



# PORTUGUESE OMBUDSMAN NATIONAL HUMAN RIGHTS INSTITUTION

REPORT TO THE PARLIAMENT 2016

Lisbon, 2017



According to the article 23 of the Statute of the Ombudsman, I have the honor to present to the Parliament the Annual Activity Report for the year 2016.



This Report is the result of a combination of two annexes. One of the annexes is based on the documentary collection illustrating the various dimensions of the Ombudsman's activity in the examination of complaints and the investigation of procedures, reflecting some of his views on promoting and defending fundamental rights. The other, denotes the intervention of this State body regarding the National Preventive Mechanism, created after the ratification by the Portuguese State of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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# *Introduction*

> Detail of the building's front door



José de Faria Costa, Ombudsman

# *Introduction*

The English version of the Portuguese Ombudsman's Report to the Parliament reveals the various dimensions in which this State body develops its activity regarding the promotion and protection of human rights. Bearing in mind that the field of intervention of the Portuguese Ombudsman spreads beyond the verification of actions or omissions by the public administration and the eventual reparation of injustice or illegality, this report will also illustrate the activities developed as the Portuguese National Human Rights Institution.

The activity regarding the role of the Portuguese Ombudsman as the National Preventive Mechanism, under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is presented in an autonomous report.





*The Portuguese Ombudsman and his staff*







# *1. The Ombudsman's activity in the complaints procedures*

> Interior of the Portuguese Ombudsman's building

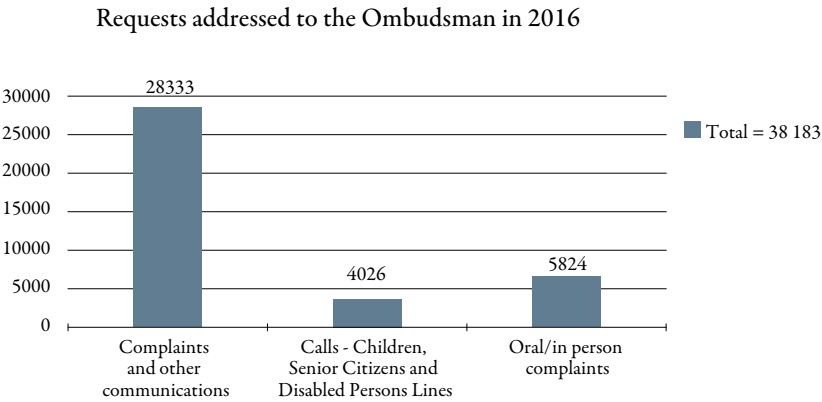
# 1. The Ombudsman’s activity in the complaints procedures

## 1.1. Statistics: brief notes

The Ombudsman’s mission, in terms of its classical function, relies on the handling of complaints and on the management of the citizens’ requests regarding the administrative action of public authorities or private entities that provide essential services to the community.

This report will provide, for the first time, the full scope of the Ombudsman’s effort, through the analysis of all communications and requests received, regardless of the instruments used, reporting new situations or relevant ones to the examination of issues, some of them already under consideration. The analysis presented here, is anchored in the fact that 2016 is the first full year of complete operation of the integrated project to assist the citizens and of the new computerized procedural management system, which started in September and April 2015, respectively.

Graph I



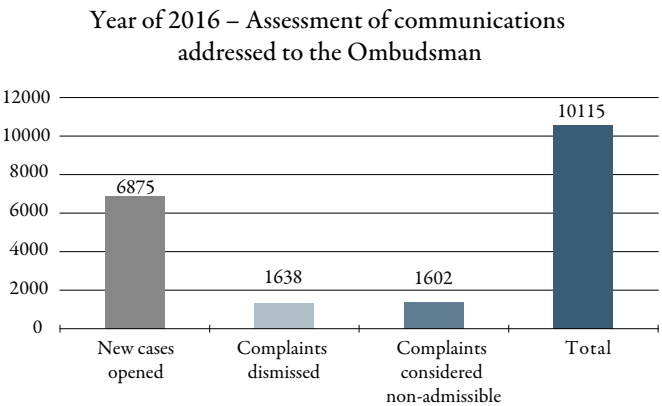
As a result, in 2016, the Ombudsman received 38 183 requests, as shown in the chart above. These requests correspond to 28 333 records of complaints and other communications, 4026 telephone calls received through the Children’s Line(541), the Senior Citizen’s Line (2878) and the Disabled Person’s Line (607) and 5824 telephonic or presential services by the Information and Public Relations Division. These statistical data, which will be analyzed in the course of this report, reflect the volume of work that daily and instantaneously demand the attention of the Ombudsman, in addition to the activities



carried out by this State body as an National Institution for Human Rights and National Preventive Mechanism, as well as intervention at the international level.

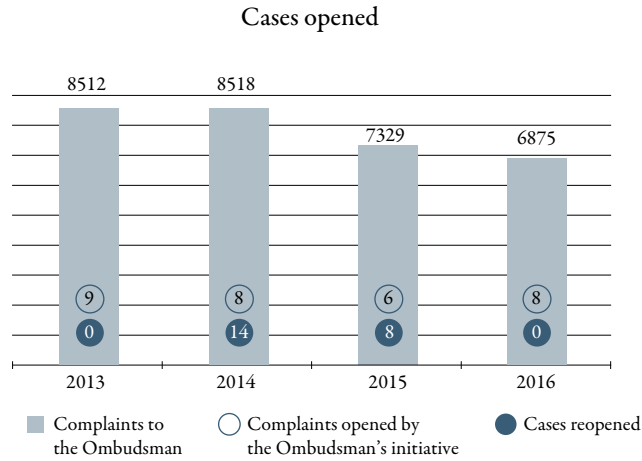
Next there is some statistical information which clarifies, in quantitative terms, the activity carried out by the Ombudsman in the handling of complaints and other new communications and of the procedures that, on his own initiative, determined the opening with the purpose of investigating the situations that come to our attention and which may be detrimental to fundamental rights.

*Graph II*



The graph above – introduced for the first time to the Parliament in 2013 – shows the activity of the Ombudsman in its traditional functions. Any communication addressed to this State body is subjected to a preliminary analysis, which may or may not lead to the opening of a procedure. The analysis of the annual activity of the Ombudsman should not be limited to the number of new procedures, but it has also to take into account the work done with the preliminary assessment of all communications. It is also important to mention that that subsequent communications that deal with matters already under investigation are incorporated in an opened procedure. In other words, an opened procedure may cover several complaints regarding the same subject.

Graph III



In 2016, 6883 procedures were opened, 6875 of which were due to the complaint, which corresponds to a decrease of 6% compared to the figure recorded in 2015. Notwithstanding this decrease - lower than that of 2014 to 2015 -, the number of procedures opened in the year to which this report refers is the fifth highest in the 41 years of activity of this State body, being only surpassed by the values registered between the years of 2012 to 2015. There were also 8 procedures opened by the Ombudsman initiative, equal or similar numbers to the ones registered in the last years.

Graph IV

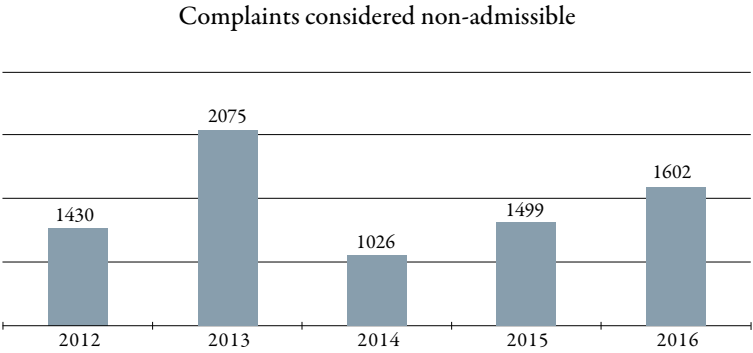


The number of dismissed complaints also declined, similarly to what occurred in the number of open procedures (in absolute terms, it corresponds to minus 116 units). It should be pointed out that complaints are dismissed when they deal with matters which

fall outside the Ombudsman’s jurisdiction, when his intervention is premature due to a lack of prior intervention by the hierarchically competent administrative authority or with powers of internal control or supervision of the target entity. To these grounds we may add the legislative initiative that follows its normal course or that has been or is being subject to judicial review.

Although the opening of a complaint procedure is not initiated, the preliminary objection is always preceded by a summary analysis of the question - as in all other communications - and sometimes by a request for further processing addressed to the complainant before taking any decision regarding the complaint. Also, it is always provided an elucidation - by telephone contact or written communication - to the complainant and, when the situation so determines, proceed to the referral to the competent authority.

Graph V



As shown in the above graph, for communications classified as exposures, the growth trend observed since 2014 is observed. In 2016, there was a 7% increase in 2015. The treatment of these communications does not, as a rule, require an express reaction on the part of the Ombudsman, but the substance of the matter has always been well taken into account. However, if it is justified, the complainant is also elucidated, explaining the scope of intervention of this State body.

Of the 1602 exposures received, 81 were anonymous, which corresponds to 70% of the value observed in the previous year (116).

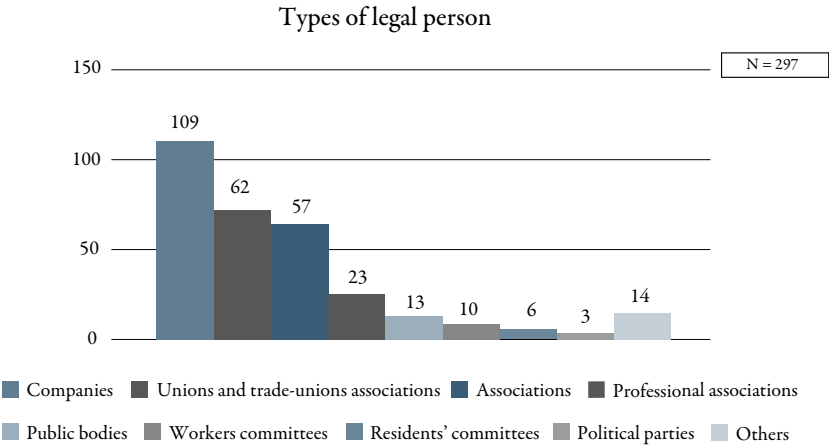
Table 1

Number of first complainants	
Natural persons	6578
Legal persons	297
<b>Total complaints</b>	<b>6875</b>

As can be seen from the above table, in relation to the nature of the first complainant in each complaint procedure, in 2016 the predominance of natural persons was slightly higher (95,3%) (compared to 94,8% in the previous year).

Regarding the breakdown by gender of the natural persons, it is clear that the complaints presented by men (58,3%) predominate, slightly higher numbers than in 2015 (57,6%).

Graph VI



With regard to the typology of legal persons whose complaint gave rise to a procedure, the above chart shows that the first place in 2016 was occupied by companies (109 cases compared to 97 in 2015), followed by unions and trade-unions (62 cases compared to 71 in 2015) and associations (57 cases compared to 71 in 2015). It is also worth mentioning the increase in the number of complaints filed by public entities with respect to the previous year (from 6 cases in 2015 to 13 in 2016). However, they are accepted only if they are presented in the interests of private individuals, since any request for an opinion or intervention in public administration internal conflicts is subject to preliminary dismissal.

Table 2

**Number of cases opened and reopened**

Written complaint	1767
Oral/in person complaint	282
Electronic complaint	4826
On the Ombudsman's own initiative	8
<b>Total of cases opened</b>	<b>6883</b>
Cases reopened	0
<b>Total of cases opened and reopened</b>	<b>6883</b>

Continuing the almost uninterrupted trend of decades, the use of electronic means (which encompasses the use of electronic mail and the complaint form available on the institutional site) has grown as a preferred means of contact for the submission of a complaint to the Ombudsman, corresponding in 2016 to 70% of the total (66% in 2015, a year in which it has fallen by one percentage point compared to the previous year). In turn, postal use decreased by four percentage points (26% in 2016 compared to 30% in 2015).

Regarding the oral presentation of complaints, there was a decrease of one percentage point, which corresponds in absolute terms, to a decrease from 350 to 282 cases compared to the year 2015. It should also be noted that there has been a drop in the number of complaints presented orally in one percentage point, which corresponds, in absolute terms, to a decrease from 350 to 282 cases, in line with the trend observed in previous years.

*Table 3*

**Number of pending cases**

Pending cases from 2011	2
Pending cases from 2012	31
Pending cases from 2013	140
Pending cases from 2014	652
Pending cases from 2015	2711
<b>Total of cases prior to 2016</b>	<b>3536</b>
Cases opened in 2016	6883
Past year cases reopened in 2016	0
<b>Total pending cases</b>	<b>10 419</b>

As shown in the above table, in 2016, the volume of procedures under investigation was only slightly lower than in 2015, down from only 90 units, from 10 509 to 10 419. This figure covers the procedures opened in the year itself and the ones that transited from previous years.

*Table 4*

**Number of cases closed and reclosed**

Closed cases from 2016	2
Closed cases from 2012	15
Closed cases from 2013	81
Closed cases from 2014	424
Closed cases from 2015	2049

<b>Total of cases closed prior to 2016</b>	<b>2571</b>
Closed cases from 2016	4548
Closed and reclosed cases from 2016	0
<b>Total of closed and reclosed cases</b>	<b>7119</b>

Regarding the above table that shows the number of procedures filed *per year* of the respective entry, the first step is the three percentage points increase from 63% to 66% of the proportion of procedures opened in the year of 2016 and which were closed during the course of the same year. It is also worth noting the closing of more than 145 procedures compared to the previous year (6974 procedures in 2015 for 7119 procedures in 2016).

*Table 5*

**Number of cases pending on December 31st**

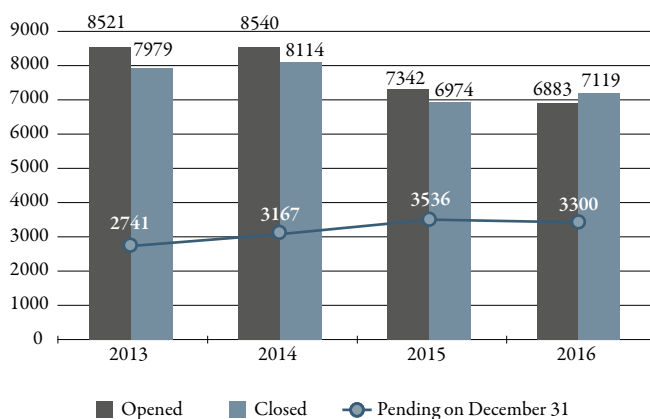
Cases from 2011	0
Cases from 2012	16
Cases from 2013	59
Cases from 2014	228
Cases from 2015	662
<b>Total of cases prior to 2016</b>	<b>967</b>
Cases opened in 2016	2335
Cases reopened 2016	0
<b>Total of cases closed and reclosed</b>	<b>3300</b>

Regarding the pending procedures on December 31 2016, the reduction of the procedural pendency by 7% is very positive, reversing the trend observed in previous years. In fact, at the end of 2016, 3300 procedures were pending (a figure that is 236 less than that of the same period in 2015, which was 3536 procedures). It should be noted that the decrease in pending procedures (236 units, as referred to above) outweighs the difference in the number of procedures under investigation compared to the previous year (only minus 90 procedures in instruction in 2016 compared to the year 2015). This means that there is a positive net result as a result of the work carried out in the resolution of the concrete cases which have been submitted to the Ombudsman for consideration.

The reduction of pending issues was more relevant in the universe of more recent procedures.

Graph VII

Cases opened, closed and pending on December 31



From the reading of the chart above, it is evident that the increase in the number of procedures filed in 2016, of 2% compared to 2015, was in contrast to the trend of decreasing number of procedures opened in the same year (6% between the two years mentioned above).

As was pointed out in the most recent annual activity reports, despite a trend towards an increase in the number of pending procedures at the end of each calendar year, the value of this increase in comparative terms has been gradually eased. In 2016, the turning point of the trend was reached, with an actual decrease in the pending procedures.

Table 6

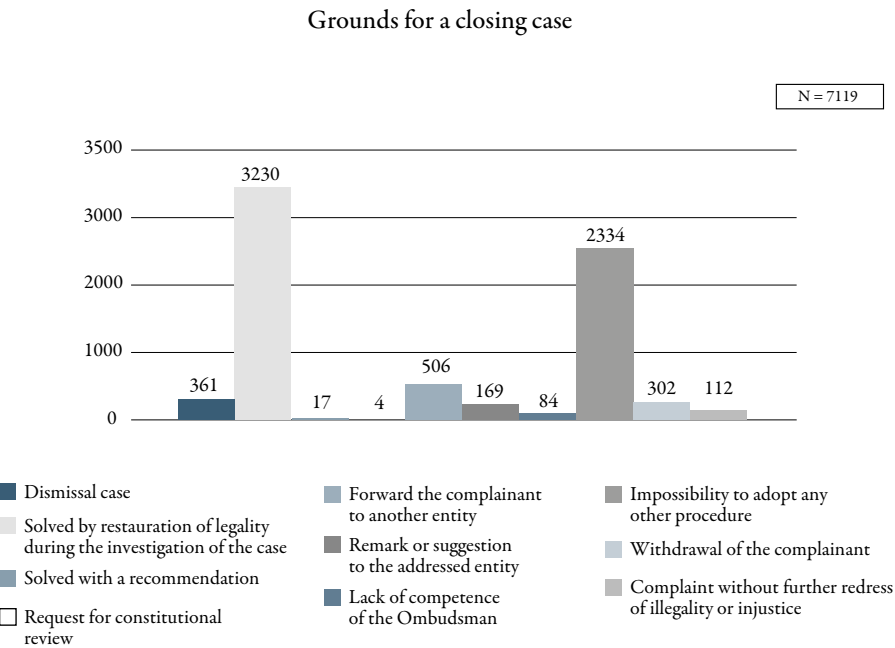
Summary of the cases assessment activity

Total of cases pending since 2015	3536
Total of cases opened (and reopened)	6883
Total of cases closed and reclosed	7119
Cases opened and closed in 2016	4548
<b>Cases pending on December 31</b>	<b>3300</b>

The previous table summarizes the observations made regarding the procedures carried out in 2016. Of the 10 419 procedures investigated in 2016, in addition to those carried over from 2015 and the procedures opened in the year to which this report refers, 68,3% (7119), which is two percentage points higher than in the previous year. If we

only take into account the procedures opened in 2016, it is observed that two thirds were closed during this year.

Graph VIII



In a scenario of increasing number of filings, regarding its foundations, the main observation focuses on the significant growth of cases where the reparation of illegality or injustice has been achieved, in line with the trend already verified. In fact, 45,4% of the procedures closed in 2016 were terminated (42,6% in 2015 and 39,2% in 2014). It should also be noted that, in relative terms, there was a small increase in cases of referral to an adequate mean of guaranteeing the rights and interests involved. It should also be noted that this percentage increase in the adequately resolved cases was verified with the similar decrease in the number of procedures filed (32,8% in 2016, compared to 37,8% in 2015, and 38,6% in 2014).

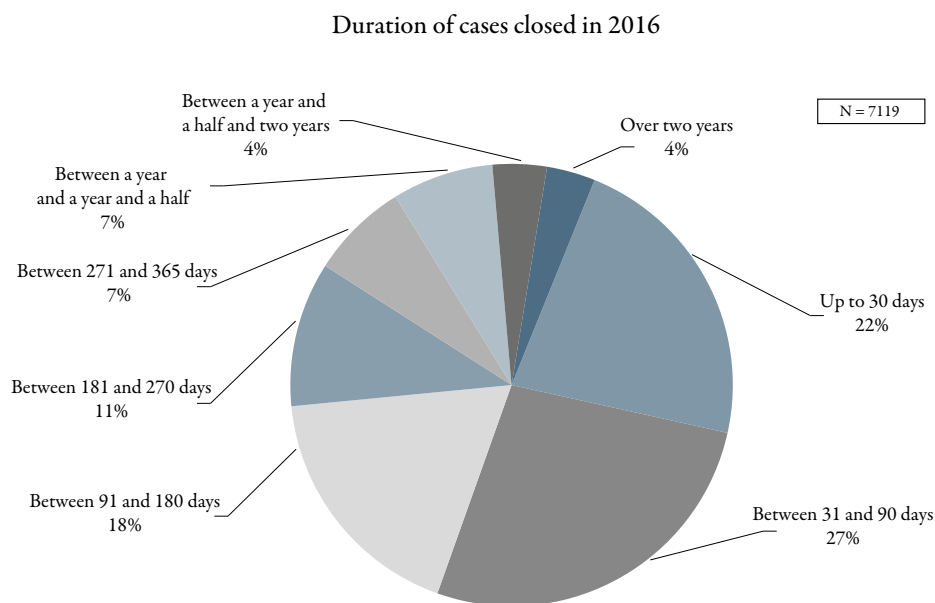
It should be noted that the cases in which, when the complaint was filled out, the solution considered as minimally restorative was not achieved. In other words: cases where, despite all or at least a significant part of the Ombudsman’s satisfaction, the complainant’s claim has been identified, no solution has been found to remedy illegality or injustice. This was the situation in 112 cases, corresponding to 1,6% of the total number of procedures filed.



In a similar number to the one recorded in the previous year (in 2016 it was set at 17, down one unit compared to 2015), the procedure ended with the issuance of recommendation. Twelve recommendations (eight in 2015) were addressed, of which six had general or normative objectives and the other six aimed at improving administrative activity. In the same way, the three initiatives of successive abstract inspection of constitutionality justified the filing of four procedures.

In 169 cases, the procedures were closed with the formulation of a call to attention to the competent bodies or services, with a slight decrease in this filing basis compared to 2015 (184 cases).

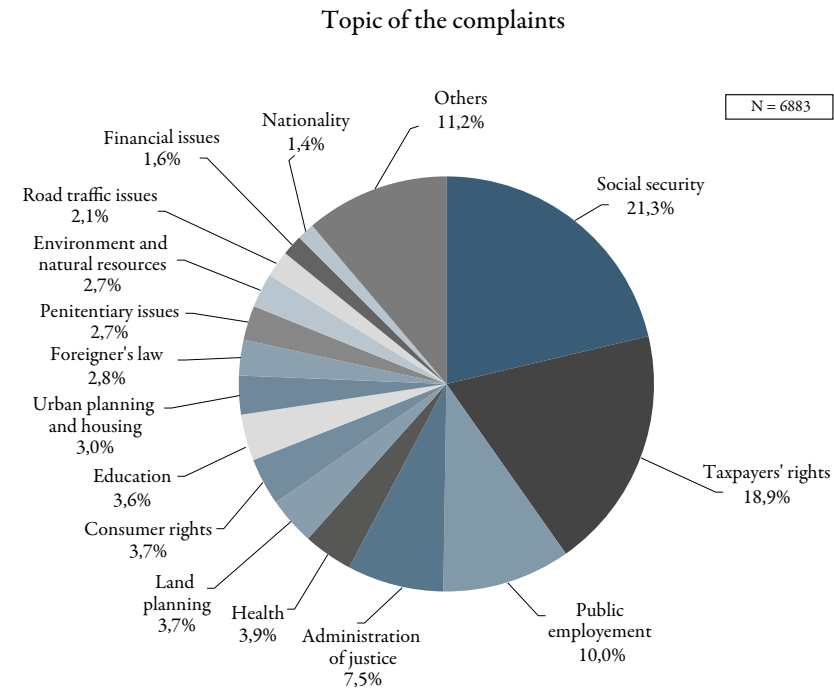
*Graph IX*



The recovery of the procedural pendency reached in 2016 has an impact on the greater weight of procedures with greater antiquity than in previous years. Once this explanation has been made, it is clear that in 85% of the closed procedures the maximum long-term trend has been observed for 12 months from the date of its opening. In 2016, there was a decrease of six percentage points over the previous year. In 22% of the procedures, the decision took less than 30 days, a proportion that reaches almost 50% if we take as reference the threshold of 90 days to complete the procedures.

Regarding the duration of the procedures opened in 2015, and having as horizon the maximum pendency for twelve months, it is concluded that the instruction of those procedures complied with this deadline in 84% of cases.

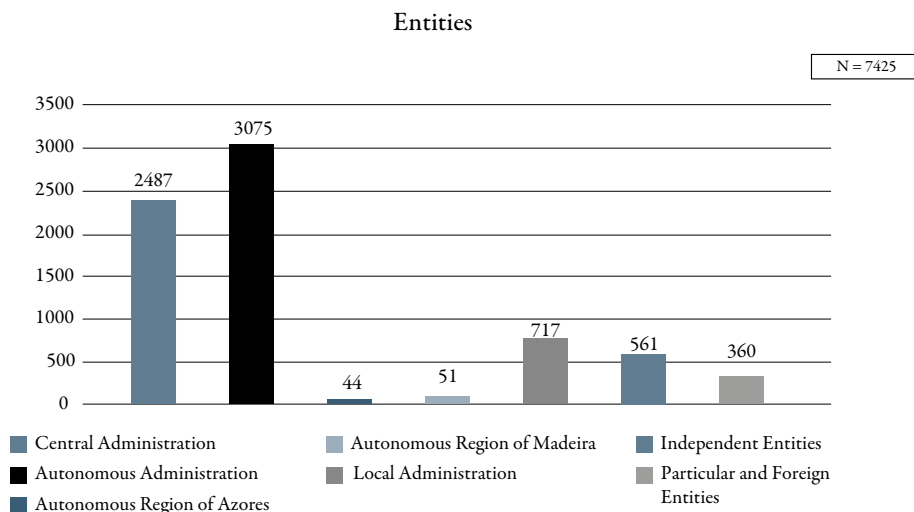
Graph X



Regarding the distribution of the procedures learned in relation to the subjects most dealt with in the procedures studied, there is a coincidence in the identity and ordering of the four traditionally frequent themes: social security issues (with an increase of almost two percentage points compared to 2015), taxation (an increase of more than three percentage points compared to 2015) and, in the third place, public employment issues are raised, even though there was a two percentage 2015. As a whole, in 2016, the aforementioned matters accounted for 57,7% of the total number of procedures opened, while in the previous year the figure was 54,4%.

Not to mention the changes in relative position in some cases in other areas, the most impressive cases of absolute growth are the complaint procedures concerning urban planning and housing matters (16%), those concerning education (12%) and penitentiary affairs (10%). On the other hand, there is an absolute decrease in the number of road subjects (37% less), territorial planning (14% less) and nationality (12% less).

Graph XI

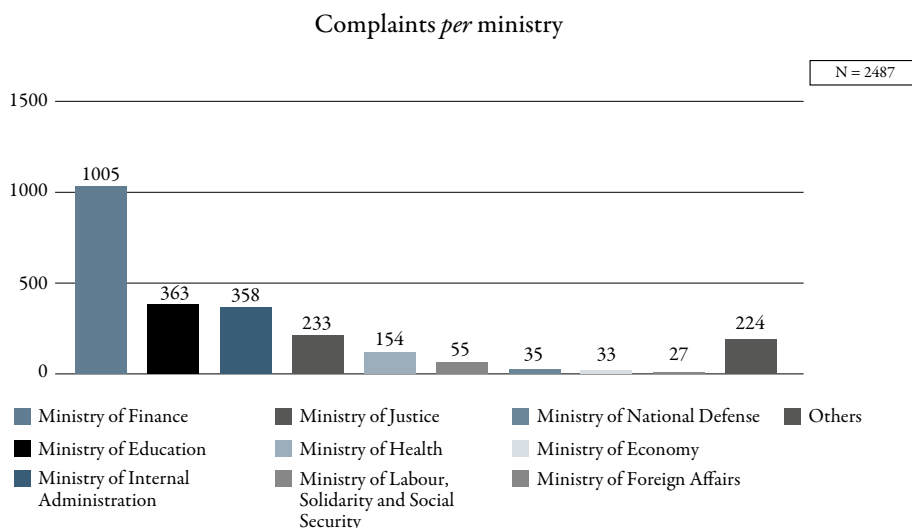


As a preliminary note to the analysis of the above graph, it should be noted that the total number of entities targeted in the open procedures is higher than the number of them, since more than one entity can be targeted in a single complaint procedure.

The analysis of the graph shows the great regularity in relation to central government and indirect and autonomous administration, observing variations only in local administration and in independent entities (where there was respectively an increase of two percentage points and one reduction by three percentage points).

A look at the absolute numbers, in addition to what supports the variations noted, allows to register the increase of the procedures of complaints aimed at the regional administrations, with more emphasis in the case of the Autonomous Region of Madeira (from 29 cases to 51) than in the case of the Autonomous Region of the Azores (from 32 cases to 44). The conclusion is that the majority of complaints originating from residents in the territory of any of the Autonomous Regions are aimed at entities that are not part of the regional administration.

Graph XII



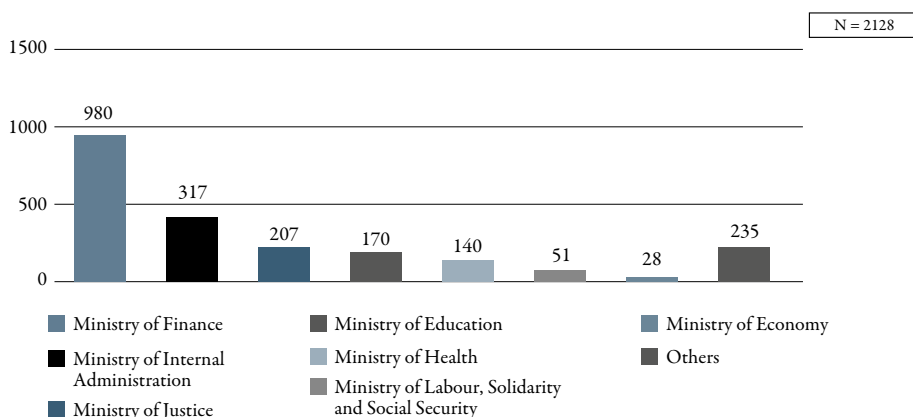
The chart above reflects the distribution of complaints, in which the central administration was targeted, by the various ministries.

In line with that observed in the previous year, the three most targeted ministries in 2016 were Finance (1005), Education (363) and Internal Administration (358), and their relative weight increased from 67% to 69%. Compared with the previous year, there is also an increase in the complaints filed by the Ministry of Finance (from 869 in 2015 to 1005 in 2016) and the decrease in the Ministry of Education (from 481 in 2015 to 363 in 2016). Once again, this evolution reflects the increase in complaints about taxation and, in addition, the decline in the public employment relation and the weight of the Ministry of Education's regarding this last topic.

In other ministries, there is a significant increase in complaints aimed at the Ministry of Health, from 6% in 2015 to 14% in 2016.

Graph XIII

Distribution of the complaints *per* ministry  
(Excluding the matters regarding public employment)



Excluding the complaints concerning public employment issues in the central administration (359 cases, compared to the 535 cases registered in the previous year), it is natural to maintain the most targeted ministries, with the exception of the Ministry of Education, which moves from second to fourth, reflecting the size of its staff. As was the case in the previous year, in 2016, there was still little expression of labor issues in the complaints in which the entity concerned was the Ministry of Health.



The complaints against municipalities increased, reversing the previously verified trend (658 complaints received in 2016 from 553 in 2015). Keeping the concentration of complaints in some municipalities, the ten most targeted represent about 1/3 of the total complaints aimed at such entity. The municipalities of Lisbon (92 procedures compared to 81 in the previous year, slightly correcting the sharp decline recorded compared to 2014) and *Sintra* (from 19 procedures in 2015 to 27 cases in the year 2016). The municipalities of *Porto* and *Cascais* maintain the numbers for 2015, of which the number of complaints against the Municipality of *Amadora* is high (21), making it the third most targeted municipality in 2016.

Graph XIV

### Complaints per 10 000 inhabitants: Districts and Autonomous Regions

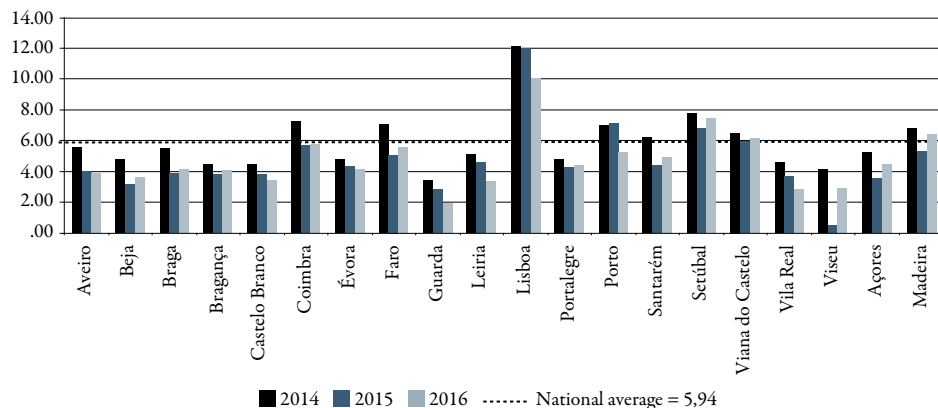


Table 7

### Complaints due to population - the five highest values

	2012	2013	2014	2015	2016
1 <sup>st</sup>	Lisbon	Lisbon	Lisbon	Lisbon	Lisbon
2 <sup>nd</sup>	<i>Santarém</i>	<i>Setúbal</i>	<i>Setúbal</i>	<i>Porto</i>	<i>Setúbal</i>
3 <sup>rd</sup>	<i>Madeira</i>	<i>Madeira</i>	<i>Coimbra</i>	<i>Setúbal</i>	<i>Madeira</i>
4 <sup>th</sup>	<i>Setúbal</i>	<i>Faro</i>	<i>Faro</i>	<i>Viana do Castelo</i>	<i>Viana do Castelo</i>
5 <sup>th</sup>	<i>Açores</i>	<i>Porto</i>	<i>Porto</i>	<i>Coimbra</i>	<i>Coimbra</i>

For an analysis of the distribution of domestic complaints, the chart above shows the last three years evolution, in comparison with the population residing in each district or Autonomous Region.

The national average is 5,94 complaints per 10 thousand inhabitants, higher than the figures for the districts of Lisbon (10,05), *Setúbal* (7,46), the Autonomous Region of *Madeira* (6,39) and the district of *Viana do Castelo* (6,12). The sharp drop in complaints from the *Porto* district is underlined. Once again, the *litoralisation* of the territory is evident, even disregarding that of the population, since the assessment of absolute numbers is not concerned.

In turn, the five districts with the lowest values are in descending order, with three replications compared to 2015, the districts of *Castelo Branco* (3,41), *Leiria* (3,36), *Viscu*

(2,91), *Vila Real* (2,81) and *Guarda* (1,93). With the exception of *Leiria*, the mark of interiority is evident.

In absolute terms, the largest decreases were observed in the districts of Lisbon (428 complaints), Porto (354 complaints) and Leiria (59 complaints). (Up to 59 complaints) and in the Autonomous Region of Madeira (29 complaints).

After a strong decrease in the previous year (by about two-thirds), the number of complaints from abroad increased from 83 to 103 units (an increase of 24%).

In conclusion of this statistical analysis, some observations are made, which result from the analysis of the answers given by the complainants who filled out the questionnaire, which is entirely optional and anonymous, which is sent to the complainant when the decision to initiate a complaint procedure.

The proportion of the responses received presented an intermediate value in relation to the previous two years. Thus, there was an increase of three percentage points and 2597 responses were validated, corresponding to a rate of 38%. This response rate corresponds to that of individual respondents (2527 cases), the lowest value (24%, corresponding to 70 responses) in the universe of legal persons.

With respect to natural persons, gender was indicated in 2409 questionnaires (corresponding to 95%), with a majority of answers given by men (59%).

Regarding the fact that it was a person who had previously referred to the Ombudsman, it was observed that in most situations this had happened (77%). Among the situations that mentioned the previous complaint (in 594 cases), 45% complained a second time, 46% did it for the third, fourth, fifth or sixth time, and 10% indicated that it was the seventh time and again, complaining to the Ombudsman.

If these quantitative indications are equally valid for the universe of natural persons, the reality in the universe of responding collective people is different. Therefore, of these, 74% had a complaint for the first time. Of the others, only 17% did it for the second time, 56% for the third to sixth time and 28% more than six times.

In 2446 responses the age was indicated, in very similar terms to what happened in the previous year. The percentage of respondents between the ages of 60 and 65 years of age fell by three percentage points to 13%, and the increase was mainly in the category aged 40 and over 49 years old (24%). The percentage of respondents over 65 years of age remained at 18%, 17% of respondents between the ages of 30 and 39 years and 23% of respondents who declared between 50 and 59 years of age. Under the age of 18, only six questionnaires were received.

Regarding academic qualifications, it should be noted that 46% of the respondents stated that they had a higher degree, in line with those recorded in previous years, as well as their distribution among the different study cycles defined. There has been a slight downward trend in respondents who declare that they only have the first cycle of basic

education (11%). Gender separation indicates, in the female case, a higher proportion with higher habilitation (50%).

Dividing into three categories the universe of respondents over 30, the proportion of those who hold higher education almost doubles in those under 39 years compared to those who are over 60 years of age. The proportion of those who declared that they did not have any qualification or only the first cycle of basic education was of 2,7% in the first group and 25,2% in the second, that is, almost tenfold.

Concerning the declared socio-professional situation, the percentage of those who stated that they are unemployed (15%) are uniquely uniform. The proportion of retired respondents continued to decline slightly (one percentage point in each of the last two years). Finally, 21% of the respondents indicated that they are active in the public sector.

## *1.2. Promotion and protection of fundamental rights*

### *1.2.1. Environmental, urban planning and cultural rights*

#### *Complaints and ex officio investigations*

In 2016, 885 new cases were opened concerning environmental, urban planning and cultural rights, a significant increase (+20%) compared with the previous year. To some extent, this increase is due to the fact that this thematic unit is now also responsible for examining complaints regarding the provision of public services (utilities), such as electricity, gas, water and telecommunications.

On this subject only, 235 complaints were received, representing 27% of the total proceedings opened in this unit in 2016. That means that there is a general public concern on the quality of the public services, but also that the consumers are not sufficiently protected by national or Community law.

It should also be pointed out that consumers call for urgent action from the Ombudsman as these legal issues are marked by the absolute need of the good or services provided (water, electricity, gas and electronic communications).

#### *Categories of complaints*

Complaints about urbanization, that include private construction works, use of buildings and facilities, urban lootings, electricity, water and sewage piping projects and urban rehabilitation, totaled 13% of the complaints (119 in 885).



Contrary to previous years in which the number of complaints on urban planning operations diminished, in 2016 the grievances to the Ombudsman have increased, maybe due to the strengthening of the economic activity. In any case, social problems persist, which is reflected in the substantial number of complaints about housing support and social housing.

