



Bundesverwaltungsgericht

ACA-Europe Colloquium
ReNEUAL II – Administrative Law in the European Union
Administrative Information Management in the Digital Age

Leipzig, Germany

Answers to questionnaire: Portugal



Activity co-financed by the Justice Programme of the European Union

Answers to the Questionnaire for the preparation of the colloquium organized by the Federal Administrative Court of Germany in cooperation with ACA Europe in Leipzig, 11 May 2020.

I

Shared databases, structured information mechanisms or duties to inform of national authorities and the case law of your court or other courts of your country:

Background: Book VI establishes in Art. VI-2 (1)-(3) three categories of (advanced) inter-administrative information management not covered by the (more basic) rules for information exchange under the obligations of mutual assistance regulated in Book V (in order of their level of integration): structured information mechanism; duties to inform, and (shared) databases. They are defined in Art. VI-2 (see also Introduction to Book VI paras 17-23 and paras 5-8 of the explanations of Book VI).

1.A. Does your national legal order establish mechanisms of information exchange among authorities within your country which are similar to those categories as defined in Book VI (Book VI, Art VI-2 1 & 3 – 3 categories of advanced inter-administrative information management, namely, structured information mechanism; duties to inform and (shared) databases?):

Yes.

Constitution of Portuguese Republic (CRP/CPR)

Article 35 (6) (use of information technology):

“Everyone is guaranteed free access to public-use information technology networks. The law shall define the regime governing cross-border data flows, and the appropriate means for protecting both personal data and other data whose safeguarding is justified in the national interest”.

Administrative Procedure Code (CPA):

Article 14 (Principles applicable to electronic administration)

"1. Public Administration services and offices should use electronic means to conduct their activities, in order to promote efficiency and administrative transparency, as well as proximity with the interested parties.

2. The electronic systems should guarantee the availability, access, integrity, authenticity, confidentiality, conservation and security of the information."

Article 19 (Principle of Loyalty and sincere cooperation with the European Union)

"1. In cases where EU Law requires from the public administration the duty of providing information, presenting proposals or, of in any way, cooperating with the public administrations of other Member States, such requirement should respect the established deadlines".

Article 66 (Administrative Support)

"1. The competent service for the final decision should, either by its own initiative, by the proposal of the agent responsible for directing the procedure or by request of the private individual involved in the administrative process, in the cases where the law doesn't impose the intervention of other services in the process, solicit the support of other services of the public administration, (...) in the cases where:

- a) The best understanding of the relevant subject matter requires research that only the service with the exclusive competence or the specific knowledge has;*
- b) Only the agent to whom the solicitation is directed has the access to documents or information that are necessary to the decision;*
- c) The instruction requires the intervention of staff or the use of technical means that the competent service for the final decision does not have".*

1B- If so, please provide the most important examples from a range of legal domains, describe how they work and classify them into the categories as defined in Book VI as far as feasible.

Taking into account that the scope of Book VI: *"does not apply to information management activities legally confined to a single Member State with no information*

exchange with either another Member State or an EU authority”, (according to its Chapter I, VI-I, nº1), we make reference to a range of legal domains that include an exchange of information within Portuguese national authorities and an exchange with other EU Member States.

EXAMPLE 1 (FISCAL MATTERS):

a) Law 120/2019, September 19

Article 3 (1) 1st part: Establishes that the interested party has a right to file a complaint to the competent national authority.

Article 3 (2) 2nd part: States that the complaint should also be sent to other Member State’s competent authorities.

How they Work:

Article 3 (4): *“The competent national authority has a 2-month deadline from the time of the reception of the claim to:*

a) Notify the interested party, (...);

b) Inform other Member State’s competent authorities involved in the case of the reception of the claim, as well as the language (s) intended to use for communication purposes during the relevant legal procedures”.

Classification:

Duty to inform.

b) Decree-law 61/2013, May 10 ¹

Transposed Directive 2011/16/UE of the Council, February 15 2011, and established administrative cooperation in the fiscal domain.

Article 2 (4) establishes the mandatory and automatic exchange of information by financial institutions to the Tax and Customs Authority.

¹ Re-published by Law 98/2017 August 24 and amended by Law 17/2019 February 14.

