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# **Erin Brockovich turns European: is there an interest for class actions?**

## **Litigation/Antitrust/Distribution law Commissions**

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National Report of Argentina

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## **INTRODUCTION**

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”<sup>1</sup>, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”<sup>2</sup>:

*“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”*

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”<sup>3</sup>.

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<sup>1</sup> COM(2013) 401/2

<sup>2</sup> C(2013) 3539/3

<sup>3</sup> COM(2013) 404 final

## 1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

The amendment to the National Constitution passed in 1994 granted to individuals the legal standing to sue in proceedings to protect the environment, fair competition and consumer rights, as well as general collective interests (Article 43, paragraph 2). Indeed, not only the injured party has legal standing to sue, but also the ombudsman and the associations registered and authorised to protect these rights.

This amendment generated a lively debate, and for several years there was no agreement among the courts or legal scholars as to whether the amendment only involves the protection of collective rights that are endowed on a plurality of unnamed individuals whose object is single and indivisible (e.g., the correct labelling of a product) or whether, on the contrary, it also involves individual rights with a divisible object (e.g., monetary compensation in the consumer relationship).

The trend of the case law leaned to admit the legal standing to sue of consumer associations in claims for the protection of both individual rights and collective rights of consumers, especially in cases of homogeneous injuries and small claims (e.g., undue charge of a few cents in utility bills). In these cases the courts have stated that if standing is not granted, access to justice of each of the injured individuals would be restricted.

In re: “Halabi” (February 2009), the Argentine Supreme Court of Justice, after discussing individual and collective rights, identified a “*third category comprising rights with collective incidence that refer to homogeneous individual interests*”. In the wording of the Court, these rights are defined as follows: a) there is no collective interest (as would be the case, for example, of the environment) and divisible individual rights are impaired; b) there is a single and continued fact that causes the injury to all of them, and consequently, there is an homogenous factual causation; and c) the proof of all the allegations is common to these interests, except as regards to the injury that is individually sustained. Consequently, in these cases, the Court establishes that “*there is factual and regulatory homogeneity that makes it reasonable to carry out a single lawsuit with expansive res judicata effects of the judgment entered therein, except as to the proof of the injury.*”

Currently, there are several bills addressing Class Actions in the National Congress. It should be noted that one of them is a partial copy of Rule 23 of the US Federal Rules of Civil Procedure.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?

Following the national constitution amendment (1994), both the Environmental Act (No. 25.675) and the Consumer Protection Law (No. 24.240) provide certain collective procedural rules. The former regulates a procedure to obtain redress of damages to the environment, whereas the latter includes the enforcement authority (National or Local), consumer associations, the Ombudsman and the Public Prosecutor among those with legal standing to advocate for consumer collective rights. “Collective interests” are those that are indivisible and belong to unnamed individuals that share factual circumstances, whereas “individual rights” are divisible and belong to each individual.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

As long as the plaintiff is one of those mentioned in Article 43 of the National Constitution (see answer to 1.1.), the claim can be grounded on one or more statutes applicable. In fact, article 3 of the Consumer Protection Law states that its provisions are integrated with the antitrust and fair trade rules. However, there is no specific regulation of collective actions in the antitrust field.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Yes, in fact the Consumer Protection Law required the Courts determine summary proceedings when possible according to the applicable procedural rules.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors (“injunctive relief actions”) and/or to claim compensation for damage suffered (“compensatory relief actions”)?

Yes. In the consumer protection jurisprudence, there are countless precedents of injunctive relief actions initiated by either the Consumer Associations, the Ombudsman, or the Enforcement Authority, especially against insurance companies and banks.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

In practice, the collective redress actions sought under the Consumer Protection Law, Area, compensation for monetary damages, which comprise: (i) direct damages, i.e. expectation damages; (ii) consequential damages, i.e. lost profits; and (iii) costs of suit.

There are not precedents yet as to non-monetary damages, such as pain and suffering or emotional distress.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

In April 2008, Law No. 26.631 amended the Consumer Protection and introduced the punitive damages in Argentina. The wording of such provision establishes that the mere non-compliance with legal or contractual duties by the supplier of the product or service is enough to make the supplier subject to punitive damages in favour of the consumers. Courts have been reacios to recognize punitive damages. There is a cap of five millions pesos (u\$s 700.000 approximately). Punitive damages cannot be applied *sua sponte* by the Court, but only at request of the injured party.

1.8 More particularly in the anti-trust field, how does the ‘passing on’ defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

In re “*Aut-O-Gas S.A. v. YPF S.A. et al s/ Ordinary Proceeding*” the First Instance Commercial Court (September 16, 2009), recognized for the first time the “passing on defense”. The plaintiff alleged a series of damages related to the abuse of dominant position of the defendant in the bulk liquefied petroleum gas market. The defendant succeeded in proving that plaintiff passed most of the over price to the end consumer (“passing on defense”).