In both urban planning and housing, special mention should be made to the New Urban Agenda adopted by the United Nations at the Conference on Housing and Sustainable Urban Development, known as *Habitat III*, which establishes standards for sustainable urban development. It is indeed also up to the Ombudsman to working towards achieving the purposes of *Habitat III*, namely the defense of an urban development model that integrates the different aspects of sustainable development, promotes equity and well-being and combats social exclusion.

Looking at the Ombudsman's activities over the last year related to environmental, urban planning and cultural issues it may be concluded that most complaints on environmental matters, as much as 61% of the total, had to do with noise emissions; most of the complaints on planning were about infrastructures and extra-contractual civil liability (61%) and most of the complaints on urbanism and housing were about private construction works (35%).

A high number of citizens' complaints (235) were related to different public services (utilities) such as electricity (33%), water (23%), electronic communications (17%), postal services (9%) and gas (7%).

In 2016, the Ombudsman made four recommendations on topics as diverse as local referendum (Recommendation No. 1/A/2016), urban management of the Lisbon riverfront (Recommendation No. 5/A/2016), highways consumer's rights (Recommendation No. 6/A/2016) and Special Rehabilitation Program for Metropolitan Areas of Lisbon and *Porto* (Recommendation No. 3/B/2016).

Even if municipalities were the main entities targeted in the complaints (211), it should be noted that the Municipality of Lisbon only was aimed in 44. Another entity concerned in many complaints was EMEL, the municipal company that manages parking policy in Lisbon.

Many of the Ombudsman's cases, in particular concerning public services (utilities), aimed the regulatory bodies, such as ANACOM (the telecoms regulator), ERSE (Electricity Services Regulatory Entity) and ERSAR (Services Regulatory Authority for Water and Waste).

### *Construction and housing*

In the field of building and construction, it has generally been observed that urban planning authorities in different municipalities are not able to respond promptly to

complaints against illegal works or to respond in a timely manner to the requests for information submitted by individuals.

With regard to complaints about social housing, a substantial gap was found to exist between the number of houses available and the number of residences in need, as demand greatly exceeds supply.

### *Environment and natural resources*

The Ombudsman also investigated complaints about environment and natural resources, nature conservation, air quality and the preservation of water resources.

Two thirds (168) of the total complaints about the environment and natural resources were about noise pollution. Although their origin may be the result of public or private initiative activities, noise always implies substantial harm to people's health, well-being and quality of life.

This serious problem is also related to the land-use planning and is most obvious in urban areas, because of leisure activities, namely nightlife establishments and the promotion of spectacles, fairs, cultural activities and others noisy events.

In this field, the Ombudsman's work aims at improving the powers of noise control, and it is often suggested that specific constraints be set in the special municipal noise licenses granted to festival promoters.

### *Land-use planning*

Several complaints relating to land-use planning were also investigated, in particular regarding territorial management tools and special territorial schemes, environmental impact assessment, public construction works, public domain, expropriations and administrative easements.

In 2016, more than half of the complaints on this matter (168 out of 246) were related to infrastructure problems, in particular road-infrastructures, equipment and urban traffic in public domain.

A significant number of complaints was also received by the Ombudsman requesting intervention before the supervision bodies responsible for the management of the roads, due to road accidents caused by obstacles which unexpectedly appear in highways under concession or in municipal roads or as the result of pavement defects.

In view of the accidents occurring in municipal roads, the municipalities consider that the generic fulfillment of duties is enough to exonerating themselves from the enforcement of non-contractual liability regime. However, in case of the occurrence of an accident on a concessionaire highway, the reversal of the burden of proof is established by law.

It is not enough to plead that obligations of supervision and assistance have been fulfilled, but it is necessary to demonstrate compliance in the specific case.

Many complaints have been received against concessionaires of car parking areas, due to alleged abuses of the law enforcement staff.

### *Culture*

On the other hand, not many complaints involving cultural rights issues were lodged with the Ombudsman (11 complaint procedures out of a total of 885).

Most cases were concerned with the deterioration of cultural monuments, so often irretrievably affected by misguided interventions.

Sometimes, even though the claim is made against the licensing of civil works the true motivation is the protection of historic building and monuments.

### *Leisure*

Regarding the leisure activities, there were 24 complaints addressed.

Most of the requests received concern pet animals, gambling and sports federations.

In 2016, the amounts of the prizes awarded in recognition of the value and merit of the remarkable sporting results of the Paralympic athletes were equaled to those attributed to the Olympic athletes. This amendment was based on a suggestion of the Ombudsman that had pointed out that the value of the prizes awarded to Olympic players were twice the value of the prizes awarded to Paralympic players. The Ombudsman considered it an intolerable discrimination, in violation of the Universal Declaration of Human Rights and the Convention on the Rights of Persons with Disabilities.

In addition, the suggestion to amend the Statutes of the Portuguese Skating Federation, bringing to an end the violation of the right of access to justice and the right to effective judicial protection enshrined in article 20 of the Constitution, was also accepted.

### *Provision of public services (utilities)*

Regarding the provision of public services, the Ombudsman, as a general rule, forward the complainants to the regulatory authorities.

However, in critical situations where the urgent provision of services is concerned, the Ombudsman simultaneously makes inquiries directly with the companies involved.

## *Cases closed*

In 2016, 947 cases were closed – a significant increase of 31,8% over the previous year (+229 complaints procedures filed) – on the following grounds:

- 23, summarily dismissed and the complainants received detailed legal information in respect to their files (2,4%);
- 369 were favourably solved (40%);
- 3, were closed with a recommendation of the Ombudsman (0,3%);
- 88, were closed after the complainant was instructed to use appropriate means of resolution (9,2%);
- 24, as it was concluded that the Ombudsman had no jurisdiction to deal with the request (2,5%);
- 353, due to lack of substance (37,2%);
- 90, due to complainants' withdrawal (9,5%).

## *Good practices and final assessment*

The most targeted entities in the complaints submitted to the Ombudsman were the local authorities, which also showed greater difficulty in responding to the Ombudsman's requests in a timely manner.

On the contrary, the police forces, particularly the Public Security Police (PSP) and the Republican National Guard (GNR), were very cooperative. Also the EMEL collaboration was very good.

Regarding utilities, it is fair to mention the good collaboration provided by EDP-Energias de Portugal and MEO-*Serviços de Comunicações e Multimédia*.

### *1.2.2 Taxpayers', consumers' and economic operators' rights*

Complaints related to tax, economic and financial matters have constantly increased over the past few years. This is due namely to legislative changes, the increase of financial and tax charges borne by most of the households and the cash-flow difficulties of micro and small companies.

In 2016 the total number of cases opened (1531) remained around 2015 numbers, with only less 39 cases.

1493 cases were closed in 2016, which 74% of them (1112) were opened in such year. This means that almost  $\frac{3}{4}$  of the closed cases total reached a final decision less than a year after their opening.

In 2016, the grounds for closing the cases were as follows:

- In 646 (43,3%) cases, the invoked illegality or unfairness was remedied;
- 625 (41,9%) cases were dismissed due to lack of substance;
- In 121 (8,1%) cases, resolving the matter by other means turned out to be essential or more suitable, and therefore the complainants have been directed to the appropriate means;
- In 42 (2,8%) of them, new facts found during the investigation showed they were outside the scope of the Ombudsman's competence;
- 37 (2,5%) cases were closed due to complainants' withdrawal;
- In 19 (1,3%) cases, a remark to the body or competent service was made;
- Only 2 cases (0,1%) were closed without remedying the invoked illegality or unfairness and only in 1 case it was decided a summary dismissal.

Beside these 1493 decisions, with communications to the complainants of the respective foundations, this thematic unit also elucidated 423 citizens whose communications did not give rise to cases. They were instead classified as non-admissible or dismissed complaints, without further investigation.

Comparing with the previous year, it should be outlined: *i)* a very sharp rise in the individual income tax cases; *ii)* a relevant increase on tax enforcements cases; *iii)* a sharp fall on toll fees cases. Moreover, apart from an increase on the cases concerning real estate tax – which in 2016 ranked 3<sup>rd</sup> – the matters are distributed in a manner similar to that of the previous year. These matters are analyzed below in more depth.

### *Individual Income Tax*

The amendments resulting from the reform of the Individual Income Tax (IRS), in force since 1 January 2015, generated an increase of complaints during that year, as outlined in the Report to the Parliament 2015. This increase not only remained, but became far more marked in 2016.

Of the 478 IRS cases opened, more than a half (around 56%) related to the slowness in reimbursements (146) and to the impossibility of opting for the joint taxation regime in returns delivered after the time limit (123).

Following the initial phase of the IRS Code, which gave rise to the intervention of the Ombudsman on delays in reimbursements in the early 1990s and although such problems did not fully disappear, they became without a quantitative expression. This led this State body to focus not only in ensuring that reimbursements were made in time but also on the automatic interest payments on delays.

In 2016, the problem of slowness of IRS refunds related not only to the delay itself but also to the difficulty in obtaining, by the Tax and Customs Authority (AT), a diagnosis as to the motives at the origin of these delays.

Following enquiries with the IRS Directorate, between the beginning of September<sup>(1)</sup> and mid-November, some information was collected in mid-December. A meeting was also proposed by the Ombudsman.

By 31 December, more than a half of the cases opened on this issue were closed. However, the 68 outstanding cases as well as the need to prevent the repetition of these delays, in the year 2017, justify the subject to be monitored by this State body.

In relation to the second major cause of IRS' complaints – the impossibility of opting for the joint taxation regime in returns delivered after the time limit – there was a faster and positive evolution. In fact, by the end of the year, a Parliament Decree enshrined a transitional regime aimed to solve the problems outlined by the Ombudsman to the State Secretary for Tax Affairs, on 22nd August, within the framework of an own initiative case. It should be noted that, on this matter, the Ombudsman has received over a hundred complaints from citizens who, because they have delivered the annual tax return after the time limit, found themselves unable to opt for the joint taxation of their household's income.

The problem of changing the rule of taxation scheme of household members to the precisely opposite scheme, i.e. separate taxation, although with the possibility of joint taxation option, surprised several citizens who only realized the amendment when they proposed deliver the respective returns.

However, in some cases, and for different reasons, this delivery happened after the time limit. In 2016, the consequence was not only the imposition of fines but also the more burdensome of being impossible to opt for the joint taxation regime.

Whereas separate taxation tends to harm especially households in which a member receives all or almost all of the income, the complaints commonly showed that the households most affected by the problem were those in which there were problems of unemployment, disability or prolonged illness of one of the spouses. Hence, the impossibility of opting for the joint taxation regime put these households in a weaker situation.

Not only the Ombudsman's suggestion to amend the legislation to future was accepted<sup>(2)</sup>, but also his suggestion for settling the cases occurred in 2016, regarding the taxation of income from 2015, was welcomed.<sup>(3)</sup>

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(1) Under articles 96 and 97 of the IRS Code, the tax overpaid shall be repaid until 31 August of the year of delivery of the return when that delivery has been made within the period laid down in article 60 of the referred Code.

(2) Through the amendment of article 59 of the IRS Code, implemented by law No. 42/2016, of 28 December (State Budget for 2017).

(3) The transitional regime which ensured the resolution of these cases was promulgated by the President of the Republic on 23 December 2016, and was published in 2017. This is law No. 3/2017, of 16 January.

This own initiative case also included, among other matters,<sup>(4)</sup> the problem of unequal treatment of tutoring fees, depending whether paid to individuals or to tutoring centres. Only those paid to individuals are deemed as education expenses. This difference in treatment, although with legal basis, since tutoring centres are neither exempt from VAT nor taxed at the reduced rate<sup>(5)</sup>, creates a discrimination that this State body deems unjustified. In fact, it treats differently households that bear the same type of expenditure, which is considered relevant, or not, for the purposes of the IRS deduction, depending on the rate of VAT applicable to the service provider. It was thus considered that such a circumstance was merely a formal requirement and not acceptable, and therefore this matter should be analyzed and, consequently, the legislation reviewed.

Contacts with the State Secretary for Tax Affairs were also made on other issues related to the deduction of education and health expenses, since complaints kept being received.

In a first letter, dated 29 April, the Ombudsman called the attention to the disparities that the legal system could generate on the grounds of detention, or not, of Economic Activity Code (CAE) of the education sector by the entity issuing the invoices. This may again constitute a substantive unequal treatment as to the IRS to be paid by different households with identical type of charges.<sup>(6)</sup> The reply to this letter was received in early August and reported that a proposal for a legislative amendment was being prepared «to be presented in due course». Notwithstanding, the Ombudsman addressed new communication to the State Secretary for Tax Affairs, calling the attention to the fact that education expenses which had been historically accepted should be maintained. This included pens, pencils, notebooks, electronic calculators required for the study of mathematics, materials used by art students, among others, as well as transportation costs to and from schools, costs of food in school canteens and accommodation when students study away from their residence.

Regarding health expenses, a first letter was also sent to the State Secretary for Tax Affairs in April<sup>(7)</sup>, which was equally replied in early August. On that occasion, the State Secretary for Tax Affairs considered that, in the specific case of health costs, the legal

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(4) The complete letter sent to the State Secretary for Tax Affairs is available in the Ombudsman site: [http://www.provedorjus.pt/site/public/archive/doc/oficio\\_P\\_16\\_9\\_SEAF\\_tributacao\\_conjunta.pdf](http://www.provedorjus.pt/site/public/archive/doc/oficio_P_16_9_SEAF_tributacao_conjunta.pdf)

(5) See item a) paragraph 1 of article 78-D of the IRS Code, which states the following: «1 - A credit corresponding to 30% of education and training expenses borne by any of the household members shall be given, with the global limit of € 800,00:

a) Included on invoices regarding supply of services and purchase of goods, exempt from VAT or taxed at the reduced rate...».

(6) The letter S-PdJ/2016/5330, of 29 April, sent in the framework of case Q-4270/15, is available in the Ombudsman site: [http://www.provedorjus.pt/site/public/archive/doc/Oficio\\_Secretario\\_de\\_Estado\\_dos\\_Assuntos\\_Fiscais.pdf](http://www.provedorjus.pt/site/public/archive/doc/Oficio_Secretario_de_Estado_dos_Assuntos_Fiscais.pdf)

(7) Letter S-PdJ/2016/4668, of 28 April, is available in the Ombudsman site: [http://www.provedorjus.pt/site/public/archive/doc/Q6359\\_2015\\_IRS\\_Despesas\\_de\\_saude\\_Deducoes.pdf](http://www.provedorjus.pt/site/public/archive/doc/Q6359_2015_IRS_Despesas_de_saude_Deducoes.pdf)



regime allows, as a rule, the correct classification of expenditure which is intended to cover, and therefore «the essentials of the scheme created in 2014 should be preserved».

This State body reaffirmed that principles of fair taxation should prevail over issues of feasibility of the system. For example, regarding people with allergies and food intolerances such as lactose or gluten, it was suggested the possibility that the legal presumption of the CAE in the invoices of purchase of food may be rebutted by proof of such diseases, on a case-by-case basis. This would prevent that two purchasers of food without lactose or gluten free, both with the same clinical pathology, see the respective expense deductible or not, just as the shop where they purchase the products has, or not, CAE for the health sector.

Compliance by public transport operators of the requirement of invoice issuance and the corresponding right to obtain invoices by the users, also gave rise to some complaints. As a result, public transport operators updated their sites and affixed information on this matter.

### *Tax enforcements*

This subject gave rise to 351 cases, representing approximately 27,5% of the total number of open cases on taxation. Of those, 197 had as addressed entities the Social Security Enforcement Sections while 123 had as addressed entities the local offices of AT.<sup>(8)</sup>

It can therefore be said, for the third consecutive year, that the situations where the actions of the Social Security Enforcement Sections were challenged have been increasing worryingly. In 2014 the cases filed against local offices of AT roughly doubled the complaints in which the addressed entities were the Social Security Enforcement Sections. In 2015 was much the same. However, in 2016, the complaints in which the addressed entities were the Social Security Enforcement Sections are 1,6 higher to those where the addressed entities were the local offices of AT.

Despite the remaining difficulties on the tax enforcement proceedings for collecting social security's debts, it should be pointed out on the positive side, the willingness of the Financial Management Institute of Social Security, I.P. (IGFSS), as interlocutor with the Ombudsman.

It was precisely in order to diagnose and to contribute to the resolution of the major issues that affect debtors on proceedings by social security that was held a meeting, at the premises of the IGFSS, between staff of the Ombudsman and staff of that Institute. One of the topics discussed – and that will further be monitored – was the undue tax

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(8) Addressed entities in remaining cases were *Caixa Geral de Depósitos* (16), as receiver of bank accounts' attachment orders, municipalities and municipal services that have their own enforcement services (9) and the remaining against entities receiving attachment orders, namely entities paying salaries or pensions (6).



enforcements. This happens either because the debt is already paid, or because it is found out that the debtor is exempt, or for any other reason that leads to unwarranted extraction of debt certificates by the Social Security Institute, I.P. (ISS). In this respect it was possible to assess some ongoing changes, notably in the computer system that can help overcome this problem. The monitoring of developments will be maintained.

It should be noted that, in a service that faces, in addition to other problems, a lack of human resources, starting undue enforcements represents a waste of human and material resources. According to good administrative practice, human resources should be directed to the swift and strict proceedings of duly justified enforcements.

The lack of human resources continues to be sustained by IGFSS, as a cause for the maintenance of a very worrying situation: the extreme slowness in sending the actions contesting enforcements to courts.<sup>(9)</sup> Taking this into account, the Ombudsman opened an own-initiative case to strengthen the efforts of knowledge and change this reality. On 31 December 2016 this case was not yet closed.

Regarding tax enforcements, the issues concerning the breach of minimum amounts not attachable remain (in some cases without the liability of the enforcement authority or of the addressee of the attachment order, as it happens when the bank complies with an attachment of the bank account in which it was deposited the remaining of the salary or pension already attached at the source).

In these circumstances, this State body elucidates the complainant and refers him to the enforcement authority in order to prove that the amount deposited arises from salaries or pensions. The enforcement authority should assess the evidence and if validated, it should cancel or reduce the attachment so that it is guaranteed the respect for the minimum amounts not attachable.

In some cases it has been necessary to intervene with the enforcement authority<sup>(10)</sup> so that it assesses the evidence and does not refer to the banks the responsibility to attach, not attach or partially attach.

In other cases is the performance of the banks themselves that is called into question – and rightly so – by the claimants. This occurs when the fulfilment of the bank account attachment order breaches the minimum amounts foreseen in the law.<sup>(11)</sup>

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(9) The 20 days deadline that binds Social Security Enforcement Sections is often exceeded not only in several months but even in several years.

(10) This problem has only been occurring with social security and not with AT.

(11) According to No. 5 of article 738 of the Civil Procedural Code, the amount corresponding to the minimum national wage is not attachable.

## *Real Estate Taxation*

Cases related to Municipal Real Estate tax (IMI) assume a greater quantitative expression in the framework of real estate taxation. In 2016 they ranked 3rd among the tax affairs more often object of complaint.

There has been a relevant increase in cases opened on this subject, in particular regarding the loss of exemptions. In the vast majority of cases it relates to the loss of the exemption currently provided for in article 11 of the Municipal Real Estate tax code (CIMI), for low-tax value real estate, owned by low-income taxpayers.

The reason most often found to be the cause of the loss of this exemption was not the change in the financial position of the taxpayer but, instead, the increase in the tax value of the real estate, as a result of the general evaluation of urban real estate recently completed. For this reason, in communication addressed to the State Secretary for Tax Affairs, dated 12 August, on issues of real estate taxation, the Ombudsman stressed the fact that the incomes of households do not have accompanied proportionally the growth of tax value of real estate. Hence, the limits foreseen in the law – € 15 295,00 to the total gross household income and € 66 500,00 for the overall tax value of all real estate belonging to the household – should be updated in order to ensure the respect for constitutional imperatives of the right to housing and the right to private property.

In the communication, this State body has taken over another issue related to the real estate taxation not yet discussed with this Government, i.e., the problem of application of article 28 of the General Stamp Duty Chart (TGIS), giving rise to stamp duty on property rights, usufruct, alternately or jointly, and the right to surface on urban real estate, with tax value equal to or greater than one million euros for the purposes of IMI. In response, coming at the end of October, this State body was informed that the draft State budget for 2017 included a provision revoking article 28 of the TGIS. However, as regards tax assessments already made, whose legality, in some cases, the Ombudsman questioned, nothing was reported. Similarly, it was not received any information about updating the limits for recognition of exemption provided for in article 11-B of the CIMI. The inadequacy of the response was reported to the State Secretary for Tax Affairs. Thus, those issues will continue to be monitored in 2017.

## *Other tax issues*

In 2016 it was possible to resolve, fairly, some situations related to the imposition of fines, having this State body, again, counted with the good collaboration of the Tax Justice Department of AT.

Also, in 2016, there was a very sharp decline in the number of complaints related to toll fees, which may be explained by the correction of the most flagrant deficiencies of the legal system and in the clarification of the main questions of users.

Finally, there was an increase in the cases opened regarding the collection of the audiovisual contribution (CAV). Almost all of the cases (17, an increase of roughly 2,5 compared to the previous year) resulted from the collection, in 2016, of the CAV respecting 2015 since it was not confirmed the assumption on the basis of the exemption in that year (annual consumption of electricity less than 400 kWh). A final position on this matter will take place probably in 2017, which will not fail to take account the background to this subject, namely the recommendation No. 15/A/2013, of 7 October.<sup>(12)</sup>

### *Banking*

Complaint on this issue show the concerns of citizens with the costs associated with commissions (11), as well as some problems related to the granting of credit (10). These complaints continue to reveal some situations of financial need, over-indebtedness and a low degree of financial literacy, which leads, for example, to undertaking bails without the minimum knowledge required about the actual consequences of such decisions. Often, at a time when such problems are presented to the Ombudsman there is not much to be done, except to inform and direct the complainants to attempt negotiating a debt settlement plan with creditor banks, eventually requesting the intervention of the Credit Mediator. Also, it is provided information to complainants about the possibility of challenging the borrower in court or out of court.

As per above, the Ombudsman received complaints regarding the attachment of bank accounts which are directed to banks. This happens when the bank seizes the entire balance of bank accounts, disrespecting, namely, the minimum threshold of unseizability provided for in paragraph 5 of article 738 of the Civil Procedural Code – and depriving the debtor of the amount essential to keep his livelihoods. It also happens when bank accounts are owned by more than one person (some banks seize the entire balance, without taking into account the share of the debtor).

Besides the Ombudsman's intervention with the addressed credit institution whenever the respective nature allows it<sup>(13)</sup> and besides directing the complainants to the appropriate means of protecting their rights, namely in court, this State body has requested statistic information to the Bank of Portugal, which, by the end of the year, had not yet been provided. This prevented the Ombudsman to reaching a final conclusion on this issue.

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(12) Available in the Ombudsman site: [http://www.provedorjus.pt/site/public/archive/doc/Rec\\_15A2013.pdf](http://www.provedorjus.pt/site/public/archive/doc/Rec_15A2013.pdf)

(13) The activity of private banking is generally outside the scope of the Ombudsman's competence.

The enquiries made concerning cases where *Caixa Geral de Depósitos, S.A.* is the addressed entity and the excellent cooperation provided by this entity, allowed to solve cases such as the issuance of essential Declaration for residence visa for a citizen of Brazilian nationality and the assumption of costs with the cancel of a mortgage in the framework of a housing credit.

### *Transports*

Delays, cancellations of flights and the right of users to the respective indemnity continue to be the object of cases. It was necessary to insist with TAP Portugal (TAP) to refrain from the practice, already censored by the Ombudsman, of paying compensation for the delay or cancellation of flights, by issuing travel vouchers without informing the affected citizens about the alternatives at their disposal, namely the cash payment.

In one case of impossibility of bicycle transport in a train set at the Douro railroad, the complainant was informed that the conduct of the *CP – Comboios de Portugal, E.P.E.* was legal, as justified by the characteristics of the rolling stock. Nevertheless, it was suggested to the carrier that all efforts were carried out to achieve, as soon as possible, the adaptation of essential rolling stock to the transport of bikes.

Concerning several issues raised by users of public passenger transport in the metropolitan areas of Lisbon and Oporto, the Ombudsman has promoted, for some years, enquiries with the Government, the *Instituto da Mobilidade e dos Transportes, I.P.* (IMT) and, more recently, the *Autoridade da Mobilidade e dos Transportes* (AMT). These include incidents recorded with careers and compliance with schedules and, most of all, with the ticketing system, including tariff, zoning and the cards of support themselves.

In response to enquiries made and the questions raised by this State body, the State Secretary for the Environment reported that a legal document relating to the availability of tickets is being prepared. He assumed the commitment to protect the rights and interests of consumers in the creation and availability of these tickets and of market regulation and tariffs, as well as to the level of validity and exchange of cards of support and return or refunds of tickets contained in these cards. The subject will continue to be accompanied by the Ombudsman.

### *Trade*

A remark was made to the Energy Services Regulatory Authority about the procedure of claim recorded in the trader's complaints book. The regulator's response was considered satisfactory and enlightening, both in the present case, and in similar cases.

## *Other financial and economic issues*

Complaints about insurance activity are, as a rule, instructed within the respective regulatory and supervisory authority, the Portuguese Insurance and Pension Funds Supervisory Authority (ASF). The Ombudsman can rely on ASF for settling several situations and also to collect information to elucidate complainants when it is concluded that no reason existed. One of the problems that was possible to overcome with the mentioned good cooperation with ASF related to a citizen, with Hodgkin's lymphoma, for which the insurance company *Allianz Portugal, S.A.* had refused the inclusion in a group health insurance, subscribed by his employer. The complainant ended up being included in the group health insurance.

The State's debt to suppliers and the limitation period of saving certificates owned by deceased savers were also object of complaints. Regarding the latter, there is not much this State body can do – other than elucidate the complainants to prevent future situations – when the heirs miss the 10-year deadline after the death of the saver, date on which the certificates revert to the public debt stabilization fund.

## *European and National Funds*

Among the cases closed, it should be highlighted a situation in which the managing body of the Rural Development Program 2014-2020 (PDR 2020) agreed to review a decision of refusal of the application for Operation – 6.2.2 – restoring the productive potential of the PDR 2020.<sup>(14)</sup>

The question of the limitation period applicable to the right to revoke the acts of granting Community financial support continues to give rise to some complaints.

### *1.2.3. Social rights*

The issues relating to social rights and more specifically to social protection continued to be the subject of a large number of complaints addressed to the Ombudsman.

In general terms, it can be said that complaints in this area cover a variety of issues relating to social security schemes, the convergent social protection system, special and supplementary schemes.

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(14) The support granted within the framework of this operation are designed to support the rebuilding or replacement of the production conditions of farms affected by natural disasters, adverse climatic accidents or catastrophic events in order to create conditions for the return to a normal activity.

In the year 2016, 1496 complaints procedures were opened, representing a slight decrease compared to the number (1636) registered in the previous year. However, it should be noted that the number of complaints exceeded the number of procedures effectively opened, not only because a number of complaints (325) were incorporated into proceedings that had already been opened and dealing with similar issues, but also because other complaints (185) were rejected without further consideration.

As in previous years, the matters relating to social rights were those which most frequently substantiated complaints to the Ombudsman, representing 22% of the total number of cases procedures received.

1574 procedures were concluded in 2016 (more 78 than the previous year). Among the 1574<sup>(15)</sup>, 1083 procedures were completed in the same year, which means that 72% of complaints opened in 2016 were concluded in less than a year.

More than 90% of procedures related to social rights were concluded within less than one year

It is important to highlight that 92% of the grounded procedures were successfully concluded following the intervention of the Ombudsman.

This result shows a greater swiftness and efficiency on the Ombudsman's performance, which is of particular relevance when – as is the case – the subject complaints concern fundamental protection social rights.

With regard the complaints subject, the most frequent issues were: unemployment benefits, family benefits (child benefit to children and young people) benefits for people with disabilities, sickness benefit, parental allowance, old-age and invalidity pensions, benefits in the event of death, solidarity benefits (insertion social income, solidarity supplement for the elderly and other subsidies within the scope of social action). Several complaints regarding debts and social security contributions were also received.

Merely as an example, below are reported some of the Ombudsman interventions in the social protection affairs.

In the first place, it must be reported the developments achieved by former Ombudsman's decisions.

Therefore, it is worth to refer that the Recommendation No. 15-B/2012, December 28, 2012<sup>(16)</sup> - which purpose was the revision of the special education allowance legal

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(15) Within 1574 concluded cases in 2016, it is noted that 970 (61,6%) have succeeded in repairing the illegality or injustice, following of the Ombudsman intervention; 507 (32,2%) were considered groundless, after instruction. Several of the remaining cases were concluded with remark or suggestion call addressed to the public entities.

(16) After critical remarks issued to the Government, on April 11, 2014

frame (a special support benefit provided to children and young with disabilities or with difficulties in learning) – was accepted<sup>(17)</sup>.

It was also achieved the harmonization of the retirement rules applicable to *Guarda Nacional Republicana* military members and to *Forças Armadas* military members, by the publication of the Decree-Law No. 3/2017, of 6 January, after former remarks made by the Ombudsman in that way.

Another Ombudsman's suggestion claiming for a legislative amendment was achieved with the publication of Law No. 34/2016, of 25 August.

In fact, the Ombudsman had been defending since April 29<sup>th</sup>, 2013, the necessity of altering the unemployment law in force in what concerns the fortnightly presentation duty (according to which unemployed with benefits should present themselves before Employment Services every fortnight).

The Ombudsman considered that, despite the necessity of guaranteeing that unemployed citizens search actively for a new job and that an effective control held by Unemployment Services is assured, the fortnightly presentation duty should be abolished or at least modified.

Still regarding the unemployed social protection scheme, the Ombudsman addressed the Government, on November the 3rd, 2016 the Recommendation No. 4/B/2016.

This Recommendation claimed for another legal amendment in unemployment rules, aiming the clarification of both the reduction limits and the increasing rules of unemployment benefits amounts.

In what concerns the rules of increasing, the Ombudsman defended that all unemployed couples with dependent children should be entitled to an increase in unemployment benefit amount.

Regarding a different matter and following the examination of several complaints about the new Regulation of the Pension Fund for Lawyers and Solicitors, approved by Decree-Law No. 119/2015, of 29 June, the Ombudsman drew the special attention of the Government to the need to consider different regulatory solutions for some aspects and injustices.

The suggestion was accepted and Government determined the establishment of an inter-ministerial working group to assess the new Regulation of the Pension Fund for Lawyers and Solicitors.

The Ombudsman has also repeatedly analyzed the application of self-employed workers' contributory social security scheme provided by the Social Security Contribution Regimes Code, therefore having suggested several legislative amendments to the

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(17) By the publication of Implementing Decree No. 3/2016, of 23 August. This legal instrument updated some concepts. It also clarified items about the medical certification related to disability and its effects, as well as about the necessary supports/devices that children and young with disabilities need.



Government as well as various administrative procedures corrections to the Social Security Institute<sup>(18)</sup>, many of which were accepted.

Also related to self-employed workers was the remark the Ombudsman made to the Government because these workers are still not entitled to an early old-age pension in the event of long-term unemployment, in contrast to employees.

Another legislative amendment suggested was the reduction of the 10-year limitation period established for recovery of social benefits unduly paid. The legislative developments<sup>(19)</sup> have made necessary a fresh approach and a new thinking on this subject and have showed that such a long limitation period is unjust, disproportionate and creates legal uncertainty<sup>(20)</sup>.

On the other hand, the Ombudsman accepted the proposal raised by teachers with annual contracts in order to keep them entitled to access the convergent social protection scheme managed by *Caixa Geral de Aposentações* (CGA). In this sense, the Ombudsman suggested the Government to provide guidelines to CGA so that the situation is settled<sup>(21)</sup>.

Besides legislative changes, the Ombudsman also contributed to improve the administrative activity and good administrative practices, as one can see from the actions listed below.

In fact, following several interventions and insistences of the Ombudsman, it was possible to a) solve issues related to social security registry of foreign workers<sup>(22)</sup>; b) urge the Board of the Social Security Institute to adopt measures that avoid delays by Pensions National Centre to grant pensions to the elder and also on the coordination with foreign social security institutions according to EU regulations; c) solve several complaints concerning grant, refusal, suspension or termination of illegal social benefits; d) clarify and contribute to settle illegal debts compensations; e) contribute to the proper enforcement of the new administrative procedural code regarding administrative void decisions and revocation of decisions granting social benefits<sup>(23)</sup>; solve issues related to framework and registry of workers in the social security system, remuneration registry in Social security Information System, contribution rates, exemptions and self-employed workers' contributory base, as well as social security contributions debts and reimbursement of contributions unduly paid.

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(18) For further details, see Section 6.3.1.a) of this Report.

(19) Currently, Portuguese law states a 5-year limitation period for social security contributions payment and for public money return.

(20) For further details, see Section 6.3.1.a) of this Report.

(21) For further details, see Section 6.3.1.a) of this Report.

(22) For further details, see Section 6.3.1.b) of this Report.

(23) See an example in Section 6.3.1.a) of this Report.



#### 1.2.4. Workers' rights

In regard to labour and employment, occupational training and public procurement, the overall number of complaints' procedures initiated in 2016 has registered a decrease of 14,5%, when compared to 2015, from 1021 to 873<sup>(24)</sup>. The number of cases closed in 2016 was 1013, which corresponds to 116 % of the number of cases opened in the same period.

As registered in the past year, whilst the number of complaints related to labour disputes between private parties, occupational training, unemployment, and public procurement has increased, the number of complaints concerning public employment has diminished (by 23%, from 848 to 652) but still constitutes the major area of intervention on workers' rights. This reduction may in part be due to the fact that, in 2016, the annual teachers' recruitment procedure has led to fewer disputes than in the precedent year. In fact, teachers in elementary and secondary public schools represent about 19,6% of all public servants and the yearly recruitment procedure, complex as it is, usually gives rise to a very significant number of complaints. Therefore, the outcome of this recruitment procedure may have a very noticeable impact on the number of complaints related to public employment received by the Ombudsman.

The number of cases related to private labour disputes rose from 104 to 135 as a consequence of the increase of complaints presented against the Wage Guarantee Fund (*Fundo de Garantia Salarial* – FGS). This Fund grants financial protection of employees in case of insolvency or during companies' recovery processes; it pays any credits emerging from the employment contract; and it is managed by the State and the social partners represented in the Standing Committee for Social Dialogue. The main reasons that led the employees (or former employees) to address the Ombudsman were: the delay in deciding the workers' requests; and the refusal to repay workers who did not file their request within one year after the termination of the employment contract.

The cases opened in 2016 in the field of public procurement were no more than 17 (against 9, in 2015), the majority of which concerned the alleged breach of legal duties by electronic public procurement tendering platforms, the so called *e-platforms*. One of the e-platforms operating in Portugal was particularly aimed by the complaints, which led the Ombudsman to address the issue to the *IMPIC* (the Public Institute responsible for monitoring the activity of the electronic tendering platforms).

Among the cases related to public employment (652), most arise from problems regarding public officials' selection procedures (104), working conditions (98), retribution (85),

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(24) Of the 873 cases opened in 2016, one was opened by Ombudsman's initiative on the 6<sup>th</sup> of September, following the death of one trainee, during the course of the *Comandos* (a special military force whose officials must undergo demanding training). After the procedure was opened, one other trainee passed away.

employment relationship (78), labour mobility (67), career development (60) and occupational accidents or disease (54).

In general, complaints concerning selection and recruitment procedures keep revealing that the irregular or illegal conduction of public tenders is recurrent, regardless of the important consequences it brings, not only to the affected candidates, but also to the Administration. In fact, public recruitment procedures aim to select the best candidate and that objective can not be fulfilled if they are faulty. Therefore, once again in 2016, the Ombudsman repeatedly drew the public entities' attention to unlawful practices, such as: introducing illegal requirements that inhibit potential candidates; excluding candidates from procedures on merely formalistic or bureaucratic grounds; applying discriminatory criteria on the evaluation of the candidates' *curriculum, etc.*

In regard to working conditions, the many complainants have once again fought unjustified or poorly grounded decisions taken by public employers to refuse flexible or continuous work schedules, even when an adequate conciliation of work and family life is at stake. Public entities continue to show some resistance in assessing, in particular, the needs of the worker and the effective repercussion their claim would have on the entities' activity or organization, even when urged to do so by the Ombudsman or the Commission for Equality in Labour and Employment. This year, for instance, the Ombudsman had to persuade a hospital to abide to the recommendations of this Commission on the subject of authorizing flexible schedules. As those recommendations are mandatory, the hospital resorted to purely formal arguments, in order not to comply with the instructions given by the Commission for Equality.

On the subject of employment relationship, the cases on precarious contracting of work or disguised employment in the Public Administration (*v.g.*, false self-employment, irregular internships or research grants, employment-insertion contracts and employment-insertion+contracts<sup>(25)</sup>) should be highlighted. Although this problem has for long deserved the attention of the Ombudsman, this year the Budget of State Law for 2016 determined that the Government should launch a multiannual strategy to combat precarious forms of employment in public bodies (article 19). In this context, besides considering particular complaints, the Ombudsman has been monitoring the launch of this strategy and the adoption of further proposals or recommendations shall be considered.

The right to compensation for the damages suffered in consequence of occupational accidents or disease also motivated the Ombudsman to take position in some relevant cases concerning: the possibility to accumulate compensation for permanent partial disability with other income (see below, § b) of No. 6.6.1.); the right to compensation of

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(25) Employment-insertion contracts and employment-insertion+contracts are the names of two programmes which aim to promote employment. These contracts are celebrated between public or private entities and people who are unemployed or receiving unemployment compensation, which agree to perform tasks considered "socially useful".

public servants working for public-sector enterprises (see below, § b) of No. 6.4.1.); and the duty of the public service responsible for granting the compensatory pension due to military officials who suffer from permanent disability to decide the requests of the disabled officers based on the evidence presented, without posing merely bureaucratic obstacles (such as demanding the submission of a specific kind of form, not required by law).

Among the cases that required a more formal and substantiated intervention, the Ombudsman issued, in 2016, five recommendations (see below, § a) of No. 6.4.1) and intervened in various complex situations, that involved a significant number of complainants or public servants: for instance, by urging the Secretary of State of the Public Administration to clarify the law applicable to public servants in case of long-term absence due to illness and its consequences in the right to vacation or the count of service time (see below No. 6.4.2.); or by addressing the Secretary of State Assistant and of Education while the amendment of Decree-Law No. 132/2012 (the Decree-Law that disciplines the yearly procedure of recruitment of teachers) was being discussed, in order to stress the need to solve various problems brought to the attention of the Ombudsman by plaintiffs over the past years.

Yet, obeying the principles of informality and celerity that preside to the activity of the Ombudsman, many of the cases come to an end following simple contacts by email or telephone, that allow, *v.g.*, to clarify facts or the rules that should be followed by the Administration. Frequently, the informal intervention of the Ombudsman leads delays in the conclusion of administrative procedures or purely bureaucratic obstacles to be swiftly overcome.

