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**Seminar organized by the Council of State of Italy and ACA-
Europe**

**“Techniques for the protection of private subjects in
contrast with public authorities: actions and remedies
– liability and compliance”**

Rome, 23 May 2022

Answers to questionnaire: Portugal



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“TECHNIQUES FOR THE PROTECTION OF PRIVATE SUBJECTS IN CONTRAST WITH PUBLIC AUTHORITIES: ACTIONS AND REMEDIES - LIABILITY AND COMPLIANCE”.
INTRODUCTION

The seminar will analyse the types of actions that can be brought before the administrative judge: action of annulment, action of declaration and action of condemnation. With particular reference to the latter, the seminar will focus on compensatory measures, including damages for loss of opportunity and damages as a result of delay.

The seminar also intends to examine the possibility of any and eventual special or fast-track procedure, for introductory terms and methods which pertain to certain subjects under consideration, for example, for their economic or political relevance, such as those to be found in the sphere of public contracts (see also transversal analysis).

The aim of this questionnaire and of the subsequent seminar is to provide a wider comprehension of the similarities and differences that exist among the various legal systems of the member States insofar as they apply to the situations to be dealt with by the administrative court, paying particular attention to the content and subject matter of the relative rulings.

SESSION I

LEGAL PROCEEDINGS THAT CAN BE BROUGHT BEFORE THE ADMINISTRATIVE COURT

1. In your legal system, which judges are competent to pronounce on disputes in which one of the parties is the public administration?

- An ordinary judge
- An administrative judge
- A judge who deals with special areas
- Others

An administrative judge. In the Portuguese legal system, the competence of the administrative and tax courts is defined in article 212 of the Constitution of the Portuguese Republic (hereinafter CRP), in conjunction with the provisions of article 4 of the Statute of Administrative and Tax Courts (hereinafter ETAF)¹. In these terms, it is up to the administrative courts to adjudicate actions that seek to settle disputes arising from the relationship between individuals and the Administration, when the latter carries out its administrative activity of public management, excluding private law relations in which it may intervene.

¹ Approved by Law No. 13/2002, of February 19, with the last amendment introduced by Law No. 114/2019, of September 12th.



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2. Which actions can be brought before the administrative court in view of the exercise of administrative powers?

- Annulment of administrative acts
- action of condemnation
- Other actions

If you have replied 'other actions', please clarify which.

According to article 37 of the Code of Procedure of Administrative Courts (hereinafter CPTA)², administrative courts have the competence to hear, namely, the following actions:

- annulment or declaration of nullity of administrative acts;
- condemnation for not issuing due acts;
- recognition of rights and interests;
- imposition of conducts;
- inhibitory actions;
- actions to provide amounts, things or facts; and
- actions on contracts, etc.

3. From which sources can actions be-brought before the administrative court?

- Law
- Public authority regulations
- Guidelines
- Supreme Court rulings
- Other

Actions may be brought before the Portuguese courts, based on non-compliance or violation of the law, public authority regulations and guidelines. With regard to judgments handed down by the Supreme Administrative Court (hereinafter STA) - although they do not have binding force except in the context of the process in which they are handed down -, the decisions of the Supreme Court have a persuasive effect based on the quality of the protagonists and the value of the reasoning presented.

4. Which administrative decisions can be challenged?

- Administrative acts which have a specific recipient
- General acts and regulations
- Acts inherent to the procedure
- Political acts



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In Portugal, with the exception of acts carried out in the exercise of political and legislative functions, all administrative decisions mentioned above can be syndicated by administrative and tax courts (article 4, no.3, point a) of ETAF).

5. On the grounds of which defects can the annulment of an administrative act be requested?

- Breaches of the law
- Breaches of competence
- Technicalities and procedural defects
- Breaches of general principles
- Other

The Code of Administrative Procedure (hereinafter CPA)³, in terms of the invalidity of the administrative act, provides for the nullity or annullability of the act, depending on the defects that the administrative act presents. Thus:

a) the acts that suffer in particular from the following defects are null (article 161, no. 2):

- defective acts of usurpation of power;
- acts outside the attributions of the ministries;
- acts whose object or content is impossible;
- acts that offend the essential content of a fundamental right;
- acts performed with misuse of power for purposes of private interest;
- acts that absolutely lack the legal form;
- acts performed with total disregard for the legally required procedure; and

b) administrative acts carried out in breach of the general principles of administrative activity or other applicable legal norms, for whose violation the law does not provide for another sanction, are annulable (article 163, no. 2).

