Securities Class Actions and Extra-Territoriality: a View from Spain

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In 2009 Spanish investors were surprised with the news that they were also affected by Madoff's fraud in so far as their credit entities were trusting their money to him. That was the case of Banco de Santander, which immediately reacted announcing that it was not responsible for the 2330 million € lost. Later on, Spanish and US-American lawyers presented a class action in Florida on behalf of two investors, from Chile and Venezuela, on the grounds that Banco de Santander and Optimal (its subsidiary seated in Florida) had been negligent and reckless while trusting a substantial part of their actives to Madoff, without performing to him and his company an audit with due diligence and according to financial market standards; all interested from Spain were invited to joint it. After the filing, Banco de Santander offered to reimburse private investors (not institutional ones), by issuing to them preferent shares. According to the Bank, the agreement was accepted by up to 90% of the investors, which seems not to be a bad outcome. The non-settled investors are still pouring into the Spanish judicial system, dealing individually with the Bank (see El Pais, 20.5.2010).

Unlike Morrison, securities were purchased in the US in the aforementioned case, and still, it casts thoughts obviously on the conduct test, but also on the effects test, putting into question the territoriality approach taken in Morrison. But it does not change the fact that the Banco de Santander's willingness to settle has been positively assessed by investors, which turns the issue to the availability of class actions in Spain. Spanish legislation lays down collective actions indeed; since 1985 groups have standing, but without further procedural development this possibility has remained dormant. Eventually and limited to consumer matters, collective actions were set up and they can be found now in the Spanish Civil Procedure Law, in particular in Article 11. Therefore, the aforementioned case could give rise to a group action in so far as private investors may be deemed consumers: but the truth is that the Spanish regulation is very

unfortunate, especially with regards to this kind of collective action, since it lacks a clear treatment of group members, e.g. not being stated which kind of right they have, either to opt out or to opt in. Even more worrying is the fact that the Spanish legislator has barely regulated the res iudicata issues, forgetting e.g. about settlements, when the general regime preserves third parties to proceedings from detrimental ones. All these issues make collective actions a rare species in Spain, not much helped by the granting free access to justice to associations entitled to protect consumers.

Spanish securities law provides investors with traditional claims on fraud or misrepresentation; information obligations are strengthened by the transposition of Directive 2004/108/EC. Besides, misconduct resulting in counterfeiting the balance sheet or the books which provoked damages to the company, to stakeholders or to third parties may be criminally prosecuted (Article 290 of the Spanish Criminal Code), as well as manipulation to modify prices, including that of securities. In Spain crimes open a door to collective action; civil liability may be claimed in criminal proceedings, either by the Public Prosecutor or by the victim or victims, who must act under the same representation, according to Article 103 of the Criminal Procedural Law. Anyway, the exceptional intervention of Criminal Law leaves investor protection to individual claims, which is nowadays insufficient.

So far, international cases regarding these issues have been seldom in Spanish judicial practice, so it would be difficult to report on extraterritoriality issues. Most of them stem from Lehman Brothers' bankruptcy and involved both Spanish investors and brokerage services. With this background, it is difficult to assess the extraterritoriality of US-law, especially because the Spanish justice system is open to claims against foreign co-defendants, although theoretically limited by the abuse of procedure clause. It seems to me that Morrison exemplifies a case in which this clause should intervene if presented in Spain. Beyond the exceptionality of this case, Morrison frames a debate to be addressed in Spain about how to protect investors in a global capital market.