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

"Law, Courts and guidelines for the public administration"

Fiesole (Firenze), Autumn 2021

Answers to questionnaire: Portugal

Seminar co-funded by the «Justice » program of the European Union

ITALIAN PRESIDENCY ACA - EUROPE

FIESOLE (FIRENZE), 19 OCTOBER 2020

"LAW, COURTS AND GUIDELINES FOR PUBLIC ADMINISTRATIONS"

QUESTIONNAIRE

1. Introduction

1.1 The seminar to be held in Fiesole, on the 19th and 20th October 2020 at the European University Institute, is the first meeting organised by the Italian presidency.

As explained during the initial presentation of the programme for the upcoming Italian presidency, its leitmotiv will be to enhance and foster the value and the experience of "horizontal dialogue" among the highest administrative national Courts, aiming to create and develop a common culture and shared standards in judicial review of the activity of the public authorities.

This "horizontal dialogue", more than "vertical dialogue", aims to focus on examining and comparing modes of judicial decision making and judicial conduct, and the impact of judgments on the activities of public authorities.

Horizontal dialogue between Courts of Member States is the best way to achieve an effective European citizenship, that is to say a common standard of legal protection for citizens and companies living´--+

.0 in Europe and dealing with public powers.

1.2 The purpose of this questionnaire and of the subsequent seminar is to provide a greater understanding of similarities and differences among our legal systems, especially regarding:

a) the interpretation of law by judges;

b) the binding effect of judgments both so as to ensure the judges' compliance with the nomophylactic statements of the Supreme Administrative Courts (SACs) and to act as an instrument to address the future action of public administrations in similar cases;

c) the effect of the administrative judgments on the activity of public administration and their enforcement;
d) the consultative role of the SAC, if existing.

1.3. The seminar will cover the following topics:

a) The method followed by administrative courts in the interpretation of the law, focusing on the criteria applied by judges (including reference to *ratio legis*, reference to preparatory work, reference to the advice of the SAC regarding the adoption of the law, if existing, etc.). A special focus will be placed on the tools for supporting judicial activity with regard to services for classifying and archiving judgments, e.g. databases and AI instruments.

b) The application of the law by the Court, with specific reference to the nomophylactic pronouncements of the SAC. Jurisprudential stability and the predictability of decisions are important values related to the general principles affirmed by the European Court of Justice such as legal certainty, predictability for citizens and companies of the consequences of their behaviour and the protection of legitimate expectations. Therefore, there will be a special focus on the ways and the procedures, where they exist, through which SACs ensure compliance with the nomophylactic statements in the administrative system.
The "binding or steering effect" of the of Supreme Court judgments: this topic aims to foster mutual understanding of the capacity of administrative judgments to bind the public administration in the subsequent exercise of its power. It covers not only the binding effect on decided case, but it also aims to analyze judgments as instruments to orientate the future action of public administrations in similar cases (i.e. judgement as guidelines).

c) The seminar will also examine the enforcement of the administrative judgment, in case the public administration fails to comply with it spontaneously and correctly, with special reference to judicial enforcement measures provided by each legal jurisdiction, if they exist.

d) Finally, a brief session will be devoted to the consultative role of the SAC, if existing, and its impact on administrative action.

1.4 It is intended that the Seminar will provide each Supreme Administrative Court with a better understanding both of the decision making process underpinning the judgments of other SACs and of their impact on the activity of public authorities.

In a constitutional democracy, administrative courts are seen as performing a vital function in the interaction between law and administration.

The purpose, to reiterate, is to verify whether it is possible to find or develop a homogeneous method to scrutinize the way public administrations exercise their powers and to guarantee a common standard of legal protection for citizens and companies in all Member States.

The questionnaire which follows represents an initial information gathering exercise the purpose of which is to clarify the interaction of the administrative courts with the law, on the one hand, and the administration, on the other, so as to ensure certainty, legality and quality of justice for citizens and public institutions.

I SESSION

THE METHOD OF INTERPRETATION OF LAW AND ITS APPLICATION BY THE COURTS

1. The role of the Supreme Administrative Courts in the interpretation of law.

1.1. Does your legal system provide general rules for the interpretation of law?

□ **No**

□ **X Yes**

1.2. What is the level of general rules for interpreting the law?

□ **X Law**

□ **X Public authority regulations**

□ **Guidelines**

□ **Supreme Court rulings**

□ **Other**

Please explain and give an example.

a) Role of Law: Interpretation of the law looks to understanding the meaning behind the words of the legislator. The general rules on the interpretation of the law are contemplated in Art.9 of the Portuguese Civil Code (CC) [1], which reads the following:

- *"The interpretation should not limit itself to the written word, but should seek to reconstruct the legislative thought, whilst taking into account the unity of the legal system, the circumstances in which the law was formulated and the specific conditions of the time in which it is applied"* (1)
- *"It should not, however, be taken into account the legislative thought that does not have the minimum verbal correlation, even if imperfectly enunciated"* (2)

[1] Approved under Decree Law 47344/66, 25 November, last revised under Law 85/2019, 3 September.

