



## **SIGMA**

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### **ADMINISTRATIVE PROCEDURE:**

#### **THE PORTUGUESE CASE**

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## 1. Introduction and Context

The 1976 Constitution, which institutionalised a democratic system following the 1974 Revolution, provides for the codification of administrative law. Since the 1960s, there had been incessant calls for a general administrative procedure law to reform public administration in Portugal. However, only in 1991 the Portuguese Administrative Procedure Code was published. (Decree-Law no. 442/91 of 15<sup>th</sup> November, as amended by Decree-Law no. 6/96 of the 31<sup>st</sup> of January).

In Portugal, major reforms of public administration have occurred as a consequence of constitutional change. This is true for the Administrative Procedure Code and also for the 2002 Administrative Courts Proceedings Code. As will be seen throughout this paper, Portugal complies fully with common parameters for public administration and integration within the so-called “European Administrative Space”.

Administrative procedure is a means to achieve rationality in public choices, but it does not prevail over constitutional principles, which regulate relations between the public authorities and the general public.

Article 266 of the Portuguese Constitution states:

- “1. Public administration shall pursue the public interest in accordance with due respect for the legal rights and interests of the citizens.
2. Administrative organs and agents are subject to the Constitution and the law and shall, in the performance of their duties, act in accordance with the principles of equality, proportionality, justice and good faith.”

Article 267 of the Portuguese Constitution clearly establishes the objectives of administrative procedure rules:

“Administrative activity proceedings shall be the subject matter of a special law, which shall ensure the rationalisation of resources to be used by the administrative services and the participation of citizens in the making of the decisions that concern them.”

Thus, in an administrative procedure, the objectives of **rationalisation** and **participation** must be reconciled with the constitutional principles that bind Portuguese public administration.

In this respect, the Administrative Procedure Code plays a vital role in establishing the scope of these principles.

To summarise, rationalisation and participation are objectives of public administration, but they must be pursued in accordance with a series of democratic values imposed by the constitution on administrative organs and agents. It should be noted that the submission of public administration to the law includes constitutional law, as well as constitutional principles. As *Sigma Papers: No. 27 European Principles for Public Administration* (page 9) states:

“These administrative principles are not simply ideas based on goodwill; they are embedded in institutions and administrative procedures at all levels. Actors in the public sphere are legally obliged to comply with these legal principles, which must be upheld by independent control bodies, systems of justice and judicial enforcement, parliamentary scrutiny, and by ensuring opportunities for hearing and redress to individuals and legal persons”.

## 2. The Structure of Portuguese Administrative Proceedings

The Portuguese Administrative Procedure Code seeks to regulate all administrative activity. The Code deals not only with the conduct of the administrative business but also places great importance on the development of substantive administrative concepts such as the administrative act, regulation and contract.

The Code is divided into four parts:

- Part I – General Principles;
- Part II – Parties;
- Part III – Acts of administrative agents;
- Part IV – Administrative activity.

*Part I* contains preliminary provisions (articles 1 and 2) and sets out the general principles of administrative activity (articles 3 to 12).

I shall enumerate those principles, which I consider to be essential because they limit discretionary powers and promote legitimacy of decisions under heading 4. (page 6 ff.).

*Part II* deals with parties to the procedure and is divided into two chapters: The first governs administrative agents (articles 13 to 51) and the second interested parties (articles 52 and 53).

This part of the Code promotes uniformity in the conduct of all organs and agents. It has proven to be very important, as it allows for the improvement of regulations regarding the activity of public sector corporations.

*Part III* deals with acts of administrative agents and contains four chapters: The first deals with general principles (articles 54 to 60), the second with the right to information (articles 61 to 65), the third with notifications and time limits (articles 66 to 73) and the fourth with the conduct of proceedings (articles 74 to 113).

Administrative agents act at the behest of the administration or upon request of interested parties (article 54).

The activity of administrative agents takes place within the context of general principles, which seek to balance participation of interested parties with the speed necessary for public administration.

Accordingly, procedures are governed by the principle of public initiative (article 56), in order to avoid useless formalities and to ensure the hearing of all parties. Special emphasis is given to those provisions, which detail the right to information (article 61 and following), with the aim of making administrative activity more transparent, and relating it to the new constitutional principle of open administration (article 65).

Chapter III (article 66 *et seq.*) concerns notifications and time limits. This chapter has been prepared with a view to guarantee full knowledge of administrative acts to all parties concerned.

Chapter IV deals with the various phases of administrative procedures (article 74 *et seq.*), special emphasis is given to the importance of promoting collaboration between public administration and concerned parties, such as encouraging the latter to take part in the investigation phase of the proceedings and the discussion of pertinent questions.

The various methods of terminating proceedings (principally decision-making) are regulated in detail.