The success of the Ombudsman's interference greatly depends, nevertheless, of the level of the cooperation of the entities addressed. In some cases, the Ombudsman tries special strategies of communication – such as scheduling regular meetings or asking for the appointment of a privileged interlocutor of the public body at stake. In 2016, these strategies, especially when used with entities that are targeted in a great number of complaints (*v.g.*, the school administration), have been proven effective.

### *1.2.5. Right to justice and security*

In 2016, the complaints concerning the administration of Justice and security gave rise to 762 complaint procedures. During the same period, 911 procedures were filed.

It should be noted that the instruction of the procedures relating to the Autonomous Regions of the Azores and Madeira is carried out by advisors that are part of this thematic unit.

In continuity with previous years, the preponderance of complaint procedures relating to the administration of justice remains, corresponding to 63% of the requests made to this state body, with respect to this thematic unit.

These procedures involve issues of judicial delays and, for this reason, the Ombudsman's intervention is made to the Superior Councils for the Judiciary, and for the Administrative and Fiscal Courts (199), as well as the Superior Council for the Prosecution Service (22)<sup>(26)</sup>. It is also worth noting the number of complaints procedures regarding the activities of auxiliary officers of justice, namely, enforcement officers (95) and insolvency administrators (14).

It is stressed that the access to the law and to the courts also presents a remarkable number of complaints procedures (61, which represents an increase of 5% over the previous year), corresponding to 8% of the total. 26 complaints procedures concerning the deontology of lawyers were also opened, which motivated inquiries before the Councils of Deontology of the Portuguese Bar Association.

The issues relating to road affairs rank second (133), corresponding to 18% of the total number of procedures opened in 2016 in this thematic unit. This group includes issues relating to administrative offences proceedings (57), followed by driving licenses and driving schools (33), and finally the action or omission of the bodies responsible for road traffic signs and road and transport planning (17).

Within registries and notaries, 84 complaints procedures were opened (representing an increase of 5% over the previous year), of which 38 corresponded to interventions in registry matters, and only 10 dealt with the performance of notary offices.

With regard to questions of internal security, 43 complaints procedures have been opened regarding either the police action, per action (22) or omission (6), or the activity in the implementation of the legal system of weapons and ammunition (11) and other internal security problems with a residual value of 4 procedures.

As for the entities referred to in the complaint procedures, in addition to the interventions in the administration of justice carried out before the respective High Councils, the PSP and the GNR were also targeted, and also the criminal investigation police (PJ) and the municipal police. It should also be noted that, in terms of road law, the IMT was targeted in 53 complaints procedures and the National Road Safety Authority in 49. Similarly, municipal entities such as ECALMA, in *Almada*, or EMEL, from Lisbon, were also targeted.

With reference to the final decisions of filing procedures taken in the year 2016, it should be highlighted the issuing of two recommendations<sup>(27)</sup> regarding road law and 10 remarks.

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(26) See No. 3 of article 22 of the SPO.

(27) See *Positions adopted in 2016*, p. 159-171.

With regard to the main grounds for filing, the following stand out:

- a) In 45% of the assessed situations, illegality or unfairness were remedied during the investigation;
- b) In 35% of cases, the investigation did not lead to the acceptance of the plaintiffs' claims;
- c) In 7% of assessed cases, this State body referred the complainants to the appropriate means to assert their claims;
- d) In 7% of cases, there was withdrawal of the complaint;
- e) In 4% of cases, although it has been considered that the complainants were right, it has not been possible to lead the targeted entity to immediately change the situation or solve the issue of the complaint.

The main issues discussed in the year 2016 are analyzed below.

### *Administration of justice*

The administration of justice comprises the following segments: judicial delays, access to justice, deontology of lawyers and enforcement officers and other administrative problems of justice.

As previously stated, regarding the administration of justice, judicial delays is the matter with higher numerical expression (358) which involves cooperation with the Superior Councils for the Judiciary (152) and the Administrative and Fiscal Courts (47), as well as the Superior Council of the Prosecution Service (22), essential for the timely monitoring of the situations in question.

To illustrate the Ombudsman's intervention, a few concrete cases will be mentioned. Therefore, it can be noted the performance of this State body near the Directorate-General for the Administration of Justice (DGAJ) following a complaint contesting the obligation to indicate the NIF of the defendant in the enforcement actions that must be established through the *Citius* program under penalty of refusal of the application. In the course of the enquiries of the complaint procedure, DGAJ has come up with a solution: the interested party may, if necessary, use the «justifiable impediment» referred to in the first part of Article 3 (1) of Ordinance No. 282/2013, of August 29, by delivering the application in physical support. The application would be accompanied by the reasoning for the impossibility of filing it by electronic means, due to the lack of the NIF of the defendant and the impossibility of obtaining it, in order to prevent the immediate refusal, thus bringing the matter to the attention of the judge.

Also concerning the judicial pendency situation of the 1st Section of Labour of the Central Instance of Loures, this entity was heard and, remembering the budgetary constraints, has informed that the DGAJ process recovery team had already scheduled to the second half of 2016, the support to the elaboration of the account of about 1200 legal

proceedings, in compliance with according with the approved activity plan. In view of the above, with the reporting of the delay and the taking of measures to overcome the slowness of the proceedings of the section under review, the intervention of this State body was concluded.

Another situation considered by the Ombudsman has been was a complaint lodged by a prisoner in which he argued that his hearing in the conditional release procedure<sup>(28)</sup> should be recorded in order to strengthen the legal means of defense. The complainant has been informed that, whenever the opposite does not result from CEPMPL, the provisions of the Code of Criminal Procedure (Article 154 of the CEPMPL) are applicable to pending proceedings before the Enforcement Sentences Court. The result of the applicable rules is that the law provides adequate documentation of the hearing of the conditional release procedure, in particular as regards evidence produced orally, by not imposing a phonographic or video record, but does not prohibit it either (see Article 99 (1) and 364 (1) of the Code of Criminal Procedure).

Under the rules on access to justice, the Ombudsman has intervened with the Directorate-General for Justice Policy. The Ombudsman — considering that the value of the cause has direct impact on the amount of the initial and subsequent court fees and, consequently, on the number of installments to be paid by the recipient of legal protection in the form of phased payment of court fees — suggested that it should be ascertained whether or not the contribution supported by the beneficiary (in accordance with the annex to Law No. 34/2004, of 29 July) should be extended for a more or less broad period of time, regarding installment payment, not being enough for that purpose to invoke the safeguard clauses of paragraph 3 of article 16 of Law No. 34/2004, of 29 July, and article 13 of Administrative Rule No. 1085-A/2004, of 31 August. Thus, on the one hand, benefits which become payable after four years have elapsed from the date the final decision on the matter has acquired the force of *res judicata* shall not be enforceable, circumstance applicable to any situation of legal aid in the form of phased payment, without weighing the overall amount of the costs in relation to the value of the cause. On the other hand, the beneficiary has the power to request the suspension of the phased payment whenever the sum of benefits paid is more than four times the value of the initial court fee, a prerogative that, however, only takes into account the value of the party's costs due at the end of the proceedings, without taking into consideration the negative impact that the payment of the further benefits may have on the economic capacity of the interested party<sup>(29)</sup>.

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(28) See articles 155 and 176 of the Code of Enforcement Prison Sentences and Imprisonment Measures (CEPMPL), published as an annex to the law No. 115/2009, of 12 October, and altered by law No. 40/2010, of 3 September, and by Law No. 21/2013, of 21 February.

(29) See the summary of the complaint procedure Q-2343/16, in *Positions adopted 2016*, pp. 178-182.



The number of complaint procedures concerning the delay in the assessment of disciplinary procedures by the Councils of Deontology of Portuguese Bar Association showed a slight increase compared to 2015 (from 24 to 26). Also in disciplinary matters, there were six complaint procedures on the performance of enforcement officers.

### *Road safety*

As outlined above, in 2016, 133 complaint procedures referring to problems arising from, in decreasing order, the prosecution relating to Road Traffic Offences (57), the issuing or renewal of driving licenses or the performance of driving schools (33), the traffic signs and road and transport planning (17) and, finally, 26 complaints procedures on matters falling under the category of «other road safety issues».

In this thematic area, the Ombudsman issued two recommendations (Recommendation No. 2/A/2016<sup>(30)</sup> e Recommendation No. 3/A/2016<sup>(31)</sup>) where were targeted entities, respectively, the Mayor of Lisbon and the National Director of PSP. The complaint procedure which culminated in these positions pertained to the delay of the police forces intervention following the illegal parking of a combustion vehicle in an electric vehicle supply terminal. The investigation undertaken concluded that: i) the issue of the removal of improperly parked vehicles in electric vehicle supply terminals, initially cause of contention, is legitimized by the correct use, in those locations, of the legally provided signs; ii) the verification of excessive response times, involving the removal of vehicles in the city of Lisbon (especially when human resources affected by the PSP and the Municipal Police are in question). In this context, it has appeared impracticable that the individual who presented the complaint is forced to remain in the location for excessively long periods and without being safeguarded the reinstatement of legality.

The Ombudsman recommended not only the regulation of parking, but also the registration of all active points of supply of electric vehicles in the municipality of Lisbon, thus reinforcing the response capacity of the supervising entities. It also considered to be necessary a coordinated action between the main entities that regulate and supervise the parking in the council area, therefore being urgent the joint articulation of PSP, EMEL and the Municipal Police, in situations of illegal parking in particularly dangerous locations or involving a serious disturbance to traffic. In view of the above, the Ombudsman recommended to the Mayor of Lisbon that steps should be taken to determine the car parking signalling at all points of supply of electric vehicles in the municipality of Lisbon, as well as an inventory of the terminals in the city, in accordance with the provisions of the legal regime of electric mobility.

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(30) See *positions adopted 2016*, pp. 159-165.

(31) See *positions adopted 2016*, pp. 165-171.

In addition, the Ombudsman recommended that the National Director of the PSP, in coordination with EMEL, the Municipal Police and the Lisbon City Council, define a procedure to ensure the immediate appearance of a police officer in the location where it was signalized the especially dangerous illegal parking or parking with serious disturbance to traffic. These recommendations have been implemented.

With regard to the complaint procedures relating to cases of road traffic offences, the issues examined were related to the legibility of the information included in the respective files.<sup>(32)</sup>

In another situation, the Ombudsman pointed out to the entity concerned – the Northern Regional Directorate of Mobility and Transport – the reasonableness of reserving daily a small number of tickets for priority attendance service cases (in the case of motor disability), in order to avoid cases of refusal of attendance service due to lack of tickets.

Taking into account the long held position of the Ombudsman<sup>(33)</sup>, it was addressed a remark to the target entity in order to comply with Technical Guideline 02/DGAP/2006 of 28 April 2006, which was issued following a previous position taken by the Ombudsman.

This State body also alerted IMT for two other situations: the need to, without exception, be guaranteed the response to the complaints presented in the respective book and the convenience of remembering that, whenever possible, the administrative proceedings should mention the identification of at least one witness who can testify on facts, in compliance with Article 170 (1) (a) of the Highway Code.

### *Registries and Notaries*

There were 38 complaint opened procedures referring to several issues relating to registration. However, a special mention should be made to issues regarding the citizen's card which gave rise to 26 complaints procedures - the second largest group in these areas – since complaints regarding retention or undue photocopy of citizen's card by public and private entities continue to be registered<sup>(34)</sup>.

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(32) See, in this regard, and in order to standardize the files, the Order of the President of the National road Safety Authority, No. 7103/2016, of 20 May, published in *Diário da República* No. 104, 2. Series, of 31 May.

(33) It should be noted that the Ombudsman has already taken a position on the posting of notices containing the essential rules on preferential or priority attendance service, as well as the existence of special service counters, queues or tickets for these cases, thus allowing a prior orientation of the users and the prevention of conflict situations at the time of the attendance service. This position was accepted by the DGAEP, through Technical Guidance No. 02/DGAP/2006, of 28 April, 2006. See note released on the institutional website of the Portuguese Ombudsman <http://www.provedor-jus.pt/?idc=35&idi=69>.

(34) This situation has already been the subject of an interpellation to the Government by this State body, resulting in the commitment that the situation will be considered in the next legislative amendment of the regime of the identification document.



Another situation, sporadic, but still recurrent, is the one in which citizens challenged the requirement of an address in order to obtain the citizen's card. In a particular case, it was defended the sufficiency of the postal box.

However, it was stressed that although the citizen's card fulfills primarily a function of civil identification, its importance is transversal to several public entities, requiring particular caution in the collection and filling of its elements, with particular emphasis on the address which assumes a central role in the communication between the State and Public Administration services and the holder of the document.

In this regard, the law regulating the issuance and use of a citizen's card states that «the address is the physical postal address freely indicated by the citizen, corresponding to the place of residence where he can be regularly contacted»<sup>(35)</sup>. Therefore, strictly speaking, the postal box does not correspond to the place of residence. In fact, having the purpose of the deposit of correspondence, the postal box does not integrate the concept of residence, commonly understood as the place that provides the basis for the life of a natural person, where it might be found. The Institute of Registers and Notaries (IRN) has informed that the address of a support institution is accepted whenever the holder of the identification document has not had a fixed residence and is being accompanied by that entity.

Questions concerning the spelling of names were also the subject of many complaints, not only on the need for it to be in accordance with the birth registers, but also on the need to use the mechanism of Article 103 (1) of the Code of Civil Registry (IRN intervention through the Central Registry Office). In the scope of procedural investigation, this State body concluded that in this matter the action of the administration was not susceptible of censorship.

With regard to the car Registry, questions are still being raised, although residually, on the requirement of payment of the Single Road Tax (IUC) in case of the absence of deregistration of the vehicle. Similarly the cost of registration acts was also contested.

In the scope of a procedure in which the subject of the complaint was the increased cost of a registration act, it was not recognized the reason to the complainant, as such a rise in cost had a legal basis. However, in the course of the investigation, this State body verified that the services did not discriminate the amounts charged on the issued invoice.

Following the intervention of the Ombudsman with the IRN, the administrative action was modified accordingly, in order to issue a detailed bill of the registration request, with receipt value, with all the notary fees charged broken down, specifying all the sums comprised, with reference to respective regulations and indication of the whole amount due<sup>(36)</sup>.

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(35) See article 13 (1) of the Law No. 7/2007, of February 5, in its current wording.

(36) See *positions adopted 2016*, pp. 171-172.

## *Internal security*

In the field of internal security, the police force's action or omission also triggered the intervention of this State body. The most frequent situations are related to the public attendance services or attention given to citizens' requests.<sup>(37)</sup>

Whenever a conduct that is likely to integrate the practice of a disciplinary infraction and its procedure is under investigation by the General Inspection for Internal Administration, this State body monitors the situation. For instance, there was a case where reservations had been made to the action of police officers in an intervention on noise produced by dogs. Once the investigations have been carried out, and since no further inquiries have been justified, this State body still has indicated that «members of the security forces should behave in order to preserve the confidence, consideration and prestige inherent to the police function, treating all citizens, nationals, foreigners or stateless persons with courtesy and respect, promoting coexistence and providing all the help, information or requested clarification, in the field of their competences»<sup>(38)</sup>.

In a complaints procedure concluded in the year to which this report refers, the SEF's action was contested for having carried out two control operations on the same day and to the same citizen upon her exit and re-entry in national territory. Notwithstanding such control has a valid legal basis - since the procedure in which those operations took place was not extinguished - and, likewise, the informality of SEF's action ensured that travels were carried out normally, Ombudsman has signaled to SEF that the inconvenience caused by that duplication could have been avoided by the rapid and proper insertion of the data in the database, since the return date would have already been mentioned in the travel documents.

Still in this area of internal security, the requests made for intervention by this State body continue to raise as the result of expressed reservations regarding the application of the legal regime of arms and ammunition (11), especially as regards the payment of fees, especially when at stake is the substitution of administrative documents, being, however, certain that we are facing an activity which requires prior authorization.

In this context, in a specific case there was an opportunity to emphasize that the CRP does not state the right to use and carrying of a weapon. Following the case-law of the Constitutional Court, it was stated that «there is no constitutional right to use and carrying arms, without excepting the hunting guns, regardless of constraints, including those dictated by the public interest to avoid inherent dangers, which can be safeguarded by granting licenses and withdrawing them», and «it is justified to say that the license is

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(37) See, for example, *Positions adopted 2016*, pp. 175-178.

(38) See article 7 (2) of the Code of Ethics for Police Service, published by the Council of Ministers Resolution No. 37/2002, of February 7, published in *Diário da República* No. 50, 1<sup>st</sup> Series-B, of February 28.

intended to exclude the unlawfulness of an act which is generally prohibited» (see Judgment of the Constitutional Court No 1010/96). The complaint was not upheld.

It should be mentioned another situation submitted to the appreciation of this State body<sup>(39)</sup>, which was related to the late loading of the complainant's identifying data in the PSP computer system, following her complaint regarding the loss of her wallet. The wallet was found even before the presentation of the complaint of its loss, yet due to the possible negligence of the police officer involved the complainant's identification data were not included in the file related to the wallet recovery. This prevented the immediate delivery of the said item its owner, which only occurred a few months later. The investigation of the complaint procedure opened in this State body allowed to conclude that it was an act of negligence of the services. Nevertheless, the PSP informed the Ombudsman that the procedures would be improved in order to avoid similar situations.

### *Good practices and final assessment*

The issues raised by the citizens in the different subjects dealt with by this thematic unit, were investigated with the collaboration of the targeted entities, which provided the relevant clarifications and, when justified, welcomed the Ombudsman's positions, changing its procedural acting in order to correct or improve administrative activity in the areas of justice, internal security and road safety.

Particular emphasis is placed on good institutional cooperation between the Ombudsman and the Superior Council for the Judiciary. Likewise, it is worth noting the fruitful cooperation provided by the IRN in response to the requests submitted to it.

#### *1.2.6. Rights, freedoms and guarantees; health, education and constitutionality valuations*

This thematic unit studies complaints and initiatives taken on issues relating to the rights to health, education, foreigner's law, nationality and the penitentiary system. It should be noted that the two first thematics listed above are dealt with from the perspective of the users of such public services.

The requests addressed to the Ombudsman to exercise his powers of initiative towards a successive abstract review of the constitutionality or legality of norms, before the Constitutional Court, as well as the verification of unconstitutionality by omission, are also dealt by this unit. Likewise, in a subsidiary manner in relation to the other thematic units,

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(39) See *positions adopted 2016*, pp. 175-176.

other issues within the catalog of rights, freedoms and guarantees, namely access to information, data protection and freedom of access and exercise of profession, are addressed.

In general terms, the procedures initiated in 2016 - including five procedures opened at the Ombudsman's own initiative<sup>(40)</sup> – maintained the same figures registered in 2015. The most significant qualitative changes occurred in education issues (raising about 10%) and, in the opposite direction, health issues (however remaining predominant since 2013), nationality and foreigner's law.

During this year, 1000 procedures were concluded, distributed as follows:

- a) In 425 cases, with total or partial satisfaction of the complainant's claim;
- b) In 340 cases, no ground was found to agree with the claim;
- c) In 152 cases, the complainant was referred to the appropriate mean for the defense of the rights at stake, or the clarifications necessary for a correct understanding of the situation were provided;
- d) In 51 cases, in the impossibility of undertaking other actions, with a remark to the Administration, calling for a change in procedures;
- e) In 26 cases the complainant withdrew the petition;<sup>(41)</sup>
- f) In 6 cases, albeit the Ombudsman recognized totally or partially the complaint as reasonable, no recognition of this fact and further restitution was achieved by the Administration.

### *Valuations of constitutionality*

Following the trend noted on the previous year, a further decline was felt in the number of open complaint procedures whereby citizens directly requested the Ombudsman to request the Constitutional Court to declare the unconstitutionality of a certain norm (29 in 2016 with 44 in 2015), thus maintaining the same level registered in 2008, after five years of steep increase and another one of stabilization. In many cases, the grounds used were the principle of equality and organic and formal vices, in this case very much associated with the enactment of new taxes.

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(40) These self-initiated procedures focused on: *i*) assessing the constitutionality of some of the rules of the Lisbon Urban Planning Regulation, namely in relation to the absence of additional criteria to be observed if a project is declared of exceptional importance for the city and, consequently, depart from the construction criteria defined; *ii*) alleged constraints registered in some hospitals in the dispensing of medicines (antiretroviral) for a minimum period of 90 days; *iii*) verification of third party access to data of Portuguese emigrants enrolled in the network of national consular posts; *iv*) analysis of the food situation in prisons; *v*) assessing the access by visitors to prisoners who are in a high secure facility.

(41) This comparatively high figure is mainly due to the reception, in 2015, of several complaints, incompletely substantiated, concerning the procedures for granting residence permits for investment activity, without no reply to subsequent requests for further information.

During 2016, the Ombudsman submitted to the Constitutional Court three petitions for the reviewing of the constitutionality of norms, all of them still without decision at the end of the year.

The Ombudsman argued a rule contained in a 2013 amendment of the Law on Organization of the Judicial System, providing the ability to the Higher Council of the Judiciary to, based on the proposal of the president of a court, to reassign judges, respecting the principle of specialization of magistrates, or to change the allocation of case files to another court. The Ombudsman considered that this rule violated the principle of the natural judge, the right to a fair trial, the principle of the irremovability of the judges and the principle of independence of the courts. The said rule was amended by Law No. 40-A/2016, of December 22, the initiative on its origin using an argumentative line consistent with the reasoning of this request from the Ombudsman.

Another initiative of the Ombudsman had as object a legal rule requiring, for a professional activity in the private security field, the inexistence of any prior conviction for an intentional crime.<sup>(42)</sup> The Ombudsman found this solution to be incompatible with the constitutional prohibition of any automatic effect of criminal sanctions.

The third initiative was held over a set of rules limiting compensation for damages for accidents in service or occupational diseases in the public sector, thus infringing the fundamental right of workers to fair compensation and the principle of equality.<sup>(43)</sup>

As of cases not endorsed to the Constitutional Court in 2016, a reference should be made to the doubts raised about the new Regulation of the Advocates and Solicitors Social Security Fund, approved by Decree-Law No. 119/2015, of June 29. Considering the jurisprudence of the Constitutional Court in this matter, with regard to the right to social security and having an impact on the principle of the protection of legitimate expectations, the allegations of unconstitutionality did not proceed. However, the Ombudsman found suitable to approach the Government on another level, stressing the need to several improvements to the system.<sup>(44)</sup>

Likewise, in a complaint based on parameters of constitutionality, the Ombudsman decided to address the Minister of Interior regarding the solutions contained in current Police (PSP) Disciplinary Regulations, regarding the subjection of retirees to disciplinary power, the application of preventive measures and the rehabilitation regime. In response,

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(42) The Portuguese full text of this initiative may be read at <http://www.provedor-jus.pt/site/public/?idc=46&idi=16444>

(43) The Portuguese full text of this initiative may be read at <http://www.provedor-jus.pt/site/public/?idc=46&idi=16664>

(44) Complaint Q-4114/15.

this member of the Government transmitted the favorable reception of such remarks, in the framework of the drafting of a new disciplinary regime of the PSP.<sup>(45)</sup>

### *Nationality*

The steady and continuous trend towards a reduction in the number of complaints related to Portuguese nationality continued, albeit in a much more gentle way. With a 31% drop in 2015 compared to the previous year, in 2016 there was a further decrease of 13%. This decrease essentially affected the complaints about administrative delays and not on substantive grounds.

The complaints coming from the former Portuguese State of India were scarce.

The number of complaints concerning naturalization procedures remained relevant, with substantive situations being raised for the Ombudsman's consideration, either in relation to the verification of the requirements laid down in the various typologies set out in article 6 of the Nationality Law, as well as to the dispensation cases mentioned there.

Complaints filed in the interest of children born in Portugal were rare, and almost all were about the clause on the prevention of statelessness. In all these cases, this clause has been interpreted as requiring the objective impossibility of the child to acquire the nationality from either parent, thus disregarding the cases when only the unwillingness of the parents was the cause for the statelessness.

Simple and informal contact was provided with the entities most frequently targeted: the Central Registry Office and the Lisbon Civil Registry Office. On nationality issues, there was a much lower need to inquire the Foreigner's and Border Police (SEF), thus indicating an improvement in its operation, providing quicker answers to the civil registry services.

### *Foreigner's law*

The number of complaints decreased around 10% (191 in 2016 after a total of 211 in 2015), maintaining the proportion ( $\frac{3}{4}$ ) between the complaints motivated by delays and those on substantive grounds.

The trend observed in recent years is congruent with the general situation of country, in migratory terms, also in compliance with the several instruments provided by Law No. 23/2007 and its amendments. The exceptional acceptance of residence permit without previous issuance of a visa remains the most frequent mechanism dealt in complaints, both on formal and substantive grounds. As in previous years, there was a decline in complaints relating with visa issue by Portuguese consular services abroad.

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(45) Complaints Q-7848/13 e Q-5842/14.

A particular serious issue aroused from the limitation of access, by lawyers, to their clients detained at the Detention Facility located in Lisbon Airport, the said access being subjected to the payment of a fee for each entrance. Notwithstanding the acceptable and normal security controls, for entering a particularly vulnerable area, the Ombudsman called for action by the Foreign and Border Police (SEF) and the regulatory independent body – the National Civil Aviation Authority (ANAC), towards the elimination of such fee.<sup>(46)</sup>

The frequent and informal contact with local services of the Foreign and Border Police (SEF) continued, seldom with meetings, a good level of cooperation being provided. Once more, the results achieved from the cooperation protocol subscribed with the High-Commissioner for Migrations (ACM) should be underlined, with mutual referral, according to the specialized competences and scope of each institution.

### *Education*

The number of complaints climbed from 220 in 2015 to 242 in 2016, specially because of preschool education issues (an increase of 45%), the former proportional distribution being maintained in basic, secondary and higher education-related complaints.

This increase in preschool education was mainly due to the enlargement of the universal guarantee of public offer to all children completing 4 years until the end of the civil year<sup>(47)</sup>, thus creating more pressure on allocating the places available on public educational facilities in specific areas.

In general terms, the same issue is also an important cause for complaint, on non-superior levels of education, during July and August of each year. Also in the same levels, a significant proportion of complaints deal with the lack or insufficiency of support provided to children and youngster with disabilities or other special educational needs. The Ombudsman's intervention is focused on promoting dialogue between all the concerned parties, deepening the reasoning and technical grounds on allocating resources.

In basic educating, besides the material conditions of facilities, a common issue presented relates to the payment of transportation, especially when the pupil lives in a certain municipality and studies in a neighbouring one, neither City Council assuming the cost. As there is no perfect match of the school network and the administrative structuring of the territory, further emboldened by the right of choice acknowledged to parents, the Ombudsman always stress the need to respect this freedom of choice, however restraining the financial support to the cost bearable by the municipality if the school chosen was that provided by the officially established network.

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(46) See 6.6.1.b).

(47) Law No. 65/2015.



In what concerns the higher education, the more often cause of the complaints received is the collection of tuition fees, due because of enrollment in past years, and only now requested by Universities and other institutions. The Ombudsman underlined to all institutions the need to not rely only on limitation period rules, but to collect any debts in the quickest delay, thus sparing the interest provided by law.<sup>(48)</sup> On several occasions, the Ombudsman's action was decisive to eliminate odd requirements, such as the establishment of the absence of any debt as previous requisite to the annulment of the enrollment, thus promoting further indebtedness,<sup>(49)</sup> or the recognition of the impossibility to collect fees for a period during which the University failed to provide as it should (the case related to the absence of tutor during the preparation of a doctorate thesis).<sup>(50)</sup>

Concerning the procedure of the enrollment, the Ombudsman obtained a change, in *Universidade do Minho*, eliminating the default value, established in the electronic form, that provided for a simultaneously inscription in the students association.<sup>(51)</sup>

In 2016, a major issue dealt by the Ombudsman related to a conflict between some private schools and the Ministry of Education, on the quantitative and qualitative aspects of the support the former gave, to the public educational sector, in the framework of a triennial contract. The Ombudsman underlined that the issue should be solved strictly following the legal rules on the interpretation of contracts, rejecting both opposite positions, mutually excluding the other on constitutional and legal grounds.

During 2016, 4 schools were visited, two of them of the first cycle of basic education, one of the 2nd and 3rd cycle of basic education and one secondary school.

## Health

The complaints presented on health issues drop around 10%, however remaining in historical high levels. The major modifications were felt on complaint about the payment of user fees and, in lesser terms, concerning healthcare in hospitals.

Registering, on the contrary, a modest growth, more complaints were received about delays on payments due by public health subsystems, namely the one for civil servants (ADSE). In this area, the complaints are ever more presented against other subsystems, such as the one for Armed Forces (ADM) or for Police (SAD/PSP and SAD/GNR).

In the frame of the SAD/PSP, a complaint was presented against the refusal to co-pay the amount due for a certain dental treatment, as an internal rule stated a previous

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(48) Complaint Q-1899/16.

(49) Complaint Q-6739/15.

(50) Complaint Q-0643/15.

(51) Complaint Q-5220/16.



authorization was due.<sup>(52)</sup> The Ombudsman concluded this demand was contradictory with the legal framework of the said subsystem, as there was a specific provision of uniformisation with ADSE. As no such obligation existed in the ADSE regulations, the Ombudsman proposed, with success, for the co-payment to be done.

In the framework of the National Health Service, there was an increase in the number of complaints about deficiencies in the articulation of its several layers, namely between the primary care units and hospitals. To single out two cases, the Ombudsman intervened, successfully, in a case on which a major disarray in the follow-up procedures, after a surgery, was particularly felt, and also on a situation with evidence of severe lack of communication between two hospitals belonging to the same medical center and supposed to articulate in a close network.<sup>(53)</sup>

A special attention was paid, during this year, to the modifications endured by the system of ascription of support products to disabled people. The former system being too tardy and rigid in excess, especially in what concerns daily use consumables (in connection with tracheostomy, ostomy, urine drainage, among others), which, being of clinical nature nevertheless had to be submitted to the intervention of the Social Security. After several inquiries, the solution proposed by the Ombudsman, reattributing the responsibility of distribution of these products to hospitals and primary care units was reinstated.<sup>(54)</sup>

Concerning the Long-Term Continued Care Network, the Ombudsman, besides other concrete complaints, intervened about two abstract issues. The first one was the normative exclusion of the access to the network of those patients who needed respiratory support. The removal of this legal restriction was duly announced.

The second situation affected those citizens also benefitting from a public health subsystem (like ADSE, ADM or SAD/PSP or GNR). In this case, the access to the network depended on the availability of vacancy in an unit with an agreement with such subsystem, thus delaying the admission far more than in a similar situation, of someone only (but also) enrolled in the National Health Service.<sup>(55)</sup>

The issue of access to foreign citizens, in an irregular situation, to the National Health Service has been solved since 2001, by a decision of the Ministry of Health, after an Ombudsman intervention. However, in rare occasions, there is still need to further action, such in the case of pregnancy.

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(52) Complaint Q-0232/16.

(53) Complaints Q-6942/15 (cf. 6.3.1.b) and Q-2613/2016.

(54) Complaint Q-1875/16.

(55) See 6.3.1.b).

## *Penitentiary issues*

The number of complaints about the penitentiary system was very similar to the figures of 2015, with a growth of ten units. In qualitative terms, the issues relating to overcrowding, particularly in lodgment and food, and also concerning the use of disciplinary powers and violence situations were more frequent. Reversely, there was in decline concerning transfer requests.

The access to healthcare was also a significant issue during this year, promoting contacts also with the relevant units of the National Health Service.

As the Ombudsman's concerns are not restricted to the universe of the persons within walls, it is worth mentioning the assessment made of the visitor's conditions in *Caxias* Prison, namely in what concerned the conditions during the waiting period, prior to the visit, and the enforcement of legal rules concerning priority of elderly persons, persons with disabilities, persons with children and pregnant women. Suitable preventive measures were reinforced.<sup>(56)</sup>

Besides the visits made on prisons in the scope of the National Preventive Mechanism,<sup>(57)</sup> and, all year round, of the visits personally made by the Ombudsman to those prisons chosen in the framework of the project *The Ombudsman, the prisons and the 21st century: journal of some visits*<sup>(58)</sup>, 15 visits were held to prisons, to observe their conditions or to meet with persons detained, namely the prisons of *Lisboa* (3 times), of *Tires*, of *Vale de Judeus* (3 times), of *Coimbra*, of *Monsanto* (2 times), of *Alcoentre* (2 times), of *Évora*, of *Aveiro* and the one functioning near the Judiciary Police in *Lisboa*.

## *Other issues*

The complaints relating to access to administrative files have doubled, in a trend also felt in complaints concerning data protection. Likewise, the presentation of complaints against the conduct of social media was more frequent, promoting the referral to the appropriate regulatory authority (ERC).

An issue particularly frequent was the demand, by public authorities, namely, to citizens seeking some action by them, of a photocopy of their citizen's ID card, openly disobeying to the legal rules. One of these complaints was presented against ERC, as this entity required the presentation of a photocopy of digitalization of the citizen's card to

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(56) Complaint Q-4078/16.

(57) Described in an annex to this report.

(58) See 3.2.

whoever wanted to present a complaint. The situation was promptly eliminated, after a statement from the Ombudsman.<sup>(59)</sup>

A related issue was felt at a public hospital, whenever someone asked the cession of a wheelchair. For that purpose, the hospital asked for the delivery of the citizen's ID card, thus being retained until the return of the wheelchair. As this behaviour is expressly forbidden by law, the Ombudsman stated to the hospital the unlawfulness of this conduct, an alternative mean of guaranteeing the return of the loaned public equipment being advisable.

Putting into a colliding course the right to access to information and the right to privacy, the situation of the extent, for a defendant in a police file to have access to the full text of the denunciation that led to it, including the name and address of the plaintiff, was subjected to the appreciation of the Ombudsman. In the actual situation leading to the complaint to the Ombudsman, the accused retaliate the accuser. After hearing the police body involved, the Ombudsman concluded its actions were supported by the open administration principle. However, it was recommended that some guidelines should be studied, in order to prevent the access to individual data and further harassment of their holder.<sup>(60)</sup>

### *1.2.7. Autonomous Regions*

All procedures concerning public entities located at the Autonomous Regions of Azores and Madeira – whatever their subject - are treated, in the main, by two collaborators of the Ombudsman, designated for their analysis, integrated in the thematic unit responsible for the complaints concerning Right to Justice and Security.

#### *1.2.7.1. Office at the Autonomous Region of Azores*

During 2016, 93 cases were opened. Nevertheless, during that same period of time, 179 procedures were instructed (86 of which carried over at the end 2015).

Between 2011 and 2015, respectively, 82, 127, 70, 93 and 88 procedures were opened.

Taking as reference the year 2016, 26 procedures were completed, 15 of which opened in that same year.

Of the 26 closed procedures:

- 7 cases (26,9%) the illegality or injustice was repaired during the instruction;

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(59) Complaint Q-1545/16.

(60) Complaint Q-0004/15.

- 1 case (3,8%), the Ombudsman issued suggestions or amendments to the entity addressed or identified irregularities in their performance, according to article 33 of the Ombudsman Statute;
- 3 cases (11,5%) complainants were referred to other especially competent entities, or to other appropriate means to assert their positions, according to article 32.º of the Ombudsman Statute;
- 14 cases (53,8%) the complaint was dismissed as unfounded;
- 1 case (3,8%) there was withdrawal of the complaint.

Workers' rights continued to be the main issue of the complaints that were received, maintaining a tendency registered in previous years (33%). Questions about public employment, presented by individuals as well as unions, were the most significant part of the procedures opened. In those complaints, career issues, irregularities on recruitment procedures, remuneration supplements, as well as work regimes were the most covered topics.

In second place, representing 15 % of all procedures opened, were subjects related with justice administration, police action and road matters. In third place, it is possible to find the questions concerning taxation and economic activity (four of the procedures were focused on the IRS – personal income tax), as well as consumption (four cases), which represent 13% of all the procedures opened.

Other relevant areas were the right to environment and life quality. Among these it is important to emphasize the urbanism and land planning questions, as well as environment protection (11%). Thereafter are issues related with the social rights, essentially the payment of social benefits (9%).

Finally, the wider category represented on the graph in analysis (19%) includes several issues related with the right to education (*v.g.*, university fees), right to health (clinical practice, medical care and patients transportation) and also prisoners' rights.

Besides three collective complaints, 83 citizens demanded the Ombudsman intervention (56 of the masculine gender and 27 of the female gender). Seven of the procedures opened originated in complaints submitted by unions.

18 of the 93 complaints were made in person, at the Office at the Autonomous Region of Azores. Because of that, at this point, it is important to mention the permanent availability and institutional collaboration of the Representative of the Republic for the Autonomous Region of the Azores. Of the remaining, 45 were submitted by postal service and 30 by email.

As it turns out of the graph below, 76 claims came from *São Miguel* (38) and *Terceira* (38) Islands, followed by *Faial* (7), *Pico* (4) *Flores* (3) and *Santa Maria* (1). Two complaints were received without any identification of their geographic origin.

Concerning the characterization of the targeted entities, it is important to emphasize the fact that, in 2016, Regional Autonomous Administration (51%) appeared as the main interlocutor in complaints addressed to the Ombudsman, related not only with education, health and social security, but also agriculture, environment and transportation.

In second place, were entities belonging to the Central Administration (26%), without taking account of justice administration issues (courts, registry and notary) which represent, autonomously, 6% of the total.

Local Administration was demanded in 9% of the complaint procedures. In this context, cases against the municipalities of *Angra do Heroísmo*, *Horta* and *Ribeira Grande* were predominant.

From the several subjects that have been in the basis of the Ombudsman intervention, it should be stressed out, for example: a remark to the Azores Regional Government Vice-Presidency concerning the delay on the payment of the attendance fees to members of Island Councils<sup>(61)</sup>; a practical situation involving the conciliation of maternity rights and working time in a security force. At the end of the analysis, and despite the fact that no illegality was found, the Ombudsman has intervened, raising awareness to the targeted entity to the need of given a positive answer to this important question, receiving good collaboration to that end<sup>(62)</sup>.

#### *1.2.7.2. Office at the Autonomous Region of Madeira*

In the year 2016 the Office at Autonomous Region of Madeira instructed 155 new procedures; to this quantitative it were added 65 procedures from previous years, resulting in a total volume of 220 cases carried out in this period.

In 2016, the Office closed 135 procedures (in 69,5% of the cases it was possible to close complaints submitted in the year itself), and in about 50% the cases were satisfactorily ended after the Ombudsman's intervention.

Of the 154 closed procedures:

- 7 were resolved following the Ombudsman's intervention;
- 3 corresponding to procedures in which the Ombudsman fixed suggestions or amendments to the entity addressed or identified irregularities in their performance.
- In 1 circumstance, the case was solved but the illegality was not subsequently repaired;
- In 4 cases the complainants were referred to other especially competent entities;
- In 7 situations, it was concluded that the Ombudsman was incompetent to intervene;

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(61) *Ombudsman's decisions* 2016, pp. 242-246

(62) *Ombudsman's decisions* 2016, pp. 251-253

- 10 cases resulted from withdrawal of the complaint;
- 52 claims were dismissed, following the competent study of the case, or judging unable or useless the adoption of other measures.

