort claims (Article 1968 CC). However, declaratory actions asking for injunctive relief are imprescriptible.²⁸

3. Costs

Basic rules governing costs and scope of the rules

Act 1/1996 on Free Legal Assistance²⁹ provides the right to apply for free justice benefits to associations declared to be in the public interest or foundations registered in the corresponding administrative register if they cannot afford to litigate.³⁰ The claimant party might be obliged to post security. Nevertheless, in the procedures in which an action for cessation (injunction) is filed in defence of the collective interests and the particular interests of consumers and users, the court may exempt the applicant from the obligation to post

²⁴ Nevertheless, some forms of over compensation are allowed under Spanish law. See M. Otero Crespo, ‘Punitive damages under Spanish law: a subtle recognition?’ in R.C. Meurkens/ E. Nordin (eds), *The Power of Punitive Damages. Is Europe Missing Out?*, Intersentia, 2012, 283- 310.

²⁵ *Ley 16/2011, de 24 de junio, de contratos de crédito al consumo*.

²⁶ See also Article 12 SFCA and Article 29 CCCA.

²⁷ *Comisión Nacional de los Mercados y de la Competencia*, (the Spanish National Authority for Markets and Competition).

²⁸ See Articles 56 GCA and 19 ACGC.

²⁹ *Ley de justicia gratuita 1/1996, de 10 de enero*.

³⁰ See also Article 37 GCA.

security (taking into account the circumstances of the case, the financial significance and social repercussions of the various interests affected – Article 728 CCP).

4. Loser Pays Principle

The ‘loser pays principle’ applies as a general rule under Spanish law. Nevertheless, the CCP allows some exceptions. For instance, when the court considers and reasons that the case is legally doubtful (i.e. may pose serious *de facto* or *de iure* doubts), the losing party will not be ordered to pay the costs (for further details see Article 394 ff. CCP).

5. Lawyers’ Fees

Contingency fees or *quota litis* agreements are considered valid in Spain (lost cases included) after the decision of the Administrative Chamber of the Supreme Court of 4 November 2008.³¹ This has been followed in subsequent Supreme Court decisions.

It should be highlighted that when giving effect to the ‘loser pays’ principle, there is a cap on the fee set in Article 394.3 CCP. According to this provision, the losing party cannot be obliged to pay more than one third of the total amount of the claim to the other party’s lawyer. Additionally, Spanish bar associations publish guidance rules on the recoverability of legal costs.

6. Funding

Third party funding is largely unknown in Spain, but it would be considered generally valid, as it is not prohibited itself. As previously stated, in the case of representative actions brought by consumer and user associations, the GCA imposes a series of independence and transparency requirements which may be related to third party funding. In this regard, Article 27 GCA establishes that consumer associations shall not, for instance, include profit-making legal persons as their members or receive economic or financial assistance from companies or groups of companies that supply goods or services to consumers or users. These measures are aimed at preserving the independence of the association. However, there is one exception, as contributions made in accordance with the transparency conditions established by the law and the regulatory standards, which do not undermine the independence of the association and which are the result of cooperation agreements are not considered as financial assistance.

7. Enforcement of collective actions/settlements

On enforcement, there is not a specific and systematic regime applicable to collective redress cases. Nevertheless, the CCP does establish a series of rules, namely the abovementioned Articles 221.1.1 and 519 CCP.

According to Article 221 CCP (judgments issued in proceedings brought by consumer or user associations), where a monetary sanction has been sought for doing or failing to do a specific or generic thing, the judgment upholding the claim shall individually determine the consumers and users who shall be deemed as benefiting from the judgment; if individual identification is not or may not be possible, the judgment shall set forth the conditions to be met in order to be eligible for payment or, as appropriate, apply for enforcement or be a party to it. Furthermore, should a specific activity or behaviour be considered illegal, the judgment shall determine whether such verdict shall have procedural effects beyond those who had been a party to the corresponding proceedings. And finally, where individual consumers or users have joined the proceedings, the judgment shall expressly issue a ruling on their pleas.

In the case of injunctions, the Court may order the full or partial publication of the judgment at the defendant’s expense or, where the effects of the infringement may persist over time, a rectifying statement. In order to ensure the effective compliance with the injunctive order, the CCP establishes that a judgement upholding an action for cessation in defence of collective interests and of the diffuse interests of consumers and users, may impose a fine ranging from sixty thousand to six hundred thousand euros per day of delay in the enforcement of the court decision within the time limit set forth therein, depending on the nature and significance of the



damages caused and the economic capacity of the party thus condemned. This fine is to be paid to the Public Treasury (Article 711 CCP).

Article 519 CCP establishes that in those cases where consumers who are to benefit from the judgment cannot be identified, the enforcement court will issue an order on whether the requirements established in the judgment are satisfied. It should be highlighted that the Public Prosecution Service also has standing to seek enforcement on behalf of the consumers and users affected.

There are no cases dealing with cross border enforcement so far.

8. Number and types of cases brought/pending

Over the last few years, in light of the Spanish financial crisis, collective redress has become a hot topic, especially when referred to the context of financial and banking services contracts (see also product liability cases reported in Section V). In particular, a not insignificant number of collective redress proceedings (typically initiated by consumer associations) have been brought for abusive clauses in banking contracts (preference shares or floor clauses in contracts), asking not only for injunctive relief but also for monetary compensation. However, these collective/ representative actions have co- existed with multiple individual actions – probably hundreds of individual claims. This feature might indicate that the current collective redress ‘scheme’ needs to be amended in order to facilitate a coherent and complete system aimed at restoring the aggrieved parties. The existing provisions were not designed to be applied to collective litigation – with only a few exceptions-, probably because the minds of the drafters of the CCP in 2000 were thinking of traditional forms of litigation.

