

Class Actions, Group Litigation & Other Forms of Collective Litigation

(Portuguese Report)

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The rapid flow of information on a worldwide scale, and the simultaneous sharing in foreign dramas and successes, has led to a sense of humanity which breaks through national boundaries. Man has become aware of the universal nature of his journey through life. He is born, lives and dies, and laughs and cries just like any other from the most varied of races and religions in some far off point on the planet. But Man has also become receptive to conflicting social and cultural models.

The discussion of legal solutions, which themselves belong to a very diverse legal family, gives rise, without doubt, to lively and ardent debates, although most certainly without the same spirit of combat, or of intolerance, that other characteristics of civilization cause. It is within this context of a heated, but orderly, discussion that some of the distinctive elements of American law are analyzed within the civil law systems.

In the eyes of the European jurist, attraction to the novelties of the New World has always been accompanied by a lack of trust founded on centuries of history and tradition, like a father who assents to his son's rebellion. However, the science of Law cannot ignore the phenomenon of the influence in Europe of the language, practice and teaching of American law, within an Americanization of Law which takes place alongside the Americanization of European culture.

The European distrust of damages class actions is rooted, essentially, in the characteristics of the American legal system which favors them and in the consequences with which they are normally associated. The "no-win, no-fee" situation and the lawyers collection of a percentage of the damages awarded to his client, and also the fact that the party who loses the case is exempt from paying the legal fees of the successful party, are concepts which remain alien to most of the European countries and which, without doubt, provide an incentive to go to court. In much the same way, if damages are

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limited to the injury suffered, practical difficulties present themselves in the calculation of an overall quantity to be shared between the victims.

The reasons indicated distort the unclouded analysis that the issue requires. As Michele Taruffo noted, “one may observe that proportioned fees (when they are admitted) also exist in individual litigation and that a class action may be filed even without considering proportioned fees; however (...) many civil lawyers seem unable to grasp such an obvious distinction”¹. Also, and regarding the amount of damages awarded to the victim, “since the practice of class actions is commonly associated (in the naïve European conception of the US system of litigation) with immense punitive damages, the rejection of the latter entails the rejection of the former. Of course, punitive damages may also be awarded in individual actions, and class actions do not necessarily result in high punitive damages awards. However, this distinction seems too subtle for most European lawyers to perceive”².

This does not, of course, mean that Europe does not recognize certain phenomena with a collective impact, such as abusive or unfair commercial and business practices, sexual discrimination in the workplace, accidents resulting in multiple injuries or harm caused by defective products. However, the solution used differs from class actions – at least from damages class actions, that is, actions which aim to compensate for harm suffered. Standing in the defense of supra-individual interests is normally limited to injunctions. This was the case with Directive 98/27/EC of the European Parliament and of the Council, of 19 May 1998, on injunctions for the protection of consumers’ interests, which gave standing to qualified entities, or rather, independent public bodies or organizations whose purpose is to protect the interests referred to in the Directive.

When the purpose of the action is to provide damages for harm suffered, the multiplicity of injured parties may lead to joinder of parties, consolidation or a stay of proceedings. Funds for the compensation of victims created by some States serve the same purpose.

¹ *Some Remarks on Group Litigation in Comparative Perspective*, in “Duke Journal of Comparative & International Law”, vol. 11, no. 2 (Debates over Group Litigation in Comparative Perspective – What Can We Learn from Each Other ?), Spring/Summer 2001, page 415.

² Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, cit., page 414.

The current reality poses a challenge to classic civil procedure based on the principle of action for the protection of one's individual rights. For some, as Deborah Hensler suggests, the "monster" denounced by Arthur Miller has returned: "large-scale litigation is the new "monster" portrayed as a product of entrepreneurial lawyers' and greedy citizens' intent on securing financial rewards for questionable claims"³. This is, however, the reaction of an emerging global society. In the words of the author "if there is a new "monster" at large, it is the rise of multinational corporations and the development of a global economy that bring with them the potential for large-scale injuries resulting from worldwide product consumption. If there is a key that has unlocked the monster's cage, it is the information science revolution and the development of the Internet, which have provided the means for people to become informed about such injuries and the tools for individuals, organizations and attorneys to organize to secure remedies"⁴. The task for traditional systems is, therefore, to discover a solution which keeps the "monster" within his boundaries rather than, in the words of Michele Taruffo, "preventing such a monster from penetrating the quiet European legal gardens"^{5 6}.

As background for consideration of the context within which your country's group litigation operates, please briefly describe your civil litigation system (e.g. common law, civil law)?

The Portuguese system of civil procedure is characterized by distinct signs of the Civil Law legal family. Thus, we can verify the absence of a jury and the importance of a written procedure⁷. Also, particular relevance is given to documentary evidence⁸. That

³ *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, in "Duke Journal of Comparative & International Law", vol. 11, no. 2 (Debates over Group Litigation in Comparative Perspective – What Can We Learn from Each Other?), Spring/Summer 2001, page 212.

⁴ Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, cit., page 212.

⁵ Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, cit., page 414.

⁶ These introductory remarks were initially published in Henrique Sousa Antunes, *Once Upon a Time in America*, in "Occasional Papers in Comparative Law", Issue Number 2, April 2005, published by the Portuguese-American Comparative Law Center – Roger Williams University Ralph R. Papitto School of Law, page 22 et seq.

⁷ Only after the allegation or introductory stage has been concluded, the judge calls for an oral hearing, a pre-trial hearing [see *Portuguese law – an overview* (editors – Carlos Ferreira de Almeida/Assunção Cristas/Nuno Piçarra), Chapter 22 (*Civil Procedure* – José Lebre de Freitas/Mariana França Gouveia), Universidade Nova de Lisboa Faculty of Law, Coimbra, 2007, page 308].

said, it must be added that in contrast to other Civil Law countries, in which there is no immediacy in the relationship between the adjudicating body and the evidentiary elements, civil proceedings include an oral discussion (*audiência de discussão e julgamento* – final hearing) conducted by the adjudicating body and including the taking of evidence^{9 10}. The power of initiative in the field of evidence remains with the parties¹¹.

What formal rules for representative or non-representative group litigation have been adopted in your country?

1. A distinction needs to be drawn between non-representative and representative group litigation. We shall begin by pointing to appropriate references for the former.

2. Joinder is a classic instrument of collective legal protection (Article 275 of the Code of Civil Procedure): it allows for the joining of actions when, having been proposed separately, these may be brought together in a single suit where the presuppositions of the admissibility of litisconsortium, coalition, opposition or counterclaim are confirmed.

3. The system of aggregation established by the legislator in Decree-Law 108/2006, of 8 June, pursuant to Council of Ministers Resolution 100/2005, of 30 May, is of substantially more limited reach. The measure allows the judge to “practice “mass acts” so long as there is an element of connection between the actions and the combined performance of a procedural act or diligence simplifies the court’s task” (preamble to Decree-Law 108/2006). This is an alternative to joinder “whenever, following confirmation of the presuppositions for this, wholly joined consideration of the cases is

⁸ See *International Encyclopedia of Comparative Law*, volume XVI (*Civil Procedure* – Mauro Cappelletti as Chief Editor), Chapter 1 (*Introduction. Policies, Trends and Ideas in Civil Procedure* – Mauro Cappelletti/Bryant G. Garth), Tubingen/Dordrecht/Boston/Lancaster, 1987, § 5, pages 8 and 9.

⁹ See *International Encyclopedia of Comparative Law*, volume XVI (*Civil Procedure*), Chapter 1, cit., § 5, pages 8 and 9.

