

SPAIN

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. WHAT IS THE DEFINITION OF CLASS/COLLECTIVE ACTIONS IN YOUR JURISDICTION? ARE THEY POPULAR AND WHAT ARE THE CURRENT TRENDS?

Definition of class/collective actions

There is no specific definition of class/collective actions in Spain. The concepts of “collective” and “group” actions are often used interchangeably. Actions seeking collective redress under Spanish law can only be brought by organisations designated in Article 11 of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act). In Spain, actions for the protection of identified group members are referred to as “collective actions” while actions seeking the protection of unidentified group members are referred to as “representative actions”. This terminology may create uncertainty because unlike other jurisdictions which use this terminology, individuals are barred from bringing Article 11 claims.

The Civil Procedure Act distinguishes between the members of affected groups and therefore establishes two types of collective redress actions:

- Actions for cases in which the group members are identified or easily identifiable (*Article 11(2), Civil Procedure Act*).
- Actions for the protection of “diffuse interest” for cases in which the affected group is undetermined or difficult to determine (*acción para la protección de intereses difusos*) (*Article 11(3), Civil Procedure Act*).

This Q&A will follow these distinctions.

In Spain there is no collective redress mechanism but there are particular procedural rules in order to fit collective claims. These particularities, which will be addressed in detail in this Q&A, include:

- The right to bring collective redress actions.
- The right to stand.
- The extension of the effects of the ruling.

Use of class/collective actions

In Spanish practice the most common grounds for bringing collective redress actions have taken place in the field of consumer and user rights. This broad field includes:

- Product liability (Ruling of the First Instance Court number 12 of Barcelona, No. 973/2005).
- Unfair financial terms (Ruling of the Barcelona Court of Appeal, No. 351/2005).
- Wrongful billing (Ruling of the Madrid Court of Appeal, No. 177/2005).
- Travel contracts (Ruling of the Badajoz Court of Appeal, No. 647/2003).

Current trends

In light of the financial crisis, collective redress actions have become more popular in financial and banking services contracts. In particular, collective redress actions have been brought for:

- Abusive clauses in banking services (particularly terms that set a minimum base rate in floating rate mortgage loans, also referred to as “floor-clauses”).
- Product liability.
- Financial contracts related to service contracts.

REGULATORY FRAMEWORK

2. WHAT ARE THE PRINCIPAL SOURCES OF LAW AND REGULATIONS RELATING TO CLASS/COLLECTIVE ACTIONS? WHAT ARE THE DIFFERENT MECHANISMS FOR BRINGING A CLASS/COLLECTIVE ACTION?

Principal sources of law

As mentioned, in Spain there is not a specific collective redress procedure (*see Question 1*). Therefore, there is a non-systematic regulation.

The principal source of law which regulates the procedure for collective actions is Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act).

In addition, certain aspects regarding consumer and user associations’ right to sue are set out in the Royal Legislative Decree 1/2007 of 16 November on Consumers and Users (*Real Decreto Legislativo 1/2007, de 16 de Noviembre, Ley de Consumidores y Usuarios*) (Consumers and Users Act). The consumer and user association must be registered in the Healthcare and Consumer Ministry’s registry.

The general substantive law on damages, which also applies for collective redress actions, is set out in the Spanish Civil Code in Articles 1902 and 1968.

There are also regulations on specific fields of law that expressly entitle organisations using Article 11 of the Civil Procedure Act to bring collective claims. These regulations include Article 32 of Act 3/1991 of 10 January on Unfair Competition (*Ley 3/1991, de 10 de enero, de Competencia Desleal*) (Unfair Competition Act), which can be used when the damage arises from an unfair competition act, and Chapter IV of Act 7/1998 of 13 April on General Terms and Conditions (*Ley 7/1998, de 13 de abril, de Condiciones Generales de la Contratación*) among others.

Principal institutions

The type of court that will have competence over the matter will depend on the nature of the claim.

If the claim is a tortious claim or the claim is based in general contract law, Civil Courts (*Juzgados de Primera Instancia*) will have competence over the matter.

If the claim arises from mercantile matters (that is, a claim seeking a competition unfairness declaration and the damages arising from the unfair act), the Mercantile Courts (*Juzgados de lo Mercantil*) will have competence over the matter.

If the claim is brought against the Public Administration, the Administrative Courts (*Juzgados de los Contencioso Administrativo*) will have competence over the matter.