Since 2013 the Spanish Supreme Court has given judgment in ‘many’³² famous cases (see Section V) and even its doctrine has been modified by the case law of the CJEU. First instance court decisions (Civil or Commercial tribunals) have also become the centre of unusual media attention. For instance, in 2010 ADICAE – on behalf of more than 15,000 consumers- filed a claim against financial entities asking for the annulment of the so-called floor- clauses and the recovery of the amounts unduly paid based on the existence of such clauses. The Commercial Court of Madrid number 11 admitted (partially) the claim in its decision of 7 April 2016.³³

9. Impact of the Recommendation/Problems and Critiques, including

a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)

As already described, forms of collective litigation are available under Spanish law but the legal system does not provide for a proper and coherent *general* collective redress mechanism. The existing rules on collective redress were designed for consumer law cases but nowadays it is clear that it is also possible to use these collective claims in other ‘non- typical’ scenarios. However, the existing collective redress ‘regime’ has been heavily criticised namely by academics, lawyers, members of the public prosecution service, judges and representative entities, and in fact, many individual lawsuits are still filed before the Courts as aggrieved parties (and their lawyers) still prefer to obtain individual and ‘tailored’ redress, rather than joining proceedings controlled by a third party (typically, a representative consumer association).³⁴ Those actors have also highlighted the need to establish a coherent and genuine collective redress mechanism.³⁵

In the aftermath of mass financial related disasters (complex financial products acquired by small investors – for instance, preference share cases-, floor- clauses in mortgage contracts, etc.) there have been some legislative reactions (without express reference to the EC Recommendation), but still based on individual redress

³² The number of collective claims has increased over the last few years.

³³ SJM M 53/2016. ECLI:ES:JMM:2016:53.

³⁴ The preference share cases are a good example as many investors preferred to file an individual claim before a Court or submit the controversy to individual arbitration through consumer arbitration tribunals. In fact, thousands of claims have been settled via ‘*arbitraje de consumo*’, thus avoiding Court proceedings. See also the Study of the Spanish Ombudsman (2013) on the Preference Shares: <https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013-03-Estudio-sobre-las-Participaciones-Preferentes.pdf>.

³⁵ See C. Varela García, ‘Hacia un nuevo proceso civil colectivo en el ejercicio de las acciones en defensa de los consumidores’, Ponencia de las Jornadas de ADICAE ‘Sin acción colectiva no hay justicia para los consumidores’, 2 October 2014. Available at: http://publicaciones.adicae.net/publicaciones/pdf/Ponencia_Fiscal_Varela_2_octubre_2014.pdf

mechanisms. In this regard, last January 2017, and as a reaction to the CJEU decision on the ‘floor-clauses’ of 21 December 2016, the Spanish government approved a Royal decree- law in order to establish an out-of-court mechanism aimed at preventing thousands of individual proceedings before the Spanish courts. Interestingly, this out-of-court mechanism is designed for aggrieved parties on a voluntary basis, but considered individually. The Royal Decree- law also stipulates the establishment of a Monitoring Committee, which will be in charge of the monitoring, the control and the assessment of the claims arising from the application of the law. This Committee must issue a biannual report and will involve consumers and lawyers’ representatives. This body will be in charge of collecting relevant information and may propose the measures it considers necessary for the correct implementation of this extrajudicial mechanism.

Furthermore, the General Council of the Judiciary (*Consejo General del Poder Judicial*) has announced an *emergency plan* to face potential massive litigation related to the floor- clauses cases.³⁶ These measures would include ‘specialized’ First instance courts and therefore, additional human and material resources. The issue is that collective redress mechanisms are not envisaged as a real alternative to individual litigation.

b. Incompatibilities with the Recommendation’s principles

From a general perspective, Spanish law provides for collective redress mechanisms aimed at providing compensatory and injunctive relief. However, the mechanism is neither coherent nor systematic, since the rules are dispersed throughout different laws.

While the Recommendation advocates for the creation of a claimant party through its opt-in principle as the default option, the EU instrument accepts exceptions under its opt-out principle. The Spanish CCP does not contain any specific rule on the issue and as a consequence, the constitution of the claimant party has been subject to diverging interpretations and this may collide with the ‘any exception to this principle, by law or by court order, should be duly justified by reasons of the sound administration of justice’. Taking into account the rules established in Article 15 CCP (announcement and intervention in proceedings for the protection of collective and diffuse interests of consumers and users), Article 221 CCP (judgments issued in proceedings brought by consumer or user associations, Article 222.3 CCP (material *res judicata*) and Article 519 CCP (enforcement action for consumers and users grounded on a conviction without individual determination of beneficiaries), it has been argued that the Spanish system advocates for an opt- out *sui generis* regime.³⁷ However, the recent case law of the CJEU and the Spanish Constitutional and Supreme Courts seems to favour the compatibility of individual and collective actions (both referred to the stay of proceedings/ *res judicata* effect) so it may be concluded that collective proceedings are binding for those actively joining the claim, but the existence of the collective proceeding does not impede the exercise of a second (individual) claim. Considering the recent case law and the fundamental procedural rights granted by Article 24 of the Spanish Constitution, together with Article 6 ECHR and Article 47 (1) of the Charter of Fundamental Rights, the Spanish system might be interpreted as an opt- in model.

