

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 observation submitted by respondents from the various Parties were correctly translated into the text.

We would, however, like to take this opportunity to make a few remarks regarding the non-adoption of some of the comments presented on the previous draft (July 2020), as well as on some other aspects that we still feel further attention.

Firstly, we have noticed that this latest draft did not take into account a most relevant Portuguese comment on page 2, paragraph 3, 4 and 5 and page 3 paragraph 1, regarding the existence of a special autonomous action, the subpoena to the provision of information, consultation of proceedings or for the issuance of certificates (article 104 et seq. of the Portuguese Code of Procedure in Administrative Courts - 'CPTA') which, according to Article 36 CPTA, is an urgent procedure and, as such, its judgment has priority over other procedures.

In practice, after the subpoena, the entities have 10 days to respond (Article 107 CPTA) and, as can be concluded from this type of action, interested parties have a fairly expedited decision period, despite the statement in the draft in answer to question No. 1 concerning section 2, "Questions concerning access to justice in cases on the right to environmental information".

We, therefore, maintain that such comment should be included in the draft because we consider this guarantee given to the interested parties as being of extreme importance since the CPTA itself provides the possibility of the usage of the aforementioned subpoena of information, which has, in fact, a smaller time-frame than the standard procedure.

Still concerning question 1, section 2, regarding 'Questions concerning access to justice in cases on the right to environmental information', it is crucial to note that, contrary to what is indicated in the draft, nor the Portuguese Administrative Procedure Code ('CPA') or CPTA, admit the figure of tacit refusals by the Administration. On the contrary, the CPA only admits tacit deferrals in its Article 130. The fact that tacit refusals are not lawful results from the circumstance that the failure to reply (configuring an "omission" on its part) by the Administration, gives rise to various guarantees of reaction to individuals such as administrative and judicial guarantees.

As regards question 2, a brief distinction should be made on linguistic interpretation grounds. The author states that "Portugal (...) have created special courts for dealing with appeals in information cases", but the answer will differ depending on how the word "appeals" is interpreted. If the word "appeals" is used as referring to the legal meaning of appeals (where the individual does not agree with the decision given by a court, consequently leading to file an appeal against it): these are the responsibility of the Central Administrative Courts, under Article 37(a) of the Statute of Administrative and Tax Courts, and not of any "specialised court" *per se*. Even when appealing against decisions of CADA, the competent bodies are always the judicial courts. Nonetheless, if "appeals" have the legal meaning of means of reaction: then yes, it is understood that Portugal has indeed created special courts (in the very sense that the author gives in the draft: "the term 'information tribunal' is used here to cover all kinds of administrative bodies that have been created outside the information holding authorities to analyse information cases, irrespective of their national labels") with jurisdiction to decide cases of requests for access to administrative and environmental information, such court being CADA. CADA has jurisdiction to resolve complaints relating to failure to reply after the deadline (article 30 *ex vi* Article 16 of the Law 26/2016).

As to question 4, concerning costs, the current draft fails to recognise the existence of different costs according to the various types of actions filed, as mentioned on page 3, paragraphs 2, 3 and 4 of the Portuguese comments.

In this context, it should be emphasised that, in Portugal, the costs differ depending on whether referring to administrative guarantees or judicial guarantees. As such, we reiterate that the recourse to administrative guarantees is free of costs and that the costs of resorting to judicial guarantees will always depend on the type of action filed, namely: a) in the case of Popular Action, there is the exemption from payment of court costs provided that the claim is partially granted, as established in articles 4(1)(b) and 5 of the Rules on Court Fees (as expressed on page 3 of paragraph 5 of the Portuguese comments); b) if the mean used is the action for a subpoena to the provision of information, consult proceedings or for the issuance of certificates, since this type of action is a special one (as stated above) the court fee will be reduced by 50% under Article 12(1)(b) of the Rules on Court Fees, as stated on page 3, paragraph 5 of the Portuguese comments.

It is important to note that the value of the unit of account (for reasons of determining the value of the justice fee), in 2020, is 102 euros, so the justice fee to be paid would be 51 euros ($102/2=51$), not including the lawyer's fees.

Furthermore, important to state that, since this type of action is a special and urgent one (under Article 36(1)(d) of CPTA), the mentioned action will always involve lower costs than a non-special administrative action, where the time-frame to decide is longer and, additionally, the cause may be more complex to resolve.

All things considered, not all the information concerning the different fees' variations of actions has been integrated into the draft and only the obligation of legal representation seems to have been considered.

Concerning question 5, it was not included in the draft that the reference to "short periods of time" in the conclusion of the case could be misleading since the deadline referred to is, ultimately, an academic/theoretical hypothesis, as stated in page 1, paragraph 5 of Portuguese comments.

Lastly, in section 3 "Remarks and discussion", specifically the point "barriers and challenges", the Portuguese commentary has been partly introduced. Although the individualisation of Member States has been removed from the draft, it still seems that the individualisation of a particular Member State is perceptible while concealing its name.