



TRANSPOSITION OF DIRECTIVE (EU) 2020/1828 IN THE SPANISH LEGAL SYSTEM: IMPACT ON PASSENGERS' RIGHTS IN THE FIELD OF AIR TRANSPORT.

The incorporation of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers¹, carried out through the Bill on representative actions for the protection of the collective interests of consumers (hereinafter, the "Bill"), undoubtedly poses great novelties in the procedural legislation in our country. This newsletter will set out the main changes and analyse the potential implications of collective actions on air transport, particularly concerning passengers' rights provided by Regulation (EC) No 261/2004².

AMENDMENTS PROPOSED BY DIRECTIVE (EU) 2020/1828

Let's begin by recalling that 25th December 2022 was the deadline for transposing Directive (EU) 2020/1828 into the legal systems of the European Union Member States and that the entry into force of the new regime is set for 25th June 2023. In the case of Spain, the transposition is currently in progress and awaits its final approval by the Spanish Parliament³.

Directive (EU) 2020/1828, and its subsequent transposition into national legislation of each Member State, introduces a range of mechanisms designed to protect the collective interests of consumers and avoid, according to the text, an abusive use of the legal proceedings and enhance access to justice.

The Directive establishes a novel procedural avenue by granting legal standing to "qualified entities" responsible for defending collective consumer interests. This differentiates between two representative actions: the "injunctive measures" and the "redress measures." Whilst the former were already regulated by a 1998 European Directive⁴, which mandated Member States to establish consumer protection mechanisms (and which implementation was limited), the latter is a new mechanism that seeks to repair the damage suffered by consumers affected by alleged misconduct, encompassing compensation, price reimbursement, and product replacement, among other remedies.

The aim of the Directive is to rectify this situation by strengthening the mechanisms that safeguard collective consumer rights and interests

across Europe. This, through the creation of legally qualified entities that can effectively protect these interests.

Consequently, the objective is to enable competent entities to advocate for consumer rights and ensure appropriate remedies in cases where infringements or violations of EU law impact collective interests, including the rights of passengers under Regulation (EC) No 261/2004.

This objective serves a dual purpose: not only it impedes the emergence of class actions in the old continent, typical in countries like the US, but it also prevents profit-driven claim farms, particularly frequent in sectors like air transport, from setting themselves up as qualified entities with access to personal data of potentially affected consumers.

SCOPE OF APPLICATION ENVISAGED IN THE BILL AND LEGITIMIZATION OF THE QUALIFIED ENTITIES

The transposition of Directive (EU) 2020/1828 into Spanish law requires amending civil procedural rules and introducing a specific procedure for representative actions. Therefore, it is important to provide a brief overview of the key new elements and questions that arise from this reform.

Firstly, the scope of application outlined in the Bill extends beyond the provisions of Annex I of Directive (EU) 2020/1828. It encompasses a comprehensive regulation of representative actions, including the definition of qualified entities, the requirements for consumer and user associations seeking authorization, the procedure for obtaining it, and mechanisms for supervision, assessment, and revocation.

¹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25th November 2020 on representative actions for the protection of the collective interests of consumers (hereinafter "Directive (EU) 2020/1828" or "the Directive").

² Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11th February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (hereinafter "Regulation (EC) No 261/2004").

³ The recent political decision to dissolve the Spanish Parliament and call general elections on 23rd July 2023 in our country suggests, however, that the European mandate will not be fulfilled in due time (Royal Decree 400/2023 of 29th May on the dissolution of the Congress of Deputies and the Senate and the calling of elections, published in the Spanish gazette of 30th May 2023).

⁴ Directive 98/27/EC of the European Parliament and of the Council of 19th May 1998 on injunctions for the protection of consumers' interests.



Regarding the material scope, the Bill broadens the application to cover any type of infringement of collective rights and interests of consumers and users, without further specification beyond the provisions of Directive (EU) 2020/1828.

In terms of the subjective scope, our legislator adopts the default linkage system (known as the 'opt-out' system) for collective actions. This means that potential consumers affected by the case or process are automatically included unless they explicitly request their disassociation⁵.

Furthermore, the Bill introduces the use of an electronic platform that enables consumers to stay informed about the ongoing action and provides the opportunity to express their intention to dissociate from the action and its outcome.

It is worth noting that the Spanish General Council of the Judiciary (CGPJ), in a report dated 27th April 2023, raises concerns about the Bill regarding the default linkage system, by pointing out that *this system may cause irreparable harm to consumers as they will be bound by the outcome of the representative action without being adequately informed, and they may have not been able to withdraw within a reasonable timeframe⁶. Additionally, it would prevent consumers from pursuing individual claims⁶.*

This could potentially lead to pay significant compensations to consumers whose circumstances may not be comparable to those of the public. Moreover, it raises the possibility of actions being nullified, which limits the practical effectiveness of these actions and goes against the intended purpose of the legislator.

On the other hand, an 'opt-in' system would have better protected consumers' rights, allowing them to individually pursue litigation if necessary.

The proposed configuration by the legislator deviates from the existing Spanish procedural legislation, which requires the affected party's explicit will to bring an action against a company allegedly responsible for damage. This raises concerns about the constitutional compatibility of a mechanism that should allow affected consumers to exclude themselves from the subjective scope of the process. It is crucial to ensure effective awareness of the ongoing process among potentially affected individuals, although the Bill does not currently specify any mechanisms to effectively guarantee this.

Insofar the legitimacy to exercise these actions is concerned, the Bill not only recognizes the Public Prosecutor's Office, the Directorate General for Consumer Affairs, bodies and entities under the authority of Autonomous Communities and local corporations with consumer protection competence, but also consumer and user associations authorized for this purpose⁷.