- "*Whilst fixating the meaning and scope of the law, the interpreter should presume that the legislator has consecrated the most informed solutions and that the legislator was able to express his thoughts in adequate terms"* (3)

Example: Judgement by the Supreme Administrative Court (STA), case 0701/10, from 29/11/2011[2], clarifies that:" *To interpret the law is to provide it with meaning and to determine its purpose, in order to better understand its application in a specific case. Legal interpretation takes place via elements, means, factors or criteria that should be used in harmony and not in isolation. The first elements are the words that the law has used to express itself (literal element); the other elements that follow are the so-called logical elements (historical, racional and teleological). The literal element, or gramatical, are the words by which the law expresses itself and constitutes the starting point of the interpreter as well as the very limit of the interpretation".*

b) Role of the Public Authority Regulation in the interpretation of law:

Public authority regulations, or executive regulations, seek to rectify the involuntary deficiencies of expression made by the legislator. These regulations interpret the meaning of legal norms in three ways: 1) clarifying legal norms that are obscure; 2) specifying the norms when they are deficient or incomplete, and 3) detailing the norms, when necessary, in order to ensure the good execution of legal norms.

Example: Judgement by the STA, case 01548/13, from 10/01/2014[3], stated that: *"executive regulations substantiate the task of detailing and complementing the legal command (...). The order by the Minister in charge (legally responsible for defining the amount of taxes to be charged by the telecommunications operator), should be qualified as an executive regulation"*

---

[2] Available here: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/4d5dfe357c53e3978025795e0052e61f?OpenDocument&ExpandSection=1#_Section1

[3] Available here: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/b977d4ce1df1371f80257d690031b143?OpenDocument&ExpandSection=1#_Section1

c) The Role of the Supreme Administrative Courts in ensuring the uniform application and interpretation of law

Notwithstanding the fact that the STA does not define general rules for interpreting the law, the Code of Procedure for Administrative Courts (CPTA) [4] provides three legal means to standardize the interpretation of the law:

A. *Preliminary ruling consultation*, (Art. 93, CPTA and Art. 122-A, of the Code of Tax Procedure and Proceedings (CPPT[5]).

"Whenever a new legal matter is raised in a Circle Administrative Court that elicits serious difficulties and that is likely to come up again in other legal disputes, the president of the Court, per officio or upon proposal by the respective judge, (...) submits the appreciation of the matter to the Supreme Administrative Court, so that it issues a binding decision on the question at issue within three months".

Example: Judgement by the STA, case 0942/08, from 19/11/2008[6] , stated that:*" the admissibility of the request for a preliminary ruling depends on the verification of the following criteria: a) the case in question is not of an urgent nature; b) there must be a new legal issue that generates serious difficulties; c) the issue in question may be raised again during other disputes and, finally; d) the issue at hand is not of minimal importance".*

B- *Expanded appeal* judgment (Art. 148 do CPTA and Art. 289 do CPPT).

Art.148, CPTA states the following:

"1- The president of the STA or of the Central Administrative Court may determine that all the judges within the section take part in the appeal judgement, when it is seen as necessary or convenient to ensure the uniformity of jurisprudence, in a quorum of two-thirds of the judges.

[4] Approved under Law 15/2002, 22 February, last revised under Law 118/2019, 17 September.
[5] Approved under Decree-Law 433/99, 26 October, last revised under Law 2/2020, 31 March.
[6] Acessible here: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/a48f56ad361ffcec8025750d004273d2?OpenDocument&ExpandSection=1

2- The judgement in these terms may be requested by the parts in the dispute and should be proposed by the Rapporteur or by the adjuncts, namely in situations where there is a possibility that the legal solution may be revoked for being in opposition with previously standardized jurisprudence on the same matter."

Example: Judgement by the STA, case 2/2017, process 1658/15, from 22/02/2017[7] (*Extended appeal* judgement), stated: *"The exemption contemplated in Art. 44, 1, subparagraph e, Statute of Tax Benefits (ETB), only applies to buildings that are directly earmarked to the statutory objectives of the collective person of public utility, v.g, the necessary objectives to the establishment of the headquarters, delegations and indispensable services to the execution of statutory goals, and its ex officio recognition takes place in accordance with Art. 44, 4, ETB".*

C- Appeal for the *standardization of jurisprudence* (Arts. 152, CPTA and 284, CPPT).

Art. 152, CPTA, states the following:

«1 – The parties and the public prosecution office may initiate proceedings before the Supreme Administrative Court, within 30 days once the contested decision has become final, to standardise case law where there is a contradiction on one and the same fundamental question of law:

a) between a decision of the administrative court of appeal and a decision previously rendered by the same court or by the Supreme Administrative Court; b) between two decisions by the Supreme Administrative Court.

2-(...)

3-The action is inadmissible if the direction pursued in the contested decision is compliant with the most recent consolidated case law of the Supreme Administrative Court.

4-The action is heard by the plenary panel of the section, and the decision is published in the first series of the Official Gazette (Diário da República).

5-The favourable decision rendered by the higher court does not affect previous judgements to the one contested, nor legal situations created by virtue of the said judgements. (...)»

