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Answers to questionnaire: Portugal

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Disputes concerning acts by regulatory authorities

Courts with competence to hear disputes concerning regulatory authorities

1. Does your supreme administrative court have competence to hear appeals against acts by regulatory authorities? Yes/no

Yes.

If yes:

1.1. Without being exhaustive, could you present the main regulatory authorities in your country whose acts are brought before your supreme administrative court, specifying if these appeals are subject to several levels of jurisdiction?

In Portugal, independent administrative entities are public authorities that exercise administrative functions without being subject to the subordination of public entities or corporative interests. There are two types of independent entities: the ones that are constitutionally enshrined and the others, created by law, such as the independent regulatory entities (ARIs).

In line with the Framework Law of the Independent Administrative Entities (LQER)[1], ARIs are collective legal persons regulated by public law, with the nature of independent administrative entities. They have attributions in the matter of regulation of the economic activity, in the defense of services that engage with general interests, in the protection of the rights and interests of the consumers and in the promotion and defense of the competition in the private, public, cooperative and social sectors (Art.3, LQER).

Some of the main regulatory authorities in Portugal (albeit not necessarily subject to the LQER), include: (a) the Authority for Mobility and Transportation (AMT)[2]; (b) the National Authority for Civil Aviation (ANAC)[3]; (c) the Authority for the Supervision of Insurances and Pension Funds (ASF)[4]; (d) the Competition Authority (AdC)[5]; (e) the National Communications Authority (ANACOM)[6]; (f) the Regulatory Entity for Energy Services (ERSE)[7]; *(g)* the Regulatory Entity for Health (ERS)[8]; (h) the Regulatory Entity for Water and Residue Services (ERSAR)[9]; *(i)* the

[1] Approved by Law 67/2013, 28 August, last modified under Law 75-B/2020, 31 December.
[2] Accessible here: https://www.amt-autoridade.pt/
[3] Accessible here: https://www.anac.pt/vPT/Generico/Paginas/Homepage00.aspx
[4] Accessible here: https://www.asf.com.pt/NR/exeres/97C24D91-5FD7-4874-9D7D-FFE049D206D9.htm
[5] Accessible here: http://www.concorrencia.pt/vPT/Paginas/HomeAdC.aspx
[6] Accesible here: https://www.anacom.pt/render.jsp?categoryId=2958&languageId=1
[7] Accessible here: https://www.erse.pt/en/home/
[8] Accessible here: https://www.ers.pt/pt/
[9] Accessible here: http://www.ersar.pt/en/search#k=

Regulatory Entity for Communication (ERC)[10]; *(j)* the Securities Market Commission (CMVM)[11]; and, *(l)* the Bank of Portugal (BP)[12].

The norms and administrative acts that have been approved by independent administrative entities may be contested in the administrative jurisdiction. More specifically, in the case of the Supreme Administrative Court (STA), its competence is limited to matters of significant social relevance and complexity, and restricted to matters of law.

In these cases, the STA acts as *"an internal safety valve of the system"* that may only be activated as long as the limits consecrated in Art. 150 of the Code of Procedure of Administrative Courts (CPTA) are respected. As a general rule, the double degree of appeal is not admissible in the Portuguese administrative litigation jurisdiction.

1.2 Please distinguish, if necessary, according to the nature of the acts concerned (in the event, for example, that individual acts taken by these authorities are subject to separate jurisdictions from their general acts, notably regulations).

In the Portuguese legal jurisdiction, there is a distinction of competences whether the subject at hand is related to administrative activity or whether it pertains to mere administrative offences. In the case of regulatory matters, specifically with regards to disputes that concern regulations that do not encase the typification of administrative offences, the jurisdictional competence lies, in general, in the administrative and tax courts (for example, regulations on fines and special contributions emitted by financial entities).

2. In particular, can any of these authorities themselves impose sanctions (including fines)? Yes/no

Yes.

If yes is it possiblee to challenge them before your supreme administrative court?

The LQER attributes to authorities real regulatory powers, which are deemed essential to the activities these perform, such as: *(i)* the power to approve technical norms for the regulated sectors (normative power); *(ii)* the power to oversee and supervise its compliance (supervision

[10] Accesible here: https://www.erc.pt/pt/fs/erc-in-english
[11] Accessible here: https://www.cmvm.pt/en/Pages/homepage.aspx
[12] Accessible here: https://www.bportugal.pt/en

power); *(iii)* the power to solve conflicts (*quasijudicial* power); and *(iv*) the power to punish infractions (sanctioning power)[13].

With regards to its sanctioning power, the LQER attributes to the ARIs, in line with the respective sanctioning regimes, the competence to practice all the necessary actions to the processing and punishment of the infractions to the laws and regulations, as well as to the lack of compliance to its own resolutions (Art.43, LQER).

Notwithstanding the fact that the LQER only references one type of sanctions (fines), the statutes of the ARIs may establish other sanctions of a punitive and persuasive nature, such as warnings and reprimands (Arts. 413-414, Security and Exchanges Code)[14].

In line with the Law for the Organization and Functioning of Judicial Courts (LOFTJ), litigation of administrative offences takes place in the Court of Competition, Revision and Supervision (TCSR)[15] -Art. 112, LOFTJ-.