Some matters are particularly noteworthy, i.e.: the implementation of the constitutional norm of ensuring the participation of citizens in decision-making via the right of interested parties to be heard before any final decision in the proceedings is made (articles 100 to 105).

Finally, *Part IV* deals with administrative activity, and contains three chapters, which correspond to the three principal juridical forms of administrative activity in public management: regulations (articles 114 to 119), administrative acts (articles 120 to 177) and administrative contracts (articles 178 to 188).

This part of the Code is substantive and theoretical, as well as practical in nature. A series of rules are established in order to provide a general framework governing the making of rules (regulations) by public administration, which implement both Parliamentary laws but, above all, decrees passed by the Government.

So far as the administrative act is concerned, its concept is defined and provisions are made as to under which circumstances such acts are invalid, how they can be revoked and the way in which they can be enforced. The ways in which members of the general public may challenge acts and decisions through the administration are particularly noteworthy. Finally, special powers of public administration to conclude an administrative contract with private individuals are defined. With a view to increasing the use of contracts, it is established that these may be used except where some other arrangement is required by law or by the very nature of the relationships involved (article 179).

### **3. Major Objectives**

Having provided a brief summary description of the structure and provisions of the Code, we can now proceed to summarise its objectives.

An Administrative Procedure Code is always essentially aimed at attaining five purposes:

- (I) To control the organisation and functioning of public administration, and to increase the efficiency of its departments.
- (II) To regulate the way in which administrative decisions are taken, so that they are just, legal, useful and opportune.
- (III) To ensure that interested parties are informed so that they may participate in the making of decisions concerning them directly.
- (IV) Generally to safeguard the transparency of administrative action and the respect for the legitimate rights and interests of citizens.
- (V) To avoid over-bureaucratisation and bring public departments into closer contact with the people.”

#### **4. Fundamental Legal Principles**

We shall now consider the general principles, which govern the activity and organisation of the administration. The densification of these principles is particularly noteworthy because it plays a decisive role in the rationality of public choices. In the first place, these principles stress the subordination of administrative bodies and agents to the rule of law. In the second place, they give rise to legitimacy of administrative decisions.

These principles govern all administrative activity and allow for extensive control of decisions by the courts, both in terms of the exercise of discretion and the elaboration of new legal concepts.

##### **1) *Principle of Legality***

Agencies of public administration must act in accordance with the law and legal principles, within the limits of the powers attributed to them and in conformity with the aims for which the said powers are granted.

##### **2) *Principle of Prosecution of Public Interest and Protection of the Rights and Interests of the Citizen***

It is the duty of administrative agencies to pursue public interest, and to respect the legally protected rights and interests of citizens.

##### **3) *Principle of Equality***

In its relations with individuals, public administration must be governed by the principle of equality, and no person shall receive privileges or benefits, suffer prejudice or be deprived of any right or exempted from any duty by reason of family origins, gender, race, language, country of origin, religion, political or ideological belief, education, financial circumstances or social condition.

##### **4) *Principle of Proportionality***

The decisions of the administration, which conflict with legally protected personal rights or interests of individuals may only have such effects as are adequate and proportional to the aims proposed.

##### **5) *Principles of Justice and Impartiality***

In the course of its activity, public administration must treat all those with whom it deals in a just and impartial manner.

##### **6) *Principle of collaboration by the administration with individuals***

The agencies of public administration must act in strict collaboration with individuals and seek to ensure their proper participation in the performance of administrative functions. It namely shall be their duty to:

- a) Supply individuals with such information and clarifications as they may require;
- b) Support and stimulate initiatives of private individuals, as well as to receive their suggestions and information.

##### **7) *Principle of Participation***

The organs of public administration must ensure the participation of private individuals, and associations that defend special interests, in the making of decisions which may concern them, namely through appropriate hearings.

### **8) *Principle of Decision-making***

Administrative agencies, under the provisions regulated by this Code, have the duty to decide on all matters within their jurisdiction, which may be presented to them by individuals, namely:

- a) On matters, which directly concern the latter;
- b) on any applications, demands, claims or complaints formulated in defence of the Constitution, of any law or of the public interest.

### **9) *Principle of Debureaucratization and Efficiency***

Public administration must be structured so as to bring its services closer to local populations in a non-bureaucratic form, so as to ensure swiftness and efficiency in its decision-making.

### **10) *Principle of Free Service***

Administrative proceedings are free of charge, save where special laws impose the payment of fees or expenses incurred by the Administration.

The Administration may waive the payment of the fees or expenses referred in cases where lack of financial resources has been proven.

### **11) *Principle of Access to Justice***

Access to administrative justice is guaranteed, so that acts of the administration may be subject to control by the courts, and also so that individual legally protected rights or interests may be safeguarded, in accordance with the provisions of the legislation, which regulates judicial administrative matters.