The year 2016 has deepened the already identified tendency of previous years, regarding the strengthening of Regional Autonomous Administration (41%) as the main interlocutor in complaints addressed to the Ombudsman, to the detriment of the role assumed by the Local Administration (21%). In this context, the municipality of Funchal has consolidated its predominance, gathering a majority of 52% in the complaints, followed by the municipalities of Santa Cruz and Ponta do Sol (13% each). Concerning the Regional Government of Madeira, it should be highlighted the position held by Regional Directorate for Tax Affairs and by the Social Affairs Institute with a percentage of 21% each in the complaints.

In the global context of the complaints brought before the Ombudsman, and for the first time in many years, the traditional predominance of environmental and urban development cases gave way to the complaints relating to the rights of taxpayers and consumers (28%).



## *2. Children, Senior Citizens and Disabled Persons Unit (N-CID)*

*Interior facade of the Portuguese Ombudsman's building*



## *2. Children, Senior Citizens and Disabled Persons Unit (N-CID)*

The Office of the Ombudsman includes a unit, comprised of a multidisciplinary team, especially dedicated to address issues regarding persons that, on account of their age, health condition or other limiting characteristics are perceived as more vulnerable: The Children, Senior Citizens and Disabled Persons Unit (N-CID).

The activity of the N-CID involves different approaches including the development of informal proceedings before the competent entities and the participation in the procedural investigation of complaints regarding the rights of the children, senior citizens or persons with disabilities.

The N-CID team ensures the functioning of three specialized helplines (the Children's Line, the Senior Citizen's Line and the Disabled Person's Line) and provides personalized assistance to citizen's who contact the Ombudsman through those helplines.

In this State body, the N-CID team provides information, redirects the complainants to the competent entities and establishes direct contact with the entities addressed in the complaint in order to ensure that the rights of the citizens are being respected.

Frequently, the activity of the N-CID team is not reduced to a single intervention but, instead, includes the follow-up on the reported situation.

In other cases, the complaint addressed to this State body though the helplines leads to the opening of a formal complaint procedure. In these formal cases the procedure is conducted by the competent unit according with the matter at stake (*v.g.*, Social rights, Workers' rights) together with the N-CID.

During 2016, the Ombudsman received a total of 4026 telephone calls in the three helplines, as this report will further explain.

As in the 2015 report, the statistical data will not include telephone calls made by mistake or non-serious telephone calls.

In addition, as complainants frequently address several issues in a single telephone call, the total number of received telephone calls will not match the exact number of issues.

### *Children's Line*

The Children's Line received, in 2016, 541 telephone calls while in 2015 this Line received 671 telephone calls. In the same period, 35 telephone calls were placed.



Table 8

**Telephone calls – Children’s Line**

Received calls	Placed calls*
541	35

\* The number of placed calls includes the telephone calls placed to the complainants as well as the telephone calls placed to the entities identified in the complaints.

The Children’ Line, compared with the other helplines<sup>(63)</sup>, was the one to receive fewer telephone calls. The low number of calls can be explained by the existence of several other helplines aiming at assisting children, youth and their respective families as well as to the intervention of other proximity entities such as schools, health facilities and police forces in the referral and follow up on risk situations.

Table 9

**Main issues – Children’s Line**

Parental responsibility issues	134
Neglect	55
Education and school related problems	47
Psychic and physical ill-treatment	44
Child Protection Committee	26
Protection Commissions for Children and Youth and other services	22
Exposure to deviant behaviours and risk behaviours	19
Health care	15
Exposure to domestic violence	14
Bullying	11
Social security	10
Foster institutions	8
Grandparents visiting arrangements	8
Sexual abuse	1
Other issues ( <i>v.g.</i> , court decisions delays, adoption, legal information, information on the ombudsman services, the Children’s Line and social allowances)	90
<b>Total</b>	<b>504</b>

(63) In 2016, the Senior Citizen’s Line and the Disabled Person’s Line received, respectively, 2878 and 607 telephone calls.

Senior Citizen's Line

Within the three specialized helpline services, the ombudsman receives, since 2003, the majority of the telephone claims from the Senior Citizen's Line. One of the reasons for this to happen seems to relay on the fact that this helpline is nationwide and free of charge. There is also other possible explanation: the Senior Citizen's Line is one of the few resources especially directed to the elder population and its issues. In addition, the growing aging of the Portuguese population is probably a factor that contributes to the high number of telephone calls received.

During 2016, the Ombudsman received, through the Senior Citizen's Line, 2878 telephone calls.

During the same time, the Senior Citizen's Line registered 132 placed calls regarding contacts with the entities identified in the complaint and intermediation contacts established with the complainants and those entities.

Table 10

Telephone calls – Senior Citizen's Line	
Received calls	Placed calls *
2878	132

\* The number of placed calls includes the telephone calls placed to the complainants as well as the telephone calls placed to the entities identified in the complaints.

It should be noted that the total number of calls received through this helpline is in accordance with the annual tendency verified since this telephone line was first set up: as a rule, since 2003, the Senior Citizen's Line has been registering an average of 3000 calls *per* year, with minor oscillations.

Table 11

Main issues – Senior Citizen's Line	
General issues ( <i>v.g.</i> , daily contracts, neighbours conflicts, driver's license or identity card renovation)	534
Health	317
Pensions	226
Support services ( <i>v.g.</i> , day centers, in-home support, tele-assistance)	219
Residential care facilities for the elderly	201
Dependency allowance and other supports to senior citizens	201

Social welfare	126
Neglect	115
Public services	111
Family conflicts	111
Ill-treatment (within the family or institutions)	105
Conduct of public entities ( <i>v.g.</i> , social welfare, police forces)	87
Housing	75
Isolation or loneliness	74
Other fundamental rights ( <i>v.g.</i> , self-determination)	72
Useful contacts	61
Material and financial abuse	58
Noise	32
Economic deprivation	32
Legal information ( <i>v.g.</i> , living will, legal protection, inheritance law)	30
Information regarding the Ombudsman Office /Senior Citizen's free Line	28
Mental capacity legal actions	24
Abandonment	20
<b>Total</b>	<b>2859</b>

### *Disabled Person's Line*

The Disabled Person's Line, in full function since April, 2013, after an experimental period of approximately two years, is the most recent specialized telephone service of the Ombudsman.

Notwithstanding being recently created this helpline was the second most used helpline in 2016 (as in 2013), to contact the Ombudsman.

According to the table below, during 2016, 607 telephone calls were received and 38 were placed.

*Table 12*

#### **Telephone calls – Disabled Person's Line**

Received calls	Placed calls *
607	38

\* The number of placed calls includes the telephone calls placed to the complainants as well as those placed to the entities indicated in the complaints.

Table 13

**Main questions – Disabled Person's Line**

Social allowances ( <i>v.g.</i> , disability benefits, disability living allowance)	105
Legislation and family obligations	64
Rehabilitation and physical and mental health care	39
Assessment of disability	27
Access and mobility (lifts, ramps)	27
Support products	21
Employment	18
Tax benefits	16
Discrimination and violation of rights	16
Centers of reference	16
Public services	14
Special regime for the acquisition of capital goods ( <i>v.g.</i> houses and vehicles)	14
Special parking rights	12
Education	11
Parking	10
Neglect and ill treatment	10
Housing	9
Mental capacity legal actions	8
Priority in attendance	6
Other issues	139
<b>Total</b>	<b>582</b>



### *3. The Ombudsman as a National Human Rights Institution*

> Detail – facade of the Portuguese Ombudsman's building

### 3. *The Ombudsman as a National Human Rights Institution*

#### 3.1. *Background*

After the world conflict of 1939-1945, the member States of the United Nations were encouraged to devise entities that, locally and autonomously, promoted and defended human rights. With this change of paradigm, it was then understood that the different member States should establish human rights committees that were independent of the powers of the State (legislative, executive and judicial), which would Disclosure of those rights. It was, however, in the 1990s that, following the meeting held in Paris under the motto National Institutions for the Promotion and Protection of Human Rights and in the subsequent acceptance of the *principles* emanated, national human rights institutions, in their different conformations, they affirmed themselves.

In Portugal, the Ombudsman's role in the Ombudsman's role has always been one of the distinguishing *quid* of the Ombudsman. In addition to the classic activity of assessing the complaints received about (in)justice and (il)legality of the exercise of public powers, it is up to this State body to promote and defend the essential rights, freedoms and guarantees of citizens.

For this reason, since 1999, the Ombudsman has been a National Human Rights Institution duly accredited by the Global Alliance of National Human Rights Institutions (formerly known as the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights) with status «A». This means that the performance developed by this state body in this dress is in full compliance with the *Paris Principles*.

As the National Human Rights Institution, the Ombudsman is responsible for the constant promotion and uncompromising defense of human rights. With a view to pursuing this aim, this State body may initiate proceedings on its own initiative and have at its disposal various means of ascertaining the facts, such as conducting inspections, consulting multiple documents and hearing a good amount. In addition, the Ombudsman presents himself as a privileged interlocutor with national and international organizations, and therefore has a range of rights of participation in the UN Human Rights Council and the Special Committees provided for in international legal instruments. These participation rights include the provision of autonomous contributions, meeting assistance and intervention (oral and written) in the framework of the periodic universal review mechanism, as well as in the specific mechanisms for verifying compliance with the obligations internationally assumed by the Portuguese State.

This competence is also reflected in several initiatives for the promotion and protection of human rights, above all those that, due to age, health condition or other limitations (children, the elderly, migrants or persons deprived of their liberty), are in a situation of particular vulnerability.

### 3.2. Project «Ombudsman, prisons and the 21<sup>st</sup> century: reports on some of the visits»

The questions related to the prison system have always integrated the function that is constitutional and legally attributed to this State body. If the mission of promoting and defending human rights is *per se* as noble as it is complex, it assumes the intricate design of filigree when it concerns the rights of the people who are in a situation of greater vulnerability, such as those that are deprived or limited in their freedom. For this reason, the Ombudsman determined that in the course of 2016 he would visit the Portuguese prisons, in order to know and understand, now and in the voice of those who are in seclusion, the problems that are part of our prison system. These problems concern not only prisoners and their rights, but also cover the concerns and discontentment of prison guards, officials and all persons who represent and constitute the penitentiary universe.

In this sense, the reference year for this report was marked by the completion of the project «Ombudsman, prisons and the twenty-first century: reports of some of the visits», in which the Ombudsman visited the following penitentiary establishments: Lisbon (January 19), Prison of *Tires* (February 4), Prison of *Vale de Judeus* (February 23), Prison of *Coimbra* (April 18), Prison of *Ponta Delgada* (May 4), *Monsanto* Prison (June 27), Prison Establishment of *Funchal* (June 19), *Leiria* Prison for Young People (September 16), *Évora* Prison Establishment (November 17) and Military Prison Establishment).

From these visits, a set of reports was drawn up which, drafted in a diary, made known to the community the main observations and concerns that the Ombudsman stressed in each of the visits, thus fostering joint reflection on the prison system and the problems that plague it.

It should also be noted that the reality found in these visits - coupled, in part, with some communications and complaints received by or in the interest of prisoners - prompted the opening of two Ombudsman procedures, one on the quantity and quality of food provided in portuguese prisons and another on the conditions for the realization of the right of access for prisoners to security, above all with regard to visits and contact of children.

The project *Ombudsman, the prisons and the 21<sup>st</sup> century: reports on some of the visits* will continue its development throughout the year 2017.

### 3.3. *Activities with the purpose of promoting and protecting human rights*

Bearing in mind the previous years activities, the Ombudsman's activity in 2016, as a National Human Rights Institution, has spread to several initiatives that, along with the instruction of the complaints that have come to them, shared the desideratum to promote and defend human rights. In this sense, and in addition to the actions that are referred to throughout this report, it is important to state others in which this State body participated, beginning, from the outset, by those who had the presence of the Ombudsman himself:

- On May 6, an intervention entitled «Health: a question of the Ombudsman», delivered at the Conference on *Health Justice*, organized by the Regional Health Secretariat of the Autonomous Region of the Azores and the Regional Health Inspection, in *Angra do Heroísmo*;
- On May 19, intervention entitled «Speech delivered at the Opening Session of the Cycle of Conferences in Homage to Professor Jorge Ribeiro de Faria», delivered in the Cycle of Conferences in Homage to Professor Jorge Ribeiro de Faria, organized by the University of *Porto*, in *Porto*;
- On May 20, intervention entitled «The Defense of Fundamental Rights and Addictive Behaviors: The Role of the Ombudsman», delivered at the *National Congress of Addictology - time and addictions: linking science, clinics and politics*, in *Coimbra*;
- On June 2, participation in the opening session of the Conference on *Europe and Refugees - Risks and Opportunities*, promoted by the Immigration and Borders Services, at the Institute of Social and Political Sciences of the University of Lisbon, in Lisbon;
- On July 17, participation on the opening session of the *First Iberian Conference on Restorative Justice*, promoted by the Association *Confiar*, in *Cascais*.

It should also be noted that in the course of 2016 the Ombudsman participated with some writings for works or magazines. One of the texts elaborated under the theme «La Constitution portugaise de 1976 et le *Provedor de Justiça*: 40 ans de chemin commun», is part of the collective work dedicated to the 40th anniversary of the Constitution of the Portuguese Republic, organized by the Institute of Iberian Studies and Ibero-Americans of the *Université de Pau et des pays de l'Adour*. Another focused on the role of local elected officials in promoting and defending their fellow citizens, thus helping the Ombudsman to associate himself with the evocation of the 40 years of elected local power.

Two articles were also written for publication in national collective works. The article entitled «The Ombudsman for the promotion and defense of the rights of migrants» was intended to be part of the Sergio Vieira de Mello Chair's book on *Immigration, Refugees and Equality* organized by the Brazilian Institute of Faculty of Law of the University of Lisbon. In turn, the article entitled «Justice and its Provider» aimed at its integration in



the work on Portuguese justice, an edition of the Institute of Social and Political Sciences of the University of Lisbon.

Following, we present the events, hearings and interventions attended by the Deputy Ombudsman:

- On February 17, participation in the *Opening Session of the Community of Portuguese-speaking Countries Year against Child Labor*, organized by the Parliament, the Community of Portuguese Speaking Countries and the International Labor Organization, in the Parliament, in Lisbon;
- On February 23, participation in the presentation of the book *Commemorative Conferences of the 10<sup>th</sup> Anniversary of the Central Administrative Court South*, in Lisbon;
- On 25 February, an intervention on the theme «*Evaluation de la législation relative à l' Ombudsman*», within the framework of a cooperation project between the AOM (*Association des Ombudsmans de la Méditerranée*), with the support of the European of the Venice Commission, with a view to the evaluation and training of the institution *Médiateur Administratif* of Tunisia in Tunisia;
- On April 4, participation in the Opening Session of the National Campaign of the Month of Prevention of Child Abuse, organized by the Lisbon City Council, the Women's Association against Violence and the National Commission for the Promotion of Rights and Protection Children and Youth in Lisbon;
- On 15 April, participation in the Diplomacy and Great War Seminar: one hundred years after the entry of Portugal into the First World War, organized by the Diplomatic Institute and the Institute of Social Sciences of the University of Lisbon in Lisbon;
- On April 26, participation in the Commemorations of the 40<sup>th</sup> anniversary of the Constitution of the Portuguese Republic, promoted by the Parliament, in Lisbon;
- On May 3, participation in the military ceremony of the 105<sup>th</sup> anniversary of National Republican Guard, at *Guarda School*, in *Queluz*;
- On May 9, participation in the commemoration of the Day of Europe, organized by the Representation of the European Commission in Portugal, in Lisbon;
- On June 23, participation in the commemoration of the 100<sup>th</sup> anniversary of Law No. 621, of June 23, 1916, organized by the Parliament and the National Association of Parishes, in the Parliament, in Lisbon;
- On June 30, participation in the solemn session of the Commemorations of the 90 Years of the Portuguese Bar Association, promoted by the Bar Association in *Cascais*;
- On September 7, participation in the Conference *What Justice Do We Want?*, organized by the Trade Union of Portuguese Judges in Lisbon;

- On September 10, participation in the commemoration of the 80<sup>th</sup> anniversary «The Marines' Revolt of September 8, 1936» - National Day of the Armed Forces Square, promoted by the Association of Squares and the Squares Club of the Navy, in *Feijó*;
- On September 16, participation in the formal opening session of the 32nd Judges Training Course for the Judicial Courts and the 4<sup>th</sup> Training Course for Judges of the Administrative and Tax Courts, promoted by the Center for Judicial Studies, in Lisbon;
- On September 28, participation in the launching ceremony of the Sectoral File «Challenges and Opportunities of Social Responsibility in Law Societies», organized by GRACE - Group of Reflection and Support to Corporate Citizenship, in Lisbon;
- On October 4, participation in the inauguration ceremony of the Commemorative Exhibition of the Fiftieth Anniversary of the Civil Code, in *Pampilhosa da Serra*;
- On October 10, participation in the official opening ceremony of the XXIV *Ordinary General Assembly of the Ibero-American Association of Public Ministries*, organized by the Ibero-American Association of Public Ministries, in Lisbon;
- On 10 October, she participated in the Women in Diplomacy Conference, organized by the Association of Women Ambassadors, at the Higher Institute of Social and Political Sciences and the Diplomatic Institute in Lisbon;
- On October 12, participation in the International Seminar, under the theme Ethical-Deontological Statute of Prosecutors and Prosecutors in Lisbon;
- On October 20, participation in the Sovereign State Functions Conference, organized by the Association of Criminal Investigation Officials of the Judiciary Police, the Union of Portuguese Diplomats, the Union of Police Professionals, the Association of Officers of the Armed Forces, The Association of Squads, the SEF Research and Inspection Career Union, the Union of Judicial Officials, the Union of Magistrates of the Public Prosecutor's Office, the National Union of the Prison Guard Corps, the Workers' Union Taxes, by the Union of Registrars and Notaries and by the Socio-Professional Association of the Maritime Police, in Lisbon;
- On October 20, participation in the ceremony commemorating the 71st anniversary of the Judicial Police, in Lisbon;
- On October 21, participation in the opening session of the International Conference Our prisons: what present and what future ?, promoted by the Bar Association in Lisbon;
- On November 3, participation in the Children's Court Hearing Conference and the launch of the illustrated book João goes to court / The day Mariana did not want, events organized by the Lisbon District Council of the Lisbon Bar Association;
- On November 21, participation in the 27<sup>th</sup> anniversary of the Convention on the Rights of the Child - Reflection on the topic «The Convention on the Rights of the

Child TODAY», promoted by the National Commission for the Promotion of the Rights and Protection of Children and Youth in Lisbon;

- On November 24, participation in the opening session of the 50<sup>th</sup> Anniversary International Congress of the Civil Code, organized by the Commemorative Commission of the Fiftieth Anniversary of the Civil Code, in *Coimbra*;

- On November 25, participation in the presentation of the Platform for Inclusion and Reinsertion, promoted by the Vice President of CONFIAR - Prison Fraternity Association, in *Sintra*;

- On December 7, participation in the evocative session of the 15<sup>th</sup> anniversary of the publication of the Laws that Recognized the Right to Socio-Professional Associativism of the Military, promoted by the Professional Associations of Military Personnel in Lisbon;

- On December 13, participation in the solemn opening ceremony of the academic year 2016/2017 of the Higher Institute of Police and Homeland Security Sciences, in Lisbon;

- Participation in the public debate on the theme «New Urban Agenda» – Conclusions of the United Nations Conference on Housing and Sustainable Urban Development, organized by the Committee on Environment, Spatial Planning, Decentralization, Local Government and Housing, In the Parliament, in Lisbon;

- On December 16, participation in the 6th plenary meeting, under the theme «Mental Health and Human Rights» of the National Commission for Human Rights in Lisbon;

- On December 23, participation in the commemoration of the National Human Rights Day, in the Parliament, in Lisbon.

The contributions and interventions of the Office of the Ombudsman and the Office of the Advisor are listed below in the following initiatives:

- From January 7 to February 2, participation in the course *Taller virtual sobre Informes Temáticos*, organized by the University of Alcalá, Madrid;

- On January 21, participation in the *Family law Meetings*, an event dedicated to the theme “Children and the house: shared custody of children after separation from parents”, organized by the Private Law Research Center and the National Confederation Of Family Associations, at the Faculty of Law of the University of Lisbon, in Lisbon;

- On February 12 and 16, participation in the meeting on the Platform on Migrants’ Rights and Asylum Seekers, organized by the European Union Agency for Fundamental Rights,, with a view to joint reflection on those rights by the Agency, the Council Europe, National Human Rights Institutions and Ombudsmen in Vienna, Austria;

- On April 27, participation in the meeting of the Advisory Committee of the European project THEAM - Specialized training in children's rights - the Convention in practice, organized by the Center for Studies on Social Intervention (CESIS) in Lisbon;
- On May 10, participation in the Conference on *Human Rights and the Challenges of the 21st Century: Globalization Dignities*, organized by the Calouste Gulbenkian Foundation, the Robert F. Kennedy Center for Human Rights and the Austrian and United States of America Embassies, in Lisbon. The initiative included the signing of the Lisbon Declaration, through which several organizations committed themselves to uphold human rights and human dignity;
- On May 11, participation in the final presentation session of the activities developed by the Anti-Discrimination Center, within the framework of the European EEA Grants mechanism, Active Citizenship Program in Lisbon;
- On May 27, participation in the training action on the legal regime of occupational accidents and diseases in the Public Administration, organized by the Center for Judicial Studies in Lisbon;
- From May 30 to June 3, participation in the National Human Rights Institutions Academy 2016 training course, organized by the European Network of National Human Rights Institutions (ENNHRI) and the Office of Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE / ODIHR) in Tbilisi, Georgia;
- On June 18, participation in the *Urban Breakfast Seminar*, organized by the Territorial Directorate-General, the Lisbon and Porto metropolitan areas and the *Habitat III* Secretariat of the United Nations, in Lisbon;
- On September 20, participation in a conference on the *New Data Protection Regulation*, held in the Parliament, organized by the National Data Protection Commission in Lisbon;
- On October 10, participation in the Seminar *(In)tolerance and discrimination - Fairer and safer cities for all*, organized by the Portuguese Victim Support Association (APAV) and Lisbon City Hall, in Lisbon;
- On October 14, an intervention entitled «The Ombudsman's Exercise as a Promotion of Justice, Cohesion and Development: Considerations from the Ombudsman Institution», delivered at the *VI National Meeting of Student Providers* at the University of Beira Interior, in *Covilhã*;
- On October 15, participation in the *XII National Congress of Disabled Persons*, organized by the National Confederation of Disabled Organizations, in the module «*Prioridade à Inclusão é a Nossa Direcção*», in Lisbon;

- On October 21, an intervention entitled «The Ombudsman and the prison situation», delivered at the International Conference *Our Prisons: What Present and What Future?*, sponsored by the Bar Association in Lisbon;
- On November 7, participation in the *International Law Meetings*, dedicated to the theme «Current Trends in Civil and Commercial Judicial Cooperation», organized by the Office of International Relations of the Directorate General of Justice Policy in Lisbon;
- On November 11, participation in the formation about «Migrations», promoted by the Judicial Studies Center, which took place at the Higher Institute of Management Sciences, in Lisbon;
- On November 21, the intervention of the reflection session on the topic «The Convention on the Rights of the Child TODAY», promoted by the National Commission for the Promotion of the Rights and Protection of Children and Young People, in Lisbon;
- On November 24 and 25, participation in the International Conference on *Policies and Practices in Intervention in Gender Violence*, organized by the Lisbon City Council, in Lisbon;
- On December 2 and 3, participation in the *II European Congress of Labor Law*, promoted by the Student Association of the Faculty of Law of the University of Lisbon, in Lisbon;
- Participation in the workshop on the creation and implementation of an individual complaint mechanism of *FRONTEX* (European Border Agency and Coast Guard), in conjunction with the Member States and the countries subscribing to the *Schengen Agreement*, in Brussels.

On November 15, the Ombudsman joined in the celebrations of the 40<sup>th</sup> anniversary of the Constitution of the Portuguese Republic and promoted the Conference *The Ombudsman and the 40 years of the Constitution*. This event took place in the Assembly Hall of the Republic and was attended by the President of the Parliament, the Ombudsman and, as a speaker, by Professor José Gomes Canotilho, who gave the conference «*Razões de uma razão e a compaixão dos cidadãos*».

Within this scope, the Ombudsman presents himself as a privileged interlocutor with international organizations that work in the promotion and defense of human rights, making contributions, replying to questionnaires addressed to this State body for the purpose of knowing and understanding the culture of respect for human rights in Portugal.

It is therefore important to mention the active and committed role of the Ombudsman in the periodic evaluations resulting from the international obligations assumed by the Portuguese State. In 2016, this role consisted in the elaboration of two autonomous

contributions requested by the institutions of the international system for the protection of human rights: one was the contribution to the 15<sup>th</sup> Session of the United Nations Committee on Human Rights of Persons with Disabilities; And the other on Portugal's 15<sup>th</sup> and 17<sup>th</sup> reports in the framework of the implementation of the Convention on the Elimination of All Forms of Racial Discrimination, to the 91<sup>st</sup> session of the Committee on the Elimination of Racial Discrimination.

With regard to other requests, in 2016, the Ombudsman made the following contributions:

- Questionnaire response for the European Union Agency for Fundamental Rights on cooperation between National Human Rights Institutions and National Parliaments;
- Questionnaire response for the preparation of a study by the Global Alliance of National Human Rights Institutions (GANHRI) on strengthening and harmonizing the intervention of the parties to international treaties with National Human Rights Institutions;
- Questionnaire response to the of the United Nations High Commissioner for Human Rights on stateless persons;
- Questionnaire response for the Office of the United Nations High Commissioner for Human Rights concerning the drafting of a special report on the rights of persons with disabilities;
- Questionnaire response for the Office of the United Nations High Commissioner for Human Rights as a contribution of this State body to the report of the Special Rapporteur on the right to adequate housing;
- Questionnaire response for the Global Alliance of National Human Rights Institutions (GANHRI) on cooperation between National Human Rights Institutions and Parliaments;
- Questionnaire response for the Office of the United Nations High Commissioner for Human Rights on labor rights in the context of fiscal policy adjustment and consolidation;
- Questionnaire response for the European Committee for the Prevention of Torture on the situation of persons deprived of their liberty and on matters relating to the prison system, police intervention and the role of the Ombudsman as a National Preventive Mechanism;
- Questionnaire response for the National Institute for Rehabilitation, I.P. On Law No. 46/2006, of August 28, regarding the instruction of complaints in this State body regarding issues of discrimination on the grounds of disability and the existence of aggravated health risk;



- Questionnaire response for the Center for Social Intervention Studies (CESIS) to draw up a national contribution to the report of the Agency for Fundamental Rights of the European Union, under the theme *Short thematic report: National intelligence authorities and surveillance in the EU: Fundamental rights, safeguards and remedies*;
- Questionnaire response for the National Institute for Rehabilitation, on the existence of complaints in this State body related to priority service;
- Legal review of the Portuguese translation of the *Handbook on European law relating to access to justice*, supported by the European Union Agency for Fundamental Rights (FRA), the Council of Europe and the Secretariat of the European Court of Human Rights.

From December 5 to 13, Portugal received a visit from the United Nations Special Rapporteur on the right to adequate housing and the UN Special Rapporteur on the right to safe drinking water and sanitation. During the visit, the Ombudsman received the two Special Rapporteurs on December 6 and provided them with information on the activity of this State body in the promotion and defense of the right to drinking water and sanitation As well as the right to adequate housing. This meeting discussed the impact of the economic crisis and the austerity measures on access to those rights.

On December 20, this state agency monitored the arrival of a group of refugee families from Greece, claimants of international protection, under the emergency resettlement mechanism adopted by the Member States of the European Union, organized by the *Immigration and Borders Services* (SEF) and the Refugee Support Platform, in Lisbon. This participation allowed observing the procedures of the procedures inherent to the reception and the integration of the refugees.

Being aware of the need to promote a strong culture of respect for human rights at all times, the Ombudsman has published brief notes on the institutional site of this State body, as has been the case in previous years. Through these messages, the Ombudsman has vehemently repudiated any and all acts constituting an individual or collective offense against our fundamental rights. In addition, this means of communication has been the main resource to mark the following days throughout the world: International Memorial Day for the Victims of the Holocaust (January 27), International Day of Zero Tolerance for Mutilation Women's Day (February 6), Zero Discrimination Day (March 1), International Women's Day (March 8), International Day for the Elimination of Racial Discrimination (March 21), International Day for the Right to the Truth on Human Rights Violations and Dignity of Victims (24 March), World Health Day (7 April), World Day for Safety and Health at Work (28 April), World Day for Cultural Diversity for Dialogue and Development (21 May), Children's Day (1 June), World Day against Child Labor (12 June), World Day of Awareness on Prevention of Violence Against the Elderly (15

June), World Refugee Day (June 20), International Day of Support for Victims of Torture (June 26), World Day against Trafficking in Persons (June 30), World Humanitarian Day (August 19), International Day in Memory of Commerce (August 23), International Day of Victims of Forced Disappearance (30 August), International Day of Democracy (September 15), International Day of Peace (September 21), International Day of the Elderly (1 World Day for Mental Health (10 October), International Day for the Eradication of Poverty (October 17), Universal Children's Day (November 20), International Day for the Elimination of Violence against Women (25 November 2), International Day for the Abolition of Slavery (December 2), International Day of Disabled Persons (December 3), International Human Rights Day (December 10) and International Day of Migrants (December 18).

It should also be emphasized that, within the context of the commemorations of the Children's Day, this State body promoted a human rights awareness campaign at its headquarters and the Ombudsman, which was attended by Students from the Josefa Primary and Secondary School of *Óbidos* in Lisbon. In addition, this State organ organized, with the support of the Oriente Foundation, a concert by the *Orquestra Geração de Vialonga*, which took place on June 1, 2016 in the auditorium of the *Museu Oriente*, in Lisbon.

The Ombudsman activities as a National Human Rights Institution, are materialized in the development of the protocol signed with the Ministry of Education, through the realization of an action to raise awareness of human rights with the school community. This event corresponded to a human rights awareness campaign, the United Nations and the Ombudsman, which took place with the school population of the Secondary School of *Amora*, on December 13.

In developing the cooperation protocol which has been established between the Ombudsman and the (then) High Commissioner for Immigration and Intercultural Dialogue (current High Commissioner for Migration), on April 29, two collaborators from this State body carried out a *workshop* on the theme «Activity of the Ombudsman in promoting and defending the rights of foreign citizens». This event took place at the National Center for Immigrant and Migration Support, located in Lisbon, and consisted of a training program directed to the employees of the High Commission for Migration, civil society organizations and local authorities.

It should also be mentioned that, in the course of 2016, the Ombudsman, in liaison with the Office of the High Commissioner for Migration, designed information materials on the role of this State body in promoting and defending Rights of migrants. These flyers will be published this year in five foreign languages (French, English, Mandarin, Romanian and Russian), in addition to the Portuguese language, in order to reach a wider universe of its recipients.



The Ombudsman, as a guest observer, was represented at meetings of the National Commission on Human Rights and those of its working groups.

This State body, represented by the Deputy Ombudsman appointed for this purpose, also participated in the meetings of the National Council of the National Commission for the Promotion of the Rights and Protection of Children and Young People, held in Lisbon on March 31, May and June 21.

Following the ratification by the Portuguese State of the Convention on the Rights of Persons with Disabilities, signed at the United Nations, the National Mechanism for Monitoring the Implementation of the Convention was created. In this sense, through the Resolution of the Council of Ministers No. 68/2014 of November 13, Portugal created its Mechanism, which is composed, among others, of a representative of the Ombudsman. On December 6, in Lisbon, the first meeting of this Mechanism was held.





## *4. International relations*

> Annual Congress and the XXI General Assembly of the Iberianamerican Federation of the Ombudsman

## *4. International relations*

### *4.1. Background*

The universality that characterizes human rights is reflected in the constant and intense consolidation of a web of international relations among the various community actors whose mission is the promotion and defense of those rights. For this reason, and since the Ombudsman has taken on a human rights Ombudsman dimension since its inception, a dimension that is gradually reinforced by the attribution to this State body of other powers, such as that of Institution the development of its activity spreads to the international level, which is evidenced by its membership in a wide range of international organizations, both universal and regional, which share the culture of respect for human rights.

### *4.2. International activity*

The achievement of the Ombudsman's mission at the international level is based on collaboration with various institutions or organizations. Of these, it should be emphasized that the Ombudsman cooperates with the High Commissioner for Human Rights and the Human Rights Council, bodies which have been conceived under the aegis of the United Nations and which are mandated by national human rights institutions. The human rights situation of each community (be it understood as a country, a region or, even, globally). This State body is also a member of the Global Alliance of National Human Rights Institutions (current denomination of the International Committee for the Coordination of National Institutions for the Promotion and Protection of Human Rights), the organization responsible for the accreditation and reaccreditation of the National Institutions of Human Rights. Human Rights and its statutes of conformity – total or partial – with the Paris Principles.

This State body is also part of the European Network of National Human Rights Institutions which, under the aegis of the aforementioned Global Alliance, closely monitors the activity of the national human rights institutions of Europe, Training and other support.

Still in the European continent, the Ombudsman's cooperative relations with the various mechanisms under the influence of the Council of Europe, the European Network of Ombudsmen and the Agency for Fundamental Rights of the European Union deserve special mention.

Within the scope of lusophony, the work carried out by this State agency in promoting the Network of Ombudsmen, National Commissions for Human Rights and other Human Rights Institutions of the Community of Portuguese Speaking Countries should be highlighted.

It is also worth mentioning the continuous reinforcement of bilateral cooperation with several countries, intensified by actions of a training nature with collaborators of similar institutions and other servants of the State of other Lusophone and European countries, as well as the development of *twinning* and *taix* projects with other foreign organizations.

The Ombudsman's assumption by the Ombudsman of the presidency of the Ibero-American Ombudsman Federation, which took place on March 10, 2016, is of particular importance. This fact and the work that was carried out within that Federation and of its thematic networks justify that in this report, the initiatives that had the participation, intervention and organization of this State body in this capacity should be autonomous.

In addition to the above, and as mentioned elsewhere, this State body prepares autonomous and specific contributions, as well as providing the information required by international organizations or similar institutions.

#### *Participation in twinning and taix cooperation projects*

Another dimension in which the Ombudsman's international activity materializes, and which is particularly important, is participation in institutional cooperation initiatives in *twinning* and *taix* projects.

In 2016, the Ombudsman continued his participation in the Twinning Project Support to Establishment of Ombudsman Institution in Turkey, which began in the last quarter of the previous year. Of the various activities carried out, the Ombudsman's visit to Ankara in Turkey took place between 8 and 11 February, where he gave a lecture entitled «*The Portuguese Ombudsman: from the inception to the present and towards the future. Overview of its mission and responsibilities*». This event was also attended by the Deputy Ombudsman who made an intervention entitled «*The Istanbul Convention*».

The participation of Ombudsman staff in Ankara in the following project development activities is also highlighted:

- Participating in workshops on refugee, migrant, asylum-seeking and minority issues on 11-16 January;
- Participation in the workshop on the theme of the European Court of Human Rights, from 26 to 29 January, with a view to enabling the beneficiary entity with theoretical and practical information on the terms adopted by the Court in the

interpretation and application of the European Convention Human Rights on the implementation of their decisions and on the interventions of National Human Rights Institutions with them;

- From January 25 to 30, participation in the debate module «Interpretation and application of the European Convention on Human Rights: Fundamental Principles»;
- From February 8 to 13, participation in seminars to support the strengthening of the Turkish Ombudsman on *Women's Rights*. Participation in the following panels: «The Ombudsman Means of Action», «The Convention on the Elimination of All Forms of Discrimination against Women», «Positive Discrimination» and «Gender Equality», «Violence against Women», «Mobbing», «Vulnerable Groups» and «Women Trafficking»;
- From March 1 to 5, participation in a seminar on the work of the Portuguese Ombudsman and the *Defensor del Pueblo* (Spain) in the area of health.

Also, regarding the framework of the international cooperation with Turkey, the Portuguese Ombudsman received, on February 24, a delegation from the *Turkish General Directorate of Migration Management*, as part of the *Taiex Study Visit on Child Migration Policy for Turkey* project organized by European Commission.

With regard to cooperation with Azerbaijan, the participation of a collaborator of this State body on 13 and 14 June in the Expert Mission on Taxpayers' Rights module under the *TAIEX* program in Azerbaijan. The purpose of this program was to provide the Ministry of Finance of Azerbaijan with detailed information on the establishment and operation of an institution that promotes the defense of taxpayers' rights.

Likewise, the participation of Ombudsman staff in the *twinning* project «*Support to the strengthening of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan*», organized by the European Commission, the Portuguese Ministry of Foreign Affairs And the Polish Human Rights Ombudsman. This participation was translated into the realization of the following initiatives that took place in Baku, Azerbaijan:

- Participation on the theme of the application of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, with a view to providing effective and effective interaction between central institutions, organizations International organizations, foreign countries and civil society;
- On November 21 to 25, participation subordinate to the theme of health in a prison context;
- From October 29 to November 12, participation in the rights of the elderly and disabled.

In this context, mention is also made of participation in the *taiex* project, which took place in Yerevan, Armenia, from December 12 to 15, with the objective of supporting the

state migration service, especially with regard to the ongoing mission of a national plan of action on migration.

### *Bilateral cooperation initiatives*

The international action of the Ombudsman also involves the establishment and strengthening of relations with counterparts and counterparts, with which he shares the mission of promoting and defending human rights.

The Ombudsman participated in a project on the *Functioning and Strategy of Communication and Expansion of the Ombudsman of the Republic of Angola*, promoted by the Ombudsman of Angola and the United Nations Development Program, which had the following main objectives : i) to provide the Ombudsman's services with technical criteria and positive experiences in the field of institutional promotion and communication; ii) to promote the relationship between civil society institutions and State institutions by holding a seminar to share knowledge and experience.

The first initiative, developed within the scope of this project, was attended by a representative of this state body that, from September 19 to 30, was part of the working group, composed of elements of the Ombudsman of Angola and the Program United Nations Development Program. This group held several meetings with the central services, as well as with the provincial authorities and local representatives of the Ombudsman of Angola in the provinces of *Cunene*, *Cabinda* and *Huambo*. In the last two provinces, there were further enlightenment sessions with civil society.