¹⁰ The final hearing is preceded by a pre-trial hearing: “here, a series of different matters relating to the action are discussed by the parties and the judge, for example the procedural objections and the exact cause or causes of action. If none of the procedural objections prevails, the judge, with the collaboration of the parties, continues with the preparation of the proof-taking, which begins with the partition of proved facts and contested facts. At the pre-trial the parties must also offer the means of proof, for example the persons that will testify. Thereafter the judge indicates the day of the final hearing, which should be scheduled within the next 3 months (*Portuguese law – an overview*, Chapter 22, cit., page 308).

¹¹ See *International Encyclopedia of Comparative Law*, volume XVI (*Civil Procedure*), Chapter 1, cit., § 5, pages 8 and 9.

not advisable. (...) Via aggregation, the judge is permitted, at any time, to perform an act or carry out a diligence which may be extended to several cases, without these having to be treated jointly in the future” (preamble to Decree-Law 108/2006). The procedural instrument is regulated in Article 6 of the statute. The intervention of the legislator was the result of an increase in the phenomena of mass non-compliance, with the intervention of the courts applying to a limited number of users, concentrated geographically according to their respective headquarters (“small debts of communications companies, consumer credit, car leasing and, in general, all the natural litigation of a consumer society”¹²).

4. Portuguese law provides for a test claim under administrative procedure law. With regard to the special administrative action, Article 48 (1) of the Code of Procedure in the Administrative Courts establishes that, where more than twenty actions have been proposed regarding the same material legal relationship or which may be decided by application of the same norms to identical situations of fact, the president of the court may determine, once the parties have been heard, that only one or some of these will be pursued and consideration of the others will be suspended. Once the decision pronounced in the test claim has become *res judicata* (matter decided), the authors of the suspended claims may apply to the court for the effects of that decision to be extended to the case in which they are a party [Article 48 (5.b)].

It is understood that, in Portuguese law, there is a valid convention which allows an individual to be bound, with regard to the remaining members of a group, to respect the decision that is pronounced in an action proposed by one of them, whilst at the same time all the others are bound, by entering into a *pactum de non petendo* (agreement not to claim), not to seek protection of their interests in court. The classification of the agreement as a contract of material right which allows the contracting parties to establish the existence and the content of a right in harmony with that which comes to be decided in this same process prevents any argument based on the parties’ inability to contest in a *res judicata* case [Articles 494 (i) and 495 of the Code of Civil Procedure]¹³.

¹² See *Portuguese law – an overview*, Chapter 22, cit., page 310.

¹³ Suggested in Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, Lisboa, 2003, page 87 et seq.

5. With regard to representative group litigation, Portuguese law has implemented a general set of rules in this area (Law 83/95, of 31 August, on the right to take part in administrative proceedings and the right of popular action). The legislator gave effect to Article 52 (3) of the Constitution of the Portuguese Republic, of 1976, in the version which resulted from the constitution amendment of 1989¹⁴. Up until then, the law only entertained the possibility of a popular action of a corrective nature, for the jurisdictional control of certain acts of the Administration, and a popular action of a suppletory nature, which aimed at overcoming the omissions of local public entities in the defense of property and rights of the Administration. The law in force extended popular action to prevention, to the prosecution of offenses and to claims for damages. Besides this, it has changed from simply being a means of controlling the activity of the Administration to also being a means by which individuals can bring actions against the acts or omissions of other individuals.¹⁵

6. According to Article 1 (2) of Law 83/95, popular action includes, amongst other interests protected by the law, public health, the environment, quality of life, consumers' rights, cultural heritage and the public domain. As we shall see, standing is granted to any citizen who enjoys civil and political rights, and to associations and foundations who defend the interests provided for in Article 1, regardless of whether they have a direct interest in the claim or not. This is set out in Article 2, paragraph 1. It should be added that paragraph 2 of the same Article grants standing to local authorities concerning the interests of all those who are officially resident in their district. The question being dealt with is the supra-individual protection of diffuse interests and collective interests, and also homogeneous individual (fragmented) interests or rights with the *res judicata* binding all members of the class who have not exercised their right to opt out¹⁶.

¹⁴ The law currently in force states that: "Everyone shall be granted the right of popular action, either personally or via associations that purport to defend the interests in question, including the right of an aggrieved party or parties to apply for the corresponding compensation, in such cases and under such terms as the law may determine, in particular 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) safeguard the property of the State, the Autonomous Regions and local authorities".

¹⁵ Vide José Robin de Andrade, *A Acção Popular no Direito Administrativo Português*, Coimbra, 1967, page 6 et seq., and Paulo Otero, *A Acção Popular: configuração e valor no actual direito português*, in "Revista da Ordem dos Advogados", year 59, December 1999, page 871 et seq.

¹⁶ Although popular action, by definition, constitutes "(...) a form of jurisdictional protection of legal positions which, belonging to all the members of a given community, may not, however, be used by any

7. Popular action can take an administrative or a civil form. In the former, there is a legal reaction to an act or omission of the Administration. In civil popular action, the injury or threat of injury is caused by a private individual, or by the State or other public body when acting without the power of authority. The law also recognizes the possibility of intervention in an action of a criminal nature. Article 25 of Law 83/95 grants standing to holders of the right of popular action to make a denunciation, complaint or notification to the Public Prosecutor (*Ministério Público*) or to join proceedings. This fact does not, however, influence the system of criminal procedure, excluding, accordingly, the possibility of a popular criminal action or proceedings¹⁷.

of them in individual terms” (Paulo Otero, *A Acção Popular: configuração e valor no actual direito português*, cit., page 872; vide, also, Miguel Teixeira de Sousa, *A Protecção Jurisdicional dos Interesses Difusos: Alguns Aspectos Processuais*, in “Ambiente e Consumo – textos”, vol. I, Centro de Estudos Judiciários, Lisboa, 1996, pages 235 and 236, and José Eduardo Figueiredo Dias, *Os Efeitos da Sentença na Lei de Acção Popular*, in “CEDOUA – Revista do Centro de Estudos de Direito do Ordenamento, do Urbanismo e do Ambiente”, year II – 1.99, page 47 et seq.), Law 83/95 extended this protection to homogeneous individual interests and rights. It was in this sense that the Supreme Court of Justice ruled on 23 September 1997 (in “Boletim do Ministério da Justiça”, no. 469, page 432 et seq.). With regard to the confluence of interests in one good, it is common to distinguish the public interest, which is an interest of the State and other territorial beings, diffuse interest, meaning the sharing by each subject of interests that belong to the community, collective interest, identified by the joint purpose of persons joined together by a legal bond in the same group or class, and homogeneous individual interests, where the individual entitlement to a good shares questions of fact or law with other interests of that nature (for a summary, vide António Payan Martins, *Class Actions em Portugal*, Lisboa, 1999, page 19 et seq.). A different interpretation is given in Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 20 et seq. The author argues that collective interests differ from diffuse interests due to the nature of the good to which they refer. The existence of a legal bond between the members of a collective is shown to be an incorrect criterion for distinguishing collective interests from diffuse interests. While both of them fall within the category of diffuse interests *lato sensu* (in the broad sense), since, in both cases, their supra-individual dimension is a characteristic element, the public or private nature of the aim separates diffuse interests *stricto sensu* (in the narrow sense) from collective interests. In the latter, the individual subjective situations relate to private goods (such as the right to compensation), and in the former they concern public goods (the interest of any person in the quality of the air or water or the interest of any consumer in the quality of goods and services provided). Thus, the impossibility of the individual appropriation of a good which is enjoyed by members of the class or group in the diffuse interests *stricto sensu* is different to the exclusivity of the right of each one of the individuals which come together in collective interests. In the words of the author: “(...) while diffuse interests *stricto sensu* relate to indivisible goods and, for that reason, may not be divided between each one of their holders, collective interests include a plurality of individual interests over exclusive goods, and are therefore shared between each one of the respective holders. The supra-individual nature of the diffuse interests *stricto sensu* is a necessary consequence of their purpose, but the supra-individual nature of collective interests results from accidental circumstances, for example, the large number of victims resulting from pollution of the atmosphere” (*idem*, page 51). Homogeneous individual interests are, in the author’s opinion, the individual expression of diffuse interests *stricto sensu* and of collective interests. They are given form therefore, respectively, in legally protected interests and in subjective rights: “(...) the legally protected interest is the individual situation corresponding to the diffuse interest *stricto sensu* and the subjective right is the individual situation which correlates to the collective interest” (*idem*, page 58).

