

**Universidade Católica Portuguesa**  
CATÓLICA-LISBON, School of Business and Economics  
&  
Faculdade de Direito, Escola de Lisboa

# Class Actions in Portugal

## Master Dissertation

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Maria Raimundo  
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### Abstract

Even eighteen years after the implementation of Law 83/95, of August 31, about the rights of participation in class action litigation in Portugal, there is no sufficient evidence of its applicability. Contrarily to what is observed in other countries as the United States and Brazil it seems that in Portugal, there is no interest of the several parties that would be involved in a class action litigation to obtain information or inform other parties relatively to the main procedures on it and to induce the litigation.

The aim of this dissertation is to understand what may be influencing class action litigation in Portugal. One begins with the economic rationale for class action litigation. One introduces its main benefits and costs, when compared to other litigation mechanisms and the main procedural mechanisms generally influencing the litigation. Then, one examines the Portuguese case, having into account not only the influence of legislation but also of other extra-legal factors which may be influencing Portuguese society and the number of class action litigation cases in Portuguese courts. This last part is supported by several interviews to the main parties who would be involved in class action litigation in the country. To do this analysis one focus on class action litigations related with consumer protection.



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## Supervisors:

Prf. Nuno Garoupa, University of Illinois College of Law, USA

Prf. Teresa Lloyd-Braga, CATÓLICA-LISBON School of Business and Economics, Portugal





*“Lord, grant me the strength to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference.”*

**St. Francis of Assisi**

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## 1. Introduction

Law and Economics in Europe, contrarily to what happens in the United States (US), has been applied separately to analyse cases in which the complementarity between both approaches would benefit the society. Despite this evidence, economic analysis of law is nowadays a more frequent approach. A good example is the study of class actions, a legal procedure with an economic rationale.

Several definitions of class action litigation are provided in literature<sup>1</sup>. In general, class action litigation is a mechanism of collective litigation in which it is possible to consolidate individual claims against the same defendant and with the same motifs in a single litigation. Class action procedures are usually applied to cases in which a group of persons, for example a group of consumers or business entities who suffered a common injury with equal characteristics and from the same origin, want to be compensated from the damage caused to them. It is a method that allows a single representative to protect the rights of a class avoiding the costs of a multiple number of single litigations in courts and enjoying from benefits as economies of scale. This representative may be a named member of the class, a member of an organization or a private attorney, depending on the legislation of the country.

This litigation procedure was approached for the first time in 1938 in the US. However, only in 1966, with the creation of Rule 23 and in 2005 with the Class Action Fairness Act, class action litigation began to be very common in the US. In Europe, the general process of adaptation to class actions was slower. In 1961 with the academic contribution of Calabresi (1961) it began to be versed that it would be more efficient to concentrate losses than spreading it, contrarily to what was previously done. Few years after, another author, Olson (1965), emphasized the importance of coordination and group constitution in litigation cases. In the European Union (EU), the possibility of collective litigation was endorsed in 1984 by the European Commission (EC). In Portugal, legislation related with class action litigation was implemented for the first time in 1995. However, contrarily to what would be expected, it has not been applied in reality.

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<sup>1</sup> In the paper *"Incentive Structures for Class Action Lawyers"*, p.102, Alon Klement and Zvika Neeman defined class actions as a *"private lawsuit in which the represented members of the plaintiff class are absent throughout the litigation, yet are bound by its outcome."* Also, in the Paper *"Class Actions in Portugal"*, p.2, Mariana Gouveia and Nuno Garoupa defined class actions as *"an action interposed by a private party (natural or legal person) to determine rights and remedies where the private party is not the exclusive possessor of the right in question..."*. Other definitions are provided in *"Law and Economics of Class Actions in Europe – Lessons from America"*, edited by Jürgen Backhaus, Alberto Cassone and Giovanni Ramello.

As one will discuss in section two and three there are several elements enumerated by authors affecting class action litigation. Class actions have been pointed as a solution to economic problems related with the ineffectiveness of regulation and individual litigation. Different economic theories have been developed to explain the rationale for class actions. Alberto Cassone & Giovanni Ramello (2012)<sup>2</sup> were two of the authors studying the cases in which class action litigation would be more efficient than other litigation mechanisms. Their paper begins from the point in which class action litigation promotes social welfare. This notion of social welfare is different from the frequently applied in economics. In this specific case the society is considered as the group of all individuals encompassed in the litigation. Another author, Ulen (2012)<sup>3</sup>, gave a huge contribution to the analysis of economic rationale for class action litigation. In his paper, the author provides the main costs and benefits of class action litigation comparing it with the case in which individual litigation applies. On the development of this dissertation one will follow the analysis taken by Ulen (2012). Also, one includes other factors explaining the social benefits obtained from consolidation of claims proposed by other authors. Bruno Deffains & Eric Langlais (2012)<sup>4</sup>, for example, evidenced that the sequential entry of all plaintiffs injured in an individual litigation by the same defendant creates information externalities. In the second part of the model the authors concluded considering class action procedures as a proper mechanism to internalize the externality. Regarding class action costs Ulen (2012) provides in his paper the four main costs created by class action procedures.

Relatively to the main elements influencing the existence of class action litigation there are a lot of disagreements in the literature reviewed. Some authors as Ulen (2012) consider that in general the remuneration of attorneys influences the number of class actions in court. However, an article wrote by Alon Klement & Zvika Neeman (2004)<sup>5</sup> demonstrates that, if the court can observe the attorneys' effort and there is a hourly contingent fee multiplied by a multiplier which decreases with the number of plaintiffs, the optimal payoff to the class may be realized using the "lodestar method", without abuses by attorneys<sup>6</sup>. In cases in which the court cannot observe the effort did by the attorneys the

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<sup>2</sup> See, Alberto Cassone & Giovanni B. Ramello in *"Private, Club and Public Goods: The Economic Boundaries of Class Action Litigation"* in *"The Law and Economics of Class Actions in Europe – Lessons from America"*, pp.101-126.

<sup>3</sup> See, Thomas S. Ulen in *"The Economics of Class Action Litigation"* in *"The Law and Economics of Class Actions in Europe – Lessons from America"*, pp.75-98.

<sup>4</sup> See, Bruno Deffains & Eric Langlais in *"A Case for Information sharing in Class Action Suits"* in *"The Law and Economics of Class Actions in Europe – Lessons from America"*, pp.146-177.

<sup>5</sup> See, Alon Klement & Zvika Neeman in *"Incentive Structure for Class Action Lawyers"* in *The Journal of Law, Economics & Organization*, Vol.20, No.102-124.

<sup>6</sup> In the "lodestar method" of attorneys' remuneration, the remuneration is computed by the multiplication of a value related with the attorneys' salary by hour with the number of hours spent in

optimal payoff may be achieved by a menu of fee schedules offered to them. Other elements influencing class action litigation are pointed by Bruno Deffains & Eric Langlais (2012) and Francesco Parisi & Marta Silvia Cenini (2012)<sup>7</sup>. The first authors referred the use of contingency fees<sup>8</sup> and the last two compared the use of punitive damages<sup>9</sup> and class action litigation, emphasizing its main costs.

Despite all the academics' studies developed in favor of class action litigation, the number of class actions in the EU courts is still reduced. In order to do some recommendations regarding collective litigation, the EC developed the Green Paper of 2005, the White and Green Papers of 2008 and some consultations. While the aforementioned literature is academic in nature and look at incentives, the Green and White Papers and the consultations are policy oriented and look at more practical aspects.

The 2005 Green Paper was created with the aim of promote and enforce antitrust rules in the EU. Its main conclusion is that class actions are the solution to situations of sub-optimal incentives, incentivizing cases of very small individual injuries which affected a group of persons. In the 2008 White Paper, that followed the above Green Paper, the EC had the objective of assure that, "*all victims of infringements of EC competition law have access to effective redress mechanisms, so that, they can be fully compensated for the harm they suffered.*" (EC 2008, pp.2-3). The first purpose of the Paper was to improve legal conditions creating new compensatory mechanisms. The proposed complementary mechanisms were the combination of representative actions with opt-in collective actions<sup>10</sup>.

The more recent 2008 Green Paper, on consumer collective redress, introduced for the first time the care of EC with cross-border litigation focusing also in the national context. The harmonization of legislation between Member States and the possibility of claim in EU

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the cases. The abuses referred here are related with the possibility that the attorneys have of lying in the number of hour they spent in a case increasing their total remuneration.

<sup>7</sup> See, Francesco Parisi & Marta Silvia Cenini in "*Punitive Damages and Class Actions*" in "*The Law and Economics of Class Actions in Europe – Lessons from America*", pp.131-146.

<sup>8</sup> A contingency fee is a fee for services provided by an entity that is paid only in case of a favorable result. Applied to law, a contingency fee is a fee paid to an attorney, for his services, if the case is winning. It is usually computed as a percentage of the recovery obtained by the plaintiff. (Legal Dictionary)

<sup>9</sup> A punitive damage is a monetary compensation beyond the necessary to compensate the plaintiffs for the harm caused to them, with the aim of punishing the wrongdoer. (Legal Dictionary)

<sup>10</sup> Opt-in collective actions are actions in which to participate in the litigation the plaintiffs have to include themselves in it. By opposite if a collective litigation is opt-out all the plaintiffs who suffered the injury are encompassed in the litigation and if they want to exclude themselves from it they have to opt-out. If the person opts out, he or she will not be bound by any judgment or settlement of the class action. (Class Action Law & Legal Definition)

courts about injuries suffered in one of the EU countries, even if not the home country of the plaintiff, are one of the novelties of the Paper. In it, the EC identifies the main elements to the effectiveness and efficiency of collective redress mechanisms and the main elements that hinder it. Regarding the last, the EC presents four ideas to solve it. The first relies on the use of the already available legislation, both national and EU laws. The second involves cooperation between the Member States (MS) and is related with the opening of collective redress mechanism, across MS, through recommendations and directives. The third is a mix of policy tools addressing the impeditive elements for the formation of collective redress. These policies may also include improvement on the extension of the scope of the Consumers Protection Cooperation Regulation (CPCR) and Alternative Dispute Resolution (ADR) mechanisms. To finalize, the last option is related with decisions that encompass financing of the procedures, prevention of unmeritorious claims, the distribution of compensation and the question of whether adopt an opt-in or opt-out mechanism.

