

GROUP LITIGATION IN SPAIN

NATIONAL REPORT

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1. BACKGROUND

Spanish Legal System

The Spanish Constitution of 1978 (“Constitución Española”: CE) marked decisively the beginning of this country as a State under the *rule of law*, subject to the provisions of laws, and, all them, to the Constitution. This fundamental Law, which sets up that «Spain constitutes itself as a social, democratic State under law», caused an enormous transformation of its Legal system, including the Judicial.

The Constitution, that obviously states the classic legal doctrine of separation of powers, dedicates its Title VI to the Judiciary. The principles underlying the Judicial system can be synthesized in the rule that Justice is administered in the name of the sovereign or people by professional Judges, members of the Judiciary Branch, who shall be independent, non-removable, responsible and only submitted to orders of law. The Jurisdiction is characterized by the principles of unity and exclusivity: although Spain is divided into Autonomous (Self-Governing) Communities, the Judiciary is unitary. The decentralisation of the State’s territorial organisation hasn’t got its translation to the third power: the Judiciary. Autonomous Communities have its own Parliament and Government, but doesn’t have “Judicial Branch”, so that the Courts in them are Courts of the State.

According to the subject of the matter, Spanish courts are organized in four categories: Civil, for civil or commercial issues; Criminal, for violations of the Criminal law; Administrative, for claims based on acts and regulations performed by public administration; and Social, for social security and employment contracts issues. Spanish Courts are also organized hierarchically: there is a system of appeals against the decisions of lower (first instance) courts to higher (appeals) courts, and to the (cassation) Supreme Court (Tribunal Supremo: TS), which is the highest judicial body of all branches of justice, excepting provisions concerning constitutional guarantees (rules and rights). The Constitutional Court does not belong to Judicial Branch structure and is regulated separately at Title IX of CE and by its own Organic Law, 2/1979, October 12th, “del Tribunal Constitucional” (LOTC).

Spanish civil litigation system is a *Civil Law* system, with some regional variations. Sources of law are provided by the Civil Code (Código Civil: CC). Pursuant its art. 1, the sources of law are:

- a) Statutes, in the sense of any written rule of law, which is the main source: Constitution; Laws, whose hierarchy is Organic Laws, (Ordinary) Laws, Decree-Law and General Administrative regulations; and, on the other hand, International Treaties, that become internal laws once they have been signed, ratified and published in the Official State Gazette (and so is the European Union law, whose rules become internal and directly applicable as a part of the national system).
- b) Custom (non written law, coming from the society, based on an *opinio iuris*, that is the general conviction about the obligatory character of a customary rule, and that is only applicable if there is no applicable law, and it's not contrary to morals or public law: custom against statutes -*contra legem*- is forbidden by the art. 1 CC).
- c) General Principles of Law (basic rules reflecting the convictions of a community governing its organization).
- d) Case Law: complements the legal system with doctrines repeatedly expressed by the Supreme Court in its decisions. It is a complementary source of interpretation and application of the law. Case Law is not formally binding on judges, although decisions which do not follow Supreme Court doctrine may be set aside on appeal (TS is allowed to decide not only if the if decisions are against the law, but also, if judicial decisions of the lower courts were against the established jurisprudence. The decisions of a court may be appealed if they are not in accordance to the case law of the Supreme Court on the same issue in at least two judgments).

Spanish Civil Procedural Law is also unitary (the territorial decentralisation not applies to the procedural rules). It is contained principally in the Organic Law for the Judiciary (Ley Orgánica del Poder Judicial, 1/1985 –LOPJ-, with several reforms). And most Civil Procedure regulation is provided for the Civil Procedure Act (Ley de Enjuiciamiento Civil: LEC), Law 1/2000, passed on 7 January 2000.

Spanish Civil Justice has been traditionally *adversarial* (governed by the “*dispositivo*” principle), with the *parties* controlling the issues in dispute and evidences. So, general procedural **principles** affecting the parties are:

- *initiative of the parties* in bringing an action,
- initiative of the parties in presenting evidence,
- besides the obvious equality of the parties under law, right of the defendant to be heard and contested nature of legal proceedings.

The –procedural- principles concerning the *judge* are the judicial expediting of proceedings and congruence.

And the general evidentiary principle is the free weighting of evidence (with only a few exceptions of weighted evidence).

However, significant reforms from LEC'2000 have introduced greater judicial control, to limit parties' proposal of evidence (number of witnesses, type of experts, documentary evidence, etc.); and have encouraged settlements, procedural orality, immediacy (presence of the judge during oral judicial proceedings –hearings-) and concentration (of procedural sessions).

There are two types of **civil** (ordinary) **declaratory proceedings**: the “juicio ordinario” (“ordinary proceeding”), that is the most composite and structured proceeding, for most expensive (> 3.000 €) or complex matters; and the “juicio verbal” (“oral proceeding”), a simpler proceeding based absolutely on concentration, orality and rapidity, for small claims –lower value cases- or supposed less complicated matters.

2. RULES FOR GROUP LITIGATION

The Spanish statutory rules governing “class” or “group” litigation are mainly laid down at the LEC. The precedent of this statutory regulation was only the art. 9(3) LOPJ and the general provisions at the Constitution (art. 51).

Social, political and legal context.

