

International **Comparative** Legal Guides



Class & Group Actions **2020**

A practical cross-border insight into class and group actions work

12th Edition

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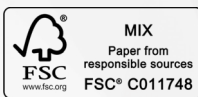
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Class & Group Actions 2020

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& Tom Fox, Arnold & Porter**

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Yes, Portuguese law (Law no. 83/95) establishes a specific procedure for handling a series or group of related claims. This specific procedure is called “*Ação Popular*”. In fact, the Portuguese Constitution grants all citizens, independently or through associations for the defence of relevant interests, the right to take a class action, including the right of the injured party or parties to request compensation, namely in order to:

- a) promote the prevention, cessation or the judicial persecution of infringements against public health, consumer rights, unqualified investor rights regarding financial instruments, quality of life and the preservation of the environment and cultural heritage; and
- b) guarantee the defence of State property or property of the Autonomous Regions or of the local authorities.

1.2 Do these rules apply to all areas of law or to certain sectors only, e.g., competition law, security/financial services? Please outline any rules relating to specific areas of law.

Generally, these rules are not restricted to a particular area of law or a specific sector. Notwithstanding this, the law does specify certain areas to be specially protected by these class actions, such as public health, consumer rights, unqualified investor rights regarding financial instruments, quality of life and environmental protection, cultural heritage and public dominion. There are some specific provisions regarding the awarded compensations and their management, which are applicable in the financial services sector.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

As a general rule, the procedure provides for the management of claims by means of a class action. Furthermore, as a rule, all members of the group will be bound and affected by the final verdict. This rule can be excluded by the judge when he considers that certain

aspects of the case justify a restriction on the extent of the decision's effects or when the case is dismissed due to insufficient evidence.

1.4 Is the procedure 'opt-in' or 'opt-out'?

Portuguese law establishes an “opt-out” scheme.

Once the petition for the class action is received, the interested parties will be summoned to the proceedings, in order to, within the term fixed by the judge: (i) be able to join the proceedings; (ii) declare their consent to be represented by the claimant; or, otherwise (iii) declare that they do not wish to be represented by the claimant. In the latter case, the decision will not be applicable to them.

After being summoned, even if the parties potentially affected by the infringement do not take any of the actions described above, they are considered as being part of the group. Consequently, individuals' belonging to the class is presumed, unless the injured parties affirmatively declare that they have no desire to participate and be bound by the proceedings.

The claimant's representation can be refused by the interested parties until the end of the collection of evidence, or an equivalent stage, by stating so in the proceedings.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

Portuguese law does not specify a minimum number of claims that can be managed under the procedure.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

There is no mechanism of previous certification regarding entitlement to take the action. The claimant will represent all parties with an interest or right in the relevant class action. As a rule, either the parties are affected by the same or similar conduct, or the rights and interests harmed are related.

1.7 Who can bring the class/group proceedings, e.g., individuals, group(s) and/or representative bodies?

Class/group proceedings can be brought by:

- a) individuals (citizens with political and civil rights), regardless of whether or not they have a direct interest in the case, provided that their claim is not purely individual, i.e., that collective interests are at stake;

- b) associations and foundations that defend relevant interests (regardless of whether or not they have a direct interest in the case);
- c) local authorities, regarding the interest of their residents within their respective area;
- d) the Public Prosecutor, where cultural heritage or consumer rights are in question; or
- e) the Directorate-General for Consumers, where consumer rights are in question.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Once the petition for the class action is received, the relevant interested parties will be summoned to the proceedings in order to, within the term fixed by the judge, be able to join the proceedings (accepting the proceedings at whatever stage they are at) and declare their acceptance to being represented by the claimant, or, alternatively, that they do not wish to be represented by the claimant. In the latter case, the final decision will not be applicable to them. The interested parties' silence will be considered as an "opt-in".

The claimant's representation can be refused by the interested parties until the end of the provision of evidence, or an equivalent stage, by stating so in the proceedings.

