



DISPUTE RESOLUTION

Representative actions for consumer protection

New legislation

Decree -Law 114-A/2023 of 5 December was published on 6 December 2023 to incorporate 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 (Directive) into Portuguese law.

The aim of this Directive is to guarantee the existence of a uniform procedural mechanism for representative action, which is available to consumers in each of the Member States to obtain (i) injunctions to put an end to or prohibit, provisionally or definitively, unlawful practices by a trader, and (ii) redress measures, including varying means of compensation as applicable.

Scope of application

The new rules will only apply when the infringements in question have harmed or are likely to harm the collective rights and interests of consumers (including infringements that ceased before the class action was brought or concluded).

These include infringements of the provisions of national and European Union law identified in Annex I of the Directive and other consumer protection legislation in force in the national legal system.

Annex I of the Directive identifies 66 EU laws, including liability for defective products, unfair terms in consumer contracts, the sale of consumer goods and associated guarantees, general product safety, processing of personal data and protection of privacy in the electronic communications sector, unfair business-to-consumer commercial practices, distance marketing of financial services, contracts for the supply of digital content and services, among others.

The new rules will only apply when the infringements in question have harmed or are likely to harm the collective rights and interests of consumers. In all other cases Law 83/95 of 31 August will apply.

In all other cases (infringements of collective rights and interests of a different nature), Law 83/95 of 31 August will apply, which is the law that regulates the right to procedural participation and representative action. In any case, the provisions of Law 83/95 of 31 August and Law 24/96 of 31 July will continue to apply to anything that is not provided for in the new law.

The new law comes into force on 7 December 2023 and will apply to representative actions brought from that date onwards.

Main changes introduced by the new law (particularly in relation to Law 83/95 of 31 August)

1. This new legislation provides that associations and foundations, whether or not they have a direct interest in the claim, and local authorities are entitled to bring representative actions. The list of requirements for legal standing to bring a representative action now also expressly includes requirements relating to the independence of associations and foundations. The new law stipulates that the association or foundation bringing a representative action (i) may not engage in any kind of trading activity in competition with companies or liberal professionals, and (ii) must be independent and free from influence exerted by people who are not consumers, especially by traders who have an economic interest in bringing the action. To this end, the new law stipulates that an association or foundation is independent if, among other things, it is exclusively responsible for making the decisions to bring, withdraw or settle a representative action, with the guiding principle being the defence of consumer interests.
2. The competent national authority is the Directorate-General for Consumer Affairs. It will be responsible for making public, on its website, (i) the list of qualified entities designated for the purpose of bringing cross-border representative actions, and (ii) information on ongoing and concluded representative actions before the Portuguese courts.
3. The rules for designating national organisations as qualified entities with legal standing to bring cross-border representative actions before the courts of other Member States are laid down. This status will be conferred by the Directorate-General for Consumer Affairs upon confirmation that certain requirements have been met, to associations and foundations that apply for it. The national authority will then publish a list of these organisations. Conversely, the possibility is also established for qualified entities designated by other Member States to bring cross-border representative actions before the Portuguese courts.
4. The new law also regulates the funding of representative actions by third parties. It requires the claimant to provide the court with a certified copy of the funding agreement, which must be written in a clear and comprehensible manner and in Portuguese. It must also include a financial summary listing the sources of funding used to support the representative action and the various costs and expenses to be borne by the third party funder.

The association or foundation bringing a representative action (i) must not engage in any kind of trading activity in competition with companies or liberal professionals, and (ii) must be independent and free from influence exerted by people who are not consumers.

The agreement providing for the financing of representative actions by third parties must be attached to the case and cannot provide for remuneration for the financier that goes beyond a fair and proportionate amount.

