



The Legal 500 Country Comparative Guides

Portugal

CLASS ACTIONS

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in Portugal.

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PORTUGAL

CLASS ACTIONS



1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

In Portugal, the class action mechanism available is the popular action. The right to popular action is foreseen in the Portuguese Constitution since 1982 and every citizen is guaranteed that right.

The right to popular action is the citizens right to (individually or through associations) bring petitions, claims or complaints to the sovereign bodies, the organs of the autonomous regions, or any authorities to defend their rights, the Constitution, the laws, or the general interest. Popular action covers all sectors and aims to defend both diffuse interests protected by the law and homogenous individual interests (considered the individual rights of the holders of the diffuse interests).

The general procedure and framework for bringing class actions is set out in the Law on the participation in administrative proceedings and popular action (Law no. 83/95 of 31 August 1995).

Apart from this general procedure and framework for bringing class actions, there are other provisions that explicitly prescribe the right to class actions, including the Consumer Protection Act, in connection with consumer claims and the power of consumer associations to file class actions (Law no. 24/96 of 31 July 1996), the Private Enforcement Law regarding compensation for infringements of competition law (Law no. 23/2018 of 5 June 2018) or the Portuguese Securities Code, regarding class actions seeking to protect interests of non-qualified investors in financial instruments (Decree-Law no. 486/99 of 13 November 1999).

Popular action differs from other forms of collective actions, like the joinder of parties. Joinder of parties occurs when multiple claimants join separate claims on a similar or related subject in one action. Popular action is also distinct from the joinder of actions, which is the possibility, when two or more proceedings are already

pending before the court and there is a connection between the claims, to request that both cases be joined and decided together.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Class actions may be brought by any citizen, individually or jointly with others, in the exercise of his civil and political rights, by legal associations and foundations (but not companies or professionals) that protect public health, environmental protection, quality of life, consumer rights and services, cultural heritage and public dominium, as well as by the public prosecutor and local authorities in respect of their geographical jurisdiction, regardless of their own direct interest in the proceedings.

In relation to the legal requirements provided for legal associations or foundations, it is undisputed that the association and foundation must have legal personality, the relevant interest to be protected must be covered by the corporate purpose as set out in their articles of association and the association or foundation cannot carry out an activity that could, in any way, be deemed as competing with an activity carried out by a corporate entity or a liberal professional. The application of additional legal requirements regarding consumer associations, pursuant to consumer's law and doctrine has been under discussion, notably if associations must have a minimum number of associates, as well as corporate bodies freely elected by universal and secret vote, if they must be non-profit-making for themselves but also for their members and third parties and if they must have as their main objective the protection of the rights and interests of consumers in general or of consumers who are members of the association.

In turn, the implementation of the Directive (EU) 2020/1828 will result in some changes in this matter, considering that it states that Member States shall ensure that class actions can be brought by qualified

entities designated by the Member States. For cross border class actions, the qualified entities to be appointed must comply with the certain criteria foreseen in Article 4 of the Directive (some of them being already applicable under the current regime). Member States enjoy a wide discretion regarding the criteria that qualified entities must meet for the purpose of bringing domestic class actions. In addition, for the specific purpose of bringing a particular domestic class action, qualified entities may also be designated on an ad hoc basis.

Most qualified entities are likely to be consumer organizations, and we already have four qualified entities for the purpose of bringing class actions under the Law no. 25/2004 of 8 July 2004 which transposed Directive 98/27/EC on injunctions for the protection of consumers' interests. It should not be difficult for the already existent qualified entities to comply with the legal requirements, but most probably other associations will apply.

In any case – because the implementation of the Directive (EU) 2020/1828 cannot reduce the preexistent levels of consumer protection – the Portuguese law shall continue to grant legal standing to all citizens and remaining entities at least for the purpose of bringing domestic actions.

3. Which courts deal with class actions or collective redress proceedings?

Class actions can be filed in administrative or civil courts, depending on the object of and parties to the claim. Competition courts also have jurisdiction over class actions related with infringement of competition rules.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

The collective action mechanism system in place in Portugal applies to all areas and sectors of the law.

The right to popular action is exercised to prevent infringements of, namely, public health, environment, quality of life, goods and services, consumer protection, cultural heritage, and public interests. Such right may also be exercised to safeguard property owned by the Portuguese state, autonomous regions, or local authorities.

5. Are there any limitations of types of claims that may be brought on a collective basis?

All types of claims may be filed collectively, as long as the general and specific requirements set out in the Law on the participation in administrative proceedings and collective action (Law no. 83/95 of 31 August 1995) are met.