3. ARE CLASS/COLLECTIVE ACTIONS PERMITTED / USED IN ALL AREAS OF LAW, OR ONLY IN SPECIFIC AREAS?

According to Article 11 of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act), group actions are permitted in all areas of law which involve consumers' or users' interests or rights. This includes actions relating to:

- Product liability.
- Damages arising from unfair practices.
- Consumer redress for financial services (*see below*).
- Unfair or abusive contract terms.
- Competition law.

However, for collective actions for financial services, the grounds on which claims are brought are also relevant. The Alicante Court of Appeal in Order no 18/2013, 31 January, did not admit a collective action which sought consumer redress arising out of the misselling of bonds. Although the Court did not deny the consumers' association the right to stand before the Court for defending consumers' interests, it dismissed the claim as it found it contradictory to lodge a collective redress action based on a flawed consent of the individuals. The rationale behind the dismissal was that each individual had a different knowledge of financial products, different investment records, and so on, and therefore each claim should have been analysed on a case-by-case basis.

It should be noted that collective redress actions do not cover environmental damages as the affected individuals do not fit into the category of consumers or users.

Accordingly, the individuals that have been damaged by the wrongful conduct must be categorised as consumers or users as defined in Article 3 of the Royal Legislative Decree 1/2007 of 16 November on Consumers and Users (*Real Decreto Legislativo 1/2007, de 16 de Noviembre, Ley de Consumidores y Usuarios*) (Consumers and Users Act). Article 3 establishes that consumers or users are "individuals acting for a purpose unrelated to their commercial or business activity, trade or profession".

The Spanish collective redress scheme is not available for companies that do not fall under the definition of consumers or users (*Order no. 45/2013 of the Court of Appeal of Madrid, January 17*). However, this does not preclude the possibility of companies bringing a joint action (*litisconsorcio activo*) which, for example, would be the usual scenario for companies damaged by a cartel (*Ruling of the Supreme Court, No. 344/2012, 8 June 2012 also known as the "Sugar Cartel Case"*).

LIMITATION

4. WHAT ARE THE KEY LIMITATION PERIODS FOR CLASS/COLLECTIVE ACTIONS?

Under Spanish law, claims arising from contractual obligations have a 15 year limitation period from the day on which the claimant could have brought the action (that is, when he or she realises that the contract was breached), whereas the limitation period for bringing a tortious claim is one year from the date that the claimant became aware of the wrongful act (*Articles 1964, 1969 and 1968, Civil Code*).

Article 35 of Act 3/1991 of 10 January on Unfair Competition (*Ley 3/1991, de 10 de enero, de Competencia Desleal*) (Unfair Competition Act) also establishes a limitation period of one year. Additionally, it also sets out a statute bar of a three-year period since the conduct took place.

It should be borne in mind that the recent Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) establishes in Article 10(3) that member states must ensure that the limitation periods for bringing actions for damages are at least five years. Accordingly, Spain will need to modify its national legislation regarding the limitation periods in order to comply with the EU Anti-trust Damages Directive.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

STANDING

5. WHAT ARE THE RULES FOR BRINGING A CLAIM IN A CLASS/COLLECTIVE ACTION?

Definition of class

Under Spanish law, there is no specific definition of “class”. See *Question 1*.

Potential claimant

In order to protect “collective interests”, Article 11(2) of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act) states that the action can be brought by:

- Consumers’ and users’ associations.
- Legally incorporated entities.
- Groups of affected individuals.

For more information on the definition of these groups see *Question 6*.

Actions seeking the protection of “diffuse interests” can exclusively be brought by representative consumers and users associations (*Article 11(3), Civil Procedure Act*).

Claimants outside the jurisdiction

With regard to cases of international scope, the rules laid down in Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, are applicable if the defendant has its legal address in the EU.

If the defendant is not established within the EU, the jurisdictional rules laid down in the Civil Procedure Act are applicable. A Spanish court has jurisdiction when one of the defendants has its legal address in Spain.

QUALIFICATION, JOINDER AND TEST CASES

6. WHAT ARE THE KEY PROCEDURAL ELEMENTS FOR MAINTAINING A CASE AS A CLASS ACTION?

Certification/qualification

A group action certification does not exist as such under Spanish law. However, there are some procedural requirements that must be met in order to bring collective redress actions. These procedural particularities are set out in Articles 11 and 15 of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act).

The collective redress action must be brought only by those entitled to do so under the Civil Procedure Act. These groups include:

- Consumers' and users' associations.
- Legally constituted entities.
- Groups of users or consumers affected.

