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Ad Hoc Information Report

Data Protection: Redress mechanisms and their use

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DISCLAIMER: The ad hoc information reports were commissioned as background material for the comparative report on *Access to Data Protection Remedies in EU Member States* by the European Union Agency for Fundamental Rights (FRA). They were prepared under contract by the FRA's research network FRANET. The views expressed in the ad hoc information reports do not necessarily reflect the views or the official position of the FRA. These reports are made publicly available for information purposes only and do not constitute legal advice or legal opinion.

## Mapping of Redress mechanisms in the area of data protection

Redress Mechanism Number	Type of possible outcomes of procedure	first Instance	Total Number of times this procedure was initiated in 2009	Total Number of times this procedure was initiated in 2010	Total Number of times this procedure was initiated in 2011
<b>1</b>	compensation, fine, imprisonment or criminal fine <sup>1</sup>	1st Instance Law Courts of general and specialised jurisdiction (e.g. district civil court or district criminal court)	6 Cases involving “breaches in rights to personality” <sup>2</sup>	5 Cases involving “breaches in rights to personality” <sup>3</sup>	Not available
<b>1.1.</b>	compensation	1st Instance Law Courts of general and specialised jurisdiction (e.g. district civil court or district criminal court)	Disaggregated data not available See footnote 1	Disaggregated data not available See footnote 1	Disaggregated data not available See footnote 1
<b>1.2.</b>	imprisonment	1st Instance	Disaggregated	Disaggregated	Disaggregated

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<sup>1</sup> Source: The Portuguese Directorate-General for Justice Policy (*Direcção-Geral da Política de Justiça*, DGPI [www.dgpj.mj.pt](http://www.dgpj.mj.pt)). According to the Directorate-General’s written information, it is not possible to supply neither disaggregated information about the courts where these cases were intended, nor the information pertaining to the possible outcomes of the trials, owing to the fact that this type of information is protected by statistical secret. The only information available concerns the number of cases based on the intent to “violate the rights of personality” that were entered and concluded in the law courts of the 1st instance. There are a few cases based on intent as such which would make it easy to identify the people involved; however, this is not permitted by the Law on the Portuguese Statistics System, Law No. 22/2008 of 13 May, Article 6 (2) c) on: (<http://dre.pt/pdf1sdip/2008/05/09200/0261702622.pdf>).

For this reason, the possible outcomes occurring in the various 1st instance law courts are mentioned in No. 1. Disaggregated data referring to the number of cases in 1<sup>st</sup> instance civil and criminal courts per type of possible outcomes are not available. With regard to these courts, see the Law governing the Organisation and Functioning of the Law Courts, Law No. 52/2008 of 28 August.

([http://www.dgpj.mj.pt/sections/leis-da-justica/pdf-ult2/lei-n-52-2008-de-28-de/downloadFile/file/lei\\_52.2008.pdf?nocache=1219910956.12](http://www.dgpj.mj.pt/sections/leis-da-justica/pdf-ult2/lei-n-52-2008-de-28-de/downloadFile/file/lei_52.2008.pdf?nocache=1219910956.12))

<sup>2</sup> Source: DGPI. The same source indicated that in 2009, seven (7) cases were concluded and five (5) were concluded in 2010.

<sup>3</sup> Ibid.

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	or criminal fine plus additional penalty	Law Courts of general and specialised jurisdiction (e.g. district civil court or district criminal court)	d data not available See footnote 1	d data not available See footnote 1	d data not available See footnote 1
2	fine plus additional penalty (Prohibition of processing, blocking, erasure or total or partial destruction of data, publication of the judgement, public warning or censure of the controller <sup>4</sup> )	Portuguese Data Protection Authority	745 Complaints <sup>5</sup>	863 Complaints <sup>6</sup>	985 Complaints <sup>7</sup>
3	Access to data <sup>8</sup>	Portuguese Data Protection	143 <sup>9</sup>	149	Not available

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<sup>4</sup> Ibid, Article 49.

<sup>5</sup> Source: The answer to our request for information given by the Portuguese Data Protection Authority (*Comissão Nacional de Protecção de Dados*, CNPD, <http://www.cnpd.pt/>) included the following clarifications:

*"Some of these procedures refer to complaints of the data subject, but also to communications from the police authorities or by the Authority for Working Conditions, or other entities, such as Labour Unions or organisations representing a specific sector. The Portuguese DPA also initiates procedures when there is public notice of some specific data breach (from the media or anonymous complaints).*

*Not all files conducting to administrative fines end with this result. Under the Portuguese law (Data Protection Act - Law n. 67/98, 26.10, available, in English, at <http://www.cnpd.pt/english/bin/legislation/Law6798EN.HTM>) the powers of the DPA are:*

1. *Power to supervise and monitor compliance with the laws and regulations in the area of personal data protection, with strict respect for human rights and the fundamental freedoms and guarantees enshrined in the Constitution and the law;*
2. *Consultation on any legal provisions and on legal instruments in preparation in Community or international institutions relating to the processing of personal data.*

*Therefore, the DPA is endowed with:*

*(a) investigative powers, and may have access to data undergoing processing and powers to collect all the information necessary for the performance of its supervisory duties;*

*(b) powers of authority, particularly those of ordering the blocking, erasure or destruction of data, or imposing a temporary or permanent ban on the processing of personal data, even if included in open data processing networks from servers situated on Portuguese territory;*

*(c) the power to deliver opinions before processing is carried out and to ensure their publication. In the event of repeated failure to comply with legal provisions relating to personal data the Portuguese Data Protection Authority may warn or publicly censure the processor, and in accordance with its duties may raise the matter with the Assembleia da República (Portuguese Parliament), the Government or other bodies or authorities."*

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

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		Authority			
4	fine <sup>10</sup>	ICP-ANACOM Portuguese Communications Authority <sup>11</sup>	198 complaints	246 complaints <sup>12</sup>	282 complaints <sup>13</sup>
5	fine plus additional penalty	Authority for Working Conditions	Not available	Not available	Not available
6	recommendation	Ombudsman <sup>14</sup>	5 complaints <sup>15</sup>	6 complaints <sup>16</sup>	9 complaints <sup>17</sup>

<sup>8</sup> Source: The answer to our request for information given by the Portuguese Data Protection Authority. According to the information provided, “the general rule for access to data is that it should be requested directly to the controller. The numbers presented refer to the access of data within the Schengen Information System – this is not a data breach situation. The law implies that the access to this specific data is indirect - through the DPA. This regimen also applies to some specific data kept by the criminal justice system.”

<sup>9</sup> See previous footnote.

<sup>10</sup> Chapter III in the Law No. 41/2004 of 18 August (<http://dre.pt/pdf1sdip/2004/08/194A00/52415245.pdf>) enacts the internal legal order of European Parliament and Council Directive No. 2002/58/CE passed on 12 July. It deals with personal data and the protection of privacy in the electronic communications sector.

<sup>11</sup>Source: The answer to our request for information given by the Portuguese Communications Authority (*Autoridade Nacional de Comunicações*, ICP-ANACOM) and its Report: [http://www.anacom.pt/streaming/Supervisao\\_Acompanhamento\\_Mercado\\_relaregulacaosuperv\\_2010web.pdf?contentId=1101646&field=ATTACHED\\_FILE](http://www.anacom.pt/streaming/Supervisao_Acompanhamento_Mercado_relaregulacaosuperv_2010web.pdf?contentId=1101646&field=ATTACHED_FILE)

The 2010 Report issued by ICP-ANACOM on the Supervision and follow-up of the market, gives the statistics of Complaints Book entries. It shows that the electronic communications sector is one of the areas causing the most conflicts on a nationwide scale. Effectively speaking, in 2010, a total of 44,108 complaints were registered, more than 5% higher than in 2009. Of them, 32,224 complaints pertained to the electronic communication sector. Nevertheless, where complaints about the privacy of personal data were concerned, the numbers were relatively low as shown in the figures given in the Table, although they have grown quite significantly. The Table only considers written complaints which had been made at the on-line attendance counter, sent by e-mail, letter or fax and written in the Complaints Book under the heading Privacy and Personal Data. The total number of the complaints referred to, are divided into the various sectors in the following way: 196 in the electronic communications sector; 52 about the fixed-line telephone services; 81 about mobile telephone services; 18 about service providing internet connections and 3 complaints about television services. See: [http://www.anacom-consumidor.com/assets\\_live/19/relatorio\\_estatistico2009.pdf](http://www.anacom-consumidor.com/assets_live/19/relatorio_estatistico2009.pdf)

<sup>12</sup> Only the written complaints have been considered according to the conditions mentioned in the previous footnote. The total number of the complaints referred to, are divided into the various sectors in the following way: 243 in the electronic communications sector; 80 about the fixed-line telephone services; 97 about mobile telephone services; 29 about service providing internet connections and 19 complaints about television services. See: [http://www.anacom-consumidor.com/assets\\_live/1582/relatorio\\_anual\\_2010.pdf](http://www.anacom-consumidor.com/assets_live/1582/relatorio_anual_2010.pdf)

<sup>13</sup> In the three years referred to in the Table, and according to written information received from ICP-ANACOM, the main problems which users described in the complaints they made in the sphere of privacy and personal data processing are connected with: a) their telephone numbers given out to electronic communications service-providers for promotional services; b) receiving anonymous calls which normally means having to ask for the identity of the calling number or blocking non-identified in-coming calls; c) wrong numbers called by service providers; d) contracts drawn up in the person’s name without his/her consent, and other diverse complaints about infringing upon privacy or illegally using data or failure to obtain the person’s permission. The same information states that “In most of the cases received, the duties of the Portuguese Communications Authority are laid down in Law No. 41/2004 of 18 August, as well as in Law No. 7/2004 of 7 January (<http://dre.pt/pdf1sdip/2004/01/005A00/00700078.pdf>) about unsolicited calls for direct marketing purposes. Therefore, in cases where there has been an allegedly abusive use of personal data or where consent is lacking, the complainants are advised to go to the Portuguese Data Protection Authority. In the remaining cases, when there is legal coverage that comes under the tutelage of the Portuguese Communications Authority, the complainants are informed as to what the applicable laws are and the ICP-ANACOM’s field of intervention. In the period under study, there were no cases that showed these laws had been infringed”.

<sup>14</sup> The Ombudsman’s (*Provedor de Justiça*, <http://www.provedor-jus.pt>) Statutes, in Law No. 9/91 of 9 April (<http://dre.pt/pdf1sdip/1991/04/082A00/18681873.pdf>), subsequently changed by Law nos. 30/96 of 14 August (<http://dre.pt/pdf1sdip/1996/08/188A00/25142514.pdf>) and 52-A/2005 of 10 October, Article 3, (<http://dre.pt/pdf1sdip/2005/10/194A01/00020011.pdf>), states that: “Citizens may refer complaints to the

## Detailed information

### Ad Redress Mechanism Number 1: compensation, administrative fines, imprisonment or criminal fines, Law Courts of the 1st Instance

According to the Law on the Organisation and Operation of Judicial Courts, Law No. 52/2008, of August 28, courts may have generalised or specialised jurisdiction.<sup>18</sup> First instance specialized courts include namely civil and criminal courts. Owing to the fact that it is not possible to disaggregate the statistical data provided by the General Directorate of Justice Policies (*Direcção Geral de Política de Justiça*, DGPJ), it is not possible to identify neither the number of cases initiated in courts of generalised or of specialised jurisdiction, nor the outcomes of the cases filed. Therefore, Ad Redress Mechanism 1 aggregates the existing data of the cases initiated in all first instance courts, which are likely to be related to data protection. These possible outcomes are disaggregated in Ad Redress Mechanism 1.1. and 1.2. – a mere development of Ad Redress Mechanism Number 1 in order to allow us to provide the detailed information requested per type of outcome.