---

[7] Accessible here: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/fd6a2e67f8d18c2d802580d7004368d6?OpenDocument

Example: Judgment by the STA, case 013202/1, from 25/11/2018[8], concluded that: *"conflicting judgments presuppose that, within the same legal framework and in face with an identical factual reality, the judgment under appeal and the judgment already substantiated adopt opposing solutions regarding the same essential legal question. This contradiction may only be assessed if it exists between explicit decisions and not between explicit and implicit decisions".*

The main objective of a "*preliminary ruling* procedure", of an "*expanded appeal* judgment" and of the "appeal for the *standardization of jurisprudence"* is to attain uniformity in the interpretation of the law.

1.3 What are the criteria for interpretation of the law?

□ X literal interpretation

□ X reference to purpose of law (so-called *ratio legis*)

□ X consistency within the legal system

□ X reference to preparatory work

□ X reference to the advice of the SAC regarding the adoption of the law, if existing

□ Other

Explain, if necessary.

It is the mission of the interpreter to determine the real sense of the legal rule, under the assumption that the legislator did consecrate the wisest solutions and was able to express his thought into appropriate terms. In order to determine the real sense of the legal rule, the interpreter should take into account, in addition to the literal element (the absolute starting point and limit of the interpretation), the logical elements, subdivided into three categories:

[8] Accessible here: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/77e0662d23b1f580802584a4004c0bf5?OpenDocument&ExpandSection=1#_Section1

a) historical element, that looks into the history of the legal rule (preparatory works; elements from the preamble or draft of the rule, as well as the *occasio legis*, i.e, the social/political/economic circumstances surrounding the formulation of the rule);

b) systematical element, that takes into account the unity of the legal system;

c) rational element, that looks into the objective that the legal rule seeks to accomplish and constitutes its ratio (*ratio legis*).

In conclusion, the interpretative activity follows a specific methodology that, whilst taking into account all the elements of interpretation (grammatical, historical, systematical and theological), allows the interpreter to determine the appropriate meaning of the legal text.

1.4. What criteria do judges apply when there are gaps in the law?

□ X Analogy (reference to similar *ratio* of other rules)

□ X General principles of the legal system

□ Other

Explain, if necessary.

A. Analogy:

In Administrative Law, gaps in the law should be overcome, firstly, via analogy, and, secondly, via the general principles of Law.

In Tax Law, legal norms that establish tax benefits are not susceptible of being analogically integrated, but may be extensively interpreted, in accordance with Art.10, Statute of Tax Benefits (EBB)[9].

With regards to administrative sanctioning norms, it is not possible to resort to analogy as an instrument to address gaps and loopholes. This is a security measure that ensures that legal norms that represent infractions and sanctions are specifically determined.

[9] Approved by Law 215/89, 1 July. Last revised under Law 2/2020, 31 March (*State Budget Law*).

B. General Principles of the Administrative activity:

In the case of doubts regarding interpretation of a legal norm or loophole, the general principles (such as the principles of legality; pursuit of the public interest; impartiality; proportionality; good faith, protection of legitimate expectations; justice; responsibility, etc.), provide a path towards the correct interpretation and/or integration of the most appropriate decision, in the terms of Art.266, 2, CRP and Arts.3-19, CPA[10].

1.5. Does the SAC elaborate general interpretative *criteria*?

□ **X No**

□ **Yes**

Please explain and give an example.

The STA does not elaborate general interpretative criteria, but does ensures the good application and interpretation of the law, when it acts as a:

- *"an advisor of inferior courts",* in the terms of the *"preliminary ruling consultation"* (Art. 93, 1 and 3, CPTA and Art.122-A, CPPT);

- "*regulator of the administrative and tax justice system",* in the terms of the *"appeal for the uniformization of jurisprudence"* (Arts. 152, CPTA and 284, CPPT), and,

-*"security valve for the system",* in the terms of *"an appeal on a point of law"* for decisions that are delivered in the second instance, when the case in point is of high importance, legally or socially, or when the admissibility for an appeal is clearly necessary for a good application of the law (Arts. 150, CPTA and 285, CPPT).

[10] Approved by Law 4/2015, 7 January.

1.6 In deciding the case, to what extent does the Court take the following into account and within which limits?

1.6.1. EU law (Nice Charter, EU regulations, EU directives) and the judgments of the EU Courts;

□ never □ seldom □ sometimes □ X often

Please specify.

Portuguese courts interpret national norms in conformity with EU Law. It is a duty of Portuguese judges to respect the principle of primacy of EU Law. Consequently, judges should request a preliminary ruling to the ECJ (Art. 234, TUE), whenever a doubt arises on the interpretation of a norm. The infringement, by Member States, of the obligations that are imposed by EU Law, including the breach of the obligation to request a preliminary ruling to the ECJ (when mandatory), is the cause for an infringement proceeding (action for failure to fulfill obligations), in the terms of Arts. 258-260, TFUE[11].

1.6.2. The European Convention of Human Rights and the general principles elaborated by the ECHR;

□ never □ seldom □ sometimes X □ often

Please specify.