Consumers' and users' associations. These entities must be legally constituted according to the Organic Act 1/2002 of 22 March on Associations (*Ley Orgánica 1/2002, de 22 de marzo, Ley de Asociaciones*), and must meet the requirements laid down in Title II of the Royal Legislative Decree 1/2007 of 16 November on Consumers and Users (*Real Decreto Legislativo 1/2007, de 16 de Noviembre, Ley de Consumidores y Usuarios*) (Consumers and Users Act), which include:

- Being a non-profit organisation.
- Being officially registered.
- Having a purpose that is for the defence of consumers' and users' interests.

If these associations do not comply with these requirements, the action could be dismissed on the grounds of a lack of capacity to sue (*Ruling of the Mercantile Court of Badajoz, 15 February 2011*).

Article 37(c) of the Consumers and Users Act establishes that consumers' or users' associations have the right to carry out the relevant activities in defence of the collective or diffuse interests of consumers and users including its legal defence.

Legally constituted entities. These are defined as those legal entities which, without specifically being consumers' associations, have a statutory purpose which may also cover the defence of consumers' rights and interests.

Group of consumers or users affected. The group of consumers and users affected who aim to file collective actions must meet two requirements (*Article 6(1)(8^o), Civil Procedure Act*):

- Consumers or users affected by a damaging event must be determined or easily determined. The group bears the burden of proof.
- The group must be constituted by the majority of those users affected. The group bears the burden of proving that they represent such a majority (*Article 6(7^o), Civil Procedure Act*). This process takes place outside the proceedings and before the claim has been filed.

Minimum/maximum number of claimants

Collective redress actions under the Civil Procedure Act do not qualify as such because of the number of individuals, but because of the organisation that brings the claim. Accordingly, there is no limitation as to the minimum number of individuals needed before a collective action can be brought as long as the claimant falls under the scope of Article 11 of the Civil Procedure Act. However, as mentioned, any group of affected consumers and users who can only bring Article 11(2) actions must represent the majority (*see above, Group of consumers or users affected*). There is no limitation as to the maximum number of claimants for bringing collective actions.

Joining other claimants

There are certain mechanisms to inform affected individuals after the initiation of proceedings started by Article 11 organisations. The general principle is set out in Article 15(1) of the Civil Procedure Act which states that the individuals who have been damaged by the product or service which gave rise to the proceedings must be summoned to a hearing to enforce their rights or individual interest.

There are two types of mechanisms to inform individuals of the initiation of the proceedings depending on the type of action.

Where the members are identified or easily identifiable, prior to lodging the claim, the association, entity or group bringing the claim must notify the members of the affected group of its intention to lodge a claim. The Seville Court of Appeal held that the failure to do this was a ground to dismiss a collective action based on a lack of due process (*Ruling of the Seville Court of Appeal No. 33/2004, January 22*).

After the notification, the court must announce the admission of the claim through media outlets that have territorial coverage. In this case, after the call, the consumer or user can “opt-in” to the proceedings at any time, but can only take part in the procedural acts which have not been precluded (*Article 15(2), Civil Procedure Act*).

Where the members are undetermined or difficult to determine, the procedure is different. As discussed above, only certain consumers’ and users’ associations (those who are considered sufficiently representative under Article 11(3) of the Civil Procedure Act) are entitled to bring a collective action to protect “diffuse” interests. The court must announce the admission of the claim through media outlets that have territorial coverage. In this case, the call suspends the proceedings for no longer than two months. After that period, the procedure must be resumed with the intervention of those consumers and users that have come forward (*Article 15(3), Civil Procedure Act*).

Unlike with group members who are easily identified or identifiable, once the call in the media has taken place and the stayed period has expired, individual consumers are not

allowed to join the proceedings, unless there is a possibility that they could benefit from the ruling as the proceedings progress.

It is worth noting that Article 12 of the Civil Procedure Code also establishes that multiple claimants or defendants can stand together within the same proceeding (*litisconsorcio activo*) if the damage arises from the same wrongful act.

Test cases

There are no test cases available as the courts will only assess whether there is liability on a case-by-case basis. For the requirements that must be met for the finding of liability, see *Question 19*.

TIMETABLING

7. WHAT IS THE USUAL PROCEDURAL TIMETABLE FOR A CASE?

Once the claim has been admitted and served on the defendant, the defendant will have 20 days to answer the claim. Once the claim has been answered, the court clerk will fix the date of the preliminary hearing which must take place within the following 20 days (*Article 414, Act 1/2000 of 7 January on Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil)* (*Civil Procedure Act*)). Once the preliminary hearing takes place, the court will fix a date for the hearing within the following month (*Article 429(2), Civil Procedure Act*). However, it is worth noting that in practice this is rarely the case.