### Ad Redress Mechanism Number 1.1.: compensation

The Act on the Protection of Personal Data<sup>19</sup> (*Lei de Protecção de Dados Pessoais*, LPDP) stipulates that: any person who has suffered damage as a result of unlawful processing or of

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Ombudsman concerning actions or omissions by public authorities. The Ombudsman shall examine such complaints and address the public bodies concerned, making recommendations where appropriate so as to prevent and redress injustices”. (*Provedor de Justiça*, <http://www.provedor-jus.pt>)

<sup>15</sup> Source: information from the Ombudsman’s Office in an e-mail. The complaints made were: 1 about giving an employee’s data to a third party; 3 about video surveillance involving public and private entities, and 1 complaint about the lack of response from the Portuguese Data Protection Authority and its failure to make documentation available. In order to redress these problems, the Ombudsman’s Office contacted both the Data Protection Authority and the entities responsible for undertaking the video surveillance.

<sup>16</sup> Source: Written information received by the Ombudsman’s Office. The complaints received were: 1 about video surveillance; 1 about the Portuguese Data Protection Authority’s lack of response in authorising action; 2 about the Portuguese Data Protection Authority’s lack of response about the illicit use of personal data, and 1 about the 2011 Census data processing; 1 about using personal data for purposes not stated when collecting the details. In order to redress the problems, the Ombudsman’s Office contacted the Portuguese Data Protection Authority.

<sup>17</sup> Source: Written information received by the Ombudsman’s Office. The complaints received were: 1 about the Portuguese Data Protection Authority’s lack of response in authorising action; 3 about the Portuguese Data Protection Authority’s lack of response against the abusive use of personal data; 1 about accessing registry office data about all the cases of unknown paternity during a specific period; 1 about biometric monitoring at school; 1 about the conditions imposed on answering a survey launched by the Portuguese Statistics Institute (*Instituto Nacional de Estatística*, INE, [www.ine.pt](http://www.ine.pt)), and 2 about the 2011 Census data processing. In order to redress the problems, the Ombudsman’s Office contacted the Portuguese Data Protection Authority, asking for information about the progress made on the respective cases and perspectives in sight. It also contacted the Statistics Institute to enquire about the cases regarding the 2011 Census. In one of the cases, after having contacted the data controller, the data pertaining to the complainant were deleted. In the case of the biometric data a check was made to see whether the Portuguese Data Protection Authority’s had given permission to collect these data. The system was erased until new authorisation from the Data Protection Authority’s had been obtained.

<sup>19</sup> [www.cnpd.pt/bin/legis/nacional/lei\\_6798.htm](http://www.cnpd.pt/bin/legis/nacional/lei_6798.htm)

any other action breaching the law as per personal data protection is entitled to receive compensation from the controller for the damage suffered<sup>20</sup>.

For its part, the Civil Code<sup>21</sup> (*Código Civil*) establishes that any person, who is intentionally or merely culpable of committing an illegal act against the rights of another person or of any law aimed at protecting third-party interests, is obliged to pay compensation to the injured party for the damages suffered as a result of the breach.<sup>22</sup>

### **Range of possible outcomes**

(a) Restitution of the original situation: The Civil Code's general principle is also applicable to the legal right to personality<sup>23</sup>. It stipulates that any person who is obliged to redress the damage should reconstitute the situation that would have normally existed in the event that the deed warranting compensation had not taken place.<sup>24</sup>

(b) Compensation is set in terms of money whenever the natural reconstitution is not possible, or fails to fully repair the damage suffered, or has been excessively hard on the debtor. In the event that the exact value of the damage cannot be calculated, the court will decide equitably within the limits of the burden of proof.<sup>25</sup>

(c) The amount of compensation:

(i) With regard to the value of compensation, it should take into account:

- the damage caused;
- the benefits the injured party has ceased to enjoy as a result of this injury.

(ii) In settling upon the amount of compensation to be paid, the court has to take future damages into account provided they may be predicted. If future damages cannot be determined, the amount of awardable compensation should be decided upon in a verdict later.<sup>26</sup>

(iii) The Civil Code states that when the liability is based merely on culpability, the compensation may be calculated equitably to a sum that is lower than that attributable to the damages caused, provided that the degree of the agent's culpability, the economic situation of both the guilty party and the complainant as well as other mitigating circumstances of the case so demand.<sup>27</sup>

All these redresses are applied to breaches in personal data processing. This is because when they are based on the generic formula mentioned above, the Act on the Protection of Personal Data recognises the right of the injured party to obtain compensation from the party responsible in lieu of damages suffered.

### **Legal basis:**

The Constitution of the Portuguese Republic<sup>28</sup> (*Constituição da República Portuguesa*), Part 1, Fundamental Rights and Duties, Title II, Rights, freedoms and guarantees, Chapter 1, Personal rights, freedoms and guarantees, Articles 26 (1) and (2) (Other personal rights)<sup>29</sup> and 35 (The Use of Computerised Data)<sup>30</sup>; the Civil Code, Book I, General Part, Title II, on Legal

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<sup>20</sup> Act on the Protection of Personal Data, Article 34 (1).

<sup>21</sup> [http://www.igf.min-financas.pt/infllegal/bd\\_igf/bd\\_legis\\_geral/Leg\\_geral\\_docs/DL\\_47344\\_66\\_COD\\_CIVIL\\_1.htm](http://www.igf.min-financas.pt/infllegal/bd_igf/bd_legis_geral/Leg_geral_docs/DL_47344_66_COD_CIVIL_1.htm)

<sup>22</sup> Civil Code, Article 483 (1).

<sup>23</sup> Ibid, Article 70.

<sup>24</sup> Ibid, Article 562.

<sup>25</sup> Ibid, Article 566.

<sup>26</sup> Ibid, Article 564 (1) e (2).

<sup>27</sup> Ibid, Article 494.

<sup>28</sup> <http://dre.pt/util/pdfs/files/crp.pdf>

<sup>29</sup> Article 26 “1. Everyone shall possess the right to a personal identity, to the development of their personality, to civil capacity, to citizenship, to a good name and reputation, to their likeness, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination. 2. The law shall lay down effective guarantees against the procurement and misuse of information concerning persons and families (...).”

<sup>30</sup> Constitution, Article 35 “1. Every citizen shall possess the right to access to all computerised data that concern him, to require that they be corrected and updated, and to be informed of the purpose for which they are intended, all as laid down by law. 2. The law shall define the concept of personal data, together with the terms and

Relations, Subtitle I, on Single Parties, Section II, The Right to Personality, Articles 70<sup>31</sup> to 81, and Book II, Obligation Rights, Title I, on Obligations in general, Chapter I, General dispositions, Section V, Civil liability, Subsection I, Liability for illegal facts, Articles 483 to 498 and Chapter III, Kinds of obligations, Section VIII, Compensation obligation, Articles 562 to 572; Act on the Protection of Personal Data, Chapter VI, Section I, Administrative and jurisdictional supervision, Article 34.

**Type of procedure: civil/criminal/administrative/data protection authority/ alternative mechanism**

The injured party's demand for compensation is made in a civil court case. If a crime has been committed at the same time, there is a criminal court case owing to the principle of accession laid down in this case.<sup>32</sup> However, the applicable system is a civil court case.<sup>33</sup>

Should the parties agree, they may also resort to alternative means, namely arbitration so as to solve their differences when submitting opposing civil litigations about the civil liability of illegal personal data processing.<sup>34</sup>

**Possibilities of appeal: 2<sup>nd</sup>, 3<sup>rd</sup> and further instances**

In civil court cases, the possibilities of appeals made to the courts of the 2<sup>nd</sup> and 3<sup>rd</sup> instances are enshrined in the Code of Civil Procedure<sup>35</sup> (*Código do Processo Civil*, CPC). Moreover, in cases where the unconstitutional nature of the applicable rules is invoked, it is possible to appeal to the Constitutional Court<sup>36</sup> (*Tribunal Constitucional*, TC).

The CPC defines the decisions that appraise appeals in civil court cases. Therefore, "the common appeal is only permitted when the amount being sued for is higher than the amount ruled upon in the appeal court<sup>37</sup>, and the contested ruling is unfavourable to the respondent to more than half the sum ruled by the appeal court, provided that in the event of well-founded doubt about the overruled party's value, only the amount in question is considered".

Nevertheless, regardless of the sum in question and the overruled party, it is always possible to appeal against decisions that:

- violate the rules of international jurisdiction or the subject matter or the rank, or issues offending the case being tried;

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conditions applicable to its computerised treatment and its linkage, transmission and use, and shall guarantee its protection, particularly by means of an independent administrative body. 3. Computers shall not be used to treat data concerning philosophical or political convictions, party or trade union affiliations, religious beliefs, private life or ethnic origins, save with the express consent of the data subject, with authorisation provided for by law and with guarantees of non-discrimination, or for the purpose of processing statistical data that cannot be individually identified. 4. Third-party access to personal data shall be prohibited, save in exceptional cases provided for by law (...).

<sup>31</sup> Civil Code, Article 70. (The general protection of personality): "1. The law protects a person against any illegal offence or the threat of an offence to his/her physical and moral integrity. 2. Irrespective of the civil liability that takes place, the threatened or injured party may appeal to the appropriate quarters as to the circumstances of the case, in order to avoid the threat being carried out or the effects attenuated of the threat in the event that it has already been committed".

<sup>32</sup> Code of Criminal Procedure, Article 71.

<sup>33</sup> Article 129 of the Penal Code (Civil Liability emerging from the crime) states that "compensation in lieu of losses and damages as a result of a crime is regulated by civil law".

[http://www.pgdlisboa.pt/pgdl/leis/lei\\_mostra\\_articulado.php?nid=109&tabela=leis](http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=109&tabela=leis)

<sup>34</sup> Law No. 63/2011 of 14 December, Article 1.

[http://www.pgdlisboa.pt/pgdl/leis/lei\\_mostra\\_articulado.php?nid=1579&tabela=leis&ficha=1&pagina=1](http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=1579&tabela=leis&ficha=1&pagina=1)

<sup>35</sup> [http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/consolidacao-processo/codigo-processo-civil/downloadFile/file/CODIGO\\_PROCESSO\\_CIVIL\\_VF.pdf?nocache=1286970369.12](http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/consolidacao-processo/codigo-processo-civil/downloadFile/file/CODIGO_PROCESSO_CIVIL_VF.pdf?nocache=1286970369.12)

<sup>36</sup> Law No. 28/82 of 15 November, Article 70 in its current form. <http://www.dgpj.mj.pt/sections/leis-da-justica/livro-ii-leis-sobre-jurisdicao/lei-do-tribunal>; <http://www.tribunalconstitucional.pt/tc/home.html>

<sup>37</sup> In agreement with the Law on the Organisation and Functioning of the Law Courts (*Lei de Organização e Funcionamento dos Tribunais Judiciais*, <http://www.dgaj.mj.pt/sections/files/legislacao/leg-loft-e-rlof/sections/files/legislacao/leg-loft-e-rlof/lei-52-2008/downloadFile/file/12LEI522008.pdf?nocache=1232964356.86>), Law No. 52/2008 of 28 August, Article 31

(1) Court costs in courts of the 1<sup>st</sup> instance are set at 5,000 euros and in the Higher Court dealing with appeals, costs are set at 30,000 euros.

- are based on the amount of money in question or the incidents involved although there must be proof that it is in excess of the sum awarded by the court;
- are based on like legislation and on the same question of right as against the standard case-law of the Supreme Court of Justice (*Supremo Tribunal de Justiça*<sup>38</sup>, STJ).

**Burden of proof: what the complainant needs to prove.**

In conformity with Civil Code Article 483, the law lays down that the presuppositions involving subjective civil responsibility is founded upon the formation of compensation obligations. It establishes the existence of the agent's conduct (voluntary fact) which represents an infringement of a legally imposed court order (an illicit act) where the agent's conduct is deemed culpable (guilty) and which has caused harm (damage) as a result of the conduct being pursued (the causality link between the fact and the damage). It therefore falls to the complainant to prove the existence of such presuppositions. Where the culpability in terms of subjective civil responsibility is concerned, Article 487 of the Civil Code states that it falls to the injured party to prove the perpetrator's guilt except when there is legal evidence of guilt.

