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## Portugal: Trends and Developments

Alexandra Nascimento Correia, Guilherme Santos Silva, Gonçalo Malheiro and Laura Cecília Lourenço
Abreu Advogados

# Trends and Developments

**Contributed by:**
Alexandra Nascimento Correia, Guilherme Santos Silva, Gonçalo Malheiro and Laura Cecília Lourenço
**Abreu Advogados**

**Abreu Advogados** is a big four independent law firm with over 30 years of experience in the Portuguese market. It partnered with FBL Advogados in 2007 and JLA Advogados in 2010 to meet client interests in the Angolan, Mozambican and Portuguese markets while benefiting from an international decision-making process when presenting innovative legal solutions to its clients. The firm continuously attracts strategic opportunities for its clients in key areas such as finance, corporate and M&A, tax, litigation and competition. It invests in multidisciplinary teams that tackle increasingly complex transactions with cost-effective solutions and anticipates clients' needs with a business-oriented vision. In both Portugal and internationally it is chosen to provide legal advice in international transactions across Portuguese-speaking countries, particularly Angola, Mozambique and Timor-Leste.

## Authors

**Alexandra Nascimento Correia** has been a partner at Abreu Advogados since 2016. She is co-head of the litigation and arbitration practice, with more than 20 years of experience. She has been appointed as an arbitrator for civil and commercial disputes in domestic arbitration, and she is one of the few Portuguese lawyers to have experience in international mediation under the rules of the International Chamber of Commerce. She is a member of the board of the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry and a member of the board of the Circle of Litigation Lawyers.

**Guilherme Santos Silva** has been a partner at Abreu Advogados since 2004. He is co-head of the litigation and arbitration practice and the firm's Angolan desk. He is listed as an arbitrator at the Concordia – Centre of Conciliation, Mediation of Conflicts and Arbitration and is an active member of the Litigation and Arbitration Committees of the IBA. He has been working in highly complex commercial litigations and has been acting for clients on civil, commercial and transportation litigation matters, as well as on domestic and international arbitrations, for more than 28 years, making him one of the most well-known lawyers in this field.

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**Gonçalo Malheiro** is a partner in the litigation and arbitration practice at Abreu Advogados. He focuses in particular on litigation proceedings in different areas of law, such as civil and commercial litigation, insolvency, intellectual property, criminal litigation and arbitration proceedings. With 25 years of experience, he has broad expertise in handling arbitration, civil, commercial and criminal litigation. He has also represented foreign and national clients before tribunals and courts. He has handled numerous contract disputes including claims arising out of sales agreements, distribution arrangements and franchising disputes. He is a member of the Chartered Institute of Arbitrators and a registered arbitrator at the Arbitration Centre of the Portuguese Chamber of Commerce of São Paulo.

**Laura Cecília Lourenço** joined Abreu Advogados in 2024 as a trainee lawyer. She holds a law degree from the Faculdade de Direito da Universidade de Lisboa. She is currently also studying a master's degree in forensic law at the Católica Lisbon School of Law. Her traineeship has a special emphasis on litigation and arbitration proceedings in different areas of law.

## Abreu Advogados

Av. Infante Dom Henrique 26 1149-096
Lisbon
Portugal

Tel: +351 21 723 18 00
Fax: +351 21 723 18 99
Email: lisboa@abreuadvogados.com
Web: www.abreuadvogados.com/

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## Class Actions in Portugal

This article will briefly analyse the legal regime and practice associated with so-called class actions. This matter has been regulated for several years and its practical application over time allows us to draw some conclusions.

The aim of class actions is to bring people who have suffered damage under the same conditions together in a single process and provide a single legal solution through an action in which a multiplicity of people are represented.

By being represented by just one organisation or concentrating on a single individual, class actions not only prevent the courts from being overloaded but also prevent the same factual situation from having different legal outcomes, contributing to legal certainty and procedural effectiveness and efficiency. It also allows certain types of litigation, often consumer-related, to have a legal regime that is more appropriate to the nature of the dispute.