On the other hand, administrative sanctions that do not constitute administrative offences- such as the closure of installations due to to the breach of precautionary measures[16]; the prohibition of licenses or permits[17]; and the suspension or cancelling of licenses and other authorizing titles that permit the exercise of activity [18]-, are scrutinized by the administrative courts.

3. Are any of these regulatory authorities subject to judicial review by civil courts, for some or all of their acts? Yes/no

Yes.

Please If yes give examples.

The independent administrative entities, despite being independent, remain subject to judicial review. In this regard, disputes that emerge from actions and contracts ruled by private law, are subjected to judicial courts, as well as disputes that concern employment in the terms of the general regime of the individual work contract for the regulatory entities (Art. 32, LQER and Art. 4, 3, subparagraph "b", ETAF).

[13] Cf. Art. 3, 2, subparagraph "e" and Art.40, 1-3, subparagraphs "c" & "f", LQER.
[14] Approved by Decree-Law 466/99, 13 November, last modified under Law 50/2020, 25 August.
[15] Created by Law 46/2011, 24 June.
[16] Cf. Statute of the ERSAR, approved by Law 10/2014, 6 March (Art.9).
[17] Cf. Competition Law, approved by Law 19/2012, 8 May, last modified under Law 23/2018, 5 June (Art. 71, 1, subheader "b").
[18] As determineed by the ASF, during sanctioning proceedings for violation of the legal regime on the distribution of insurance (Arts. 65, 1, subparagraph "c"; 66, 1, subparagraph "f" and 116, 1, subparagraphs "c", "d" and "e", Law 7/2019, 16 January.

In addition to the judicial review, ARIs are also subject to the control of the Court of Auditors with regards to financial management (Art.46, 2, LQER)[19], as well as to political parliamentary control by virtue of exercising administrative functions in the use of public money (Art.49, LQER)[20].

4. Are the courts with competence to hear the acts of regulatory authorities:

- specifically identified by the texts in force, by way of derogation from the normal rules of territorial or material competence? Yes/no

- or do they result from the application of the general rules on the distribution of competences? Yes/no

From a combined analysis of the Statute for Administrative and Tax Courts (ETAF)[21]; of the Framework Law for Regulatory Entities (LQER), and the Law on Organization of the Judiciary System (LOSJ), it can be understood that regulatory authorities are subject to the following courts:

i) Administrative Courts for acts that are practised in the exercise of public authoritative functions and contracts of an administrative nature (Art.5, 2, LQER);

ii) Judicial Courts for disputes concerning acts and contracts governed by private law, as well as employment disputes, taking into account the general regime of the individual employment contract for regulatory authorities (Art. 32, LQER, combined with Art. 4, 3, subparagraph "b", ETAF);

iii) Court for Competition, Regulation and Supervision for matters of appeal, revision and execution of decisions, orders and other measures in contested administrative offences proceedings. The competence of this court encompasses the respective incidents and joined cases, as well as the execution of decisions (Art.112, LOSJ).

[19] Cf. Ruling 21/ 2017, 31 October from the Court of Auditors, regarding financial infractions that are attributed to the president and other members of the board of directors from ERSE, for not having returned to the State an amount that corresponds to 85% of the accumulated value of the management treasury. Accessible here: https://www.tcontas.pt/pt-pt/ProdutosTC/acordaos/3s/Documents/2017/ac021-2017-3s.pdf

[20] Cf. Hearing from the Regulatory Council in the Parliamentary Commission for Culture and Communication, for the purpose of presenting the 2019 Report on Regulation and 2019 Report of Activities and Accounts on the 5th of January, 2021. Accessible here: https://www.erc.pt/pt/audicoes-na-comissao-de-etica-sociedade-e-cutura-da-assembleia-da-republic

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

5. Is there any specific distinction in relation to the rules of competence applicable to equivalent acts of other administrative authorities in your country? Yes/no

If yes, please explain

Regarding administrative offences, there are specific procedural provisions that prevail over what is established in the General Regime for Administrative Offences (RGIMOS)[22]. Distancing from the sectorial regimes *vis-à-vis* the RGIMOS is based on four aspects:

1.Establishment of procedural opportunity mechanisms (consensual decision mechanisms);

2. Attribution of the statute of procedural subjects to the ARIs that are not consecrated by the RGIMOS[23], during the judicial impugnation stage;

3. Greater formalization of the process, as is the case in the Legal Regime for Competition, with the definition of formally distinct stages in the course of the administrative phase;

4. Widening of the limitation period for the proceedings.

With regards to the determination of the applicable procedural law, it is first necessary to ascertain the existence of specific procedural regimes. If there are no specific regimes then the applicable norms are the ones in the RGIMOS. Once these first steps have been assessed, the matter of the determination of the subsidiary application of Criminal Law and Criminal Procedural Law is addressed, in the terms of Art.32 and Art.41, 1, RGIMOS.

5. **Are the remedies available against the acts of these authorities of the same nature as those available against the equivalent or similar acts of other administrative authorities? Yes/no**

No.

If no. Please explain.