It is significant that Consumer Law emerged (in the Consumer Protection Act, approved by Law 26/1984 of 19th July, called General Law for Protection of Consumers and Users: LGDCU) and developed in Spain after some outstanding events (mass tort cases, as the “Colza oil case”, in the 80's) and, time after, on the occasion of national implementation of EU legislation. But legal recognition of consumer substantive rights was not accompanied by a regulation of procedural statutes and mechanisms in order to enforce those rights before the Courts (only by a few sectorial -scarce and disseminated- legal rules).

Some scholars had been talking about it, and denouncing that traditional procedural laws and schedules were inappropriate to provide legal protection to this new situations, rights and interests. But, from these clichés on, thorough analysis and jointed proposals were missing¹.

The group and collective litigation phenomenon become widely –statutory- accepted in the Civil Procedure Act (LEC) of 2000. This Act tackle the “collective” and “diffuse” matter, issue that was been claimed long time ago by the legal –academic- doctrine and was a pressing need in the Spanish legal system. This legal phenomenon, of such a significant importance in our days, has got “naturalization papers” by means of the LEC, to which the Spanish rules of civil procedure could not remain strange more time: the whole new elaboration of the Civil Procedure Act (with permanence and actuality vocation for the new

¹ For a deeper analysis, see GUTIÉRREZ DE CABIEDES, P., *La tutela jurisdiccional de los intereses supraindividuales: colectivos y difusos*, Aranzadi, Pamplona, 1999.

millennium) was an unbeatable chance for it. And it could be shown up that the new regulation is able to be instrument for a great transformation in Spanish justice system.

Policy debates

However, it is relevant the absence of political debates on this matter. In fact, the rules governing it were mainly introduced at the end of the legislative procedure in Parliament. So, although this legal “recognition” must be considered positive itself, being an advance respecting to the LEC of 1881 (which, for obvious reasons, could not attend this phenomenon), it must be affirmed that the regulation established is far from being satisfactory and it may give many problems in its interpretation and application.

If the interpretation and application of this rules is wanted to go beyond the superficial idea that “the collective rights are already protected” (which it is certainly hardly necessary), we must descend to the concrete way and effects of this rules real enforcement.

Rules

A. Non-representative actions

As non-representative mechanisms, Spanish civil procedure law has traditionally established the ordinary techniques of *joinder of claims*, or joinder or *consolidation* of individual *actions*, laid down now in arts. 71 to 73, and 74 to 80, being the art. 78(4) specifically dedicated to joinder of actions to these lawsuits (actions brought by consumer organizations aiming the protection of collective and diffuse interests of consumers).

Besides, it can be stressed that there is a non-representative mechanism in the administrative jurisdiction, regulated in Administrative Jurisdiction Law (Law 29/1998, dated 13 July), art. 110, that permits to *extend the effects* of a *judgement rendered on an individual-case basis* to persons who are in the same situation that the one which has been issued.

B. Representative actions

Enforcement of the “collective” and “diffuse” interests of consumers

This is the most relevant mechanism regarding to the so-called “class” or “group” “representative” litigation and providing protection to consumers’ interests.

Various enforcement provisions originate from European legislation, and are implemented into Spanish legislation. The provisions are statutory, and enable collective action to be taken to defend the collective rights of consumers and users in specified circumstances. The available remedies are typically *injunctions* (and previous available injunctive relief) and *action for damages*, mainly *monetary claims*.

Thus, an injunction might be granted against traders for allegedly breaching consumer protection, fair trading or competition laws. And it has been recently extended in environmental field.

It is described in detail further down that following the Continental European model, the consumer organizations possess the right to bring collective actions, having an important role (together with some public authorities) in the enforcement of this mechanism.

After the Consumer Act'1984 have done it, the modern sectorial commercial laws - the most of which were enacted implementing UE Directives- empowered consumer organizations to apply to the courts to an injunction, and, in some cases, to monetary claims, in defence of the consumers' rights. So happened, e.g. in these matters:

- misleading advertising: Publicity General Act (Law 34/1988, of 11th November).
- unfair commercial practices: Unfair Competition Act (Law 3/1991, of 10th January).
- and (with a special regulation) the Law 7/1998, of 13th April, on Standard Terms in Contracts.

Most of procedural provisions on these Laws have been brought to Civil Procedure Act (LEC) of 2000, avoiding in such way the lack of unity and dispersion of existing legal rules regarding to these.

After LEC'2000, other Laws transposing into Spanish law UE Directives have deepened this matter. They lay down rules with regard to the protection of consumers' collective and diffuse interests, setting a collective action for injunction) without prejudice to individual actions brought by individuals who have been harmed by an infringement>

- Law 34/2002, of 11th of July, on Services in the Information Society and Electronic Commerce (LSSI-CE).
- Law 39/2002, of 28th of October, for the transposition into the Spanish legal system of some community Directives on protection of the interests of consumers and users.
- Law 23/2003 on Guarantees for Consumer Goods, incorporating Directive 99/44, 25 May 1999, on Certain Aspects of Sale of Consumer Goods and Associated Guarantees.

These Laws, implementing the Directives, establish the “entities qualified” to bring an action seeking such an injunction against practices that are unlawful under the Spanish law and that constitute infringements harmful both to the collective and diffuse interests of consumers, in the way laid down in LEC and LGDCU.

