

Class Actions in Portugal: *The little regime that could*¹

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The Portuguese class action regime is unique and particularly claimant friendly. It is often overlooked, internationally, that Portugal is one of the few EU jurisdictions with an opt-out class action regime. At the same time, when it comes to reaction to unlawful practices causing mass damage, the regime has hardly ever been used and has almost never been successful. Portugal is, therefore, an important case study to understand the factors that can facilitate or stand in the way of the effective use of a class action regime.

This paper is meant, first and foremost, for practitioners and policy makers. It succinctly describes the legal framework for civil class actions in Portugal. It then provides an overview of the practical reality of class actions in Portugal, including the recent watershed change that has occurred in the use of this mechanism.

1. Origins and legal basis

1.1. Origins

Other countries' class action regimes are relatively, or very, new mechanisms created by legislators in response to gaps in access to justice and effective enforcement of rights. They typically started from the realization that a solution was needed to tackle situations of mass damage, avoiding widely dispersed litigation leading to varying outcomes and leaving out the least informed and most vulnerable victims, and imposing a great burden on the justice system.

The Portuguese class action regime, more properly referred to as the "popular action" regime, has its roots in the *actio popularis* of Roman Law, which continued, more or less continuously, through medieval laws to the present day.³ The *actio popularis* gives any citizen the right to initiate court proceedings in defense of collective or diffuse interests. The claimant could (also) have a personal stake in the outcome of the proceedings, but this was irrelevant to determine active legitimacy.

Various expressions of this basic idea are still found today throughout Europe, although often limited to

reactions against acts of public authorities.⁴ In Portuguese Medieval and Modern Law, the right of *actio popularis* tended to be limited to the defense of public goods, in particular public domain. The most typical Portuguese popular action (even today) is one where a resident of a given location sues a neighbor for unlawfully occupying public domain or blocking a public path across their property.

In the mid-90s, an Act for popular actions was adopted which regulated, in a single stroke, actions for the protection of diffuse, collective and individual homogenous interests. In other words, the same regime is used to defend abstract diffuse interests such as public health and the environment, and to seek damages for consumers in situations of mass damages. Indeed, a fundamental tenant of Portuguese case-law on the subject is that the defense of individual homogenous interests (typically, the right to damages) can only be carried out through this mechanism if a diffuse or collective interest is also being protected.

This is at the heart of much of the criticism which has been made of the Portuguese popular action regime. The legislator extended the use of this law to situations of compensation for mass damages without proper and complete differentiation, and without going into some of the details that one tends to find in the regulation of mass damages mechanisms in other countries.

1. The title of this paper paraphrases Watty Piper's children story "The Little Engine That Could" (1930).

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3. PAYAM MARTINS, A., *Class actions em Portugal*, Edições Cosmos, 1999.

4. For an example from the realm of environmental protection, see Article 9(3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

1.2. Constitutional right

One of the most important specificities of the Portuguese class action regime is that it is rooted in a constitutional right. The Portuguese Constitution not only guarantees the fundamental right of access to justice and to effective judicial protection – Article 20(1) – but it also explicitly guarantees the right of *actio popularis*. While the original drafting of the 1976 Constitution did so only in a vague manner,⁵ Article 52(3) now reads as follows (ever since the 1997 amendment):

"Everyone is granted, personally or through associations purporting to defend the interests in question, the right of popular action under the terms set forth in the law, including the right to seek compensation for the aggrieved person or persons, including to:"

"a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage;"

"(b) Ensure the defense of State, autonomous regions and municipalities' property'."

The Portuguese Constitution acts as an anchor and limit for the powers of the legislator, who is required to recognize and implement the right of popular action by single citizens or associations, in such a way that can lead to claims for injunctions and damages arising from infringements to constitutionally protected values such as the ones listed in that provision. While legislators in other States may also see their collective redress mechanisms challenged for lack of compliance with the fundamental right of access to justice, the Portuguese legislator is faced with an additional layer of constitutional restraint.

1.3. General and special rules on popular action

Article 52(3) of the Constitution was implemented by:

- a. a general regime (*lex generalis*), set out in Law 83/95 ('Popular Action Act', or 'PAA')⁶;
- b. restatements of the basic right and special regimes (*lex specialis*):

5. Article 49(2) of the original version of the 1976 Constitution: *"The right of popular action is recognized, in the cases and conditions foreseen in the law"*.

6. Law 83/95, of 31 August, rectified by Rectification no. 4/95, of 12 October, and amended by Decree-Law 214-G/2015, of 2 October.

- i. civil procedure: Articles 31 and 303 of the Code of Civil Procedure⁷ and Article 4(1) of the Procedural Costs Regulation;⁸
- ii. administrative procedure: Article 9(2) of the Code of Administrative Court Procedure;⁹
- iii. antitrust: Article 19 of the Private Enforcement Act;¹⁰
- iv. securities: Articles 31 and 32 of the Securities Code;¹¹
- v. standard contractual terms: Articles 26 and 29 of Decree-Law 446/85;¹²
- vi. consumer protection: Articles 10 to 13, 17 and 18(1)(l) of the Consumer Protection Act;¹³
- vii. environmental protection: Article 7 of Law 19/2014¹⁴ and Articles 10 and 11 of Law 35/98;¹⁵
- viii. animal protection: Articles 9 and 10 of Law 92/95;¹⁶
- ix. unfair commercial practices: Article 16 of Decree-Law 57/2008;¹⁷
- x. cultural heritage: Article 59 of Law 13/85;¹⁸
- xi. women's rights: Articles 3 and 7 of Law 107/2015;¹⁹
- xii. commons and other collective means of production: Article 6(9) and (10) of Law 75/2017;²⁰
- xiii. racist criminality: single Article of Law 20/96.

