

## CONSUMERS, ALL FOR ONE, AND ONE FOR ALL!

How Diesel-gate has reactivated the harmonisation of class actions for the defence of consumers in the European Union. We are going to analyse the Proposal for a Directive published and look at the implications it could have for Spain.

The diesel fraud case, by virtue of which several automobile manufacturers acknowledged having manipulated their vehicles to elude emissions limits, thus infringing the regulatory framework of the European Union for the approval of vehicles and environmental legislation, may have caused damages to some consumers. Faced with a situation like this, an individual consumer could be disinclined to claim financial compensation due to the costs associated with it, as they could exceed the amount of compensation to which the consumer may be entitled. However, the sum of the harm caused to all consumers affected could reach a very significant figure.

With this kind of scenario in mind, the European Commission proposed guaranteeing consumers a right to collective claims on a European scale, taking the form of qualified entities, enabling consumers to obtain redress for the harm suffered as a result of this kind of unlawful commercial practice. In particular, on 11 April 2018, the European Commission published a *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC of the European Parliament and of the Council, of 23 April 2009, on injunctions for the protection of consumers' interests (the "Proposal")*. While the title refers to "representative actions", the actions it regulates are those commonly known as "class or collective actions" and that are described in the Spanish regulations as "acciones colectivas". In this briefing we will refer to them as "class actions".

### Proposed harmonisation of class actions:

- Unifies the criteria to designate the entities entitled to bring class actions.
- Imposes a duty of transparency on the financing of the action.
- Aims to extend the scope of class actions to include the possibility of obtaining redress.
- Punitive damages such as in US-style class actions are excluded.
- It envisages deterrents to avoid unlawful commercial practices
- It regulates some procedural aspects in order to facilitate class actions.

### Main changes that the Proposal would entail for the regulations in force in Spain:

- Iuris tantum presumption in favour of declarations of infringement issued by bodies in other Member States.
- Facilitates access to evidence in the possession of the defendant operator.
- Avoids possible abuse of class actions, introducing transparency measures in relation to financing and supervision of settlements.

Although class actions are already regulated in some Member States (such as Spain), the Proposal aims to extend this kind of action to all Member States and ensure that they all respect the same principles that guarantee European consumers the possibility to defend their rights and obtain redress, while at the same time avoiding the risk of abusive litigation. The European system of actions for collective redress that is to be implemented wants to set itself apart from the class actions found in the United States of America, which is why it expressly rules out punitive damages and establishes that such actions must be brought through qualified entities, on a non-profit basis, that meet a series of requirements and that are transparent in terms of the source of their financing.

## **SCOPE**

The Proposal applies to class actions brought against operators who have infringed an EU law provision on consumer protection, whether or a national or cross-border level, and have caused or may cause harm to the collective interests of consumers. Attached to the Proposal, as Annex I, is a list of 59 Community directives and regulations that regulate a variety of aspects of consumer protection and that address different areas, such as personal data protection, financial services, passengers' rights, energy, telecommunications, the environment, misleading advertising and liability for defective goods.

The Proposal does not affect the private international law rights established in the Union on jurisdiction and applicable legislation. Thus, the applicable legislation for the purposes of determining the jurisdiction for filing this kind of action will continue to be the provisions of the Regulation known as "Recast Brussels I" and in terms of determining the applicable law, those of the "Rome I" and "Rome II" Regulations on the applicable law for contractual and non-contractual regulations will continue to apply.

## **PROPOSAL TO HARMONISE CLASS ACTIONS: HOW WOULD IT AFFECT THE CURRENT SPANISH REGULATIONS?**

### **Standing: qualified entities**

Actions to protect the collective interests of consumers must be filed by qualified entities, which will have been previously designated by the Member States for this purpose and will appear as such on a publicly available list.

Qualified entities will meet the following requirements:

- they will be properly constituted according to the law of a Member State,
- they will have a legitimate interest in ensuring that provisions of Union law covered by the Proposal are complied with, and
- they will have a non-profit making character.

