

X. Country report Portugal

Document Control

<i>Document</i>	<i>Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Portugal</i>
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1.1 Overview of collective redress mechanisms¹

There is only one collective redress mechanism in Portugal that may provide a damages remedy. This is a fully judicial group action set out in statute, and not specifically directed at consumers, although consumer rights are one of the explicitly listed groups of interest to which the mechanism is addressed. (Under the Portuguese Constitution, the other groups of interests that are covered are those related to: public health, quality of life and preservation of the cultural and environmental heritage (Article 52(3)).) The action is called '*acção popular*', which translates as 'popular action' or 'collective action', and is accorded an important place in Portuguese law: It has been the subject of a right in the Portuguese Constitution since a constitutional revision in 1989. The mechanism allows for an exception to the usual rules set out in the Civil Code, reducing the formality required in relation to procedural requirements, and ensuring reduced costs for consumer organisations in bringing such claims.

The mechanism has been little used in practice, the landscape of Portuguese consumer law being dominated by the non-judicial and conciliatory mechanisms and bodies. In particular, it seems that most consumer cases are brought before the *Centros de Arbitragem*, which occasionally have referred cases to the Portuguese consumer associations to take to the courts in a collective action suit (e.g. DECO-P. case in 1999 (Case Portugal 3); DECO-M. case in 1998 (Case Portugal 5). The collective action cases for damages are often intimately linked with allied injunctive cases. The collective redress mechanism fills a void in attempting to provide a remedy for notoriously difficult mass cases, but there are doubts whether it achieves the aim in the best way possible.

Nevertheless, while it is unlikely that the action will become widely used in the near future, there are indications that it is becoming increasingly relevant, at least insofar as understanding of the mechanism is increasing among the legal community. In short, it appears that there has been a great evolution in the way in which this relatively new procedure is used (it was introduced only in 1995). The first set of cases involved in-depth discussions about the *acção popular*, focusing on the standing of the consumer organisations and the nature of the procedural requirements for the case. There was some uncertainty as to the way in which these cases would mesh with the remainder of the Civil Code, and judges and lawyers were in some sense resistant. Most of the legal discussion was addressed to procedural aspects and, substantively, the discussion was weak and cases were lost. In comparison, the latest cases occur in a context in which the mechanism is rather more understood and its existence is not questioned. This is exemplified by the A. case (Case Portugal 6) in which the *acção popular* was not explicitly mentioned in the original court documents, as seemingly simply stating the nature of the claimant as a consumer organisation was sufficient to ensure that this was

¹ This is an update of a previous study commissioned by DG SANCO. See: Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings. Hereafter referred to as "Leuven study".

understood. Further, this case was resolved by a settlement between the parties simply and quickly, resulting in a very effective full resolution of the matter for consumers. This trend has been accompanied by a further trend towards better argued and chosen cases by the claimants, thus resulting in a higher chance of success, a quicker process, and a more feasible use of limited resources.

It seems that the introduction of this collective redress action has resulted in a greater understanding of consumer law among lawyers and judges, as well as an enhanced role for the most important consumer organisation, DECO. Despite this, DECO remains a comparatively small organisation with limited resources, and the use of the mechanism depends on the dedicated time and effort of experienced lawyers; it seems that there has been a shift in more recent years to an approach that prioritises the quality of legal representation, but the effectiveness of the organisation is still hampered by its general lack of resources. The existence of the mechanism also appears to have had an important impact in terms of the knowledge among companies of such cases and there is a general sense that these cases have some degree of preventive effect. In terms of the way that the mechanism has been used, it seems that DECO has taken advantage of the lack of formality to file what are in essence claims for declarations of legal rights, on the basis of a nominal sum of money; the actual amount of money to be awarded and how this will be distributed among consumers is a secondary point apparently decided after the attribution of guilt or otherwise. This has arguably had some ideological impact, as procedural formalities are an essential part of the usual Portuguese Civil Code. Nevertheless, opportunities have not always been taken (e.g. no case has sought non-material damages, although these would theoretically be available).

In conclusion, it seems clear that the mechanism is potentially important, and has proven to be an interesting way of bringing cases that are likely to have otherwise occurred within the ordinary rules of procedure. Having said that, there have been an extremely small number of cases in total, and a number of them have been unsuccessful. Clearly there is a problem with the effectiveness of the mechanism. In particular, this seems to be associated with general factors to do with the Portuguese judicial system: its relative slowness, high cost and lack of predictability in comparison with the non-judicial solutions. These general problems are compounded in this instance by factors associated with the newness of the system – that is, a lack of knowledge and experience on the part of the lawyers and judges involved, and a lack of best practices that has built up in relation to how to bring such cases. Other factors are linked with the nature of consumer claims of a mass nature – the difficulties of distributing monetary awards are great. It seems that the success of the mechanism is reliant upon good lawyers and sufficient funding to ensure that these factors are overcome. The collective redress mechanism is perhaps best understood as providing a procedure that will be of use when the other, more preferable, procedures do not for whatever reason work in the particular situation.

1.1.1 **Collective redress mechanism 1: Acção popular**

Summary description

This is an opt-out mechanism of general application, amounting to a representative collective action that will proceed through the usual court system. The *acção popular* will be commenced at the first instance courts, and is appealable in the ordinary way, through an additional two levels of courts. There are a limited number of organisations that may bring these cases and by having cases dealt with by those organisations, individual consumers avoid having any costs. In reality, the only organisation likely to bring such claims is DECO. There is a special procedure reducing the amount payable for court costs, it is a much less formal system, and it is used to avoid the difficult, technical, proof of each element of individual consumer cases within a large mass action.

Details

A. LEGAL BASIS

Portuguese Constitution – Articles 52 and 60 (VII constitutional revision, 2005)

Law 83/95 of 31 August – Participation and Popular Action Law

Law 24/96 of 31 July – Consumer Rights Law

B. COMPETENT AUTHORITY

Ordinary courts.

C. WHO CAN INITIATE THE PROCEDURE – RULES OF STANDING

Individual citizens and consumer organisations. The Ministério Público and the Direcção-Geral do Consumidor can also commence a proceedings when there is a violation of “*interesses homogêneos, colectivos ou difusos*” (article 13(1)(a) Law 24/96); additionally, the Ministério Público can substitute itself for the original claimant if s/he withdraws or behaves in such a manner that could put the claim at risk (article 16(3) Law 83/95).