In Portugal, there is a general regime regulated primarily by Law 83/95 of 31 August 1995 and supplemented by several other laws that specify or reinforce this right. These include:

- Law 19/2014 of 14 April 2014 on environmental policies;
- Law 107/2001 of 8 September 2001 on the protection and enhancement of cultural heritage;
- Law 24/96 of 31 July 1996 on consumer protection;
- Law 486/99 of 13 November 1999, which enshrines a right of class action for the protection of individual homogeneous or collective interests of non-institutional investors in securities;
- Law 35/2014 of 20 June 2014, regulating collective labour disputes in the civil service; and
- Decree-Law 114-A/2023, which was introduced as part of the transposition of Directive 2020/1828 (the "Directive").

Before this, Article 52 of the Portuguese Constitution (the "CRP") itself provided for a right of class action in circumstances of:

- the promotion and prevention, cessation or prosecution of offences against public health;
- consumer rights;
- quality of life;
- the preservation of the environment and cultural heritage; and
- the defence of assets of the state, autonomous regions and local authorities.

These interests do not seem to be exhaustive, and all the goods and/or values that make sense when systematically evaluated by the constitutional provisions should be considered for the purposes of the right to a class action.

On 25 November 2020, the European Parliament and the Council approved the Directive, which revoked Directive 2009/22/EC on the grounds of insufficiency. The Directive is motivated by the globalisation and digitalisation of the market and directly related to the increase of consumer risks in cross-border and national transactions.

Its legal provisions seek to prevent unlawful practices and prevent consumer losses from diminishing their confidence in the internal and community markets. It also establishes that entities bringing class actions must not only be registered in each member state but also be qualified, impartial, free from any influence and fully transparent, energising rules on publicity and access to information about the proceedings.

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### Decree-Law 114-A/2023

With the Directive, Portugal, despite already providing for class actions, had the opportunity to develop its legal provisions by establishing a special national class action regime for the protection of consumer rights and interests by making the necessary adaptations and enshrinements to transpose the Directive.

The special regime set out in Decree-Law 114-A/2023 applies to infringements of the provisions of national consumer protection law, as well as EU consumer protection law. Under the terms of Article 21, anything not provided for in this Decree-Law will be applied by Law 83/95, which enshrines a general right of class action.

### Legitimacy

Under general law, class actions can be brought by any citizen, individually or jointly with others, but, looking at Article 5 of Decree-Law 114-A/2023, private individuals, in their individual capacity, are no longer legitimate parties. Only associations and foundations, as well as local authorities, can therefore exercise the right to a class action on behalf of injured parties.

Associations and foundations are now subject to stricter requirements. First and foremost, it is mandatory for organisations to be registered with the Directorate General for Consumer Affairs (the "DGC") in order to bring transnational class actions, and they must meet the following requirements.

- Be a legal person, demonstrating activity to promote and protect consumer rights for at least 12 months, with this characteristic included in its corporate purpose.
- Be non-profit-making.
- Not be insolvent or subject to insolvency proceedings.
- Be independent, ie, be solely responsible for making the decisions to bring, withdraw or settle, all within the scope of the class action, and be free from the influence of anyone other than the consumers involved in the class action.
- Not engage in any kind of professional activity that competes with the companies or professionals against whom they are bringing the action.

In addition to the parties already deemed as legitimate, the Directive now being transposed also gives each member state legitimacy to be a party to cross-border actions, having to answer to entities in other countries for possible national offences.

Although private individuals do not have the autonomy to exercise the right of action, it is they who are represented, who are harmed and it is to them that compensation is owed. Although some scholars criticise the permanence of the opt-out system, which is also characteristic of many of the world's class action systems, there is no change in this respect. In other words, it is not necessary for the injured party to demonstrate an interest in the action in order to be legitimately represented.

However, this will not be the case for those who are injured but do not have their habitual residence in Portugal. In order to be bound by the decision of the class action, those who are not habitually resident in Portugal but have been injured in Portugal must explicitly express their wish to also be represented at the time the action is brought, under the terms of Article 12 of Decree-Law 114-A/2023.