Articles 5 and 6 of this DL state the exchange of information between Member States upon request of the interested Member State for cases when such a procedure is necessary for the execution of EU fiscal legislation.

How they Work:

Mandatory and automatic exchange of information.

Classification:

Duty to inform.

c) Decree-law 64/2016, October 11²

Regulates the automatic and mandatory data exchange mechanism in the fiscal realm and establishes communication rules for financial institutions regarding Portuguese migrants living abroad.

Article 1 (2) c) and **Article 10A³** establish the exchange of financial information within national authorities such as the Tax and Customs Authority.

Article 2 (3) extends the legal regime to exchanges of information to third countries.

How they Work:

Article 10A (4) highlights that the exchange of information should be done electronically and with Government approval.

Classification:

(Shared) Databases.

EXAMPLE 2 (ON THE EXECUTION OF REGULATION (EU) 2016/679, APRIL 27, OF THE EUROPEAN PARLIAMENT ON DATA PROTECTION AND THE FREE CIRCULATION OF DATA

Law 58/2019, August 8:

Article 8 (1) – establishes a duty of cooperation between public and private entities with the National Commission for Data Protection (CNPD).

² Executed by Government Ordinance 302-A/2016 December 2, and amended by Government Ordinance 169/2017, May 25.

³ Introduced by Law 17/2019, February 14.

Article 22 – determines that data exchanges to third countries (non-EU members) or to international organizations when legally required should be of public interest.

How they Work:

The CNPD and the data protection officer, (in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, Article 58, are competent to control the implementation of the Regulation “(...) *in order to uphold the rights, liberties and guarantees of individuals regarding personal data management*”⁴

(Classification:

(Shared) Databases.

EXAMPLE 3 (ON CRIMINAL MATTERS)

Law 59/2019, August 8

On the rules for managing personal data for the purposes of prevention, detection, investigation or repression concerning criminal infractions or sanctions.

Article 2 (4) - states that personal data exchanges between the competent authorities of the EU, when legally required, is not limited by personal data protection rules. Article 8, (4) extends the application of the national regime to data exchanges between EU authorities and Member States.

Article 44 (1) h) – establishes that the National Commission for Data Protection (CNPD) is responsible for the oversight and monitoring of the execution of the present law. In this task, the CNPD cooperates in the exchange of data, as well as in the provision of mutual assistance to other control authorities, with a view to ensure the coherent application and execution of the present Law.

How they Work:

Article 43 (3) – Establishes that the **CNPD** integrates a judicial magistrate, designated by the Supreme Judicial Council (CSM), as well as a State prosecutor’s magistrate, designated by the Public Prosecutor (MP).

⁴ See Article 2, Law 43/2004, August 18, re-published by Law 58/2019.

Classification:

(Shared) Databases.

EXAMPLE 4: ELECTRONIC COMMUNICATIONS

Law 41/2004, August 18⁵

Transposes Directive 2002/58/EC, July 12, on personal data management and the protection of privacy in the electronic communications sector and including the alterations brought about by Article 2 of Directive 2009/136/CE of the European Parliament and the Council, November 25.

Article 13-C: establishes trans-border cooperation measures to ensure the execution of the Law including the transfer of the necessary information to the European Commission.

Article 13-E (1): establishes data exchange within national authorities.

How they Work:

Article 5 (1) – States that data storage and access requires previous consent in accordance with Data Protection Legislation, namely on the objectives of data processing.

Classification:

(Shared) Databases

EXAMPLE 5: ON THE DATABASE FOR THE EMISSION OF PASSPORTS

Decree-Law 86/2000, December 5⁶

Approves the legal regime of the database for the emission of passports.

⁵ Re-published by Law 46/2012, August 29.

⁶ Re-published by DL 139/2006, July 26

Article 4 establishes the exchange of data between the Portuguese Electronic Passport Information System (SIPEP) and:

- Other national authorities, such as the Foreigners and Border Service Information System (SISEF) **(2) a)**;
- The national focal point of the SIS (the Schengen Information System) **(2), b)**.

How they Work:

Article 3- Establishes the procedure for the storage and update of data.

Classification:

(Shared) Databases

2- Are there additional mechanisms of information exchange among authorities within your country which are not covered by those categories? If so, please provide examples, describe how they work and explain their specifics in relation to the RENEUAL categories.