The Portuguese Constitution (Article 52(3)(a)) states that “It is conferred on everyone, individually or through associations defending the interests at stake, the right of a collective action in the cases and terms set out in the law”.²

Article 2(1) of Law 83/95 adds that “The holders of the procedural right to popular participation and the right of collective action may be citizens in the pursuit of their civil and political rights, and the associations and foundations defending the interests set

² “É conferido a todos, pessoalmente ou através de associações de defesa dos interesses em causa, o direito de acção popular nos casos e termos previstos na lei”

out in the preceding article, independently of whether or not they have a direct interest in the particular claim”.³

The early cases (and to some extent the later cases) all included significant discussion of the standing of the consumer organisations (ACOP and DECO) to bring these actions. The defendants have argued that such organisations have no right to bring such actions as it is not explicitly mentioned as a purpose within their foundation documents. While in the earlier cases confusion about the new law meant that this argument may win in the lower instance courts, and the matter would be argued as a preliminary matter in the Supreme Court, in later cases, increased understanding among lower instance judges seems to have solved this problem somewhat. It is clear now that DECO has standing to bring such cases. This certainty is an important factor in reducing the amount of time and money spent on such cases, as it is now possible for resources to be focussed on substantive matters rather than questions of standing.

D. TYPES OF DISPUTES

The Constitution states that the collective action applies to disputes involving public health; quality of life; preservation of the cultural and environmental heritage; and consumer rights.

E. MAIN PROCEDURAL RULES

To be commenced in court, the *acção popular* should be filed on one of the procedure forms in the *Código de Processo Civil* (Civil Code). In other words, there is no specific new procedure concerning *acções populares*; rather, it is a less formal version of the general regime. In particular, there is no need to have exact formal proof of monetary claims for all possible claimants, and all claimants do not need to be named.

The process begins with the presentation of the initial petition in court, which should conform to the general formal requirements imposed by the Civil Code (article 467). Article 467 states that in the initial petition, the claimant should indicate the appropriate court and the names and addresses of the parties; identify the form of the procedure to be followed; explain the facts of the case and the legal arguments; present the claim; and indicate the monetary value of the proceeding. The relevant time periods will depend on which form the proceeding will take, but for example the defendant will have 30 days (in the most formal form) from notification of the claim to present a defence.

In the second stage of the process, consumers affected by the action (and not only the parties) will be called to participate in the process or to exclude themselves from it (opt-out procedure, Law 83/95, article 15(1/)). According to subparagraphs 2 and 3 of the same article, this advertisement should be published in the media.

In terms of evidence rules, the judge’s power is tremendously increased in these sorts of cases, comparatively to the usual civil process. Judges will not be confined to the

³ “São titulares do direito procedimental de participação popular e do direito de acção popular quaisquer cidadãos no gozo dos seus direitos civis e políticos e as associações e fundações defensoras dos interesses previstos no artigo anterior, independentemente de terem ou não interesse directo na demanda”

evidence presented in court by the parties; but will be entitled to collect from the parties and other institutions additional evidence on their own initiative. As a general rule, this is only possible in criminal proceedings. The prosecutor has the power to ‘monitor’ (*fiscalizar*) the way in which the law is respected in every *acção popular* (art. 16) which is atypical in civil proceedings.

The process will follow the general process in terms of appeal. Pursuant to article 18, judges may suspend the enforcement of a court decision pending an appeal, to avoid damage that may otherwise occur and that would be difficult to repair or irreparable. Finally, if the defendant loses, it must pay for the publication of the decision (or part thereof as ordered by the judge) in a newspaper expected to be read by those with an interest in the case (i.e. consumers). The *acção popular* can be, and has been, used as ‘*reparatória, preventiva e inibitória*’ – to reimburse monetary loss, to prevent future violations, and to stop current violations. Injunctive remedies can be sought in the same proceedings as monetary remedies. This report concerns only monetary compensation/damages.

Article 14 of Law 83/95 states that the claimant acts on behalf of all others with a right or interest, even without an explicit authority, except (pursuant to article 15), if someone expresses the intention of not being represented by the claimant, after either being notified of the claim or being aware of the claim through the media. Pursuant to article 15(4), a person can inform the court, before the evidence is discussed, that s/he does not wish to be represented by the claimant and the effect of the court decision will not then affect her/him.

F. REMEDIES THAT CAN BE OBTAINED

Pursuant to the Civil Code and Law 24/96, consumers can claim material and non-material damages and compensation. Punitive and exemplary damages are not available in Portugal.

G. COSTS INVOLVED FOR THE PARTIES

Pursuant to article 14(2) of the Lei 24/96, consumers are exempted from the cost of preliminary preparations in bringing a case to court that concerns rights arising from the provision of goods and services if the value of the action does not exceed the monetary competence of the first instance court. Article 14(4) provides that claimants will be obliged to pay 10-50% of the cost of court fees (as determined by the judge), at the discretion of the judge, if the case is lost. If the case is won, then court fees will be waived in full (article 14(3)). The defendant will be obliged to pay court fees regardless of whether or not it wins.

Normal lawyers’ fees will be applicable, but as it is to be expected that consumers will chose to be represented by the consumer organisations rather than individually, this cost will fall to the organisations who will use a combination of in-house lawyers, and retained lawyers with a specialization in the field. In practice, it is likely that consumers associate the collective action mechanism with DECO and will take any complaint to the organisation. Although a pro bono system exists in Portugal, such specific cases are unlikely to take advantage of that system, which officially involves the random

allocation of a lawyer for particular cases. DECO will choose its own specialist lawyer, ensuring a quality of service that would not exist if the strict pro bono system was implemented.

If a case is lost, consumers will have no personal costs, unless the action is taken at the initiative of consumers themselves, rather than through a consumers' association.

H. AVERAGE DURATION OF THE PROCEDURE

Varies greatly and is difficult to estimate given that there have been so few cases. A case could be expected to take at least one year, although a more usual average duration would be approximately 5-7 years.

1.2 Overview of relevant literature

There has been little written by Portuguese academics or otherwise explicitly concerning the effectiveness and efficiency of mechanisms for collective redress for damages in the country. This may be attributable, at least partly, to the fact that the mechanism is relatively new and little used in practice, and so has not attracted much attention nor generated much upon which to base comment.

First analyses of the definition of collective redress under the Portuguese Constitution were provided by Sotto Maior (1998) and Duarte, both of whom who consider the use of collective redress to protect consumers' rights as an instrument of participatory democracy. More recently, the Direcção-Geral do Consumidor (2007), in the context of the Portuguese Presidency of the EU, released a handbook on collective actions in Portugal. This short text reflects on why there have been so few *acções populares*, suggesting as reasons the limited financial resources of consumers' associations and individual consumers in a country with high poverty levels, and the existence of court fees as well as lack of training of lawyers working for consumers' associations. In the national report on collective litigation in Portugal produced by Antunes (2007), it is interesting to note that arguments concerning the efficiency and effectiveness of the system are based on general theory rather than Portuguese specifics, given the lack of data available.

1.3 Difficulties to obtain redress for mass claims

This issue is subject of a complementary study⁴ and results from the country studies are integrated therein.

1.4 Collective actions filed so far

The collective actions filed so far are presented in the table on the following page. For more details, please refer to part III of this study.

⁴ CPEC 2008, Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, Final Report (study prepared for DG SANCO).