Notwithstanding the fact that the general rule is to attribute the control of the activities of the ARIs to the administrative courts, there are legal exceptions in the Portuguese legal system.

One of these exceptions is the Competition Authority (AdC), whose decisions, rendered in administrative procedures within the scope of the Legal Regime for Competition[24], are challengeable at the TCRS, with the right to appeal to the Court of Appeal and to the Supreme

[22] Approved by Decree-Law 433/82, 27 October, last modified under Law 109/2001, 24 December.

[23] Despite what is stated in the RGIMOS- where the court concedes to the administrative authorities the possibility of bringing to the hearing elements that are considered relevant for the correct decision of the case (Art.70)-, many sectorial laws establish the concurrence of the administrative authority to the validity of certain procedural acrs, such as the possibility of the court to decide by simple decision, in the terms of Art.64, RGIMOS.

[24] Approved by Law 19/2012, 8 May, last modified under Law 23/2018, 5 June.

Justice Court, following the dispositions for contentious disputes established in the Code of Procedure of Administrative Courts (Art.84, 1; Art.91 and Art,93).

With regards to the ERC, the activities of its bodies and agents is subject to the administrative jurisdiction, in line with the dispositions and limitations stated in the Statute for the Administrative and Tax Courts. The sanctions established for the practise of administrative offenses, as well as the resolution of disputes between social communication operators and plaintiffs, may give rise to an appeal to judicial or arbitration courts (Art. 45, 1 and 3)[25].

With the exception of the aforementioned cases, the general subjection to the administrative and tax jurisdiction of disputes that emerge from norms (regulations), administrative acts, contracts and from extracontractual civil responsibility, takes place in the context of the regime that is applicable to these entities.

Admissibility of appeals against regulatory acts

6. In your view, do disputes concerning "hard law" acts (regulatory acts, sanctions, individual authorisation decisions, etc.) of these authorities raise particular issues of admissibility? Yes/no

Yes.

If yes: Please explain.

ARIs develop their activity in the framework of formal regulatory administrative law instruments (administrative regulations, acts and contracts), and its regulatory decisions can be contested in different jurisdictions, namely:

- for public nature decisions, the respective tribunal is The Court of Competition, Regulation and Supervision, and decisions rendered by the latter may be subject to appeal in judicial Appeal Courts (example: Supreme Justice Court decision 11/15.1YQSTR.S1[26], 19 January 2017);

-for regulatory administrative disputes, the respective jurisdiction takes place in the administrative and tax courts, and decisions rendered in these courts may be subject to appeal in the central administrative courts (example: Central South Administrative Court decision 09509/12[27], 5 September 2013).

[25] Approved by Law 53/2005, 8 November.
[26] Ruling accessible here: http://www.dgsi.pt/jstj.nsf?OpenDatabase
[27] Ruling accessible here: http://www.dgsi.pt/jsta.nsf?OpenDatabase

7. Are "soft law" acts (opinions, recommendations, warnings, position papers) of these authorities and, more broadly, their various positions on the behaviour to be adopted by the actors in their field of intervention (whatever form they take: code of conduct, guidelines, etc.) liable to be the subject of a direct action for annulment? Yes/no

Yes.

If yes: under what conditions? Make any distinction you think useful according to the degree of normativeness of the acts.

In the course of their informative activity, ARIs develop informal administrative law instruments subject to judicial control, such as: recommendations, warnings, opinions, directives, codes of conduct, good practice manuals, newsletters, according to Art. 136, 4, Code for Administrative Procedure (CPA)[28].

Notwithstanding the fact that Courts must not replace regulators, they are still authorized to control the procedural aspects and the reasonability of the regulatory decisions. In this sense, the principle of reasonability, consecrated in Art.8, CPA[29], enables the understanding of Art.71, CPTA, authorizing the court to annul the decisions that are unreasonable and incompatible with Law, especially in the domain of competences that concede free assessment to the administration.

On the other hand, one cannot exclude the possibility to appeal an inhibitory action destined to condemn the administration and stop it from continuing to divulge informative illegal acts, in the terms of Art. 37, 1, subparagaph "c", CPTA, as well as to request precautionary orders destined to prevent the Administration from diffusing illegal informative acts (Art.75, 3, Statute of the Regulatory Entity for Communication).

8. Can positions taken by these authorities, possibly with little or no formality (press release, website section, FAQ, etc.) be challenged in court? Yes/no

Yes.

The answer to this question has already been given in the previous question. It should be highlighted that the lack of formality in an action from an authority may still have legal value, as an interpretative instrument for other legally binding instruments or as a preliminary step for binding instruments.

[28] Approved by Decree-Law 4/2015, 7 January, last modified under Law 72/2020, 16 November.

[29] Art.8, CPTA states that: *"The Public Administration must treat fairly all those that it establishes a rapport with, and reject clearly unreasonable or solutions that are incompatible with the Law, namely regarding the interpretation of legal norms and considerations regarding the administrative function".*

With regards to publication in the site for information regulatory authorities, decision 1233/20.9. BEPRT from the South Central Administrative Court, April 2 2021, assessed the question of whether a published release from the Competence Authority in the internet of a notice of unlawfullness, where it identified the subjects, not allowing them to exercize the adversarial principle, violated the presumption of innocence.