**Available mechanism to lower the burden of proof: for example presumption of fact or reversal of the burden of proof or lump sum compensation arrangement etc.**

The law does not have any mechanism for lowering the burden of the proof.

**Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?**

The Code of Civil Procedure establishes that in the event that legal representation is not required, the parties may speak for themselves or be represented by trainee lawyers or solicitors.<sup>39</sup> Nevertheless, a lawyer must be present in cases appearing within the remit of the court in which common appeals are possible, as well as in cases in which an appeal is always possible regardless of the sums in question. A lawyer's representation is also obligatory in appeals and in cases heard in higher courts.<sup>40</sup> Be that as it may, despite representation by a lawyer being compulsory, trainee lawyers, solicitors and the parties themselves may make claims where questions about the law are not raised.<sup>41</sup> Furthermore, when there is no lawyer available in the district, sponsorship may be undertaken by a solicitor.<sup>42</sup>

**Is there free legal advice/representation available from a public body (please specify the public body)?**

In agreement with the Act on the Protection of Personal Data, it is the duty of the Portuguese Data Protection Authority to:

- (i) follow up a request made by any person or any association that represents the person in order to uphold his/her rights and freedoms in terms of his/her personal data processing;
- (ii) inform the data subjects or their representatives of the outcome;
- (iii) verify, at the request of any person, the legal status of the data subject's personal data processing whenever the processing is subject to restricted access or information;
- (iv) inform the data subjects or their representatives of the outcome of this verification.<sup>43</sup>

On the other hand, where filing a civil law-suit is concerned, the injured party may request legal aid from Social Welfare in terms of Law No. 34/2004 of 29 July, the Access System to the Law and the Law Courts.<sup>44</sup>

<sup>38</sup> <http://www.stj.pt/?idm=54>

<sup>39</sup> Code of Criminal Procedure, Article 34.

<sup>40</sup> Ibid, Article 32 (1) a), b) e c)

<sup>41</sup> Ibid, Article 32 (2).

<sup>42</sup> Ibid, Article 32 (4).

<sup>43</sup> Act on the Protection of Personal Data, Article 23 (1) i) and j).

<sup>44</sup> [http://www.pgdliisboa.pt/pgdl/leis/lei\\_mostra\\_articulado.php?nid=80&tabela=leis](http://www.pgdliisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=80&tabela=leis)



### **Is there *locus standi* for DP authorities, civil society organisations and associations to initiate/be active in procedure?**

The Portuguese Data Protection Authority has the right to intervene in a court case should a breach occur in the data protection law. The DP Authority is represented in a court case by the Public Prosecutor's Office<sup>45</sup> (*Ministério Público*, MP) and is exempt from costs arising in the ensuing proceedings.<sup>46</sup>

It is not known whether there are any other organisations apart from the trade unions active in civil society and specifically defending people against breaches in their right to privacy and the protection of personal data. The trade unions have the right to initiate and intervene in court cases and in administrative procedures on behalf of their union members in conformity with the law. Protecting their members' interests also includes protecting their personal data.<sup>47</sup>

To this effect, the Portuguese Constitution states in Article 52 (3) that: "Everyone shall be granted the right of *actio popularis*, to include the right to apply for the appropriate compensation for an aggrieved party or parties, in such cases and under such terms as the law may determine, either personally or via associations that purport to defend the interests in question (...)". Following this provision, Law No. 83/95 of 31 August was published as regards the right for people to take part in the procedures and in *actio popularis*.<sup>48</sup> According to this law, associations and foundations have the effective right provided that they are endowed with a legal personality. Their statutory character or attributions should expressly include mention of their right to defend interests pertinent to court cases of this type. Furthermore, they should not exercise any kind of professional activity that would compete with companies and the liberal professions.<sup>49</sup>

### **Cost of procedure: please provide information on the average cost of the procedure**

There is no information available.

### **Average duration of procedure: please provide available information**

Disaggregated data are not available on the average duration of court procedures dealing with compensation due to the illegal use of protected personal data. DGJP only provides data about the average duration of concluded cases in the field of civil justice, which is about 29 months.<sup>50</sup>

### **Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011**

In 2009, 7 cases were concluded in the Courts of the 1<sup>st</sup> Instance, and in 2010, 5 cases that answered to the charge of "breach in the right to personality" were concluded. However, as mentioned above, it is not possible to learn what these court decision. As mentioned above, if the data were disaggregated, the small number of cases would reveal the identity of the people involved, which is forbidden in terms of Law No. 22/2008 of 13 May, concerning the Portuguese Statistics System.<sup>51</sup>

<sup>45</sup> [http://www.pgr.pt/grupo\\_pgr/indice.html](http://www.pgr.pt/grupo_pgr/indice.html)

<sup>46</sup> Ibid, Article 22 (6).

<sup>47</sup> Labour Code, Law No. 7/2009 of 12 February, Articles 443 (1) d) and 14 to 22.  
<http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>

<sup>48</sup> [http://www.pgdlisboa.pt/pgdl/leis/lei\\_mostra\\_articulado.php?nid=722&tabela=leis](http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=722&tabela=leis)  
English version: [http://app.parlamento.pt/site\\_antigo/ingles/cons\\_leg/Constitution\\_VII\\_revisao\\_definitive.pdf](http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf)

<sup>49</sup> Law No. 83/95, Article 3. <http://dre.pt/pdf1sdip/1995/08/201A00/54645467.pdf>

<sup>50</sup> Source: The 2010 Official Justice Statistics, DGPJ. See: [http://www.dgpj.mj.pt/sections/siej\\_pt/destaque4485/os-numeros-da-justica\\_1/downloadFile/attachedFile\\_f0/Os\\_numeros\\_da\\_justica\\_2010.pdf](http://www.dgpj.mj.pt/sections/siej_pt/destaque4485/os-numeros-da-justica_1/downloadFile/attachedFile_f0/Os_numeros_da_justica_2010.pdf)

<sup>51</sup> Law on the Portuguese Statistics System, Article 6 (2) c).  
<http://dre.pt/pdf1sdip/2008/05/09200/0261702622.pdf>.

## Ad Redress Mechanism Number 1.2.: imprisonment or criminal fines plus additional penalties

The Act on the Protection of Personal Data criminalises certain behaviours breaching data protection as do other laws that deal with processing personal data. All such matters are referred to this Act.<sup>52</sup>

The same Act establishes that should the Portuguese Data Protection Authority learn of criminal infractions while exercising its duties, it should inform the Public Prosecutor's Office in the course of its duties and take the necessary, speedy measures to obtain proof.<sup>53</sup>

### Range of possible outcomes

The Act on the Protection of Personal Data makes provision for prison sentences or fines of varying orders according to the legal type of crime and the degree of guilt.<sup>54</sup> It also includes the possibility that together with these penalties, additional penalties are brought to bear. Such additional penalties may include temporarily or permanently forbidding data processing, blocking, erasing or the full or partial destruction of data, as well as publicising the sentence received and warning or publicly cautioning the processing controllers. The controllers will be dealt with in redress mechanism number 5.<sup>55</sup>

According to the Law, there is a prison sentence of up to one year or a fine of up to 120 days for anyone who wilfully:

- (a) fails to notify or ask for permission as foreseen in Articles 27 (compulsory notification made to the Portuguese Data Protection Authority) and 28 (Prior supervision);
- (b) supplies false information about having notified or requested permission to process personal data or when processing such data, makes changes that are not allowed by the law;
- (c) diverts or misuses personal data in such a way as to be incompatible with the goals of data collecting or with the law;
- (d) promotes or undertakes the illegal intermeshing of personal data;
- (e) after having failed to respect the deadline set by Portuguese Data Protection Authority in conformity with the dictates of the Act on the Protection of Personal Data and other laws pertinent to data protection, fails to comply with such dictates;
- (f) after having been notified by the Portuguese Data Protection Authority forbidding access to open networks that are transmitting data to the controllers processing personal data, fails to comply with the provisions laid down in the Law.<sup>56</sup>

Other sentences:

- (i) The maximum sentence is doubled when dealing with personal data as referred to in Articles 7 (Sensitive Data) and 8 (Data on suspects of illegal activity, criminal infractions and administrative offences).<sup>57</sup>

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<sup>52</sup> See Law No. 7/2007 of 5 February, Article 50, (<http://dre.pt/pdf1sdip/2007/02/02500/09400948.pdf>) which established the citizen's identity card and Law No. 5/2008 of 12 February, Article 35, (<http://dre.pt/pdf1sdip/2008/02/03000/0096200968.pdf>) that approved setting up a DNA data base for civil and criminal identification purposes.. Law No. 33/99 of 18 May, Article 47 (2) (<http://dre.pt/pdf1sdip/1999/05/115A00/26062613.pdf>), which rules on civil identification and issuing identity cards, does not however, come under the scope of the Act on the Protection of Personal Data, but rather, in its own provisions, stipulates a prison sentence of up to one year or a fine of 120 days for anyone who illegally obtains, supplies to 3<sup>rd</sup> parties or makes use of the data or the information contained in the non-computerised civil identification filing systems and deviates them from their rightful purpose.

<sup>53</sup> Act on the Protection of Personal Data, Article 22 (5).

<sup>54</sup> Ibid, Articles 43 to 49. The crimes stipulated are: failure to comply with obligations in terms of protecting personal data (Article 43), undue access to these data (Article 44), changing or destroying such data (Article 45), qualified disobedience (Article 46), violation of the right to secrecy (Article 47).

<sup>55</sup> Ibid, Article 49 (1).

<sup>56</sup> Ibid, Article 43 (1).

<sup>57</sup> Ibid, Article 43 (2).

- (ii) Anyone who has access to personal data without due authorisation and for whatever reason, and where this access is forbidden, is liable to a serve up to one year in prison and pay a fine of up to 120 days.<sup>58</sup> Nevertheless, in this case, the criminal procedure depends upon filing a complaint.<sup>59</sup>
- (iii) The maximum sentence is doubled when access to protected data has been contrived through violating technical safety rules; or when personal data were made available to the agent or to third parties; or when the agent or third parties benefited from or received material advantages from these data.<sup>60</sup>
- (iv) Anyone without due authorisation who erases, destroys, damages, suppresses or changes the data, making them unusable or tainting their use, is liable to serve up to two years in prison and pay a fine of up to 240 days.
- (v) The maximum sentence is doubled if the resulting damage has been particularly serious.<sup>61</sup> In both cases, the sentence of up to one year in prison or a fine of up to 120 days holds if the agent has been found guilty of negligence.<sup>62</sup>
- (vi) Anyone who has been found guilty of the crime of civil disobedience and who has been notified to the effect but who has not interrupted, stopped or blocked personal data processing is subject to a penalty.<sup>63</sup>
- (vii) The same sentence is applied to anyone who has duly been notified but who without a valid reason, refuses to cooperate in terms of the law and meet the demands of the Portuguese Data Protection Authority<sup>64</sup>, and where the personal data have not been erased, or fully or partially destroyed.
- (viii) Likewise the same sentence is also applied to anyone who:
- has not destroyed the personal data after the necessary deadline has expired for keeping such data for the assigned purpose of data-collecting;
  - has not destroyed the personal data after data processing has been concluded;
  - has failed to obtain permission from the Data Protection Authority for preserving the data for historical, statistical or scientific aims over a further length of time.<sup>65</sup>
- (ix) The crime of qualified disobedience is punishable with a prison sentence of up to 2 years and a fine of up to 240 days.<sup>66</sup>
- (x) Anyone, who is bound by professional secrecy and who, without a valid reason or due permission, has revealed or disclosed all or a part of the personal data, is liable to receive a prison sentence of up to 2 years or a fine of up to 240 days.<sup>67</sup>
- (xi) The maximum sentence is doubled if:
- the agent is a civil servant or the equivalent of one in the eyes of the criminal law;
  - breaching his duty to safeguard professional confidentiality is deemed intentional in lieu of material gain or any other illicit benefit;
  - the breach jeopardises the reputation, honour and esteem and the private life of the other party/parties.

