10th Congress f the IASAJ

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Review of administrative decisions of government by administrative courts and tribunals

1. Jurisdiction or competence.

1.1. Which categories of administrative decisions are eligible for review (administrative regulations/ individual decisions)?

Article 4 no. 1 of ETAF (Statute of Administrative and Tax Courts) approved by Law no. 13/2002 of 19 February, which went into force on 1 January 2004, by force of Law no. 4-A/2003), defines the scope of the administrative jurisdiction, which includes the assessment of the lawsuits relative to the interests directly founded on the norms of administrative or tax law or from acts of law practiced under provisions of administrative or tax law or for the guardianship of fundamental rights. It also settles the questions concerning pre-contractual acts and contracts regulated by norms of public law and proceedings of the establishment of the responsibility for damages resulting from the acts of entities with public ends.

It is also their responsibility to promote the prevention, termination and repair of violations to values and goods that are constitutionally protected in terms of public health, environment, urbanism, town and country planning, quality of life, cultural heritage and goods of the State, when undertaken by public entities and as long as they do not constitute criminal offence or administrative offence.

As relevant as the announced is the jurisdiction of the administrative courts to control the supervision of the legality of norms and other acts of law from legal entities of public law under the provisions of the administrative or tax law and norms and other acts of law practiced by private individuals, namely concessionaries, in the exercise of administrative powers.

It is also the responsibility of the administrative courts to adopt the necessary measures for the execution of all its decisions.

1.2. According to which criteria is the jurisdictional of the court or tribunal (hereafter "court") determined? Are there certain decisions of the Executive or public authorities which cannot be submitted to review, by reason of the nature or substance of such decision?

Executive acts that due to legal option are attributed to common, civil and penal jurisdiction escape the juridical control of administrative courts. These are the cases of administrative offences and also of the relationships of public employment that are submitted to private law and attributed to the juridical control of common courts.

The criterion currently used to delimit the jurisdiction of administrative courts is the "juridical administrative relationship". We can state that there is a juridical administrative relationship when we are in the presence of a relationship the purpose of which is the activity targeted at continuing public interest, regulated by norms that differentiate themselves from civil law, even if only in a few aspects. This means that they are regulated by norms of public law even though these do not have to be necessarily of statutory nature nor are they restricted to relationships that are directly involved in the exercise of authority powers and that also integrate relationships established between public entities and the acts of private entities that by law were given administrative powers.

In the observance of the principle of separation of powers and having the purpose of making real the constitutional command of conferring an effective and ample judicial guardianship, the Portuguese Law does not stop excluding, however, certain acts of the executive power of the jurisdiction of administrative courts, as mentioned in articles 4 no. 2 and 3 of ETAF. The negative delimitation that excludes the control of acts practiced in the exercise of the political function and the legislative function is established, as well as the judicial decisions from courts that are not integrated in the tax and administrative jurisdiction and also the lawsuits from individual work contracts in which one of the entities is a legal person of public law.

However, the State and other public law legal entities answer civilly towards the injured parties to whom in the exercise of the political-legislative function they cause damages or that they have had illegal omissions towards a norm that imposes a different action. This civil, extra-contractual responsibility of the State is in the scope of the jurisdiction of administrative courts as it is also regulated by public law.

1.3. Please provide relevant case-law illustrating the extent and limits of the scope of the competence of the court in charge of review.

The below mentioned Judgements exemplify a few of the limits imposed on the jurisdiction of the administrative courts.

- STA judgement of 8/7/2009, D. no. 0687/07: an employee of a technical support service removed by the government due to the operation of restructuring the services of the central administration of the State asked the court to annul the act.

The administrative courts declare that the matter is not their jurisdiction because the Government has exercised its political and legislative function.

- In the STA judgment of 6/3/2007, D. no. 01143/06, the suspension of the act of the Government of ordering the closure of a delivery unit in a certain hospital was requested, this issue not being considered by the court as being under its control as it is related to the reserve of administration.

2. Procedure

2.1. General description of applicable procedural rules:

Where can these rules be found; by which statute or regulations are they defined?

The system applicable to the procedure in the Portuguese administrative and tax courts is based on two fundamental diplomas:

- The Criminal Procedure Code in the Administrative Courts, approved by Law no. 15/2002 of 19 February;
- The Statute of the Administrative and Tax Courts, approved by Law no. 13/2002 of 19 February.