As far as is publicly known, the procedure for the transposition of the Representative Actions Directive²¹ has not yet begun in Portugal.

1.4. Characteristics of civil popular actions

7. Law 41/2013, of 26 June, last amended by Law 55/2021, of 13 August.
8. Decree-Law 34/2008, of 26 February, last amended by Law 7/2021, of 26 February.
9. Law 15/2002, of 22 February, last amended by Law 56/2021, of 16 August.
10. Law 23/2018, of 5 June.
11. Decree-Law 486/99, of 13 November, last amended by Decree-Law 56/2021, of 30 June.
12. Decree-Law 446/85, of 13 November, last amended by Law 32/2021, of 27 May.
13. Law 24/96, of 31 July, last amended by Law 63/2019, of 16 August.
14. Law 19/2014, of 14 April.
15. Law 35/98, of 18 July, as amended by Law 82-D/2014, of 31 December.
16. Law 92/95, of 12 September, last amended by Law 39/2020, of 18 August.
17. Decree-Law 57/2008, of 26 March, last amended by Decree-Law 9/2021, of 29 January.
18. Law 13/85, of 6 July.
19. Law 107/2015, of 25 August.
20. Law 75/2017, of 17 August.
21. 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 and repealing Directive 2009/22/EC (OJ L 409/1, 04/12/2020).

a. Who can be a claimant

The persons who can bring a popular action depend on the cause of action. The general rule is that a popular action can be initiated (regardless of whether or not they have a direct interest in the claim) by:

- i. any citizen in full possession of political and civil rights;
- ii. associations and foundations whose statutory goal it is to protect the interests in questions; and
- iii. municipalities, in relation to the interests of the residents of that municipality.²²

It is a matter of dispute whether the Public Prosecutors' Office has the right to file popular actions under general rules. The main argument against is the letter of Article 2 PAA. The main arguments for are the letter of the laws of civil procedure²³ and of the Public Prosecutors Statutes,²⁴ and the power of Public Prosecutors to replace claimants and carry on popular actions²⁵ (making it strange if they didn't have original legitimacy as well). It is clear that Public Prosecutors are empowered to initiate popular actions in certain areas or for the infringement of certain rules.²⁶ There are various precedents of Public Prosecutors initiating popular actions and their legitimacy being confirmed by the courts.²⁷

Under the general rules, the requirements for the legitimacy of associations are: legal personality, explicit inclusion of the defense of the interests in question in the statutory goals, and non-exercise of any professional economic activity.²⁸ There are no additional requirements, namely concerning how long ago they were created, how many members they have, whether they can show sufficient funds to pursue the claim, etc. The fact any individual citizen can bring a popular action (even if he/she is not a member of the class of injured persons) has frequently justified non-restrictive interpretations of the right of active legitimacy by associations.

Defendants have sometimes argued that consumer protection associations should have a minimum number of members – foreseen in the Consumer Protection Act – in order to exercise the right of popular action, but so far this argument has been rejected by the courts. In the author's view, Article 18(1)(l) of

the Consumer Protection Act does not actually grant or regulate the right of popular action. This is granted by and regulated in the Constitution and the PAA (or in *lex speciali*, depending on the subject matter). It would be illogical if any individual member of the association could bring a popular action, but the association were required to have a minimum number of members in order to have the same right.

In the *OdC v Sport TV* case, the Lisbon Appeal Court ruled that an association of academics, created shortly before filing the popular action, with a small number of members and having made no demonstration of financial capacity, was entitled to bring a popular action seeking damages for all injured consumers, given that these goals and powers were foreseen in its statutes.²⁹

Some *lex specialis* provisions, however, derogate from the general rules by extending or restricting the right of initiative. The main examples of extension of legitimacy are:³⁰

- i. in the sphere of antitrust private enforcement, popular actions can also be filed by an association of undertakings or trade association (no further requisites indicated), seeking damages for all injured undertakings, even if their statutes do not explicitly mention protection of competition as a goal;³¹
- ii. the Directorate-General for Consumers may file actions under the Consumer Protection Act.

As the example of restriction of legitimacy, the Securities Code asymmetrically allows popular actions by individual non-professional investors and by any foundation aimed at protecting financial investors, but only allows them to be filed by associations if these have the protection of investors as their specific goal, have been active for at least 1 year and have at least 100 non-professional investors as members.³²

b. What rights / interests can be protected

The Constitution and the PAA explicitly set out that the popular action may be used to protect diffuse, collective and homogenous individual interests relating to public health, consumer rights (or protection of consumption of goods and services), quality of life, environmental protection, cultural heritage and public domain.³³ But the letter of the law also makes it clear that these are mere examples of protected interests, meaning that others can be invoked, as long as they merit constitutional protection.