In the 2011 EC consultation<sup>11</sup> the Commission highlights the role of national authorities in the enforcement of EU law. This consultation had the aim of identifying common legal principles on collective redress. In this document the EC considers individual lawsuits as a non-effective mean to stop illegal practices or to obtain compensation from injuries due to the fact that sometimes the individual loss value is higher than the costs of litigation. Another propose of the consultation is to allow the possibility to resolve collective disputes out of the court.

However, in order to avoid economic incentives to bring abusive claims, EC also suggested the creation of EU safeguards. In the end of the consultation the EC enumerates the core principles, identified to guide EU initiatives, for collective redress: the need for effectiveness and efficiency, the importance of information, the role of representative bodies, the existence of ADR mechanisms, strong safeguards to avoid abusive litigation, appropriate financial mechanisms and effective enforcement across the EU.

Despite all the recommendations, there are still some countries in EU in which the number of class actions in court is very low. In Portugal, it seems that before legislation uniquely regarding class actions, the number of cases related with collective redress in Portuguese courts was higher than after<sup>12</sup>. Observing the American case it is evident that class actions

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<sup>11</sup> Consultation named *Towards a Coherent European Approach to Collective Redress*.

<sup>12</sup> See, *“Class Actions, Group Litigation & Other Forms of Collective litigation – Portuguese Report”*, by Henrique Antunes, p.20, in which between 1991 and 2003, regarding class actions of administrative nature, the highest number of class actions in court was of 73 cases in 1991 and the lowest of 9 cases in 2002. The values correspond to 0,2% to 4% of the total administrative cases solved in court.

are one of the most useful tools in solving cases regarding collective litigation and a success in terms of number of cases solved<sup>13</sup>.

Regarding the Portuguese case there are not several papers about class actions in the country and the theme seems to be little discussed and unknown to the majority of the Portuguese people. Authors as Henrique Antunes (2007) and Mariana Gouveia & Nuno Garoupa (2012)<sup>14</sup> provided a revision of the main Portuguese Law regarding class action litigation. The authors analyzed Law 83/95, of August 31, complemented by legislation included on the Constitution of the Portuguese Republic and other additional legislations, specific for the different interests encompassed in the Law for class actions, as for example, consumer protection and environment defense. The last two authors also presented the impact of class action litigation procedures influencing class action litigation in the country. The main elements enumerated were: the adequacy of representation, the application of compensatory damages, the statutory time previewed and the enforcement of judicial decisions. Both authors concluded that the fact that one does not observe a lot of cases of class actions in the Portuguese courts means the failure of the legal framework or the use of improper procedural rules. Another author, Leonardo Silva Nunes (2010)<sup>15</sup> developed a comparative analysis of class action litigation procedures in Portugal and Brazil. The author concludes that there is no way to prefer Portuguese to Brazilian class actions or vice versa due to that both are very rich in mechanisms which allow class action litigation. The main differences evidenced by Nunes (2010) between the two approaches were historical, cultural and political. The author considers the Portuguese system for class action litigation more simplified and more democratic than the Brazilian one, allowing an easier access to justice. The main critics the paper does to the Portuguese legislation are related with the Government role and the supervision of representative powers. To finalize, another author, Lisa Tortell (2008) pointed in her paper the main determinants of class actions in the country, which will be presented during the dissertation.

The aim of this dissertation will be to provide an analysis of which are the main factors influencing the existence of class action litigation cases in Portuguese courts, related with consumer protection. For this analysis one will support our conclusions not only on

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<sup>13</sup> See, "*Securities Class Actions Fillings*" in "*2012 Year in Review*", by Cornerstone Research, p.7, in which it is presented the number of class actions filed in the securities sector, from 1997 to 2012. The highest number of class action in court was of 242 cases in 1998 and the lowest of 120 cases in 2006.

<sup>14</sup> See, Mariana Gouveia & Nuno Garoupa in "*Class Actions in Portugal*" in "*The Law and Economics of Class Actions in Europe – Lessons from America*", pp.342-350.

<sup>15</sup> See, Leonardo Silva Nunes, "*Collective Actions in Portugal*" for Uiversidade Federal de Minas Gerais, Brasil.

literature but also on interviews did to a group of parties, possibly involved in class action litigation. The dissertation is organized in the following way: Firstly, one begins by a general analysis of class action litigation. One provides the main economic rationale for class actions and its main costs and benefits when compared with other mechanisms of litigation. Secondly, one enumerates the main elements affecting class action litigation procedures. To finalize, on the third part of the dissertation, one analyses the Portuguese case. One begins with a description of the main legislation regarding class actions, including also legislation for consumer protection and one provides the main conclusions obtained from literature and from the interviews. In the final of this section, one briefly concludes about what are the main elements which seem to be influencing class action litigation in the country.

## **2. Economic Rational for Class Action Litigation**

### **2.1 The Benefits of Class Actions**

According to Cassone & Ramello (2012) there are cases in which both market regulation and individual mechanisms of litigation are ineffective. In cases like this the introduction of the possibility of use class action litigation as a legal instrument has been suggested as a solution to bridge these inefficiencies.

#### **2.1.1 Failures in Regulation**

Following Donatella Porrini (2007)<sup>16</sup> regulation is the result of the existence of market imperfections and a mechanism to maximize welfare. Regulation regarding consumer protection has been applied as an ex-ante procedure<sup>17</sup> by National Regulatory Authorities (NRAs). In each economic sector the NRA is responsible for providing sufficient information to their consumers in order to inform them about their rights and liabilities and to afford them the necessary tools for a best choice of goods and services. However, ex-post regulation<sup>18</sup> led by NRAs has also a huge influence in consumer protection.

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<sup>16</sup> See Donatella Porrini in *“Which Law and Economics Model – The Case of Class Actions”*, pp.1-15, Università del Salento.

<sup>17</sup> Ex-ante regulation by NRAs is a form of intervention in a market before a wrong behavior has been verified in order to prevent abuses from the parties which lead the regulated sector. Usually, this mode of regulation is based in providing information about the services or goods existing in the sector and the main problems it can bring to the individuals.

<sup>18</sup> Ex-post regulation by NRAs is a form of intervention in a market after a wrong behavior has been verified in order to penalize the individuals who caused a harm in the regulated sector and also to prevent future abuses and similar situations.

With ex-post regulation it is possible to mitigate the negative effects of market failures which already harmed consumers. As an instrument of ex-post regulation the addition of class actions to legislation has been considered more effective, due to lower probability of capture<sup>19</sup>, when compared with the role of NRAs. This maximizes welfare for plaintiffs.

### **2.1.2 Failures of Individual Litigation Mechanisms**

Class action litigation procedures have been referred as a solution for cases in which individual litigation discourages plaintiffs to claim. Ulen (2012) dedicated his paper to analyze the main costs and benefits of class actions. The author divided plaintiffs involved in individual litigation in two different groups. The first, composed by the ones who expect to obtain a positive value from individual litigation, for which individual litigation makes economic sense and the ones for whom individual litigation has a negative expected value, i.e. individual litigation is not expected to succeed. The non-success of individual litigation in this last case is usually related with the fact that each individual has suffered no injury or a non-compensatory one. It may also be the case in which there was an injury but it was relatively small given the value of the likelihood of winning the litigation and the value for the compensation awarded when compared with the costs of litigation. This case frequently happens in small and fragmented claims. For both cases, class actions are pointed as a possible solution to avoid discourage litigation and to maximize welfare for the injured class.

One maintains the approach taken by Ulen (2012) including on it other factors pointed by other authors in which class action litigation is more efficient than individual litigation.

#### **2.1.2.1 Plaintiffs With Positive Expectations About the Litigation Value**

For plaintiffs with positive expectations about individual litigation the main benefits from class action litigation are: the existence of economies of scale, the increasing probability of success of the litigation, the attenuation of external costs and the decrease of externalities impact.

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<sup>19</sup> Sometimes the regulators face pressures by companies to decrease the level of regulation in a particular sector or even receive money to stop a policy. This power of companies over regulators usually decreases when we compare it with the power that these companies have in court. Hence, courts suffer less capture than NRAs and may be considered more effective in solving problems which affect a particular sector or class of plaintiffs.

i) Economies of Scale

The main point in favor of class actions is the possibility for several parties to enjoy from economies of scale as a result of consolidation. Following Ulen (2012, p.75):

*“The principal argument in favor of class action litigation is straightforward: it is likely to be more efficient to litigate the same general complaint once than to do so in a series – perhaps a large number – of similar complains. To put the matter in economic parlance, there are likely to be economies of scale for both plaintiffs and defendant or defendants in having one large trial than in having individual trials.”*

Some litigation costs as discovery and fees for attorneys are in average a decreasing function of the number of plaintiffs in the claim. Usually, these costs represent a huge investment for each plaintiff and are related with the success (to win) of the litigation. The process of choosing the more able attorney for a particular case may leave the plaintiff to incur in costs sometimes too huge to be afforded by him, Ulen (2012). However, this increases the probability of a better recovery from the litigation. When using class actions, it is possible to support these costs and it creates a benefit for all plaintiffs.