With regards to the subsidiaries, in the terms of article 1 of CPCAC, the Code of Civil Procedure is applicable to all the procedures of the jurisdiction of administrative courts.

This subsidiary application covers most questions of the procedure so it can be affirmed that the procedure pattern is the same as the common jurisdiction, there only being the specialities regulated in those two diplomas

Are the various procedural steps in the hands of the parties and/or the court and which role do they respectively play?

The general principle of the Portuguese procedure outside the criminal field is that of the enacting terms.

In the current Portuguese administrative justice and in the scope of the challenges of acts (one of the special administrative proceeding methods) – or in the ones that follow the same system – the principle of the enacting terms is mitigated and the inquisitorial principle comes with greater force for the prevalence of the protection of the legality and of the general interest.

This is the case of the allocation to the Public Ministry of the ability of replacing the author in the proceeding, in the cases when the author withdraws from the proceeding (article 62 of the CPCAC). This is also the case of the imposition on the judge of the duty of knowing, identifying and assessing not only the defects and invalidities blamed by the parties on the contested act but also the other defects that have not be alleged but that affect the legality of the contested act (article 95 no. 2 of CPCAC).

The importance and reach of these enacting terms introduced by the 2002/04 reform also lack the intervention of the case-law, the STA having admitted an exceptional appeal of reviewing this theme– D. 0121/09, Article of 25/02/2009 which awaits the merit decision.

The judge can also correct the form of the procedure and suggest improvements of the sections of the parts in all types of procedure.

In the special administrative proceedings in which the purpose consists of obtaining the condemnation of the Administration in the due act, the judge has powers to ascertain

what type of due act it is and what contents are due as they are binding and the judges explains these bonds and removes the consequences that are possible in terms of condemning the Administration, in the respect for its own space, i.e. for the margins of assessment that the legislator confers in different measures according to matters and circumstances.

In the special administrative proceedings of any type the administrative judge has the power of ordering the production of evidence that he deems necessary for the discovery of the truth and of rejecting the probation inquiries that he understands to be clearly unnecessary (cfr. article 90 nos. 1 and 2 of CPCAC).

In the proceedings of contracts and preponderate responsibility, as in the civil procedure, the principle of the enacting terms (that is embodied in the idea of availability of the proceedings and its elements and is manifest namely in the freedom to set-up the procedure and to form its purpose).

We can conclude that the balance clearly leans towards the principle of the enacting terms, the parties thus assuming a decisive role concerning the creation of the plea, carrying out the requests that they deem convenient and suitable for the guardianship of their rights and interests and indicating the factors to sustain the case to be requested.

The role of the judge in the procedure is essentially to direct the respective development; ensure the adversary and the equality of weapons; privilege the issuing of decisions that are in the substance of the case, set up in the disputed material relationship as emerges from the procedure and decide with exemption, independence and balance having the law and its conscience as criteria.

Is there a prosecutor? If so which role does he/she play?

The Public Ministry intervenes actively in the procedures that are under the jurisdiction of administrative courts. It is the holder of public action, it acts in the defence of legality and public interest as a Representative of the State, as stated in the provisions of article 51 of ETAF.

Its main mission is to protect the legality of the administrative actions whenever constitutionally protected goods are at stake, according to article 9 no. 2 of CPCAC, which attributes active legality to it in the challenges.

In most procedures- those interposed by the interested entities – the procedure powers of the Public Ministry are delimited by articles 85 and 146 no. 1 of the CPCAC. The Public Ministry looks at the beginning of the procedure to assess whether it wishes to intervene in it or not, according to the legal criteria and statutes and it can request the carrying out of inquiries and pronounce itself on the merit of the case but only in defence of the fundamental rights of citizens or of public interests that are specially relevant, namely: public health, environment, urbanism, town and country planning, quality of life and cultural heritage and goods of public entities.

Besides this, in all the procedures, even those organized by individuals, the Public Ministry holds the right to always make appeals with regards to the decisions of the judge if it considers them illegal (cfr. articles 141 and 155 no. 1 do CPCAC).

Are the court proceedings mainly written or oral i.e. do the parties communicate by exchanging written presentations or in the form of an oral debate before the court?