On remedies, the EC Recommendation advocates injunctive and compensatory relief and both may be achieved under the Spanish system when consumers are involved. In this regard, the CCP was amended in 2014 to grant standing to the Public Prosecution Service to claim for damages (and not only for injunctive relief). However, it is not clear whether compensatory relief for collective losses is recognized in other areas – however, each victim is entitled both to claim damages individually, and to join other claimants through a joint action with several plaintiffs.

Information on collective redress actions is available in the terms *generally* prescribed by the Recommendation, as far as, for instance, consumer associations and law firms publicize potential collective claims and the CCP establishes a series of rules in order to identify aggrieved parties. However, Spain does not comply with the requirement to establish a National Registry of collective redress actions and there are no public reform plans to establish it in the near future.

³⁶ Press release available at: <http://www.poderjudicial.es/cgpi/es/Poder-Judicial/En-Portada/Los-Juzgados-especializados-en-clausulas-suelo-tendran-distintos-niveles-de-refuerzo-en-funcion-de-la-entrada-de-asuntos>.

³⁷ F. Gascón Inchausti, *Tutela judicial de los consumidores y transacciones colectivas*, Ed. Civitas, Madrid, 2010, at 26. A. Montesinos García, ‘Últimas tendencias en la Unión europea sobre las acciones colectivas de consumo. La posible introducción de fórmulas ADR’, REDUR 12/2014. Available at: <http://www.unirioja.es/dptos/dd/redur/numero12/montesinos.pdf> (at 96)

On funding, the Spanish system ignores the third- party funding institution in itself- this is neither regulated nor used in practice.

c. Problems relating to access of justice/fairness of proceedings including

Restrictions on access to justice negatively affecting collective redress

The interplay between individual and collective actions has been a critical issue at stake. Over the last few years, and due to the lack of a coherent procedural system, the question of whether the existence of a collective action prevented (or not) individuals from obtaining individual redress before a different court (*lis pendens*, stay of proceedings and *res judicata*) fostered legal uncertainty.

Time and burden of collective actions on courts and parties compared to non-collective litigation

The traditional reluctance to engage in collective litigation in Spain may be related to a cultural fact: individual litigation as a means of obtaining 'tailored' redress is still preferred – a fact that is confirmed by the existence of parallel litigation (collective – individual actions) in recent cases and it seems that members of the judiciary still prefer to face individual actions rather than *real* collective proceedings. The recent experiences have shown that First instance courts dealing with collective claims have been stuck (for months or years), due to the general lack of human and material resources in the Spanish Administration of Justice (circumstances aggravated by the economic crisis). This might work as an incentive to file an individual claim as well, as the management of the case is less complex.

Risks of and examples for abusive litigation

Over the last few years, the economic crisis along with the occurrence of a series of mass harm situations, such as the scandals related to the sale of complex financial products to small investors or the 'floor-clauses' cases in loan contracts, have undoubtedly influenced the way in which Spanish people injured by the same legal infringement seek relief. Nowadays, collective proceedings are frequently being announced on websites, newspapers, radio, etc., so that individual consumers have the opportunity to join collective proceedings initiated by associations of consumers and users and *specialized* law firms. This propaganda may generate some *unknown* risks, such as abusive litigation (unfounded claims) or the generalization of abusive or unfair contingency fees (see above 5. Lawyers' fees).

Effective right to obtain compensation.

As already described, the Spanish law on collective redress is quite fragmented and chaotic. These procedural issues do not impact negatively on the effective right to obtain redress in mass harm situations, but sometimes the 'effectiveness' of redress might be questioned due to the length of the court procedures.

As already mentioned, the general procedural rules described under section II. 2 apply to non-consumer law scenarios. In addition to this general provisions there are sectoral rules dealing primarily with legal standing issues within different and categorized areas, such as competition law, antidiscrimination law, environmental law and labour law.

B. Competition law

1. Scope/ Type

a. Horizontal/ sectoral

Leaving aside the application of the general provisions of the CCP, the UCA also provides for a series of actions, which may be taken against acts of unfair competition, including unlawful advertising.³⁸ These remedies include:

- (1) to have the unfairness of the conduct declared,
- (2) the cessation and prohibition order of subsequent repetition of the unfair behaviour,
- (3) the removal of the effects produced by the unfair behaviour,
- (4) the rectification of a misleading, incorrect or false information, and finally,



³⁸ See also Article 6 of the Act 34/1988 on Advertising (Ley 34/1988, de 11 de noviembre, General de Publicidad).

(5) an action against unjust enrichment, which shall only apply when the unfair practice prejudices a legal position protected by an exclusive right or some other of similar content.

Furthermore, in favourable rulings regarding the actions envisaged in the subsections 1 to 4, it may be determined the total or partial publication of the court decision or a rectifying statement (Article 32 UCA).

b. Injunctive / compensatory

Under the application of the UCA, both injunctive and compensatory relief are available in collective redress cases. However, compensatory relief is only available under certain conditions (see below 2.b. Standing) and the action against unjust enrichment is only available to the holder of the violated legal position (see Article 33 UCA).

Furthermore, any claim arising from a breach of the competition law rules contained in Article 1 and 2 of the Act 15/2007 on the Protection of Competition (APC)³⁹, can be brought before the competent Spanish Competition Authority (CNMC– public enforcement) but also before the Courts (private enforcement).