Cassone & Ramello (2012) emphasized the benefits of the creation of economies of scale in both demand and supply. On one hand, on the demand side, individual costs with the litigation decrease. On the other hand, on the supply side there is a reduction in costs if consolidation allows saving resources when compared with multiple claims. The substitution of a plaintiff for a single representative decreases the costs relative to court appearance and the number of cases pending in court, decreasing the average length of the procedures and increasing the involved parties welfare.

ii) The Success of the Litigation

Not only does the success of the litigation (the number of actions brought to court and won) increases for plaintiffs but also the success for the defendant decreases with consolidation. In the case of an individual litigation the defendant may increase efforts in the first litigation as a signal for future plaintiffs quit from the litigation. Ulen (2012, p.78) states that, *“the defendant...has strong incentives to invest heavily in winning the early cases. The point is that the defendant may be willing to expend much more on each early case than would each individual plaintiff.”* This would increase the defendant likelihood of winning these individual litigations. Furthermore, with the increasing number of similar individual claims against the same defendant, the defendant starts to increase his knowledge about

how to turn the case on his favor. These situations do not occur in the case of a consolidated class action, where the efforts done by the defendant to win the litigation are done at the same time.

iii) External Costs

External costs of individual litigation are usually related with coordination mechanisms. The use of class actions in positive-expected-value litigations decreases the external costs characteristic of individual claims, as for example the costs created by the fact that all the plaintiffs want to be the firsts to litigate since they know that the probability of win an individual litigation decreases with the number of litigations brought to court. Ulen (2012, p.80) stated:

*“...where there may be a limited-fund situation, the possibility of certifying a class can forestall the problems that would arise if the class members realized that there might be little or no satisfaction available to late arrivals and began a stampede to be the first to litigate.”*

In this sense, class action litigation provides a coordination mechanism.

iv) Positive externalities

Deffains & Langlais (2012) emphasized the existence of positive externalities between plaintiffs in individual litigation. In this case, the externality value appears due to sequential entry in the litigation when there are similar individual claims. Each one of the plaintiffs has individual information that shares with the following plaintiffs. *“This implies positive informational externalities between plaintiffs because later filers benefit from the experience of the first plaintiffs.”* Deffains & Langlais (2012, p.149). Class actions are considered as a useful mechanism to avoid economic inefficiencies in situations like this internalizing the informational externality. In a class action the existence of an attorney plays an active role in the transmission of these information externalities.

### **2.1.2.2 Plaintiffs With Negative Expectations About the Litigation Value**

For plaintiffs with negative expectation about the litigation, the costs of small individual claims may be very high and prohibitively of claim when compared with the potential awards which the party expects to receive. These negative expectations are not related with the probability of win the litigation or even with the strategy used. In class actions

the costs are divided by all plaintiffs and the plaintiffs together are stronger. Hence, with class actions it will be possible to supersede the huge power that defendants have in small claim cases creating a significant benefit for plaintiffs, Ulen (2012). Similarly, in Cassone and Ramello (2012) the authors defined as main justification for the use of class actions the existence of costs with individual litigation which are discouraging plaintiffs to continue or even initiate the litigation against the defendant.

## 2.2 The Costs of Class Actions

Class actions have been under several critics. Some authors, as Ulen (2012), point it as a socially beneficial practice although considering also its costs. Regarding costs the same author divided its analysis in four parts: the first related with litigation costs, the second with agency costs, the third regarding adverse selection and opt outs and the fourth regarding the strategic use of blackmail settlements.

### i) Litigation Costs

Litigation costs are related with the managing of communication between class members. Sometimes there are overlapping class actions against the same defendant for the same injury and at the same time. As attorneys want to coordinate between these actions they have coordination costs that may be very high. This does not apply in the case of individual litigation in which the costs are related to a single case.

### ii) Agency Costs

Agency costs are associated with the behavior between the class counsel and the class members. It creates a principal-agent problem since the desires of the principal, represented by class members, and the ones of the agent, the class counsel, are not aligned. Avoiding this problem increases the costs supported by the plaintiffs with the litigation. Ulen (2012, p.82) explains: *“when a principal suspects that there are agency costs, he or she can incur monitoring costs to observe the agents’ behavior or institute a compensation scheme that better aligns the agent’s interests with those of the principal.”*

In the case of litigations with positive expectations it may also appear a free ride problem in which some plaintiffs may enjoy from monitoring efforts of other plaintiffs. Also, unless the agency problems had been solved the counsel may aim to maximize its own interest instead of the interest of the plaintiffs. *“Even worse, class counsel may have an incentive to arrange a “sweetheart settlement” under which counsel agrees with the defendant to settle the claim for a high attorney’s fee and a low class recovery”* Ulen (2012, p.83). Sometimes it

happens that the defendants offer in-kind monetary compensations as coupons for discount in future purchases which do not compensate the plaintiffs.

iii) Adverse Selection and Opt-outs

Sometimes it happens that the class counsel has an incentive to increase the size of the class. *“More class members, typically means more hours of work or a great total recovery...”*, Ulen (2012, p.85). This creates a problem of adverse selection. For the reasons aforementioned, weak claims are more likely to opt into than strong claims due to the fact that in the case of strong claims individual litigation will benefit the counsel. Defendants anticipating this situation may offer a lower settlement amount to the class. *“There is a transfer of wealth from those with strong claims to those with weak claims. In the extreme it may be the case that this adverse selection sets off a “death spiral”: the defendant offers a lower amount than the strong claims believe they are entitled to, leading the strong claims to opt out of the class, leading the defendant to offer a lower settlement amount, causing more strong claims to exit the class, leading the defendant to offer still less, and so on.”* Ulen (2012, p.85).

iv) Blackmail Settlements

To finalize, the last cost created by class action litigation and enumerated by Ulen (2012) is related with the possibility to turn the action from a way of protect plaintiffs to a way of extracting huge compensations from vulnerable defendants. It is a case that usually gets worse by the allowance of punitive damages, Parisi & Cenini (2012).

### **3. Procedural Mechanisms Influencing Class Action Litigation**

Additionally to the aforementioned costs there are other elements affecting the numbers of class actions bring to court. From literature the main characteristics distinguishing the existence of a lot and so few class actions worldwide seem not to be legislation or even social traditions. According to some authors factors related with the methodologies previewed in law and applied together with class actions are the main factors affecting the number of class action litigations. From all the methodological factors the ones that have more reference on literature are: the way as remunerations are computed for attorneys, responsibility for litigation costs, the possibility of consider or not punitive damages and the preference for an opt-out or an opt-in system.

### **3.1 Attorneys' Remuneration**

Ulen (2012) distinguishes between two methods of computing remunerations for attorneys in class actions. These two methods are the "percentage of the recovery" and the "lodestar" method. When attorneys' remunerations are computed accordingly to the "percentage of the recovery" method, the payment is based on a percentage of the compensation received by the plaintiff when he or she wins the litigation. Giving preference to this method plaintiffs are protected from the aforementioned abuses by the attorneys which usually appear with the application of the "lodestar method". Remuneration accordingly to this last method is computed in a basis of salaries per hour. In order to increase profits there is an incentive for attorneys to increase the number of hours spent in each case increasing the costs for plaintiffs. As a consequence it also creates an additional cost for plaintiffs increasing the length of the procedures. This last method may also disincentive attorneys in cases where the expected compensations for the plaintiffs are very high, the case of strong claims, since their remuneration will not depend on it. In this case attorneys' efforts assuring a value of the compensation at least sufficient to cover the injuries caused may not be the expected. A similar problem may happen with the "percentage of the recovery" method as the attorneys have the incentive to settle early and for a large amount despite usually lower than the expected by the plaintiff, Ulen (2012).

However, as aforementioned in the first section, Klement & Neeman (2004) in their literature proved that both methods may provide an optimal scheme for compensation in different situations.

### **3.2 Responsibility for costs**

Allowing attorneys' remuneration as a contingency fee may be a good incentive for the existence of more class actions in courts. Deffains & Langlais (2012) presented in their paper the main advantages from the use of contingency fees in class action litigation. Firstly, contingency fees allow the risk of litigation for the plaintiffs to decrease due to that in this case it is the attorney who supports the risk. *"...plaintiffs own their attorney a fee only when there is recovery, i.e. when they win at trial."* Deffains & Langlais (2012, p.166). The plaintiff in case of winning the litigation will receive a compensation from the injury caused only having to support the value of the fee accorded with the attorney. Secondly, it enables the plaintiff of the responsibility to monitor attorneys. In cases with contingency fees, information has no role to play so that it may also solve agency problems between

plaintiffs and the counsel. Finally, it will increase the incentive for the attorney to obtain a properly value for compensation benefitting the class.

In law there are other cases in which it is the unsuccessful party who bears the costs of the successful one. This rule is usually called the “loser pays” rule. This may be seen as an incentive to litigate. However, it is not as efficient as the allowance of contingency fees since plaintiffs are more risk averse than attorneys. Consider a case in which none of the previews rules apply. Irrespectively of losing or not the litigation, each party pays its own costs. In a case where a “loser pays” rule applies, although the plaintiff knows that he will not have to support some costs if litigation is successful, when a plaintiff is thinking in start a litigation he or she accounts not only with the costs in the case of winning but also with the costs he has to support relatively to the other party in the case of failure of the litigation. If the plaintiff is very risk averse he or she will think twice before start the litigation. When comparing the effectiveness of this process with the contingency fee system the last seems to be better. As attorneys are usually less risk averse than plaintiffs and they know exactly their capabilities, the risk decreases for the class. When starting the litigation plaintiffs will not have to account with costs.

### **3.3 Punitive Damages**

Following Parisi & Cenini (2012, p.131), *“punitive damages...are damages that are awarded in excess of the plaintiffs’ actual harm when compensatory damages are not sufficient to deter and redress wrongdoing”*. In addition to compensatory damages there is also opportunity for the existence of punitive damages as another way of punishing the defendant. Parisi & Cenini (2012) emphasized the main benefits and problems regarding the use of punitive damages. The two main problems enumerated by the authors are related with moral hazard and the disappearance of the defendant. Moral hazard problems are connected with the possibility of risk redistribution which changes plaintiffs’ behavior due to redistribution of the levels of precaution. The plaintiffs in this situation may incur in non-safe behaviors with the aim of being compensated by the defendant. Other problem may be the disappearance of the defendant. With a high penalty, the defendant may go to bankruptcy. Plaintiffs will always be compensated while defendants are left without protection.

However, there are some cases in which the use of punitive damages is considered very effective to prevent damages and the need to litigate. In situations where the benefit for the defendant is so high that it overruns the harm he or she causes, punitive damages are a

useful mechanism to internalize the benefit of the defendant. Otherwise, as stated by Parisi & Cenini (2012), if the defendant has only to pay a compensatory damage awards he or she may benefit and have incentive to cause the harm.

Another situation in which punitive damages should be awarded is the case when health is in play. Health when destroyed is no more fully replaceable creating an immeasurable damage. It is also the situation which usually occurs in damages related with the environment and nature life.