6. Can the judge partially annul the challenged administrative act?

- Yes
- No

If your reply is yes, please elaborate.

Yes. According to the principle of usefulness of administrative acts, the judge can partially annul the administrative act. The criterion for determining whether the act must be totally or partially annulled involves assessing whether the illegality affects the act as a whole, in which case the act must be completely annulled, or only in part, in which case the partial annulment is justified.

³ Approved by Law No. 4/2015, of 7 January, with the last amendment introduced by Law No. 72/2020, of 20 November.



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7. Can the judge substitute the Administration by modifying the content of the administrative act?

- Yes
- No

If your reply is yes, please elaborate.

Yes, but when the exercise of discretionary power is at stake, the judge, as a rule, cannot replace the Administration in weighing up the valuations that make up the margin of free appreciation, so the ruling must be limited to a generic or directive condemnation, except in situations where it is only possible to identify a solution as being legally possible (cf. articles 71, no. 2, 95, no. 5 and 179, no. 1 of the CPTA).

8. When the judge annuls the challenged act, can he dictate provisions which the P.A. must abide by in the review proceedings of the subject-matter of the litigation?

- Yes
- No

If your reply is affirmative, please elaborate.

Yes. The issue concerns the delimitation of the court's powers of decision, that is, when the court annuls or declares null the act of rejection, it does not limit itself to returning the issue to the competent administrative body, but pronounces on the material claim of the interested party, imposing the practice of the due act (article 71, no. 1 of the CPTA).

9. When do the effects of the jurisdictional annulment of an administrative act become applicable?

- From the date of the adoption of the act (*ex tunc*)
- From the date on which the judgement becomes final (*ex nunc*)
- Other

From the date on which the judgement becomes final (*ex nunc*), but according article 163, no. 2.º of the CPA, by decision rendered by the administrative courts or by the Administration itself, it may be retroactively effective (*ex tunc*), destroying the effects produced in the meantime by the annulable act.



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10. Can the judge modulate the effects over time of the ruling of annulment of an administrative act?

- Yes
- No
- Other

According to the CPA, the annulable administrative act can be validated, either in an administrative or in a judicial context, through "ratification, reform and conversion" of the administrative act (article 164).

11. Can the act of ordering payments for damages be proposed autonomously or must it always be proposed together with other kinds of actions?

- Yes
 - No
 - Only in certain cases
- If your reply is yes, please elaborate

According to CPTA, nothing prevents a possible compensation for damages, in an autonomous civil liability process against the Administration (article 38).

12. In the light of what kind of behaviour is the compensatory action for damages feasible when dealing with a Public Administration?

- Implementation of an illegal and detrimental administrative act
- Non-observance of the deadline of the procedure
- Lesion of good faith and trust
- Resultant behaviour of the public administration
- Other

Please elaborate

In Portugal, all the behaviours mentioned above may be the basis of a claim for compensation.

13. Which are the different kinds of reimbursable damages?

- Material damage
- Non-material damage
- Loss of opportunity

In Portugal, all the damages mentioned above are liable to be compensated.



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14. Does the omission of lodging an action of annulment result in elision or reduction of the compensatory damages?

- Yes
- No
- Other

No

15. In order to award compensatory damages, is proof of the responsibility of the public administration required? If your reply is affirmative, which party is obliged to provide said proof?

- Yes – the party with burden of proof is...
- No

Yes. In the Portuguese legal system, whoever invokes a right has the burden of proof of the respective constitutive facts, with the proof of impeding, modifying or extinct facts being up to the counterparty.