The procedure is mainly written but it did gain important verbal marks in the 2002-2004 reform. Examples may be found in the provisions of article 91 of CPCAC, which mentions the existence of a public audience and the discussion of the factual issue, namely when the parties thus request.

Another example, in terms of the production of evidence, results from it now being in the reach of the parties to petition for the evidence resources that they deem adequate and as such testifying evidence can be produce even in the challenges.

Article 111 of CPCAC refers that in the protective procedure it will be especially urgent for the protection of rights, liberties and guarantees that the judge promote a verbal hearing, at the end of which the decision will be made immediately.

It is also to be highlighted that the hearings for the production of evidence can be carried out through video-conferencing, the people in the nearest court to the residence being present and that this method has been in force for many years and has been used a lot.

Is the case determined by a single judge or a panel of judges?

The formation of the court for the assessment of lawsuits depends on the value of the case, the form of the procedure applied and the jurisdiction. Thus:

In the courts of first instance, the general rule of no. 1 of article 40 of ETAF, determines the decision by one judge.

The case is assessed by a group of judges whenever the ordinary procedure is applicable and any of the parties requests it. The same happens in the special administrative proceedings if the value of the proceeding is higher than that of the jurisdiction or if it is undeterminable.

In the high courts, the North and South Central Courts and the Supreme Administrative Court, the norm is a group of judges composed of three judges (cfr. namely, articles 35 no. 2 and 17 of ETAF).

2.2. What conditions must be fulfilled in order to confer the right to make a claim for review? Must the plaintiff show some form of personal interest? If so, is it defined in a broad or narrow manner? Please provide relevant cas-law.

The active legality of procedure is based on a subjective model, so that all those who have seen their juridical sphere affected by the juridical effects resulting from administrative actions or omissions can appeal to the administrative courts.

In the scope of the special administrative proceeding of contesting the administrative action, the rule moulded in article 55 nº1 of CPCAC establishes that the entity with procedural legality is the one that alleges to be the bearer (presents itself as) of a right or legally protected interest that has been affected or injured by the administration.

Still in the scope of the special administration proceeding, legality for the contesting of norms to everyone who is negatively affected, or that can become so through the application of an illegal norm, thus being able to request for de-application or a declaration of illegality.

In the scope of administrative actions through contracts, the 2002/2004 reform carried out a noticeable increase of active legality, thus allowing the control of the contents of contracts of the administration by the administrative courts and carrying out the guardianship of market agents that are interested in the contracts and the competition. Thus, in the terms of article 40 the parties of the contract are not the only ones that can contest it in court, this right being recognized to other individuals mentioned in the norm, thus the principle of "*res inter alios*" being surpassed in the public contracts.

Recognizing the importance of goods with marked social relevance, the legislator also confers active legality to any person, as well as the Public Ministry, the association of defence of the interests in question and the local authorities, when the defence of constitutionally protected goods is at stake, such as, public health, environment, urbanism, town and country planning and others, as mentioned in article 9 no.2 of CPCAC.

Finally, the class action regulated by Law 83/95 of 31 August also attributes active procedural legality for the objective guardianship of legality of juridical goods that coincide in any measure to the ones mentioned in no.2 of article 9 of CPCAC to any individual in full enjoyment of his civil and political rights as well as to the Public Ministry, the associations and foundations in terms of their purposes, and to the local authorities.

We can conclude that the contents of the active procedural legality in the scope of the Portuguese administrative litigation is currently comprehensive and is based on a model of subjective guardianship that gathers elements so that it can be effective in the defence of legally protected rights and interests.

The following judgements can illustrate the subject-matter of the active procedural legality in administrative courts:

- STA judgement of 25/06/2009, D. no. 0913/08, in which procedural legality was recognized to a union of public service workers to interpose special administrative proceeding for the declaration of illegality due to omission of the regulation norms regarding salaries, in their own name but in defence of its members.

- STA judgement of 3/05/2007, D. no. 01050/03 in which active procedural legality was recognized to an association of passenger transportation companies for the contesting of the act of the Government that conceded compensation for the provision of public services to other companies that operated in the same sector of the market and that also exercised activity outside the conceded geographical area. This association alleged that the conceded activity was not differentiated in the attribution of allowances and the rest of those companies.