### **3.4 Opt-out versus Opt-in Procedures**

All the previous enumerated factors function as a way of incentivize the class to initiate a litigation. The last proposed mechanism is the existence of an opt-out system by which no class member has to opt-in to enter the class, i.e. all the class members are automatically encompassed on the litigation even if they do not have conscience of it. If the plaintiffs want to go out of the process they opt-out, i.e. exclude themselves. This last system is also a good way of assure that future injured members are included in the litigation. Without clear and sufficient incentives, plaintiffs would not opt-in in the action.

Following Issacharoff & Miller (2012), opt-in and opt-out procedures have its advantages and disadvantages. The main advantages regarding opt-in procedures enumerated by the two authors are related with voluntarily joining the litigation, for plaintiffs, and to support the jurisprudential idea of protection of the innocent party. However, opt-in procedure disadvantages are also, evidently, non-incentivizing plaintiffs to enter in the litigation and avoiding the defendant opportunity to have a calm life since the plaintiffs can enter the class at all time.

Considering the individual benefits of opt-out and opt-in procedures, the authors stated:

*“ If the class member opts out he gains virtually nothing but loses the right to participate in whatever benefit the class litigation may generate... conversely, if the class member does nothing, he loses nothing other than an essentially worthless right to bring his own litigation. A rational class member will not opt-out.”* Issacharoff & Miller (2012, p.60)

### **3.5 Other Factors Influencing Class Actions**

The aforementioned mechanisms may be explanatory of differences in the number of class actions across countries but other factors may be pointed as influencing litigations in courts<sup>20</sup>. The first is related with funding. Plaintiffs have usually no incentives to start litigation due to insufficient funding. This problem disappears in the cases in which it is the attorney who bears all the costs if the litigation is lost. Attorneys have usually better liquidity than plaintiffs. The resort to consumer organizations as representatives is also being pointed as a possible solution for this problem. However, in the majority of the countries, consumer organizations lack of resources to represent their consumers. Other solution is governmental funding even if it may bring problems related with capture, i.e. if the party which receives the fund may suffer some pressure from the government or the government may suffer pressure from other entities, leading to the prevalence of political interests. The second fact is related with the inexistence of a sufficient number of experts with the necessary information about class actions. Without experts in the area it is difficult or impossible to give incentive for plaintiffs to litigate. Thirdly, media coverage of class actions may be a solution for communication costs within the class and between the class members and the counsel. Also, the existence of very bureaucratic courts may be prejudicial for class actions prevailing the benefits of a more flexible system.

As a resume, class actions have both costs and benefits and the balance between both depends on the procedural mechanisms which can improve or aggravate the different issues considered in this section. So that, the role of class actions cannot be assessed without taking into account the main contextual determinants which influence it.

## **4. Class Action Litigation in Portugal**

### **4.1 Legal Overview**

Following the Portuguese report by Lisa Tortell (2008), there is only one collective legal mechanism in Portugal allowing damages remedy, the so-called “Ações Populares<sup>21</sup>” or class actions. In the country, class action litigation has gained a privileged place for the legislator allowing for an exception to the usual rules set out in the Portuguese Code of Civil Procedures. Class actions had its origin in the Roman law, Gouveia & Garoupa

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<sup>20</sup> Information collected from the EC Green and White Papers and the Country Reports of 2008, wrote for Civic Consulting.

<sup>21</sup> Ações Populares is the Portuguese denomination for class actions.

(2012). Contrarily to what may seem due to its lack of clarity, legislation regarding class actions in Portugal is not a novelty. Class actions were considered for the first time in the Administrative Code of 1878, as the so-called supplementary class action, and remained in the following Administrative Codes of 1886, 1896 and 1936. Then, it was contemplated in the Constitution of the Portuguese Republic of 1976 and remaining with the 1989 revision, Antunes (2007). In 1995 it was created Law 83/95, of August 31, exclusively related with class action litigation.

Actually, the main general legislation for class actions in Portugal is considered in Law 83/95, of August 31, related with the right to participate in proceedings and class actions; complemented by Article 52 and Article 60, respectively related with the right of petition and class action and consumers' rights of the Constitution of the Portuguese Republic of 1976, after the amendment of 1989 and Article 26 related with judicial personality of the Code of Civil Procedure. One also includes in the legal overview legislation related with consumer protection due to the intention of develop the theme of class actions applied to consumption injuries, Law 24/96, of July 31, the legal regime for consumer defense.

Until Law 83/95, of August 31, legislation about collective litigation only encompassed the possibility of class actions as a corrective toll and for the control of administrative acts. Following Antunes (2007), *"the law in force extended popular action to prevention, to the prosecution of offenses and to claims for damages...it has changed from simply being a means of controlling the activity of Administration to also being a means by which individuals can bring actions against the acts or omissions of other individuals."*

Class actions in Portugal can be both civil and administrative. It is possible to settle an administrative class action regarding the defense of interests of several agents<sup>22</sup>, against illegalities related with administrative acts.<sup>23</sup> Also, the law encompasses cases previewed in the Portuguese Code of Civil Procedure. When civil, the damage is caused by a private individual, the government or other public entity<sup>24</sup>. It is possible to denounce, claim and participate to the Public Prosecutor (Ministério Público) for violations of interests defined in Article 1, of Law 83/95, of August 31, allowing also participations with criminal nature.<sup>25</sup>

Law 83/95, of August 31, defines the cases and terms for the rights of class action in administrative procedures in which it is possible to litigate as a form of class action and as

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<sup>22</sup> See Article 1 of Law 83/95, of August 31.

<sup>23</sup> See Article 12 (1) of Law 83/95, of August 31.

<sup>24</sup> See Article 2 of Law 83/95, of August 31.

<sup>25</sup> See Article 25 of Law 83/95, of August 31

a toll for prevention, cessation or judicial persecution of injuries encompassed in Article 52 (3) of the Constitution of the Portuguese Republic.<sup>26</sup> All the individuals covered by the Portuguese law have the right of constituting a class action individually or through a consumers' organization for defense of its related interested motifs.<sup>27</sup> The legislation in cause has the aim of protecting public health, environment, life quality, consumption in general, culture heritage and public domain.<sup>28</sup>

In Portugal, it is also possible to join actions that started to be proposed separately in court. Those actions may constitute a single suit when it is verified the admissibility of the cases regarding *littisconsortium*<sup>29</sup>, coalition<sup>30</sup>, opposition<sup>31</sup> and counterclaim<sup>32,33</sup>. When the instructing authority has more than twenty auditions to solve, he or she may determine the tittle of one representative.<sup>34</sup>

Regarding what concerns consumer representation, all citizens with their civil and politician rights, associations and foundations for defense of the interest protected by the Law, independently of having or not interest in the claim, are titled of the procedural right of class action together with parish councils in relation to the interest of the individuals residing in their municipality.<sup>35</sup> The representative of the class is responsible for representation of all the individuals who had not opt-out, exerted the right of exclusion, from the litigation. It also allows refusing representation by declaration.<sup>36</sup> Usually, in Portugal, the cases are brought to ordinary courts from individual citizens and consumer organizations, usually DECO, the one with more resources in the country, in monetary terms<sup>37</sup>.

Representation through consumer organizations is possible even if the organization is not directly harmed.<sup>38</sup> Consumer organizations are defined as profit or non-profit associations

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<sup>26</sup> See Article 1 (1) of Law 83/95, of August 31.

<sup>27</sup> See Article 52 (3) of the Constitution of the Portuguese Republic.

<sup>28</sup> See Article 1 (2) of Law 83/95, of August 31.

<sup>29</sup> *Littisconsortium* is the reunion of several parties with the same motifs and interests in a single process for defense of common interests.

<sup>30</sup> Coalition represents the creation of a pact in which several parties agree to participate in a common action, each in their own interest but joining forces for a common cause.

<sup>31</sup> Opposition occurs when the entire plaintiffs together act in opposition to a given action from the same defendant.

<sup>32</sup> Counterclaim is the claim of a defendant opposing the previous claim of a plaintiff.

<sup>33</sup> See Article 275 of the Portuguese Code of Civil Procedure.

<sup>34</sup> See Article 10 of Law 83/95, of August 31.

<sup>35</sup> See Article 1 (2) of Law 83/95, of August 31.

<sup>36</sup> See Article 14 of Law 83/95, of August 31.

<sup>37</sup> As stated by Tortell (2008) this is the unique Portuguese consumer organization able to bring class action cases into courts.

<sup>38</sup> See Article 13 b) of Law 24/96, of July 31.

with the main aim of protect the rights and interests of the consumers. These associations may be grouped in national, regional or local associations, depending on the number of members constituting it, respectively, at least 3000, 500 or 100. The cooperatives are also considered as consumers' organizations.<sup>39</sup>

The Public Prosecutor and the Institute of Consumers (a government agency) in situations of homogeneous, collective and diffuse interest may also have powers of representation.<sup>40</sup> It is also the Public Prosecutor who supervises the legality of the procedures and represents the government when it is part in the case, the minors and incapable individuals in the case in which they are plaintiffs or defendants.<sup>41</sup> It also may represent a public legal person and substitute the claimant in the case of desistence from the transaction or harmful behaviors regarding the interests in cause.

In a class action, the judge is the responsible for the collection of proofs without the linking of parties' initiative. Any settlement between the parties in a class action or by the representative who represents them is checked by the court before approval. If the interests in question are not being protected by the action the settlement may not be approved.<sup>42</sup>

In terms of compensation, regarding consumer protection, consumers have the right to be compensated from damages caused to them, both patrimonial and non-patrimonial, by defected products and services.<sup>43</sup> Also, compensation for injuries is previewed in Portugal for cases which promote prevention, cessation or persecution for injuries related with public health, consumer rights, quality of live, environment and cultural heritage, as well as, in defense of government, parishes and autonomous regions' goods.<sup>44</sup>

Portuguese law distinguishes between compensation of injuries to identified holders of interest and the global fixing compensation for violation of the interest of unidentified holders.<sup>45</sup> The prepayment of costs is not required.<sup>46</sup> The plaintiff is also not required for payment of costs in the case of a partially proceeding claim.<sup>47</sup> In the case of total failure of the claim the plaintiff is only responsible for paying an amount to be determined by the judge between 10% to 50% of the costs depending on his financial situation and the

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<sup>39</sup> See Article 17 (1) of Law 24/96, of July 31.

