



Class actions land in Portugal

We asked some of the experts in Portugal, the reality of the class action phenomenon arriving this side of the Iberian Peninsula. Who can bring them, the procedure and measure of damages, are all uncovered and answered here

by michael heron

I have interviewed a lot of legal practitioners over the years, and when asked why they wanted to become a lawyer, often the response is having watched legal drama tv series or films from a young age. Of course, all the lawyers I interviewed often admit that this was somewhat naïve, and there were many other reasons to end up at law school. But there is something gripping about the way lawyers are portrayed. In the film adaptations of some of the **John Grisham** novels, the stories that tend to make it to the big screen invariably surround the theme, class action lawsuits. It is no surprise therefore, that the class action originated in the US and is still widely perceived predominantly as an American term. Class actions are simply a type of lawsuit where one of the parties is a group of people who are represented collectively by a member or members of that group. However, several European countries with civil law, have made changes in recent years to allow typically consumer organisations to bring claims on behalf of consumers. The recently enacted Decree-Law no. 114-A/2023, the result of the transposition of the Directive, brings Class Actions into the Portuguese legal system in their own right.

BRINGING CLASS ACTIONS TO PORTUGAL

In practical terms, who can bring class actions to Portugal? **Martim Valente**, a senior counsel in the EU and Competition law practice at PLMJ, says, "The rules on who can bring a class action in Portugal are broad. Anyone can bring a class action and the general rule is that class actions are opt out." Valente goes on to explain that in practice, in recent years consumer associations have brought the greatest number of class actions, and most of these have related to alleged infringements of competition law. **Fabio Loureiro**, partner

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at Eversheds Sutherland, explains in more detail the importance of the “opt out” and how it works in practical terms. “One of the main particularities of the Portuguese class action framework is that any member of a group or community that collectively holds the relevant interests, is entitled to bring up a class action on behalf of all the others who don’t expressly exclude themselves from said representation, instead of the general rule applicable, according to which the legitimacy to bring up legal action belongs exclusively to whoever holds the individual interests or rights in question.” He goes on to explain that the opt-out system is in place in Portugal, “so it is up to any members of the relevant group or community to expressly request their exclusion from representation in any particular class action.”

Sofia Vaz Sampaio, partner at Morais Leitão, explains that there aren't limitations to the types of claims that may be brought on a collective basis. "Class actions may be brought to protect all type of interests (namely, public health, the environment, quality of life, goods and services, consumer protection, cultural heritage and public interests) and to seek both injunctive measures (including provisional or definitive measures aimed at stopping, identifying or prohibiting an unlawful practice) and redress measures (providing remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid)".

Martim Valente argues that, “a claimant needs to demonstrate that they are representing diffuse interests, i.e., that they are representing a class of consumers and not individual interests. Note, however, that there is no stand-alone class certification process in Portugal. Courts typically decide on standing and the scope of a class of consumers at final judgment.” Valente also makes an important point by highlighting the fact “Portugal is a one-shot jurisdiction.” He adds that, “a defendant must present all of its procedural and substantive defences in its defence to a claim. This can often place a defendant on the back foot, as the deadlines for submitting a defence are very tight.”

THE PROCEDURE

When asked about the requirements to begin the procedure of filing a class action in Portugal, Fabio Loureiro confirms that the “most significant practical shared differences compared to regular individual actions are that the plaintiff in a class action does not have to pay court fees for the submission of a written claim and does not need a specific title to act on behalf of all the other member of the group or community.” Martim Valente adds that, “the claimant must set out a statement of claim that describes the relevant facts, the cause of action and applicable law. Documentary evidence (where applicable) must also be attached as well as an indication of any witnesses to be heard at trial. Recent practice indicates that claimants also include broad requests for documents from the defendant to substantiate their claims.” Sofia Vaz Samapaio adds that, “Portugal has an opt-out model, which means that the claimant does not need a mandate from those affected by the offense of the particular interest at stake and members of the class may exercise their right to be or not to be represented in the proceedings

until the end of the evidential stage of proceedings. The claimant must however comply with the applicable specific legal standing requirements and must aim to protect a relevant interest.”

MEASURE OF DAMAGES

Will we therefore see potential mega payouts in these suits in Portugal, or are the damages measured and payouts capped? Sampaio says that regarding caps, “There is no limitation to the amount of damage that may be claimed.” She clarifies however, that “class actions may be brought to claim compensation for all types of damages, including general and special damages and compensation for loss of profit, the only exception being punitive damages (i.e. damage for which compensation has a sanctioning purpose).” Loureiro confirms, “the Portuguese legal framework does not establish any specific measure of damages in class actions or collective redress proceedings. Compensation in class actions follows the same general principles applicable to civil liability in Portugal, which means the measure of compensation corresponds to the damages



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FABIO LOUREIRO

suffered and is granted by courts on a case-by-case basis". Valente adds that, "the general rule under Portuguese law is that damages are compensatory in nature, i.e., punitive damages are not awarded. Despite this, some provisions regarding tort liability and compensation for loss and damage appear to have a punitive role. In particular, there is case law that appears to recognise a certain form of punitive liability in the application of these provisions".

LITIGATION FUNDING

Duarte Henriques, founder at Victoria Associates and who's practice focuses on international disputes, was asked about the world of litigation funding, and whether it applies. "Is litigation funding for class actions or collective redress proceedings permitted? A recently enacted law decree of December 2023 expressly allows third party funding to be considered as expenses of the plaintiff that may be reimbursed with the allocation of the proceeds. This legal rule is aligned with European directives that provide for the same understanding". Henriques was finally asked if contingency fee arrangements are permissible for the funding of class actions or collective redress proceedings? He concludes, "the ethical regulation of the Portuguese bar association does not allow a fees' agreement "exclusively" dependent upon the results of the case which means that contingency fees are only allowed if agreed with the client in a blended manner (that is, at least a portion of those fees must not be contingent)".

CONCLUSION

Class actions are clearly here to stay. They have been regulated by Portuguese law since 1995 and the recent legal changes at the end of 2023, will ensure these suits grow in volume, sophistication and undoubtedly media coverage. A number of international law firms have been eyeing the Portuguese jurisdiction as a soft landing to bring these suits on behalf of clients. It could ensure that, the dispute resolution practices of firms in Portugal prepared to react quickly, will add a significant contribution to their firm's revenue in 2024 and beyond. ■

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