22. Article 2 PAA.

23. Article 31 of the Code of Civil Procedure.

24. Articles 4(1)(h) and (i), 9(1)(f), 10(1)(a) and 61 to 63 of the Statutes of the Public Prosecutors' Office.

25. Article 16 PAA.

26. See, e.g., Article 13(c) of the Consumer Protection Act; Article 26(1)(c) of Decree-Law 446/85; Article 6(9)(b) of Law 75/2017; Article 7 of Law 19/2014.

27. See, e.g., Judgment of the Porto Appeal Court of 8 February 2001 (case no 0130039); judgment of the Porto Appeal Court of 10 April 2007 (case no 0721017); judgment of the Supreme Court of 2 June 2011 (case no 851/09.OTJLSB.L1.S1); judgment of the Lisbon Appeal Court of 7 November 2019 (case no 2667/14T8OER.L1-6).

28. Article 3 PAA.

29. Lisbon Appeal Court judgment of 4 December 2018, *Observatório da Concorrência v Sport TV* (case no. 7074/15.8T8LSB.L1-1). Similar issues have been argued and are pending in Case *Ius Omnibus v Super Bock*, Competition Court case no. 20/20.9YQSTR.

30. There are no known precedents of these extended rights having been used.

31. Article 19(2)(b) of the Private Enforcement Act.

32. Articles 31 and 32 of the Securities Code.

33. Article 52(3) Constitution and Article 1(2) PAA.

The special rules mentioned above (as well as case-law) clarified that the other interests which can be pursued by the popular action include: protection of competition on the market, women's rights, immigrants' rights, non-professional investors' rights, animal protection, etc.

A recent discussion in Portugal is whether the popular action may be used to react to infringements of the GDPR (including seeking damages for all injured consumers). The issue came up in the *DECO v Facebook* case (see below).

c. What can be sought

A popular action may be used in any form allowed by civil procedural law (e.g., including requests for provisional measures or use of any special forms of action available in the legal order).³⁴ Under the general regime (and every *lex speciali* which refers to it), claimants can seek declarations that the law was infringed, injunctions and damages. Some of the *lex speciali* foresee specific forms of action and claims.³⁵

Damages can be sought for all persons represented in the popular action, whether they were individually identified during the case or not.

In the case of damage to diffuse or collective interests (e.g. to the environment) which cannot be individualized, it seems to follow that compensation can also be sought for the collective, represented by the State or relevant territorial political unit, but this conclusion requires greater in-depth, case-by-case, assessment.

d. Who is represented and how

The Portuguese popular action follows the opt out model. The claimant acts on its own initiative, with no need for power of attorney or mandate from represented persons. He/she/it is deemed to represent all the members of the class as defined in the claim, as long they do not intervene or exercise the right to opt out.³⁶

As for who can be represented, the general regime does not limit potential represented persons in any way. It simply refers to them as the holders of the rights and interests being protected. It's clear that the regime can be used to represent interests of consumers. While not yet settled, it seems to follow that the State and other territorial political units can also be represented, as holders of diffuse or collective interests.

It is more arguable whether undertakings may also be represented through this mechanism. The letter of the general regime does not explicitly provide reasons to exclude them. And the spirit of the law seems to support the usefulness and appropriateness of the popular action when it comes to representing

(at least) small and medium undertakings. But, to the best of my knowledge, this use has never been attempted. What is clear is that some *lex speciali* specifically prohibit or allow representation of undertakings. In the realm of securities, the law allows for representation only of "*non-professional investors*".³⁷ In the realm of antitrust, the law explicitly allows popular actions by associations of undertakings whose members were injured by anticompetitive practices.³⁸

The Portuguese popular action does not have a "class certification" stage as such. Once an action is filed, the judge takes a first look and decides whether it is manifestly inadmissible or doomed to failure, in which case it dismisses the case immediately.³⁹ If it passes that *prima facie* assessment, the specific individuals or class of represented persons are notified by newspaper ads or public edict.⁴⁰ The court has significant discretionary margin in this regard. Typically, courts choose the option of publishing an announcement in two widely circulated newspapers. So far, there is no publicly available online database of past or pending popular actions.

Represented persons are given a deadline, set by the court (usually, 30 days, but can vary significantly), plus a legally mandated 30 days extension, to intervene in the popular action. No right to intervene by non-represented persons is foreseen.⁴¹ All represented persons can exercise the right to opt out (through a declaration filed at the court) up until the end of the trial phase.⁴²

After the initial written stage of the proceedings is completed, the court schedules a preliminary hearing (sometimes replaced by a written decision without a hearing) where it will decide, *inter alia*, on any arguments raised by defendants on why the case should be dismissed. This may include challenges to the claimant's active legitimacy or the applicability of the popular action to the defense of the rights and interests in question. This is the moment the court confirms whether the action is to proceed (as a popular action), in which case all the members of the class are deemed to be represented. A negative decision brings the case to an end⁴³ and is subject to immediate appeal.

There are no special rules on what happens in case successive popular actions are filed with fully or

34. Article 12(2) PAA.

35. See, e.g., Article 6(9) of Law 75/2017;

36. Article 14 PAA.

37. Articles 31 and 32 of the Securities Code.

38. Article 19(2)(b) of the Private Enforcement Act.

39. Article 13 PAA.

40. Article 15(1) to (3) PAA.

41. Although, in a recent case, one court decided to innovate and to explicitly allow (in fact, invite) other public or private consumer defense entities to intervene as assistants to the claimant – see Lisbon Judicial Court Order of 17 September 2021, *Ius Omnibus v Fiat et al* (case no 11400/21.2T8LSB).