- The STA judgement of 18/5/2004, D.0269/02, decided that the partnership the company purpose of which is to explore fortune or misfortune games rooms has the legality to interpose appeal for the act that it prorogued without applying for the concession of an area of the game.

2.3. Does the plaintiff have direct access to the court, or is he/she obliged to submit his/her demand through a counsel/attorney?

In the terms of article 11 of CPCAC, the constitution of a lawyer to present a case towards the administrative courts is compulsory.

2.4. Can a legal demand be submitted to an administrative court using electronic technologies (Internet)?

The reform of administrative justice which went into force on 1/1/2004 invested in giving the courts electronic tools and the new technologies. In that sense and on the way towards an increasing dematerialization of procedures, the Information Service of Administrative and Tax Courts – SITAF – started processing all the procedures on a computer platform in the first instance.

Thus all the procedural pieces were dematerialized with the exception of the large documentation that is not possible to digitalize.

The system progressed in such a way that at this moment a common platform for the administrative and judicial courts is searched for through the CITIUS programme.

With regards to the consignment of procedural sections for the administrative courts and according to Decree no. 1417/2003 of 30 December, from January 2004 all the procedural sections presented in administrative courts of first instance became electronic and if this did not happen, the judicial secretary digitalized them, the procedure thus being always electronic.

This way the legislator created a digitalized procedure in the administrative litigation which is the only one is use in the first instance. This platform is aimed at covering high courts but is still not in functioning order in those proceedings.

For common courts the computer platform CITIUS also allows a digital organization of the procedure, which is in application.

2.5. Is there some form of public or private legal system aimed at providing assistance to a person who cannot afford an attorney?

The access to law and to courts is regulated in Portugal by Law no. 47/2007 of 28 August. This Law assumes that there are different means of judicial support, the appeal being done before the first procedural intervention, except in the case of conditions of financial insufficiency. In the terms of article 16 no. 1 of the quoted Law, the judicial support to be conceded assumes the nominating of a lawyer and the payment of the corresponding wages by the Ministry of Justice and or the total or partial exemption of judicial costs of the procedure. It is also possible, in any of the cases, to appeal for the respective payment by instalments. To make this system operative in the initial stage of attending the people interested, the Lawyers Guild provides a service of juridical consultation which is free for the citizens who appeal.

2.6. When a claim is made to a court, is the right of the relevant public authority to implement the decision stayed or suspended until the court has determined the case?

The administrative proceeding is submitted to the principle of legality, which means that the Law determines the margin of the licit proceeding of the administration, both in the classic function and in the provision aspect.

However, even when there is illegality in the administrative acts, in the system of executive administration of the continental type, the effects are produced and imposed on individuals from the notification of the act as if it is valid and in the Portuguese legal system the general rule is that the introduction of an appeal against this act on its own also does not suspend the effects of administrative action.

To guarantee the useful effect of the Administration it is possible to appeal to the judge in cautionary procedure that it is urgent to suspend the validity of the administrative action considered illegal by the applicant.
Besides this, as soon as the request for the suspension of the validity is notified to the administrative entity, this automatically determines the suspension of the production of consequences from the act until the judge decides about the protective request.

Thus automatically suspended, the author of the act can issue an order in which he justifies the pressing urgency for the common good in applying what he had decided to mitigate this automatic effect and this new administrative decision allows the progression of the execution although it becomes subject to the control of the judge.

2.7. Can the court deliver an injunction ordering the Executive or a public authority to produce a document to which the other party could not previously have access? (Please provide relevant case-law)

The acts of the administration are submitted to the Law, giving the administrative judge the responsibility of controlling the legality of the acts.

Conscientious that the administrative act is mostly developed far away from the possibility of the target individuals knowing about it, the legislator gives the administration the duties of procedural information with special intensity, article 268 no.1 of the Constitution referring to the compulsory nature of the notification of administrative actions to the individuals by them affected.

And there are suitable procedural resources for individuals to make the constitutional guarantee happen.

In the first place, for checking of documents or for acquiring certificates an urgent main procedure can be carried out, later referred to in question 2.8.