In the terms of Art.8, CRP, the legal norms deriving from internationally ratified conventions are in effect in the Portuguese internal legal system, once they have been published and whilst they bind the Portuguese State in the international sphere. Portugal ratified the European Convention on Human Rights (CEDH) on November 9, 1978, the date

[11] Judgement by the ECJ (Grand Chamber, 27 February 2018) decided on a preliminary request presented by the Portuguese STA on account of a dispute between the Union Association of Portuguese Judges and the Portuguese Court of Auditors over the temporary reduction of the amount of payed remuneration in the context of the budgetary policy of the Portuguese State (Case C-46/16).

when the CEDH entered into effect in the Portuguese legal order and became a source of obligations, under penalty of international responsibility.

1.6.3. The general clauses of proportionality and of reasonableness.

□ never □ seldom □ sometimes □ X often

Please specify.

The principle of proportionality determines that the public administration, in the pursuit of public interest, *"should adopt actions that are appropriate to the pursuit of its objectives and that any decisions that collide with subjective rights or with the legally protected interests of private citizens, must only be affected to the extent necessary and in proportional terms to those objectives"* (Art.266, 2, CRP and Art.7, CPA).

The principle of reasonableness determines that *"the public administration should treat all those with which it contacts in a fair manner, as well as to reject all of those solutions that are clearly unfavorable or incompatible with the Law, namely in the matter of the interpretation of legal norms whilst taking into account the natural assessments that arise from the administrative function"(*Art. 266, 2, CRP and Art.8, CPA).

These principles constitute an assessment method for the evaluation of an action or decision in terms of its weighting factor and the measurability of the rationality of the objectives pursued, as well as the means employed, thus acting as a control instrument in the jurisprudence of tax and administrative courts.

1.6.4. The statements (or case law) of the Courts of other countries in similar cases;

□ never □ seldom X sometimes □ often

The use of jurisprudence from other countries, albeit less frequent, has intensified in the last years. It is possible to attest the influence of case law from other European courts in the reasoning of some of the decisions rendered by Portuguese administrative courts.

1.6.5. The general interests involved (i.e: order and public safety, environmental protection, consumer protection, the economic, financial and social effects on the labour market)

□ never □ seldom □ sometimes □ X often

Please specify.

The principle of the pursuit of public interest determines that *"it is the competence of the public administration entities to pursue the public interest, in the respect for the rights and legally protected interests of the citizens",* meaning that the administrative activity is conditioned to the pursuit of the public interest. Consequently, courts are bound to choose, from among the possible solutions abstractly projected by the law, the decision that best serves the public interest (Art. 266, 1, CRP and Art.4, CPA).

1.6.6. The results of regulatory impact analysis (AIR), if applicable;

□ X never □ seldom □ sometimes □ often

1.6.7. - The impact of the decision;

□ never □ seldom □ sometimes □ often

□ X Other

Please specify.

When exercising his/her judicial duties, the judge does not ignore the repercussions that his/her decision may bring, not just to the parties involved, but also to society. Nevertheless, the objectivity of the judge should remain indifferent to any pressure that the public opinion and/or the media may exert on the case.

2. <u>Tools for supporting judicial activity.</u>

2.1. Are there any services established in the Supreme Administrative Court responsible for classifying the judgments and drafting their abstracts?

□ **No**

□ **X Yes**

There is a working group at the STA that is responsible for the computerization of jurisprudence, the *"Comission for the Computerization of Jurisprudence from the STA",* constituted under Order 2490/2019, 31 January[12]. This working group comprises three Councillor Judges and one Assistant Attorney General and is responsible for the selection, preparation, introduction and management of the database *"Judgements by the Supreme Administrative Court".* The technical management of the database is ensured by the *Institute of Information Technologies in Justice* (ITIJ), part of the Ministry of Justice.

2.2. What other activities do these Services perform?

□ **preparation of useful material for the most important judgments of the SAC;**

□ **comparative studies;**

□ **information about new developments in the law and in the case law;**

□ **training of judges**

□ **X other activities.**

Please specify.

The *Commission for the Computerization of Jurisprudence from the STA* is responsible for maintaining and updating the database *"Judgements by the Supreme Administrative Court",* as previously referred on Question 2.1.

The *Division for Documentation and Legal Information of the STA*[13], however, is in charge of providing legal assistance to Councillor Judges in the following ways:

[12] Accessible here:
https://dre.tretas.org/pdfs/2019/03/12/dre-3644706.pdf

[13] The competences of the Division for Documentation and Legal Information are consecrated in Art. 11, Decree-Law 73/2002, 26 March.

i) analysis of cases; ii) research and gathering of specific legislation; iii) research and gathering of relevant national and EU jurisprudence when European Law is at stake; iv) research and gathering of doctrine on the questions under discussion; and, v) studies on comparative law, among other activities.

2.3. Are administrative Court judgments stored on a searchable and free database?

□ **No**

□ **X Yes**

Please explain.