This activity culminated in the holding in Luanda, on September 29 and 30, of a workshop on the theme «Transversality of the Ombudsman's Role versus Pragmatism – The Decisive Power». This meeting brought together representatives of various transnational regions and subregions, with the presence of the Ombudsman of Angola, the Ombudsman of Cape Verde and the Ombudsman of Portugal, the latter having delivered the communication 'The Ombudsman of Portugal: mission, powers and challenges'. This event was also attended by the Ombudsman of Namibia and President of the International Ombudsman Institute and the Ombudsman of Kenya.

In continuation of the cooperation between the Ombudsman of Portugal and the Ombudsman of Cape Verde, this State body received, on June 7, and from 11 to 14 July, a delegation of the Ombudsman of Cape Verde, aiming to provide information on the system for the promotion and protection of human rights, on collaboration with the United Nations and on the institution's international accreditation procedure.

As in previous years, this state body received from November 22 to 25 a delegation from the office of the Ombudsman of Mozambique, in the framework of cooperation between the two institutions, which he was able to hold *in loco* to know the good practices



and the activity carried out by the Ombudsman in promoting and defending citizens' fundamental rights.

On June 14 the Ombudsman received a delegation of Government and municipal authorities and civil society experts from Ukraine in the framework of a Project Coordinator in Ukraine with the support of the Organization for Security and Cooperation (OSCE), which aims to improve the social services system by civil society organizations, with Ukrainian public funding based on international experiences.

### *Other cooperation initiatives*

It should be noted that, in addition to the cooperation established with similar or similar institutions, the Ombudsman also develops training or exchange of experiences and knowledge with other entities. As an example of the aforementioned, the participation in a training action, promoted by the INA - Directorate General of Qualification of Public Employees, was attended by a delegation of judges from the Administrative Courts of Mozambique.

On October 7, the Ombudsman received a delegation of magistrates from the Center for Juridical and Judicial Training of Macao. This visit, included in the scope of the 5th training course of this Center, had the objective of knowing the mission, the mandate and the competences attributed to the performance of this State body.

On October 19, 2008, at the request of the Group of Reflection and Support for Corporate Citizenship - GRACE, this state body received a young woman graduated in Law from the *Universidade Católica de Moçambique* who, under the program developed in Mozambique by the *Girls Move Academy*, was able during one day to follow the work developed by this State body, as well as to perceive its operation.

On October 24, the Ombudsman received a delegation from the People's Republic of China headed by the *Chief Inspector of the Inspector's Office of the Central Commission for Discipline Inspection of the Communist Party of China at the Central Foreign Affairs Office*. This meeting allowed the presentation of the institutions, the exchange of knowledge and experiences related to the scope of intervention of the Ombudsman and its development in the face of the challenges that the global community considers today.

Finally, the Ombudsman received, in audience, the Federal Prosecutor for Citizens' Rights of Brazil and the Ombudsman of Mozambique, respectively on 13 January and 18 November.



### 4.3. Portuguese Ombudsman as President of the Ibero-American Federation of Ombudsmen

The Ibero-American Federation of Ombudsmen (FIO) brings together 104 Ombudsmen and Human Rights Institutions from 20 Ibero-American geographical areas, which since 1995 have been dedicated to the protection and promotion of Human Rights.

On March 10, 2016, the Ombudsman assumed the Presidency of the Ibero-American Ombudsman Federation, an institution of which he was already Vice-President of the European Region, following the resignation of the previous President elected at the XX General Assembly of FIO, of November 2015, that took place in the city of Montevideo, Uruguay. On the same occasion, on the proposal of the Ombudsman of Portugal, approved by the Rector Council of FIO, Deputy Ombudsman Jorge Miranda Jacob was appointed as FIO's technical secretary.

At the aforementioned meeting of the FIO Rector Council, held on March 10, 2016, in the city of Lisbon, FIO's Strategic Strategic Plan was approved for the four-year 2016-2020, in which the following strategic objectives were defined: As a reference institution in the defense, promotion and protection of Human Rights in Ibero-American geographic space; Improve the internal and external communication processes of the Federation; Ensure the principle of gender equality in the FIO; Support and strengthen the thematic networks based work model; Strengthen the relationship between the institutions that make up the FIO and improve its capacity for action; And develop a permanent technical structure.

In the course of FIO's current activity and with a view to its institutional strengthening, in view of the inadequacy of its Statutes in view of the current size and activity of the Federation, steps were taken to reform them, which also corresponded essentially to the text approved In 1995, the year of its foundation, with further detailed corrections. For this purpose, FIO members were consulted, a first update study was carried out and a commission was set up to present a proposal for a statutory amendment to the FIO General Assembly.

Each year the FIO produces a thematic report on human rights issues. The first report prepared and published under the Portuguese Presidency focused on the theme of poverty, an option dictated by the relevance and visibility of the subject, which is also the essential theme of the United Nations Agenda 2030, To put an end to poverty in all its forms and throughout the world and, by 2030, to eradicate extreme poverty. This report, which was attended by 19 of the 20 National Institutions of FIO, was publicly presented at its Annual Congress, under the theme *Poverty, Dignity and Human Rights*, held on November 23 in *Santa Cruz de Tenerife*, In the Canaries. In this same place was held, on November 24, the XXI Ordinary General Assembly of the FIO, where they discussed

several issues of relevance to the activity developed in the promotion and defense of human rights in the Ibero-American space.

At the same time, following a plan to monitor the main issues of human rights violations, and without losing sight of the need to give greater visibility to the Federation in the European geographic area, FIO was associated with the organization of an international conference on migratory flows, Entitled «*Les défis des institutions d'Ombudsman les aux migrants*», which took place on 7 and 8 September in Tirana, Albania, in partnership with the Mediterranean Ombudsman Association (AOM), the Association of Ombudsman and (AOMF) and the International Ombudsman Institute (IOI), which culminated in the adoption of the *Tirana Declaration*, and a memorandum of understanding was negotiated between the various participating institutions, which is currently being finalized. The Ombudsman took part in the opening and closing sessions and delivered a communication in which he presented the conclusions of that international conference.

As part of the institutional strengthening of FIO, the participation of the Ombudsman as President of the Federation at the International Conference on «*Human Rights Challenges Now: The Ombudsman facing threats*», which took place in Barcelona on the 26<sup>th</sup> and 27<sup>th</sup> of April. In this event, the Ombudsman delivered two communications: the first in the section entitled «*The freedom-security dilemma*», entitled «*The freedom-security dilemma: contributions for a human rights based approach*» and the second in the closing session. On this occasion, a memorandum of understanding was signed between FIO and the International Ombudsman Institute (IOI), aimed at fortifying the two institutions, increasing the exchange of relevant information and the development of joint activities.

Still in the wake of the alliance policy being developed by FIO, it was agreed to extend the existing arrangement with the *Corte Interamericana de Derechos Humanos* until 2020, and a working document was also signed to develop an effective implementation of the terms of the agreement.

However, the most relevant aspect of this policy of strategic alliances is evidenced by the recent research developed in partnership with the Auschwitz Institute on transitional justice in order to preserve memory and compensate victims in countries affected by complex Periods of instability and violence. This research was based on the experiences of Brazil, Colombia, Ecuador and Guatemala, and gave rise to a study entitled «*El Rol del Ombudsman en los Procesos de Justicia Transicional*».

Another point that greatly contributed to FIO's international visibility in the year 2016 was participation in the *HABITAT* process, which took place under the aegis of the United Nations. In this context, the following initiatives are highlighted: i) participation in the regional event for Latin America and the Caribbean in April 2016 in Toluca, Mexico, by holding an open table where the Ombudsman and President of FIO was represented by the technical secretary; ii) the participation of the Ombudsman at the World

*HABITAT*, in Quito, Ecuador, in October, ensuring the opening of the open table promoted by the platform led by FIO, it should be noted that this presence was the only one assured in this event by Institutions of the promotion and defense of human rights.

The Ibero-American Ombudsman Federation has developed, in the current mandate, the first steps to follow up and support the institutions that are part of the Federation and which have competencies in the prevention of torture, including those which are also National Mechanism for the Prevention of Torture. In June 2016, FIO supported the holding of the First International Meeting of National Mechanisms for Preventing Torture in Zacatecas, Mexico, under the auspices of the Mexican National Human Rights Commission. As part of this initiative, the Technical Secretary delivered an intervention under the theme «*Actuación de las INDH como Mecanismos Nacionales de Prevención de la Tortura*».

This new line of work, inserted in the horizon outlined in the FIO Strategic Plan, led to the development of institutional contacts with the APT - Association for the Prevention of Torture, and a memorandum is being prepared to institutionalize the management of joint initiatives.

In the context of interinstitutional cooperation, a number of initiatives were also developed in order to streamline the so-called Good Practices, with special emphasis on initiatives concerning prior consultation of indigenous peoples and management of social conflicts.

It should also be pointed out that a very significant part of the current activity of the Federation is developed through the respective thematic networks, according to activity plans previously approved by the Rector Council. The FIO currently has four thematic networks: *Red de Niñez y Adolescencia*, *Red de Defensorías de Mujeres*; *Red sobre Migrantes y Trata de Personas* e *Red de Comunicadores de la FIO (ComFIO)*.

In 2016, the *Red de Niñez y Adolescencia* participated in several events in coordination with other institutions, namely UNICEF, in particular the participation in thematic investigations focusing on deviant behavior and unaccompanied child migration in Central America. The participation of the representative of the Ombudsman in the aforementioned thematic network at the seminar, which took place from September 26 to 28 in Lima, Peru, under the theme *Los Derechos de los Niños, Niñas y Jóvenes – Métodos y Orientaciones para su Aplicación en la Práctica*, promoted by the FIO's Childhood and Adolescence Network, with the support of GIZ – *Deutsche Gesellschaft für Internationale Zusammenarbeit*, UNICEF, the European Union and the German Institute of Human Rights in Lima.

On 1 and 2 June, the *Red de Defensorías de Mujeres* of FIO organized the Congress «*Obstetric Violence in Ibero-America: Challenges of Sexual and Reproductive Rights*» held in San José, Costa Rica. This event was attended by the technical secretary who gave

a brief address on the subject. It is also worth mentioning the development, through the above-mentioned thematic network, of research on sexual and reproductive rights.

The *Red sobre Migrantes y Trata de Personas* carried out the diagnosis related to trafficking in persons in the Andean region, which allowed the development of joint strategies of several FIO members, and also elaborated a set of indicators that will allow, after its implementation, to build Mechanisms and carry out concerted actions between institutions. In addition, steps were taken to prepare for the second migration summit to be held in Mexico on May 2017.

It is also pointed out that, at the annual meeting of the network held on November 22 in Santa Cruz de Tenerife, the representative of the Ombudsman in the Network on Migrants and Trafficking in Persons was appointed as coordinator for The Europe Region, a circumstance occurring for the first time since its inception.

The FIO's *Red de comunicadores*, disseminated the events developed by FIO.

On December 1 and 2, this state agency participated in the seminar «Institutional Practices in Situations of Social Conflicts» organized by GIZ, FIO and the *Defensoria del Pueblo de Bolivia* in La Paz, through the presentation of the modules «Paper of Institutions in Conflict Processes - to conciliate mediator, observer and guarantor», «Definition of conflicts, typology and classification» and «Conflict Management Instruments».

It is mentioned the collaboration of this organ of State in the elaboration of answer to the questionnaire of the FIO on the role of the institutions of human rights in the *New Urban Agenda Habitat III*.

Finally, the Ombudsman's commitment as President of FIO to key initiatives for the future of the Federation, such as its technical and financial sustainability, should be highlighted as a result of the search for new strategic alliances and the extension of its activity to new areas. In an effort to keep track of the issues dealt with at the national level, in each FIO member country, as well as at the international level, thus ensuring a permanent visibility of the Federation in the main human rights forums.



## *5. Management and resources*

> Detail - facade of the Portuguese Ombudsman's building

# 5. Resource management

## 5.1. Administrative and financial management

Following the procedures of the last years and in what concerns the management of the available resources, in the year of 2016, remained the purpose to improve the quality of the service offered to the citizen and the time of response to the external requests send to this State body.

### 5.1.1. Financial resources

The Ombudsman’s budget, in the year 2016, was subject to a slight rise resulting from the gradual salaries replacement verified in the same period.

Table 14

2016 Budget	
Current expense	€ 5 149 880,00
Investment costs	€ 120 000,00
<b>Total</b>	<b>€ 5 269 880,00</b>

### 5.1.2. Investment costs

In the year 2016, similarly to what happened in previous years, it was given a special attention to the maintenance of the building, with the completion of the works necessary for the preservation of the installations of this State body in order to improve the facilities of the space. In addition, in the year under review, it became necessary to make adjustments and improvements in the new computer system management procedures put in operation since April 2015.

### 5.1.3. Human resources

Human resources represent one of the fundamental pillars for the proper and continuous functioning of any organization. In this sense, the Ombudsman continued to focus on the knowledge and skills of the staff, promoting specific and continuing training.

Table 15

**Existing staff in the Ombudsman's services (31 December 2016)**

Ombudsman's Cabinet and Deputy Ombudsmen	13*
Advisory legal service	46
Directorate of technical services and administrative support	43
Children's, senior citizens and disabled citizen's toll-free	2

\* One of the elements of the Ombudsman's Cabinet performs specialized functions in the N-CID (Children's, Senior citizens and Disabled citizens).

Regarding the gender, the majority of workers and co-workers who perform duties in this State body belong to the female gender, as shown in the following table.

Table 16

**Gender**

Male	25
Female	79

It should be noted that for the age group, the most representative remains, similarly to the previous year, between 45 and 49 years old, as shown in the table below.

Table 17

**Age group**

25-29	30-34	35-39	40-44	45-49	50-54	55-59	+60
1	5	17	14	33	16	11	7

It should also be noted that the predominant academic degree is the law degree, which is explained by the nature of the powers of this State body, as defined in article 1 of the Statute of the Ombudsman.

A final note to mention that, in accordance with article 28 of the Organic Law of the Ombudsman, the prevailing legal employment relationship is the service commission.

## 5.2. Public relations

In 2016 it was maintained a personalized and close assistance, either in person or by telephone, in order to:



- Bring the Ombudsman closer to citizens;
- Inform the citizens about the right to complain to the Ombudsman;
- Provide a prompt reply to information requests regarding cases in instruction;
- Inform the citizens about their rights, and, when necessary, guide them to the competent entities.

### 5.2.1. Attendance

The activity developed by the Information and Public Relations Division is, essentially characterized, by the citizen's attendance, in presence and by telephone.

In 2016, were performed 629 presential attendances, and of these, only 278 submitted a complaint, 279 asked for information on procedures in instruction and the remaining 72 in the provision of other information. Despite the growing and vital electronic means to contact the Ombudsman, it should be noted the fact that is still significant the number of presential attendances of citizens that come to the headquarters of this State body.

Table 18

#### Presence service attendance 2015-2016 - variation

Year	Attendance in person			Total
	Information on cases	Other information	New complaints	
2015	336	113	401	850
2016	279	72	278	629
<b>Variation (%)</b>	<b>-16,96%</b>	<b>-36,28%</b>	<b>-30,67%</b>	<b>-26%</b>

In the year 2016, were registered 5195 phone calls, which were made, respectively, through the general number (4488) and through the toll-free number (707).

### 5.2.2. Telephone assistance

As shown in the table below, the 4488 telephone calls made to the general number, were divided as follows: 3739 resulted in the provision of information on procedures in instruction, 722 in the provision of other information and the remaining 27 in submitting a complaint. With the exception of the complaint to the Ombudsman, through telephone contact – which increased 22,72%, the requests for information about procedures



or other information have undergone a slight decrease, which can find explanation in the number of open procedures.

*Table 19*

**Telephone assistance (general number) 2015-2016 - variation**

Year	Telephone assistance (general number)			
	Information on cases	Other information	New complaints	Total
2015	4266	868	22	5156
2016	3739	722	27	4488
<b>Variation (%)</b>	<b>-12,35%</b>	<b>-16,82%</b>	<b>22,72%</b>	<b>-12,95%</b>

In the table below the reverse trend is observed, that is, the service conducted across the toll-free line had an overall increase of 28,77%, which are separated by different percentages depending on the purpose of the service. It should be noted, however, that, in percentage terms the service with the purpose to obtain information on procedures in instruction have exceeded the 60%. In absolute terms there was a great increase (+84) in the service through which were provided other informations. In the other hand it should be noted, that the calls for submission of complaint exceeded twice the value verified in the previous year (from 4 to 9).

*Table 20*

**Telephone assistance (toll-free line) 2015-2016 - variation**

Year	Telephone assistance (toll-free line)			
	Information on cases	Other information	New complaints	Total
2015	114	431	4	549
2016	183	515	9	707
<b>Variation (%)</b>	<b>60,52%</b>	<b>19,48%</b>	<b>125%</b>	<b>28,77%</b>

The table below presents a combined reading of the elements concerning the citizens' attendance, either by phone or in full-face consultation, made contact with this State body. It must be recalled, however, that besides the attendance performed by the Information and Public Relations Division, the Ombudsman also provides to the citizens three specialized telephone lines integrated into the N-CID (See Chapter 2).

Table 21

**Total of citizens assisted 2015-2016 – variation**

Total of citizens assisted	
2015	6555
2016	5824
<b>Variation (%)</b>	<b>-11,15%</b>

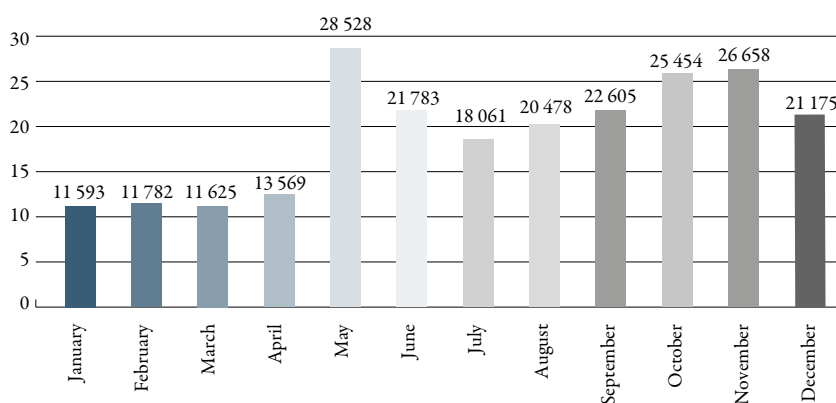
### 5.3. Monthly accesses to the Ombudsman's website

The growing technological development has been promoting the use of the software tools as a privileged and rapid form to access the information. For that reason, in 2016, has been developed a constant work of updating and creation of contents for the institutional website of the Ombudsman, which is an important means of dissemination of this State body.

In the chart below are presented, in quantitative terms, the monthly accesses to the website of the Ombudsman, which, in 2016, were computed in 233 311. It should be noted, finally, that May was the month in which there was the greatest number of accesses.

Graph XV

Monthly accesses to the Ombudsman's website





*6. Ombudsman's decisions  
in the promotion and  
protection of fundamental  
rights*

> Detail of the Portuguese Ombudsman's building

## ***6. Ombudsman's decisions in the promotion and protection of fundamental rights***

### ***6.1. Environmental, urban planning and cultural rights***

#### ***6.1.1. Ombudsman's decisions favourable to complainants***

##### ***a) Recommendations***

###### **Recommendation No.1/A/2016**

**Proc. Q-1477/15**

**Entity addressed:** *Campolide Parish Council*

**Date:** 2016.05.02

**Subject:** Popular consultation procedure. Replacement of traditional Portuguese stone pavement

**Status:** Accepted

The Ombudsman has received a complaint regarding the popular consultation procedure, promoted by the *Campolide Parish Council*. This procedure meant to understand the resident's view about the replacement of the traditional Portuguese stone pavement.

The Ombudsman has concluded that some requirements of the Legal Regime of the Local Referendum weren't accomplished, namely the preliminary examination by the Constitutional Court. Furthermore, the consultation procedure didn't respect duties of exemption and impartiality (particularly with regard to the constitution and the way polling stations operated). In addition, the question subject to consultation didn't comply with the legal requirement of clarity, objectivity and accuracy.

The Ombudsman has also concluded that the consultation procedure shouldn't use a rough approximation towards the democratic mechanism of referendum and, at the same time, water it down with the non-compliance of formal and substantial legal requirements.

The Ombudsman recommended that the Parish Council should refrain from taking any legal effect from this consultation procedure and shouldn't take any similar initiatives that simulate a referendum.



**Recommendation No.5/A/2016****Proc. Q-2308/13****Entity addressed:** Municipality of Lisbon**Data:** 2016.12.14**Subject:** Lisbon master plan. Exemption of compliance with the construction standards in the riverside zone**Status:** Accepted

The Ombudsman concluded that the Lisbon master plan has some rules that create an exemption of compliance with the construction standards in the riverside zone.

To apply this exemption the municipality only has to declare that the project is of exceptional interest to the city. At the same time, that master plan doesn't establish any others standards to this zone. The application of this regime will vary upon undetermined concepts, leaving a large margin of discretion to the municipality on a casuistic basis.

In order to ensure greater certainty and predictability in the application of the law, the Ombudsman recommended that these rules should be amended.

Otherwise, these rules are in violation of the principles of equality, legal certainty and the citizen's participation rights.

**Recommendation No. 6/A/2016****Case Q-4162/14****Entity addressed:** Scutvias Mortorways company**Date:** 2016.12.16**Subject:** Rights of the users of roads classified as concessionaire highways**Status:** Waiting for reply

A complaint was investigated concerning the refusal by a concessionaire company on assuming liability for the damage suffered by a vehicle as a result of a collision with an object left on the highway.

The Ombudsman concluded that the concessionaire did not take appropriate measures in order to prevent the accident.

In fact, general allegations that patrols were conducted at a diligent, acceptable, permanent and regular frequency are not sufficient to refute the legal presumption of non-compliance with the security obligations imposed upon concessionaires.

The mere allegation that a vehicle is driving at excess speed does not serve as proof of causal link between the fact occurred and the damage produced.

**Recommendation No.3/B/2016****Case Q-6312/15****Entity addressed:** Ministry of Environment**Date:** 2016.08.17**Subject:** Spatial Resettlement Program on the metropolitan areas of Lisbon and Oporto. Districts of *Santa Filomena and 6 de Maio***Status:** Accepted

Since 2012, the Ombudsman is actively monitoring the eviction and forced demolition program of two slums by the Municipal Council of *Amadora*.

The evictions that displaced numerous families were based on the Spatial Resettlement Program of 1993, which revealed to be outdated due to the natural changes in the population that occurred since then. During its analysis, special attention was paid to situations involving senior citizens, persons living with disabilities or suffering from serious illness and ethnic minorities. The Ombudsman even suggested that the demolitions and evictions should be suspended until the municipality, the State and eventually other social institutions were able to rehouse all persons that did not have alternative housing.

In view of the social dimension of this issue, which clearly outweighs the Municipal Council of Amadora and its ability to solve each and every situation, and faced with the impossibility to provide a proper solution for all families occupying vacant houses with the expectations of remaining there or benefiting from financial support, the Ombudsman recommended the Environment Ministry to review the Spatial Resettlement Program for the metropolitan areas of Lisbon and Porto approved by Decree-Law No. 163/93 of May 7.

*b) Suggestions***Case Q-1834/16****Entity addressed:** Intermunicipal Water and Waste Services of *Loures* and *Odivelas***Date:** 2016.08.17**Subject:** Noise. Times of waste collection**Status:** Suggestion accepted

The Ombudsman was requested to intervene with the Intermunicipal Water and Waste Services of *Loures* and *Odivelas* for refraining from answering a complaint about

noisy discomfort attributed to operations to collect waste eco points, between seven and seven and fifteen in the morning, behind five residential buildings.

It was found that the vehicles complied with the legal requirements for noise emissions. Nonetheless, this State body suggested the reweighting of collection times to the Intermunicipal Services, which agreed to delay the collection, at 8:00 am whenever possible, instructing the services accordingly.



**Case Q-1080/14**

**Entity addressed:** Municipality of *Torres Vedras*

**Date:** 2016.03.17

**Subject:** Municipal Cemetery – use of public domain - charges – principle of adequacy

**Status:** Accepted

The Ombudsman received a complaint against the charge of annual fees for the use of a Cemetery facility, requested at the end of the year.

The Municipality informed that the fees were charged in accordance with the cemetery regulation in force, which provided the same annual fee, whether the use of the space in the cemetery occurred for few days or all over the year. Considering that the charges should be just-enough to generate revenue required for provision of public service, the Ombudsman suggested the amendment of the cemetery regulation. The Municipality accepted the suggestion and initiated the proceeding in order to revise the rule and to fix the amount of the fee according to the period of the occupation.



**Case Q-4795/14**

**Entity addressed:** Lisbon Municipality

**Date:** 2016.05.24

**Subject:** Maintenance works. Failure to act

**Status:** Suggestion accepted

The Ombudsman pursued with resilience the monitoring of the housing and social situation of an elderly person who lived as a single occupant in a residential building in the center of Lisbon where the necessary and obligatory maintenance works were not carried out.

The situation lasted more than twenty-five years, without the Lisbon Municipal Council having taken the appropriate measures.

The Ombudsman decided to take a position before the municipality, noting the inconsistency of the services, taking into account the age of the tenant and the fragility of the means of defense of their rights, and the local authority acceded to carry out a new survey to the place. As a result, the Municipality of Lisbon ordered the owner to carry out the preservation and rehabilitation works necessary to correct the deficiencies described in the inspection report, setting the deadline of 30 days for its beginning and nine months for its completion.



### *c) Remarks*

#### **Cases Q-2675/14 and Q-2576/14**

**Entity addressed:** Secretary of State for Land Development and Nature Protection

**Date:** 2016.12.16

**Subject:** Legal Framework on Exceptional and Temporary Urban Regeneration. Seismic safety. Accessibility

**Status:** Accepted

A complaint was filed about the Legal Framework on Exceptional and Temporary Urban Regeneration, approved by Decree-Law No. 53/2014, of 8 April. Complainants contested that buildings to be rehabilitated under such framework were exempt of seismic reinforcement works and did not have to comply with general accessibility requirements.

The Ombudsman acknowledged some weak points of the legal framework and questioned members of the Government responsible for Environment, Land Development and Energy, pointing out it was possible to regenerate buildings without prior assessment of their seismic resistance. Likewise, rules on accessibility might be waived, potentially affecting people living with disabilities, families with small children, senior citizens and residents in historic neighborhoods.

Moreover, the framework did not provide scientific, technical or legal justification for non-compliance with certain technical standards: only non-compliance of legal standards on energy and heat efficiency required the presentation of a term of responsibility.

The Secretary of State for the Environment agreed with the concerns raised by the Ombudsman and undertook to amend the legal regime, admitting exemptions to general construction rules merely in case of technical or economic non-viability.





**Case Q-1722/2015****Entity addressed:** Mayor of *Cascais***Date:** 2016.09.13**Subject:** Municipality Regulation on Urban Development and Edification. Works exempted from prior control. Prior notice. Administrative contravention**Status:** Suggestion accepted

The Ombudsman received a complaint against the municipality of *Cascais* concerning the local Regulation on Urban Development and Edification. Such rule typified as an administrative contravention the omission of informing the municipality, at least five days in advance, about the execution of works and the identification of both the promoter and the technician responsible, even in the cases exempted of prior control by the legal framework on construction.

The rule under appreciation could be interpreted in a way that all works, including simple maintenances, cleaning operations plumbing repairs, roof tiles replacing or even the painting of interior walls, should be mandatory communicated to the municipality under penalty of fine application.

Such interpretation would result in the breach of the constitutional principle of prohibition of excess or disproportion.

The Ombudsman considered that the obligation to inform municipal authorities on works that, under the legal framework on construction, are exempted of prior control was far too excessive, particularly if under penalty of fine application.

The Ombudsman also concluded that the legal framework on construction only establishes the obligation of prior notice with regard to works which are preliminary to or consequential of construction operations. Therefore, simple works as repairs, cleaning or maintenance operations are not be submitted to municipality control.

The Ombudsman draw attention to the fact that the municipality of *Cascais* should take measures in order to exempt from prior notice the works that, by definition, neither represent construction operations nor have a link with them.

The municipality of *Cascais* accepted the position of the Ombudsman and acknowledged the need to amend its Regulation of Urban Development and Edification.



**Case Q-7841/13****Entity addressed:** Portuguese Roads Concessionaire (*Infraestruturas de Portugal*)**Date:** 2016.12.13**Subject:** Public works contracts. Losses. Responsibility of the construction owner**Status:** Waiting for reply

A complaint was lodge to the Ombudsman against the Portuguese Roads Concessionaire concerning the damage suffered by building's owners due to the construction of the highway IC2 – South Road of *Coimbra*, and the delay in the reimbursement procedures.

Investigations were promoted and the Portuguese Roads Concessionaire confirmed having received several complaints which were submitted to the builder (a foreign company) for assessment further contact with the complainers. However, the builder submitted the complaints to the insurance company.

Considering no solution had been found by the companies involved and the Portuguese Roads Concessionaire argued it had only powers to supervise the construction works and to notify the builder of the claims received, the Ombudsman addressed a remark to Portuguese Roads Concessionaire in order to engage in finding a fair solution. According to the public works administrative contract, although the builder is in charge of the construction works, the construction owner remains responsible for its supervision and direction, on behalf of public interest.

The builder is essential to ensure the construction works. Nevertheless, the Administration is fully responsible before the community for the successful completion of works and for guaranteeing public security. The Ombudsman sustained that if damages in private buildings were caused during public activities – such as the construction of a highway – the public entity involved could (and should) be civilly liable for damages resulting from the action of agents during the fulfilment of their duties to carry out such construction works.

In accordance with the principle of justice, the Ombudsman recalled the Portuguese Roads Concessionaire that the owners of damaged buildings had been given expectations of receiving compensation for damages, which made unacceptable to invoke the prescription of their rights.



### *6.1.2. Ombudsman's decisions non favourable to complainants*

#### **Cases Q-1767/16 and Q-3059/15**

**Entities addressed:** Lisbon Municipality and Lisbon's Mobility and Parking Municipal Company (EMEL)

**Dates:** 2016.04.11 and 2016.05.24

**Status:** Installation of bollards to prevent car parking on the sidewalks. Parking areas for residents

The Ombudsman received a complaint against the Lisbon City Council requesting the installation of automatic bollards in order to prevent abusive car parking on the sidewalks. He also received a complaint against Lisbon's Mobility and Parking Municipal Company regarding the creation of parking areas exclusively for residents.

In the first case, the complainant was informed that, according to the applicable law, local authorities are given extensive powers in respect of traffic planning and management. Therefore, the Ombudsman may not censure the choices made by municipalities in this regard or assess their adequacy to pursue public interest.

In respect of traffic planning and management, only Public Administration has a comprehensive vision of its attributions as well as of the resources available and of the technical contingencies that result from the solutions implemented. The Ombudsman also clarified that this margin of local autonomy can only be evaluated through political means, in particular, by electoral suffrage.

Another complaint was received about the establishment of parking areas for residents in the city of Lisbon. The complainant considered that there was a clear disadvantage to non-residents since the constraints to parking that justified the creation of areas exclusively for residents was limited to a certain period of time. Therefore, other drivers could not use the many available car places during the remaining hours.

Following inquiries made with Lisbon's Mobility and Parking Municipal Company, the Ombudsman concluded that, beside the provisions of the General Parking Regulations in the City of Lisbon, the definition of parking areas for residents is based on specific requirements that include: the low demand for short-term parking in predominantly residential areas with no relevant commerce and services activities, the high demand for residential parking and the conclusions reached in studies carried out by local councils and municipal services.

It was concluded that the creation of parking areas for residents was based upon fixed criteria related to the specific characteristics of each location and to needs of the population.



**Case Q-2240/2016****Entity addressed:** Portuguese Roads Concessionaire (*Infraestruturas de Portugal*)**Date:** 2016.07.22**Subject:** National roads. Advertising. Fees. Double taxation

The intervention of the Ombudsman was requested due to the concerns with the double charge of fees for advertising licenses and permits in the vicinity of national roads, both by the Portuguese Roads Concessionaire and by the Municipalities, referring to the same event and the same period of time.

The Ombudsman concluded that there were no legal grounds to support that double taxation was occurring, since the fee due to the road administration will be established by a ministerial implementing order, which has not yet been approved.

**Case Q-545/2015****Entity addressed:** Portuguese Authors Society**Date:** 2016.12.16**Status:** Tax settlement for author remuneration due to the broadcasting of music in a restaurant and beverage establishment

A complaint was lodged to the Ombudsman against the performance of the Portuguese Authors Society which urged the complainant to regularize the diffusion of ambient music in an establishment of catering and beverages.

The complainant believed that this action violated the judicial decision 15/2013 of the Supreme Court of Justice which decided that the application to a television set of sound amplification apparatus in a commercial establishment does not constitute a new use of the transmitted work and, therefore, its use does not require the author permission and does not constitute an usurpation crime.

The Ombudsman has already taken a similar position, however, the recommendations 4/B/2002 and 8/B/2013 have not been complied with.

The entity addressed invoked the Court of Justice of the European Union order, dated 14th July 2015, which ruled that the concept of “communication to the public” in the Directive 2001/29/EC of the European Parliament and Council, dated 22th May 2001, comprises the transmission, through a radio connected to speakers and/or amplifiers, of musical and literary works broadcasted by a radio station to the customers of a coffee shop and restaurant.

This decision is binding to the Portuguese judicial and administrative entities and, consequently, the complainant was duly informed of the lack of grounds for the Ombudsman to recommend a different performance to the Portuguese Authors Society.

## *6.2. Taxpayers', consumers' and economic operators' rights*

### *6.2.1. Ombudsman's decisions favourable to complainants*

#### *a) Suggestions*

##### **Case P-009/15**

**Entity addressed:** State Secretary for Tax Affairs

**Date:** 2016.08.22

**Subject:** Tax. Individual Income Tax (IRS). The impact of some rules of the IRS code (CIRS) in Portuguese households

**Sequence:** With regard to the option for the joint taxation regime of married taxpayers or non-marital partnership, the Ministry of finance would announce the intention to solve the problem, not only for future years, but also in respect of income earned in 2015 and declared in 2016. At the end of the year, the legislation in question had been approved

A year and a half later on the entry into force of Law No. 82/E/2014, of 31 December, which reformed the taxation of individuals, the Ombudsman deemed as important to make a balance of the impact of some provisions therein foreseen as well as reaffirm the need of settling the iniquitous scheme of reporting income from previous years, still giving rise to complaints. This was made through a letter directed to the State Secretary for Tax Affairs, where the following matters were addressed:

#### *1) Impossibility of opting for the joint taxation regime in returns delivered after the time limit*

The Ombudsman considered that it would be essential, not only to change the situation for the future, but also revert situations that occurred in the taxation of income from 2015, declared in 2016.

## *2) Expenses related with tutoring*

Families complained about not being able to deduct the cost with tutoring centres, instead of what would happen if the tutors were individuals. The Ombudsman considered that the rules in question introduced an unjustifiable discrimination by treating differently aggregates that have borne the same type of expenditure.

## *3) Taxation of compensation due for onerous waiver of contractual positions or other rights inherent to real estate contracts*

In 2016 complaints were received concerning the new item e) of article 9 of the CIRS. According to this rule, compensation due for onerous waiver of contractual positions or other rights inherent to real estate contracts became taxable. For example, this includes compensation paid by landlords to tenants who use the dwellings as permanent abode, in order to recover them. The protection of the constitutional right to a dwelling justifies the exclusion from taxation of capital gains, if the taxpayer reinvests the value of the sale of the personal and permanent abode in a dwelling for him and his household. However, this new rule does not safeguard the material situation of the taxpayer, since it does not include exclusion from tax if the taxpayer reinvests the proceeds on the lease or acquisition of a new dwelling.

## *4) Legal scheme of reporting income from previous years (retroactive)*

The Ombudsman pointed out, once again, the need to introduce a legal scheme that allows the reporting of income from previous years.<sup>(64)</sup> This suggestion had been previously addressed not only to the State Secretary for Tax Affairs of past governments, as well as to the President of the Commission for the IRS Reform<sup>(65)</sup>.



### **Case Q-6794/12**

**Entity addressed:** State Secretary for Tax Affairs

**Date:** 2016.08.12

**Subject:** Tax. Real Estate Taxation. Article 28 of the General Stamp Duty Chart (TGIS). Exemption of Municipal Real Estate Tax (IMI) for low-tax value real estate, owned by low-income taxpayers

**Sequence:** This State body was informed that the draft State budget for 2017 included a provision revoking article 28 of the TGIS

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(64) See Recommendation No. 7/B/2008 available at: <http://www.provedor-jus.pt/site/public/archive/doc/Rec7B08.pdf>

(65) See letter available at: [http://www.provedorjus.pt/site/public/archive/doc/Oficio\\_Comissao\\_Reforma\\_IRS.pdf](http://www.provedorjus.pt/site/public/archive/doc/Oficio_Comissao_Reforma_IRS.pdf)

Article 4 of Law No. 55-A/2012, of 29 October, added article 28 to the TGIS. This provision foresees the taxation of property rights, usufruct and the right to surface on urban real estate, with tax value equal to or greater than one million euros for the purposes of IMI.

This new tax gave rise to several complaints to the Ombudsman. Several enquiries were then made with the tax authorities and the State Secretary for Tax Affairs but replies were unable to clarify all issues raised.

Following the intention expressed by the XXI Constitutional Government to review the existing legal framework, with the aim of eliminating the pernicious effects of its less correct and reasonable implementation, the Ombudsman deemed as appropriate to bring to the attention of the new State Secretary for Tax Affairs his thoughts on the subject, in order to contribute to the improvement and clarification of the legal system in question, having in consideration the position of the Constitutional Court established in the decision No. 620/2015, of 31 December 2015 and in the decision No. 692/2015, of 16 December 2015.

On the other hand, and in relation to the loss of exemption of Municipal Real Estate Tax (IMI) for low-tax value real estate, owned by low-income taxpayers, the Ombudsman has requested the State Secretary for Tax Affairs a significant update of the maximum limits, foreseen in article 11-A of the CIMI, to the total gross household income and to the overall tax value of all real estate belonging to the household, in order to ensure the respect for constitutional imperatives of the right to housing and the right to private property.

The State Secretary for Tax Affairs informed the Ombudsman that the draft State budget for 2017 included a provision revoking article 28 of the TGIS. For having left out all other questions and comments contained in the communication, the Ombudsman has made a remark.



### **Case Q-3821/15**

**Entity addressed:** Tax Justice Department of Tax and Customs Authority.

**Date:** 2016.04.06

**Subject:** Tax. Penalties. Communication of invoices to the Tax and Customs Authority

**Sequence:** Suggestion expressly and fully accepted

A company has paid 3 penalties for not having communicated invoices, through electronic means, to the Tax and Customs Authority (AT), for the periods 2013/04, 2013/05 and 2013/06, amounting to € 376,50, € 384,45 e € 376,50, respectively. <sup>(66)</sup>

Following the Ombudsman's intervention, and since the complainant company was not the issuer of the invoices, but the acquirer, the Director of the Tax Justice Department of Tax and Customs Authority finally decided to order the refund of the penalties paid.