2. Procedural Framework

a. Competent Court

Private law courts (Commercial courts *ex Art. 86 LOPJ*) are the competent courts. Nevertheless, the decisions of the Spanish Competition Authority (CNMC) might be appealed before the Administrative Courts. When the administrative investigation is still ongoing or when the administrative decision is not final, Civil courts are still not bound by the findings of fact made by the CNMC (See below e. Main procedural rules).

b. Standing

As mentioned above, apart from the general rules of the CCP, the UCA establishes a series of rules on standing depending on the type of the claim brought before the Courts. In this regard, Article 33 UCA grants standing to claim compensation for damages to associations of consumers and users, to the entities legally constituted whose purpose is the defence or protection of those consumers and users and to the groups affected. Selected claims (Article 32. 1 numbers 1 to 4 – see above) may be brought by associations, professional corporations or representatives of economic interests when the interests of their members are affected. Furthermore, the same 'selected' claims may be brought in defence of the general, collective or diffuse interests of consumers and users by (1) the National Institute of Consumer affairs and its regional/ local counterparts, (2) consumer and user associations meeting the requirements laid down in the GCA or in the relevant regional legislation, (3) organizations from other EU Member States constituted for the protection of the collective and diffuse interests of consumers and users and authorised by virtue of their inclusion in the list published for that purpose in the Official Journal of the EU. Finally, the Public Prosecution Service may order injunctions in the defence of the general, collective or diffuse interests of consumers and users.

c. Availability of Cross Border collective redress

See above.

d. Opt In/ Opt Out

See above Section II.2.

e. Main procedural rules

Evidence/discovery rules

In this context, follow-on claims may come to reduce the burden of proof or to exempt the claimant to prove the unlawful practice, as there is a previous administrative decision containing relevant data about the unlawful



Act 15/2007, de 3 de julio, de Defensa de la Competencia. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFUE) are also directly enforceable before the Courts.

behaviour.⁴⁰ When the administrative decision is challenged before the Administrative Courts and this Court issues a ruling ratifying the facts, Civil courts are bound by the finding of facts made by the Administrative court.

In stand-alone actions, the court would need to confirm the alleged breach of competition law before concluding that the infringement has caused damages.

Interim measures can be granted by the Courts upon request of the interested parties (and by the CNMC *ex officio*). See above.

See above Section II.2. for further details.

3. Available Remedies

a. Type of damages

As described above, injunctive and compensatory relief are available in cases of breaches of competition law.

b. Skimming-off/ restitution of profits

According to the wording of Article 33.1 UCA, the action against unjust enrichment shall only be filed by the holder of the violated legal position.

c. Injunctions

Injunctions are available in collective actions following Article 32 UCA (see above for further details)

d. Possibility to seek an injunction and compensation within one single action

Compensatory and injunctive relief may be granted under the same claim.

e. Limitation periods

General limitation periods apply. The Spanish Supreme Court (Civil chamber) in its decision of 8 June 2012⁴¹ has established that antitrust damage claims have a non-contractual nature when resulting from an infringement of a cartel prohibition and that the limitation period of 1 year (Article 1968 CC) begins after the binding decision confirming the infringement – that is, the final decision of the Supreme Court upholding the administrative prohibition decision). Furthermore, Article 35 UCA sets out that ‘actions against unfair competition laid down in Article 32 UCA lapse one year after the person entitled to take action discovered who was responsible for the act of unfair competition and, in any case, three years as from the time such conduct ceased. The time bar for legal action in defence of general, collective or diffuse interests of consumers and users is governed by the terms of Article 56 GCA’ (see above).

For further details see above Section II.2.

4. Costs

See above Section II.2.

5. Lawyers’ Fees

See above Section II.2.

6. Funding

See above Section II.2.

7. Enforcement of collective actions/settlements

See above Section II.2.

⁴⁰ Generally, follow-on actions have been rarely filed before Spanish courts. See E. Ruiz de Angulo Gómez/ R. Bayo Álvarez/ J. Costas Comesaña, ‘National examples of private enforcement of Competition Law: Spain’ in *Private Enforcement of Competition law*, Ed. Lex Nova, Valladolid, 2011 at 138 ff.
⁴¹ TSJ 5462/2012. ECLI:ES:TS:2012:5462.

8. Number and types of cases brought/pending

There are very few cases involving collective redress in the competition law sphere:

(1) At the end of 2007 a collective redress action was filed by *Ausbanc* ('*Asociación de Usuarios de Servicios Bancarios*') against *Telefónica* before the Commercial Court No. 4 of Madrid, based upon the Decision of the European Commission of 4 July 2007 that established that *Telefónica* had abused its dominant position within the ADSL market. However, the Commercial court ruled in October 2012 that *Ausbanc* was not entitled to represent the consumers and users in that matter (lack of legal standing).

(2) There have been two follow-on actions after the 1999 DCT's⁴² decision on the sugar production cartel: the decisions of the Supreme Court (Civil Chamber) of 8 June 2012 and of 7 November 2013.⁴³ In both cases the Supreme Court granted compensation to companies damaged by the sugar cartel (joined actions).