<sup>40</sup> See Article 13 c) of Law 24/96, of July 31.

<sup>41</sup> See Article 16 (1) of Law 83/95, of August 31.

<sup>42</sup> See Article 300 of the Portuguese Code of Civil Procedure.

<sup>43</sup> See Articles 12 (4) and (5) of Law 24/96, of July 31.

<sup>44</sup> See Article 52 (3) a) and b) of the Constitution of the Portuguese Republic.

<sup>45</sup> See Article 22 (2) and (3), respectively, of Law 83/95, of August 31.

<sup>46</sup> See Article 20 (1), of Law 83/95, of August 31.

<sup>47</sup> See Article 20 (2) of Law 83/95, of August 31.

substantive or formal reason for dismissal of the action.<sup>48</sup> It is defined that it is role of the judge to decide about the legal costs which depend on the complexity and value of the case.

Regarding consumer protection and consumer organization rights<sup>49</sup>, consumers' organizations are exempt of the payment of costs, prepayments and stamp duty.<sup>50</sup> Also, consumers' organizations have the right to receive government support from central, regional and local administration in the exercise of their role, in formation, information and representation of consumers and of benefit from fiscal benefits identical to the ones conceded to private social welfare institutions.<sup>51</sup> Legal aid, totally or partially, is available in Portugal. The right of compensation prescribes in three years accounting from the transition of the sentence which recognized the compensation.

To finalize, under the Portuguese law it is considered the possibility to announce the existence of a class action in posters and media without mandatory personal identification of the recipients.<sup>52</sup>

#### **4.2 Evidences from Literature**

Class actions in Portugal have been pointed as not efficient from several authors. Tortell (2008) emphasized in her report the main peculiarities of the Portuguese judicial system influencing class actions. In the author opinion, the main failures in the Portuguese judicial system are: i) the relative slowness in the process development and in the attainment of results; ii) the high costs in general; iii) the lack of predictability in comparison with non-judicial solutions; iv) the lack of knowledge and experience of attorneys and judges; and v) the lack of best practices that associated with the newness of the system may discourage consumers to collective claims. Other difficulties are related with the mass nature of consumer claims as for example the difficulties of distributing monetary awards. Also, all the process has the expected duration of one year but the usual duration is between five to seven years.

Following Lisa Tortell (2008), the small number of cases brought to court and the failure of some of them indicate a failure of the system itself. One possible reason additional to

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<sup>48</sup> See Article 20 (3) of Law 83/95, of August 31.

<sup>49</sup> See Article 18 (1) of Law 24/96, of July 31.

<sup>50</sup> See Article 18 (1) n) of Law 24/96, of July 31.

<sup>51</sup> See Article 18 (1) o) and p), respectively, of Law 24/96, of July 31.

<sup>52</sup> See Article 15 (2) of Law 24/96, of July 31.

the ones above enumerated is the association of the mechanism to a single organization with low resources and representing only their consumers.

Comparing with the American case in which there is a high number of class actions in court, the Portuguese law does not include punitive damages nor contingency<sup>53</sup> or conditional fees<sup>54</sup>. Other differences from the US but in common with the most of Europe are the impossibility of use the “*percentage method*” to compute attorneys’ compensation and the extensive limits on attorneys’ advertising.

Regarding the Portuguese legislation for class actions Gouveia & Garoupa (2012) found on it four main weaknesses. The first is related with the adequacy of representation. Both authors considered that legislation about representation is not very clear and individual citizens were not able to represent a class in an appropriate way given the existence of diffuse interests. Secondly, the way as legislation previews the notification of class action cases by poster or press does not assure that all the injured plaintiffs are informed about the action. In this case the authors emphasize the need of personal notification as it happens in America, when it is possible to determine the class. This element was also pointed by Nunes (2010). Thirdly, legislation is not specific about the criteria to compute compensations giving incentives to the introduction of punitive damages in the country when this is not allowed. To finalize, the period established for reclamation of the compensation is considered not sufficient. In that, some plaintiff may just recognize after this period that they suffered a harm situation which happens frequently in cases of health contamination.

As conclusion, due to all the aforementioned peculiarities of the Portuguese case, authors consider litigation in the Portuguese courts a not credible threat, Nunes (2010). Also, attorneys seem not be interested in incentivize class actions in the country due to conservatism and cultural influences. “Civil law systems present substantial obstacles to the legal protection of group rights. These obstacles include the tradition of judicial conservatism, a deeply ingrained individualistic philosophy, the “scientific” and legalistic approach to law and the judicial tendency to reverse the status quo.” Nunes (2010, p. 402).

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<sup>53</sup> Fees for lawyers computed as a percentage of the damages awarded.

<sup>54</sup> Fees paid in case of success and not related with the amount of damages awarded.

### 4.3 Evidences from Interviews<sup>55</sup>

In order to have a perception about what is influencing class action litigation in practice one conducted several interviews<sup>56</sup> to the main parties representing a class action: one attorney, one city council, one consumer organization, one cooperative and a parish council.

Regarding the elements influencing class actions in Portugal the four most enumerated during the interview as having more relevance were: cultural influence, lack of information about class action procedures, lack of monetary support and the way as attorneys are being remunerated. One additional reason was pointed by the Cooperative. As some institutions depend directly from the Government existing only due to Government subsidies and as the main claims they have are also linked to the services and goods that Government provides it is almost impossible to litigate in court against the injuries caused by them, due to fear of retaliation. The interviewed stated that as these organizations are present in several cities in the country class actions could be a solution to overpass some problems. However they verified that when the institutions organize a petition to go to court against Government it has not accession by the other parties which suffered from the same injury and class action litigation turns to be impossible. Institutions depending directly from the Government, in the view of the interviewed, give preference to conversation and extra-judicial procedures to solve their problems.

Other particularly different opinion was given by the attorney interviewed. He indicated that it does not make sense to have collective litigation when the plaintiffs involved have different backgrounds and characteristics. An example given was related with cases regarding collective fire from a company and a car accident. In the first case, although the problem seems to be the same all the plaintiffs are different as persons and have some particularities which should not be missed. Not all the workers entered to the company at the same time, they have different ages, they worked in a different part of the company, they have different financial situations and so on, these factors do not allow attorneys to treat the cases as a single case. The same happens in the case of a car accident. If the attorney has five claims against a driver requested by the plaintiffs who suffered the injury, despite all having the same wounds they all have different characteristics. At the

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<sup>55</sup> See the annex section in which one presents all interviews did.

<sup>56</sup> These interviews were formal interviews with a semi structures organization. Adding to it, one also considers the outputs of informal conversations one had with other parties involved in the case and academics.

moment of the accident some may be probably sleeping others reading, which creates an impossibility of treating all in the same way.

Culture and tradition were the most relevant elements for almost all the interviewed parties. Four in five of the parties referred to the Portuguese society as a society which claims a lot but do nothing to change the problem. Also, as long as the extra-judicial procedures lead to effective results the parties interviewed will always prefer conversation to litigation. The interviewed stated that, by tradition, litigation is not seen as the best solution to solve problems and when litigating individuals seem to prefer to solve the problems individually and using law procedures with which they are more familiarized.

The aforementioned disabilities of the Portuguese judicial system were also mentioned by the majority of the interviewed parties. The length of the procedure, the high costs of litigation and the uncertainty about the success of the litigation were the main aspects referred. Regarding the high costs of litigation one of the interviewed denoted the particular evidence that in small cities it is observable that all the attorneys ask for the same amount of salary per hour for the same case. The lack of competitiveness between attorneys in this case leads to a disincentive for the parties injured to litigate when all the attorneys practice high prices. Also, in cases as the referred it is very hard to identify the more indicated attorney for a given case due to the existence of a signaling problem.

Another point of accordance in the interviews was related with the knowledge of the existing legislation about class actions. None of the parties knew the sufficient about the legislation nor to use it nor to recommend it. When asked if it would make the difference to know the legislation all the parties said that probably yes but all remained very reluctant of its use. The ones who answered the question: "Have you ever incentivized, or would incentive, your ... to claim in court in one class action litigation?...", their response was that they had never incentivized a class action litigation in court and do not intend to do it even knowing the legislation. In the particular case of the Cooperative interviewed they referred the possibility of incentivize the practice but always in the cases in which there is no conflict of interests between the parties in the litigation.

Regarding the effectiveness of NRAs all the parties interviewed with this question pointed the regulators as non-effective in solving problems due to the duration between the moment when the complaint is sent and the answer arrives. Also, sometimes the NRAs do not have power to solve the problems consumers have due to the fact that it is not in their competencies. Consumer organizations were also pointed as non-effective due to lack of

resources and the unavailability of protecting the interests of other consumers which make not part of their association.

When asked about which entities should be responsible for incentivize class action procedures the answers varied across the interviewed. The attorney referred themselves, the Government, the Ministry of Justice and the Bar as the main responsible. The city council referred the city councils and consumer organizations. The cooperative referred the Government and consumer organizations and the parish council referred the Government.

To finalize, few were the answers to the last question done regarding the main solutions to increase the number of class actions in court. The general answer was that the actual situation is preferable to a situation in which class actions exists. A lot of changes would have to be done to courts for an effective use of class actions. Also, the interviewed concluded that increasing the number of class actions does not make sense when it is not necessary. However, the cooperative pointed as solution more Government monetary support and the parish council a higher provision of information.