¹⁷ As suggested in Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 132 et seq.

8. Of particular relevance are liability actions. Rather like the damages class actions provided for in the American legislation, the entities referred to in Articles 2 and 3 are granted standing in damages actions for harm caused to transindividual and indivisible rights (e.g. the natural environment which is for the use of everyone in the community), and harm caused to individual rights when the injury originates from a common source (e.g. the personal or material damage suffered by the members of that community).

In terms of the compensatory function, the Portuguese legislator has also provided for collective protection in special legislation. With regard to consumer protection, Article 12 (4) and (5) of Law 24/96, of 22 August, provides that the consumer has the right to receive compensation for patrimonial damage or non-patrimonial damage caused by defective products or services, and Article 13, *b)* and *c)* grants standing, where homogeneous individual interests and collective or diffuse interests are in question, to consumers and consumers' associations although not directly harmed, under the terms of Law 83/95, and to the Public Prosecutor and the Institute for the Consumer. Also, the Securities Code, approved by Decree-Law 486/99, of 13 November, provides, in Articles 31 and 32, for the possibility of recourse to popular action for the protection of homogeneous individual interests or collective interests of investors in securities, giving standing to non-institutional investors, to associations for the protection of investors and to foundations whose aim is the protection of investors in securities.

9. The classic scope of collective litigation relates to the exercise of injunctions. There is also a range of legislation in this area.

According to Law 24/96, of 31 July, which establishes the legal regime applicable to the protection of consumers, the right to prevention and injunction is ensured. Article 10 (1) of Law 24/96, on the scope of the injunction, sets down that the aim of the injunction is recognized as the prevention, correction or cessation of practices which are harmful to the rights of consumers contemplated in the aforementioned law, in particular, injury to the health and physical safety of the consumers and the use of prohibited general contractual terms or commercial practices which are expressly forbidden in law.

The particular relevance of Law 24/96 regarding collective litigation in the exercise of the injunction is to be found in Article 13: it grants active standing to the Public Prosecutor and to the Institute for the Consumer where homogeneous individual, collective or diffuse interests are at issue.

10. The possibility of the right to injunction when the harmful practice takes the form of prohibited general contractual terms is based on the application of Decree-Law 446/85, of 25 October, subsequently amended. Active standing to apply for an injunction is granted to consumer protection associations which, under the terms of the respective legislation, are afforded the capacity of representation; to trade union or professional associations or economic interest associations when, constituted under the terms of the law, these act within the scope of their powers; and to the Public Prosecutor, officiously, following an indication from the Ombudsman or if it deems the claim of any interested party to be justified [Article 26 (1)]. In this case, this is a form of non-representative group litigation, since the aforementioned bodies act in their own name, although they are asserting the right of another which belongs, collectively, to the consumers who may be harmed by the clauses for which they are seeking prohibition [Article 26 (2)].

11. Definitive prohibition of the use of certain general contractual terms, or of others which are equivalent to them in substance, means that they may not be included in contracts that the defendant enters into or, if such is the case, may not be recommended [Article 32 (1)]. Definitive prohibition grants a party who entered into a contract with the defendant to whom the injunction applies, where this contract includes forbidden clauses, the possibility of invoking, for his own benefit, the incidental declaration of nullity contained in the injunction decision [Article 32 (2)]. In that situation, the individual contracts remain in force, with the applicable supplemental norms ruling the affected parts, with recourse, if necessary, to the rules of integration of legal transactions, except in the case of insurmountable indeterminateness with regard to essential aspects of the transaction or where there is an imbalance in the duties to perform which represents a serious affront to good faith, in which case invalidity of the contract is sanctioned [Articles 32 (3) and 9].

12. Also worthy of note is Article 45 of Law 11/87, of 7 April (Framework Law on the Environment), with the wording given to it by Law 13/2002, of 19 February. This law, in its provision for legal protection, reiterates the right of popular action, recognizing standing for any person, regardless of whether they have an interest in the claim, for associations and foundations that defend the interests in question and for local authorities, to propose and intervene, under the terms of the law of popular action, in

main proceedings and provisional remedies proceedings which seek to protect environmental values [Article 45 (2)]. It should be added that, notwithstanding the fact that the person whose rights are threatened or harmed has standing to act before the competent jurisdiction, requesting the cessation of the illegal conduct and indemnity for harm caused by it, it is also the responsibility of the Public Prosecutor to defend environmental values by the use of the mechanisms set down in the Framework Law on the Environment [Article 45 (1)]. These are, simultaneously, means of an administrative nature (administrative bans – Article 42 and administrative offences – Articles 47 and 48), of a civil nature (civil liability – Article 41), and of a criminal nature (crimes against the environment - Articles 46 and 48).

13. Finally, Law 107/2001, of 8 September, on the protection of the portuguese cultural heritage, recognizes the right of popular action according to Law 83/95, but it grants active standing also to the Public Prosecutor.

14. The Portuguese legal system has other forms of collective protection. These relate to supra-individual interests, for example, bankruptcy proceedings, proceedings to dispute collective dismissal or actions for the annulment of a social resolution. Given the wide diversity of themes covered by these measures, we will restrict mention of them to these brief comments.

For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules

1. The law of popular action includes administrative and civil popular action, and takes the forms set out in the Code of Procedure in the Administrative Courts and in the Code of Civil Procedure. The special cases or exceptions are listed, with a reminder that Article 265-A of the Code of Civil Procedure applies, which provides for the principle of appropriateness of form: “When the procedure for consideration provided for in the law is not appropriate to the specific characteristics of the case, the judge, having heard the parties, should, officiously, order the practice of those acts that best suit the purpose of the case, and also the necessary adaptations”.

2. Article 13 of the law of popular action (Law 83/95) establishes a special regime of dismissal of the complaint: the complaint should be dismissed if the judge considers that it is highly improbable that it will proceed, having heard the Public Prosecutor and made the preliminary inquiries that he considers justified or that the claimant or the Public Prosecutor request.

3. Article 14 clarifies that popular action corresponds to a form of representative litigation. The law establishes a special regime of representation: the claimant represents on his own initiative, and without the need for a mandate or express authorization, all the other holders of the rights or interests in question who have not exercised the right to exclude themselves as set out in Article 15 (opt-out regime), with the consequences of the law under appreciation.

4. Article 16 recognizes that the Public Prosecutor reviews legality and represents the State when it is a party in the case, and also minors and other incapacitated individuals, in the case of the latter whether they are claimants or defendants (1). If the law so provides, the Public Prosecutor may represent other public legal persons (2). The Public Prosecutor also has the power, with regard to reviewing legality, if it so wishes, to replace the claimant in the case of withdrawal from the suit, or transaction or behavior which is harmful to the interests in question (3) ¹⁸.