There are additional mechanisms of information exchange among national authorities that are not covered by the categories of Book VI. Various examples can be found regarding legislation on the administrative procedure, the annual budget, state security and the on the judicial system.

EXAMPLE 1 (ADMINISTRATIVE PROCEDURE)

Article 26 (1), *Código de Processo nos Tribunais Administrativos*, or **CPTA**⁷ (Administrative Courts Procedure Code):

“The information network of fiscal and administrative courts ensures the daily electronic and automatic distribution of cases and of other relevant documents”.

⁷ Approved by Law 15/2002, February 22, Annex III, Article 26 (1), following the alteration of Law 118/2019, September 17.

How they Work:

The system operates automatically and electronically and in accordance with **Article 13 (2) of Government Ordinance 380/2017, December 19⁸**, which guarantees the automatic distribution of court cases (and of other relevant documents) twice a day as well as the establishment of extraordinary distribution procedures in urgent and justified cases.

Specificities:

Article 26 (2) CPTA: *“(...) In order to ensure the due execution of the previous number (n 1), the necessary data is inserted in accordance with the respect for the principle of impartiality and taking into account the following criteria:*

- A) *The type of cases (...);*
- B) *The workload of the judges (...);*
- C) *The type of subject matter (...).*

- With regards to the ReNEUAL categories, this procedure only takes place between national authorities of the same State and in an automated fashion, without it being necessary to file a previous request.

EXAMPLE 2: 2019 ANNUAL BUDGET

Law 71/2018, December 31 - on data exchange between Tax Authorities -AT- and Social Security Organisms- SS-:

Article 127 (2)- Establishes that social security offices and Civil Servants Pension Fund (CGA) should communicate on an annual basis the *“amounts of all social contributions, including pensions, scholarships and training subsidies, as well as rent and housing subsidies received by every beneficiary during the previous year”*.

Article 127 (3), 1st part: Likewise, tax authorities should communicate: *“the amounts of income presented in annexes A, B, C, D, J and in the SS regarding IRS income declarations relating to last year, (...)”*.

⁸ Government Ordinance 380/17, December 19 (later revised by Ordinance 267/2018, September 20 and by Ordinance 93/2019, March 28).

How they Work:

Article 127 (3), 2nd part – This obligation to communicate data between national authorities takes place in the period of up to 60 days after the submission deadline of the IRS declarations and whenever an alteration takes place electronically and until the end of the second month following the alteration, via an official model.

Specificities:

Given the important nature of this Law (the 2019 Annual Budget), there is an obligation to exchange personal data between national authorities.

EXAMPLE 3 (ON STATE SECURITY)

Law 30/84, September 5⁹- on the Information Services of the Portuguese Republic.

Article 3 (3) – Limits data management activities to the legal attributions of information services but establishes a duty to inform on data considered relevant for national security purposes.

How they Work:

Article 3 (1) and (2) – Establishes that information services must limit their activities in conformity with all the restrictions established in the law to guarantee the fundamental rights of citizens.

Specificities:

Article 9 (2), b) and e) - Establishes that the request for information from data centers should be relevant and necessary to fulfill the monitoring mandate of the Conselho de Fiscalização (CF).

Article 9 (4)- Establishes that the CF is subject to Parliament approval and financial support, in order to guarantee its independence.

With regards to the ReNEUAL categories, this information exchange takes place with the approval of Parliament and with a view to monitor the activity of the information services of the Portuguese Republic.

⁹ Re-published by Organic Law 4/2014, August 13.

EXAMPLE 4 (ON DATA MANAGEMENT IN THE JUDICIAL SYSTEM)

Law 34/2009, July 14¹⁰

Article 3, b) – Establishes the types of data that can be processed, including “*data that relates to fiscal and administrative cases*”.

Article 4, f) – Establishes the duty to ensure the execution, by judiciary authorities of international judiciary cooperation, of obligations deriving from international and EU legislation among the objectives of data processing, as well as:

Article 4, g) – The duty to transmit to criminal police entities the necessary data to ensure the execution of data exchange obligations for the prevention and fight against emerging criminality as regulated in international and EU legislation.

Article 24– Attributes to the Supreme Council of Administrative and Fiscal Courts (CSTAF), the responsibility of managing this information.