The writ of summons will be made by means of one or various announcements made public through the media or public notice (whether referring to general interests or geographically localised interests), without having to identify the specific recipients. With regard to the action, at least the first claimant (when there are several) and the defendant or defendants will have to be identified, also mentioning the request and grounds for the action.

When it is impossible to determine the actual interested parties, the above-mentioned writ of summons will be drafted with reference to: a) the relevant scope determined from the specific circumstances or features; b) the geographic area where such parties live; and c) the group or community of which they are a part.

1.9 How many group/class actions are commonly brought each year and in what areas of law, e.g., have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g., disaster litigation; Environmental; Intellectual property; or Employment law?

Although, in general, this type of action is not very common in Portugal, there has been an increase in these proceedings in the last few years. The majority of the class actions brought were aimed at protecting environmental rights, public works or assets belonging to the public domain. However, class actions may be brought in all of the fields referred to in the question, provided the requirements highlighted in the answer to question 1.1 are verified.

The first known class action on competition matters was filed in 2015 by the Observatory of Competition against a television channel for anti-competitive practices against the clients and any potential clients of the channel.

In the field of financial services, a few class actions against private and public entities were brought by a group of private investors, following the collapse of Group Espírito Santo, in 2014.

As regards the class actions pending in the last few years, the following have been filed (amongst others): a) class action brought by a local associative movement against the Portuguese State, asking for compensation for the losses suffered by several companies and families during the fires that occurred in Portugal in October 2017; b) class action filed by the association "Terra da Morte Lenta" against the Portuguese steel company "Siderurgia Nacional" due to the atmospheric pollution allegedly caused by this company; and c) class action brought by the Portuguese Association for Consumer Protection against several mobile operators asking for reimbursement of the amount charged to their clients after a price increase without prior notice.

1.10 What remedies are available where such claims are brought, e.g., monetary compensation and/or injunctive/declaratory relief?

The remedies available where such claims are brought are:

- a) Negligence civil liability – the party liable for the deliberate breach of the relevant interests or rights of the injured party/injured parties will indemnify the latter for such damages.
- b) Strict civil liability – the obligation to indemnify for damages (regardless of culpability), when an action, or failure to act, of an agent results in the breach of (i) the relevant rights and interests, (ii) the law, or (iii) results from a dangerous activity.
- c) Criminal liability – interested parties have the right to claim or participate in public proceedings for breach of relevant interests of a criminal nature, as well as join civil proceedings.
- d) Conservatory acts/interim measures/injunctions – in certain fields, such as consumers' rights, the law allows the application of such means of action where infringements against homogeneous individual interests, collective or diffuse interests of consumers were perpetrated.

1.11 Are there any limitations in your jurisdiction on global/cross-border class or group actions, including any limitation on the ability of international claimants to participate in such actions?

Portuguese law does not foresee any specific limitations on global/cross-border class or group actions.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies, e.g., consumer organisations or interest groups?

Class actions may be filed by associations and foundations duly incorporated that defend relevant interests, whether or not they have a direct interest in the case, and by local authorities regarding the interests of their residents within their respective geographical jurisdiction.

2.2 Who is permitted to bring such claims, e.g., public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Please see question 1.7.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law, e.g., consumer disputes?

Representative actions may be brought in the same circumstances as class actions brought by individuals.

However, Portuguese law does establish certain compulsory features for associations and foundations:

- a) they must have legal personality;
- b) they must expressly include, in their articles of association, objectives for the defence of relevant interests in these types of actions; and
- c) they must not carry out any kind of professional activity competing with companies or independent professions.

In this regard, Portuguese law goes further to specify the particular areas covered, such as public health, consumer rights, quality of life and environment protection, cultural heritage and public dominion (but representative action procedures can deal with other areas of law).

2.4 What remedies are available where such claims are brought, e.g., injunctive/declaratory relief and/or monetary compensation?