In the procedures proposed by the individuals interested article 8 no. 3 determines that the Administration has the duty of sending to the court the administrative procedure and other relevant documents for the analysis of the case, as well as the duty of letting the court know about all the circumstances resulting from its acts throughout the procedure. These circumstances shall be communicated to the counter-party so that it can act accordingly, for example, asking for the widening of the purpose of the procedure to acts practiced after the contesting. Number 4 of article 8 carries out the duties mentioned from no. 3, which was the number mentioned above.

If the Administration does not act voluntarily in the fulfilment of these legal duties, article 3 attributes powers to the judge for him to act on his own initiative, establishing a deadline for the fulfilment of these legal duties and if justified it allows him to apply a compulsory financial penalty.

In the procedural staging of the special administrative proceeding this system is moulded in articles 84 no. 1, 4 and 5 of CPCAC and it highlights the relevance of the commination that it establishes by allowing the continuation of the procedure in limit cases without the documentation in the power of the Administration, giving the judge the facts alleged by the Author as proven when the fact that the Administration did not send the documents made the proof impossible or very difficult.

The following judgements are relevant to illustrate the powers that assist the administrative judge in the taking of evidence in the procedure:

- STA judgement of 2/03/2004, D. no. 0678/03, which considered that for the assessment of an error or lack of pondering of the aspects relevant to the definition of the unspecified concept of “dominating typology” it is the responsibility of the court to order all the necessary inquiries to arrive at the truth so that the lawsuit will be fairly set-up.

- STA judgement of 2/12/99, D. no. 043528, understood that there being doubts about the content of the administrative action in which the request for compensation is founded

and if these prevent a secure judgment about the respective illicitness, the court shall make use of all the powers of taking of evidence given to it by the law, even if doing so on its own initiative and in a non contested proceeding, thus ordering the execution of the inquiries that are deemed necessary for the complete clarification of the issue.

2.8. Are there emergency or interim procedures? Are they simply aimed at delivering preliminary injunctions (such as a Temporary Restraining Order) or at taking provisional measures, or can they also resolve a fundamental question?

The CPCAC contemplates four forms of special procedures that are qualified as urgent due to the nature of the respective purpose, which takes on characteristics that justify the acquirement of a judicial indictment about the merit of the case in a swifter manner than that resulting from normal staging. These procedures were outlined by the legislator which the purpose of propitiating a swift merit decision about the substance of the case.

Below these are regulated in Title IV of the CPCAC and are:

a) The contentious election procedure: it is aimed at allowing the contesting of electoral acts the assessment of which is attributed to the administrative jurisdiction (articles 97 to 99 of the CPCAC);

b) The pre-contractual contentious procedure: its purpose is to allow the contesting of administrative actions related to the creation of contracts of ventures and concessions of public works, the provision of services and the supply of goods and the following to be contested: the programme, the contract specifications or any other document that shapes the procedure of contract creation mentioned in the previous number. This is done namely with the illegality of the technical, economic or financial specifications that are in those documents as a basis, according to what is mentioned in article 100 no.1 and no.2 of the CPCAC.

c) The summons procedure for the provision of information, consultation of the procedures or issuing of certificates: aimed at allowing the complete realization of the exercise of the right to procedural information, as well as access to archives and administrative records (articles 104 to 108 of CPCAC).

d) The summons procedure for the protection of rights, liberties and guarantees: urgent procedure that allows the foundation of the case to be known when guardianship of the adoption of protective order is not sufficient, namely the provisional title – article 131. It is an urgent procedural resource that aims at the swift issuing of the merit decision that imposes the adoption of a positive or negative conduct indispensable to ensure the exercise of rights, liberties or guarantees in productive time to the Administration– article 109 no.1 of CPCAC.

The protective procedures are also urgent even though they are not main procedures but auxiliary to the efficiency of a possible provenance of the main proceeding.

When the manifest urgency of the definite resolution of the case taking into account the nature of the questions and the gravity of the interests involved allows us to conclude that the situation does not change with the adoption of the requested protective order and all the necessary elements have been brought to the respective procedure, the court can anticipate and issue the judgement about the principal case within ten days of hearing the parties. Thus, the main non urgent procedure becomes an urgent procedure in which the case is decided definitely – article 121 of CPCAC.

The reform of 2002/2004 extended the protective guardianship so that the judge can decree non specified orders adapted as provisional remedies to caution the efficiency of the definite constitution of the lawsuit.