#### **4.4 Final Remarks**

Some of the aforementioned elements enumerated in literature and interviews as influencing class actions in court are not particularities of the Portuguese case or even of collective litigation, however it is influencing it in such a way that turn impossible its implementation. As conclusion of this section one may agree that all the critics pointed by literature are in accordance with the ones answered in the interviews. Firstly, culture and tradition which deter litigation in general and not particularly class actions are pointed as a crucial point. People prefer extra-judicial resolution of cases individually or in a class due to uncertainty of the judicial ones. The lack of predictability of the final outcome and the attorneys' remuneration lead plaintiffs to not litigate. The uncertainty concerning the outcome is not only affecting plaintiffs but also attorneys who seem to prefer individual litigation to collective one. This fact may also be influenced by the lack of competitiveness existing in the attorneys market in the country and the lack of experts in the field. However, regarding attorneys' it may also be related with their conservatism and the newness of the procedure. Attorneys' remuneration, by the "lodestar" method may also disincentive attorneys due to the fact that the amount they win is not dependent of the recovery from the case. More, they receive a higher compensation treating cases individually than in a class, due to the fact that the number of hours decreases when

treating all the plaintiffs together. Secondly, the lack of information that in the majority of the opinions should be provided by Government is influencing directly class actions despite opinions against. With more information it would be possible to induce collective litigation. In some cases, people do not resort to collective litigation and say that it is not need due to lack of information about it . Thirdly, with not only more information but more monetary support to consumer organizations and other possible representatives it would be possible for them to represent consumers more frequently. To finalize, the non-effectiveness of the Portuguese legal system and the direct dependence from Government are elements influencing individual litigation and not explaining *per se* class actions, leading plaintiffs to quit of judicial litigations. As aforementioned, class actions suffer of huge lengths, high costs, lack of predictability and lack of expertise. So that, with a more organized judicial system the situation would probably change.

## 5. Conclusion

The EU has been incentivizing class action litigation procedures as a way of surpass the problems faced with individual litigation and regulation in European countries. The truth is that although all the papers published by the EC regarding collective litigation the European countries remain using individual litigation to solve problems which probably would be solved in a more efficient way by collective redress. Oppositely, in the US collective redress has been a case of success in the number of class actions brought to court and in the number of cases effectively solved.

There are several economic reasons to litigate in court in a form of class action as the ones exposed in this dissertation. As explained, class actions have both costs and benefits and there are several mechanisms influencing it.

The Portuguese case is not very different from the average of Europe. Legislation uniquely regarding class action litigation has not many years and there is still a feeling of novelty about class actions in the country. Also, it seem not be gathered the right incentives to its application. Despite the lower number of interviews done and the impossibility of drawing untouchable ideas from it, in general it seems that the main intervenient parties share the same opinion.

The Portuguese judicial system is not effective due to several elements, such as, the length of the procedures, the costs with the litigation and the uncertainty of the results. Although it influences also individual litigation, it was frequently enumerated by the parties interviewed as one of the reasons for the few number of class action litigations in court.

Other evidence is that attorneys' remuneration is very similar in small cities and not much different in the big ones highlighting the non-existence of sufficient competitiveness in the market. Also, extra-judicial litigation by conversation with the responsible parties seems to be the best and fast way to solve particular problems which affect several individuals. The parties involved in the interview also referred not have the sufficient information about class action litigation nor even be interested on it. In the case of the attorneys all referred to know the legislation but no one had solved a case based on it. Probably it is due to lack of monetary incentives, as the ones already mentioned. Some had represented in court a group of plaintiffs but without refer legislation for class actions and treating all plaintiffs as single individuals.

Another element influencing class actions in Portugal denoted by the several parties interviewed was the culture and tradition of the Portuguese society in general and attorneys in particular. Also, there is a general tendency not to use the legal system to address NRAs due to the fact that in the majority of the cases plaintiffs consider it ineffective. Portuguese people are very claimant but when the cases encompass courts they remain very reluctant. It seems that class action litigation procedures are need in the country but the country prefers alternative dispute resolutions. Even without information the parties involved in the interviews when necessary recur to collective redress as a way of litigate without having this idea.

After all, one is able to conclude that there are several elements influencing the non-existence of class actions in Portuguese courts which should be surpassed with Governmental help mainly by the Ministry of Justice.

To finalize, this dissertation opens the way to more research. Some interesting questions are still to develop, such as, if the market for attorneys is avoiding competition and if conflict of interests is really distorting litigation in Portugal.

## **6. Annex**

In this part of the dissertation one intends to understand which are the opinions of the main intervenient parties about class actions. The propose of this study is to understand why there are so few class action cases in the country particularly when compared with the American case. In consequence, one interviewed five main parties: one attorney, one city council, one parish council, one cooperative and one consumer organization. Also, one had informal conversations with other parties possibly involved in class action litigation to understand what leaves the intervenient agents to be so reluctant for class action litigation in Portugal. The parties were chosen due to their directly influence on society and the powers of representation they have.

All the different parties interviewed had different opinions and background but in the majority of the cases they agreed with the factors that are enabling class actions in the country. Bellow one presents the structure and the results of the aforementioned interviews.

## 6.1 Structure of the Interviews

Attorney	City Council	Consumer Organization	Cooperative	Parish Council
<p>1. May you please describe me your professional career?</p> <p>2. Is it usually for you to find in your office cases related with the same motifs? Justify.</p> <p>3. Did you have faced a case in which it seemed that probably there were more clients than yours? Justify.</p> <p>Imagine that it would be possible for you to give a positive answer to the last two questions in the case of not.</p> <p>4. How do you proceed to solve question 2? Justify.</p> <p>5. How do you proceed to solve question 3? Justify.</p> <p>6. Which are in your opinion the huge gaps in Portuguese legislation which leads to a so few number of class action litigations in court?</p> <p>7. Which of the following factors in your opinion better distinguish the Portuguese and American class actions? Please order the following sentences by decreasing sequence of importance:</p> <p>The non-allowance of Punitive Damage award in Portugal; The way as attorneys are being remunerated; The Opt-out versus Opt-in procedure; Cultural Influences, i.e. tradition of the societies; Lack of support for consumers, i.e. lower cost incentives, lower number of experts</p>	<p>1. Is it frequent for you to receive complaints from your municipals? Justify.</p> <p>2. To whom do you usually report these complaints? Justify</p> <p>3. Do you frequently receive very similar complaints or about the same motifs?</p> <p>Imagine that it would be possible for you to give a positive answer to the last question in the case of not.</p> <p>4. Have you ever incentivized or would incentive your municipals to claim in court in one class action litigation? Justify and give examples.</p> <p>5. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance (from the more important to the last important):</p> <p>Cultural Influences, i.e. tradition of the societies; Lack of public information about class action litigation; The way as attorneys are being remunerated; Lack of support for municipals, i.e. lower cost incentives, lower number of experts in the field; The usual lengths of the procedure; The non-allowance of Punitive Damage award in Portugal;</p>	<p>1. Is it frequent for you to receive complaints from your consumers? Justify.</p> <p>2. To whom do you usually report these complaints? Justify</p> <p>3. Do you frequently receive very similar complaints or about the same motifs?</p> <p>Imagine that it would be possible for you to give a positive answer to the last question in the case of not.</p> <p>4. Have you ever incentivized or would incentive your consumers to complain in court in one class action litigation? Justify and give examples.</p> <p>5. If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify</p> <p>6. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance:</p> <p>Lack of public information about class action litigation; Cultural Influences, i.e. tradition of the societies; Lack of support for consumers, i.e. lower cost incentives, lower number of</p>	<p>1. Is it frequent for you to receive complaints from your student/user? Justify.</p> <p>2. To whom do you usually report these complaints? Justify</p> <p>3. Do you frequently receive very similar complaints or about the same motifs?</p> <p>Imagine that it would be possible for you to give a positive answer to the last question in the case of not.</p> <p>4. Have you ever incentivized or would incentive your consumers to complain in court in one class action litigation? Justify and give examples.</p> <p>5. If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify</p> <p>6. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance:</p> <p>Lack of public information about class action litigation; Cultural Influences, i.e. tradition of the societies; Lack of support for students/users, i.e. lower cost incentives, lower number of experts in the field; The usual lengths of the procedure; The way as attorneys are being</p>	<p>1. Is it frequent for you to receive complaints from your municipals? Justify.</p> <p>2. To whom do you usually report these complaints? Justify</p> <p>3. Do you frequently receive very similar complaints or about the same motifs?</p> <p>Imagine that it would be possible for you to give a positive answer to the last question in the case of not.</p> <p>4. Have you ever incentivized or would incentive your municipals to claim in court in one class action litigation? Justify and give examples.</p> <p>5. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance (from the more important to the last important):</p> <p>Cultural Influences, i.e. tradition of the societies; Lack of public information about class action litigation; The way as attorneys are being remunerated; Lack of support for municipals, i.e. lower cost incentives, lower number of experts in the field; The usual lengths of the procedure; The non-allowance of Punitive Damage</p>

<p>in the field; Other.</p> <p>For the following questions please exclude the possibility of make any change in the Portuguese legislation.</p> <p><b>8.</b> Which are the possible factors that lead attorneys to non-incentive class action litigation? Justify.</p> <p><b>9.</b> To who should be pointed the responsibility of incentive class action litigation in courts? Justify</p> <p><b>10.</b> In your opinion there are in the country the right incentives for class action litigation? Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.</p> <p><b>11.</b> Would you like to add some additional information?</p>	<p>Other.</p> <p><b>6.</b> Do you think that National Regulatory Authorities and Consumer Organizations are efficient in answering to municipals complaints? Justify</p> <p><b>7.</b> If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify</p> <p>For the following questions please exclude the possibility of make any change in the Portuguese legislation.</p> <p><b>8.</b> In your opinion there are in the country the right incentives for class action litigation? Justify.</p> <p><b>9.</b> To who should be pointed the responsibility of incentive class action litigation in courts? Justify</p> <p><b>10.</b> Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.</p> <p><b>11.</b> Would you like to add some additional information?</p>	<p>experts in the field; The usual lengths of the procedure; The way as attorneys are being remunerated; The non-allowance of Punitive Damage award in Portugal; Other.</p> <p>For the following questions please exclude the possibility of make any change in the Portuguese legislation.</p> <p><b>7.</b> In your opinion there are in the country the right incentives for class action litigation? Justify.</p> <p><b>8.</b> To who should be pointed the responsibility of incentive class action litigation in courts? Justify</p> <p><b>9.</b> Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.</p> <p><b>10.</b> Would you like to add some additional information?</p>	<p>remunerated; The non-allowance of Punitive Damage award in Portugal; Other.</p> <p>For the following questions please exclude the possibility of make any change in the Portuguese legislation.</p> <p><b>7.</b> In your opinion there are in the country the right incentives for class action litigation? Justify.</p> <p><b>8.</b> To who should be pointed the responsibility of incentive class action litigation in courts? Justify</p> <p><b>9.</b> Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.</p> <p><b>10.</b> Would you like to add some additional information?</p>	<p>award in Portugal; Other.</p> <p><b>6.</b> Do you think that National Regulatory Authorities and Consumer Organizations are efficient in answering to municipals complaints? Justify</p> <p><b>7.</b> If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify</p> <p>For the following questions please exclude the possibility of make any change in the Portuguese legislation.</p> <p><b>8.</b> In your opinion there are in the country the right incentives for class action litigation? Justify.</p> <p><b>9.</b> To who should be pointed the responsibility of incentive class action litigation in courts? Justify</p> <p><b>10.</b> Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.</p> <p><b>11.</b> Would you like to add some additional information?</p>
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## **6.2 Reports of the Interviews**

### **6.2.1 Attorney**

#### **1. May you please describe me your professional career?**

I did training in Advocacy in the city of Coimbra, I was consultant for risk and financing in the company “Ocidental Seguros”, group B.C.P. , professor of ethics and judicial consultant at UTAD, I was a lawyer for 25 years and I was president of the “Região de Turismo do Douro”.