## **2. Standing and admissibility to bring class actions/collective redress actions**

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement (“collective actions”), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?

As stated in answer to question 1.1., the National Constitution and the Supreme Court in case “Halabi”, recognizes standing to file Collective Actions to the affected person, the Ombudsman and the duly registered Associations.

The Consumer Protection Law enables the Consumer Associations, the Regulatory Authority (National and Local), the Ombudsman and the District Attorney to start Collective Actions.

The Environmental Law also recognizes standing to sue to: a) the affected persons, the Ombudsman, environmental protection NGO’s, municipal, provincial and national State in order to get the damaged environment repaired; b) all persons affected by an event to seek compensation damages; and c) any person can claim for environmental damages.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Please see answer to question 2.1.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements...), and can the representative entities be sanctioned if they do not comply with such requirements?

The consumer associations must meet the following requirements in order to be recognized by the Regulatory Agency: a) shall not participate in partisan political activities; b) shall be independent of any form of professional, commercial and productive activity; c) may not receive donations, contributions or contributions from commercial, industrial or service providers, private or state, national or foreign companies; d) their publications may not contain ads.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

There is no certification stage in the procedure. However, a defendant may enter a defense of lack to standing to sue with the answer to the complaint. In the answer, the

defendant may raise certain admissibility defenses which which require plaintiffs to meet certain requirements. These are based on the U.S. Federal Rule of Civil Procedure 23. The Supreme Court outlined these requirements in *Halabi* (see above).

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Only the person affected and the different entities listed in answer to question 2.1. have standing to sue.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

The Federal Civil and Commercial Code recognizes not only the joinder of actions, but also the consolidation of claims. There is no limit as to the number of claims to be aggregated nor the number of plaintiffs.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

Along with the answer to the complaint, defendants may also file: a) a counterclaim; and b) a wide variety of defences or preliminary issues such as statute of limitations, *res judicata*, lack of standing to sue, insufficiency of service of process, motion for more definitive statements, request for the plaintiff to place a bond to cover possible litigation costs, etc.

Once the plaintiff answers to the defences or preliminary issues lodged by the defendant, the Court is entitled to: a) postpone the consideration of these issues until entering final judgment; b) order the production of the evidence (if there are facts to be clarified related to the preliminary defenses); or c) enter an interlocutory decision, if there are not facts to be proven.

### **3. “Opt-in” vs “Opt-out” systems and information on the class action/collective redress action**

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed (“opt-in” principle), or is it composed of all individual belonging to the defined group and claiming to have been

harm by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?

The “opt-out” principle is recognized for Collective Actions in the Consumer Protection Law.

3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?

The judgment has “res-judicata” effect on all consumers or users who are in similar conditions, except those who express a wish to the contrary prior to the judgment in the terms and conditions that the judge provided.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

In practice, the Ombudsman, the consumer associations or the regulatory authority (National and Local) are the plaintiffs in the collective actions regarding Consumer Protection. There is no participation of individuals as co-plaintiffs.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

There is no obstacle for individuals to join the claimants (mentioned in answer to question 3.3.), before the judgment. However, rarely occurs.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

There is no express regulation on this. However, the Courts, following the Supreme Court decision in re “Halabi” have ordered that all possible affected persons be notified in order to let them decide whether to participate or not in the procedure.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?



There is no provision regulating the way or means in which the victims are to be informed. In practice, it is up to the Courts to decide which is the best way to ensure due process.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

There is no official registry for collective actions in Argentina. However, there are some studies as to the quantity of collective actions initiated in some Jurisdictions.

#### **4. Interplay of class actions / collective redress actions and public enforcement**

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

Class Actions have not been specifically regulated in the area of competition law, and no jurisprudence has been found.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Class Action have not been specifically regulated in the area of competition law, and no jurisprudence has been found.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

There is no pre-trial discovery in Argentina. The procedure usually starts when the complaint is filed. As an exception, prior to filing the complaint, a plaintiff may request: a) preparatory measures (i.e., those aimed at collecting the information necessary to sufficiently ground the complaint); or b) anticipated production of evidence, supported by the eventual disappearance or difficulty in the subsequent production of evidence (e.g., the testimony of an advanced-age or severely ill witness). Parties may obtain documents in possession of a public authority through requests for information.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

There are no rules on this topic.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

As stated above, there are no collective actions nor case law to this respect. However, if a collective action is commenced following a decision of the national competition authority, undoubtedly this decision would constitute an important factor to be considered, but is not technically a presumption. A judge is free to appreciate the probative value of all the means of evidence by a reasoned analysis of them, following the rules of logic based on his experience, good sense and human understanding.