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<sup>58</sup> Ibid, Article 44 (1).

<sup>59</sup> Ibid, Article 44 (3).

<sup>60</sup> Ibid, Article 44 (2).

<sup>61</sup> Ibid, Article 45 (1) e (2).

<sup>62</sup> Ibid, Article 45 (3).

<sup>63</sup> Ibid, Article 46 (1).

<sup>64</sup> Ibid, Article 46 (2) a). In conformity with Article 24, private and public entities should cooperate with the Portuguese Data Protection Authority. They should make all the information demanded by the Authority available so that it may carry out its duties and so that it may exercise its role and audit the computer system, the personal data files and all the information pertaining to personal data processing. Where its scope and power are concerned, the Portuguese Data Protection Authority and its legal representatives and well as the technical experts delegated by the Authority have the right of access to the computer hard and software systems involved in data processing and the information referred to above.

<sup>65</sup> Ibid, Article 46 (2) b) and c) and Article 5 (1) e) and (2).

<sup>66</sup> Penal Code, Article 348 (2).

<sup>67</sup> Act on the Protection of Personal Data, Article 47 (1).

With the exception of these cases, criminal proceedings will depend upon the filing a complaint.<sup>68</sup>

(xii) Negligence is punishable with a prison sentence of up to 6 months and a fine of up to 120 days.<sup>69</sup>

(xiii) In the crimes referred to above, an attempt is always punishable.<sup>70</sup>

**Legal basis:**

Law No. 67/98 of 26 October, Act on the Protection of Personal Data, Chapter IV, Administrative and jurisdictional protection, Section III, Crimes, Articles 43 to 49.

**Type of procedure: civil/criminal/administrative/data protection authority/ alternative mechanism**

Criminal procedure

**Possibilities of appeal: 2nd, 3rd and further instances**

The general solution in criminal cases is that decisions, sentences and orders can be appealed in higher courts except where otherwise stated.<sup>71</sup>

The following are not allowed:

- merely expedient appeals of orders;
- decisions that rule on acts dependent on the court's free deliberation;
- judgements made on the basis of appeals to a higher court that does not really know the case subject matter;
- verdicts based on acquittals based on appeals to a higher court confirming the decisions of the 1<sup>st</sup> instance;
- verdicts passed on an appeal by a higher court where the punishment does not involve a prison sentence;
- sentences passed in an appeal to a higher court confirming the decisions of the 1<sup>st</sup> instance and applying a prison term of not more than 8 years;
- other cases as laid down in the law.<sup>72</sup>

With the exception of cases where an appeal can be made directly to the Supreme Court of Justice (*per saltum*), an appeal against a decision passed by a court of the 1<sup>st</sup> instance has to go through a higher court.<sup>73</sup> The appellate courts have the knowledge to decide upon conclusions of law and the findings of fact.<sup>74</sup>

Appealing to the Supreme Court of Justice is generally made on the basis of decisions issued by a higher court with regard to sentences passed by a court of the 1<sup>st</sup> instance and of decisions that are not unappealable which have been made by a higher court acting on an appeal.<sup>75</sup> The appeal made to the Supreme Court of Justice dictates the need to re-examine the material of the law.<sup>76</sup>

In cases where the allegation rests on the unconstitutional nature of the rules which have been applied, there is also the possibility of appealing to the Constitutional Court.

**Burden of proof: please list what the complainant needs to prove**

<sup>68</sup> Ibid, Article 47 (2) and (4).

<sup>69</sup> Ibid, Article 47 (3).

<sup>70</sup> Ibid, Article 48.

<sup>71</sup> Code of Criminal Procedure, Article 339:

[http://www.pgdlisboa.pt/pgdl/leis/lei\\_mostra\\_articulado.php?ficha=401&Article\\_id=&nid=199&pagina=5&tabela=leis&nversao=](http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?ficha=401&Article_id=&nid=199&pagina=5&tabela=leis&nversao=)

<sup>72</sup> Ibid, Article 400.

<sup>73</sup> Ibid, Article 427.

<sup>74</sup> Ibid, Article 428.

<sup>75</sup> Ibid, Article 432 (1).

<sup>76</sup> Ibid, Article 434.

If the crime has a semi-public nature, or rather, if it depends upon filing a complaint, the complainant has to lodge the complaint so as to initiate the process. In a criminal case, it falls to the Public Prosecutor's Office to receive reports, complaints and claims, and analyse what sort of follow-up they need to be given. The Public Prosecutor's Office needs to conduct the inquiry, formulate the indictment and effectively substantiate it during the instruction stage and the trial, and draw up an appeal in the defence's best interests.<sup>77</sup> The complainant's role is therefore limited except in cases where he becomes the Assistant.

**Available mechanism to lower the burden of proof: for example presumption of fact or reversal of the burden of proof or lump sum compensation arrangement etc.**

As was referred to in the point above, the Public Prosecutor's Office has to substantiate the indictment in a criminal case.

**Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?**

Without jeopardising the right to present a complaint to the Portuguese Data Protection Authority and according to the law, any person may seek the administrative or jurisdictional means of ensuring that the law about personal data protection has been upheld.<sup>78</sup> Owing to the fact that what is at stake is a crime where the criminal proceedings depend upon a complaint having been made, the following rules are applied:

- (i) In the penal process, assistants may be constituted.
- (ii) The assistants are namely the injured party, considered as such because they detain the very interests that the law seeks to protect by obtaining incrimination.
- (iii) Assistants should be over the age of 16 and should be the person whose particular complaint or indictment the case hinges upon.<sup>79</sup>
- (iv) The assistants are always represented by a lawyer and they may be advised by a lawyer in the investigations in which they take part.<sup>80</sup>

**Is there free legal advice/representation available from a public body (please specify the public body)?**

The Public Prosecutor's Office has the power to promote the penal process except in procedures dependent upon a private complaint or indictment.<sup>81</sup> In the concrete case of the Act on the Protection of Personal Data, there are no crimes where:

- the criminal procedure hinges on a private indictment;
- it merely depends upon a complaint involving access to personal data without due authorisation;
- access has been denied (Article 44 (1));
- the crime is a breach of confidentiality (Article 47 (1)).

When a criminal procedure hinges on a complaint made by the injured party or a 3<sup>rd</sup> party or based on the report of any authority, the said parties and authorities should make the fact known to the Public Prosecutor's Office who will then file a lawsuit. A complaint may be presented by the holder of the respective right by means of a court order or an order endowed with special powers.<sup>82</sup> The Public Prosecutor's Office then undertakes any official investigations falling within its power and that are deemed indispensable to uncovering the truth. The Public Prosecutor's Office also makes independent appeals against court decisions.<sup>83</sup> On the other hand, if so wished and if conditions are complied with, the

<sup>77</sup> Ibid, Article 53.

<sup>78</sup> Act on the Protection of Personal Data, Article 33.

<sup>79</sup> The Criminal Procedure Code, Article 68.

<sup>80</sup> Ibid, Article 70 (1) and (3).

<sup>81</sup> Ibid, Article 48.

<sup>82</sup> Ibid, Article 49 (1), (3) e (4).

<sup>83</sup> Ibid, Article 50 (2).

complainant may request legal aid from Social Welfare in terms of the Law No. 34/2004 of 29 July dealing with the Access System to the Law and the Law Courts.<sup>84</sup>

**Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?**

The Portuguese Data Protection Authority has the right to intervene in a court case should a breach occur in clauses laid down in the Act on the Protection of Personal Data. As was mentioned earlier on, in pursuing its duties and in line with such duties, the Authority should inform the Public Prosecutor's Office about the criminal misdemeanours that have come to its notice as well as take the urgent, necessary precautions to ensure the burden of proof. With respect to the organisations in civil society, the same applies here as was mentioned in the point coming under *Ad redress mechanism Number 1.1*.

**Cost of procedure: please provide information on the average cost of the procedure**

In general, criminal procedure is free of costs. However, the Assistant has to pay court costs in the event that:

- (i) the defendant is acquitted;
- (ii) the defendant is not answerable to all or some of the crimes stated in the indictment;
- (iii) the appeal or any opposing stand taken is not successful;
- (iv) the case is closed due to the complainant having dropped the suit or due to his/her unjustified absence to prosecute;
- (v) the indictment is fully or partially dismissed.<sup>85</sup>

The Portuguese Data Protection Authority is exempted from paying any of the costs in the cases in which it is involved.

The average cost of the procedure is unknown.

**Average duration of procedure: please provide available information.**

There are no disaggregated data about the average duration of criminal procedures as regards the protection of personal data. The Directorate-General for Justice Policy only provides data about the average duration of concluded cases in the field of criminal justice, which is about 10 months.<sup>86</sup>

**Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011**

For details, please see the same point in *Ad redress mechanism Number 1.1*.

**Ad Redress Mechanism Number 2: blocking, erasure or destruction of data,  
temporary or permanent prohibition of data processing, fine,  
Portuguese Data Protection Authority**

In conformity with the Act on the Protection of Personal Data, Law No. 67/98 of 26 October<sup>87</sup>, the Portuguese Data Protection Authority is an independent administrative agency

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<sup>84</sup> Lei 34/2004, Article 17, as per Law No. 47/2007 of 28 August.

<http://dre.pt/pdf1sdip/2004/07/177A00/48024810.pdf>

<http://dre.pt/pdf1sdip/2007/08/16500/0579305810.pdf>

<sup>85</sup> Code of Criminal Procedure, Article 515 (1).

<sup>86</sup> Source: Statistics for 2010 in the Official Justice Statistics, Portuguese Directorate-General for Justice Policy:

[http://www.dgpj.mj.pt/sections/siej\\_pt/destaque4485/os-numeros-da-justica\\_1/downloadFile/attachedFile\\_f0/Os\\_numeros\\_da\\_justica\\_2010.pdf](http://www.dgpj.mj.pt/sections/siej_pt/destaque4485/os-numeros-da-justica_1/downloadFile/attachedFile_f0/Os_numeros_da_justica_2010.pdf)

<sup>87</sup> <http://www.cnpd.pt/english/bin/legislation/Law6798EN.HTM>

with powers of authority. It works jointly with the Parliament. The Authority's main duties are:

- (i) to supervise and monitor compliance with the laws and regulations in the area of personal data protection, with strict respect for human rights and the fundamental freedoms and guarantees enshrined in the Constitution and the law.<sup>88</sup>
- (ii) to make use of its investigative powers and powers of inquiry, authority and delivering statements of opinion before personal data processing is carried out. In order to exercise its investigative powers, it may have access to data undergoing processing and collect all the information necessary for the performance of its supervisory duties.<sup>89</sup> (iii) to order the blocking, erasure or destruction of data, as well as temporarily or permanently forbid the processing of personal data, even if they are included in open networks transmitting data via servers situated inside Portugal<sup>90</sup>.
- (iv) to ensure the right of access to information and exercise the right to correct and update information; to assess the claims, complaints or applications of private individuals; deliberate on the application of fines; promote the disclosure and clarification of rights relating to the protection of data and publish its annual report.<sup>91</sup>
- (v) to exercise its power to make decisions of an administrative nature.<sup>92</sup>

In the event that the legal provisions about personal data processing repeatedly fail to comply with the Law, the Authority may publicly warn or censure the controllers about personal data processing, as well as bring the question to the notice of the Parliament, the Government and any other authority.<sup>93</sup>

**Range of possible outcomes (for example fine up to Euro 1000)**

In terms of Article 37 (1) a) and b) of the Act on the Protection of Personal Data, administrative offence are committed by entities which:

- (i) negligently fail to comply with the obligation to notify the Portuguese Data Protection Authority;<sup>94</sup>
- (ii) provide false information;
- (iii) fail to comply with contents of statements of opinion or authorisations or notifications laid down in the law;<sup>95</sup>
- (iv) after having been notified by the Authority, continue to allow access to open data transmission networks to controllers who fail to comply with the provisions of this Law.