### *b) Remarks*

#### **Case Q-1461/14**

**Entity addressed:** Municipal Real Estate Tax Department of AT (DSIMI).

**Date:** 2016.05.30

**Subject:** Tax. Municipal Real Estate Tax (IMI). Safeguard clause foreseen in article 15 of the Decree-Law No. 287/2003, of 12 November. Real estate registered with flyer

**Sequence:** Case closed. Question being monitored

It arises from the complaint that AT did not consider the safeguard clause foreseen in article 15 of the Decree-Law No. 287/2003, of 12 November, regarding the IMI assessment of 2012 of a building which tax value was increased in the framework of the general evaluation of urban real estate. This clause, aiming to prevent sharp increases of the tax due in relation to the years 2012 and 2013, introduced a mechanism for phasing the increase, over the two years of the respective collection (2013 and 2014).

In accordance with item c), paragraph 4, of the said article 15, the safeguard clause was not, however, applicable to real estate for which a change in the IMI taxpayer had occurred after December 31, 2011, except «death transfers which beneficiaries are spouses, descendants and ascendants, when they do not express a will otherwise».

For not having complied with the declarative obligation imposed by article 23 of Decree-Law No. 287/2013, of 12 November, the complainant kept the real estate registered with the number of entry (flyer) until 2013, having only in such year promoted its identification with the respective tax identification number.

The complainant was informed by AT that in such cases the safeguard clause was not applicable.

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(66) Decree-Law No. 198/2012, of 24 August, establishes, namely, issuance control measures of invoices and other relevant documents and defines the shape of their communication to AT.



The Ombudsman did not question the requirement set by article 23 of Decree-Law No. 287/2013 nor the fact that failure of compliance with this rule is subject to a penalty. However, the Ombudsman pointed out that there are no legal grounds to portray a transfer of real estate by aligning the method of identification of the taxpayer to an alteration of the taxpayer. The question continues to be monitored by the Ombudsman.



**Case Q-6242/14**

**Entity addressed:** Financial Management Institute of Social Security, I.P. (IGFSS)

**Date:** 2016.02.22

**Subject:** Tax. Tax Enforcements. Actions contesting enforcements. Slowness in sending to Court

**Sequence:** Without express reply. Case settled

Two brothers have presented actions contesting tax enforcements to the Social Security Enforcement Section of *Braga*. By the time the complaint was made such Section had not yet sent the actions to Court.

Paragraph 1, of article 208, of the Tax Procedural Code provides that the tax enforcement authority should send the actions contesting the enforcements to courts within 20 days. Paragraph 2 adds that in the same time period the tax enforcement authority may analyze the merits of the actions and revoke the previous decision.

The lack of compliance with the deadline of sending actions contesting the enforcements to courts (or revoking them) by the Social Security Enforcement Sections has long been under the scrutiny of this State body. Hence, without prejudice of the efforts made to prevent such situations, the Ombudsman seeks to establish, for each new case, the circumstances in which it arose. In this context, the Ombudsman heard IGFSS. IGFSS replied that the Social Security Enforcement Section of Braga justified the delay on sending the actions to Court since they were not deemed as urgent matters. They were sent to Court roughly two years after their presentation and after the complaint made to the Ombudsman.

This circumstance determined a new remark to IGFSS. It was stressed, again, that there has been a blatant failure to comply with paragraph 1, of article 208, of the Tax Procedural Code and it was suggested to raise awareness within the several Social Security Enforcement Sections to the importance of avoiding the repetition of such cases.



**Case Q-4823/15****Entity addressed:** Energy Services Regulatory Authority (ERSE)**Date:** 2016.03.03**Subject:** Consumption. Electricity. Conduct of the Regulatory Authority. Complaint Book**Sequence:** ERSE explained that it has opened two infringement proceedings and stressed the commitment to carry out its legal competences

Decree-Law No. 156/2005, of 15 September, requires the existence and availability of the Complaint Book in the premises of the essential public service providers referred to in Law No. 23/96, of 26 July, including the electric power supply.

Taking this into account, the Ombudsman concluded that the conduct of ERSE should be remarked, based on the following grounds: *i)* the original of the complaint must be submitted to the regulatory authority within 10 working days from the date of filling whether or not accompanied by allegations of the supplier; *ii)* the fact that the consumer sends the duplicate of the complaint to the regulatory authority, does not release the service provider from the obligation of sending the original within 10 working days; *iii)* the breach of the referred deadline constitutes infringement under the competence of ERSE.

Therefore, the regulatory authority can never agree with the regulated entities an extension of the deadline. On the contrary, this authority shall control the fulfilment of the deadline and apply penalties, if needed.

Since it was beyond dispute that the original of the complaint still had not entered in ERSE, around eight months after being filled by the complainant, ERSE was called the attention to, in general, take a decision putting an end to the practice agreed with the regulated entities.

ERSE replied that it did not establish with regulated entities any agreement breaching the law that would allow the sending of the leaves of the Complaint Book about eight months after the filling, as it turned out in this case. It also informed that two infringement proceedings were opened. It finally informed that it had been applying penalties foreseen in the energy sector infringement law and other legal provisions.

After ascertaining that ERSE had complied with the legal and regulatory framework, this State body has closed the case.



### 6.2.2. Ombudsman's decisions non favourable to complainants

#### **Case Q-3258/16**

**Entity addressed:** CTCV – *Centro Tecnológico da Cerâmica e do Vidro*

**Date:** 2016.07.27

**Subject:** Economic matters. Trade. General contractual terms and conditions

The Ombudsman has been requested to require the Prosecutor to initiate an action aimed at obtaining a conviction regarding a clause included in a contract for the provision of services concluded between private entities, in accordance with Decree-Law No. 446/85, of 25 October (Legal scheme of general contractual terms and conditions).

The Ombudsman concluded that he had not elements allowing, with legal certainty, the use of the prerogative assigned by item c), paragraph 1, article 26 of Decree-Law No. 446/85, i.e., to send the case to the Prosecutor.

The case was closed and the complainant informed that it could itself request the intervention of the Prosecutor.



#### **Case Q-5340/16**

**Entity addressed:** Schools Grouping of *Benedita*

**Date:** 2016.12.20

**Subject:** Tax. Tax enforcements. Seizure. Minimum threshold of unseizability. Christmas and holiday bonuses. Union due

Ombudsman's intervention was requested with regard to the alleged infringement of the legal minimum of unseizability by the Schools Grouping of *Benedita* who, as employer of the complainant, had been complying with the attachment order of the respective salary.

The complainant appended copy of pay slips from May to September 2016, in which were detailed the amounts withheld on account of the seizure. Those pay slips evidenced that the net total remuneration was always below the amount equivalent to one national minimum wage.

After hearing the addressed entity, it was found that the complainant based the complaint only in the pay slips respecting to the main salary, not including the Christmas and holiday bonuses, which were processed in separate pay slips.

The Complainant was elucidated that the Constitutional Court has not considered unconstitutional the applicable provision, in so far as it admits the attachment of the Christmas or holiday bonuses in an amount which, added to the wage, exceeds the national minimum wage.

The complainant was also elucidated that the union due withheld is not part of the compulsory deductions, being only the latter considered to assess the net amount of payments, required to determine what is or not attachable.<sup>(67)</sup> It is up to the worker to decide if it pays directly the union due or through the employer.

In conclusion, the complainant was informed on the regularity of the terms applied by the grouping to comply with the salary attachment order.



### Case Q-1469/16

**Entity addressed:** *Instituto de Financiamento da Agricultura e Pescas, I.P.* (Fisheries and Agriculture Financing Institute - IFAP)

**Date:** 2016.08.26

**Subject:** National and European Funds. Agriculture. Repayment of aid. Period of limitation

A complaint was directed to the Ombudsman by the heiress of a guarantor of a project supported by the forestry measures on farms, which aimed the refund of an aid repayment, considering that the debt was time-barred.

The position forwarded by IFAP reiterated the understanding already expressed to the complainant, i.e., the debt which payment was claimed, and that turned out to be made on 15 June 2007, was not time-barred. IFAP justified the lack of notification of the project guarantor, first with his psychic incapacity certified by a court and, then, with the respective death.

In view of the above, the Ombudsman concluded that it could not urge IFAP to acknowledge the debt time-barring, which would be required to refund the amount paid in the framework of the tax enforcement.

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(67) In fact, according to article No. 738 of the Civil Procedural Code:

«1 – Two thirds of the net amount of salaries are not attachable (...).

2 – For the purpose of calculating the net amount previously referred, only the compulsory deductions are considered.

3 - The unseizability established in paragraph 1 has as (...) minimum limit, when the debtor has no other income, an amount equivalent to one national minimum wage (...).».

It is not an issue without contention the limitation period applicable to the right to revoke the acts of Community financial, either from an administrative perspective, or within courts (community and national) that are being asked to decide in this area.

Nevertheless, when IFAP revoked the financial aid, the national and community jurisprudence was not yet settled as per the decision of the Supreme Administrative Court No. 1/2015, of 7 May 2015 (in the absence of national legislation foreseeing a period of limitation longer than the one set in Council Regulation (EC, EURATOM) No. 2988/95, of 18 December 1995, the latter is applicable).

Also, if it would be considered that the debt was time-barred – position that would be contrary to the jurisprudence at the time –, the Ombudsman could not urge IFAP to make the refund since the aid repayment was made by fulfilling a «natural obligation» (paragraph 2, article No. 304 of the Civil Code).

### 6.3. *Social rights*

#### 6.3.1. *Ombudsman's decisions favourable to complainants*

##### *a) Suggestions*

##### **Case Q-2658/16**

**Entity addressed:** Secretary of State for Social Security and Social Security Institute (*Instituto da Segurança Social, I.P.*)

**Date:** 2016.10.14

**Subject:** Application of self-employed workers' contributory social security scheme provided by the Social Security Contribution Regimes Code

**Status:** A response is awaited from the two entities addressed. However, the Social Security Institute has already accepted one of the Ombudsman suggestions related to the calculation of the annual remuneration for the granting of social security contributions exemption

Having received several new complaints about the application of self-employed workers' contributory social security scheme provided by the Social Security Contribution Regimes Code, the Ombudsman made new legislative amendment suggestions to the Secretary of State for Social Security and addressed remarks to the Social Security Institute in order to correct several administrative procedures.

The suggestions to the Secretary of State for Social Security were related to the following matters: the date on which the self-employed workers' contributions exemption takes effect; the calculation of self-employed workers' contributory base; the summoning and notification of self-employed workers by electronic means; and the qualification of the partners of professional partnerships that are taxed according to the tax transparency regime.

As to the remarks made to the Social Security Institute, they focused the correction of administrative procedures related to the self-employed workers' contributions exemption, the calculation of the relevant income, the debt resulting from the increase in the contributory level, the contributory base of the self-employed workers who restarted their own account activity and also the qualification of the partners of professional partnerships that are taxed according to the tax transparency regime.



#### **Case Q-8480/14**

**Entity addressed:** Secretaries of State for Social Security

**Date:** 2016.05.18

**Subject:** Maintenance of the right to register in the Civil Servants Social Security System (*Caixa Geral de Aposentações, I.P., - CGA*)

Over the past few years, the Ombudsman has received complaints from several contract teachers about the CGA's refusal to maintain their membership in the convergent social protection scheme although they have exercised their duties continuously through the succession of annual contracts. In the present case, the CGA considers that, in the event that new contracts are concluded, new public functions also begins and, pursuant to article 2, paragraph 1, of Decree-Law n 60/2005 of 29 December, teachers must be enrolled in the general social security scheme.

However, after the intervention of the Ombudsman, the CGA has considered more recently that, from 1 August 2014 - the date of the entry into force of the General Labor Law in Public Functions (LGTFP - Law No. 35/2014 of June 20) - the provisions of the said paragraph 2 of article 2 of Law No. 60/2005, of December 29, no longer apply to situations covered by said Law, limiting its application only to those who enter the Public Administration for the first time.

The CGA's new position is just only partly in line with the Ombudsman's point of view, who considers that even before 1 August 2014, already existed the right of registration of the said teachers, in accordance with the law in force, provided that occurred the continuity of exercise of the public functions. On the other hand, regarding situations verified

before and after that date – 1 August 2014 - the CGA continues to refuse, without any valid legal foundation, the registration of teachers based on the kind of recruitment.

Like the Ombudsman, the recent jurisprudence delivered on the subject has recognized the right of the maintenance of the right of enrollment in the CGA. Consequently, after a number of unsuccessful attempts in order that the CGA regularize the situation of the teachers concerned, the Ombudsman urged the Secretary of State for Social Security to issued guidelines to the CGA in order to maintain enrollment of all said teachers.

The Ombudsman expects an answer from the Government.



### **Case Q-5292/15**

**Entity addressed:** Secretary of State for Social Security

**Date:** 2016.02.05

**Subject:** Amendment to article No. 13 of Decree-Law No. 133/88, of 20 April, that states the limitation period for recovery of social benefits unduly paid

**Status:** A response from the Secretary of State for Social Security is awaited

Several citizens complained to the Ombudsman about the requests they received from the Social Security Institute for recovery of social benefits unduly paid for more than five years before.

The Ombudsman found the requests to be legal as they were notified before the 10-year limitation period established in article 13 of Decree-Law No. 133/88, of 20 April, which was not revoked by Decree-Law No. 155/92, of 28 July.

However, taking into account the legislative developments since 1988 and the updating of Social Security's information system, the Ombudsman suggested to the Secretary of State for Social Security an amendment to article 13 of Decree-Law No. 133/88, or a new legal framework for recovery of social benefits unduly paid.

In relation to this matter, the Ombudsman suggested also the correction of the Social Security Institute procedures that operate automatic debt compensation with social benefits granted to beneficiaries.



**Case Q-6674/15**

**Entity addressed:** Civil Servants Social Security System (*Caixa Geral de Aposentações-CGA*)

**Date:** 2015.04.14

**Subject:** Administrative annulment of retirement pension. Effectiveness for the future of administrative annulment of acts constituting rights to obtain regular benefits, after the expiration of a period of one year. Application of the new Administrative Procedural Code, approved by Decree-Law No. 4/2015, of 7 January

**Status:** The Ombudsman's suggestion was accepted, the case was solved and established a future understanding

The Ombudsman received a complaint from a citizen challenging the CGA's request for the return of an amount as unduly paid, after the administrative annulment of the act that recognized him the right to early retirement.

After an analysis of the situation, it was shown that the right to early retirement was recognized to the complainant on June 20, 2014, and it was subsequently subject to an administrative annulment, by order of October 7, 2015, that was based on the fact that there was a mistake in the counting of service time by the CGA.

Invoking the application of article 171, No. 3 of Decree-Law No. 4/2015, CGA has demanded the return of the claimant's amounts unduly received as pension (from the beginning of the CGA's payment of the pension until October 31, 2015). On the other hand, CGA notified the employer to reinstate the claimant in active life, with the reconstitution of "the whole situation" as if the previous act had not been delivered.

Considering that the CGA is making an incorrect application of the law, the Ombudsman requested a review of the situation in accordance with the law applicable to the specific case.

In fact, according to the provisions of article 168, No. 4, paragraph b), of Decree-Law No. 4/2015, the annulment of administrative acts which are constitutive of rights, even if after a period of one year, is possible for a maximum period of five years, but it only may produce effects for the future, where the acts concern the obtaining of regular benefits.

This means that, once the administrative annulment of the act has been ordered, the payment of the early retirement pension ceases, and no other effects can be attributed to this act and therefore, in this case, the claimant had been improperly demanded for the return of the amounts received.

The suggestion was accepted and the debt issued was cancelled.





## *b) Remarks*

### **Case Q-3885/15**

**Entity addressed:** Minister of Justice and Minister of Labour, Solidarity and Social Security.

**Date:** 2016.04.15

**Subject:** Amendment of some rules of the new Regulation of the Pension Fund for Lawyers and Solicitors, approved by Decree-Law No. 119/2015, of 29 June

**Status:** It was determined the establishment of an inter-ministerial working group to assess the new Regulation of the Pension Fund for Lawyers and Solicitors

The Ombudsman received several complaints about the new Regulation of the Pension Fund for Lawyers and Solicitors, approved by Decree-Law No. 119/2015, of 29 June.

After considering the different issues presented, the Ombudsman drew the special attention of the Government<sup>(68)</sup> to the need to consider different regulatory solutions for some aspects.



### **Case Q-7200/15**

**Entity addressed:** Social Security Institute (*Instituto da Segurança Social, I.P.*)

**Date:** 2016.02.01

**Subject:** Registration of foreign workers (nationals of non-EU countries) in social security

**Status:** The Ombudsman remark was accepted

Considering the several complaints received regarding the registration in social security of foreign workers (nationals of non-EU countries), the Ombudsman addressed a remark to the Social Security Institute (ISS, IP).

In cause was the fact that Social Security Institute required foreign workers the presentation of a work visa or residence permit, to accept their registration in social security.

Complainants understood that the requirement of these documents had no legal basis and claimed that ISS, IP's refusal or the delay in accepting their registration in Social Security (and the consequent grant of a social security number) prevented them from

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(68) Offices addressed to the said members of the Government may be consulted on the Ombudsman's institutional website: [http://www.provedor-jus.pt/site/public/archive/doc/Q-3885-2015-RegimedeProteaaoSociaIdosAdvogadoseSolicita-dores\\_MM\\_0.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Q-3885-2015-RegimedeProteaaoSociaIdosAdvogadoseSolicita-dores_MM_0.pdf)

resorting to the extraordinary legalization provided for in Law No. 23/2007, de 4<sup>th</sup> of July, since this requires the prior granting of a the social security number.

The Ombudsman addressed a remark to the Social Security Institute (ISS, IP), emphasizing the need to clarify procedures in this matter.

ISS, IP informed the Ombudsman that, after a meeting held with the Foreigners and Border Service (SEF) and the High Commission for Migrations, it was settled that the registration in social security of foreign workers that proves to have a job in Portugal and had legally entered and legally stayed in the country, will be accepted.

Accordingly, the Directorate-General for Social Security issued technical guidelines regarding this matter.

Since then a faster conclusion of these procedures was noted and most of the cases submitted to the Ombudsmen were favourably resolved.



#### **Case Q-2619/14**

**Entity addressed:** Secretaries of State for Social Security

**Date:** 2016.05.19

**Subject:** Relevance on retirement pensions of contributory periods made, at the same time, as a teacher of private education and as a teacher of official education, prior to the entry into force of Decree-Law No. 321/88, of 22 September

The Ombudsman received a complaint from a teacher of private and cooperative education regarding the fact that the contributions made before the entry into force of Decree-Law No. 321/88, of 21 December, at the same time the ones he made as a teacher of the public education, had not been considered in his retirement pension.

These teachers are covered by a mixed social protection scheme provided by the said Decree-Law No. 321/88, of 21 December. They pay social contributions to the CGA to have access for deferred benefits (old age and invalidity) and also for the General Social Security Scheme to obtain immediate benefits (unemployment, illness, parenting, etc.).

Since those contributions were legally owed, the Ombudsman asked for the intervention of the Social Security Institute, which concluded that, in the absence of a legal provision allowing such contributions to be considered for the purpose of granting a pension, the complainant could only be reimbursed duly revalued, which succeeded.

The Ombudsman then addressed himself to the Secretary of State for Social Security call his attention on the need to legislate on this subject so that the persons concerned are guaranteed the right to receive the pension, or if this is not accepted, that the Social Security Institute ensure the reimbursement of such contributions duly revalued.

### 6.3.2. Ombudsman's decisions non favourable to complainants

#### Case Q-2204/16

**Entity addressed:** Social Security Institute (*Instituto da Segurança Social, I.P.*)

**Date:** 2016.12.22

**Subject:** Parental benefits. Length of father's parental allowance in case of non-shared parental leave and when the mother continues to work uninterruptedly after child-birth

The Ombudsman received a complaint from a working father contesting the length of parental allowance granted by Social Security. In fact, the Social Security Institute, gave him 74 days of parental allowance, refusing to grant the 120 days he believed was entitled to.

The complainant claimed that the mother of his child was a lawyer and therefore a beneficiary of the lawyers' special social security scheme (*Caixa de Previdência dos Advogados e Solicitadores*). Consequently she was not entitled to the parental allowance (maternity allowance) paid by the Social Security Institute and, for that reason, did not take a parental leave, continuing to work uninterruptedly and immediately after giving birth.

Based on that fact, the complainant claimed that he was entitled to the entire parental allowance (120 days).

The Ombudsman concluded that if parental leave is not shared between the parents (as in this case), the parental allowance can be granted to the father, as long as the mother works and has not applied for the allowance. However, the minimum period of six weeks following delivery is always and necessarily reserved for the mother

Accordingly, Ombudsman concluded that the complainant was not entitled to 120 days of parental allowance but only 78 days, as correctly decided by the Social Security Institute.



#### Case Q-1012/16

**Entity addressed:** Social Security Institute (*Instituto da Segurança Social, I.P.*)

**Date:** 2016.05.23

**Subject:** Access to social benefits by self-employed workers. Full compliance with social security obligations

The complainant was a self-employed worker to whom the sickness benefit was denied due to his social security contributions debt. He asked the Ombudsman to intervene with

the Social Security Institute because he was fulfilling an instalment-based payment agreement and so he should be considered as having full compliance with his social security obligations.

However, the Ombudsman found this complaint lacked grounds because in accordance with article 217 of the Social Security Contribution Regimes Code, self-employed workers must have all their contributions effectively paid three months before the fact that determines social benefits. This is because self-employed workers are treated as employers by the law and their social security contributions are reverse charged.

In any event, article No. 219 of the Social Security Contribution Regime Code states that self-employed workers can reacquire their entitlement to social benefits if they pay their debt within the deadline established.

The complainant was duly informed and the case was closed.



### **Case Q-3358/16**

**Entity addressed:** Social Security Institute (*Instituto da Segurança Social, IP*)

**Date:** 2016.07.04

**Subject:** Request for early retirement of pension entitlement. Rejection of the request

The Ombudsman received a complaint concerning the rejection of a request for early retirement of age pension entitlement.

After examining the complaint and all the documentation it was concluded that the complainant did not meet the requirements of the applicable law.

According to article 28, No. 2 of Decree-Law No. 187/2007, of May 10 to access the early retirement pension, at the age of 55, the applicant must have completed 30 years with records of remunerations.

At the age of 55, the claimant had only 28 years of remuneration records.

The claimant informed that he had worked for 14 years in Angola, claiming that the remunerations registered in that period should be considered for purposes and access to the early pension.

During that period the claimant did not pay any contributions to an officially recognized pension fund, which is why the working years in Angola could not be considered for access to the early pension.

The Decree-Law No. 335/90, of 29 October, expressly defined the pension funds that were officially recognized in Angola by the time this country was still considered a part of Portuguese territory.

It was confirmed that the claimant did not pay contributions to any of those official pension funds.

The complainant was also informed about the social benefits that he could have access to in order to face his difficult economic situation.

#### *6.4. Workers' rights*

##### *6.4.1. Ombudsman's decisions favourable to complainants*

###### *a) Recommendations*

###### **Recommendation No. 2/B/2016**

###### **Case Q-7094/15**

**Entity addressed:** President of the Parliament

**Date:** 2016.06.07

**Subject:** Activities involving direct and regular contacts with minors. Duty to present the certificate of criminal record annually

**Status:** No conclusive response yet given by the addressee

In 2015, aiming to reinforce the preventive measures against sexual abuse or exploitation of minors, a legislative amendment of the Law No. 113/2009 rendered mandatory the yearly presentation of the certificate of criminal record, by workers and volunteers engaged in activities that involve a direct and regular contact with children, both in the private and public sector. Previously, this duty had to be fulfilled only prior to recruitment, when employers were obliged to verify the criminal antecedents of potential workers.

After analysing the complaints filed, mainly, by teachers and other public servants, the Ombudsman concluded that the objectives pursued by this measure could be achieved at a lower cost, both for workers and volunteers, and for the public services responsible for issuing the certificates. In fact, that legislative reform, operated by Law No. 103/2015, also determined that both volunteers and workers who were condemned for crimes against the sexual integrity or selfdetermination of children, could be condemned to a penalty of prohibition of carrying out any activity involving regular contact with children. Therefore, prosecutors must always ascertain the professional or volunteer activities pursued by the defendants in such cases – which would make it possible, in the event of a condemnation, to communicate to the employers (or entities that promote other volunteer activities) the decisions regarding their workers or collaborators. Moreover, under article No. 179 of

the General Law of Labour in Public Functions, whenever a public servant is condemned for any sort of crime, the public prosecutor is already obliged to report that fact to the employers – which renders the duty to yearly present the criminal record certificate rather redundant, where public sector workers are concerned.

Consequently, the Ombudsman recommended to the Assembly of the Republic the adoption of other legal solutions, that in a more economic and efficient way could guarantee that entities responsible for promoting activities involving regular contact with minors have adequate conditions to regularly assess the suitability of workers and volunteers for the exercise of their functions.



**Recommendation No. 4/B/2016**

**Cases** Q-3094/13, Q-985/13, Q-2873/15 *et al.*

**Entity addressed:** Minister of Labour, Solidarity and Social Security

**Date:** 2016.10.14

**Subject:** Social protection in the event of unemployment. Rules applicable to the unemployed who do not receive unemployment benefits. Reduction and increase of the unemployment subsidy

**Status:** Partially accepted

After analysing several complaints filed by unemployed citizens, the Ombudsman concluded that the legal discipline of protection in the event of unemployment (contained in Decree-Law No. 220/2006) should be improved in various aspects.

The Ombudsman issued a recommendation for the Minister of Labour, Solidarity and Social Security to consider: a) adopting a legal discipline especially applicable to citizens enrolled in employment centres who are not receiving any subsidy; b) establishing limits to the reduction of 10% of the unemployment allowance after six months, provided for in No. 2 of article 28 of Decree-Law No. 220/2006, in order to assure a minimum grade of protection in the event of unemployment; and c) clarifying the scope of the unemployment benefit increase for families in a particularly fragile situation, in order to benefit all households where both spouses or equivalent are unemployed and have children to provide for.

Since, at the time the recommendation was issued, the Parliament was discussing the Budget of State Law for 2017, the Ombudsman considered opportune to give notice of this recommendation also to this sovereign body.



**Recommendation No. 5/B/2016****Case Q-2363/15****Entity addressed:** Minister of Education**Date:** 2016.11.18**Subject:** Teachers of English in elementary schools. Professional qualification. Duty to approve the regulations necessary to enact legal rules**Status:** Accepted. In 2017 the procedure to adopt the necessary regulations was initiated

The law established that graduates with a master degree in English teaching, that have not completed the period of supervised teaching of English in elementary school, can be considered professionally qualified to teach this discipline and level of education, provided that they carry out complementary training. The rules applicable to this complementary training were to be defined by an ordinance of the member of the Government responsible for the Education area.

In fact, the regulation that was issued (Ordinance No. 260-A/2014) contemplates only a part of the situations provided for in the legal regime of qualification for teaching that discipline. As a result, the teachers under the above mentioned conditions found themselves prevented from teaching English in elementary schools.

The Ombudsman sustained that this omission, more than an offense to the principle of legality, put at risk the fundamental freedom to pursue an occupation and the right of access to public service, which was why the missing regulations should be promptly adopted.

**Recommendation No. 4/A/2016****Case Q-2095/16****Entity addressed:** Secretary of State Assistant and of Education**Date:** 2016.12.07**Subject:** Delay in scheduling medical board appointments to ascertain prolonged illness leaves of absence, by several services of the educational administration**Status:** No conclusive response yet given. In January 2017, the addressee informed that it had requested the legal opinion of the General Directorate for Administration and Public Employment

The Ombudsman was made aware that in various regional delegations of the Educational Administration serious difficulties were being felt in scheduling medical appointments for sick leaves to be verified by the competent boards.

These delays, in the view of the Ombudsman, may have important consequences, not only to the workers, but also by affecting the efficiency and economy of school management. In fact, after a period of 60 days of absence due to sickness, the Law determines that the illness of the worker has to be verified by a board of doctors, who decide whether the leave may last up to 18 months or, in case of prolonged illness, up to 36 months. While waiting for the medical board appointment to take place, and for a total period of 18 months, workers may be absent in sick leave, without any verification of the cause of absence. This may also lead to the need to hire new workers, in order to replace the absent ones, which bears increased costs.

Moreover, workers on long-term care should be allowed to remain on sick leave for 36 months, as the law prescribes, regardless of the lack of verification by the competent authorities.

Consequently, the Ombudsman recommended the adoption of the necessary measures to assure, as quickly as possible, the timely verification of sick leaves of absence; and stated that the public services responsible for controlling these leaves should be given clear guidelines in order to assure that workers who suffer from prolonged illness are not harmed by the Administration's failure to promptly schedule the medical board appointments.



**Recommendation No. 6/B/2016**

**Cases Q-2428/15, Q-6028/15, Q-1031/16**

**Entity addressed:** Minister of Finance

**Date:** 2016.12.19

**Subject:** Legal discipline on the recovery of amounts unduly paid to employees of the Public Administration

**Status:** Partially accepted

The Ombudsman proposed several amendments to the legal framework of the restitution of amounts unlawfully or mistakenly awarded by public employers to their employees, contained in the legal act that disciplines the financial administration of the State (Decree-Law No. 155/1992).

Fundamental constitutional principles, such as the principles of legal certainty, good faith and protection of legitimate expectations, restrict the possibility of revoking



administrative decisions after too long since they were adopted, even when those decisions were based on a misconception of the relevant facts or rules applicable. The Ombudsman noted that, since in 2015 a new Administrative Procedure Code entered into force, containing new rules on the revocation of administrative decisions, the prevalence of these rules over the rules of the Decree-Law No. 155/1992 should be clarified, in order to guarantee that they are uniformly applied by all public services.

Secondly, the recovery of the unduly paid sums is frequently carried out by deducting the parcels of the due amounts from the employee's stipend. The Ombudsman defended that limits on the percentage of salary that may be deducted should, therefore, be set, and clearly, in order to ensure that the fundamental right to a minimum income is not violated.



### *b) Suggestions*

#### **Case Q-4482/15**

**Entity addressed:** Hospital Centre of *Vila Nova de Gaia/Espinho*

**Date:** 2016.04.19

**Subject:** Strike – ascertainment of the retribution due to workers involved

**Status:** Accepted by the addressee

A worker who joined a two-day strike complained that his pay was calculated on the basis of his normal working hours. The Ombudsman pointed out that this discount had to be recalculated, taking in consideration the daily remuneration of the employee (and not the number of hours of the shift he was assigned on the days of the strike). Consequently, the remaining value that had been unduly deducted to the worker's salary should be returned – suggestions that were accepted by the Administration.



#### **Case Q-590/16**

**Entity addressed:** Public Security Police

**Date:** 2016.09.15

**Subject:** Salary supplements. Protection of parenthood

**Status:** Accepted by the addressee

A Trade Union Association requested the intervention of the Ombudsman regarding the decision to suspend the payment of salary supplements to two female agents of the Public Security Police (PSP) during pregnancy and later during the breastfeeding period. Considering that it wouldn't be safe for the agents to perform shift work or patrol, the PSP assigned them other tasks and thus suspended the payment of the so-called shift and patrol supplements that previously were awarded to them.

The Ombudsman considered that ensuring the safety and assigning compatible tasks to pregnant workers, without reducing their pay on those grounds is a general duty of every employer in any activity under the legal rules that grant special protection to workers in parenthood. There was, therefore, no reason for the law enforcement agents to have their monthly regular wages reduced when pregnant or while breastfeeding.



#### **Cases Q-2661/16 and Q-6060/15**

**Entity addressed:** State-owned enterprises (hospitals)

**Date:** 2016.06.16 and 2016.10.25

**Subject:** Public servants working for state-owned enterprises. Work accidents

**Status:** Accepted by the addressee

The lack of clarity of a legislative amendment lead to public employees working in enterprises of the public sector not being compensated in the event of a work accident: the *Caixa Geral de Aposentações* – a central body responsible for the payment of pensions due to accidents at work suffered by workers in public functions – and those public entities with an entrepreneurial nature attributed to each other the responsibility for that compensation.

The Ombudsman concluded that *Caixa Geral de Aposentações* was right: once liability for the compensation of occupational accidents is a responsibility of the employers, the public-sector enterprises, following the abovementioned legislative amendment, should have transferred the risk to insurance companies. Not having done so, they remain primarily responsible for compensating the damages sustained as a consequence of work accidents (medical expenses and compensation for permanent disability). In order to ascertain the degree of the disability of the worker, the employer is required to communicate the accident to the court.

In regard to the plaintiffs, the Ombudsman suggested that the employers should pay for medical expenses and ask the court to ascertain the degree of disability of the workers – a suggestion that was accepted by the addressee.

### *c) Remarks*

#### **Case Q-5044/15**

**Entity addressed:** Secretary of State Assistant and of Education

**Date:** 2016.04.12

**Subject:** One-year contracts celebrated with teacher of public elementary, basic and secondary schools in 2014 and 2015. Retroactive effects of contracts

**Status:** Not accepted

In 2014 and 2015 several services of the Educational Administration issued official information that stated that all teachers who, in consequence of the recruitment procedures of those years, had been selected for a full-year contract would benefit from the retroaction of the effects of those contracts (retribution and count of service time) – even if, because of the delay in concluding the tenders, they were called to start working only after the date the employment contract was due to begin.

As a result, some teachers received the salary due as retroactive effect of the contracts celebrated in 2014. But by August 2015, the Educational Administration decided that the contracts should not have retroactive effects where retribution was concerned, so the teachers that were hired in 2014 and that didn't receive any amount as a retroactive effect of their contracts, were not repaid as their colleagues.

The Ombudsman noted that the Administration, in order to comply with the principles of good-faith, protection of legitimate expectations and equality, is bound not to act in contradiction with the orientations itself adopts and publicizes, unless there are solid grounds to do so and provided that already stabilized situations are not affected.

Albeit the remarks of the Ombudsman, the Educational Administration failed to comply with what was promised to teachers in 2014 and 2015 and to treat all teachers equally, by not repaying to the plaintiffs the retribution due as an effect of the retroaction of contracts.



#### **Case Q-6520/15**

**Entity addressed:** Psychiatric Hospital Centre of Lisbon

**Date:** 2016.04.12

**Subject:** Succession of employment contracts. Termination of contract. Compensation due to employer in case of breach of prior notice period

**Status:** The entity addressed decided to wait for the result of court cases meanwhile initiated

A public entity has demanded the payment of a compensation for the breach of the prior notice period imposed by law to employees who intend to terminate a contract. However, the workers at stake have ceased their contracts since they had been employed in other public administration services, following public recruitment procedures to which they had applied. The Ombudsman urged the Hospital Centre to return the amounts collected as a compensation, since such compensation only proves to be due in cases of termination of the public employment bond, which is not the case when there is a mere succession of contracts with different public entities.



**Case Q-5978/16**

**Entity addressed:** Municipality of *Mafra*

**Date:** 2016.12.06

**Subject:** Using geo-location devices' information to control the professional performance of workers

**Status:** No objections from the entity addressed

The plaintiff stated that the City Hall of *Mafra* had confronted him with information from a GPS device, in order to question the veracity of an activity report the worker had delivered for a specific date.

Article 20 of the Code Labour expressly forbids the use of any means of remote surveillance to control the performance of workers. To this effect, the National Committee for Protection of Data has already stated that geolocation devices, such as GPS installed in service vehicles, phones, tablets, *etc.*, should be considered “means of remote surveillance”. Consequently, the Ombudsman made the Municipality of *Mafra* aware that the information extracted from these devices cannot be used to this purposes or, *a fortiori*, as evidence in disciplinary procedures.



#### 6.4.2. Ombudsman's decisions non favourable to complainants

##### **Case Q-7605/14 et al.**

**Entities addressed:** Various

**Date:** 2016.09.26

**Subject:** Effects of the leave of absence for long-term illness on the right to vacation

Workers admitted as public servants until 2006, and enrolled at the *Caixa Geral de Aposentações (CGA)*, benefit from a special scheme of social protection, while workers admitted afterwards are covered by the common Social Security scheme. This circumstance often raises confusion on what legal provisions are still in force or on whether the general rules of the Law of Labour in Public Functions (LLPF) are applicable to the first group of workers.

In this case, it was doubtful whether article 278 of the LLPF – that prescribes the suspension of the public employment contracts after a month of absence due to reasons non attributable to the employee (namely, long term illness) – was also applicable to workers enrolled in the CGA. This would have important consequences in regard to vacation days: as the contract is suspended, the worker does not earn the right to enjoy the same number of vacation days as he would, if the contract was considered active.

The Ombudsman concluded that the discipline especially applicable to the workers enrolled in the CGA did not cover the problem of the suspension of the contract in case of prolonged absence due to illness, neither did it rule out the application of the general rules of the LLPF. Therefore, article 278 of the LLPF should apply to all workers, regardless of the social protection scheme they are covered by.



##### **Case Q-1073/16**

**Entities addressed:** General Directorate of Natural Resources, Safety and Maritime Services

**Date:** 2016.02.29

**Subject:** Recruitment procedure for a leading position. Notifications

A candidate to a position as an intermediate director complained to the Ombudsman stating that, since her application was admitted, she had not received any communication or notification from the jury, namely she had not been notified to attend the public selection interview, which is a compulsory selection method.

After hearing the president of the jury, the Ombudsman found that in that procedure it was settled that all notifications would be sent by email; and that the jury had sent to the plaintiff, in due time, an email message calling her to attend the public interview.

However, during the tender, the plaintiff started working in another public body and failed to inform the jury of her new official email address. Therefore, although it is the jury's responsibility to ensure that all communications to candidates are effectively received, in this case the jury could not be held responsible.



### **Case Q-1379/16**

**Entity addressed:** General Directorate of Prison Services and Reintegration

**Date:** 2016.04.27

**Subject:** Selection procedure to recruit prison guards. Eligibility criteria. Minimum height. Exclusion of a candidate who underwent a sex reassignment surgery during the tender

In recruitment procedures for the post of prison guards, one of the eligibility criteria is to have a minimum height of 1,60m or 1,65m for female guards and male guards, respectively. During a tender a female candidate, who was 1,60m tall, underwent a sex reassignment surgery and changed the first name accordingly. Consequently he was no longer considered eligible for the post of male guard, for not having the minimum height.

The plaintiff considered that a special treatment should be granted to candidates who had their gender reassigned, a situation that found no express provisions in the legal discipline applicable.

After carefully analysing the problem, the Ombudsman concluded that the deliberation of the jury was grounded. The minimum height criterion is justified in the light of the role that prison officers have to perform in detention facilities, which is particularly demanding in prisons with male inmates, whose safety guards are bound to protect. Since this is the reason why a minimum height is required, that same justification is still valid and pertinent where the eligibility of transsexual candidates is at stake: no objective reason would justify the differentiation between male candidates.