After the proceedings, the losing party can file an appeal before the Court of Appeal (*Audiencia Provincial*) within 20 days after the issuance of the ruling from the First Instance Court (*Juzgado de Primera Instancia*). The losing party can also file an appeal before the Supreme Court within 20 days after the Court of Appeal's ruling.

According to the 2013 statistics of the General Council of the Spanish Judiciary, proceedings before the Court of First Instance take seven months on average, and an appeal before the Court of Appeal takes seven months. Nevertheless, the regions of Madrid and Catalonia have a higher average of estimated time. However, it is difficult to provide a reliable estimate of time, as one of the determining factors is the workload of each particular court. This issue is usually related to the court's location.

In addition, it is also highly likely that collective actions take longer than other proceedings due to the increased complexity of the matters. As mentioned above, collective actions may also need to summon the affected consumer or users (which in some cases stays the proceedings), and it may also involve preliminary applications (*diligencias preliminares*) (see *Question 6, Joining other claimants*).

EFFECT OF THE AREA OF LAW ON THE PROCEDURAL SYSTEM

8. DOES THE APPLICABLE PROCEDURAL SYSTEM VARY DEPENDING ON THE RELEVANT AREA OF LAW IN WHICH THE CLASS/COLLECTIVE ACTION IS BROUGHT?

The applicable procedural system varies depending on whether the claim is brought against a public administration. Those particular consumers who are affected are required to claim for damages following an administrative procedure. However, in the case of

claimants who were not awarded the claimed damages, they can then bring an action before the Judicial Administrative Courts.

In this case, the applicable procedural law is Act 29/1998, 13 July, governing the Administrative Jurisdiction (*Ley de la Jurisdicción Contencioso-administrativa*) (Administrative Jurisdiction Act). Although there are no specific provisions regarding collective actions, Article 19(b) of the Administrative Jurisdiction Act recognises the right for affected groups and associations to bring claims and to defend collective rights or interests.

The judicial administrative procedure can be summarised as follows:

- Once the statement of claim has been filed, the court will transfer the administrative file and the statement of claim to the parties and it will grant them a 20 day deadline to respond to the substantive claim.
- The parties can request an oral hearing in the statement of claim and in the defence, respectively. The court will decide the convenience of such a request and, if it considers it pertinent, will set a date for the oral hearing.
- The parties can also request to be granted the possibility of submitting a final written statement (*escrito de conclusiones*). The court, if applicable, will grant a ten-day deadline for the parties to submit their final statements. Once all these procedural steps have been fulfilled, the court must declare the process pending for ruling.

The entire proceedings can last up to a year and a half to two years; however, the timeframe can vary.

FUNDING AND COSTS

FUNDING

9. WHAT ARE THE RULES GOVERNING LAWYERS' FEES IN CLASS/COLLECTIVE ACTIONS?

Contingency fees (*quota litis*) were regulated by Article 16 of the Spanish Lawyers' Deontological Code (*Código Deontológico de la Abogacía Española*), which prohibited their use. However, in a ruling by the Spanish Supreme Court, this Article was quashed since it could restrict competition in the legal market by not allowing lawyers and clients to freely negotiate the prices of services (*Ruling of the Supreme Court, appeal No. 5837/2005, 4 November, 2008*). As a result of this judgment, contingency fees are now allowed in the Spanish legal market. However, the "no win, no fee" principle is not allowed.

Lawyers' fees are agreed between the lawyer and its client. However, when giving effect to the "loser pays" principle, there is a cap on the fee set in Article 394(3) of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act), under which the losing party cannot be obliged to pay more than one third of the total amount of the claim to the other party's lawyers.

In addition, there are limits on the recoverability of legal costs set by each regional bar association. Consequently, in most cases, the recoverable legal costs are substantially lower than the incurred costs.

10. IS THIRD PARTY FUNDING OF CLASS/COLLECTIVE ACTIONS PERMITTED?

There are no specific provisions on third party funding of collective actions (or any other actions) under Spanish law and therefore it is not prohibited. However, third party funding is not common in Spain. Given the absence of any specific regulation, the answer is to be found in general contractual law.