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### Costs and Financing

Article 20 of Law 83/95 already provided for an exemption from costs as long as the claim was judged to be partially well-founded. Good practice has continued and is still enshrined in Decree-Law 114-A/2023, which refers to Decree-Law 34/2008 (the "Procedural Costs Regulation"). There will therefore be an exemption as long as the claim is not manifestly unfounded, under the terms of Article 4 of the Procedural Costs Regulation.

Despite the provision for exemption from legal costs and facing the costs that always exist when litigation is initiated, one of the great novelties and changes that the Directive has brought to the system is the regulation of the financing of class actions, guided by transparency and independence, avoiding litigation in bad faith.

The financing of class actions, as set out in Decree-Law 114-A/2023, provides for the possibility of these actions being financed without allowing financial power to influence in any way the procedural strategy or the decision itself, for which, in addition to the financing agreement having to be put before the court, the plaintiff has to be independent of its financier, who, in turn, cannot be a competitor in any way with any of the defendants.

This is a hands-off funding system, and the funder has the right to be informed and can give a non-binding opinion.

Consideration could be given to financing these actions with public funds. It's true that, on the one hand, this public investment would demonstrate the importance of preserving and guaranteeing the rights that class actions are intended to protect. However on the other, in addition to all the bureaucracy and limitations that characterise a public fund, it would not be rare for this investment to give rise to conflicts of interest, for example if the state itself was the offending plaintiff.

### Information and Knowledge

As well as the great banner of the right to information and knowledge, which is provided for in all consumer rights legislation, guidelines have been enshrined that are in line with the need to keep consumers informed, protected and as up to date as possible on what is happening in class actions of interest to them. Examples of this are Articles 7.1(f) and 19 of Decree-Law 114-A/2023, which make it obligatory for claimants to make constant updates on the proceedings they are involved in available on their website.

They must identify the class action in question as well as the parties and the case number. In addition, they must identify the court where it is being heard and update the status of the judicial proceeding, provide its outcome, the overall compensation and the method of distribution to the defendants, if applicable.

The DGC was also appointed as the competent authority under the terms of Article 4 of Decree-Law 114-A/2023 and for everything provided for in Decree-Law 114-A/2023 in question. Among other obligations, the DGC must make the list of qualified entities public on its website for the purpose of bringing transnational class actions, of which there are currently two.

They must also communicate the number of cases pending before the national courts, as well as a summary description of the cases. This must include the type of offence, the parties involved and the outcome of the cases annually to the European Commission at least.

### Distribution of Compensation

It is already known that the parties, even those who have not expressed a wish to be represented in the class action, may be entitled to compensation. This calculation, when the overall amount awarded does not cover all the damages, will be made in proportion to the respective damages that have been presented individually by the injured parties.

In the event that the amount of compensation is not claimed in full and even if the claim for this amount is time-barred, under no circumstances will the money be returned to the defendant.

Firstly, these amounts cover the plaintiff's costs, and if there is a third-party funder, it can be paid in a way that will be assessed by the court, respecting certain subjective criteria such as fair and proportionate value analysed in light of the characteristics and risk factors of the respective class action. There is no maximum ceiling that would prohibit, for instance, the funder from seeing their entire investment reimbursed, as is the case in some countries with legal regimes similar to the one applied in Portugal.

The remaining amounts, ie, those that are not claimed by any holder and that have not been allocated to paying the claimant's costs, fees and expenses, revert to the state as if they were a mere penalty. Therefore, under the terms of Article 16(b) of Decree-Law 114-A/2023, the state allocates 60% to the Fund for the Promotion of Consumer Rights and 40% to the Institute for Financial Management and Justice Equipment.

In general terms and in all non-consumer protection-related class actions, something similar to this is envisaged. With little materialisations, the other amounts, including those that are time-barred within the legal period of three years, are handed over to the Ministry of Justice to, after payment by the public prosecutor, support access to the law and to the courts that justifiably require it, in compliance with Article 22.5 of Law 83/95.