## 6.5. *Right to justice and security*

### 6.5.1. *Ombudsman's decisions favourable to complainants*

#### *a) Recommendations*

##### **Recommendation No. 2/A/16**

##### **Case Q-4042/15**

**Entity addressed:** Mayor of the Lisbon City Council

**Date:** 2016/07/20

**Subject:** Combustion vehicles at supply stations for electric vehicles. Signalling. Parking in places of special danger or causing serious traffic disorder. Coordination between supervisory bodies

**Status:** Accepted

The Ombudsman has recommended the following:

- i)* That in accordance to the Traffic Signalling Regulation signalling should be placed in all supply and parking stations for electric vehicles in the County of Lisbon;
- ii)* To carry out an inventory of all electric supply stations in the city of Lisbon in accordance with the provisions of the legal framework for the electric mobility;
- iii)* To be identified and implemented an intervention procedure able to ensure the immediate presence of the Police at the place when there is a report of a dangerous forbidden parking or causing serious traffic disturbance even if its removal could not be done immediately;
- iv)* For such purpose the identification and operationalization of the necessary procedures should be done in full coordination with the EMEL, the Municipal Police and the Public Security Police (PSP);
- v)* Within 180 days a municipal regulation should be produced in order to standardize procedures and all the aforementioned.

The applicable Decree-Law No. 39/2010 of the 26<sup>th</sup> of April amended by the Decree-Law No. 90/2014 of the 11<sup>th</sup> of June classifies all types of electric vehicles and determines that electric vehicles are subject to the Road Traffic Act and related applicable laws. The aforementioned Act contains provisions regarding the danger and traffic disturbance and the vehicle removal possibility when parked in places specially designated to certain category of vehicles.

Therefore, the fine and removal of vehicles due to inappropriate parking in places exclusively allocated to electric vehicles would be legitimized through the use of authorised parking signalling for vehicles of such category only.

The National Direction of PSP informed that when a vehicle is parked in a supply station exclusively for electric vehicles the legal penalty should be a fine and not its removal if the supply station is not properly signalled.

In what concerns the coordination model between all supervising authorities the PSP informed they comply with the Parking Regulations in the Lisbon city and the Decree-Law No. 44/2005 of 23rd February.

On another side, the Municipal Police of Lisbon acknowledged a poor coordination with other supervising bodies and their lack of information resources to identify and locate all supply stations existent in Lisbon.

Although there is a single call centre there is no coordination or procedural uniformity handling the calls. Thus, an interinstitutional coordination is necessary involving all supervising bodies, which is to say PSP, EMEL, and Municipal Police.

Lastly, given the absence of a supply stations inventory in the Lisbon county there is an urgent need of a uniform signalling towards to parking regulation in those places.



### **Recommendation No. 3/A/2016**

#### **Case Q-4042/15**

**Entity addressed:** National Director of the Public security Police

**Date:** 2016/07/20

**Subject:** Combustion vehicles at supply stations for electric vehicles. Signalling. Parking in places of special danger or causing serious traffic disorder. Coordination between supervisory bodies

**Status:** Accepted

The Ombudsman has recommended that within 180 days an intervention procedure should be identified and implemented an intervention in order to ensure the immediate presence of the Police at the place when there is a report of a dangerous forbidden parking or causing serious traffic disturbance even if its removal can not be done immediately;

*ii)* The identification and operationalization of the necessary procedures should be done in full coordination with the EMEL, the Municipal Police and the Public Security Police (PSP)



The complaint addressed to the Ombudsman referred to an irregular parking of a combustion vehicle in a supply station exclusively for electric vehicles, which was dealt by the 2<sup>nd</sup> PSP Police Station of Lisbon.

The complainant was informed that the vehicle would be towed immediately and she should stay there until the arrival of the trailer. However, the trailer never arrived.

In consequence it was noted a flagrant poor coordination between all supervising authorities mainly in what concerns the way these situations of irregular parking are handled.

The enquiry phase revealed a different understanding and procedure from the three supervising authorities involved, such as the PSP, the Municipal Police and the EMEL.

The PSP and Municipal Police do not consider the present situation is not under the article no 164 of the Road Traffic Act so the vehicle irregularly parked should be fined but not towed as the supply station is not properly signalled giving permission for the electric vehicles parking. The EMEL goes a little further pointing out that in the absence of the appropriate signalling there is no legal ground for them to take any action.

In what concerns the coordination model between all supervising authorities the PSP informed they comply with the Parking Regulations in the Lisbon city and the Law decree no 44/2005 of February 23.

On another side, the Municipal Police of Lisbon acknowledged a poor coordination with other supervising bodies and their lack of information resources to identify and locate all supply stations existent in Lisbon.

The EMEL, responsible for supervising the parking activity in Lisbon, informed they act in articulation with the PSP and the Municipal Police.

All three above mentioned authorities mentioned the lack of instruments allowing the correct and full location of the supply stations for electric vehicles.

In what regards the signalling issue for the purpose of this complaint and in accordance to the applicable law it is imperative affixing an informative signal for authorised parking for electric vehicles only at the supply stations. Otherwise the provisions of the article No. 164 of the Road Traffic Act could not be applicable in full and consequently only a fine could be issued.

Lastly is imperative to highlight the inadequate response time in what concerns towing a car. Currently both the PSP and the Municipal Police need in average three hours. Given the complainant is forced to remain in place for the same period of time, this becomes unworkable to them.

The Ombudsman acknowledges the lack of resources but suggests a change in this procedure allowing the complainant to leave the place even if the trailer has not arrived at that time, namely if the vehicle is parked in supply stations, zebra cross and garages.

In conclusion, the Ombudsman considers that towing vehicles irregularly parked at supply stations for electric vehicles is legitimized through the correct signalling at those places.

Equally important is a timely response by officers responsible for the parking supervision. The response time should be shortened whether towing takes place or not in order to protect citizens interests.



### *b) Suggestions*

#### **Case Q-5231/15**

**Entity addressed:** Institute of Registries and Notary, I.P. (IRN)

**Date:** 2017/07/07

**Subject:** Vehicle registration

**Status:** The IRN changed its procedures

The complainant argued that the amount charged by the IRN for updating the address has increased as there was a delay of over 60 days to officially report that change.

Moreover the receipt issued by the Institute of Registries and Notary was not itemised.

In what concerns the first point and in accordance to law the registration of the change of residence of the vehicle owner is required. In case of a late registration request a fee is applied. Therefore, in this case, fees were properly charged.

Regarding the second point the Ombudsman approached the IRN and highlighted the Decree-Law No. 201/2015 of 17<sup>th</sup> September, which states the compulsory requirement of an itemised receipt.

It was stated that the registration request document, equivalent to a receipt, should be issued in detail, itemising all charged fees and the total in full respect with the law.



**Case Q-6374/15****Entity addressed:** National Commission for the Protection of the Child Rights**Date:** 2016/12/14**Subject:** Termination of the protective measure. Legal age. Process of voluntary jurisdiction**Status:** Legislative initiative is ongoing

The Ombudsman mediation was requested following the publication of the Law No. 122/2015 of 1st September related to the alimony in case of adults or emancipated children.

The complainant mentioned a legal discrepancy regarding children support regulations in case of divorce, judicial separation from bed and board, declaration of nullity or annulment of the marriage.

The above mentioned law makes an amendment to the article 1905, no 2 of the Civil Code which states that the child support responsibility could be extended till the age of 25 under certain circumstances.

On the other side the Law for Protection of Child and Youth at Risk states in its article No. 63, no 1, item d) the age of 21 years old.

It seems therefore there is a difference of regimes between the protection and promotion processes and the civil guardianship one as the legislator allows an extension of alimony till the age of 25 years old under certain circumstances in the later but this would be terminated at the age of 21 years old in the former.

However, after conducting some enquiries at the National Commission for the Protection of the Child Rights, the Ombudsman took notice that there was an ongoing legislative initiative addressed to the above mentioned.

Therefore, given the Ombudsman is prohibited from supervising the politic activities of sovereign bodies, it was determined the closure of this case.

**Case Q-3866/16****Entity addressed:** Institute of Mobility and Transports, I.P.**Date:** 2016.11.22**Subject:** Driving license. Expiration. Exam. Complaint**Status:** The addressee did not raise objections

The complainant received a letter stating a date and time to attend a passenger vehicle driving exam. After attending the appointment and waiting two hours he was informed

that his file was not in that centre. A new date was written down erasing the old one and no further explanations were provided.

The complainant disagreed with the above mentioned, requested the complaint book and wrote down his complaint.

According to the Decree-Law No. 135/99 of April 22, article 38, No. 5 states that all complaints must be answered within 15 days.

During the instruction the Institute explained all the steps taken towards the complaint and issued a new letter.

After clarifying the complaining procedure and the c Institute's legal obligations it was decided to close the case.



### *c) Remarks*

#### **Case Q-3147/15**

**Entity addressed:** Public Security Police (PSP)

**Date:** 2016.08.03

**Subject:** Police action. Loss of documents

**Outcome:** Appropriate measures were adopted to prevent further similar cases

The Lisbon Metropolitan Command of Public Security Police has an information system in operation providing an interconnection and share of information between all the police stations.

In case of loss and found procedures it should be possible to cross-check all information provided the recording procedures are properly done.

The present complaint refers to a failure in complying to those procedures, namely a missing data entry regarding the identity on documents found, and consequently a three months delay to cross-check with the claim of loss of those documents.

The Ombudsman has concluded, however, that this case was unusual. The Lisbon Metropolitan of PSP has reassured the Ombudsman all appropriate measures would be taken to avoid the same error in the future.



**Case Q-0732/16****Entity addressed:** *Aveiro* District Command of the Public Security Police (PSP)**Date:** 2016.09.29**Subject:** Police Action. Request for preservation of images**Status:** The addressee did not raise objections

The complainant argued that the PSP made a mistake by requesting to the competent authority the preservation of video surveillance images with a different date from that mentioned in the claim.

The Ombudsman investigation concluded that despite their mistake related to the date all the appropriate procedures were observed.

Furthermore the use of video surveillance images aims the criminal prevention and repression and its use to other purposes is illegal and unconstitutional. Given that the present case had a civil nature and taking in consideration the legal protection of the rights and interests of citizens the above mentioned images should be destroyed within 30 days counting from its recording.

Moreover the Law No. 34/2013, article 31, no 4 of 16<sup>th</sup> May states that the yielding or copying of images obtained in accordance with this Law could only be used under the terms of the criminal procedure law.

As the Public Prosecution is the solely responsible for criminal matters the Ombudsman could not interfere. However there was a recommendation to the District Command of *Aveiro* to take all necessary measures to avoid future and similar mistakes.

**Case Q-2343/16****Entity addressed:** Director-General of Justice Policy.**Date:** 2016.12.07**Subject:** Access to law. Paid instalments by the beneficiary of legal protection in the modality of phased payment of the judicial fee**Status:** A legislative procedure is ongoing

Following an intervention by the Ombudsman a multidisciplinary group was created aiming at the study and analysis of the current access to law and courts system and future legal changes.

The Ombudsman stressed that the existent legal aid based on the fees due and value of the case proportionality principle could lead to scenarios that are able to distort the grounds of the access to law and courts regimen, which is to say nobody should be

impeded or excluded of exercising or defend their rights due to social or cultural status, or insufficient economic resources.

The reasoning was focused on the effects of the increasing value of a case and its correspondent legal fees, which have to be paid by the parties despite their financial hardship and their right to legal protection.

In view of the winning argument the system would allow the payment of legal fees in instalments and for a period of four years after which no further instalments would be due.

Notwithstanding, it was stressed that in the above mentioned suggestion there is no concern about the specific economic situation of the legal fees payer. Whether the current legislation states limits related to the payment of legal fees to those eligible for legal aid there is no material coherence between this and the legal protection and the calculation of the amount to be paid is irrelevant the economic and financial status of the parties.

Therefore it was agreed that in order to properly serve the legal protection system the law should take in consideration the specific economic situation of the parties thus the current Law No. 34/2004 of 29th July and the Decree No. 1085-A/2004 of 31st August cannot be considered adequate.

Finally, the formalization of legal protection requests addressed to cross-border dispute resolutions in accordance to the Decree-Law No. 71/2005 of 17th March. In this context the Member State of the applicant residence shall be responsible for the legal aid costs until the claim, its translation and attached documents are transferred to the Member State jurisdiction. A possible amendment of the legal aid law should not forget the importance of a timely translation of the said documentation, that being instrumental to guarantee access to the courts.



#### *6.5.2. Ombudsman's decisions non favourable to complainants*

##### **Case Q-2713/15**

**Entity addressed:** Institute of Registries and Notary, I.P. (IRN). Tax and Customs Authority

**Date:** 2015.08.26

**Subject:** Personal data. Access

The Ombudsman received a complaint regarding a decision issued by the Land Office Registration concerning the existence of buildings registered in the name of a third party. Upon the absence of the cadastral register and the parish, both required for the research, the complainant was informed that his request could not be fulfilled.

A similar request was made to the tax department which had the same outcome.

According to the Estate Registration Code the public nature of the register means that anyone can request certificates of registration and get information about its content. This does not mean these bodies have or can disclose information related to the patrimonial situation of a third party as such.

In fact what is legally guaranteed is the access to the information based on a registration and filed documents but not the access to the information related to eg the real estate of an individual as that would be personal data and contrary to the scope of the register.

In this line the personal data requested could only be disclosed to the authorities legally legitimized to do so, which was not the case of the complainant.

Furthermore it is important to point out the relevancy of both the right to information and the right to privacy. The rule of tax secrecy configures an extension and acknowledgement of the right to privacy in what concerns the tax activity which includes taxpayers' personal data and their tax situation. This right has implicit the right to secrecy all tax officers shall abide to, preserving citizens reliance and, on the other side, protecting their privacy.

In conclusion, data collected aiming a specific purpose can only be disclosed to others administrative authorities under the situations provided by law.



**Case Q-4026/15**

**Entity addressed:** Council of Justice Officials

**Date:** 2016.06.22

**Subject:** Court clerk action

The complainant argued against the denial of the right to access a case file and the related certified copy.

The Ombudsman provided some clarifications on this matter in accordance with the Civil Procedure Code regarding the publicity of judicial cases. Although there is the right to access judicial cases and attached documents this access is not absolute. Thus when that access might interfere or offend the fundamental rights of the parties involved or jeopardize the effectiveness of a future decision that right should be restricted.

Therefore this is a civil procedural law matter, out of scope of the Ombudsman competences.



**Case Q-5127/16**

**Entity addressed:** Institute of Registries and Notary, I.P. (IRN).

**Date:** 2016.11.10

**Subject:** Citizen Card. Replacement. Delay

The complaint was about the delay of over one month of the renewed Citizen Card.

The applicable law however does not state any deadline to send over the renewed document unless the applicant request it as a matter of urgency and pay the appropriate fees.

Notwithstanding the IRN has informed the Ombudsman that they make use of all their resources to meet the requests in the shortest time but at the holiday periods there could be a processing delay, which was the case of the present complaint.



*6.6. Rights, freedoms and guarantees; health, education and constitutionality valuations*

*6.6.1. Ombudsman's decisions favourable to complainants*

*a) Recommendations*

**Recommendation No. 1/B/2016**

**Case Q-6433/12**

**Entity addressed:** Parliament

**Date:** 2016.02.17

**Subject:** Residents' organisations. Legislative omission (Articles 263 to 265 of the Constitution)

**Status:** The recommendation was brought to the attention of the relevant Parliamentary Committees and Parliamentary Groups. A definitive reply is still pending



A complaint was received urging the Ombudsman to seize the Constitutional Court for the control of unconstitutionality by omission, in view of the absence of legislation on residents' organisations, which are foreseen in Chapter V, Title VIII ("Local Government"), of the Constitution's Part relating to the "Organisation of political power" (Articles 263 to 265 of the Fundamental Law).

The Constitution provides for the existence of residents' organisations in order to raise participation of the population in local administrative life and, accordingly, outlines a characterisation of their composition and structure, as well as of the activity that those communities are intended to exercise. However, mentions in legislation relating to residents' organisation are extremely sparse. Such an omission of legislation lead to the conclusion that it was in breach of the Constitution, as the latter requires the adoption of legislative measures clearly targeted at the setting of these associative entities and that are required to make executable the constitutional status sought for them.

In this framework, underlining the need to overcome this lack of legislation and in alternative to the seizure of the Constitutional Court, another mode of intervention was deemed as more adequate by the Ombudsman, thus addressing a Recommendation to the Parliament instead.

In this initiative, besides emphasising the constitutional command to legislate, the Ombudsman also laid emphasis on the renewed importance of residents' organisations in the framework of the recent territorial administrative reorganisation (which resulted in the extinction of many civil parishes by aggregation), so as to ensure continuity in the representation of the specific interests of those populations that, along with others, are placed under the umbrella of a joint local authority since then.

Therefore, the Ombudsman recommended to the Parliament to ensure the drawing up and the adoption of the legal framework relating to residents' organisations, including the establishment of their structure and the definition of the their competences, necessary to give practical effect to the rules of the Constitution on the matter.



### *b) Requests for constitutionality review*

**Case Q-4100/15**

**Entity addressed:** Parliament

**Date:** 2016/03/18

**Subject:** Judiciary System Organisation Act; powers of the Superior Council of the Judiciary; Right to be heard by a court or tribunal established in accordance with the law

**Status:** Pending

The Ombudsman addressed a request to the Constitutional Court, aimed at the declaration of unconstitutionality of a rule enshrined in the Judiciary System Organisation Act, approved by Law No. 62/2013, of August 26, when it foresaw the possibility for the Superior Council of the Judiciary, on the proposal of the president of the district court, to re-allocate judges to another chamber of the same district (while respecting the principle of specialisation of magistrates) or to transfer proceedings to another judge (for procedural handling and decision), having regard to a better balance of the caseload and the efficiency of the services.

According to the Ombudsman, as the contested rule allowed for changes of judges and subtraction of proceedings on a case by case and discretionary basis, it was in breach of the right to be heard by a court or tribunal established in accordance with the law, the right to a fair trial, the principle of irremovability of judges and the principle of independence of the courts as well, all embraced in the Constitution.

In its argument the Ombudsman also emphasised, as an interpretative tool, the case law of the European Court of Human Rights with regard to the right to a fair trial.

The aforementioned rule was amended in the meantime by Law No. 40-A/2016, of December 22, the proposal in its origin using an argumentative line consistent with that pursued by the Ombudsman in his request.



**Case Q-4802/13**

**Date:** 2016/09/15

**Subject:** Freedom to exercise a profession (private security). Automatic effects of a penal sanction

**Status:** Pending

After examining an individual complaint about this matter, the Portuguese Ombudsman requested the Constitutional Court to analyse the constitutionality of the legal rules restricting access to private security activity.

According to the Law No. 34/2013, of May 16, the directors or managers of companies which perform private security activities must fulfill, permanently and cumulatively, the requirements listed therein, among them, not have been convicted, by a final judgment, for the perpetration of an intentional crime described in the Penal Code and other criminal legislation [article No. 22 (1, d)]. Also in conformity with the contested legal precepts, that requirement applies not only to the company managers, but also to the security personnel, the security director, the person responsible for self-protection services and the private security trainers [article No. 22 (2, 3 and 4)].

In this framework, the Portuguese Ombudsman considered that by preventing, without any additional administrative or judicial evaluation in each specific case, the exercise of a professional activity (in this case a private security activity) by those who were definitively convicted of committing an intentional crime, such rules contradicted the constitutional statement according to which no punishment automatically implies, as a necessary or automatic effect, the loss of any civil, professional or political rights — article No. 30 (4) of the Constitution, in combination with its article No. 47 (1), inasmuch as this case it is about the freedom to exercise a profession.



**Case Q-2287/16**

**Date:** 2016.12.21

**Subject:** Accidents at work and occupational diseases affecting those employed by public entities; limitation of indemnity

**Status:** Pending

An initiative was prompted by the Ombudsman following several complaints (most of which neither encompassing nor claiming the constitutional dimension of the issue), aimed at the successive abstract review of a set of rules laid down in the legal framework on accidents at work and occupational diseases affecting those employed by public entities (Decree-Law No. 503/99, of November 20, as amended by Law No. 11/2014, of March 6).

These rules prohibit the accumulation of benefits in cases of partial permanent incapacity with the corresponding portion of the pay to which the injured or affected worker is entitled to, as well as entail the deduction of such benefits from the injured or affected worker's pension (the same applying to death and survivors' pensions).

The Ombudsman considered that these limitations on the accumulation of benefits resulted in the negation of the reparation of the damage caused to the worker's health, body or earning capacity, amounting to an infringement of the Constitution.

Indeed, not only the Constitution entails the provision of means to overcome or, at least, compensate for a damage of that kind as an integral part of the fundamental right of workers to fair reparation in case of an accident at work or an occupational disease, but also unjustified differentiations in treatment are precluded by the constitutional principle of equality, whereas, in this case, the concerned rules on accumulation of benefits disadvantage those employed by public entities, when compared to the other employees, subject to the Labour Code.

### *c) Suggestions*

#### **Case Q-1004/14**

**Entity addressed:** Police Health Subsystem (SAD/PSP)

**Date:** 2016.01.14

**Subject:** Enrolment as beneficiaries of the Police Health Subsystem of descendants above 18 years old, as students of a post-secondary (but not superior) education course

**Status:** Accepted

A complaint was lodged with the Ombudsman concerning the refusal, by the Health Subsystem of the police forces, to maintain the enrolment of a descendant aged above 18, as a family beneficiary, attending a post-secondary course, as the relevant law was silent on this category of courses.

According to the wording of the law, any descendant, aged between 18 and 26 years, can register as a family beneficiary in so far as he/she attends a course of secondary or higher education.

In a first stance, it was proposed to the National Directorate of Police to reconsider that negative decision, with reference to teleological and historical parameters, in the interpretation of the norm at stake, in order to accommodate situations substantially identical to those explicitly foreseen therein, that is to say all types of intermediate situations that lie between the minimum (secondary school) and upper (higher education) poles referred explicitly by the law, such as the post-secondary courses. It was thus argued that students attending post-secondary courses must benefit from the same treatment than those, with the same age, attending only secondary education, furthermore aligning the solution enforced with that correctly followed by the health subsystem in general encompassing civil servants (ADSE).

As this suggestion was not accepted, the subject was presented to the Minister of Internal Administration, who agreed with the Ombudsman's position and, therefore, promoted a legislative initiative in order to adapt the law to its aim.



**Case Q-2326/15****Entity addressed:** Health System Central Administration**Date:** 2016.08.01 and 2016.10.11**Subject:** Access restriction to the National Network of Integrated Continued Care, concerning patients using oxygen therapy; discrimination of public healthcare subsystems users**Status:** The modification of the first criticized normative solution has been accepted; the second aspect remains under discussion

Upon a concrete situation, of an elderly patient suffering from Amyotrophic Lateral Sclerosis, with scarce economic resources and no family support besides the one provided by his also aged wife, the Ombudsman evidenced to the competent authorities two normative aspects which could lead to the lack of protection and discrimination of patients, regardless of the actual verification of the conditions of dependency that justify their access to continued long-term health care.

The first one concerned the regulatory exclusion of access to long-term units by patients who were in need of permanent or near-permanent respiratory support measures, as expressly provided for in article 19, paragraph 4, b), of Ordinance No. 174/2014 of September 10.

The aforementioned norm was considered inadequate as it excludes from the long-term care specifically a group of chronic patients who should benefit from this type of clinical and social attention, including those suffering from Obstructive lung disease or Neurodegenerative diseases. Following an intervention with the Regional Health Administration of *Alentejo*, the complainant was provided with a place in a long-term care unit.

Furthermore, a normative modification was suggested to the Health Systems Central Administration aiming the repeal of the rule stipulating the condemned exclusion criterion. In response, the addressed entity communicated that the government had in the meantime adopted a legislative procedure in compliance with the critical remark assumed.

The second controversial issue concerns the conditions for access to the National Network of Integrated Continued Care by the beneficiaries of public health subsystems, whereby the right of entry is conditioned to the existence of a vacancy in a unit accepted by the subsystem concerned. Since the agreements between long term and medium term care facilities and the subsystems are often scarce in certain regions, this has resulted in much longer waiting times when compared to the ones experienced by other National Health System (NHS) users (which do not belong to any subsystem).

Following previous interventions on the same subject, the Ombudsman issued a recommendation to the Secretary of State of Health, aiming the rejection of a practice that allows the discrimination of NHS users, based on the fact that they cumulatively benefit from a public health subsystem. The question extends to other areas of healthcare such as home-based respiratory care or non-urgent patient transportation, and must be regarded

as part of the more general context of the relationship between public health subsystems and the National Health System. The final pronouncement of the requested member of the Government is still expected.



**Case Q-3382/16**

**Entity addressed:** Portuguese Civil Aviation Authority

**Date:** 2016.07.11

**Subject:** Conditioning of access by lawyer to the Temporary Installation Center of Humberto Delgado Airport, in Lisbon

**Status:** The regulator recommended to the airport concessionary the removal of this financial conditioning. Reply pending

A complaint was filed against the access procedures, endured by a lawyer who wished to visit a foreign citizen detained at the Temporary Installation Centre, in Lisbon Airport, under the responsibility of the Portuguese Immigration and Borders Service (SEF).

Two issues were at stake, the first concerning an alleged delay in the completion of the access, indicating that there had been control at the entrance, with personal and laptop inspections, the second one the charging of a fee of € 11,87.

The first question was clarified in connection with SEF, as the inspection made was merely the same enforced to all crew members and passengers entering the airport, with metal detection and objects control through X-ray, without any control of the content of the laptop.

Concerning the fee demanded for access, as it was levelled by the airport concessionaire, allegedly by determination of the National Civil Aviation Authority - ANAC, the Ombudsman addressed a letter to this entity, enhancing the impossibility of its existence, due to the constitutional framework of the fundamental right to a due process of law and to legal aid.

It was not considered as feasible to restrict the possibility of contact between a detained person and his or her legal counsel. To this extent, it has been considered that it is the duty of the State (in a broad sense, clearly encompassing every public entity or in the exercise of public powers) to ensure and even facilitate such access and contact, without being able to pass on the costs of the measures security to be taken.<sup>(69)</sup>

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(69) As a parallel example, there were other places of detention, which were under the responsibility of other police forces or the prison services, where important security procedures were also adopted, in any case any fee never being allowed.

In these terms, ANAC was requested to take the necessary steps to eliminate the charge of the fee in question, providing free access to the area where the Airport CIT is located. The same solution was deemed as fit to other specific visitors cases, like relatives of the detainees.

The ANAC promptly informed that it had sent a recommendation to the concessionaire company, establishing a tax exemption for the lawyers and relatives of the persons detained in the CIT.



#### *d) Remarks*

##### **Case Q-4108/16**

**Entity addressed:** Health Centres Grouping *Médio Tejo*

**Subject:** System for granting support products to persons with disabilities

**Date:** 2016.09.21

**Status:** Accepted

The procedure applicable to the allocation of support products was reformulated in 2016 following a political decision to transfer from the Social Security Institute to the Ministry of Health (through hospitals and health centres) the responsibility to finance certain products (in particular ostomy consumable products, as well as products for the absorption of urine and stools), as was the case in the past.

On the basis of the aforementioned solution was the recognition of the need to ensure, especially for everyday products, greater agility and readiness in access, as well as greater proximity between the users and the health professionals for advice and support their delicate clinical situations, which was not happening with the system then adopted.

The new system came into operation in November 2016, with the implementation of a renewed procedural circuit characterized by greater simplicity and speed from an administrative and computer point of view.

During this time, however, it was known that some users were facing difficulties in obtaining support products due to anomalies of the online system used to order them and the lack of training of medical personnel to its use.

The Ombudsman remarked to the entity addressed the need to remedy the situation by arguing, on the one hand, that the resolution of individual cases was not commensurate with the wait for the implementation of the new system and, on the other hand, that the allegation that the medical staff was not trained to justify a denial of citizens' rights could not be accepted.

Proper articulation and referral to the support services in the Ministry of Health was deemed as fit to overcome the difficulties detected.



**Case Q-6931/15**

**Entity addressed:** Basic School and Kindergarten, *Cascais*

**Date:** 2016.03.02

**Subject:** Refusal of a child with disabilities to be assisted by a private physiotherapist in the kindergarten classroom

**Status:** Decision revoked and access granted

A child with special educational needs, attending a kindergarten, had previously received permission to be assisted by a private physiotherapist in the classroom, during its activities. This support was funded by the family and aimed at improving inclusion in the class and preventing the consequences of the pathology suffered.

For the new school year, the School Board had issued a negative decision to the requested authorization, with the support of the Pedagogical Council, based on the alleged disruption of school activities and on the existence of a group of specialized external technicians contracted by the School to provide support to students with special educational needs outside school hours.

The Board was also claiming the need of any further decision had support of external entities, namely the Regional Directorate of the Ministry of Education and the General Inspection of Education.

After several contacts with all entities at stake, the Ombudsman concluded there was no dispute over the need of the requested assistance, the alleged disruption of the classroom being finally denied. Such type of assistance was also clearly not provided by the alternative means assumed in the decision.

Hence, it was conveyed by the child's teacher and the responsible of the kindergarten that the development of the therapy in question, in the classroom, did not cause any disturbance in the activities. It was also found to be possible to carry out that therapy in the School's facilities, having 3 rooms dedicated to special education.

Thus, it appears that the only reason for the negative decision was the alleged absence of support, to an alternative decision, by the Regional Directorate of the Ministry of Education and the General Inspection of Education.

Both entities, contacted by the Ombudsman declined the need to intervene. Therefore, the Ombudsman stated to the School the need of an urgent decision in this matter, which, in the stated parameters, should be positive. The Ombudsman also remarked that



any future situations should be decided with the real necessity and compatibility of the therapy with educational activities as main parameters. The School acted accordingly.



**Case Q-6842/16**

**Entity addressed:** *Beatriz Ângelo* Hospital

**Date:** 2016.01.29

**Subject:** Post-surgery follow up and coordination between hospital services

**Status:** Concrete situation overcome and improved communication between hospital services

A complaint was presented regarding the follow-up of a patient in the late postoperative phase. Allegedly informed of the impossibility of a medical observation by the attending physician, the patient recurrently contacted the emergency hospital service, and other medical care services, thus receiving disaggregated diagnoses and therapies, always perceived unsatisfactorily. These included, for instance, the intervention of an Obstetrician; despite the patient's claim that the symptoms and pain experienced were related to the urologic surgery performed. Only one and a half month later was the complainant able to schedule an appointment with the doctor responsible for the surgery, who decided further invasive treatment was needed.

Excluding any suspicions as to the technical correctness of the various procedures adopted (which was not called into question and outweighed the scope of the intervention), the Ombudsman strained humanization purposes as well as the improvement of the quality of care provided in the late postoperative period to justify the rules of action proposed after the hearing of the hospital concerned<sup>(70)</sup>. In this context it had been asserted by the hospital's administrators, that the (electronical) clinical files of the patients are accessible to the medical professionals in the emergency service.

First of all, it was recommended the definition of explicit guidelines intended to determine the availability of the attending physician (or his/her substitute) to respond to interurrences communicated to him/her during a postoperative period, within a reasonable time. This should take into account the patient's clinical condition and presumed

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(70) Although the situation communicated to the Ombudsman did not apparently carry the same degree of severity, a reference was made to the Decision of the European Court of Human Rights, of the 15<sup>th</sup> of December 2015, which condemned Portugal for the incapacity to prevent the death of the patient as a consequence of postoperative complications, being particularly censured the disarticulation between the hospital service responsible for the surgery and its emergency services.

seriousness of the situation, further respecting a presumable emotional fragility of the patients concerned.

Additionally, the presence of a patient recently submitted to surgery in the emergency service of the hospital ought to be promptly notified to the correspondent specialist services, whenever the attending doctor is not to reach.

In conclusion, the Ombudsman intervention aimed at guaranteeing the improvement of the coordination between the services of a same hospital in order to respond to unforeseen but possible post-surgery complications. The suggestions were welcomed by the hospital entity which also clarified the clinical circumstances regarding the situation to the attention of the Ombudsman.



#### *6.6.2. Ombudsman's decisions non favourable to complainants*

##### **Case Q-4584/2016**

**Entity addressed:** Central Registry Office

**Date:** 2016/.0.12

**Subject:** Refusal of Portuguese nationality to a child born in Portugal, with foreign parents who did not wanted him to be national of their respective country of origin

A child, born in Portugal from parents both foreign nationals, of different nationalities, claimed to benefit from the statelessness prevention clause in the current Nationality Law, which confers Portuguese nationality to those born in Portugal without any other nationality, since it was not the parents' intention to take advantage of the nationality of either Country of origin.

It was first clarified that, according to the Nationality Law, the child in question could be considered a Portuguese citizen of origin, when born in Portugal from foreign citizens who were not in the service of their state, if at the time of the birth (and not later, as it was assumed in the complaint), one of these parents had a minimum of five years of regular residence in Portugal.

Another legal cause for obtaining Portuguese nationality by birth in the national territory is provided for in paragraph 1, g) of article No. 1 of the Nationality Law, that is, benefiting those born in Portugal who do not benefit from other nationality.

This clause aims to prevent cases of statelessness, guaranteeing to all those born in Portugal the right to a nationality. It is not, however, possible to consider it as protecting any

freedom of choice on the part of the person concerned or his/her parents, as in this case it seemed to happen.

Thus, this clause could only be applied to the person concerned if it was established that, under the law of the two states of origin of their parents, it was impossible to grant any of these nationalities. Since these were states with a large community living in Portugal, it seemed certain that, in a solution similar to that provided for by Portuguese law for the children of Portuguese born abroad, it was feasible, with minimal diligence, to obtain any of the nationalities in question or even both.

It was thus up to the parents to file with the consular entities of the state(s) of their nationality in order to assign the citizenship to the person concerned, issuing a passport that is essential for a regular stay in Portugal and, in due course and if wanted, a naturalization.



**Case Q-0664/15**

**Entity addressed:** Parliament

**Date:** 2016.11.16

**Subject:** Educational Guardianship Act. Intervention of the Public Prosecutors' Office. Complaint of the victim in semi-public and private crimes. Effects of the appeal raised against the decision which applies an internment measure

A complaint was lodged invoking the unfitness of two modifications made to the Educational Guardianship Act (Law No. 166/99, of September 14), by Law No. 4/2015, of January 15. The first one was the abandonment of the rule according to which, in the semi-public and private crimes, the tutelary measure was dependent on the victim's denunciation [former article No. 72 (2)]. The second one was concerned with the privation of suspensive effect of the appeal filed against the decision applying to the young offender the internment in an educational centre [new article No. 125 (4)].

With the first amendment, the legislator now admitted two different situations. When the agent who practices an offense, classified as a semi-public or private crime, is more than 16 years old (at the time of the wrongdoing), the corresponding accountability process depends on the offender's provocation, whether by complaint or private prosecution. When the agent is under the age of 16, the corresponding accountability process no longer depends on initiative by the offended person and the Public Prosecutor's Office can freely decide on the viability of the request for judicial intervention.

In the opinion of the Portuguese Ombudsman, this differential treatment is not contrary to the principle of equality, nor to the unity of the legal system. While the Criminal

Law takes a perspective centred on the social damage caused by the fact, the Educational Guardianship Law assumes a social pedagogy bias which, according to the legislator's assessment — and it is always required to remember that this normative centre has a wide border of evaluation in this matter —, should not be left exclusively in the hands of the victim.

Therefore, it is the responsibility of the Public Prosecutor's Office to analyse, in the light of the goals established in the Educational Guardianship Act and considering especially the principle of the best (higher) interest of people under 16 years old, the pedagogical needs of social instruction as well as the convenience of activating the judicial machine for the application of a didactic measure that seeks to offer to the young offender the conditions to achieve the expected understanding and assimilation of the basic values incorporated on legal system. In fact, taking into account the legitimate social interest in the protection of legal goods and emphasizing the specific reintegration purpose of the tutelary action, it would be less understandable to maintain the old solution, inasmuch as in the offenses classified as semi-public or private crimes the educational act used to be conditioned by the victim's initiative.

It is the same logic of teaching and reorientation to the most fundamental values of community that makes comprehensible the precept which deprives the suspensive effect of the appeal raised against a decision which applies a tutelary internment — it has only a devolution effect, in such a way that the offender interned in the educational centre has to wait there until the final decision. Due to its pedagogical vocation and unlike the criminal punishment, the tutelary intervention is more open to the hypothesis of provisional execution of the sentence. If it is true that the fixing of automatic effects, which are not subject to the judge's assessment, is always problematic, in the other hand it may be assumed that the new rule can be interpreted as safeguarding the possibility of judicial evaluation of the necessity and convenience of the guardianship measure during the period the offender under the age of 16 awaits the response to his appeal.



### **Case Q-0629/2016**

**Entity addressed:** University of *Porto*

**Date:** 2016.07.13

**Subject:** Viability of access to public higher education through the special competition addressed to holders of a higher education diploma and envisaging the very same higher education institution and degree course of that diploma

A complaint was addressed to the Ombudsman against the decision of the University of Porto denying an application under the competition for access to higher education

that is specifically addressed to those already holding a higher education diploma. The complainant's prior diploma concerned a first cycle of studies course at the above mentioned University, the 1<sup>st</sup> and 2<sup>nd</sup> curricular years being dedicated to the principal subject and, subsequently, comprising studies in several related scientific areas (minor). Notwithstanding the fact that the complainant intended to pursue a different minor, he did not contest that his application was aimed at the very same course/degree he was holder, awarded by the same University.

The Ombudsman concluded that the situation was not cause for critical concern. In fact, the competition at stake is addressed to holders of a higher education diploma, which should be interpreted as other diploma than the combination of higher education institution and course for which the candidate wants now to apply.

In addition to the text of the law, which points in that sense (competition for «holders of other higher education courses», according to Decree-Law No. 113/2014, of July 16), a distinct solution would be dissonant with the rationale of access to higher education, which combines a general annual competition (at national level) with special competitions (held locally, by the institutions of higher education), the latter being addressed to applicants with specific conditions or qualifications. Weighting the coherence of the legal system, the Ombudsman underlined that access to higher education is not unrelated “to the country's needs for qualified staff” and “to raising its educational, cultural and scientific level” [article No. 76, 1) of the Constitution]. Hence these needs are equally important in laying down the rules to be followed by universities in special competitions for holders of other higher education courses.

Moreover, the Ombudsman did not minimise the public investment dimension at stake, which is compatible, it is true, with diversification of knowledge at the highest level of education, but also with the aim of widening the public that is in higher education, in accordance with the principle of equal opportunities. In this connection, the contested decision should not be criticised, whereas the complainant intended to repeat the same course (only in another minor): given the public investment involved therein, it is legitimate and appropriate to focus on candidates with a diploma other than the course they are applying for under the special competition concerned.