5. Articles 17 to 19 of Law 83/95 also differ from the general regime of civil procedure, respectively on the collection of evidence by the judge, the special regime of effectiveness of appeals and the effects of *res judicata*. Under Article 17, it is understood that within the scope of the fundamental issues defined by the parties, the judge is responsible on his own initiative for collecting evidence, not being bound by the will of the parties. Article 18 sets down that, regarding appeals, if a given appeal does not have suspensory effects, under general terms, the judge may confer this effect with the aim of avoiding damage which is impossible or difficult to repair. Lastly,

¹⁸ Limitation of the *res judicata* to the parties in the action, a sanction which, as we shall see, the law provides to the judge, allows the latter to accompany the Public Prosecutor in confirming adequacy of representation. It should, however, be noted that, because of the distinct nature of the two judicial entities, although either of them may react to a conflict of interests between the claimant in the popular action and the holders of interests represented, only the Public Prosecutor may sanction the procedural choices of the claimant or the lack of diligence employed in the action (for comments on this, see Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 241).

Article 19 provides, in relation to the effects of *res judicata*, that decisions pronounced in administrative actions or appeals or civil actions which have become *res judicata*, except where these result from insufficient evidence, or when the judge should decide alternatively, considering the actual motivations of the concrete case, have *erga omnes* (towards all) effect, but excluding the holders of rights or interests who exercise the right to exclude themselves from the representation (1) ^{19 20}.

6. Decisions which become *res judicata* are published at the expense of the losing party who will otherwise be in contempt of court, and make reference to the *res judicata*, in two newspapers which interested parties are presumed to read, to be selected by the judge in the case [Article 19(2)]. The judge may decide that publication be restricted to the essential aspects of the case when the length of the decision suggests against its publication in its entirety [also Article 19(2)].

7. In the law for consumer protection (Law 24/96), Article 11 provides for the possibility of appeal to the Supreme Court of Justice against an injunction decision, and also establishes that the injunction falls within the terms of the summary proceeding and is exempt from costs (1). According to paragraph 2 of the same Article, the decision will specify the extent of the abstention or correction, in particular with a concrete indication of its content and an indication of the type of situations to which it applies. Once it becomes *res judicata*, a sentence is published at the expense of the transgressor, under terms fixed by the judge, and is registered with a service designated by the legislation governing the law for consumer protection. According to Article 10 (2), the judge may add a compulsory pecuniary sanction to the injunction decision, as provided for in Article 829-A do Civil Code, notwithstanding the compensation due. Regarding injunction for general contractual terms, Article 11 (4) also refers to the application of the respective legal regime in force, specifically Articles 31 and 32 of the same.

8. In relation to the injunction provided for in the regime concerning general contractual terms, Article 27 confers standing to be sued on those who, having prepared general

¹⁹ This occurs, as previously mentioned, when the judge considers there has been inadequate representation of absent interests (*vide* Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 241).

²⁰ For comments on this, see José Lebre de Freitas, *A acção popular do direito português*, in “sub judice”, no. 24, January/March 2003, page 19 et seq.

contractual terms, propose contracts which include them or accept proposals in those terms and on those who recommend them to third parties (1). According to the same Article, the claim may be brought collectively against several entities which, by referring to the same contract clauses or others which are identical in substance, have prepared and use them or recommend them (2).

The injunction claim follows a more simple form (summary proceeding) and is exempt from costs [Article 29 (1)]. There is the possibility of appeal to the Appeals Court (2nd Instance) [Article 29 (2)].

The decision pronounced in the action in question prohibits the use or recommendation of the general contractual terms, specifying the scope of the prohibition, namely by concrete mention of the content and indication of the type of contracts to which the prohibition refers [Article 30 (1)]. At the request of the claimant, the defeated party may be required to publicize the prohibition in a manner and for a period determined by the court [Article 30 (2)]. The law also provides that, where there are sufficient grounds for fearing that, during the course of the claim, abusive general contractual terms will be included in individual contracts, the entities with standing to present the claim for injunction may request the temporary prohibition of the use or recommendation of those clauses [Article 31 (1)]. The terms that procedural law fixes for unspecified provisional remedies apply to the temporary prohibition [Article 29 (2)].

9. Once the definitive decision is pronounced, the law provides that the prohibited general contractual terms, or others which are equivalent to them in substance, may not be included or recommended when future contracts are entered into [Article 32 (1)]. Any violation of the prohibition leads to the application of Article 9 [Article 32 (3)] (Art. 32.3), which determines that individual contracts will remain, with the applicable supplemental rules applying to the affected parts (1). The contract is, however, invalid if, when the integration of the rules of legal transactions has been respected, there is insurmountable indeterminateness with regard to its essential aspects which cannot be overcome or where there is an imbalance in the benefits which seriously violates the principle of good faith (2). The decision contains an incidental declaration of nullity and this may be invoked at any time by a party to a contract which contains the prohibited general contractual terms, for his own benefit, in the relationship with the entity to which the injunction applies [Article 32 (2)].

10. If it is confirmed that the defendant infringed the duty to refrain from using or recommending general contractual terms which were the object of a definitive prohibition as a result of a *res judicata* decision, he is subject to a compulsory pecuniary sanction (*astreinte*) for each infraction [Article 33 (1)]. The sanction is applied by the court that decided the case in the 1st instance, at the request of whoever may avail himself of the pronounced decision, with an opportunity being provided to the transgressor to be previously heard [Article 33 (2)]. The law provides that the amount of the pecuniary sanction be divided equally between the claimant and the State [Article 33 (3)].

It is the duty of the courts, within a period of 30 days, to send a copy of the *res judicata* decisions which prohibit the use or recommendation of general contractual terms to the competent recording service (Articles 34 and 35).

11. Within the scope of the Framework Law on the Environment, collective litigation acquires special relevance with regard to requests for compensation for damage attributable to an agent, with subjective or objective responsibility, and regarding administrative bans, that is, requests for the immediate suspension of an activity which involves injury to the right to a healthy and ecologically balanced environment (Articles 40 to 42).

In representative litigation, who may come forward to represent groups of claimants, in what circumstances?

1. The Portuguese legal system shares many of the characteristics of the other legal systems in continental Europe which discourage the practice of collective protection, in particular the prohibition of remuneration for lawyers according to the system of *quota litis* (share of amount awarded) (Article 101 of the Bar Association Statute, approved by Law 15/2005, of 26 January) and the extensive limits on lawyers' advertising (Article 89, of the same Statute). It should be pointed out, however, that, regarding costs, the so-called American Rule operates in Portuguese law, according to which the party defeated in a case is not required to reimburse the expenses of the successful party. This rule constitutes a strong impetus to the initiation of popular actions.

2. As we know, the law recognizes the possibility for those who hold the right of popular action to present an administrative or civil action [Article 52 (3) of the Constitution and Article 2 of Law 83/95], as well as the right to denounce, complain or notify the Public Prosecutor of violation, with criminal relevance, of diffuse or collective interests and homogeneous individual interests or rights and to join the respective criminal proceedings [Article 25 of Law 83/95].

To recap, the law states that holders of the right of popular action are any citizens in the enjoyment of their civil and political rights and any associations and foundations which include amongst their aims the protection of the rights provided for in Law 83/95, whether or not they have a direct interest in the claim [Article 2 (1)]. Local authorities also have standing when the litigation relates to interests held by those people who are resident in the corresponding district [Article 2 (2)].