(3) On July 2015, *OCU* ('*Organización de consumidores y usuarios*') announced its intention to bring a collective damage claim representing consumers against the different car dealers of different car brands having being fined by different CNMC's decisions.⁴⁴

9. Impact of the Recommendation/Problems and Critiques, including

a. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)

See above Section II.2.

b. Incompatibilities with the Recommendation's principles

See above Section II.2.

c. Problems relating to access of justice/fairness of proceedings including

- Restrictions on access to justice negatively affecting collective redress. The 'Sugar cartel case' provides evidence on the (sometimes) lengthy procedures related to follow-on actions. The decision of the National Authority was adopted in 1999, challenged before the Administrative courts, and then, finally the Decisions of the Supreme Court granting compensation to companies are dated in 2012 and 2013.
- Time and burden of collective actions on courts and parties compared to non-collective litigation. See previous paragraph.
- For further details see above Section II.2.

C. Other sectoral laws

a. Antidiscrimination law

In 2007 the CCP was amended to insert a new Article 11*bis* (Standing for the defence of the right of equal treatment for men and women). According to this provision trade unions and other legally constituted associations whose primary goal is the defence of equal treatment for men and women, shall be authorised to represent their own affiliates and members. Furthermore, when those affected are an indeterminate number of persons or a number difficult to ascertain, the standing to lodge a claim in court in defence of these diffuse interests corresponds exclusively to the public bodies with competence in the matter, to the more representative trade unions and to the associations at State level whose primary objective is equality between men and women, 'notwithstanding their procedural standing if those affected are determined'. Paragraph 3 of Article 11 CCP establishes that in cases of sexual or gender harassment, the person harassed is the only person who can bring a claim before the courts.

⁴² This is the former *Tribunal de Defensa de la Competencia*.

⁴³ STS 5819/2013. ECLI:ES:TS:2013:5819.

⁴⁴ <https://www.ocu.org/organizacion/prensa/notas-de-prensa/2016/demanda-concesionarios> and <https://www.cnmc.es/2015-06-05-la-cnmc-multa-con-411-millones-de-euros-95-concesionarios-de-automoviles-audi-y-vw-swagen>.

Furthermore, Article 76 of the Revised Text of the Act 1/2013 on Equal Opportunities and Social Inclusion⁴⁵ also grants standing to legal entities, under certain criterion, to defend collective interests and rights in order to ensure the effectiveness of the right to equal opportunities.

b. Environmental law

Article 42 of the Act 26/2007 on Environmental liability⁴⁶ contains mainly administrative provisions, but according to Arts 41 and 42 collective, physical and legal persons (under certain circumstances) can initiate proceedings (as interested parties) in environmental damage cases.

c. Labour law

Trade unions, under certain circumstances, have standing to promote the defence of workers' collective interests. In this regard, under Articles 153- 162 of the Act 36/2011 on Social Jurisdiction Proceedings⁴⁷, the 'collective conflicts' proceedings are designed.

⁴⁵ Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social.

⁴⁶ Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental.

⁴⁷ Ley 36/2011, de 10 de octubre, reguladora de la Jurisdicción Social.

III. Information on Collective Redress

1. National Registry

Spanish law does not provide for a National Registry on collective redress actions.

2. Channels for dissemination of information on collective claims

Article 15 CCP contains provisions governing the publication of the proceedings in order to make the intervention of the affected persons in the collective proceedings possible. Leaving aside the CCP, there are no other pre-established channels for dissemination of information on collective claims. However, over the last few years, law firms and consumer and users' associations have been playing a crucial role in disseminating information on collective redress claims. In this regard, collective proceedings are frequently being publicized through the media (websites, newspapers, radio, etc.) so that individual consumers have the opportunity to join collective claims, which are initiated, by both associations and law firms. As already stated, this new form of propaganda may increase some avoidable risks, such as abusive litigation or the generalization of 'unfair/abusive' *quota litis* arrangements. However, the CCP rules and the guidance rules on fees published by regional bars may act like a barrier.

Finally, it should be noted that after the abovementioned cases on the sale of complex financial products to consumers/ small investors or more recently, on the 'floor- clauses' cases in mortgage contracts, many law firms (irrespectively of their size) have started to publicize collective actions in the media.



IV. Case summaries

Key cases for the period 2013- May 2017

<p>Case name N/A</p> <p>Reference STS 3334/2013 (18 June) ECLI:ES:TS:2013:3334</p> <p>Subject area Product liability</p>	<p>Keywords Product liability; defective drug; patrimonial and moral damages</p> <p>Summary of claims Sixty-eight women filed a claim against the laboratory Sanofi-Aventis, SA. They asked for the compensation of material and moral damages caused by the consumption of <i>Agreal</i> (a drug to treat the symptoms of menopause)</p> <p>Findings <i>Agreal</i> was a drug commercialized between 1983 and 2005 aimed at combating the symptoms of menopause. The lab failed to provide complete information on the side effects caused by its consumption, causing harm to women who had taken the pills.</p> <p>Outcomes The First instance Court granted compensation for damages to eleven women. Twenty-two of the initial plaintiffs appealed before the Provincial Court but only nine of them were granted compensation for the harm suffered by the consumption of the drug. The Supreme Court confirmed the Provincial Court decision by dismissing the appeal on cassation.</p> <p><i>On the same topic, see also the Supreme Court decision of 10 July 2014 (ECLI:ES:TS:2014:3433). In this case 146 women harmed by the consumption of Agreal were granted 3,000 EUR (moral damage) and 13 of them were compensated for the physical damage caused by the drug.</i></p> <p>Settlement: no Remedy: damages Amount of damages awarded: the final amount of damages awarded and the identification of the successful plaintiffs are not included in the Supreme Court decision. Distribution of damages: N/A</p>
<p>Dispute resolution method Joinder of claims</p> <p>Court or tribunal Supreme Court (Civil Chamber, Section 1)</p>	
<p>Cross-border character/ implications, if any N/A</p>	
<p>Opt-in/out N/A</p>	
<p>Type of funding None</p>	
<p>Costs Loser pays principle</p>	
<p>Abusive litigation No</p>	
<p>Case name N/A</p> <p>Reference STS 1916/2013 (9 May) ECLI:ES:TS:2013:1916</p> <p>Subject area Consumer law</p>	<p>Keywords Consumer law; floor- clauses; injunctive relief; nullity of clauses; restitution of unduly paid sums.</p> <p>Summary of claims AUSBANC (consumer association) filed a claim against financial entities in order to declare abusive the so-called floor- clauses inserted in mortgage loan contracts. Furthermore, a cease action to avoid the future use of such unfair terms, the publication of the judgment and its access to the Registry of general terms were also requested by the plaintiff.</p> <p>Findings</p>
<p>Dispute resolution method Collective/ Representative action</p> <p>Court or tribunal</p>	