42. Article 15(4) PAA.

43. Unless the case was also filed, subsidiarily, as a common action.

partly overlapping scopes. There are differing views on what should happen in such a situation. The solution closest to the letter of the general rules of civil procedure seems to be that there would be *lis pendens*. Subsequent actions would have to be dismissed or, at best, suspended while waiting for confirmation of the legitimacy of the original claimant.

The *res judicata* effects of a judgment in a popular action vary depending on the outcome. Represented persons who did not opt out are, in principle, bound by the judgment, but they are not bound by a judgment which dismisses the claim due to insufficient evidence or other "reasoning specific to the case". In other words, in the majority of cases, negative outcomes for the claimant do not create *res judicata* for the represented persons and do not, in themselves, prevent individual claims or a new popular action from being filed (subject to other rules, such as limitation period).⁴⁴

Represented persons are notified of the outcome of the case by publication of adds in two newspapers, at the expense of the losing party.⁴⁵

e. Global compensation and its distribution

When a claimant is successful protecting homogeneous individual interests (subjective rights), the Court will order the payment of:

- i. individual compensation directly to all represented persons who were specifically identified in the case file (typically, those who were claimants or intervened in the popular action); and
- ii. a global compensation for all represented persons who have not yet been identified in the case file.⁴⁶ In cases of mass damages, expectably, the vast majority of represented persons have not yet been identified.

The general regime provides no guidance on how the global compensation is to be determined and distributed. The special regimes for antitrust actions and for securities provides the following additional instructions (which may come to be used by the courts when resolving the *lacunae* in the general regime):

- i. if the global compensation turns out to be insufficient for all the injured persons who come forward, it should be distributed in proportion to the respective damage of each injured person;⁴⁷
- ii. the judgment should appoint an entity to receive, manage and pay out the global compensation, and this may be, *inter alia*, the claimant, one or several identified injured persons or a guarantee fund (in the case of securities).⁴⁸

44. Article 19(1) PAA.

45. Article 19(2) PAA.

46. Article 22(2) and (3) PAA. See also, e.g., Article 19(4) of the Private Enforcement Act.

47. Article 19(5) of the Private Enforcement Act.

48. Article 19(6) of the Private Enforcement Act; Article 31(2) of the Securities Code.

Under the general regime, represented persons have up to 3 years (limitation period) to ask for their share of the global compensation.⁴⁹ But the special antitrust rules require the judge to set a "reasonable deadline" for the represented persons to ask for their share, before the remainder is used to reimburse the claimants' costs.⁵⁰ The articulation of this provision with the general rule has not yet been clarified.

The global compensation system is meant to be a compromise between the principle of compensation and the difficulties of access to justice in situations of mass damage. The infringer's obligation to pay compensation will be limited by the damage it was proven to have actually caused to the represented persons, but it does not get to keep the owed compensation (unlawful profits) just because some consumers do not take the steps required to ask for their individual damages. The infringer must pay the totality of the damages, and whatever is undistributed will be surrendered to the State and be used for the good of society. Specifically, the remainder is handed over to the Ministry of Justice, to support access to justice and future popular actions.⁵¹ One exception is found in popular actions relating to securities, where the remainder is surrendered to the guarantee fund associated to the activity in question or, in the absence thereof, to the "investors' compensation system".⁵²

f. Supervision by public authorities

The Portuguese popular action regime includes extensive safeguards against abuse, in the form of constant supervision by judicial authorities.

The Court is required to carry out a preliminary assessment of the likelihood of success of the claim (analogous to *fumus boni juris* approach). If, after consulting the Public Prosecutor and carrying out any preliminary inquiries it deems fit or are requested by the claimant or Public Prosecutor, the Court must dismiss the claim at once if it deems it "manifestly unlikely to succeed".⁵³ This preliminary assessment is typically carried out before the Defendant and represented consumers are notified.

At any point during a popular action, if the Public Prosecutor believes the claimant is acting in a way contrary to the interests of the represented persons (or if claim is withdrawn), he/she is entitled to replace the claimant.⁵⁴

49. Article 22(4) PAA.

50. Article 19(7) of the Private Enforcement Act.

51. Article 22(5) PAA.

52. Article 31(3) Securities Code. It is not entirely clear what is the investors' compensation system being referred to here.

53. Article 13 PAA.

54. Article 16 PAA. As this has never occurred, as far as could be determined, there is significant uncertainty around how this would take place.

The general rules of civil procedure, together with those of the popular action regime, mean that no settlement can be reached without the Court's approval, after consulting the Public Prosecutor.

The Court is required to take a particularly proactive stand in arriving at the truth. The judge is expected within the limits of the fundamental issues defined by the parties, to *ex officio* require the production of evidence.⁵⁵ The judge is thus not bound to the parties' initiative in this regard, and can even act to complement shortcomings in the claimants' or defendants' approach to evidence.

g. Costs

The Portuguese popular action regime is particularly claimant-friendly when it comes to courts fees and adverse costs.

Portugal is not a loser pays jurisdiction. Under the general rules of civil procedure, a party who is entirely unsuccessful (absent bad faith litigation) is ordered to pay only court fees (and other expenses which the court may have incurred in the case) and half of the amount of the total court fees as a contribution to the other side's legal fees.