Member States will periodically check compliance with these requirements, with the entities losing their status if they fail to comply. It is understood that consumer organisations and independent public bodies *per se* will meet these requirements and that, as such, they are entities that must be recognised as "qualified" for the purposes of this Proposal. Moreover, the possibility is envisaged for a Member State to designate an *ad hoc* qualified entity for a specific action, provided, of course, the entity meets the requirements set out above.

*The rules envisaged in the Proposal on qualified entities are in line with the rules in force in Spain where, at present, there are 28 qualified entities that can bring class actions to defend consumers' rights (list published in the Communication from the European Commission 2012/C 97/01).*

Apart from this general standing, whether or not a qualified entity has standing to bring a class action in a specific case must be analysed on a case-by-case basis. This is because not all qualified entities will have standing to bring any kind of class action; instead, the Proposal envisages the need for a direct relationship between the objectives sought by the qualified entity in question and the rights granted by EU law that the particular class action is attempting to safeguard. For example, a qualified entity established to safeguard the rights of people affected by preferred shares will not have standing to bring a class action to defend consumers affected by the diesel fraud.

*This regulation matches that currently existing in Spain with regard to bringing this kind of class actions.*

The Proposal also establishes that the qualified entities in one Member State should be able to bring the corresponding class actions before the judicial or administrative bodies of another Member State, provided they can accredit that they are on the publicly available list kept by the Member State that designated them as such. This list will be accepted by the other Member States as proof that the entity is qualified to bring this kind of action, notwithstanding the possibility of verifying *in casu* if, depending on the objective sought by said entity, it has standing to bring that action in particular. In cross-border actions, there is even the possibility for several qualified entities from different Member States to band together and sue jointly or represented by a single qualified entity for the protection of the collective interests of consumers in several Member States.

*The possibility for Spanish qualified entities to bring actions for an injunction in other EU Member States, and for the qualified entities of other States to bring actions before the Spanish bodies, is also envisaged in the current regulations.*

## **Actions for an injunction**

In accordance with the terms of the Proposal, qualified entities must be able to bring class actions for the purpose of:

- applying for an interim measure for stopping the infringing practice,
- obtaining an order established that the practice constitutes an infringement of law, and if necessary, an action for an injunction stopping the practice, and
- eliminating the continuing effects of the infringement.

In order to bring any of these actions, the qualified entities do not need to obtain the mandate of the individual consumers affected by the unlawful commercial practice or demonstrate that the practice caused actual harm to the consumers or that the operator committed the infringement intentionally or by negligence.

*Actions for an injunction were harmonised in Directive 2009/22/EC, which the Proposal aims to replace, and are already contemplated in our legal system.*

## **Redress actions**

The Proposal also establishes that the qualified entities must be able to bring class actions aimed at obtaining redress for harm caused to the consumers affected.

According to the Proposal, the redress action can consist of financial compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as is most appropriate in view of the case in question.

*In Spain, the possibility of joining an action for redress with an action for an injunction is envisaged in some scenarios, depending on the infringed rule on which the class action is based.*

In order to bring this kind of redress actions, the qualified entity will have to supply sufficient information (as necessary according to national law) in order to support such action, including the description of the consumers affected and an explanation of the facts and the relevant points of law for the resolution of the same.

In relation to the class action for redress, the Proposal envisages giving Member States certain flexibility when it comes to transposition.

On the one hand, it envisages the possibility for Member States, when transposing it, to stipulate that the qualified entity must have obtained a mandate from the individual consumers affected.

*The need to obtain a prior mandate is not envisaged in our legal system, even if the qualified entity is also bringing a class action. However, what it does envisage is that a call be made to the consumers that were harmed so that they can intervene in the process, if they see fit.*

States are also entitled to specify what qualified entities can exercise all the actions established in the Proposal (action for an injunction, whether in interim measures proceedings or as part of the main proceedings, and redress action), or just some of them.

Moreover, Member States can empower the corresponding administrative authority or judicial body so that, instead of issuing an order for redress, it simply issues a declaration of liability of the operator for infringing EU law. This possibility will in any case be limited to those scenarios in which, due to the characteristics of the individual harm caused to consumers, the quantification of the individual redress is complex.