Supreme Court (Civil Chamber)	<p>'Floor- clauses' were inserted in mortgage loan agreements concluded between financial institutions and consumers. The clauses in question provided that, even if the interest rate falls below a certain threshold or floor defined in the agreement, the consumer must continue to pay minimum interest equivalent to that threshold or floor, without being able to benefit from a lower interest rate.</p> <p>Outcomes</p> <p>The Supreme Court declared null and void those abusive floor-clauses inserted as general terms in mortgage loan contracts. However, the Supreme Court surprisingly declared that the invalidity of the unfair term did not imply retroactive effects (that is, the consumers were not entitled to claim the restitution of the amounts unduly paid in light of such nullity).</p>
Cross-border character/ implications, if any N/A	
Opt-in/out N/A	
Type of funding N/A	
Costs No order for costs	
Abusive litigation N/A	<p><i>It should be noted that this interpretation has been overruled by the CJEU as the European Court has ruled that the Spanish case-law placing a temporal limitation on the effects on the invalidity of 'floor clauses' included in mortgage loan contracts is incompatible with EU law. Recent decisions of the Supreme Court have confirmed the retroactive effects and the right to obtain restitution of these unduly paid amounts (however, these are individual actions. See for instance the Supreme Court decision (Civil Chamber) of 24 February 2017</i></p> <p>Settlement: N/A</p> <p>Remedy: injunctive relief + limited restitution of unduly paid sums.</p> <p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
Case name N/A (However, this is known as the Sugar cartel decision)	<p>Keywords</p> <p>Competition law; sugar cartel; damages to competitors; follow-on action</p> <p>Summary of claims</p> <p>Claim for damages against a sugar manufacturer which had been previously sanctioned by the competent Competition Authority (<i>Nestlé, Lacasa, Zahor and others vs Ebro foods</i>).</p> <p>Findings</p> <p>The price-fixing sugar cartel was dismantled and fined by the Spanish Competition Authority in 1999. Two follow-on claims were brought before the Courts after the final administrative decision. The first Supreme Court decision was in 2012 and this was the second case heard before the Civil Courts.</p> <p>Outcomes</p> <p>The Supreme Court established that the right to effective judicial protection to be compensated must be granted to any victim of anticompetitive behaviour.</p> <p>Settlement: N/A</p> <p>Remedy: damages</p>
Reference STS 5819/2013 (7 November) ECLI:ES:TS:2013:5819	
Subject area Competition law	
Dispute resolution method Joint action (several co-plaintiffs)	
Court or tribunal Supreme Court (Civil Chamber, Section 1)	
Cross-border character/ implications, if any N/A	
Opt-in/out N/A	

<p>Type of funding</p> <p>N/A</p>	<p>Amount of damages awarded: in total: 4,1 million EUR</p> <p>Distribution of damages: each plaintiff asked for an amount of damages in order to be compensated for their economic losses.</p>
<p>Costs</p> <p>Loser pays (first instance and appeal costs)</p>	<ul style="list-style-type: none"> - Nestlé España, SA: 1,548.828.39 EUR - Productos del Café, SA: 19.881,94 EUR
<p>Abusive litigation</p> <p>N/A</p>	<ul style="list-style-type: none"> - Helados y Postres: 149.207,66 EUR - Chocolates Hosta Dulcinea, SA: 774.957,00 EUR - Zahor, SA: 3.802, 59 EUR - Mazapanes Donaire, SL: 27.428,10 EUR - LU Biscuits, SA: 191.674,35 EUR - Chocolates Torras, SA: 18.608,72 EUR - Arluy, SL: 45.089, 76 EUR - Chocovic, SA: 448.188,58 EUR - Lacasa, SAU: 76.109,09 EUR - Productos Mauri, SA: 8.305,27 - Delaviuda Alimentación, SA: 90.177,17 EUR - Wringley CO, SA: 702.950.17 EUR
<p>Case name</p> <p>N/A</p> <p>Reference</p> <p>STS 1279/2015 (24 March)</p> <p>ECLI:ES:TS:2015:1279</p> <p>Subject area</p> <p>Consumer law</p>	<p>Keywords</p> <p>Consumer law; unfair terms; injunctive relief</p> <p>Summary of claims</p> <p>AUSBANC (consumer association) filed an injunction against a financial entity asking for the annulment of a (potential) unfair term included in banking contracts (floor clause) together with a cease action to avoid the future use of such unfair term. The plaintiff also requested the publication of the judgement and its access to the Registry of general terms.</p>
<p>Dispute resolution method</p> <p>Collective/ Representative action (Consumer association). However, the plea of lack of legal standing was admitted by the first instance Court so the Public Prosecution Service continued the proceedings.</p> <p>Court or tribunal</p> <p>Supreme Court (Civil Chamber)</p>	<p>Findings</p> <p>BBK Bank Cajasur SA inserted floor and ceiling clauses as general terms in loan contracts. In order to protect the consumer interests, AUSBANC filed a claim aiming at combating the use of such terms (the floor clauses).</p> <p>Outcomes</p> <p>The Supreme Court dismissed the appeal in cassation and confirms the decision of the Provincial Court, favourable to the petition of the claimant party. The clause was declare therefore null and void (see above Summary of claims).</p>
<p>Cross-border character/ implications, if any</p> <p>N/A</p>	<p>Settlement: no/N/A</p> <p>Remedy: injunction</p>
<p>Opt-in/out</p> <p>N/A</p>	<p>Amount of damages awarded: N/A</p> <p>Distribution of damages: N/A</p>
<p>Type of funding</p>	



