

## THE NEW ADMINISTRATIVE PROCEDURE CODE

### PUBLIC LAW

Decree-Law No. 4/2015, 7 January, approved the new Administrative Procedure Code (hereinafter “APC” or “Code”), which repeals the Administrative Procedure Code in force since 1991 (a landmark for the Portuguese Public Administration).

The changes are so profound that what initially had been thought of as a mere revision became the adoption of a new code. This new APC will enter into force on 8 April.

Among the many innovations in the APC, we herein analyse the most relevant.

#### **a) Scope and general principles**

Firstly, the Code clarifies the entities within its scope of application: the rules related to general principles, the procedure and the administrative activity **are applicable to any entity that performs administrative functions** regardless of its nature. Only part II – concerning administrative bodies – is exclusively applicable to Public Administration.

The Code establishes new general principles of administrative activity: the principles of good administration (Article 5), responsibility (Article 16), open administration (Article 17), data security (Article 18) and the cooperation of the Public Administration with the European Union (Article 19).

#### **b) Electronic resources**

The new Code establishes principles regarding electronic administration (Article 14). The APC establishes that “Public Administration bodies and services shall use electronic resources in the performance of their activity in order to promote efficiency, administrative transparency, and proximity to citizens” and provides rules for electronic desks. In any case, for natural persons the Code guarantees that the Administration’s communications and notifications with a concerned party throughout a procedure can only be done by fax, phone or email, upon prior

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*The APC establishes new principles regarding electronic administration*

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written consent. If the concerned party is a legal entity, consent is not required if communications are made to platforms with restricted access or to electronic addresses, faxes or telephone numbers, which appear on any document submitted to the procedure.

Aiming for debureaucratisation, we highlight that the submission of a request, petition, claim or appeal to an incompetent body always implies its consignment by the Administration to the competent body.

### c) Administrative procedure

Regarding the **terms of administrative procedure**, the APC introduces significant changes, notably the introduction of a principle of procedural adequacy which grants the person responsible for a procedure a margin of discretion in its structuring, which must be guided by participation, efficiency, economy and promptness in the preparation of a decision (Article 56). In this context, the Code allows the entry into agreements through which a competent body and concerned parties can agree to the terms of the procedure (“**endo-procedural agreements**” – Article 57).

The APC now is particularly concerned with the so-called complex procedures, i.e., those involving several administrative bodies.

For this purpose, inspired by other jurisdictions, the APC introduces what also has been done in the case of urban legislation: the legal figure of **procedural conferences** to be held among the various bodies involved in one or more procedures for the joint or combined exercise of competences (Articles 77 to 81). Such procedural conferences may take the form of a deliberative conference, which is intended to practice a single administrative act, which replaces the practice of autonomous acts by each of the involved bodies, or a coordination conference, in which are practiced autonomous administrative acts by the various involved bodies simultaneously.

On the other hand, the Code extends the scope of the duty of a competent body to request the support of other administrative bodies (**administrative assistance** – Article 66), previously merely provided for evidence gathering.

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*The Code introduces the legal figure of procedural conferences*

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Towards greater impartiality of the decision maker, a duty (as opposed to what was previously a right) to delegate the power of direction over a procedure to a lower hierarchical person is now provided (Article 55). For this purpose it must also be highlighted that the Code introduces innovations on the matter of guarantees for

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the impartiality of decision makers (notably with the establishment of the possibility of annulment of an act or contract where “from the circumstances of the specific case results a reasonable serious doubt regarding the impartiality of the body’s activity”) – (Article 76, paragraph 4).

The general term for the decision of private initiative procedures remains 90 days, although the new Code provides more detailed and stricter rules regarding the deadlines for a decision (Article 128). In coherence with the provisions of the Code of Process in Administrative Courts, the lack of a decision within the established time limit represents non-compliance with the duty of decision for the purposes of access to administrative and jurisdictional protection resources and there is no provision of a system of tacit rejection (Article 129).

#### **d) Administrative regulations**

The new APC also provides, for the first time, a **substantive regime for administrative regulations** (Articles 135 to 147). As a rule, the Code establishes the possibility of declaring its invalidity at any time. It is provided that the execution regulations are not subject to repeal without new regulation.

Concerning the **procedure for administrative regulations**, the Code establishes an obligation to publish the initiation of the procedure on the Internet and the need for the adoption of the regulation to be accompanied by an explanatory memorandum, which must include a cost-benefit analysis of the measures foreseen in the regulations (Articles 98 and 99).

#### **e) Administrative act**

In what concerns the **administrative act**, one of the main innovations is the invalidity regime (Articles 161 to 164), notably the extension of cases of nullity provided for by law, the possibility of reform and conversion of null acts, and also the increase of cases in which it is possible to confer effects to a null act. We also highlight the establishment of cases in which, although there is an invalidity, the annulment effect is denied.

Another fundamental change can be found in the regime of the revision of administrative acts, the effective scope of which only administrative practice and jurisprudence can clarify. The APC now reserves the term **repeal** for cases where the termination of effects of the previous act is grounded on reasons of merit or convenience. The Code expressly allows the placing of clauses reserving the right to

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repeal in acts that constitute rights, and, as a main innovation, allows the repeal of these acts on the grounds of a change of circumstances (Article 167). The previous repeal on the grounds of invalidity is now designated **administrative annulment** and has a new regime, in particular regarding deadlines, also as a result of European Union Law (Article 168).

With regard to the execution of administrative acts, the Code also establishes a new regime: the APC now subjects the possibility of coercive enforcement of administrative acts to the existence of a special law, except for the cases of duly reasoned urgent public need (Article 176). Until the entry into force of such a special law, the regime of the repealed APC shall remain in force (Article 6 of Decree-Law 4/2015, 7 January).

Finally, rules relating to **administrative contracts** reappear, although merely for the purpose of referring to the Public Procurement Code.

#### Contacts

Margarida Olazabal Cabral | [mocabral@mlgts.pt](mailto:mocabral@mlgts.pt)  
Gonçalo Carrilho | [garrilho@mlgts.pt](mailto:garrilho@mlgts.pt)



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#### LISBON

Rua Castilho, 165  
1070-050 Lisbon  
Telephone: (+351) 213 817 400  
Fax: (+351) 213 817 499  
[mlgtslisboa@mlgts.pt](mailto:mlgtslisboa@mlgts.pt)

Luanda, Angola (in association)  
Angola Legal Circle Advogados

#### PORTO

Av. da Boavista, 3265 - 5.2  
Edifício Oceanvs – 4100-137 Porto  
Telephone: (+351) 226 166 950  
Fax: (+351) 226 163 810  
[mlgtsporto@mlgts.pt](mailto:mlgtsporto@mlgts.pt)

Maputo, Mozambique (in association)  
Mozambique Legal Circle Advogados

#### MADEIRA

Avenida Arriaga, 73, 1.º, Sala 113  
Edifício Marina Club – 9000-060 Funchal  
Telephone: (+351) 291 200 040  
Fax: (+351) 291 200 049  
[mlgtsmadeira@mlgts.pt](mailto:mlgtsmadeira@mlgts.pt)

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