9. Who can challenge the acts of regulatory authorities? Specify the criteria for assessing the interest in bringing proceedings, making any useful distinction according to the type of act (soft law act; individual decisions of a non-repressive nature; sanction; etc.).

In Portugal, legitimacy to initiate control of the activity of ARIs belongs to:

i) The Public Prosecutor, invested in its functions of guardian of legality;

ii) The regulated subjects: recipients of acts or norms; concerned parties in disputes that involve subjects in a competition relation and the service users;

iii) The executive power , that may appeal to courts with a request to contest or convict, in line with Art.55, 1, subparagraph "c" and Art.68, CPTA[30].

10. Please indicate any other particularities that you consider relevant to the admissibility of appeals against the acts of these authorities (interest in bringing proceedings, time limits for appeal, specific means of appeal open to State authorities, etc.).

With regards to the effects of an appeal, case law from the Constitutional Court discussed the question of whether the *devolutive* effect (in lieu of a standstill effect), of an appeal directed at sanctioning decisions from regulatory authorities (Competition Authority and the Regulatory Entity for the Energy Sector) violated, among others, the principle of the presumption of innocence, consecrated in Art. 32, 10, CRP (Portuguese Constitution).

In favour of an absence of constitutionality, an allusion can be made of rulings 397/2017, July 12(Case number: 136/2017) and 123/2018, March 6 (Case number: 136/2017). In the contrary view, rulings 674/2016 (Case number: 216/2016) and 675/2016 (Case number: 352/2016), both from December 13, are alluded.

Subsequently, ruling from the Constitutional Court number 74/2019, March 7, declared the unconstitutionality of Art.67, 5, Statute of the ERS, and determined that the appeal of final enforceable decisions (that impose fines) from the ERS has, in fact, a mere *devolutive* effect. The

[30] Regarding the dispute of norms, the matter is questionable, since there is no provision that equals it to other disputes (Art.73).

attribution of the suspensive effect is then subject to the provision of security and to the claim of considerable damages to the appellant, arising from the execution of the decision (Case number: 837/2018) [31].

11. Can the general acts of a regulatory authority, whether "hard law" or "soft law", be challenged by way of exception in an appeal against an individual decision (sanction, follow-up to a complaint, etc.) taken by that same authority and applying that general act (for example, if a sanction imposed on an economic operator refers to previously issued guidelines or recommendations to set out the applicable legal rules and the authority's interpretation of the texts in force)? Yes/no

Yes.

If yes, to what extent? Will the plea of illegality against this general act, if upheld, lead to the (retroactive) annulment of this act?

ARIs may be held responsible for damages resulting from both formal administrative acts and for acts of a more informal nature. With regards to formal administrative acts, in view of the existence of illegal regulations, mechanisms established in the CPTA may be triggered to contest the unlawfulness. These include the dispute of norms[32] and the declaration of unlawfulness (Art.72), with *ex tung* effects, where the Court reverts the superseded norms (with the exception of ilegal norms or norms that are no longer in force for any other reason).

Notwithstanding, the Court may determine that the effects should only be *ex nunc, "when, for legal security reasons, equity or for exceptionally relevant matters to the public interest, (...), this understanding is justifiable"* (Art.76).

12. Where the actions of these authorities have harmful consequences, should liability claims be brought:

- against these authorities? Yes/no

- or against the State on whose behalf they may have acted? Yes/no

Yes.

[31] Rulings from the Constitutional Court are accessible here: https://www.tribunalconstitucional.pt/tc/home.html

[32] Cf. Ruling from the TCAS, from 5 September 2013, stated that *"the contested decision of the Regulatory Council of the ERC constitutes an administrative act, at least materially, and therefore subject to the administrative jurisdiction",* in line with Art. 212, 3, CRP and Arts. 1 & 4, subparagraphs "a" & "b", ETAF and Art. 75, 1, Statutes of the ERC.

Should regulatory authorities and the holders of its bodies, in the exercise of their supervision activities end up harming rights and legally protected interests, whether from the supervised entities, whether from third parties, do incur in extracontractual civil responsibility.

In line with LQER, Art.5, 3, subparagraph "b", ARIs are subject to the civil responsibility regime of the State. Accordingly, members of the Board of Directors are solidarily responsible for actions practised in the exercise of their functions, notwithstanding the fact that members that have voted against during the deliberation are exempt from the responsibility (Art.24).

Holders of the bodies of regulatory entities, as well as their workers, answer for the civil, criminal, disciplinary and financial responsibility of actions and omissions they practise in the exercise of their functions, in the terms of the law. Nonetheless, it is necessary to draw upon the regulatory statutes that discipline the civil liability of regulatory authorities, since the LQER is not applicable to all the regulatory entities.