#### **2. Is it usually for you to find in your office cases related with the same motifs? Justify.**

Not very frequently, maybe more or less 3 or 4 cases of workers who were fired from the same company.

#### **3. Did you have faced a case in which it seemed that probably there were more clients than yours? Justify.**

Yes, in the case aforementioned.

**Imagine that it would be possible for you to give a positive answer to the last two questions in the case of not.**

#### **4. How do you proceed to solve question 2? Justify.**

I would treat each case with its singularities and specificities giving context to the singular in the global of the case.

#### **5. How do you proceed to solve question 3? Justify.**

For all the clients I would take what I could obtain from the common part of the case because for the client the fees supported would turn to be more economic. But all the part related with the singularity of them would require an individual treatment of the case.

**6. Which are in your opinion the huge gaps in Portuguese legislation which leads to a so few number of class action litigations in court?**

The legislation about class action litigation in Portugal is very insufficient in what regards the “legal mission” of increasing the number of class action litigations in Portuguese courts and provide them a huge visibility in the Portuguese judicial system.

**7. Which of the following factors in your opinion better distinguish the Portuguese and American class actions? Please order the following sentences by decreasing sequence of importance:**

1. **The non-allowance of Punitive Damage award in Portugal;**
2. **The way as attorneys are being remunerated;**
3. **The Opt-out versus Opt-in procedure;**
4. **Cultural Influences, i.e. tradition of the societies;**
5. **Lack of support for consumers, i.e. lower cost incentives, lower number of experts in the field;**

Other.

**For the following questions please exclude the possibility of make any change in the Portuguese legislation.**

**8. Which are the possible factors that lead attorneys to non-incentive class action litigation? Justify.**

It is not in the tradition of Portuguese judicial planning.

**9. To whom should be pointed the responsibility of incentive class action litigation in courts? Justify**

The responsibility should be pointed to the Government the Ministry of Justice, the unions, the attorneys and its Bar.

**10. In your opinion there are in the country the right incentives for class action litigation? Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.**

Almost nothing was done and I do not expect more changes in the future.

**11. Would you like to add some additional information?**

No.

## **6.2.2 City Council**

### **1. Is it frequent for you to receive complaints from your municipals? Justify.**

Yes we receive a lot of complaints from our municipals. The main complaints are related with the provision of services that we assure but we have also complaints about services provided by private companies as for example regarding electricity, gas and communications. Usually, complaints about the services we provide are related with no or insufficient provision of the service in services as municipal transportation, leisure places, roads, sanitation and garbage collection.

Sometimes, complaints are bringing to the parish councils in this case we frequently ask them to send us the ones with which they cannot lead. We are directly dedicated to solve the problems of our municipals and we try to answer it in the best way we can. We intend that we just left to have a complaint when the problem is totally solved. Although, some complaints about other motifs are frequent in our offices, as for example the ones about totally private services as communication services and services related with the banking sector.

### **2. To whom do you usually report these complaints? Justify**

Usually, when there is a sectorial regulator the majority of the complaints are send to them. Also, we provide to our municipals free judicial services. We have a permanent judicial office only dedicated to solve the municipals' problems and we also have once a week the presence of a particular attorney totally dedicated to solve problems related with our municipals. In this last, the municipals have the opportunity of directly meet the attorney without any additional costs. All the costs are supported by us. Usually, when it is impossible to solve the problem at the first time we insist in solving it until it is totally solved. We always try firstly to solve the problems in an extra-judicial way. Very few are the cases of litigation in court due to the successful possibility that we have of talk previously with the parties involved and make an agreement.

### **3. Do you frequently receive very similar complaints or about the same motifs?**

It is very frequent in our council to receive similar complains about the same motifs. Usually, what happens is that when the case is intended to be a general case (a case which affects all the population) the city council asks all the parish councils to assure that all the municipals affected by the problem are considered. In these cases we ask to all the parish councils to inform their municipals providing a poster in the parish council building to announce the case. When we have the name of all the claimants then we treat all as a

single if it is possible or as individuals in the case of not. With this approach we assure that all the cases are taking into account. Our main role is to understand our municipals and help them. We truly incentive our municipals to join their claims because we believe that joint litigations have more power than individual one. It is particularly relevant for cases involving large companies due to the power over the consumers they have.

**Imagine that it would be possible for you to give a positive answer to the last question in the case of not.**

**4. Have you ever incentivized or would incentive your municipals to claim in court in one class action litigation? Justify and give examples.**

As already mentioned we give always preference to extra-judicial litigation and we solve the majority of our problems by conversation. We do not incentive to go to court for any reason we always try to solve the problems of our municipals the best way we can by alternative dispute resolution. We think that if we have success not litigating we should continue and in this case there is no reason to incentive class action litigation. Also, with the lack of information that we face about class action litigation procedures we are not prepared to do the incentive.

**5. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance (from the more important to the last important):**

**1 - Cultural Influences, i.e. tradition of the societies;**

**2- Lack of public information about class action litigation;**

**3- The way as attorneys are being remunerated;**

**4- Lack of support for municipals, i.e. lower cost incentives, lower number of experts in the field;**

As we do not have sufficient information about the last cases we prefer to not rank it.

**The usual lengths of the procedure;**

**The non-allowance of Punitive Damage award in Portugal;**

**Other.**

**6. Do you think that National Regulatory Authorities and Consumer Organizations are efficient in answering to municipals complains? Justify**

Sometimes, when related with the services provided by us the decision is a political decision and do not depend on other parties depending directly from us or from governments. When the problem may be solved internally we assure that the problem is really solved. When we are depending of other entities as National Regulatory Authorities to solve our problems sometimes they are not so efficient they left more time to answer and the complaints are solved more slowly. However, the majority of the problems have been successfully solved. From consumer organizations we have support but we pay for assure it so we consider it just efficient when there is a monetary incentive for it. From regulators when they can they solve the problem but it lefts more time.

**7. If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify.**

We do not know the Portuguese legislation regarding class action litigation.

**For the following questions please exclude the possibility of make any change in the Portuguese legislation.**

**8. In your opinion there are in the country the right incentives for class action litigation? Justify.**

Probably yes but as we do not know anything nor have any information about it we cannot properly answer this question. As we incentive join claiming and we usually do not incentive join litigation in courts we do not have incentives to know more about class action litigation. I think that it is not our tradition as a country and tradition also has an impact in our behavior. Consumers are not interested in search for information about class actions and the ones responsible for class action representation are not interested in provide to consumers sufficient information. The attorneys seem not be interested on it and we do not have the right tools to inform about it. We are also very reluctant about the success of these procedures mainly against strong entities with a huge power. Also, Portuguese people are very self-indulgent and they claim a lot but do almost nothing to change their problems maybe also due to lack of knowledge. This is one problem very evident in cases of individual bankruptcy; people act without information and then try to claim about what they cannot.

**9. To who should be pointed the responsibility of incentive class action litigation in courts? Justify**

In our opinion the responsibility should be pointed to city councils and consumer organizations. They are directly related with municipals/consumers and are the ones with more power to incentive people to litigate. Usually, they have this obligation by law. Other entities do not as for example attorneys.

**10. Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.**

May be it does not make sense. When we may treat our problems without litigate why should we go to court and litigate? Once more litigation is our last resource.

**11. Would you like to add some additional information?**

No.

**6.2.3 Consumer Organization**

**1. May you please describe me the way of functioning of your institution?**

Our organization is responsible for consumer defense in Portugal. We have the right and liability to inform consumers and represent them. We also protect them from injuries. In our office we have available lawyers to treat their main problems in consumption of services and goods.

**2. Is it frequent for you to receive complaints from your consumers? Justify.**

Yes, we usually receive several complains from our consumers.

**3. To whom do you usually report these complaints? Justify**

We treat our complaints internally or trough National Regulatory Authorities we have a direct contact with the regulators and the government.

**4. Do you frequently receive very similar complaints or about the same motifs?**

We do not have information to provide relatively to this question. If it happens we are treating it as individual litigations.

**Imagine that it would be possible for you to give a positive answer to the last question in the case of not.**

**5. Have you ever incentivized or would incentive your consumers to complain in court in one class action litigation? Justify and give examples.**

No, we do not incentive class action litigation because we do not have information about it. We know vacantly what it is but without specification. Our lawyers had never dealt with a class action litigation case.

**6. If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify**

We do not have information about the legislation. We know that it exists but we do not have the need of know it as the ones we frequently use.

**7. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance:**

**1 - Lack of public information about class action litigation;**

One has no sufficient information to answer.