Judgements by the superior courts – such as the STA and the Administrative and Central Courts- are stored and may be freely consulted in the legal database provided by the *Institute for Financial Management and Justice Equipment* (IGFEJ), accessible at www.dgsi.pt. As of now, the database contains eighty thousand and six hundred and 6 decisions from the STA (80.606); twelve thousand and four hundred and sixty-two decisions from the TCA North (12.462), and eighteen thousand and three hundred and twenty-four decisions from the TCA South (18324).

2.4. What kind of database do the administrative judges consult in their daily work?

□ **X public and free databases**

□ **X private databases, provided by their institution**

□ **other**

Please explain.

Portuguese judges have access to several work instruments that provide assistance to their daily judicial activities. One of the most relevant instruments is the *Information System of Tax and Administrative Courts* (SITAF), accessible at www.taf.mj.pt . It is a computerized platform that ensures the electronic proceeding of cases in the administrative and tax courts[14]. This platform provides specific modules for case proceedings and allows actions from judges,

[14] Ordinance 380/2017, 19 December, revised under Ordinance 4/2020, 3 January, regulates the electronic proceeding of administrative and tax courts.

Public Attorney magistrates, justice officials and authorized representatives from the parties in a legal case.

Apart from the SITAF, there are several other free legal databases, namely:

a) Legal documents database from the Institute of Financial Management from the Ministry of Justice, accessible at www.dgsi.pt. Provides consultations on national jurisprudence and on EU jurisprudence and legislation, through the link *"EU Portal",* allowing a direct access to the libraries of several national entities;

b) Legal and jurisprudential database from the Attorney General´s Office of the Lisbon District, accessible at http://www.pgdlisboa.pt/home.php . Provides consultations on the main national legal documents as well as on national jurisprudence;

c) Legal and jurisprudential database from the *Official Journal of the Portuguese Republic*, accessible at www.dre.pt , daily updated.

The STA also provides a privately owned database entitled "DATAJURIS – Legal Database", providing access to specific domains, such as *"legislation", "jurisprudence*", *"newsletters, opinions and guidelines"* and *"regulations, statutes and municipal stances".*

2.5. Are there projects implementing advanced artificial intelligence systems operating in the decision making process and/or for the preparation of decisions?

□ X No

□ Yes

2.6 If yes, explain the role of the AI systems in the decision-making process (e.g. drafting final decisions, supporting judges for some significant aspects of the case, such as for example the calculation of damages, etc.)

Does not apply.

3. The application of law: the "nomophylactic" statements in the administrative judicial system.

3.1. Does the judgment of the SAC have binding effect on lower courts?

□ X No

□ **Yes**

□ **Only if the SAC decides in special composition**

In accordance with the Law on the Organization of the Judiciary System (LOSJ)[15] , Portuguese judges are independent and *"judge only under the Constitution and the law and are not subject to any orders or instructions, except with regards to the duty of respect of decisions rendered in appeals by superior courts"* (Art.4, LOSJ). Judgments by the STA differ from the kind of proceeding that is at stake. Therefore, when the STA judges on

- *"Appeals for the uniformization of jurisprudence",* the judgment is only binding within the case in point, albeit it tends to be respected outside of this sphere of action (Art.152, CPTA and Art. 284, CPPT). Exceptions to this include the following circumstances: i) when a significant amount of time has gone by since the rendering of the judgment; ii) when a doctrinal debate has taken place that questions the standardized jurisprudence; iii) when relevant legal arguments that were not discussed in the judgment are presented; iv) when an alteration in the composition of the Supreme may lead to a different solution.
- *"Appeals on a point of law",* the judgment is also binding to the Central Administrative Courts, considered as second instance courts (Art. 150, CPTA and Art.285, CPPT).

Finally, with regards to decisions on *preliminary consultations,* the judgment rendered is binding in the process it refers to, i.e, the judge has the duty to apply to the facts the norm interpreted in accordance with the STA. This duty, however, does not apply to new judgments (through appeals or consultations) that may be rendered by the STA in the future on the same topic, outside of the process (Arts.93, 1, b) and 5, CPTA and Art.122-A, CPPT).

3.2. If the answer to question 3.1. above is no, what percentage of lower court cases comply with SAC decisions?

□ **less than 25%**

□ **from 25% to 50%**

[15] Approved by Law 62/2013, 26 August, last revised under Law 55/2019, 5 August.

□ **from 50% to 75%**

□ **X from 75% to 100%**

3.3. If the answer to question 3.1. above is no, how is the consistency and predictability of court decisions ensured?

Please explain and give an example.

Notwithstanding the fact that court decisions are not binding outside of the process they refer to, these entail a persuasive strength that is a result of the quality of its authors and of the importance of its reasoning, translated in the generalized respect that the instances showcase towards standardized solutions that ultimately rule over the jurisprudential controversies that precede them.

3**.4. When solving jurisprudential conflicts or stating principles of law, does the SAC work in a special composition (for example a Plenary Assembly or a larger panel)?**

□ **No**

□ **X Yes**

If the answer is yes, please explain.