Specifically:

1. -Bank of Portugal (BP): the Organic Law of the Bank establishes the competence of judicial courts to rule on all disputes that involve the Bank, including civil liability actions that involve their bodies, as well as the assessment of civil liability of the holders of the bodies towards the Bank, without prejudice of Art.39 (Art.62)[33];

2. -Security Markets Comission (CMVM): the Statutes of the CMVM establish that *"members of the bodies of the CMVM and its workers answer for the civil, criminal, disciplinary and financial responsibility for actions and omissions they practise in the exercise of their functions, in the terms of the Constitution and other applicable legislation" (Art.39)*[34];

3. -Supervision Authority for Insurance and Pension Funds (ASF): the Statutes of the ASF establish the applicability of the regime for civil responsibility of the State to the ASF (Art.52, 3, subparagraph "b"). In addition, it established that *"the members of the bodies of the ASF and its workers answer for the civil, criminal, disciplinary and financial responsibility of the actions and omissions they may practise in the exercise of their functions, in line with the CRP and other applicable legislation*" (Art. 53, 1) [35];

4. -Competition Authority (AdC): the Statutes of the AdC establish that: *"1- members of the Board of Directors are solidarily responsible for the actions and omissions practised in the exercise of functions, in the terms of the law; 2- members that have voted against the*

[33] Approved by Law 5/98, 31 January, last modified under Law 73/2020, 17 November.
[34] Approved by Law 5/2015, 8 January, last modified under Law 148/2015, 9 September.
[35] Approved by Decree-Law 1/2015, 8 January, last modified under Decree-Law 59/2018, 2 August.

*deliberation are exempt from the responsibility, as well as members that were absent and voted in written their disagreeement" (*Art.23). In addition, it is established that: *"1-the holders of the bodies, the workers and the holders of senior positions answer for the civil, criminal, disciplinary and financial responsibility of actions and omissions they practise in the exercise of their functions, in the terms of the applicable legislation; (...) 4- when these members are judicially inquired by third parties, (...), they are entitled to legal support, ensured by the AdC, without prejudice of the right of recourse of the AdC"* (Art.44, 1-4)[36];

5. -National Authority for Communications (ANACOM): the Statutes of the ANACOM establish that the entity is subject to *"the applicability of the regime for civil responsibility of the State"* (Art.3, 3, subparagraph "b"). In addition, it is established that *"1- members of the Board of Directors are solidarily responsible for actions practised in the exercise of their functions, with the exception of members that have voted against the deliberation (...), as well as members that were absent and declared, in written, their disagreement (...)"* (Art.30). With regards to legal responsibility, the Statute establishes that *"1- holders of the bodies (...) and their workers, answer for civil, criminal, disciplinar and financial responsibility for the actions and omissions they practise in the exercise of their functions, in the terms of the CRP and other applicable legislation".* Likewise, it is stated that *"4- when legally inquired by third parties, (...), they are entitled to legal support, ensured by ANACOM, without prejudice of the right of recourse in the general terms" (*Art.50, 1 and 4*)* [37];
6. -National Authority for Civil Aviation (ANAC): the Statutes establish the applicability of the regime for civil responsibility of the State, in its Art.2, 3. In addition, is is stated that: "*1- members of the board of directors are independent in the exercise of their functions, and are not subject to instructions or specific orientations".* Likewise it is established that: *"2- members of the board of directors are solidarily responsible for actions practised in the exercise of their functions", and: "3- members that have voted against the deliberation (...) and absent members that have voted against, in writing, are exempt from the responsibility"* (Art.18)[38];
7. -Finally, the Authority for Mobility and Transportation (AMT), the Regulatory Entity for Water and Residue Treatment (ERSAR), the Regulatory Entity for Health (ERS), the Regulatory Entity for Energy Services (ERSE), and the Regulatory Entity for Social Communication (ERC), all establish the solidary responsibility (with the aforementioned exemptions), as well as the right to legal support:

[36] Approved by Decree-Law 125/2014, 18 August.
[37] Approved by Decree-Law 39/2015, 16 March.
[38] Approved by Decree-Law 40/2015, 16 March.

Legislation: AMT Statutes- Art. 19, 1 & 2 and Art.47, 1[39]; ERSAR Statutes- Art.51, 1 & 3[40]; ERS Statutes- Art. 2, 3, Art. 43, 1 & 3 and Art.69, 1 & 3[41]; ERSE Statutes- Art.60[42], and ERC Statutes- Art.74[43].

Internal organisation of the courts and hearing of appeals

13. Are cases concerning these authorities assigned, within the courts and more particularly within the supreme administrative court, to panels specifically dedicated (to the authority concerned, or more generally to regulatory litigation), in order to allow for an increase in the level of competence or a critical mass of cases? Yes/no

Yes.

If yes: please explain and give examples. Or is it a distributed dispute with no particular allocation rule? Yes/no

Case law from the Supreme Administrative Court (STA) has repeatedly highlighted the exceptionality of the appeal on a point of law, consecrated in Art. 150, CPTA, establishing the two scenarios where it may take place:

a) When the matter at stake is the assessment of a matter that is considered fundamentally relevant for its legal or social content, or
b) When the admission of the appeal is deemed clearly necessary for a better application of Law.

In these cases, the decision on whether the admission criteria for the appeal are met, is subject to a summary preliminary assessment, in charge of a group formation of three judges of the STA with the highest seniority (Art.150, 6).

