Portuguese Comments to the Draft Report on Access to Justice in Information Cases

Reiterating its commitment to the proper implementation of the Aarhus Convention, Portugal recognises the relevance of the work being carried out by the Task Force on Access to Justice in this context and is grateful for the opportunity to express its views on the draft report presented.

As such, we are overall supportive of the systematic approach adopted and we consider that, in general, the responses submitted by respondents from the various Parties were correctly translated into the text.

Regarding the treatment of the information submitted by the national respondents, although we agree that this is mostly adequately considered, we feel it is relevant to draw attention to a particular point, which refers to the specific mention of Portugal on the item *Barriers and challenges*, inserted in Section 3 (*Remarks and discussion*).

Firstly, regarding the approach adopted in this section, it should be noted that in its introduction the author states that [*i*]*n this section, I make some remarks on issues I find problematic, challenging or especially interesting from general viewpoint* (emphasis added). As such, we would expect that the aim of this particular part of the text would be to present an overall general viewpoint with no specific references to any of the Parties (as it is, in fact, the case in most of the text in this section). Still, regarding *Barriers and challenges*, we have specific examples regarding some Parties for some of the barriers and challenges – *length* and *cost* of the procedure, PT and EU and IE, respectively – and no such approach is taken when referring other barriers or challenges – *weak enforcement* – or under the item *Good examples and interesting features in the studied Parties*, which could lead to possible misinterpretations or compromise the aforementioned *general approach* that was meant to characterize the entire section.

Additionally, regarding the mention to Portugal as being, on itself, an example for *length of the procedure*, we view it as particularly misleading taking into account the answers provided by the national respondents. In fact, even abstracting from the fact that Portugal is not the only Party where appeals of court decisions may take some time, we should underline that this is, in most cases, a mere academic possibility, as we can illustrate by leaving a few notes regarding our national approach on this subject.

As stated by our national respondents, the national legal order provides for a relatively wide catalogue of instruments for the implementation of the provisions on access to justice provided for in Article 9 of the Convention, of which we should point out Law 83/95, of August 31 – Law on procedural participation and popular action (LAP), the Code of Procedure in Administrative Courts (CPTA), the Code of Administrative Procedure (CPA) and in the already mentioned Law 26/2016, of August 22 – Law on Access to Administrative Documents (LADA).

Therefore, any applicant who considers that his request for information has been disregarded, unduly rejected – in whole or in part –, has received an inadequate response, or has received a treatment not compliant with what the law provides, has two different types of guarantee at his disposal: administrative guarantees and judicial guarantees.

Regarding administrative guarantees, we should mention the following:

a) The administrative complaint – challenge addressed to the author of the act (CPA, Article 191);

b) The hierarchical appeal – challenge addressed to the hierarchical superior of the author of the act (CPA, Articles 193 *ff.*);

c) Special administrative appeals – challenge addressed to the body exercising supervisory powers; for an organ exercising oversight powers; to a collegial body (in this case, acts or omissions of any of its members, commissions or sections), or to the delegating authority or sub delegating authority of the acts practiced by the delegate or sub-delegate (CPA, Articles 199 *ff.*);

d) The complaint directed to the Ombudsman; and

e) The complaint to CADA (Commission for Access to Administrative Documents).

On the other hand, in the scope of the judicial challenge, it is possible for the interested party to use:

a) The *summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance* – "intimação da entidade administrativa a prestar informações, permitir a consulta de documentos ou passagem de certidões" – CPTA, Articles 104 *ff.*; and

b) The right of popular action ("ação popular") – provided by Article 52 of the Portuguese Constitution (CRP) and in Law 83/95, of august 22.

Without dwelling on the requirements of each one, we should emphasize, taking into account its importance, the role of the *Summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance*, which constitutes a special autonomous procedure for verifying the reasons for the rejection of requests made by private parties to public authorities in this context.

And, according to Articles 104 to 108 of the CPTA, such procedure, created to respond precisely to these situations, is characterized by its speed and effectiveness: the procedural deadlines are reduced, the decision period is short – tending to be less than one month (CPTA, Article 107) – and the court may order the imposition of a penalty payments, in case of conviction of the requested party, for each day of delay in complying with the decision issued – CPTA, Article 108 (2).

Taking as a reference the previous considerations, and assuming that the interested party to react judicially against a decision to refuse access to environmental information uses the most appropriate means for that purpose which, as we demonstrated, could be the *summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance*, established under CPTA Articles 104 to 108 (and not the general "administrative action" established in CPTA, Article 35), we can safely say that national law ensures a speedy judicial decision in these cases.

Moreover, established as an "urgent procedure", under Article 36 (1d) of the CPTA, it benefits from a special procedure in order to ensure prompt access in a timely manner to the data and/or documents sought: once the application has been filed, the judge orders the administrative entity to respond within 10 days and, in the event of a positive decision, the judge determines the period within which the request must be fulfilled, which cannot exceed 10 days. If there is a noncompliance with the *summons* without acceptable justification in the timeframe indicated, there is, as we said, possible cause for the imposition of penalty payments and the establishment of civil, disciplinary and criminal liability (CPTA, Articles 107 and 108).

In relation to costs – bearing in mind that this was also an issue raised in the draft report –, we must take into account the catalogue of guarantees mentioned above, as there is a significant variation depending on the means used by individuals to react to the refusal of access to the information sought.

Regarding administrative safeguards – administrative complaint, hierarchical appeal, special administrative appeals, complaint to the Ombudsman and complaint to CADA – its use is free of charge and does not require the interested party to appoint a lawyer.

With regard to judicial guarantees, it should be clarified that their costs also vary according to the means used.

Regarding the right to popular action, the interested parties may request from the competent authorities the issuance of the certificates and information they deem necessary to be provided in due time. In such cases, the refusal, delay or omission of indispensable data and information, except where justified on grounds of confidentiality of State or of justice, will cause the agent responsible to sustain civil and disciplinary liability. Procedurally, its exercise may take the form of civil action or administrative procedure (in this case it may take any of the forms of proceedings provided for in the CPTA). Concerning the costs involved, it should be pointed out that for the exercise of the right of popular action no preparation is required and its author is exempt from the payment of court fees as long as the request is partially upheld – Article 4 (1b) and (5) of the Procedural Costs Regulation (RCP).

On the other hand, the summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance, despite the fact of requiring the nomination of a lawyer – and the payment of his fees – they are subjected to a reduction in the value of the court fees by half – RCP, Article 12 (1b) –, a fact that is not mentioned by the Communicant. Regarding the actual figures involved, although there are no estimates regarding the average cost of this type of action, and bearing in mind that the *summons* is the only of the aforementioned instruments in which there is a cost payment at the outset, its value is reduced by half. Moreover, since it is a special and necessarily swift process, its total costs will always be much lower than those resulting from the general "administrative action", a far more complicated lawsuit which demands far superior costs and takes much more time to be decided (this was actually the procedure that was used in the Communication, and it is unfit for situations such as simple access to information or documents). As an example, taking into account the value of the UC (the unit for calculating court fees) for 2019 (€

102.00) the value of the court fee to be paid in a summons case with a fixed value of € 2,000.00 amounts to € 51.00.