Table 1: Overview of cases collected – mechanism 1: Acção popular

Case number	Name of case	Brief description of case	Year of filing of original case	Year of final court decision / settlement	Cross-border element
1	ACOP-P.	Discussion of the procedural elements of the <i>acção popular</i> mechanism, which were won by ACOP; lost on substance	1995	2006	None
2	DECO-P.	Discussion of the procedural elements of the <i>acção popular</i> mechanism, which was won by DECO; lost on substance	1995	2002	None
3	DECO-P. (set-up fee claim)	Following a judicial decision of illegality of a set-up fee, determination of an illegal payment through a settlement	1999	2003	None
4	DECO-Carmen Opera	Refund ordered of cost of tickets to a show that was different from that originally advertised	1999	2006	2 Spanish defendants (resulted in difficulties)
5	DECO-O.	Pending decision concerning refund for annual fee paid in advance for a language course from a school that closed during the year. Involvement of major banks due to contractual arrangement to pay the fee.	2003	pending	Language school closed because its parent company, which was Spanish, closed.
6	DECO-Á.	Out of court settlement ensuring refund of cost of repairing broken water meters	2006	2006	None

1.5 Hypothetical example cases

The following section contains data concerning the costs of 3 “hypothetical example cases”. A “hypothetical example case” is hereby understood as being an action proceeding which is “invented” on basis of existing cases, and defined through the type of individual damage suffered by a number of consumers, the sector, the category of law, the value of the case, the affected number of consumers, etc. For each case are analysed:

- a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).*
- b) The effects on consumers who do not bring the collective action.*
- c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).*
- d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer’s fee).*
- e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.*
- f) Is there a “loser pays principle”? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?*

In all cases it is assumed that claims are brought at the same court. The consumers are not in a state of poverty and are not eligible for legal aid targeted exclusively at the poor. All cases are decided after appeal.

1.5.1 Case 1 - telecommunication

Due to a technical defect, the telecommunications services provider T has miscalculated the duration of all telephone calls made by customers as being 2-3 percent longer than they were in reality, resulting in extra profits of 1 million Euro. 100,000 customers suffered damages; with certain differences as to the individual case. The consumer organisation or other intermediary preparing the claim estimates the average damage per consumer to be 1 Euro per month. The service provider claims to have repaired the defect after 10 months. Therefore the average damage per consumer could be estimated at 10 Euro.

- If the relevant mechanism is an opt-out system: consumer organisation or other intermediary represents all consumers (combined value of claims 1 million Euro)*
- If the relevant mechanism is an opt-in system: consumer organisation or other intermediary could mobilise 1,000 consumers (combined value of claims 10,000 Euro)*

- a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).**

In principle, the group action (*acção popular*) is available.

- b) The effects on consumers who do not bring the collective action.**

This is an opt-out procedure, so consumers that do not opt-out are bound by the court decision.

- c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).**

See table below.

- d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer's fee).**

See table below.

- e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.**

- f) Is there a "loser pays principle"? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?**

Both parties will pay their own lawyer costs. In relation to court costs, the relevant law ensures that consumer organisations will pay nothing if they win the case, and will only pay a small amount if they lose. They will never be responsible for the full costs of the case or any part thereof. Individual consumers will have no costs unless they bring the case in their individual capacity (as is allowed by the Civil Code). This however is unlikely, as consumers would be expected to approach DECO to act on its behalf, in which case it is the consumer organisation that takes responsibility for the costs of the case.

Table 2: Estimates regarding hypothetical example case 1 - telecommunications

	Estimated court fees [national currency]	Estimated lawyer's fees [national currency]	Other costs, if any [national currency]	Public support that is available [national currency]	Estimated time involved	Comments
Collective redress: Acção popular						
<i>For each individual consumer</i>	0	0	0		2 hours	Theoretically possible for pro bono lawyer to be assigned; unlikely in practice as would be inexperienced in such cases
<i>For intermediary filing the action</i>	If lose, 1800 Euro; if win, zero	10 000 Euro	0		7-12 days	Estimate involving many unknown assumptions
Individual redress (through ordinary court procedure)						
<i>For each individual consumer</i>	If lose, 50 Euro; if win, zero	0 (if pro bono lawyer) 200 Euro (if monthly income is over 400 Euro, will need a non pro bono lawyer)	0		4 hours	This is the most expensive and slowest option. It is difficult to estimate exact amounts of both time and cost, not least because it is difficult to imagine anyone bringing a claim for individual redress of 10 Euro in the ordinary courts.

	Estimated court fees [national currency]	Estimated lawyer's fees [national currency]	Other costs, if any [national currency]	Public support that is available [national currency]	Estimated time involved	Comments
Individual ADR						
<i>For each individual consumer</i>	0	0	0		4 hours	This is the quickest and cheapest option, but requires the agreement of both parties. While representation by a lawyer is not required, it might be chosen.

1.5.2 Case 2 – financial services

Enterprise E released a third tranche of shares (230 million shares, 60 Euro per share). Following this, the value of the shares decreased rapidly during the next three years (to 10 Euro per share), leading to a loss in shareholder value of 11.5 billion Euro. Shareholders claimed that they had been victims of false information (considerably overestimated property; concealment of the burdensome acquisition of a foreign competitor) contained in the company's prospectus when the shares were put on the market. 15,000 investors bring their claims to the court, with an average value of the claim being 7,000 Euro each. The combined value of the claims is therefore 105 million Euro.

a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).

In principle, the group action (*acção popular*) is available. However, it is difficult imagining this case coming to court in Portugal for various reasons including the inexperience and lack of resources of the consumer organisations, the lack of community knowledge about the procedure, and the general cultural context. These factors are particularly strong in relation to financial services, where investors are unlikely to be aware of the *acção popular*. It may be, as banking problems are increasingly commonly reported in the media, that in the future such a case could possibly be brought as a collective action. Nevertheless, for those reasons, an estimate of costs is particularly difficult to make.

b) The effects on consumers who do not bring the collective action.

This is an opt-out procedure, so consumers that do not opt-out are bound by the court decision.

c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).

See table below.

d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer's fee).

See table below.

e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.

f) Is there a “loser pays principle”? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?

Both parties will pay their own lawyer costs. In relation to court costs, the relevant law ensures that consumer organisations will pay nothing if they win the case, and will only pay a small amount if they lose. They will never be responsible for the full costs of the case or any part thereof. Individual consumers will have no costs unless they bring the case in their individual capacity (as is allowed by the Civil Code). This however is unlikely, as consumers would be expected to approach DECO to act on its behalf, in which case it is the consumer organisation that takes responsibility for the costs of the case.