The articles in Civil Procedure Act (LEC) concerning group litigation are –as said above- scarce and dispersed: sections 6(7) on capacity to sue, 7(2) on appearance at trial, 11 on standing to sue, 13 and 15 on notice and intervention, 221 on *res iudicata*, 222 on requirements of judgment, and 519 on consumers “executive action” in enforcement of judgment. They are analyzed further on.

In terms of *Jurisdiction* (generally determined by the branch of law to which the action relates), Civil Courts will usually hear group actions concerning to private (Civil and Commercial) Law. But it could be the Administrative Courts, if the claim refers to an act or

regulation of this nature, and Social ones, if the claim refers to an action coming from an employer. In civil actions, Judges of the First Instance will have competence to hear the case, not so in some cases concerning criminal, administrative or social proceedings.

Enforcement of environmental rights and interests

Recently the constitutional right “to enjoy an environment suitable for the development of the person” has got its necessary legal development in Law 27/2006 of July 18th, regulating the rights of access to environmental information, public participation, and *access to justice* in environmental matters.

There are not specific procedures for access to justice in matters related to the environment: it is necessary to resort to ordinary legal procedures.

Access to *criminal courts* is granted whenever a public authority or a natural or legal person commits a breach of criminal provisions regulated by the Criminal Code or any specific criminal law. Criminal –popular- action is granted for environmental crimes: every citizen has the right to exercise it in respect of criminal offences (in this case, “offences related to town and country planning and protection of historical heritage and of the environment”). By accessing criminal courts, individuals and organizations can become party² to criminal proceedings and therefore help protect the right to environment. And, as it is explained later on, any declared criminal liability implies a civil liability.

Access to *civil courts* is possible when damage is caused by any natural or legal person. This access is limited to affected parties. The application of this jurisdiction in relation to the environment would correspond to matters concerning civil liability not arising from an offence, or arising from an offence about which the criminal process has **explicitly** made reservations.

Access to *administrative courts* is ruled under Law 29/1998 of July 13th on Administrative Jurisdiction. Access is possible whenever there is a breach of any specific environmental legislation. Now, Law 27/2006 expressly recognises the right to *actio popularis* whenever a public authority acts or fails to act in breach of environmental legislation. Articles 22 and 23 lay down the scope of this *actio popularis*³.

² By being a party to a criminal suit, acting as a private prosecutor, assisting the Attorneys General’s Office in the investigation of offences, and even acting in the role of this public prosecutor.

³ A list of what is regarded as environmental legislation is established in article 18(1): “All general provisions concerning the following matters:

- protection of water
- protection against noise pollution
- protection of soil
- air pollution
- rural and urban planning and land use
- nature conservation and biodiversity
- woodlands and forest management
- waste management
- chemical products, including biocides and pesticides
- biotechnology
- other emissions, discharges and releases of substances into the environment
- environmental impact assessment

Redress in Bankruptcy cases

Some recent cases in Spain (Opening Case, Air Madrid Case, and Forum Filatélico & Afinsa Cases) have been processed by means of bankruptcy proceeding, because the company that was involved into the “collective action” on redress ended up in bankruptcy. And so, the “credits” (the amounts for those plural injuries, damages or losses to a group or collective of persons) must be obtained in this type of proceeding.

Compensation Orders in criminal proceedings

Spanish legislation empowers the public authority (the Attorney General’s Office) to seek compensation orders from the courts as part of the criminal enforcement process. And this general provision can be –and is- used for class or group cases. Criminal courts have a general competence to order a person convicted of an offence to pay compensation for any personal injury, loss or damage resulting from that fact. And it’s the way widely used and chosen in practice at serious events and offences (when it gets criminal nature) concerning numerous injured persons or victims.

If the compensation is sought in criminal proceeding (by the aggrieved, or –as it’s usually- by the public authority), it can’t be done in other civil one for damages, and viceversa: if the civil action is expressly renounced or reserved for civil action by the aggrieved, it will be not sought in criminal proceeding by Attorney General’s Office.

In fact, the most serious event (and outstanding case) of class action for damages in Spain (the “Colza oil Case”) was processed by means of the criminal proceeding. This was a case of liability for defective products: a mass-scale poisoning due to the consumption of adulterated colza oil, with fifteen thousand victims, that gave rise to two sets of criminal proceedings which, both in terms of the number of victims and the amount of compensation finally awarded (around three thousand million euros), undoubtedly constitutes the most important case this century in the Spanish law of tort. It was also an important case on product liability in which some of the most controversial issues in the modern treatises on causation and proof of same were addressed⁴.

3. GENERAL DESCRIPTION OF THE PROCESS

Proceeding

- access to information, public participation in decision-making and access to justice in environmental matters

- any other matters provided for by regional legislation”.

Vid. SANCHIS-MORENO & Asociacion para la Justicia Ambiental (Association for Environmental Justice), *Access to justice in Spain under the Aarhus Convention*, Santander, 2007, at <http://www.elaw.org/assets/pdf/es.a2j.spain.2007.pdf>.

⁴ Vid. VV.AA. (coord. Salvador Coderch,P.), *Civil Liability for Defective Products. Green Paper*, Universitat de Girona-Universitat Pompeu Fabra-Cuatrecasas Abogados, Barcelona, 1999.

The LEC does not set up a special proceeding for collective or group litigation, but it provides for some specific procedural rules (mentioned: arts. 11, 15, 221, 222, 519...), which must be applied to these lawsuits, that will follow the correspondent ordinary proceeding, but taking care of these special rules. So, these actions will be processed by a “ordinary proceeding with peculiarities”.