*Given that our legal system does not envisage that the judicial body can, of its own motion, hand down a purely declaratory judgment leaving the calculation of damages for a later date, it remains to be seen whether the legislator would decide to introduce this possibility when implementing the Proposal because, on the face of it, it would be a bad fit with the procedural principles that apply to the same.*

However, the Proposal envisages that this power will not apply when:

- The consumers affected are identifiable and have suffered comparable harm as a result of the same commercial practice in relation to a certain period of time or purchase. In this case, the redress obtained will be given to the consumers affected. In order to do so, the competent administrative authority or judicial body must be able to ask the defendant operator to supply relevant information in order to identify the consumers and specify the period during which the unlawful commercial practice lasted.

*The Spanish legal system currently envisages that, in the class actions in which an order to pay money was sought, the judgment will determine which individual consumers are to be deemed to have benefited from the sentence or, at least, establish the details, characteristics and requirements necessary to identify them.*

*Moreover, the possibility to ask the operator for this information is currently contemplated in the context of preliminary measures, before they are imposed and at the request of the qualifying entity that is to bring the action, meaning that the Proposal could entail some changes in our regulations in order to include the possibility for the competent body, acting of its own motion, to request such information.*

- The harm suffered by the consumers is minor, meaning that it would be disproportionate to impose upon them the burden of having to bring a redress action in order to receive compensation for the harm. In this case, the redress obtained will have to be directed to a public purpose in order to protect the collective interests of consumers, such as advertising campaigns or a legal assistance fund for consumers.

*Our legal system does not have a similar exception, which would have to be introduced if the Proposal is approved.*

Any redress obtained by a final decision as a result of a class action does not affect the consumers' additional rights to obtain redress by virtue of national or EU law.

## **Transparency regarding the source of funding**

In an attempt to prevent any sort of abuse in class actions for which operators intend to obtain compensation, the Proposal establishes a transparency mechanism regarding the source of funding of these types of actions. Thus, qualified entities must declare, at the start of the proceedings, the source of the funds they are using to finance such action.

And if this funding is provided by a third party, the Proposal obliges Member States to adopt the necessary measures to ensure that this third party: (i) will not influence the decisions that the qualified entity must take throughout the proceedings, and (ii) will not fund a class action brought against one of its competitors, or an action brought against a defendant upon whom such third party is dependent, either. The aim of this is to prevent class actions from being brought abusively, thereby deviating from their purpose.

*This transparency measure is not envisaged in the regulations in force in Spain, meaning that it would have to be implemented if the Proposal is ultimately approved.*

## Supervision of settlement agreements

Also with the aim of preventing possible abuse, the Proposal establishes that competent administrative authorities or judicial bodies must supervise all settlement agreements reached by qualified entities with the defendant operator, in order to verify that the agreement is fair, legal and that they take into consideration all interests at stake, including those of consumers. The Proposal likewise establishes that when a settlement agreement has been reached which concludes a class action, the individual consumers must be informed of this and must be given the opportunity to either accept or reject the option to remain bound by such agreement.

*Our legal system does not envisage a similar supervisory measure, meaning that it would have to be introduced if the Proposal is approved.*

## Information to consumers of final decisions issued or settlement agreements reached

The Commission is fully aware that one of the greatest incentives for companies to abide by the rules is that by doing so, they would avoid the ensuing reputational damage following the publication in the media of news regarding how such companies have committed illegal commercial practices to the detriment of their consumers. With this in mind, the Proposal establishes that such operators must inform affected consumers, at the operators' expense, of final decisions declaring infringement and adopting the corresponding compensatory measures, as well as any settlement agreement reached. As stated in the Whereas section of the Proposal, this can be done via the website of the infringing operator itself, or through social media and national newspapers, apart from individually contacting each one of the consumers affected.

*Spanish law currently only establishes that if an action for an injunction is upheld, the Court can order the publication of the judgment, either in full or in part, at the defendant's expense. This possibility will become an obligation if the Proposal is approved.*

## Effects of final decisions and sanctions in the event of infringement

In order to prevent the Proposal from being applied in contexts other than EU law and to thereby increase legal certainty and the effectiveness and efficiency of class actions and redress actions potentially brought against them, the Proposal establishes that final decisions adopted by an administrative authority or judicial body declaring that an infringement has been committed against the collective interests of consumers will be considered irrefutable proof of the existence of such infringement, in order for the corresponding redress actions to subsequently be brought before the national bodies of such Member State against the same operator for the same infringement.