This agreement must ensure the independence of the claimant and the absence of conflicts of interest between it, its funders and the interests of consumers. The claimant will be understood to be independent of the third-party funder if it is solely responsible for all decisions relating to the representative action. These decisions include, for example, the choice of legal representatives and the definition of the litigation strategy, as well as the decisions to bring, to continue, to withdraw, to settle, to appeal or not to appeal and, in general, to take or not to take any procedural step in the context of the representative action. In this regard, it is also expressly stipulated that the funder of the representative action may not impose, prevent or influence these decisions in any way. Furthermore, any clause to the contrary is null and void. If these conditions are not met, the court will declare that the claimant does not have legal standing and the Public Prosecutor's Office can take the place of the claimant and continue the action.

In addition, the new law stipulates that the funding agreement cannot provide for remuneration for the funder that goes beyond a *fair and proportional value*, assessed in the light of the characteristics and risk factors of the action and the market price of the funding.

5. In terms of representative actions to obtain an injunction
 - i) It is stipulated that the claimant in a representative action for injunctive relief does not have to prove actual damage suffered by the individual consumers affected by the infringement in question, nor the existence of wilful misconduct or negligence on the part of the trader.
 - ii) It is clarified that bringing a representative action to obtain an injunction interrupts the limitation period applicable to consumers represented in that representative action for the exercise of rights arising from the infringement in question (including as regards redress measures). The period starts to run again as soon as the final and unappealable decision terminating the representative action is taken. However, this provision applies to representative actions to obtain redress measures arising from infringements that occurred after the new law came into force. The same rule (without the last provision concerning the temporal application of the law) is laid down for representative actions to obtain redress measures.
 - iii) The new law provides that permanent injunctions can only be applied for once a prior consultation process has been set in motion with the trader, i.e., once a period of two weeks has passed from receipt by the trader of a registered letter with acknowledgement of receipt identifying the conduct / facts in question and the rules infringed.
 - iv) The new law repeals Law 25/2004 of 8 July on injunctions for the protection of consumer interests.

Compensation that is not claimed by consumers will revert to payment of all the costs, fees and other expenses incurred by the claimant in the action. The remainder of the compensation will go to the Fund for the Promotion of Consumer Rights and the Institute for Financial Management and Justice Equipment.

6. Like Law 83/95 of 31 August, the new law provides for an opt-out system. Under this system, at their own initiative, and without the need for a mandate or express authorisation, claimants represent all other holders of the rights or interests in question who have not exercised their right to opt out of the proceedings. This this opt-out right can be exercised until the end of the evidence phase, under the terms of Law 83/95 of 31 August. The only exception is for consumers who are not habitually resident in Portugal on the date of service of notice on the holders of the rights or interests in question in the representative action. These consumers are only represented by the claimant if they expressly state that they are.
7. Final decisions (no longer appealable), including decisions to approve settlements, are published and communicated to consumers.

When a judgment is handed down with a compensatory component, the judge sets a reasonable time limit for the individually identified injured consumers to claim their compensation. The judge also sets the criteria for quantifying the compensation according to the damage suffered by each one. If all the injured consumers are not individually identified, an overall amount of compensation is set, as is also provided for in Law 83/95 of 31 August. Compensation that is not claimed by consumers within the time limit set for this purpose will revert to payment of all the costs, fees and other expenses incurred by the claimant in the action.

Furthermore, the remuneration of any third party funder may be included in these expenses, provided that the limit on the fairness and proportionality of this remuneration is confirmed by the court. The court's assessment will be set out in an order made after the deadline for consumers to claim compensation, in proceedings joined to the representative action.

The remainder of the compensation will go to the Fund for the Promotion of Consumer Rights (60%) and the Institute for Financial Management and Justice Equipment, I. P. (40%).

8. Claimants are under an obligation to disclose on their websites a set of information on each representative action brought: (i) the identification of the representative action in question, with reference to the identification of the parties, claim, case number, court and procedural stage; and (ii) the court's decision including an indication of including the overall compensation and the method of distributing the compensation to the consumers they represent, where applicable. ■