The opportunity of this legal option is questionable, unless it’s coherent with the general legislator desire of simplifying the precedent complex nebula of special proceedings in LEC’1881. However, in this case it would have been justified to provide for one.

Depending on the action brought (injunction or redress), there can be distinguished two types of proceedings (ordinary proceedings with specialities) to be processed:

1. an “*injunction* proceeding”, that, from the Law 39/2002 on transposition of several Directives regarding the protection of the consumers and users’ interests, follows the procedure of “oral proceeding” (“juicio verbal”) according to art. 250(1)(12) LEC,
2. the “action for *damages*” proceeding, that, in absence of any specific legal provision, will be processing by means of “ordinary” or “oral” proceeding according to the general rules, depending on amount of the claim: arts. 249(2) y 250(2) LEC: if it is higher than 3.000 € –as it will usually be–, the ordinary proceeding; if it’s lower –which may rarely happen– the oral one⁵.
3. These rules have the only exception, because of the matter, of infringements and actions concerning *standard terms in contracts*. These actions will be processed according to rules established in the Law 7/1998 of 13th April.
 - 3.1. If it’s only sued a declaratory judgment, this law sets the “oral proceeding” (“juicio verbal”: a quicker proceeding than the ordinary one) to be processed.
 - 3.2. In any other case (injunctions, rectification actions or actions for damages), the designated procedure for those issues is the ordinary proceeding.

Procedure

In short, the action begins with the filing of the complaint by the entitled to sue (set at the capacity and standing to sue regime). Law also provides the best notice and publicity to be given to all affected and their possible intervention (of individual consumers and other associations). Later on, it lays down the main features and requirements of the judgment, and its effects. And, finally, the possible appearance of affected in the enforcement of judgment, seeking the defence of their rights recognized in it.

The first issues (capacity, standing, notice and intervention) are analyzed deeply further on. Regarding to the effects of judgment, art. 222(3) LEC states –with a complex writing– that “judgments shall affect all the parties to the proceedings, including their heirs, as well as non-litigants whose rights found the standing to sue of the parties under section 11 of this Act”. So, pursuant the LEC, judgements rendered in class actions affect all non-

⁵ See question 1 above.

litigants, whatever the outcome, and not only if it is beneficial. And art. 221 specifically establishes the characteristics and regime of effects of judgment rendered in consumer “class actions” proceedings. Section 221(1) states that “judgments passed in connection with claims filed by associations of consumers and users based on the standing to sue laid down on section 11 shall comply with the following rules: (1) where the claim is for monetary compensation, or in order to require the defendant to do, abstain to do, or give a specific or generic thing, the judgment shall determine individually which consumers and users must benefit from it according to law.

Where such determination is impossible, the judgment shall establish the details, features and requirements necessary to demand payment and, where appropriate, to apply for or take part in the enforcement of the judgment, if requested by the claimant association”.

STANDING TO SUE. OPT IN.

4. Representative litigation: “adequate representation” and opt in

4.1. Civil Procedure Act (LEC)

The standing to sue regulation is laid down in art. 11 LEC. The title of this article “Standing to sue for defending consumers and users rights and interests” is unduly and improperly restricted to consumers, even though it has the virtue of not using the confusing “collective standing to sue” formula, that so many times has brought authors to say that only collective entities could be considered entitled to sue, denying the individual standing to individuals affected or harmed; and because it doesn’t tell the difference between collective and diffuse interests defended. That is why I upheld that it was better to say “Standing to sue for defending collective and diffuse interests”, and, in this sense, the legal expression must be considered right.

This article is made up of three paragraphs:

1. First one (which is a reproduction of what it was already provided twenty years ago by the of Consumer protection Act, art. 20), says that “Notwithstanding the individual standing to sue of injured persons, the consumers’ and users’ organizations legally constituted are entitled to bring an action defending the rights and interests of their members, of the association, or the general interests of consumers and users”.
2. The new rules are so contained in second and third paragraph. In these following two paragraphs, the LEC deals with who are entitled to sue, depending if the affected or injured persons by the tort or harmful event are a “determined or easily determinable group of consumers” or “an indefinite or hardly determinable plurality of consumers”.

In first case, under the art. 11(2) LEC, “When the affected persons by a harmful event would be determined or easily determinable, the standing to sue to pretend the protection of these *collective interests* belongs to the consumer

organizations, to legally constituted entities which aim is their protection or enforcement, as well as to the groups of affected”.

3. In second one, pursuant to the art. 11(3) LEC, “When the affected persons by a harmful event would be an indefinite or hardly determinable plurality of consumers and users, the standing to sue the protection of these [those which are here cold] *diffuse interests* exclusively belongs to the consumer organizations that, *under the Law*, will be considered *representative*”. However, this Law does not tell us anything about what “representative” means⁶, constructing a *corporative model* that gives many doubts not only about his convenience, but about its constitutional adequacy. It has been in the end of 2006, by Law 44/2006 of 29th December, when this requirement –its content and meaning- has been determined by legislator⁷. Even though, I think an individual must be considered entitled to sue in protection of his interests, under the first section of 11(1), and first of all, under the Constitution, art. 24.
4. The Organic Law for Effective Equality between men and women (3/2007, of march 22nd) has introduced a new paragraph that applies this regulation to this specific matter, setting the same standing to sue of public entities and organizations whose main aim was the defence of equal treatment between men and women, in addition to the individual standing that is again correctly recognized

With this, Civil Procedure Act alludes to the differentiating criterion between collective and diffuse interests (terminology established in legal doctrine and statutes of many civil law countries), based on the determination of “class members”, but does not attend to the substantial different nature of multiparty legal situations: a *supraindividual interest*, that is hurt and can be satisfied or made amends (eg: by a declaratory or injunctive action); and *individual* although *plural rights* (like the enforced by damage class actions)⁸. Furthermore, the legal drafting, by the description it makes, seems to be talking about second ones (in spite of using this nomenclature in this article, which just comes to set a “definition” of these legal situations).