In line with this argument, the Ombudsman also rejected that this special competition for access to higher education suited the complainant interest to get a better classification in his prior degree; otherwise, it would go to the detriment of other candidates, with a different academic background, and, thus, the applicable principle of equal opportunities requirements would become unbalanced.

Finally, it appeared to be relevant the fact that, as an alternative, the complainant was not prevented from enrolling on and concluding one or more curricular units of the requested course.

## 6.7. Office of the Autonomous Region of the Azores

### 6.7.1. Ombudsman's decisions favorable to complainants

#### a) Remarks

##### **Case Q-3669/14**

**Entity addressed:** Government Vice-Presidency, Employment and Business Competitiveness

**Date:** 2016/02/12

**Subject:** Island Councils. Operating costs

**Status:** Waiting for an answer

The Ombudsman organized a procedure following several complaints about a Regional Autonomous Administration decision involving the suspension of payment of the attendance fees to members of the Island Councils, due to their participation in several extraordinary meetings, grounded in the unpredictability and costs of those.

Island Council is a statutory organ, with advisory status, representative of each island's interests. In its composition are representatives of the own government bodies, the municipalities and society<sup>(71)</sup>

During the instruction the Azores Regional Government Vice-Presidency has been heard (responsible for the Island Councils functioning costs).

In response, the Ombudsman was informed that there was no limit to extraordinary meetings, considering their nature. For that reason, it was impossible to predict, in a given year, the charges associated to those sessions, with consequences to the Government Budget. Sessions, whose number had been increasing in terms that, in some situations, exceeded the number of ordinary meetings.

Meanwhile, it was approved an amendment to the law<sup>(72)</sup>, dated of April 15, 2015, according to which the extraordinary meetings were limited to 3 per year.

As matter of fact, this was a legitimate political decision, justified by the economic and financial reality, lived in Portugal (economic and financial adjustment program), with their effects in the public finance management.

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(71) *Vide* article No.128 of the Autonomous Region of the Azores Political-Administrative Status, that can be found at [http://www.alra.pt/images/alra/doc\\_alra/estatuto\\_raa/estatuto\\_pt.pdf](http://www.alra.pt/images/alra/doc_alra/estatuto_raa/estatuto_pt.pdf) (accessed on August 17, 2016)

(72) *Vide* article No. 18 of the Regional Legislative Decree No. 21/99/A, 10 of July, republished by the Regional Legislative Decree No. 11/2015/A, April 14.

A comprehensible context, considered the public interest behind the good administration of the public resources.

Despite that, and since the number of sessions related to the claimed payment was well defined (those who took place until 15th April 2015, according to law in force), the Ombudsman has considered that there was no reason to refuse it.

More, the Regional Autonomous Administration is obliged to make those payments, as established by regional law.

Therefore, in the present moment there is no reason to refuse the demanded payment.

For all these reasons, this State body addressed a remark to the targeted entity, in which was highlighted the duty to make the punctual payment of the claimed fees, in accordance to the applicable law.



#### **Case Q-0758/15**

**Entity addressed:** President of the Municipality of *Angra do Heroísmo*

**Date:** 2016/12/19

**Subject:** Illegal kennel in a residential area. Noise

**Status:** Without objection

The Ombudsman received a complaint against an illegal kennel that worked near the complainant's house.

Having been heard the Municipality of *Angra do Heroísmo*, information was provided about the decision to demolish the kennel, in obedience of the applicable law.

Visited the place, it was possible to verify the existence of a shed and a little annex near the house, functioning as a working area, as well as several animals, without particular urbanistic relevance.

According to law it is allowed to accommodate, in a same house, until 3 dogs or 4 cats (adults).

The municipal regulation predicts, at this point, the possibility of having animals at home.

The Regulation on Noise and Noise Pollution Control, establishes as neighborhood noise the sound produced by animal that, by its duration, repetition or intensity, can affect public health or neighborhood tranquility.

In those cases, the same law set that complainants can demand a police intervention.

The investigation taken by this State body was not able to identify the reason why the targeted municipality took so long to decide for the kennel's demolition.

The law obliged one of two things: the licensing of the construction or its demolition.

The reported situation occurred, at least, since 2014, without having been presented any public interest reason for its maintenance; and only in 2015 measures on this matter were adopted.

For that reason, the Ombudsman addressed a remark to the president of the Municipality of *Angra do Heroísmo*, considering that it had been allowed, for undefined time, an illegal construction, made without license, and without possibility of legalization.



### *6.7.2. Ombudsman's decisions non favorable to complainants*

#### **Case Q-6147/14**

**Entity addressed:** Municipality of *Angra do Heroísmo*. National Communications Authority (ANACOM)

**Date:** 2016.11.10

**Subject:** Radio communications station. Electromagnetic fields

This State body has received a complaint about the installation of a radio communications aerial next to the complainants' house, on the basis that its operation was dangerous to residents' health, as well as to people who were going to sports areas and to kindergarten located in the neighborhood.

The investigation reached the conclusion that the request to the installation of the aerial had been made in accordance to the applicable legislation, namely the documentation that should had be presented (*v.g.* liability notes), as well as in respect of all the requirements demanded for that kind of infrastructure.

Furthermore it has been possible to verify that, in the reported situation, the aerial position did not violate the specifics restrictions predicted in the Municipal Plan of Territorial Planning, having been object of the necessary municipal authorization.

The licensing entity also informed that no impediments, related to environment, cultural heritage and urban landscape had been found. For that reason the Regional Director of Culture delivered his favorable opinion on this matter.

In effect, despite the fact that the radio communications station has been, apparently, installed on the protection zone of the classified area of *Angra do Heroísmo*, its exact location was in the area adjoining that zone, without representing a danger.

Besides that, the above mentioned infrastructure was not in any urban or residential area and, although its visibility, its visual impact was minor.



It is important to mention that other aerials, namely from amateur radio service, had been installed near the space occupied by the targeted radio communications station.

During the instruction, the Azores Delegation of the National Communications Authority (ANACOM) was contacted. According to the information that has been given, based on the evaluation of electromagnetic fields, it was possible to conclude for admissibility of the radiation values registered (substantially below to legal limits).

For all these reasons the complaint was dismissed.



**Case Q-0481/16**

**Entity addressed:** Automobile Registry Office of *Praia da Vitória*

**Date:** 2016.12.30

**Subject:** Automobile registration. Single Automobile Document

The complainant required the intervention of this State body, concerning the alleged treatment that had been given, by the Institute of Registries and Notaries' (IRN, I.P.) services, to the loss of official documentation (Single Automobile Document) issued after a property registration requested by him.

During the instruction of the procedure the targeted civil, property, commercial and automobile registry office was heard. According to the information that has been given, there wasn't any documents loss.

In fact, the targeted entity had made the required registration and had issued the correspondent documentation.

Furthermore, the above mentioned issuing was made the day after the request, and the documentation was sent and delivered in a certain date.

For that reason, it didn't occur any loss resulting from the Institute of Registries and Notaries' (IRN, I.P.) services activity and, in consequence, nothing had to be censored in the treatment given to complainant's situation.

Considering this, the Ombudsman concluded that, when a document is lost for a reason not imputable to IRN services, a duplicate of it must be required, and the costs shall be paid by the person who has made the request, as established in the applicable law.



**Case Q-1947/15****Entity addressed:** Public Security Policy (PSP)**Date:** 2016.11.07**Subject:** Human resources. Work time

The Ombudsman received a complaint presented by a PSP officer, contesting the denial of a request aiming at the alteration of her work schedule, in order to exercise of her profession during working days and in daytime.

In the course of the investigation, this State body was informed that, according to the position adopted, in general, by the targeted entity it «is possible the adoption of specific and adjusted working hours, with the goal to ensure the conciliation of the professional life and the promotion of gender equality», «contributing to the strengthening of family responsibilities», in an attempt to achieve a «fair balance» between the dimensions in presence.

In the specific case, PSP clarified that imperious reasons, related with public interest prosecution, associated at the unavailability of human resources of the police station where the complainant was working, did not allowed the positive decision of the application.

PSP also informed that the police station in question had a small number of officers to guarantee a continuous public attendance and car patrolling. This situation was aggravated by the significant number of female police officers who were married with police officers, working at that same place, on a shift work basis, all of them with young children.

Another question to be answered was related with the nature of the request that had been made. In fact, and despite complainant's mention to «flexible working hours», her claim did not fit on that legal concept, once that what it was requested was the absence of work at night and on working days.

Considering all the interests (officer *vs* PSP), PSP tried their conciliation, namely with the definition of orders directed to create mismatched shifts (to the complainant as well as to her husband), trying to guarantee the exercise of parental responsibilities, as requested.

The Ombudsman also observed the creation of specific instructions in order to allow adjustments on arriving and departure timetable, that would be considered necessary to guarantee assistance to minor children (*v.g.* changing work schedules).

All these measures showed PSP willingness to find the most adequate solution.

Having studied the situation in light of the applicable law and of the information given by PSP, this State body has concluded that nothing should be done in order to change the position adopted on the specific case.



## 6.8. Office of the Autonomous Region of Madeira

### 6.8.1. Ombudsman's decisions favourable to complainants

#### a) Suggestions

##### **Case Q-1133/16**

**Entity addressed:** *Madeira* Employment Institute

**Date:** 2016.03.04

**Subject:** Annulment registration of nonsubsidized jobless citizens in employment centers

**Sequence:** Suggestion accepted

Ombudsman's intervention following a complaint against the Madeira Employment Institute, regarding the annulment of nonsubsidized jobless citizens registration in employment centers.

Recognizing the implications of a new subscription, in a context of reinforcing the rights of the candidates involved, the Ombudsman suggested different forms of articulation with the public users, in order to prevent similar situations, namely:

a) the need for updating the information flyers delivered to the candidates at registration, as well as the control methods used for applications and the rights and duties of the users;

b) the prompt analysis (90 days) of all complaints submitted, and the clarification about the possibility of appealing;

c) the implementation of digital media conferring greater proximity and agility.

It was further suggested that the decision-making process concerning nonsubsidized unemployed citizens should guarantee the constitutional rights of users involved, in particular:

i) the right to be heard prior to decision (articles No. 12 and No. 121 of the Administrative Procedure Code), especially before the application of new registrations inhibition for 90 days;

ii) the right to appeal, regarding the annulment of registrations in employment centers (in accordance with article No. 184 of the Administrative Procedure Code).



**Case Q-3150/13****Entity addressed:** Municipality of *Funchal***Date:** 2015.05.13**Subject:** Loud noise**Sequence:** Suggestion accepted

Ombudsman's intervention following a complaint raising the apparent omission of action on the part of the municipality of Funchal in order to contain the noise attributed to a commercial establishment exploitation.

This activity caused a discomfort situation, especially during the night period.

Aware of the need to preserve the right to rest on the part of the residents, the Ombudsman suggested the following measures:

a) the owner notification, in order to reduce the sound produced by the ventilation system, after issuance of technical opinion on the part of the competent authorities in the field of fire safety;

b) the closure of the establishment from 11:00 pm.

The procedure was closed following the adoption of the proposals made by the Ombudsman.

**Case Q-3860/13****Entity addressed:** *Gaula's* parish council**Date:** 2016.04.11**Subject:** Territorial planning. Public paths**Sequence:** Suggestion accepted

It was claimed the absence of efficient action by *Gaula's* parish council, regarding the obstruction of public path by an individual.

The entity addressed expressed some doubts concerning the possibilities of intervention in this case, so the Ombudsman suggested measures for the protection of legality. In fact, the matter in question should not be seen as a private law situation, but referring to the public interest and the possible need of sacrifice of certain private interests, on behalf of the common good. Accordingly, the acts at stake are acts of public management concerning the exercise of a public authority (an integral administrative role of municipal power).

Thus, it was defended that *Gaula's* parish council would not require the need of a judicial order, under the penalty of denying their legal competences.

## *b) Remarks*

### **Case Q-3135/15**

**Entity addressed:** Municipality of *Machico*

**Date:** 2016.03.02

**Subject:** Illegal construction

**Sequence:** Without objection

The Ombudsman organized a procedure following a complaint about the unconformity of administrative authorizations issued by the municipality [subparagraph (a) of article 68 of Decree-Law No. 555/99, of December 16].

It was found that the municipality of *Machico* kept unchanged the illegal context mentioned above.

As for the supervision duties assigned to municipalities, the legislator sets several administrative measures aimed at ensuring the conformity of those operations with legislative and statutory provisions applicable and to prevent the dangers of misconduct to the health and safety of citizens.

Excessive extension of the time limits prescribed or the police measures omission conducts to the degradation of the municipal authority and the public interest violation in regard to the offenders.

Since the execution of any urban operations is subject to administrative inspection, regardless of prior licensing or subject to authorization, the municipality of *Machico* would had to perform the monitoring duties with greater diligence.

It was concluded that the adoption of all the necessary mechanisms to urbanistic legality reintegration was to be performed by *Machico* Municipal Council, under waiver of jurisdiction's penalty.



### **Case Q-4049/16**

**Entity addressed:** *Madeira* Electricity Company

**Date:** 2016.11.15

**Subject:** Electricity consumption settlement. Prescription

**Sequence:** Without objection

A case was opened, following a complaint to the Ombudsman about the procedure conducted by *Madeira* Electricity Company regarding the invoice's issuance of electricity consumption between November 2013 and December 2015.

Article 10 of Law No. 10/96, of July 26, establishes that the right to receive the price for service is time barred within 6 months, even if it has been paid less than the significance which corresponds to the consumption, by mistake attributable to services.

The term in question aimed to protect the service consumer, avoiding the accumulation of debt and obliging the provider to act quickly and timely in recovering of their rights; accordingly to this regime, the consumer would not be confronted in the future with any debts that the provider did not ask him or her in due course.

On the other hand, case law does not follow the understanding that the term relates to the invoices submission for the service provided, to the extent that the Law No. 23/96, does not refer a deadline for this effect.

Accordingly, after the expiration of the six month period, the service provider cannot submit one debit invoice with new values, since the right to credit for these additional amounts is out of limitation, not previously having been required by any mean capable of interrupting the said limitation period.



### **Case Q-1389/15**

**Entity addressed:** Civil Servants Pension Fund

**Date:** 2016.08.26

**Subject:** Withdrawal of the application for retirement

**Sequence:** Without objection

In the context of the complaint submitted to the Ombudsman, it was contested the Civil Servants Pension Fund (CGA) action, following the application for retirement made by the complainant, after online consultation through the CGA Portal.

Finding that the pension value would be substantially lower than expected, the complainant presented the withdrawal of the application, in November 2014, requesting the annulment of the promotion procedure carried out. The request was not granted in accordance with the provisions of paragraph 6 of article 39 of the Retirement Statute (approved by Decree-Law No. 498/72, of December 9, modified by Law No. 11/2014, March 6).

It was concluded that CGA ruled out the prior hearing principle, and by doing so, the contested [...] decision was vitiated by an essential procedural defect.

The prior hearing integrates the participation principle, in accordance with article No. 184 of the Administrative Procedure Code, and paragraph 4 of article No. 267 of the Constitution, from what we can tell that it is a constitutionally enshrined right.

Therefore, there is an essential and compulsory procedure, although the law provides that the same can be waived in some situations (as in the case of the administrative exemption provided for in (f) of paragraph 1 of article No. 124 of the CPA), but with no applicability in this case, given that the entry into force of the Law No. 11/2014, March 6, was not accompanied by a safeguard clause to rights in respect of previous applications received by the CGA.

Despite this, the entity addressed informed that a different procedure would be adopted for the future, and that all applicants before Law No. 11/2014, of March 6, should be notified regarding the amount of the pension to be allocated, previously to the retirement order.



#### *6.8.2. Ombudsman's decisions non favourable to complainants*

##### **Case Q-5519/16**

**Entity addressed:** Municipality of *Porto Santo*

**Date:** 2016.11.15

**Subject:** Transitional allowance

It was required the Ombudsman's intervention with the municipality of *Porto Santo*, concerning transitional allowance processing, claimed before article No. 19 of law No. 29/87 of June 30, that approved the local elected officials statute (EOS), still in force under the transitional regime laid down by the Law No. 52/2005, of October 10.

The Ombudsman concluded that the entity addressed processed the amount of X in favor of the petitioner; in fact, in accordance with paragraph 2 of article No. 19 of the EOS, the value of the transitional allowance is equivalent to the value of one month of pay for every six months of effective exercise of functions, up to a limit of 11 months.

After the request examination, it was found that the complainant would have been entitled to 12 months allowance for the exercise of Mayor functions on an exclusive basis, i.e., two semesters, equivalent to two months' pay, from October 2011.

In fact, it was found that between January 1999 and November 2011, the applicant was in office on a non-exclusive basis.

In this sense, the Advisory Council of the Attorney-General of the Republic ruled out of the system provided for in subparagraph a) of paragraph 1 of article No. 7 of the EOS, the accumulation of tasks performed by Presidents and Counselors in a full-time permanent role, on boards of Direction of local public companies or public limited companies with exclusive or mainly public capital, of local authority services, or of public associations or Foundations (private law), with municipal scope.

According to the Council, such functions are legally framed in articles No. 18 to 19 d) of EOS.

Thus, it was communicated to the petitioner the partial dismissal of the complaint.



#### **Case Q-6554/15**

**Entity addressed:** Legislative Assembly of *Madeira*

**Date:** 2015/09/05

**Subject:** Competitive procedure. Public employment relationship

According to the complaint, the competitive procedure for the category and career of a parliamentary consultant would not have consubstantiated an effective equality of opportunities in the access to Senior Technician career, to librarianship, archiving and documentation specialists, since item c) of paragraph 2 of the Public Notice only referred to Information Sciences and Documentation or History degrees. As a follow-up to the investigations, it was concluded that the competitive proceedings under examination were opened to the job foreseen in article No. 32 (1) of Regional Legislative Decree No. 24/89/M of September 7, modified by Regional Legislative Decree No. 2/2015/M of January 26.

It was also concluded that the training areas provided in the Public Notice are normatively established according to the National Classification of Education and Training Areas (CNAEF), and the public employer can not elaborate its own training areas. On the other hand, the jury's classifying activity contains some margin of appreciation and technical consideration regarding the qualifications analysis suitable for competition's opposition.

Accordingly, the candidates exclusions sanctioned under the procedure resulted from legal requirements (see articles 34 of Law No. 35/2014, of June 20, approving the General Labor Law in Public Functions - LGTFP), namely the absence of a public employment bond, or the lack of an enabling level in the expertise area required.

The applicable law to this case, LGTFP, in conjunction with paragraph a) of article No. 32 of Regional Legislative Decree No. 24/89/M of September 7, only required that



the recruitment in question should be made between candidates with a degree level prior to Bologna process or the 2<sup>nd</sup> cycle of Bologna, in their specific expertise area, while parliamentary officials are performing their duties in special careers, whose functional content includes positions in which the bodies are of a parliamentary nature.

Consequently, their career transition was effected by a nominative list in accordance with articles No. 58 to 61 of Regional Legislative Decree No. 16/2012/M, of August 13, which amended the organizational structure of the Legislative Assembly of Madeira, with special parliamentary careers being the Parliamentary Adviser, the Parliamentary Support Technician and the Parliamentary Operational Assistant (see article No. 29 of the LGTFP).

The procedure was closed, since equal opportunities in career access were observed, within the universe of candidates for which it was intended: workers with public employment relationships previously established.



### **Case Q-6305/16**

**Entity addressed:** Regional education secretary

**Date:** 2016.12.22

**Subject:** Pre-school education universality for children from 4 years

It was requested the Ombudsman intervention before the Regional Education Secretary, regarding the non-compliance of the regime under paragraph 1 of article No. 21 of Law No. 65/2015, of July 2, amended by Law No. 85/2009, of August 27, that establishes the universality of pre-school education for children from 4 years of age for the 2016/2017 school year, and from the 3 years of age for the 2017/2018 school year.

Following the approval of the Madeira Regulation of the Educational Social Action, by Ordinance No. 53/2009, of June 4, as amended and republished by Administrative Rule No. 248/2016, of June 30, it was added that article No. 21 would refer to its rules on the monthly family allowances applicable to children and infants' establishments for Annex IV, which provided that the table set out therein would not apply to the year immediately preceding entry primary schools (children in the age group of 5 years).

As a follow-up to the investigations carried out by the Ombudsman, it was concluded that the principle of universality of pre-school education, provided for in article No. 4 of Law No. 85/2009, of August 27, is duly safeguarded in Madeira, showing the full placement of the children candidates for the respective frequency between 3 and 5 years of age.

On the other hand, the children included in primary schools are exempt from the payment of this component, being partial the cost charged by the frequency for the children of the 2<sup>nd</sup> and 3<sup>rd</sup> cycles.

In relation to 5-year-olds, Regional Administration charges only the part related to food, equating that regime to that applied in the 1st Cycle, in order to encourage their attendance. In that age category, the remaining non-educational component (extra staff, extended hours, educational material and other services) are free for all.

In view of the above, it was verified that, in the case of social action, positive discrimination measures were implemented regarding the candidates, once only the costs related to the non-educational component were determined.

To the extent that the educational component of Pre-School Education (5 hours, an educator) is presented free of charge to its beneficiaries, due to the publication of the Pre-School Education Framework Law, the procedure organized by the Ombudsman was closed.





## *7. Publications, conferences and articles – 2016*

> Detail of the balcony's railing of the Portuguese Ombudsman's building

## ***7. Publications, conferences and articles – 2016***

### ***Report to the Parliament, 2015***

<http://www.provedor-jus.pt/?idc=16&idi=16128>

### ***Report to the Parliament, 2015***

#### ***Annex***

<http://www.provedor-jus.pt/?idc=16&idi=16130>

### ***Provedor de Justiça – Mecanismo Nacional de Prevenção Report to the Parliament 2015***

<http://www.provedor-jus.pt/?idc=16&idi=16129>

### ***Portuguese Ombudsman – National Human Rights Institution Report to the Parliament, 2015***

<http://www.provedor-jus.pt/?idc=16&idi=16385>

### ***Portuguese Ombudsman – National Preventive Mechanism Report to the Parliament, 2015***

<http://www.provedor-jus.pt/?idc=16&idi=16386>

### ***National Preventive Mechanism and the educational centres Report of the visits during the year of 2015***

<http://www.provedor-jus.pt/?idc=83&idi=16497>

### ***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (I)***

Report of the visit made to the Prison Facility of Lisbon

<http://www.provedor-jus.pt/?idc=83&idi=16117>

### ***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (II)***

Report of the visit made to the Prison Facility of Tires

<http://www.provedor-jus.pt/?idc=83&idi=16149>

### ***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (III)***

Report of the visit made to the Prison Facility of Vale de Judeus

<http://www.provedor-jus.pt/?idc=83&idi=16159>

### ***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (IV)***

Report of the visit made to the Prison Facility of Coimbra

<http://www.provedor-jus.pt/?idc=83&idi=16258>

### ***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (V)***

Report of the visit made to the Prison Facility of Ponta Delgada

<http://www.provedor-jus.pt/?idc=35&idi=16274>

### ***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (VI)***

Report of the visit made to the Prison Facility of Monsanto

<http://www.provedor-jus.pt/?idc=83&idi=16476>

***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (VII)***

Report of the visit made to the Prison Facility of Funchal

<http://www.provedor-jus.pt/?idc=35&idi=16491>

***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (VIII)***

Report of the visit made to the Youth Prison Facility of Leiria

<http://www.provedor-jus.pt/?idc=83&idi=16631>

***O Provedor de Justiça, as prisões e o século XXI. Diário de algumas visitas (IX)***

Report of the visit made to the Prison Facility of Évora

<http://www.provedor-jus.pt/?idc=83&idi=16873>

***The Portuguese Ombudsman: from the inception to the present and towards the future. Overview of its mission and responsibilities***

Twinning Project Support to Establishment of Ombudsman Institution in Turkey  
Ankara, 2016-02-09

<http://www.provedor-jus.pt/?idc=97&idi=16076>

***The freedom-security dilemma: contributions for a human rights based approach***

International Workshop: Human rights challenges now: The Ombudsman facing threats  
Barcelona, 2016-04-26

<http://www.provedor-jus.pt/?idc=97&idi=16138>

***Human Rights challenges now: the Ombudsman facing threats***

Closing session of the International Workshop: Human rights challenges now: The Ombudsman facing threats  
Barcelona, 2016-04-27

<http://www.provedor-jus.pt/?idc=97&idi=16147>

***Health: call for the Ombudsman***

Conference «Justiça em Saúde»

Angra do Heroísmo, 2016-05-06

<http://www.provedor-jus.pt/?idc=97&idi=16165>

***Speech at the Open Ceremony of the Conferences in honor of Professor Jorge Ribeiro de Faria***

Porto, 2016-05-19

<http://www.provedor-jus.pt/?idc=97&idi=16861>

***The defense of Human Rights and the addictive behaviors: the role of the Ombudsman***

Addictology National Congress «O Tempo e as adições: ligando a ciência, a clínica e a política»  
Coimbra, 2016-05-20

<http://www.provedor-jus.pt/?idc=97&idi=16863>

***Europe and the Refugees Conference- Risks and Opportunities***

Lisbon, 2016-06-02

<http://www.provedor-jus.pt/?idc=97&idi=16865>

### *Opening Session of the 1st Iberian Restorative Justice Conference*

Cascais, 2016-07-15

<http://www.provedor-jus.pt/?idc=97&idi=16951>

### *Tirana high-level International Conference: The role of the Ombudsman in the migration crisis – Conclusions*

High-level International Conference: Challenges for Ombudsman Institutions with respect to mixed migratory flows – The role of the Ombudsman in the migration crisis

Tirana, 2016-09-08

<http://www.provedor-jus.pt/?idc=97&idi=16432>

### *The Portuguese Ombudsman: mission, powers and challenges*

<http://www.provedor-jus.pt/?idc=97&idi=16457>

### *The Ombudsman and the prison scene*

International Conference «As nossas prisões: que presente e que futuro?»

Lisbon, 2016-10-21

<http://www.provedor-jus.pt/?idc=97&idi=16527>

### *The Ombudsman's role as a promoter of justice, cohesion and development*

Covilhã, 2016-10-14

<http://www.provedor-jus.pt/?idc=97&idi=16531>

### *«Razões de uma razão (XIII)»*

Article published in Diário de Notícias, January 14 2016

[http://www.provedor-jus.pt/site/public/archive/doc/14\\_01\\_2016DN\\_Artigo\\_Razoesdeumarazao\\_XIII\\_pag4e5.pdf](http://www.provedor-jus.pt/site/public/archive/doc/14_01_2016DN_Artigo_Razoesdeumarazao_XIII_pag4e5.pdf)

### *«Razões de uma razão (XIV)»*

Article published in Diário de Notícias, March 7 2016

[http://www.provedor-jus.pt/site/public/archive/doc/Razoes\\_XIV\\_.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Razoes_XIV_.pdf)

### *«Razões de uma razão (XV)»*

Article published in Diário de Notícias, April 20 2016

[http://www.provedor-jus.pt/site/public/archive/doc/20\\_04\\_2016\\_DN\\_Artigo\\_Razoes\\_de\\_uma\\_razao\\_XV\\_pags\\_6e7.pdf](http://www.provedor-jus.pt/site/public/archive/doc/20_04_2016_DN_Artigo_Razoes_de_uma_razao_XV_pags_6e7.pdf)

### *«Razões de uma razão (XVI)»*

Article published in Diário de Notícias, May 25 2016

[http://www.provedor-jus.pt/site/public/archive/doc/25\\_05\\_2016\\_DN\\_Razoesdeumarazao\\_XVIpags\\_6e7.pdf](http://www.provedor-jus.pt/site/public/archive/doc/25_05_2016_DN_Razoesdeumarazao_XVIpags_6e7.pdf)

### *«Razões de uma razão (XVII)»*

Article published in Diário de Notícias, July 26 2016

[http://www.provedor-jus.pt/site/public/archive/doc/26\\_07\\_2016\\_Razoes\\_de\\_uma\\_razao\\_XVII\\_pub.pdf](http://www.provedor-jus.pt/site/public/archive/doc/26_07_2016_Razoes_de_uma_razao_XVII_pub.pdf)

### *«Razões de uma razão (XVIII)»*

Article published in Diário de Notícias, September 15 2016

[http://www.provedor-jus.pt/site/public/archive/doc/15\\_09\\_2016\\_DN\\_Artigo\\_Razoes\\_de\\_uma\\_Razao\\_XVIII\\_pags\\_6e7.pdf](http://www.provedor-jus.pt/site/public/archive/doc/15_09_2016_DN_Artigo_Razoes_de_uma_Razao_XVIII_pags_6e7.pdf)

«*Razões de uma razão (XIX)*»

Article published in Diário de Notícias, November 3 2016

[http://www.provedor-jus.pt/site/public/archive/doc/03\\_11\\_2016\\_Razoes\\_de\\_umarazao\\_XIX.pdf](http://www.provedor-jus.pt/site/public/archive/doc/03_11_2016_Razoes_de_umarazao_XIX.pdf)

«*Razões de uma razão (XX)*»

Article published in Diário de Notícias, December 11 2016

[http://www.provedor-jus.pt/site/public/archive/doc/11122016\\_Razoes\\_de\\_uma\\_razao\\_XX.pdf](http://www.provedor-jus.pt/site/public/archive/doc/11122016_Razoes_de_uma_razao_XX.pdf)

«*Uma questão de direitos*»

Article published in Público, July 14 2016

[http://www.provedor-jus.pt/site/public/archive/doc/14\\_07\\_2016\\_Uma\\_questao\\_de\\_direitos\\_Publico\\_pag4.pdf](http://www.provedor-jus.pt/site/public/archive/doc/14_07_2016_Uma_questao_de_direitos_Publico_pag4.pdf)

«*A Justiça Penal (é) restaurativa*»

Article published in Expresso, July 16 2016

[http://www.provedor-jus.pt/site/public/archive/doc/16\\_07\\_2016\\_Expresso\\_Artigo\\_A\\_Justica\\_Penal\\_e\\_restaurativa\\_pag35.pdf](http://www.provedor-jus.pt/site/public/archive/doc/16_07_2016_Expresso_Artigo_A_Justica_Penal_e_restaurativa_pag35.pdf)

*Newsletter no. 1 – September/October 2016*

<http://www.provedor-jus.pt/?idc=98&idi=16556>

*Newsletter no. 2 – November/December 2016*

<http://www.provedor-jus.pt/?idc=98&idi=16843>







## *8. Other contents*

*> Detail of the balcony of the Portuguese Ombudsman's building*

## 8. Other contents

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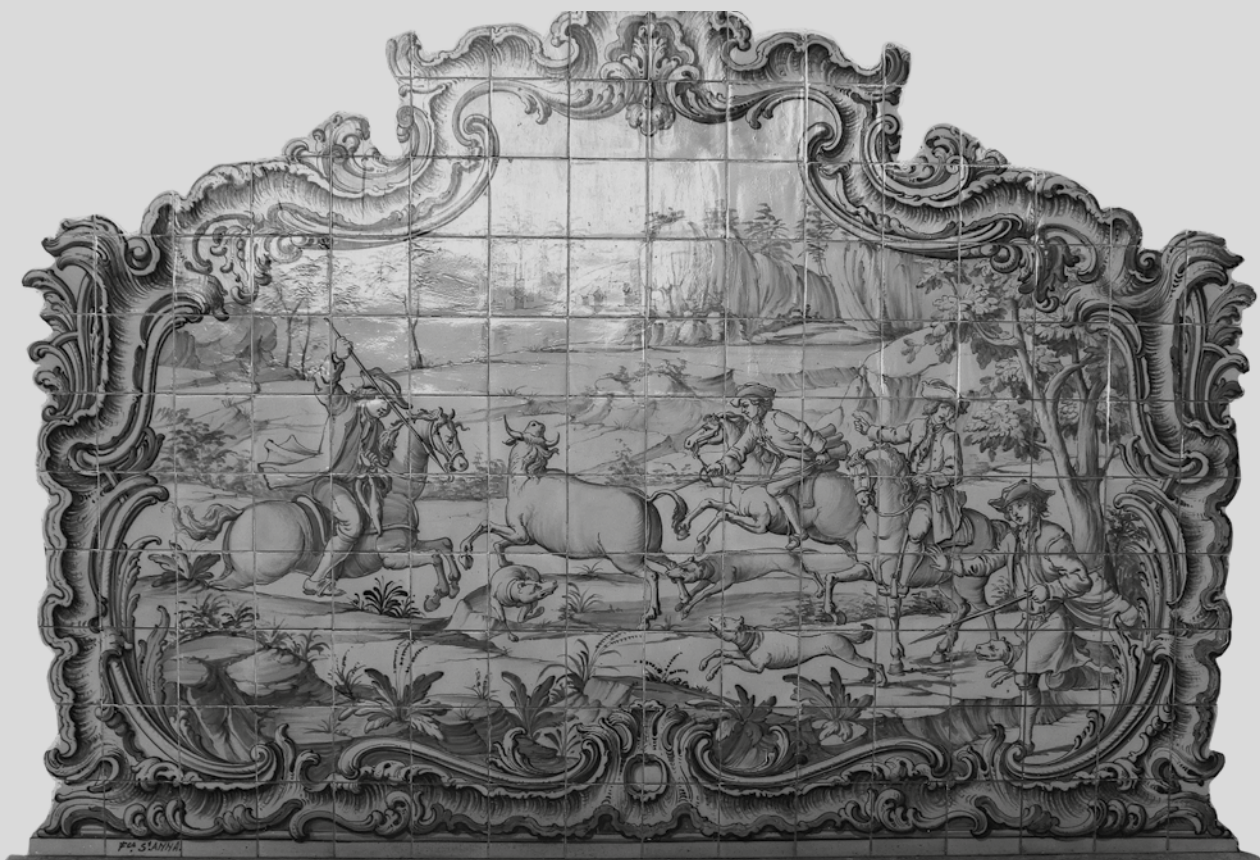
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## *9. Acronyms and abbreviations*

> Detail of the tiles at the Portuguese Ombudsman's building

## *9. Acronyms and abbreviations*

ACSS – Administração Central do Sistema de Saúde, I.P.  
(Central Administration of the Health System)

ADM – Assistência na Doença aos Militares (Military Assistance in Illness)

ADSE – Instituto de Proteção e Assistência na Doença, I.P. (Institute for Protection and Assistance in Illness)

ANSR – Autoridade Nacional de Segurança Rodoviária (National Road Safety Authority)

AMT – Autoridade da Mobilidade e dos Transportes (Mobility and Transport Authority)

APAV- Associação Portuguesa de Apoio à Vítima (Portuguese Victim Support Association)

ASAE – Autoridade de Segurança Alimentar e Económica  
(Food and Economic Security Authority)

ASF – Autoridade de Supervisão de Seguros e Fundos de Pensões  
(Authority for the Supervision of Insurance and Pension Funds)

AT – Autoridade Tributária e Aduaneira (Tax and Customs Authority)

CAE – Código de Atividade Económica (Code of Economic Activity)

CAV – Contribuição para o Audiovisual (Contribution to Audiovisual)

CC – Código Civil (Civil Code)

CE – Código da Estrada (Road Code)

CEPMPL – Código de Execução das Penas e Medidas Privativas da Liberdade  
(Code of Execution of Sentences and Privative Measures of Freedom)

CGA – Caixa Geral de Aposentações, S.A.

CGD – Caixa Geral de Depósitos, S. A.

CIMI – Código do Imposto Municipal sobre Imóveis

CIRS – Código do Imposto sobre o Rendimento das Pessoas Singulares

CNP – Centro Nacional de Pensões

CP – CP - Comboios de Portugal, E.P.E. (Portugal Trail-Rail)

CPA – Código de Procedimento Administrativo

CPAS – Caixa de Previdência dos Advogados e Solicitadores

CPC – Código de Processo Civil (Civil Procedure Code)

CPPT – Código de Procedimento e de Processo Tributário  
(Code of tax procedure and proceedings)

CRP – Constituição da República Portuguesa (Portuguese Constitution)

CT – Código do Trabalho (Labor Code)

DGAE – Direção-Geral da Administração Escolar  
(Directorate-General for School Administration)

DGAJ – Direção-Geral da Administração da Justiça  
(Directorate-General for Administration of Justice)

EMEL – Empresa Municipal de Mobilidade e Estacionamento de Lisboa, E.M. S.A.

EPJ – Estatuto do Provedor de Justiça (Statute of the Ombudsman)

ERC – Entidade Reguladora para a Comunicação Social  
(Regulatory Entity for Social Communication)

FGS – Fundo de Garantia Salarial (Wage Guarantee Fund)

GNR – Guarda Nacional Republicana (Republican National Guard)

IEFP – Instituto do Emprego e Formação Profissional, I.P.  
(Employment and Vocational Training Institute)

IGFSS – Instituto de Gestão Financeira da Segurança Social, I.P.  
(Institute for the Financial Management of Social Security)

IMI – Imposto Municipal sobre Imóveis (Property tax)

IMT – Instituto da Mobilidade e dos Transportes, I.P. (Institute for Mobility and Transport)

IRN – Instituto dos Registos e Notariado, I.P. (Institute of Registries and Notaries)

IRS – Imposto sobre o Rendimento das Pessoas Singulares (Individual Income Tax)

ISS – Instituto da Segurança Social, I.P. (Social Security Institute)

IUC – Imposto Único de Circulação (Single Circulation Tax)

IVA – Imposto sobre o Valor Acrescentado (Value-added Tax)

LAT – Lei dos Acidentes de Trabalho e Doenças Profissionais  
(Labor accident and Disease Law)

LGTFP – Lei Geral do Trabalho em Funções Públicas  
(General Labor Law in Public Functions)

N-CID – Núcleo da Criança, do Idoso e da Pessoa com Deficiência  
(Children, the Senior Citizens and Disabled Persons Unit)

NIF – Número de Identificação Fiscal (Tax identification numbers)

p./ p.p. – page/pages

PDM – Plano Diretor Municipal (Municipal Master Plan)

PDR 2020 – Programa de Desenvolvimento Rural 2014-2020  
(Rural Development Program 2014-2020)

PERES – Programa Especial de Redução do Endividamento ao Estado  
(Special Program for Reducing State Debt)

PJ – Polícia Judiciária (Judiciary Police)

PSP – Polícia de Segurança Pública (Public Security Police)

RNCCI – Rede Nacional de Cuidados Continuados Integrados  
(National Integrated Continuing Care Network)

SAD/PSP – Serviço de Assistência na Doenças da PSP  
(Disease Care Service for the Public Security Police)

SEF – Serviço de Estrangeiros e Fronteiras ( Immigration and Borders Services)

SNS – Serviço Nacional de Saúde (National Health Service)

TAP – TAP Portugal

TGIS – Tabela Geral do Imposto do Selo (General Stamp duty Table)