At the Supreme Administrative Court the case is judged by a panel of judges. Its composition differs according to how the judgment takes place (Section, Full Court or in Plenary). According to the Statute of Administrative and Tax Courts (ETAF)[16], judgments in the Section are a competence of the Judge Rapporteur and of two Judges (Art.17), but when the Supreme decides in a Full Court or in Plenary, there are specificities regarding the composition:

-Judgment in a Full Court is comprised of the judge Rapporteur and other judges in exercise in the Section in question. The Full Court is competent to decide on Appeals of judgments rendered by the Section in the 1st degree of jurisdiction, on *"Appeals for*

[16] Approved by Law 13/2002, 19 February, last revised under Law 114/2019, 12 September.

*the uniformization of jurisprudenc*e", and on *preliminary consultations*. The Full Court requires a *quorum* of, at least, two-thirds of the judges (Arts. 17; 25 and 27, 1, ETAF).

-Judgment in Plenary comprises the president of the Court, its vice-presidents and the five eldest judges of each Section. The Plenary is competent to decide on *Appeals for the uniformization of jurisprudence* whenever there is a contradiction between judgments from both Sections of the STA (Arts. 28; 29 and 30, ETAF).

3.5. Is there a specific procedure for referring a question to the SAC working in special composition?

□ **No**

□ **X Yes**

There is a screening process before the Supreme Administrative Court in the following three areas:

A- Reference to a *preliminary request* (articles 93 §1 (b), CPTA and 122.º-A CPPT)

In the case of a preliminary request, solely the president of the Administrative Circle Court may, *in officio* or by proposal of the judge of the case, submit the question to the appreciation of the STA, which must decide within three months. The court will refuse to examine the matter, however, when a panel composed of three members among the oldest judges of the administrative legal section of the STA considers that the required conditions for such a reference are not met or when the question lacks the relevance to justify a ruling.

B-Exceptional application for *judicial review* (articles 150 do CPTA e 285.º do CPPT):

«Application for judicial review:

1 – Under exceptional circumstances, an application for a judicial review of decisions delivered by the Administrative Court of Appeal may be lodged with the STA when there is a legal or social issue of fundamental importance or when the action must be admitted in order to ensure a better application of the law.

(...)

6 – The decision on the verification of the criteria on Paragraph 1 is a competence of the STA and must be subjected to a preliminary summary review by a panel composed of three judges from among the oldest in the administrative legal section."

C- Petition to *standardize case law* (articles 152 do CPTA e 284 do CPPT):

"1- The parties and the Public Prosecution Service may place a request to the STA, within 30 days of the unappeasable decision of the contested judgment, for the admission of an Appeal to standardize jurisprudence.

(...)

3 – The petition is inadmissible if the guidelines pursued in the contested decision comply with the case law most recently consolidated by the Supreme Administrative Court. This is verified by the Court (in a Plenary assembly) (...)"

3.6. If the answer to question 3.5 above is yes, if a judge of the SAC does not agree with the principle affirmed, what can he or she do?

□ **it is not possible to disagree**

□ **X it is possible to take a different decision, giving reasons**

□ **X a new referral to the Court is necessary**

In the cases submitted to trial, judges may disagree on the interpretation of their peers, and emit dissenting opinions, that also become integrated in the judgment.

In accordance with Art.96, CPTA: *«in superior courts, when the judgment can not be transcribed during the session, the outcome is written down, dated and signed by the winning judges and by the judges with dissenting opinions (...)».*

In the terms of Art. 153, CPTA: *"when, in Full Court, the Rapporteur has a dissenting opinion regarding the decision or the argumentation of the decisison, the Judgment is then transcribed by another judge, who has a winning opinion, via raffle"* (1); *"From the raffle, judges that have winning opinions are then continuously excluded"* (2).

3.7. In order to guarantee the consistency of jurisprudence among the various sections of the SAC or with another Supreme Court, if such exists, are there organizational

mechanisms in place to promote this aim (for example, periodical meetings among judges or among presidents)?

□ **No**

□ **X Yes**

If the answer is yes, please explain.

Even though there is no legal imposition on this matter, Councillor Judges that exercise functions in the administrative and tax Sections of the STA exchange opinions and ideas in a voluntary and spontaneous manner, with the goal of avoiding jurisprudential conflicts between the Sections.

Within the same section, the *Expanded Appeal Judgment* seeks to prevent the occurrence of a jurisprudential conflict. This appeal has the intervention of all the judges from the respective Section and is not to be confused with the *Appeal for the Uniformization of Jurisprudence*, since it does not resolve conflicts, but merely seeks to prevent them.

On the other hand, the work that results from the legal assistance provided by the Division of Documentation and Legal Information is especially relevant in this context (see answer to Question 2.2).

3.8. If your judicial system has administrative Courts separated from other Courts (civil ones), which body or Court is entitled to resolve conflicts of jurisdiction between administrative and ordinary courts? (e.g. *Tribunal des Conflicts*).

In Portugal, the entity responsible for the resolution of jurisdiction conflicts between judicial and administrative and tax courts is the Court on conflicts of jurisdiction (*Tribunal de Conflitos*). The composition, competence and functioning of this Court was established under Law 91/2019, from the 4th of September.

SESSION II.