None. N/A	
Costs Loser pays principle	
Abusive litigation N/A	
Case name N/A Reference STS 5618/2015 (23 December) ECLI:ES:TS:2015:5618 Subject area Consumer law	Keywords General contractual terms; banking contracts; unfair terms; control of transparency and abusive clauses; representative action Summary of claims OCU ('Organización de consumidores y usuarios') filed a representative claim against two financial entities (Banco Popular Español, SA and BBVA, SA) mainly asking for the annulment of several (potential) unfair terms included in banking contracts together with a cease action to avoid the future use of such unfair terms. The plaintiff also requested the publication of the judgement and its access to the Registry of general terms.
Dispute resolution method Collective/ Representative action Court or tribunal Supreme Court (Civil Chamber)	Findings
Cross-border character/ implications, if any N/A	Two financial entities (Banco Popular Español, SA and BBVA, SA) inserted (potential) unfair terms in some banking contracts (for instance, floor clauses, mortgages fees and costs, etc.). In order to protect the consumer and users interests, OCU filed a claim aiming at combating the use of such terms.
Opt-in/out N/A	Outcomes
Type of funding N/A none	The Supreme Court dismisses the appeal in cassation (the Provincial Court admitted the claim against the financial entities). Clauses were declared null and void (i.e., were considered unfair terms).
Costs Loser pays rules	<i>Following this decision, ADICAE (another consumer association) has announced its intention to promote a collective settlement involving financial entities, claiming on behalf of their members (individual consumers) the recovery of unduly paid mortgage costs (such as notary costs, mortgage land registry costs, attached abusive insurance costs, etc.</i>
Abusive litigation No/N/A	Settlement: N/A Remedy: injunction Amount of damages awarded: N/A. <i>However, following this decision, individual claimants are reaching private agreements with these financial institutions in order to recover unduly paid sums.</i> Distribution of damages: N/A
Case name N/A (AVITE case) Reference STS 4149/2015 (20 October)	Keywords Product liability; defective product; damages; representative action Summary of claims

<p>ECLI:ES:TS:2015:4149</p> <p>Subject area</p> <p>Product liability</p>	<p>AVITE filed a claim against Grünenthal Pharma (German pharmaceutical company) asking for damages caused by the consumption of thalidomide (20.000 EUR for every percentage point of disability in each case of the 186 victims).</p>
<p>Dispute resolution method</p> <p>Collective/ Representative action</p> <p>Court or tribunal</p> <p>Supreme Court (Civil Chamber)</p>	<p>Findings</p> <p>In 2012, AVITE (the Spanish association of Thalidomide victims) filed a claim asking for 204 million EUR in damages. After the decisions of the First instance court and the Provincial Court of Madrid, the Supreme Court upheld the overturning of the previous decision on the basis that the statute of limitations on the case has run out.</p>
<p>Cross-border character/ implications, if any</p> <p>N/A</p>	<p>Settlement: no</p> <p>Remedy: compensation (not awarded)</p>
<p>Opt-in/out</p> <p>N/A</p>	<p>Amount of damages awarded: none</p> <p>Distribution of damages: N/A</p>
<p>Type of funding</p> <p>None /N/A</p>	
<p>Costs</p> <p>Loser pays principle</p>	
<p>Abusive litigation</p> <p>No</p>	
<p>Case name</p> <p>N/A</p> <p>Reference</p> <p>SJM M 53/2016 (7 April)</p> <p>ECLI:ES:JMM:2016:53</p> <p>Subject area</p> <p>Consumer law</p>	<p>Keywords</p> <p>Consumer law; floor clauses in loan agreements; unfair terms; representative action</p> <p>Summary of claims</p> <p>ADICAE filed a claim on behalf of more than 15,000 consumers against 72 financial institutions. Essentially, the association asked for injunctive relief (to prevent the future use of floor clauses in loan contracts), compensatory collective relief (asking for the restitution of unduly paid amounts) and a declaratory action of nullity.</p>
<p>Dispute resolution method</p> <p>Collective/ Representative action</p> <p>Court or tribunal</p> <p>Commercial Court of Madrid, Section 11</p>	<p>Findings</p> <p>‘Floor- clauses’ were inserted in mortgage loan agreements concluded between financial institutions and individual consumers. The clauses in question provided that, even if the interest rate falls below a certain threshold or floor defined in the agreement, the consumer must continue to pay minimum interest equivalent to that threshold or floor, without being able to benefit from a lower interest rate.</p>
<p>Cross-border character/ implications, if any</p> <p>N/A</p>	
<p>Opt-in/out</p> <p>N/A</p>	<p>Outcomes</p> <p>The Commercial Court decision declares null and void certain floor clauses inserted in mortgage loan contracts and prohibits its future incorporation into other contracts. Furthermore, financial institutions must reimburse consumers the unduly paid amounts – but with limited effects, that is, since 9 May 2013.</p>
<p>Type of funding</p> <p>None (N/A)</p>	
<p>Costs</p>	