Finally, it is important to mention that other urgent procedural resources arise in disperse legislation which is what happens in the scope of the right to urbanism for the authorizing of constructions, in the scope of concession or loss of the right to asylum and deportation of foreigners and in the proceedings of loss of mandate of the local elected entities.

3. The powers of the administrative judge

3.1. What is the hierarchy of legal standards (Constitution, international law, statutes) that the court takes into account when carrying our review?

In the terms of the Constitution, it is the responsibility of the administrative courts to administrate justice in lawsuits emerging from administrative and tax juridical relationships, applying the law but keeping the application away from any norms that infringe the Constitution or the principles consecrated in it – article 204.

The norms and the principles of the general or common international law are an integral part of Portuguese law and the norms mentioned in the international, ratified and approved conventions are in the internal order, while they bond the Portuguese State internationally.

The hierarchy or pyramid of norms results from the joint reading of articles 8 and 112 of the Constitution of the Portuguese Republic.

- In the first place the constitutional norms regarding fundamental rights that are interpreted and integrated in harmony with the Universal Declaration of Human Rights and after these;

- The many norms of the Constitution;

- The General or Common International Right, the international Treaties and Conventions, including the Community Right;

- Laws of reinforced value that are organic laws, draft laws and laws approved by the Parliament by a majority of two thirds;

- Laws of the Assembly of the Republic, Decree-Laws of the Government and Decrees – Regional Legislations;

- Regulations of general character and national application.

- Other Regulations.

In the resolution of concrete cases, the administrative judge applies the pertinent norms according to the duties that are incumbent upon him for protecting the control of the constitutionality and the conformity of the norms of the lower hierarchy with those of the higher hierarchy.

3.2. When the Executive or a public authority gives its interpretation of a statute, can the lawfulness of such interpretation be challenged in court? If so, according to which standards and criteria? Is the court bound by policy decisions of the Executive or a public authority?

The administrative circulars are directives written about the high bodies of the Administration in the exercise of its power for the direction of the services dependent on it. The circulars embody diverse orientations or instructions, some of them being aimed at clarifying interpretive doubts about certain norms.

The circulars have binding force exclusively in the actual Administration. These are not imposed at all on the judge. The judge only owes obedience to the law and not to circulars which means he resolves the concrete case through application of the law that he shall interpret according to the laws of juridical hermeneutics as mentioned in the general norm about the interpretation of the law in article 9 of the Civil Code. This is also according to the doctrine of the biggest supporters of the law and is not bound to administrative circulars.

The interpretive circulars can thus be censured by the administrative courts in terms of administrative actions that apply them to an individual and concrete case that is subject to contestation.

3.3. If the Executive gives its interpretation of treaty law, is the court bound by such interpretation?

The interpretation of the treaties carried out by the Administration in general or by the Ministry for Foreign Affairs be it due to diplomas of internal law or international or community law, does not bind at all the administrative courts that apply and interpret the norms of the Treaties according to the general rules of international and conventional law, as

according to the Convention of Vienna on the Law of Treaties of 23 May 1969 namely in the terms of articles 31 and others.

3.4. Insofar as discretionary measures are concerned, which type of review does the court exercise? Provide, if possible, relevant case-law to show the court verifies the reasonableness of a decision of the Executive or a public authority and checks whether the reasons are consistent with the substance of the decision.

In the Judgment of 6/12/2006, D. no. 0881/06, STA analyzed the situation of a teacher with a degree in history who did a specialization course that awarded her with a master's degree. She asked the Administration that they would recognize the right to a bonus of 4 years in her time of service to progress in the respective level. The Administration rejected this request because they thought that the specialization course mentioned was not directly related to the bachelor's degree and the field of work that the appealer worked in.

In the judicial appeal STA highlighted that is not the responsibility of the courts to replace the Administration and decide in their place. However, in the concrete case the Court highlighted that in the control of the legality of the Administration actions it is the jurisdiction of the courts to assess if the freedom that it has was exercised in an acceptable manner. And in this case, it considered that to deny the claim of the applicant it elected and used an ostentatiously inadmissible and inadequate criterion for the purpose determined by law, for approximations resulting from the way the actual law regulates the bachelor degrees of that area and others.