The provisions of the Administrative Procedure Code apply to all agencies of the Public Administration having any relationship with individuals in the course of their activity pursuant to public law (article 2). The general principles of administrative action set out in the Code also apply to all activities of public administration, even those of a merely technical nature or under private law (article 2, paragraph 4).

The aim therefore is to expressly regulate activities by the administration in relation to individuals under public law, while all other administrative business not directly regulated is nevertheless subject to the general principles of administrative action.

## **5. The Consequences of the Application of the Code**

The application of the Administrative Procedure Code led to profound changes in Portuguese public administration with regard to the rationality of public choices.

I consider that increased protection of individual rights has been achieved while satisfying public interest.

I shall briefly consider three topics, which have contributed decisively to rationality in administrative action, in the time available for this paper, i.e.: (I) the duty of celerity; (II) the duty to inform; and (III) the duty to hear interested parties.

### **5.1 *The Duty of Celerity***

How does the Code react against unjustified delay by public departments? It states that acts of the Administration must be practiced within 10 days. It provides furthermore that the proceedings must be fully documented and prepared within 90 days, unless some other time limit is established by the law or is imposed under exceptional circumstances.

The Code accepts that the fixing of an overall time limit does not suffice, and thus provides that, in the event of failure to comply with time limits, "the body responsible shall state the grounds therefore to its immediate superior or to the proper collegial body, during the 10 days following the expiry of the time limits in question".

The duty of celerity is also related to the powers of the administration in the conduct of the proceedings.

Even where proceedings are initiated at the initiative of parties concerned, administrative agencies may take such steps as they think convenient for the preparation of the case, even in relation to matters not mentioned in the application or the replies of the interested parties and may decide a different matter or a matter of wider scope than that requested, when public interest so requires.

### **5.2 *The Duty to Inform***

Secrecy, which used to characterise the administration, has been vigorously eradicated. Citizens have the right to be informed within 10 days regarding proceedings in which they are directly involved. The

information that must be provided includes the identification of the department where the proceedings are pending, the acts practiced and measures taken, the shortcomings to be resolved and the decisions taken so far. Furthermore, members of the public are entitled to consult proceedings, which do not contain classified documents and to obtain certified or authenticated copies of the documents comprised therein.

### **5.3 Prior Hearing of Interested Parties**

The Code implements the constitutional principle regarding “the participation by members of the general public in the making of decisions, which concern them.” This provision was implemented with minimal content, but it nevertheless radically alters the administrative decision-making process.

The traditional procedure prior to the Code was as follows: “Application by the citizen or initiative by the administration — consideration by the administrative departments — decision”. From 1991 onwards, in case the decision is unfavourable for the applicant, the procedure is as follows: “Application by the citizen or initiative by the administration — consideration by the administrative departments — hearing of the interested party - decision”.

This means that when acting on its own initiative or pursuant to an application the administration,, intends to act in such a manner that it would negatively affect the rights or interests of a private individual, it must inform that individual of “all aspects relevant to a decision on the matters of fact and law, indicating the time when and the place where the proceedings may be consulted” before making a decision. The interested party then has an opportunity to rebut the administration’s points of view, to make presentations/submissions which support his/her position or to correct the assumptions on which the administration is acting, if he or she considers them to be incorrect. The right of citizens and economic agents to participate in administrative proceedings prior to the making of a decision enables them to have prior notice of the administration’s intentions, to accept the grounds stated and to abandon their opposition, which is frequently a consequence of ignorance.

The openness and fairness required by this *modus operandi* heralds decisions that are fairer, legal, useful and opportune because the right to a hearing requires greater consideration and the provision of detailed grounds for disagreement with the arguments of interested parties. The hearing prior to the decision exists in contexts, which range from curtailing administration to the administration’s role as a service provider. It is noted that procedures by which the beneficiary of grant-in-aid is selected, or the making of an administrative contract involve the exclusion of other interested parties. This means, for example, that the other interested parties must be heard with regard to the grounds for the administration’s selection of a specific person or enterprise. As the right to a prior hearing applies to all special proceedings, even if the participation of the interested parties is not specifically provided, there has been a reduction of illegitimate lobbying and greater rigour of selection procedures, and the eradication of politicisation of and political party involvement in the administration.

The Portuguese administrative courts have been extremely rigorous in setting aside decisions taken without prior hearing.

So far as the duty to inform is concerned, the courts have systematically ordered the administration to provide documents to the interested parties. Furthermore, the time limits for the commencement of legal proceedings are suspended for as long as the administration fails to deliver the documents, which naturally amounts to a significant guarantee for members of the general public.

I hope that these brief considerations regarding Portuguese administrative procedure contribute to an understanding that rationality of administrative action depends on the law but implies, above all, a change in attitude. This change of attitude involves proximity to the general public, while also defending the public interest as determined by the democratically legitimated political authorities.