## **5. Funding of the class actions / collective redress actions, attorney's fees**

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

As explained above, the Consumer Protection Law enables to commence collective actions only to the Consumer Associations, the Regulatory Authority (National and Local), the Ombudsman and the District Attorney. None of these entities are allowed to receive financial support from third parties. Indeed, as to the Consumer Association, the specific regulation expressly prohibits receiving donations, contributions or contributions from commercial, industrial or service providers, national or foreign companies.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

Please, see answer to question 5.1.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

Please, see answer to question 5.1.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

The consumer associations receive financial contributions from the national government in order to promote and complete their objectives in accordance with the Consumer Protection Law.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Contingency or success fees are allowed only for representation in individual claims, rather than in collective actions.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party (“loser pays principle”), and in which proportion?

The general principle governing the award of costs of legal actions is known as the ‘objective defeat principle’ and sets forth that the losing party in the lawsuit must bear the expenses of the opposing party, even if this party has not formally requested it. The winning party may recover 100% of the total expenses and legal fees. However, the judge may exempt the losing party from payment of costs of the suit (for instance, when there are controversial legal issues involved). This power is obviously exceptional and of restricted application.

Consumer associations, when litigating collective actions, are legally entitled to litigate without bearing litigation costs.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

No, there are not such safeguards. Because consumer associations are legally entitled to litigate without bearing litigation costs, there have been many frivolous or groundless collective actions so far. This issue is one of the major concerns to be addressed in the current bills to regulate class actions in Argentina.

5.8 Are the parties to an action able to insure against the cost risks?

A party may obtain insurance only when the procedural code requires (e.g. to secure possible damages due to injunctions or actions brought by a plaintiff who has no domicile nor real estate assets in the country).

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Since the plaintiffs in actions seeking collective redress in Consumer law are: a) Consumer Associations, b) the Regulatory Authority (National and Local), c) Ombudsman, or d) the District Attorney; the defendants are not able to request an order for security costs.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

There are no ethical nor Bar rules related to class or collective actions.

## **6. Cross-border cases**

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are not rules applicable to class or collective actions. International private law rules would apply.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

There is no specific rule as to collective actions to this respect.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

No, a representative entity designated by a foreign country has no legal standing to bring representative actions in Argentina. As stated above, only the entities expressly mentioned in the National Constitution and the respective statutes (e.g. Consumer protection law and Environmental Law) are allowed.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

A collective action may be commenced with the court correspondent to the domicile of any of the consumers affected by the defendant's tort or breach of contract. The plaintiff in a collective action may also join a parent company regardless its domicile (in or out the jurisdiction). If a defendant is subject to a

second cause of action in a different jurisdiction arising out of the same facts and practices, he may oppose res judicata or claim preclusion, if applicable, as an affirmative defense.

## **7. Alternative dispute resolution**

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are the implications for refusing?

There is no specific mechanism of ADR for collective actions.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

There are arbitral tribunals set up in different jurisdictions, but they only deal with single or individual claims.

In the city of Buenos Aires, there is a compulsory prejudicial mediation for all civil and commercial claims. However, since the Consumer Protection Law provides that any settlement of collective actions shall be entered with the leave of the Attorney General and the judge, the mediation procedure is not efficient in practice to avoid the intervention of the Judiciary.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

Since collective actions are eventually negotiated and settled during the judicial procedure, the toll of any statute of limitation has already accrued when filing the complaint.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

A Court would void any clause that restrains the right of consumers recognized by the Consumer Protection Law (public order). Therefore, a court would not enforce a clause restraining the consumer from bringing a class action in Court.

## 8. Enforcement of the court decision

- 8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

There are no provisions related to the way victims or any other affected party are informed about a decision rendered in a collective action. The National Supreme Court in “*Halabi*” stated that “*proper notice*” must be given, but did not mention how it should be done.

In practice, courts decide this issue on a case-by-case basis. For example, if the defendant is a bank that was overcharging its clients, the same bank must show that “*proper notice*” is given through the usual means (e.g. email, letters, etc.) to the clients. Moreover, in order to assure this requirement, courts usually order an additional notice through ads in newspapers. Of course, the defendant has the burden to bear the cost of any notice.

- 8.2 Are there any provisions regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

The Consumer Protection Law provides that any amount of money that a defendant must pay, shall be done through the same means that were perceived. There is prolific case law applying such provision when defendants are banks, health care providers, insurance companies, etc.

Moreover, the same statute leaves to the court’s discretion the most effective way to implement the distribution of the damages among the persons of the affected group. If the damage is different for each consumer, the court must establish groups or classes, and each person would seek its own damage through a summary procedure.

- 8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day’s delay or any other amount provided)?

Courts may impose pecuniary sanctions “*astreintes*” when the losing defendant does not honor the final decision, only if the plaintiff duly and timely requests it. In other words, the court would not impose them ex-officio or sua sponte.