Article 37 (1), a) and b) –Provides a list of entities that cooperate and exchange data with the justice system in the internal sphere, including criminal police organizations and the Border and Foreign Nationals Service (SEF).

Article 39 – Extends the application of this legal regime to other systems.

How they Work/ Specificities:

Article 37, (3) – Establishes the automatic exchange of data relating to arrest warrants to the Judiciary Police (PJ), the Judiciary Military Police (PJM) the Public Security Police (PSP) the National Republican Guard (GNR), SEF and Maritime Police (PM).

3) In your country, do there exist legal obligations or a political practice to conduct an impact assessment before such advanced forms of information exchange are established?

Yes.

In addition to the list of operations subject to a data protection impact assessment (as established in **Article 35 (3) of the EU Regulation 2016/679**, also known as **GDPR**), **Law**

¹⁰ Amended by Law 30/2017, May 30.

58/2019, August 8, (which implements this regulation), in accordance with **Opinion 18/2018, September 25**, (European Data Protection Board), further extends this list to include, among others:

- "1. Data management resulting from electronic systems that process health related information;*
- 2. Interconnection or management of personal data that relates to highly personal information (...)."*

More recently, **Law 59/2019, August 8** also includes a requirement for data protection impact assessments in its **Article 29**, for situations in which there is a high risk of fundamental rights violations.

On the subject of electronic communications, **Law 41/2004, August 18**, in its **Article 3**, also establishes a prevention mechanism for possible data protection infringements.

4.

4. A) Has your Court (or other courts of your country) pronounced judgements on such mechanisms of advanced information exchange among authorities within your country? Are you aware of ongoing court proceedings concerning such matters?

4. B) What are the most important cases or principles established in this case law?

4.A) Yes.

Several Court Decisions have pronounced judgements on such mechanisms of advanced information exchange.

Cases in point:

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|--|
| EXAMPLE 1 (COURT DECISION - ADMINISTRATIVE PROCESS) |
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South Central Administrative Court:

Judgement of 6 of August 2017 - 09945/16

Judged that Social Security services should act in conformity with the data provided by the Tributary Authority (AT), as a mechanism of advanced information exchange between national authorities.

EXAMPLE 2 (COURT DECISION – STATE SECURITY)

Constitutional Court:

Judgement 403/2015 – 773/15

Judged that, in conformity with the Portuguese Constitution (CRP), Article 78, (2) of the Decree 426/XII of the Parliament (approving the *Legal Regime of the Information Services of the Portuguese Republic*) is unconstitutional, as it violates **Article 34, (4) of the CRP**, that “prohibits all intrusion by public authorities in the correspondence, telecommunications and other communication systems with the exception of legal exemptions in the criminal realm”.

EXAMPLE 3 (COURT DECISION – STATE SECURITY)

Constitutional Court:

Judgement 464/2019 – 26/2018:

Judged that, in conformity with the **CRP**, Article 3 of Law 4/2017, August 25, is unconstitutional (...), as it states the admissibility of access from officials of the Information Services to data relating to the location of certain materials when there are no concrete communications that support a threat to national security.

4. B) The most important principles deriving from national Court decisions are, among others:

- The principle of transparency and of an efficient public Administration.
- The principle of the limitation on the restriction of rights (to the exceptional cases established in the **CRP**).

-The principle of the recognition of personal and individual rights, such as the right to privacy and family life.

-The right to access the personal information present in information systems by private citizens, as well as the prohibition of disclosure of personal data to third parties.

5.

5.A) Can a decision making body in your country rely on information from partners of such national information networks or is it obliged to scrutinize the information itself?

5.B) If a decision-making body in your country is obliged to scrutinize information obtained from a national information network, what does this mean in practice? How far does this obligation reach?

Background: In Case C-503/03 Commission v Kingdom of Spain [2006] the CJEU established an obligation for users of the Schengen Information System (SIS) to take advantage of the so-called SIRENE offices in the system in order to validate sensitive information provided through the SIS. This jurisprudence inspired Art. 25(2) SIS II-Regulation (EC) 1987/2006 and the general draft rule in Art. VI-21 of the ReNEUAL Model Rules.