3. It is worth distinguishing the standing of natural persons from that of legal persons, given the decision of the legislator to provide additional provision regarding the latter (Article 3). It is a subject of debate whether the reference to any citizen includes foreigners and stateless persons. In the positive sense, one can argue that the constitutional right to access to the courts is not tied up with the nationality of the interested party being Portuguese ²¹.

4. With regard to legal persons, Article 3 sets down that the requirements for associations or foundations to have active standing are that they have legal personality, that there is a connection between the aims expressly set out in their statutes and the interests they are pursuing with the popular action, and that they do not exercise any kind of professional activity in competition with the activity of companies or independent professionals.

5. It may be questioned whether these requirements are sufficient. In particular, there is no mention of the personal or material base of the legal person (for example, the number of members or the endowment to the foundation) or its organization. The participation of other interested parties in the action, controlling the conduct of the claimant, association or foundation does, however, mean that it is possible to overcome any

²¹ Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 178.

inconveniences resulting from a more liberal option from the legislator in the granting of active standing in proceedings ²².

It is worth reflecting more deeply on the requirements that the law stipulates, seeking, namely, to understand them in the light of a systematic interpretation. At issue is the regime of legal persons, with regard to their constitution and activity. In Portuguese law, associations acquire legal personality at the moment they are constituted, on production of a public deed (Article 158 of the Civil Code). Conversely, the legal personality of foundations is dependent on an act of recognition by the State, which must assess the social interest of the aim proposed by the entity and whether the endowment to it is sufficient [Article 188 (1 and 2) of the Civil Code]. In either case, once the association or foundation has legal personality it may immediately bring a popular action, without the need to have been exercising the activity for a certain period of time. Although this is the rule, it should be mentioned that according to Article 32 of the Securities Code, associations for the protection of investors only have active standing to exercise the right of popular action when they have been actively engaged in their activity for more than one year.

It should also be clarified that the private entities, associations and foundations to which the law grants active standing are not required to have the status of public utility. This quality privileges the legal persons who are beneficiaries in their relationship with the State, namely, in terms of taxes, in virtue of the public impact of the aims they pursue. Accordingly, the social nature of the scope of the association or foundation proves to be sufficient for the law of popular action ²³.

6. The claimant in the popular action is granted standing as a representative, acting in the defense of all those interested parties who do not reject such representation. Naturally, the combination of representative standing with the opt-out system (Article 14 of Law 83/95) presupposes recognition of guarantees to the holders of the affected rights or interests. Herein lies the role of the Public Prosecutor. In particular, it has responsibility for protecting legality, and may replace the claimant in the case of withdrawal from the suit, or transaction or behavior which is harmful to the interests in question [Article 16 (3)].

²² Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 181.

²³ *Vide* Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 184.

The Portuguese legislator restricted standing of the Public Prosecutor to reviewing legality and to representing the State, when the latter is a party in the case, and representing absent parties, minors and other incapacitated persons, whether they be plaintiffs or defendants, and also other public legal persons, in the situations provided for in the law [Article 16 (3)].

Standing of the Public Prosecutor with regard to the law for consumer protection (Article 13) differs from its standing regarding the law on general contractual terms (Article 26).

7. Under Law 24/96, Article 17 sets out the notion and requirements demanded of consumers' associations for standing to be recognized to bring a popular action (Article 13.b): according to the provisions of that law, consumers' associations are non-profit-making associations with legal personality and the main aim of protecting the rights and interests of consumers in general or of their members as consumers [Article 13 (1)]. With regard to the scope of action, the law provides for three types of associations: consumers' associations may be national, regional or local, according to the extent of their intervention and, if they respectively bring together 3000, 500 or 100 members [Article 13 (2)]. Concerning their scope, the law divides the entities in question into general interest consumers' associations and specific interest consumers' associations. In either case, there is a need for the organs of the association to be freely elected by universal and secret ballot of all of the members. General interest associations are those whose aim, as stated in their statutes, is the protection of consumers' rights in general, and specific interest associations are any other associations of consumers of particular goods or services [Article 13 (3)]. Lastly, for the purposes of the provisions of the law for consumer protection, Article 17 (4) regards consumers' cooperatives as being equivalent to consumers' associations.

8. According to the regime of general contractual terms, it will be remembered that active standing to request an injunction to require abstention from the use or recommendation of abusive clauses is available to consumer protection associations with the capacity of representation, in accordance with Law 24/96 (Article 13), to legally established trade union or professional associations or economic interest associations, in the exercise of their powers, and to the Public Prosecutor, officiously,

following an indication from the Ombudsman or if it considers that the request of any interested party has sufficient grounds [Article 26 (1)].

9. Article 32 of the Securities Code establishes the requirements for standing to be conferred on associations (it should be recalled that Article 31 gives standing to non-institutional investors, to associations for the protection of investors and to foundations whose aim is the protection of investors in securities). Besides having the protection of the interests of investors in securities as the principal aim of their establishment, they must have at least 100 members, natural persons, who are not institutional investors, and must have been in operation for more than a year²⁴.

10. With regard to environmental protection, the role played by non-governmental environmental organizations is relevant (Law 35/98, of 18 July). Article 10 grants the organizations in question standing to bring legal actions necessary for the prevention, correction, suspension and cessation of acts or omissions of public or private bodies which lead to, or may lead to, environmental degradation (a). In the same way, standing is recognized for the legal exercise of civil liability actions based on the aforementioned acts and omissions (b). In addition, the organization may also join criminal proceedings for crimes against the environment and accompany proceedings for administrative offences (c).

For the above purpose, non-governmental environmental organizations are associations with legal personality constituted under the terms of the general law which do not seek to make profits, either for themselves or for their members, and seek exclusively to protect and enhance the environment and natural and built heritage, and to conserve nature [Article 2 (1)]. The law makes distinctions according to the extent of representation of the association, and includes organizations of national, regional or local scope. The distinguishing criteria are the geographical reach of the activities and the number of members. National organizations regularly and permanently conduct activities of national interest or throughout the national territory and have at least 2000 members. Regional organizations regularly and permanently conduct activities with supra-municipal interest or geographical reach and have at least 400 members. Local

²⁴ On this subject, *vide* Sofia Nascimento Rodrigues, *A Protecção dos Investidores em Valores Mobiliários*, Coimbra, 2001, page 57 et seq.

organizations regularly and permanently conduct activities with municipal or infra-municipal interest or geographical reach and have at least 100 members.

11. Common to all the aforementioned regimes is the issue of the interest in bringing a claim. It is important to distinguish between natural persons and legal persons. With regard to the former, there is a general consensus that standing for popular action should be restricted to holders of diffuse, collective or homogeneous individual interests which are threatened or harmed. We may list two arguments in favor of this: firstly, extension of the *res judicata* to other interested parties is only compatible with preventing the risk of granting standing to “(...) false altruists for their own benefit”²⁵. Otherwise, it would be possible, for example, for producers or distributors to pursue interests in opposition to those of the consumers²⁶. It should be added that while a popular action is pending, Article 15 of the applicable law establishes the need to summon holders of the diffuse, collective or homogeneous individual interest in question, providing them with the option to intervene or opt out of the action. The law is only compatible with the possibility of standing to bring an action coinciding with standing to intervene in that action²⁷.