The remedies are as described in question 1.10.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

The trial is by a judge.

3.2 How are the proceedings managed, e.g., are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The proceedings are managed before administrative and civil courts.

3.3 How is the group or class of claims defined, e.g., by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The group or class is not defined by a previous certification of the class, as described in question 1.6. With regard to "cut-off" dates, please see question 1.8.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

The methods of the court are determined on a case-by-case basis. The court can order preliminary issues related to matters of law and matters of fact, and these issues are resolved by a judge.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

There is a procedure called "*Direito de Participação Popular*", which consists of the right of a group to participate with the Administration (hearing both the interested party and the entities defending their interests) in the adoption of development plans and the preparation and decision-making process of the Administration in order to obtain results that have a relevant impact.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Expert evidence can be requested by the parties and the judge.

The court may also be assisted by an expert with competence and capacity to help the judge with the examination and interpretation of relevant facts.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Under Portuguese law, there are:

- a) witnesses that provide their oral testimony, generally about facts, in the final hearing (thus during the trial); and
- b) experts that prepare a report before trial and that may attend the final hearing in order to provide explanations or clarifications thereupon.

Pre-trial witness evidence (given in writing or orally) and pre-trial expert evidence can be obtained, provided that there is a valid concern of not being able to obtain evidence later on.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Under Portuguese law, there is no obligation to disclose documentary evidence either before court proceedings begin or as part of the pre-trial procedure.

3.9 How long does it normally take to get to trial?

It normally takes from one to two years to get to trial. Interim proceedings are urgent; thus, they usually take a few months.

3.10 What appeal options are available?

The appeal options regarding class actions are those available for ordinary actions. Under Portuguese law, there are two appeal instances (the second essentially rules on matters of law, only), as well as the Constitutional Court, depending on the significance of the particular grounds.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

No, there are no time limits on bringing or issuing court proceedings, except for the ordinary terms of criminal and civil statute of limitations.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

If the statute of limitations is brought by the parties, the court has no discretion to waive these time limits.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Under Portuguese law, when the interested party cannot invoke his/her right during the last three months of the term, for reasons of fraud or *force majeure*, limitation periods are suspended for as long as the party is prevented from exercising his/her right.

5 Remedies

5.1 What types of damage are recoverable, e.g., bodily injury, mental damage, damage to property, economic loss?

All types of damages are recoverable.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g., covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

In the event the product has not yet malfunctioned and caused injury, but it may do so in the future, any costs of medical monitoring may only be recovered if such monitoring is requested by the court within the corresponding class action.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Where supra-individual interests are considered, the gains obtained by the defendant with the conduct that caused damages can be taken into consideration. However, in general, such analysis should not have a punitive scope, as under Portuguese law punitive damages are not recoverable, except if expressly agreed between the parties. Notwithstanding, recent case law is beginning to recognise some form of punitive damages.

5.4 Is there a maximum limit on the damages recoverable from one defendant, e.g., for a series of claims arising from one product/incident or accident?

Generally, there is no maximum limit on the damages recoverable from one defendant. Notwithstanding this, the law establishes some

specific cases in which there is a cap on the damages recoverable, such as damages caused by traffic accidents and electric or gas facilities, regardless of culpability.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages are quantified based on the losses actually suffered.

5.6 Do special rules apply to the settlement of claims/proceedings, e.g., is court approval required?

No, special rules do not apply to the settlement of claims/proceedings, other than those providing the possibility of replacement of the claimant by the Public Prosecutor where the case is settled. In any case, the settlement needs to be confirmed by the court.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Claimants are exempted from paying court fees in class actions, unless the case is dismissed for being manifestly unfounded.