6. How frequently are class actions brought?

According to our own experience and information gathered from the market, class action activity has been increasing in the past few years and we are convinced litigation will increase in the years ahead.

Although there is a widespread feeling that class actions have increased in recent years, official data does not exactly confirm this idea. For example, according to official statistics, seventeen cases commenced in 2010, but in 2014 there were forty-three cases; in turn, in 2018, nine cases commenced, while in 2021 there were twenty.

Even though there are no accurate data to draw this conclusion, it seems to us that recently the number of class actions for damages compensation (redress measures) has actually increased, whereas before class actions for injunctive measures predominated. Furthermore, we have been witnessing an increase of more complex class actions, as shown by the spread of consume-related class actions, which involve more sophisticated players in the market, more high-value actions, and high-profile defendants. Another useful example are the class actions brought against different entities after the collapse of financial institutions and respective resolutions.

In line with statistical reports on class actions before first instance courts between 2007 and the first quarter of 2022, 279 cases commenced, and 311 cases were finalized. It should be noted that statistics show small numbers of pending proceedings considering the average length of the proceedings in Portugal, which is 2/3 years. We can also take from those data that several proceedings have terminated at an early stage.

So, we find that long-term financial litigation and litigation on consumer rights will certainly continue to dominate in the coming years, not to mention the increase and importance of class actions for indemnity based on infringement of competition law (under Directive 2014/104/EU).

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

The first risk companies face has to do with the fact that, in comparison with some other jurisdictions, there is still not a lot of experience in class actions in Portugal, since many have fallen by the wayside and there have been only a few for damages compensation. Therefore, there are not many public court decisions on procedural and substantive aspects and doctrine from recognized authors is only now beginning to emerge. This leads to a degree of unpredictability regarding the result and course of these actions.

Another relevant challenge arises from a potentially broad or liberal interpretation of the range of rights that may be enforced through class actions and the fact that it is quite easy to bring a class action in Portugal, especially since the Claimant is not required to attach a declaration or a power of attorney of each of the represented citizens, and as the legal fees regime applicable to class actions totally or partially exempts claimants from the payment of legal fees, which may lead claimants to submit high-value claims, to put pressure on the Defendants, with no consequences in terms of legal fees. In fact, there is no limit on the damages that can be claimed, no deterrence for claimants from filing exorbitant claims (except if acting in bad faith) and no effective control over the amount of money claimed at an early stage of the proceedings.

Regardless of the action's actual grounds, the Defendants may face significant reputational risks, in particular before high-value claims, as class actions tend to be prominent cases that easily capture the attention of the media. Also, it may have an effect on the companies' financial statements if faced with the obligation, under the applicable rules, to make provisions to cover potential liabilities.

8. Is your jurisdiction an "opt in" or "opt out" jurisdiction?

Portugal is an "opt out" jurisdiction and the right to opt out of a class action may be exercised until the end of the evidence production stage of the proceedings by submitting a statement to the court.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

Assuming that citizens (individually or collectively) have

legal standing under the terms indicated above in point 2, the requirements are those generally provided by law.

A class action may take any of the forms set out in the Civil Procedure Code and the Administrative Procedure Code. Pursuant to the general terms of Portuguese Law, the Claimant must be represented by a lawyer, and it is required to file a statement of claim, describing the facts, explaining the cause of action and the applicable law. Documentary evidence, if applicable, must be attached to this pleading, beyond the necessary indication of other types of evidence such as witnesses. It should be emphasized that within the context of tort liability, the claimant will have to show the infringement occurred, prove the ensuing damages, and demonstrate the existence of a causal link between the one and the other (without the benefit of presumptions of harm). The burden of proof may only be reversed in case of legal presumption, exemption, or liberation from the burden of proof, or in case the counterpart has deliberately made the fact impossible to prove.

The claimants must concentrate the full statements in the statement of claim and set out all essential facts and arguments, as well as the respective evidence, at this initial stage, otherwise they may not be able to do so later. Yet, in class actions the judge is not dependent on the evidence submitted by the parties and may require the parties to provide additional evidence.

In Portugal, there is no certification, but instead there is the preliminary order, whereby the statement of claim may be dismissed at an early stage if likely to be rejected (this happens when the judge considers that it is manifestly unlikely that the request will be granted).

10. What remedies are available to claimants in class action or collective redress proceedings?

There are two types of remedies available to claimants in class actions: injunctive measures, including provisional or definitive measures to cease an infringement, and redress measures, including compensation, repair, replacement, price reduction, contract termination or reimbursement.