Such administrative offences are punishable with the following fines:

- (a) in the case of a single person, a minimum of PTE 50,000\$00<sup>96</sup> and a maximum of PTE 500,000\$00;
- (b) in the case of a collective person or an entity without legal personality, a minimum of PTE 300,000\$00 and a maximum of PTE 3,000,000\$00

The fine is increased to double the maximum value in the case of failure to comply with the obligations as laid down in the Law.<sup>97</sup>

In terms of Article 38 (1) a) and b) of the same Law, bodies which fail to comply with any of the following provisions of the Act are committing an administrative offence punishable with

<sup>88</sup> Act on the Protection of Personal Data, , Article 21 (1) e 22 (2).

<sup>89</sup> Ibid, Article 22.

<sup>90</sup> Ibid, artigo 22 (3) b)

<sup>91</sup> Ibid, Article 23 (1) g), i), j), k), n) e p).

<sup>92</sup> Ibid, Article 21 (1).

<sup>93</sup> Ibid, Article 22 (4).

<sup>94</sup> Data processing as dealt with in Article 27 (1) and (5) of the Act on the Protection of Personal Data.

<sup>95</sup> Ibid, Article 29.

<sup>96</sup> The official conversion rate of the Portuguese escudo to Euro is 1 Euro=200.482 PTE (as from January 1999).

<sup>97</sup> Ibid, Article 28, establishes situations in which prior authorisation from the Portuguese Data Protection Authority is missing.

a minimum fine of PTE 100,000\$00 and a maximum of PTE 1,000,000\$00, namely regarding:

- (a) informing the Portuguese Data Protection Authority of the appointment of a representative which replaces it in its rights and duties without jeopardizing its own duties, on behalf of a controller who is not established on European Union territory and who for purposes of processing personal data makes use of equipment, computerised or otherwise, situated on Portuguese territory, unless such equipment is used only for purposes of transit through the European Union<sup>98</sup>;
- (b) the observance of these obligations conforms to Articles 5 (Data Quality), 10 (Right to Information), 11 (Right of Access), 12 (Data subject's right to object), 13 (Automated individual decisions), 15 (Special security measures), 16 (Processing by a subcontracted processor) and 31 (Publicising processing operations). Other penalties:
  - (i) Article 38 (2) in the Act establishes that the penalty shall be increased to double the maximum in the case of failure to comply with the obligations in Articles 6 (Criteria for making data processing legitimate), 7 (The processing of sensitive data), 8 (Suspicion of illegal activities, criminal and administrative offences), 9 (Combination of personal data), 19 and 20 (Transfer of personal data to a country outside the EU).
  - (ii) Where infractions are committed, the Act on the Protection of Personal Data establishes that if the same fact constitutes a crime as well as an administrative offence simultaneously, the agent is always punished for the crime; the punishment for the administrative offence is always added on materially.<sup>99</sup>
  - (iii) Negligence is always punishable for the administrative offences as laid down in Article 38 (quoted above) and attempted administrative offences as stipulated in Articles 37 and 38 mentioned above.<sup>100</sup>

In acting upon the prior deliberation of the Portuguese Data Protection Authority, it falls to the Chairperson of the Authority to apply the fines as specified, where the deliberation is enforced, provided it is not challenged within the statutory period.<sup>101</sup>

Together with the fine that is applied, additional penalties may be ordered in accessory, as per the terms relevant to the sentences.

#### **Legal basis:**

Act on the Protection of Personal Data, Chapter VI, Administrative and jurisdictional protection, Section III, Crimes, Articles 35 to 42 and 49. Note that there are laws dealing with processing personal data which refer back to the Act on the Protection of Personal Data when dealing with administrative offences.<sup>102</sup>

#### **Type of procedure: civil/criminal/administrative/data protection authority/ alternative mechanism**

Administrative Offence cases

#### **Possibilities of appeal: 2nd, 3rd and further instances**

The fines applied by the Portuguese Data Protection Authority are liable to be disputed by the court in terms laid down in the General System of Administrative Offences (*Regime Geral das Contra-Ordenações*), Decree-Law No, 433/82 of 27 October.<sup>103</sup> The appeal is made in writing and presented to the administrative authority that has applied the fine within a

<sup>98</sup> Ibid, Article 4 (3c).

<sup>99</sup> Ibid, Article 39 (1) e (2).

<sup>100</sup> Ibid, Article 40 (1) e (2).

<sup>101</sup> Ibid, Article 41 (1) e (2).

<sup>102</sup> See. Law No. 33/99 of 18 May, Article 47 (1) and Law No. 5/2008 of 12 February.

<sup>103</sup> The General System on Administrative Offences, Decree-Law No, 433/82 of 27 October (<http://dre.pt/pdf1sdip/1982/10/24900/35523563.pdf>) has been changed several times, the last time by Law No. 109/2001 of 24 December, Article 59 (1). <http://dre.pt/pdf1sdip/2001/12/296A00/84108410.pdf>



deadline of 20 days after the plaintiff knows the sentence.<sup>104</sup> Once the appeal has been received, within a term of five days, the administrative authority has to send the report to the Public Prosecutor's Office which then forwards it to the judge, whereby this act becomes an indictment.<sup>105</sup> The judge decides upon the case by scheduling a hearing or by simply issuing an order when an audience is deemed unnecessary to the trial and when the plaintiff or the Public Prosecutor's Office fail to raise objections. The order may demand that the case be dismissed, acquitted or upheld, or the sentence changed. In the event that the sentence is upheld or changed, the judge has to justify his decision, as much with regard to the facts as to the applicable law and the circumstances determining the punishment. In the event of acquitting the plaintiff, the judge has to state why he considered the facts unproven or why they failed to constitute an administrative offence.<sup>106</sup>

A sentence or a court order may be appealed: when the plaintiff has to:

- (i) pay a fine of more than Euros 249.40;
- (ii) when the sentence includes additional penalties;
- (iii) when the plaintiff has been acquitted;
- (iv) when the case is dismissed where the administrative authority has levied a fine of more than Euros 249.40 or where the fine has been demanded by the Public Prosecutor's Office;
- (v) when the court's review has been rejected;
- (vi) when the court has come to a decision by means of an order despite the appellant having opposed such a move.

Apart from these cases, and upon an application made by the plaintiff or the Public Prosecutor's Office, the higher court may accept the sentence appeal when there is a clear indication that the application of the law or the standardisation of jurisprudence needs to be improved.<sup>107</sup> The appeal follows the normal channels of an appeal in a penal process, taking into account the special conditions referred to in Decree-Law No. 433/82.<sup>108</sup> If the outcome does not contradict this law, the Court of the 2nd instance will only deal with matters of the law whereby there is no possibility of appealing against its decisions.<sup>109</sup>

It should be pointed out that the court is not bound to assess a fact as an administrative offence; it may officially convert the case into a criminal lawsuit or do so at the request of the Public Prosecutor's Office,. The conversion demands that the Instance be stopped and an inquiry opened, taking advantage as much as possible of the proof already produced.<sup>110</sup>

### **Burden of proof: please list what the complainant needs to prove**

The complainant is not required to present proof. He merely has to disclose the facts that are considered as a breach of personal data. It is the duty of the Portuguese Data Protection Authority to investigate the fact brought to light, in conformity with the Authority's powers of investigation and the inquiry already mentioned above. The case may be heard within this framework. It should be noted that complaints/ grievances, claims and petitions are not subject to any special formality but only need to be in writing and contain the name and the addresses of their authors. A confirmation of their identity may be called for, if not already requested confidentially.<sup>111</sup>

### **Available mechanism to lower the burden of proof: for example presumption of fact or reversal of the burden of proof or lump sum compensation arrangement etc.**

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<sup>104</sup> Ibid, Article 59 (3).

<sup>105</sup> Ibid, Article 62 (1).

<sup>106</sup> Ibid, Article 64.

<sup>107</sup> Ibid, Article 73.

<sup>108</sup> Ibid, Article 74 (4).

<sup>109</sup> Ibid, Article 75 (1).

<sup>110</sup> Ibid, Article 76.

<sup>111</sup> Law 43/2004 of 18 August, Law on the Portuguese Data Protection Authority Organisation and Functioning, Articles 17 and 18. <http://dre.pt/pdf1sdip/1982/10/24900/35523563.pdf>

See the answer in the point given above.

**Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?**

The law does not stipulate any particular requirements for presenting complaints/grievances.

**Is there free legal advice/representation available from a public body (please specify the public body)?**

In terms of the Act on the Protection of Personal Data, it falls to the Portuguese Data Protection Authority to:

- (i) pass on any request made by any person or association that represents the person/party;
- (ii) protect his/her rights and freedoms as regards personal data processing;
- (iii) inform him/her as to the outcome.
- (iv) check whether any illegality has been committed in the data processing, upon receiving the request of any person, whenever processing is subject to limited access or disclosure;
- (v) inform the person that verification has indeed been made.<sup>112</sup>

**Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?**

As has already been mentioned, the Portuguese Data Protection Authority has the power to intervene in court cases where the provision laid down in the Act on the Protection of Personal Data has been infringed. It is its duty to inform the Public Prosecutor's Office about the criminal violations that have come to its knowledge when pursuing its duties or in line with such duties. The Authority's representation in court is handled by the Public Prosecutor's Office.<sup>113</sup>

With regard to the organisations in civil society, the information is the same as in *Ad redress mechanism Number 1.1*.

**Cost of procedure: please provide information on the average cost of the procedure**

There is no cost entailed with presenting a complaint/claim. The Portuguese Data Protection Authority is exempt from paying costs in any the cases in which it is involved.

**Average duration of procedure: please provide available information.**

No available information.

**Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011**

In terms of the Annual Report published by the Portuguese Data Protection Authority, in 2009 it applied 260 fines to the approximate value of Euros 540,000; in 2010 there were 248 fines to the approximate value of Euros 507,000.<sup>114</sup> There are no available data for 2011 as yet.

### Ad Redress Mechanism Number 3: access to data, fine, Portuguese Data Protection Authority

In this point, the question of personal data accessed by the subject himself/herself, and not a third party, is dealt with. The undue access to these data by a third party is covered in Article

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<sup>112</sup> Ibid, Article 23 (1) i) and j).

<sup>113</sup> Ibid, Article 22 (5) and (6).

<sup>114</sup> <http://www.cnpd.pt/bin/relatorios/anos/relat2009.pdf>  
<http://www.cnpd.pt/bin/relatorios/anos/relat2010.pdf>

44 of the Act on the Protection of Personal Data and constitutes a crime as has already been explained in *Ad Redress Mechanism Number 1.2*.

Every citizen has the right to access to all computerised data that concern him/her, and he/she may require that they be corrected and updated, and that he/she be informed as to the purpose for which such data are intended, as laid down by Portuguese law and enshrined as a fundamental right in the Constitution.<sup>115</sup>

With respect to this provision, Article 11(1) of the Act on the Protection of Personal Data, states that: “the data subject has the right to obtain from the controller without constraint at reasonable intervals and without excessive delay or expense:

(a) Confirmation as to whether or not data relating to him/her are being processed and information as to the purposes of the processing, the categories of data concerned and the recipients or categories of recipients to whom the data are disclosed;

(b) Communication in an intelligible form of the data undergoing processing and of any available information as to their source;

(c) Knowledge of the rationale involved in any automatic processing of data concerning him/her;

(d) The correction, erasure or blocking of data when the processing does not comply with the provisions of this Act, in particular because of the incomplete or inaccurate nature of the data;

(e) Notification to third parties to whom the data have been disclosed about any corrections, erasures or blocking that has been done in compliance with (d), unless this proves impossible.