11. IS FINANCIAL SUPPORT AVAILABLE FROM ANY GOVERNMENT OR OTHER PUBLIC BODY FOR CLASS/COLLECTIVE ACTION LITIGATION?

There is no specific public financial support available for class actions. However, according to Article 37(b) of the Royal Legislative Decree 1/2007 of 16 November on Consumers and Users (*Real Decreto Legislativo 1/2007, de 16 de Noviembre, Ley de Consumidores y Usuarios*) (Consumers and Users Act), legally established consumers' associations may receive public assistance and subsidies in order to achieve their purposes.

Additionally, consumers' and users' associations may also benefit from legal aid (that is, an exemption from paying court fees).

12. ARE OTHER FUNDING OPTIONS AVAILABLE TO CLAIMANTS IN CLASS/ COLLECTIVE ACTIONS?

In Spain, a legal entity or individual can take out insurance policies for legal representation and for civil liability. After-the-event insurance comes under the private and contractual relationship between the insurer and policyholder and will therefore depend on the will of the parties.

COSTS

13. WHAT ARE THE KEY RULES FOR COSTS/FEEES IN CLASS/COLLECTIVE ACTION LITIGATION?

In Spain, relevant costs and expenses within a proceeding include:

- Lawyers' fees (*see Question 9*) and the mandatory legal agent representative's fees (*procurador*).
- The placement of advertisements or public notices that may have to be published during the course of the proceedings.
- Deposits to lodge appeals.
- The cost of evidence and experts' fees.

Regarding costs, Spain follows the "loser pays" principle unless:

- The case raises serious doubts regarding the facts or the application of the relevant law.
- The arguments of the losing party are not totally dismissed (*estimación o desestimación parcial de las pretensions*). In those cases, the court will not make an order for costs, and each party will bear its own costs (*Article 394, Act 1/2000 of 7 January on Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) (Civil Procedure Act)*). Accordingly, each party has to pay its costs upfront and the successful party will have to wait until the end of the proceeding for a reimbursement.

If the claimant discontinues the action before it is concluded, the allocation of costs will depend on the consent of the defendant. If the claimant discontinues the action without the consent of the defendant, the claimant must bear the legal costs. In the event that the defendant consents, each party must bear its own legal costs (*Article 396, Civil Procedure Act*).

The Civil Procedure Act does not provide for a specific regime if the dispute is settled. Therefore, it will be down to the discretion of the parties to decide how to allocate the costs incurred. Usually each party will bear its own legal costs and the court fees equally.

KEY EFFECTS OF THE COSTS/FUNDING REGIME

14. WHAT ARE THE KEY EFFECTS OF THE CURRENT COSTS/FUNDING REGIME?

There are no specific rules regarding costs or funding for collective actions. The current system discourages reckless claims through the “loser pays” principle.

It can be argued that the same principle encourages claimants with strong cases to come forward. However, costs must be paid up front and the reimbursement will be delayed until the end of the proceedings. In addition, under the current Spanish system parties are not likely to recover all the expenses incurred.

However, as previously mentioned, consumers’ and users’ associations can opt for state subsidies and free legal aid (*see Question 11*).

DISCLOSURE AND PRIVILEGE

15. WHAT IS THE PROCEDURE FOR DISCLOSURE OF DOCUMENTS IN A CLASS/ COLLECTIVE ACTION?

Before litigation

There is no regulated pre-trial discovery procedure in Spain. However, there are two types of proceedings which have similar effects to pre-trial procedures:

- Pre-trial proceeding (*Diligencias preliminares*).
- Examining evidence in advance (*Anticipación de la prueba*).

Pre-trial proceeding (*Diligencias preliminares*). Such a procedure is common in areas of law involving the defence of consumers, intellectual property or unfair competition.

For example, Article 256 of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act) entitles the future claimant(s) to request a preliminary process from the court in order to obtain from the future defendant any necessary information to prepare for the case. In these cases, it would be compulsory to file a formal complaint within one month following the performance of the pre-trial proceeding in order to initiate judicial proceedings. This process is expressly stated in Article 36 of Act 3/1991 of 10 January on Unfair Competition (*Ley 3/1991, de 10 de enero, de Competencia Desleal*) (Unfair Competition Act).

This pre-trial proceeding is particularly relevant for determining which individuals have been affected by a wrongful act. According to Article 256(6^o) of the Civil Procedure Act, the potential claimant can ask the court to take the necessary measures to determine the individuals affected (that is, to request from the corporation the list of clients). After such a process the claimant will be able to determine which type of collective redress action can be brought. This is relevant as the entitlement for bringing the claim and the procedural requirements are different. In addition, if the potential claimant is a group of affected consumers or users, they will be able to determine whether or not they comply with the majority rule for lodging a claim.

