

# Class Actions

*Contributing editors*

Joel S Feldman and Joshua E Anderson



2016

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# Class Actions 2016

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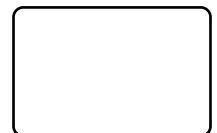


Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

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First published 2016  
ISSN 2059-5468

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Portugal

Nuno Líbano Monteiro and António Pedro Pinto Monteiro

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## 1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

Portugal has what might be called a class action mechanism: the popular action. These types of actions are very old and have a long tradition in Portuguese law (their origins are rooted in Roman Law – the ‘actio popularis’ or the ‘pro populo’ action). Currently, the legal framework for class or popular actions is fundamentally established by Law No. 83/95 of 31 August, which was in some ways influenced by American class actions – particularly in the special regime of representation (opt-out principle).

It is important to note that Portuguese law distinguishes between the right of popular participation in administrative procedures and the right of a class action to promote prevention, cessation or judicial prosecution of certain offences. The first of these rights aims to guarantee to citizens and certain associations or foundations (promoters of public health, environment, quality of life, consumption of goods and services, cultural heritage and the public domain) a series of participation rights in administrative proceedings such as development plans, urban development plans, master plans and land use planning, location decisions and public works with relevant impact on the environment or on the economic and social conditions of the population. The second right (class actions per se) covers two different actions: an administrative and a civil class action. Both can take any of the forms set out in the Code of Procedure in Administrative Courts or in the Civil Procedure Code and must be brought before administrative or civil courts, respectively.

## 2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

Class actions are not common in Portugal. The majority of the actions refer to the protection of environmental rights, public works or goods in the public domain. Nowadays, most consumer litigation has been brought before consumer arbitration centres. There are some relevant points that can explain this lack of success, such as:

- the illegality of Portuguese lawyers acting on a pure contingency fees model, as this is not allowed by the Portuguese Bar Association rules (prohibition of quota litis);
- the fact that punitive damages are not available; and
- the extensive limits on lawyers’ advertising.

Recently, however, an increasing number of class actions have been filed (particularly securities claims).

## 3 What is the legal basis for class actions? Is it derived from statute or case law?

Class actions are derived from statute; more precisely from:

- article 52, paragraph 3 of the Portuguese Constitution; and
- Law No. 83/95 of 31 August (the Law of Popular Action), which contains the general provisions applicable to class actions.

There are also other specific provisions (of a procedural nature) contemplated in special legislation that also regulates collective protection. These include Law No. 24/96 of 31 July (consumer protection); Law No. 11/87 of 7 April (framework law on the environment); Decree-Law No. 446/85 of 25 October (general contractual terms); Law No. 107/2001 of 8 September

(protection of the cultural heritage); and Decree-Law No. 486/99 of 13 November (Securities Code). There was a preliminary project for a Consumer’s Code, which would simplify the provisions regarding collective protection of the consumer and would revoke the statutes on general contractual terms and consumer protection. The draft bill, however, has not yet been approved.

## 4 What types of claims may be filed as class actions?

Class actions are not restricted to a specific area of law or sector. The object of a class action is diffuse interests in particular, that is the sharing by subject of interests that belong to the community (eg, public health, consumer rights, quality of life, preservation of the environment and cultural heritage). ‘In particular’ but not exclusively, because the Popular Action Law also extends its protection to homogeneous individual interests and rights (individual interests and rights shared by a certain number of individuals). This is one of the points where we can see the influence of the American class actions model, and of Brazilian law.

Currently, there is an increasing number of securities claims being filed.

## 5 What relief may be sought in class proceedings (money damages, injunctive relief, restitution, etc)?

Class actions may be injunctive or remedial. They seek not only to promote the prevention, cessation or judicial prosecution of certain offences, but also to provide due compensation to the aggrieved party or parties.

## 6 Is there a process for consolidating multiple class action filings?

There is no specific process for consolidating multiple class action filings. General rules regarding consolidation in the Civil Procedure Code will apply.

## 7 How is a class action initiated?

A class action is initiated with the filing of the complaint.

## 8 What are the standing requirements for a class action?

The right to file class actions is quite broad. Class actions may be brought by:

- any citizen in the enjoyment of their civil and political rights;
- any association and foundation that defends relevant interests, whether or not they have a direct interest in the claim; and
- municipalities and local authorities, when the litigation relates to interests held by those who are resident in the corresponding district.

The role of the public prosecutor should be emphasised, as this role may replace the claimant in the case of withdrawal from the suit, settlement or behaviour that is harmful to the interests in question.

Finally, it is important to note that there is no mechanism of preventive certification regarding the legitimacy to take action. Portuguese law does not foresee a test to the popular action like the one contemplated in Rule 23(a) of the American Federal Rules of Civil Procedure. Nevertheless, some authors sustain that there must be a connection to the object of the popular action and to the right or interest that has been harmed, and that parties must have been affected by the same or similar conduct.

### Update and trends

There are two legislative developments related to class actions that must be emphasised.

The first one concerns the substantial revision to the Code of Procedure in Administrative Courts, which will enter into force at the beginning of December 2015. There are three minor changes to the Law of Popular Action, regarding:

- the administrative class actions;
- the role of the public prosecutor; and
- the res judicata effect.