In the recent Judgement of 2/4/2009, D. 0624/08, STA assessing the rejection of a request for an unemployment benefit had the opportunity to decide: the administrative decision is unconstitutional due to the violation of the principle of proportionality which with the non compliance to the deadline of 90 days counting from the beginning of the situation as a basis, denies the right to all payments of that nature, including the ones not yet redeemed.

The courts are responsible for controlling the legality of the administrative actions not their merit. Notwithstanding, the criteria of proportionality are external to the merit.

The matters of police and urbanism are important and delicate areas in the exercise of the juridical control about the Administration.

The freedom to act and assess the administration results from the option of the legislator, who considered that the appropriateness of the administrative actions to the different conditionings of the reality requires a margin of freedom that allows him to choose between acting in this or that way, according to the concrete situation. Even though this margin of free acts which is due to the merit escapes from juridical control, the administrative decisions have to present a rationale susceptible to a certain type of control. At least, the appropriateness to the purpose allows criteria of proportionality in the juridical assessment to be introduced.

As well as this, the tendency bonds established in a negative manner are in operation. These bonds result from constitutional and legal principles that shape the administrative activity, such as the principal of the prosecution of public interest, the protection of rights and guarantees of citizens, equality, proportionality and good faith and justice.

Even in the control of the non juridical valorisations we find bonds that result from the error about factual premises of the decision and of the error evident even if in technical matters;

The juridical-administrative concept of proportionality has been understood by the Portuguese case-law in three aspects:

a) The requirement of that administrative behaviour as an indispensable condition for the prosecution of public interest;

b) The appropriateness of the administrative behaviour to the prosecution of the certified public interest;

c) The proportionality in a strict sense or cost-benefit relationship, i.e. the existence of a proportion between the advantages resulting from the prosecution of certified public interest and the sacrifices inherent to private interests.

The STA Judgement of 27/2/2008 D. no. 0269/02, applied the principle of proportionality to affirm: “The prorogation of a contractual deadline only constitutes

violation of the principle of proportionality if it is inadequate, unnecessary or disproportional in relation to the desired end".

3.5. Is the court simply empowered to quash (to declare null and void) the decision or to dismiss the legal demand? Instead or quashing the decision, is it within the authority of the court to amend or modify the decision? Can the court substitute an entirely new and different decision? Can the court reconsider the merits of the decision?

The administrative actions were, for many years, a mere annulment power for the control of legality.

In the current procedure law alongside the contesting appeals that take place exclusively when there is an interfering proceeding of the Administration targeted at limiting the juridical sphere of individuals, the special proceeding of the condemnation of the practice of the due act was created.

In this proceeding the judge assesses the substance of the claim of the Author and if he recognizes that the Author is right he issues a sentence of the Administration as concrete as possible in terms of the definition and limits of the contents of the juridical relationship in question.

This way the judge can conform and change the administrative decision, sometimes changing it and other times indicating the juridical parameters to be observed.

If an administrative action of rejection of the claim presented by an individual to the Administration is contested in the presence of the judge, in which the Administration requests only a annulment of this rejection, in the terms of article 51 no. 4 of CPCAC, the court shall invite the Author to replace the petition to formulate the adequate request of condemnation of the practice of the due act.

When a condemnation of the practice of the due act has been interposed, the sentence that rectifies it shall pronounce itself on the material claim of the Author and impose the practice of the illegally omitted act on the Administration. If the issuing of this act involves valorisations of the administrative function, the court may not determine the contents of the act to be practiced but shall determine all the bonds to be observed by the Administration in the issuing of that act, as mentioned in article 71 no. 1 and no. 2 of CPCAC.

3.6. When the court quashes a decision taken by a public authority, does this take effect retroactively, when the original decision was made, or simply when the court rules? Does the judge have power to fix the time form which the annulment operates? On what principles is a date chosen?

The Portuguese procedural law does not regulate in detail the subject-matter, so the rules taken from the Code of Administrative Procedure are applied for the revocation of illegal acts. Thus, as the annulment by the judge is always founded on a specific invalidity of the act, it has a retroactive effect, i.e. it operates from the moment the annulled act is carried out – this is the general rule.

On the other hand, the law states (art. 128 -b) of CPCAC) that the acts that execute the judicial decisions that annul administrative actions have a retroactive effect, except if they are relative to renewable acts.