But there are significant differences between the cost rules for popular actions and those for ordinary proceedings. First, no filing fees are owed.⁵⁶ Second, at the end of the case, if the claim is at least partly successful, no court fees or adverse costs are owed.⁵⁷ If the claim is entirely unsuccessful, at worst, the claimant will be ordered to pay between 1/10 and 1/2 of the costs which would usually be owed.⁵⁸ The Court has discretion to determine the amount of costs within that interval, taking into account the formal or substantive reasons for the case's outcome and the economic situation of the claimant. There is some legal uncertainty about whether, in some or all popular actions, no costs whatsoever are owed.⁵⁹ If there are several claimants, they share joint and several liability for the costs of the proceedings.⁶⁰

Court fees and adverse costs are calculated as a function of the value of the case. To the extent that popular actions pursue diffuse interests (often, in tandem with the defense of homogenous individual interests, i.e. subjective rights), they are awarded a fictional

value of 60.000 EUR,⁶¹ instead, for example, of the value of the damages being sought. Some popular actions are awarded the lower value of 30.000,01 EUR, in particular actions reacting to unlawful standard contractual terms⁶² and requiring injunctions based on violations of the Consumer Protection Act.⁶³

As a result, a popular action by one claimant against one defendant, even if it is appealed all the way to the Supreme Court and is deemed particularly complex, will cost the popular action's claimant a maximum of 4.820 EUR in court fees and 2.410 EUR in defendants' legal fees. Other costs of the procedure may be added, such as the price of publications in newspapers (typically a cost of *circa* 250 EUR) or the remuneration of court appointed experts.

These favourable rules cease to apply in the case of bad faith litigation.⁶⁴ In such cases, under the general rules of civil procedure, *inter alia*, the claimant may be ordered to pay a fine and all the (reasonable) costs of the defendants (rather than simply the limited adverse costs which would be owed under the general rules on costs), and the attorneys of the claimants may also be held liable.⁶⁵ Naturally, the popular action's rules on costs will also cease to apply if the court determines that the proceedings should be re-qualified as ordinary proceedings.

h. Cost recovery and funding

Under the general rules of civil procedure, at least as interpreted (seemingly) in the large majority of cases, a successful claimant cannot hope to recover its own expenses, including legal fees, beyond half the amount of the total court fees. As noted above, the general rules would thus limit the recoverable costs of a successful claimant in a popular action, at best, to 2.410 EUR. However, popular actions benefit from special rules on recovery of claimants' costs.

First, the general regime states that the Court should determine the amount of the "procuradoria" to be paid by the defendant to the successful claimant, in accordance with the complexity and value of the case.⁶⁶ "Procuradoria" is typically used to refer to legal fees, but there is legal uncertainty whether it is being used, in this context, to refer to other costs as well.

Second, the *lex specialis* for popular actions in the field of antitrust (in a provision clearly inspired by UK Law)⁶⁷ specifies that the undistributed portion of the global compensation, after a reasonable deadline

55. Article 17 PAA.

56. Article 20(1) PAA; Article 11(1) of the Consumer Protection Act; Article 29(1) of Decree-Law 446/85 (as amended); Article 11(2) of Law 35/98.

57. Article 20(2) PAA.

58. Article 20(3) PAA.

59. For all popular actions, see Article 4(1)(b) of the Procedural Costs Regulation (together with the concept of "custas" defined in Article 3(1) of the same). For certain popular actions governed by *lex specialis*, see Given the above quoted provisions of the Consumer Protection Act, of Law 35/98 (popular actions by environmental NGOs) and of Decree-Law 446/85 (standard contractual terms).

60. Article 20(5) PAA.

61. Article 303(3) of the Code of Civil Procedure and Article 44(1) of Law 62/2013, of 26 August (as revised).

62. Article 29(2) of Decree-Law 446/85 (as amended).

63. Article 11(1) of the Consumer Protection Act.

64. Article 20(4) PAA.

65. Articles 542 to 545 of the Code of Civil Procedure.

66. Article 21 PAA.

67. See Section 47C(6) of the Competition Act, as amended by 2015 Consumer Rights Act; and of the Rules of the Competition Appeal Tribunal, cujo artigo 93(4) e (5)

set by the Court, is to be used to pay for the costs, burdens, legal fees and all other expenses incurred by the claimant due to the claim.⁶⁸ This is autonomous from the Defendant's obligation to pay adverse costs (up to the amount foreseen in the general rules). It is a special provision which ensures that the amount of expenses not compensated by the Defendant's obligation to pay adverse costs will be reimbursed from the undistributed portion of the global compensation (before the remainder is surrendered to the Ministry of Justice).

There is significant legal uncertainty as to whether the general regime should not also be interpreted to arrive at the same, or to a similar, result as the special rules for antitrust popular actions.

On the one hand, there are strong arguments of constitutionality and fundamental rights. It can be argued that the right of popular action would be deprived of its effectiveness and access to justice would be prevented if claimants were required to shoulder the burden of the – potentially very large – expenses of a popular action, with no hope of being reimbursed even in case of complete success.

On the other hand, the PAA itself stipulates that the remainder of the global compensation should be surrendered to the Ministry of Justice and used to support access to justice by popular action claimants.⁶⁹ It would be systemically baffling if the general regime were to be interpreted in the sense that a successful popular action claimant has to pay for the vast majority of the costs of the case, without possibility of reimbursement, when its success secure funds which the Ministry of Justice will use to fund future popular actions, while not being entitled to be reimbursed from that remainder for its expenses in that case.