5A e 5B)

The **SIS II** – System is an information system that allows national authorities that are responsible for border controls to issue alerts on wanted and missing individuals, as well as stolen goods.

The **SEF**¹¹ is the national security service for border control that is responsible for registering personal data in the Integrated Information System (**SIS/SEF**). According to **Article 35** of the Legal Regime for the Entry, Permanency, Exit and Distancing of Foreign Nationals from Portuguese Territory¹²: “SEF can (when in doubt) access the information that relates to the process that led to the emission of a passport, identity card or any other document that has been used for border control”.

¹¹ Cfr. Decree-law 252/2000, October 16, re-published by Decree-law 2140/2012, January 6.

¹² Cfr. Law 23/2007, July 4, re-published via Law 102/2017, August 28, has recently been revised by Law 28/2019, March 29.

SIRENE's national focal point, however, is the only contact point in each Member State through which all relevant complementary information is emitted for SIS system users.

According to **Decree Law 292/94, November 16, Article 3** (the legal basis for the Portuguese **SIRENE** office), the national focal point is responsible for:

-“Inserting, modifying, completing, rectifying or eliminating information on the SIS, following the instruction, requisition or delegation by judicial and administrative authorities or via a request by security forces and services, after the verification of its conformity with the relevant Application Convention” (subheading a);

-“Informing authorities on the compatibility of the information inserted by other Member States to national law, international obligations and to essential national interests” (subheading c); (and)

-“Consulting foreign entities in the case of a double indication, as stated in Article 107 of the Application Convention” (subheading d).

SIS users, such as the **GNR** (National Republican Guard), **PSP** (Public Security Police), **SEF**, **PJ** (Judiciary Police), **DGA** (Customs General Directorate), have the right to create, insert, modify, update and eliminate information from the **SIS**. Moreover, and in parallel with the **SIRENE** national focal point, the State Prosecutor is responsible for *“the control of legality and validation of acts that require its intervention”*, according to **Arts. 5 and 8 of the DL 292/94**. In this regard, the **SIRENE** national focal point is responsible for verifying the conformity of the information with the national procedure.

This competence includes the responsibility to ensure the permanent update and accuracy of the information present in the **SIS**, in accordance with the principle of data ownership, which attributes to the Member State that manages **SIS** information the responsibility for any alterations in the system¹³.

¹³ See Council of Ministers Resolution 104/2017, July 17, Point 9 (on *Internal Measures and Trans-border Crime*).

6. In case of an information exchange between national authorities which concerns the transfer of personal data:

6A) Does your national legal order provide for the automatic (i.e without request) information of the person concerned?

Yes.

- **Law 30/84, September 5, on State Security¹⁴**, in its **Article 3 (3)**, for example, safeguards the obligation to exchange personal information between authorities in cases where matters of state security are concerned.

- **Law 59/2019, August 8: Article 11**

Prohibits the decisions made exclusively through the automatic processing of information, (...) and that may affect the rights of the person concerned. This prohibition does not apply to those cases where the decisions are legally authorized, with the condition that the person concerned maintains the right to request the human intervention of the person who is responsible for the processing of information.

- **Law 34/2009, July 14: Article 37 (3)**

Establishes an automatic exchange of data involving arrest warrants between the PJ, PJM, PSP, GNR, SEF and the PM.

- **Law 61/2013, May 10¹⁵, Article 6 (3)**, states the mandatory automatic exchange of information including to the competent authorities of other Member States.

6B) Does your national legal order provide for an enforceable right of the person concerned that he/she be informed of such an exchange upon request?

Yes.

According to **Law 59/2019, August 8, Article 15 (1)**, "(...) the person concerned has the right to obtain, (from the person assigned to manage his/hers personal information, and

¹⁴ Re-published by Organic Law 4/2014, August 13.

¹⁵ Re-published by Law 98/2017, August 24.

in a timely manner), *information as to if that information is being used (or not)*". **Article 18 (1)** of the same **Law** establishes the right of the person whose data is processed, to request the verification of the legality of the processing by the competent control authorities.

Moreover, **Law 58/ 2019, August 8, Article 34**, reinforces the principle of effective judicial protection to individuals whose personal data has been mismanaged.

7) Who is liable for any damage caused by malfunctioning of those national information networks or by false information entered into the system by a partner institution?