When personal data processing relates to State security and criminal prevention or investigation, the right of access may be exercised by means of the Portuguese Data Protection Authority or another independent authority in which the law vests verification of compliance with legislation as regards the protection of personal data.<sup>116</sup> If data processing is solely for journalistic purposes or the purpose of artistic or literary expression<sup>117</sup>, the right of access is exercised by means of the Data Protection Authority. Access is based on the applicable Constitutional rules, in particular the rules guaranteeing freedom of expression and information, freedom of the press and the right to professional independence and journalists’ confidentiality.<sup>118</sup> If the data is diffused in these two situations, thereby jeopardising the State’s security, criminal prevention, the investigation and freedom of expression and information or the freedom of the press, the Data Protection Authority need only inform the data subject of the measures taken.<sup>119</sup>

The right of access to information relating to health data, including genetic data, is exercised by means of the doctor chosen by the data subject.<sup>120</sup>

If the data are not used for taking measures or decisions regarding any particular individual, the law may restrict the right of access where:

(i) there is clearly no risk of breaching the data subject’s fundamental rights, freedoms and guarantees, particularly the right to privacy;

(ii) the data are used solely for purposes of scientific research;

(iii) the data are kept in personal form for a period which does not exceed the period necessary for the sole purpose of establishing statistics.<sup>121</sup>

It falls to the Portuguese Data Protection Authority to:

(i) ensure the right of access to information and the exercise of the right to correct and update data;

(ii) authorise the establishment of costs or frequency for exercising the right of access;

(iii) establish the maximum periods for compliance in each sector of activity with the obligations which are incumbent upon the controller for processing personal data.<sup>122</sup>

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<sup>115</sup> The Constitution of the Portuguese Republic, Article 35 (1).

<sup>116</sup> Act on the Protection of Personal Data, Article 11 (2).

<sup>117</sup> Ibid, Article 10 (6).

<sup>118</sup> Ibid, Article 11 (3).

<sup>119</sup> Ibid, Article 11 (4).

<sup>120</sup> Ibid, Article 11 (5).

<sup>121</sup> Ibid, Article 11 (6).

Apart from the Act on the Protection of Personal Data, several other laws recognise the data subject's right of access to his/her data. We refer namely to:

- Law No. 12/2005 of 26 January about personal genetic data and health data<sup>123</sup>
- Law No. 51/2006 of 29 August that rules on using electronic surveillance systems on motorways<sup>124</sup>
- Law No. 7/2007 of 5 February that establishes the citizen's card and rules on its issue and use<sup>125</sup>
- Law No. 34/2009 of 14 July that establishes the legal system applicable to data processing in the judiciary system.<sup>126</sup>

All these laws generally refer back to the Act on the Protection of Personal Data.

**Range of possible outcomes (for example fine up to Euro 1000)**

The Act on the Protection of Personal Data stipulates that failing to abide by the obligations established in the above mentioned articles, constitutes an administrative offence punishable with a minimum fine of PTE 100,000 going to a maximum of PTE 1,000,000.<sup>127</sup>

**Legal basis: (for example section XX of data protection act)**

Law No. 67/98 of 26 October, The Act on the Protection of Personal Data, Chapter IV, Administrative and jurisdictional protection, Section II, Administrative Offences, Article 38 (1) b)..

**Type of procedure: civil/criminal/administrative/data protection authority/ alternative mechanism**

Administrative Offence cases.

**Possibilities of appeal: 2nd, 3rd and further instances**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Burden of proof: please list what the complainant needs to prove**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Available mechanism to lower the burden of proof: for example presumption of fact or reversal of the burden of proof or lump sum compensation arrangement etc.**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Is there free legal advice/representation available from a public body (please specify the public body)?**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Cost of procedure: please provide information on the average cost of the procedure**

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<sup>122</sup> Ibid, Article 23 (1) g) e h).

<sup>123</sup> Law No. 12/2005, Articles 3, 6 (9). See: <http://www.cnpd.pt/bin/legis/nacional/Lei12-2005.pdf>

<sup>124</sup> Law No. 51/2006, Article 19. <http://dre.pt/pdf1sdip/2006/08/16600/62746278.pdf>

<sup>125</sup> Law No. 7/2007, Article 39. <http://dre.pt/pdf1sdip/2007/02/02500/09400948.pdf>

<sup>126</sup> Law No. 34/2009, Article 36. <http://dre.pt/pdf1sdip/2009/07/13400/0446704481.pdf>

<sup>127</sup> Act on the Protection of Personal Data, Article 38 (1) b).

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Average duration of procedure: please provide available information.**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011**

Please see this point as referred to in *Ad Redress Mechanism Number 4*

## Ad Redress mechanism number 4: fines, ICP-ANACOM

The Portuguese Communications Institute – Portuguese Communications Authority<sup>128</sup> (*Autoridade Nacional de Comunicações*, ICP-ANACOM) is a collective person subject to public law: It enjoys administrative and financial independence and has its own heritage which has the aim of ruling on, supervising and representing the communications sector.<sup>129</sup>

Within the sphere of its powers to regulate and supervise, the ICP-ANACOM monitors compliance with the law and applicable regulations in the communications sector, initiates and follows up cases involving sanctions and punishes infractions within its jurisdiction.<sup>130</sup>

The ICP-ANACOM duties are to:

- (i) regularly inspect the complaints book and the consumers' claims as well as those entered by other users submitted to the concessionaries or licensed entities, which should upkeep due records of the same;
- (ii) order an investigation into the complaints or claims from consumers and users, submitted to the appropriate concessionary or licensed entities or directly to the regulatory authority itself, as long as they are within the scope of its jurisdiction;
- (iii) open a case involving an administrative offence if the ICP-ANACOM finds evidence that the law has been broken; the case may terminate in the application of a fine to the service provider in cause.<sup>131</sup> If this measure fails to solve the conflict that was the cause of the complaint, or fails to impose on the service provider any concrete obligations, mainly compensation in lieu of damages eventually suffered, the complainants should address themselves to the service providers for the purpose redress. In the case of on-going conflict, they should seek a consumer arbitration<sup>132</sup> or court arbitration;<sup>133</sup>
- (iv) recommend or decide that the concessionaries or licensed entities take the measures deemed necessary to redress the users' justifiable complaints.<sup>134</sup> The violation of personal data is included in the consumers' complaints, as explained in the notes to the table *Mapping of Redress mechanisms in the area of data protection*;

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<sup>128</sup> <http://www.anacom.pt>

<sup>129</sup> Statute of the Portuguese Communications Institute – Portuguese Communications Authority (ICP-ANACOM), annexed to Decree-Law No. 309/2001 of 7 December, Article 1. <http://www.dre.pt>

<sup>130</sup> Ibid, Article 9.

<sup>131</sup> Source: Written information transmitted by ICP-ANACOM.

<sup>132</sup> Consumer Arbitration is arbitration of an institutionalised nature promoted by non-profit making private associations. They have set up Arbitration Centres that seek to settle consumer conflicts connected with purchasing goods and services in establishments situated in their respective geographical locality. Law No. 61/2011 of 10 March which changed Law No. 23/96 of 26 July concerning the basic public services, set up an arbitration mechanism that was needed for the users of basic public services to gain access to the law courts. Article 15 states that these conflicts require arbitration when it is the express wish of single-party users to submit them for the appreciation of the court's arbitration in the centres solving conflicts about legally authorised consumption. When the parties enter into conflict due to a basic public service, and choose to settle out of court, the deadline for filing a lawsuit or an injunction no longer holds. See: <http://www.anacom.pt/render.jsp?contentId=1099318>

<sup>133</sup> Source: Written information transmitted by ICP-ANACOM OM.

<sup>134</sup> Source: Written information transmitted by ICP-ANACOM and according to Article 16 of the Statute annexed to Decree-Law No. 309/2001, mentioned above.

- (v) share powers ruling over administrative offences with the Portuguese Data Protection Authority in the sphere of personal data processing and the protection of privacy in the electronic communications sector.<sup>135</sup>

### **Range of possible outcomes**

This section concerns recommendations to service suppliers, filing administrative offence cases and applying fines. The fines vary according to the respective administrative offence and range between a maximum and a minimum fine.

- (i) Minimum fine of 1,500 Euros, maximum fine of 25,000 Euros for:
- cases based on the failure to abide by security rules imposed by Law No. 41/2004, Article 3 (Security)
  - the violation of duties as laid down in Article 4 (1) and (2) (Inviolability of electronic communications) in the same Law..
- (ii) Minimum fine of 500 Euros, maximum fine of 20,000 Euros for:
- cases where the administrative offence has infringed Law No. 41/2004, Article 8 (1) (Itemised invoice);
  - Article 9 (Identification of the calling line and the connect line) in the same Law;
  - Article 10 (3) to (6) (Exceptions) in the same Law;
  - Article 11 (Automatic call forwarding) in the same Law.
- (iii) Minimum fine of 5,000 Euros, maximum fine of 5,000,000 Euros for:
- an administrative offence committed by a collective party breaching Arts 3 and 4 (1) and (2) of Law No. 41/2004.
- (iv) Minimum fine of 2,500 Euros, maximum fine of 2,500,000 Euros for:
- a breach against Articles 8 (1), 9, 10 (3) to (6) and 11 of the same Law.<sup>136</sup>

### **Legal basis:**

Law No. 41/2004 of 18 August, which transposes European Parliament and Council Directive 2002/58/CE of 12 July into Portuguese law; it deals with personal data processing and the protection of privacy in electronic communications, Chapter III, System of Penalties, Article 14, Administrative Offences (1) a) and b), (2) b), (3) and (4), Article 15, Processing and application of fines(2), (3) and (4), and Article 16, Secondary Legislation.<sup>137</sup>

### **Type of procedure: civil/criminal/administrative/data protection authority/ alternative mechanism**

Administrative offence cases or criminal cases, if the Court converts the case into a criminal charge officially or at the request of the Public Prosecutor's Office.<sup>138</sup>

### **Possibilities of appeal: 2nd, 3rd and further instances**

The decision of the administrative authority which applies a fine is liable to review by a judicial court.<sup>139</sup> The appeal is made in writing and is presented to the administrative authority which has levied the fine, within a deadline of 20 days after the plaintiff has received the information; it should contain allegations and conclusions.<sup>140</sup> After the appeal has been received, the administrative authority has 5 days to send it to the Public Prosecutor's Office, which will then place it before the judge whereby it now becomes an indictment.<sup>141</sup> It should

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<sup>135</sup> Law No. 41/2004 of 18 August, Article 15.

<sup>136</sup> Ibid, Article 14 (1) a) and b), (2) b) and 3.

<sup>137</sup> Ibid. Article 16 states that everything that is not laid down in Law No. 41/2004 is applicable to the provisions in Nos. 33 to 39 of the Act on the Protection of Personal Data.

<sup>138</sup> Article 76 (1) of the General Regimen for Administrative Offences (*Regime Geral das Contra-Ordenações*). Decree-Law No. 433/82 of 27 October.

[http://www.pgdlisboa.pt/pgdl/leis/lei\\_mostra\\_articulado.php?nid=166&tabela=leis](http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=166&tabela=leis)

<sup>139</sup> Ibid, Article 53 (2).

<sup>140</sup> Ibid, Article 59.

<sup>141</sup> Ibid, Article 61 (1).

be pointed out that the court is not bound to make an appreciation of the case as an administrative offence, and it may be converted into a criminal case pending official decision or at the request of the Public Prosecutor's Office. The conversion means that the court case is interrupted and an inquiry launched, whereby the proof already produced is used as far as possible.<sup>142</sup>

The judge decides on the case by requesting a court hearing or by simply issuing an order when a court hearing is deemed unnecessary and the plaintiff or the Public Prosecutor's Office do not raise objections. The order may demand that the case be dismissed, acquitted or upheld or that the sentence be changed. In the event that the sentence is upheld or changed, the judge has to substantiate his decision, as much with regard to the facts as to the applicable law and the circumstances determining the punishment. In cases involving acquittal, the judge should explain why he considered the facts unproven or why they failed to constitute an administrative offence.<sup>143</sup>

A sentence or a court order may go to a higher court to be appealed when:

- (a) the plaintiff has to pay a fine of more than Euros 249.40;
- (b) the sentence includes additional penalties;
- (c) the plaintiff has been acquitted or the case dismissed where the administrative authority has levied a fine of more than Euros 249.40 or where the fine has been demanded by the Public Prosecutor's Office;
- (d) the court's review has been rejected;
- (e) the court has decided by means of issuing a court order despite the appellant having opposed such a move.