The Bill sets specific requirements for the designation of these associations, such as (i) national representation, legal establishment, registration, authorization in Spain⁸; (ii) being a non-profit organisation; (iii) demonstrated activity in protecting consumer interests for a minimum period of one year, and (iv) absence of insolvency or conflicts of interest with those they represent. These criteria are designed to prevent the rise of ad hoc or self-interested entities attempting to exploit the protection offered by this regulation for their own benefit.

It also provides for the supervision of qualified entities in each State to ensure compliance with the requirements for exercising collective actions, in a clear attempt to avoid potential abuse of the proposed regime.

Similarly, it should be noted that the Bill introduces a new mechanism to access information and sources of evidence in these actions. This will allow the court to request to the defendant or to any third party relevant evidence, including information necessary to identify the consumers and users affected by the action. However, this may raise concerns about the

principle of adversarial proceedings and equality of evidence, as it may favour one party in obtaining documents.

Concerning the judgment and the consequent award of damages, it will be up to the judge to determine the amount and specific identity of the consumers and users who will benefit from the compensation. It is surprising, however, that a flat-rate estimate of the sum to be paid to consumers is possible, even if they have not been identified. This creates a situation of complete vulnerability for one party to the proceedings, who may not even be aware of the presumed affected consumers. The Bill does provide mechanisms for publicizing the content of the ruling to ensure potential consumers and users are aware of its existence.

COLLECTIVE ACTIONS FOR DAMAGES IN THE FIELD OF AIR PASSENGERS' RIGHTS

Within the field of air transport, collective actions aimed at defending passengers' interests and rights have become increasingly prevalent. There has been a significant rise in such actions, seeking compensation for passengers affected by infringements of the rights outlined in Regulation (EC) No 261/2004.

In these cases, airlines, like other companies in other sectors, have faced lawsuits where consumer associations have attempted to obtain lists of passengers whose flights have been cancelled or delayed, without these passengers themselves being identified or being members of the organisations involved.

Apart from considering the intentions of such associations –clearly driven by profit motives–, and their lack of legitimacy under Spanish regulation, the new configuration proposed in the Bill introduces a paradigm shift that necessitates a legal analysis of the legislator's envisioned changes.

In relation to this, it is essential to emphasise the requirement of homogeneity among the claims of consumers affected by the conduct described in the Bill when considering the certification of the action for damages⁹. And therefore, asking, would a collective action for damages be possible in this new legal framework?



⁵ This involvement of potentially affected consumers in the proceedings does not apply to so-called 'cross-border proceedings'.

⁶ For further details, please refer to the aforementioned [CGPJ Report](#).

⁷ In this respect, the Bill provides for the modification of articles 54 and 55 of Royal Legislative Decree 1/2007, of 16th November, which approves the revised text of the General Law for the Defence of Consumers and Users and other complementary laws.

⁸ The Preliminary Draft introduces the establishment of an electronic Public Registry of Representation Actions, which will be created by the Ministry of Justice. This will need to be further developed through appropriate regulatory measures.

⁹ As regards, be referred to article 847 of the Draft Bill, which states that 'homogeneity' will be established when it is possible to determine the presence of the infringing conduct, the collective damage being claimed for compensation, and the causal link between them based solely on the applicable substantive rules. This means that there is no need to consider specific factual or legal aspects that may be unique to each individual consumer or user affected by the action.



This requirement poses a significant obstacle to the exercise of such an action, as compensation resulting from situations like overbooking or delayed luggage do not generate collective damage to consumers, nor do they affect them collectively in a generic manner.

On the other hand, hypothetically speaking, it could be argued that passengers on the same flight could claim collective compensation for the specific damage caused by that particular flight (if cancelled or delayed). This scheme would fit into the new regime only if the procedure had been initiated by a "qualified entity", that is, by a non-profit organisation, which, in turn, met the other requirements established by the Spanish legislator.

Furthermore, in terms of the legitimacy of authorized entities, the claim farms that currently act following a credit assignation of the passenger rights, or those who act as their lawyers, will not be able to use this mechanism, as the profit-making and commercial purpose of their business model prevents them from accessing this new system of collective actions.

Other question that come up is: which courts will have jurisdiction to hear these cases? The Bill proposes that the Courts of First Instance will, regardless of the subject matter. However, this may pose practical challenges as suggested by the CGPJ, who holds that jurisdiction should lie with the Commercial Courts, as the exercise of representative actions is objectively linked to matters falling within their jurisdictions.

Lastly, regarding the judgement, the judge will be responsible for determining the list of passengers entitled to compensation. However, this approach may overlook the specific circumstances affecting each case, potentially rendering the collective recognition of the rights of these passengers inappropriate.

TRANSPPOSITION OF THE DIRECTIVE INTO OTHER LEGAL SYSTEMS

Having said all the foregoing, it is worth making a brief mention to the transposition of the Directive into other legal systems of EU Member States.

There are significant variations in the regulation of the countries, most of which have opted for a system of representative actions based on the voluntary membership (opt-in) of the affected consumers. Examples of this approach include France, Germany, Poland and Italy. Alternatively, countries such as The Netherlands or Romania -with certain distinctions- have adopted a mixed system (i.e. a system of default membership only for nationals and voluntary membership for foreign citizens).

In conclusion, although the Bill aims to strengthen and ensure a straightforward, efficient system for exercising collective actions in defense of consumers' interests, there are notable concerns regarding its practical efficacy. The impact of this new regulation in Spain will only become evident upon approval and implementation of the future regulation on representative actions for the protection of consumers' collective interests.



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