Background: In the legal framework of some European information systems the legislator established a substitutional liability or subrogation mechanism (Art. 48 SIS II-Regulation (EC) 1987/2006; see also Art. 116(2) Convention Implementing the Schengen Agreement; Art. 40(2), (3) CIS-Regulation 515/97). Art. VI-40 ReNEUAL Model Rules formulates a general rule along these lines in order to enhance the protection of individuals facing damages caused by such mechanisms. In addition, Art. VI-40(2) provides for a compensation mechanism among the participating authorities in order to provide incentives to comply with their respective legal obligations.

- Law 58/2019, Article 33 (3)

Establishes the civil responsibility institute in cases where damages have occurred.

- Law 59/2019, August 8, Section II

Typifies the crimes and establishes criminal responsibility procedures in cases where personal data has been mismanaged or falsely entered (Arts. 53-60), whilst expanding this responsibility to collective persons in Article 62. On the other hand, Article 43 establishes that the National Committee for Data Protection (CNPD) is responsible for monitoring and verifying the due implementation of this law.

Law 67/2007, December 31¹⁶

Establishes the general regime for the non-binding contractual liability of the Portuguese State.

Article 1 (1) states that the non-binding contractual liability of the State and of other public collective persons for damages that have resulted from the exercise of the legislative, jurisdictional and administrative functions is regulated by the Law in question, with the exceptions of special regimes.

Article 1 (2) specifies that the exercise of administrative functions corresponds to the actions and omissions adopted during the exercise of public power or regulated by administrative law.

Article 7 (1) establishes the exclusive liability of the State and of other public collective persons for the damages that result from illicit actions or omissions, committed with ordinary negligence, by agents and services in the exercise of the administrative function and as a consequence of that exercise.

8. A) In your national legal order, are there any specific safeguards or legal remedies of individuals considering information about them to be false or an exchange of information about them to be illegal?

Yes.

Individuals who have suffered damages relating to the processing of personal data can request the correction of errors.

- **Law 59/2019, August 8** attribute to the person concerned the right to have his/her personal data be rectified, deleted or limited in cases when the registered information is false or incorrect (Articles 17 and 19);

- **Decree-Law 139/2006 Article 11, July 26**, establishes the right to request the correction, elimination and completion of inaccurate data (Article 11);

¹⁶ Last revised by Law 31/2008, July 7.

- **Law 34/2009, July 14, Article 24 b)**, attributes to the **CSTAF** the competence to update, rectify, complete and eliminate any errors relating to personal data (Article 24 (7) b))

- **Decree-law 292/94, November 16**, attributes to the Portuguese **SIRENE** office the function of inserting, modifying, completing, rectifying or eliminating data by request of the competent authorities (Article 3);

- **Law 58/2009, August 8, Article 33** determines the civil extra contractual responsibility of the State for the reparation of the damage incurred; and

- **Regulation 2016/679, April 27**, establishes the right to a pecuniary compensation in the case of damages (Article 82).

8. B) Is there a political or academic discussion about (further) needs for new or more specific legal safeguards in this context? Are there any recent legislative proposals on this topic?

Academic Discussions:

Paulo Guilherme da Rocha Pichel¹⁷ alerts to the dangers of recent European efforts to establish automatic exchange mechanisms for personal financial data as it *“(...) brings about a profound gap between the robustness and celerity of automatic exchange mechanisms and the absence of supranational instruments dedicated to protect private citizens (...)”*.

¹⁷ Paper “*Automatic Exchange of Financial Information; Respect for Private Life and Personal Data Protection*”, in «Forum de Proteção de Dados» n.º 5, pp. 30-59, November 2018.

II.

Cross-border and multi-level information sharing and the case law of your court or other courts of your country

1. Has your court (or other courts of your country) pronounced judgements on such EU mechanisms of advanced cross-border or multi-level information Exchange among European authorities? Are you aware of ongoing court proceedings concerning such matters? What are the most important cases or principles established in this case law?

Yes.