On this matter, the following case law from the STA is highlighted:

- Case number 0223/07 [44], ruled on March 22, 2007 – assessed the exceptional character of the Appeal on a point of law, clarifying that *"the criteria for the exceptionality is translated in the complexity of the logical operations that are implicated by the matter under review, and the probability that the issue will repeat itself in future disputes".* In this regards, the court decided

[39] Approved by Decree-Law 78/2014, 14 May, last modified under Law 18/2015, 2 February.
[40] Approved by Law 10/2014, 6 March, last modified under Law 75-B/2020, 31 December.
[41] Approved by Decree-law 126/2014, 22 August.
[42] Approved by Decree-Law 97/2002, 12 April, last modified under Decree-Law 76/2019, 3 June.
[43] Approved by Law 53/2005, 8 November.
[44] Cf. Ruling from the STA, dated 22 March 2007. Accessible here: http://www.dgsi.pt/jsta.nsf?OpenDatabase

that *"the situation is verified in the case of assessing whether the refusal of an order to respond to information requested by the Competition Authority should be understood as an administrative procedure decision on the matter of competition";*

- Case number 01206/16 [45], ruled on September 2, 2016 – assessed the request to respond to information and to the issuing of a certification (established in Art.104, CPTA), where ANACOMs order to authorize access to the supporting documentation regarding the bearing of the costs associated with the regulation, supervision and monitorization of the universal and non-universal postal service was requested.

13.2 Please indicate, in a more general way, any notable particularities in the internal organisation of your courts that may be relevant.

In the context of the administrative and tax jurisdiction, specialized administrative courts should be created in order to ensure a greater jurisdictional quality control, by assuring a deeper knowledge of earmarked subjects.

In the context of the judicial jurisdiction, it should be noted that, out of the five Appeal Courts in Portugal (Porto, Guimarães, Coimbra, Lisbon and Évora Appeal Courts), only the Lisbon Appeal Court has a special section dedicated to the appeals of rulings by the Competition, Regulation and Supervision Court.

14. What investigative or examination techniques can you use in particular in the examination of particularly technical cases:

- oral inquiry hearing in the presence of the parties, - expert's report,

- amicus curiae,

- solicitation of a reference expert administration,

- other?

Please explain, where applicable by giving some examples from your experience.

Portuguese judges may officially request the intervention of experts in order to receive assistance in the task of assessing regulatory measures adopted by the ARIs. Art.91, CPTA refers to this matter in the following terms:

[45] Rulings from the STA are accessible here: http://www.dgsi.pt/jsta.nsf?OpenDatabase

- "1- a formal hearing takes place when parties are providing testimonies, when witnesses are being examined, or when experts are providing verbal clarifications";

- "2- with the exception of a superior court, the hearing takes place before a singular judge and is ruled by the principles of full assistance to the judge, of publicity and continuity of the hearing, in line with what is established in the civil procedure law. The judge enjoys all the necessary powers to ensure a useful and brief discussion and to guarantee the just cause of the decision";

- "3- in the beginning of the hearing, the judge will seek to reconcile parties (…), and afterwards decide on the following acts:

a) rendering of statements from the parties;

b) exhibition of films or of phonografic records, where the judge may determine that it should take place with the assistance of the parties, their lawyers and/or the people whose presence he/ she deems relevant;

c) verbal clarifications from experts whose attendance has been officially determined or requested by the parties;

d) examination of witnesses;

e) oral allegations, where the lawyers expose the conclusions of law and of fact, that they have extracted from the evidence presented in court (…)".

14. 2 Do you feel that these regulatory cases require a particular method? Yes/no

Yes.

If yes. Please explain.

In the context of the administrative and tax jurisdiction, technical specificities in the performance of the ARIs, as referees of the regulated markets, require the adoption of particular methods that address the needs to:

- create a set of processual rules specific to the assessment of the activities of these entities, distinct from the current ones that can be found in the administrative litigation proceedings;

- equip the administrative and tax courts with the technical conditions that are requires to the assessment of certain aspects related to the activity of ARIs;

- ensure speedy procedures, an essential requirement for an adequate regulation and functioning of markets.

15. What is the role of the traditional administrations (especially when the act of an independent administrative authority, distinct from the ministry concerned, is at issue), in the examination of appeals against regulatory authorities:

-are they invited to comment? Yes/ No

-or do they remain outside the case? Yes/ No

-No.

-Yes, they remain outside the case.

The examination of appeals against regulatory authorities by traditional administrations is not possible since a double degree of appeal is not admissible in the Portuguese administrative litigation (see answer 1.1).

The intervention of traditional administrations is limited to specific situations (see answer 4). The administrative and tax jurisdiction is involved when the acts concerned are practiced in the exercise of public functions of authority and in contracts of an administrative nature. More concretely, the examination of appeals by the Supreme Administrative Court is restricted to matters that shoulder *"significant social relevance"* (Art.150, CPTA) and on matters of Law (*de jure*), in accordance with Art.12, 3-5, ETAF.