Apart from these cases, and upon an application made by the plaintiff or the Public Prosecutor's Office, the higher court may accept the appeal of the sentence whenever there is a clear indication that applying the law or standardising jurisprudence needs improving.<sup>144</sup> The appeal would follow the normal channels of an appeal in a criminal case bearing in mind the special conditions as a result of Decree-law No. 433/82.<sup>145</sup> If, on the other hand, there is no outcome on the basis of this law, the court of the 2<sup>nd</sup> instance may only proceed on the knowledge of the law. No appeal can be lodged against its decisions.<sup>146</sup>

**Burden of proof: please list what the complainant needs to prove**

The complainant need not present any proof but need only indicate the facts that are necessary to assess a claim. It falls to the ICP-ANACOM to investigate the facts referred to while pursuing its duties that include investigation and inquiry.

**Available mechanism to lower the burden of proof: for example presumption of fact or reversal of the burden of proof or lump sum compensation arrangement etc.**

Not applicable due to what has been said in the previous point.

**Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?**

In the complaint/claim the role of the complainant is mainly to present the claim. Nevertheless, in the case's instruction phase he may be asked to testify or provide information whenever deemed necessary for fact finding.

Within the framework of eventually presenting the complaint to an Arbitration Centre, the case needs to be substantiated by the complainant and all the documents that have been

<sup>142</sup> Ibid, Article 76 .

<sup>143</sup> Ibid, Article 64.

<sup>144</sup> Ibid, Article 73.

<sup>145</sup> Ibid, Article 74 (4).

<sup>146</sup> Ibid, Article 75 (1).

requested by the Centre need to be handed in, namely the contract proving the acquisition of the service, should there be one.<sup>147</sup>

**Is there free legal advice/representation available from a public body (please specify the public body)?**

This question is not pertinent as regards the complaint.

**Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?**

Please see this point as referred to in *Ad Redress Mechanism Number 2*

**Cost of procedure: please provide information on the average cost of the procedure**

Filing a complaint does not give rise to any cost.

**Average duration of procedure: please provide available information.**

No information made available in due time.

**Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011**

According to the written information provided by the ICP-ANACOM, in the period referred to, no administrative offences were filed in terms of breaking the laws covering matters falling under ICP-ANACOM's surveillance.

## Ad Redress Mechanism Number 5: fine plus additional penalty, Authority for Working Conditions (ACT)

The Labour Code (*Código do Trabalho*) states that computerised files and accesses used by the employer to process personal data are subject to the laws in effect that cover personal data processing.<sup>148</sup> Therefore, it falls to the Portuguese Data Protection Authority to apply fines in this domain. The Labour Code also refers to the fact that the employer may only start processing the worker's biometric data after the Portuguese Data Protection Authority has been duly notified.<sup>149</sup> The use of distance surveillance at the workplace needs the Authority's express permission.<sup>150</sup>

Nevertheless, the Labour Code has other provisions about data protection where the competent authority applying fines is the Authority for Working Conditions<sup>151</sup> (*Autoridade para as Condições do Trabalho*, ACT). The Authority for Working Conditions is a department in the Ministry of Economy and Employment; its mission<sup>152</sup> is namely to promote improved better working conditions by seeing to it that labour rules and regulations are complied with.<sup>153</sup> The Authority for Working Conditions receives and investigates complaints that have been sent to it mainly by electronic messages.

**Range of possible outcomes (for example fine up to Euro 1000)**

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<sup>147</sup>[http://www.portaldocidadao.pt/PORTAL/entidades/MJ/GRAL/pt/SER\\_arbitragem+institucionalizada++consumo.htm#TOPO](http://www.portaldocidadao.pt/PORTAL/entidades/MJ/GRAL/pt/SER_arbitragem+institucionalizada++consumo.htm#TOPO)

<sup>148</sup> Labour Code, Article 17 (4). <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>

<sup>149</sup> Ibid, Article 18 (1).

<sup>150</sup> Ibid, Article 21 (1) e (2).

<sup>151</sup> <http://www.act.gov.pt/%28pt-PT%29/Paginas/default.aspx>

<sup>152</sup> Decree Law No. 326-B/2007 of 28 September, Article 2:

<http://dre.pt/pdf1sdip/2007/09/18801/0000500010.pdf>

<sup>153</sup> The Ministry of Economy and Employment Organic Law (*Lei Orgânica do Ministério da Economia e do Emprego*) as in Decree-Law No. 126-C/2011 of 29 December, Article 15.



The Labour Code states that a variable fine is applied in conformity with the scale of seriousness of the administrative offences in the field of labour and according to the firm's volume of business and the degree of the law-breaker's culpability.<sup>154</sup>

- (i) The following cases are classed as very serious administrative offences; here, the Labour Code rules have been disrespected<sup>155</sup>:
- personal data protection about the worker's or prospective worker's private life, state of health or pregnancy<sup>156</sup>;
  - medical tests and exams demanded by the employer when it is not sanctioned by the law, and mainly pregnancy tests in order for the prospective worker to gain admittance to the firm or keep his/her job.<sup>157</sup>;
  - using distance surveillance at the workplace resorting to technological equipment that aims at monitoring the worker's performance on the job.<sup>158</sup>
- (ii) A serious administrative offence includes<sup>159</sup>:
- filing biometric data above and beyond the period needed to process such data for the purpose intended and failure to destroy them when the worker is transferred to another workplace or when the labour contract expires<sup>160</sup>;
  - preserving personal data collected by means of distance surveillance above and beyond the period needed to process such data for the purpose intended, and failure to destroy them when the worker is transferred to another workplace or when the labour contract expires.<sup>161</sup>
- (iii) A non-serious administrative offence<sup>162</sup> involves:
- failure to inform the worker that distance surveillance legally exists and is used for the purpose of protecting the safety of people and goods.<sup>163</sup>

The minimum and maximum limits of fines where very serious offences have been committed are as follows:

- (a) if committed by a firm which has a volume of business of less than 500,000 Euros, the fine is between 20 to 40 Units of Account (UC) in the event of negligence, and between 45 and 95 UC if committed with intent;
- (b) if committed by an enterprise with a volume of business equal to or more than 500,000 Euros but less than 2,500,000 Euros, the fine is set at between 32 and 80 UC in the event of negligence, and between 85 and 190 UC if committed with intent;
- (c) if committed by an enterprise with a volume of business equal to or more than 2,500,000 Euros but less than 5,000,000 Euros, the fine is set at between 42 and 120 UC in the event of negligence, and between 120 and 280 UC if committed with intent;
- (d) if committed by an enterprise with a volume of business equal to or more than 5,000,000 Euros but less than 10,000,000 Euros, the fine is between 55 and 140 UC in the event of negligence, and between 145 and 400 UC if committed with intent;
- (e) if committed by an enterprise with a volume of business equal to or more than 10,000,000 Euros, the fine is between 90 and 300 UC in the event of negligence, and between 300 and 600 UC if committed with intent.<sup>164</sup>

The minimum and maximum limits of fines where serious offences have been committed are as follows:

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<sup>154</sup> Ibid, Article 554 (1). The scales of seriousness for administrative offences range from very serious, to serious to non-serious.

<sup>155</sup> Ibid, Articles 17 (5), 19 (4) and 20 (4).

<sup>156</sup> Ibid, Article 17 (1) e (2).

<sup>157</sup> Ibid, Article 19 (1) and (2).

<sup>158</sup> Ibid, Article 20 (1).

<sup>159</sup> Ibid, Article 18 (5) and 21 (5).

<sup>160</sup> Ibid, Article 21 (3).

<sup>161</sup> Ibid, Articles 18 (3).

<sup>162</sup> Ibid, Article 20 (4).

<sup>163</sup> Ibid, Article 20 (3).

<sup>164</sup> Ibid, Article 554 (4).

- (a) if committed by a firm which has a volume of business less than 500,000 Euros, the fine is between 6 to 12 Units of Account (UC) in the event of negligence, and between 13 and 26 UC if committed with intent;
- (b) if committed by an enterprise with a volume of business equal to or more than 500,000 Euros but less than 2,500,000 Euros, the fine is set at between 7 and 14 UC in the event of negligence, and between 15 and 40 UC if committed with intent;
- (c) if committed by an enterprise with a volume of business equal to or more than 2,500,000 Euros but less than 5,000,000 Euros, the fine is set at between 10 and 20 UC in the event of negligence, and between 21 and 45 UC if committed with intent;
- (d) if committed by an enterprise with a volume of business equal to or more than 5,000,000 Euros but less than 10,000,000 Euros, the fine is between 12 and 25 UC in the event of negligence, and between 26 and 50 UC if committed with intent;
- (e) if committed by an enterprise with a volume of business equal to or more than 10,000,000 Euros, the fine is between 15 and 40 UC in the event of negligence, and between 55 and 95 UC if committed with intent.<sup>165</sup>

The minimum and maximum limits of fines where non-serious offences have been committed are as follows:

- (a) if committed by an enterprise with a volume of business less than 10,000,000 Euros, the fine is between 2 and 5 UC in the event of negligence, and between 6 and 15 UC if committed with intent;
- (b) if committed by an enterprise with a volume of business equal to or more than 10,000,000 Euros, the fine is between 6 and 9 UC in the event of negligence, and between 10 and 15 UC if committed with intent.<sup>166</sup>

The Unit of Account is currently valued at 102 Euros.<sup>167</sup>

In the event of a very serious administrative offence or a serious repeat offence committed with intent or gross negligence, the agent is given an additional penalty involving a public warning. In the event of a repeated very serious administrative offence, under certain circumstances the law lays down that additional penalties are compounded in the form of banning the activity carried out in the enterprise, the factory or the yard in which the infraction was committed for a period of up to two years, as well as forfeiting the right to take part in public auctions or bidding.<sup>168</sup>

**Legal basis: (for example section XX of data protection act)**

Labour Code, Book II, Chapter II, Administrative Offence Liability, Articles 548 to 566 *ex vi* Book I, Title II, Chapter I, Section II, Subsection II, Rights to Personality, Articles 17 (5), 18 (5), 19 (4), 20 (4) and 21 (5). Procedural System Applicable to Administrative Labour and Social-Welfare Offences, Law No. 107/2009 of 14 September, Chapter I, Object, sphere and powers, Article 2 (1) a) and Chapter IV, Normal Legal Channels, Section I of the Administrative Stage, Articles 13 to 31.

**Type of procedure: civil/criminal/administrative/data protection authority/ alternative mechanism**

Procedures for Administrative Offences.<sup>169</sup>

<sup>165</sup> Ibid, Article 554 (3).

<sup>166</sup> Ibid, Article 554 (2).

<sup>167</sup> Rules on court costs, Decree-Law No. 34/2008 of 26 February, Article 22. The 2012 State Budget Law (Law 64-B2011 of 30th December 2011) defined the conversion of each UC into 102 Euros (for 2012).

<sup>168</sup> Ibid, Article 562 (1) e (2).

<sup>169</sup> Law No. 107/2009 of 14 September, Procedural System Applied to Labour and Social Welfare Administrative Offences (*Regime Processual Aplicável às Contra-Ordenações Laborais e da Segurança Social*) available at <http://dre.pt/pdf1sdip/2009/09/17800/0625506263.pdf>. According to Article 2 (1), administrative labour offence procedure falls to the Authority for Working Conditions (ACT) when there are administrative labour violations of the rules that enshrine rights or impose duties on any subject in the sphere of labour relations. Such offences are punishable by paying a fine. See:

### **Possibilities of appeal: 2nd, 3rd and further instances**

Based upon the decision of the administrative Authority for Working Conditions (ACT),, applying a fine is liable to judicial review.<sup>170</sup> The judicial review is sent to the competent Labour Court and should contain allegations, conclusions and an indication of the burden of proof.<sup>171</sup> The judicial review is presented to the administrative authority that had issued the decision to apply the fine within 20 days after having received notification.<sup>172</sup> Once the administrative authority has received this review, it sends reports to the Public Prosecutor's Office within a deadline of ten days, and if so wished, may present its own allegations.<sup>173</sup>

It is also possible to seek redress for the sentence or a court order in a higher court when:

- (a) the plaintiff faces paying a fine higher than 25 UC or the equivalent;
- (b) when the penalty received by the plaintiff also includes additional penalties;
- (c) when the plaintiff is acquitted or the case is dismissed in the event that the competent administrative authority has levied a fine of more than 25 UC or the equivalent or when the fine has been claimed by the Public Prosecutor's Office;
- (d) when the judicial review is rejected;
- (e) when the court decides by means of a court order notwithstanding the disagreement of the appellant.

