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Spain: The limited impact of class actions and the impact of regulators

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Collective Claims in Spain (I): Regulation:

- Procedural standing: consumer associations
- Represented individuals; consumers.
- Redress sought: compensation for damages arising from the event causing the damage
- Identified consumers (individual notification) v. non-identified consumers (publication of lawsuit)
- Res-judicata effect
- No certification stage
- No mechanism to opt out is available, but individual consumers can join the action

Collective Claims in Spain (II): Case law:

- General conditions of contract and cases: Opening
- Endesa case
- NCG Bank case

Collective Claims in Spain (III): Endesa case:

- July 2007: electricity supply failure (24-72 hrs)
- 40,000 people affected
- September 2007: filing of a collective claim by OCU (consumer association)
- OCU filed a claim for individual damages: complex criteria for determining damages (no less than EUR 450 per day, as an average) - Endesa offered between EUR 122 and 300 depending on their track-record on supply failure; also offered internal proceedings to speed-up payments
- November 2011 final decision by Court of Appeal: dismissed OCU's claim due to failure to prove damage and upheld compensation offered by Endesa

Collective Claims in Spain (IV): Endesa, "second episode"

- March 2010: electricity supply failure
- 10,000 individuals and companies affected
- No legal action filed by OCU (or any other consumer association)
- 99% of consumers affected adhered to the compensation system offered by Endesa
- Girona Chamber of Commerce agreed to arbitrate on compensation to be paid to companies

Collective Claims in Spain V: NCG Bank case:

- Dispute on validity of swap agreements: alleged flaw in consent
- December 2010: ADICAE files collective claim on behalf of 16,000 NCG Bank clients
- 1,260 represented consumers join the action
- Relief sought: reimbursement of payments, compensation for damages
- December 2012: Court of First Instance accepts procedural motions filed by defendant and finds: (i) lack of procedural standing of the consumer association; and (ii) misjoinder of actions in connection with the 1,260 aggregated cases

Collective redress in Spain VI: What courts have said:

represented consumers' procedural rights must prevail:

- (a) consumers should normally be identified
- (b) personal notification must be proven by the consumer association

defendants' procedural right must be observed:

- (a) consumer associations' procedural standing for collective claims is limited to highly exceptional cases where commonality is not an issue
- (b) individual focus is necessary to preserve defendants' (and also represented consumers' procedural rights)

Collective claims in Spain VII: Conclusions:

- Those claiming that Spanish collective redress system is a *panacea*.
- Spanish courts have confirmed the limitation of collective claims: Spanish "class-action" system does not work
- Limitation of the system is not due to insufficient regulation, but to its foundations
- Regulation plays an efficient role in Government-driven collective redress (*colza* oil case, Endesa case, Subordinated debt cases)