Supreme Administrative Court (STA)

Judgment of 25 of September 2003 - 01349/02, judged that the principle of public interest and of the protection of citizens' rights and interests (**Article 4, CPA**) should not be invoked autonomously as a means to assess the validity of which aspects of the administrative act are to be considered essential. This decision concludes that residence authorization of foreign nationals (when the individual is registered in the **SIS** in the "non-admission list" in the Schengen area, by another MS's initiative), should not fall on public administration services, in accordance with **Article 3, d) of Law 17/96, may 24**¹⁸. Moreover, the decision states that the inclusion of a foreign national in the "non-admission list" is not of a permanent or immutable state. The insertion of data in the **SIS** respects a deadline (...) (**Articles 112 and 113 of the Application Convention of the Schengen Agreement**), and the person in question may ask for the rectification or elimination of false information (**Article 110, CAS**), or file a legal claim (**Article 111, CAS**). Finally, the decision underlines that **Article 8 of the European Convention on Human Rights (ECHR)** is not an absolute guarantee for foreign nationals wanting to reside in an ECHR signatory member State¹⁹.

¹⁸ Law 17/96, May 24, Article 3, d) (Reasons for Exclusion): "People that cannot benefit from extraordinary regularization regime include those who have been referred to as non-admissible in the SIS.

¹⁹ Available here:

www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/bd589e24cacc36c680256db300359fd6?OpenDocument

-Likewise, **Judgment of 24 of September 2003 - 047977 by the STA** concluded that the *extraordinary regularization of residency, (Law 17/96, May 24, Article 3, d))* does not apply to a foreign national who is residing in national territory without the necessary legal authorization and that has been registered in the “*non-admission list*” to the Schengen area by a MS. According to this Decision, the exclusion of such individuals constitutes a legislative option that does not collide with the individual’s right to the pursuit of a family life, as stated in **Article 8 of the ECHR**. The Decision concludes that the decision to forgo the request for an extraordinary regularization of residency is duly justified, *de facto* (with the indication of “*non-admission list*” provided by the MS of the individual in the Schengen area), and *de jure* (according to **Law 17/96, May 24, Article 3 d)**).

2)Has your court (or other courts of your country) delivered judgements drawing on the CJEU case law in Case C-503/03 Commission v. Kingdom of Spain (2006) or on Article 25 (2) SIS II-Regulation (EC) 1987/2006?

Yes.

There are Judgements drawing on the CJEU case law C-503/03 Commission v. Kingdom of Spain:

Supreme Court of Justice:

Judgment of 17 of April 2013- 2/10.9SHISB-A.S1²⁰

Determined that: “*an expulsion may be imposed on a foreign national resident in the country, if the individual has been convicted of a serious crime with a prison sentence that exceeds 1 year (notwithstanding the mandatory consideration of the degree of seriousness of the fact, the personality of the individual and the eventual re-incidence of the offense , the degree of the individual’s social life immersion, special preventative*

²⁰Available

here:
www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/48f26ffa1eb46f7180257b520035dd8f?OpenDocument

measures and the duration of his/her residence in Portugal” (Article 151 (2), Law 23/2007).

The same Decision also states that the expulsion of a foreign national with a permanent residency in Portugal can only take place when his/her behavior constitutes a serious threat to public order or to national security.

South Central Administrative Court:

Judgment of 15 of December 2016 -560/13.6BEALM²¹, determined that *“the individual, having committed 3 crimes of robbery and 1 crime of illegal firearm possession, for which he was sentenced to an 8 year old prison sentence, has acted against public order and committed crimes, that, (given its respective criminal outlines) (...), are of a serious nature. For this reason, the defendant may not benefit from the limits to the expulsion of national territory as present in Article 135, of Law 23/2007, July 4.*

Supreme Administrative Court (STA):

Judgement of 20 of April 2017 – 0417/17²², rejected an Appeal on the basis that a previous judgement by the Central Administrative Court (TCA) had been substantiated and justified in the decision to expel an illegal immigrant living in Portugal. The TCA concluded that the exceptions stated in Article 135 of Law 23/2007, July 4 did not apply, as the individual had committed a serious criminal offense (drug trafficking).

Judgement of 24 of May 2017 – 0566/17²³, in a similar case the STA, also rejected an Appeal on the basis that a previous judgement by the TCA had not applied the exception of Article 135, Law 23/2007, July 4, given the fact that the individual represented a threat to public order and committed a serious crime (homicide).