From this point on, the rest of articles about this matter talk always about the “consumer and users rights and interests” or “collective and diffuse rights and interests”, and doesn’t make any difference between these multiparty legal situations (plural and *supraindividual*).

Standing to sue of the individuals affected

⁶ See on this issue, GUTIÉRREZ DE CABIEDES, P., «La nueva Ley de Enjuiciamiento Civil y los daños con múltiples afectados», en *Derecho del Consumo: acceso a la justicia, responsabilidad y garantía*, Ministerio de Sanidad y Consumo-Consejo General del Poder Judicial, Madrid, 2001, p. 163-168; FERRERES COMELLA, A., «Las acciones de clase (“Class Actions”) en la Ley de Enjuiciamiento Civil», *Actualidad Jurídica Uría y Menéndez*, 11-2005, pp. 44-45.

⁷ Law 44/2006 of 29th December, on the Improvement of the protection of consumers and users (providing, inter alia, for the amendment of General Law 26/1984: Consumer Act). Pursuant to this Law, only associations represented in Council of Consumers and Users would be considered “representative”.

⁸ On this fundamental distinction, see at full length GUTIÉRREZ DE CABIEDES, P., *La tutela jurisdiccional de los intereses supraindividuales...*, cit., specially pp. 99-113.

Art. 11(1) starts saying (as a due new addition to art. 20 Consumer Protection Act) that “Notwithstanding the individual standing to sue of injured persons, ...”. With it, the Law comes to save the standing to sue of individuals injured or affected by unlawful actions in consumer law. Considering the minimal position of the Law in this matter, it turns out to be an accuracy that this rule will be provided, once that there have been heard voices that pretended to deny it (because we would allegedly be in presence of “*something collective*” that only “belongs” to collective entities). But, on the other hand, it must be rejected of being done this –laconic- way: and because of it, that it isn’t clear at all which is the object or matter of this standing to sue: standing for what? For which situations? For which claims? We can gather that law is of course thinking in individual harms, but supraindividual interests must not be excluded (eg. injunction actions), because they’re legally affected. “Collectivity” refers to simultaneousness or concurrence in a good’s enjoyment, but not to a so-called lack of ownership of a right or legitimate interest: interest in obtaining judgment concerning it—in addition to others, but it-, and so, interest to bringing proceeding (eg. claiming the annulment of an unlawful act, seeking an injunction, etc.).

However, Spanish Procedure Act does not entitle individuals to bring a “class action” for damages (like US class actions), empowering only to organizations.

The consumer organizations

The LEC, following the European Civil Law tendencies on the matter, confers to consumer associations standing to bring to the court the collective and diffuse interests of those. Given the difficulties and cost for individuals to bring an action before the Courts, these consumer organizations play a *fundamental role* in class or group litigation. This rule is provided in the European Union Law and in its enforcement in Spanish law.

However, it must be distinguished the different types of association’s enterprise in this matter. The art. 11(1) states that “Notwithstanding the individual standing to sue of injured persons [already commented], the consumers’ and users’ organizations legally constituted are entitled to bring an action defending the rights and interests of their members, of the association, or the general interests of consumers and users”.

- a) The first rule concerns the own association rights, which has nothing to do with “collective interests” protection or with an alleged “collective standing” (that’s just the reason why I talked about the inconvenience of using this expression). It is an individual right (of the association) and it is an ordinary standing to sue rule.
- b) The second one deals with representation of individual association members, that from a technical point of view, is not even a “standing to sue” (active legitimacy) case. In fact, art. 11(2) states that the association needs the member acceptance to seek an action, which shows that it’s acting on behalf of the individual, which is the party. The issue is that it can be considered an *implied* or tacit and supposed *representation* (based on an adequate notice system), but representation. There are many differences and important effects depending on what we are talking about -own standing to sue or representation of the injured person-, at least in Spanish Law.

- c) And the third subparagraph, which talks –without precise terminology- about “general interest”, is supposed to be referred to what properly are *collective and diffuse interests*; that’s to say, about the cases providing in next sections of this article. This is a really case of *standing to sue* in protection of these interests, based on the special purpose of the organization (that is to protect the specific interest of consumers and users as a whole, or of those of specific goods and services). This purpose, reflected in its statutory objective, forms the basis of its own interest and standing to sue.

The article 11(2) and (3) legal criterion

We have already shown how the Law distinguishes the standing to sue regime, according to the determination of the affected persons, setting that where they are determined (or are easily determinable), the standing to pretend the protection of these collective interests belongs to the consumer organizations, to legally constituted entities which aim is their protection or enforcement, as well as to the groups of affected”. And where they’re undetermined or are hardly determinable, it belongs exclusively to organizations that will be considered “representative”.

