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CLASS & GROUP ACTIONS

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in class and group actions.





SOFIA VAZ SAMPAIO
Morais Leitão, Galvão
Teles, Soares da Silva &
Associados
+35 12 1009 1738
sofiasampaio@mlgts.pt

Sofia Vaz Sampaio is a member of the litigation and arbitration team. She is also a member of the sport and entertainment law team. She has acted as counsel in judicial and arbitration proceedings in a variety of industrial sectors, such as banking, construction, food and beverage, infrastructure, media and advertising, public-private partnerships, energy, and telecommunications, both domestic and international.

Portugal

■ **Q. How would you characterise class and group action activity in Portugal over the past 12 months? What key trends would you highlight?**

SAMPAIO: Considering our own experience and the information gathered from the market, it is fair to say that class action activity has been increasing in the past few years and specifically in the last 12 months. Pursuant to article 2 of Law no. 83/95, of 31 August 1995, which regulates the right of procedural participation and class action, class actions may be brought by any citizen, individually or jointly with others, in the exercise of his civil and political rights, by associations and foundations that protect public health, environmental protection, quality of life, consumer rights and services, cultural heritage and public dominium, as well as by local authorities in respect of their geographical jurisdiction. Until very recently, most class actions were brought by associations, specifically by consumer associations, but in the last year more actions have been brought by individual citizens, which could be identified as a key trend. Most class actions are related to environmental protection, data protection and consumer rights, particularly in the telecommunications and financial services sectors. Reference should be made, in this context,



to recent class actions related to the collapse of Banco Espírito Santo (BES) and alleged financial mismanagement involving directors, auditors and regulatory bodies' liability. Finally, this class action 'movement' may also be linked to the appearance of a new dynamic, mobilising 'plaintiff bar'.

■ **Q. Are there any common factors generally driving claims?**

SAMPAIO: While class actions are typically brought to protect public health, the environment, quality of life, consumption in general, cultural heritage and the public domain, there is a broad range of rights that may be enforced through class action, so the specific subject matter and claims of class action lawsuits can vary widely. There are, however, some common factors. In all class actions the issues in dispute are common to all members of the class, although in particular cases the different claims arise out of different, even if similar or related, circumstances, which is usually an argument raised by defendants in favour of dismissing the class action. Also, in most cases, the persons allegedly affected are so numerous that it would be impractical to bring them all before

the court, which makes the proceedings more impressive and more 'media friendly'. Finally, claims amounts tend to be quite high, regardless of their actual grounds, which is undoubtedly influenced by the legal fees regime applicable to class actions, which totally or partially exempts claimants from the payment of legal fees – which does not include the costs incurred by the winning party in the event of loss.

■ **Q. Could you outline some of the key challenges a class or group action defendant will typically face when a claim is made? What are the biggest risks and threats to companies?**

SAMPAIO: The first challenge companies face has to do with the fact that, in comparison with other jurisdictions, there is little experience of class actions in Portugal, and there are not many public court decisions on procedural and substantive aspects, nor doctrine from recognised authors. The second challenge or risk arises from a potentially broad or liberal interpretation of the range of rights that may be enforced through class actions. Reputational risk may also be significant. Class actions tend to be prominent cases that easily capture the



attention of the media and the public, sometimes with relevant effects in terms of a company's reputation, especially because claimants tend to submit high-value claims, with no consequences in terms of legal fees.

■ **Q. Given the nature of class or group action litigation, what strategies can in-house and outside counsel employ to effectively manage a case in Portugal?**

SAMPAIO: There is a broad range of rights that can be enforced through class action and therefore different economic sectors and companies that can be affected, with strategies varying from sector to sector and from one company to another. That said, in terms of reputational risk, hiring a communication agency or crisis manager could be an effective strategy, especially if this is closely and effectively coordinated with the lawyers in charge of the proceedings. Also, in cases where claims are obviously groundless, to compensate for the legal fees exemption, companies should consider asking for claimants to be condemned for malicious prosecution and seek compensation.

■ **Q. At what point should the decision to fight or to settle be taken? To what extent can consulting experts and statistical analysis assist?**

SAMPAIO: There are no specific rules regarding settlement within class actions, so the general requirements, set out in the civil procedure code, apply. It can be questionable whether settlement is possible within class actions. Against it one may argue notably that the rights subject to class actions are indisposible. In favour, one may invoke, among other arguments, the opting-

out mechanism. If settlement is admitted, then parties may settle at any time, but, in general terms, a defendant should not settle or even negotiate before presenting its defence. A strong, supported defence is the best weapon a defendant could have when facing negotiations. Also, the parties may not invoke pending negotiations to postpone a previously scheduled final hearing, so any negotiations should start beforehand. Consulting experts may help a company to decide whether to settle, it may help the company to justify its decision to settle or not to settle and it may help in negotiations by strengthening the defence and the defendant's position in the proceedings.

■ **Q. How important is it to stay on top of discovery obligations? What options are available to more effectively and efficiently manage this process?**

SAMPAIO: Discovery is not available under Portuguese law, either prior to or after the filing of a case. In civil proceedings, a party may, however, request the other party to present specific documents, by identifying the documents, the reason why it could not obtain them on its own and what it aims to prove. Also, under the civil procedure code, the court may ask the parties or a third party to disclose documents or other evidence to support the facts in discussion. This possibility is reinforced in class actions proceedings, whereby a court may, on its own initiative, decide what proof to collect, regardless of the parties' initiative.



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■ Q. Do you expect to see the amount of class or group action litigation increasing in Portugal in the years ahead? If so, how do you foresee defensive strategies evolving?

SAMPAIO: We are convinced litigation will increase in the years ahead. Long-term financial litigation will surely continue to dominate in the coming years and class actions will probably increase in this context, especially if linked to third-party funding and investment funds looking for opportunities. Recent legislation on private antitrust enforcement – the EU Directive on antitrust damages actions – also has the potential to increase class actions. The referred

law specifically provides for collective actions for indemnity based on infringement of competition law. Finally, the EC Recommendation 2013/396/EU of 11 June 2013 favours an opt-in model, as opposed to the opt-out system applicable in Portuguese class actions. It is still, however, unknown if Portugal will follow these recommendations. Again, strategy is likely to vary from one sector to another and from one company to another. ■

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SOFIA VAZ SAMPAIO
Managing Associate
+351 12 1009 1738
sofiasampaio@mlghts.pt

FRANCISCO CORTEZ
Partner
+351 213 817 433
fcortez@mlghts.pt

FILIPE VAZ PINTO
Partner
+351 210 091 791
fvpinto@mlghts.pt