Examining evidence in advance (*Anticipación de la prueba*). According to Article 293 of the Civil Procedure Act, if there are reasonable grounds for believing that evidence may no longer be available at the moment of trial, an early assessment of evidence or measures to secure evidence can be sought. Article 295.3 of the Civil Procedure Act states that if an early assessment of evidence is made, the claimant must serve its claim within two months after this, otherwise the evidence will cease to be valid.

During litigation

According to Article 265 of the Civil Procedure Act, all claims and answers must be accompanied by any kind of evidence that each party deems necessary for defending their case.

Once the claim has been answered, the court will establish a date in order to carry out the preliminary hearing. The aim of the preliminary hearing is to verify if the parties have reached an agreement over the dispute and if not, to fix the position of the parties and admit or dismiss the parties' proposal for evidence.

During the preliminary hearing, the parties have the right to challenge the evidence brought by the counter party (that is, they are not relevant for the case; the time for filing the evidence has ended as it was available before lodging the claim; or illegality of evidence) and to propose their evidence (that is, to request documents, cross-examination and so on). In particular, the request for documents (*deber de exhibición documental*) is regulated in Article 328 of the Civil Procedure Act under which a party can request from the other the disclosure of documents that are not at its disposal.

The court must decide whether each piece of evidence which has been proposed by the parties can be admitted. The court will issue a specific request (*providencia*) formally requiring the party to provide the admitted evidence.

Once the preliminary hearing has taken place and the date for the hearing has been set, the parties are barred from bringing new evidence except if a new fact occurs or is known after the preliminary hearing. This applies even after the judgment has been remitted for a decision.

16. ARE THERE SPECIAL CONSIDERATIONS FOR PRIVILEGE IN RELATION TO CLASS/ COLLECTIVE ACTIONS?

Under Spanish law, the concept of privilege for collective actions is the same as for any other action.

In Spain there are certain grounds on which a party can refuse to disclose documents. The most relevant examples are documents produced on a lawyer-client basis (*Article 542(3) of the Act 6/1985, of 1 July, of the Judicial Power (Ley Orgánica núm. 6/1985 de 1 de Julio, del*

Poder Judicial) and Article 34(e) of Royal Decree 658/2001, of 22 June, of the General Statute of Advocacy (*Real Decreto núm. 658/2001 de 22 de junio, del Estatuto General de la Abogacía*). Privilege also covers conversations and the exchange of postal or e-mail conversations with the opponent's lawyers, and expressly prohibits their use within the proceedings without the other lawyers' consent. A lawyer cannot be obliged to testify in a trial regarding facts that are acknowledged because of his or her professional activity (*Article 32, Spanish General Statute of Advocacy*). This breach could eventually lead to the removal of the lawyer's licence. The Ethics Code states that the confidentiality duty remains even after the case has finished or been settled (*Article 5, Spanish Bar Ethics Code*).

In addition, the accounts of traders are secret (*Article 32, Commerce Code*) and a court will only request their disclosure on an exceptional basis and only for relevant specified items in the accounts (*Article 327, Act 1/2000 of 7 January on Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) (Civil Procedure Act)*).

EVIDENCE

17. WHAT IS THE PROCEDURE FOR FILING FACTUAL AND EXPERT WITNESS EVIDENCE IN CLASS/COLLECTIVE ACTIONS?

There is no specific procedure for filing factual and expert witness evidence in collective actions and therefore, the procedure is the same as for general claims. There are no limitations as to the evidence that parties can propose or request. As discussed, it will be the court that will admit or dismiss the evidence proposed by the parties. Therefore, the parties can propose as many witnesses as they deem appropriate (*see Question 15*).

The experts' reports must be attached to the claim and/or response to the claim (*Article 336, Act 1/2000 of 7 January on Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) (Civil Procedure Act)*). If it is not possible to attach the report to the claim and/or the response, it can be supplied later but no later than five days before the preliminary hearing (*Article 337, Civil Procedure Act*).

Regarding expert witnesses, the costs of exceeding three for each fact at issue must be borne by the party presenting them. When the court has heard the testimony of at least three witnesses in relation to a fact at issue, it can omit the remaining testimonies concerning the same fact if it considers that the fact has been sufficiently made by those already given.