16. Can the judge convert *ex officio* one action into another?

- Yes
- No

If the reply is yes, please elaborate

Yes. Procedural convolution (convert one action into another) is a corollary of the principles of economy, procedural management and formal adequacy. In the Portuguese legal system, the error in the form of the process constitutes a nullity, resulting from the use of a procedural means inadequate to the claim of legal protection made in court. In these cases, the judge can determine the adoption of the appropriate procedural procedure to the specificities of the case.

17. Is there a time-limit for the proposition of the compensatory action?

- Yes
- No

If the reply is yes, please elaborate



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The Legal Regime of the State's Extra Contractual Civil Liability⁴ determines, in its article 5, that the right to compensation for the State's non-contractual civil liability (and other legal persons governed by public law) expires within a period of three years from the date on that the injured party was aware of his/her right, in accordance with the provisions of article 498 of the Civil Code⁵

18. Can the judge rule that the Administration implement an administrative act? If your reply is affirmative, what are the prerequisites for implementation?

- Yes – explain
- No

CPTA provides for the condemnation of the administrative entity to practice an administrative act illegally omitted, provided that certain assumptions are verified: (a) absence of decision within the established legal period; (b) rejection or refusal to consider the application; (c) non-compliance with the duty to decide regardless of the existence of an application; and (d) replacement of an administrative act with a positive content that does not fully satisfy the interested party's claim (articles 66 and 67).

In turn, the procedural requirements regarding legitimacy and timeliness are enshrined in articles 68 and 69, respectively.

⁴ Approved by Law No. 67/2007, of December 31st, with the last amendment introduced by Law No. 31/2008, of July 17th.

⁵ Approved by Law No. 67/2007, of December 31st, with the last amendment introduced by Law No. 31/2008, of July 17th.



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SESSION II – SPECIAL PROCEDURES

1. Does your administration have provisions for special procedures

- Yes
- No

If the reply is yes, please elaborate

Yes. In the Portuguese legal system, there are detached or special administrative actions that are not regulated by the CPTA, and that have specificities as to their regime. As an example, the following stand out: (i) the action for the declaration of loss of local mandate provided for in the Administrative Guardianship Law (LTA)⁶; (ii) court summons for the practice of an act legally due in urban matters provided for in article 112 of the Legal Regime for Urbanization and Building (RJUE)⁷; and (iii) challenging acts of granting or refusing international protection, or removal from national territory, provided for in articles 31 and 44 of the Law on the Granting of Asylum or Subsidiary Protection.

In turn, the CPTA alludes to urgent declarative processes that present an accelerated and simplified procedure, such as "electoral litigation" (article 98); the "mass procedures" (article 99); "pre-contractual litigation" (article 103); the "subpoena to provide information" (article 107); the "summons for the defence of the rights of liberty and guarantees" (articles 111), and the "precautionary measures" (articles 112).

Finally, reference is also made to the special procedures that follow their own procedure, different from that stipulated in the CPA, as is the case with the rules contained in the Public Contracts Code and the rules contained in the Expropriation Code⁸.

2. What do the specialities consist of?

- Ways of introducing the appeal
- Procedural time-limits
- Jurisdiction of the court
- Other

The detached or special administrative actions, mentioned above, present some peculiarities in their regime. Actions for the declaration of loss of local mandate present special rules regarding the legitimacy and forfeiture of the right of action (article 11, nos. 3 and 4 of the

⁶ Approved by Law No. 27/96, of August 1st, with the last amendment introduced by Law 118/2019, of September 17th.

⁷ Approved by Decree-Law No. 555/99, of 16 December, with the last amendment introduced by Decree-Law No. 214-G/2015, of 2 October.

⁸ Approved by Law No. 27/2008, of 30 June, with the last amendment introduced by Law No. 26/2014, of 5 May.



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LTA). Urban planning actions, namely the judicial subpoena for the practice of an act legally due in matters of municipal licensing provides that the interested party may ask the administrative court of the district of the seat of the requested authority, the subpoena of the competent authority to carry out the decision (articles 111 and 112 of the RJUE).