Without prejudice to the above, as regards court fees, other incidental expenses and the legal costs for bringing the action, the successful party may recover the amounts paid within the proceedings. In respect of legal fees, they shall be allocated by the judge at the end of the proceedings in accordance with the complexity and value thereof. However, Portuguese courts tend to limit the amount of legal fees that shall be paid by the losing party to an insignificant amount.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

The liability for the claimants' court fees is joint and several in nature.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

When a member of the group/class discontinues their claim before the conclusion of the group/class action, this member will still have to pay court fees and his/her discontinuance does not exempt them from this responsibility.

6.4 Do the courts manage the costs incurred by the parties, e.g., by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

The costs are assessed by the court at the end of the proceedings. The only "cap" imposed on costs concerns legal fees, as described in question 6.1 above.

7 Funding

7.1 Is public funding, e.g., legal aid, available?

Legal aid is available.

7.2 If so, are there any restrictions on the availability of public funding?

According to Portuguese law, one must prove to be in economic need in order to be entitled to legal aid.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Funding through conditional and contingency fees is not allowed, as the Portuguese Bar Association Statute – in accordance with the principles adopted in the majority of European countries – imposes a prohibition of *quota litis*.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Although the law does not provide for a specific regime, in general, third-party funding is not prohibited.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes, consumers' claims can be assigned to a consumer association or representative body and brought by that body (please see question 2.3).

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Yes, consumers' claims can be brought by a professional commercial claimant that purchases the rights to individual claims in return for a share of the proceeds of the action, according to the general civil law terms regarding the assignment of credits.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

According to Portuguese law, interested parties have the right to claim or to participate in public proceedings concerning breach of

relevant interests of a criminal nature. Notwithstanding this, according to certain case law, civil class actions are the appropriate method of obtaining compensation for these types of damages.

8.4 Are alternative methods of dispute resolution available, e.g., can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

The matter can be referred to an Ombudsperson, in accordance with the general terms. Mediation and arbitration are also available in accordance with the general terms.

Please note that, according to Portuguese law, mediation and arbitration are only possible if the counterparty consents and/or agrees, and the matter is not a class action (*ações populares*) in the sense of Law no. 89/95.

8.5 Are statutory compensation schemes available, e.g., for small claims?

Statutory compensation schemes are not available.

8.6 What remedies are available where such alternative mechanisms are pursued, e.g., injunctive/declaratory relief and/or monetary compensation?

Within arbitration, the remedies available are those foreseen in ordinary proceedings, including interim measures. Please note that the Ombudsperson has no judicial authority.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims may be brought by residents of other jurisdictions. There are no specific rules to restrict "forum shopping".

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

No, there are no proposed changes to the law to promote class/group actions in Portugal. However, the recent proposals of the European Commission on collective redress, notably in the consumer rights field, may lead to some changes in this area.



João Maria Pimentel joined Campos Ferreira, Sá Carneiro & Associados in February 2011 as senior Of Counsel and is currently a Partner of the firm, heading the Litigation/Arbitration and Restructuring/Insolvency departments.

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He focuses his practice on litigation, covering all areas of professional litigation and non-litigation, including all types of civil, commercial and criminal proceedings in all court instances. He is also involved in proceedings before arbitration courts, as counsel to the parties and arbitrator, as well as insolvency proceedings.

João Maria Pimentel is qualified to practise in Portugal and Macau, having practised in the latter jurisdiction at the start of his career. He has also been an adviser to the Portuguese Minister of Justice.

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In order to achieve its purpose, CS ASSOCIADOS assists its clients only in the legal areas where it possesses specialised competences and in which its distinctive quality is widely recognised in the market. The lawyers of the litigation and arbitration department have taken part in relevant legal proceedings in recent years, representing clients at all stages of the process and collaborating with reputable foreign law firms in international proceedings.

The team's experience encompasses all areas of law (such as civil and commercial litigation, enforcement proceedings and criminal law) and includes cases before civil and criminal courts. The firm's litigation and arbitration team has also acted in multijurisdictional proceedings and actions before the highest arbitration bodies.

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