We think that this requirement is not justified in a civil law system (or, at least, in Spanish law); and that it is due to the lack of the substantial distinction between supraindividual –or common- interests, and individual but plural rights. In first case (*supraindividual interests*), the association has its own interest and ordinary standing to sue: so, it doesn’t need –and cannot be limited by- an adequacy of representation requirement. And in second one (*plural rights*), the adequacy of representation comes from an adequate notice system, and not from any regulatory or administrative requirements.

And this impression is confirmed when we look at what are the “representativity” evaluation criteria taken in account in the recent and scarce provisions laid down by regulation and administrative action. The evaluation criteria should be granted generally by law, and its discretion must belong only to a judge.

The groups of affected persons

When the injured persons by the harmful event are a consumers’ group whose members are determined or are easily determinable, art. 11(2) gives a right of action to the own “group of affected persons”. This expression had been already used by the LOPJ, but there was not anything said there about what it meant. Now the LEC states something about it, although its regulation relays being quite unsatisfactory.

Art. 6(1)(7^o) gives the “groups of affected persons” capacity to sue and to be sued, although requiring that “the group set up itself with most of the affected members”. And, providing their capacity to appear at trial, art 7(7) sets that, in the name of these entities “will appear at trial the persons that, de facto or with the agreement of the entity, act on its behalf”.

The requirement of the setting up and appearing “with most of the members” shows again that this regulation is out of focus, conditioning this essential aptitude with

“majorities” criteria: as we said, if we are talking about common interests, an affected person does not need to appear at trial together with others, so he is able to seek an action for his own interest defence. And we are talking about individual but plural rights, it is not properly the group who appears and claim, but each one of the affected or harmed persons. Nevertheless, to easy its access to justice they may –and should- use the representation mechanism, based on an adequate notice regime.

Besides, this odd regime forces to “proof” (and, before, to know) who and how many are exactly the members of the group of affected persons. That has brought the Law to set a peculiar “preparatory proceeding”, held prior to the complaint, in which the injured persons who intend to bring the suit, by means of a “production order”, may require the defendant to determine –identify- the members of the “affected group”; and even by means of “search and seizure orders” and criminal sanctions. Sincerely, I don’t think the necessary protection of consumer rights must be done in this way.

4.2. Other Laws

For its part, other subsequent Laws implementing some Directives on consumer law establish the “*qualified entities*” to bring an action seeking such an injunction against practices that are unlawful under the Spanish law and that constitute infringements harmful both to the collective and diffuse interests of consumers, by the way laid down in LEC and LGDCU.

- a. The Law 34/2002, of 11th of July, on Services in Information Society and Electronic Commerce and the Law 39/2002 establishes which are the entities qualified to seek an injunction. With this aim, the first Law states the empowered to seek an injunction (as sawn afterwards⁹) and the second Law carries out a reform of several substantial laws concerning sectorial fields in which the Directive 98/27/CE demands the introduction of the injunction mechanism (“acción colectiva de cesación”) for protection of consumer collective or diffuse interests. These entitled bodies are:
 - A) The National Institute for Consumers and the regional or local bodies or entities responsible for consumer protection.
 - B) Consumers and users associations who meet the requirements of Law 26/1984 of 19 July, General for the Protection of Consumers and Users, or, in their case, in regional legislation in the field of consumer protection.
 - C) The Attorney General’s Office.
 - D) The bodies of other Member States of the European Union formed for the protection of collective and diffuse interests of consumers who are qualified by inclusion in the list published for this purpose in the "Official Journal of the European Communities".

⁹ This Law empowers the entities referred afterwards, and, besides, add to them –before- the mention to “any natural or legal person who has a right or legitimate interest” and “the own groups of affected persons, pursuant to the Civil Procedure Act (LEC)”.

- b. The Law 23/2003 on Consumer Goods, incorporating the correspondent Directive 99/44, specifies the entities qualified in that matter:
- public bodies: “National Institute for Consumers” and the corresponding regional and local bodies or entities responsible for protecting the consumer interests,
 - the “Ministerio Fiscal” (the Spanish Attorney General’s Office –similar to Public Prosecutor's Office-),
 - consumer organizations constituted according to the law and fulfilling criteria and requirements laid down by LGDCU, or, in its case, by the regional consumer regulations. And, for Intra-Community infringements, the qualified entities from other Member States constituted for the protection of consumer interests where these interests are affected by the infringement, and included at the list published in the Official Journal of the European Communities.

5. Non-Representative Group Litigation

As it has been already said before, classical mechanisms of joinder of parties, claims or actions, and intervention are the forms of group litigation that could properly fit to this category. Regarding the type of cases, the situations in which these instruments are principally present in group litigation are contractual liability cases (medical malpractice, air companies, holidays and some other services, like advanced language schools) in which the aggrieved persons are determined.

But in many of them, if real features of mass litigation appear, the representative litigation rules are finally applied.

6. LAWSUITS FILLED

There is not any statistic (official or officious) provided by any institution or available about how many lawsuits of this kind of litigation have been proceeded in Spain in last years. However, it can be shown up that group litigation is taking increasingly relevance in Spanish legal system. Outstanding cases will be put forward in this question.

INFORMATION ABOUT SUIT INITIATION

7. In representative litigation

The LEC lays down the notice to group or class members and their intervention in art. 15, titled “Publicity and intervention in lawsuits for protection of consumers’ and users’ rights and interests”. As art. 11, it only talks about the “consumers and users” injured by harmful events; so, it only applies, in principle, to consumer field.