12. Regarding legal persons, we may restate the provisions that dispense with the need for a personal interest in the claim. This is the case, as has been stated, in Article 2 (2) of Law 83/95. Both Article 10 of Law 35/98 and Article 13.b of Law 24/96 adopt the same solution, by use of the same concept. It is, however, necessary to understand the meaning of exemption from the need for personal interest in the claim. It is important to note that this exemption means that, when assessing standing, there is no need to confirm the association or foundation’s own interests, regarding patrimonial or non-patrimonial damage to the entity or interests which are identical to those of its members. All that is essential is that the aims, as set out in its statutes, of the claimant association or foundation coincide with the diffuse, collective or homogeneous individual right which is at risk or harmed.

²⁵ Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 216.

²⁶ Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 216.

²⁷ Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 216.

In non-representative group litigation, who may initiate group litigation and in what circumstances ?

See the general description on page 5, paragraph 4.

How many lawsuits have proceeded in each litigation form over the past 5 years ?

1. Information regarding this question is not available. It has only been possible to obtain information regarding the exercise of popular action of an administrative nature between 1991 and 2003 (cases concluded in the administrative district courts) ²⁸. The number of cases brought by a popular action claimant was at its highest in 1991 (73) and lowest in 2002 (9). These represent a particularly small percentage of the total number of administrative cases considered (between 0.2 % and 4%).

2. On consultation of the case reports of the Supreme Court of Justice (the exercise of popular action of a civil nature), it seems fair to conclude that the law of popular action has been applied very scarcely, whether due to the fact that the intervention of civil society is still in its early stages, or due to the prohibition on *quota litis* agreements or to the doubts that the application of Law 83/95 has raised.

In representative litigation, must possible class members be informed of the initiation of the litigation and, if so, how ?

1. Once the writ for popular action has been received, the judge summons the holders of the interest in question, the purpose being for them to state whether they intend to intervene in the case in their own name or whether they accept representation by the claimant, with no express declaration being understood as acceptance of the representation [Article 15 (1) of Law 83/95]. In that case, any decisions pronounced are applicable to them. Holders may refuse the representation up until the end of the production of evidence or an equivalent phase, by express declaration in the case records [Article 15 (4)].

²⁸ This information was supplied by the Ministry of Justice's Office of Planning and Legislative Policy.

2. The summons is by means of an advertisement publicized in any form of the media or press, depending on whether general or geographically specific interests are at issue [Article 15 (2)]. The law does not require personal identification of those at whom the advertisement is directed, it being sufficient for the summons to refer to them as holders of the interests at stake, mentioning, also, the action in question, the identity of the claimant, or at least of the first claimant where there are several, the identity of the defendant or defendants, and sufficient reference to the claim and the reason for it.

Where it is not possible to specify the individual holders, the summons uses the circumstance or characteristic that is common to all of them, such as the geographical area in which they reside or the group or community that they make up [Article 15 (3)].

3. We recall that according to the provision of Article 19 of Law 83/95, judgments, published at the expense of the defeated party, have general effect, except in the case of holders of interests or rights who have opted out of representation by the plaintiff. Exceptions to the *erga omnes* effect are limited to situations where the case is dismissed due to insufficient evidence or when the judge rules otherwise based on reasons specific to the case in question. Only practice will allow us to judge how appropriate that option was, but it is a recognized fact, even in the United States, that neither opting out nor *erga omnes* effect for unfavorable decisions are closed questions.

4. The exercise of popular standing leads to conflicts of an endogenous nature, between the holders of the interest at issue, and conflicts of an exogenous nature, in the relationship with the legal representative²⁹. Of course, there are means which prevent or correct these undesirable effects. There is the possibility of endogenous conflict in actions with a compensatory purpose with regard to future injured parties. It is argued that adequacy of representation provides grounds for separating agents who resort to popular action to protect the interests of currently aggrieved parties from agents who seek compensation for future aggrieved parties, or, if it is accepted that there is only one agent, that there should be a check on the handling of the popular action with regard to future aggrieved parties. Here the Public Prosecutor has a role to play [Article 16 (3) of Law 83/95]. Where there is collusion between the claimant and the defendant, the court may declare the proceedings to be terminated (Article 665 of the Code of Civil

²⁹ Refer to the observations, in summary form, in Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 231 et seq.

Procedure) and, where the collusion in the proceedings has not been made known in a timely fashion, the holders of the harmed interests may, even after the decision has become *res judicata*, object by means of an extraordinary appeal [Article 778 (1) of the Code of Civil Procedure].

In terms of exogenous conflicts, it should be highlighted that Portuguese law is compatible with entrepreneurial litigation, notwithstanding the prohibition on *quota litis*: “The representative who offers to ensure the funds necessary for the instigation of a popular action and for the period during which it remains pending “creates a market”, which makes him the most interested party in seeing the action proceed or in agreeing a settlement with the defendant, whatever the means by which his remuneration is calculated” ³⁰. Once again, the role of the Public Prosecutor is essential in the prevention or sanction of fraudulent conduct. In the same way, the possibility of the court restricting the *res judicata* [Article 19 (1)] is a useful instrument in repressing abusive use of popular action, for personal gain.

In non-representative group litigation, must the named parties be informed that the litigation is proceeding in group form ?

1. The decision to proceed in a group form litigation is dependent on a previous hearing of the named parties [Article 48 (1 and 2) of the Code of Procedure in the Administrative Courts).

2. It should be mentioned that, according to Article 48 (5) of the Code of Procedure in the Administrative Courts, when a decision is pronounced in the selected case, the parties in the suspended actions are notified, and the claimant in these cases may opt, within a period of 30 days to “a) withdraw from his own case; b) request that the court extend the effects of the decision pronounced to his own case (...); c) request continuation of his own case; d) appeal against the decision, if this has been pronounced in the court of first instance”.

³⁰ Vide Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 247.

In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues) ?

1. The regime of popular action does not recognize a previous certification. The action is not, therefore, submitted to the test by which Rule 23 (a) conditions class actions in American law. It will be recalled that, in accordance with this provision, incompatibility between the number of interested parties and the practicability of the classical instruments of joinder (numerosity), the existence of questions of law and/or of fact common to the members of the class (commonality), community of claims (typicality) and the guarantee that the representative will act in a manner appropriate to the interests of the class (adequacy of representation) guard against the inefficient and/or unjust application of the mechanism ³¹. The omission in Portuguese law is particularly relevant with regard to the last requirement, since with the possibility of an opt-out system and the granting of standing for the exercise of popular action to any citizen in the enjoyment of his civil and political rights, it is necessary that the system provides a guarantee to the interest holder that the representation by the claimant correctly and adequately protects the rights or interests in question ³².

2. It should be remembered, however, that the legislator provided for a special regime for the dismissal of the case when there is no *fumus boni iuris* (reasonable grounds) (Article 13 of Law 83/95).

3. The recognition of insufficiencies in classic procedural law explains, on the other hand, the fact that the law of popular action has received some solutions within the family of common law. With regard to evidence, in the popular action and concerning

³¹ Supplementary requirements are added to these. We may recall the provisions of Rule 23 (b) 3, extending the possibility of recourse to class actions for mass losses, that is, homogeneous individual interests or rights. The judge must examine whether “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy”.

³² See, for example, António Payan Martins, *Class Actions em Portugal*, cit., page 112. Miguel Teixeira de Sousa has written on the constitutional provision of the right of popular action: “(...) when this standing is given to any citizen or to certain representative associations, this requires jurisdictional control on the legitimacy of the individual or the organization, and indeed on the adequacy of the procedural means used by them and the safeguarding of the position of the interested parties who are not present in the court” (*A Protecção Jurisdicional dos Interesses Difusos: Alguns Aspectos Processuais*, cit., page 236).

the fundamental issues defined by the parties, the judge is responsible on his own initiative for collecting evidence, not being bound by the will of the parties (Article 17).