THE IMPACT OF DECISIONS OF SUPREME ADMINISTRATIVE COURT ON THE FUTURE DEVELOPMENT OF ADMINISTRATIVE ACTIVITY

1. To what extent does the administrative judgment bind the public administration in the new exercise of its power? Please explain.

According to the CPTA, court judgments are binding to all public and private entities (Art. 158, 1). The illicit non-compliance of a judicial decision by the Public Administration has several legal consequences, such as the nullity of the administrative act (*constitutive effect of the judgment),* as well as the civil, disciplinary and criminal liability of the authors of the non-execution, in the following terms:

a) civil liability, in the general terms, by the Administration and by those who act on its behalf (Art. 159, 1, subparagraph a, CPTA);

b) disciplinary liability, also in the general terms, by those same people (Art.159, 1, subparagraph b, CPTA); and,

c) criminal liability in the specific terms of the crime of disobedience. The following criteria must be present once the administrative entity, after being notified, displays: a) clear intention not to execute the judgment without invoking a legitimate cause for the inexecution; b) does not proceed to the execution in the terms defined by the judgment or that will be defined during the execution procedure (Art.159, 2, CPTA).

2. Can the decision of an administrative judge influence the work of public administrations even beyond the objective and subjective context of the case decided?

□ **No**

□ **X Yes**

Please explain.

The public administration must respect the judgment and accept the content of the decision, as well as the restrictions that may arise during the upcoming and eventual exercise of its powers. This is also known as the *ultra-constitutive effect of the judgment,* i.e, it is attributed to the judgment an inhibitory effect, that impedes recurrences of acts committed by the administration with the same vices.

Notwithstanding, in an action for annulment, the judgment pertaining to the annulment of an administrative act due to a specific vice does not prevent the administration from promulgating a similar act, provided that the vice in question is not repeated.

3. According to regulatory rules or practices, may the effects of an administrative judgment be extended by the administration itself beyond the case decided?

□ **No**

□ **X Yes**

Please explain.

The CPTA provides that the effects of a final judgment that has annulled or declared null an unfavorable administrative act or recognized a favorable legal situation for one or more persons, may be extended to third parties, whether or not they have resorted to the court. The criteria for this extension require that third parties have been subject of an administrative act with the same content or have been placed in the same legal position, provided that no final decision has been rendered concerning the latter. This also applies to identical cases, particularly with regards to civil service and competitions, and only when five final decisions have been delivered along the same lines, or, in the case of mass trials, where three decisions have been rendered along the same lines (article 161, §1).

SESSION III

IMPLEMENTATION AND ENFORCEMENT OF THE DECISIONS

1. Is there a specific legal procedure in your system aimed at monitoring and pursuing the full and complete execution of the judgement?

According to the Portuguese Constitution, court decisions are obligatory, and judgments must be fully executed (Art.205, 2 and 3, CRP). The CPTA also establishes this principle in Art. 158, that, in line with the Principle of Effective Judicial Protection (Art.2, 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 Art. 159, CPTA.

More specifically, and according to Vieira de Andrade[17], the administrative legislative reform of 2015 *:"has clearly established the anticipation of the executive procedure on actions of condemnation to the practice of legal acts and in claims for damages, through a supplementary stage of the declarative procedure, thus allowing the specification of actions or of proper conducts, or even the settlement of the compensatory amount, in the terms of Art.95, 6 and 7, CPTA".* This mechanism added by the 2015 Reform, in line with the idea of the assurance of the *Principle of Effective Judicial Protection* of private individuals (a constitutional objective set about during the legislative Reform of 2002), supplemented the already active "*possibility of emitting substituting sentences of rightful and binding administrative actions, as well as the empowering of judges in the right to condemn public entities and its holders to compulsory pecuniary sanctions- which constitutes an astonishing tool (Arts. 3, 2 and 169, CPTA)".*

1.1. If the answer to question 1 above is yes, in what percentage of cases are such remedies used?

Notwithstanding the fact that there is no specific percentual data on these cases, more general information can be found in the following link:

https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Movimento-de-processos-nos-tribunais-administrativos-e-fiscais-superiores.aspx

2. If there is no specific procedure, how does your system ensure the full compliance of the judgement?

Not applicable.

[17] Vieira de Andrade, *A Justiça Administrativa*, 17th edition, Almedina, 2019 (pp.369-370).

3. If there is such a judicial remedy, does it require the judgement to become final?

According with Art.164,1, CPTA: *"If the Administration does not spontaneously execute the sentence within the deadline (...), both the interested party and the Public Prosecutor, when the latter has been a part in the process or when there are at stake the principles established under Art. 9, 2* (constitutionally protected values such as public health, environment, urbanity, territory administration, quality of life, etc.), *may request the execution of the sentence from the Court that rendered a first instance decision".* This procedure follows the lines established under Art. 164, CPTA, that refers in its Second Paragraph that :*"(...)the petition for the execution (...)must be placed within the time period of one year, counted from the end of the deadline for the spontaneous execution of the sentence"* ("*ninety days"*, in accordance with Art.162, 1 CPTA). This request for the execution of the sentence, presented by the interested party or the Public Prosecutor in the aforementioned terms, however, does not preclude the duty of the Court to ensure the execution of the sentence, in the cases when it is not spontaneously carried out by the Administration, and even resort to the cooperation of the authorities and officers of the administration or other entities, when necessary, according to Art. 167, 1 and 2, CPTA.