Table 3: Estimates regarding hypothetical example case 2 – financial services

	Estimated court fees [national currency]	Estimated lawyer's fees [national currency]	Other costs, if any [national currency]	Public support that is available [national currency]	Estimated time involved	Comments
Collective redress: Acção popular						
<i>For each individual consumer</i>	0	0	0		2 hours	As in previous table
<i>For intermediary filing the action</i>	2000 Euro if lose, zero if win	14400 Euro	0		10 days	As above.
Individual redress (through ordinary court procedure):						
<i>For each individual consumer</i>	75 Euro, if lose, zero if win	500 Euro	0		6 hours	As above. Note that pro bono lawyer is unlikely to be available because of the technical difficulties of this case.
Individual ADR:						
<i>For each individual consumer</i>	0	0	0		4 hours	As above.

1.5.3 Case 3 - tourism

The tour operator T advertised on its website a “last-minute package” called “4-star” in which the consumers were supposed to be offered services in various hotels on various locations (Greece, Tunisia, etc.) in the 4-star category. However, the hotels were in very bad shape and in spite of the request of consumers no other accommodation was provided. The tour operator also categorically rejected all written claims of consumers for compensation. The only argument of the trader for rejection was that last-minute arrangements meant lower quality of services. About 500 travellers are affected, of which 200 claim a refund of 250 Euro each (which is 10% of the total price of the package). The combined value of the claims is therefore 50,000 Euro.

- a) The availability of group actions, representative actions, test case procedures and procedures for skimming-off profits (brought by an intermediary).**

In principle, the group action (*acção popular*) is available.

- b) The effects on consumers who do not bring the collective action.**

This is an opt-out procedure, so consumers that do not opt-out are bound by the court decision.

- c) The expected costs of the action (court fees, costs of paying the lawyer, other costs, if applicable).**

See table below.

- d) The estimated time involved to get information on the case, for preparation of file, coordination, court hearings etc. required from consumers and the intermediary (please do not consider time effort involved of any lawyer paid by the intermediary, as this is covered by the lawyer’s fee).**

See table below.

- e) The existence and relevance of public support, third party financing, contingency fees etc. for bringing the action.**

- f) Is there a “loser pays principle”? Which percentage of the costs of the winning side would be covered by the losing side? In the case of collective redress: Which amount would have to be paid by consumers participating in the action, if the case is lost?**

Both parties will pay their own lawyer costs. In relation to court costs, the relevant law ensures that consumer organisations will pay nothing if they win the case, and will only pay a small amount if they lose. They will never be responsible for the full costs of the case or any part thereof. Individual consumers will have no costs unless they bring the case in their individual capacity (as is allowed by the Civil Code). This however is unlikely, as consumers would be expected to approach DECO to act on its behalf, in which case it is the consumer organisation that takes responsibility for the costs of the case.

Table 4: Estimates regarding hypothetical example case 3 – tourism

	Estimated court fees [national currency]	Estimated lawyer's fees [national currency]	Other costs, if any [national currency]	Public support that is available [national currency]	Estimated time involved	Comments
Collective redress: Acção popular						
<i>For each individual consumer</i>	0	0	0		2-3 hours	As above
<i>For intermediary filing the action</i>	250 if lose, zero if win	2000 Euro	0		6 days	As above
Individual redress (through ordinary court procedure).						
<i>For each individual consumer</i>	30 Euro, if lose; zero if win	0 (if pro bono) 250 Euro (if no pro bono available)			6 hours	As above.
Individual ADR						
<i>For each individual consumer</i>	0	0			4 hours	As above

1.6 Effectiveness and efficiency of collective redress mechanisms

1.6.1 Effectiveness of current collective redress mechanisms

Objectives

1. Does the collective redress mechanism fulfil the objectives of the national law which introduced it?

This country study indicates that the *acção popular* does fulfil the objectives of the national law to the extent that it provides a mechanism that evades the usual procedural formalities that would otherwise prevent these cases coming to court. It allows for a mechanism whereby mass claims can be heard in the courts, and in so doing perhaps operates as a preventive tool, and thus enhancing alternative dispute mechanisms, as defendants become increasingly eager to avoid the *acção popular* cases which can be larger-scale and more heavily followed in the media. However, the small number of cases, and the failure of some of them, seems to indicate that the mechanism has not been entirely successful.

2. Has the mechanism enabled consumers to obtain satisfactory redress in cases which they would not otherwise have been able to adequately pursue on an individual basis?

Yes, in that redress has been available to consumers who would not otherwise have brought a case through the courts. However, this is a heavily guarded answer, as many factors reduce the value of the redress. In particular, the mechanism has resulted in redress in only a very few cases; it is unclear whether these cases could have been adequately pursued through alternative redress mechanisms rather than the courts, thus resulting in a more effective solution (cheaper, quicker); and it is far from certain that the practical problems associated with distribution of redress to individual consumers has resulted in a satisfactory remedy for those individual consumers.

Incentives provided

3. a) Does the mechanism ensure a change in the behaviour of the defendant, which results in the reduction of future harm to all consumers?

Yes, it seems, that the collective action cases have been successful in this regard. For example, a company interviewed that was affected by a court decision pointed out that in their case all the profit had to be given back to consumers and that the practice was not repeated.

3 b) Does the mechanism have a preventive effect and deter potential offenders, for instance by skimming off the profit gained from the incriminated conduct?

The threat of publication of a court decision against a company has had a preventive effect in general. The interviewees (see Annex 3) mostly also were of the opinion that the mechanism may have a preventive effect.

3 c) Does the mechanism provide incentives and sufficient opportunity for out-of-court settlement?

The mechanism itself provides no incentives for out of court settlement. Having said that, the slowness of the court system provides opportunity for settlement, as does the threat of high costs in a drawn-out court case with significant bad publicity for a company. In practice, there has been one recent settlement where it is particularly evident that the *acção popular* was used to obtain, successfully and effectively, a complete settlement.

4. Does the mechanism discourage the introduction of unmeritorious claims? Is there a “gatekeeper procedure” to certify whether a collective action is admissible to the court or not. If yes, how does it work?

Article 13 allows the judge, following initial investigations, to decide to throw the case out at that point. This would, it is to be expected, be reserved for clearly unmeritorious cases or cases brought in bad faith with no chance of success. In addition, the general problems associated with the mechanism are likely to reduce the number of claims in general, and early failures of what were probably unmeritorious claims may operate as a discouragement to consumer organisations to bring questionable cases (given that time and money will be spent to no purpose). A claimant that loses such a case will be obliged to pay court costs at the discretion of the judge hearing the case; it is possible that this could be used to discourage future unmeritorious cases.

Accessibility**5. Is the mechanism easily accessible to consumers?** [Costs, rules of standing, length of proceedings and other factors hindering or facilitating access for consumers to the mechanism should be considered]

The mechanism is associated with DECO, and in practice is probably inaccessible to individual consumers not represented by the association for reasons of lack of understanding, duration and cost of court proceedings. DECO, however, has limited resources, and so it is possible that consumers will have problems bringing such claims to the attention of the organisation. On the other hand, the high financial burden of bringing such a claim is passed onto the consumer organisation and so does not affect the mechanism’s accessibility to consumers. The rules of standing are therefore in favour of accessibility for consumers, but do not counter all the problems preventing complete accessibility.