**Cultural Influences, i.e. tradition of the societies;**

**Lack of support for consumers, i.e. lower cost incentives, lower number of experts in the field;**

**The usual lengths of the procedure;**

**The way as attorneys are being remunerated;**

**The non-allowance of Punitive Damage award in Portugal;**

**Other.**

**For the following questions please exclude the possibility of make any change in the Portuguese legislation.**

**8. In your opinion there are in the country the right incentives for class action litigation? Justify.**

One has no sufficient information to answer.

**9. To who should be pointed the responsibility of incentive class action litigation in courts? Justify**

One has no sufficient information to answer.

**10. Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.**

One has no sufficient information to answer.

**11. Would you like to add some additional information?**

No.

#### **6.2.4 Cooperative**

**1. May you please describe me the way of functioning of your institution?**

We are a cooperative of social responsibility for defense of disabled people. We function both day and night providing for our students a familiar environment in which they learn and play developing their capabilities. We have in our organization professors, monitors, social assistants, psychologists, therapist and a group of persons completely dedicated to our students. Our main difficulties are regarding funding, so that, we almost totally depend of governmental funding.

**2. Is it frequent for you to receive complaints from your users? Justify.**

Yes, we usually receive complaints from our users and we also receive complaints from disable persons outside of our institution who need our help. The main complaints we receive are regarding transportation and issues related with mobility in general.

**3. To whom, do you usually report these complaints? Justify**

Usually, we report these complaints to the responsible for our functioning the city council, parish councils, government, social security and the Ministry of Education.

**4. Do you frequently receive, very similar complaints, or about the same motifs?**

Not usually, but sometimes in specific cases we receive complaints that are very similar. It usually happens in the cases of transportation when the problem is affecting a group of persons.

**Imagine that it would be possible for you to give a positive answer to the last question.**

**5. Have you ever incentivized or would incentive your students to complain in court in one class action litigation? Justify and give examples.**

We do not face cases regarding join complains but as we represent a totality of our students we have all the legitimacy to represent them in court when necessary so we incentivize them, although only in extreme cases and not related with the government or the entities from which we depend. In this particular case we privilege direct contact and conversation. As we directly depend on government funding the incentives of litigate against them are almost zero. We try always to solve our problems by discussion and in the majority of the cases it seems to be a successful way of solve our problems. This opinion seems to be shared by almost all the other cooperatives in the country belonging to our organization. As example, there are cases in which as the cases globally affect a number of individuals in the country we try to talk with similar cooperatives to join efforts and solve the problem together in court. Although, it is clear that some of them even suffering from the same problem do not want to litigate afraid of retaliation. As us they strongly prefer conversation to litigation.

**6. If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify**

We do not have information about class action litigation.

**7. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance:**

- 1- **Other:** Difficulties of agreement with similar cooperatives;
- 2- **Lack of public information about class action litigation;**
- 3- **The usual lengths of the procedure;**
- 4- **The way as attorneys are being remunerated;**
- 5- **Cultural Influences, i.e. tradition of the societies;**
- 6- **Lack of support for students, i.e. lower cost incentives, lower number of experts in the field;**
- 7- **The non-allowance of Punitive Damage award in Portugal.**

**For the following questions please exclude the possibility of make any change in the Portuguese legislation.**

**8. In your opinion there are in the country the right incentives for class action litigation? Justify.**

No, it may be seen with the problems the government has with the courts. The government does not give the right incentives in terms of information and funding for class action litigation in court. We are an institution without sufficient funds to spend in courts litigation. Also, from what we know the length of the procedures in court is very huge and sometimes when the problems are effectively solved it is too late.

**9. To who should be pointed the responsibility of incentive class action litigation in courts? Justify**

We think that responsibility should be pointed to government's consumer organizations. Usually, although with higher link to politicians they are the ones which do not require additional payments for their services and they are also the more accessible ones. In this sense they should have the responsibility to protect consumers in an efficient way.

**10. Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.**

Better and timely government support would be a possible solution to create a sufficient fund to spend in litigation. Also, decreasing the slowness of courts and increase the amount of information provided would also be an effective solution.

**11. Would you like to add some additional information?**

No.

### **6.2.5 Parish Council**

**1. Is it frequent for you to receive complaints from your municipals? Justify.**

No, we do not frequently receive complaints from our municipals. The majority of the complaints are directly brought to the city council. Although, in some particular cases when we see that the problem complained is related with a group of municipals from our parish we try to join all the claims and bring it together to the city council.

**2. To whom do you usually report these complaints? Justify**

The complaints that arrive to us are complains regarding the services we provide. In this case we are able to treat the problems internally and so that we do not send our claims to any other party. Otherwise, all the claims are sent to the city council.

**3. Do you frequently receive very similar complaints or about the same motifs?**

As we sometimes induce the collection of several claims about the same injury to send to the city council usually the motifs of the claims we receive do not change a lot.

**Imagine that it would be possible for you to give a positive answer to the last question.**

**4. Have you ever incentivized or would incentive your municipals to claim in court in one class action litigation? Justify and give examples.**

No, because we prefer extra-judicial treatment of the complaints that arrive to us. Also, we do not have sufficient strong claims to go to court. Other additional problem is related with our insufficient funding. We have no monetary incentives to do it people are not interested and the knowledge we have about class actions is not sufficient.

**5. Which of the following factors in your opinion better justify the existence of so few class action litigations in Portuguese courts? Please order the following sentences by decreasing sequence of importance:**

- 1 - Cultural Influences, i.e. tradition of the societies;**
- 2 - Lack of public information about class action litigation;**
- 3 - Lack of support for municipals, i.e. lower cost incentives, lower number of experts in the field;**
- 4 - The usual lengths of the procedure;**
- 5 - The way as attorneys are being remunerated;**

We do not have sufficient information to rank the last sentence.

**The non-allowance of Punitive Damage award in Portugal;**

**Other.**

**6. Do you think that National Regulatory Authorities and Consumer Organizations, are efficient in answering to municipals claims? Justify**

We do not have sufficient information to answer this question due to the fact that it is the city council role to send claims to National Regulatory Authorities and Consumer Organizations if it is the case.

**7. If you have information about the existent legislation related with class action litigation do you think that it should undergo some modifications? Justify**

We do not know the existent legislation regarding class action litigation procedures.

**For the following questions please exclude the possibility of make any change in the Portuguese legislation.**

**8. In your opinion there are in the country the right incentives for class action litigation? Justify.**

There is almost no information about class action litigation in the country the parties involved on it do not have incentives maybe because our country is not traditionally a litigant country. As already said when we receive complains we expect to solve it by conversation with the municipals and the other party involved. If we are able to solve the problem we solve it internally. Also, municipals usually claim but they do not pretend to involve courts. Probably the length of the litigation the costs with attorneys and the time spend on the search for sufficient information to litigate creates costs which disincentive municipals to litigate in courts turning litigation almost unthinkable.

**9. To who should be pointed the responsibility of incentive class action litigation in courts? Justify**

We think that the Government is the main authority responsible for the divulgation of law. The Ministry of Justice should be the first to incentive attorneys to the existence of the possibility of class action litigation. Also, just they and consumer organizations may inform parish councils which in its turn may inform municipals. We need to be informed from the top to change the way as we address our responsibilities.

**10. Which may be the possible solution to increase the number of class actions in the Portuguese courts if it makes sense to increase it? Justify.**

I think that for the case of our country class action litigation does not make sense. People is not interests in court litigation and we are not interest in litigate in court mainly when we can solve our problems internally. Although, increasing information it would make the difference.

**11. Would you like to add some additional information?**

No.

### 6.3 Resume Table

	Attorney	City Council	Consumer Organization	Cooperative	Parish Council
Is it frequent to you, to receive complaints?	Yes	Yes	Yes	Yes	No
To whom, do you report the complaints you receive?	NA <sup>57</sup>	National Regulatory Authorities; No report <sup>58</sup> .	National Authorities ; No report.	Regulatory City Council; Government; Ministry of Education; Parish Council; Social Security.	No report; City Council.
Do you receive, similar complains or with the same motif?	Yes, in particular cases as labor law.	Yes	NI <sup>59</sup>	Not usually	Yes
Do you incentive, or would incentive, class action litigation, in court?	No	No	NI	It depends against who we litigate	No
Factors influencing, class actions, in Portugal, by order of importance:	The non-allowance of Punitive Damage award in Portugal; The way as attorneys are being remunerated; The Opt-out versus Opt-in procedure; Cultural Influences, i.e. tradition of the societies; Lack of support for consumers, i.e. lower cost incentives, lower number of experts in the field.	Cultural Influences, i.e. tradition of the societies; Lack of public information about class action litigation; The way as attorneys are being remunerated; Lack of support for municipals, i.e. lower cost incentives, lower number of experts in the field.	Lack of public information about class action litigation.	Other: Difficulties of agreement, with similar cooperatives; Lack of public information about class action litigation; The usual lengths of the procedure; The way as attorneys are being remunerated; Cultural Influences, i.e. tradition of the societies; Lack of support for students, i.e. lower cost incentives, lower number of experts in the field; The non-allowance of Punitive Damage award, in Portugal.	Cultural Influences, i.e. tradition of the societies; Lack of public information about class action litigation; Lack of support for municipals, i.e. lower cost incentives, lower number of experts in the field; The usual lengths of the procedure; The way as attorneys are being remunerated;

<sup>57</sup> Na – Not Applicable

<sup>58</sup> No report means that the parties privilege to treat claims internally.

<sup>59</sup> It was not provided sufficient information to answer this question.

	<b>Attorney</b>	<b>City Council</b>	<b>Consumer Organization</b>	<b>Cooperative</b>	<b>Parish Council</b>
<b>Do you have knowledge about the legislation?</b>	Yes	No	Yes	No	No
<b>Are, National Regulatory Authorities and consumer organizations, efficient?</b>	NA	No	NA	No	NI
<b>There are in the country the right incentives for class action litigation?</b>	No	Yes	NI	No	No
<b>Who should have, the responsibility of incentive class action litigation, if it makes sense?</b>	Government; Ministry of Justice; Attorneys; Bar.	City Council; Consumer Organizations.	NI	Government; Consumer Organizations	Government
<b>What is the solution to increase the number of class actions, in Portuguese courts?</b>	Increase does not make sense	Increase does not make sense	NI	Governmental Support	Increase information

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