Regulatory authorities are generally subjected to Administrative Law and fall within the scope of the administrative and tax jurisdiction. There are caveats, however, that arise from the interplay of these authorities with private law, certain social sectors or economic interests, and where celerity and technical knowledge play an important role in the fair resolution of conflicts or disputes. These situations, given their specificity, require the involvement of the Court for Competition, Regulation and Supervision (which, in accordance with Law 62/2013, 26 August, 1, Art.11246, *"is competent to analyze matters that pertain to the appeal, revision and execution of decisions, decrees and other measures susceptible of being challenged for entailing an administrative offence by the Competition Authority, ANACOM, the Bank of Portugal, Securities and Exchange Commission, Regulatory Authority for Social Communication, the Portuguese Insurance Institute and other independent administrative entities with regulation and supervision tasks".* In accordance with Art.112, 2 of the Law, the Court for Competition, Regulation and Supervision is also competent to analyze the *"appeal, revision and execution"* of *"other decisions*

[46] Available here: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1974&tabela=leis&so_miolo=

from the Competition Authority that allow the appeal under the terms set out in the legal regime for competition".

For this reason, and with the aforementioned exceptions, (such as the Competition Authority), the *"regulation of the administrative activity pursued by regulatory authorities remains subjected, (…), to the administrative jurisdiction and its standard procedures, given the fact that there is no specialized jurisdictional knowledge in this regard"*[47].

For this reason, with regards to the examination of appeals against regulatory authorities, the role of traditional administrations is the same regarding general appeals against state or public institutions. The examination of appeals rests on the Central Administrative Courts and on the Superior Administrative Court, in the terms of Arts. 140-156, CPTA.

16. More generally, when examining appeals against acts with a high socio-economic impact issued by these authorities, in particular those in charge of a field of economic regulation, does the court collect (on the initiative of the court or the interested organizations) observations from other stakeholders? Yes/ No

If Yes:

Please explain.

The examination of appeals against acts with a high socio-economic impact issued by these authorities falls within the competence of the Superior Administrative Court, as previously referred, given its considerable "*significant social relevance*", in the terms of Art. 150, CPTA.

In another view, certain independent authorities that are involved in matters of economic competition are subjected to the Court for Competition, Regulation and Supervision, which, as stated in Art. 112, 1, Law 62/2013, 26 August 48, *"is competent to analyze matters that pertain to the appeal, revision and execution of decisions, decrees and other measures susceptible of being challenged for entailing an administrative offence by the Competition Authority, ANACOM, the Bank of Portugal, Securities and Exchange Commission, Regulatory Authority for Social Communication, the Portuguese Insurance Institute and other independent administrative entities with regulation and supervision tasks".*

[47] Proença, André; *As Entidades Reguladoras Independentes e o Contencioso Administrativo: Algumas Notas* in "Estudos de Homenagem a Mário Esteves de Oliveira", Almedina, 2017, p.939.
[48] Accessible here: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1974&tabela=leis&so_miolo=

17. What role does orality play, even before the hearing, in the investigation of complex cases, in particular those involving regulatory acts?

In accordance with Art. 206 of the Portuguese Constitution, the Principle of Publicity is ensured so as to safeguard fundamental rights. This is the general rule in the judicial and administrative jurisdictions and is mostly relevant in the first instances of jurisdiction, where the forms of evidence and of the constitution of facts are being assessed and analysed. Orality may also take place in the final allegations, in line with Art. 91, 3-5, CPTA, as well as in situations where celerity is at stake and the court finds it necessary to opt for a public hearing to discuss matters of fact and of law, in the terms of Art. 102, 5, CPTA. Likewise, in especially urgent situations and where fundamental rights are at stake, the judge may opt for an oral hearing (Art.110, 3, subparagraph c), CPTA).

As for the role of orality in the Supreme Administrative Court, it is quite limited, given its intervention in the final instances of a dispute where only legal matters are being assessed.

18. Do you have, in one form or another (specialization of magistrates, continuing education, expert decision support unit to assist magistrates, etc) internal resources in your courts enabling you, if necessary, to familiarize yourself with or master sectoral but also transversal expert subjects (technologies protecting privacy, communication technologies in the case of audiovisual or electronic communications regulators, role and architecture of social networks, etc)? Yes/ no

Yes.

If yes:

Please explain and give examples.

In Portugal, the Center for Judiciary Studies (CEJ) is responsible for the initial and ongoing training of judges and public prosecutors for courts of law and for administrative and tax courts. According to the document «European Justice Training Strategy for 2021-2024»[49], the priority is to train judges and prosecutors, notwithstanding the training of all justice professionals: court staff, lawyers, notaries, bailiffs, mediators, legal interpreters and translators, court experts, and in certain situations, prison staff and probation officers.

[49] Accessible here: https://ec.europa.eu/info/law/cross-border-cases/training-legal-practitioners-and-training-practices_en#the-european-judicial-training-strategy-for-2021-2024.

The ongoing training is destined for active administrative court judges and seeks to develop adequate abilities and competences to their professional performance and personal valorization for the course of the magistrate career, promoting, namely:

(i) the updating, deepening and specialization of technical-legal knowledge that is relevant to the exercise of the jurisdictional function;

(ii) the development of technical-legal knowledge with regards to European and International cooperation;

(iii) a deepening of the awareness of the realities of contemporary life in a multidisciplinary perspective;

(iv) the awareness to new realities that are relevant to the judiciary activity.