6. What are the litigation costs of collective redress for consumers compared to individual redress? What is the risk of the consumer if case is lost?

None, as the costs will be borne by the consumer organisation, if it is brought in that way. Should it be brought by an individual consumer, which is a theoretical possibility but is extremely unlikely in Portugal, then the law operates to reduce the court costs associated with the case compared with individual redress through the court system. It will, however, for an individual consumer be much more expensive than an individual

alternative dispute resolution approach through the Arbitration Centres or small claims courts.

Financing and distribution of proceeds

7. Are actions under the mechanism financed in a way which ensures that consumers are able to obtain effective legal representation? Are there mechanisms of public support for the party that brings forward a collective action (the intermediary⁵), are contingency fees/conditional fees⁶ allowed? What is the risk of the intermediary if a case is lost?

No contingency or conditional fees are available in Portugal. Effective legal representation is reliant upon DECO retaining experienced specialist legal counsel as a priority (see above). It has not proved possible to obtain estimates regarding the costs of these cases in terms of the lawyers' fees for either claimant or defendant.

8. Are proceeds of collective redress actions distributed in an appropriate manner amongst plaintiffs and their representatives?

This is difficult to answer as information is not clearly available. It seems that there have been problems with the distribution of proceeds, associated with the practicalities of the type of case and claim. The judicial decisions given in the earliest collective cases noted likely practical problems with distributing proceeds in these cases.

1.6.2 Efficiency of available mechanisms

Length of proceedings

9. Is the length of the proceedings under the mechanism reasonable for consumers, consumer organisations, public bodies, and the defendants?

In general, such cases take a very significant amount of time that detrimentally affects the relevance and effectiveness of the mechanism. The interviewees stated that it may take 5 to 7 years until a final decision. Having said that, it does not seem to differ greatly from other court-based mechanisms, and so perhaps is not a real factor when the comparison is made with such mechanisms. If the comparison is made in relation to alternative dispute resolution mechanisms existing in Portugal for consumer complaints, then it is clearly a very important (and negative) factor affecting the mechanism's effectiveness. Nevertheless, the suggestion that more recent cases may be quicker than past cases, due to the reduction in uncertainty about the scope of the procedure and standing of consumer organisation claimants, as well as to an increased

⁵ A collective action is usually brought forward by an intermediary, that organises the action on behalf of consumers. This can be a public intermediary (e.g. an ombudsman), a representative organisation as intermediary (e.g. a consumer organisation) or private intermediaries (e.g. a private law firm/an individual consumer taking the lead in an action). Intermediaries may also engage a private lawyer, who is not considered to be an intermediary in this context, as long as he or she is not responsible for organising the action.

⁶ Contingency fees are lawyer's fees that consist of a percentage of the damages awarded. Conditional fees are (possibly additional) fees that are paid in case of success, but not related to the damages awarded.

chance of settlement for clearly meritorious cases, this factor may be resolved somewhat in future cases.

Costs for consumers, consumer organisations and public bodies

10. Are the costs related to bringing an action under the mechanism for consumers, consumer organisations and public bodies proportionate to the amount in dispute?

The interviewees mostly were of the opinion that the fees are proportionate related to the amount in dispute. A problem is that lawyers' fees may be high, and could be considered only to be proportionate if they are reduced from a normal charge-out rate – that is, should DECO hire a large international law firm, it is unlikely that the cost of the action would be proportionate, although the increased resources of such a firm could result in better argued cases and so more successful results.

11. Does the mechanism minimise litigation costs for consumers?

The mechanism exceptionally limits court costs for consumers and their organisations. The lack of formality required by the procedure also minimizes the cost to consumer organisations, as this will reduce the amount of time the organisation and its lawyers need to spend on case preparation and evidence gathering. Nevertheless, the general court system involves a large number of appearances, particularly as appeals seem commonplace in these cases, and a large number of associated court documents to prepare.

Costs for businesses

12. *Information costs*: Does the mechanism impose requirements on businesses (in terms of being informed about the existing collective redress mechanisms and providing related information to public authorities) that lead to additional costs? Do these costs weigh in heavily on Small and Medium Enterprises (SMEs)?

The general opinion of the interviewees was that there are no relevant costs in this respect.

13. *Litigation costs and related insurance costs*: Are cost for businesses for (legal) insurance (for litigation and for damages) and the litigation costs under the existing collective redress mechanisms unreasonable?

The interviewees considered the litigation costs to be on an acceptable level for companies and they were not aware of additional insurance costs related to the risk of an *acção popular*. There is no further evidence available to verify this empirically.

14. Is the *economic impact* on traders against whom actions have been brought under the mechanism proportionate to the alleged harm caused by the trader's conduct?

Most interview partners were of the opinion that the economic impact on businesses is proportionate. Two interviewees pointed out that the company can even benefit from the claim as the P.–DECO case illustrates (see Table 1, case number 3): P. used the

case for its own publicity after they settled the case. This was possible because of an agreement with DECO on free phone calls.

15. Does the mechanism lead to the *closing down* of businesses?

There is no evidence that the *acção popular* has led in the analysed cases to the closing down of businesses.

Competitiveness and investment flows

16. Does the mechanism have an impact on the competitive position of EU firms in comparison with their non-EU rivals?

There is no evidence available in this respect.

17. Does the mechanism provoke cross-border investment flows (including relocation of economic activity in Member States which do not have any collective redress mechanisms?)

There is no evidence available in this respect.

1.6.3 *Added value of available mechanisms*

18. What is the added value of the collective redress mechanism(s) compared to individual judicial redress and ADR schemes, i.e. what is achieved by the mechanism(s) that is not achieved by individual redress?

The collective redress mechanism theoretically allows redress for mass claims that would not adequately be dealt with elsewhere in the system (due to the small amounts of the individual complaints). It also has a preventive effect, in the sense that it is increasingly becoming a mechanism that companies wish to avoid having implemented in relation to them. It is high-profile (note the requirement to publish adverse findings) and attracts easily the attention of the media. Its lack of formality and formal evidence requirements is an important added value for consumers, as it allows for the cases to be brought in an effort to obtain a declaration of a right, with the details of compensation determined as a secondary matter.

19. Please estimate, what percentage of consumers who were represented in the collective redress cases would likely have undertaken individual redress through ordinary court procedures if no collective redress system was in place (e.g. none, 10%, 50%)?

In the interviews, those who answered this question estimated a number between 10 and 20%. This is obviously very difficult to verify. The analysis of the existing cases even indicates it to be likely that almost none of these cases would have been the subject of individual cases through the usual court procedures.

1.7 Overview of alternative procedures for consumers

1.7.1 *Individual court action*

Is there any data available on the number of consumers seeking individual redress through ordinary court procedures?

The interviewees stated that there is no data available because the statistics do not differentiate between consumer cases and other claims.