And article 173 of the CPCAC establishes that the duty of the Administration of executing the annulling judicial decision can form it in the duty of practicing acts with «retroactive effect except if they involve the imposition of duties, the application of sanctions or the restriction of rights».

In any case, the Administration's obligation of executing comprehends the duty of removing, reforming or replacing acts of law and changing situations of fact that have arisen and the maintenance of which is incompatible with the reconstitution of the situation that would exist had it not been for the annulled act.

Even in cases of serious invalidity, named invalidity of the act, the reconstitution can be "in natura", the law stating that the judge issues the declaration of legitimate case of non execution in the presence of exceptionally serious circumstances in the execution stage, this constituting the biggest limit to the constitutive effects of the annulment or declaration of invalidity and confers right to a compensation substitute.

Also with regards to the annulment of the regulation norms, the application by the judge of a power of limiting the effects regarding the already stabilized situations is allowed, ordering that these be produced only from a certain time in application of the identical rule

that the law consecrates for the declaration of unconstitutionality of norms by the Constitutional Court.

In multi-polar relationships resulting from the administrative action the 'ex nunc' effect of the annulment also lacks modulation so as to avoid serious damages for those included without knowing the preceding invalidity or of preceding acts.

This is what happens with the declaration of the invalidity of the authorization of a group of constructions that has been in legal commerce for several years and that was subject to successive transactions and purchases by people who knew nothing of the authorizing procedure, nor knew the preceding juridical situation and less still the preceding administrative situation of those goods. A situation of this nature was assessed by the Supreme and also a procedure of the execution of a sentence that had declared the authorizing of a construction as invalid. The Court concluded through the impossibility of specific execution through the demolition of that which was built, as more than ten years had passed and there being buyers of good faith that could not see the rights thus acquired frustrated - Article of 4/7/2002, D. 041815.

In the scope of the juridical system of urbanism and construction, Law no. 60/2007, of 4 of Sept. in article 69 no. 4 with regard to special administrative action and declaration of invalidity determines that even if there are facts that generate certain invalidities of the act or administrative deliberation, this invalidity can no longer be declared by the Administration after ten years and the right of proposing the corresponding action becomes invalid if the facts that determine the invalidity are not communicated to the Public Ministry in this deadline, except with regards to the national monuments and respective protection zone.

This solution demonstrates the recognition of the need for a solution modelled on the invalidity effects and the rejection of the traditional diktat about the absolute, radical character and with no time limit of the serious invalidities that were dogmas in the continental rights.

3.7. What means are available to a judge to compel the administration to enforce a decision which the executive does not wish to carry out?

In the terms of article 158 no. 1 of CPCAC: *"The decisions of the administrative courts are compulsory for all the public and private entities and prevail over those of any administrative authority."*

When the Administration does not comply with the judicial sentence spontaneously, the winning party can attempt an executive proceeding.

In this proceeding the powers of the judge mentioned in the terms of article 167 no. 6 of CPCAC when an act of bound content is in question the judge replaces the administration and issues a sentence that produces the effects that the illegally omitted act should have produced.

If reconstructing a situation or removing the one that was created by the challenge and annulled is in question and if there are bonds that define the content of the act to be issued sufficiently but there are missing elements of fact to decide the case, the court informs the Administration that within 20 days it should gather these elements and present a proposal founded on this subject-matter, listens to the interested entities and decides.

Articles 3 no. 2 and 169 of CPCAC, give the judge the power of applying financial penalties for each day after the deadline at the request of the parties or spontaneously and to impose the compliance to the duties that it attributes to the Administration.

In the execution of annulled acts in which the reconstitution by the Administration of the situation that would exist without the annulled act is not clarified and needs to be defined from the annulment causes, in what can be called ultra-constitutive effect of the annulment, the judge in the executive procedure defines the acts and operations which the execution of the annulment sentence consists of for the integral compliance to what was decided (art. 95. nos. 3 and 4 of CPCAC).

In the cases in which the execution means the issuing of new administrative actions, in which the Administrations has a margin of freedom or assessment, or filling in of open concepts, the judge fixes the deadline for the Administration to carry out its activity as well as indicating the linked aspects that it has to observe.

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