*In Spain, the possibility of extending the effects of a judgment declaring a commercial practice unlawful to consumers who were not parties to the proceedings already exists.*

However, the Proposal goes further and establishes that when the final decision has been adopted by the bodies of another Member State, the decision will be considered a presumption *ius tantum* (i.e. a legal but rebuttable presumption) of the existence of the infringement. In this regard, the Proposal envisages implementing a similar measure to that envisaged for actions for damages in antitrust matters in class actions for the defence of consumers.

*This presumption in favour of the declarations of infringement affecting consumers issued by bodies of other Member States is not envisaged in Spanish regulations, meaning that it will have to be introduced if the Proposal is approved, as has already been done in relation to antitrust damages.*

To ensure compliance with any final decisions issued in this regard, the Proposal establishes the possibility of sanctioning operators who fail to comply with them. These penalties must be effective, proportional and have a deterrent effect.

*Currently in Spanish legislation, the fine is set at between 600 and 60,000 euros per day of delay in complying with a judgment upholding an action for an injunction in defence of collective interests. It remains to be seen, however, if this fine can indeed be considered "effective, proportional and having a deterrent effect" in the terms of the Proposal, or if a decision is made to increase it.*

## **Procedural issues: effects on limitation periods, procedural expediency, access to evidence and procedural costs**

The Proposal also governs certain procedural issues of interest. On the one hand it establishes that the act of bringing a class action must have the effect of suspending or interrupting the limitation periods applicable to the redress actions of the affected consumers. This is relevant since, regardless of whether suspension or interruption is chosen, in practice this period can obviously be extended.

*This suspension or interruption of the term for the individual action by a consumer as a result of the filing of a class action by a qualified entity is not expressly envisaged in the Spanish legal system for this kind of actions.*

Member States are likewise obliged to implement the necessary measures to ensure that class actions brought by virtue of the Proposal will be processed with due expediency, so as to avoid delays in their processing.

Furthermore, the possibility is envisaged of the qualified entity, having filed at court reasonable facts and sufficient evidence to substantiate its action, being able to request, from the corresponding administrative authority or judicial body, access to evidence that is under the control of the defendant operator. Logically, when approving such measure, the competent body must verify the need and proportionality of such evidence, as well as the relevant measures to ensure its confidentiality. This is done in an attempt to remedy the information asymmetry usually produced in these cases, in which the defendant operator generally has the relevant documentation available to it so as to be able to substantiate the class action.

*The Spanish legal system only envisages the possibility to access information in the possession of the operator in order to adopt preliminary measures for the purposes of determining the number of consumers affected (in those cases in which the qualified entity is unaware of the specific consumers affected, but they are perfectly identifiable) or in the general document discovery rules, which implies some restrictions in practice. This being the case, if the access to evidence envisaged in the Proposal has to be implemented, we do not rule out the Spanish legislator adopting similar measures to those envisaged for actions for damages in antitrust law, in which it has extended the possibility of requesting the discovery of documentation, making it more flexible, while at the same time respecting the principles of proportionality, necessity and confidentiality.*

In order to ensure that procedural costs do not present any impediment to qualified entities intending to bring the corresponding class actions, it is expected that Member States will put measures in place to reduce legal fees, to give free access to justice, and to contribute public funds to finance them.

*Similar measures are already envisaged in our legal system. In fact, the consumer associations are entitled to legal aid and are exempt from having to pay judicial fees.*

## **AN OPPORTUNITY TO IMPROVE HOW CLASS ACTIONS ARE REGULATED IN SPAIN**

As we have seen, while the Proposal would entail some new developments to the regulations currently in force in Spain for this kind of actions, its implementation should not represent a radical change, as many of the aspects regulated are already envisaged. However, the current rules are contained in different pieces of legislation, both substantive and procedural, and this dispersion makes it difficult to exercise such actions in practice.

If the Proposal is ultimately approved, the Spanish legislator could take advantage of its implementation to systemise the current regulations and consolidate it in a single piece of legislation in order to facilitate the filing of this kind of class actions in defence of consumer rights.

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