Therefore, although there is a real risk that not all injured parties will claim the compensation they are owed, these legal provisions, which are not consensual in all the regimes, guarantee that the amount paid is allocated to instruments that, like Decree-Law 114-A/2023 and the Directive, seek to energise and improve the guarantee of consumer rights and the constitutional rights of the Portuguese population in general. This is yet another factor that encourages the filing of these types of lawsuits.

### Collective Arbitration

In the context of class actions, much has been said about the possibility of linking them with arbitration in an attempt to legally provide for collective arbitration. This system is not entirely new and is already in force in countries such as Spain, France and Brazil.

In Portugal, starting with the CRP, the possibility of collective arbitration seems obvious, since a class action can be brought in any court under the terms of Article 52, and arbitration courts are effectively enshrined as such under Article 209 of the CRP. On the other hand, there has been a significant increase in the number of arbitrations in Portugal, which have become an effective alternative means of resolving conflicts which makes it possible to anticipate that arbitration may increasingly be used in this type of class action.

However, looking at the legislation that regulates voluntary arbitration, and in particular Law 63/2011, the Voluntary Arbitration Law (the

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"LAV") now in force, the nature of arbitration in Portugal seems to raise some questions in terms of compatibility with the nature of class actions or possible collective arbitration.

Article 1(1) of the LAV immediately demonstrates one of the major obstacles to this transposition, as it mentions the arbitration agreement. Furthermore, the requirement for an arbitration agreement is absolutely contrary to the opt-out regime laid down in the class action regime, and it is not possible for the injured party's silence to bind them to an arbitration decision in the same way that it binds them to the outcome of the class action. This consideration must be made regardless of whether there is a plurality of plaintiffs or defendants, as class actions are not about a mere plurality of parties but rather a multiple and sometimes indiscriminate representation of injured parties.

Apart from this criterion, the interests at stake in class actions appear to be arbitrable under the terms of Article 1(1) and (2) of the LAV and are not unavailable rights. Therefore, and it may differ from case to case, the requirement of arbitrability can be met in a class action.

Another obstacle is the principle of confidentiality, set out in Article 30(5) of the LAV. Under the terms of the general law, the incompatibility of the regimes was not so obvious. However, with the rationale for the Directive and the protection of consumers in terms of their basic right to information, the principle of confidentiality cannot be considered to be fulfilled under any circumstances, even though it is also characteristic of arbitration proceedings.

In fact, recalling at least Article 19 of Decree-Law 114-A/2023, organisations have an express duty to update their websites with information and the status of cases.

The lack of practical examples makes it difficult to anticipate how these difficulties and contradictions might be resolved. However, international examples suggest rapid developments in the near future.

## Conclusion

Even though the class action regime has been in force in Portugal for a long time, compared to other regimes around the world, the transposition of the Directive has brought real and important additions to the regime.

Decree-Law 114-A/2023 came into force on 6 December 2023, which means that the effects have not necessarily been felt in Portuguese courts yet. However, over the years, the number of class actions brought before the courts in Portugal has increased, for reasons that seem obvious in terms of the regime but also because of the greater scope and multiplicity of national and cross-border legal relationships.

Despite the fact that Decree-Law 114-A/2023 only applies to cases concerning the protection of consumer rights, which, moreover, are representative of the largest percentage of cases, it facilitates a system that already provided for the guarantee and protection of other constitutional rights, extending national competence to a cross-border competence and legitimacy.

In fact, there has been a very clear increase in the number of class actions, with some consumer organisations particularly active in filing lawsuits and benefiting from court fee payment exemptions. Over time, it is likely that case law will develop on the merits of these lawsuits and on procedural issues.

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Although Decree-Law 114-A/2023 brings new features, it has not yet been sufficiently analysed and studied. Possibly due to the complexity of the transposition and the incompatibility of the nature of the two regimes, the impact of the collective arbitration doctrine on the regime in Portugal has not been studied much.

However, across borders, collective arbitration has not only been discussed but effectively regulated. Developments are expected in the near future in this area in particular, and it is likely that this type of arbitration will see a noticeable increase.

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