There is also – for now – legal uncertainty concerning whether the claimant's expenses which are reimbursable from the remainder of the global compensation includes funding costs (i.e., capital invested by the funder and remuneration thereof). The legal debate in Portugal in this regard is very similar to the one that occurred in the UK, beginning with *Merricks v Mastercard*,⁷⁰ given the similarity between the letter and spirit of the laws, and so one may expect it to play out in the same way. The main difference between the arguments to be used in the Portuguese debate on this issue is that, in Portugal, (a) popular action is, in itself, a constitutional right; and (b) the principle of effectiveness of EU Law is also called into play (whereas in the UK it is no longer an issue). Bottom-line, funding is, in principle, possible, potentially subject to certain conditions such as transparency vis-à-vis the court.

Recovery of claimants' costs, including funding costs, may also be included as part of a settlement.

2. Reality of class actions in Portugal

2.1. Initial overview

While the current general rules of Portugal's popular action regime have been in force since 1995, the regime has seen only sporadic use until recently.

According to official Ministry of Justice statistics, from 2007 to 2020 there was an average of 37 civil popular actions per year.⁷¹ The numbers were significantly higher at the beginning of that period (66 per year) than at the end (25 per year). While further empirical study is required, there is strong evidence to suggest that the majority of these actions are still the same type of popular actions as corresponding to the historical routes of the figure in Portugal – actions in defense of public domain or public paths (reacting to misappropriation by private persons).

Throughout the same period, the subgroup of popular actions aimed at protecting consumer rights was dominated by actions aimed at seeking injunctions and restoration of legality, such as those reacting to unlawful standard contractual terms.

2.2. Mass damages claims

Popular actions aimed at obtaining damages for consumers injured by mass infringements, until recently (it would seem), were rare. Example of such actions go back to the entry into force of the PAA, with a group of first historical judgment by the Portuguese Supreme Court, starting in 1997, which confirmed that this mechanism could be used by consumer associations to seek restitution or compensation for all represented consumers, specifically in cases where the damage was caused by the same unlawful behaviour, while the extent of the damage varied from one consumer to another.⁷²

Although more in-depth empirical study is required, it would seem that, to this day, never has a popular action led to a final judgment which awarded a global compensation to be distributed among represented consumers, as foreseen in the PAA.

There have been a number of successful popular actions, but aimed at achieving different outcomes, or

68. Article 19(7) of the Private Enforcement Act.

69. Article 22(5) PAA.

70. UK Competition Appeal Tribunal, Case 1266/7/7/16 *Merricks v Mastercard*.

71. Not publicly available, provided to author upon request.

72. Portuguese Supreme Court Judgment of 23 September 1997, *ACOP v Portugal Telecom* (case no. 97B503); Portuguese Supreme Court Judgment of 17 February 1998, *DECO v Portugal Telecom* (I) (case no. 97A725); Portuguese Supreme Court Judgment of 7 October 2003, *DECO v Portugal Telecom* (II) (case no. 03A1243); Portuguese Supreme Court Judgment of 7 January 2010, *DECO v Language Schools* (case no. 08B3798).

which didn't arrive at the global compensation stage because, upon declaration of the illegality and duty to compensate by the Court, the parties settled before a ruling on the global compensation was required.

2.3. Consumer and regulatory law cases

The best-known example of this is the *DECO v Portugal Telecom (II)* case, which ended in a settlement giving consumers free national calls on the fixed network on 14 consecutive Sundays, after the Supreme Court seemed to exclude the possibility of global compensation except when protecting diffuse interests. By one estimate, that settlement implied potential total compensation of 120 million EUR (i.e., 60 EUR per client).⁷³

A relatively frequent feature of civil popular actions is for 1st instance generalist courts to initially refuse active legitimacy of the Claimant, who then overturns that ruling before the Appeal Court and the case is ordered to proceed. One can only speculate about the reasons for this reality. But it seems arguable that the low number and lack of empirical studies and dissemination of knowledge about such popular actions in Portugal is likely to be a crucial factor.

A number of important civil popular actions are currently pending before the Lisbon Judicial Court, including:

- a. Volkswagen:⁷⁴ VW *Dieselgate* 1.0 case filed in October 2016; currently proceeding after Lisbon Appeal Court overruled the 1st instance court and confirmed the jurisdiction of Portuguese courts to hear the claim.⁷⁵
- b. Daimler/Mercedes-Benz:⁷⁶ *Dieselgate* case filed in March 2021, seeking a minimum of 4,200 EUR per vehicle; awaiting completion of notification of Defendants.
- c. Stellantis/Fiat Chrysler Automobiles:⁷⁷ *Dieselgate* case filed in May 2021, seeking a minimum of 2,700 EUR per vehicle; awaiting completion of notification of Defendants.
- d. Apple iPhones: Case filed in July 2021 concerning misleading advertising on the resistance to liquids of iPhones, claiming global compensation estimated at 137 million EUR; awaiting notification of Defendants and represented consumers.⁷⁸

2.4. Antitrust cases

The first popular action filed to seek compensation for consumers harmed by an antitrust infringement was the *OdC v Sport TV* case, mentioned above.⁷⁹ The case was initiated in 2015 and is still pending. The Court has recently rejected the Defendant's arguments on time-barring, in all but one source of damage, while also deciding that it is not bound (*ratione temporis*) by the *res judicata* Decision of the Portuguese Competition Authority which declared the infringement. Appeals by both the claimant and the defendant are pending, while the case proceeds to the evidence production phase.