No order for costs	Settlement: no
Abusive litigation No	Remedy: injunction and damages Amount of damages awarded: restitution of unduly paid amounts Distribution of damages: N/A
Case name N/A Reference SJM M 12/2017 (16 February) ECLI:ES:JMM:2017:12 Subject area Consumer law	Keywords Consumer law; representative claim; damages suffered by small investors (non- professional investors). Summary of claims ADICAE filed two injunctions (to cease in the commercialization of a financial product and to stop misleading advertising) and a declaratory action of nullity of the sale contracts (unfair terms) against BANKIA on the grounds of the massive sale of complex financial products to small investors (preference shares). Restitution of amounts and compensation for damages are also included in the claim.
Dispute resolution method Collective/ Representative action Court or tribunal Commercial Court of Madrid, Section 5	Findings Caja Madrid (now BANKIA) sold preference shares to small investors who were completely unaware of the complexity of those financial products. Following the financial crisis, thousands of clients suffered significant losses. ADICAE filed a representative claim on behalf of their members.
Cross-border character/ implications, if any N/A	Outcomes The Commercial Court admitted partially the claims (declared null and void certain terms and granted injunctive relief – however limited the res judicata effect to the members of ADICAE who had joined the proceedings). However, the court rejected the collective claim asking for the annulment of the contracts based on the lack of informed consent (mistake). The judge considers that consent can only be analysed on an individual basis and not collectively.
Opt-in/out N/A	Settlement: no Remedy: injunction
Type of funding None	Amount of damages awarded: no Distribution of damages: N/A
Costs No order for costs (each party shall bear its own costs, and all common costs shall be shared between the parties in equal parts)	<i>Please note that this is a first instance decision.</i>
Abusive litigation N/A	
Case name N/A Reference STS 454/2017 ECLI:ES:TS:2017:454 Subject area Product liability/ consumer law	Keywords Product liability; consumer law; breast implants; contract law; damages Summary of claims A Consumer association filed a claim on behalf of 53 women (their members) against a clinic asking for the annulment of the contract for services (based on mistake) and the corresponding damages caused by the defective breast implants.

<p>Dispute resolution method</p> <p>Group action/ representative action</p> <p>Court or tribunal</p> <p>Supreme Court (Civil Chamber)</p>	<p>Findings</p> <p>'Asociación de consumidores y usuarios de las Islas Baleares' (Acuib) filed a claim on behalf on their 53 members against a clinic. They had carried PIP breast implants, which were implanted in the premises of that clinic.</p>
<p>Cross-border character/ implications, if any</p> <p>N/A</p>	<p>Outcomes</p> <p>The Supreme Court dismisses the appeal. The contracts were not declared null and void as the court considers that those women were properly informed about the risks of carrying breast implants, i.e., there was not medical malpractice in these cases.</p>
<p>Opt-in/out</p> <p>N/A</p>	
<p>Type of funding</p> <p>Non</p>	
<p>Costs</p> <p>Loser pays principle</p>	
<p>Abusive litigation</p> <p>No</p>	
<p>Case name</p> <p>N/A</p> <p>Reference</p> <p>STS 477/2017 (24 February)</p> <p>Subject area</p> <p>Consumer law</p>	<p>Keywords</p> <p>Consumer protection; floor clauses; individual action; collective action; <i>res judicata</i> effect; retroactive effects</p> <p>Summary of claims</p> <p>A consumer filed a claim against a financial entity asking for the annulment of a floor-clause (abusive clause) and the restitution of the amounts unduly paid.</p>
<p>Dispute resolution method</p> <p>Individual action</p> <p>Court or tribunal</p> <p>Supreme Court (Civil Chamber)</p>	<p>Findings</p> <p>A floor- clause was inserted in a mortgage loan agreement concluded between a consumer and a bank. The client filed a claim asking for the annulment of such abusive clause and the restitution of the amounts unduly paid.</p> <p>Outcomes</p> <p>This decision has adapted the Supreme Court doctrine to the CJEU of 21 of December 2016. The relevant outcome of this decision is that the Court sustained that a joint interpretation of Articles 15, 222.2 and 221 CCP leads to the conclusion that, when a collective action is filed (see Decision of the Supreme Court of 9 May 2013), the <i>res judicata</i> effect of the corresponding judgment upholding the claim only affects to those absent consumers who are individually determined in the text of the judgment ex Article 221.1.1 CCP.</p> <p><i>See also the Supreme Court decision of 9 March 2017 and the Auto of the Supreme Court of 19 April 2017 (mentioned above in this report).</i></p>
<p>Cross-border character/ implications, if any</p> <p>N/A</p>	
<p>Opt-in/out</p> <p>N/A</p>	
<p>Type of funding</p> <p>None (N/A)</p>	
<p>Costs</p> <p>No order for costs</p>	
<p>Abusive litigation</p> <p>No</p>	



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