In turn, CPTA defines in its article 36, no. 2, the regime applicable to urgent processes with specific processing deadlines (reduced by half), which run on judicial vacation, with no need for prior visas. acts of the secretariat performed on the same day and the deadline for filing an appeal reduced by half (set at 15 days).

3. The special rites are established:

- According to subject (for example, tenders, procedures of expropriation, independent administration authorities)
 - According to actions
 - Both of the above
- Please elaborate

In Portugal the special rites are established according to the subject (procedures of expropriation) and according to special actions.

4. Does your system provide for appeals against the silence of the Administration at the request for an administrative provision presented by a private individual?

- Yes
- No

If the reply is yes, please elaborate

Yes. Failure by the Public Administration to make a decision grants the interested party the possibility of resorting to the appropriate means of administrative and jurisdictional protection, such as an action condemning the practice of the legally due administrative act, in accordance with article 129 of the CPTA.

5. Do the Administrations comply spontaneously with the decisions of the administrative courts?

- Yes, always
- No, never
- In the majority of cases, in any case more than in 50% of cases
- Hardly ever, in any case less than in 50% of cases



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The Public Administration accepts, in most cases, the decisions handed down by the administrative and tax courts, although there is no percentage data on the matter.

6. . In your legal system, is there a special procedure for ensuring the integral execution of the sentence?

- Yes
- No

If the reply is yes, please elaborate

According to the Portuguese Constitution, court decisions are obligatory, and judgments must be fully executed (CRP article 205, nos. 2 and 3). The CPTA also establishes this principle in article 158, that, in line with the Principle of Effective Judicial Protection (article 2, no. 1), seeks to ensure the right to the protection of rights and legally relevant interests and to the execution of a judicial decision. Consequently, the non-execution of a judicial decision or judgment may incur the public administration in disciplinary, civil and criminal responsibility (the latter under a qualified disobedience criminal charge), according to article 159, CPTA.

7. Are the judge's decisions which are not of the last resort immediately enforceable?

- Yes
- No

If the reply is yes, please elaborate

They are, if there is *res judicata*, in the sense that none of the parties appealed.

8. Following the annulment of a decision characterized by discretionary power, the interested party is forced to challenge each of the ulterior negative decisions which have been deemed illegitimate by dint of defects which are different to those identified by the judge or, in alternative, are there certain mechanisms of "reduction" of the aforesaid discretionary power which ensure the definition of the litigation once and for all?

- Yes – elaborate
- No

Yes. According to CPTA article 95, no.5, the Judge can bind the Public Administrative entity to certain limit frames, that must be obeyed in the decision characterized by discretionary powers.



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SESSION III – PRECAUTIONARY MEASURES

1. Does the proposition of an appeal automatically suspend the effectiveness of the administrative act?

- Yes
- No

The general rule is the suspensive effect of the appealed decision. However, there are cases in which the law has not such effect: (i) of subpoenas for the protection of rights, freedoms and guarantees; (ii) decisions regarding injunctions; (iii) decisions regarding the request for lifting the automatic suspensive effect, provided for in no. 1 of article 103-A (pre-contractual litigation relating to public works contracts, public works concessions, requested concessions public services, etc. iv) decisions regarding the approval of provisional measures, referred to in article 103-B; and (v) decisions rendered in the same sense as the jurisprudence standardized by the STA, in accordance with article 143 of the CPTA.

2. In your legal system, are precautionary measures provided for?

- Yes
- No

Yes.

3. What kinds of decisions can the judge apply as a precautionary measure?

- The suspension of the challenged act;
- (if the subject of the challenge is the refusal of an application) a positive measure which provisionally anticipates the effects of the administrative act being contested;
- The order to the administration to re-examine the application on the strength of indications contextually provided by the judge;
- Whatever measure necessary to satisfy, in each case, the precautionary requests presented by both parties

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4. What are the conditions for the acceptance of a precautionary request?