In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision ?

1. Considering the provisions of Article 300 (3) of the Code of Civil Procedure, any settlement agreed between the parties in the popular action (or concluded on behalf of them by the respective representatives) is checked by the court before the respective approval. Although the law limits this intervention to the checking of the form of the settlement (to certify whether the settlement is valid, regarding the purpose and the characteristics of the persons included within it), it is understood that this intervention includes an assessment of the adequacy of the representation exercised by the claimant in the popular action ³³. Accordingly, the court may refuse to approve the settlement if the representation has not been exercised with the aim of satisfying the interests in question.

2. Additionally, if the Public Prosecutor considers that the settlement does not safeguard the interests being represented, it may replace the claimant and continue the popular action [Article 16 (3) of Law 83/95].

What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants?

1. If we consider that the previous description of the special means is sufficient to outline the objectives of the actions in question, it now seems relevant to provide details of the aims of popular action as a result both of the Constitution and of the respective law. It will be recalled that Article 12 of Law 83/95 differentiates between administrative popular action and civil popular action.

³³ Vide Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 242.

2. Similarly to the American system of class actions, where a compensatory function is associated with the purpose of safeguarding the supra-individual interest, popular action seeks to protect the interest and repress attacks on it. Hence, preventive and repressive aims work together, making Portuguese law a minority example in the family of Roman-Germanic law. Miguel Teixeira de Sousa points out: “(...) it is very significant that, confirming the reservations of some European legal theory on the introduction into European systems of something similar to class actions, Directive 98/27/EC, regarding the protection of the “collective interests” of consumers, restricts itself to injunctions and expressly excludes from its scope the “interests of individuals who have been harmed by an infringement” (...)”³⁴.

3. The system of administrative popular action depends, strictly, on the applicable administrative laws, within the many regimes provided for administrative action in general. In that sense, the following, among others, are all the subject of popular action: action for declaring void or for annulment of administrative acts, action for practice of legally due act, action for declaring void or for annulment of administrative rules or regulations, declaration of the illegality of an administrative omission, actions for the Administration to adopt or refrain from behavior or to practice conduct necessary to re-establish violated rights or interests, and the civil liability of the State or of other public legal persons, as well as those who hold office in its organs, its staff or agents, including appeals. The best interpretation seems to be that the law allows recourse to provisional remedies that prove to be adequate in ensuring the usefulness of the decision pronounced in the administrative popular action³⁵.

4. Parallel to this, civil popular action takes “(...) any of the forms provided for in the Code of Civil Procedure” [Article 12 (2) of Law 83/95]. The action is, therefore, declaratory, condemnatory or constitutive [Article 4 (2) of the Code of Civil Procedure] depending on the interest which it is intended to protect and the desired outcome. The scope of popular action covers the request for provisional remedies³⁶.

³⁴ *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 117.

³⁵ Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 135.

³⁶ Article 26-A of the Code of Civil Procedure provides grounds for such a conclusion: “Any citizen in the enjoyment of his civil and political rights, any associations or foundations which defend the interests in question, local authorities and the Public Prosecutor have standing to propose and intervene in actions and provisional remedies proceedings aimed, namely, at protecting public health, the environment,

5. Repair of mass injury received particular attention from the legislator in Articles 22 et seq. of Law 83/95. Article 22, which sets down the subjective liability of the agent, distinguishes between compensation for injury to identified holders of interests, calculated under the general terms of civil liability (3) and the global fixing of compensation for violation of the interests of unidentified holders (2). Interpretation of the rules appears to give rise to different readings. Summarizing the trends in question, what is at issue is the greater or lesser extent of collective protection of homogeneous individual interests. There are those who restrict the global compensation to violation of collective or diffuse interests ³⁷ or, at least, to situations where the amount due to each of the injured parties is of a small amount, not justifying the costs inherent in calculating the individual harm ³⁸. That is the reason why, together with the need to prevent repetition of the illegal behavior regarding repair of the individual injury, it is legitimate to index the compensation to the profits of the agent. In our opinion, as, indeed, has already been written on another occasion, the mention that the law makes of identified holders of rights is understood as a reference to those who, in fact, intervene in the action or reject representation by the claimant ³⁹. This, therefore, distances the fear of harm to injured parties based on an “(...) arbitrary demarcation of the object of the popular action brought by the popular claimant” ⁴⁰. Between the conditioning of collective appreciation of civil liability for violation of homogeneous individual rights or interests by the prevalence of common issues over individual issues, which we consider appropriate, and its restriction to harm of low value, wide scope should be recognized for standing for global compensation. In support of this conclusion, we may remember the fact that Article 31 (2) of the Securities Code provides that a decision in favor of the plaintiffs in a popular action must indicate the entity charged with receiving and managing the damages due to persons not individually identified. The following

quality of life, cultural heritage and the public domain, and also the protection for consumption of goods and services, under the terms provided for in the law” (understood, namely, as the law of popular action).

³⁷ One can read in the Judgment of the Supreme Court of Justice of 7 October 2003: “Although the interpretation of this legal rule [Article 22 (3) of Law 83/95] gives rise to many doubts, it seems clear to us that the compensation in question only takes place when the interests violated are actual diffuse interests and not, as in the present case, homogeneous individual interests (interests of entitled persons who, if unidentified, may perfectly be identified: the subscribers to a fixed telephone service who, during the period considered, had paid the activation charge)” (in <http://www.dgsi.pt/jstj.nsf>).

³⁸ Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 170 et seq.

³⁹ Henrique Sousa Antunes, *Apontamento sobre a Responsabilidade Civil do Fabricante de Tabaco*, in “Direito e Justiça”, vol. XVII, 2003, page 202 et seq.

⁴⁰ Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 174.

may be nominated: a guarantee fund, an association for the protection of investors or one or several holders of rights to damages who have been identified in the action. The rule is linked, inextricably, to homogeneous individual interests ⁴¹.

6. In the law of popular action, the legislator did not establish any system for sharing the global compensation between injured parties. Regarding this issue, the following has been written: “(...) it seems to us that *de iure condendo* (in law as it should be) the payment should be made by resorting exclusively to arbitration, setting up a highly specialized court or arbitration committee alongside the court in question which processes the payment of all the indemnities. This process would thus be relatively simple, non-litigious, informal, and with low costs and would increase the number of injured parties that would come to court to receive compensation” ⁴². Once the compensation had been paid, there would be significant advantage in the collective execution of the patrimony of the debtor ⁴³.

Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves ?

1. The success of popular action in Portugal depends on the level of initiative of persons, both natural and legal, who have standing. This success happened in Brazil due to the dedicated activity of the Public Prosecutor. The Portuguese legislator, despite having restricted the intervention of the Public Prosecutor, has provided incentives for the participation of interested parties, by establishing a special system of prepayment and costs. According to Article 20, prepayment of costs is not required (paragraph 1), the plaintiff, in the event of the claim only partially proceeding, is exempt from the payment of costs (paragraph 2), and in the case of total failure of the claim, he is only responsible for an amount to be determined by the judge, somewhere between 10% and 50% of the costs that would normally be due, depending on his financial situation and the substantive or procedural reason for the dismissal of the action (paragraph 3).

⁴¹ Vide J. Oliveira Ascensão, *A Acção Popular e a Protecção do Investidor*, in “Cadernos do Mercado de Valores Mobiliários”, no. 11, August 2001, page 65: “The holders of rights who are not individually identified are the parties who are individually harmed that did not take part in the action. This is confirmed by Paragraph 3: damages which are not paid as a result of the statute of limitations or the impossibility of identifying the respective holders revert to the guarantee fund. Only individual parties may be unable to be identified”.