With regard to the small claims courts (*Julgados de Paz*) during 2002 and 2007 the estimated number of consumer cases is 1 500 (around 25% of all the cases handled by them).⁷

Please estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking individual redress through ordinary court procedures?

Estimates are in the range of between 100 and 500 Euro.

1.7.2 *Individual action – ADR scheme(s)*

Is there an ADR scheme(s) for consumer cases?

Yes, as set out in the Leuven study there are a variety of alternative schemes for consumers in Portugal.

There are two main schemes of ADR for consumer related issues: The Consumer Arbitration Centre and the Automobile Arbitration Centre (AAC). In both, consumer disputes can be resolved through mediation or arbitration. The AAC deals with automobile accident disputes, but also with automobile insurance related disputes.

It is necessary that both parties agree to go to the ADR.

In case that one of the parties disagrees to bring the case to an out-of-court settlement scheme, the complainant can go to the small claims courts. These small claims courts have a mediation stage (not compulsory). Within their area of competence are matters related to the non-fulfilment of obligations (area closely related to consumer disputes).

The decision pronounced by the judge at a small claims court has the same legal force as a decision of an ordinary court. One of the major limitations for bringing a case to the small claims courts is due to the limited number of these courts (16). Nonetheless, the creation of several new small claims courts is currently underway. Another limitation for consumers is the maximum amount of 5 000 Euro for this type of claims.

⁷ Estimation of the Ministry of Justice

Is there any data or an evaluation report available on the consumer relevant use of the ADR scheme(s)?

The Ministry of Justice provided the following statistics:

Concerning the ADR schemes for consumers (CAC and AAC with a total of eight centres in Portugal) the available data refers to the period between 2004 and 2006: in this period a total of 18 501 consumers went to ADR schemes (5 669 in 2004, 6 151 in 2005, 6 690 in 2006). These ADR schemes are free of charge for consumers and the maximal time to conduct a case is 2 months.

With regard to the small claims courts, during 2002 and 2007 the estimated number of consumer cases is 1 500 (around 25% of all the cases handled by them).

The table below shows the evolution of small claims courts in Portugal in the considered period.

Table 5: Evolution of the number of small claims courts in Portugal

Year	Number of small claims courts
2002	4
2004	12
2006	16
2007	16
2008 (estimate)	24

The fee to go to a small claims court is 35€ is for each party. The party who wins the case may be reimbursed. The maximal time delay for a final decision is 2 months.

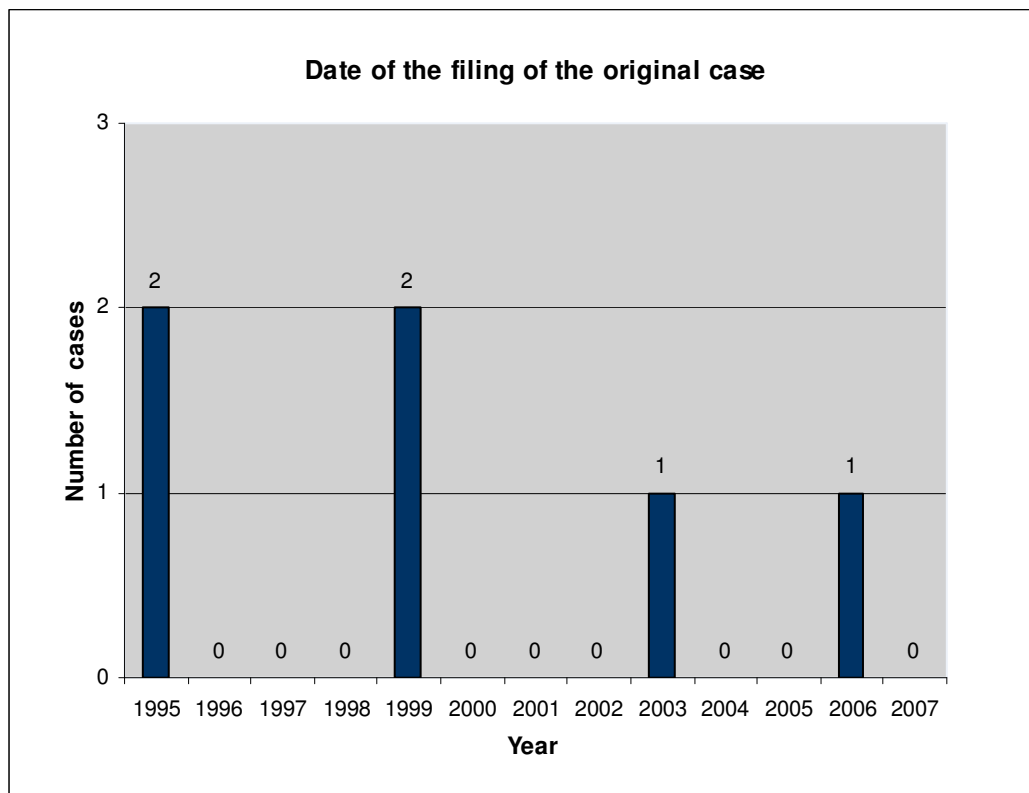
Please estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking redress through an ADR scheme?