- The probable validity of the action
- The probable validity of the action together with a serious prejudice



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- The prevalence of public or private interest, based on the results of the equilibrium/assessment
- The required prerequisites of trial law to accord precautionary measures vary according to the different types of litigation
- Other prerequisites (please specify)

The granting of precautionary measures is, in accordance with article 120 of the CPTA, subject to the fulfilment of three requirements: (i) fear of injury (risk of the sentence being rendered useless in the main action – *periculum in mora*); (ii) appearance of the right (*fumus boni iuris*); and (iii) the proportionality of the decision (assessment of all interests involved).

5. Can the judge force the petitioner to pay bail?

- Yes
- No
- If yes, in which cases?

CPTA provides, in accordance with article 120, no. 4, that when potential damage to public and private interests, in conflict with those of the claimant, are fully reparable through compensation, the court may impose on the claimant the provision of a guarantee by one of the forms of provision of guarantee provided for in article 199 of the Code of Tax Procedure and Procedure⁹

6. Are precautionary measures generic?

- Yes
- No – are there some subjects in which precautionary measures are not admitted? Which?

Yes. Ordinary law allows, in compliance with the constitutional guarantee, precautionary measures of various types as long as they are adequate and without any limitations other than those resulting from the nature of things and the functional limits of the administrative jurisdiction.

⁹ Approved by Decree-Law No. 433/99, of October 26th, with the last amendment introduced by Law No. 56/2021, of August 16th.



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7. Can a precautionary request be introduced autonomously before the presentation of the main trial proceedings (*ante causam*)?

- Yes
- No

Yes

8. In the event of cautionary request *ante causam*, does the precautionary decision of the judge lose effectiveness?

- Yes, in the event that the interested party does not initiate main trial proceedings within the mandatory time-limit
- No, its effectiveness remains intact even if the main trial proceedings have not been initiated within the mandatory time-limit or even if the time-limit has expired
- Yes, in the event that the interested party does not initiate main trial proceedings within the mandatory time-limit

9. When dealing with the precautionary request, does your legal system provide for specific procedure?

- Yes (give details of the main characteristics with regard to trial deadlines, type of decision, motivational burden, ways for establishing debate)
- No

Depending on the type of measure, the CPTA includes special rules with a different scope. There are legal provisions that aim to complete the general regime of certain measures, such as the provisions that regulate the suspension of the effectiveness of acts, and there are specific provisions that derogate from the general regime, among which legal provisions referring to «processes injunctions in contract formation procedures»; the «provisional regulation of amounts»; and the «anticipated production of proof», under the terms of articles 132 to 134.

10. Is the precautionary decision taken unilaterally or collegiately?

- Unilaterally;
- Collegiately;
- Collegiately, but in the event of extreme urgency, the precautionary decision can be taken temporarily by means of a simple unilateral decree;



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In Portugal, the precautionary decision is taken unilaterally, unless, under request of the single judge, the president of the court determines that the matter must be decided by a panel of three judges - article 119 of the CPTA.

11. During the discussion of the precautionary request, can the judge directly define the judgement on the merit?

- Yes (explain in which conditions)
- No

Yes, the early decision on the merit of the main cause may occur, pursuant to article 121, no. 1 of the CPTA, *«when there is a main proceeding already filed, it is verified that all the necessary elements for the purpose have been brought to the precautionary proceeding and the simplicity of the case or the urgency of its final resolution justifies it, the court may, after hearing the parties for a period of 10 days, anticipate the judgment of the case, issuing a decision that will constitute the final decision of this process»*.

12. Can precautionary measures be challenged before the Supreme Court /Council of State?

- Yes
- Yes, but only if they pass a test of eligibility
- No

Yes, but only if they pass a test of eligibility. According to article 24, no. 1, point c) and 26, no. 1, point d) of ETAF, the STA is the competent court to decide on requests for the adoption of precautionary measures related to processes that lie within its competence.

13. Can the Supreme Administrative Court / Council of State, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level?

- Yes
- No

Yes.

14. On average, how many precautionary decisions are taken every year by the Supreme Court/ Council of State in comparison to the overall number of decisions taken?



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In the last two years (2019/2020), the Portuguese Supreme Administrative Court issued, in a universe of 1194 court decisions, 13 injunctions