Following the change of rules which transferred jurisdiction for antitrust private enforcement cases to the Competition Court, 4 antitrust popular actions seeking global compensation for consumers were filed, all following-on from NCA or European Commission decisions:

- a. Mastercard:⁸⁰ case filed in December 2020, claiming an estimated 400 million EUR; currently awaiting the filing of the Defence, after significant delays in notification of Defendants.
- b. Super Bock:⁸¹ case filed in December 2020, claiming an estimated 401 million EUR; defence and reply to exceptions raised by Defendant have been filed, preliminary hearing set for January 2022.
- c. Land Surveyors Association:⁸² case filed in July 2021; a settlement has already been approved by the Court and become *res judicata*; under the terms of the settlement, represented consumers have 3 months to contact the consumer association and present an invoice for purchase of land surveying services during the 16 years of the infringement, upon which they will receive damages in the amount of 5% of the price they paid;⁸³ by approving this settlement, the Court implicitly confirmed *Ius Omnibus*' (i.e., the claimant consumer association) active legitimacy to pursue such popular actions.
- d. EDP:⁸⁴ case filed in September 2021, claiming 95 million EUR in damages; the deadline for the defence is early January 2022.

Popular actions before the Competition Court have progressed much faster than before generalist courts. The current rhythm of cases, together with the history of this Court in other antitrust public and private

73. MULHERON, R., "Competition law cases under the opt-out regimes of Australia, Canada and Portugal", Research Paper, available at: www.bis.gov.uk/files/file49008.pdf, at pp. 77-78.

74. Lisbon Judicial Court, *DECO v Volkswagen AG et al* (case no. 26412-16.0T8LSB).

75. Lisbon Appeal Court judgment of 27 April 2021, *DECO v Volkswagen AG et al* (case no. 26412/16.0T8LSB.L1-7).

76. Lisbon Judicial Court, *Ius Omnibus v Mercedes-Benz AG et al* (case no. 6970-21.8T8LSB).

77. Lisbon Judicial Court, *Ius Omnibus v Stellantis NV et al* (case no. 11400-21.2T8LSB).

78. Lisbon Judicial Court, *Ius Omnibus v Apple* (case no. 17713-21.6T8LSB).

79. Lisbon Judicial Court, case no. 7074/15.8T8LSB.

80. Portuguese Competition Court, *Ius Omnibus v Mastercard* (case no. 19/20.5YQSTR).

81. Portuguese Competition Court, *Ius Omnibus v Super Bock* (case no. 20/20.9YQSTR).

82. Portuguese Competition Court, *Ius Omnibus v ANT* (case no. 15/21.5YQSTR).

83. Further details available at: iusomnibus.eu/pt/ius-omnibus-v-ant-pt/.

84. Portuguese Competition Court, *Ius Omnibus v EDP* (case no. 18/21.0YQSTR).

enforcement proceedings, suggest that, absent major incidents, antitrust popular actions before this Court may be decided within a timeframe of 2 to 2.5 years.

There are also two examples of popular actions meant to obtain pre-filing discovery from potential Defendants, so as to determine whether antitrust practices identified by the European Commission affected Portuguese consumers and to what extent, in preparation of a potential action for damages:

- a. Melia:⁸⁵ claim filed in July 2021; defence filed in December 2021.
- b. Comcast / Universal Studios:⁸⁶ bundle of claims filed in July 2021, deadline for defence not yet elapsed.

2.5. Securities cases

No examples could be identified of popular actions successfully admitted in representation of investors harmed by securities infringements. In the *DECO v BES* case (a popular action seeking compensation for investors injured by practices of BES, which was liquidated by order of the Bank of Portugal),⁸⁷ the 1st instance and the Lisbon Appeal Court began by declaring that the claimant had deserted the action by failing to comply with court orders concerning the notification of some Defendants.⁸⁸ The Supreme Court overruled that decision and ordered the case to proceed.⁸⁹ The 1st instance court then decided that the claim should be excluded outright, as the claimant did not have active legitimacy, because it did not meet the requirements of the *lex specialis* rules on popular action of the Securities Code, and because non-professional investors are not consumers, but also on the grounds that the rights being protected were neither collective nor homogeneous individual interests, and because the Bank of Portugal measure being challenged could only be annulled by an administrative court.⁹⁰ This was upheld by the Lisbon Appeal Court.⁹¹ As far as could be determined, an appeal is pending before the Supreme Court.