Art. 15 states, over this notice, that «In proceedings brought by associations or entities created for the protection of the rights and interests of consumers and users, or by affected

groups, an appeal shall be made to consumers of the product or users of the service to enable them to enforce their individual right or interest. This appeal shall be advertised by the media in the area where such rights and interests arose».

Afterwards, the LEC distinguishes two regimes, concerning to what are called in art. 11 “collective interests” (determined injured persons) and “diffuse interests” (non-determined injured persons).

First ones are shown up in next paragraph (quest. 8), because it could be considered a form of non-representative litigation.

Regarding the second type of events, art. 15(3) sets that «Where the damages affect an undetermined or hardly determinable number of persons, following the appeal the proceedings shall be adjourned for a period of up to two months. The suspension period shall be determined in each particular attending to the circumstances or the complexity of the facts and the difficulties involved in the determination and location of the affected persons. The proceedings shall resume with the intervention by those consumers or users who have come into the action; the late appearance of consumers and users on an individual basis shall not be permitted, but they shall be permitted to enforce their rights and interests under articles 221 and 519 of this Act».

8. In non-representative litigation

With regard to the notice and information of suit initiation, when the affected are determined or are easily determinable, art. 15(2) establishes that «Where the damages affect a determined or easily determinable number of persons, a due notice of the initiation of the action shall be given before filing of complaint to all of them by claimant or claimants. In this case, after the appeal, the individual consumer or user may intervene in the action at any moment, but he only shall be able to perform non-precluded procedural acts by that moment».

9. SPECIAL CASE MANAGEMENT PROCEDURES

There are not special management procedures laid down for group litigation concerning to jurisdiction, case pleadings or time-limits. There is not either any special rule about scheduling or development of evidence.

In court practice, some special case management mechanisms have been provided (strikingly in Colza Case) to facilitate the scheduling and development of practice of evidences.

10. NEGOTIATION AND SETTLEMENT

In Spanish group litigation, very few cases are been resolved through party or attorney negotiation and settlement: most of them are been resolved through full judicial trial and decision. Negotiation and settlement would be done, in that case, by the attorney, that is supposed to confirm it anyway with parties defended by him. And there shall be observed the general requirements for settlements laid down at art. 19 LEC. It may be only

denied by the Court if it is “forbidden by law” or “limited by public interest reasons or on a third party interest”. In this matter, that generic sentence may give the court the opportunity for examining and assuring fairness of negotiated outcomes.

11. REMEDIES

General regime

The available remedies are specified in the legislation. These remedies can be typically classified as it follows:

- *Injunctions* (and previous available injunctive relief). An injunction might be granted against traders for allegedly breaching consumer protection, fair trading or competition laws. And it has been recently extended to environmental field.

So, the entitled entities can bring an injunction for infringements of Spanish national consumer law -transposing the EU Directives-, and of the consumer rights as set out on advertising, antitrust or unfair commercial practices, consumer credit, distance selling contracts, time sharing, package travel, or sale of consumer goods and associated guarantees. For unfair terms in consumer contracts lawsuits, there is a specific regulation, treated next.

- *Action for damages*, mainly *monetary claims*. This is the action which articles 11(3), 15, 221(1) and 519 provisions are really talking about.

The action for collective redress is the one which has got less legal regulation (which is not clear at all) and enforcement, although it is growing and will be the budget of oncoming important developments in its enforcement.

Unfair Standard Terms in Contracts

For this matter, law lays down a specific regulation of “collective actions”, in sense of remedies to be demanded before the Courts. There are three kinds of “collective actions” in regards to standard terms or so-called “general conditions”:

- a) *injunctions* sensu stricto –“acciones de cesación”–
- b) *rectification* actions –“acciones de retractación”
- c) and *declaratory* actions –“acciones declarativas”; and also references are made to the “Register of Standard terms”, in which judgements declaring the nullity or not incorporation of a general term, either due to an individual action or to a “collective action” are registered (art. 11.4 LGDCU '84).

There is also statuted a provisional measures regime, usually limited to injunctive relief.

12. FUNDING

In Spain, the general rule on funding litigation costs is the “*loser pays*” rule: the party whose claims are rejected is assessed all costs (with a limit of one-third of the amount of the claim payable) as fees for lawyers and solicitors, expert witnesses and certain public officials, which are included in the concept of “*costas*” (procedural reimbursable costs).

Public (State): Legal Aid for organizations

Nevertheless, in order to encourage the *access to justice*, the Constitution establishes that “justice will be free of charge when provided by law and, in any case, for those who have insufficient monetary resources to bring legal action”. Implementing this general provision, the right to legal aid (free legal defence) is regulated nowadays by Law 1/1996, of 10th January 1996 on *Legal Aid*. And pursuant this Law, justice will be administered *free of charge* to those who accredit having insufficient recourses to litigate (in terms laid down in it), as well as to individuals and public or private entities granted this right by this law. Among these, the *consumers and users’ associations* are awarded that right by this Law (Additional Disposition 2).

Finally, Law 27/2006 improve on this system by article 23(2), stating that all non-profit entities allowed in it to bring an action meeting the requirements set in article 23(1) are entitled to obtain free legal aid in accessing to administrative judicial procedures as regulated in Law 1/1996 on Legal Aid¹⁰. Free legal aid may cover besides attorney’s fees other costs involved in a judicial review, i.e.: expert fees, bonds for becoming a party, for applying for injunctive relief, etc. This provision is intended to establish an assistance mechanism to help reduce financial barriers in access to environmental justice.