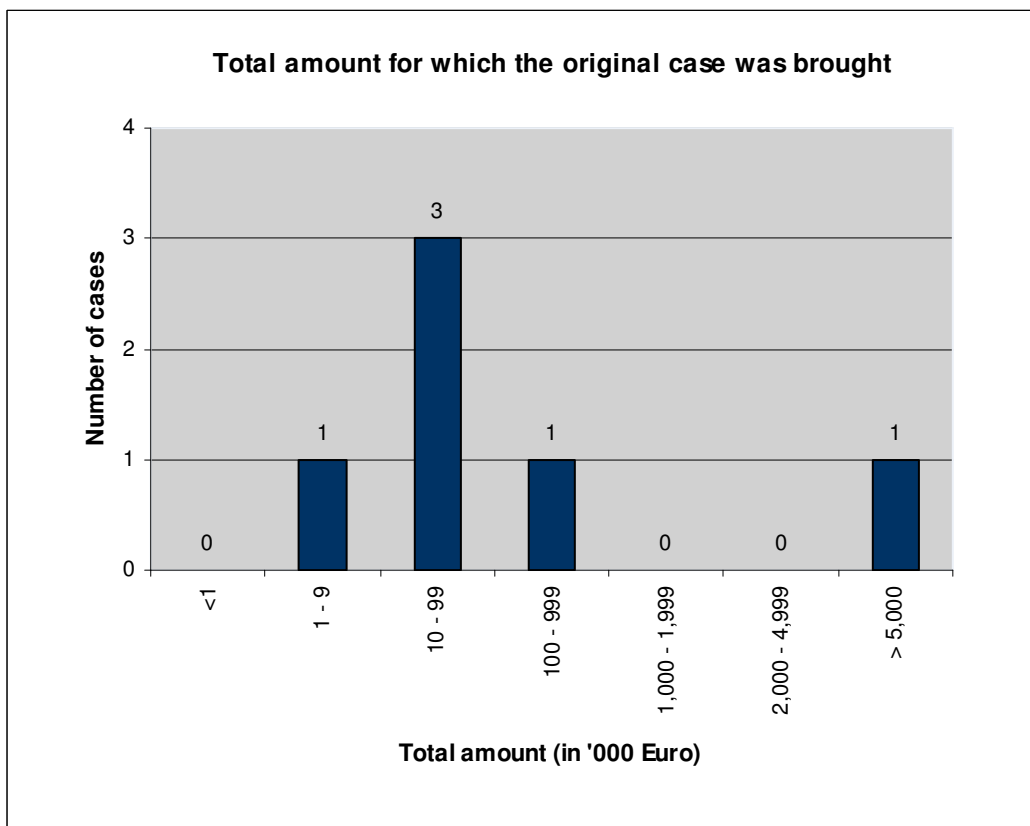
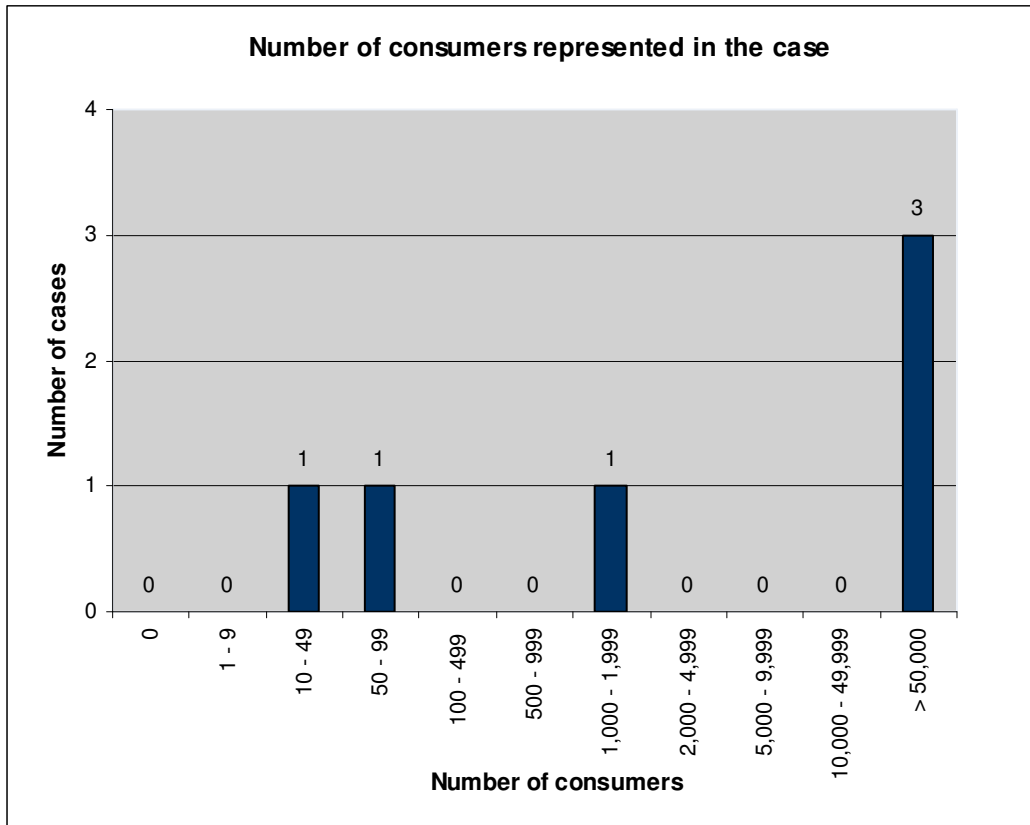
This threshold would be significantly less than for the usual court procedure. Estimates are in the range of between 2 and 50 Euro.

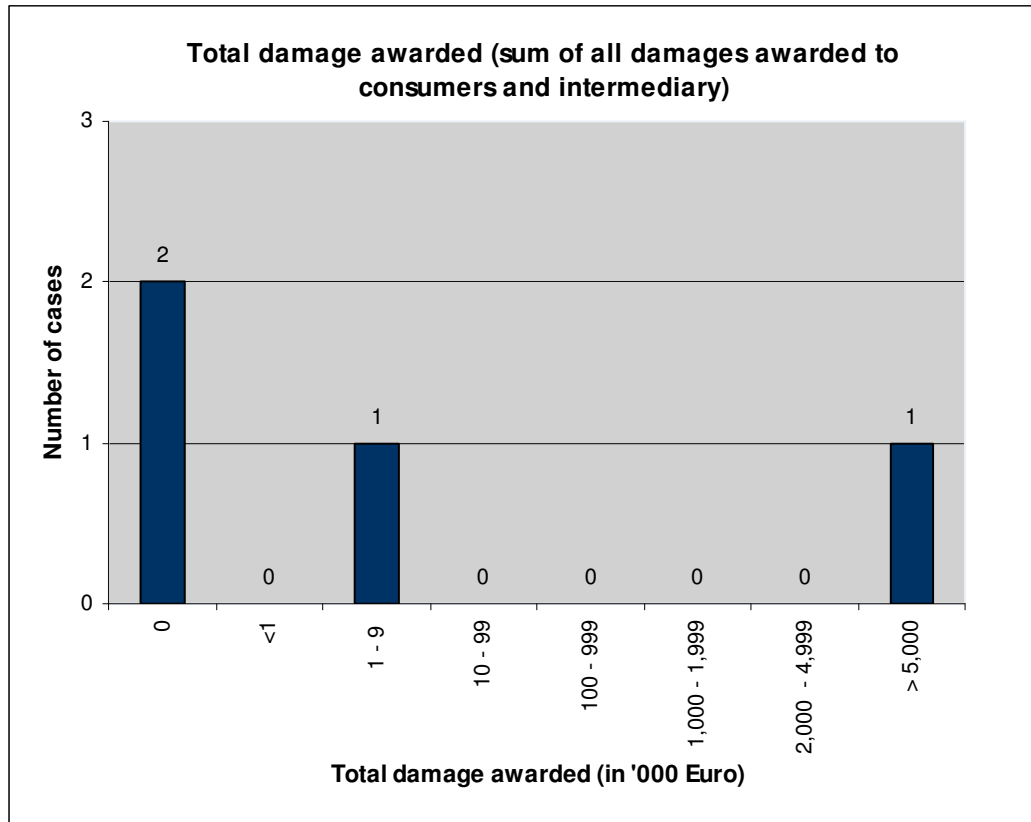
The Centro de Arbitragem de Conflitos de Consumo de Lisboa pointed out, that in 2006 the average amount in dispute was 587 Euro, in 2007: 802 Euro. The lowest amount was 1,80 Euro.