2.6. GDPR cases

The only known example of a popular action enforcing GDPR rights was the *DECO v Facebook* case, where the Defendant challenged the consumer association's active legitimacy. The issue went unresolved because the claim was withdrawn following an agreement between the parties.⁹² Mirroring arguments raised elsewhere in Europe, the Defendant had argued that the GDPR and its implementation law in Portugal (Law 58/2019) excluded the possibility of popular actions within the realm of the GDPR. There are, in the Author's view, strong constitutional and legal arguments against such an interpretation:

- i. Article 35 of Law 58/2019 sets out a right to representation through mandate given to an association, but it doesn't exclude representation under other mechanisms, including popular actions as governed by the PAA. That provision is clearly the "transposition" of Article 80(1) GDPR, which was meant to introduce a minimum harmonized approach, not to prohibit Member States' representation mechanisms which offer consumers greater protection;
- ii. popular action is a constitutional right, which cannot be derogated by ordinary legislation;
- iii. it would be illogical and contrary to the spirit of the Portuguese legal order for popular actions to be available to protect all other consumer rights, but not GDPR infringements;
- iv. there would arguably be a right of popular action against actions which violate the GDPR based on (simultaneous) infringements of other rules, such as fundamental right to privacy or antitrust rules, but without being able to invoke GDPR rules – this would be untenable for the courts, which can and must raise legal infringements *ex officio*.

While my personal view is that popular actions must necessarily be available also for GDPR cases (which are, first and foremost, consumer protection cases), a first *res judicata* data protection popular action in Portugal is required to have more clarity on this issue.

2.7. Recent trends and funding

There has clearly been a recent drastic increase in the number and complexity of the mass damages claims presented using the popular action mechanism. This is partly explained by some high profile cases which are pushing multinational consumers redress efforts. Another decisive contributing factor has been the entry into force of the antitrust Private Enforcement Act with its new rules on popular actions, which have been used by a new consumer protection association to test the possibility of using

85. Portuguese Competition Court, *Ius Omnibus v Meliá Hotels International, S.A.* (case no. 6-21.6YQSTR).

86. Portuguese Competition Court, *Ius Omnibus v NBC Universal Media LLC et al* (cases no. /21.4YQSTR, 8/21.2YQSTR, 9/21.0YQSTR, 10/21.4YQSTR, 11/21.2YQSTR, 12/21.0YQSTR, 13/21.9YQSTR, and 14/21.7YQSTR).

87. Lisbon Judicial Court, *DECO v Banco Espírito Santo de Investimento, S.A. et al* (case no. 3422-15.9T8LSB).

88. Lisbon Appeal Court judgment of 20 December 2016, *DECO v Banco Espírito Santo de Investimento, S.A. et al* (case no. 3422-15.9T8LSB-L1).

89. Supreme Court judgment of 14 May 2019, *DECO v Banco Espírito Santo de Investimento, S.A. et al* (case no. 3422-15.9T8LSB-L1.S2).

90. Lisbon Judicial Court judgment of 10 October 2019, *DECO v Banco Espírito Santo de Investimento, S.A. et al* (case no. 3422-15.9T8LSB).

91. Lisbon Appeal Court judgment of 25 February 2021, *DECO v Banco Espírito Santo de Investimento, S.A. et al* (case no. 3422-15.9T8LSB.L2).

92. Lisbon Judicial Court, *DECO v Facebook* (case no. 26304-18.8T8LSB).

third party funding in popular actions in Portugal. This has allowed very costly cases which would never have been brought with the limited resources of individual consumers or of a consumer association to be put before the courts.

As far as could be determined, four of the popular actions currently pending before Portuguese courts have been filed with third party litigation funding, provided by 3 different funders: Mastercard, Super Bock, Daimler/Mercedes-Benz and Stellantis/Fiat Chrysler Automobiles. These funders entered into funding agreements with the consumer association according to which they bear the expenses of the proceedings and, if the claim is successful and to the extent that the Court approves, they will receive a factor of their investment or a percentage of the global compensation, to come out of the undistributed portion of the global compensation. A first decision on defendants' challenges against the admissibility of such funding may be taken by the Competition Court in January 2022, in the Super Bock case.

3. Conclusion

The Portuguese popular action regime has, until recently, been a sleeping giant. Its succinctness and brevity are both a strength and a source of shortcomings. It allows the regime to evolve and meet new demands and challenges, but it also means there is significant room for diverging interpretations by judges. Practitioners coming from common-law jurisdictions are likely to find the degree of legal uncertainty surrounding the application of this mechanism troubling. But this is a largely inevitable consequence of the structuring principles of most continental European legal orders.

Much of the legal uncertainty that resulted from the lack of experience with this type of claims seems to be abating. The drastic increase in the number of mass damages class actions being filed recently means that courts will become growingly more familiar with this type of proceedings and heterogeneity will tend to dissipate as appeal court judgments clarify the view of the higher courts on various issues. The decision of the Competition Court – so far – to concentrate popular actions in a single judge allows a faster and greater specialization and will provide increased foreseeability of outcomes at an accelerated pace.

Portugal is very much at the same point of development of opt-out class actions as the UK and the Netherlands. The Portuguese constitutional right of popular action is finally being tested to its full potential. Ever since a year ago, highly complex cases are being brought with funders' backing, placing consumers, if not on an equal footing, at least not on such a profound disadvantage over Defendants when it comes to resources. Already the first settlement in an anti-trust case has been reached.

All that is left is to wait and see. Can the Portuguese

class action regime deliver on its promise? I think it can.

Note from the Editorial Board:

It has come to our attention that contrary to the statement in the article in the last edition⁹³ it is controversial whether or not the general class action regime in Portugal also applies to GDPR infringements. We have therefore given space in this edition to present the opposing view on this topic. We have learned from this experience and will going forward ensure an even stricter peer review process.

93. 'Mass damage claims for GDPR infringements: a multi-jurisdictional perspective' *Mass Claims*, June 2021, p.18.