Private: “pactum de quota litis” and contingency fee

So, until now, public funding has been the general rule, or, in its case, private-loser-counterparty refunding, after the judgment setting the breach of consumer laws. But in last years, there has been an arising phenomenon on this issue: the case finding and management, not by consumer organization legal services, but by private lawyers and law firms (characteristic -as is known- of US class actions). In this case, there is not free legal defence, and the *contingency fee* is making its way, in which lawyers fix the level of their fees by reference to the amount recovered in the action. Up to now, the so-called “pactum de quota litis” was forbidden by the General Bylaw of the Legal Profession, but his fairness and validity is being submitted to an important debate in public institutions.

The central governing body for the legal profession in Spain (the General Council of Spanish Lawyers “Consejo General de la Abogacía Española”: CGAE) has had to defend its professional rules of conduct several times before the Spanish Competition Defence Court, and finally following the imposition of a fine amounting to €180,000 by this Antitrust Court. The Court considers that the prohibition on contingent fee agreements in Rule 16 of the professional rules of conduct adopted in 2000 undermines competition in the legal sector. CGAE argues that the rules do allow for a contingency fee but prohibits “*no*

¹⁰ As amended by Law 16/2005 of 18th July.

win no fee” agreements and that this is in line with the Code of Conduct for Lawyers in the European Union adopted by the Council of the Bars and Law Societies of the European Union (CCBE) (Section 3.3¹¹). That decision was appealed by the CGAE to the National Court, who did admit the appeal, rendering the validity of the prohibition of “*pactum de quota litis sensu stricto*”.

Other phenomena like commercial third party funding are unknown in Spain.

Funding is perceived to be a problem, principally in small claims, but not so when the claims have a higher amount. For consumer organizations, the main problem has been to pay forward the (sometimes important) sums for publicity at mass media demanded in art. 15 LEC, not included in the free of charge legal aid provision.

13. COSTS AND BENEFITS

Payment of attorneys

In Spain, legal fees are charged in accordance with an officially approved fee scale based on the value of the matter handled by the lawyer, although regulatory rules of legal profession also permits the setting of alternative fees according to the effective work, difficulty and outcome of the case, as long as these fees at least cover the cost of providing the legal service.

There are not special rules for paying attorneys in (representative and non-representative) group litigation. Ordinary civil litigation rules (set out above) over it are observed. And there are not specific pre-action protocols for group litigation.

As said before, it is arising in practice of group litigation (increasingly) managed by private lawyers, the *contingency fee* custom and provision. And due to the challenged prohibition of the “*pactum de quota litis*”, at last, the lawyers often are entering agreements fixing their fees in accordance to the amount recovered in the action, but with some minimum fee account.

Courts role

Courts don’t have responsibility for determining fees in these cases. Fee and other costs in litigation may be reviewed by the court only on the objection of the paying counterparty: i.e. if attorneys fee is objected to as being unlawful –improper- or excessive. A special proceeding is initiated: the lawyer is heard and the local bar association is asked to issue a report over that fee.

¹¹ This Sections states that «by “*pactum de quota litis*” is meant an agreement between a lawyer and his client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter».

Comparison of costs

The private costs of group litigation compared to the costs of ordinary civil litigation are in accordance to the “numerosity” and complexity of those actions. Attorneys maybe make initially more effort and risk (mainly, at the initiation of case management), by comparison to ordinary civil litigation, but in a *scale point of view*, final work and costs are much lower than in ordinary litigation, and the possibility of outcomes and benefit achieved, much higher. There is not any quantitative data available on litigation costs.

The range of costs and the relationship between costs and outcomes is clearly beneficial for everybody (lawyers, affected class members, representative organizations, the administration of justice...) except for the responsible of the breach of law, which loses his unjust enrichment grown out of his infringement.

14. BURDEN AND TIMING ON THE COURTS

Group litigation places on the Courts the logical burden for its complexity and “numerosity”, but less than in a classical non-group litigation pursued separately.

Large group or mass cases take some years to resolve, but also it will take always less resources and time that if it would be managed individually. And, in practice, they are solving each time with less delay (because of the increasing current legal certainty and experience).

15. APPLICATION. DEBATES. PREDICTION OF ONCOMING DEVELOPMENTS

There are not currently outstanding debates in Spain over the application of collective litigation rules and their consequences, like they in other countries and in the European institutions, in which some important discussions and consultations are taking place.

It can although be predicted that some remarkable developments are very likely to come in the following years. They could arise, e.g., in competition law field, on the occasion of the discussion on some proposals of “privatisation” of competition law enforcement, enhancing the private action in competition law and improving *effective (collective) redress*.

16. EVALUATION. CONCLUSION

The group and collective litigation phenomenon has been “accepted” and regulated in the Civil Procedure Act of 2000. And it must be shown up that the new regulation –in spite of its important fails- is able to be instrument for a great transformation –I have called it a “*Copernican revolution*”) in Spanish justice system.

So far, it allows consumers and their organizations to a better access to justice, not increasing public or private costs. And not generating a “litigation culture” as some people predicted, but an “*enforcement culture*” of consumer law and consumers’ rights and interests.