The annual plan of ongoing training is developed by CEJ, in articulation with the Superior Council for Tax and Administrative Courts (CSTAF) and taking into account the performance gaps that are verified during the exercise of jurisdictional activities.

In addition, judges may resort to the technical knowledge of experts and request assessments that require specific technical competences.

The "Continuing Training Plan for 2020-2021" may be consulted here:

http://www.cej.mj.pt/cej/forma-continua/fich-pdf/formacao_2020_21/PFC_2020_2021.pdf

The extent of the judge´s control, the court decision.

19. What are the main categories of grounds that can be invoked and relied upon against the acts of regulatory authorities? Based on your experience and the case law of your country, do you find that appeals against acts of independent authorities raise particular problems (real independence in decision-making, impartiality, etc) compared with disputes concerning acts taken by other administrative authorities? Please share any relevant analysis you may have.

There is currently no available data for a direct answer, but the grounds on which an act of a regulatory authority can be invoked and relied against, are the same as any other case in which an administrative act is under the review of the Court. Appeals against acts of independent authorities do not raise any particular problems.

20. Does your court consider itself bound by the technical or economic assessments made by the regulator? Or does it feel entitled to control them? In the latter case, is this control complete or only limited to the manifest error of assessment?

The Supreme Administrative Court is not bound by any technical or economic assessments made by the regulator. It is only bound by the Constitution and the Law.

21. If you receive an application against an act of a regulatory authority or against a sanction imposed by it, is your court only competent to annul the act or sanction or can it also modify the sanction imposed?

Administrative acts that have been approved by the independent administrative authorities may be contested in the administrative and tax jurisdiction. In the case of the Superior Administrative Court, the competence to intervene as an appeal institution and analyse fundamental matters of law means that the decision to annul or modify an act or a sanction is conditioned to the specific decision of law that is observed by the judges with reference to an appeal.

On another hand, the Supreme Administrative Courts acts as a first instance court in specific situations, such as with regards to acts and omissions by sovereign entities, with procedures related to electoral law and with rights of recourse based on the functional responsibility of judges from the Supreme Administrative Court, the Central Administrative Courts and Magistrates of the Public Prosecutor´s Office, in line with Art. 24, 1, ETAF.

In conclusion, in the past, in line with the limitations of the jurisdiction of the administrative court, judges could only annul the act of the administration, and didn´t exercise the typical powers of an absolute jurisdiction (such as the power to condemn or to direct orders to the administration). These days, however, the law attributes to Portuguese administrative courts the power to establish deadlines for the compliance of duties and to establish compulsory pecuniary sanctions to the Administration, as well as to ensure the execution of judicial decisions, via sentences that substitute administrative acts.

Nonetheless, and in this regard, the judge cannot determine what the Administration should decide on a specific case, let alone replace it when what is at stake is the discretionary power of an authority, and should instead limit itself to a generic or directive condemnation of an administrative action, in the terms of Art.71, 2 and Art.95, 5 CPTA.

22. Have you been confronted with the problem of an independent authority in your country taking into account a foreign element such as an opinion given by an authority in another country or a decision by a European authority (for example, in the context of the mechanisms set up by the GDPR between the European data protection authorities, which lead these authorities to submit some of their decisions to the European Data Protection Committee for approval)?

No.

23. Are these cases a particular field of preliminary questions to the Court of Justice of the EU?

No.

24. Does the drafting of court decisions raise particular issues related to the technical nature or media exposure of some of these cases? Yes/ No

No.

The judges in the regulatory ecosystem

25. Are judgements on such appeals subject to any particular publicity or accompanying measures (press release)? Yes/ No

No.

26. Are regulatory authorities entitled to challenge acts or decisions taken by other public persons on the grounds that they impinge on their competence? Yes/ No

Yes.

If yes:

Please specify.

Theoretically yes, since there is no legal obstacle. But so far, no case was presented to the Court.

27. Independently of a particular case, does your court or its members regularly participate in general exchanges bringing together professionals (regulatory authorities, operators, doctrine, ministries, etc.) from the regulatory sectors concerned? Yes/ No

No.

28. Are the judges in your courts, or more generally the staff of your investigating and registry departments, sometimes led in their careers to take up activities in regulatory authorities, and are such careers encouraged where appropriate? Yes/ No

No.

Quantitative data

29. What is the number of cases concerning regulatory authorities registered before your supreme administrative court in 2020?

This information is unavailable at this moment.

30. What is the number of cases concerning regulatory authorities settled by your supreme administrative court in 2020?

This information is unavailable at this moment.

31. What is your estimate of the percentage of cases concerning regulatory authorities in the total number of cases registered before your supreme administrative court in 2020?

This information is unavailable at this moment.

32. What is your estimate of the percentage of cases concerning regulatory authorities in the total number of cases settled by your supreme administrative court in 2020?

This information is unavailable at this moment.

33. What percentage of applications against the acts of regulatory authorities were annulled, in whole or in part, by your supreme administrative court in 2020?

This information is unavailable at this moment.