Apart from these cases, the higher court may, upon the request of the plaintiff or the Public Prosecutor's Office, accept the need for a decision when such a procedure is deemed necessary for improving the application of the law or when it helps to standardise jurisprudence.<sup>174</sup>

Higher court decisions may not give rise to any appeal.<sup>175</sup>

### **Burden of proof: please list what the complainant needs to prove**

Although the case involving an administrative offence during the administrative stage may be initiated with a suit filed by any worker or organisation representing the workers, it is the Authority for Working Conditions that has to investigate the reported facts. In the event that a judicial dispute arises from the administrative authority's decision, the latter should provide allegations, conclusions and an indication of the burden of proof.

### **Available mechanism to lower the burden of proof: for example presumption of fact or reversal of the burden of proof or lump sum compensation arrangement etc.**

This point is not pertinent due to the contents of the previous point.

### **Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?**

Filing a complaint is not subject to any other requirement.

### **Is there free legal advice/representation available from a public body (please specify the public body)?**

In agreement with the rules governing the Authority for Working Conditions, it is the duty of this body to provide legal information. As far as the Authority's intervention in the court case is concerned, see the following point.

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[http://www.pgdlisboa.pt/pgdl/leis/lei\\_mostra\\_estrutura.php?tabela=leis&Article\\_id=&nid=1154&nversao=&tabela=leis](http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_estrutura.php?tabela=leis&Article_id=&nid=1154&nversao=&tabela=leis)

<sup>170</sup> Ibid, Chapter IV, Section II, Legal stage, Article 32.

<sup>171</sup> Ibid, Article 33 (1).

<sup>172</sup> Ibid, Article 33 (2).

<sup>173</sup> Ibid, Article 36 (1). In conformity with number (2), until the records are sent, the competent administrative authority may fully or partially revoke the decision to levy a fine or an additional penalty.

<sup>174</sup> Ibid, Article 49 (1) e (2).

<sup>175</sup> Ibid, Article 51 (1).

**Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?**

In terms of the Procedural System Applicable to Administrative Labour and Social-Welfare Offences (*Regime Processual Aplicável às Contra-Ordenações Laborais e da Segurança Social*), the Court informs the Authority for Working Conditions (ACT) about the date of the hearing, should the latter wish to attend and take part in it. A written statement from the Authority for Working Conditions is required after the Public Prosecutor's Office has received notification that a case has been dismissed or acquitted, or that the sentence has been changed. The statement should be sent, within six days of this notification in order to draw up an eventual appeal.<sup>176</sup>

Where the organisations representing civil society are concerned, the trade unions have the right to file a suit, and take part in legal cases and in administrative procedures in order to protect their members' interest in terms of the law.<sup>177</sup> Within the framework of the Procedural System Applicable to Administrative Labour and Social-Welfare Offences mentioned above, trade unions representing the workers against whom administrative offences have been allegedly committed, may be considered assistants in the case.<sup>178</sup> In being constituted as an assistant, the necessary adaptations of the provisions laid down in the Code of Criminal Procedure have to be made.<sup>179</sup>

**Cost of procedure: please provide information on the average cost of the procedure**

No costs are involved in constituting assistants in cases involving the normal course of procedure during the administrative stage of an alleged administrative offence.<sup>180</sup>

**Average duration of procedure: please provide available information.**

As has been mentioned above, no disaggregated data are available about the average duration of cases based on illegal acts involving personal data protection. According to the Portuguese Directorate-General for Justice Policy, the average duration of work-related cases in 2010 was about 12 months.<sup>181</sup>

**Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011**

Information not available

**Ad Redress mechanism number 6: recommendations, Ombudsman**

In terms of the Constitution, the Ombudsman is a government body where the person of the Ombudsman is elected to office by the Parliament (*Assembleia da República*, AR). His main duties are to defend and promote the rights, freedoms, guarantees and legitimate interests of citizens, ensuring through informal means, that public authorities act fairly and in compliance with the law.<sup>182</sup>

The activities of the Ombudsman focus namely on the activity of the services integrated in the central, regional and local public administration, the Armed Forces, public institutes, public companies or the companies whose capital is mostly public and the concessionaires operating public services or exploiting state property. The scope of activity of the Ombudsman may also

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<sup>176</sup> Ibid Article 45 (1, (2) e (3).

<sup>177</sup> Labour Code, Article 443 (1) d).

<sup>178</sup> Law No. 107/2009, Article 23 (1).

<sup>179</sup> Ibid, Article 23 (2).

<sup>180</sup> Ibid, Article 23 (3).

<sup>181</sup> Portuguese Directorate-General for Justice Policy – Numbers issued by the Official Justice Statistics. 2010, op.cit.

<sup>182</sup> Statute of the Ombudsman, Law No.9/91, op.cit., Article 1 (1).

include relations between persons in a special power relationship, within the scope of protection of rights, freedoms and guarantees.<sup>183</sup>

Citizens may refer complaints to the Ombudsman concerning actions or omissions by the public authorities. The Ombudsman examines such complaints and addresses the public bodies concerned, making recommendations where appropriate so as to prevent and redress injustices.<sup>184</sup>

The Ombudsman also acts on his own initiative, irrespective of the administrative and judicial redresses provided for in the Constitution and in the law.<sup>185</sup>

### **Range of possible outcomes**

It falls to the Ombudsman to:

- (i) address recommendations to the competent bodies with a view to redressing illegal or unfair acts carried out by public bodies, or enhance their respective services;
- (ii) point out shortcomings in the laws, issuing recommendations for interpreting, amending or revoking such laws or suggesting the drafting of new laws;
- (iii) promote the disclosure of the content and meaning of basic rights and freedoms.<sup>186</sup>
- (iv) explain the means at his disposal and how to make an appeal for his help;
- (v) protect collective or separate interests when public entities are involved and where applying the law is concerned.<sup>187</sup>
- (vi) dismiss complaints when they lie outside the Ombudsman's powers;
- (vii) dismiss complaints when he deems the complaint unfounded or where there are insufficient grounds warranting a case, or when the invoked illegality or unfairness has already been redressed.<sup>188</sup>;
- (viii) inform, as the case may be, either the Public Prosecutor's Office or the authority that is hierarchically competent to initiate disciplinary or administrative proceedings, whenever there is sufficient evidence that criminal, disciplinary or administrative offences have been committed during the course of the proceedings;
- (ix) decide to issue statements or to publish information concerning the conclusions reached in the proceedings whenever circumstances so require<sup>189</sup>;
- (x) communicate conclusions to the bodies or officials involved, and to the complainants when resulting from a complaint having been made.<sup>190</sup>

### **Legal basis: (for example section XX of data protection act)**

Statute of the Ombudsman, Law No.9/91 of 9 April, Chapter III, Mandate, Articles 20 to 23, and Chapter IV, Procedure, Articles 24 to 39.

### **Type of procedure: civil/criminal/administrative/data protection authority/ alternative mechanism**

The Ombudsman performs his duties either in response to complaints referred to him by citizens, both separately or jointly, or on his own initiative in response to facts that he becomes aware of by any other means. The complaints addressed to the Ombudsman do not depend either on the complainant's direct, personal and legitimate interest or on any time limits.<sup>191</sup>

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<sup>183</sup> Ibid, Article 2.

<sup>184</sup> Ibid, Article 3.

<sup>185</sup> Ibid, Article 4.

<sup>186</sup> Among the basic rights and freedoms are those which mainly ensure the right to privacy (Article 26) and the use of computer science and the protection of personal data (Article 35).

<sup>187</sup> Statute of the Ombudsman, Article 20 (1) (a), (b).

<sup>188</sup> Ibid, Article 31.

<sup>189</sup> Ibid, Article 35.

<sup>190</sup> Ibid, Article 38 (7).

<sup>191</sup> Ibid, Article 24.

A preliminary examination of the complaints are made with a view to deciding upon their admissibility; manifestly unfounded complaints or one that have been made in bad faith are dismissed immediately.<sup>192</sup>

Where it is established that a complaint has been lodged in bad faith, the Ombudsman forwards the matter to the Public Prosecutor's Office for a criminal proceeding to be initiated in accordance with the law.<sup>193</sup>

#### **Possibilities of appeal: 2nd, 3rd and further instances**

The Ombudsman's acts may not be appealed and they may only be the object of a complaint addressed to the Ombudsman himself.<sup>194</sup>

#### **Burden of proof: please list what the complainant needs to prove**

The complainant does not need to present any proof. After a preliminary assessment has been made of the complaint, the instruction stage follows. This consists of requests for information, inspections, examinations, inquiries or any other procedure deemed reasonable that do not go against the fundamental rights of citizens. They are undertaken through swift informal means, without being subject to procedural rules based on the burden of proof. Actions within the investigation process are carried out by the Ombudsman, but they may also be urgently requested with the right to priority treatment, directly to Public Prosecutor's Office or any other public entities if necessary.<sup>195</sup>

#### **Available mechanism to lower the burden of proof: for example presumption of fact or reversal of the burden of proof or lump sum compensation arrangement etc.**

As was referred to in the previous point, the instruction stage is not subject to procedural rules when collecting evidence. Nevertheless, the Ombudsman should always hear the bodies and the agents at stake and allow them to provide all the clarifications needed before any conclusions are drawn.<sup>196</sup>

#### **Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?**

The question is not pertinent here. Nevertheless, the Ombudsman may request statements or information from any citizen, including the complainant, whenever he deems them necessary for establishing the facts.<sup>197</sup>

#### **Is there free legal advice/representation available from a public body (please specify the public body)?**

Cases coming before the Ombudsman do not require the intervention of a lawyer and are exempt from costs and stamp duty.<sup>198</sup> Where the Ombudsman deems that a judicial or administrative redress is available to the complainant and is specifically established by law, he may simply refer the complainant to the competent authority. However, he should always inform the complainant of the forms of legal redress provided for him.<sup>199</sup>

#### **Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?**

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<sup>192</sup>Ibid, Article 27.

<sup>193</sup>Ibid, Article 37.

<sup>194</sup> Ibid, Article 36.

<sup>195</sup> Ibid, Article 28 (1) e (2).

<sup>196</sup> *Ibidem*, Article 34.

<sup>197</sup> *Ibidem*, Article 30 (1).

<sup>198</sup> Ibid, Article 39.

<sup>199</sup> Ibid, Article 32 (1) and (2).

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The Portuguese Data Protection Authority is not necessarily involved when a complaint is made to the Ombudsman. Nevertheless, the Authority's deposition or cooperation may be requested owing to the fact that as a public entity, it is under an obligation to cooperate without jeopardising the legal restrictions that may exist.<sup>200</sup> With respect to the organisations operating in civil society, it should be pointed out that the complaints they make may be individual or collective.

**Cost of procedure: please provide information on the average cost of the procedure**

As referred to above, all cases handed in to the Ombudsman are exempt from costs.

**Average duration of procedure: please provide available information.**

In conformity with the law, within a 60-day deadline of having received the recommendation, the targeted body should communicate its position regarding the recommendation to the Ombudsman. If it fails to do so, it has to give valid reasons for its non-compliance.<sup>201</sup>

No other information on average duration is available.

**Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011**

The information relevant to this point is given in footnotes 16 (for 2009) and 17 (for 2010).

<sup>200</sup> Ibid, Article 29.

<sup>201</sup> Ibid, Article 38 (1), (2) and (3).