The second point is very relevant. It concerns the current discussion that the European Commission is conducting on collective redress and its recent developments. We particularly refer to (i) the 11 June 2013 Communication 'Towards a European Horizontal Framework for Collective Redress' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 401 final); and (ii) the 'Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' (2013/396/EU). This is an important development that might imply some substantial changes to the Portuguese class actions regime.

### 9 Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

Portuguese law follows an opt-out system. Members of the class must opt out of the action. The problem is the notification of interested parties, which has been criticised by many. The summons are made via one or various announcements made public by the media or by public notice, whether referring to general or geographically localised interests. In any case, the law does not require personal identification of those to whom the advertisement is directed. It is sufficient for the summons to refer to them as holders of the interests at stake, mentioning, also, the action in question, the identity of the claimant or at least of the first claimant where there are several, the identity of the defendant or defendants, and sufficient reference to the claim and the reason behind it. Where it is not possible to specify individual holders, the summons use the circumstance or characteristic that is common to all of them, such as the geographical area in which they reside or the group or community that they make up.

### 10 What are the requirements for a case to be filed as a class action?

The prerequisites for class actions are very mild. Portuguese law does not require a minimum number of persons to be included in the class action and there are no specific requirements to ensure that a claimant sufficiently represents the class.

### 11 How does a court determine whether the case qualifies for a collective or class action?

There are no specific requirements to determine if the case qualifies as a class action. However, the judge may dismiss the petition if it considers the success of the claim to be manifestly unlikely (this decision will be taken after consulting the public prosecutor and after the investigations the judge considers to be justified, or that were required by the claimant and public prosecutor).

### 12 How does discovery work in class actions? (Is discovery relevant to whether the court allows the case to proceed as a collective or class action? Is discovery split between what is relevant to determine whether the case proceeds as a class action and what merits discovery?)

Discovery does not work in class actions. There is no obligation to disclose evidence in a pretrial procedure. It is important to note, however, that the judge may gather evidence at his or her own initiative (within the key issues defined by the parties).

### 13 Describe the process and requirements for approval of a class-action settlement.

Portuguese law does not foresee any specific rules for class action settlements. General rules in the Civil Code will apply. All class members who want to be part of the settlement should subscribe to it.

### 14 May class members object to a settlement? How?

See question 13.

### 15 What is the preclusive effect of a final judgment in a class action?

Unless they are dismissed for insufficient evidence, or the judge decides differently considering the actual motivations of the case, final judgments rendered in class actions will have res judicata effects on the holders of homogeneous individual interests who have not exercised the right to exclude themselves from representation (opt-out).

After the decisions have become res judicata they will then be published at the expense of the losing party in two newspapers that interested parties are presumed to read, to be chosen by the judge. The judge can also decide that publication is restricted to the essential aspects of the case, when an extension of the decision suggests that.

### 16 What type of appellate review is available with respect to class action decisions?

The type of appellate review that concerns class actions is the same as for ordinary actions. It is possible to appeal to the second instance court and, depending on the particular grounds, to the third instance court (Supreme Court of Justice), as well as to the Constitutional Court.

### 17 What role do regulators play in connection with class actions?

Regulators do not play any specific role in class actions. However, it is important to emphasise the role of the public prosecutor (see question 8), as well as the active participation of some consumer associations (the Portuguese Association for Consumer Protection, for example).

### 18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

Arbitration does not play any role in class actions, and is not likely to under current legislation. Despite the friendlier environment in Portugal towards arbitration (which can be seen at various levels: political, jurisprudential, practical, academic, etc), there has not been a single case of 'class arbitration'. Therefore, at the moment, there is simply no need for class action waivers.

In our opinion, the situation could be different with specific legislation on the subject or with another class action regime – particularly one that adopts an opt-in system, which is more coherent with the consensual nature of arbitration. For further information on this subject, see António Pedro Pinto Monteiro, José Miguel Júdice, 'Class Actions & Arbitration in the European Union - Portugal', in *Estudos em Homenagem a Miguel Galvão Teles*, Vol II, Almedina, Coimbra, 2012, pp189-205.

### 19 What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

Portuguese lawyers cannot act on a pure contingency fees model, as this is not allowed by the Portuguese Bar Association rules (prohibition of quota litis).

### 20 What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

The claimant does not have to pay court fees, even if the claim is only partially successful. If it fails completely, the claimant will have to pay an amount to be determined by the judge – somewhere between 10 per cent and 50 per cent of the costs that would normally be due, depending on his or her financial situation and on the material or procedural reason for dismissal of the action. The losing party will only have to pay the prevailing party's attorneys' fees if the judge considers that there was bad faith litigation.

**21 Is third-party funding of class actions permitted?**

Portuguese law does not regulate third-party funding - it is not prohibited.

**22 Can plaintiffs sell their claim to another party?**

The class action law does not foresee any specific rules on this. However, according to the general rules in the Civil Code, and depending on the case, it is possible to make an agreement concerning disposable rights.

**23 If distribution of compensation to class members is problematic, what happens to the award?**

According to Portuguese law, the right to compensation shall lapse three years after the final judgment that has recognised it. After these three years, the compensatory damages are given to the Ministry of Justice, which will use them to promote access to justice.

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Class Actions  
ISSN 2059-5468



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