DEFENCE

18. CAN ONE DEFENDANT APPLY TO JOIN OTHER POSSIBLE DEFENDANTS IN A CLASS/COLLECTIVE ACTION?

Joining other defendants

The defendant can request to call other defendants to join the proceedings (*litisconsorcio pasivo necesario*). This request must be attached to the claims response and the request

will be examined during the preliminary hearing (*Article 405.3, Act 1/2000 of 7 January on Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) (Civil Procedure Act)*).

In addition, according to Article 13 of the Civil Procedure Act whoever proves a direct and legitimate interest in the outcome of the case can be admitted as a claimant or defendant in the case while the proceedings are underway.

The application does not suspend the procedure. The parties will be heard within the following ten days. After the parties have been heard, the court will decide (by deciding if they have a direct and legitimate interest) whether they admit the defendant to join.

Rights of multiple defendants

Each defendant has the right to appoint its own lawyer which does not prevent the possibility of multiple defendants having the same lawyer. Multiple defendants can also instruct joint experts.

DAMAGES AND RELIEF

19. WHAT IS THE MEASURE OF DAMAGES UNDER NATIONAL LAW IN THE FIELD OF CLASS/COLLECTIVE ACTIONS?

Damages

The basic rules governing tort actions are also applicable to group actions. Article 1902 of the Spanish Civil Code establishes that the person who, as a result of an action or omission, causes damage to another by his fault or negligence must repair the damage caused (also referred to as the *alterum non laedere* principle). Therefore, damages are assessed on the basis of injury suffered by the claimant. In other words, damages are generally awarded to restore the claimant to his or her position prior to the wrongful act.

The main criteria that must be met for a finding of liability are:

- An act or omission.
- The existence of wilful misconduct or negligence.
- Damage effectively caused.
- A causal relationship between the damage and the act or omission.
- Evidence of the amount of the damage suffered.

The amount to be paid is worked out by examining the damage and the lost profits caused by the illegal action. Moral damages can also be claimed but it is up to the court to decide on these. Punitive damages are not available under Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act) but are awarded on a compensation basis.

The general rule regarding a group action ruling is that it must determine which individuals can benefit from it. In case this is not possible, the court will establish the requirements that the individuals must fulfil in order to benefit from the ruling even though they have not participated in the proceeding (*Article 519, Civil Procedure Act*).

Recovering damages

If multiple defendants are found liable, the court may declare joint and several liabilities. To enforce the ruling, the claimant can request payment of the total amount of damages from any of the liable defendants (*Article 1144, Spanish Civil Code*). This scenario usually takes place when each defendant's share of responsibility is difficult to determine or when the law expressly determines this must be the case (for example, for members of a cartel).

In this case, any defendant who faces monetary damages can subsequently recover part of the amount (including interest) by means of a cross-claim (where an action is brought against a co-defendant) or a contribution claim (brought against a third party) (*Article 1145, Spanish Civil Code*). These actions seeking to recover damages will take place in separate proceedings.

Interest on damages

In cases where the claimant is awarded damages, the judge will fix a lump sum for the interest on the basis of various criteria used by the courts. One of the typical elements taken into account when calculating damages is the interest from the date when the claimant suffered the damage.

If the defendant does not pay the damages after the first instance decision has been issued, then the relevant amount will accrue "procedural interest" (*mora procesal*) from the date of the judgment. Article 576 of the Civil Procedure Act establishes that, once the judgment ordering the payment of money has been issued, an annual interest rate equal to the legal interest rate plus 2% will be used or, if relevant, the rate can be agreed between the parties or can be subject to any applicable special provisions of the Civil Procedure Act.

20. WHAT RULES APPLY TO DECLARATORY RELIEF AND INTERIM AWARDS IN CLASS/COLLECTIVE ACTIONS?

Interim awards

There are no specific provisions related to interim awards in a collective action. As a general principle, interim injunctions can be sought by the claimant under Articles 721 and following of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act). The general principle is that the request must be filed together with a claimant's writ. However, interim measures may be granted at other times during the proceedings if they are urgently necessary.

The party requesting the interim injunction must prove in its request a prima facie appearance of good faith and a "danger in delay" or, in other words, that without such interim relief the final ruling will not be enforceable or it will be ineffective. In addition, the party requesting the injunction can use an escrow fund to cover the potential damage caused.

Serious harm can also be cited as another reason to apply for an interim injunction, to prevent further damage from being caused.