Beyond that, the judge is required to order the infringing defendant to publish the decision (or extracts) at its own cost in two newspapers.

11. Are punitive or exemplary damages available for class actions or collective

redress proceedings?

Pursuant to Portuguese law, as a rule, no punitive damages are admitted.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

Class action proceedings are not subject to juries.

13. What is the measure of damages for class actions or collective redress proceedings?

The Portuguese law does not impose a maximum limit on the damages that the court may award, as the quantum is fixed considering the actual losses suffered by the claimants. In addition, all types of damages may be recoverable, including general and special damages and compensation for loss of profit.

To obtain compensation for damages, the claimant has to prove the defendant's fault or negligence (except in exceptional cases of strict liability that may only occur when expressly stated in the law) in performing the unlawful conduct, the extent of the injury and the link between the two (except when rebuttable or irrebuttable presumptions apply if expressly applicable to the case at hands).

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

Portuguese courts must be the competent to decide the case under the applicable rules of international jurisdiction, which may vary depending on the case

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

There are no limits on the nationality of claimants, but on their domicile, since the right to popular action is only granted to citizens in Portugal in the exercise of their civil and political rights (which might include foreigners residing in Portugal).

16. Do any international laws (e.g. EU**Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?**

Portugal has not yet implemented Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers. While the implementation of Directive (EU) 2020/1828 will certainly bring changes, in particular regarding cross-border actions and qualified entities, a radical overhaul of the current regime is not expected, since Portugal already has a class action mechanism.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

There are no specific rules regarding settlement within class actions, so the general requirements set out in Civil Procedure Code shall apply. It can be arguable whether settlement is possible within class actions. Against it one may argue notably that the rights subject to class actions are not disposable. In favor, one may invoke, among other arguments, the opting-out mechanism and the letter of the law which establishes that the public prosecutor may replace the claimant in case of settlement, withdrawal of the case and in any case if he considers that the interests represented in the class actions are being harmed.

According to the general rules, the parties may settle at any time. Cases can be settled by the parties within the legal proceedings or out of court and then submitted to the court for approval. In addition, to approve the settlement of the class action, the court must assess if the class of people covered by the claim was adequately and lawfully represented.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

As mentioned, there are no specific rules regarding settlement within class actions, so the referred general requirements set out in the Civil Procedure Code apply.

Settlement has to be submitted to the court for approval.

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g.

competition or financial regulators?

Some class actions arise following convictions by regulatory authorities, and especially by the Competition Authority. In the specific context of competition and in compliance with the implementation of Directive 2014/104/EU, Portugal has a private enforcement law in place (Law no. 23/2018 of 5 June 2018) that provides the right to submit claims seeking for damages resulting from infringements of competition law. Thus, following any administrative decision in this scope, and taking advantage of it, a class action may be filed to seek compensation for damages caused by that infringement. The referred law has the potential to increase class actions and those signs are already visible in Portugal.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

We are aware of some high value class actions related to alleged non-compliance of environmental norms and principles (ESG matters), whereby the claimants request specific prevention or redress measures, but such actions have not been framed under the ESG Directive, which has not been implemented yet.

21. Is litigation funding for class actions or collective redress proceedings permitted?

The litigation funding for class actions or collective redress proceedings is not regulated and raises several legal and constitutional questions under the Portuguese law.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Although the Portuguese Bar Association rules admit the success fee, they prohibit any agreement in which the right to attorney's or firm's fees is exclusively dependent on the outcome of the lawsuit.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

Under Portuguese Law, the "loser pays" principle is applicable, but there are limits to the amount that the winning party may recover from the losing party.

Court fees and other costs paid (e.g., experts costs when judicial expert evidence is produced) are recoverable by the successful party from the losing party. However, lawyer fees of the successful party are recoverable up to a maximum amount corresponding to 50% of the court fees. In turn, court fees in class actions are very low since the court fees are determined by the value of the proceedings and class actions in Portugal tend to be attributed the value of 60.000 €.

Private Enforcement Law (Law no. 23/2018 of 5 June 2018) states that the non-claimed amount of the global compensation may be used to pay for the claimants' expenses but it doesn't include a similar provision regarding defendants which seems to raise constitutional issues.

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

The proposal for the reform of class actions or collective redress proceedings is the referred Directive (EU) 2020/1828. This Directive has not yet been transposed into Portuguese national law and the terms under which it will be implemented are still unknown.

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