⁴² António Payan Martins, *Class Actions em Portugal*, cit., page 122.

⁴³ In this sense, see António Payan Martins, *Class Actions em Portugal*, cit., page 123.

2. Also, the right to compensation lapses three years from the date of the sentence which recognizes it – Article 22 (4). In this case, the corresponding amounts, which are handed over to the Ministry of Justice, go towards the payment of successful parties' attorney fees (Article 21) and for support in access to law and to the courts for holders of the right to popular action who justifiably seek it [Article 22 (5)]. Article 31 (3) of the Securities Code presents a different solution when payment of damages cannot be made due to the statute of limitations or to the impossibility of identifying the respective holders; the amounts in question revert to the guarantee fund of the injuring activity.

3. Article 18 of Law 24/96 grants relevant support to the consumers' associations to which it affords legal standing for the exercise of popular action. This includes, among others, the right to exemption from payment of costs, prepayments and stamp duty, under the terms of Law 83/95, the right to receive support from the State, via the central, regional and local administration, namely in the exercise of its activity within the area of training, provision of information and representation of consumers, and the right to tax benefits identical to those which the law provides either now or in the future to private social welfare institutions [Article 18 (1.n, o and p)].

Costs and benefits.

According to Article 21 of Law 83/95, the judge in the case will decide on the legal costs, depending on the complexity and the amount in question. No data is available to compare the costs of group litigation with the costs of ordinary civil litigation or, in addition, assess the relative efficiency of the lawyers' performance.

Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation ? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation ?

Information is not available on this question. Once again, it has only been possible to obtain information regarding the exercise of popular action of an administrative nature between 1991 and 2003 (cases concluded in the administrative district courts). The

average duration of popular action proceedings is between 11 and 14 months, this amount being slightly lower (between one and two months) than the average duration of proceedings instigated by the holder of the legally protected interest.

What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences ?

1. The adoption of a Consumers' Code is envisaged in the near future, which, in particular, will simplify the system of relevant provisions regarding collective protection of the consumer. Among others, the statutes on general contractual terms (Decree-Law 446/85) and consumer protection (Law 24/96) will be revoked. The Draft Bill for the Code, which has been made public, provides, in Article 550, that popular action will be exercised under the terms of Law 83/95, with the specifics of the articles subsequent to it.

2. Article 551 (1) sets down that standing for the exercise of popular action, aimed at protecting homogeneous individual or diffuse rights and interests, belongs to any individual who demonstrates an objective and serious interest in bringing the action and to associations and foundations which fulfill the requirements of Article 552. It should be pointed out that the standing of the aforementioned legal persons is dependent on registration with the Institute for the Consumer (Articles 552 and 553). It is a requirement of foundations that their aim, as set out in their statutes, consists of the defense of the interests of those persons that the Consumers' Code seeks to protect. With regard to the standing of associations, the law adds the following requirements: that at least 100 natural persons are included among their effective members; that they have been exercising their activity continuously for over a year.

3. The provisions of Articles 554 and 555 are especially relevant, since they fill a gap in the law of popular action. Article 554 establishes, with regard to reparative protection, that, once the substance of the request for compensation has been confirmed, the decision designates the Institute for the Consumer as the competent body to receive and manage the amount of the order and fix the criteria to be observed in its distribution to the holders who are not identified by name in the proceedings (1). The court is able to apply a compulsory pecuniary sanction which is sufficient to encourage voluntary

compliance with the obligations placed on the defendant, under the terms of Article 829-A of the Civil Code.

4. According to Article 555, the procedure for sharing the amount fixed as global compensation is conducted officiously by the Institute for the Consumer, and should be begun within 30 days of the decision becoming *res judicata* and concluded within 180 days (1 and 2). The procedure includes a phase, with a minimum duration of 30 days, aimed at allowing the intervention of those with interests in the sharing of the globally fixed amount (3). The start and finish of the period for the intervention of interested parties, in addition to the purpose for which it is intended, a warning that failure by interested parties to declare their intentions within the period established in paragraph 3 will lead to exclusion of their right to participate in the product of the compensation granted to the holders of interests who are not identified by name in the decision (5), and other information considered to be opportune is publicized in an advertisement made public by means of any form of the media or press, or by any other form deemed to be more effective (4). The division of the amount set as global compensation may be contested, by means of a claim made to the judge in the case, processed as part of it, with the interested parties who are contesting indicating the amount they believe they are entitled to and providing corresponding proof (6). In that case, the judge designates a day on which a conference with the interested parties can be held, with a view to dividing the amount of the global compensation fairly (7).

6. The right to the compensation calculated via the application of the procedures set down in Article 555 lapses after 3 years counting from the date the decision pronounced in the popular action becomes *res judicata* [Article 556 (1)]. Any amounts corresponding to quantities that have not been distributed revert to the Institute for the Consumer [Article 556 (2)].

7. In Article 558 et seq., the Draft Bill of the Consumers' Code regulates injunctions. With the presentation of an extensive list in annex, although merely by way of example, of behavior which provides grounds for use of the injunction, Article 558 establishes that, following a decision of the judge, prohibition, correction or cessation of behavior capable of harming the rights recognized by the Code may be determined. Active standing is granted to consumers' associations, to the Public Prosecutor, to any

consumer in the exercise of his right of popular action, and to any professional or organization representing his interests when the action seeks to impede any of the disloyal commercial practices set out in Article 129 et seq. [Article 559 (1)]. The subsequent paragraphs of the rule give effect to the standing of associations and of the Public Prosecutor.

8. The promotion of injunctions finds support, amongst other regimes, in the guarantee of appeal to the Appeals Court [Article 565 (1)] and in the exemption from costs for the consumers' associations [Article 565 (2)]. Regarding the scope of the *res judicata*, Article 567 states that, once the action is in progress, the illegality of the behavior may be invoked against the same transgressor in a new action aimed at impeding behavior which is similar to that which was the object of the previous action, although there is a different claimant (1). If the action proves to be unfounded, the defendant may invoke the *res judicata* before third parties, except when the decision was due to a lack of proof (2). Finally, Article 569 provides that the court fix, either officiously or at the request of the claimant, the compulsory pecuniary sanction sufficient to guarantee compliance with the prohibition imposed, applying Article 829-A of the Civil Code with the necessary adaptations.

Overall, how would you evaluate the mechanism(s) success in achieving major changes in behavior, activities or policy, relative to the costs incurred by public and private actors ?

In the absence of statistical data, it can be pointed out that, from a pragmatic point of view, there is ample and significant legal theory which accepts that the use of the collective action motivated by the impulse of one representative for all the interested parties is a more advantageous solution than opting for the more traditional means of combining the interests of various parties in a single action. Satisfaction of the individual claims and administration of justice are dampened when it proves difficult to coordinate the procedural strategy for those interested in the legal proceedings and the purposes that they pursue with them. It may be added that individual participation, if possible, is inversely proportional to the prominence of the collective dimension of the litigation and to the low economic impact of the continuance of the action in the sphere of the injured party, justifying recognition of standing for bodies representing the

aggrieved interest. That orientation, which safeguards collective protection in the light of the insufficiency of the classic procedural instruments, also produces some reflex benefits, seen, essentially, in the increased economic capacity and in the superior technical preparation of the associations or foundations in the exercise of the right to appeal to the courts, balancing the positions of the parties in conflict ⁴⁴.

⁴⁴ For extended writing on this theme, see Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, cit., page 85 et seq.