SETTLEMENT

21. WHAT RULES APPLY TO SETTLEMENT OF CLASS/COLLECTIVE ACTIONS?

Settlement rules

Under the Spanish Civil Code, a settlement is defined as a contract which aims to prevent a lawsuit or end one which has already begun (*Article 1809, Civil Code*). The settlement contract is subject to the general rules of contract law and is regulated under Article 1809 of the Civil Code and Article 19 of Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act). The settlement can be reached at any time during the proceedings and even after the ruling (*Article 19(3), Civil Procedure Act*). There are no specific provisions regarding settlements in collective actions.

The parties can bring the settlement contract before the court. However, settlements will not be allowed if:

- The law prohibits the right to dispose of the subject matter of the proceedings.
- There are public interest reasons.
- There is a need to safeguard the interests of third parties.

After the court has decided on the legal capacity of the parties and the right to dispose of the subject matter of the claim, the settlement agreement will be approved. The approved contract will have the same legally binding nature as a court ruling.

Separate settlements

When there is more than one defendant, each defendant can settle separately. The settlement contract will be binding on the parties who have reached the agreement.

APPEALS

22. DO PARTIES HAVE A RIGHT TO APPEAL DECISIONS RELATING TO CLASS ACTIONS, SUCH AS A DECISION GRANTING OR DENYING CERTIFICATION OF A CLASS ACTION?

There are no specific provisions regarding appeals for decisions relating to collective actions.

The party whose claim has been rejected by a final ruling can file an appeal to the court immediately above the First Instance Court, which is the Court of Appeal and subsequently the Supreme Court.

The parties can also challenge the ruling given by the Court of Appeal by filing an extraordinary appeal before the Supreme Court. However, an appeal to the Spanish Supreme Court can only be made on limited grounds, where the party is claiming there have been breaches of:

- The court's jurisdiction and competence.
- Procedural issues relating to the format and content of judicial decisions.

- Procedural guarantees which have created a lack of defence.
- The fundamental rights contained in Article 24 of the Spanish Constitution.

ALTERNATIVE DISPUTE RESOLUTION

23. IS ALTERNATIVE DISPUTE RESOLUTION (ADR) AVAILABLE IN CLASS/COLLECTIVE ACTIONS?

Mediation and arbitration for collective claims regarding consumers' and users' rights are regulated under the Royal Decree 231/2008 of 15 February on the Consumer Arbitral System (*Real Decreto 231/2008, de 15 de febrero, Sistema Arbitral de Consumo*).

Mediation is administered by Public Arbitral Boards (*Juntas Arbitrales*) if the parties have the right of disposal over the subject matter of the claim.

Arbitral consumer claims are also administered by Public Arbitral Boards. The competent board for hearing the case will be determined according to the needs of the affected group. The National Arbitration Board will have competence over the matter when the case has supra-regional scope.

Regarding the consent to arbitrate, there are two possible scenarios:

- The corporation has previously submitted its consent to take part in arbitration (*Oferta pública de adhesión al Sistema Arbitral de Consumo*). In the submission it must be stated whether:
 - the acceptance is limited to a certain period;
 - there has been acceptance of previous mediation mechanisms; and
 - the arbitration should be in equity or in law (that is, either on the principles of equity and justice or according to the applicable legislation) in the event that the arbitration finally takes place.
- The corporation can also give its consent after the request for arbitration by the claimant. If the corporation does not agree, the arbitration will be discontinued.

In the Spanish Consumer Arbitration System, arbitration proceedings are by default in equity. If the parties want arbitration in law they must expressly request this (*Article 33(1), Consumer Arbitral System Royal Decree*).

The arbitration procedure is similar to a court claim in terms of the evidence needed and the media announcement of the proceedings. Arbitration proceedings can be brought by consumers' and users' associations but unlike in court claims, they can also be brought *ex officio* by the President of the Arbitral Consumer Council (*Article 58, Consumer Arbitral System Royal Decree*).

The Arbitral Board must decide on an award within six months following the announcement of the arbitration proceedings in the media. The award is subject to the regulations set out in Act 60/2003 of 23 December, on Arbitration (*Ley 60/2003, de 23 de diciembre, de Arbitraje*).

PROPOSALS FOR REFORM

24. ARE THERE ANY PROPOSALS FOR REFORM CONCERNING CLASS/COLLECTIVE ACTIONS?

There are no current proposals to change the relevant rules on collective actions in Spain.

At an EU level, no substantial changes are expected to be made to Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive). However, the current Spanish regime could be affected by the time limit in which to institute proceedings, which are set out in the Anti-trust Damages Directive (*see Question 4*).