For this reason, it is understood that the judgment does not have to be final in order for the judicial remedy to become effective, as the CPTA makes no mention of final decisions or judgments by the 2nd Instance and Supreme Courts. Moreover, in line with Vieira de Andrade[18]*:" the Court that is competent to execute the sentences (...), is the first instance court where the case was judged, even if the sentence in question has been rendered after an Appeal, in a superior Court. In the case where sentences were rendered, in first instance, by superior courts, the general rule of civil procedure no longer applies in the administrative process, and the first instance court is no longer deemed competent to execute the sentence".*

4. Do judges have the power of substitution, directly or through Commissioners *ad acta*, in the case of inertia or incorrect execution of judgments?

[18] Vieira de Andrade, *A Justiça Administrativa*, 17th edition, Almedina, 2019 (p. 378).

In the case of inertia or incorrect execution of judgments, judges should adopt the necessary measures to ensure the effective execution of the sentence, by declaring the nullity of administrative actions that do not comply with it, in the terms of Art. 167, 1, CPTA. These measures comprise the notification to the holder of administrative powers to execute the judgment and may include the judicial surrender of what is owed or the determination of a provision of an owed fact. For situations where what is at stake is an administrative action that is rightfully legal and binding, the Court may emit a sentence that produces the effects of the legally omitted administrative action, as established under Art. 167, 2, 5 and 6, CPTA.

With regards to the power of substitution, judges may decide on an indirect subrogation, in the terms of Art.167, 2, CPTA. According to Vieira de Andrade[19]: *" (...) the so-called sub rogatory execution may be granted (...) to the hierarchical superior or to the entity with the power of oversight over the officer responsible for the execution (the so-called execution by public substitution), notwithstanding the possibility of resorting to a third party, instructed by the Court at the expense of the administrative entity at fault, in the general terms of the civil procedure and with the necessary adaptations".*

5. Is the administration (and/or the official) liable for damages due to non-execution or incorrect execution of the judgement?

Yes. In accordance with Art.158, 2, CPTA*: "The prevalence of the decisions by the administrative Courts over those of the administrative authority implies the nullity of any administrative action that disrespects a judicial decision and incurs its authors in civil, criminal and disciplinary liability, in the terms of the following Article"* (Art.159, CPTA).

[19] Vieira de Andrade, *A Justiça Administrativa*, 17th edition, Almedina, 2019 (p. 383).

5.1. If the answer above is yes, is it within the jurisdiction of the administrative judge to decide on the action for damages?

Please explain and give an example.

The effective compliance by the administration of the duty of specific execution (primary protection) is ensured through the attribution, to the judge, of the power to apply *compulsory pecuniary sanctions* to the holders of public power, in the terms of Arts.3, 2 and 169, CPTA.

Example: Judgement 16/2/2017, Judge- Rapporteur Nuno Coutinho

In this case, the administration judge of the 2nd instance South Central Administrative Court (Tribunal Central Administrativo Sul) decided against the pretensions of a private citizen seeking compensation against a Portuguese City Hall after claiming that the municipality had failed to act (together with a demand for a petition of execution of a judgment of the 1st instance court Leiria Administrative and Tax Court (TAF Leiria)). The demand for compensation, argued in line with Art. 169, CPTA, was later denied by the TCA-Sul, on the grounds that: *"The compulsory pecuniary sanction established under Art. 169, CPTA, cannot be applied, as it would counter the Adversarial Principle, by not providing an opportunity to the entity incumbent of the execution of the judgment, the opportunity to comment on the imposition of the sanction"* [20].

SESSION IV

THE CONSULTATIVE ROLE OF THE SAC (IF EXISTING) AND ITS IMPACT ON ADMINISTRATIVE ACTION.

1. Does the SAC play advisory functions for the government or for the public administration?

No.

In accordance with Art. 212, 3, CRP and Art.1, 1, ETAF, the competence of the STA and of other administrative and tax Courts is to:" *judge on disputes emerging from administrative and*

[20] Edgar Valles, *Contencioso Administrativo*, 3rd edition, Almedina, 2019, p.188.

tax relations". More specifically, Art.4, ETAF, in its exhaustive list of competences of the administrative and tax Courts, does not include the possibility of the STA to play advisory functions for the government or for the public administration.

(NON APPLICABLE QUESTIONS):

1.1. Where the answer to the above question is yes, please specify the kind of acts to which the advisory functions apply. Please specify.

2. The SAC´s advice in its consultative role is: (select)

3. In exercising its advisory functions, can the SAC consult experts in economics or statistics in order to assess the economic and social impact of regulations?

4. Are there forms of collaboration of administrative judges in the activity of the government or of public administrations? (for example, secondment of individual magistrates to head legislative boards of a Ministry or as members of an independent authority, participation in study commissions, etc).

5. Can the advisory function of the SAC also consist in the resolution of a specific dispute working as an ADR (alternative dispute resolution)? (select)