1.8 ANNEX

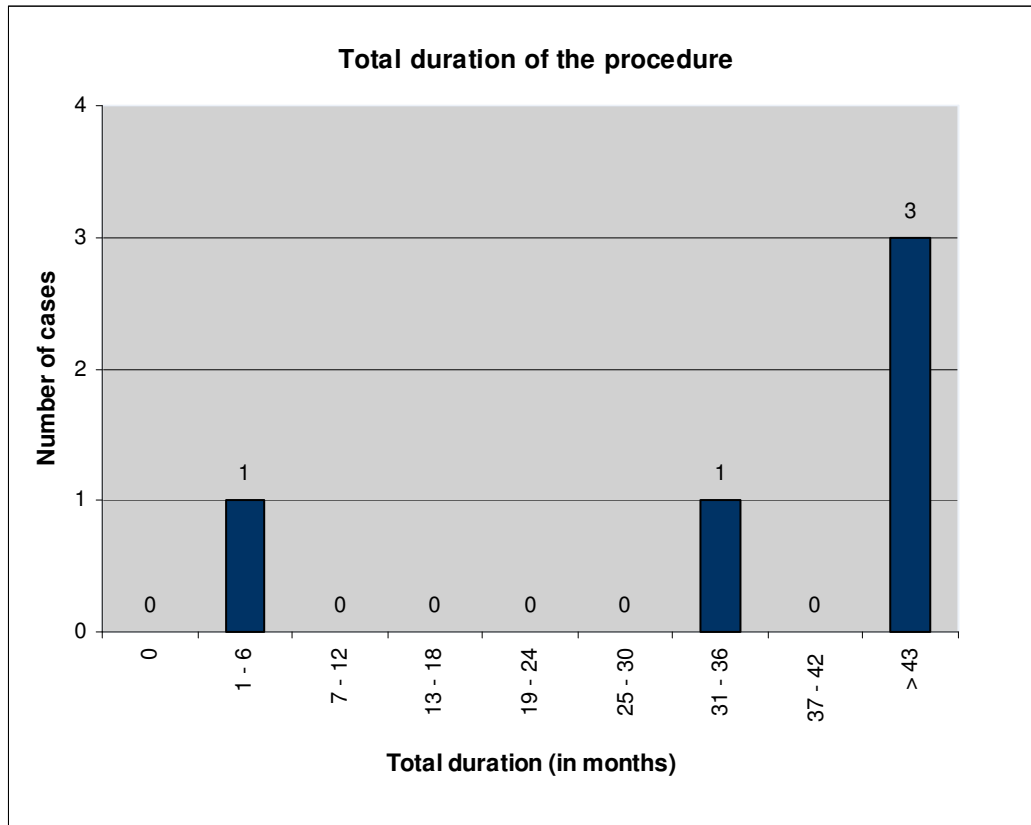
Annex 1: Case statistics



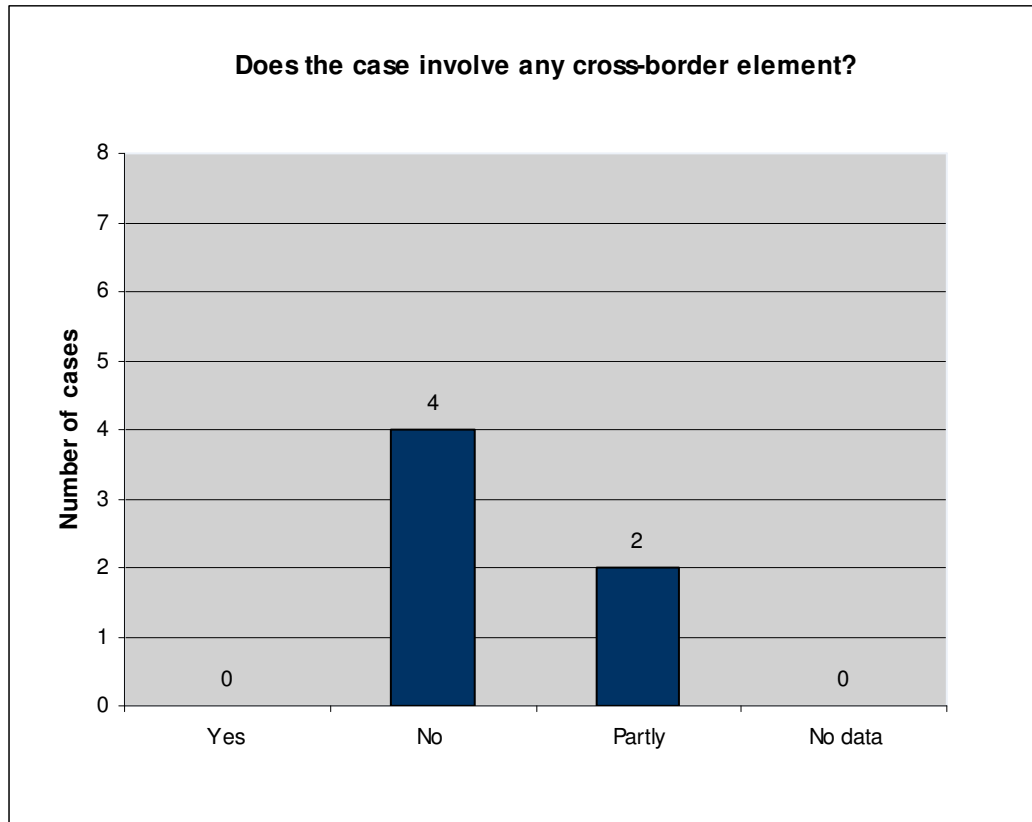




Note: One case is ongoing. No data available for one case.



Note: One case is ongoing.



Annex 2: Country literature on collective redress

- ❑ Antunes, H. S. (2007): 'Class action, group litigation and other forms of collective litigation (Portuguese report)', paper presented at 'The Globalization of Class Actions' conference, December 2007, Centre for Socio-Legal Studies, University of Oxford, England
- ❑ Sotto Maior, M. (1998): 'O Direito de Acção Popular na Constituição da República Portuguesa', *Documentação e Direito Comparado*, nos. 75/76, Portugal
- ❑ Direcção-Geral do Consumidor (2007): *Das acções colectivas em Portugal*, Portugal
- ❑ Duarte, M., (2004): *Novas e velhas formas de protesto: o potencial emancipatório da lei nas lutas dos movimentos sociais*, Oficina do CES, 210, Portugal

Annex 3: Organisations interviewed

- Ministry of Justice
- Direcção-Geral do Consumidor, Ministry for the Economy and Innovation
- DECO (consumer organisation)
- Portuguese Confederation of Commerce and Services (CCP)
- Portugal Telecom (PT)
- Centro de Arbitragem de Conflitos de Consumo de Lisboa
- 1 Public Attorney (Procurador da República) involved in collective redress

Date of interviews: January 2008