²¹ Available here:

<http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/caa9e9ce1b1cc4418025809f005da516?OpenDocument&Highlight=0,560%2F13.6BEALM>

²² Available here:

<http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/e1ac10df67671c9080258114003b411b?OpenDocument&Highlight=0,0417%2F17>

²³ Available here:

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/925c533de98311718025813100502761?OpenDocument&ExpandSection=1&Highlight=0,0566%2F17#_Section1

Judgement of 14 September 2017 – 0871/17²⁴, had the STA reject an Appeal on the basis that, given the gravity of the offenses committed by the individual, Article 135 of Law 23/2007 did not apply given the gravity of the actions (in this case, robbery and armed assault).

3. Has your court (or other courts of your country) delivered judgements drawing on a substitutional liability or subrogation mechanism in accordance with Article 48 SIS II-Regulation (EC) 1987/2006, Article 116 (2) Convention implementing the Schengen Agreement, Article 40 (2), (3) CSIS-Regulation 515/97 or similar provisions of EU law?

Guimarães Court of Appeal:

Judgment of 15 of January 2015²⁵ - 3604/12.5TBCL.G1, ruled in favor of the attribution of responsibility to the Portuguese State in accordance with **Law 67/2007, December 31**. The case involved a responsibility claim invoked by a Portuguese national whose vehicle was apprehended on account of false information in the Schengen SIS system (the vehicle had been reported as stolen in the SIS by a false claim in relation to a robbery that took place in Poland in 2005). Portuguese authorities failed to properly analyze the information and apprehended the vehicle for a period of 9 months (April 2008-January 2009).

4. In your national legal order, are there any new or specific legal safeguards with regard to cross-border or multi-level information sharing? Is there a political or academic discussion about (further) needs for new or specific legal safeguards in this context? Are there any recent legislative proposals on this topic?

On the issue of Integrated Border Management, Portugal approved the National Integrated Border Management Strategy, via Council of Ministers Resolution 104/2017, July 17. The adoption of this Strategy followed the EU Regulation 2016/1624 by the

²⁴ Available here:

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/497be59169d462c4802581a00055fe28?OpenDocument&ExpandSection=1&Highlight=0,0871%2F17#_Section1

²⁵ Available here:

<http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/7bdaa5951fc2bc8a80257df0005900ce?OpenDocument&Highlight=0,schengen>

European Parliament and Council on Integrated Border Management, which brought forth 11 measures for Member States to implement nationally.

The national strategy aims to promote and facilitate data exchange in the realm of internal security, including the prevention of irregular migration and the strengthening of the cooperation between national security forces and services and its international counterparts. The implementation of this aim includes the establishment of a *Rede de Oficiais de Ligação*, (a network of communication of security officials), responsible for the “(...) promotion and facilitation of internal security data exchange” and the creation of Visa Information System (VIS). The VIS has the goal of “improving the implementation of the common policy on visa matters”, of strengthening “consular cooperation” and of improving the “exchanges between central authorities in charge of Visa processes”. The Strategy also entitles private citizens of the right to be informed of the content of the personal data that is present in the VIS as well as the right to request the correction of any eventual errors or the elimination of illegally registered information.

The Government decision identifies in Point 14 its “Guidelines for the Future”, which include, among others:

- “The creation of a regular monitoring system of good practices in the Schengen area and of the due implementation of the National Strategy”;
- “Strengthening of data exchange (...) between different authorities”;
- “Establishment of protocols that focus on cooperation procedures between different authorities”;
- “Strengthening data exchange cooperation between Europol, Eurojust and Interpol”;
- “The creation of a common system for all border integration management authorities”.

Moreover, in the fiscal realm, Portugal adopted Law 98/2017, August 24, on the “Regulation of the automatic exchange of information on previous trans-border fiscal data and previous fiscal agreements” to implement (EU) Directive 2015/2376 of the Council, December 8, 2015 and (EU) Directive 2016/881 of the Council, May 25, 2016. The Law includes Article 6 (“on the conditions for automatic data exchange on fiscal decisions and trans-border agreements”), Article 7 (that establishes the duties that

derive from the automatic data exchange by financial institutions), and Article 12 (on the disclosure of information).

Due December 20th 2019
Supremo Tribunal Administrativo
Portugal